

# *Cornell Law Faculty Publications*

---

Cornell Law Library

*Year 2008*

---

## Cultural Conflicts

Annelise Riles

Cornell Law School, ar254@cornell.edu

# CORNELL LAW SCHOOL

## LEGAL STUDIES RESEARCH PAPER SERIES



### **Cultural Conflicts**

**Annelise Riles**

Cornell Law School  
Myron Taylor Hall  
Ithaca, NY 14853-4901

Cornell Law School research paper No. 08-016

This paper can be downloaded without charge from:  
The Social Science Research Network Electronic Paper Collection:

<http://ssrn.com/abstract=1136864>

# Cultural Conflicts

Annelise Riles \*

|             |   |           |
|-------------|---|-----------|
| <b>I.</b>   | <b>INTRODUCTION.....</b>  | <b>1</b>  |
| <b>II.</b>  | <b>THE STATE POWER AND INDIVIDUAL RIGHTS FOCUS OF CONFLICTS .....</b> | <b>9</b>  |
| A.          | JOSEPH STORY .....  | 10        |
| B.          | THE FIRST RESTATEMENT.....  | 12        |
| C.          | INTEREST ANALYSIS AND THE SECOND RESTATEMENT .....                    | 14        |
| D.          | THE LIMITATIONS OF THE FOCUS ON POLITICAL AUTHORITY .....             | 15        |
| <b>III.</b> | <b>THE PROBLEM OF CULTURAL CONFLICT IN THE CONFLICT OF LAWS .....</b> | <b>20</b> |
| A.          | WHAT IS MEANT BY CULTURE?.....  | 20        |
|             | A PROBLEM OF DESCRIPTION.....   | 24        |
| B.          | .....   | 24        |
| C.          | KINDRED PROJECTS .....  | 31        |
| 1.          | <i>Political Conflicts</i> .....                                      | 31        |
| 2.          | <i>Legal Pluralism</i> .....  | 35        |
| D.          | LATERAL THINKING.....   | 39        |
| E.          | EXPANDING THE FIELD BEYOND THE RESOLUTION OF JUDICIAL DISPUTES .....  | 51        |
| <b>IV.</b>  | <b>CONCLUSION.....</b>  | <b>54</b> |

## I. INTRODUCTION

It is no secret that there is widespread dissatisfaction with the prevailing doctrinal approaches to conflict of laws in the United States.<sup>1</sup> 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, as none has managed to garner sufficient

---

\* Jack G. Clarke Professor of Far East Legal Studies, Cornell Law School, and Professor of Anthropology, Cornell University. For comments and conversation that substantially shaped the direction of this article, I am grateful to Gregory Alexander, Karen Knop, Ralf Michaels, Hirokazu Miyazaki, Eduardo Peñalver, and Kevin Sobel-Read. I am also grateful to Leticia Barrera, Kevin Boroumand, Anna Chehtova, Sergio Latorre and Guillaume Ratel for their research assistance.

<sup>1</sup> This article takes as its point of reference U.S. conflicts law. Where 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.

support and each has been the subject of extensive scholarly and judicial criticism.<sup>2</sup> 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.”<sup>3</sup> At least until the very recent resurgence of interest in the field exemplified by this special issue, moreover, contemporary conflicts problems have not inspired the theoretical interest 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 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 to the creation of a new European culture.<sup>4</sup> Likewise, in her contribution to this issue, Karen Knop reports that in the United Kingdom, Canada, and elsewhere in the common law world, private international law is increasingly a site of cosmopolitan progress on multicultural issues.<sup>5</sup>

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

---

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

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

<sup>4</sup> See 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).

<sup>5</sup> See Karen Knop, *Public/Private Citizenship*, L. & CONTEMP. PROB. (2008).

of issues of individual rights: The central questions conflicts doctrines seek to address are, either, what is the extent, and what are the limits, of a state's legitimate authority to assert jurisdiction or impose its law or demand that its judgments be enforced where a dispute also implicates the power and authority of another political community, or, what is the extent, and what are the limits 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 toolkit<sup>6</sup> 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 framing 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 a vis another. At issue also 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.<sup>7</sup> And crucially, at issue also is a clash of values *within* the foreign culture. Hence a court confronting such a case must

---

<sup>6</sup> See generally Annelise Riles, *A New Agenda for the Cultural Study of Law: Taking on the Technicalities*, 53 BUFFALO LAW REVIEW 973 (2005) (discussing the tool-like quality of U.S. conflicts doctrine).

<sup>7</sup> See, e.g., Horatia Muir Watt, *Yahoo! Cyber-Collision of Clutures: Who Regulates?* 24 MICH. J. INT'L L. 673, 674 (2002-2003) (“[A] growing number of conflicts involve clashing fundamental public values in the international arena”).

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 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.<sup>8</sup> But it is equally true of mundane disputes arising out of garden variety differences between California and Nevada’s laws governing the vicarious liability of tavern owners for patrons’ torts while under the influence of alcohol,<sup>9</sup> or Toronto and New York state’s differing rules concerning a driver’s liability to guests for torts arising out of automobile accidents.<sup>10</sup> 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”<sup>11</sup> or “the needs of the international system.”<sup>12</sup> 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

---

<sup>8</sup> See generally Bill Maurer, *Anthropological and Accounting Knowledge in Islamic Banking and Finance: Rethinking Critical Accounts*, 8 (4) J. OF THE ROYAL ANTHROPOLOGICAL INST. 645 (2002); MUTUAL LIFE, LIMITED, ISLAMIC BANKING, ALTERNATIVE CURRENCIES, LATERAL REASON (2005).

<sup>9</sup> See *Bernhard v Harrah’s Club*, 16 Cal. 3d 313 (1976).

<sup>10</sup> See *Babcock v. Jackson*, 23 N.Y. 2d. 473 (1963).

<sup>11</sup> AMERICAN LAW INSTITUTE, RESTATEMENT (SECOND) OF THE LAW CONFLICT OF LAWS § 6(2)(d) (1971).

<sup>12</sup> *Id.* at § 6(2)(a) (1971).

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,<sup>13</sup> 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.<sup>14</sup> As a social science, 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

---

<sup>13</sup> See, e.g., EDMUND LEACH, *CUSTOM LAW AND TERRORIST VIOLENCE* (1977) 21 (“[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.”)

<sup>14</sup> See Gerhart Husserl, *The Foreign Fact Element in Conflict of Laws*, 26 *VIRGINIA L. REV.* 243, 261-262, 267 (arguing that “[a]ll Private International Law,, gives unmistakable expression to the view that the realm of domestic law is limited” but adding that “Where 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 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 of cultural relativism in anthropology, see Karen Engle, *From Skepticism to Embrace: Human Rights and the American Anthropological Association from 1947 to 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).

in 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<sup>15</sup> and arguably is 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.”<sup>16</sup>

In other words, conflicts between Native American and federal and state law makes it possible to see, in greater relief, the cultural conflict dimensions of all conflicts problems, including those routine conflicts problems analyzed rather in the vocabularies of state

---

<sup>15</sup> See e.g., *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543 (1823); Joseph W. 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. F1 (2005) (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”).

<sup>16</sup> 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, 1051-1055 (2007) (questioning liberal standards of good governance as they relate to Indian Nations, and proposing, instead, a theory of good Native governance)

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 unrecognized and unanalyzed examples of cultural conflict embodied in more common forms of intra-state 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.<sup>17</sup> Courts in these cases routinely 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 can readily yield the application of forum law.<sup>18</sup>

---

<sup>17</sup> See Brenda Cossman, *Between and Between Recognition: Migrating Same Sex Marriages and the Turn to the Private*, 71 LAW & CONTEMP. PROBS. 71 (2008) (arguing that what is striking about most “conflicts” cases concerning gay marriage is the total absence of conflicts analysis as courts simply apply forum law without discussion); Florey, *supra* note XX at 162-68 (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 where the Federal Tort Claims Act mandates that the law of the place of the tort shall apply to claims against the federal government, and where 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.”)

<sup>18</sup> See e.g. *Bournias v Atlantic Maritime 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., *Pueblo of Laguna v Pueblo of Acoma*, 1 N.M. 220; 1857 N.M. LEXIS 10; *Jim v. CIT Financial Services Corporation* 87 N.M. 362; 533 P.2d.751 (1975); *Nez v Forney* 109 N.M. 161; 783 P.2d 471 (1989); *Lonewolf v. Lonewolf*, 99 N.M. 300; 657 P.2d 627. (1982); *State ex rel. Vega v. Medina*, 549 N.W. 2d.507, 1996 Iowa Supp. LEXIS 282, *Wilson v. Marchington*, 127 F.3d 805 (1997). The same tendency appears in the decisions of Native American courts. See, e.g., *Hopi Indian Credit Assoc. v. Thomas*, 25 ILR 6168-6170 (1998); *Jacobson v. Mashantucket Pequot Gaming Enterprise*. 32 ILR 6062 (2005); *Anderson Petroleum Services, Inc. v. Chuska Energy and Petroleum Co.*, 4 Nav. R. 187 (1983); *MacDonald v. Ellison*, No. SC-CV-44-96 (Navajo 12/15/1999); *Russell v. Donaldson*, 3 Nav. R. 209 (Navajo 03/05/1982); *MacDonald v. Ellison*, No. SC-CV-44-96 (Navajo 12/15/1999). Cf. Robert D.

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' effort to grapple seriously with the problem of cultural conflict, then their very flaws may become their virtues.

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.

Section 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. Section III turns to debates in

---

Cooter & Wolfgang Fikentscher, *Indian Common Law: The Role of Custom in American Indian Tribal Courts (II)*, 46 AM. J. COMP. L. 510, 559 (1998) (reporting that in interviews with judges and other legal experts in Native American tribunals "we often found...the deep-rooted conviction that tribal courts apply tribal law, and state courts apply state law") *But see Satiacum v. Reagan*, 10 Indian L. Rep. 6009 (1982) (Navajo Tribal Court applied state law based on principles of comity). This case is analyzed in NAFZIGER, *supra* note XX, at 263.

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 as “lateral thinking” in anthropology. Section IV applies this understanding of cultural conflict 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 untenable. Conflicts as a field should devote as much care to “knowing” foreign law as to deciding which law applies—indeed, from the point of view of cultural conflicts, the distinction between these two is logically and morally untenable. Drawing on the example of conflicts over choice of law between Native American and U.S. national and state courts, this section presents several examples of the doctrinal implications of this insight. Section V 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.<sup>21</sup>

#### A. *Joseph Story*

The starting point of Joseph Story's approach to conflicts, as 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.<sup>22</sup> 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 state to adjudicate matters before it, as a matter of the application of its own law.<sup>23</sup>

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 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:

---

<sup>21</sup> This section 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 section can be neatly arranged chronologically. As I have argued elsewhere, many of the insights associated with the Realist Revolution in conflicts can actually be found in earlier approaches. *See generally*, Riles, *supra* note 6.

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

<sup>23</sup> *See id.* at 8, § 8 (sovereignty “has no admitted superior, and...gives the supreme law within its own domains on all subjects appertaining to its sovereignty”).

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.<sup>24</sup>

---

<sup>24</sup> See *id.* at 1–2 .

Indeed, Story wrote at a moment of extreme tension over 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.<sup>25</sup> Yet these issues for the most part remain in the margins;<sup>26</sup> the analysis is directed, rather, toward questions of state power, and one could say that Story's rhetorical achievement is to compartmentalize the slavery question and proceduralize it within the technical doctrines of conflicts.<sup>27</sup>

### B. *The First Restatement*

In the received history of the discipline, the methodology advocated in Joseph Beale's First Restatement<sup>28</sup>—still followed by courts in many U.S. jurisdictions<sup>29</sup>—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 follow foreign law, as a matter of forum law, if they so choose,<sup>30</sup> Beale's vested rights approach presents, at least at first blush, a rather more mechanical picture of conflicts adjudication: “an act valid where done cannot be called into question anywhere.”<sup>31</sup> Likewise, while Story focuses primarily on the nature of state power, Beale

---

<sup>25</sup> Story himself opposed slavery but he authored the Supreme Court opinion that found fugitive slave acts to be constitutional. *See* STORY, *supra* note 18, at p.97 § 33 (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).

<sup>26</sup> *See* STORY, *supra* note 15 at 28-29 (discussing how his conflicts analysis would address the slavery issue).

<sup>27</sup> On the proceduralization of politics in the transnational realm as a rhetorical achievement of jurists, *see generally* Berman, *infra* note XX; DAVID KENNEDY, *INTERNATIONAL LEGAL STRUCTURES* (1987).

<sup>28</sup> *See* Restatement (First) Conflicts of Law (1934).

<sup>29</sup> *See* SYMEON C. SYMEONIDES, *THE AMERICAN CHOICE-OF-LAW REVOLUTION: PAST, PRESENT AND FUTURE* 65 (2006).

<sup>30</sup> *See* STORY, *supra* note 18, at § 38.

<sup>31</sup> J. BEALE, *TREATISE ON THE CONFLICT OF LAWS* § 73 at 105 (1916).

focuses primarily on the nature of individual rights.<sup>32</sup> Judges simply enforce pre-existing 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 a vis the individual.<sup>33</sup> In this understanding, an individual's rights trump state power both domestically<sup>34</sup> and internationally.<sup>35</sup> This understanding of vested rights as a matter of individual rights also translates into an understanding of the boundaries of state power: vested rights limits the authority of another sovereign over the rights created (vested) within its territorial boundaries.<sup>36</sup> But rather than assuming 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. Thus for present purposes, what is most interesting is what the two approaches share. Both assume that conflicts is about the nature of political authority,<sup>37</sup> whether it takes the form of state power, of individual rights, or of some mix of the two.

---

<sup>32</sup> JOSEPH HENRY BEALE, *I A TREATISE ON THE CONFLICT OF LAWS OR PRIVATE INTERNATIONAL LAW* (1916) (“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....”)

<sup>33</sup> See BEALE, *supra* note 31, at §450 (1934) (discussing the effect of a foreign judgement).

<sup>34</sup> See GREGORY S. ALEXANDER, *COMMODITY & PROPRIETY, COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT 1776-1970* 311-50 (1997).

<sup>35</sup> See ALBERT VENN DICEY, *A DIGEST OF THE LAW OF ENGLAND WITH REFERENCE TO THE CONFLICT OF LAWS* (2<sup>nd</sup> ed. 1908), xxxi,16, 23, 32-3; 3 JOSEPH H. BEALE, *A TREATISE ON THE CONFLICTS OF LAWS* 1969 (1935).

<sup>36</sup> BEALE, *supra* note 32, at 116 (“in 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.”)

<sup>37</sup> See LEA BRILMAYER, *CONFLICT OF LAWS* 240-262 (1995).

*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, adopted by the largest number of U.S. jurisdictions today,<sup>39</sup> 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.”<sup>40</sup>

If, in the opening paragraphs of Story’s text, at least, 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 just a matter of ordinary statutory or judicial interpretation:<sup>42</sup> 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.<sup>43</sup> As numerous critics have pointed out, these decisions fail

---

<sup>39</sup> See SYMEONIDES, *supra* note XX, at 65.

<sup>40</sup> Joseph William Singer, *Real Conflicts*, 69 B.U.L. REV. 3, 7–78 (1989).

<sup>42</sup> Brainerd Currie, *Married Women’s Contracts: A Study in Conflict-of-Laws Method*, 25 U. CHI. L. REV. 227 (1958).

<sup>43</sup> See *e.g.*, *Sosa v. Alvarez-Machain* 542 U.S. 692 (2004) (upholding the “foreign country” exception to a waiver of government’s sovereign immunity under the Federal Tort Alien Claims (FTCA)) (“Foreign country exception” [...] bars all claims against federal government based on any injury suffered in foreign country, regardless of where the tortious act or omission giving rise to that injury occurred”); *U.S. v. Delgado-Garcia* 544 U.S. 950 (2005) (denying petition for writ of certiorari to the United Court of Appeals for the District of Columbia Circuit holding that statutes of conviction applied extraterritorially).

even to consider issues beyond questions of domestic legislative intent;<sup>44</sup> the assumption is not only that state power is what is at issue, but that there are no countervailing concerns even of 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 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 commitments 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*

There are many reasons to focus on questions of state power and legitimacy, or on the scope of individual rights, in conflicts analysis. But like all perspectives, this perspective illuminates some issues and obscures others. By focusing entirely on state authority and legitimacy, or by focusing on a priori notions of political rights, and hence by translating directly between the conflict between individual litigants on the one hand, and the interests of the state that asserts sovereignty over them, or the scope of the individual litigants' political rights on the other, these analyses leave little room for exploring the

---

<sup>44</sup> 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 L. 81, 91 (Fall 2004); Harlan Grant Cohen, *Supremacy and Diplomacy: The International Law of the U.S. Supreme Court*, 24 BERKELEY J. INT'L L. 273, 285-6 (2006); Mark Knights, *Recent Decisions of the United States Court of Appeals for the District of Columbia Circuit: Criminal Cases*, 74 GEO. WASH. L. REV. 754, 770 (2006)..

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 Ben Jarvison*.<sup>45</sup> 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 inter-spousal privileges. Esther and Ben had lived together and had two children together from 1953 until 1980 when Ben commenced a relationship with Esther's daughter by a prior relationship, and they had lived together on and off again since 2000.<sup>46</sup> Navajo records on the couple were equivocal on the status of their union.<sup>47</sup> 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

---

<sup>45</sup> 409 F.3d 1221 (10th Cir. 2005).

<sup>46</sup> *Id.* at 1223. The alleged abuse occurred in 2000 when the couple was living together. *Id.*

<sup>47</sup> The Navajo Vital Records Office held documents in which Ben Jarvison checked "no" in the box marked "married" but did list Esther as his "wife". *Id.*

marriage was a “sham” invented solely for the purpose of evading testimony.<sup>48</sup> The conflicts issue, as framed by the court, then, was “what law would apply to the question of a marriage between two Navajo tribal members who live completely within the boundaries of the Navajo Reservation.”<sup>49</sup>

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 statutory and constitutional law interpretations to which Currie sought to analogize conflicts.<sup>50</sup> When the issue is a matter of conflicts analysis, rather than of

---

<sup>48</sup> *Id.* at 1224.

<sup>49</sup> *Id.* at 1225.

<sup>50</sup>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*, 98 S.Ct. 1670 (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 XX; Lucy A. Curry, *A Closer Look at Santa Clara Pueblo v. Martinez: Membership by Sex, by Race, and by Tribal Tradition*, 16 *Wisconsin Women’s Law Journal* 161 (2001); Francine R. Skenandore, *Revisiting*

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.<sup>59</sup> 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.<sup>60</sup> At least since Savigny, these larger questions have been as much a part of the unstated, but implicitly recognized project of

---

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 Mackinnon, Whose Culture? A Case Note on Martinez v. Santa Clara Pueblo (1983), in FEMINISM UNMODIFIED 63 (1987). It is interesting that where the interpretation 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.

<sup>59</sup> Cite to Karen Knop.

<sup>60</sup> See Erik Jayme, Identité Culturelle et Intégration : Le Droit International Privé Postmoderne, 251 RECEUIL DES COURS. COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 9, 52–3 (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 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 juridical system can be justified by another principle, such as for example 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).

modern private international law as the question of the scope of state power.<sup>61</sup> 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.”<sup>62</sup> Husserl’s drawing of the sphere of cultural commonality around the boundaries of Western civilization is of course in need of updating and also indicative of the possible dangers of the cultural basis of conflicts rules. 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,<sup>63</sup> or again, the question of how to define the state interests at play in a particular legal rule. But the methodologies do not encourage sustained analysis of these questions. One of the classic criticisms of interest analysis is that the definition of state interests is too mechanical<sup>64</sup>—that interest analysis proceeds from an almost a 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.

---

<sup>61</sup> FRIEDRICH CARL VON SAVIGNY, I SYSTEM OF THE MODERN ROMAN LAW 15–16 (William Holloway trans. 1979) (“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).

<sup>62</sup> Husserl, *supra* note XX, at 267.

<sup>63</sup> See generally LEA BRILMAYER, CONFLICT OF LAWS 17 (1995).

<sup>64</sup> 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 and 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.<sup>79</sup> Rather, as Karen Knop points out in her article in this issue,<sup>80</sup> 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 are always changing.<sup>81</sup> From this point of view, “culture” is more of a constant act of translation and recreation or re-presentation than it is a fixed and given thing.<sup>82</sup> 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.<sup>83</sup>

---

<sup>79</sup> See CLIFFORD GEERTZ, *THE INTERPRETATION OF CULTURES* 11 (1973) (arguing against the view of culture as a “super-organic”).

<sup>80</sup> cite

<sup>81</sup> See Lan Cao, *Culture Change*, 47VA. J. INT’L L. 357 (2007).

<sup>82</sup> Although this is sometimes described as an effect of globalization, anthropological research suggests that there probably has never a society in which this was not already true.

<sup>83</sup> 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 Nakazoto, *The Rational Litigant:*

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, and the ultimate harm. 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 this intuition that a difficult cultural choice must be made—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.<sup>84</sup>

But if we reflect further on the case, this understanding of the conflict 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 long-standing doctrine of interspousal testimonial immunity, built on assumptions about the privacy of communication between spouses.<sup>85</sup> As the court points out in its decision, it is equally well established that the government cannot compel one spouse to testify against another.<sup>86</sup> 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

---

*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 choices are dictated by culture).

<sup>84</sup> The *Jarvison* court draws this analogy by citing to *Santa Clara Pueblo*, *supra*, note XX.

<sup>85</sup> 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 Rules of Evidence 501: Privilege and Vertical Choice of Law*, 82 GEO. L. J. 1781, 1814 n. 157 (“The purpose of the testimonial immunity doctrine is to preserve marital harmony from unwarranted intrusion by the state.”)

<sup>86</sup> 409 F.3d 1221 (10th Cir. 2005). at 1232 (citing *Trammel v. United States*, 445 US 40, 53 (1980)).

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,<sup>87</sup> and 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 also in Navajo law.<sup>88</sup>

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;<sup>89</sup> on the other hand, some commentators and doctrines gravitate toward a kind of "public policy exception" for interference in this zone of autonomy necessary 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.<sup>90</sup>

---

<sup>87</sup> See BRENDA COSSMAN, *SEXUAL CITIZENS: THE LEGAL AND CULTURAL REGULATION OF SEX AND BELONGING* 73–83 (2007).

<sup>88</sup> 409 F.3d 1221, 1228 (10th Cir. 2005) (citing *Navajo Nation v. Murphy*, 6 Navajo Rptr. 10, 13 (Navajo 1988)).

<sup>89</sup> Family relations have been one of the areas of expansion of substantive due process doctrine in the recent years, in particular 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 (1997) (striking down a city's ordinance limiting the fundamental right of family members to reside together); *Troxel v. Granville*, 530 U.S. 57 (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 that a Wisconsin statute imposing requirements on parents under court order to support out-of-custody children to be permitted to remarry "unnecessarily impinged on the right to marry"). Nonetheless, even though the Court has granted marriage fundamental right status, the right of persons of same sex to marry has not been acknowledged as a fundamental right.

<sup>90</sup> *Jarvison*, 409 F 3d at 1231.

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.<sup>91</sup> 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 are replete with changes and reversals of their own on the question of what constitutes a valid marriage as differing legal institutions struggled with how to accommodate custom with the demands of running a modern administrative state.<sup>92</sup> There is no single answer to the question of what are Navajo cultural norms about the validity of marriage, just as there is no singular answer to the question of what is the scope of autonomy of the family from state intrusion in Euro-American culture.<sup>93</sup>

### *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

---

<sup>91</sup> 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 *supra* note XX.

<sup>92</sup> 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).

<sup>93</sup> See, e.g., *Hopi Indian Credit Assoc. v. Thomas*, 25 ILR 6168-6170 (1998) (decision of the appellate court of the Hopi tribe treats Hopi custom as raising problems of pleading and proof analogous to foreign law and argues that F.R.C.P. 44.1 concerning the application of foreign law is “instructive” on the question of how to interpret Hopi customs).

singular, too determinative, too all-encompassing.<sup>94</sup> But it is also to ignore how legal rules, legal technique, and legal expertise are their own cultural force.<sup>95</sup> One way law shapes the culture is by describing that larger culture in authoritative settings such as legal documents and judicial decisions.<sup>96</sup> Like it or not, the *Jarvison* case is an authoritative (if contestable and contested) statement about what constitutes a valid marriage under Navajo law.<sup>97</sup> Whether its adjudicators are even aware it is doing so, “U.S. law represents Native Americans . . . in a particular way.”<sup>98</sup> As Audra Simpson’s article for this issue 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.<sup>99</sup>

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 the negative consequences of getting it wrong,<sup>100</sup> while others have argued that the

---

<sup>94</sup> See Annelise Riles, *Comparative Law and Socio-Legal Studies*, in OXFORD HANDBOOK OF COMPARATIVE LAW 775, 802–03 (Mathias Reimann & Reinhardt Zimmerman eds., 2006).

<sup>95</sup> See generally, Gunther Teubner, *How the law thinks: toward a constructivist epistemology of law*, 23 L. & SOC. 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”).

<sup>96</sup> 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); ANNEISE RILES, *THE NETWORK INSIDE OUT* (2000).

<sup>97</sup> 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.

<sup>98</sup> MARIANNE CONSTABLE, *JUST SILENCES: THE LIMITS AND POSSIBILITIES OF MODERN LAW* 75 (2005).

<sup>99</sup> See Audra Simpson, Article in this symposium

<sup>100</sup> 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).

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.<sup>101</sup>

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.<sup>102</sup> What 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”<sup>103</sup> 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.

---

<sup>101</sup> See 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 (2006).

<sup>102</sup> *Jarvison*, 409 F 3d at 1224.

<sup>103</sup> *Id.* at 1232 (Anderson, J., dissenting).

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

The 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.”<sup>104</sup>

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.”<sup>105</sup> 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 autonomy from colonial state intrusion traditionally accorded to subjugated cultural minorities by modern nation-states in matters of family law.<sup>106</sup>

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.

---

<sup>104</sup> *Id.* (citations omitted)..

<sup>105</sup> *Id.* at 1232.

<sup>106</sup> *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)..

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.<sup>107</sup> So on closer analysis, the federal law bears the 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."<sup>108</sup> 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

---

<sup>107</sup> See MARIANNE CONSTABLE, *JUST SILENCES: THE LIMITS AND POSSIBILITIES OF MODERN LAW* 85-90 (2005).

<sup>108</sup> *Id.* at 89.

hear.”<sup>109</sup> 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 cases in 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.<sup>110</sup> On the whole, conflicts scholars have also failed to appreciate the analytical and normative

---

<sup>109</sup> *Id.* at 92. See also Jacques Derrida, *Force of Law: The “Mystical Foundation of Authority”*, 11 CARDOZO L. REV. 919 (Mary Quaintance, trans. 1989-1990); Charles M. Yablon, *Forms*, 11 CARDOZO L. REV. 1349 (1989-1990).

<sup>110</sup> See Alexander, *supra* note XX, at 608. FRCP 44.1 states, “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, 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.” As Amended Dec. 1, 2007.

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.<sup>111</sup>

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 *U.S. v 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.”<sup>114</sup> 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 have presented no conflicts issue at all. Hence the court follows with an extensive, nuanced and multi-layered discussion of the history and contemporary law and culture of marriage recognition in Navajo society.<sup>115</sup> 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,<sup>116</sup>

---

<sup>111</sup> See, e.g., ERNST RABEL, 4 THE CONFLICT OF LAWS: A COMPARATIVE STUDY 473-500 (1958); Rudolf 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 xx; Ralf Michaels & Nils Jansen, *Die Auslegung Und Fortbildung Ausländischen Rechts*, ZZP . 116. Band . Heft 1 . 2003 p. 3.; Mathias Reimann, *Comparative Law and Private International Law*, in OXFORD HANDBOOK OF COMPARATIVE LAW, *supra* note xx, at 1363.

<sup>114</sup> 409 F.3d at 1225 (citation omitted).

<sup>115</sup> See *id.* at 1225–1228.

<sup>116</sup> See Gregory Alexander, *The Application and Avoidance of Foreign Law in the Law of Conflicts*, 70 NORTHWESTERN L. REV. 602, 609 (1975).

or at best to 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 interpretive context,<sup>117</sup> or at best to apply "only so much of that law as suits its purposes."<sup>118</sup>

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, and these questions are the focus of Section C.

### *B. 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 contributions of anthropological methods to this problem, it may be useful at this stage, by way of clarification, to highlight the commonalities and differences between the problem of culture in conflicts as outlined in the previous sections and the problems and solutions articulated by these authors.

#### **1. Political Conflicts**

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

---

<sup>117</sup> *See id.* at 604.

<sup>118</sup> *Id.* at 620.

<sup>126</sup> Singer, *supra* note 40, at 79.

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.<sup>126</sup>

Singer exposes here the impossibility of the ideals of neutrality and objectivity implicit in many multilateral approaches to conflicts adjudication.<sup>127</sup> 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.<sup>128</sup> In this respect, Professor Singer builds on the dominant post-realist assumption within the field

---

<sup>127</sup> See Reimann, *Savigny's Triumph*, *supra* note XX, at 594 (arguing that “neutrality” was a central value of Savigny’s conflicts method, and remains a central value of European conflicts).

<sup>128</sup> See *id.* at 33 (“In my view, the most important factors include: (1) furthering the substantive policies underlying state laws . . . and (2) furthering multistate policies . . . .”)

that conflicts problems primarily concern questions of 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.<sup>129</sup>

A 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 Joseph Singer's more substantive focus on real conflicts, is that it draws attention to the political nature of the conflicts 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.<sup>130</sup>

Indeed, as Katherine Florey suggests, were U.S. courts simply to engage in ordinary conflicts analysis—the kind of analysis they routinely deploy in inter-state choice-of-law

---

<sup>129</sup> See *id.* at 79. On the Realist treatment of conflicts problems as largely indistinguishable from ordinary domestic problems of legal interpretation, see SYMEON C. SYMEONIDES, *THE AMERICAN CHOICE-OF-LAW REVOLUTION: PAST, PRESENT AND FUTURE* 14 (2006) (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").

<sup>130</sup> See, Singer, *Reply Double Bind: Indian Nations v. The Supreme Court*, *supra* note 10.

problems—for analyzing conflicts between Native American law and state and federal law, this might seriously advance the cause of Native American sovereignty.<sup>131</sup>

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.<sup>132</sup> 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.<sup>133</sup> 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

---

<sup>131</sup> See Florey, *supra* note 62, at 150-1.

<sup>132</sup> See, generally, MICHELLE Z. ROSALDO & LOUISE LAMPHERE, *WOMEN, CULTURE, AND SOCIETY* (1974); RAYNA REITER, *TOWARD AN ANTHROPOLOGY OF WOMEN* (1975); SHERRY B. ORTNER & HARRIET WHITEHEAD, *SEXUAL MEANINGS, THE CULTURAL CONSTRUCTION OF GENDER AND SEXUALITY* (1981); BERNARD S. COHN, *COLONIALISM AND ITS FORMS OF KNOWLEDGE: THE BRITISH IN INDIA* (1996); JOHN & JEAN 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).

<sup>133</sup> See James F. Weiner, *Culture in a Sealed envelope: The Concealment of Australian Aboriginal Heritage and Tradition in the Hindmarsh Island Bridge Affair*, 5 (2) *J. OF ROYAL ANTHROPOLOGICAL INSTITUTE* 193 (1999).

substantive law considerations.<sup>134</sup> As he acknowledges, his focus on the political nature of law-making in the vast majority of cases will lead courts to adopt forum law as “better law.”<sup>135</sup> 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 while Professor Singer’s approach importantly broadens the 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 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.<sup>136</sup> In the pluralistic framework, law is no longer imagined as the exclusive artifact of the nation-state. Rather,

---

<sup>134</sup> See Singer, *supra* note 40, 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.”)

<sup>135</sup> See *id.* at 6.

<sup>136</sup> 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); *Global Legal Pluralism*, 80 S. CAL. L. REV. 1115 (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).

diverse “communities”—from minority groups within the nation-state to non-state 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 *US v Jarvison* might view it not as a conflict between Navajo statutory law and U.S. federal law, but rather 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 conflicts problems than standard analyses.

This approach deploys mid-twentieth century and more recent anthropological work on legal pluralism<sup>137</sup> in the service of the principle that communities are the genitors of norms and that the authority of these norms 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

---

<sup>137</sup> 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., 11 (1986); John Griffiths, *What is Legal Pluralism?*, 24 *J. OF LEGAL PLURALISM AND UNOFFICIAL LAW* 1 (1986); Sally Engle Merry, *Legal Pluralism*, 22 (5) *L. & SOC'Y REV.* 869 (1988); Carol Greenhouse & Fons Strijbosch, *Legal Pluralism in Industrialized Societies*, 33 *J. OF LEGAL PLURALISM* (special issue) (1993); Franz von Benda-Beckmann, *Who's Afraid of Legal Pluralism?*, 47 *J. LEGAL PLURALISM & UNOFFICIAL L.* 37 (2002).

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.<sup>138</sup> 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.<sup>139</sup> 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.<sup>140</sup>

---

<sup>138</sup> 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.”)

<sup>139</sup> See Berman, *Global Legal Pluralism*, *supra* note 72, 1230-2 (outlining the principles that courts should follow toward a pluralistic vision of foreign judgment recognition).

<sup>140</sup> See “*But the Alternative is Despair*”: *European Nationalism and the Modernist Renewal of International Law*, 106 HARV. L.REV. 1792 (1993).

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 independent states, foundered 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 truly significant 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.

As argued above, the "facts" of culture 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.<sup>141</sup> 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

---

<sup>141</sup> 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 (Annelise Riles, ed. 2006); Aaron Turner, *Embodied Ethnography. Doing Culture*, 8 SOC. ANTH.51 (2000).

descriptions—acts that constitute the communities and problems they claim only to adjudicate between.<sup>142</sup>

### C. *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 simply for applying forum law without reflection or elaboration, as the government had assumed it would do.<sup>143</sup> The court in Jarvison appeared to struggle to approximate a Navajo community member’s thinking about its questions and interestingly 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. But in engaging in this exercise, the Jarvison court remained clearly cognizant that the judges could only approximate a Navajo perspective. And yet the court does not throw up its hands and decide that it cannot determine questions of Native American law.<sup>144</sup> Nor did it “outsource” the difficult task of finding foreign law—by certifying questions of foreign law to Navajo

---

<sup>142</sup> See Riles, *supra* note 112, at 25–28.

<sup>143</sup> Jarvison at 1225.

<sup>144</sup> See, e.g. *Williams v. Lee*, 358 U.S. 217 (1959) (holding that “Arizona courts are not free to exercise jurisdiction over civil suit by one who is not an Indian against Indian where cause of action arises on Indian reservation”); *Strate v. A-1 Contractors*, 520 U.S. 438, 454 (1997) (ruling that “when accident occurred on a portion of public highway maintained by state under federally granted right-of-way over Indian reservation land, tribal courts could not entertain civil action against allegedly negligent driver or driver’s negligent employer, neither of whom was a member of tribe, absent a statute or treaty authorizing tribe to govern conduct of nonmembers on highway in question”).

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”<sup>145</sup> role of describing-as-adjudicating. As Karen Knop argues, the objective of private international law should be the cosmopolitan one<sup>146</sup> 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.<sup>147</sup> This has led one commentator to think of private international law as a project of communication—among sources of law and cultural identities.<sup>148</sup> It is important to recognize that the goal 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

---

<sup>145</sup> See Florey, *supra* note 62, 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).

<sup>146</sup> See, Berman, *Towards a Cosmopolitan Vision of Conflict of Laws*, *supra* note 44, 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”).

<sup>147</sup> On co-construction, see Iris Jean-Klein & Annelise Riles, *Introducing Discipline: Anthropology and Human Rights Administrations*, 28 (2) POL. & LEGAL ANTHROPOLOGY REV. 173 (2005).

<sup>148</sup> Jayme, *supra* note 60, 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.)

Jayme, *supra* note XX at 259.

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?

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<sup>149</sup>, 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.<sup>150</sup> 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 trope. 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.

---

<sup>149</sup> Cite to Brenda's paper.

<sup>150</sup> Cite Karen's paper 71 *LAW & CONTEMP. PROBS.* ?? (2008). See, also, Robert Wai, *supra* note 107, at 153 (arguing that the Canadian Supreme Court's international law decisions "may simply reflect the significant tradition of internationalism in Canadian policy discourse").

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 is domestic law, 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.<sup>151</sup>

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. There is no parallel introspection into the cultural conflicts at work in forum law. And indeed, the name for the doctrinal problem at issue here in conflicts is the problem of determining foreign law.<sup>152</sup> The implication is that there is no difficulty about, perhaps not even a need for inquiry into, the nature and meaning of forum law.

The importance of giving attention to the nature of the cultural values of the domestic culture, instead of just taking these as an unexamined given, and in particular on 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 seek to highlight, to force attention on, the issue of

---

<sup>151</sup> See Reiman, *supra* note XX, at 1381.

<sup>152</sup> Editors, pls add cross-cite to the note that includes articles on this subject, above

gay marriage and the corresponding contention within our own society and even the potential ambiguity and contradiction within domestic laws. This 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 that does not appear in the decision itself. In a Realist vein, therefore, there is surely value in making this subtext explicit—in describing the domestic 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 its own understandings of its extraterritorial reach in such cases, 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.”<sup>153</sup> In order to define culture, Wagner begins with the experience of ethnographic fieldwork, an experience shaped by the risky experience of “culture shock,” of losing all 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:

---

<sup>153</sup> ROY WAGNER, *THE INVENTION OF CULTURE* 3 (1975).

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).

. . .

We might actually say that an anthropologist “invents” the culture he believes himself to be studying . . . if we understand the invention to take place objectively, along the lines of observing and learning, and not as a kind of free fantasy.<sup>154</sup>

In order to come 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.’”<sup>155</sup> Culture functions as a heuristic for the fieldworker, then—a fiction not unlike legal fictions.<sup>158</sup> It is a tool for translating one set of meanings into another, for “drawing self-knowledge

---

<sup>154</sup> *Id.* at 4.

<sup>155</sup> *Id.* at 8.

<sup>158</sup> *See generally*, HANS VAIHINGER, THE PHILOSOPHY OF “AS IF”: A SYSTEM OF THE THEORETICAL, PRACTICAL, AND RELIGIOUS FICTIONS OF MANKIND (C.K. Ogden trans. 1925)

from the understanding of others, and vice-versa.”<sup>159</sup> Together, the anthropologist and her informant actually *invent* that heuristic, Wagner argues—which is not to say that they fabricate lies, but rather that they use the “as if” of 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 our equals, as cocreators, not merely as “objects” of the researcher’s study.<sup>160</sup> 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”<sup>161</sup>: 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*.<sup>162</sup> 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,<sup>163</sup> and I have analyzed the treatment of globalization in international law as if seen through Fijian gift-giving aesthetics.<sup>164</sup>

---

<sup>159</sup> WAGNER, *supra* note 153, at 16.

<sup>160</sup> *Id.*

<sup>161</sup> *See, e.g.,* MAURER, *supra* note ??.

<sup>162</sup> *See, e.g.,* HIROKAZU MIYAZAKI, *THE METHOD OF HOPE: ANTHROPOLOGY, PHILOSOPHY, AND FIJIAN KNOWLEDGE* (2004).

<sup>163</sup> *See* MARILYN STRATHERN, *AFTER NATURE, ENGLISH KINSHIP AT THE END OF THE TWENTIETH CENTURY* (1992)

<sup>164</sup> *See* RILES, *supra* note 60, at 70-91..

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 question 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—is very much the authors’ own question, not theirs. 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 oneself. Thinking through one’s best approximation of others’ points of view yields new kinds of insights which would be unthinkable otherwise<sup>166</sup>—and hence which could be said to be not simply one’s own or those of others but the product of collaborative experimentation.

One could argue that the normative premise of conflicts doctrine is precisely a mandate to engage in lateral thinking—in thinking through problems “as if” from another’s point of view. When a court chooses to apply foreign law, it is well understood, 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

---

<sup>166</sup> See, e.g. Donald Brenneis, *Discourse and Discipline at the National Research Council: A Bureaucratic Bildungsgroman*, 9 (1) CULTURAL ANTHROPOLOGY 23 (1994); Tony Crook, *Growing Knowledge in Bolivip, Papua New Guinea*, 69 (4) OCEANIA 225 (1999); MARILYN STRATHERN, *AUDIT CULTURES, ANTHROPOLOGICAL STUDIES IN ACCOUNTABILITY, ETHICS AND THE ACADEMY* (2000); Douglas R. Holmes and 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 13 (Aihwa Ong & Stephen J. Collier eds., 2005)

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.<sup>167</sup>

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 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.<sup>168</sup> But this rule has been criticized for its failure to take into account the substantive conflicts issues at stake in evidentiary questions.<sup>169</sup> Or perhaps, despite its sensitivity to questions of description described above, the court relieves itself of the burden of conflicts analysis through the presumption that forum law and foreign law are identical. The majority notes

---

<sup>167</sup> Husserl, *supra* note XX, at 255.

<sup>168</sup> See Federal Rule of Evidence 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.”) .

<sup>169</sup> see Dudley, *supra* note XX, at 174-5

in its opinion, for example, that a Navajo court decision recognized a similar rule of interspousal immunity,<sup>170</sup> without elaborating on the legal consequences of this fact.

Whether a rule of evidence is substantive or procedural, for example, is an issue of 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<sup>171</sup> focus on the cost to judicial resources entailed in researching and applying unfamiliar procedural rules on the one hand,<sup>172</sup> and concerns about the importance of uniformity on the other.<sup>173</sup> 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 it engage in?

A more thorough conflicts analysis might have at least recognized the legal issues at stake in this characterization.<sup>174</sup> It might have entered into the extensive methodological

---

<sup>170</sup> See *Jarvison* at 1228.

<sup>171</sup> See RESTATEMENT SECOND OF THE CONFLICT OF LAWS § 603-604. *But see* *Sun Oil 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).

<sup>172</sup> 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).

<sup>173</sup> See RESTATEMENT OF THE CONFLICT OF LAWS Introductory note to Chapter 12 GET CITE

<sup>174</sup> See EUGENE F. SCOLES, PETER HAY, PATRICK J. BORCHERS & SYMEON C. SYMEONIDES, *CONFLICT OF LAWS* (4<sup>TH</sup> ED.) 536-37 ("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'")(quoting the Restatement Second Conflict of Laws, §139(1) (1971)).

debates in conflicts about whether it the court should characterize interspousal immunity as a matter of substance or procedure according to the law of the forum, the law of the place of the events (presumably Navajo law), or according to some comparative analysis of the two.<sup>175</sup> 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 this as an opportunity to engage in a more expansive exercise in lateral thinking by 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.<sup>176</sup>

Lateral thinking bears some resemblance to another image of the task in conflicts jurisprudence, the model of translation—in which the project is to “translate[e] the legally foreign, as, e.g., a contract made or to be performed abroad, into the legal reality of the forum.”<sup>177</sup> Like lateral thinking, conflicts analysis as translation aims to broaden the horizon, and 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

---

<sup>175</sup> See generally Reimann, *supra* note XX, at 1384-1387.

<sup>176</sup> 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. Mathias Reimann, *Comparative Law and Private International Law*, in OXFORD HANDBOOK OF COMPARATIVE LAW, *supra* note XX, at 1386. The nature of comparison has long been debated in anthropological theory. See, e.g., MARILYN STRATHERN, PARTIAL CONNECTIONS (1991); *Gender: division or comparison?*, in IDEAS OF DIFFERENCE: SOCIAL SPACES AND THE LABOUR OF DIVISION 42 (Kevin Hetherington & Rolland Munro eds. 1997).

<sup>177</sup> Husserl, *supra* note XX, at 248.

forum as something legally relevant to the case”.<sup>178</sup> But in another respect, lateral thinking and legal translation are precise opposites. While translation make as-if sense of the foreign in domestic terms, lateral thinking thinks through the domestic in as-if foreign terms.

---

<sup>178</sup> *See id.* at 268.

*D. Expanding the Field Beyond the Resolution of Judicial Disputes*

---

<sup>225</sup> See, e.g., *Joint Tribal Council of the Passamaquoddy Tribe v. Morton.*, 528 F.2d 370 (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); *Shchaghticoke Tribe v. Kent School Corp.*, 423 F.Supp. 780 (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 (1982) (holding that the Nonintercourse Act was meant to apply to Indian lands throughout the United States); *Oneida County, N.Y. v Oneida Indian Nations 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).

Finally, thinking of 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 which is 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. These are questions that should be the distinct province of conflict of laws, and its contribution to wider legal and cultural debates.

Take, for example the larger set of political and legal disputes over Native American land claims in the United States. In many senses, the disputes over the territorial sovereignty and property rights of Native Americans is the bedrock of all disputes over the colonial status of the United States and its consequences for Native Americans. In recent years, Native American tribes have argued successfully that the appropriation of Native American lands often violated the colonial state's own legal criteria for such appropriation and hence that title properly rests with Native American owners.<sup>225</sup>

Nonetheless, 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 reasonable remedy.<sup>226</sup>

---

<sup>226</sup> *City of Sherril v. Oneida Indian Nation of New York* 544 US 197 (2005) (holding that equitable defenses of laches, acquiescence, and impossibility barred 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).

The many legal criticisms of recent U.S. court rulings have focused principally on the lawless quality of the reasoning, on U.S. law's own terms.<sup>227</sup> Some analyses have brought international law to bear upon the dispute by pointing out that the appropriation of Native American lands and its subsequent treatment in U.S. courts violates universal human-rights principles and established practices of treaty interpretation.<sup>228</sup> Yet all of these arguments, for very understandable strategic reasons,<sup>229</sup> 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 legal 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.<sup>230</sup>

---

<sup>227</sup> See, e.g. Kathryn Forth, *The (In)Equities of Federal Indian Law*, MSU Legal Studies Research Paper No. 04-24 (January 14, 2005) (discussing the inconsistencies in the *Sherrill* case in light of the history of equitable jurisprudence and the defenses 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).

<sup>228</sup> See, e.g., Arlinda Locklear, *Morality and Justice 200 Years After the Fact*, 37 NEW ENG. L REV. 593, 594 (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 XX, at 47. See, also, Eva Mackey, *Universal Rights in Conflict: “backlash” and “benevolent resistance” to indigenous land rights*, 21 (2) ANTHROPOLOGY TODAY 14, 15 (“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”).

<sup>229</sup> 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.

<sup>230</sup> Interview with Joe Heath, General Counsel for the Onondaga Nation, July 25, 2006. (videotape on file with the author).

What is at stake in these claims, in other words, is a cultural conflict of laws broadly conceived.<sup>231</sup> And even if it is unlikely that a U.S. court will address the 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 these disputes, this does not excuse conflicts scholars from bringing their analytical skills to bear on the issue. Moreover analyzing the dispute as a matter of a conflict of laws, in the way discussed in this article, yields an alternative and equally rich set of questions as the existing postcolonial critiques of 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. It asks more, arguably, of the colonial state than simply a judgment in favor of the claimants that would recognize their property rights. It asks for certain deeper and more affirmative efforts at understanding—both understanding of Native Americans and self-understanding of one’s own colonial history.<sup>232</sup>

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, while conflicts is a set of rules for adjudicating cases that arise because of those differences. This disciplinary distinction builds upon a

---

<sup>231</sup> See, e.g. Singer, *Reply Double Bind.*, *supra* note 10 (arguing that the manner in which the Supreme Court “seeks to harmonize inconsistent precedents and conflicting policies toward Indian nations” might limit those nations’ “ancient rights and inherent sovereign powers” and, ultimately, to subordinate them to state governments).

<sup>232</sup> See, *id.* (“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”).

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,<sup>233</sup> one works in the realm of fact while the other works in the realm of law. One is mainly descriptive while the other is mainly normative. One is forward-looking and addresses a full range of legal 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.<sup>234</sup>

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 that 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 was not limited to the analysis of justiciable questions.

---

<sup>233</sup> See Mathias Reimann, *Comparative Law and Private International Law*, in THE OXFORD HANDBOOK OF COMPARATIVE LAW, *supra* note XXError! Bookmark not defined., at 1363, 1365 (comparative law’s “primary purpose is academic . . . By contrast, private international law *is* a body of positive rules. . .”).

<sup>234</sup> ERNST RABEL, THE CONFLICTS OF LAWS: A COMPARATIVE STUDY (2<sup>nd</sup> ed. 1958).

#### IV. CONCLUSION

Many conflicts doctrines, maligned for their technical confusion, seem much less absurd and much more principled when they are understood to be asking direct questions about whether, or rather to what extent, decisionmakers should look at problems through 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 opens the flood gate by acknowledging that one’s cultural point of view is one among many and that the truth of one’s observations is constructed through the exercise of making those observations, that is, that culture is embodied in persons, not extraneous to them. 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*,<sup>235</sup> 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

---

<sup>235</sup> See Florey, *supra* note 62, at 1673 (arguing that this methodological flexibility is particularly important in conflicts involving tribal law).

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.<sup>236</sup>

One response is, first, that 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, cultural analysis, and cultural choice that have serious and lasting political and moral consequences. The issue then is, should this 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,<sup>237</sup> courts and scholars that take cultural conflict as the dominant lens begin to struggle with the core of the problem.

Moreover, as already suggested, this area is already marked by an unwillingness on the part of courts to engage in conflicts analysis *tout court*. 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.

---

<sup>236</sup> See, e.g., Reimann, *supra* note XX, at 1386.

<sup>237</sup> Muir Watt, *supra* note XX.

<sup>241</sup> See, Singer, *supra* note 17, at 88 (commenting on the importance of not minimizing the harm caused to the foreign jurisdiction by the forum's choice of law methodology).

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.

I want to respectfully acknowledge the basis and legitimacy of these fears. It is important to recognize the real dangers and costs associated with lateral thinking in particular and cultural analysis more generally.<sup>241</sup> As some Native American commentators point out,<sup>242</sup> 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.<sup>243</sup> 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.”<sup>244</sup>

Although I respect the view that, particularly in the political context of a long and ongoing history of erosion of Native American legal and cultural authority one might

---

<sup>242</sup> See Harte, *supra* note 51; Florey, *supra* note 52.

<sup>243</sup> See Florey, *supra* note 62 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),

<sup>244</sup> See Florey, *supra* note 62, at 1684-85.

wish to defer to others in this way,<sup>245</sup> I ultimately believe 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 these fears, the fact of the "danger" of representing foreignness, that is at the heart of this proposal. Consider once again an example from the parallel multiculturalism debate. In a recent essay, the cultural theorist Ghassan Hage, writing about racist violence against Arabs in Australia, has asked the question, should we choose hope over fear?<sup>246</sup> As he and others points out, many politicians in Australia, Europe, and the United States, have recently advocated a "politics of hope" over a "politics of fear," and in the process have belittled the 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. In contrast, hope, he argues, requires that something be wagered, something be truly risked. Hope cannot exist without danger, or without fear. Thankfully, however, conflicts is not simply another instance of political necrophilia. Something serious is risked, something is at stake, in every conflicts dispute. This is what makes the questions of description at issue in

---

<sup>245</sup> See Florey, *supra* note 62, 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).

<sup>246</sup> See Gassan Hage, *Learning to hope with beasts*, Monash University Museum Catalogue, "Regarding Hope and Fear" Exhibition, July 2007.

cultural conflicts so immediate and potentially transformative. In the conflicts context, it seems, we still have reason to be hopeful.