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Law Beyond Borders: Jurisdiction in an Era of Globalization, Introduction to the Symposium

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LAW BEYOND BORDERS: JURISDICTION IN AN ERA OF GLOBALIZATION INTRODUCTION TO THE SYMPOSIUM

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Table of Contents

I. INTRODUCTION

During 2004, it was my privilege to serve as Chair of the Association of American Law Schools Section on Conflict of Laws. One of the responsibilities of the Chair is to select the topic and organize the program for the Section's annual meeting the following January. I had no difficulty in selecting the topic for the January 2005 program. I wanted to build the program around what I considered to be a very challenging and potentially pathbreaking work by Professor Paul Schiff Berman in 2002, *The Globalization of Jurisdiction*.[1] In this work, Professor Berman maintains that our traditional notions of jurisdiction need to be reconsidered in this era of globalization,[2] that the concept of jurisdiction is not merely about setting the appropriate boundaries for governmental regulation but should be "the locus for debates about community definition, sovereignty, and legitimacy."[3] He also maintains that "the idea of legal jurisdiction both reflects and

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1. Paul Schiff Berman, *The Globalization of Jurisdiction*, 151 U. PA. L. REV. 311 (2002) [hereinafter Berman, *Globalization*]. Professor Berman has expanded on this theme in subsequent works. *See, e.g.*, Paul Schiff Berman, *From International Law to Law and Globalization*, 43 COLUM. J. TRANSNAT'L L. 485 (2005) [hereinafter Berman, *International Law*]; *see also* Paul Schiff Berman, *Redefining Governmental Interests in a Global Era*, 153 U. PA. L. REV. 1819 (2005) [hereinafter Berman, *Redefining Governmental Interests*].

2. Berman, *Globalization*, *supra* note 1, at 319.

3. *Id.*

reinforces social conceptions of space, distance and identity."[4] In this regard, he proposes to explore the idea of jurisdiction and the cross-border association of norms from a variety of disciplinary perspectives.[5]

Second, in this article, Professor Berman undertook to explore the myriad ways that law and jurisdiction function transnationally.[6] The reality, as Professor Berman notes, is that people form affiliations, enter relationships, cause harms and develop norms without regard to what he calls the often "arbitrary" boundary lines of sovereign nation-states.[7] He questions whether jurisdiction and sovereignty should always be viewed as coterminous and contends that the assertion of jurisdiction may consist of more than the projection of state power.[8] He approaches jurisdiction from an overarching framework that draws on theories of cosmopolitanism and legal pluralism, recognizing and attempting to respond to the reality of multiple community affiliations and sources of law-making, both extrinsic and intrinsic to the nation-state.[9]

To a commentator such as myself, who also teaches constitutional law, whose conflicts work has been almost entirely in the area of interstate conflicts, and who has viewed American conflicts law as an integral component of the American federal system,[10] many of the ideas set forth

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4. *Id.*

5. *Id.* at 319-20.

6. *Id.*

7. *See id.* at 495-96.

8. Berman, *Globalization*, *supra* note 1, at 495-96.

9. *Id.*

10. For works illustrating my view of interstate conflicts, the relationship between constitutional law and conflicts law, and of conflicts law as being an integral part of the American federal system, *see, e.g.*, Robert A. Sedler, *Across State Lines: Applying the Conflict of Laws to Your Practice* (A.B.A. Gen. Prac. Sec. Rep. 1989); *see also* Robert A. Sedler, *American Federalism, State Sovereignty, and the Interest Analysis Approach to Choice of Law*, *in* LAW AND JUSTICE IN A MULTISTATE WORLD: ESSAYS IN HONOR OF ARTHUR T. VON MEHREN (J. Nafziger & S. Symeonides eds., 2002); Robert A. Sedler, *Interest Analysis, 'Multistate Policies,' and Considerations of Fairness in Conflicts Torts Cases*, 37 WILAMETTE L. REV. 233 (2001); Robert A. Sedler, *A Real World Perspective on Choice of Law*, 48 MERCER L. REV. 781 (1997) [hereinafter Sedler, *Choice of Law*]; Robert A. Sedler, *The Complex Litigation Project for Federally-Mandated Choice of Law in 'Mass Tort' Cases: Another Assault on State Sovereignty*, 54 LA. L. REV.1086 (1994); Robert A. Sedler, *Interest Analysis and Forum Preference in the Conflict of Laws: A Response to the New Critics*, 34 MERCER L. REV. 593 (1983); Robert A. Sedler, *Constitutional Limitations on Choice of Law: The Perspective of Constitutional Generalism*, 10 HOFSTRA L. REV. 59

in Professor Berman's *The Globalization of Jurisdiction* have added a different dimension to my thinking about jurisdiction and the conflict of laws. At the same time, I have been trying to relate Professor Berman's theories of cosmopolitanism and legal pluralism to the constitutionally permissible exercise of jurisdiction, to state court choice of law, and to recognition of judgments in the American federal system. As I found myself very interested in Professor Berman's ideas on the globalization of jurisdiction, I concluded that the subject likewise would be of interest to the members of the Association of American Law Schools Section on the Conflict of Laws and that it should be the topic for the January 2005 Section program.[11] The papers presented at the program have been expanded into law review articles and are being published in this symposium in *The Wayne Law Review*.

II. PROFESSOR BERMAN'S THESIS

In his article, *Conflict of Laws, Globalization, and Cosmopolitan Pluralism*,[12] Professor Berman continues to develop the thesis that globalization should have a significant impact on our approach to jurisdiction and choice of law. As he puts it, the present is "an auspicious time to consider the social meanings embodied in conflicts rules, or the ways that judges applying conflicts rules might come to see themselves as transactional actors."[13] The conflict of laws, he writes, should be "the locus for debates about community definition, sovereignty, and legitimacy."[14] He maintains that "if communities are based not on fixed attributes like geographical proximity, shared history, or face-to-face interaction, but instead on symbolic identification and social psychology, then there is no intrinsic reason to privilege nation-state communities over other possible

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(1981) [hereinafter Sedler, *Constitutional Limitations*]; Robert A. Sedler, *Judicial Jurisdiction and Choice of Law: The Consequences of* Shaffer v. Heitner, 63 IOWA L. REV. 1031 (1978); Robert A. Sedler, *The Governmental Interest Approach to Choice of Law: An Analysis and a Reformulation*, 25 UCLA L. REV. 181 (1977).

11. The program was jointly sponsored by the Association of American Law Schools Section on Anthropology and the Association of American Law Schools Section on International Human Rights.

12. Paul Schiff Berman, *Conflict of Laws, Globalization, and Cosmopolitan Pluralism*, 51 Wayne L. Rev. 1105 (2005) [hereinafter Berman, *Cosmopolitan Pluralism*].

13. *Id.* at 1106.

14. *Id.* at 1108.

community identifications that people might share."[15] Professor Berman then discusses three alternative concepts of community: subnational, transnational and supranational.[16] Subnational communities are built around a physical part of a national state, such as a city or town, or around functions or activities, such as schools or religions.[17] Transnational communities are communities of interest that cut across national boundaries, the classic example of which is the multinational corporation.[18] Finally, supranational communities reflect the primacy of governing norms that exist above the nation state, being currently exemplified by the United Nations and the World Trade Organization.[19]

Recognizing the alternative concepts of community leads Professor Berman to what he calls a cosmopolitan pluralist vision of conflict of laws,[20] which starts from the premise that community affiliations are always plural and can be detached from mere spatial location,[21] but at the same time rejects the notion of universalism and the idea that we are all members of a global community.[22] "A conflicts regime built on cosmopolitan principles," he says, "asks courts to consider the variety of normative communities with possible ties to a particular dispute."[23] The pluralist component of this vision emphasizes that the state does not hold a monopoly on the articulation and exercise of legal norms, but that normative commitments may also arise from nonsovereign communities and that the conflict of laws must attend to their jurisdictional assertions.[24]

Applying this cosmopolitan pluralist approach to questions of jurisdiction would mean that courts "would look not to a mechanical counting of contacts or delineation of territory, but to "a more nuanced analysis of community affiliation, contact, and effect."[25] This means that sometimes the legal norms of non-state communities are recognized and enforced by state courts and that sometimes some of the power exercised by the state has

15. *Id.* at 1109-10.
16. *Id.* at 1111.
17. *Id.*
18. Berman, *Cosmopolitan Pluralism*, *supra* note 12, at 1111.
19. *Id.*
20. *Id.* at 1112.
21. *Id.* at 1113.
22. *Id.*
23. *Id.* at 1115.
24. Berman, *Cosmopolitan Pluralism*, *supra* note 12, at 1116.
25. *Id.* at 1118.

been delegated to non-state communities.[26] He concludes:

> This more fluid model of multiple affiliations, multiple jurisdictional assertions, and multiple normative statements captures more accurately than the classical model of territoriality and sovereignty the way legal rules are being formed and applied in today's world. Whether or not the nation-state is dying, we will need to come to grips with the diffusion of law across borders and will also need to understand that the normative statements law inscribes cannot be so easily bounded off from the world of political rhetoric.[27]

In the second part of the article, Professor Berman explains how his cosmopolitan pluralist vision of the conflict of laws would work in the areas of jurisdiction, choice of law, and recognition of judgments.[28] He does so with the acknowledgment of the fact that actual conflicts will always arise on a case-by-case basis, and that his analytical framework is not designed to provide systematic doctrinal answers to specific problems.[29] He also suggests that in some cases, his approach really provides a conceptual basis for what judges are already doing intuitively.[30]

In determining questions of jurisdiction, under the cosmopolitan pluralist framework, he says that the focus would be on "whether the parties before the court are appropriately conceptualized as members of the same community, however that community is defined,"[31] and that "territorially based limitations on the assertion of jurisdiction are inappropriate because they reify arbitrary boundaries and foreclose debate about either community definition or the evolution of substantive norms."[32] Berman suggests that in practice, while courts continue to articulate the minimum contacts and fundamental fairness test of *International Shoe Co. v. Washington*,[33] they are basing their decisions on community affiliations rather than factual

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26. *Id.* at 1124-25.
27. *Id.* at 1125.
28. *Id.*
29. *Id.*
30. Berman, *Cosmopolitan Pluralism*, *supra* note 12, at 1125.
31. *Id.* at 1126.
32. *Id.*
33. 326 U.S. 310 (1945).

contacts with the forum.[34] Berman views this as a positive development and one supportive of his cosmopolitan pluralist view in that it enables courts to "articulate the substantive concerns about both overly broad and overly narrow assertions of jurisdiction and thereby begin to delineate jurisdictional norms that respond to the social meaning of community affiliation."[35]

When it comes to choice of law, Berman says that the cosmopolitan approach would borrow elements from each of the major methods of the twentieth century: vested rights, governmental interests and substantivism.[36] It would borrow from vested rights in the sense that it would separate choice of law from the substantive norm to be applied.[37] Courts would consider the relative importance of the parties' community affiliations in making the choice of law decision, and the choice of law decision would "becom[e] the terrain for debate about the proper scope of community dominion in an era when pure territorial borders no longer adequately delimit community boundaries."[38] It would borrow from interest analysis by expanding the notion of governmental interest far beyond a state's interest in applying its own law "to effectuating [a] state's broader interest in taking part in a global community."[39] It would borrow from substantivism in that it would allow courts to "engage in a dialogue with each other concerning the appropriate definition of community affiliation and the appropriate scope of prescriptive jurisdiction," and enable the courts to "develop hybrid norms for resolving multistate disputes."[40]

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34. Berman, *Cosmopolitan Pluralism, supra* note 12, at 1126-27.

35. *Id.* at 1128. Berman insists that a community-based analysis of jurisdiction would not necessarily result in broader assertions of jurisdiction than under current jurisdictional schemes. *Id.* at 1131. He notes that this analysis would make forum-shopping more difficult for plaintiffs, who would be precluded from suing in a state with which they had no associational ties. *Id.* It would also preclude transient jurisdiction, which while constitutionally permissible is difficult to justify on any functional basis. *Id.* (citing Burnham v. Superior Court, 495 U.S. 604 (1990)). What a community-based analysis would do, says Berman, is to "go beyond counting contacts [and] inquire about the substantive bonds formed between the member of the forum community and the territorially distant actor." *Id.* at 1131.

36. Berman, *Cosmopolitan Pluralism, supra* note 12, at 1132.

37. *Id.* at 1133.

38. *Id.*

39. *Id.* at 1134.

40. *Id.* As an example of a case that should have been decided differently under a cosmopolitan framework, Berman cites *Barcelona.com, Inc. v. Excelentisimo Ayuntamiento*

In the area of recognition of judgments, Berman maintains that when an American court is asked to recognize a foreign judgment, it should treat that judgment much the same way that it is required to treat the judgment of a sister state under the Full Faith and Credit Clause.[41] The American courts should acknowledge the importance of participating in an interlocking international legal system, and in a case where the parties have no significant affiliation with the forum state, "there is little reason for a court to insist on following domestic public policies, particularly when the parties have no significant affiliation with the forum state."[42]

Finally, Berman discusses plural sources of law-making authorities[43] and says that it is possible to think of jurisdiction, choice of law and recognition of judgments, "not only concerning official nation-state-tribunals, but also concerning a whole panoply of norm-generating bodies, [whose] decisions may have important impact even if they lack coercive power."[44] He uses some examples of how the decisions of non-legal norm-generating bodies have influenced the actions of courts and governments,[45] and

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de Barcelona, 330 F.3d 617 (4th Cir. 2003). *Id.* at 1135. In that trademark registration case, a Spanish citizen registered "barcelona.com" with a Virginia-based domain registrar. He formed a corporation under American law but had no other connection with the United States. The Barcelona City Council asserted that he had no right to use "barcelona.com" under Spanish trademark law and demanded that he transfer the domain registration to the City Council. The Fourth Circuit ruled against the city, holding that United States trademark law applied because the domain name was registered with an American registrar company. *Id.* He also uses the example of Indian-Americans purchasing bonds issued by India, which, he says, obviously reflects the ongoing tie the these Indian-Americans feel for their homeland, so that the purchases should be governed by Indian law. *See Id.* at 1135-36.

41. U.S. CONST. art. IV § 1 (cited in Berman, *Cosmopolitan Pluralism*, *supra* note 12, at 1136).

42. Berman, *Cosmopolitan Pluralism*, *supra* note 12, at 1137. Berman is highly critical of the refusal of a Maryland state court to enforce a libel judgment of a British court in *Telnikoff v. Matusevitch*, 702 A.2d 230 (Md. 1997), an action between two British citizens concerning writings that had appeared in a British newspaper. *Id.* at 1136. The defendant subsequently moved to Maryland, and when the plaintiff sought to enforce the British judgment there, the Maryland court held that because British libel law did not incorporate the First Amendment-required "malice" standard of *New York Times v. Sullivan*, 376 U.S. 254 (1964), and its progeny, the British judgment violated Maryland public policy and could not be enforced. *Id.* This case is discussed further below, *infra* notes 226-33.

43. Berman, *Cosmopolitan Pluralism*, *supra* note 12, at 1137.

44. *Id.* at 1137-38.

45. *Id.* at 1138.

concludes that, "once we acknowledge the importance of changes in legal consciousness over time, it becomes clear that *enforcement* power is not the only factor in determining the *normative* power a jurisdictional assertion might have."[46]

Berman concludes by relating his cosmopolitan pluralist approach to the work of courts and conflicts commentators.[47] He says that this approach "asks courts both to be in dialogue with each other and to take seriously the rhetorical assertions of norm of non-state communities to that courts more fully engage in a 'world constitutive process.'"[48] For conflicts commentators, the task, drawing on interdisciplinary scholarship as well as work in other areas of law, is to "have as part of their core mission the conceptualization and preservation of a world of plural legal voices engaged in ongoing conversation and dispute."[49] The real goals of conflict of laws, he maintains, are "first to make sure that the interaction among these voices is as robust as possible and second to study more comprehensively the changing definitions of community, physical and social space, borders, citizenship, and affiliation that will always be contested through conflicts challenges."[50] With these goals in mind, conflicts commentators will be "ideally suited to offer both descriptive and normative insights about the complex and interwoven world of law in the twenty-first century."[51]

III. THE COMMENTATORS RESPOND

Professor Ralf Michaels cautions that in any analysis of legal pluralism and the significance of globalization, we must not lose sight of the centrality of the state.[52] "The world of conflict of laws," he maintains, "is still a world based strictly on the state, to the extent that the state administers conflict of laws."[53] "Instead of asking how globalization has changed the role of the state in the world," Michaels urges, we should ask how the state should

46. *Id.* at 1141.

47. *Id.* at 1145.

48. *Id.* (quoting Myres S. McDougal et al., *The World Constitutive Process of Authoritative Decisions*, 19 J. LEGAL EDUC. 253, 255 (1967)).

49. Berman, *Cosmopolitan Pluralism*, *supra* note 12, at 1145.

50. *Id.*

51. *Id.*

52. *See* Ralf Michaels, *The Re-State-ment of Non-State Law: The State, Choice of Law, and the Challenge from Global Legal Pluralism*, 51 Wayne L. Rev. 1209 (2005).

53. *Id.* at 1258.

change itself to deal with globalization, how the state can accommodate multiple communities, and how conflicts can be resolved through a combination of public and private interests.[54] An important part of Professor Michaels' article is his explanation of how the state deals with non-state normative legal orders. As he explains, the state does not treat non-state normative legal orders as "law," but only the normative legal orders of another state.[55] To the extent that the state takes account of non-normative legal orders, it does so through incorporation, deference and delegation.[56] If the state treated non-state law as law, it would thereby weaken its position as a state.[57]

Michaels uses the examples of the Internet and the new law merchant, which have been referred to by proponents of global legal pluralism as autonomous non-state legal orders, to raise the question of what is "law."[58] He concludes that it is not possible to separate a definition of what is "law" from the criteria that form the basis of the definition,[59] and says that "global legal pluralism rests on a politic of recognition."[60] Multiple groups challenge the monopoly of the state to make "law" and want recognition of their status, autonomy and lawmaking capacity.[61]

The question for the conflict of laws, he says, is whether the state, through its law of the conflict of laws, does recognize or should recognize non-state law as "law."[62] Michaels concludes that, almost exclusively, states have rejected any claim that non-state law has the status of "law" and have thereby has rejected global legal pluralism.[63] However, Michaels also explains that the state can deal with non-state legal norms by incorporation, such as when the common law incorporated parts of the law merchant,[64] by deference when it looks to commercial practice in

54. *Id.* at 1258-59.

55. *Id.* at 1212.

56. *Id.* at 1214.

57. *Id.*

58. Michaels, *supra* note 52, at 1219.

59. *Id.* at 1225.

60. *Id.* at 1227.

61. *Id.*

62. *Id.*

63. *Id.* at 1228. Michaels notes that within states, non-state law may be recognized and applied as law, such as India applying the marriage law of different religious communities depending on the allegiance of the spouses to those communities. *See id.* at 1131.

64. Michaels, *supra* note 52, at 1231.

interpreting contracts,[65] and by delegation when the state defers to self-regulation by interested groups in the case of collective bargaining agreements and industry codes of conduct.[66]

Michaels discusses at length the reasons why the state does not treat non-state law as "law."[67] In this context, he challenges Berman's argument that as members of a global community states have a "governmental interest" in the application of non-state law.[68] Michaels argues that a state's interest in being part of a global community is a justification for applying the law of a foreign state, but not a justification for applying non-state normative orders as "law."[69] Rather, he says, the states that comprise the "'community of nations' have a collective interest in maintaining their cartel of law-making and law administration, and of not admitting outsiders into their cartel."[70] He also demonstrates that in a number of contexts the reasons that exist for one state to recognize the laws of another state do not apply when the question is whether a state should recognize non-state normative orders as law.[71] He also demonstrates that legal pluralism not only leads to a bilateral conflict between state and non-state law, but between different non-state orders, so that a pluralist concept of conflict of laws will lead to more not fewer conflicts.[72]

Michaels concludes that the conflict of laws cannot solve the challenge from legal pluralism without also questioning the role and nature of law.[73] Without acknowledging the "jurisdiction" of non-state communities, and therefore, without challenging its own existence, the state may well develop rules analogous to the conflict of laws to deal with non-state normative orders.[74] But it is not necessary for the state to assign "jurisdiction" to non-state communities, and it may in fact be counterproductive to do so.[75]

Another commentator, Professor Walter W. Heiser, analyzes at length a specific and very important issue in the world of globalization: the use of

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65. *Id.* at 1233.
66. *Id.* at 1234.
67. *Id.* at 1241.
68. *Id.* at 1242.
69. *Id.* at 1243.
70. Michaels, *supra* note 52, at 1243.
71. *Id.* at 1250.
72. *Id.*
73. *Id.* at 1258.
74. *Id.* at 1259.
75. *Id.*

forum non conveniens in transnational tort actions to dismiss suits brought by foreign plaintiffs against American defendants in an American court.[76] He begins by discussing the debate over the use of forum non conveniens in such cases—often posed as "a question of the moral and ethical accountability of United States companies who, taking advantage of their dominant role in the global economy, cause injuries overseas"[77]—and says that the assumption underlying both sides of the debate is that the forum will apply "domestic law in a transnational tort case."[78] Professor Heiser's article examines "how the choice of law decision to apply the tort law of a foreign country may affect the current debate over the propriety of forum non conveniens."[79] He argues that the fact that an American court finds that the case should be decided in accordance with the tort law of a foreign country may have little effect on the use of forum non conveniens in transnational tort litigation.[80]

Professor Heiser begins by explaining the basis of the forum non conveniens doctrine, and concludes that convenience has little to do with why a defendant seeks a forum non conveniens dismissal.[81] The real reason is that the defendant wants to force the plaintiff to "re-file the lawsuit in another country whose substantive and procedural laws are more favorable to the defendant."[82] In the case of a foreign country plaintiff, this means that the plaintiff will have to file the suit in his home country, where substantive law and the amount of damages recoverable are more likely to be defendant-favoring, discovery more restrictive than it is in American courts, and above all, where there is likely no trial by jury.[83] Heiser then demonstrates the reasons why in practice the American defendant is highly likely to prevail on the forum non conveniens motion.[84] These reasons are

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76. *See* Walter W. Heiser, *Forum Non Conveniens and Choice of Law: The Impact of Applying Foreign Law in Transnational Tort Actions*, 51 Wayne L. Rev. 1161 (2005).

77. *Id.* at 1163.

78. *Id.*

79. *Id.* at 1164.

80. *Id.* at 1182.

81. *Id.* at 1167.

82. Heiser, *supra* note 76, at 1167.

83. The United States is virtually the only country in the world that provides for trial by jury in civil cases, constitutionalizing this right in the Seventh Amendment to the United States Constitution and in analogous provisions of every state constitution. *See* U.S. CONST. amend. VII.

84. *See* Heiser, *supra* note 76, at 1165-77. He uses two well-known cases to illustrate

that: (1) There is little deference to a foreign plaintiff's choice of forum;[85] (2) American courts are very likely to find that there is an adequate alternative forum, since they are reluctant to find that another country's court system is "inadequate;"[86] (3) For the same reason, American courts are not likely to find that there is "no remedy at all" in the alternative forum;[87] and (4) Balancing the various interest factors, courts downplay the deterrent value of lawsuits in American courts against American defendants.[88]

Professor Heiser advances two reasons why the decision of the American court to apply foreign law in such a case would make it less likely for the court to grant the defendant's forum non conveniens motion. First, the foreign plaintiff hopes that the American court will apply the more favorable domestic tort liability and damages law rather than the law of the plaintiff's home country where the injury occurred.[89] From the defendant's perspective, the possibility that the American court will apply the more favorable domestic law is a sufficient motivation to seek a forum non conveniens dismissal.[90] Second, from the trial court's perspective, the fact that it will be faced with a choice of law decision and may end up having to apply foreign law, makes the granting of the dismissal motion an attractive option.[91] Heiser maintains that "when the choice of law decisions is a binary

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this protective effect. In *In re Union Carbide Corp. Gas Plant Disaster at Bhopal*, 634 F.Supp. 842 (S.D.N.Y. 1986), *aff'd*, 809 F.2d 195 (2d Cir. 1987), *cert. denied*, 484 U.S. 871 (1987), some 145 class actions had been filed in various federal district courts, seeking money damages on behalf of over 200,000 persons who were killed or injured by a catastrophic gas leak at a Union Carbide chemical plant in Bhopal, India. *Id.* at 845. Union Carbide succeeded in getting the suit dismissed on forum non conveniens grounds. *Id.* at 866-67. In *Gonzalez v. Chrysler Corp.*, 301 F.3d 377 (5th Cir.2002), *cert. denied*, 582 U.S. 1012 (2003), the Mexican plaintiffs in a lawsuit in a Texas federal court were the parents of a three-year old child who was killed in by the deployment of the passenger-side airbag of a Chrysler automobile there. *Id.* at 379. Under Mexican law, the maximum amount recoverable for the child's death was the equivalent of approximately $2500. *Id.* at 381. Chrysler succeeded in getting the suit dismissed on forum non conveniens grounds. *Id.* at 383-84.

85. *See id.* at 1168.

86. *Id.* at 1169.

87. *Id.* at 1172.

88. *Id.* at 1175.

89. *Id.* at 11757

90. *See* Heiser, *supra* note 76, at 1177-8.

91. See *id.* at 11768 It should be noted that generally, the decision whether or not to grant a forum non conveniens motion is in the discretion of the trial judge, and can only be

one"[92] — whether the domestic or foreign law applies to all parties and all claims — the court should make the choice of law decision before ruling on the forum non conveniens motion. Not only is the applicable law a relevant factor in the forum non conveniens balancing process, but, as he goes on to say, "much of the interest-balancing undertaken for purposes of forum non conveniens purposes is similar to the analysis required by many modern choice-of-law doctrines."[93] He uses the example of a trial court comparing the deterrence and regulatory interests of the country in which the defendant manufacturer resides with those of the country where the injured plaintiff resides for purposes of forum non conveniens, and says that, "the process of identifying and assessing respective interests is not unlike a governmental interest choice of law analysis."[94] Indeed, in terms of interest analysis, this example presents the situation of the false conflict, so that the law of the defendant's home state should apply. That state has a real interest in applying its laws reflecting deterrence and regulatory policies, such as strict liability and punitive damages, while the defendant's home state usually will not have any interest in applying its defendant-protective policy for the benefit of a non-resident defendant.[95] It may be noted in this regard that whenever a court dismisses a case on forum non conveniens grounds, it has effectively made the decision to subordinate the forum's policies and interests to the policies and interests of the alternative forum. This being so, it can be contended that to the extent that the forum makes the choice of law decision with reference to the policies and interests of the involved states, it should not dismiss the case on forum non conveniens grounds when this would displace the law that it would otherwise apply, usually its own, if the case remained before it.

As Professor Heiser has pointed out, the controversy over forum non conveniens proceeds on the assumption that in a transnational tort case, once the American court decides to retain jurisdiction, it will decide to apply

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reversed on appeal for abuse of discretion.

92. *Id.*

93. *Id.* at 1179.

94. *Id.*

95. This is the result that occurs in cases outside of the products liability area and in some products liability cases. *Id.* Some courts, however, hold that in products liability cases, the law of the plaintiff's home state applies across the board, whether it is plaintiff-favoring or defendant-favoring. See the discussion and review of cases in Robert A. Sedler, *Choice of Law in Conflicts Torts Cases: A Third Restatement or Rules of Choice of Law*, 75 IND. L. REV. 615, 626-28, 630-33 (2000).

American law.[96] And as I have contended above, when the American court concludes that it will apply its own law because it has a real interest in doing so in order to implement the policy reflected in that law, it should not dismiss the case on forum non conveniens grounds. Professor Heiser then asks, if the American court concludes that foreign tort law will apply in the case, would this have an impact on the forum non conveniens decision?[97] He concludes that as a practical matter, the decision to apply foreign law "may have little effect on the use of forum non conveniens in transnational tort litigation."[98] This is because, as Heiser explains, the decision to apply foreign law will not eliminate the defendant's and trial court's desire for a forum non conveniens dismissal.[99] The American defendant not only wants to avoid application of the domestic law of tort liability and damages, but wants to avoid an American forum for the same reasons that the foreign plaintiff wants to sue here: the American court's more liberal discovery rules, contingent fees, and the right to trial by jury.[100] Likewise, from the standpoint of the court ruling on the forum non conveniens motion, once the court decides that foreign law applies, Heiser says that many of the public interest factors would likely favor dismissal.[101] The application of foreign law might be confusing to the jury, particularly where that law is complex or ambiguous and the case would more appropriately be decided in the foreign country forum. Also, if the foreign country has a greater interest than the United States in applying its law in a transnational tort action, American courts are less likely to see an interest in adjudicating the case and imposing costs on their own legal system.[102]

It is in this context that Professor Heiser raises a very provocative question: even though the American court has decided to apply the law of the foreign state, should it recognize some obligation to foreign plaintiffs injured by domestic defendants and retain the case for trial?[103] He notes that "the overwhelming majority of other countries do not recognize forum

96. *See id.* at 1182.
97. *See* Heiser, *supra* note 76, at 1182.
98. *Id.*
99. *Id.*
100. *Id.*
101. *Id.* at 1185
102. *See id* at 1188.
103. *See* Heiser, *supra* note 76 at 1187

non conveniens,"[104] so that they have a duty to adjudicate a transnational tort action brought by a foreign plaintiff against a resident defendant regardless of whose law they decide to apply. He then suggests that, "[i]n the current global economy, perhaps a court in the United States should recognize a similar obligation."[105] However, he is not optimistic that American courts will do so, saying that unfortunately most courts in the United States currently have a parochial, not a global perspective when it comes to hearing international tort actions.[106] He concludes that there will continue to be great controversy over the use of forum non conveniens in transnational tort actions brought by foreign country plaintiffs in American courts.[107] He also concludes that American courts are likely to continue to take a parochial rather than a global approach to transnational tort actions, so that defendants are likely to continue to assert forum non conveniens in an effort to avoid having to defend the lawsuit against them in the American legal system.[108]

Another commentator, Professor Janet Koven Levit, provides an insightful dimension to our understanding of non-state law norms when she explores the question of "How do these norms come to be?"[109] She notes that Professor Berman's cosmopolitan pluralist approach to jurisdiction assumes that a multitude of inevitably overlapping and potentially conflicting norms compete for relevance and dominance.[110] She uses the case of export credit insurance to demonstrate "how such norms gel transnationally prior to assuming their place on jurisdictional battlefields."[111] She does so "from within," based on her on-the-ground experience at the Export-Import Bank of the United States (Ex-Im Bank), a small United States government agency that provides financial support to American exporters, and Trade-Card, Inc., an Internet innovator in the trade finance realm.[112]

Professor Levit says that the transnational rules that govern much of

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104. *Id.*

105. *Id.* at 1188.

106. *Id.* at 1189

107. *Id.*

108. *See id.* at 1192.

109. Janet Koven Levit, *A Cosmopolitan View of Bottom-Up Transnational Lawmaking: The Case of Export Credit Insurance*, 51 WAYNE L. REV. 1193, 1194 (2005).

110. *Id.* at 1193.

111. *Id.* at 1194.

112. *Id.*

the every-day minutiae of export credit insurance are "transcendently potent, endangering almost instinctual compliance."[113] She describes them as "bottom-up transnational lawmaking,"[114] and explains in detail how they have developed to provide one solution to the recurring exporter problem of how to extend credit to a buyer who might be thousands of miles away, without choking the seller's working capital and concomitant ability to continue producing and engaging in trade transactions.[115]

Levit says that an export credit insurance transaction by definition is transnational and "raises a host of cross-border issues that defy national regulation."[116] In response to the need for industry "rules of the road," a group of French, Italian, British and Spanish export credit insurers got together in Berne, Switzerland in 1934, and formed the Berne Union, which grew in size and role after World War II, and today has 54 members, including both private companies and public entities.[117] The Berne Union regulates its members' export activities by means of a General Understanding, which "prescribes specific, technical and at times cumbersome rules to standardize the options that export credit insurers may offer to buyers and sellers in order to attract their business."[118] Levit's research shows that the Berne Union members overwhelmingly comply with its rules, but at the same time, a degree of non-compliance is built into the system.[119] There is a formal process by which members notify other members of any deviation from the rules, and the other members may then reciprocally derogate from the rules to match the non-compliance.[120]

Professor Levit contends that the rules of the Berne Union function in the same way as law should function: they are authoritative and effectively binding.[121] Moreover, she points out that they successfully facilitate over a half trillion worth of international trade annually, and that formal lawmaking institutions, such as the OECD, the WTO, and the European Union, have appropriated many of them, "in essence transforming such rules from soft

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113. *Id.*
114. *See id.* at 1195.
115. *See* Levit, *supra* note 109, at 1195
116. *Id.*
117. *Id.* at 1195-1196.
118. *Id.* at 1196.
119. *Id.*
120. *Id.*
121. *See* Levit, *supra* note 109, at 1197.

to hard law."[122] Thus, she concludes that, "bottom-up international lawmaking is a soft, non-choreographed process that produces hard, legal results."[123]

Professor Levit goes on to point out that like Berman's cosmopolitanism, bottom-up lawmaking debunks the state's monopoly, but that unlike Berman's cosmopolitanism, bottom-up lawmaking does not depend on state-based enforcement of law, but instead "showcases the potency of informal endorsement mechanisms."[124] In the Berne Union, enforcement of the rules remains an intra-community matter, and order is reinforced through the reputation-laced sanctions stemming from public brandishing and informal hallway gossip."[125]

Professor Levit then emphasizes that bottom-up lawmaking is not bound by geography.[126] Through the Berne Union, she says, a "transcendental cadre of export finance practitioners forge potent ties and constitute a viable lawmaking community."[127] She further maintains that while the Berne Union's General Understanding, while neither domestic nor international law, "functions as well, if not better, than much we deem law,"[128] and that bottom-up lawmaking is a "decisively process-oriented approach to the law."[129] Thus Professor Levit's article provides us with a concrete understanding of how non-state law establishes norms that within their sphere of operation perform the same function that is performed by state law.

Professor Peter Spiro suggests that the state still remains too centered in Berman's constellation and goes on to suggest how community membership rules in the state, in particular the United States, are likely to accelerate the decline of the state.[130] Spiro maintains that just as it is community membership that allows for the assertion of law's dominion through the exercise of jurisdiction, community membership may also have

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122. *Id.* at 1197.

123. *Id.* at 1198.

124. *Id.* at 1199.

125. *Id.*

126. *Id.* at 1200.

127. *See* Levit, *supra* note 109, at 1200.

128. *Id.* at 1202.

129. *Id.* at 1202-1203.

130. Peter J. Spiro, *The Boundaries of Cosmopolitan Pluralism*, 51 WAYNE L. REV. 1261 (2005).

an impact on the law's content.[131] He says that constitutions have reflected distinctively national communities, and that in the United States, in some important respects the Constitution stands as the only clear signifier of the American national community.[132] As national communities become less segmented in the fact of globalization, and as the significance of national borders diminishes, the segmentation of national constitutional systems will also diminish, so that, "national communities are of declining salience to individual identity and to the definition of law."[133]

Spiro goes on to say that if communities are the central building block of law, it is necessary to explore the criteria for membership in a national community.[134] He uses the example of Yasser Hamdi, an American citizen by birth who spent more of his life in Saudi Arabia and was detained at Guantanamo as an unlawful enemy combatant.[135] Recognizing what Spiro calls a "persistent citizenship differential,"[136] the Supreme Court held that Hamdi was entitled to a full and fair hearing to determine his status as an unlawful enemy combatant.[137] Spiro maintains that it is possible to suggest an argument for depriving Hamdi of his membership in the national community of Americans, in that, "[i]t was clearly the case that he was in no way a member of the community of Americans defined in any on-the-ground, organic sense."[138] He goes on to say that, "it is not immediately clear why the fact of his birth in U.S. territory supplies any basis for community membership, given the rest of his life history, as against any other person in the world who might want to claim membership for instrumental purposes."[139] Looking to Hamdi's acts against the United States and the acts of another American citizen, John Walker Lindh, who was apprehended on the battlefield in Afghanistan and later pled guilty to federal criminal charges of giving material support to a terrorist organization,

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131. *Id.* at 1262-63.

132. *Id.* at 1263.

133. *Id.* at 1264.

134. *Id.*

135. *Id.*

136. Spiro, *supra* note 130, at 1265.

137. Hamdi v. Rumsfeld, 542 U.S. 507 (2004). Hamdi subsequently renounced his American citizenship and was permitted to expatriate himself to Saudi Arabia. *See* Eric Lichtblau, *U.S., Bowing to Court Ruling, Will Free 'Enemy Combatant,'* N.Y TIMES, Sept. 23, 2004, at A1.

138. Spiro, *supra* note 130, at 1266.

139. *Id.*

Spiro asks, "Why exactly is it that a citizen cannot be expatriated upon the commission of acts against the community, especially as undertaken as members of other, hostile communities?"[140]

Spiro recognizes that constitutional constraints prevent birthright citizenship from being qualified or expatriation triggers from being revived.[141] But he says that to the extent that citizenship practices become

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140. *Id.* at 12657

141. *Id.* The principle of citizenship by birth, *jus soli*, was a part of the received English common law and was given constitutional status by section one of the Fourteenth Amendment in order to confer citizenship upon newly-emancipated African Americans, who were denied the right of citizenship during the time of slavery. *See* Dred Scott v. Sanford, 60 U.S. 393 (1857). The Fourteenth Amendment's incorporation of the *jus soli* principle also ensured that the children of the waves of immigrants who arrived in the United States during the middle and latter part of the nineteenth century and earlier part of the twentieth century would become American citizens upon birth even if their parents were still aliens. *See* United States v. Won Kim Ark, 169 U.S. 649 (1898). This means today that the children of illegal immigrant parents are American citizens upon their birth in this country. The *jus soli* principle is a fundamental part of the American constitutional culture, and the principle is no less fundamental because in isolated instances, such as in the *Hamdi* case, it operates to enable a person who was not an "on the ground, organic member of the community of Americans" to obtain the benefits of American citizenship.

By the same token, it is now a well-established constitutional principle that once acquired, American citizenship can be lost only be a voluntary act or expatriation or by the de-naturalization of a naturalized citizen. Congress may provide that certain acts may result in expatriation, but only if those acts are accompanied with the intention to relinquish American citizenship. *See* Vance v. Terrazas, 444 U.S. 252 (1980); Afroyim v. Rusk, 387 U.S. 253 (1967). Nor can Congress constitutionally distinguish between native-born and naturalized citizens with respect to voluntary expatriation, such as providing that a naturalized citizen can be expatriated for a period of residence in the naturalized citizen's former country. *See* Schneider v. Rusk, 377 U.S. 163 (1964). So, in answer to Professor Spiro's question, "Why exactly is it that a citizen cannot be expatriated upon the commission of acts against the community, especially as undertaken as members of other, hostile communities?", it is because in the American constitutional system, American citizenship is considered so valuable and priceless that it can be lost only by a voluntary act of expatriation. *See* Trop v. Dulles, 356 U.S. 86 (1958) (holding that removal of American citizenship as punishment for a crime is cruel and unusual punishment within the meaning of the Eighth Amendment). Of course, if it could be proved by the testimony of two witnesses or by confession in open court that an American citizen actually "levied war against the United States, or in adhering to our enemies, gave them 'aid and comfort,'" the American citizen, precisely because of that person's citizenship, would be guilty of treason. U.S. CONST., art. III, sec. 3, cl. 1.

the subject of exogenous constraint, such as when international human rights law dictates the terms of membership, the less likely the citizenship tie will reflect actual bonds of community.[142]

Spiro then contends that insofar as bonds of community in the state weaken, the less members will be inclined to privilege their relations with each other relative to the rest of the world, and that in the context of rights, this could "spell the decline of the state as the primary agent for the protection of individual liberties."[143] At the same time, he says that international institutions are becoming increasingly salient to the protection of individual rights, reflecting the fact that on matters of basic rights, the relevant community may now be genuinely universal.[144] The downside of this phenomenon is that transnational communities will be in a position to inflict injustice, and that the state will be less able to police against those injustices.[145] Spiro concludes with the observation that, "it will be important to understand both that, as state-based communities face erosion, the state can no longer fulfill its liberal purpose with the same vigor it has in the past,, and that non-state communities may increasingly become an alternative site of justice and injustice."[146]

Professor Berman's cosmopolitan pluralist approach to the conflict of laws puts much emphasis on the matter of *community*.[147] Thus, in determining jurisdiction under this approach, the focus would be on "whether the parties before the court are appropriately conceptualized as members of the same community, however that community is defined."[148] Berman also maintains that we should explore the idea of jurisdiction and the cross border association of norms from a variety of disciplinary perspectives.[149]

With this goal in mind, we were fortunate to obtain the participation in the program and in this symposium of Professor Susan Bibler Coutin, an anthropologist in the Department of Criminology, Law and Society at the

142. Spiro, *supra* note 130, at 1268.
143. *Id.* at 1268.
144. *Id.*
145. *Id.* 1268-69.
146. *Id.* at 1269.
147. *See* Berman, *Cosmopolitan Pluralism*, *supra* note 12, at 1105.
148. *Id.* at 1126
149. *Id.* at 1125

University of California, Irvine. In her article,[150] Professor Coutin, to use her own words, "analyzes social meanings, the multiplicity of affiliations, official and unofficial legal practices and norms, and the law-making activities of non-state entities."[151] Her focus is on what she calls "conflicts of membership,"[152] or situations in which there are disjunctures between individuals' formal legal status and informal social location.[153] She discusses four contexts in which these disjunctures arise so that she may raise questions about the social meanings of jurisdiction, the complexity of affiliations, the transnational significance of United States immigration laws, and the ways that unauthorized migrants are transnational legal actors.[154]

First, there is the matter of the social location of unauthorized migrants. Professor Coutin notes that illegal entry or overstaying one's visa is a transgression of legal space, in particular the space of the nation.[155] Moreover, a variety of enforcement practices partially exclude unauthorized migrants from this legal space, even if they are physically present, such as when government officials and private entities deny rights and services to those who cannot prove that they are legally present in this country.[156] Subjectively, she says, unauthorized migrants have described these practices as making them feel that they are not here.[157] They are located in, yet outside of legal jurisdictions, and as Professor Coutin puts it, "[t]hey are physically and often socially present, but that are also in some sense, located 'elsewhere.'"[158]

The fact that unauthorized migrants are "present yet absent" results in their having multiple affiliations, so that legally, they may be citizens of their country of origin, but they may also be affiliated socially and culturally with their country of residence. However, as Coutin points out, the very activities that make up these social affiliations—living and working in the United States—are illegal for unauthorized migrants, so the very affiliation is itself

150. Susan Bibler Coutin, *Law on the Ground: Jurisdiction, Affiliation, and Transnational Law-making within Unauthorized Migration from El Salvador to the United States*, 51 WAYNE L. REV. 1147 (2005).

151. *Id.* at 1148.

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. Coutin, *supra* note 150, at 1148.

157. *Id.* at 1149.

158. *Id.* at 1150.

illegal.[159]

Second, there is the deportation of long-time resident aliens, which exacerbates these conflicts in membership. Coutin points out that 1996 immigration legislation expanded the range of crimes for which aliens could be deported, applied the new definitions retroactively, and eliminated waivers through which criminal aliens could petition to remain in the United States, thereby increasing the number of long-time resident aliens who could be deported.[160] This situation can lead to what she calls "informal conflict of laws,"[161] such as when the country of origin no longer regards the individual in question as a citizen of that country,[162] and such as when, as in El Salvador, deportees are widely regarded as serious criminals. This perception makes it very difficult for deportees to secure employment and reestablish lives in El Salvador.[163] Third disaporic citizens have become very important for certain sending states. Coutin points out that in the case of El Salvador, in 2004 alone, migrants sent relatives in El Salvador approximately 2.5 billion dollars in migrant remittances which has become a mainstay of the Salvadoran economy.[164] Because of the importance of these remittances to the Salvadoran economy, the legal status of Salvadorans has become an important policy issue in El Salvador. As a result, the government of El Salvador asserting "jurisdiction" over expatriate Salvadorans by claiming expatriate El Salvadorans as part of the Salvadoran citizenry, and taking actions to strengthen the connection between El Salvadoran expatriates and their country of origin.[165]

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159. *Id.* at 1152.

160. *Id.* at 1153.

161. *Id.*

162. The Supreme Court has held that after an alien subject to an order of removal has been in detention for a six-month period, and there is no significant likelihood of removal in the foreseeable future due to the unwillingness of any nation to take the alien, the alien must be released from detention. Zadvydas v. Davis, 533 U.S. 678, 701-02 (2001).

163. Coutin, *supra* note 150, at 1153. She says that although they are legal citizens of El Salvador, deportees may be regarded by other Salvadorans as foreigners and may suffer discrimination at the hands of government officials. *Id.* at 1154.

164. *Id.* at 1154-55. She notes that following the January and February 2001 earthquakes in El Salvador, the United States awarded Temporary Protected Status to Salvadorans in the United States, and that the United States and Salvadoran officials added migrant remittances to the "foreign aid" package that the United States was sending to El Salvador. *Id.* at 1155.

165. *Id.* at 1156.

Finally, Professor Coutin details the efforts of unauthorized Salvadoran migrants to influence American immigration law and policy so that they will be able to remain in the United States.[166] These efforts have been successful to some extent, which is due, in considerable part, to the substantive ties that these migrants have developed in the United States.[167]

Professor Coutin concludes with some observations on the implications of these conflicts of membership for the cosmopolitan as well as the law and globalization approaches discussed in Professor Berman's work.[168] Professor Berman says that one benefit of the cosmopolitan schema is that various types of connections and affiliations could be taken into account in assessing membership.[169] Thus, immigration policy could be developed in a context of transnational interdependency, instead of primarily one of national sovereignty, meaning that substantive as well as formal ties could be given weight.[170] One example of a change in immigration policy would be to not deport migrants who have strong substantive ties to the United States.[171] Going further, Professor Berman suggests that the role that the law can play in influencing the conditions that cause multiple affiliations should be considered, such as looking for ways in which the law can be used to eliminate poverty, human rights abuses, and other conditions that flue migration.[172] Second, Professor Berman suggests that the move from international law to law and globalization has the potential to broaden our understanding of the various legal and other forces at work in transnational legal contexts, such as causing us to examine the transnational implications of immigration policies, the roles of non-state actors in law-making and the relationships between "official" and "unofficial" versions of law.[173]

Professor Coutin's discussion of the multiple affiliations of unauthorized migrants brings this discussion to a consideration of how these multiple affiliations impact the American legal system. The Supreme Court was forced to confront the impact of multiple affiliations in *Plyer v. Doe*,[174]

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166. *Id.* at 1156-58.

167. *Id.*

168. *Id.* at 1158-59.

169. Coutin, *supra* note 150, at 1158, *citing* Berman, *International Law, supra* note 1.

170. *Id.* at 1158.

171. *Id.*

172. *Id.* at 1159.

173. *Id.*

174. 457 U.S. 202 (1982).

where the Court held a Texas law that denied a free public school education to undocumented alien children unconstitutional.[175] The Court emphasized that many of these children were likely to remain in the United States, and that this being so, it was arbitrary and irrational for the state to deny them the benefit of a free public school education.[176] The Court also noted that it was the responsibility of the federal government to control illegal immigration, and the state's denying them a free public school education conflicted with the effective policy of the federal government to permit many illegal aliens to remain in the United States.[177]

In point of fact, the federal government has, to a large extent, tolerated extensive illegal immigration into the United States, and illegal aliens are a mainstay of the American economy, performing many of the low-level jobs that Americans and legal immigrants are not willing to perform.[178] We have seen a form of amnesty for illegal aliens in a 1986 law, and it is a matter of intense political controversy whether additional forms of amnesty should be provided.[179] Unauthorized migrants will continue to enter the United States in significant numbers, and the American legal and political system will continue to have to confront this aspect of "globalization."

IV. THE AUTHOR'S PERSPECTIVE

I now turn to the subject of this symposium from my perspective as a conflicts commentator whose work has been almost entirely in the area of interstate conflicts and who has viewed American conflicts law as an integral component of the American federal system. The overwhelming majority of conflicts cases coming before American courts involve interstate conflicts,[180] and it is my submission that American conflicts law has

175. *Id.* at 230.

176. *Id.* at 229-30.

177. *Id.* at 225-27.

178. As Thomas Donohue, President of the United States Chamber of Commerce has put it, "Legislative action is needed 'right now' to address problems dogging many of the estimated 8 million to 10.5 million illegal workers in the United States. If they went home, we'd have to shut down the country." Stewart M. Powell & Judy Holland, *Immigration Plan Facing Lengthy Debate in Congress*, ALBANY TIMES UNION, Jan. 8, 2004, at A6.

179. *See* Sue Kirchhoff & Barbara Hagenbaugh, *Immigration: A Fiscal Boon or Financial Strain*, USA TODAY, Jan. 22, 2004, at 1B.

180. I consider a conflict between the law of an American state and a Canadian province to be essentially an interstate conflict in light of the substantial similarities in our laws and

developed primarily with reference to the interstate case. I also maintain that the American courts have dealt with international cases—those involving foreign parties or events occurring outside of the United States—essentially within the framework that the courts have established for dealing with interstate cases, making adjustments that may be called for by the international nature of a particular case.

It is clear from the articles in this symposium that the issues raised by globalization do not have direct relevance for the resolution of the interstate case and are not intended to do so. Rather, the issues raised by globalization that are discussed in the articles in this symposium suggest that it may be appropriate for American courts and commentators to consider, in a more comprehensive way, how American conflicts law should be adapted to deal with the international case. Should the doctrine that the courts have developed to deal with the interstate case essentially be carried over to deal with the international case, with perhaps only minor adjustments; or should the courts develop a completely different approach for dealing with the international case, taking into account the considerations of globalization raised by the articles in this symposium? Additionally, when the issue is necessarily one with international implications, such as the application of American regulatory laws to activity taking place outside of the United States,[181] or the recognition of judgments issued by foreign courts, should

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legal systems.

181. Neither Professor Berman's article nor the articles of the other commentators in the symposium deal directly with this issue. Strictly speaking, the issue here is one of interpretation of federal statutes, but in this area both Congress and the Supreme Court have demonstrated a respect for the interests of foreign states in deciding how far American regulatory power should reach. *See, e.g.*, F. Hoffman-La Roche, Ltd. v. Empagran, 542 U.S. 155 (2004) (holding in antitrust case charging conspiracy between vitamin manufacturers and distributors to fix vitamin prices in the United States and foreign countries, that federal antitrust law does not apply to foreign companies located abroad who had purchased vitamins only outside American commerce); McCulloch v. Sociedad Nacional, 372 U.S. 10 (1963) (holding that the National Labor Relations Act does not apply to labor disputes, foreign flagships and foreign employees, even though the ships are owned by a subsidiary of an American corporation and operate in American waters); Romero v. International Terminal Operating Co., 358 U.S. 354 (1959) (holding that the Jones Act does not apply to claim of foreign seaman on foreign flagship injured when the ship was docked in an American port); Lauritzen v. Larsen, 345 U.S. 571 (1953) (holding that the Jones Act does not apply to claim of foreign seaman on foreign flagship injured while in port in foreign country, although seaman joined crew in United States); Foley Bros. v. Filardo, 336 U.S. 281 (1949)

(holding that federal wages and hour law does not apply to claim of American citizens working for American contractor in Iraq and Iran). *See also* McBee v. Delicia Co., Ltd., No. 04-2733, 2005 U.S. App. LEXIS 15826 (1st Cir. Aug. 2, 2005) (holding that the Lanham Act did not apply to trademark infringement claim of American entertainer where alleged infringement took place entirely in Japan and user's registration of the trademark with the name of the entertainer had been upheld by Japanese courts).

In *Spector v. Norwegian Cruise Line, Ltd.*, 125 S. Ct. 2169 (2005), the Court held that Title III of the Americans with Disabilities Act, 42 U.S.C. § 12181-12189, which requires "readily achievable" removal of barriers in places of public accommodation, applied to foreign-flag cruise ships operating in American waters, but that this provision did not apply if barrier removal would bring a vessel into noncompliance with the International Convention for the Safety of Life at Sea (SOLAS) or any other international legal obligation. In this regard, the Court has stated that statutes "should not be interpreted to regulate foreign persons or conduct if that regulation would conflict with principles of international law." Hartford Fire Ins. Co. v. California, 509 U.S. 764, 815 (1993).

In *Hartford* itself the Court held that American antitrust law applied to an alleged conspiracy between American and British insurance companies that would have an effect on the insurance market in the United States. *Id.* at 795-96. The Court also found that principles of international comity would not counsel against the application of American antitrust law in this case, because there was no conflict between American and British law on the point in issue in that British law did not require the British insurance companies to act in a manner prohibited by American antitrust law. *Id.* at 798. As this case indicates, the Court is more likely to find that Congress intended that American law apply extraterritorially where the acts committed abroad have the prohibited harmful effect in the United States. In *Steele v. Bulova Watch Co., 344 U.S. 280 (1952)*, an American citizen conducted a watch business in Mexico City, stamped the name "Bulova" on watches he assembled there, and sold them as "Bulova" watches in the United States. *Id.* at 281. The Court held that the Lanham Act applied, because the trademark infringement harmed Bulova's business in the United States, and also noted that the defendant's attempt to register the "Bulova" trademark in Mexico had been denied by the American courts. *Id.* at 285-88. *See, e.g.*, United States v. Aluminum Co. of America, 148 F.2d 416 (1945) (holding American antitrust law applied to the monopolization of the market for a product by a foreign-based cartel, where American companies bought and sold aluminum from cartel members). In this connection, the Securities Exchange Commission has asserted and the courts have agreed that American securities laws can be applied to actions abroad that involve stocks traded in the American securities markets. *See, e.g.*, Leasco Data Processing Equip. Corp. v. Maxwell, 468 F.2d 1326 (2d Cir. 1972). *See also* Consolidated Gold Fields PLC v. Minorco, S.A., 871 F.2d 252 (2d Cir. 1989) (holding that anti-fraud provisions of securities law apply to tender offer involving two foreign corporations on foreign soil where tenders offers were forwarded to shareholders of target corporation in United States, although they represented only 2.5 percent of shareholders).

Congress is more likely to make American law applicable to actions of American

the courts resolve these questions by taking into account considerations of globalization?

At the same time, my constitutional law side cautions that for an American court, considerations of globalization cannot override the limitations on governmental action imposed by the Constitution. Nevertheless, it may be that considerations of globalization can influence the courts' interpretation of constitutional limitations in international cases.

It is also important to understand the role of the American states in the American constitutional system. In American constitutional theory, upon independence, the American states have succeeded to the sovereignty formerly exercised by the British Crown over domestic matters. State

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citizens abroad. After the Supreme Court held that Title VII's anti-discrimination provisions did not apply to American citizens employed abroad by American employers in *Equal Employment Opportunity Commission v. Arabian American Oil Co.*, 499 U.S. 244 (1991), Congress quickly acted to overturn *Aramco* and make it clear that Title VII applies to relations between American employers and employees abroad. 42 U.S.C. §2000e(f), 2000e-1. Congress has made it a crime for an American citizen or resident alien to have illicit sexual contact with a child in a foreign country. 18 U.S.C. § 2423©). *See* United States v. Clark, 315 F. Supp. 2d 1127 (W.D. Wash. 2004) (upholding the power of Congress to enact the law under the commerce clause and upholding its extraterritorial application against a due process challenge).

In the International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, sec. 3, 112 Stat. 3304 (1998), Congress amended the Foreign Corrupt Practices Act of 1977 (FCPA), 15 U.S.C. § 78dd-2, to expand its coverage of prohibited bribery of foreign officials. The 1977 Act only imposed criminal penalties for bribery against officers and directors of American companies and against American citizens, national and resident employees of those companies. These limited restrictions, according to the Senate Report on the proposed amendments, put American businesses "at a disadvantage relative to foreign competitors who have continued to pay bribes without fear of penalty." The International Anti-Bribery Act of 1999, S. REP. NO. 105-277, at 2 (1998). The Report also concluded that this bribery was "estimated to affect overseas procurement values in the billions of dollars each year." *Id.* Under the new amendments, the FCPA's coverage is expanded to include all foreign persons who commit an act in furtherance of a foreign bribe while in the United States and foreign nationals employed by or acting as agents of American companies for actions that take place wholly outside of the United States. *Id.* According to the Senate Report, the 1998 Act was enacted in response to American ratification of the Organization for Economic Development Cooperation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the "OECD Convention"), which called on the parties to the Convention to cover "any person" and to "assert nationality jurisdiction when consistent with national legal and constitutional principles." *Id.* at 2-3.

sovereignty is thus a "given" in the American constitutional system, and the American states do not depend on the federal Constitution as the source of their power.[182] Thus, conflicts questions are determined by state law, and the federal courts must apply state law in diversity cases.[183] Each state court likewise exercises jurisdiction in accordance with its own law, subject only to due process limitations. While the Full Faith and Credit Clause mandates maximum recognition of sister state judgments,[184] the states are free to decide what recognition they will accord to judgments of foreign state courts. Although Congress has the power to regulate state court jurisdiction and choice of law, it generally has not done so, and federal treaties generally do not apply to state court choice of law decisions or recognition of foreign judgments.[185] Professor Michaels cautions that in any analysis of the role of legal pluralism and the significance of globalization, we must not lose sight of the fact that the world of conflict of laws is a world based strictly on the state, to the extent that the state administers conflict of laws,[186] and in the American federal system, this means each of the American states, American territories and the District of Columbia. It is from these perspectives that I want to discuss some of the globalization issues raised by Professor Berman and the other commentators in this symposium.

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182. The Supreme Court has said that, "The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible states." Texas v. White, 74 U.S. 700, 725 (1869) (overruled on other grounds, but upholding this main issue, by Morgan v. United States, 113 U.S. 476 (1885)). Because this is so, the Court held in that case that during the Civil War, the Confederate states were still a part of the Union from which they were trying to secede. *Id.* at 726-30. Under the "equal footing" doctrine, all states are admitted to the Union with the same attributes of sovereignty as were possessed by the original thirteen states. Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172 (1999).

183. *See* Klaxon v. Stentor Electric Co., 313 U.S. 487 (1941).

184. *See* Faunterloy v. Lum, 210 U.S. 230 (1908).

185. But see *Kolovrat v. Oregon*, 366 U.S. 187 (1961), where an Oregon "cold war era" law denying inheritance of property situated in Oregon to non-resident aliens unless the alien's home country provided a reciprocal right of inheritance to American citizens, was found to conflict with an 1881 treaty with Serbia giving "most favored nation" rights to Serbian citizens, including those residing in Serbia, then a part of the former Yugoslavia. *Id.* at 192-98. Likewise a similar Oregon "cold war era" law, conditioning succession by foreign heirs upon a finding that the practices of the heir's government would ensure that the heir would receive the property, was held to amount to an unconstitutional intrusion on the federal power over foreign affairs. Zschering v. Miller, 389 U.S. 429 (1968).

186. *See* Michaels, *supra* note 52, at 1258.

Let us first consider the matter of jurisdiction. Professor Berman maintains that under the cosmopolitan pluralist framework, the focus would be on "whether the parties before the court are appropriately conceptualized as members of the same community."[187] The "community affiliation" approach would replace a "contacts" approach, which Berman says courts are effectively doing in cyberspace jurisdiction cases.[188] One of the cases Berman uses to illustrate this point is France's assertion of jurisdiction over the American Internet service provider Yahoo! in a suit by French plaintiffs to block Nazi memorabilia and holocaust denial material from being accessed in France through its service.[189] While there was controversy over France's exercising jurisdiction over Yahoo! as opposed to exercising jurisdiction only over its French subsidiary fr.Yahoo, Berman maintains that the assertion of jurisdiction could be supported under a community-based analysis because of Yahoo!'s numerous substantive connections with France.[190] I agree with this analysis, noting that if the situation were reversed, the exercise of jurisdiction by an American court over a foreign company effectively doing business in the United States through a subsidiary and offering products for sale here, would comport with due process standards of minimum contacts and fundamental fairness. (As I will point out subsequently, however, the First Amendment would preclude an American court from recognizing the French judgment against Yahoo! in this case).

He then says that a focus on community membership "might also lead us to rethink the scores of cases in which American courts have dismissed on forum non conveniens grounds, human rights claims brought by foreign nationals against American corporations."[191] In a similar vein, Professor Heiser has detailed at length how forum non conveniens has been used to dismiss suits brought by foreign plaintiffs against American multinationals to recover for injuries taking place in their home country, and has concluded that the use of forum non conveniens by American defendants to try to avoid the exercise of jurisdiction by American courts in these cases would not decline even if the American courts applied the substantive law of the

187. Berman, *Globalization*, *supra* note 1, at 496.
188. *Id.* at 498-500.
189. *Id.* at 518.
190. *Id.* at 518-21.
191. *Id.* at 523.

foreign plaintiff's home state.[192] This is because what the American defendants really want to avoid is having to litigate the claim under the American legal system, with its more liberal discovery rules, contingent fees, and the right to trial by jury. Berman says that existing forum non conveniens doctrine based on the public and private factors set forth in *Gulf Oil Corp. v. Gilbert*,[193] "leaves little, if any, room for the argument that American society and American courts have a social responsibility to provide an American hearing for alleged misconduct of U.S. based multinationals."[194] In contrast, Berman says, "a conception of jurisdiction based on community membership and responsibility would offer more space to consider such an argument."[195]

It is here that I submit that we should not be separating the question of jurisdiction from the question of choice of law. More specifically, jurisdiction should not be separated from the question of the circumstances in which American law should apply to determine the legal liability of American-based multinationals for conduct that has harmful effects in foreign countries to residents of those countries. I maintain that when an American court concludes that it will apply American state or federal law to such a case, because the policy reflected in that law will be significantly advanced by such application, it should not dismiss the case on forum non conveniens grounds. In this day of advanced technology, it cannot be inconvenient for an American multinational, with its substantial resources and American affiliations, to defend a case in an American forum. On the other hand, if an American court is not going to apply American law to a transnational case, and is going to decide the case in accordance with the law of a foreign country, the fact that the defendant is an American-based multinational and that the American legal system provides litigation benefits to the foreign plaintiff does not seem to be a sufficient justification for the exercise of jurisdiction by an American court.

I will use the *In re Union Carbide Corp. Gas Plant Disaster at Bhopal*[196] case to illustrate this point. The "most tragic industrial disaster in

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192. Heiser, *supra* note 76, at 1190.

193. 330 U.S. 501 (1947) *sup'd in part by* 28 U.S.C.S. § 1404(a) (1948), *amended by* 28 U.S.C.S. § 1404 (1996).

194. Berman, *International Law*, *supra* note 1, at 524.

195. *Id.*

196. 634 F.Supp. 842 (S.D.N.Y. 1986), *aff'd*, 809 F.2d 195 (2d Cir. 1987), *cert. denied*, 484 U.S. 871 (1987).

history," to use the words of the District Court, occurred in the City of Bhopal, India.[197] It occurred at a plant owned and operated by Union Carbide India, Ltd. (UCIL), which was incorporated in India under Indian law in 1934, although a majority of its stock was owned by Union Carbide, an American corporation.[198] The plant had numerous hutmets adjacent to it, which were occupied by impoverished squatters.[199] UCIL, which was heavily regulated by the Government of India, manufactured pesticides there, at the request of, and with the approval of, the Government of India.[200] A highly toxic gas was used in the production of the pesticides, and for reasons not determined at the time of the filing of the suit, the gas leaked from the plant in substantial quantities.[201] "Prevailing winds" blew the deadly gas into the overpopulated hutments adjacent to the plant and into the most densely occupied parts of the city.[202] The deaths attributable to the leaking case were estimated to be in the thousands, and the injuries were estimated to be in the hundreds of thousands.[203] Livestock were killed, crops were damaged, and businesses were interrupted. Following the disaster, the Government of India enacted legislation providing that the Government of India had the exclusive right to represent Indian plaintiffs in India and elsewhere in connection with the tragedy.[204] Instead of filing the claims in India, the Government of India brought suit against Union Carbide in a New York federal court.[205] The suit was dismissed on forum non conveniens grounds.[206]

I would submit that under Professor Berman's concept of community membership, this was a case that properly should have been resolved in the "community of India." All the facts relating to the disaster took place in India, all the victims were Indian citizens, the operation of the plant was heavily regulated by the government of India, the pesticides with the highly toxic gas were manufactured at the request of, and with the approval of, the

197. *Id.* at 844.
198. *Id.*
199. *Id.*
200. *Id.*
201. *Id.*
202. *Bhopal,* 634 F. Supp at 844.
203. *Id.*
204. *Id.*
205. *Id.*
206. *Id.*

Government of India, and the Government of India had the exclusive right to litigate the claims of the victims. For these reasons, the only law that could constitutionally be applied by an American court to determine the rights of the Indian plaintiffs against Union Carbide in this case was Indian law.[207] It may be fairly suggested that in its effort to obtain foreign investment and the economic benefits to India and its citizens from the operation of the plant, the Government of India was lax in its regulation of the plant, and so must bear some responsibility for the disaster. Additionally, if the Indian legal system was inadequate to handle the claims resulting from the disaster, this could have been remedied by improvements in the legal system. If we are to look to community affiliation to determine the propriety of a court exercising jurisdiction, the only courts that could properly exercise jurisdiction over the claims arising from the Bhopal disaster were the courts of India.

On the other hand, where an American corporation manufactures a product in the United States that causes injury to victims in foreign countries, and the law of the state of manufacture reflects a strong regulatory policy, as reflected in the imposition of strict liability or the authorization of punitive damages, that state has a real interest in applying its own law to harm caused by the defective product. Thus, the state can properly assert jurisdiction and apply its own law in products liability cases arising from that manufacture, regardless of whether the harm occurred in the same state, another American state, or in a foreign country. Since the

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207. *See* Allstate Insurance Co. v. Hague, 449 U.S. 302 (1981). In order for the application of a state's law to a particularly fact situation to be constitutionally permissible, that state must have a "significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair." *Id.* What this means as a practical matter is that a state's law may constitutionally be applied in any case where the state had an interest in applying its law in order to implement the policy reflected in that law, and the application of its law in the circumstances was not fundamentally unfair to the party against whom the law was applied; *or* the state had sufficient factual contacts with the transaction making it reasonable for its law to be applied to the transaction despite is lack of a substantive interest in doing so. Sedler, *Constitutional Limitations*, *supra* note 10. Where the application of a state's law cannot be sustained on either of these two bases, it will be found to be violative of due process and full faith and credit. *See* Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985) (holding that in nationwide class action in involving royalties on gas leases in Kansas court, where over 99 percent of the leases and 97 percent of the plaintiffs has no connection with Kansas, Kansas could not constitutionally apply its own law to determine royalties due on the leases).

state will be applying its own law in a suit brought there by a foreign country plaintiff injured in the plaintiff's home country. I would submit that the court should not dismiss the case on forum non conveniens grounds.[208]

Professor Berman says that a community-based approach would "go beyond counting contacts to inquire about the substantive bonds formed between the member of the forum community and the territorially distant actor."[209] Looking to "substantive bonds," I submit that when a product has been manufactured in one state or nation and distributed nationwide or globally, there is a "substantive bond" between the manufacturer and the person who has been injured by the product. This justifies the exercise of jurisdiction either by the courts of the state where the defendant manufactured the product or the courts of the state where the injured person resides. Looking to considerations of fairness rather than to considerations of "foreseeability" or "purposeful availment," it is fully fair to both parties for either court to exercise jurisdiction in this situation.

Are there some circumstances in which considerations of fairness, as reflected in Professor Berman's community based approach, would justify the exercise of jurisdiction by an American court over an American defendant, but not over a foreign defendant? There may be such a situation in regard to the manufacturer of a component part of a product. In *Asahi Metal Industrial Co. v. Superior Court*,[210] a plurality of the Court invoked considerations of fairness and reasonableness in holding that due process precluded the exercise of jurisdiction over a Japanese manufacturer of a component part of a product that reached California and caused injury

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208. As Professor Heiser notes, "[w]hen a trial court compares the deterrence and regulatory interests of the country in which a defendant manufacturer resides versus those of the country where the injured plaintiff resides for purposes of forum non conveniens, the process of identifying and assessing interests is not unlike a governmental interest choice-of-law analysis." Heiser, *supra* note 76, at 1179. In terms of interest analysis, this case presents a false conflict. The state where the product is manufactured has a real interest in applying its own law while the state where the accident occurs, assuming that its law is manufacturer-protecting, has no real interest in applying that law to protect an out-of-state manufacturer. As a general proposition, this result obtained in interstate cases, although some courts have held that the law of the plaintiff's home state applies in products liability case, including where that state's law is manufacturer-protecting. See the discussion and review of cases in Sedler, *supra* note 95, at 630-32.

209. Berman, *Globalization*, *supra* note 1, at 500.

210. 480 U.S. 102 (1987).

there.[211] In that circumstance, Professor Berman would probably say that there was not a "substantive bond" between the Japanese manufacturer of the component part and the injured victim in California. I wonder if the same result would have obtained if the manufacturer of the component operated in an American state. Perhaps I am suggesting that Professor Berman's community-based approach may not be relevant in determining questions of fairness in subjecting an American defendant to jurisdiction in one American state or another. Nevertheless, it clearly is relevant in determining the fairness of subjecting a foreign actor to suit in any court in the United States.

When it comes to the cosmopolitan approach to choice of law, Professor Berman says that this approach is firmly grounded in an expanded notion of governmental interests that looks to a state's "broader interest in taking part in a global community."[212] This approach would allow courts to "engage in a dialogue with each other concerning the appropriate definition of community affiliation" and enable the courts to "develop hybrid norms for resolving multistate disputes."[213] It is in this regard that I found it necessary to ask myself the question, "Should we have a different approach to choice of law in the international case than in the interstate case?" While it may be intuitive to say that in this era of globalization the answer is "yes," however, I am not so sure that this is the right answer for American courts operating within the framework of the American federal system.

Let me explain what I mean by American courts operating within the framework of the American federal system. I am a strong proponent of interest analysis as the preferred approach to choice of law in the interstate case. I maintain that in practice, at least in tort cases, courts, regardless of which approach that they are purportedly applying, generally reach results that are consistent with the interest analysis approach and apply their own law when they have a real interest in doing so in order to implement the policy reflected in that law. I also assert that in practice, the courts' use of interest analysis in these cases has produced results that are functionally sound and fair to the parties.[214] Needless to say, many academic

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211. *Id.* at 113-16.

212. Berman, *Redefining Governmental Interests*, *supra* note 1, at 1864.

213. *Id.* at 1865.

214. Sedler, *supra* note 95, at 617-19. *See also* Sedler, *Choice of Law*, *supra* note 10, at 788-89. I have also emphasized that in the "real world" of conflicts litigation, the question

commentators reject any notion of forum preference and seek solutions that try to accommodate conflicting state interests that do not make the result depend on the forum in which a suit is brought.

If I am correct in my analysis of what American courts do in practice, then we come back to the question of whether they should take a different approach to the international case, and in those cases at least, seek to achieve results that accommodate the conflicting interests of the American state court and the forum country court. I would first ask, "why should they?" What is there about the international case that makes it so different from the interstate case, so that although a state would apply its own law to the fact-law pattern presented in an interstate case, it should not necessarily do so when that same fact-law pattern is presented in an interstate case? Suppose that a resident of an American state is injured by a product manufactured by a defendant in another American state. Under the law of the plaintiff's state, there is strict liability for defective products and a court is authorized to award punitive damages in product liability suits. Under the law of the state of manufacture, liability for defective products is based on negligence only, and the courts are not authorized to award punitive damages. The plaintiff will bring suit in the home state, and that court will apply its own law because it has a real interest in doing so in order to implement the policy reflected in that law. There is no unfairness in that state exercising jurisdiction and applying its own law in this case, since the defendant voluntarily shipped the product into that state.

Now suppose that the product is manufactured in a foreign country. Let us also suppose that the foreign country is a third-world country that is trying to develop its manufacturing base such that its tort law is extremely manufacturer-protecting, imposing liability only for gross negligence and capping damages at a very low level. Since the foreign manufacturer has

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of jurisdiction cannot be separated fully from the question of choice of law, as it relates to the possible states in which suit can be brought. Litigating lawyers know that the choice of law result in a particular case and the possible outcome of the case as well may often depend on the state where suit can be brought. They quite realistically assume that a court is more likely to apply its own law in preference to the law of another state and that where a state has a real interest in applying its own law in order to implement the policy reflected in that law, the courts of that state are highly likely to do so. This being so, plaintiffs' lawyers will try to bring their suit in the state whose law is plaintiff-favoring, while defendants' lawyers will assert jurisdictional and forum non conveniens objections to suit in the plaintiff-favoring state and try to force the plaintiff to litigate the case in a forum whose law is defendant-favoring.

voluntarily shipped the product into the American state, it is subject to jurisdiction there, and as discussed earlier, there are "substantive bonds" between the foreign manufacturer and the person who has purchased the product. Should the American state court apply its own law in order to implement the policy reflected in that law, as it would in the interstate case, or should it try to resolve the case by looking to "an appropriate definition of community affiliation," or by developing "hybrid norms" to resolve this multistate dispute?

I would submit that the court would not treat this case differently from the way it would treat an interstate case, because it does not see its function as an American state court to deal with issues of "globalization" that may be implicated by its choice of law decision in an international case. For the court to apply its own law in this case would seem to achieve a result that is functionally sound and in no way unfair to the foreign defendant. If there is a need to change the way that state courts resolve questions of choice of law in international cases, it can be contended that in the American federal system, it is up to Congress, exercising its power over foreign commerce, to legislate that change. I come to the conclusion that considerations of "globalization" are not likely to change the approach of American courts to choice of law in international conflicts cases, nor do I think that they should do so.

When it comes to recognition of foreign country judgments, I fully agree with Professor Berman that American courts should enforce these judgments in the same manner as they enforce the judgment of a sister state under the Full Faith and Credit Clause. The one qualification is that American courts may not do so when enforcement of the foreign country judgment is precluded by the Constitution. This was the situation presented in the *Yahoo*! case,[215] which was discussed earlier in connection with the exercise of jurisdiction. Yahoo! is an Internet service provider with its principal place of business in California.[216] Its American website, yahoo.com, targets American users and provides many services, including auction sites, message boards and chat rooms, for which Yahoo! users provide much of the content.[217] Nazi discussions have occurred in Yahoo!'s chat rooms and Nazi-related paraphernalia have appeared for sale on its

215. *See* Berman, *Globalization*, *supra* note 1, at 337-42.

216. *Id.*

217. *Id.*

auction website.[218] French criminal law prohibits exhibition of Nazi propaganda and prohibits French citizens from purchasing or possessing such material.[219] Yahoo!'s French subsidiary, yahoo.fr, has removed all Nazi material from its French website to comport with French law.[220] However, it is possible for French citizens to access yahoo.com in France and view Nazi materials.[221] This led to a suit by French organizations against Yahoo! in a French court, and the French court issued an order requiring Yahoo!, subject to a fine of approximately $13,300, per day to remove all Nazi-related material from its server and to take a number of other actions to prevent French citizens from accessing Nazi-related material on its website.[222]

While the French court could properly exercise jurisdiction over Yahoo!, for an American court to enforce the judgment against Yahoo! would clearly violate the First Amendment.[223] Yahoo! operates its website in the United States, and the First Amendment fully protects the dissemination of hate speech.[224] While commentators may debate the legitimacy of an American-based Internet provider including material on its website that is illegal in many other countries, the dissemination of that material is protected by the First Amendment, and that is the end of the matter as far as American courts are concerned.[225]

A variant of the *Yahoo!* case was presented in *Telnikoff v.*

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218. *Id.*

219. *Id.*

220. *Id.*

221. *See* Berman, *Globalization*, *supra* note 1, at 337-42.

222. *Id.*

223. The French plaintiffs have made no effort to enforce the judgment in the United States. Yahoo! brought suit against the French plaintiffs in the United States, and a federal court held that enforcement of the judgment would violate the First Amendment. Yahoo! v. La Ligue Contre Le Racisme et L. Antisemitisme, 169 F. Supp.2d 1181 (N.D. Cal. 2001). The decision was reversed on appeal to the Ninth Circuit on the ground that the case was not yet ripe. 433 F.3d119 (9th Cir. 2006). The case was remanded with instructions to dismiss it without prejudice. *Id.*

224. *See, e.g.*, R.A.V. v. City of St. Paul, 505 U.S. 377 (1992).

225. Just as the First Amendment precludes the government from denyingadults access to expressive material on the Internet that is "harmful to children," it precludes the government, here acting through the courts, from denying Americans access to expressive material on the Internet that may be illegal in other countries. *See* Shelley v. Kraemer, 334 U.S. 1 (1948).

Matusevitch[226] which involved a judgment entered in a libel action between two British citizens concerning writings that appeared in a British newspaper.[227] A British court ruled in favor of the plaintiff and ordered damages.[228] The defendant subsequently moved to Maryland, and filed a declaratory judgment action in a Maryland state court, alleging that the First Amendment precluded enforcement of the judgment in the United States.[229] The Maryland Supreme Court ruled that because British libel law does not include the First Amendment-mandated requirement that the statement of fact be knowingly false or made with reckless disregard for truth or falsity, enforcement of the judgment would violate Maryland's public policy.[230]

Professor Berman criticizes the decision, saying that in a case like *Telnikoff*, where the parties have no significant affiliation with the forum state, "there is little reason for a court to insist on following domestic public policies in the face of competing conflicts values."[231] While I agree with Professor Berman that domestic public policies should not cause a court to refuse to enforce a foreign judgment, the problem here is that enforcement of the British judgment may violate the First Amendment. The processes of the American legal system are being invoked to enforce a foreign court judgment that imposes liability for speech that is protected under the First Amendment. The contrary argument is that the First Amendment is not implicated in a case such as this where the underlying speech had no connection with the United States.[232] Without trying to resolve the First Amendment issue, my point is that the question before the court should have been whether enforcement of the judgment would violate the First Amendment, and if the court held that it would not, the judgment should have been enforced.

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226. 702 A.2d 230 (Md. 1997).

227. *Id.* at 234-36.

228. *Id.* at 234.

229. *Id.* at 235.

230. New York Times v. Sullivan, 376 U.S. 254 (1964).

231. Berman, *Redefining Governmental Interests*, *supra* note 1, at 1869.

232. Professor Berman addresses the First Amendment issue somewhat more fully, maintaining that there is a significant distinction between a court itself issuing a judgment that would violate the First Amendment and that court's recognizing the judgment of another court that reaches a contrary result. He also questions whether the action of a court recognizing the judgment of another court is sufficient state action to bring into play the strictures of the First Amendment. Berman, *Redefining Governmental Interests*, *supra* note 1, at 1871-72.

With this introduction, we now turn to Professor Berman's article, *Conflict of Laws, Globalization, and Cosmopolitan Pluralism* and the responses of the commentators.