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EXIT COSTS – A NEW PARADIGM FOR THE TREATMENT OF INTERNATIONAL CONFLICTS OVER MATRIMONIAL PROPERTY REGIMES?

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I. Introduction

[To] assume a closed society is to make an abstraction which takes us (conceptually) too far away from actual societies. The significance of the state as a form of social order with the power to open and close its borders . . . makes it tempting to assume that societies can be divided along and distinguished using national boundaries. But the world is not made up simply of states, and borders are not always tightly sealed. People operate across, and societies straddle, national boundaries.¹

The empire driven vision of Anglo-American jurisprudence (more accurately Anglo jurisprudence, since that is where the earlier developments occurred) worked off an assumption that the only foreign juridical activity worth acknowledging was that of sovereigns who had a similar understanding of the role of the state.² Accordingly, a domestic forum would defer to consequences dictated by the foreign system unless, in the domestic forum's eyes, the result that the foreign system produced was in fact unsatisfactory, in which case it could be dealt with by the domestic forum on a public policy basis, or on the basis that the outcome in fact was otherwise unacceptable to local law.³

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1. CHANDRAN KUKATHAS, *THE LIBERAL ARCHIPELAGO: A THEORY OF DIVERSITY AND FREEDOM* (2003).

2. See JAMES FAWCETT & JANEEN M. CARRUTHERS, *CHESHIRE, NORTH & FAWCETT PRIVATE INTERNATIONAL LAW* 26 1301 (14th ed. 2008), [hereinafter *CHESHIRE*] (“[T]he incidents of a right of a type recognized by English law acquired under the law of any *civilized* country must be determined in accordance with the law under which the right is acquired”) (quoting Dicey, *CONFLICT OF LAWS*, 43 (5th ed. 1932) (italics added)). English law developments only really began in the last third of the 18th Century. *Cheshire, supra* at 21-3. Traditional political doctrine accepts the notion of a nation state with a political authority whose role is to preserve the social unity of the state. See KUKATHAS, *supra* note 1, at 8, 15. In Kukathas’ view the mutual “respect showed by sovereigns reflects an international community premised on tolerance.” *Id.* at 163.

3. American conflicts of laws jurisprudence might have felt that it had found a way around these problems by mostly rejecting an Anglo “jurisdiction-selecting” approach which focuses on picking the forum, not the content of what that forum does, in favor a “rule-selection” approach which focuses on the relative merits of the possible rules in the light of the interests involved in case. But in the contemporary world both analyses ultimately lead

However, today the pressures of globalization on one hand and the increasing real global political power of foreign sovereigns on the other are forcing domestic regimes to recognize that sovereignty.⁴ At the same time we have become painfully aware that the foreign state's vision — for example of the role of the state with respect to insular elements in their societies, whether cultural, ethnic or religious — may differ radically from our own.⁵ Domestically, we are increasingly being forced to confront “the question of whether the good society or a free society is, indeed, a closed society.”⁶ Because the system boundary tensions have become so painfully obvious, and our premises for rejecting that which is foreign have become increasingly suspect, we have started to see greater efforts to identify a new matrix for engaging that which is foreign.⁷ For example, can

us through the same process. These concerns drive us to do two things. First, we are compelled to examine the legitimacy of our own domestic concerns, and then we are driven to look at a number of aspects of the foreign activity: the acceptability of the foreign sovereign's political thesis; the engagement of this thesis with the relevant elements in its society; and the ultimate impact of this engagement with the topic of our current concern, namely the structuring of matrimonial property arrangements.

4. As is evidenced by an increase in non-hierarchical multi-nation international institutions, such as the European Community. See KUKATHAS, *supra* note 1, at 26-8.

5. See Ann Laquer Estin, *Embracing Tradition: Pluralism In American Family Law*, 63 MD. L. REV. 540 (2004).

6. KUKATHAS, *supra* note 1, at 6. As Kukathas points out, there is also the possibility of a debate about the content of a good society. Thus from one perspective such a society might require a commitment to an underlying set of norms, such as those of social justice. Kukathas does not see such an underlying commitment as essential to a good society. Rather, in his view the society is “good” if, following individual moral evaluation, an individual is willing to acquiesce to life in that society. *Id.* at 99-103. In his view the good society is one imbued with a tradition of civility to difference, not an association with a unique moral standing or vision of justice. *Id.* at 261. Beneath the surface lurks an anxiety about the extent to which the established dominant political community has the associated character of its “deep organization” put at risk by integrating dissenting competing legal authorities — even when as a liberal tradition the community might like to tolerate the dissenters. *Id.* at 192-93 (in part citing RONALD DWORKIN, *LAW'S EMPIRE* 214 (1986)).

7. See KUKATHAS, *supra* note 1, at 15, arguing for a departure from a traditional model of freedom of choice in favor of a model of freedom of association, and away from a goal of integrating that which is foreign into mainstream culture in favor of a system of political indifference to cultural difference. Presumably this means an indifference to the property consequences of those choices made by virtue of any cultural differences — at least beyond the state's own essential interests. Kukathas has no difficulty with a “liberal” society having illiberal elements in it — in particular he notes the illiberal characteristics of many families. Since, for him, the grounding value of liberalism is tolerance, this sort of social structure presents no problems. *Id.* at 23-4. In the Kukathas' view the liberal vision demands toleration not because it values autonomy, “but because it recognizes the importance of the fact that people think differently, see the world differently, and are inclined to live — or even think they must live — differently from the way others think they should.” *Id.* at 39. In the

we find new principles that justify recognizing at least aspects of the foreign conduct, beyond mere deference to a fellow sovereign? Even if the foreign conduct involves recognizing values in ways or to ends that we would not, is extending such recognition something that reasonable political and jurisprudential theory would tolerate, at least under certain conditions? At the same time, are there certain minimum conditions that in any event must be met, no matter what?

Matrimonial property law provides an interesting and challenging platform on which to examine some of these issues. In the not too distant past a married couple's property rights in Anglo-American jurisprudence fell comfortably under the umbrella of the status regulating their relationship. Moreover, this status, either as a matter of positive law, or as a source of public policy, provided a reliable bulwark for confronting foreign doctrine. But now the bulwark is increasingly breached. Frequently in the United States, but only recently in England and Wales, recognition is being given to prenuptial agreements. This opens the door to considering whether foreign activity engaged in by the parties (or possibly their representatives) premised on "agreement" and "choice" and impacting matrimonial property issues, should be accorded recognition by a domestic forum.⁸

This article seeks to provide a framework within which a conflicts of laws analysis might be able to grapple with matrimonial property issues arising from the parties' foreign connections. Mechanisms to do so currently exist, but as will be seen, they are crude and problematic. The inspiration for the proposed framework lies in political philosophy rather than legal theory, for political philosophy recognized much earlier than the law that the complex array of the world's communities tends to demand a refined and nuanced analysis.

The first substantive section of the paper briefly sets out the traditional conflicts of laws scheme impacting the discussion, and introduces the role of personal choice. In particular this section exposes the extent to which public policy concerns of a domestic forum might start to destabilize the parties' ability to rely on historical juridical activity. The next section

authors view, a society can be free even its members do not in fact make choices. *Id.* at 113. Besides which, to not tolerate cultural differences opens the door to an accusation of cultural imperialism. *Id.* at 191-92. In contrast, Barry takes the position that a state does not have to tolerate "deep cultural diversity," especially if doing so involves putting the force of the state behind practices that repudiate liberal values such as freedom and equality. BRIAN BARRY, CULTURE AND INEQUALITY: AN EGALITARIAN CRITIQUE OF MULTICULTURALISM 128 (2001).

8. See David S. Rosettenstein, *Comity, Family Finances, Autonomy, and Transnational Legal Regimes*, 23 INT'L J.L. POL'Y & FAM., 192, 197-207 (2009).

considers how, even if a domestic jurisdiction notionally is willing to defer to foreign “choices”, the possibility of different visions of “choice” that might exist between foreign and domestic jurisdictions will further enhance the instability of existing property arrangements. The third substantive section then uses an analysis supplied by political theory to suggest a principled way in which a domestic forum might rely on foreign choice based activity and still reconcile that activity with its own public policy concerns.

II. The Conflicts of Law Framework and Choice

Traditional conflicts of laws doctrine gives a forum state ample opportunity to disrupt the property consequences that the parties to a marriage might have anticipated ordinarily would flow from the union. One of the leading English treatises on conflicts of laws, somewhat exuberantly, has the following to say about prenuptial agreements and conflicts of laws:

The contract continues to govern the proprietary rights of the parties not only in the matrimonial domicile, but also in any other domicile that may later be acquired. It must be recognized no matter where it may be put into suit (subject to any overriding provisions of the law of the forum)⁹

However, as the classic aphorism goes, the devil is in the parentheses.

The English position just articulated, even though until very recently it probably misstated the actual rule under English family law,¹⁰ mirrors the position in the United States of the Restatement (First) of Conflicts of Laws. Eleven or twelve states follow this approach.¹¹ While the English position provides a mechanism to avoid enforcing the law of the place of contracting by conditioning the enforceability on the agreement’s not

9. CHESHIRE, *supra* note 2, at 1301.

10. *See* Radmacher v. Granatino, [2009] EWCA (Civ) 649, [2009] All E.R. (D) 31 (Eng.) (replacing the historical rule that prenuptial agreements are void with an emerging rule that prenuptial agreements will be binding if certain conditions are met). These agreements may now become more enforceable on a routine basis. *See id.* A report of the English Law Reform Commission on the enforceability of prenuptial agreements will follow the release of the Supreme Court decision according to a private communication with the Commissioner responsible for the report, Cambridge, May 2010.

11. Julia Halloran McLaughlin, *Premarital Agreements and Choice of Law: “One, Two, Three, Baby You and Me”*, 72 MO. L. REV. 793, 800 n.41 (2007); Symeon C. Symeonides, *Choice of Law in the American Courts in 2009: Twenty-Third Annual Survey*, 58 AM. J. COMP. L. 227, 232 (2010).

conflicting with overriding provisions of the forum's law, the First Restatement's escape hatch excuses enforcement where to do so would offend the fundamental public policy of the forum.¹² A comment to the Restatement's public policy exception states that mere difference between the laws will not make a (chosen) law contrary to the forum's policy.¹³ In any event, the upshot of this approach is that the stability of the premarital arrangement relies on the unstable boundaries of the public policy exception.

The Second Restatement's¹⁴ approach has been subjected to a variety of analyses. Under one, if there is a true conflict, wherein more than one state has a legitimate interest in applying its own policy, the forum's policy applies as a default.¹⁵ Others have called for a more nuanced approach. The relative strength and importance of the policies should be evaluated.¹⁶ This requires a normative decision as to which state's policy or more appropriately is gored. And how should one decide that? The Leflar refinements called for balancing the concerns of predictability of results, maintenance of international order, simplification of the judicial process, advancing the forum government's interests, and the application of "the better law" approach – that is relying on the law that is more effective, more modern and more just.¹⁷ The drafters of the Restatement (Second) picked up these threads (with the exception of the better law approach) and added concerns for the relevant policies of other interested states and the relative interests of those states, the protection of justified expectations and the basic policies underlying a particular field of law.¹⁸

Whichever of these analyses a jurisdiction adopts, the effect is that choices that parties may make, or may be assumed to have made, are

12. McLaughlin, *supra* note 11, at 803-04.

13. RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 612 (1934), cmt. b. Needless to say, in the absence of this position, either a conflicts approach is unnecessary, or the entire analysis would always collapse under the weight of the exception.

14. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1989).

15. McLaughlin, *supra* note 11, at 805.

16. *Id.* at 806.

17. *Id.* at 805-06; see ROBERT A. LEFLAR, AMERICAN CONFLICTS LAW 479 (3d ed. 1977), where the author, discussing *Wyatt v. Fulrath*, 211 N.E. 2d 637 (N.Y. 1965), is of the opinion that New York law regulating a spouse's rights of survivorship in a bank account in that state should take precedence over the law of their domicile, Spain. The author thought that the application of New York law was justified because it represented "a more modern and enlightened social policy than did Spain's medieval rule" which imposed a community property regime. Of course, the contemporary California community property system dates back to the Visigoths!

18. McLaughlin, *supra* note 11, at 807-08.

subject to reappraisal. Contemporary analyses do provide the parties with some opportunity to entrench their choices. They may attempt a choice of law. According to the Restatement (Second) that chosen law is to be applied if directly relevant, as well as when that is not the case, unless the designated state law has no substantial relationship to the parties or the transaction and there is no reasonable basis for the parties' choice, or application of the chosen state law would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the issue, and which in the Restatement's view would be the appropriate set of laws in the absence of the parties' choice.¹⁹

The above framework relates both to those situations where the parties expressly have made an attempt to regulate their matrimonial property arrangements, and to those situations where the parties make choices implicitly, such as where the act of marriage imports a matrimonial "regime" which supplies a framework for the regulation of financial matters.²⁰

The next section considers some aspects of state concerns regarding the efficacy of matrimonial property choices exercised elsewhere.

III. Choice – Foreign Versus Domestic Visions of Choice

In reality, the possibility of exercising a choice potentially occurs at a variety of different points. First there is the consent to marry. In some instances this itself imports a regime that dictates an outcome. A second possibility is that matrimonial property consequences, to a greater or lesser extent, may be regulated by agreement. In this regard, the parties may be able to regulate both the process by which the agreement is entered into as well as the consequences. On the other hand, while the process may be accepted by the parties, the actual outcome may not embody their wishes, except by implication.

Some examples may be helpful. If a couple in South Africa agrees to a civil marriage, without doing more, the marriage itself (at least if the parties

19. *Id.* at 808-09.

20. Thus, as to movables, under English law, the law of domicile at the time of marriage controls, and as to immovables, it is the law of the jurisdiction in which the property is located that applies. While English law might allow a doctrine of mutability, that is that the controlling law may change, with respect to movables acquired subsequently elsewhere, by way of contrast the French vision is one of immutability. See CHESHIRE, *supra* note 2, at 1297-1301. The American vision is considerably more opaque. See J. Thomas Oldham, *What If the Beckhams Move to L.A. and Divorce? Marital Property Rights of Mobile Spouses when They Divorce in the United States*, 42 FAM. L. Q. 263 (2008).

are domiciliaries of South Africa) automatically triggers a universal community of property regime. However, by agreement in advance of the marriage, the parties can opt for a separate property regime.²¹ In the Islamic tradition the consent to marry may be actual, or, for example, may be in the form of an implied or imputed authorization of a guardian. Indeed, in some instances, the woman's consent may not be necessary at all.²² In this tradition the consent to marry will import a separate property regime, possibly moderated by a marriage agreement, the terms of which may reflect the negotiations between the parties' families, or they may be imported by custom.²³ In these examples, as in America, the parties make "choices". But whether there is a valid "choice" is determined by each evaluating jurisdiction's own reference framework.

From our point of view, the state's policies, however they are formulated, are going to be concerned with two aspects of these choices. First, the state will be concerned with the substantive result produced by these choices. An earlier paper suggested that the state's legitimate interests in substantive outcomes should be restricted to the state's own interests, for example as the social support provider of last resort.²⁴ But a state may have concerns relating to the process itself by which any choices were made. In America, for example, a procedural fairness evaluation is a routine part of the analysis of the acceptability of a prenuptial agreement.²⁵

Choice involves at least two elements – the process by which the choice is exercised and the values that presumably are weighed in making that choice.

Domestically, when we look at the process of choosing, such as in the context of prenuptial agreements, we strive to normalize both the process and the values. Accordingly, as to the process, we take a hard look at pressures influencing choice and try to neutralize them according to our

21. D. S. P. CRONJE & JACQUELINE HEATON, *SOUTH AFRICAN FAMILY LAW* 69-71 (2d ed. 2004).

22. DAVID PEARL & WERNER MENSKI, *MUSLIM FAMILY LAW* 142-3 (3d ed. 1998). But in England, Wales, and Northern Ireland, see the Forced Marriage (Civil Protection) Act 2007, 2007, c. 20, and Ministry of Justice, Forced Marriage (Civil Protection) Act 2007, Guidance for Local Authorities as Relevant Third Party and Information Relevant to Multi-agency Partnership Working 5 (Oct. 2009), available at <http://www.justice.gov.uk/guidance/docs/forced-marriage.pdf> (“[F]orced marriage is not the same as an arranged marriage. In an arranged marriage, both spouses can choose whether or not to accept the arrangement. In forced marriage, one or both spouses do not . . . consent to the marriage and duress is involved.”).

23. PEARL & MENSKI, *supra* note 22, at 180.

24. See Rosettenstein, *supra* note 8, at 203-07.

25. Unif. Premarital Agreement Act § 6 (1983).

own perceptions of what it takes to effect that neutralization. Thus, we may require independent representation, a time for reflection, and freedom from social pressures such as those induced by waiting wedding guests watching the ice statue melt. Substantively, we seek to inform the participants both as to their rights and the actual material consequences of those rights.²⁶

The challenge is to decide to what extent the legally normative elements we employ to evaluate the efficacy of choices made domestically are appropriately applied to "foreign" choices. Of course analytical angst can be avoided in those instances where the substantive outcome produced by the parties' foreign choice is acceptable relative to the state's domestic interest benchmark, whatever that may be. In short, the domestic jurisdiction might not heavily scrutinize the choice if the outcome is acceptable to the forum, even if, were the usual analysis applied to the process, the outcome would not be found to be the product of a valid choice.²⁷ Such an approach is consistent with a view that the forum should not use its public policy concerns, reflecting the entire swathe of domestic law, to overwhelm foreign legal activity.²⁸ But in other instances a concern for validly exercised choices can and in some instances does trigger an analysis of the process. Thus, where the substantive outcomes are considered inappropriate, in some U.S. jurisdictions this triggers a presumption of inadequate disclosure, which in turn lays the foundation for the impeachment of a prenuptial agreement.²⁹ Invoking a concern for process to the end of making what the forum considers to be adequate provision for the individual is an easily understood example. But beyond the issue of inadequate provision, there is the question of whether the consequences of foreign processes should be impeached just because the process does not conform with the process norms of the domestic

26. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 7.04, and associated reporter's notes (2002).

27. The conceptualization of "choice" can be problematic. Is it permissible to consider an individual to have acted autonomously, that is to have made choices, if that individual is unaware of any alternatives. Thus, should we be saddling someone with the consequences of "choice" made by implication if that individual has lived in cultural isolation? See KUKATHAS, *supra* note 1, at 113. Of course, rejecting a choice by implication, opens the door to a choice by imposition, that is determining the outcome on the basis of what the domestic forum considers appropriate, which might be the choice the party might have made had he or she been better informed (the Romans did this with *dos* contracts, importing terms that might have been included if the agreement had been drafted by the best jurists. CODE JUST. 5.13.1d, c.), or a result that is considered appropriate in that jurisdiction, regardless of whether or not it is premised on choice.

28. CHESHIRE, *supra* note 2, at 140-42.

29. See Matter of Estate Benker, 331 N.W.2d 193 (Mich. 1982).

jurisdiction.³⁰ For example, are family to family marriage contracts never acceptable? That is, does the state's moral/paternalistic vision generate an obligation to inquire into the foreign process as such, regardless of what outcome it produced? Essentially, does, or should, the jurisdiction see a foreign process as inherently unacceptable, unless the contrary is demonstrated judged by domestic standards? Judge Cardozo (as he then was) set out the analytical tension this way:

The courts are not free to refuse to enforce a foreign right at the pleasure of the judges, to suit the individual notion of expediency or fairness. They do not close their doors unless help would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal.³¹

One view is that it does not matter whether the process by which the foreign choice is made is culturally normative and contextually sound – the only relevant standards are our own. This premise was spawned in the age of empire. It is an approach which says “we know what is good for us and the same is good for you. Our standards will be enforced no matter how socially dislocating the consequences are for you or your family.” Alternatively, we could accept the consequences of culturally normative choices, at least as to the acceptability of the process,³² while we test the substance against, for example, the state's minimal interest standard. Implicit in selecting between these models is our willingness to defer to the matrimonial property arrangements flowing from the foreign choice structure. If the foreign sovereign accommodates, or even demands, a family-controlled, gender-biased structure that is culturally normative,

30. In essence we end up treating that which is foreign as legitimate, even if it is different. The underlying problem is that we become challenged to find a basis for doing so. *See* KUKATHAS, *supra* note 1, at 5.

31. *Loucks v. Standard Oil*, 120 N.E. 198, 202 (N.Y. 1918).

32. Presumably, Anglo-American jurisprudence accepts social and legal consequences flowing from social and legal processes that meet certain minimum standards. Thus, in drafting the Forced Marriage (Civil Protection) Act 2007, 2007 c. 20, the English Parliament sought to balance on the tight rope separating “forced” marriages from “arranged” marriages. The latter are not subject to the protection orders provided for in the Act. *See* Forced Marriage (Civil Protection) Bill, 2006-07, HL Bill [129], Research Paper 07/56, 34 (June 28, 2007), available at <http://www.parliament.uk/briefing-papers/RP07-56.pdf>. Kukathas' view is that a “minority” community might be able to live according to its own customs within the community, but cannot expect the wider society to enforce the minority's norms against a dissenting individual. This would apply to the consequences of customary marriages as well. KUKATHAS, *supra* note 1, at 144-45.

when should we not defer to such an arrangement? Or, in a nutshell, why are the values appropriate to our society also appropriate for their society?¹³⁵

The overarching challenge is the extent to which we, in an environment sensitive to difference, are willing to accommodate that difference. At first blush, that is what the traditional models of conflicts of laws appear to do. Notionally, the domestic forum delegates to the foreign jurisdiction responsibility for determining the authoritativeness of juridical acts occurring there. However, because of the broad swath carved by public policy exceptions or contrary law doctrines outlined earlier, the extent of what appears to be a delegation of authority is at best limited, and in any event produces a legal framework of great instability. Philosophically, the concept of deference to others is hugely appealing, not just as an acknowledgment of autonomy but also as an acknowledgment of knowledge. Better a choice by those informed of their actual circumstances³⁴ than an imposed domestic outcome which may be more or less relevant, even if through the eyes of the imposing regime the imposed choice is, on a generic basis, an appropriate choice.

33. One vision of liberalism is that it “is an account of how different moral standards may coexist rather than a set of substantive moral commitments by which all communities should be required to abide.” KUKATHAS, *supra* note 1, at 30. The underlying issue is the extent to which a liberal society should tolerate or facilitate the ability of minority social elements to exercise meaningful choices in the context of their own societal cultures, and, indeed for our purposes, whether this option should be available to immigrant communities. See KUKATHAS, *supra* note 1, at 11-15 (discussing WILL KYMLICKA, *MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS* (1995)). Even if we deny immigrants this option once off the boat, we still have to decide on the acceptability and viability of historically exercised choices. Invalidation of these essentially are at the root of the doctrine of total mutability in the conflicts of laws analysis of family property arrangements. After all, if upon migration all the participants had abandoned the position achieved by the original choice there would be no dispute! Additionally, lest we lose sight of this fact, because of the potential for broader family involvement, some of the key players may not be the migrants.

34. This proposition need not necessarily be true, especially if the choices made are entities remote from the individuals affected by those choices. Thus, for example, one analysis argues that the family laws and practices in Muslim countries and communities were developed by classical jurists in different historical, social and economic contexts. These doctrines then merged with colonial influences and negative aspects of local customs. These evolved hybrid laws, it is argued, are now implemented by executive and legislative bodies that have neither the legitimacy nor the inclination to challenge pre-modern interpretations of Sharia, even if they are out of touch with changing political and social realities. See Musawah Statement on the Proposed CEDAW General Recommendation on the Economic Consequences of Marriage and Dissolution (Aug. 4, 2009), *available at* <http://www.musawah.org/docs/statements/Musawah-CEDAWStatement-2009-08-04.pdf>.

Could we do better? One very appealing model, at least in the context of family law, is proposed by Eekelaar.³⁵ He suggests that we respect choices made by “the family”. In essence what would be respected by a domestic forum would be the “sovereign” act of the foreign family, rather than the sovereign act of a foreign sovereign – as where the property consequences flow from the marriage status. A particular advantage of this structure is that it localizes acceptable activity to a zone in which that activity is more likely to reflect personal autonomy,³⁶ at least as that foreign family understands the concept of autonomy. That is, this approach allows the domestic forum to subordinate its less than absolutely compelling policy concerns to the choices of the foreign family,³⁷ without opening itself up to a scenario where the domestic sovereign’s concerns are seen to be being trampled on by the foreign sovereign itself. A state and its domestic policies might not be perceived as threatened by the activities of an entity of less significance than a foreign sovereign.

But can the foreign family’s autonomous acts be trusted, at least vis-a-vis the individual family member? Eekelaar’s view, correctly, is “not entirely”. He would limit the extent of recognition granted to the foreign family’s choices to those instances where the foreign activity does not violate the human rights of the individual family members.³⁸

American family jurisprudence has some experience with a delegation type model that is beyond the traditional constitutional law doctrine that throws up a zone of privacy around the “family”, while still according individuals within that zone varying measures of constitutional protection.

35. J. M. Eekelaar, *Family Solidarity and Social Solidarity*, paper presented at the International Society on Family Law regional conference, Universidade Catolica Portuguesa, Porto, Portugal, September 2009.

36. This would be seen as a virtue of the system if the vision of liberalism was one which sees tolerance as the vehicle for allowing individuals the ability to “assess and potentially revise their existing ends”. KUKATHAS, *supra* note 1, at 36 (discussing WILL KYMLICKA, *supra* note 32, at 158).

37. This approach would seem to be compatible with a “liberal” tradition. See BARRY, *supra* note 7, at 123.

38. In any social model the position of children presents a particular challenge, since they have limited ability to act autonomously, and limited power to exit any association. Nor can the position of children be considered to be analogous to that of voluntary immigrants. Deferring to the decisions of the family, subject to a check against human rights standards, is one way of attempting to grapple with this situation. KUKATHAS, *supra* note 1, at 147. In essence a human rights standard enables one to cross the boundary that Mill sought to impose by consigning the family to the “private sphere” in which notions of liberty had no place. Our contemporary understanding is probably different. See BARRY, *supra* note 7, at 130-31.

The Indian Child Welfare Act³⁹ delegates to tribal authorities the ability, within tribal structures, to make choices regarding various matters relating to Native American children.⁴⁰ There are aspects of this arrangement that are relevant to our present concerns. Who is a child covered by the Act is partly a function of federal law and partly a function of tribal law. The Act covers federally recognized tribes, but only applies to children who are enrolled or are eligible to be enrolled as tribal members.⁴¹ Access to the “benefits” of the Act is controlled by the choices of the “beneficiaries.” Eekelaar accepts this basic concept. The delegated-to family gets to define itself. This has a certain appeal, for those most likely to be impacted by what are culturally normative choices are those most likely to be understood best by the social elements of that culture. But adopting this model raises potential problems.

First, what if the domestic forum's foreign “delegate,” “the family”, declines to recognize an individual as a “family” member?⁴² With American jurisprudence recharacterizing the family almost daily, does the domestic jurisprudence defer to the foreign characterization, or ought there to be limits on the extent of that deference, along the lines of the Eekelaar boundary condition that the foreign activity should not violate human rights norms? For example, what if the foreign family declined to recognize as a member of the family an individual on the basis of that individual's religion, or lack of one?⁴³ Does the domestic system then default to traditional rules entirely, or would the domestic jurisdiction just import its own characterization of the family for this purpose, but then “enforce” the

39. 25 U.S.C. §§ 1901-63 (1978).

40. *Id.* § 1903(1).

41. *Id.* §§ 1903(8), 1903(4).

42. Indeed, in India under The Special Marriage Act, Act No. 43 of 1954, INDIA CODE (1993), where a person professing the Hindu, Buddhist, Sikh, or Jaina religion marries someone who is not of that religion, the Act affects a severance of the person of the named religious profession from his or her undivided family. *Id.*, §§ 19, 21A. Interestingly, in certain instances a “tribe, community, group, or family” by custom may identify someone as eligible to be married within that entity, even if that individual falls within the prohibited degrees for marriage under the general law. *Id.*, § 4. In short the social group can extend inclusion to an individual who might otherwise be excluded.

43. For an example of how this type of problem can arise, see *Malaysia Court Rejects Hindu Bid*, BBC NEWS (Dec. 27, 2007), <http://news.bbc.co.uk/2/hi/asia-pacific/7161177.stm>, which describes efforts by a Hindu wife in Malaysia to block an attempt by her husband, a recent convert to Islam, to divorce her in a Sharia court. Sharia courts have jurisdiction when both parties are Muslim. Secular courts deal with non-Muslim matters. The underlying problem is that demanding that autonomy be recognized involves a moral commitment to a substantive value, which may or may not be implicit in any community's sense of justice. See KUKATHAS, *supra* note 1, at 3.

foreign consequences applicable to a “family” member? Neither of these approaches seems a perfect solution. This, perhaps, highlights the fact that unless the domestic forum is willing to restrict itself to recognizing the choices of individuals as the ultimate benchmark, that is to defer to personal autonomy,⁴⁴ there are inevitably going to be problems of the potential exclusion of individuals from what the domestic forum would consider to be the appropriate foreign choice-making framework.⁴⁵ And even relying on personal choices may not be problem free.

Initially, there will be individuals who are subjected to the consequences of a “choice” that they would prefer not to be saddled with.⁴⁶ If under the operative foreign law marriage is a status this situation may be commonplace. Of course, domestic jurisdictions routinely adopt this posture with respect to their own subjects. A tension arises because of the question of whether the domestic forum should accept similar treatment by a foreign jurisdiction. Or looking at the bigger picture, to what extent should a domestic forum’s conflicts-of-laws posture be allowed to make it impossible for the individual to “escape” the consequences of foreign juridical acts, even if those consequences don’t reflect a party’s true choice? A classic example of this situation is the South African case of *Frankel’s Estate v. The Master*.⁴⁷ Here, South Africa’s conflicts of laws analysis subjected the deceased’s estate to the matrimonial regime imposed by German law by virtue of the fact that it was the deceased’s domicile at the time of the marriage, even though the couple had agreed at the time of the marriage that they would settle permanently in South Africa and did so within four months of the marriage. One of the judges in the court below explained the roots of the controlling position this way:

[T]hat the property rights of the spouses are . . . governed by the law of the husband’s domicile at the time of the marriage is based upon the fact that the husband’s domicile is normally the matrimonial home. Many principles of our law have a similar basis in that they are founded upon the facts which exist in the

44. There is a clear distinction between a liberal tradition which makes autonomy possible and a vision which contemplates state sponsored “inculcation” of autonomy. BARRY, *supra* note 7, at 119-23.

45. As in circumstances like those described *supra* in note 43.

46. See *Sharma v. Sharma*, 667 P.2d 395 (Kan. App. 1983) (Plaintiff granted a divorce notwithstanding the Hindu defendant’s religious objection).

47. 1950 (1) SA 220 (AD). If South African law applied, the marriage would have been in community of property and the wife would have taken the estate free from estate tax. German law established a separate property regime. The marriage was in 1933 and it seems the husband left Germany because of the political environment.

majority of cases. There is no reason in logic why the minority of cases, where the facts do not exist, should be bound; that they are bound is part of the tribute that logic pays to certainty. The result is that the law is sometimes hard, but the alternative is that it should be slippery.⁴⁸

But legal consequences often are uncertain. The challenge is whether the price of uncertainty is worth paying if the justification for doing so is to recognize global complexity while preserving personal choice – at least within limits. Specifically, how willing should a domestic forum be to allow foreign activities to evade the consequences of regulated and potentially restrictive foreign choices? A simplistic answer would allow this escape if not to do so infringes on the public policy of the forum. This model conceptually justifies allowing the escape in order to advance the domestic sovereign's own interests. The more difficult question is the extent to which an exit from the foreign regime should be allowed as a recognition of the foreign actor's right to a broader range of choice.⁴⁹ Traditional conflicts of laws doctrine would seem to be of some assistance. For example, the public policy exception might justify rejection of an agreement entered into under undue influence, duress, or coercion.⁵⁰

But this proposition slides past the issue of the extent to which a foreign process which is culturally apposite ought to be re-evaluated against the domestic forum's standard of coercion or undue influence, for example in the context of a family-arranged marriage with an associated marriage contract.⁵¹ And, how far should one peer into the abyss? Since in some

48. Per Broome, J., reported at 1950 (1) SA 221j.

49. Jane Perlez, *Once Muslim, Now Christian and Caught in the Courts*, N.Y. TIMES, Aug. 24, 2006, http://www.nytimes.com/2006/08/24/world/asia/24malaysia.html?_r=1&pagewanted=print (describing the efforts of a Malay woman who converted to Christianity to marry a Christian fiancée). As a Malay, the Constitution of Malaysia deems her to be a Muslim, and thus subject to the Sharia courts on issues relating to marriage, property and divorce. Her problem arose because she sought official approval of a proposed marriage to a Christian. The article points out that most converts do not seek official approval for their marriages, and thus do not run into this difficulty. This raises the extent to which any such marriage and its consequences would be recognized outside of Malaysia, absent official recognition in the country.

50. CHESHIRE, *supra* note 2, at 143.

51. Indeed, it is possible to set up a vision of public policy in which a legitimate “foreign” perspective could exercise a veto power over the domestic forum's possibly majority vision. Consider the following passage from the South African decision in *Ryland v. Edros* 1997 (2) SA 690, at 707 G. The issue involved whether it would be contrary to public policy to recognize contractual obligations flowing from a Muslim marriage that was potentially polygamous. The court took the position that it would only be offensive to public

cultures the marriage contract is an integral part of the marriage, can one strike down the contract and leave the marriage intact? The potentially broader social, and perhaps legal, ramifications of such a step, even where the parties now are linked to a new jurisdiction, would tend to suggest that caution is called for.⁵²

What the above analysis suggests is that conventional conflicts of laws treatments, in one respect or other, tend to provide a less-than-satisfactory frameworks for deciding when it is appropriate to defer to the consequences flowing from foreign “choices”. As a result, the ramifications of the historical arrangements tend to be highly uncertain.

The material that follows suggests another way of going about the analysis, namely one that conceptually recognizes what was done, and then deals with the consequences by allocating the costs of that earlier activity.

IV. A Political Theory Perspective on the Recognition of Foreign Choices

Legal theory takes the position that the consequences of foreign choices should not be recognized when to do so would violate the public policy or substantive law of the domestic forum. This tends to leave control of the situation up to an ill-defined sledgehammer. This portion of the paper looks to political theory to provide a more helpful analysis. The material just set out suggests that deference should be accorded choice, especially personal choice. A system advancing personal choice is inevitably to be seen as more just, at least if we have the appropriate starting position.⁵³

policy if it is “offensive to those values which are shared by the community at large, by all right-thinking people in the community and not only by one section of it.” *Id.* Accordingly, the contract claims flowing from a Muslim marriage contract could be enforced. Underlying this type of analysis is the fundamental debate of whether an “authority” (located in a cultural community, say, or elsewhere) is “legitimate.” And, indeed, whether any such authority can ever be legitimate if it is not “just,” even assuming we can locate the roots of justice. *See* KUKATHAS, *supra* note 1, at 259-60.

52. The Leflar view was that one can distinguish the status of the marriage itself, from the incidents of the status. In his view the status emerges from the law of the parties’ domicile (a nice simplification in today’s universe) and the incidents of the marriage are determined by local law. Accordingly, to use his example, following a polygamous marriage in India, if the parties moved to Kansas, this would not terminate the marriage, even if their cohabitation in Kansas was illegal – cohabitation in the author’s view being a “usual” incident of marriage but not a “necessary” one. *See* LEFLAR, *supra* note 17, at 444.

53. *See* JOHN RAWLS, A THEORY OF JUSTICE (1971). A more refined analysis might want to explore the ramifications for us of the difference that Rawls suggests exists between choices in the political sphere and non-public identity choices. *See* KYMLICKA, *supra* note 32, at 160. That project has been left for another day.

This would be the classic liberal analysis⁵⁴. However, society is diverse.⁵⁵ And sub-elements of society have different conceptions of justice.⁵⁶ In this environment, there are circumstances where culturally normative choices, not necessarily made by the parties,⁵⁷ nevertheless could be considered acceptable to a domestic forum? One such a model is provided by Kukathas.⁵⁸ Starting from an assumption that the ultimate tenet of the good society is freedom of association,⁵⁹ he suggests that culturally normative choices within a society are acceptable, even as to the individual, if the system is premised on free association. Essentially, an individual subjected to the consequences of community grounded choice structures should only be bound by the consequences of those choices if he or she had the option to leave the “association” — the community — but did not do so. This is the exit principle.⁶⁰

This model gives a domestic forum yet another way of looking at foreign juridical activity. For such activity to be acceptable to the domestic forum, the state’s own interests apart, the activity either should reflect the consequences of personal autonomy, or where the consequences flow from the choices of others, involve a scenario where the actors had the option to exit the foreign legal framework but chose not to do so.⁶¹ In essence, then,

54. KUKATHAS, *supra* note 1, at 16-17 (discussing the “comprehensive” account by Kant and Mills of the nature of good for individuals, encompassing among other values that of personal autonomy, and contrasting that liberal vision with another which values an order not “hostage” to any particular moral doctrine).

55. Kukathas argues that diversity is not the value that liberalism pursues, but the source of a problem to which it offers a solution. *Id.* at 29, 32.

56. *Id.* at 6.

57. One perspective is that norms are the product of political societies with enduring histories, and these political societies may be built by elites even against the wishes of many. *Id.* at 35.

58. *Id.*

59. *Id.* at 5, 17, 93. The author sees the roots of freedom of association as being a respect for liberty of conscience. *Id.* at 17. In his view, a good society need not be united by a shared doctrine or some conception of justice. *Id.* at 38. Indeed, a hallmark of such a society is a tolerance of those with whom its members disagree, even morally. *Id.* at 93. The author does not see his vision as a communitarian one because it places no particular significance on the community. *Id.* at 38. This perspective of the liberal tradition by no means owns the field. See BARRY, *supra* note 7, at 119-23. In Barry’s view, the hallmarks of a liberal society are a principle of equal freedom as is embodied in notions of civic equality, freedom of speech and religion, non-discrimination, equal opportunity and the like. *Id.* at 123. However, as Barry has noted, protecting the religious freedom of some opens the door to the secular deprivation of others. *Id.* at 167 (discussing the ability of religious entities to deny employment to some on the grounds of religious difference).

60. KUKATHAS, *supra* note 1, at 143; BARRY, *supra* note 7, at 148.

61. Barry does not see necessary contradiction between a vision of liberalism that seeks

an individual should be bound by choices made in the context of framework provided by a particular community which the individual had the opportunity to exit.⁶² As a corollary, the domestic forum should not recognize the right of the foreign forum to deny the actor the right of exit,⁶³ and this would include those scenarios where the foreign system generates exit costs which cannot be borne without outside intervention.⁶⁴ However, this model does embody a challenging boundary condition. The model accepts that a state need not always go along with an individual who asserts a dissenting allegiance to another authority, because other issues intrude such as claims of property, or third party effects of the dissenting arrangement.⁶⁵ This may be a challenge, because inevitably in matrimonial property disputes that are of relevance to us, one of the individuals or the groups affected by the possible solutions will be asserting a dissenting position. What this implies is that vis-a-vis the domestic state's own interests a dissenting authority's position would not be binding. But beyond that the normal rules would apply.⁶⁶ That is, original choices would be binding so long as the exit option existed at the time the choice was made, even if the jurisdiction in which the choices were made was ruled according to "quite illiberal principles".⁶⁷ Kukathas points out that both individuals

to foster autonomy and one whose central value is diversity or tolerance. He seeks to overcome the tension between these two perspectives by developing a "liberal theory of minority rights." BARRY, *supra* note 7, at 146-54.

62. ANNE PHILLIPS, *MULTICULTURALISM WITHOUT CULTURE* 136 (2007). Phillips identifies four questions associated with the right of exit. Is there anywhere for the person to go? Does the person have the resources to leave? Is the cost of leaving too high? And, because of cultural "drag," can the individual ever conceive of going? *Id.* at 140. Making an absolute correlation between the a failure to exit and a lack of agency is problematic. *Id.* at 150. Given that we are concerned with the consequences for individuals who have left, the primary concern for us is one of the identification of excessive or inappropriate costs, in a context where one of the participants may not have exited, and where even the departing party may be subject to residual social or cultural pressures – as where the matrimonial property arrangements reflect the involvement of, and indeed contributions from, other family members.

63. KUKATHAS, *supra* note 1, at 25, 37, 96. In Kukathas' view the underlying community has no claim on the individual on the basis of kinship or culture. *Id.* at 96.

64. See BARRY, *supra* note 7, at 191-93 (discussing the ramifications for the Amish of "choosing" to opt out of the Social Security and Medicare system).

65. KUKATHAS, *supra* note 1 at 25.

66. As Kukathas points out, in a liberal state government is not authoritative on the question of what is an acceptable way for people to live, but it is authoritative on matters having to do with the interests of the liberal state as such. *Id.* at 139 n. 57. This view may be a little simplistic. Presumably, in a utilitarian model of liberalism, someone other than the individual players is in a position to articulate what is in the collective good.

67. *Id.* at 31.

enjoy the right to exit, which means that neither is in a position to demand that the other stay, and in particular cannot do so by appealing to the rightness of beliefs or standards of a community to which one party wishes to remain attached.⁶⁸ He also points out that this bilateral entitlement alone cannot resolve claims of property and the like without consideration of specific issues arising in particular cases.⁶⁹ Ordinarily, what could well be the key determinant in resolving underlying property issues arising from prior choices would be that neither party chose to extricate himself or herself from the system when the choice was made and the exit option was available. The choice stands. Of course, there are going to be factually close judgment calls as to whether the exit principle was satisfied in scenarios where the relevant choices to a greater or lesser extent were those of third party players. This framework represents the current analysis' starting position.

Exercising the right to leave can have transaction costs. The question arises as to whether the domestic state is justified in declining to recognize choices made elsewhere because the choices made in the original community cannot be considered free because the transaction costs of leaving the original community are too high.⁷⁰ While at some level such an analysis is appealing, it involves the domestic forum assigning values to the content of the cost-benefit analysis,⁷¹ which at best can be no more than speculative. A modified approach which involves rejecting original choices because avoiding them *might* have involved excessive transaction costs is equally problematic – particularly since the cases confronting the domestic forum are likely to involve parties who did at some point exercise a right of exit. Somewhat ironically, these individuals are those for whom the transaction costs of exit are likely to have been lowest. In either event, an attempt by the domestic forum to invoke on behalf of the actor notions of costs to the actor in justification of that actor's apparent failure to exit the choice structure, and thereby provide the domestic forum with an opportunity to reject the consequences of any choices made, seems at least misguided or paternalistic.⁷²

68. *Id.* at 95.

69. *Id.* at 37.

70. *Id.* at 107.

71. BARRY, *supra* note 7, at 164 (discussing Jacob T. Levy, *Classifying Cultural Rights*, in *ETHNICITY AND GROUP RIGHTS* 64 (Shapiro & Kymlicka, eds., 1997)).

72. KUKATHAS, *supra* note 1, at 107-08. This is a philosophical analog of impeaching a prenuptial agreement on the basis that there was a procedural defect in the establishment of the agreement, for example an inadequate disclosure of resources, with the result that the forum is able to impose its own solution.

Indeed we might move the descriptor from the class of “misguided” to “dishonest” if the goal behind invoking the costs is simply to advance the domestic forum’s agenda in its own interests. In any event, there clearly ought to be a distinction between rejection of the original arrangement *in toto*⁷³ because of concerns about cultural costs subverting party autonomy,⁷⁴ and attempting a more nuanced approach reflecting the circumstances that ultimately emerged. Finally, in contexts where the autonomy of earlier acts is open to dispute, we should bear in mind that one of the participants wishes to rely on activity that was culturally normative, whatever the demerits or otherwise of the relevant cultural pressures. To what extent is it appropriate for the foreign domestic forum to saddle the traditionalist with an outcome contrary to his wishes because the domestic forum objects to the practices of his ancestors?

Among the exit costs experienced by an actor are the costs associated with arriving in an unfamiliar jurisdiction. For example, historical human capital investments may prove to have been inadequate or inappropriate.⁷⁵ Clearly, this is a situation where the domestic forum’s own interests tend to come to the fore. Language or employment skills may be incapable of grounding economic viability. The domestic forum in such a context would not be foreclosed from intervening to overturn foreign choices to the extent that those choices effectively shift a financial burden onto the domestic forum’s taxpayers and away from the party asserting a position based on original choices. A foreign *mahr* provision⁷⁶ should not burden domestic citizens. But that is different from saying that the foreign *mahr* provision should be overturned in favor of a financial outcome that might/would have resulted if the choices originally had been exercised in the domestic forum.⁷⁷ The fact that foreign choices reflect foreign preferences based on

73. And why not the marriage itself, never mind the financial arrangements? See the cases discussed in PHILLIPS, *supra* note 62, at 145-46.

74. *See id.* at 148-50.

75. BARRY, *supra* note 7, at 240; KUKATHAS, *supra* note 1, at 108; PHILLIPS, *supra* note 62, at 142, 147.

76. *Mahr* is a sum of money or other property that in the Islamic tradition is payable by the husband for the benefit of the wife. The payment may be due on marriage or on the occurrence of certain specified events such as death or divorce. *Mahr* is an integral and essential incident of a marriage. The precise contours of the *mahr* obligation are open to debate. *See* Pearl & Menski, *supra* note 22, at 190-201. *Mahr* is not dowry as Anglo-American jurisprudence understands it to be.

77. To do so would allow the domestic forum to determine what kind of associations individuals could form and maintain. KUKATHAS, *supra* note 1, at 111 (“If choices are to be regarded as voluntary only if they are sound – because they are well-informed, or rational, or not likely to lead to other ‘known’ unattractive consequences – then the way is open for all

foreign conditioning⁷⁸ does not justify the domestic forum imposing outcomes grounded on its domestically conditioned preference structures,⁷⁹ at least beyond that grounded on the forum state's own needs.

A modified version of this analysis suggests that an exit should not be burdened by any "excessive" costs.⁸⁰ Indeed, the original jurisdiction, by imposing the costs would argue that they are not excessive⁸¹ and the existence of universal standards regarding costs is at least debatable. The problem is to identify the judge of excessiveness. An actor not leaving might consider the cost of leaving excessive. On the other hand, the appeal of staying might just outweigh the costs⁸² – there is no necessary qualitative symmetry in what is being weighed. Indeed, it has been pointed out that some of the costs associated with departure potentially are not amenable to secular abatement (for example excommunication).⁸³

For our purposes we probably can identify three sets of costs to consider. The first are emotional/spiritual costs associated with leaving the prior arrangement. These ordinarily would not be the concern of a domestic legal regime. The second are those costs representing losses flowing from no longer being associated with the original arrangement, for example losing access to traditional family resources. One vision suggests that these are exit costs which it is "legitimate" for the originating regime to impose in the sense that they emerge from activities that a liberal state would find acceptable, and thus it would be inappropriate for the new forum to seek to abate them.⁸⁴ This category would remain regulated by the original regime. The third are potential costs flowing from risks generated by the original arrangement, and which it was understood, expressly or implicitly, at the time the arrangement was made might materialize on departure, that is if a

kinds of individual wishes to be denied. . ."). Also, particularizing another general argument advanced by Kukathas, secessionists cannot claim that exercising a right of exit necessarily entitles them to withdraw specific property as well. *See id.* at 205. Or, from another perspective, the receiving community does not open itself up to an argument that it is "luring" exiting parties away, that is, that it is opening the door to forum shopping.

78. *See id.* at 109.

79. To state the proposition this way just highlights the inappropriateness of doing so.

80. BARRY, *supra* note 7, at 150; PHILLIPS, *supra* note 62, at 147.

81. *See* KUKATHAS *supra* note 1, at 115-16.

82. BARRY, *supra* note 7, at 243.

83. *Id.* at 150-51, 163-64. Barry, in a broader analysis than that considered here, identifies three classes of costs: intrinsic costs — those that the state in the nature of things cannot abate; associative costs — those costs imposed by the original regime which a liberal state would permit to be imposed; and external costs — those which the controlling regime should at least try to abate, even if it cannot prevent them. *Id.* at 150.

84. *Id.* at 128, 150-53.

party exercised the right of exit. These costs would be amenable to abatement by the domestic regime.

In an environment where the premise of the analysis is voluntary choice⁸⁵ it would seem to be appropriate to insist that the risks of this last class of departure costs should be shared, at least in the context of a joint undertaking such as marriage. As Phillips correctly points out, identifying “excessive” costs really involves quantifying fair solutions in a particular context.⁸⁶ So, a traditional Islamic marriage in a foreign jurisdiction accompanied by a marriage contract establishing a separate property regime but making provision for the payment of a *mahr*, would result in the agreement being enforced as within the second category of costs. However, if the domestic role for the wife envisaged by the original understanding would with time produce human capital losses which would be realized when the marriage failed in a foreign jurisdiction, the foreign jurisdiction would be entitled to address these costs, as exit costs, notwithstanding the agreement. This approach would acknowledge the “relational” character of the understanding. It is the relational character of marriage, too, that preserves the right of exit during the marriage’s subsistence. All these cost concerns would be apart from a domestic jurisdiction’s ability to insist that at a minimum the demands of the state in its own right would have to be met.

The premise of the analysis is of an award based on an implicit agreement to share the risks of one party’s exit. However, if the conceptualization of the situation is one that, by virtue of what happened in the foreign jurisdiction, sees the costs of exit that do arise as being inappropriate, then the characterization of the award moves to one of “compensation”⁸⁷ and arguably, the party remaining behind should be liable for the entire cost. At the root of this distinction are two different visions of what liberalism demands. If liberalism requires tolerance of illiberal conduct, then costs associated with such conduct are acceptable and the premise for allocating those costs must rest on an “agreement” between the parties. If on the other hand the liberal tradition denies the ability of other groups to reject liberal safeguards for individuals, then costs originating

85. The object for the purposes of our analysis is to devise a scheme in which the domestic system recognizes the parties’ voluntary foreign activities, while drawing the line at providing its own political power to establish the norms of an illiberal foreign regime. *See id.* at 150. Barry accepts that religious association may reflect an imperative rather than a “choice,” but still sees the association as voluntary as long as no illegitimate costs are imposed on those exiting. *Id.* at 158-59.

86. PHILLIPS, *supra* note 62, at 146-47.

87. *See id.* at 148.

with such a rejection are not legitimate, and can be awarded against a non-exiting party who seeks to rely on the original behavioral standards.⁸⁸

Of course, one view might be that “the liberal principle underlying freedom not to associate has to be formulated so as to guarantee that its exercise should be costless.”⁸⁹ This idea would suggest that it would be appropriate for a domestic forum to impose an outcome that would have resulted if the foreign transaction had occurred in the domestic jurisdiction at the time when that jurisdiction first became relevant to the matter in dispute.⁹⁰ A balanced response to this complaint would seem to be that activity conducted in an environment with an appropriate exit principle must contemplate the possibility of such an exit and thus implicitly assume the risks of shouldering any negative costs associated with such exit, presumably on no more than a pro-rata basis.⁹¹ This is really the basis for the approach proposed in the previous paragraphs, except to the extent that it acknowledges that there are certain classes of costs that the now domestic forum cannot, or ought not to abate. Also, since the goal is to abate exit costs, the domestic forum’s “solution” for the costs must be regulated by the cost themselves, not the domestic forum’s vision of a generically acceptable “suitable” outcome judged by the standards of its domestic cases covering marriage failure.

In essence, the domestic forum’s role is to allocate the costs of exit between the parties, and beyond that enforce the original agreement – the domestic state’s own interests apart.⁹² This approach acknowledges the fact

88. See BARRY, *supra* note 7, at 131-32.

89. *Id.* at 154, 163 (rejecting this proposition).

90. Some would argue that it is not clear why it is legitimate to shift the costs in this way. See KUKATHAS, *supra* note 1, at 112.

91. After all, the concept of an exit costless to both a departing party and the one that remains is unachievable in the absence of some neutral compensation pool. See BARRY, *supra* note 7, at 154; PHILLIPS, *supra* note 62, at 154. Phillips discusses the view of Ayelet Shachar that an individual denied access to group resources, by being “defined out” by the group, should be able to access resources from the state. PHILLIPS, *supra* note 62, at 154 (discussing Ayelet Shachar, *The Puzzle of Interlocking Power Hierarchies: Sharing the Pieces of Jurisdictional Authority*, 35 HARV. C.R.-C.L. L. REV. 385, 422 (2000)). Shachar seems to leave open the question of whether the “alternative jurisdiction” should be a source of both procedural and substantive remedies. This raises the question of whether, where the exit costs are a unique derivative of an association with religious or moral belief structures, the exiting individual should only be treated as someone with “expensive tastes” and on that account would have no claim to have those costs reimbursed from public funds. PHILLIPS, *supra* note 62, at 40. The notion of a pro-rata apportionment applies to contexts where there was a joint endeavor, such as marriage.

92. What this and the preceding paragraph are attempting to do is define the point at which the liberal state’s possibly “benign neglect” should come to an end. See KUKATHAS,

that it is difficult for cultural or other subgroups to maintain different standards of justice when heavily engaged with a dominant community. The dissenter emerging from the minority community is recognized by the dominant community.⁹³ The domestic state's own interests can be advanced, no matter what, because ordinarily new arrivals are voluntary members of the new community and thus it is appropriate to impose society's norms on them.⁹⁴ But in the present context the domestic state's norms contemplate enforcing the original "understanding" within reasonable limits. The goal is to ensure that the exit costs do not reach a level where the participant has no choice but to remain – in that environment the arrangement would be involuntary.⁹⁵

There is a legitimate concern that as far as exit theory is concerned, if we look at the costs of exit in just money terms we will often undervalue the psychological costs of exit. There is real difficulty in escaping the social pressures associated with cultural affiliation.⁹⁶ For our present concerns, however, the issue is somewhat different. The individual(s) *have* exited. The problem for us is the question of to what extent it is appropriate to abate or modify the financial costs associated with that exit. The abatement of psychological or social costs associated with exiting a cultural affiliation is something that it is almost impossible for a legal regime to achieve. Moreover, any refusal to abate financial costs because of a grand vision that a refusal will induce individuals to remain in the original jurisdiction and work for changes from within⁹⁷ seems to be an open invitation for external forces to sacrifice individuals on the altar of an inclination, however well motivated, to modify cultures at odds with those of the domestic forum.⁹⁸

supra note 1, at 236-37.

93. *Id.* at 144-45.

94. *Id.* at 162. Some circumspection may be required in this regard because first generation immigrants may arrive on a less than voluntary basis. *Id.* at 163. Additionally, a little care is required lest we end up with a scenario where we replace one system of undesirable choices with another, the only advantage of the latter being that it is less undesirable than the former. Put another way, we need to try to isolate what it is the exiting party exited too and decide the extent to which the domestic jurisdiction can accommodate the arrival's preference structure.

95. See BARRY, *supra* note 7, at 152, 191-93.

96. PHILLIPS, *supra* note 62, at 137-39.

97. PHILLIPS, *supra* note 62, at 139-40, 150-54 (discussing AYELET SHACHAR, *MULTI-CULTURAL JURISDICTIONS: CULTURAL DIFFERENCES AND WOMEN'S RIGHTS* (2001)).

98. The existence of a right of exit puts the original community's value system at risk. KUKATHAS, *supra* note 1, at 104. To the extent that the new domestic system is willing to defer to the original, the new system is entrenching the original. Indeed, this may be the perspective underlying the respect which one sovereign shows for another. It is not the merits of the system that are being recognized, it is just the system as such. But, since in

Unfortunately for us, there are other ways of looking at the world. Thus, it is possible to argue that if the foreign activity is rooted in an environment which negates autonomy, that activity ought not to be respected. That is, it is not the right to leave, or freedom of association, that is the critical value, but rather freedom of choice.⁹⁹ Accordingly, the argument goes, we should look askance at societies that can be perceived as coercing or harming their own members, even if the goal is to sustain a traditional way of life.¹⁰⁰ The challenge of this approach is that in order legitimately to reject the foreign framework the criticism has to be grounded on a common standpoint of morality.¹⁰¹ In the absence of that common frame of reference we just endow domestic fora with the opportunity to reject the foreign activity in an unconstrained manner – as the public policy doctrine and related analyses currently allow them to do. At least if one accepts the conventional “liberal” vision of a concern for autonomy, one appeal of the Eekelaar model is that it isolates the family as a legitimate source of limitation on any such autonomy. That is, the domestic forum can reject foreign activity that was not autonomous, unless the family has signed off on that lack of autonomy, and subject in the Eekelaar model to the participant’s human rights not being violated.¹⁰² Reverting to the earlier analysis, exit costs imposed by virtue of family decisions would be considered legitimate and thus subsequently not recoverable in the domestic forum.

As far as the domestic state’s own interests are concerned, ordinarily it would be appropriate to confine those interests to material values rather than moral ones, lest the state’s liberal “vision” for its community swallow the value system on which any claim to be entitled to such a “vision” is grounded. There is a real risk that an effort to preserve choice subverts

concept all participants have a right of exit, the initial jurisdiction has no right to demand from others that they recognize or enforce the original jurisdiction’s laws. *Id.* at 97. Accordingly, for our analysis, the domestic forum’s responses are to be grounded in its reference framework, not one with its roots in the original jurisdiction. At the other extreme, the domestic reference framework is not obligated to facilitate the individual’s ability to shed the old order. *Id.*

99. For a more detailed analysis of these two perspectives, see BARRY, *supra* note 7, at 118-23.

100. See KUKATHAS *supra* note 1, at 124-25 (discussing the work of JOSEPH RAZ, *THE MORALITY OF FREEDOM* (1988); Deborah FitzMaurice, *Autonomy as a Good: Liberalism, Autonomy and Toleration*, 1(1) J. POL. PHIL. 1 (1993); Will Kymlicka, *The Rights of Minority Cultures. Reply to Kukathas*, 20(1) POL. THEORY 140 (1992)).

101. See *id.* at 125.

102. Of course, looked at through our present lens, if the “self-defining” “family” includes adults, we might like them to be protected both by a human rights benchmark and a right of exit.

choice. Of course, this position is vulnerable to the argument that it involves cultural relativism, and that to any true-blooded liberal, liberalism's standards are universal.¹⁰³ Accordingly, a "liberal" state ought never to recognize the consequences of foreign "illiberal" activity, unless sovereignty trumps all. While as a matter of a philosophy governing the behavior of nation-states or sub-units of such states this might be a worthy position, the present paper is concerned with the treatment of people who have acted on certain premises – morally just, or oppressive, or otherwise. In such a context, the imposition of outcomes premised on the domestic forum's moral position opens the door to responses which vis-a-vis the actors always may be considered to be arbitrary.¹⁰⁴

Since the essence of a Kukathas type model is one envisaging the right of the individual to repudiate a society,¹⁰⁵ it would seem quite permissible to argue that a change in country reflects such a repudiation. But it might not. After all, if the individual vision to begin with is that the regulating norms are supra-national, as where a personal law attaches on the basis of religion, no inference immediately flows from a change in geographic location.¹⁰⁶

The obvious contrary would be those instances where the individual took up a new religion. Indeed, this exit might occur without a departure from the original jurisdiction and then later be followed by a departure from that jurisdiction. In a specific context what might have occurred is two discrete exits, or only one. Thus the indicia of old order rejection will vary from situation to situation. Our concern is the ramifications of the individual exercising the right of exit, however the fact of that exercise is demonstrated. Accordingly if the individual exercised a right of exit, but remained in the original jurisdiction, this would be of no concern to our notional "domestic" forum. However, if the parties do end up in a new domestic forum, that forum may have to deal with the costs arising from more than one exit.

103. See BARRY, *supra* note 7, at 136-38 (criticizing the work of Michael Walzer, *The Moral Understanding of States: A Response to Four Critics*, 9 PHIL. & PUB. AFF. 209 (1980), and others).

104. Barry takes the position that "Political philosophy is not about what we may think it would be nice for people to do but what, at any rate in principle, they can be made to do." *Id.* at 140. Barry is concerned with what people *have* done, while attempting to minimize inappropriate "spillover" affects with respect to an activity in one group impacting other groups. *Id.* at 141.

105. KUKATHAS, *supra* note 1, at 97.

106. Indeed, this point would be reinforced by the argument that culture cannot be readily abandoned. PHILLIPS, *supra* note 62, at 13-35.

Finally, where *both* individuals exercise the right of exit, a supportable analysis is that from that point on the original regime would be replaced by that of the new regime. The open question in such a context is whether the prior arrangements should remain in force with respect assets in existence at the time of exit, or whether they should be regulated by the new regime. Even though there are powerful efficiency arguments, at least in the eyes of the domestic forum, to justify total mutation, there would seem to be an equally powerful case for applying the original rules to assets in hand before the exit occurred. Not the least of these arguments is that conceptions of culture and of the family, as they existed at the marriage's inception, may have been so different that imposing the new regime will be unjust or unfair, especially if the group of original "participants" extends beyond the parties themselves. That said, with the original arrangements at least partly retained, there may still be exit costs to be dealt with. Conceptually, the analysis would be as before, except to the extent that displacing the old regime with the new has led to the abatement of some of those costs – for example by a marriage dissolution award under the new regime partially compensating for human capital losses arising from choices made in the original jurisdiction.

V. Conclusion

Traditional conflicts of laws doctrine produces a highly unstable platform for trying to determine whether foreign juridical activity aimed at establishing property consequences attaching to a marriage and flowing from choices of one sort or another will actually produce the anticipated result. This is particularly so because the contexts in which choices are made are highly varied, for cultural reasons, amongst others, so that the outcome is likely to be uncertain when these choices are subjected to ex post facto evaluation against a benchmark of domestic public policy and positive law.

Accordingly, relying on political theory rather than traditional legal doctrine, it is apposite for a liberal society to enforce the original understanding, subject to certain limits. As to these limits, as a first order of business, the domestic states own interests, as such, need to be protected. Thereafter, on the premise that the original understanding of the actors embodied a tacit acknowledgment of the rights of participants to exit the original legal framework, the new jurisdiction is empowered to allocate the costs associated with any such exit, except to the extent that the costs arise from activities that in the ordinary course would be acceptable to a liberal society. In those instances where the new jurisdiction considers the original

choice to have been freely made, the recoverable exit costs will be shared. Where the “choice” was not free, the exit costs will be borne by the party choosing not to exercise the right to exit. In those instances where both parties at some point exercised the right to exit, the original understanding will control the consequences up until the point of mutual exit, and thereafter the new jurisdiction’s rules will control. Mere physical relocation itself will not necessarily establish that the participants have exercised a right of exit.

The suggested model seeks to avoid a new jurisdiction having to pass judgment on what ordinarily will be the culturally normative behavior of others. It also has the advantage of the domestic jurisdiction not imposing consequences designed for domestic social behavior on relationships grounded in what may be an entirely different cultural universe. The model provides an opportunity for a domestic jurisdiction to display the wisdom of acknowledging its own ignorance.