

CULTURAL CONFLICTS

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I

INTRODUCTION

It is no secret that there is widespread dissatisfaction with the prevailing doctrinal approaches to conflict of laws in the United States.¹ Judges, law students, and lawyers fear conflicts problems like practically no other area of law. The “methodologies” for resolving conflicts problems that compete for judicial attention in the United States coexist uneasily in the Second Restatement, since none has managed to garner sufficient support and each has been the subject of extensive scholarly and judicial criticism.² As Professor Arthur Von Mehren put it thirty years ago in the pages of this journal, “Ultimately, a result is reached, yet the solution is too frequently neither entirely satisfying nor fully convincing.”³ At least until the very recent resurgence of interest in the field exemplified by this special issue, contemporary conflicts problems have not inspired the theoretical interest as they once did.

More generally, if one of the central objectives of conflicts is harmonization of law from below, that is, the gradual evolution of transjurisdictional accommodation and cooperation, it is not clear that, in the United States at least, conflicts is contributing as much as it should or could to this important project. In Europe, in contrast, according to Professor Horatia Muir-Watt, judicial analyses of private international law are contributing substantially, not only to the harmonization of European law, but also to the creation of a new

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1. This article takes as its point of reference U.S. conflicts law. When not otherwise specified, references to conflicts rules, conflicts doctrines, or conflicts theories refer to these aspects of the field as practiced and developed in the United States. It also takes choice-of-law problems as its principal focus. This is because although much of what is argued here applies equally to questions of jurisdiction and recognition of judgments, debates about choice of law provide a particularly sharp and well developed framework for considering problems of cultural conflict.

2. See Symeon C. Symeonides, *Choice of Law in the American Courts in 2006: Twentieth Annual Survey*, 54 AM. J. COMP. L. 697, 705 (2006).

3. Arthur T. Von Mehren, *Choice of Law and the Problem of Justice*, 41 LAW & CONTEMP. PROBS. 27, 27 (Spring 1977).

European culture.⁴ Likewise, in her contribution to this symposium, Karen Knop reports that, in Canada, private international law is increasingly a site of cosmopolitan progress on multicultural issues.⁵

This article suggests that the general dissatisfaction with conflicts as a field in the United States, and its failure to live up to its larger promise, may stem in part from the fact that our doctrines and theories, at least as currently understood, simply do not address what our moral intuition tells us that conflicts problems are about. In the United States, conflicts as a field has always been framed in terms either of issues of political power, or of issues of individual rights: the central questions conflicts doctrines seek to address are either what is the extent of a state's legitimate authority to assert jurisdiction, impose its law, or demand that its judgments be enforced when a dispute also implicates the power and authority of another political community, or what is the extent of the rights of individuals, when those rights implicate other individuals' rights elsewhere? As such, the paradigmatic audience for conflicts theories is the judge, and the field presents itself as a toolkit⁶ for resolving questions of judicial authority.

But when a court faces a conflicts problem, or again, when a legislature frames the scope of a law to include particular cultural minorities within its territory or particular acts outside its borders, or even when scholars ponder what might constitute the right mix of accommodation and assimilation in multicultural societies, state power and individual rights are not all that is at stake. For example, when a lawsuit brought by one citizen of a foreign nation against another in a U.S. court frames alleged acts of torture as a tort actionable under the Alien Tort Claims Act, at issue is more than simply the relative power of the United States and the foreign state over the incident in question, or the rights of one individual vis-à-vis another. Also at issue is a clash of values—that is, a problem of how to make sense of something foreign to one's own world, to understand, to accommodate, to empathize with, or to choose to refuse to do so. At issue are the boundaries and the methods of our moral judgments.⁷ And, crucially, at issue also is a clash of values *within* the foreign culture. Hence, a court confronting such a case must come to terms with the foreignness of the dispute in a double sense—in the sense of its distance from the judge's own value system but also in the sense of the controversy over

4. See generally Horatia Muir Watt, *Evidence of an Emergent European Legal Culture: Public Policy Requirements of Procedural Fairness Under the Brussels and Lugano Conventions*, 36 TEX. INT'L L.J. 539 (2001).

5. See Karen Knop, *Citizenship, Public and Private*, 71 LAW & CONTEMP. PROBS. 309 (Summer 2008).

6. See generally Annelise Riles, *A New Agenda for the Cultural Study of Law: Taking on the Technicalities*, 53 BUFF. L. REV. 973 (2005) (discussing the tool-like quality of U.S. conflicts doctrine).

7. See, e.g., Horatia Muir Watt, *Yahoo! Cyber-Collision of Cultures: Who Regulates?*, 24 MICH. J. INT'L L. 673, 674 (2003) (“[A] growing number of conflicts involve clashing fundamental public values in the international arena.”).

cultural values within the foreign, normative regime evidenced by the very fact of the dispute.

The problem at the heart of conflicts, then, is not just what is the source of the authority for our laws and our judicial decisions, but whose rules or values *should* prevail, and what *are* these rules or values anyway? Or, why, and to what extent should it be the obligation of a court to make a good-faith effort to step outside of its own normative system to entertain another normative system? This is true of seemingly exotic disputes, such as those concerning the enforcement of agreements stemming from Islamic banking practices.⁸ But it is equally true of mundane disputes arising out of garden-variety differences in California's and Nevada's laws governing vicarious liability of tavern owners for patrons' torts while under the influence of alcohol,⁹ or differing rules concerning a driver's liability to guests for torts arising out of automobile accidents in the states of Toronto and New York.¹⁰ The problem of cultural conflict is legally submerged into such standard elements of choice-of-law analysis as concerns with "fairness" or "the protection of justified expectations"¹¹ or "the needs of the international system."¹² But judges receive little guidance from existing methodologies as to how to decide what is "fair" in a case of cultural conflict, or what the parties might legitimately have come to expect of their bargain, where expectations are a product of one's cultural environment, or what might further the needs of the international system in a clash of cultural values.

If this is indeed where most of the action is in conflicts adjudication, it is no surprise that there is so much frustration with the state of the field. On this point, conflicts can benefit from anthropological insight. A partnership between anthropology and conflicts makes sense because both fields share a common foundational premise: what looks exotic or irrational in one context or from one point of view looks perfectly rational and even admirable from another,¹³ and to the extent possible, one should seek to understand other people's ways of knowing the world, on their own terms, before passing judgment on them according to one's own moral or legal criteria.¹⁴ As a social science,

8. See generally BILL MAURER, *MUTUAL LIFE, LIMITED: ISLAMIC BANKING, ALTERNATIVE CURRENCIES, LATERAL REASON* (2005).

9. See *Bernhard v. Harrah's Club*, 546 P.2d 719 (Cal. 1976).

10. See *Babcock v. Jackson*, 191 N.E.2d 279 (N.Y. 1963).

11. AMERICAN LAW INSTITUTE, *RESTATEMENT (SECOND) OF CONFLICT OF LAWS* § 6(2)(d) (1971).

12. *Id.* § 6(2)(a).

13. See, e.g., EDMUND LEACH, *CUSTOM LAW AND TERRORIST VIOLENCE* 21 (1977) ("[W]hether we rate any particular item of behaviour as being that of a hero or a prophet, a madman or a criminal, will depend upon the context in which the judgment is made.").

14. See Gerhart Husserl, *The Foreign Fact Element in Conflict of Laws*, 26 VA. L. REV. 243, 261-62, 267 (1940) (arguing that "[a]ll Private International Law . . . gives unmistakable expression to the view that the realm of domestic laws is limited," but adding that "[w]here nothing more has been done than to define certain sets of circumstances as foreign, and then leave them alone, we are still on the level of strictly domestic legal thought" and hence that conflicts analysis requires "a widening of the intellectual horizon" that "reflects a general change of views regarding the foreign in the sphere of ethics, literature, fine arts and the sciences."). A concern with appreciating the relative nature of

anthropology's contribution to this normative commitment is primarily methodological and descriptive: it offers tools for understanding cultural conflict and data about the nature of cultural conflict in numerous parts of the world. This article builds upon these methodological and descriptive insights to propose that we rethink the field of conflicts as a matter of cultural conflict. It argues that there is much to learn from thinking of even the most mundane conflicts problem as a version of more overt cases of cultural conflict, if we incorporate contemporary anthropological understandings of culture into our analysis.

The article takes as its primary example of cultural conflict a case in which that conflict is particularly apparent—a case of conflict between Native American legal norms and U.S. state and federal law. The conflict between Native American and settler culture is foundational to the political and legal system of which U.S. conflicts is a part,¹⁵ and is arguably the silent background against which questions of the politics of cultural recognition are entertained, defined, or rejected in U.S. cultural, political, and legal life. Hence, this example, far from being anomalous and exotic, is the unacknowledged paradigm of cultural conflict in the U.S. conflicts regime. As Judith Resnik has put it for the parallel case of federal-courts jurisprudence, a focus on the largely ignored relationship of Native American sovereigns and the U.S. federal and state system highlights a host of questions about “what has been drawn into the circle of value, what has been excluded, and what ‘we’ can learn and should do in response.”¹⁶

In other words, conflicts between Native American and federal and state law make it possible to see, in greater relief, the cultural-conflict dimensions of all conflicts problems, including those routine conflicts problems analyzed in the vocabularies of state power and individual rights. If a focus on cultural conflict provides a useful perspective on this much more difficult area of cultural conflict, it may also help to dispose of more straightforward, but nevertheless

normative judgments, of course, does not suggest that moral judgments are impossible. See generally Clifford Geertz, *Distinguished Lecture: Anti Anti-Relativism*, 86 AM. ANTHROPOLOGIST 263 (1984). For a review of the controversy over cultural relativism in anthropology, see Karen Engle, *From Skepticism to Embrace: Human Rights and the American Anthropological Association from 1947-1999*, 23 HUM. RTS. Q. 536 (2001), and for a critique of this review, see Sally Engle Merry, *Human Rights Law and the Demonization of Culture (And Anthropology Along the Way)*, 26 POL. LEGAL ANTHROPOLOGY REV. 55 (2003). This debate is parsed in Annelise Riles, *Anthropology, Human Rights, and Legal Knowledge: Culture in the Iron Cage*, 108 AM. ANTHROPOLOGIST 52 (2006).

15. See, e.g., *Johnson v. M'Intosh*, 21 U.S. 543 (1823); Joseph William Singer, *Canons of Conquest: The Supreme Court's Attack on Tribal Sovereignty*, 37 NEW ENG. L. REV. 641, 645 (2003) (discussing the cultural prejudices against Indian government behind the Rehnquist Court's limitations on tribal sovereignty); Reply, *Double Bind: Indian Nations v. The Supreme Court*, 119 HARV. L. REV. F. 1, 3 (2005), <http://www.harvardlawreview.org/forum/issues/119/dec05/singer.pdf> (arguing that the Supreme Court often fails to grant Indian Nations the same protection as others “in cases where the tribes are indeed similarly situated to Non-Indians”).

16. Judith Resnik, *Dependent Sovereigns: Indian Tribes, States, and Federal Courts*, 56 U. CHI. L. REV. 671, 680 (1989). See also Angela R. Riley, *Good (Native) Governance*, 107 COLUM. L. REV. 1049, 1051–55 (2007) (questioning liberal standards of good governance as they relate to Indian Nations, and proposing, instead, a theory of good Native governance).

unrecognized and unanalyzed, examples of cultural conflict embodied in more common forms of intrastate conflicts.

So what would conflicts as a field, a set of methodologies, and a set of wider legal and political problems look like if, in contrast to the prevailing focus on state power, the problem of cultural conflict became the primary lens through which to analyze conflicts problems? To begin with, what is most striking about a survey of cases in which particularly obvious cultural conflicts are at issue is the habitual absence of conflicts analysis of any kind at all.¹⁷ Courts in these cases routinely and simply apply forum law without even reflecting on choice-of-law issues. When they do consider choice of law, it is most often to apply rigid, formalist doctrinal analysis resulting in the application of forum law.¹⁸

If, in contrast, a judge, legislator, or scholar wished to take seriously the questions of cultural conflict raised by any conflicts issue, he or she would find that there are a number of existing conflicts doctrines that either explicitly or implicitly put these concerns at the forefront. Ironically, these doctrines tend to be among the most maligned for being excessively malleable and too complicated to apply. But if one understands the complexity and malleability of these doctrines not as technical obfuscation for its own sake, but rather as a product of these doctrines' efforts to grapple seriously with the problem of cultural conflict, then their very flaws may become their virtues.

17. See Brenda Cossman, *Betwixt and Between Recognition: Migrating Same-Sex Marriages and the Turn Toward the Private*, 71 LAW & CONTEMP. PROBS. 153 (Summer 2008) (arguing that what is striking about most "conflicts" cases concerning gay marriage is the total absence of conflicts analysis, since courts simply apply forum law without discussion); Katherine J. Florey, *Choosing Tribal Law: Why State Choice-of-Law Principles Should Apply to Disputes with Tribal Contacts*, 55 AM. U. L. REV. 1627, 1651 (2006) (arguing that what is particularly problematic about most conflicts cases concerning Native American law is the absence of conflicts analysis); Katherine C. Pearson, *Departing from the Routine: Application of Indian Tribal Law Under the Federal Tort Claims Act*, 32 ARIZ. ST. L.J. 695, 695-96 (2000) (observing that although the Federal Tort Claims Act mandates that the law of the place of the tort shall apply to claims against the federal government, and although the law of U.S. territories routinely apply to claims arising out of torts occurring there, to date there is only one case in which Native American tribal law has been applied to such claims). Cf. JAMES A.R. NAFZIGER, CONFLICT OF LAWS: A NORTHWEST PERSPECTIVE 263 (1985) ("Normal choice-of-law rules will apply in state and federal court cases involving Indians or Indian country.").

18. See, e.g., *Bournias v. Atlantic Mar. Co.*, 220 F.2d 152 (2d Cir. 1955). For examples of formalist analysis with results favoring the forum in state and federal cases involving conflicts between Native American and state and federal law, see, e.g., *Laguna v. Acoma*, 1 N.M. 220 (1857); *Jim v. CIT Fin. Serv. Corp.*, 87 N.M. 362 (1975); *Nez v. Forney*, 109 N.M. 161 (1989); *Lonewolf v. Lonewolf*, 99 N.M. 300 (1982); *State ex rel. Vega v. Medina*, 549 N.W.2d 507 (Iowa 1996); *Wilson v. Marchington*, 127 F.3d 805 (9th Cir. 1997). The same tendency appears in the decisions of Native American courts. See, e.g., *Hopi Indian Credit Ass'n v. Thomas*, 25 Indian L. Rptr. 6168 (Hopi App. Ct. 1996); *Jacobson v. Mashantucket Pequot Gaming Enter.*, 32 Indian L. Rptr. 6062 (Mashantucket Pequot Tribal Ct. 2004); *Anderson Petroleum Servs., Inc. v. Chuska Energy & Petroleum Co.*, 4 Navajo Rptr. 187 (Navajo D. Ct. 1983); *MacDonald v. Ellison*, No. SC-CV-44-96 (Navajo Sup. Ct. 1999); *Russell v. Donaldson*, 3 Navajo Rptr. 209 (Navajo D. Ct. 1982). Cf. Robert D. Cooter & Wolfgang Fikentscher, *Indian Common Law: The Role of Custom in American Indian Tribal Courts (Part II of II)*, 46 AM. J. COMP. L. 509, 559 (1998) (reporting that in interviews with judges and other legal experts in Native American tribunals "[the author] often found . . . the firmly rooted conviction that tribal courts apply tribal law, and state courts apply state law"). But see *Satiacum v. Reagan*, 10 Indian L. Rptr. 6009 (Puyallup Tribal Ct. 1982) (Tribal Court applied state law based on principles of comity). This case is analyzed in NAFZIGER, *supra* note 17, at 263.

Hence, a more serious focus on the problem of cultural conflict does not necessarily require a rejection of existing doctrine. Rather, it suggests taking existing doctrine more seriously to understand the cultural struggles judges and commentators grapple with, often just beneath the surface of their analyses. Where this is the case, the goal of this article is to unify and amplify these as a matter of cultural conflict, and to provide richer normative and social-scientific rationales for these. But insights from the most recent theories and methods in anthropology also suggest some points of departure from existing proposals within the field.

Part II briefly summarizes the focus on state power and private rights that defines the field. It then outlines how a concern with cultural conflict is missing from this focus, and draws attention to the way this concern often lies just beneath the surface of existing methodologies, although it is rarely given voice. Part III turns to debates in anthropology and cultural theory to define what is meant by cultural conflict. It argues that the meaning of culture is inseparable from the process of describing or knowing culture, and advocates an approach to knowing culture known in anthropology as “lateral thinking.” This understanding of cultural conflict is then applied to the field of conflict of laws. The central claim here is that, from this point of view, the distinction between description and adjudication becomes logically and morally untenable. Conflicts as a field should therefore devote as much care to “knowing” foreign law as to deciding which law applies. Drawing on the example of conflicts over choice of law between Native American and U.S. national and state courts, this part presents several examples of the doctrinal implications of this insight. Part IV presents conclusions and responds to some potential criticisms of these proposals.

II

THE STATE POWER AND INDIVIDUAL-RIGHTS FOCUS OF CONFLICTS

The dominant narrative about the field of conflicts is that it is characterized by a plethora of methodologies and jurisprudential arguments, past and present, that derive from inconsistent and incompatible understandings of the nature of law. Yet in one sense, these diverse methods and approaches are remarkably consistent—all focus either on the nature, boundaries, and sources of political authority, or on the nature, boundaries, and sources of individual rights. That is, all focus on the sources of political authority, whether individual or state-derived. Some examples from approaches to conflicts that are usually understood to be quite distinct will illustrate this shared focus and highlight some of its potential limitations.¹⁹

19. This part does not purport to present an overview of the history of the development of conflicts jurisprudence in the U.S. It aims only to provide some illustrative examples of the blind spots in the discipline. Its organization likewise is not meant to suggest that the traditions or approaches presented in this part can be neatly arranged chronologically. As I have argued elsewhere, many of the insights

A. Joseph Story

The starting point of Joseph Story's approach to conflicts, as explicitly laid out in his treatise, is the view that state sovereignty is absolute and hence that deference to another state's law is a matter of comity.²⁰ What Story's analysis seeks to resolve, in other words, is the question of the authority of the forum over the dispute in question. Story addresses the issue by confirming the authority of the state to adjudicate matters before it as a matter of the application of its own law.²¹

Beginning with Story, then, the central question or problem of conflicts is one of the boundaries or scope of state power. In the margins of Story's text, however, are the traces of a very different set of concerns. The text actually begins not with state power, but with what Story views as the problem of global variation in custom and of the repugnance that one people (in his view) naturally feel for another:²²

The Earth has long since been divided into distinct Nations, inhabiting different regions, speaking different languages, engaged in different pursuits, and attached to different forms of government. It is natural that, under such circumstances, there should be many variances in their institutions, customs, laws, and polity; and that these variances should result sometimes from accident, and sometimes from design, sometimes from superior skill, and knowledge of local interests, and sometimes from a choice founded in ignorance and supported by the prejudices of imperfect civilization. . . . The bold, intrepid, and hardy natives of the North of Europe, whether civilized or barbarous, would scarcely desire, or tolerate, the indolent inactivity and luxurious indulgences of the Asiatics. . . . The Egyptians, the Medes, the Persians, the Greeks, and the Romans, differed not more in their characters and employments from each other, than in their institutions and laws. They had little desire to learn, or to borrow, from each other; and indifference, if not contempt, was the habitual state of almost every ancient nation in regard to the internal polity of all others.

Indeed, Story wrote at a moment of extreme tension about what is now called multiculturalism: the context for his interest in conflicts is the normative conflict between North and South over the institution of slavery.²³ Yet these issues for the most part remain in the margins;²⁴ the analysis is directed, rather, toward questions of state power, and Story's rhetorical achievement is to

associated with the Realist Revolution in conflicts can actually be found in earlier approaches. *See generally* Riles, *supra* note 6.

20. *See* JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS, FOREIGN AND DOMESTIC 22–25 (1834).

21. *See id.* § 8, at 11 (sovereignty “has no admitted superior, and . . . gives the supreme law within its own dominions on all subjects appertaining to its sovereignty”).

22. *See id.* at 1–2.

23. Story himself opposed slavery, but he authored the Supreme Court opinion that found fugitive slave acts to be constitutional. *See* STORY, *supra* note 20, § 33, at 97 (arguing that foreign laws contrary to the law of nature, such as the laws of slavery, need not be given effect elsewhere). On the treatment of slavery in U.S. and English conflict of laws case law, see ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS 83–99 (1975).

24. *See* STORY, *supra* note 20, at 28–29 (discussing how his conflicts analysis would address the slavery issue).

compartmentalize the slavery question and proceduralize it within the technical doctrines of conflicts.²⁵

B. The First Restatement

In the received history of the discipline, the methodology advocated in Joseph Beale's First Restatement²⁶—still followed by courts in many U.S. jurisdictions²⁷—departs radically from the methodology of Joseph Story: whereas Story emphasizes the authority of the forum to apply its own law, and conversely the discretion of judges to act on principles of comity and to follow foreign law, as a matter of forum law, if they so choose,²⁸ Beale's vested-rights approach presents, at least at first blush, a rather more mechanical picture of conflicts adjudication: "an act or obligation valid by the laws of the place where made was valid everywhere."²⁹ Likewise, whereas Story focuses primarily on the nature of state power, Beale focuses primarily on the nature of individual rights.³⁰ Judges simply enforce preexisting rights in the vested-rights scheme they do not make them. Hence, whereas Story views the decision to enforce foreign law as a matter of flexible and semi-political principles of comity, Beale presents it as the consequence of the forum's necessary legal recognition of the limits of the authority of the state vis-à-vis the individual.³¹ In this understanding, an individual's rights trump state power both domestically³² and internationally.³³ This understanding of vested rights as a matter of individual rights also translates into an understanding of the boundaries of state power: vested rights limit the authority of another sovereign over the rights created (vested) within the sovereign's territorial boundaries.³⁴ But for present purposes, what is most interesting is what the two approaches share. Both assume that conflicts is about the nature of political authority,³⁵ whether it takes the form of state power, of individual rights, or of some mix of the two. Rather

25. On the proceduralization of politics in the transnational realm as a rhetorical achievement of jurists, see generally Nathaniel Berman, *"But the Alternative is Despair": European Nationalism and the Modernist Renewal of International Law*, 106 HARV. L. REV. 1792 (1993); DAVID KENNEDY, *INTERNATIONAL LEGAL STRUCTURES* (1987).

26. See RESTATEMENT (FIRST) OF CONFLICT OF LAWS (1934).

27. See SYMEON C. SYMEONIDES, *THE AMERICAN CHOICE-OF-LAW REVOLUTION: PAST, PRESENT AND FUTURE* 65 (2006).

28. See STORY, *supra* note 20, § 38.

29. JOSEPH HENRY BEALE, *A TREATISE ON THE CONFLICT OF LAWS, OR PRIVATE INTERNATIONAL LAW* § 73, at 105 (1916).

30. *Id.* § 139, at 163 ("The primary purpose of law being the creation of rights, . . . the chief task of the Conflict of Laws [is] to determine the place where a right arose and the law that created it . . .").

31. See JOSEPH H. BEALE, *SELECTIONS FROM A TREATISE ON THE CONFLICT OF LAWS* § 450 (1935) (discussing the effect of a foreign judgement).

32. See GREGORY S. ALEXANDER, *COMMODITY & PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT 1776-1970* 311-50 (1997).

33. See ALBERT VENN DICEY, *A DIGEST OF THE LAW OF ENGLAND WITH REFERENCE TO THE CONFLICT OF LAWS* xxxi, 16, 23, 32-33 (2d ed. 1908); BEALE, *supra* note 31, § 47, at 18.

34. BEALE, *supra* note 29, at 116 ("[I]n order to decide which sovereign created a law or a legal right, we must first determine the extent of a sovereign's power to create law.").

35. See LEA BRILMAYER, *CONFLICT OF LAWS* 240-62 (1995).

than assume that one approach replaced the other in time, it is more useful to view them as versions of two classic positions that are usually both in play in any given approach to private–international-law disputes—the conflict between a focus on state power and a focus on individual rights.

C. Interest Analysis and the Second Restatement

With the conflicts revolution, and the turn to interest analysis as the predominant methodology for resolving conflicts problems, the focus on state power becomes all the more explicit. The innovation of interest analysis, which is the core methodology of the Second Restatement, and adopted by the largest number of U.S. jurisdictions today,³⁶ is to understand all conflicts questions as questions of the legitimate scope of state authority, as defined by the nature of the state interests in any given dispute. As Joseph Singer puts it, these approaches “attempt to define the spheres of power of different government actors without directly addressing the wisdom or justice of the rules in force.”³⁷

If, in the opening paragraphs of Story’s text, there is an acknowledgment of intractable problems of culture, by the time of the conflicts revolution, these questions have been cleansed from interest analysis entirely. Brainerd Currie is quite explicit about this: for him, conflicts is essentially a matter of ordinary statutory or judicial interpretation;³⁸ that is, there is no need to think about conflicts problems in any special way or to bring any different sets of concerns to bear upon them.

This focus on state power as the predominant framework for analysis arguably reaches its apotheosis in recent decisions of the U.S. Supreme Court concerning the extraterritorial reach of U.S. statutory law.³⁹ As numerous critics have pointed out, these decisions fail even to consider issues beyond questions of domestic legislative intent;⁴⁰ the assumption is not only that state power is what is at issue, but that there are no countervailing concerns about the political authority of other states that must enter into the analysis. In all of these approaches, the nature of political authority is treated as a universal fact, not something culturally specific or culturally contested, and hence outside the

36. See SYMEONIDES, *supra* note 27, at 65.

37. Joseph William Singer, *Real Conflicts*, 69 B.U.L. REV. 3, 77–78 (1989).

38. Brainerd Currie, *Married Women’s Contracts: A Study in Conflict-of-Laws Method*, 25 U. CHI. L. REV. 227 (1958).

39. See, e.g., *Sosa v. Alvarez-Machain*, 542 U.S. 692, 712 (2004) (upholding the “foreign country” exception to a waiver of government’s sovereign immunity under the Federal Tort Claims Act: “The foreign country exception bars all claims based on any injury suffered in foreign country against federal government, regardless of where the tortious act or omission giving rise to that injury occurred.”); *United States v. Delgado-Garcia*, 374 F.3d 1337 (D.C. Cir. 2004), *cert. denied*, 544 U.S. 950 (2005) (holding that statutes of conviction apply extraterritorially).

40. See, e.g., Laura A. Cisneros, *Sosa v. Alvarez-Machain—Restricting Access to U.S. Courts Under the Federal Torts Claims Act and the Alien Tort Statute: Reversing the Trend*, 6 LOY. J. PUB. INT. L. 81, 91 (2004); Harlan Grant Cohen, *Supremacy and Diplomacy: The International Law of the U.S. Supreme Court*, 24 BERKELEY J. INT’L L. 273, 285–86 (2006); Mark Knights, *Recent Decisions of the United States Court of Appeals for the District of Columbia Circuit: Criminal Law*, 74 GEO. WASH. L. REV. 754, 770 (2006).

scope of conflicts per se. This is true despite the fact that the very nature of political authority is contested as between these methodologies. Sometimes this is presented as a matter of the author's normative commitment to a particular vision of politics, justice, or law. Sometimes it is simply assumed without further discussion. In either case, however, this framework may foreclose other possible avenues of inquiry.

D. The Limitations of the Focus on Political Authority

Like all perspectives, the state-power-and-legitimacy perspective illuminates some issues and obscures others. By focusing entirely on state authority and legitimacy (or on a priori notions of political rights), and hence by translating directly between the conflict affecting individual litigants on the one hand and the interests of the state asserting sovereignty over them (or the scope of their political rights) on the other, these analyses leave little room for exploring the clash of values or perspectives that lies behind the differing positions taken by the litigants and behind the differing legal rules in force in each jurisdiction. That clash of values is simply taken for granted as a given, something that occurred off-stage, so to speak, prior to the start of the real action. That many conflicts disputes arise out of, give voice to, or ask the adjudicator to enter into and take a stand regarding real moments of cultural contention is not acknowledged by the methodologies and the academic theories behind them.

By way of example, consider the conflict in *United States v. Jarvison*.⁴¹ The U.S. government, prosecuting Ben Jarvison, a seventy-seven-year-old Navajo, for allegedly sexually abusing his granddaughter, sought to compel the testimony of Esther Jarvison, an eighty-five-year-old Navajo woman, who allegedly had witnessed some of the abuse. Esther and Ben were enrolled members of the Navajo tribe and lived together on a Navajo reservation. Esther emphatically refused to testify. She claimed that she was Ben's wife and hence could not be compelled to testify under longstanding U.S. rules governing interspousal privileges. Esther and Ben had lived together and had had two children together from 1953 until 1980, when Ben commenced a relationship with Esther's daughter by a prior relationship. Esther and Ben had lived together on and off again since 2000.⁴² Navajo records on the couple were equivocal on the status of their union.⁴³ However, the couple contended that they were married by a traditional medicine-man in 1953, more than fifty years earlier. For its part, the U.S. government contended that this marriage was a "sham," invented solely for the purpose of evading testimony.⁴⁴ The conflicts issue, as framed by the court, then, was "what law would apply to the question

41. 409 F.3d 1221 (10th Cir. 2005).

42. *Id.* at 1223. The abuse allegedly occurred in 2000 when the couple was living together. *Id.*

43. The Navajo Vital Records Office had documents in which Jarvison checked "no" in the box marked "married" but did list Esther as his "wife." *Id.*

44. *Id.* at 1224.

of a marriage between two Navajo tribal members who live completely within the boundaries of the Navajo Reservation.”⁴⁵

Under modern conflicts approaches, this dispute appears as a simple matter of conflicting state interests—the federal government’s interest in compelling testimony about sexual abuse on the one hand and the Navajo Nation’s interest in its authority to determine and defend the validity of marriages among its members living on the reservation on the other. This focus on a clash of political authorities usefully draws attention to questions of sovereignty—and hence to the complex inequalities between the sovereigns implicated in this case. Yet it is also immediately apparent that notions of state interests, or of the individual rights of the witnesses and the defendant, are only weak stand-ins for the issues raised by this case. If modern conflicts analysis would seem to suggest that what is at stake in this dispute is a simple question of statutory and judicial construction—nothing really all that different from any ordinary, garden-variety question of domestic law—our intuition suggests that what is at stake instead is a thicket of cultural questions. Ironically, such questions are already routinely foregrounded in the standard substantive statutory and constitutional-law doctrines concerning conflict over multiculturalism, to which Currie sought to analogize conflicts.⁴⁶ When the issue is a matter of conflicts analysis, rather than of substantive law, however, observers are more reticent to entertain cultural questions. This is so even though cultural questions are arguably all the more pressing in the case of conflicts between legal regimes.

Must we banish these questions from our conflicts analysis? As Karen Knop suggests, conflicts problems now address, purposely or not, a host of more “cosmopolitan” questions concerning cultural accommodation, deference, and denunciation.⁴⁷ In fact, one could argue that this is not a new phenomenon but rather an acknowledgment of what has always been at stake in questions of private international law, at their core, whether recognized explicitly in the doctrine or not.⁴⁸ At least since Savigny, these larger questions have been as

45. *Id.* at 1225.

46. For example, a lawsuit by female members of the Santa Clara Pueblo challenging the Pueblo’s restriction of membership to children whose fathers were Pueblo members became the subject of extensive legal commentary. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). The case was of particular interest, among other reasons, for the way it brought to the fore controversy about cultural norms *within* the Pueblo rather than simply between Pueblo norms and the norms of U.S. civil-rights laws. See Resnik, *supra* note 16; Lucy A. Curry, *A Closer Look at Santa Clara Pueblo v. Martinez: Membership by Sex, by Race, and by Tribal Tradition*, 16 WIS. WOMEN’S L.J. 161 (2001); Francine R. Skenandore, *Revisiting Santa Clara Pueblo v. Martinez: Feminist Perspectives on Tribal Sovereignty*, 17 WIS. WOMEN’S L.J. 347 (2002); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990); Catharine A. MacKinnon, *Whose Culture? A Case Note on Martinez v. Santa Clara Pueblo* (1983), in *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 63 (1987). It is interesting that where the interpretation of substantive legal rules, such as the application of civil-rights laws to an Indian pueblo, is at stake, observers can readily see the cultural issues involved.

47. See generally Knop, *supra* note 5.

48. See Erik Jayme, *Identité culturelle et intégration: le droit international privé postmoderne*, in 251 RECEUIL DES COURS, COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 9, 52–53 (1995) (“En fait, ce qui caractérise vraiment le droit international privé actuel, ce sont les conflits de cultures. Une règle de droit incompatible avec le principe d’égalité d’un système juridique donné

much a part of the unstated, but implicitly recognized project of modern, private international law as the question of the scope of state power.⁴⁹ As Gerhart Husserl put it in 1940, “Every system of Conflict rules is based on the belief in a set of fundamental concepts and principles of justice, to be found in all legal communities belonging to the world of Western civilization, and rooted in the deeper layer of convictions, attitudes and social values that are essential to our civilization.”⁵⁰ Husserl’s drawing of the sphere of cultural commonality around the boundaries of Western civilization is, of course, in need of updating and is also indicative of the possible dangers of cultural analysis. Yet it is clear that cultural concerns are at least implicit in many existing doctrinal problems, such as the longstanding debate over whether conflicts should proceed from a unilateral or a multilateral perspective,⁵¹ or again, the question of how to define the state interests at play in a particular legal rule.

The methodologies do not encourage sustained analysis of these questions, however. One of the classic criticisms of interest analysis is that the definition of state interests is too mechanical⁵²—that interest analysis proceeds from an almost stock set of state interests such that no serious inquiry into the actual reasons a state might have for adopting the particular legal rule at issue or the interests behind it is expected. What is arguably edited out by the technocratic orientation of interest analysis is the rich and messy cultural texture of our legal norms.

peut se révéler justifiée par un autre principe, par exemple celui de la liberté de religion. Je pense ici, surtout, au droit islamique de la famille qui a généré de nombreux conflits de lois hors des pays de tradition musulmane.”) [“In fact, what actually characterizes the law of private international law are cultural conflicts. A rule of law that is incompatible with the principle of equality in a judicial system can be justified by another principle, such as that of religious liberty. I am thinking here especially of Islamic family law which has generated numerous conflicts of laws in countries outside the Muslim tradition.”] (author’s translation).

49. FRIEDRICH CARL VON SAVIGNY, SYSTEM OF THE MODERN ROMAN LAW 15–16 (William Holloway trans., 1979) (1867) (“In fact we find so far as history informs us upon the matter that wherever men live together, they stand in an intellectual communion which reveals as well as establishes and develops itself by the use of speech. In this natural whole is the seat of the generation of law and in the common intelligence of the nation penetrating individuals, is found the power of satisfying the necessity above recognized.”). Cf. Mathias Reimann, *Savigny’s Triumph? Choice of Law in Contracts Cases at the Close of the Twentieth Century*, 39 VA. J. INT’L L. 571, 596 (1999) (arguing that Savigny’s insights still remain the basis of U.S. and European conflicts doctrines, such as the Second Restatement “most significant relationship” concept).

50. Husserl, *supra* note 14, at 267.

51. See BRILMAYER, *supra* note 35, at 17.

52. See, e.g., Lea Brilmayer, *Interest Analysis and the Myth of Legislative Intent*, 78 MICH. L. REV. 392, 397–400 (1980).

III

THE PROBLEM OF CULTURAL CONFLICT IN THE CONFLICT OF LAWS

A. What is Meant by Culture?

To begin, it is necessary to state with absolute clarity what is *not* meant by culture and cultural conflict in this article. Anthropological research plainly shows that cultures do not encompass cultural actors or dictate their thinking or their moral choices. Certainly, one cross-culturally universal truth is that in every culture, persons disagree about their cultural values. They offend each other, wrong each other, misunderstand each other, exert power over each other, and leverage the tensions and ambiguities in cultural norms in order to push for changes in those norms. There is thus always plenty of room for agency, choice, and change in any community. Cultural conflict is not just conflict between communities: it is conflict within communities as well.

It is equally well established that cultures are not billiard balls; there are no “pure” and hermetically sealed cultures.⁵³ Rather, as Karen Knop points out in her article in this issue,⁵⁴ cultures are hybrid, overlapping, and creole: forces from trade to education to migration to popular culture and transnational law ensure that all persons participate in multiple cultures at once. Cultural elements circulate globally, and they are always changing.⁵⁵ From this point of view, “culture” is more of a constant act of translation and re-creation or re-presentation than it is a fixed and given thing.⁵⁶ Hence, for example, any assertions as to what “the” authentic cultural values of a given society are concerning the legitimacy of certain forms of homicide, as in the context of claims to a cultural defense, necessarily are better understood as ideological or political claims made for a particular instrumental purpose. Culture cannot serve as a straightforward explanatory tool in that way. Likewise, even laws that are presented as reflecting local cultural values are most often products of cultural invention and borrowing from outside. So culture is neither a totalizing explanatory device for legal institutions or legal conflicts, nor a unified singular thing agreed upon by all members of any given society. While this is universally acknowledged in anthropology and cognate fields, it is still inadequately appreciated by proponents and critics of cultural analysis in legal studies alike.⁵⁷

53. See CLIFFORD GEERTZ, *THE INTERPRETATION OF CULTURES* 11 (1973) (arguing against the view of culture as a “super-organic”).

54. Knop, *supra* note 5, at 339.

55. See Lan Cao, *Culture Change*, 47 VA. J. INT’L L. 357 (2007).

56. Although this is sometimes described as an effect of globalization, anthropological research suggests that there probably has never been a society in which this was not already true.

57. See, e.g., JAMES Q. WHITMAN, *HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE* 4 (2003) (attributing the differences between American and French criminal law to their “cultural roots”); J. Mark Ramseyer & Minoru Nakazato, *The Rational Litigant: Settlement Amounts and Verdict Rates in Japan*, 18 J. LEGAL STUD. 263, 266 (1989) (rejecting cultural explanations for the low rates of litigation in Japan on the assumption that a cultural analysis would suggest that Japanese individuals’ choices are dictated by culture).

This understanding of culture highlights a number of aspects of the *Jarvison* case introduced earlier. At first blush, this case involves a conflict between the white majority's values and those of the Navajo tribe: Child sexual abuse is, in Euro-American culture, close to the ultimate evil. In the dispute, the eradication of this instance of what one culture construes as evil turns on doing damage to the legitimacy of another revered cultural institution, Navajo marriage. It is the intuition that a difficult choice must be made between two strongly held sets of cultural values—a choice akin to those addressed in substantive decisions and legislation concerning multiculturalism—that motivates our responses to the decision, which we must then translate into the language of state interests or individual rights.⁵⁸

But if we reflect further on the case, the view of the conflict as a clash of irreconcilable cultural values begins to transform into a more complex set of questions. First, we might want to reconsider the dominant culture's commitment to the prosecution of child sexual abuse. Is this all that is at stake for the majority? There is of course also the longstanding doctrine of interspousal testimonial immunity, built on assumptions about the privacy of communication between spouses.⁵⁹ As the court points out in its decision, it is equally well established that the government cannot compel one spouse to testify against another.⁶⁰ And indeed, if few issues ignite our passions as much as child sexual abuse, another issue that ranks a close second might be the “defense” of the sanctity of marriage. As Brenda Cossman has argued, the legitimacy and authenticity of marriage as a site of privacy protected from state intrusion turns on its existence as a site of sex,⁶¹ hence privacy from state intrusion means, at the least, privacy from state regulation of sex within the family. Moreover, as the court points out, the doctrine of interspousal immunity is well established in Navajo law as well.⁶²

So what at first appeared to be a conflict between Euro-American culture and Navajo culture on closer examination transforms into a cultural conflict of a different kind: a deep conflict within the adjudicator's own cultural values about sex and the family. On the one hand, the family is a sphere of autonomy and privacy;⁶³ on the other hand, some commentators and doctrines gravitate toward

58. The *Jarvison* court draws this analogy by citing to *Santa Clara Pueblo*, *supra* note 46.

59. See *Hawkins v. United States*, 358 U.S. 74 (1958); *Trammel v. United States*, 445 U.S. 40 (1980); see also Earl C. Dudley, Jr., *Federalism and Federal Rule of Evidence 501: Privilege and Vertical Choice of Law*, 82 GEO. L.J. 1781, 1815 n.157 (“The purpose of the testimonial immunity doctrine is to preserve marital harmony from unwarranted intrusion by the state.”).

60. *United States v. Jarvison*, 409 F.3d 1221, 1232 (10th Cir. 2005) (citing *Trammel v. United States*, 445 U.S. 40, 53 (1980)).

61. See BRENDA COSSMAN, *SEXUAL CITIZENS: THE LEGAL AND CULTURAL REGULATION OF SEX AND BELONGING* 73–83 (2007).

62. *Jarvison*, 409 F.3d at 1228 (citing *Navajo Nation v. Murphy*, 6 Navajo Rptr. 10, 13 (Navajo 1988)).

63. Family relations have been one of the areas of expansion of substantive-due-process doctrine in recent years, particularly in cases involving the state's desire to regulate zoning, marriage, and child-rearing. See, e.g., *Moore v. East Cleveland*, 431 U.S. 494 (1977) (striking down a city's ordinance limiting the fundamental right of family members to reside together); *Troxel v. Granville*, 530 U.S. 57

a kind of “public policy exception” for interference in this zone of autonomy to ensure that the sex occurring within the family is between the proper family members according to the normative standards of the culture. And indeed, in this case, the government argued in the alternative that, should the court find that Esther and Ben were properly married, there should be an exception to the rule that spouses cannot be forced to testify against one another for prosecutions of child sexual abuse.⁶⁴

But from the Navajo side of the story, things seem at least as complicated. First, Esther herself, in her bid to avoid testimony, weaves together the values of two cultural worlds and hence claims a foot in both, and a right to mix and match: on the one hand, she appeals to Navajo understandings of marriage to argue that she is married to Ben, while on the other hand, she argues for the application of federal rules governing interspousal testimonial immunity.⁶⁵ Second, the conflicting evidence about the marriage—equivocal, modern tribal records on the one hand and Esther’s account of a “traditional” marriage on the other—hints at conflicts between customary and modern bureaucratic practices within Navajo law and administration. And as the majority elaborates, this particular marriage spans a period of rapid change in Navajo life and law. Here, the evolving history of tribal laws and judicial decisions is replete with changes and reversals of its own on the question of what constitutes a valid marriage, as differing legal institutions have struggled with how to accommodate custom with the demands of running a modern administrative state.⁶⁶ There is no single answer to the question of Navajo cultural norms about the validity of marriage, just as there is no singular answer to the question of the scope of autonomy of the family from state intrusion in Euro-American culture.⁶⁷

B. A Problem of Description

So legal rules concerning, for example, who can and who cannot marry, are not simply products or reflections of their culture. To see them as such is to see culture as too singular, too determinative, too all-encompassing.⁶⁸ But it is also

(2000) (honoring a parent’s fundamental right to make decisions as to care, custody, and control of their children); *Zablocki v. Redhail*, 434 U.S. 374 (1978) (holding a Wisconsin statute imposing requirements on parents under court order to support out-of-custody children in order to be permitted to remarry unnecessarily impinged on the right to marry).

64. *Jarvison*, 409 F.3d at 1231.

65. Although according to the opinion, a similar interspousal immunity rule exists under Navajo law, Esther did not appeal to Navajo law on this point. See *United States v. Jarvison*, 409 F.3d 1221, 1228 (10th Cir. 2005).

66. See Catherine B. Stetson, Note, *Conflict of Laws: The Plurality of Legal Systems: An Analysis of 25 USC §§1901-63, The Indian Child Welfare Act*, 8 AM. INDIAN L. REV. 333 (1980) (discussing legal pluralism within tribal law).

67. See, e.g., *Hopi Indian Credit Ass’n v. Thomas*, 25 Indian L. Rptr. 6168 (Hopi App. Ct. 1996) (treating Hopi custom as raising problems of pleading and proof analogous to foreign law and arguing that Federal Rule of Civil Procedure 44.1 concerning the application of foreign law is “instructive” on the question of how to interpret Hopi customs).

68. See Annelise Riles, *Comparative Law and Socio-Legal Studies*, in OXFORD HANDBOOK OF COMPARATIVE LAW 775, 802–03 (Mathias Reimann & Reinhardt Zimmerman eds., 2006).

to ignore how legal rules, legal technique, and legal expertise are their own cultural force.⁶⁹ One way law shapes the culture is by describing a larger culture in authoritative settings such as legal documents and judicial decisions.⁷⁰ Like it or not, the *Jarvison* case is an authoritative (if contestable and contested) statement about what constitutes a valid marriage under Navajo law.⁷¹ Whether its adjudicators are even aware of the practical consequences, “U.S. law represents Native Americans . . . in a particular way.”⁷² As Audra Simpson’s article for this symposium points out, for example, the failure to acknowledge the conflict with Native American law at issue in any given dispute is its own act of adjudication and authoritative description—one that feeds into and amplifies certain wider cultural representations of Native American criminality.⁷³

The consequences of the interpretation of Tribal law by non-Tribal courts have given rise to a vigorous debate in Native American jurisprudence. Some have called for U.S. state and federal courts to refrain from applying Tribal customary or national law to avoid getting the law wrong,⁷⁴ while others have argued that the alternative—the habitual and unthinking application of U.S. state and federal law to matters of tribal concern—makes an even more harmful statement with equally real consequences for Native American interests.⁷⁵

For conflicts specialists, this debate demands attention to the ways conflicts adjudication often unwittingly produces authoritative acts of cultural description. Consider for example the cultural descriptions at issue in *Jarvison*. In fact, the source of controversy in *Jarvison* was not exactly the truth of Navajo cultural norms. To be more precise, it was the methods of description of those cultural norms deployed by the lower court: the government, on appeal, argued that the district court’s evaluation of the evidence concerning the marriage and, in particular, its decision not to compel Esther to testify, was prejudicial.⁷⁶ What

69. See generally Gunther Teubner, *How the Law Thinks: Toward a Constructivist Epistemology of Law*, 23 LAW & SOC’Y REV. 727 (1989); Christopher Tomlins, *How Autonomous is Law?*, 3 ANN. REV. L. SOC. SCI. 45 (2007) (tracing the history of debates about the autonomy of law and arguing that we have now moved “away from an autonomy paradigm of law’s relationality toward a *mutuality* paradigm: Law and society simultaneously contextualize, absorb, and are absorbed into each other”).

70. See MARIANA VALVERDE, *LAW’S DREAM OF A COMMON KNOWLEDGE* (2003); see also BRUNO LATOUR, *LA FABRIQUE DU DROIT: UNE ETHNOGRAPHIE DU CONSEIL D’ÉTAT* (2002); Bill Maurer, *Due Diligence and “Reasonable Man,” Offshore*, 20 CULTURAL ANTHROPOLOGY 474 (2005); ANNE RILES, *THE NETWORK INSIDE OUT* (2000).

71. To the extent that questions of the nature of foreign law are understood to be questions of law—not of fact—according to Federal Rule of Civil Procedure 44.1, the decision arguably serves as precedent for future federal courts facing the question of the legal definition of marriage under Navajo law.

72. MARIANNE CONSTABLE, *JUST SILENCES: THE LIMITS AND POSSIBILITIES OF MODERN LAW* 75 (2005).

73. See Audra Simpson, *Subjects of Sovereignty: Indigeneity, the Revenue Rule, and Juridics of Failed Consent*, 71 LAW & CONTEMP. PROBS. 191 (Summer 2008).

74. See, e.g., John J. Harte, *Validity of a State Court’s Exercise of Concurrent Jurisdiction Over Civil Actions Arising in Indian Country*, 21 AM. INDIAN L. REV. 63 (1997).

75. See Florey, *supra* note 17, at 1627.

76. *United States v. Jarvison*, 409 F.3d 1221, 1224 (10th Cir. 2005).

was at issue was a problem of cultural description: How should the district court “know” the facts of Navajo culture?

For the court, this problem seems heightened by the fact that the individuals at issue are aged Native Americans with a history of exotic sexual practices and kinship arrangements. A fiery dissent refers, with palpable indignation, to the way the district court “minimizes the significance of Jarvison’s lengthy relationship with Esther’s daughter”⁷⁷ and to the district court’s decision to itself question Esther about her marriage rather than to allow the government to cross-examine her. The dissent reproduces the entire transcript of the court’s examination of the witness, a short back-and-forth in which she asserts that she was married:

Court: Okay. Is that a traditional marriage under Navajo law?

Witness: Yes.

. . . The court then declared[,] “Okay, that’s good enough for me.”

When the government sought to cross-examine Esther, the court responded, “No, I’ve heard enough I’m not going to intrude any further on her marriage.”⁷⁸

As the dissent seems to suggest, there is indeed something a bit creepy about this language of intrusion-anxiety voiced by the district court—“I’ve heard enough. I’m not going to intrude any further on her marriage.”⁷⁹ One has the sense that the court is shying away from peeping into Esther’s bedroom, as if it might be unable to come to terms with what it might encounter there. Esther’s bedroom seems doubly private, doubly taboo—it is both a private marital space, and also within the sphere of private legal autonomy from colonial-state intrusion traditionally accorded to subjugated cultural minorities by modern nation-states in matters of family law.⁸⁰

At the same time, the government’s case turns on a classic stereotype of the “silent Indian,” one whose obstinate silence is interpreted as implicit evidence of guilt. Marianne Constable argues that Native Americans’ collective and individual silences in U.S. courts, from refusals to testify to claims that certain rituals are secret and hence cannot be discussed in court, exposes the narrowness of the dominant culture’s pretenses to inclusiveness in which everyone gets a right to speak.⁸¹ So on closer analysis, the federal law bears the

77. *Id.* at 1232 (Anderson, J., dissenting).

78. *Id.* (citations omitted).

79. *Id.* at 1232.

80. *See id.* at 1225 (“the Navajo Nation retains sovereign authority to regulate domestic relations laws, including marriage of its Indian subjects.”). The Anglo-American approach to colonial rule has long involved delegation of legal authority over matters of family law (often framed as matters of customary law) to local populations. *See generally* M.B. HOOKER, LEGAL PLURALISM: AN INTRODUCTION TO COLONIAL AND NEO-COLONIAL LAWS (1975) (surveying colonial laws granting authority over family-law matters to local courts in diverse jurisdictions); MICHAEL G. PELETZ, ISLAMIC MODERN: RELIGIOUS COURTS AND CULTURAL POLITICS IN MALAYSIA (2002) (discussing the relationship between customary and state law in the adjudication of family-law issues by Islamic courts in Malaysia).

81. *See* CONSTABLE, *supra* note 72, at 85–90.

marks of further conflicts over its own paternalistic efforts to balance cultural accommodation and moral judgment in relations with exotic, subjugated peoples.

Thus, cultural conflict is not just conflict about cultural differences “out there” in the world governed by conflict doctrines. It is also conflict about the study or representation of culture—in conflicts doctrines and analyses as in other arena of cultural description. The judge, the legislator or the lawyer making conflicts arguments therefore is an inescapable party to the cultural conflict, not simply an observer.

A conflicts analysis that wishes to take seriously issues of cultural conflict, therefore, will need to put far more energy into methodological problems of description in adjudication. Constable further argues that the difficulties Native American silences cause for the legal system expose the positivistic orientation of description in modern law: “Modern law is a matter of fact. It is grounded in empirical investigation and informed by sociological knowledge of values and preferences.”⁸² From this point of view, “Native silences may hold not only what is unsaid in U.S. law, but also what U.S. law in some sense cannot hear.”⁸³ Seemingly objective forms of description, in other words, may have certain normative, exclusionary qualities.

An appreciation of the normative, even adjudicatory force of description therefore breathes new urgency into old questions in conflicts about what it means to “know” foreign law. But it also directs attention to the inadequately appreciated work that description does in conflicts adjudication more generally. Conflicts courses in the United States rarely devote more than a single class period to the question of how to determine foreign law, and casebooks almost always present the laws of the jurisdictions that are purported to be in conflict as a given, without asking students to question how this interpretation was reached. Too often, in the classroom as in the courtroom, the question of what “is” the foreign or domestic rule is treated as a kind of procedural problem of burdens of proof in determining foreign law, an issue to be resolved before the “serious” business of determining state interests or applying conflicts rules gets underway, perhaps even something to be left largely to the parties’ own determination. Although Federal Rule of Civil Procedure 44.1, and most parallel state statutes, purport to eliminate the old treatment of foreign law as a “fact” to be “discovered” through the parties’ pleadings in very much the positivistic empiricist sense criticized by Constable, the rule still retains the vestiges of the old treatment of foreign law as fact.⁸⁴ On the whole, conflicts

82. *Id.* at 89.

83. *Id.* at 92. See also Jacques Derrida, *Force of Law: The “Mystical Foundation of Authority,”* 11 CARDOZO L. REV. 919 (Mary Quaintance trans., 1990); Charles M. Yablon, *Forms*, 11 CARDOZO L. REV. 1349 (1990).

84. See ALEXANDER, *supra* note 32, at 608 (quoting FED. R. CIV. P. 44.1 (“A party who intends to raise an issue about a foreign country’s law must give notice by a pleading or other writing. In determining foreign law, the court may consider any relevant material or source, including testimony,

scholars have also failed to appreciate the analytical and normative questions at issue in the description of law in conflicts analysis, and debate has focused on arid questions about the technical requirements for pleading and proving foreign law, and the consequences of a party's failure to do so.⁸⁵

But acts of description are not tangential to the real business of adjudicating conflicts cases. Rather, describing is often the “meat” of the decisionmaking process in conflicts analysis. On this point, the appellate court opinion in *Jarvison* is exemplary. The choice-of-law analysis in *Jarvison*, in the traditional doctrinal sense, consists of only one sentence: “Because domestic relations are considered by the Tribe as being at the core of Navajo sovereignty, we conclude that Navajo law is the appropriate law under which to evaluate the validity of the marriage.”⁸⁶ But the court admirably understands that the real problem posed by the case is one of describing and understanding the nature of the law involved. If, for example, the Jarvisons' marriage could best be described as invalid under Navajo law, then the case would present no conflicts issue at all. Hence the court follows with an extensive, nuanced, and multi-layered discussion of the history and the contemporary law and culture of marriage recognition in Navajo society.⁸⁷ In this respect, the opinion is highly unusual: U.S. courts unfortunately are far more likely to deploy legal fictions, such as the presumption that foreign law is identical to forum law,⁸⁸ or simply read off the parties' pleadings of foreign law a foreign jurisdiction's “rule” of law on a particular question without regard for how that rule fits into its own interpretative context,⁸⁹ or at best to apply “only so much of that law as suits its purposes.”⁹⁰

If this is correct, then the question becomes how best to describe—how to know—foreign (and domestic) law. On this point, anthropological insights have much to contribute.

C. Kindred Projects

In many respects, this article's concerns build upon and amplify those of two important recent interventions in U.S. conflicts discourse. Before discussing the

whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination must be treated as a ruling on a question of law.”).

85. See, e.g., ERNST RABEL, *THE CONFLICT OF LAWS: A COMPARATIVE STUDY* 473–500 (2d ed. 1958); Rudolf B. Schlesinger, *A Recurrent Problem in Transnational Litigation: The Effect of Failure to Invoke or Prove the Applicable Foreign Law*, 59 *CORNELL L. REV.* 1 (1973); BRAINERD CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 3–76 (1963). There are important exceptions. See, e.g., Husserl, *supra* note 14; Nils Jansen & Ralf Michaels, *Die Auslegung und Fortbildung ausländischen Rechts*, 116 *BAND HEFT* 1, 3 (2003); Mathias Reimann, *Comparative Law and Private International Law*, in *OXFORD HANDBOOK OF COMPARATIVE LAW*, *supra* note 68, at 1363.

86. 409 F.3d at 1225 (internal citation omitted).

87. See *id.* at 1225–28.

88. See Gregory S. Alexander, *The Application and Avoidance of Foreign Law in the Law of Conflicts*, 70 *NW. U. L. REV.* 602, 609 (1975).

89. See *id.* at 604.

90. *Id.* at 620.

contributions of anthropological methods to this problem, it may be useful, by way of clarification, to highlight the commonalities and differences between the problem of culture in conflicts as outlined in the previous parts and the problems and solutions articulated by some scholars.

1. Political Conflicts

To some extent, this article echoes concerns expressed by Joseph Singer almost twenty years ago:

Most choice-of-law theories fail to incorporate the notion of conflict into the reasoning process itself. Conflicts reasoning, both in judicial opinions and scholarly articles, often appears one-sided. The decisionmaker or scholar often acknowledges the expectations of one of the parties and ignores the expectations of the other. Or she presents a weak version of the interest and policies of the state and the party who loses. We will make better decisions—fairer and wiser decisions—if we avoid the temptation to belittle the claims of the losing party. We will make better decisions—more knowledgeable decisions—if we recognize what we lose, as well as what we gain, by any choice of law. We will make better decisions if we recognize fully the competing forms of social justice constructed by overlapping normative communities.⁹¹

Singer exposes here the impossibility of the ideals of neutrality and objectivity implicit in many multilateral approaches to conflicts adjudication.⁹² For Professor Singer, the “real conflicts” that courts should focus on are political conflicts, that is, conflicts over the politically contested nature of state policy within any given jurisdiction and over the authority of each state to define its sphere of power relative to other states.⁹³ In this respect, Professor Singer builds on the dominant post-Realist assumption within the field that conflicts problems primarily concern the authority of the political community (or state) over the individual. Although Singer chides other post-Realist scholars for ignoring or obfuscating real conflicts, he shares with those scholars an understanding of what the real conflicts are ultimately about and a view of conflicts problems as not so fundamentally different from ordinary domestic-law problems of statutory or common-law interpretation.⁹⁴

This article’s focus on cultural conflicts begins from the premise of a shared concern with Professor Singer about the political nature of law-making. An understanding of culture as a matter of power and contested authority is central to any sophisticated contemporary notion of culture. The value of the state-interest approach, as reflected in particular in Singer’s more substantive focus on real conflicts, is that it draws attention to the political nature of the conflicts

91. Singer, *supra* note 37, at 79.

92. See Reimann, *Savigny’s Triumph*, *supra* note 49, at 594 (arguing that “neutrality” was a central value of Savigny’s conflicts method, and remains a central value of European conflicts).

93. See Singer, *supra* note 37, at 33 (“In my view, the most important factors include: (1) furthering the substantive policies underlying state laws . . . and (2) furthering multistate policies . . .”).

94. See *id.* at 79. On the Realist treatment of conflicts problems as largely indistinguishable from ordinary domestic problems of legal interpretation, see SYMEONIDES, *supra* note 27, at 14 (arguing that Currie’s approach entailed “a rejection of the theretofore prevailing assumption that conflicts cases are so different from fully domestic cases as to require a distinctive mode of refereeing that draws from principles superior, or at least external, to the involved states”).

involved. It forces attention on the relative political authority of sovereigns—an important achievement in the colonial, postcolonial, and neocolonial context. For example, the curious unwillingness of U.S. courts to apply their own standard, state-interest methodologies to cases involving conflicts with tribal law suggests a latent unwillingness or inability to fully come to terms with tribal sovereignty.⁹⁵ Indeed, as Katherine Florey suggests, were U.S. courts simply to engage in ordinary conflicts analysis—the kind of analysis they routinely deploy in interstate choice-of-law problems—for analyzing conflicts between Native American law and state and federal law, this might seriously advance the cause of Native American sovereignty.⁹⁶

This emphasis on sovereignty, hierarchy, and power is by no means incompatible with a focus on cultural conflict. Feminist and postcolonial anthropology have sharpened attention to various kinds of hierarchy and power within cultures.⁹⁷ Contemporary understandings of culture emphasize the colonial and imperial context of cultural practices, including for example, the ways the very notion of “Native culture” is a product of the practices of the organs of the colonial state, such as its courts, and the double-binds it creates for colonial subjects who must express their hopes and ambitions within the colonial lexicon.⁹⁸ Hence from an anthropological point of view, the question of the relative authority of states over subjects is extremely important, but it is only one aspect of cultural conflict in the context of an understanding of culture as political and contested.

Singer’s proposal is to direct the judge to think first about domestic law—about the real policy conflicts underlying that law—and only later to moderate that thinking with questions about whether there might be any reasons to deviate from forum law. For this reason, Singer’s analysis of conflicts problems essentially collapses into an analysis of substantive-law considerations.⁹⁹ As he acknowledges, his focus on the political nature of lawmaking in the vast

95. See Singer, *Double Bind*, *supra* note 15.

96. See Florey, *supra* note 17, at 1672.

97. See generally WOMEN, CULTURE, AND SOCIETY (Michelle Zimbalist Rosaldo & Louise Lamphere eds., 1974); TOWARD AN ANTHROPOLOGY OF WOMEN (Rayna R. Reiter ed., 1975); SEXUAL MEANINGS: THE CULTURAL CONSTRUCTION OF GENDER AND SEXUALITY (Sherry B. Ortner & Harriet Whitehead eds., 1981); BERNARD S. COHN, COLONIALISM AND ITS FORMS OF KNOWLEDGE: THE BRITISH IN INDIA (1996); JEAN & JOHN COMAROFF, OF REVELATION AND REVOLUTION: CHRISTIANITY, COLONIALISM, AND CONSCIOUSNESS IN SOUTH AFRICA (1991); ANN LAURA STOLER, CARNAL KNOWLEDGE AND IMPERIAL POWER: RACE AND THE INTIMATE IN COLONIAL RULE (2002); NICHOLAS THOMAS, COLONIALISM’S CULTURE: ANTHROPOLOGY, TRAVEL, AND GOVERNMENT (1994).

98. See James F. Weiner, *Culture in a Sealed Envelope: The Concealment of Australian Aboriginal Heritage and Tradition in the Hindmarsh Island Bridge Affair*, 5 J. OF ROYAL ANTHROPOLOGICAL INST. 193 (1999).

99. See Singer, *supra* note 37, at 75 (“To figure out which law is better or which policies should prevail, we would need to engage in the kind of moral, political, and economic analysis in which torts and contracts scholars engage.”).

majority of cases will lead courts to adopt forum law as “better law.”¹⁰⁰ But this raises problems of justice of a different kind.

The cultural-conflict approach advocated here builds on Singer’s and others’ insistence that we not wish real conflicts away, but rather do our best to confront them, and that we understand conflicts problems as problems about conflicts within the relevant jurisdiction’s law as much as problems about conflict between one state’s law and that of another. Yet although Professor Singer’s approach importantly broadens the traditional frame of reference and invites a direct focus on conflict, as with much Realist conflicts analysis, it does so at the expense of becoming far more domestic in its orientation. It arguably does a better job of elucidating the real conflicts within forum law than it does at grappling with the real conflicts between forum and foreign law. The aim of the cultural-conflict approach, in contrast, is to remain as focused on the cross-cultural political contestations at stake in any conflicts problem as on the questions of internal political conflict they raise.

2. Legal Pluralism

Recently, drawing directly on anthropological theory, some commentators have suggested a “pluralistic” approach to conflicts and cognate fields.¹⁰¹ In the pluralistic framework, law is no longer imagined as the exclusive artifact of the nation-state. Rather, diverse “communities”—from minority groups within the nation-state to nonstate actors without the nation-state—are also understood to produce law and regulate behavior. The implication is that the task of conflicts doctrine must be to accommodate these diverse normative orders. For example, a pluralist approach to the choice-of-law problem in *Jarvison* might view it not as a conflict between Navajo statutory law and U.S. federal law, but rather as between Navajo customary law and U.S. federal law. This approach also usefully integrates domestic and transnational issues in conflicts, and it presents a more complex picture of the juridical sources of conflicts problems than standard analyses.

This approach deploys mid-twentieth-century- and more-recent anthropological work on legal pluralism¹⁰² in the service of the principle that communities are the genitors of norms and that the authority of these norms

100. See *id.* at 6.

101. See, e.g., Paul Schiff Berman, *Towards a Cosmopolitan Vision of Conflict of Laws: Redefining Governmental Interests in a Global Era*, 153 U. PA. L. REV. 1819 (2005); Paul Schiff Berman, *Global Legal Pluralism*, 80 S. CAL. L. REV. 1155 (2007); Gunther Teubner, *The Two Faces of Janus: Rethinking Legal Pluralism*, 13 CARDOZO L. REV. 1443 (1992); Andreas Fischer-Lescano & Gunther Teubner, *Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law*, 25 MICH. J. INT’L L. 999 (2004); Anupam Chander, *Diaspora Bonds*, 76 N.Y.U. L. REV. 1005 (2001).

102. See generally Sally Falk Moore, *Legal Systems of the World: An Introductory Guide to Classifications, Typological Interpretations, and Bibliographical Resources*, in LAW AND THE SOCIAL SCIENCES 11, 15 (Leon Lipson & Stanton Wheeler eds., 1986); John Griffiths, *What is Legal Pluralism?*, 24 J. LEGAL PLURALISM & UNOFFICIAL L. 1 (1986); Sally Engle Merry, *Legal Pluralism*, 22 LAW & SOC’Y REV. 869 (1988); Carol J. Greenhouse & Fons Strijbosch, *Legal Pluralism in Industrialized Societies*, 33 J. LEGAL PLURALISM 1 (1993); Franz von Benda-Beckmann, *Who’s Afraid of Legal Pluralism?*, 47 J. LEGAL PLURALISM & UNOFFICIAL L. 37 (2002).

over community members is analogous to the authority of state norms. The problem is that it does not go far enough. That is, although the pluralist approach asserts that cultures are fluid and hybrid rather than singular and internally coherent in nature, it treats cultural diversity simply as an increase in the *quantity* of communities with claims to legitimate authority, which the law of conflicts must therefore adjudicate between. In contrast, the starting point of most contemporary anthropological understandings of culture is that the reality of cultural hybridity and fluidity requires not just imagining a quantitative increase in the number of cultural units, but also understanding culture in a qualitatively different way than as distinct and discrete units. Most anthropologists working today, for example, would not be at all surprised to find Esther Jarvison simultaneously asserting her entitlement to rely on seemingly conflicting cultural norms—accepting some aspects of her own culture, rejecting others—and, by her own daily life choices, silently but emphatically challenging others still and in fact weaving new kinds of legal claims out of what she accepts and rejects from each normative order.

The problem with the new legal pluralism in conflicts, then, is that although it diversifies the range of authorities that must be factored into the analysis, its treatment of these authorities ultimately replicates much of the very statist model it critiques.¹⁰³ It treats cultures as authorities (“communities” with power over “individuals”)—mini-states of a kind. This in turn reinforces a standard way of thinking about conflicts problems. Like the older literature, the new legal pluralism in conflicts is oriented toward judicial decisionmakers, and its understanding of the role of a judge replicates the twentieth-century view of the judge as legal technocrat or engineer above the fray, adjudicating between groups caught in their own particular world-views.¹⁰⁴ In this view, cultures have a certain authentic legitimacy—one wants to protect and give expression to plural cultures—but the tensions among these are also potentially dangerous and need to be managed. The task of law, then, is to develop technical, procedural, quasi-scientific “frameworks”—to engineer practical tools—for managing culture.¹⁰⁵

This understanding of the role of the decisionmaker is appealing because it is empowering. But a modern anthropological view of the judge would require a far more reflexive understanding of the judge’s role in creating the very cultural truths she claims simply to adjudicate. It is useful to recall that an earlier wave of legal pluralism, aimed at building legal institutions in colonies and newly

103. See Ralph 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, 1258 (“In their desire to counter the centrality of the state and to acknowledge the existence of non-state legal orders, legal pluralists make us see more clearly the centrality of the state for our thinking about law and choice of law. Conflict of laws cannot solve the challenge from legal pluralism without also questioning the role and nature of law.”).

104. See Berman, *Global Legal Pluralism*, *supra* note 101, at 1230–32 (outlining the principles that courts should follow toward a pluralistic vision of foreign judgment recognition).

105. The most sophisticated discussion of this understanding of law’s role appears in Berman, *supra* note 25.

independent states, founded precisely on this problem of description: descriptions of customary law taken by colonial and postcolonial courts as “fact” turned out to be colonial translations of the views of certain persons (usually elites) with their own interest in enshrining certain values as the given tradition. The lesson of the legal pluralism experiment, for many of its earlier proponents, became not so much the existence of multiple communities, as is now embraced by proponents of legal pluralism in conflicts, but rather, that the storyteller is part of the story.

The “facts” of culture, then, are not just “out there” to be judicially discovered and adjudicated; rather, they are produced in the intersubjective experience of “collecting” or describing them—the experience of dialogue or confrontation or mutual learning that characterizes legal analysis as much as cultural research.¹⁰⁶ At the very least, this suggests that we must put firmly behind us the view that the task of conflicts is to invent a technocratic device that can manage cultural difference outside of the conflicts apparatus itself. It requires us to acknowledge, in a more reflexive way, that acts of adjudication, from “finding” foreign law to “applying” doctrinal tests, are also politicized descriptions—acts that constitute the communities and problems they claim only to adjudicate between.¹⁰⁷

D. Lateral Thinking

The difficulties in knowing the “truth” of culture—that there is no singular truth to know, that culture is not so much an object as an endless process of translation—surely does not relieve us of the empirical and normative burden to try to understand and know. To return to the *Jarvison* example, simply because there is perhaps no one answer to the question of whether Ben and Esther are “married” under Navajo law should not serve as an excuse for applying forum law without reflection or elaboration, as the U.S. government had assumed the court would do.¹⁰⁸ Rather, the court in *Jarvison* appeared to struggle to approximate a Navajo community member’s thinking about its questions. But it quickly found itself ensnared in the problem of whose perspective it should adopt: who—the courts, the tribal council, ordinary people today, ordinary people a generation ago—should speak for the community. In engaging in this exercise, the *Jarvison* court remained cognizant that the judges could only approximate a Navajo perspective. And yet the court did not throw up its hands and decide that it could not determine questions of Native

106. See generally ANTHROPOLOGICAL LOCATIONS: BOUNDARIES AND GROUNDS OF A FIELD SCIENCE (Akhil Gupta & James Ferguson eds., 1997); ANNA LOWENHAUPT TSING, FRICTION: AN ETHNOGRAPHY OF GLOBAL CONNECTION (2004); Annelise Riles, *Introduction: In Response, in DOCUMENTS: ARTIFACTS OF MODERN KNOWLEDGE* 1, 2 (2006); Aaron Turner, *Embodied Ethnography. Doing Culture*, 8 SOC. ANTHROPOLOGY 51 (2000).

107. See Riles, *supra* note 106, at 25–28.

108. *United States v. Jarvison*, 409 F.3d 1221, 1225 (10th Cir. 2005).

American law.¹⁰⁹ Nor did it “outsource” the difficult task of finding foreign law—by certifying questions of foreign law to Navajo courts, or to other experts. It understood that confronting the misunderstandings and multiple kinds of cultural conflicts at play in the dispute was its principal legal and ethical burden.

This understanding of the normative and ethical dimensions of description in choice of law opens us up to a more “affirmative”¹¹⁰ role of describing-as-adjudicating. As Karen Knop argues, the objective of private international law should be the cosmopolitan one¹¹¹ of developing new kinds of accommodation and understanding. A post-positivist understanding of the difficulties that inhere in the task of determining foreign law therefore also allows us to see this task as an act of accommodation, an effort toward (flawed or partial) understanding and co-construction.¹¹² This has led one commentator to think of private international law as a project of communication—among sources of law and cultural identities.¹¹³ The goal in determining foreign law is a normative and a legal one—accommodation—not an empirical one—truth seeking. It is surely the case that the court’s description of Navajo law and custom in *Jarvison* gets it wrong from many Navajos’ point of view. Yet it could also be argued that the very fact of the honest, affirmative, and committed attempt to get it right is its own achievement. So how should courts and commentators go about these projects of description?

109. See, e.g., *Williams v. Lee*, 358 U.S. 217, 222 (1959) (“There can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves.”); *Strate v. A-1 Contractors*, 520 U.S. 438, 442 (1997) (“[T]ribal courts may not entertain claims against nonmembers arising out of accidents on state highways, absent a statute or treaty authorizing the tribe to govern the conduct of nonmembers on the highway in question.”).

110. See Florey, *supra* note 17, at 1691 (arguing that the application of tribal law by state courts might lead to greater understanding of tribal law by state courts and hence a greater willingness to recognize the judgments of tribal courts).

111. See Berman, *Towards a Cosmopolitan Vision of Conflict of Laws*, *supra* note 101, at 1843, 1861 (“[A] cosmopolitan approach can recognize the possibility that norms of multiple states might apply to different parts of the dispute or that rules might ultimately be blended to account for the variety of normative systems implicated in a given transaction . . . although a cosmopolitan conception of choice of law often seeks to acknowledge and accommodate transnational and international norms, it does not require a universalist belief in a single world community.”).

112. On co-construction, see Iris Jean-Klein & Annelise Riles, *Introducing Discipline: Anthropology and Human Rights Administrations*, 28 POL. & LEGAL ANTHROPOLOGY REV. 173 (2005).

113. Jayme, *supra* note 48, at 259 (“Dès lors que l’on évoque la communication en droit international privé, le phénomène le plus important est le fait que la solution des conflits de lois émerge comme résultat d’un dialogue entre les sources les plus hétérogènes. Les droits de l’homme, les constitutions, les conventions internationales, les systèmes nationaux: toutes ces sources ne s’excluent pas mutuellement; elles ‘parlent’ l’une à l’autre. Les juges sont tenus de coordonner ces sources en écoutant ce qu’elle disent.”) [“As soon as one evokes communication in private international law, the most important phenomenon is the fact that solutions to conflicts between laws emerge as a result of a dialogue between the most heterogeneous sources. Human rights, constitutions, international conventions, national systems: all of these sources do not mutually exclude one another; they ‘speak’ to one another. Judges must coordinate these sources while listening to what they express.”] (author’s translation)

First, as carefully executed by the court in *Jarvison*, and as suggested by the renewed attention to legal pluralism in conflicts, a description of foreign law must include a broader consideration of the place of state law and lawmaking in wider cultural events, conflicts, and debates. To take the example of gay marriage analyzed by Brenda Cossman in her contribution to this symposium,¹¹⁴ a description of Canadian law might require giving attention to the place of the Canadian decisions upholding gay marriage in a wider political context in which, as Karen Knop argues, multiculturalism is a dominant political trope or orientation, and also placing the decision in the context of an understanding of a Canadian legal culture that views one of its crowning achievements, its identifying characteristics and globally exportable doctrines and methods, to be its accommodation of cultural difference.¹¹⁵ This understanding would significantly affect any analysis of the state interests behind Canadian law. It would also sharpen the contrast with the U.S. perspective, in which the courts and the political culture at large have shown far less investment in multiculturalism, and in which assimilation, rather than multiculturalism, is arguably the dominant theme. So understanding the recognition of gay marriage as a matter of cultural conflict involves addressing the differing relationship between law and culture in the two jurisdictions.

Second, any description of another culture is always implicitly a description of one's own. In conflicts cases, for example, the description of foreign law turns on a set of assumptions about what domestic law is, since it is only the differences between domestic and foreign law—and the differences that are relevant according to the standards of domestic law—that are of legal interest. Naming foreign law is an act of naming domestic law, and describing cultural conflict involves describing the foreign culture and the domestic culture, as well as the tensions within each of these. For example, reflecting on Canada's multiculturalist orientation in turn encourages comparative reflection back on the relative absence of such a debate in U.S. political culture. This is why Mathias Reimann suggests that the act of finding foreign law is inherently a comparative exercise.¹¹⁶

On this point, one could be more critical of the *Jarvison* decision. Its careful description of cultural conflict is limited to a description of Navajo law. But it would be highly unusual for a court to do otherwise. In conflicts decisionmaking, there is no parallel introspection into the cultural conflicts at work in forum law. Indeed, the name for the doctrinal problem at issue here is telling: it is the problem of determining *foreign* law.¹¹⁷ The implication is that there is no difficulty about, and probably not even a need for inquiry into, the nature of forum law.

114. See Cossman, *supra* note 17.

115. See Knop, *supra* note 5.

116. See Reimann, *supra* note 85, at 1381.

117. See materials cited *supra* note 85.

The importance of giving attention to the nature of the cultural values of the domestic culture, instead of taking these as an unexamined given, and in particular of focusing on the conflicts among domestic cultural values, and among points of view over those values, can be illustrated again with the example of gay marriage. In some of the cases Brenda Cossman describes, litigants bring suit in order to highlight contention within U.S. society and the potential ambiguity and contradiction within domestic laws on the subject of gay marriage. This internal cultural contention is a piece of the dispute, a subtext that is known to all parties and that surely shapes the outcome of the litigation. But it usually does not appear as an element of the reasoning in the decision itself. In a Realist vein, therefore, there is surely value in making this subtext explicit—in describing the domestic cultural conflict so the description can be affirmed or challenged. But in other cases, this domestic cultural context might turn out to be less important. The Toronto couple, married in Toronto, who relocate to New York and later seek the recognition of their union for the purpose of dissolving it, for example, has a very different objective. An understanding of Ontario law, and perhaps even an understanding of its extraterritorial reach, seems more important than an understanding of New York law.

We can now take this all a step further with the help of some contemporary anthropological theory. In *The Invention of Culture*, Roy Wagner argues that the study of culture presents a problem of cultural “relativity”—of forging a relationship between two sets of cultural values: “[T]he understanding of another culture involves the relationship between two varieties of the human phenomenon; it aims at the creation of an intellectual relation between them, an understanding that includes both of them.”¹¹⁸ Wagner begins with the experience of ethnographic fieldwork, an experience shaped by the risky experience of “culture shock,” of losing all of one’s intellectual and social supports and submitting oneself to another people’s evaluations. In making sense of her culture shock, the anthropologist must come to terms with the relative nature of her own values as she relates the new experience to the old:

The only way in which a researcher could possibly go about the job of creating a relation between such entities would be to simultaneously *know* both of them, to realize the relative character of his own culture through the concrete formulation of another. . . . “Culture” in this sense draws an invisible equal sign between the knower (who comes to know himself) and the known (who are a community of knowers).¹¹⁹

In order to enter into the kind of dialogue with one’s informant that will produce this kind of “invented” understanding, the anthropologist deploys a working fiction: “[I]t is necessary to proceed *as if* culture existed as some monolithic ‘thing.’”¹²⁰ Culture functions as a heuristic for the fieldworker,

118. ROY WAGNER, *THE INVENTION OF CULTURE* 3 (1975).

119. *Id.* at 4.

120. *Id.* at 8.

then—a fiction not unlike legal fictions.¹²¹ It is a tool for translating one set of meanings into another, for “drawing self-knowledge from the understanding of others, and vice-versa.”¹²² Together, the anthropologist and her informant actually collaborate to *invent* that heuristic, Wagner argues—which is not to say that they fabricate lies, but rather that they use the “as if” of an objectified culture to creatively invent new kinds of understandings that neither could produce on his or her own.

This formulation of culture radically changes our orientation away from gathering “the facts” of an “other” culture to understanding ourselves as engaged in a collaborative, intersubjective experiment in creative production, along with “others” whom we regard as cocreators, not merely as “objects” of the researcher’s study.¹²³ Wagner insists, for the anthropological context, that this ethical commitment does not undermine the scientific nature of the inquiry; rather, it humanizes it.

Anthropologists have come to talk about this way of knowing culture as “lateral thinking”¹²⁴: rather than treat culture as a thing “out there” to be studied with “our scientific tools here,” they try to know the world (“here” or “there”) by thinking through familiar problems “as if” through others’ knowledge devices. Rather than describe the “other” as an object of study, these analyses draw from such others a *method* of investigation.¹²⁵ For example, Marilyn Strathern has analyzed debates about the legality and ethics of new reproductive technologies in the United Kingdom using Melanesian conceptions of personhood as her analytical tools,¹²⁶ and I have analyzed the treatment of globalization in international law as if seen through Fijian gift-giving aesthetics.¹²⁷ This kind of analysis draws on extensive ethnographic research among the people whose knowledge practices are deployed; it is not free invention. But it proceeds with an understanding that the very questions being asked are “as if” questions—what would U.K. reproductive technologies look like to Melanesians, or what would the bureaucracy of the UN look like to Fijian mat-makers—very much the authors’ own questions, not theirs. To put it another way, this approach is highly reflexive—its starting premise is an awareness of the place of the storyteller in the creation of the story—and yet it does not abandon the ethical imperative to describe and to engage with others; it does not accept the postmodern claim that all one can do is tell stories about one’s self. Thinking through one’s best approximation of others’ points of view

121. See generally HANS VAHINGER, *THE PHILOSOPHY OF “AS IF”: A SYSTEM OF THE THEORETICAL, PRACTICAL, AND RELIGIOUS FICTIONS OF MANKIND* (C. K. Ogden trans., 1925).

122. Wagner, *supra* note 118, at 16.

123. *Id.*

124. See, e.g., Maurer, *supra* note 70.

125. See, e.g., HIROKAZU MIYAZAKI, *THE METHOD OF HOPE: ANTHROPOLOGY, PHILOSOPHY, AND FIJIAN KNOWLEDGE* (2004).

126. See MARILYN STRATHERN, *AFTER NATURE: ENGLISH KINSHIP IN THE LATE TWENTIETH CENTURY* (1992).

127. See RILES, *supra* note 70, at 70–91.

yields new kinds of insights which would be unthinkable otherwise¹²⁸—and hence which are neither one’s own or those of the others, but the product of collaborative experimentation.

To return to conflicts, one could argue that the normative premise of conflicts doctrine is precisely a mandate to engage in lateral thinking—to think through problems “as if” from another’s point of view. When a court chooses to apply foreign law, it is well understood that it actually chooses to approximate foreign law, as a matter of its own domestic law, since it has no authority to apply anything other than domestic law. Hence an application of foreign law is really an exercise in lateral thinking—of the forum thinking through a legal question as if it were a court sitting elsewhere, with the understanding that this is always its own creative exercise and not a replication of what that foreign court might actually do.¹²⁹

Lateral thinking bears some resemblance to another model of the task in conflicts jurisprudence, the model of translation—in which the project is to “translate[e] the legally foreign, as, [for example], a contract made or to be performed abroad, into the legal reality of the forum.”¹³⁰ Conflicts analysis as lateral thinking resembles conflicts analysis as translation where both aim to find new kinds of commonality, “to build a bridge between domestic legal thought and foreign facts, that the latter may enter the field of legal discussion at the forum as something legally relevant to the case.”¹³¹ But in another respect, lateral thinking and legal translation are precise opposites. Translation makes as-if sense of the foreign in domestic terms. It finds domestic ways of restating foreign law. In contrast, lateral thinking thinks through the domestic in as-if foreign terms. It asks, how would a foreign court, hearing this dispute, make sense of our domestic legal standards?

Consider for example a line of analysis that the court in *Jarvison* could have pursued. As we have seen, the conflicts issue as defined by the court was the validity of the marriage, and the court ruled that according the forum’s own conflicts rules, the validity of the marriage should be determined according to Navajo law. This relatively narrow legal question was nested in a larger legal issue, however: was Esther compelled to testify against the defendant under prevailing rules governing interspousal immunity? The court never entertains the possibility that Navajo law might apply to this larger legal question. The opinion simply assumes, without discussion, that federal law should apply to the

128. See, e.g., Donald Brenneis, *Discourse and Discipline at the National Research Council: A Bureaucratic Bildungsroman*, 9 CULTURAL ANTHROPOLOGY 23 (1994); Tony Crook, *Growing Knowledge in Bolivip, Papua New Guinea*, 69 OCEANIA 225 (1999); MARILYN STRATHERN, *AUDIT CULTURES, ANTHROPOLOGICAL STUDIES IN ACCOUNTABILITY, ETHICS AND THE ACADEMY* (2000); Douglas R. Holmes & George E. Marcus, *Cultures of Expertise and the Management of Globalization: Toward the Re-Functioning of Ethnography*, in GLOBAL ASSEMBLAGES: TECHNOLOGY, POLITICS, AND ETHICS AS ANTHROPOLOGICAL PROBLEMS 235 (Aihwa Ong & Stephen J. Collier eds., 2005).

129. See Husserl, *supra* note 14, at 255.

130. Husserl, *supra* note 14, at 248.

131. *Id.* at 268.

underlying question of interspousal immunity. The unarticulated assumption would seem to be that interspousal immunity is a matter of procedure, and that, according to formalistic doctrinal conventions, matters of procedure are governed by forum law. This assumption is in accordance with Rule 501 of the Federal Rules of Evidence.¹³² But this rule has been criticized for its failure to take into account the substantive conflicts issues at stake in evidentiary questions.¹³³ Or perhaps, despite its sensitivity to questions of description described above, the court relieved itself of the burden of conflicts analysis on this issue through the presumption that forum law and foreign law are identical. The majority notes in its opinion, for example, that a Navajo court decision recognized a similar rule of interspousal immunity,¹³⁴ without elaborating on the legal consequences of this fact.

Whether a rule of evidence should be regarded as substantive or procedural is in fact nothing more than a question as to the extent to which one point of view should accommodate another. Traditional modernist arguments for applying the forum's procedural law, after the demise of the formalist vested-rights-based distinction between substantive rights and procedural remedies,¹³⁵ focus on the cost to judicial resources entailed in researching and applying unfamiliar procedural rules on the one hand,¹³⁶ and concerns about the importance of uniformity on the other.¹³⁷ But another way of thinking about the question whether, in a given dispute, the forum can apply its own procedural rules to a substantive legal claim governed by another jurisdiction's law, or can reserve for itself the right to determine what is procedural and what is substantive, is to ask: How far must the forum go in approximating the thinking of the foreign jurisdiction about this matter? In other words, how much lateral thinking must courts engage in?

A more thorough conflicts analysis might have at least recognized the legal issues at stake in this characterization.¹³⁸ It might have entered into the extensive methodological debates in conflicts about whether the court should characterize

132. See FED. R. EVID. 501 (providing for criminal cases that "the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience").

133. See Dudley, Jr., *supra* note 59, at 1783.

134. *United States v. Jarvison*, 409 F.3d 1221, 1228 (10th Cir. 2005).

135. See RESTATEMENT (SECOND) OF THE CONFLICT OF LAWS §§ 603–604. *But see* *Sun Oil Co. v. Wortman*, 486 U.S. 717 (1988) (endorsing the formalist distinction between substance and procedure in its holding that because statutes of limitations are procedural a forum's application of its own statute of limitation does not violate the Full Faith and Credit Clause of the Constitution).

136. See, e.g., WALTER W. COOK, *THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS* 154, 166 (1942) (focusing on questions of inconvenience for the court).

137. See RESTATEMENT (SECOND) OF THE CONFLICT OF LAWS §§ 290–291 (1971).

138. See EUGENE F. SCOLES, PETER HAY, PATRICK J. BORCHERS & SYMEON C. SYMEONIDES, *CONFLICT OF LAWS* 536–37 (4th ed. 2004) ("As a general rule, the law of the place of trial governs the admissibility of evidence . . . However, there are situations where the public policy of the state of the otherwise applicable substantive law may be so strong or where the law of the latter may have such an important bearing on the result of the litigation so as to 'outweigh the inconvenience imposed upon the courts of the forum by requiring the application of the law of the locus.'").

interspousal immunity as a matter of substance or procedure according to the law of the forum, the law of the place of key events (presumably Navajo law), or according to some comparative analysis of the two.¹³⁹ It might have acknowledged that implicit in the citation to the Navajo decision recognizing spousal immunity was a second description of foreign law, and one that left as much room for a rich, textured account as the question of the meaning of a marriage under Navajo law. The court might have embraced the opportunity to engage in a more expansive exercise in thinking through the cultural conflicts that underlie federal rules governing interspousal immunity as if it were a Navajo court grappling with federal law. Even if substantial similarities existed between the two jurisdictions' rules on interspousal immunity, there no doubt would also be differences of emphasis, differences of styles of reasoning, and differing implicit and explicit normative judgments to be made.¹⁴⁰

E. Expanding the Field Beyond the Resolution of Judicial Disputes

Thinking about conflicts as a discipline devoted to problems of cultural conflict in the law opens up the scope of the field far beyond the resolution of actual disputes before courts. There is reason to bring conflicts thinking and methodologies to bear upon the larger issues at stake in cultural life, even when these go beyond this existing doctrinal scope of choice of law. How to understand cultural conflict, and what a more cosmopolitan form of accommodation not mandated from above might look like, is a question that pervades many aspects of law and culture, and it is one that is increasingly important in diverse legal fields. On these questions the conflict of laws stands to make a unique contribution to wider legal and cultural debates.

In some respects, this broadening of the field of conflicts would bring conflict of laws closer to comparative law. In the traditional view, comparative law is the empirical comparison of different legal systems, whereas conflicts is a set of rules for adjudicating cases that arise because of those differences. This disciplinary distinction builds upon a positivist view of foreign law as something "out there," to be discovered through comparative law, and of adjudication as an act of legal interpretation or of judicial power. One is an academic exercise while the other is a political one;¹⁴¹ one works in the realm of fact while the other works in the realm of law. One is mainly descriptive, whereas the other is mainly normative. One is forward-looking and addresses a full range of legal

139. See generally Reimann, *supra* note 85, at 1384–87.

140. As Mathias Reimann has argued, "comparative analysis is virtually inevitable" in problems of characterization. That is, a choice to view a dispute in a certain way is not just a decision but a description of the content of domestic and foreign law, and a comparative analysis of the two. *Id.* at 1386. The nature of comparison has long been debated in anthropological theory. See, e.g., MARILYN STRATHERN, PARTIAL CONNECTIONS (2005); Marilyn Strathern, *Gender: Division or Comparison?*, in IDEAS OF DIFFERENCE: SOCIAL SPACES AND THE LABOUR OF DIVISION 42 (Kevin Hetherington & Rolland Munro eds., 1997).

141. See Reimann, *supra* note 85, at 1363, 1365 ("[Comparative law's] primary purpose is academic By contrast, private international law is a body of positive rules").

phenomena and problems, while the other is backward-looking, judge-centered, and focused on resolving discrete disputes before actual courts. Yet in practice, some of the most interesting work in conflicts has long been work that blurs disciplinary genres by, for example, studying conflicts problems comparatively.¹⁴²

Yet at the same time, an expanded field of conflicts would maintain a different focus than comparative law. Its emphasis would be not so much on understanding law in its functional or semiotic context as on the points of intersection, conflict, and accommodation in problems of cultural conflict. There are larger questions that lay behind much of conflicts litigation, as well as much other litigation, but they rarely get explored in conflicts analyses because these issues are not raised in the discrete context of litigation. Legal studies as a whole would be enriched if conflicts scholars were to bring their expertise in matters of cultural conflict to bear upon the wider range of issues in law and culture. Likewise, better judicial decisions would ultimately be made in the field of conflicts, if conflicts as an academic field were not limited to the analysis of justiciable questions.

Take, for example, the larger set of political and legal disputes over Native American land claims in the United States that provide the wider context for the sovereignty issues raised by *Jarvison*. In recent years, Native American tribes had argued successfully that in straightforward and narrow doctrinal terms, the appropriation of Native American lands often violated the colonial state's own legal criteria for such appropriation and hence that title properly rested with Native American owners.¹⁴³ In the wake of these advances, a recent Supreme Court decision manipulates longstanding doctrines of property law in order to avoid granting Native American owners any meaningful remedy.¹⁴⁴

The many legal criticisms of recent U.S. court rulings have focused principally on the lawless quality of the reasoning from a narrow, technical legal point of view.¹⁴⁵ Some analyses have brought international law to bear upon the

142. See RABEL, *supra* note 85.

143. See, e.g., *County of Oneida, N.Y. v. Oneida Indian Nation of New York State*, 470 U.S. 226 (1985) (holding that the Oneidas could maintain an action for violation of their possessory rights based on federal common law and that extinguishment of Indian title required the United States' consent); *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 528 F.2d. 370 (1st Cir. 1975) (challenging the validity of several land transfers executed by the Commonwealth of Massachusetts and the State of Maine subsequent to the passage of the Trade and Intercourse Act of 1790, prohibiting the sale of Indian land unless approved by the federal government); *Schaghticoke Tribe of Indians v. Kent Sch. Corp., Inc.*, 423 F. Supp. 780 (D. Conn. 1976) (granting the tribe possession of land that had been alienated in violation of the 1790 Nonintercourse Act); *Mohegan Tribe v. State of Connecticut*, 638 F.2d 612 (2d Cir. 1982) (holding that the Nonintercourse Act was meant to apply to Indian lands throughout the United States).

144. See *City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197 (2005) (holding that equitable defenses of laches, acquiescence, and impossibility barred the Oneida Indian Nation's claim that original territory subsequently repurchased on the open market was part of Oneida territory and hence not subject to municipal taxation).

145. See, e.g., Kathryn Fort, *The (In)Equities of Federal Indian Law* (Jan. 14, 2005) (unpublished Legal Studies Research Paper No. 04-24, Michigan State University) (on file with author) (discussing the inconsistencies in the *Sherrill* case in light of the history of equitable jurisprudence and the defenses

dispute by pointing out that the appropriation of Native American lands and Native Americans' subsequent treatment in U.S. courts violates universal human-rights principles and established practices of treaty interpretation.¹⁴⁶ All of these arguments, for understandable strategic reasons,¹⁴⁷ ask Native American litigants to translate their own views of land and ownership, and of sovereignty and adjudication, into the legal vocabulary of the colonial state—to accept these as the given ground rules of the dispute, to meet the colonial authority on its own discursive ground, before any challenge can begin. This paradox—that in order to challenge colonial law, one must accept its terms—has been a source of considerable moral, political, and strategic debate among Native American groups. Indeed, some groups have been particularly reticent about litigating their claims at all for this reason.¹⁴⁸ At the same time, in criticizing the decision for failing to adhere to existing legal doctrine, these commentators treat any departure from existing doctrine as evidence of bad faith, rather than as a response to the larger political and cultural problems raised by the case. A dualistic picture of rights enforced or denied, and of judges acting in good or bad faith misses the opportunity to ask more, arguably, of the colonial state than simply a judgment in favor of the claimants that would recognize their property rights. Instead, commentators might ask for certain deeper and more affirmative efforts on the part of the majority at understanding—both understanding of Native Americans and self-understanding of the nation's colonial history.¹⁴⁹

What is at stake in these claims, in other words, is a cultural conflict of laws broadly conceived.¹⁵⁰ Even if it is unlikely that a U.S. court will address the

of laches, acquiescence, and impossibility); John C. Mohawk, *The Iroquois Land Claims: A Legacy of Fraud, Politics, and Dispossession*, in *ENDURING LEGACIES: NATIVE AMERICAN TREATIES AND CONTEMPORARY CONTROVERSIES* 81 (Bruce E. Johansen ed., 2004).

146. See, e.g., Arlinda Locklear, *Morality and Justice 200 Years After the Fact*, 37 *NEW ENG. L. REV.* 593, 594 (2003) (arguing that the original basis for Indian land claims was a principle of international law, “the doctrine of discovery” granting the discovering nations “what is referred to as the ‘underlying fee’ or the ‘right of preemption’ to Indian land”); Robert W. Venables, *The Treaty of Canandaigua (1794): Past and Present*, in *ENDURING LEGACIES*, *supra* note 145, at 47. See also Eva Mackey, *Universal Rights in Conflict: “Backlash” and “Benevolent Resistance” to Indigenous Land Rights*, 21 *ANTHROPOLOGY TODAY* 14, 15 (2005) (“The appropriation, settlement and management of land were central to colonialism and the formation of nation-states, both materially and symbolically, and are still central to ideologies of nationhood today. Land rights claims challenge the history and formation of settler nations, and the nationalist narratives that legitimate their existence.”).

147. If U.S. courts are unwilling to apply their own law in a way that is faithful to precedent if the outcome will be a major legal victory for Native American groups, it seems close to politically inconceivable that a U.S. court would hand Native Americans a victory on the basis of the application of tribal law.

148. Interview with Joseph Heath, General Counsel for the Onondaga Nation (July 25, 2006) (videotape on file with author).

149. See Singer, *Double Bind*, *supra* note 15, at 3 (“The best we can do is to minimize the unjust consequences of colonialism and this cannot happen unless the Court learns to tolerate anomalies, apply different legal standards in different contexts, and create an uneasy peace between laws promulgated in different eras that were designed to further opposing public policy agendas.”).

150. *Id.* at 2 (arguing that the manner in which the Supreme Court “seek[s] to harmonize inconsistent precedents and conflicting policies toward Indian nations” might limit those nations

matter in this way in the near future, and hence unlikely that well-counseled plaintiffs will raise the issue of the potential conflict between Native American and colonial law in the context of actual disputes, this does not excuse conflicts scholars from bringing their analytical skills to bear on the wider legal issue. Analyzing the dispute as a matter of a conflict of laws, in the way discussed in this article, yields an alternative set of legal questions about the legal treatment of Native American land claims. Like the postcolonial perspective, it places the political character of judicial and legislative treatment of these claims at the center. But it also focuses attention on the way that politics is refracted through particular kinds of silences, absences, and misunderstandings as political and cultural conflicts come to take legal force.

IV

CONCLUSION

Many conflicts doctrines, maligned for their technical confusion, seem much less absurd and much more principled when they are understood as asking questions about whether, or rather to what extent, decisionmakers should look at problems from the lens of their own cultural categories or attempt to look at those problems through another perspective. These doctrines are not straightforward because they grapple admirably with difficult problems about what the “stopping point” for cultural accommodation might be, once one acknowledges that the truth of one’s observations is constructed through the exercise of making those observations. The open-endedness of the analysis, seen from another point of view, gives courts the flexibility to address the subtleties and sensitivities in cases like *Jarvison*,¹⁵¹ and to face square-on questions about justice, equality, and hierarchy—about problems of ethnocentrism and cultural imperialism—built into ordinary acts of deciding and describing.

A focus on cultural difference and cultural conflicts as a conflicts methodology is not a panacea. Cultural analysis is by definition personal, ambiguous, and open-ended. It is the precise opposite of mechanical analysis, and as such it produces its own inconsistencies of result, not to mention complexities of judicial administration. Cultural conflicts can be frustrating. Thus, some may suggest that if existing conflicts methodologies are already too demanding for the judge, a serious engagement with cultural difference is far too much to ask of the judiciary and even of the litigants.¹⁵²

But whether recognized explicitly or not, courts in their decisions and conflicts scholars in their writings are engaging in acts of cultural conflict—acts of cultural description and cultural analysis that have serious and lasting

“ancient rights and inherent sovereign powers” and, ultimately, subordinate them to state governments).

151. See Florey, *supra* note 17, at 1673 (arguing that this methodological flexibility is particularly important in conflicts involving tribal law).

152. See, e.g., Reimann, *supra* note 85, at 1386.

political and moral consequences. The issue then is, should these remain an unselfconscious, ad hoc, largely amateuristic, and arguably hegemonic exercise, or should we confront our choices and our descriptions head-on and struggle with the frustrating but ultimately important task of making them as sophisticated and principled as we can? The contention here has been that at least these are the right frustrations to have. That is, like the European courts who, through their public-policy analysis have been struggling to understand one another's values and hence to work toward common values,¹⁵³ courts and scholars that take cultural conflict as the dominant lens begin to struggle with the core of the problem.

As already suggested, this area is marked by unwillingness on the part of courts to engage in conflicts analysis *tout court*. But perhaps the problem is not that new methodologies will so complicate matters as to drive courts away. The problem may in fact be the exact opposite—that existing understandings of conflicts do not seem to provide a principled way of making sense of what is at stake in these cases.

A second likely criticism of this proposal will come from two camps that at first blush might seem radically opposed. On the one hand, advocates of a presumption of forum law will regard this article's characterization of the judge's and scholar's responsibilities as far too accommodationist of foreign cultural values and concerns, and possibly even for this reason as lawless. In this view, the judge's role is ultimately to apply forum law. From the opposite camp, a foreign community—particularly a community that is relatively less powerful—may be fearful of the authoritative representation of its values by another, more authoritative, sovereign.

These are reasonable and legitimate fears. It is important to recognize the real dangers and cost associated with lateral thinking in particular and cultural analysis more generally.¹⁵⁴ It is very possible—indeed perhaps likely—that the forum will make sense of foreign law in ways that proceed from its own concerns and hence that it will place its emphasis elsewhere than would a foreign judge.¹⁵⁵ As some Native American commentators point out,¹⁵⁶ when the very nature of dispute-resolution is different, courts that look for substantive rules to apply in their own dispute-resolution context “may inevitably distort and dilute tribal law, interfering with tribes' right to make law in the manner they might wish.”¹⁵⁷ At the same time, it is possible that a richer and more

153. See Muir Watt, *supra* note 4.

154. See Singer, *supra* note 37, at 88 (commenting on the importance of not minimizing the harm caused to the foreign jurisdiction by the forum's choice of law methodology).

155. See Florey, *supra* note 17, at 1690; Gloria Valencia-Weber, *Tribal Courts: Custom and Innovative Law*, 24 N.M. L. REV. 225, 255 (pointing out differences between the customs underlying tribal law and those underlying Anglo-American law, such as the definition of immediate family, the role of extended family, or the fact that “carelessness” rather than negligence is the basis for a defendant's tort liability in tribal law).

156. See Harte, *supra* note 74; Florey, *supra* note 17.

157. See Florey, *supra* note 17, at 1684–85.

substantive engagement with foreign law, and with the cultural conflicts at stake in a dispute, will lead the forum to understand its own legal norms in new ways.

There certainly are reasons to forego an analysis of cultural conflict, then. Particularly in the political context of a long and ongoing history of erosion of Native American legal and cultural authority, one might wish to defer to others in this way.¹⁵⁸ But the core normative impulse of conflict of laws, as a field, is that, despite its costs, the act of engaging, of seriously trying to think through another's categories, as if this were possible, in light of the dangers at stake and the fears they legitimately produce, is its own political, legal, and ethical imperative.

Indeed, it is the fact of the "danger" of representing foreignness that breathes such life into this imperative. Consider once again an example from the parallel multiculturalism debate. In a recent essay, the cultural theorist Ghassan Hage, writing about racist violence in Australia, has asked the question, should we choose hope over fear?¹⁵⁹ As he points out, many politicians in Australia, Europe, and the United States, have advocated a true "politics of hope" over a "politics of fear," and in the process have belittled fears of otherness as paranoid and pathetic. Hage's response is to reject these well-intended progressive political arguments. Hope without fear is no hope at all, he points out: it is easy for states to accommodate and even celebrate minority cultural differences once the minority's power to harm the majority has been so completely eradicated that the majority has no reason at all to fear the minority. But this kind of multiculturalism, what he terms "political necrophilia," is not a politics of hope. Hope, he argues, requires that something be wagered, something be truly risked. Thankfully, however, conflict is not another instance of political necrophilia. Something serious is risked—something is at stake—in every conflict dispute. This is what makes the questions of description at issue in cultural conflicts so immediate and potentially transformative. In the conflict context, it seems, we still have reason to be hopeful about cultural conflict.

158. *See id.* at 1632 (responding to those who argue that it is not appropriate for state and federal courts to decide matters of Indian law by suggesting that state courts might certify some questions of Indian law to tribal courts).

159. *See* Ghassan Hage, *Hoping with Wolves: Can the Colonial Negotiate?*, Monash Univ. Museum Catalogue, "Regarding Hope and Fear" Exhibition (July 2007) (on file with author).