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From Multiculturalism to Technique: Feminism, Culture, and the Conflict of Laws Style

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FROM MULTICULTURALISM TO TECHNIQUE: FEMINISM, CULTURE, AND THE CONFLICT OF LAWS STYLE

Karen Knop, Ralf Michaels & Annelise Riles*

The German Chancellor, the French President, and the British Prime Minister have each grabbed world headlines with pronouncements that their states' policies of multiculturalism have failed. As so often, domestic debates about multiculturalism, as well as foreign policy debates about human rights in non-Western countries, revolve around the treatment of women. Yet feminists are no longer even certain how to frame, let alone resolve, the issues raised by veiling, polygamy, and other cultural practices oppressive to women by Western standards. Feminism has become perplexed by the very concept of "culture." This impasse is detrimental both to women's equality and to concerns for cultural autonomy.

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We propose shifting gears. Our approach draws on what, at first glance, would seem to be an unpromising legal paradigm for feminism—the highly technical field of conflict of laws (conflicts). Using the nonintuitive hypothetical of a dispute in California between a Japanese father and daughter over a transfer of shares, we demonstrate the contribution that conflicts can make. Whereas Western feminists are often criticized for dwelling on “exotic” cultural practices to the neglect of other important issues affecting the lives of women in those communities or states, our choice of this hypothetical not only joins the correctives, but also shows how economic issues, in fact, take us back to the same impasse. Even mundane issues of corporate law prove to be dizzyingly indeterminate and complex in their feminist and cultural dimensions.

What makes conflict of laws a better way to recognize and do justice to the different dimensions of our hypothetical, surprisingly, is viewing conflicts as technique. More generally, conflicts can offer a new approach to the feminism/culture debate—if we treat its technicalities not as mere means to an end but as an intellectual style. Trading the big picture typical of public law for the specificity and constraint of technical form provides a promising style of capturing, revealing, and ultimately taking a stand on the complexities confronting feminists as multiculturalism is challenged here and abroad.

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INTRODUCTION

German Chancellor Angela Merkel, French President Nicholas Sarkozy, and British Prime Minister David Cameron have each grabbed world headlines of late with pronouncements that their states' efforts to create a multicultural society have failed. "Utterly failed," according to Merkel in a speech to young members of her party in October 2010, asserting that the onus should be on immigrants to do more to integrate into German society.¹ "Oui, c'est un échec," Sarkozy responded bluntly in a February 2011 televised exchange with voters²—puzzling those who noted that France has been relatively inflexible about minorities' cultural practices, banning headscarves in schools and preparing to introduce a separate ban on face veils in all public places.³ In announcing he would soon present new policies designed to strengthen Britain's collective identity, David Cameron was equally hard hitting:

State multiculturalism is a wrong-headed doctrine that has had disastrous results.

....

Take forced marriages. In Bradford, where I was last week, schoolgirls under the age of sixteen have simply disappeared from school. Nobody knows where they are.

And, until recently, there was little investigation—despite the fact that it is likely that they may have been drugged, imprisoned, kidnapped and forced into an unwanted marriage on the other side of the world.⁴

1. Matthew Weaver, *Angela Merkel: German Multiculturalism Has "Utterly Failed,"* GUARDIAN (Oct. 17, 2010, 6:58 AM EDT), <http://www.guardian.co.uk/world/2010/oct/17/angela-merkel-german-multiculturalism-failed>.

2. Agence France-Presse, *Multiculturalism Has Failed, Says French President,* DAILYMOTION (Feb. 11, 2011), http://www.dailymotion.com/video/xgzqs8_multiculturalism-has-failed-says-french-president_news ("Yes, it's a failure.").

3. See Ruadhán Mac Cormaic, *Sarkozy Denounces Multiculturalism as "a Failure,"* IR. TIMES, Feb. 12, 2011, at 11, available at <http://www.irishtimes.com/newspaper/world/2011/0212/1224289636274.html>.

4. Andrew Sparrow, *Cameron Attacks "State Multiculturalism,"* GUARDIAN (Feb. 26, 2008, 10:58 AM EST), <http://www.guardian.co.uk/politics/2008/feb/26/conservatives.race>. In 2010, the British government's Forced Marriages Unit gave advice or support related to a possible forced marriage in 1735 cases. *Forced Marriage*, FOREIGN & COMMONWEALTH OFF., <http://www.fco.gov.uk/en/travel-and-living-abroad/when-things-go-wrong/forced-marriage> (last visited Mar. 9, 2012).

Headscarves, face veils, the British prime minister's sensationalist example of schoolgirls drugged and dragged off to a forced marriage in a backward country—as so often, domestic debates about the limits of multiculturalism revolve around the treatment of women. Much the same is true of foreign policy debates about human rights in non-Western countries. Consider, for example, that an independent bipartisan U.S. federal government commission that monitors other countries' compliance with the international human right to religious freedom has emerged as a persistent critic of Islamic countries for their violations of women's equality.⁵

In contrast to such political resolve, however, there seems to be widespread if awkward agreement that Western academic feminism has become bogged down in the problem of "culture."⁶ By the problem of culture, we mean not that actual cultures have proved resistant to efforts to further gender equality (although that is also the case), but that as understandings of the *concept* of culture have changed, it has become more and more complicated to frame, let alone resolve, the issues raised by veiling, clitoridectomy, polygamy, and other cultural practices considered oppressive to women by Western standards. Is the question whether to give our commitment to gender equality precedence over claims that a practice is fundamental to a culture—or is it actually a question of *competing* cultures? Do Western feminists fail to recognize the choices made by women in other cultures and, conversely, the cultural conditioning of their own? What should we do when confronted with internal disagreements over what is fundamental to another culture? And so on.

It is not a stretch to say that the much-noted brain drain from feminism is partly due to the intellectual and ethical morass the "feminism/culture" debate has become.⁷ "Everywhere I go," Janet Halley has written, "women complain to me that academic feminism has lost its zing. Many of the key intellectual figures in feminism have decamped to other endeavors."⁸ Indeed, Halley herself argues that feminists should "take a break from feminism."⁹

As Martha Minow has put it, the debate over women and cultural accommodation has become a number of predictable moves in a game.¹⁰ In Part I of

5. See Karen Knop, *International Law and the Disaggregated Democratic State: Two Case Studies on Women's Human Rights and the United States*, in *WE, THE PEOPLE(S): PARTICIPATION IN GOVERNANCE* 75, 78 (Claire Charters & Dean R. Knight eds., 2011).

6. See, e.g., ANNE PHILLIPS, *MULTICULTURALISM WITHOUT CULTURE* 1 (2007).

7. We use the term "feminism/culture" to encompass the range of positions taken in the debate and the term "feminism versus culture" to refer specifically to the position that feminist values conflict with concerns for cultural autonomy. See, e.g., *infra* text accompanying note 21.

8. JANET HALLEY, *SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM* 340 (2006).

9. See *id. passim*.

10. Martha Minow, *About Women, About Culture: About Them, About Us*, *DAEDALUS*, Fall 2000, at 125, 129; see also *id.* at 134-35 (working through the iterations of the normative challenges to liberal feminists from culture defenders).

this Article, we trace a succession of challenges for legal feminism caused by developments in how culture is conceived, culminating with the post-essentialist idea of culture as “invented tradition.” Along the way, we highlight a number of important insights and fault lines that emerge from the feminism/culture debate and also several common strategies for resolving the issue.

In the subsequent Parts, we suggest a way to engage in the practical political work of feminism in an intellectually vibrant fashion and, in particular, a way to both build on the insights of the feminism/culture debate and gain some critical leverage on it rather than “take a break.” The path we propose draws on an unlikely legal paradigm—conflict of laws. Conflict of laws is the part of private law that deals with cases having a foreign element. “Foreign element” simply means a connection to some legal system other than that of the jurisdiction in which the case is being tried, the other jurisdiction being either a foreign state or another subdivision of the same state. The contract in dispute might be made with a foreign company, for example, or the lawsuit might concern the ownership of property situated abroad. The questions that conflict of laws answers are whether a court can and should hear a case with a foreign element, and if so, what law it should apply. That is, a court must first decide whether it has jurisdiction, given that the case could potentially be tried elsewhere instead. Once the court has taken jurisdiction, conflicts governs the choice of law question: namely, whether the court applies its own law to some or all of the issues, as opposed to the law of another jurisdiction connected to the case. A Canadian court might apply U.S. tort law, for example, or a Maryland court might apply South Dakota contract law.

At first glance, the conventional associations of conflicts make it seem unpromising for feminism/culture issues. For one, although conflict of laws does deal with the area of the family, in U.S. legal circles it is more often associated with issues such as out-of-state car accidents, cross-border products liability, and international antitrust litigation than with issues commonly coded as cultural.¹¹ We start, however, by illustrating that the day-to-day areas of work and the economy that make up the nuts-and-bolts issues of private law can raise feminism/culture issues as well. Part II introduces a hypothetical case based on

11. Prominent issues in a 2010 survey of cases in U.S. courts include traffic accidents, car-owner’s liability, employment-related torts, medical malpractice, worker’s compensation, and child support. See Symeon C. Symeonides, *Choice of Law in the American Courts in 2010: Twenty-Fourth Annual Survey*, 59 AM. J. COMP. L. 303, 337-49, 368-85 (2011).

Conflicts has recently become relevant to issues of sexuality because it governs the recognition of foreign or out-of-state same-sex unions. See generally ANDREW KOPPELMAN, SAME SEX, DIFFERENT STATES: WHEN SAME-SEX MARRIAGES CROSS STATE LINES (2006); Peter Hay, *Recognition of Same-Sex Legal Relationships in the United States*, 54 AM. J. COMP. L. 257 (2006). However, friend and foe alike treat conflicts as a way station en route to the legalization of same-sex marriage and not as a valuable paradigm in and of itself. An exception is Janet Halley, *Behind the Law of Marriage, Part II: Travelling Marriage*, 8 UNBOUND (forthcoming 2012). See also Ralf Michaels, *After the Revolution—Decline and Return of U.S. Conflict of Laws*, 11 Y.B. PRIVATE INT’L L. 11, 21-22 (2009).

an actual dispute litigated in California between a Japanese father and daughter over a transfer of shares. Our choice of example thus cuts against the often-criticized tendency of Western feminists to focus on “exotic” ethical questions such as veiling and clitoridectomy that are usually the province of constitutional law or international human rights law, to the neglect of questions about the economic conditions of women in other cultures.¹² It also shows that economics, in fact, takes us back to the same feminism/culture debate.¹³ Even mundane aspects of corporate law prove to be dizzyingly indeterminate and complex in their feminist and cultural dimensions.

What makes conflict of laws seem particularly counterintuitive as a method for dealing with conflicts of feminism and culture, though, is not the kinds of private law issues it brings to mind, but its highly technical nature. The field has famously been described as a “dismal swamp . . . inhabited by learned but eccentric professors who theorize about mysterious matters in a strange and incomprehensible jargon.”¹⁴ Yet a court required to apply foreign law in a conflicts case runs up against the same “how different is too different” question that confronts feminists in *any* instance of feminism/culture—the ethical moment at which some feminists will decide that compromise with or tolerance of cultural difference ends. In contrast to feminism/culture analyses, however, a conflicts analysis gets to that ethical moment only after going through a series of technical steps. We will show that far from being a shortcoming of the field, these technicalities bring to the fore a vital level of detail that feminism/culture analyses must generate from first principles—and seldom achieve. Moreover, we argue that as a matter of sociology of knowledge, adhering to the constraints of form that characterize conflicts technicalities more often opens up an alternative resolution, or indeed alternative questions for theory and practice, and hence renders the “how different is too different” question less inevitable.

Thus the fruitfulness of conflicts lies in viewing it *as technique*. By “technique,” we mean the technical aspect of law, particularly although not uniquely

12. See, e.g., Cyra Akila Choudhury, *Exporting Subjects: Globalizing Family Law Progress Through International Human Rights*, 32 MICH. J. INT'L L. 259, 307-09 (2011); Karen Engle, *International Human Rights and Feminisms: When Discourses Keep Meeting*, in INTERNATIONAL LAW: MODERN FEMINIST APPROACHES 47, 65-66 (Doris Buss & Ambreena Manji eds., 2005); Leti Volpp, *Feminism Versus Multiculturalism*, 101 COLUM. L. REV. 1181, 1204-05, 1208-10 (2001); Sally Engle Merry, *Human Rights Law and the Demonization of Culture (and Anthropology Along the Way)*, POLAR, May 2003, at 55, 58, 63-64.

13. Cf. Vasuki Nesiiah, *The Ground Beneath Her Feet: TWAIL Feminisms*, in THE THIRD WORLD AND INTERNATIONAL ORDER: LAW, POLITICS AND GLOBALIZATION 133, 140-41 (Antony Anghie et al. eds., 2003) (agreeing that a focus on women's material well-being is needed to correct for the damaging tendency to frame all questions about third world feminism in terms of universalism versus cultural relativism, but arguing that this contrast of the economic to the cultural may miss the ways in which economic systems reflect cultural practices).

14. William L. Prosser, *Interstate Publication*, 51 MICH. L. REV. 959, 971 (1953).

present in private law, which foregrounds questions of form. The technical aspect of law encompasses:

(1) certain ideologies—legal instrumentalism and managerialism . . . (2) certain categories of experts—especially scholars, bureaucrats and practitioners who treat the law as a kind of tool or machine and who see themselves as modest but expertly devoted technicians; (3) a problem-solving paradigm—an orientation toward defining concrete, practical problems and toward crafting solutions; (4) a form of reasoning and argumentation, from eight-part tests to reasoning by analogy, to the production of stock types of policy arguments to practices of statutory interpretation or citation to case law.¹⁵

In this approach, “[l]egal knowledge is certainly not an end in itself—it always has a larger purpose. But at the same time, it is also not simply a pass-through to an economic or social end.”¹⁶

When the doctrines and larger moves of conflicts are approached in this mode—when its technicalities are treated *as an intellectual style*—conflicts can offer a fresh approach to the feminism/culture debate. As our definition of technique suggests, we have in mind the broader conflicts tradition in which its adepts are schooled, rather than the conflicts method often encountered in the United States, which is more narrowly understood as either interest analysis or the most significant relationship test. That said, we focus on those aspects of the tradition that hold out the greatest promise for the feminism/culture debate.

In Part III, we illustrate our argument by working through our hypothetical dispute between father and daughter again, this time in accordance with a conflict of laws analysis, showing how conflicts navigates the indeterminacy and complexity of the cultural and feminist dimensions seen in Part II. Part III demonstrates that conflict of laws captures and operationalizes important insights of feminist thinking on culture that we identify in Part I—summing up something in the air about how we approach these issues now. Yet, as Part III goes on to show, conflicts also reveals new possibilities. As a result, it provides a way for feminists to acknowledge the complexity of culture without becoming bogged down. While we explain the kind of work that each step in a conflict of laws analysis would do in resolving our hypothetical dispute, we do not propose an actual resolution in this Article because our goal is to show the promise of a style, not to stand for a particular result. That is, we believe that changing the tools with which we think can open up the ways in which we theorize and ultimately master seemingly familiar problems.

In elaborating on our approach, Part IV engages a potential objection: are we not ignoring the legal realists’ lesson that technicalities often obscure or dilute political conflict? Our answer lies in a final reason why conflict of laws is both a surprising and a promising resource for the feminism/culture debate. Conflicts was once in the very vanguard of the realist revolution, but is now

15. ANNELISE RILES, COLLATERAL KNOWLEDGE: LEGAL REASONING IN THE GLOBAL FINANCIAL MARKETS 64-65 (2011).

16. *Id.* at 70.

most often presented as layers of unsatisfactory yet not quite discarded theories. Yet, as we explain, this means that the discipline comes with built-in critiques; it is self-conscious about its use of form.

In Part V, we contrast the conflict of laws style with the familiar strategies in the feminism/culture debate featured in Part I. Conflicts thus offers a third contribution: it furnishes a critical vantage point on the state of feminist legal theory and its engagement with culture, enabling us to join with others' who have questioned the familiar strategies, and offering one picture of an alternative.

I. HOW FEMINISM BECAME ENTANGLED IN THE CONCEPT OF CULTURE

Feminism has been described as "becoming prone to paralysis by cultural difference, with anxieties about cultural imperialism engendering a kind of relativism that [has] made it difficult to represent *any* belief or practice as oppressive to women or at odds with gender equality."¹⁷ How did feminism get to this impasse? The story has been told in many ways.¹⁸ In this Part, we tell it as one of complexity produced by feminist engagements with changing conceptions of culture.

The account offered here relies both on discussions of multicultural states, where the issue is to what extent the law should recognize the value of a minority's culture or its autonomy if the minority's norms conflict with gender equality, and on discussions of international law, where the issue also sounds in sovereignty and nonintervention.¹⁹ As our focus is primarily on successive approaches to culture taken by legal feminists and feminists influential in the legal literature, our account does not attempt to summarize the full debates on the roles of culture and multiculturalism, nor to incorporate the trajectory of feminist legal theory beyond its engagement with this problem.²⁰

A. *Feminism Versus Culture: Equality > Culture*

Susan Moller Okin's essay *Is Multiculturalism Bad for Women?* is an elegant and prominent example of the initial framing of the issue as feminism ver-

17. PHILLIPS, *supra* note 6, at 1.

18. Helpful accounts include Engle, *supra* note 12, analyzing the challenges of third world feminists to liberal and structural bias feminists in the context of international human rights, and Minow, *supra* note 10.

19. In this Article, we use "culture" broadly to include religion and sexuality. By discussing culture in both the multicultural and transnational contexts, we are not implying any particular correspondence between a culture as it exists in its country of origin and as it exists in the diaspora.

20. We indicate in Parts III-V where our approach might join with feminist methods that have not figured prominently in the legal literature on feminism/culture.

sus culture.²¹ The insight here is that there is an *ethical moment*, as we will call it, a hard choice to be made between two sets of values. And for Okin, although not for all feminists who frame the choice this way, equality always trumps.

By multiculturalism, Okin means the claim made in some Western liberal democracies that minority cultures are not sufficiently protected by ensuring the individual rights (such as freedom of association or religion) of their members, and that minority cultures should therefore also be protected by recognizing the special rights of these groups as groups.²² Okin argues not only that “[m]ost cultures are suffused with practices and ideologies concerning gender,”²³ but that most also have as a principal aim the control of women by men.²⁴ Over time, some traditionally patriarchal cultures, principally Western liberal cultures, have become more egalitarian than others.²⁵ These basic facts about culture should alert us to the potential for conflict between multiculturalism and feminism, where feminism is understood as “the belief that women . . . should be recognized as having human dignity equal to that of men, and that they should have the opportunity to live as fulfilling and as freely chosen lives as men can.”²⁶ Group rights endanger the equal rights of women within the group because collective rights are often claimed by minorities with cultures that are more patriarchal than the surrounding culture.²⁷ Okin illustrates with an example from French immigration policy. Although polygamy is illegal in France, the French government in the 1980s granted immigrant men permission to bring multiple wives into the country, even though many wives themselves proved to be strongly opposed to the practice.²⁸ If we agree that women should not be disadvantaged because of their sex, Okin argues, we should not accept group rights that allow practices oppressive to women on the grounds that these practices are fundamental to the preservation of minority cultures.

On an Okin-style analysis, the ethical moment comes immediately: equality trumps culture. This is the academic formulation of a position shared by much mainstream political discourse, including the politicians cited in our Introduction. It also resonates with key universal human rights instruments. For example, the 1966 International Covenant on Civil and Political Rights provides that “[i]n those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture,

21. Susan Moller Okin, *Is Multiculturalism Bad for Women?*, in *IS MULTICULTURALISM BAD FOR WOMEN?* 7 (Joshua Cohen et al. eds., 1999).

22. *Id.* at 10-11.

23. *Id.* at 12.

24. *Id.* at 13.

25. *Id.* at 16.

26. *Id.* at 10.

27. *See id.* at 17.

28. *Id.* at 9-10.

to profess and practise their own religion, or to use their own language.”²⁹ This right has been interpreted as giving fairly robust protections to groups.³⁰ In addition, if “minorities” are also recognized as “peoples”—indigenous groups, for instance³¹—they have a right of self-determination under the Covenant, by virtue of which “they freely determine their political status and freely pursue their economic, social and cultural development.”³² Equality trumps, however, because the Covenant contains several articles on nondiscrimination and, in particular, an umbrella article requiring states “to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.”³³

Whereas many feminist activists and academics continue to frame the conflict as equality versus culture, some do not give all of the trumps to equality.³⁴ Instead, *compromise* and *tolerance* are two common strategies. The aim of compromise is to find the right balance between equality and culture.³⁵ The other culture may be tolerated, but only to a certain degree. To quote Duncan Kennedy’s description of this legal consciousness:

When an identity is recognized, it will be through a typically contemporary mix of highly formal norms, of equality and nondiscrimination, with a highly negotiated, ad hoc set of norms, about tolerance or accommodation for identity defining practices like “sodomy” and the veil In other words, public law

29. International Covenant on Civil and Political Rights art. 27, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; *see also id.* art. 18 (guaranteeing freedom of thought, conscience, and religion).

30. *See, e.g.*, U.N. Human Rights Comm., General Comment No. 23, General Comment Adopted by the Human Rights Committee Under Article 40, Paragraph 4, of the International Covenant on Civil and Political Rights, ¶¶ 6.1, 6.2, 7, U.N. Doc. CCPR/C/21/Rev.1/Add.5 (Apr. 26, 1994).

31. *Cf. Mahuika v. New Zealand*, U.N. Human Rights Comm., Communication No. 547/1993, ¶ 9.2, U.N. Doc. CCPR/C/70/D/547/1993 (Nov. 16, 2000).

32. ICCPR, *supra* note 29, art. 1.

33. ICCPR, *supra* note 29, art. 3; *see also id.* arts. 2, 26; U.N. Human Rights Comm., General Comment No. 28, Equality of Rights Between Men and Women, ¶ 5, U.N. Doc. CCPR/C/21/Rev.1/Add.10 (Mar. 29, 2000). *Compare* United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, arts. 4-5, U.N. Doc. A/RES/61/295 (Sept. 13, 2007) (indigenous peoples have the right to “autonomy or self-government” and to “maintain and strengthen their distinct political, legal, economic, social and cultural institutions”), *with id.* arts. 44, 46(3) (equality trumps). Not surprisingly, the most demanding trumping provisions are found in the Convention on the Elimination of All Forms of Discrimination Against Women, arts. 1-5, *opened for signature* Mar. 1, 1980, 1249 U.N.T.S. 13 (providing for transformative as well as formal substantive equality for women). On transformative equality, *see* RIKKI HOLTMAAT & JONNEKE NABER, WOMEN’S HUMAN RIGHTS AND CULTURE: FROM DEADLOCK TO DIALOGUE 25-43 (2011).

34. *See, e.g.*, Engle, *supra* note 12, at 63-64 & n.57 (describing convergence on a sort of middle ground she encompasses with the term “culturally sensitive universalism”).

35. *See, e.g.*, Karima Bennouna, *Secularism and Human Rights: A Contextual Analysis of Headscarves, Religious Expression, and Women’s Equality Under International Law*, 45 COLUM. J. TRANSNAT’L L. 367, 396-97 (2007).

neoformalism combined with conflicting considerations (balancing, proportionality).³⁶

In the international context of human rights and domestic violence, Sally Engle Merry similarly describes activists, reformers, and policymakers alike as “constantly tack[ing] between the goals of respecting cultural diversity and protecting women’s safety. They use pragmatic compromise and situationally determined decision-making.”³⁷

Balancing is sometimes done through a multifactor test, rather than ad hoc. For example, Karima Bennoune’s approach to the issue of headscarves or other “modest” garments for Muslim women and girls in public educational institutions involves the consideration of multiple factors in context, including the impact on other women or girls of wearing the headscarf or other garments, coercion of women by religious extremist organizations or other groups, related violence against women, the motivations of those imposing a dress restriction, Islamophobia or religious discrimination, alternatives to restrictions, possible consequences for human rights both of restrictions and of a lack thereof, and whether the relevant constituencies have been consulted.³⁸ This combination of factors, she asserts, is “more likely to produce substantively rights-friendly results for the most women and girls in the long run.”³⁹

It is important to note that such positions between equality and culture may reflect stable normative preferences as between the two, or they may instead be a starting position aimed at the real-world transformation of other societies or states in the direction of equality. Since most of these positions seek to incorporate some or all of the critical developments in the understanding of culture, we will return to them after introducing these developments.

B. *Relativist Critiques of Feminism: Culture Versus Culture*

Framing the issue as equality versus culture soon drew cultural relativist critiques. The target of the relativist critiques is the underlying assumption that “‘culture’ is what nonliberal peoples are . . . ruled and ordered by . . . [W]e have culture while they are a culture. Or, we are a democracy while they are a culture.”⁴⁰ In other words, liberal arguments about equality, including Okin’s,

36. Duncan Kennedy, *Three Globalizations of Law and Legal Thought: 1850-2000*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL* 19, 67 (David M. Trubek & Alvaro Santos eds., 2006). Janet Halley argues that the idea of rights always in need of balancing also describes the legal consciousness introduced into U.S. family law by the feminist interventions that significantly transformed the field from the 1970s onward. See Janet Halley, *What Is Family Law? A Genealogy* (pt. 2), 23 *YALE J.L. & HUMAN.* 189, 269-71 (2011).

37. SALLY ENGLE MERRY, *HUMAN RIGHTS AND GENDER VIOLENCE* 25-26 (2006).

38. Bennoune, *supra* note 35, at 396.

39. *Id.* at 396.

40. WENDY BROWN, *REGULATING AVERSION: TOLERANCE IN THE AGE OF IDENTITY AND EMPIRE* 150-51 (2006).

do not actually stand outside and above culture. Rather, liberalism is itself a culture, and, thus, what are pitted against one another are two cultures.⁴¹ This leaves no neutral viewpoint from which to comment on, let alone intervene in, another culture, whether for reasons of gender equality or other liberal reasons. We will call this basic insight *seeing culture*.

A related but distinct critique of this assumption stems from *self-reflexivity*. In anthropology, self-reflexivity is the idea that the anthropologist must put herself in the frame; she must be as much the subject of her study as the people among whom she does her fieldwork.⁴² While not necessarily subscribing to the relativists' broadening of culture to include democracy or liberalism, self-reflexive feminists reject the assumption that we can make choices about our lives because our culture is just something we *have*, whereas others' lives are determined by their culture (they are its victims) because culture is what they *are*. These authors criticize Western feminists for tending to see culture as the explanation for gender oppression within non-Western communities, while failing to see women in the West as likewise culturally situated.⁴³ Critics point to Western examples such as the premium placed on women's beauty, thinness, and youth and the greater prevalence of cosmetic surgery among Western women as compared to Western men.⁴⁴ They argue that Western women's focus on appearance is wrongly understood as an individual choice, rather than a culturally conditioned one—a personal penchant for high heels as opposed to Chinese foot-binding.⁴⁵ Meanwhile, women elsewhere are wrongly depicted as

41. See *id.*; see also MERRY, *supra* note 37, at 16, 228-29 (criticizing the assumption that "villages are full of culture" whereas international human rights law operates in a culture-free zone, and arguing that international human rights law itself should be understood primarily as a cultural system); Leti Volpp, *(Mis)Identifying Culture: Asian Women and the "Cultural Defense,"* 17 HARV. WOMEN'S L.J. 57, 78 (1994) (observing that arguments precluding the judicial recognition of culture forget that the "legal system already has a culture").

42. See ROY WAGNER, *THE INVENTION OF CULTURE* (rev. & expanded ed. 1981). For an application to feminist legal theory, see, for example, Brenda Cossman, *Turning the Gaze Back on Itself: Comparative Law, Feminist Legal Studies, and the Postcolonial Project*, 1997 UTAH L. REV. 525, 527-28.

43. See, e.g., UMA NARAYAN, *DISLOCATING CULTURES: IDENTITIES, TRADITIONS, AND THIRD-WORLD FEMINISM* (1997); Inderpal Grewal, "Women's Rights as Human Rights": *Feminist Practices, Global Feminism, and Human Rights Regimes in Transnationality*, 3 CITIZENSHIP STUD. 337 (1999); Isabelle R. Gunning, *Arrogant Perception, World-Travelling and Multicultural Feminism: The Case of Female Genital Surgeries*, 23 COLUM. HUM. RTS. L. REV. 189 (1992); Audrey Macklin, *Particularized Citizenship: Encultured Women and the Public Sphere*, in *MIGRATIONS AND MOBILITIES: CITIZENSHIP, BORDERS, AND GENDER* 276, 291-92 (Seyla Benhabib & Judith Resnik eds., 2009); Naomi Mezey, *Law's Culture and Lived Culture: A Comment on Roger Cotterrell's "The Struggle for Law: Some Dilemmas of Cultural Legality,"* 4 INT'L J.L. CONTEXT 395, 397-98 (2009); Volpp, *supra* note 12, at 1186-89, 1212-14, 1217.

44. It should be pointed out that Okin herself does not overlook the gendered nature of Western culture, and, indeed, gives these examples. Okin, *supra* note 21, at 16.

45. For a feminist account of Chinese foot-binding that accents women's agency, see DOROTHY KO, *EVERY STEP A LOTUS: SHOES FOR BOUND FEET* (2001). On whether high heels

lacking agency and thus unable to exercise any degree of choice with regard to their culture.⁴⁶ Indeed, some non-Western cultural practices, such as veiling, which seem thoroughly discriminatory in the eyes of Western feminists, are shown to be circumscribed but carefully calibrated personalized choices within certain Islamic contexts.⁴⁷

Self-reflexivity thus leads to the insight which we will term *culture and agency*. Recognizing that women in other cultures are not simply victims in need of saving introduces the principle of choice into the feminism/culture debate, to be balanced against the principle of equality. But this, in turn, leads to what Martha Minow describes as endless “dueling accusations of false consciousness” between liberals and cultural defenders: “You say that women in my culture have false consciousness, but you say this because of your own false consciousness—or I think this because of my own false consciousness, and so forth.”⁴⁸

The insights of self-reflexivity and of culture and agency are sometimes revealed through a hypothetical cross-cultural dialogue. In María Lugones’s well-known words, “Through travelling to other people’s ‘worlds’ we discover that there are ‘worlds’ in which those who are the victims of arrogant perception are really subjects, lively beings, resisters, constructors of visions”⁴⁹ This is *dialogue* for the purpose of cross-cultural understanding, to be distinguished from dialogue as a common strategy for transforming cultures, which we will discuss later.⁵⁰

and other fashion items represent oppression or empowerment, compare NAOMI WOLF, *THE BEAUTY MYTH: HOW IMAGES OF BEAUTY ARE USED AGAINST WOMEN* (1991), and ANGELA McROBBIE, *THE AFTERMATH OF FEMINISM: GENDER, CULTURE AND SOCIAL CHANGE* (2009), with Jennifer Baumgardner & Amy Richards, *Feminism and Femininity: Or How We Learned to Stop Worrying and Love the Thong*, in *ALL ABOUT THE GIRL: CULTURE, POWER, AND IDENTITY* 59 (Anita Harris ed., 2004).

46. For the criticism about lack of agency, see, for example, RATNA KAPUR, *The Tragedy of Victimisation Rhetoric: Resurrecting the “Native” Subject in International/Postcolonial Feminist Legal Politics*, in *EROTIC JUSTICE: LAW AND THE NEW POLITICS OF POSTCOLONIALISM* 95 (2005); Saba Mahmood, *Feminist Theory, Embodiment, and the Docile Agent: Some Reflections on the Egyptian Islamic Revival*, 16 *CULTURAL ANTHROPOLOGY* 202 (2001); and Volpp, *supra* note 12, at 1192, 1211-12. *But see* Michelle A. McKinley, *Cultural Culprits*, 24 *BERKELEY J. GENDER L. & JUST.* 91, 114-15 (2009) (cautioning against “over-agentivizing”).

47. *See, e.g.*, Lama Abu Odeh, *Post-Colonial Feminism and the Veil: Thinking the Difference*, 43 *FEMINIST REV.*, Spring 1993, at 26; *see also* PASCALE FOURNIER, *MUSLIM MARRIAGE IN WESTERN COURTS: LOST IN TRANSPLANTATION* (2010) (analyzing the *mahr*—an amount promised to the Muslim bride by the Muslim groom as a condition of a valid Islamic marriage—as a tool of relative bargaining power between husband and wife).

48. Minow, *supra* note 10, at 131.

49. María Lugones, *Playfulness, “World”-Travelling, and Loving Perception*, in *MAKING FACE, MAKING SOUL: HACIENDO CARAS* 390, 402 (Gloria Anzaldúa ed., 1990).

50. *See infra* notes 68-69, 229-31, and accompanying text.

C. *Post-Essentialist Critiques of Culture: Taking Apart Cultures*

A later line of critique, what we might term the post-essentialist critique, also takes issue with the meaning of culture at work in the Okin-style opposition of equality and culture, but in a different way. It aims at the underlying assumption that culture is associated with settled tradition and fixity, the assumption that it is monolithic and static. The post-essentialist critique derives from the more recent anthropological insight that culture is indeed tradition, but it is "invented" tradition.⁵¹ Invention is not meant here in the negative sense of artifice, but in the sense that culture is a dynamic practice of making and remaking meanings that are provisional, shifting, and partial.⁵² If this is so, then cultures are contestable and negotiable. They involve agency.⁵³ Moreover, they may internalize outside influences and impositions or may borrow and appropriate ideas; in short, they may be hybrid, rather than pure.⁵⁴

Lovelace v. Canada, decided by the U.N. Human Rights Committee in 1981, is a good illustration of the different conclusions about a cultural claim that might follow from a post-essentialist conception of culture.⁵⁵ Sandra Lovelace lost her status and rights as a Maliseet Indian because she had "married out" to a non-Indian, which would not have changed her status or rights had she been an Indian man. The *Lovelace* case is most often portrayed as a conflict be-

51. See THE INVENTION OF TRADITION (Eric Hobsbawm & Terence Ranger eds., Canto ed. 1992); NICHOLAS THOMAS, IN OCEANIA: VISIONS, ARTIFACTS, HISTORIES 17-18, 186 (1997); Charles L. Briggs, *The Politics of Discursive Authority in Research on the "Invention of Tradition,"* 11 CULTURAL ANTHROPOLOGY 435, 435-36 (1996); Richard Handler & Jocelyn Linnekin, *Tradition, Genuine or Spurious,* 97 J. AM. FOLKLORE 273 (1984); Allan Hanson, *The Making of the Maori: Culture Invention and Its Logic,* 91 AM. ANTHROPOLOGIST 890 (1989); Jean Jackson, *Is There a Way to Talk About Making Culture Without Making Enemies?,* 14 DIALECTICAL ANTHROPOLOGY 127, 127 (1989); Roger M. Keesing, *Creating the Past: Custom and Identity in the Contemporary Pacific,* 1 CONTEMP. PAC. 19, 19-20 (1989); Stephanie Lawson, *The Tyranny of Tradition: Critical Reflections on Nationalist Narratives in the South Pacific,* in NARRATIVES OF NATION IN THE SOUTH PACIFIC 27 (Ton Otto & Nicholas Thomas eds., 1997); Jocelyn S. Linnekin, *Defining Tradition: Variations on the Hawaiian Identity,* 10 AM. ETHNOLOGIST 241 (1983); Thomas Spear, *Neo-Traditionalism and the Limits of Invention in British Colonial Africa,* 44 J. AFR. HIST. 3 (2003); S.N. Eisenstadt, *Post-Traditional Societies and the Continuity and Reconstruction of Tradition,* 102 DAEDALUS, Winter 1973, at 1, 5.

52. See Rosemary J. Coombe, *Contingent Articulations: A Critical Cultural Studies of Law,* in LAW IN THE DOMAINS OF CULTURE 21 (Austin Sarat & Thomas R. Kearns eds., 1998).

53. See, e.g., MERRY, *supra* note 37, at 11-16; Madhavi Sunder, *Piercing the Veil,* 112 YALE L.J. 1399 (2003) (making the same point about religion).

54. See, e.g., RATNA KAPUR, *Erotic Disruptions: Legal Narratives of Culture, Sex and Nation in India,* in EROTIC JUSTICE: LAW AND THE NEW POLITICS OF POSTCOLONIALISM, *supra* note 46, at 51.

55. *Lovelace v. Canada*, U.N. Human Rights Comm., Communication No. R.6/24, U.N. Doc. A/36/40 (July 30, 1981). For an overview of the complex First Nations politics associated with the case, see John Borrows, *Contemporary Traditional Equality: The Effect of the Charter on First Nation Politics,* 43 U. NEW BRUNSWICK L.J. 19 (1994).

tween women's equal rights and the group's right to apply its traditional membership rules or to set the rules.⁵⁶ Although "Indian" is actually the category used by the Indian Act, which originated in the colonial period, the Canadian government argued that the statutory definition reflected indigenous tradition. In addition to arguing that the Act discriminated on the basis of sex, Lovelace disputed the government's contention about tradition.⁵⁷ She maintained that the Maliseet were historically matrilineal, but that Maliseet men, at least, had come to believe that the Act's patrilineal rules codified their own custom.⁵⁸ That is, she made the post-essentialist point that what appeared to be indigenous tradition was, in fact, an invention of colonial bureaucrats.

Lovelace may be read as exemplifying either a weaker or a stronger post-essentialist critique. On the weaker critique, underneath the invented tradition lies the authentic tradition that was lost when the colonized absorbed the version systematized, purveyed, and imposed by the colonizer. On the stronger post-essentialist critique, all culture is invented. If more were known about the earlier Maliseet matriarchal tradition, it would become apparent that it too was invented.

Thus we should recognize that at any one time, insiders will have different interpretations of their culture. For instance, women might "reinterpret the meaning of arranged marriage and actively invert the power hierarchies associated with customary families [by] . . . 'agreeing to marry a partner chosen through family but [still] insisting on some autonomy.'"⁵⁹ In such cases, British immigration judges have been criticized for concluding that the marriage was neither a "real" marriage (being arranged) nor a "real" arranged marriage (deviating from traditional interpretation of the custom).⁶⁰ But if any account of a culture is contested or contestable, how can we mount a cultural claim at all without falling back into essentialism?

One influential response has been Gayatri Chakravorty Spivak's idea of strategic essentialism, which she developed in the context of postcolonial studies. Unlike much-criticized essentialism, strategic essentialism recognizes that the essential attributes of a group are socially constructed rather than natural. It

56. See, e.g., HILARY CHARLESWORTH & CHRISTINE CHINKIN, *THE BOUNDARIES OF INTERNATIONAL LAW: A FEMINIST ANALYSIS* 223-24 (2000); Anne F. Bayefsky, *The Human Rights Committee and the Case of Sandra Lovelace*, 20 CAN. Y.B. INT'L L. 244 (1982); David S. Berry, *Contextualising International Women's Rights: Canadian Feminism, Race and Culture*, in *LEGAL FEMINISMS: THEORY AND PRACTICE* 119, 125-27 (Clare McGlynn ed., 1998).

57. *Lovelace*, *supra* note 55, ¶ 6.

58. See KAREN KNOP, *DIVERSITY AND SELF-DETERMINATION IN INTERNATIONAL LAW* 358-72 (2002).

59. Angelia K. Means, *Intercultural Political Identity: Are We There Yet?*, in *MIGRATIONS AND MOBILITIES: CITIZENSHIP, BORDERS, AND GENDER*, *supra* note 43, at 380, 391 (second alteration in original) (quoting Susan Sterett, *Intercultural Citizenship: Statutory Interpretation and Belonging in Britain*, in *CONSTITUTIONAL DIALOGUES IN COMPARATIVE PERSPECTIVE* 119, 121 (Sally J. Kenney et al. eds., 1999)).

60. See *id.*

refers to the deliberate choice to develop a general category or essentialized community, such as “indigenous,” for the purpose of achieving particular political aims. According to Spivak, strategic essentialism is, in fact, a means to resist essentialism. It empowers oppressed groups by giving them a way to define themselves and thus resist their definition by powerful others. This strategy is at once politically effective and deconstructive because it operates on the potential—the group’s potential and logically any subgroup’s potential—to redefine the essence of identity.⁶¹ Whereas lapsing into essentialism is a problem, deploying essentialism may be a valuable political intervention. Strategic essentialism may be either radical or conservative, depending on “*who* is utilizing it, *how* it is deployed, and *where* its effects are concentrated.”⁶²

D. Responses to Post-Essentialist Critiques of Culture

The anthropological insight that all culture is invented tradition has served to undercut the opposition of culture to equality in two principal ways. For some feminists, whom we might call transformationists, it suggests that culture need not be the enemy of women’s equal rights. As Sally Engle Merry puts it, “Seeing culture as open to change emphasizes struggles over cultural values within local communities and encourages attention to local cultural practices as resources for change.”⁶³ There is room to transform a given culture while still paying respect to culture as a concept. For others, who can be loosely grouped together as minimizers, the recognition that all cultural claims rest on a contestable account of the culture in question—an account which has often become authoritative because of powerful (male) elites—is a reason to dispense with, or at least minimize, the role of culture.⁶⁴

61. See *Criticism, Feminism and the Institution: An Interview with Gayatri Chakravorty Spivak*, THESIS ELEVEN, Feb. 1985, at 175, 183-84. Spivak has since distanced herself from this notion. See, e.g., Sara Danius & Stefan Jonsson, *An Interview with Gayatri Chakravorty Spivak*, BOUNDARY 2, Summer 1993, at 24, 34-36. On strategic essentialism and related ideas, see Lara Karaian, *The Troubled Relationship of Feminist and Queer Legal Theory to Strategic Essentialism: Theory/Praxis, Queer Porn, and Canadian Anti-Discrimination Law*, in FEMINIST AND QUEER LEGAL THEORY: INTIMATE ENCOUNTERS, UNCOMFORTABLE CONVERSATIONS 375, 378-79 (Martha Albertson Fineman et al. eds., 2009).

62. DIANA FUSS, ESSENTIALLY SPEAKING: FEMINISM, NATURE & DIFFERENCE 20 (1989).

63. MERRY, *supra* note 37, at 9.

64. See generally KAMALA VISWESWARAN, UN/Common Cultures: Racism and the Rearticulation of Cultural Difference (2010) (critiquing the traditional anthropological concept of culture for essentializing cultural identity and therefore precluding dialogue).

1. *Transforming cultures*

The idea of transforming cultures as a way to reconcile respect for the concept with a commitment to gender equality has influenced the thinking of feminist legal academics in various ways. Three serve here as representative. In a first transformationist mode, the recognition that culture is invented has led feminists to look for the inventors. As in the *Lovelace* scenario, feminist members of the community seek and advance alternative interpretations of their culture which may have been suppressed historically by the colonizer, the community's political leadership, or its cultural elites in favor of a patriarchal interpretation.⁶⁵ Feminists thus counter one cultural claim with another—theirs is an act of strategic self-definition as against those who would oppress women by defining them. It is Spivak-style strategic essentialism rather than simple essentialism.

Yet in seeing women in other cultures as engaged in strategic essentialism, we again encounter the challenge of understanding the “other.” Legal feminists in the West tend to assume that women will practice strategic essentialism in order to advance a more egalitarian version of their culture, whereas anthropologist Saba Mahmood describes women in Egypt who wear the veil not as a “manipulable mask[] in a game of public presentation,” but in order to help cultivate a form of pious “shyness.”⁶⁶ The “desires, motivations, commitments, and aspirations of the people to whom these practices are important,” she argues, must be considered when evaluating claims of essentialism.⁶⁷

The fluidity of culture also grounds a second set of proposals for transformative transcultural *dialogue*;⁶⁸ that is, alliances with feminist dissenters inside a particular culture.⁶⁹ If the dominant patriarchal account of that culture is socially constructed or up for argument, then intervention on the side of an alter-

65. See, e.g., Lata Mani, *Contentious Traditions: The Debate on Sati in Colonial India*, in RECASTING WOMEN: ESSAYS IN COLONIAL HISTORY 88 (Kumkum Sangari & Sudesh Vaid eds., 1989); see also Valentine M. Moghadam, *Global Feminism, Citizenship, and the State: Negotiating Women's Rights in the Middle East and North Africa*, in MIGRATIONS AND MOBILITIES: CITIZENSHIP, BORDERS, AND GENDER, *supra* note 43, at 255, 269 (“The Moroccan case is a striking example of how women's rights advocates can build coalitions to generate social dialogues, have an impact on key policy debates, and help effect legal reform and public policy changes.”).

66. Mahmood, *supra* note 46, at 214.

67. *Id.* at 225; see also SABA MAHMOOD, *POLITICS OF PIETY: THE ISLAMIC REVIVAL AND THE FEMINIST SUBJECT* (2005).

68. Cf. *supra* notes 49-50 and accompanying text.

69. See, e.g., HOLTMAAT & NABER, *supra* note 33, at 106-07; Karima Bennouna, *Remembering the Other's Others: Theorizing the Approach of International Law to Muslim Fundamentalism*, 41 COLUM. HUM. RTS. L. REV. 635, 686-89, 691 (2010); Madhavi Sunder, *Enlightened Constitutionalism*, 37 CONN. L. REV. 891, 901-02 (2005). For the argument that this strategy of “splitting and seduction” has colonial echoes, which is not to condemn it per se, see Nathaniel Berman, “*The Appeals of the Orient*”: *Colonized Desire and the War of the Riff*, in GENDER AND HUMAN RIGHTS 195, 206-08 (Karen Knop ed., 2004).

native, more egalitarian account, it seems to be implied, is not interfering with authenticity or imposing outside values.⁷⁰

Similarly, if all cultures “innovate, appropriate, and create local practices,”⁷¹ then meshing arguments about women’s international human rights with strategic essentialist arguments cannot be objected to simply because it may introduce outside influences. Merry’s multi-sited ethnographic account of how international human rights norms on violence against women interact with local culture recommends a process of “vernacularizing” women’s human rights. Their universality is preserved by translating them into familiar cultural terms (which makes them less disturbing to local elites and therefore easier to adopt) while retaining the human rights framework (which makes them more transformative).⁷² Merry’s work implicitly highlights both the limits of translation as a way to overcome the earlier cultural relativism critique, and the limits of strategic essentialism as a way to overcome the post-essentialist critique.

Critics caution that transformationists can lose sight of the well-entrenched institutional forms that culture takes. In debates about whether Western multicultural democracies should recognize Islamic faith-based arbitration of family and inheritance matters, for instance, some opponents argue that although progressive interpretations of Islamic law are possible in theory, historical and modern precedents point to the strong likelihood that Islamic law would be interpreted and applied in ways that would be more patriarchal and damaging to women than the state’s law.⁷³

Accordingly, a third transformationist strategy seeks to restructure the overarching rules so as to shift incentive structures within the group and thereby empower the internal dissenters (whatever the grounds of their claims, cultural or egalitarian). One such example is Madhavi Sunder’s three-part procedural prescription. First, Sunder argues that instead of privileging the norms of cultural elites, as they now do, international and national legal decisionmakers should “place elites and dissenters on an equal footing” when a dispute is brought to them.⁷⁴ Second, the state should ensure that marginalized voices are able to participate in the processes of creating cultural meaning.⁷⁵ Third, legal

70. There are also, of course, arguments for intervention qua intervention. See Sunder, *supra* note 53.

71. MERRY, *supra* note 37, at 228.

72. See *id.* at 222; see also SIOBHÁN MULLALLY, GENDER, CULTURE AND HUMAN RIGHTS: RECLAIMING UNIVERSALISM (2006).

73. Macklin, *supra* note 43, at 287; see also David Jacobson, *Multiculturalism, Gender, and Rights, in* MIGRATIONS AND MOBILITIES: CITIZENSHIP, BORDERS, AND GENDER, *supra* note 43, at 304, 322.

74. Sunder, *supra* note 53, at 1466-67; see also Linda C. McClain, *Negotiating Gender and (Free and Equal) Citizenship: The Place of Associations*, 72 *FORDHAM L. REV.* 1569, 1595-97 (2004).

75. Sunder, *supra* note 53, at 1468.

decisionmakers should ultimately choose among the competing accounts of a culture on a substantive basis, rejecting discriminatory accounts.⁷⁶

Ayelet Shachar's idea of "transformative accommodation" is another example of a transformative approach attentive to incentive structures.⁷⁷ On her model for multicultural states, the authority to decide matters critical for a minority's self-definition would be divided between the minority and the state, creating a form of joint governance similar to those found in federal systems. Neither jurisdiction would have a monopoly over these matters, neither could trump the other, and choice options would be clearly delineated. Shachar's design *tolerates* discriminatory internal restrictions on the theory that its features will "alleviate, or at least significantly mitigate, the paradox of multicultural vulnerability by equipping members with means of combating unjust internal restrictions," while also working "to preserve and even enhance the accommodation of group traditions through state-backed external protections."⁷⁸ We might think of her model as a *compromise* in that it aims at equality in all matters, but takes the chance that the incentive structure it proposes may not deliver this result for the matters within the minority's jurisdiction.

2. *Minimizing culture*

The other group of feminist responses to the post-essentialist idea of culture is less inclined toward a role for culture. One line of this response is to replace or minimize culture as a frame. Authors following this line are wary of strategic essentialism as a resource for women, emphasizing that regardless of which insider account of a culture is authorized, any account proceeds by excluding some other insider account, most often the account of those still further subjugated.⁷⁹ Ratna Kapur, for example, proposes that cultural claims be re-framed; specifically, she advocates that sexual practices in India be evaluated not in terms of their cultural authenticity, but rather in terms of erotic desire and exclusion.⁸⁰ In response, Maneesha Deckha notes that proposals such as Kapur's offer a practical alternative only when such reframing is possible, whether in terms of sexuality, justice, pain, or other concepts. "Eliminating cultural claims at this historical moment would leave many vulnerable groups without any legal tool to guard against cultural disintegration, extinction, or exploitation. . . . [S]ome essentialism in cultural claims must be tolerated. It will

76. *Id.* at 1469.

77. See AYELET SHACHAR, MULTICULTURAL JURISDICTIONS: CULTURAL DIFFERENCES AND WOMEN'S RIGHTS 14 (2001).

78. *Id.*

79. See KAPUR, *supra* note 54, at 88-90; Maneesha Deckha, *Is Culture Taboo? Feminism, Intersectionality, and Culture Talk in Law*, 16 CAN. J. WOMEN & L. 14, 35-36 (2004); Volpp, *supra* note 41, at 98-99.

80. KAPUR, *supra* note 54, at 90-93.

be a trade-off of potentially essentializing means for egalitarian ends.”⁸¹ In the context of immigrant women and the so-called cultural defense in criminal law, Leti Volpp formulates a modified strategic essentialism, in which cultural information going to an immigrant defendant’s state of mind would only be allowed if this was consistent with the principle of antisubordination.⁸² Cultural information would be permitted in the case of an Asian woman seeking to explain her mental state when she attempted to commit parent-child suicide, for instance, but not in the case of an Asian man seeking a cultural defense for his violence against an Asian woman.⁸³ In a similar vein, Deckha accepts the strategic use of cultural essentialism as a last resort provided that the cultural claim does not subordinate women or others within the cultural minority by impairing their autonomy or equality. She also accepts that such claims might privilege the interests of some vulnerable members and not others, so long as they meet this antisubordination condition.⁸⁴ In contrast to anthropologists like Mahmood, who seek to offer accounts of feminist insiders using strategically essentialist accounts of their culture as a tool of empowerment, legal academics like Kapur, Volpp, and Deckha are primarily interested in making non-essentialist or essentialist claims for a purpose and only secondarily as a description of how things are. Thus, they turn anthropological accounts of cultural tools into legal tools of their own.⁸⁵

As distinct from discarding or limiting culture as a frame, another line of culture-minimizing response by feminists foregrounds choice. In her proposal for what she calls “multiculturalism without culture,” Anne Phillips dispenses with an essentialist understanding of culture and offers “[a] defensible multiculturalism [that] will put human agency much more at its centre.”⁸⁶ A concrete example might be the 2004 report commissioned by the government of the Canadian province of Ontario as a result of public concern about the use of Muslim personal law to arbitrate family and inheritance issues. Intended to examine the impact of arbitration on vulnerable people, including women, the report recommended that enforceable faith-based arbitration continue to be available

81. Deckha, *supra* note 79, at 38.

82. Volpp, *supra* note 41, at 91, 95, 97-100.

83. *Id.* at 59-60, 97-100; see also Leti Volpp, *Talking “Culture”: Gender, Race, Nation, and the Politics of Multiculturalism*, 96 COLUM. L. REV. 1573, 1585, 1594-96 (1996).

84. Deckha, *supra* note 79, at 52.

85. Cf. Annelise Riles, *Anthropology, Human Rights, and Legal Knowledge: Culture in the Iron Cage*, 108 AM. ANTHROPOLOGIST 52, 62 (2006).

86. PHILLIPS, *supra* note 6, at 9. For yet another perspective, see DAVINA COOPER, *CHALLENGING DIVERSITY: RETHINKING EQUALITY AND THE VALUE OF DIFFERENCE* 74-78, 192-94 (2004) (arguing for “recenter[ing] social inequality, rather than cultural harm, as diversity’s problematic” and emphasizing equality of power as distinct from equality of resources, on the one hand, and equality of recognition, on the other).

under the province's Arbitration Act, but also recommended specific procedural safeguards to ensure that the parties gave their informed consent.⁸⁷

* * *

Can the concept of culture be deployed without falling back into essentialism? To take the post-essentialist critique as license to transform a culture is to hollow out the concept of culture itself. Then again, to discard culture for this reason is logically to discard any claim based on group attributes—the category of “women” is likewise socially constructed. In short, changing conceptions of culture have made it more difficult for feminists to keep their bearings in the feminism/culture debate. The normative clarity of those who frame the conflict as equality versus culture is met with layer upon layer of cultural complication. In turn, this nuanced cultural analysis is confronted with the normative hard choice. Indeed, even the most sophisticated exchanges often end on a note of critique or complexity.⁸⁸

II. A HYPOTHETICAL CASE

In this Part, we shift gears and explore what a concrete feminism/culture conflict looks like in all its private law detail. Given the broad theoretical direction of the discussion to this point, the reader may experience something of a shock of disconnect, followed perhaps by a sense of skepticism. But this is precisely the point. At first glance, our example may seem to have nothing to do with the debates surveyed above. It does not concern any of the usual suspects—veils, polygamous marriages, disparaged sexual identities, and the like. In fact, the parties themselves would be unlikely to frame the conflict as a problem of either gender or culture. And yet on closer analysis, our example proves not only to have both feminist and cultural dimensions, but to be more dizzyingly postmodern and more complex in its postcolonial dimensions and entanglements with global capitalism than even the edgiest feminist theories might imagine.

87. MARION BOYD, DISPUTE RESOLUTION IN FAMILY LAW: PROTECTING CHOICE, PROMOTING INCLUSION 5, 133-37 (2004), available at <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/boyd/fullreport.pdf>. The report's recommendations were not implemented. See *Ontario Premier Rejects Use of Sharia Law*, CBC NEWS (Sept. 11, 2005, 5:19 PM), <http://www.cbc.ca/news/canada/story/2005/09/09/sharia-protests-20050909.html>.

88. See, for example, Roger Cotterrell, *The Struggle for Law: Some Dilemmas of Cultural Legality*, 4 INT'L J.L. CONTEXT 373 (2009), and the responses by Mezey, *supra* note 43; John Mikhail, *Dilemmas of Cultural Legality: A Comment on Roger Cotterrell's "The Struggle for Law" and a Criticism of the House of Lords' Opinions in Begum*, 4 INT'L J.L. CONTEXT 385 (2009); and Robin West, *Comments on Roger Cotterrell's Essay, "The Struggle for Law: Some Dilemmas of Cultural Legality,"* 4 INT'L J.L. CONTEXT 401 (2009).

A. *A Dispute over a Gift*

Consider the following case, based on actual litigation but hypothetical in its details:⁸⁹ a conflict between a father and a daughter over the meaning of a gift. The father, Toru, is a citizen and domiciliary of Japan, while his daughter, Yoshiko, is a Japanese citizen now domiciled in California. The gift at issue comprises all the shares of a corporation, the California subsidiary of a Japanese natural health foods products company founded by Toru. Toru is the chairman of the board, principal shareholder, and CEO of the Japanese parent company. The California subsidiary manufactures the products for the American market at a factory in California.

The gift document was drafted by a lawyer in California in both English and Japanese versions, signed by Toru in Japan and countersigned by Yoshiko in California. After the documentation was signed, the company registry was amended to show Yoshiko as the owner of the shares. A year later, Toru had his daughter execute a proxy giving him the right to vote the shares for the maximum statutory period for which proxies are valid in California, eleven months. Although the proxy was never renewed, Toru continued to make all significant company decisions for several years after its expiration.

Yoshiko's story is this: her father fully transferred control of the company to her, but he continues to try to interfere in its internal affairs and arrogantly second-guesses her every business decision. When the company recently lost its primary customer, accounting for seventy-five percent of its business, Yoshiko sold some unused real estate in order to generate cash for operating expenses. This infuriated her father, who is instead pushing for a merger with another company, owned by one of his business associates, something she opposes. Yoshiko is contemplating raising funds through various means (borrowing money or issuing stock) but first her investment bank needs clarity about her rights in the existing company stock.

Toru's story is this: several years ago, in anticipation of his own death or eventual inability to head the company, he began to worry about succession struggles between his son (who lives in Japan and works at the company headquarters) and his daughter. He was also advised that it would be more advantageous from a tax perspective to transfer shares now rather than to leave them to his daughter in his will. His solution was to give Yoshiko the shares of the American subsidiary "in name only" (*meigi*) but to retain control over the company, with the view that eventually his son would own and run the parent company while Yoshiko would own and run the smaller American subsidiary. He claims (although she denies) that he clearly communicated his intent to retain

89. One of the authors (Riles) served as an expert witness in the litigation. See *Hagiwara v. Amano*, No. CIV217048 (Cal. Super. Ct. filed Jan. 23, 2003). This case settled before a decision was reached, and the parties did not raise the conflict of laws issues we raise here.

control at the time he executed the gift documentation. Toru now maintains that the gift of the shares “in name only” was simply a way of signaling his future intent, and that the gift did not actually transfer control of the subsidiary (although he explicitly stated in both the English and Japanese versions that he was making a “gift”). He brings suit against Yoshiko in California state court, asking the court to declare him the beneficial owner of the subsidiary.

B. *The Substantive Law Dimensions*

From the perspective of California law, Toru faces an uphill battle. In principle, a valid gift of shares confers on the donee all rights of control and alienation. This standard legal rule reflects a much broader baseline assumption within the culture that “a gift is a gift.” “Indian gifts” and “Indian givers”—in the problematic phrase for those who take back what they give—are frowned upon in both law and practice.⁹⁰ The problem is not that what Toru might have had in mind—namely, to transfer title to the shares to his daughter while retaining effective control for himself—would be impossible. The problem, rather, is that the particular form that he chose to effectuate his wishes is incompatible with California law.

One path for Toru lies in corporate law. Ordinarily, voting rights are inseparable from title in stock. California corporate law does not recognize transfer of shares “in name only.” It does allow, however, for agreed restrictions on their control.⁹¹ For example, if Toru’s aim was to prevent Yoshiko from selling the company, the shares transferred to her could have been made subject to a restriction on transfer. To be effective, such an explicit restriction on transfer would have had to be noted on the shares themselves, so that third parties are not misled.⁹² Likewise, a voting agreement would have obliged Yoshiko to vote her shares as Toru directed, though breach of such an agreement would be actionable only as between the parties. The parties could also have renewed their proxy agreement when it expired.⁹³

Trust law offers another possible way to account for the intimate relations between these economic actors and for Toru’s intention to separate ownership and control. Toru might have made his gift in the form of a trust, whereby the transferee acquires legal title whereas the transferor, as beneficiary, retains ef-

90. See Jonathan Parry, *The Gift, the Indian Gift, and the “Indian Gift,”* 21 *MAN* (n.s.) 453, 461 (1986).

91. See CAL. CORP. CODE § 702(c) (West 2012).

92. See *id.* § 418(b).

93. See *id.* § 706. Section 7.31(a) of the Model Business Corporation Act likewise provides that “[t]wo or more shareholders may provide for the manner in which they will vote their shares by signing an agreement for that purpose.” MODEL BUS. CORP. ACT § 7.31(a) (2006).

fective control over the stock.⁹⁴ An express trust obligating Yoshiko to act as a fiduciary for her father would not require an explicit writing as long as the intention to create a trust was ascertainable.⁹⁵ But again, Toru did not comply with these requirements. Toru might argue that the fact that Yoshiko effectively followed Toru's wishes in voting for a lengthy period after the transfer is evidence of the existence of an implied trust, but Yoshiko might reply that she complied with her father's wishes for a period of time not out of any legal obligation but simply in order to avoid conflict within the family and to do what seemed right.

A third lens for thinking about the case might be the law of gifts.⁹⁶ Like corporate law, the law of gifts requires that the parties adhere to well-defined formalities or the gift will fail.⁹⁷ According to the common law of gifts in most U.S. jurisdictions, including California, a gift requires both an intent to give and delivery—complete divestment by the donor of the property.⁹⁸ If the intention is to make a transfer in the future (at death, for example), the gift is not valid.⁹⁹ Toru thus might argue that he lacked the requisite intent¹⁰⁰ to make a gift,

94. Japanese corporate law recognizes trusts, but the trust form remains unattractive for most parties. See Hideki Kanda, *Politics, Formalism, and the Elusive Goal of Investor Protection: Regulation of Structured Investment Funds in Japan*, 12 U. PA. J. INT'L BUS. L. 569, 571-72 (1991). For a brief introduction into Japanese trust law, see Hiroto Dogauchi, *Overview of Trust Law in Japan*, SCH. L. TOHOKU U., <http://www.law.tohoku.ac.jp/kokusaiB2C/link/dogauchi.html> (last visited Mar. 9, 2012). See also Arthur Nussbaum, *Sociological and Comparative Aspects of the Trust*, 38 COLUM. L. REV. 408, 423, 429-30 (1938).

95. See *Bank of Am. Nat'l Trust & Sav. Ass'n v. Long Beach Fed. Sav. & Loan Ass'n*, 297 P.2d 443, 447 (Cal. Dist. Ct. App. 1956).

96. In the common law of most U.S. states, a gift is commonly defined as a voluntary transfer of property by one to another without consideration. See, e.g., *Heritage Bank Tinley Park v. Steinberg (In re Grabill Corp.)*, 121 B.R. 983, 997 (Bankr. N.D. Ill. 1990). Under California law, a valid gift must meet the following requirements: (1) competency of the donor to contract; (2) a voluntary intent on the part of the donor to make a gift; (3) delivery, either actual or symbolic; (4) acceptance, actual or imputed; (5) complete divestment of all control by the donor; and (6) lack of consideration for the gift. See, e.g., *Lynch v. Lynch*, 12 P.2d 741, 742 (Cal. Dist. Ct. App. 1932).

97. See, e.g., *Wood v. Stephens*, No. B151997, 2002 Cal. App. Unpub. LEXIS 9070, at *8-17 (Sept. 27, 2002).

98. See *Pashley v. Pashley (In re Marriage of Pashley)*, 115 Cal. Rptr. 537, 539 (Ct. App. 1974); see also *United States v. Alcaraz-Garcia*, 79 F.3d 769, 775 (9th Cir. 1996); *Mehren v. Dargan (In re Marriage of Mehren)*, 13 Cal. Rptr. 3d 522, 525 (Ct. App. 2004); *Garetson v. Garetson*, No. A100080, 2004 Cal. App. Unpub. LEXIS 1464, at *14-15 (Feb. 18, 2004); *Rolinson v. Rolinson*, 282 P.2d 98, 100 (Cal. Dist. Ct. App. 1955); 13 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW § 128 (10th ed. 2005).

99. See *Crocker v. Hall (In re Hall's Estate)*, 98 P. 269, 271-72 (Cal. 1908).

100. Under California law, "[i]t is the *intent* with which the delivery is made which is the primary essential, for unless the donor *intends* to divest itself completely of control and dominion over the property, the gift is incomplete." *Yamaha Corp. of Am. v. State Bd. of Equalization*, 86 Cal. Rptr. 2d 362, 375 (Ct. App. 1999); see also *Burkle v. Burkle*, 46 Cal. Rptr. 3d 562, 567 & n.5 (Ct. App. 2006); *Berl v. Rosenberg*, 336 P.2d 975, 979 (Cal. Dist. Ct. App. 1959); *Blonde v. Estate of Jenkins*, 281 P.2d 14, 16 (Cal. Dist. Ct. App. 1955).

since his goal was only to signal his intention for succession in the future. However, a donor's private, undisclosed reservations alone will not be enough to contradict other objective evidence of valid intent.¹⁰¹ The document with which the shares were transferred clearly characterizes the transfer as a "gift," and Toru would in effect need to ask for an exception to the parol evidence rule to prove that he intended something different. He might also argue that he did not relinquish control—and hence did not divest himself of the property if, in the logic of the corporate law, ownership of shares and voting rights are inseparable. However, the parties allowed Toru's proxy to expire without renewing it.

C. *The Cultural Dimensions*

1. *The culture of household—corporation and kinship*

Toru's assertion that the transfer was "in name only" might seem like a mere mistake or a flight of ignorance about (California) law. Yet what California law treats as a mistake is in fact the reflection of specific Japanese cultural practices and ideas that frame two key social institutions—the corporation and the kinship relation.

It is not surprising, then, that Toru's view of things finds considerable support in Japanese law. The heads of Japanese family-owned companies commonly transfer shares to designated successors of their companies as a means of avoiding disputes among siblings over control of a family-owned company at the time of the death of the company head. Frequently this is done "in name only," and there is considerable precedent in the case law for the concept of "name-only" shareholdings.¹⁰² In these cases, courts have found that in family-

101. *Frapwell v. Gillespie* (*In re Marriage of Frapwell*), 122 Cal. Rptr. 718, 720 (Ct. App. 1975).

102. In *Saikō Saibansho* [Sup. Ct.] Nov. 17, 1967, Sho 42 (o) no. 231, 21 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 2448, the chairman of a *dōzoku gaisha*, see *infra* note 117, issued new shares in the company and distributed them to certain employees in order to add legitimacy to the company. The company head explained to the employees that the transfer would be in name only, and that they would be paid a special bonus in consideration for their participation in the scheme. Later one of the employees demanded that he receive the shares registered in his name. The district court ruled for the company and its decision was upheld on appeal. The high court (the regional appellate court) reasoned that where shares are transferred in name only, and where the transferee approves the use of his name in this way, ownership rights are retained by the party that borrows the transferee's name. The Japanese Supreme Court upheld the high court's decision on the same reasoning. See *Komoto Ichiro, Tanin no shōdaku no motonisono meigi o mochiite kabushiki no hikiukegasanareta baai ni okeru kabunushi* [*Ownership of Shares Registered in Another Party's Name with That Party's Approval*], 59 MINSHŌHŌ ZASHI 57 (1968). In 1975, the Supreme Court again reaffirmed this decision in *Saikō Saibansho* [Sup. Ct.] Nov. 14, 1975, Sho 50 (o) no. 438, 116 MINSHŪ 475. See SUGAWARA KIKUSHI, HANREI SHŌHŌ [COMMERCIAL CODE PRECEDENT] 225 (1993). More recently, a decision of the Nagoya High Court again affirmed that actual

owned companies, transfers of shares are tantamount to wills: ways of expressing intent about what should happen at the transferor's passing. Hence they are transfers "in name only" and do not confer on the transferee rights to control. Thus, in practice, so-called "name-only" shareholders and "name-only" directors do not have the rights or duties of actual shareholders or directors. Moreover, courts confronted with disputes over transfers of shares in family-owned companies among family members most often resolve those disputes in a way that will give effect to the intention of the head of the company or prevent the fragmentation of the shareholdings.¹⁰³ This is true even when the actions of company heads explicitly violate the letter of the company law.¹⁰⁴ Article 201(1) of the Commercial Code, moreover, anticipates that share transfers may take place on the books without the knowledge of transferees and provides that in such cases, it is the actual shareholder, and not the nominal shareholder, who has control of the company.¹⁰⁵

Often family-owned companies also transfer shares or install directors to the board of directors "in name only." In addition to the above, such registration of nominal shareholders is done in order to satisfy the requirements of the commercial law for incorporation, to give the company greater legitimacy on paper, or to provide some form of symbolic recognition to non-family members who have made substantial contributions to a family-owned company (such as lifelong managers).¹⁰⁶ It is commonly understood that the purpose of transfers by a company head to his children is to plan for succession in the future, at the time of the head's death, and not to transfer control of the company in the present. In fact, it is not unusual for the designated successor to remain una-

shareholders, not those shareholders formally listed on the registry, retain legal control. Nagoya Kōtō Saibansho [Nagoya High Ct.] April 24, 1991, Hei 2 (ne) no. 206, KŌTŌ SAIBANSHO HANREISHŪ [SAIBANREI JŌHŌ] 1, <http://www.courts.go.jp>.

103. See Saikō Saibansho [Sup. Ct.] Mar. 9, 1972, Sho 43 (o) no. 232, 105 MINSHŪ 269; see also Fukuoka Kōtō Saibansho [Fukuoka High Ct.] Oct. 31, 2002, Hei 14 (ne) no. 236, SAIBANREI JŌHŌ 1, <http://www.courts.go.jp>.

104. See, e.g., Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] Sept. 17, 1997, 1640 HANREI JIHŌ [HANJI] 160.

105. The Japanese Commercial Code reads as follows:

A person who has taken shares using the name of a fictitious person shall incur the liability of a person taking shares. The same shall apply to a person who has taken shares in the name of other person [sic] without his consent.

SHŌHŌ [SHŌHŌ] [COMM. C.] art. 201(1), *translated in* 2 EHS LAW BULL. SER. no. 2200, at 54 (2005). Book II of the Commercial Code, in which this paragraph appears, was abolished when the Companies Act came into effect in 2006. See Kaishahō [Companies Act], Law No. 86 of 2005 (Hōrei teikyō dēta shisutemu [Hōrei DB]), <http://law.e-gov.go.jp/cgi-bin/idxsearch.cgi> (stating the rules of incorporation). However, the rule discussed here remains good law based on an analogy to Article 117(1) of the Civil Code, MINPŌ [MINPŌ] [CIV. C.] art. 117(1). See EGASHIRA KENJIRŌ, KABUSHIKI-GAISHAHŌ [LAWS OF STOCK CORPORATIONS] 94 (3d ed. 2009).

106. See, e.g., Komoto Ichiro, *supra* note 102 (discussing a case in which shares were issued "in name only" to add legitimacy to the company).

ware that the transfer has taken place until after the death of the company head.¹⁰⁷

Thus, the kinship relationship between Toru and Yoshiko is obviously central to their dispute. To understand their actions, we need to understand not only something about corporations in Japan, but something about the traditional nature and economic activities of the Japanese household, the *ie* (literally “house”). Unlike the common American conception of a family, an *ie* is a unit engaged in a particular kind of business, often over generations (in theory at least it should last in perpetuity, and many Japanese *ie* in fact do trace their lineage and their business back several centuries).¹⁰⁸ Prior to U.S. occupation-era legal reforms,¹⁰⁹ the *ie* legally owned all assets collectively, as its own form of legal personhood, and to this day household members extensively share assets that are nominally owned individually.

In contrast to the traditional middle-class Euro-American nuclear family form of two sexually intimate individuals living together with their genetic offspring, the Japanese *ie* has traditionally consisted of two political/economic leadership “positions” or “offices”—the office of the clan head, and his spouse/partner. The office of the clan head has traditionally brought with it authority over the family enterprise and control over its affairs as well as responsibility for managing those affairs.¹¹⁰ Only one person can hold this office at one time, and therefore only one child in each generation can succeed to the office of clan head. Hence, succession is always a crucial but contestable matter within the *ie*.¹¹¹ The presumption traditionally has been that the clan head’s oldest son succeeds his father in this position at his death.¹¹² In practice, however, this rule of primogeniture is less important than the economic well-being and survival of the *ie*. A clan head may choose as successor a second son who seems more equipped to run the family business than his older brother; he may

107. Article 201(1) of the Japanese Commercial Code clearly anticipates that share transfers may take place on the books without the knowledge of transferees, and that in such cases it is the actual shareholder, and not the nominal shareholder, who has control of the company and therefore should be held liable for its actions. *See supra* note 105.

108. *See* Jane M. Bachnik, *Recruitment Strategies for Household Succession: Rethinking Japanese Household Organization*, 18 *MAN* (n.s.) 160, 160-61(1983); *cf.* Shunji Sakai, *Communication et cohésion sociale dans les organisations japonaises* [*Communication and Social Cohesion in Japanese Organizations*], 38 *SOCIÉTÉ* 367, 371 (1992).

109. On the U.S. occupation of Japan after World War II, *see* note 125 below.

110. *See* Bachnik, *supra* note 108, at 161.

111. Anthropologist Jane Bachnik describes the *ie* as “constantly ‘sorting’ between temporary and permanent members”—between the ones who will succeed to the company and the ones who will be forced out. *Id.* at 176.

112. Those who do not succeed to the office of clan head must set out on their own, or are sent out to found “branches” of the *ie* (with economic support of their root *ie*). *See* MATTHEWS MASAYUKI HAMABATA, *CRESTED KIMONO: POWER AND LOVE IN THE JAPANESE BUSINESS FAMILY* 33 (1990). Typically this branch is engaged in some sort of economic activity that is related but subsidiary to the work of the root *ie*, such as the production of a component part of the final product produced by the root *ie*.

allow a daughter to assume control; he may bring in an outsider whose management skills he admires, by marrying him to a daughter;¹¹³ or he may adopt a manager, in adulthood, as his “eldest son.”¹¹⁴ Therefore, although *ie* is often translated as “household,” “family,” or “clan,”¹¹⁵ the *ie* is perhaps better understood as the Japanese analogue to the Euro-American corporation. Like the corporation, the *ie* is a pool of wealth that exists in perpetuity with a unified management structure that is nevertheless advised by others.¹¹⁶

This unique kinship relationship sometimes takes the form of an actual corporate enterprise. The *dōzoku gaisha* (literally “lineage company”)¹¹⁷ is a uniquely Japanese institution.¹¹⁸ Despite its formal legal existence as a corporation like any other, in the eyes of most Japanese, its corporate identity is a technical legal overlay on a very old and established social institution. The “lineage company” is more lineage than company.¹¹⁹ The particular features of these companies have contributed fundamentally to the economic success of Japan in the postwar era. For example, the practice of “relational contracting” among branch family companies engaged in a chain of production, in which each link in the chain is willing to make sacrifices in its dealings with other links for the sake of the long-term stability of relations among units, results in low transaction costs and a high degree of economic efficiency of the kind that can only be

113. When this occurs, the daughter traditionally keeps the household name and inherits its assets. *Id.* at 45.

114. There is extensive discussion of this practice in the anthropological literature. See, e.g., CHIE NAKANE, *KINSHIP AND ECONOMIC ORGANIZATION IN RURAL JAPAN* (1967); Bachnik, *supra* note 108; Harumi Befu, *Corporate Emphasis and Patterns of Descent in the Japanese Family*, in *JAPANESE CULTURE: ITS DEVELOPMENT AND CHARACTERISTICS* 34 (Robert J. Smith & Richard K. Beardsley eds., 1962); Keith Brown, *Dōzoku and the Ideology of Descent in Rural Japan*, 68 *AM. ANTHROPOLOGIST* 1129 (1966); Ichiro Kato, *The Adoption of Majors in Japan*, in *AN AGING WORLD: DILEMMAS AND CHALLENGES FOR LAW AND SOCIAL POLICY* 161 (John M. Eekelaar & David Pearl eds., 1989); Howard Wimberley, *On Living With Your Past: Style and Structure Among Contemporary Japanese Merchant Families*, 21 *ECON. DEV. & CULTURAL CHANGE* 423 (1973).

115. See Hironobu Kitaoji, *The Structure of the Japanese Family*, 73 *AM. ANTHROPOLOGIST* 1036, 1036 (1971).

116. Cf. Teemu Ruskola, *Conceptualizing Corporations and Kinship: Comparative Law and Development Theory in a Chinese Perspective*, 52 *STAN. L. REV.* 1599 (2000) (describing a similar phenomenon in Chinese kinship).

117. A *dōzoku gaisha* is defined by the corporate tax code as a company in which more than fifty percent of the company’s shares are owned by no more than three shareholders and their relatives, their “personal employees” (*shionin*) and their immediate families, and other members of the households of the above. Hōjinzeihō [Corporate Taxation Act], Law No. 34 of 1965, art. 2, para. 10 (Hōrei DB), <http://law.e-gov.go.jp/cgi-bin/idxsearch.cgi>; cf. Kitano Hirohisa, *Dōzoku gaisha*, 1069 *SHŪJI HŌMU* 39, 39 (1986). More commonly, the term is used to mean an enterprise owned in substantial part by a Japanese clan, or *ie*.

118. As the sociologist Catherine Silver points out, Japan’s successful modernization has not meant the Westernization of values. See Catherine B. Silver, *Japanese and American Identities: Values and Their Transmission in the Family*, 72 *SOC. INQUIRY* 195, 195 (2002).

119. See DORINNE K. KONDO, *CRAFTING SELVES: POWER, GENDER AND DISCOURSES OF IDENTITY IN A JAPANESE WORKPLACE* 167-68 (1990).

achieved in Euro-American economies through very large economies of scale.¹²⁰ Such small and medium-sized companies make up the overwhelming majority of all enterprises in Japan (99.7%).¹²¹ The vast majority of Japanese employees (70.2%) also work for one of them.¹²² To say that these “companies” are “really” families in legal disguise therefore risks further confusion if we have in mind a Euro-American conception of the family as a private sphere, defined by relations of affection and set apart from the rough-and-tumble of economic life. In point of fact, the Japanese household is already much more like a business entity than a “family” in Euro-American conceptions of that term.

Likewise, focusing solely on whether Toru’s state of mind conforms to what the common law defines as “intent” to make a gift, or whether or not transferring shares but continuing to exercise a degree of control constitutes “delivery,” asks the decisionmaker to enter a make-believe world in which the context of the parties’ relationships and the lenses through which they made those choices simply do not exist.¹²³ As Carol Rose argues, formal requirements reflect a wider cultural suspicion of gifts, a sense that rational people do not intend to give things away for nothing in return, and a view that many gifts are in fact the result of “theft” or “trickery” rather than freely given.¹²⁴ We rely

120. See Ronald Dore, *Goodwill and the Spirit of Market Capitalism*, 34 BRIT. J. SOC. 459 (1983).

121. *Share of SMEs in the Japanese Economy*, SMALL & MEDIUM ENTERPRISE AGENCY, http://www.chusho.meti.go.jp/sme_english/outline/07/01.html (last visited Mar. 9, 2012); see also Ministry of Internal Affairs & Commc’ns, *Establishment and Enterprise Census*, STATISTICS BUREAU (2008), <http://www.e-stat.go.jp/SG1/estat/ListE.do?bid=000001008301&cycode=0> (follow “Excel” hyperlinks adjacent to “Table No. 10”); *Chusho kigyo kankei no toikei shiryō* [Statistical Data for Small and Medium-sized Companies], SMALL & MEDIUM ENTERPRISE AGENCY, <http://www.chusho.meti.go.jp/pamflet/souran/3siryou/3-0-0-0-5toukei.html#hyo2> (last visited Mar. 9, 2012).

122. *Share of SMEs in the Japanese Economy*, *supra* note 121; see also JAPAN SMALL BUS. RESEARCH INST., MINISTRY OF ECON., TRADE & INDUS., WHITE PAPER ON SMALL AND MEDIUM ENTERPRISES IN JAPAN, at v (2009), available at http://www.chusho.meti.go.jp/pamflet/hakusyo/h21/h21_1/2009hakusyo_eng.pdf.

123. In practice, some courts have loosened the delivery requirement for gifts, especially when corporate shares are involved, introducing something more akin to a multifactor analysis for determining whether there was indeed delivery and intent. But this more open-ended analysis is directed at only one question: what did the giver intend, and did she come close enough to effectuating her intentions? Questions of culture and gender come in only as a matter of evidence as to the parties’ state of mind. See, e.g., *Jean v. Jean*, 277 P. 313, 315 (Cal. 1929); *Lynch v. Lynch*, 12 P.2d 741, 743 (Cal. Dist. Ct. App. 1932); see also *Yamaha Corp. of Am. v. State Bd. of Equalization*, 86 Cal. Rptr. 2d 362, 375 (Ct. App. 1999); *Jaffe v. Carroll*, 110 Cal. Rptr. 435, 439 (Ct. App. 1973).

124. See Carol M. Rose, *Giving, Trading, Thieving, and Trusting: How and Why Gifts Become Exchanges, and (More Importantly) Vice Versa*, 44 FLA. L. REV. 295, 303 (1992) (arguing that the rigidity and formality in the law of wills reflects suspicion concerning the legitimacy of gifts and anticipates the possibility of trickery or theft by the donee); see also *Knupper v. Lindblade* (*In re Dyer*), 322 F.3d 1178, 1188-89 (9th Cir. 2003) (exemplifying the application of rigid rules for the validation of a gift in the context of a will).

on formal doctrines such as “delivery” in the law of gifts because we assume that the parties’ commonsense understanding of a gift involves some concept of delivery. But in a situation in which the relevant law is not a stand-in for all the relevant cultural considerations, whether Toru’s actions happen to match the law’s requirements for “delivery,” for example, is almost fortuitous, and allowing the outcome of litigation to turn on such things turns the law into a game of technical one-upmanship and chance.

A case in point: Toru’s claim that his gift fails for lack of delivery is ironic given that under Japanese law, delivery is not a necessary element of a legally recognizable gift. Mere intent alone suffices. Hence Toru is availing himself of what, from a Japanese litigant’s point of view, is a technicality of American common law doctrine.

2. *The postcolonial dimension*

But if this is not complicated enough, consider how this conflict incorporates and in some senses turns upon the effects and aftershocks of a colonial legacy¹²⁵ in which, as mentioned in Part I, tradition is often invented and reinvented, such that the search for the “true” Japanese or American custom on a given point becomes largely futile. Even the fact that in Japanese law mere intent suffices for a gift (neither the gift contract nor the transfer of ownership requires delivery) may actually be a consequence of ideas adopted from continental European law.¹²⁶ We are left with the fragments of many invented

125. The postwar U.S. occupation of Japan (1945-1952) was similar in function to colonization. As historian Eiji Takemae explains, despite the Americans’ reformist agenda, the United States ran Japan for more than six years as a de facto military colony under General Douglas MacArthur, Supreme Commander for the Allied Powers. See TAKEMAE EIJI, *INSIDE GHQ: THE ALLIED OCCUPATION OF JAPAN AND ITS LEGACY*, at xxvi (Robert Ricketts & Sebastian Swann trans., 2002). According to the historian of international law Antony Anghie, throughout its history the United States has declined to term its occupation of other countries “colonialism,” instead using concepts like “trusteeship” to help resolve a fundamental contradiction: “how could the United States, born out of a war of independence against colonialism, itself become a colonial power?” ANTONY ANGHIE, *IMPERIALISM, SOVEREIGNTY, AND THE MAKING OF INTERNATIONAL LAW* 283 n.40 (2005).

Although functionally similar to earlier European colonization projects, the ways and means of the American use of power in Japan were distinct. The occupation of Japan and the establishment of permanent naval bases in Okinawa represent the fulfillment of military theorist Alfred Mahan’s vision for a U.S. foreign policy that “build[s] reach, not burdens.” JOHN D. KELLY, *THE AMERICAN GAME: CAPITALISM, DECOLONIZATION, GLOBAL DOMINATION, AND BASEBALL* 24 (2006). For an analysis of the Okinawa bases as colonization, see Kozue Akibayashi & Suzuyo Takazato, *Okinawa: Women’s Struggle for Demilitarization*, in *THE BASES OF EMPIRE: THE GLOBAL STRUGGLE AGAINST U.S. MILITARY POSTS* 243 (Catherine Lutz ed., 2009).

126. See MINPO arts. 176, 549. Japanese law is not fully clear on these questions. Under Japanese law, a gift is a “consensual contract” (*dakuseikeiyaku*): a category of contract borrowed from Roman law which by definition requires nothing more than a meeting of the minds. According to Article 549 of the Civil Code, a gift takes effect once there is mutual

traditions, available to social actors as tools, levers, and lenses through which to frame social and economic interactions, define personal aspirations, and ultimately negotiate conflicts.

In the corporate law context, the American occupation forces legislated the *ie* out of existence in 1947, abolishing its status as a perpetual property holder in the civil code and mandating the individualized division of property into equal shares¹²⁷ in a bid to strengthen individual autonomy in Japanese society.¹²⁸ Three years later, the same occupation forces mandated an “American-style” revision of the Japanese company law.¹²⁹ The response was dramatic, as companies rushed by the thousands to incorporate. What the occupation author-

intent between both parties (expression of intent by the donor and acceptance by the donee), and nothing further is required. *Tsu Chihō Saibansho* [Tsu Dist. Ct.] Dec. 4, 2003, Hei 15 (gyō u) no. 12, SAIBANREI JŌHŌ 1, <http://www.courts.go.jp>. For example, in *Tōkyō Kōtō Saibansho* [Tokyo High Ct.] Sept. 18, 2002, Hei 14 (gyō ko) no. 142, SAIBANREI JŌHŌ 1, <http://www.courts.go.jp>, a father in Japan gave money to his daughter in the United States and later contested the gift. The Tokyo High Court noted that, although the physical transfer of the money occurred at a later point in time, the gift became effective when the father expressed his intent to advance the funds to his daughter and the daughter accepted. It is not clear, however, whether this is due to European influence. According to some authors, the bindingness is a consequence of traditional Japanese norms, according to which gifts were of great importance and were usually considered binding. 14 SHINPAN CHŪSHAKU MINPŌ [REVISED COMMENTARY ON THE CIVIL CODE] §§ 549-554 (Yunoki Kaoru & Takagi Takio eds., 1993). In fact, articles 549 and 550 of the Code abolished the form requirement of the Meiji period (which had resembled both French and German law) and merely allowed the donor to cancel the gift if it was not in writing. MINPŌ art. 550; see Ronald Frank, *Law of Obligations*, in *HISTORY OF LAW IN JAPAN SINCE 1868*, at 227, 248 (Wilhelm Röhl ed., 2005). Effectively, as in French law, the recipient’s position is less stable before than after delivery. Tomotaka Fujita, *Japan*, in *TRANSFER OF OWNERSHIP IN INTERNATIONAL TRADE* 261, 262-65 (Alexander von Ziegler et al. eds., 2d ed. 2011).

Note also that articles 549 and 550 of the Code concern only the obligation created by the gift agreement, not the transfer of ownership. As concerns the need for delivery and for a separate agreement on transfer of ownership, a conflict exists between two sources of the Japanese Code: French law, where mere agreement suffices, and German law, which requires delivery and a separate agreement. See, e.g., Seizi Tanaka, *On Theories About Alienation of Jus in Rem in the Civil Code of Japan*, 5 *OSAKA U. L. REV.* 25, 25-26 (1957).

127. See Bachnik, *supra* note 108, at 160 (“[T]he *ie*, . . . although widely acknowledged as the basic unit in Japanese society, was legislated out of existence by the Occupation-inspired Civil Code of 1947.”); Karen Garner, *Global Feminism and Postwar Reconstruction: The World YWCA Visitation to Occupied Japan, 1947*, 15 *J. WORLD HIST.* 191, 215 (2004) (explaining that the American occupation forces mandated individual property rights for women, which undermined the authority of the *ie* as collective property holder); see also BEATE SIROTA GORDON, *THE ONLY WOMAN IN THE ROOM: A MEMOIR* 103-25 (1997) (providing background on the drafting of the equal rights provisions).

128. See Bachnik, *supra* note 108, at 169 (arguing that the problem with the Meiji Civil Code from the point of view of the occupation forces was that it “clearly defines succession as continuity of the *ie* and not individual continuity”).

129. Not surprisingly given this history, the corporation law does not treat *dōzoku gai-sha* differently from other companies, and hence family-owned companies are formally subject to the same rules of incorporation as other corporations under the Commercial Code. See generally *Kaishahō* [Companies Act], Law No. 86 of 2005, arts. 25-103 (Hōrei DB), <http://law.e-gov.go.jp/cgi-bin/idxsearch.cgi> (stating the rules of incorporation).

ities perhaps missed in all this was that the new corporations were, in many cases, the very *ie* they had banned three years before.¹³⁰

The conflict between the parties to this case, then, is a postcolonial predicament—one framed by layers of occupation-era reform projects and local responses. And this recent history exemplifies how culture can be its own legal invention: from the start, the company law in Japan served as a kind of local tool, a euphemism, a way of putting things better left unsaid and of interacting with the state and with others through the state—that is, as a technical game to be played. It is not an exaggeration to say that the *dōzoku gaisha* is itself an artifact of the kind of legal technicalities that are the focus of this Article. This is a complicated discovery: when we go looking for Japanese culture, in a multiculturalist vein, what we find instead are layers of history in which many actors have deployed legal technicalities for their own purposes—not some pure culture outside of law, but legal technicalities in action.¹³¹

3. *The transnational dimension*

As in most multiculturalism problems, it is not only that another culture is at issue in the dispute between Toru and Yoshiko or that the other culture is produced by an overlay of different normative, legal, and economic regimes. In addition, the parties' relationship is transnational in nature: structured and informed by more than one culture and competing conceptions of each. The interplay creates opportunity for differing understandings of what is right, just, and desirable for each person and for the group as a whole—indeed, differing understandings of the very facts involved. (For example, what exactly *was* the nature of the agreement about this transfer? The parties actually have different recollections and understandings on this point.)

The very existence of the conflict here reflects a transnational interplay of cultures. In Japan, although disputes among rival successors are common at the time of the death of the head of a family-owned company, legal disputes between the head of a family-owned company and other shareholders for control of family-owned companies during the lifetime of the head are almost unheard of, and the regulatory authorities do not treat this possibility as a serious policy concern (as they do for inter-sibling conflicts). Most Japanese would find a conflict between parents and children over business affairs to be highly unfortunate and many would assert that it is only rarely ethical for children to challenge a father's authority during his lifetime, or for a father to sue his daugh-

130. It is also possible, of course, that the occupation government knew exactly what was going on.

131. Our example is far from unique in this respect. Anthropologists have often documented how pluralist law becomes not simply a way of accommodating the truth about cultural practices, but rather a tool for continuing local politics by other means. Likewise, the legal debates about multiculturalism unearth numerous examples of parties deploying legal technicalities and conflicts between different legal regimes, in order to define their positions.

ter.¹³² Thus, as is often the case in conflicts over multiculturalism, even the party who is asserting an alternative cultural tradition in this conflict is not behaving entirely as that tradition might expect. After all, Toru has come all the way to America to sue his daughter in a U.S. court of law. Toru is picking and choosing, among fragmented and hybridized traditions, to fashion his own situated ethical position.

The issues here are further complicated by—indeed would not have arisen at all were it not for—the opportunities and also the demands of a global economy. The very existence of this company is a product of Toru's global business model. Yoshiko in turn must satisfy potential creditors about the clarity of her title (and hence the availability of her assets for seizure in bankruptcy) simply in order to conduct business in the United States.

Finally, any attempt to unravel this controversy requires confronting the pluralistic nature of national legal systems to begin with. Toru's actions presume a certain appreciation (or at least interpretation) of how formal state law in Japan accommodates norms regarding the administration of economic affairs within family-owned companies. He is relying on a pluralistic understanding of Japanese law and an assumption that state law delegates certain authority to customary law.¹³³

D. *The Feminist Dimensions*

From a feminist perspective, what is ultimately at stake in the conflict between Yoshiko and Toru is the gendered quality of the kinship hierarchies and the power dynamics within the kin group that define economic membership and frame personal choices, opportunities, and aspirations. The hypothetical pits a daughter's desire for economic and personal autonomy against a father's desire for respect and the continued economic and social viability of the household, in the context of a cultural and legal tradition that places less emphasis on the individual rights of kinspersons than the Euro-American traditions do.

A basic context for this dispute is the reality that "Japanese female participation in management is considerably lower than in other industrialized nations, despite the fact that the female workforce in Japan is among the most educated in the world."¹³⁴ In 2009, a mere 1.2% of executives at listed Japa-

132. Although it has been argued in Japanese legal studies that the Japanese are not in fact less litigious than Americans, such arguments focus on litigation among strangers and business relations, not among people who see themselves as kin.

133. For an explanation of delegation as one way that the state can accommodate non-state law, see Ralf Michaels, *The Re-State-Ment of Non-State Law: The State, Choice of Law, and the Challenge from Global Legal Pluralism*, 51 WAYNE L. REV. 1209, 1234-35 (2005). On legal pluralism in Japan, see MASAJI CHIBA, *LEGAL PLURALISM: TOWARD A GENERAL THEORY THROUGH JAPANESE LEGAL CULTURE* (1989).

134. Reginald Worthley et al., *Workforce Motivation in Japan: An Examination of Gender Differences and Management Perceptions*, 20 INT'L J. HUM. RESOURCE MGMT. 1503,

nese companies were women. As of 1995, the statistic was 0.15%. In comparison, in the United States, women held 13.5% of executive officer positions in Fortune 500 companies in 2009.¹³⁵ And yet in Japanese family-owned companies, the situation is more complicated. As Jean Renshaw argues,

It is accepted practice for wives in the large corporate families to be instrumental in decisions affecting leadership and succession, as they arrange marriages, influence which son will become president, and often through their own family bring greater wealth and power into the company. . . . As managers, [women] may be required to wield power directly, but so far they have been quite successful at remaining invisible. As a person at the margins, a woman manager truly straddles two worlds Those who spent early years without a male sibling in first place felt less trepidation in seeking expanded opportunities and trying out new behaviors.¹³⁶

The irony, then, is that women in Japan fare better as leaders in those corporations that Western feminists might denounce as overtly patriarchal—bastions of status rather than contractual relations. However, Renshaw adds, whereas women in the West hit a “glass ceiling,” the “shoji screen” is a better metaphor for capturing the nature of the discrimination that Japanese women confront as managers: “The few women who break into top management are invisible. . . . General opinion holds that there are no women managers. Shoji screens serve to maintain a collective denial of Japanese women in positions of power.”¹³⁷

Moreover, in adjudicating legal disputes between members of family-owned companies, Japanese courts appear to give some weight to their judgments about the behavior and relative fault of each of the parties. Behavior that deviates significantly from the relational and hierarchical standard of ethical practice is rarely rewarded by the courts. Obedience to the company head, understood as “a generalized dutifulness, . . . [or] a relatively low level of individualistic self-assertion,”¹³⁸ is the primary ethical imperative for company employees.¹³⁹ This ethical imperative reflects a fundamental tenet of Confucian

1505 (2009) (emphasis omitted) (citations omitted); *see also* JEAN R. RENSHAW, *KIMONO IN THE BOARDROOM: THE INVISIBLE EVOLUTION OF JAPANESE WOMEN MANAGERS* 17-18 (1999); Masae Yuasa, *Japanese Women in Management: Getting Closer to “Realities” in Japan*, 11 *ASIA PAC. BUS. REV.* 195 (2005); Frank Upham, Clarke Lecture at Cornell Law School: Resistible Force Meets Malleable Object: The Story of the “Introduction” of Norms of Gender Equality into Japanese Employment Practice (Apr. 26, 2011). Some recent studies nevertheless suggest that Japanese women’s preference for management positions is on the rise. *See, e.g.,* Worthley et al., *supra*, at 1504.

135. Juro Osawa, *Japan Investors: Why No Women, Foreigners in the Boardroom?*, *WALL ST. J. JAPAN REAL TIME* (June 30, 2010, 7:06 PM), <http://blogs.wsj.com/japanrealttime/2010/06/30/japan-investors-why-no-women-foreigners-in-the-boardroom>.

136. RENSHAW, *supra* note 134, at 120-21.

137. *Id.* at 139.

138. Dore, *supra* note 120, at 471.

139. *See* Ernest Gundling, *Ethics and Working with the Japanese: The Entrepreneur and the “Elite Course,”* *CAL. MGMT. REV.*, Spring 1991, at 25, 30.

ideology that children must honor their parents and juniors must honor their seniors.

Yet, for the most part, the conflict between Yoshiko and Toru would not even appear on the feminism/culture radar. As already noted, Western feminists have been criticized for the tendency to prioritize culture as the source of women's oppression and leave unaddressed the role of economics in constructing women's identities and concerns.¹⁴⁰ However, it should not be assumed that focusing on economics instead means putting aside the feminism/culture debate; even issues of corporate law can return us to the debate. As Vasuki Nesiiah put it in the context of third world feminism, "the putative distinction between the economic and the cultural is itself another moment in the production of each—a denial of the culture of economy and the economics of culture."¹⁴¹

Consider, for example, our treatment of this conflict as an issue of gift law. Adding a cultural dimension to the analysis revealed what seems like a conflict at the level of the rule between Japanese law, which does not have a delivery requirement for a gift, and California law, which has very clear formalistic requirements. However, Carol Rose reminds us that law and tradition reflect the gendered nature of gift giving in American culture.¹⁴² If the "quintessential gift" is one "motivated by generosity and a spirit of selfless love without thought of reciprocity,"¹⁴³ and such gifts are associated particularly with women, one might expect courts to find, for example, that daughters who care for their fathers throughout their lives are not entitled to compensation from their fathers' estates because their work was simply a "labor of love"—a free and selfless gift. On that theory, then, what seems like a conflict between Japanese law and California law at the level of the rule may turn out in its application to be no conflict at all, as judges in both societies seem more willing to favor the interests of fathers over those of daughters in the specific arena of father-daughter gifts.

What of our treatment of the conflict between Yoshiko and Toru under corporate law? Conflicts that fall into the doctrinal bucket of corporate law have only rarely captured feminist attention.¹⁴⁴ In addition, feminists and multiculturalists alike would most likely fall in line with the mainstream doctrinal

140. See *supra* notes 12-13 and accompanying text; cf. NANCY FRASER, *From Redistribution to Recognition? Dilemmas of Justice in a "Postsocialist" Age*, in JUSTICE INTERRUPTUS: CRITICAL REFLECTIONS ON THE "POSTSOCIALIST" CONDITION 11 (1997); Lila Abu-Lughod, *Do Muslim Women Really Need Saving? Anthropological Reflections on Cultural Relativism and Its Others*, 104 AM. ANTHROPOLOGIST 783 (2002).

141. Nesiiah, *supra* note 13, at 141 (footnote omitted).

142. See Rose, *supra* note 124, at 301.

143. *Id.* at 302.

144. See Kellye Y. Testy, *Capitalism and Freedom—For Whom?: Feminist Legal Theory and Progressive Corporate Law*, 67 LAW & CONTEMP. PROBS., Autumn 2004, at 87, 96.

view that what is at stake here are simple garden-variety arm's-length transactions.

Recall that introducing a cultural dimension into the corporate law analysis of our hypothetical revealed the presumption that the eldest son will succeed his father as head of a *dōzoku gaisha*, or Japanese lineage company.¹⁴⁵ In our case, it is Toru's son who would eventually own and run the parent company while Yoshiko would own and run the smaller American subsidiary. Given the presumption of male primogeniture, it is perhaps not surprising that American feminists, in fact, intervened against the *ie* after World War II. Closer inspection of the postcolonial dimension reveals that American occupation forces in Japan legislated the *ie* out of existence at the urging of American feminists within the ranks of the occupation bureaucracy, who became convinced that the Japanese household was a patriarchal institution. And indeed, as is much commented on by Japanese feminists, the *ie* has been in decline since the American reforms. But the feminist theorist Chizuko Ueno argues that the rise of the nuclear family as a result of American reforms aimed at creating "salary men" and "housewives" has led to the widespread repression of women in Japan in ways heretofore unknown in Japanese society.¹⁴⁶ These developments underline another point made by those who fault Western feminists for making practices like veiling and clitoridectomy their primary target; namely, that the focus on an "exotic" culture as the culprit misses the ways in which feminists themselves are implicated in the production of gender inequalities in the non-Western world.¹⁴⁷

The feminist dimensions of our example are more complex and indeterminate still.¹⁴⁸ On the one hand, the mainstream doctrinal view that Yoshiko's relationship to Toru is legally irrelevant chimes with Western liberal feminist struggles that count as precious victories the recognition that women's legal status should be independent of their family status.¹⁴⁹ On the other, as against the atomistic and generalized view of the self taken by American law, many

145. See RENSCHAW, *supra* note 134, at 162 (finding, based on a sociological study, that in Japanese family-owned companies, "[w]omen with brothers are not as likely to head their family businesses").

146. UENO CHIZUKO, *KINDAI KAZOKU NO SEIRITSU TO SHŪEN* [THE ESTABLISHMENT AND DEMISE OF THE MODERN FAMILY] (1994).

147. See, e.g., L. Amede Obiora, *Feminism, Globalization, and Culture: After Beijing*, 4 *IND. J. GLOBAL LEGAL STUD.* 355, 372-73 (1997). An economic example often given is the fact that Western women's ability to work outside the home has relied on non-Western women taking up some of their traditional homemaker roles. See, e.g., Ruba Salih, *Toward an Understanding of Transnationalism and Gender*, in *GENDER AND HUMAN RIGHTS*, *supra* note 69, at 231, 235 (discussing Moroccan migrant women in Italy).

148. See generally Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 *HARV. L. REV.* 1497 (1983).

149. For an annotated bibliography, see Claudia Zaher, *When a Woman's Marital Status Determined Her Legal Status: A Research Guide on the Common Law Doctrine of Coverture*, 94 *LAW LIBR. J.* 459 (2002).

cultural feminists have asserted a concept of the social or relational self.¹⁵⁰ This reconception of the self fundamentally acknowledges the part that the particularities of relationships play in constituting self-identity and the meaning of individual lives, and it argues for recognizing in law the role of these relationships.

Along cultural feminist lines, Terry O'Neill has argued for applying an "ethic of care" to corporate law: "Feminist scholars point out that the capacity to respond to the needs of others is a core aspect of being human. A feminist understanding of corporate law thus recognizes that this aspect of human nature operates in corporate relations as well as in intimate, personal relations."¹⁵¹ Although O'Neill is not writing about corporate relations that are, in fact, also intimate, personal relations, her approach would arguably not disregard that Toru and Yoshiko are father and daughter.

The culture of the household in our example as both corporation and kinship highlights a more general contrast between O'Neill's feminist analysis of corporate law, which would approach the corporation more like a family, and feminist family law scholars who treat the family more like a corporation. Many important feminist projects resist the carving out of family law from laws governing the market—they insist on recognizing household work as work, for example.¹⁵² In light of the *ie*'s history, it is striking that Janet Halley and Kerry Rittich, among others, argue for the household over the family as the best unit of analysis for comparative family law and for family law tout court.¹⁵³

Finally, the feminist dimension adds further nuance to the transnational dimension of our hypothetical case. As noted earlier, the issues here would not have come into existence at all were it not for a global economy. While feminist scholarship on globalization tends to concentrate on the ways in which the demands of globalization reinforce inequalities of gender and race, some of this scholarship also identifies globalization's potential to challenge women's socioeconomic positions by "allowing women to become economic providers for

150. See, e.g., ANNETTE C. BAIER, MORAL PREJUDICES 24-32 (1994); VIRGINIA HELD, FEMINIST MORALITY: TRANSFORMING CULTURE, SOCIETY, AND POLITICS 57-63 (1993); CATHERINE KELLER, FROM A BROKEN WEB: SEPARATION, SEXISM, AND SELF 1-4 (1986); Marilyn Friedman, *Feminism and Modern Friendship: Dislocating the Community*, in FEMINISM AND POLITICAL THEORY 143, 143-44 (Cass R. Sunstein ed., 1990), Jennifer Nedelsky, *Reconceiving Autonomy: Sources, Thoughts and Possibilities*, 1 YALE J.L. & FEMINISM 7, 8-9 (1989).

151. Terry A. O'Neill, *Gender and Corporate Personhood: A Feminist Response to David Millon*, 2 STAN. AGORA 77, 83 (2001).

152. See, for instance, the *American Journal of Comparative Law*'s recent Special Issue on Comparative Family Law, and especially the introduction by Janet Halley and Kerry Rittich, *Critical Directions in Comparative Family Law: Genealogies and Contemporary Studies of Family Law Exceptionalism*, 58 AM. J. COMP. L. 753 (2010).

153. See *id.* at 755-60.

themselves and for their transnational networks.”¹⁵⁴ California law gave Yoshiko an opportunity to assert her control of the American subsidiary as against Japanese expectations of her as a dutiful daughter. Likewise, Toru’s global business model together with the gendered differences in Japanese and U.S. corporate culture gave Toru an opportunity both to reject the Japanese cultural presumption that his son would be his sole successor and also to have Yoshiko work in the United States, where the mentality toward female executives has changed more than in Japan.

Thus, although our private law hypothetical about a transfer of shares may, at first, have looked quite remote from the feminism/culture debate, it turns out to be an example of the same conflict found in familiar cases like veils and polygamous marriages, which are usually treated as raising questions for public law. Our hypothetical is perhaps more dizzying than these easily recognizable cases because even before we reach the matter of cultural difference, a decisionmaker may have different intuitions about the problem depending on whether we choose to see the collectivity at issue here as a family or as a company.

If we are facing a company, hierarchy is of little concern as long as it pertains to matters of company affairs (personalized hierarchy of course is harassment) or as long as employees of equal rank are afforded roughly equal rights and responsibilities. If this is a company, Yoshiko’s unhappiness with her father’s control—even if any reasonable person would be unhappy with her boss’s interference—is really of little legal concern. On the other hand, if this is a family, we also imagine the relations between the parties as arm’s-length transactions, and we do not hesitate to hold them to the letter of their bargains. So if Toru wanted to retain control, he should have bargained for it explicitly.

But if this is a family, then hierarchy comes to look like a much more pernicious matter of tradition-bound, gendered, and age-based pressure, if not oppression. Yoshiko comes to look much more like someone in need of saving by the law. At the same time, if this is a family then we might be far more sympathetic to Toru’s assertion that the legal documents do not tell the whole story of the obligations and arrangements between the parties.

In sum, the dispute between Toru and Yoshiko can be seen as a classic feminist conundrum of the public/private distinction, as it grafts onto diverse bodies of law, mutates, disperses, and reorganizes in new forms in the process of crossing legal and cultural boundaries. In this context, we also begin to see the interaction of law and culture as really a matter of the parties playing with law,

154. Chantal Thomas, *Migrant Domestic Workers in Egypt: A Case Study of the Economic Family in Global Context*, 58 AM. J. COMP. L. 987, 1020 (2010); see SARAH GAMMAGE ET AL., TRADE IMPACT REVIEW: FRAMEWORK FOR GENDER ASSESSMENTS OF TRADE AND INVESTMENT AGREEMENTS 41 (2002); Kerry Rittich, *Black Sites: Locating the Family and Family Law in Development*, 58 AM. J. COMP. L. 1023, 1025 (2010); Saskia Sassen, *Women’s Burden: Counter-Geographies of Globalization and the Feminization of Survival*, 71 NORDIC J. INT’L L. 255 (2002); Thomas, *supra*, at 1020-22.

and with culture, as national laws become available as moves in a recursive set of conflicts and hierarchies.

III. THE CONTRIBUTION OF A CONFLICTS APPROACH: INTRODUCING TECHNICALITIES

In this Part, we work through our hypothetical once more, this time in accordance with a conflict of laws analysis. A traditional choice of law analysis in conflicts¹⁵⁵ might proceed through the following steps. Having determined that it has jurisdiction over the dispute in question, the court would first take notice of the existence of a “foreign element” to the case, usually by way of the pleading and proof of foreign law submitted by the parties.¹⁵⁶ Second, it would characterize the issue or issues involved.¹⁵⁷ For example, is a dispute about allocating property between divorcing spouses a matter of family law, of property law, or even of contract law if the spouses had a prenuptial agreement? Third, the court would identify the relevant connecting factors for each issue depending on the characterization,¹⁵⁸ and fourth, it would determine which law applies to the issue according to the particular choice of law methodology in use in that jurisdiction.¹⁵⁹ If the issue is characterized as title in stock and transfer of shares, for instance, then according to the traditional choice of law rules, the connecting factor is the place where the corporation is incorporated and the applicable law is the law of that place.¹⁶⁰ Fifth, if the prevailing choice of law methodology points to the law of another jurisdiction, the court would consider whether the public policy exception bars the application of that law.¹⁶¹ Sixth, the court would apply that law to the particular issue.

Our aim, however, is not to establish that our example is really a conflicts case about whether Japanese or Californian law, as the law of states, applies. Rather, it is to illustrate the value of conflicts as an intellectual style and, in particular, to show that this style offers a way to reveal and do justice to the complicated issues of gender, law, and culture our example raises without becoming bogged down. As such, we depart from standard conflict of laws in three ways. First, although conflicts as a discipline is traditionally concerned only with state-made law, we assume that conflicts analysis can, at least in theory, be applied to questions of overlap among any normative communi-

155. On the distinction between jurisdiction and choice of law, see *infra* Part III.B.1.

156. See *infra* Part III.A.

157. See *infra* Part III.B.2.

158. See *infra* Part III.B.2.

159. See *infra* Parts III.B.3, III.B.4.

160. Cf. *Porto v. Canon, U.S.A., Inc.*, No. 81 C 305, 1981 U.S. Dist. LEXIS 17611, at *4-5 (N.D. Ill. Sept. 9, 1981) (holding that a corporation organized under U.S. law is a U.S. corporation for Title VII purposes, even if it is a wholly owned subsidiary of a Japanese corporation).

161. See *infra* Part III.B.5.

ties.¹⁶² Second, our discussion modifies slightly the order of the choice of law steps just listed so as to bring out their correspondence with issues in the feminist debates about multiculturalism. We start with the steps that capture and operationalize key insights from the debate, and then proceed to the steps that go further and thus reveal fresh possibilities. For the same reason, while this Part is organized to correspond to the steps in a standard choice of law analysis, we name and describe each step as an intellectual move, which is a third difference. Our interest is in asking how thinking through feminism/culture problems analogically, as if they were technical conflicts questions,¹⁶³ might open up new avenues of theorizing. In other words, the conflicts doctrines we discuss are not simply tools for resolving disputes, although—and this is the trick—that is precisely how they are structured. Rather, they are first and foremost tools with which to think.

A. *Capturing the Insights of the Feminism/Culture Debate*

1. *Seeing culture—the “foreign element”*

Our first conflicts move is to notice that the dispute between Toru and Yoshiko has several connections to Japan and its law and culture (in addition to its obvious connections to California). In a substantive law analysis—whether applying California’s corporate law, trust law, or law of gifts—such cultural considerations are more often than not a mere afterthought. In contrast, conflicts starts with the question of which culture should provide the relevant substantive norms. Thus the very existence of the field, writ large, serves as a constant reminder that there are other frameworks of understanding any particular normative question and ours is only one among them. This was similarly the cultural relativists’ critique of an Okin-style framing of the debate as feminism versus culture. They rejected the underlying assumption that “‘culture’ is what nonliberal peoples are . . . ruled and ordered by,” or more expressively, that “we are a democracy while they are a culture.”¹⁶⁴

Here, both parties are Japanese citizens; the parent company is Japanese; one of the parties was in Japan when he negotiated and signed all agreements and transfer documents; and both parties signed original versions in Japanese. Furthermore, if indeed there was agreement on a “name-only” transfer of shares, this agreement references and arguably even represents a tacit choice of Japanese law.

Although these connections might ultimately not be controlling in a standard conflict of laws analysis, the point is that by attending to the “foreign ele-

162. See Paul Schiff Berman, *Conflict of Laws, Globalization, and Cosmopolitan Pluralism*, 51 WAYNE L. REV. 1105 (2005).

163. See *infra* Part IV.

164. BROWN, *supra* note 40, at 150-51; see discussion *supra* Part I.B.

ment,” conflicts requires us to see culture, so to speak. We recognize, for example, that what seems like a quirky twist on the traditional corporate law problem in this conflict—the fusion of kin and corporation—is in fact the norm rather than the exception in Japan. And for the conflicts approach it also matters that from the point of view of the Japanese state, whose interests the California forum must consider in modern conflicts doctrine, this kin group as corporation is a crucial building block of the economy. Thus, Toru’s decision seems less irrational when seen against Japanese, rather than Californian, expectations. The distinctions between a corporation and a family seem more fluid and contingent. Family ties seem to carry broader significance than we might otherwise have thought.

Unlike a straight corporate law analysis, then, the conflicts lens forces at least some degree of attention to the nature of collectivity and agency within the Japanese household, and thus to the questions of hierarchy and gender described in Part II. This in turn demands attention to what forms of contestation are possible within kin groups/economic collectives.

2. *Culture and agency—pleading and proving foreign law*

In common law conflict of laws, the parties must plead an issue of foreign law. If it is not pleaded then the law of the forum is applied.¹⁶⁵ In contrast, in most civil law countries, the court itself takes judicial notice of foreign law whether or not it is pleaded by the parties.¹⁶⁶ The common law approach to proof of foreign law has been criticized for allowing the parties to defeat proper outcomes by choosing not to plead the foreign law or doing a bad job of proving it. But in the context of a reflexive approach to truth questions, the value of this party autonomy lies in the agency it gives the parties to decide whether to situate themselves within one culture or another on a particular issue. This choice resonates with the relativist critique of Western feminists’ tendency to assume that non-Western women are defined by their culture rather than exercising any degree of choice within it. It also resonates with the post-essentialist culture-minimizing position taken by Anne Phillips, for example, that if culture is invented tradition, then a defensible multiculturalism will put human agency much more at the center.

At common law, and to this day in many common law jurisdictions, the parties must usually also prove foreign law through the introduction of expert evidence.¹⁶⁷ Traditionally, the judge cannot determine the foreign law for her-

165. See 1 DICEY, MORRIS AND COLLINS ON THE CONFLICT OF LAWS 255 (Lawrence Collins ed., 14th ed. 2006); PETER HAY ET AL., CONFLICT OF LAWS 602-03 (5th ed. 2010); 1 JANET WALKER, CASTEL & WALKER: CANADIAN CONFLICT OF LAWS ch. 7 (6th ed. 2005).

166. See Maarit Jänträ-Jareborg, *Foreign Law in National Courts: A Comparative Perspective*, 304 RECUEIL DES COURS 181, 272-73, 289-91 (2003). For an overview of the issue, see generally *id. passim*.

167. See *supra* note 165.

self, but must consult those with more situated knowledge. More recently, in many U.S. jurisdictions the judge can conduct her own inquiry into foreign law, but the results of this inquiry have the ambiguous status of quasi-fact.¹⁶⁸ Since foreign law is a question of quasi-fact to be ascertained through expert testimony or comparative legal research, the judge cannot presume to interpret or apply the foreign law based solely on her expert vantage point.¹⁶⁹ Likewise, the court's decision about the nature of foreign law has no precedential value either for the foreign jurisdiction or for the meaning of the foreign law in the court's jurisdiction.¹⁷⁰ Stamped into these doctrines, then, is an appreciation for the difficulties of understanding other cultures. They also give expression to a core feminist concern for giving respect for the "other."¹⁷¹

In more mechanical conflicts analyses, unfortunately, the deceptively simple question "What is the rule in each jurisdiction?" is often treated as a mere afterthought.¹⁷² As a consequence, what U.S. judges apply is often not truly the foreign law but instead some virtual law, the result of expert witness testimony (often crafted in one party's favor).¹⁷³ But this is to miss much of the revelatory potential of a conflicts approach. Treating proof of foreign law as a simple mechanical question papers over the norms at issue for each community implicated by the case. The testimony of the parties' experts or the judge's own research can seek to describe the foreign law as more than a collection of black-letter rules: it can direct attention to the subtleties of institutional arrangements,

168. See *Bodum USA, Inc. v. La Cafetiere, Inc.*, 621 F.3d 624, 631-34 (7th Cir. 2010) (Posner, J., concurring) (criticizing the use of expert testimony to establish foreign law); see also Gregory S. Alexander, *The Application and Avoidance of Foreign Law in the Law of Conflicts*, 70 NW. U. L. REV. 602 (1975).

169. *But see Bodum*, 621 F.3d at 633 (Posner, J., concurring) ("When the testimony concerns a scientific or other technical issue, it may be unreasonable to expect a judge to resolve the issue without the aid of such testimony. But judges are experts on law, and there is an abundance of published materials, in the form of treatises, law review articles, statutes, and cases . . . to provide neutral illumination of issues of foreign law."). Compare Nils Jansen & Ralf Michaels, *Die Auslegung und Fortbildung ausländischen Rechts [Interpretation and Development of Foreign Law]*, 116 ZEITSCHRIFT FÜR ZIVILPROZESS 3, 19-44 (2003), on the ideal of a foreign law perspective.

170. *But see Jansen & Michaels*, *supra* note 169, at 52 (suggesting that courts, when interpreting their own law, should pay attention to interpretations of that law given by foreign courts).

171. See discussion *supra* Parts I.B, I.D.

172. This relative lack of interest is in strong opposition to the relevance that proof of foreign law has in practice, especially where the designated law is that of a foreign nation. For example, U.S. courts have traditionally shown great unease with Japanese law. Judge Posner remarked in one decision that "the law applicable to the issues in the case is almost certainly Japanese law, with which American judges have little familiarity. In fact, as we said, even the lawyers in this case, though their clients are Japanese firms, have little familiarity with Japanese law." *U.S.O. Corp. v. Mizuho Holding Co.*, 547 F.3d 749, 751 (7th Cir. 2008).

173. For recent criticism of the role of experts in proving foreign law, see *Bodum*, 621 F.3d at 629.

policy choices, and interactions between law on the books and law in action.¹⁷⁴ In our hypothetical dispute, for example, a decisionmaker who looked no further than the letter of the Japanese company law would find no substantive difference between the laws of Japan and California on the question of whether ownership of shares confers control over those shares. And yet a more subtle and inquisitive decisionmaker might follow up on Toru's assertion that the transfer was "in name only," and hence would learn that unlike in California, there is some sort of legal practice in Japan—a practice of quasi-formal legal status—called "name-only" shareholding.

The rules on proving foreign law are intended to establish what the foreign law *is*, and in this sense conflict of laws on the surface seems to succumb to cultural essentialism. Nonetheless, the adversarial nature of this truth quest encodes the post-essentialist idea that the truth of foreign law is contestable and that what is established is a product of both competing testimony by foreign law experts and the judge's perspective on that testimony. Whereas the need to *plead* foreign law corresponds to a commitment to respect women's choices about their relationship to their culture and to the post-essentialist recognition that what their issue-by-issue choices produce may be a cultural hybrid, the need to *prove* foreign law presents women with an opportunity to articulate their account of their community's norms. This corresponds to the sort of culture-transforming positions taken by post-essentialist legal feminists like Madhavi Sunder. Indeed, the first of Sunder's three procedural prescriptions is that instead of privileging the (male) elite's account of the community's norms, legal decisionmakers should place elites and dissenters on an equal footing when a dispute is brought to them.¹⁷⁵ But, as called for by anthropologist Saba Mahmood's work on the politics of piety among Egyptian women,¹⁷⁶ party autonomy in conflicts also guards against the assumption that women will necessarily offer more egalitarian accounts of their culture. Imagine, in our example, that Yoshiko accepted, in the alternative, that Japanese law applied to the dispute. She might want to lay the ground for the public policy exception to choice of law¹⁷⁷ by proving that "name-only" shareholding is bound up with the discriminatory norm that the eldest son succeeds his father as the head of the *ie*. And Toru might counter by seeking to establish one of the other accounts we described in Part II: that in practice women may exert considerable power behind the scenes in Japanese family-owned companies, that the norm of male primogeniture is less important than the economic well-being and survival of the *ie*, that globalization has eroded the norm of male primogeniture, or that Toru's global business model avoids the norm by planning to leave Yoshiko the com-

174. *Cf. id.* at 638-39 (Wood, J., concurring).

175. Sunder, *supra* note 53, at 1466-67.

176. See MAHMOOD, *supra* note 67, at 2-4, 10-14.

177. See *infra* Part III.B.5.

pany's subsidiary in a country where she faces less discrimination as a female executive.

While the parties' experts or the judge's own research can seek to describe the foreign law as more than a collection of black-letter rules, the judge nevertheless cannot choose the more progressive account of the foreign law if that is not her best assessment of the law as it is. Thus, while competing testimony can open up space for such accounts, the judge's task also responds to feminists who caution that the recognition that culture is made, and can therefore be unmade or remade, should not obscure the power dynamics that perpetuate a culture in its current institutional form.

B. *Revealing New Possibilities*

In the previous Subpart we described how certain doctrines in conflict of laws capture and operationalize important insights of the feminism/culture debate. We now want to show how other conflicts doctrines go beyond the current debate and thus press us to theorize it in more complex ways.

1. *Splitting the power to decide from the question of whether to defer to another normative community—jurisdiction and choice of law*

In the very first move of seeing culture in the dispute, we are also effectuating a powerful analytical shift that is everyday business in conflict of laws but quite counterintuitive elsewhere. We are splitting jurisdictional questions from choice of law questions—or at least acknowledging that they might be different and indeed that each might be governed by a different set of rules and norms. In other words, we are acknowledging that just because an authority has the *power* to impose its value system on all the parties does not necessarily mean that it must or should do so. It can exercise jurisdiction and still remain open to the possibility that it might defer to another body of law—another normative system. Or, put the other way around, we are acknowledging that even if an authority does not provide the applicable body of law, it may still exercise its power of jurisdiction to ensure an adequate forum.

The distinctiveness of this approach is perhaps clearer when contrasted with Ayelet Shachar's federalism-style approach to conflicts between feminist and multiculturalist values.¹⁷⁸ Shachar's proposal involves dividing up jurisdiction over a given issue, to give some authority to the minority community to effectuate its cultural values and some authority to the majority to effectuate feminist concerns. In a case like *Lovelace*, for example, Shachar would divide questions of membership from questions of resources; she might grant the indigenous community the power to decide whether Sandra Lovelace regains her Indian status when her marriage to a non-Indian ends in divorce, and grant the

178. See SHACHAR, *supra* note 77, at 117-45.

encompassing state the authority to determine what access Lovelace would have to resources allocated to Indians.¹⁷⁹ Shachar argues that the advantage of creating such “multicultural jurisdictions” is that neither community’s authority could trump the other’s. This division, she argues, preserves a powerful element of cultural autonomy while also giving women in the group leverage to advocate for change from within. It should be added that this division also depends on the indigenous community having a decisional authority and one that appears adequate to the question allocated.

With respect to our hypothetical we might ask, as Shachar does in formulating her proposal, whether a California court really should hear Toru’s claim (or parts of his claim) at all. Perhaps it should defer to a Japanese tribunal on, say, the family law issues at stake. But Shachar’s type of analysis would stop here. That is, if California asserts jurisdiction with regard to a particular issue, it applies its own law to that issue. Conversely, if Japan hears an issue, it applies Japanese norms.

Conflicts doctrine envisages another possibility. It splits off the question of who has authority to decide (jurisdiction) from the question of which normative community’s values should apply (choice of law). Even assuming that California has the authority to hear the claim, conflicts doctrine insists that there is a further question of deference to be asked. In thinking through the dispute, should California, via its courts, defer to the values of another political community? Or on the other side of the coin, assuming that another political community’s values apply, should California decline to hear the claim? Even if no other forum exists, for instance? The key possibility opened up by the move we term “splitting” is that the California court might take jurisdiction and yet choose to effectuate Japanese cultural norms rather than Californian norms—or, as we will see, apply Japanese cultural norms to some issues and Californian norms to others.

In fact, the jurisdictional question has yet a further dimension. Under a doctrine known as *forum non conveniens*, the California court might have jurisdiction but nevertheless defer to Japan if Japan also has jurisdiction. One of the factors considered is whether the law of the other jurisdiction applies (which means that jurisdiction and choice of law are not entirely split off from one another).¹⁸⁰ However, the applicable law is only one of several factors for *forum non conveniens*, and frequently not the decisive one. More importantly, in light of concerns about the availability and nature of the actual institutional channels through which women can contest interpretations of their culture, dismissal can be granted only if an adequate alternative forum exists. In other

179. Cf. *id.* at 119-22. Shachar discusses a similar U.S. case, *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). SHACHAR, *supra* note 77, at 18-20, 142 n.51. On *Martinez*, see also Judith Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U. CHI. L. REV. 671 (1989).

180. See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241 n.6 (1981); *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 509 (1947).

words, dismissal can be granted only if the foreign community provides for a decisional institution and a fair hearing can be expected from that institution, making it defensible to refer the parties to that institution instead.

2. "As if" (I)—characterization

Most techniques and approaches for determining whether and to what extent foreign law applies to a dispute begin with characterization—the evaluation of the nature of the *legal question*. The dispute between Toru and Yoshiko could be characterized in a number of ways. If it is characterized as a matter of corporate law, the crucial legal question is whether the transfer documents conferred upon Yoshiko full rights to control or some lesser set of rights. If characterized instead as a matter of the law of gifts, the dispute turns on whether Toru “gave” the shares to Yoshiko and if he did, what legal rights and obligations ensue. Finally, if the dispute is characterized as a matter of family law, then the crucial question is what power Toru has to structure Yoshiko’s choices, opportunities and assets, both for now and for the future when he will no longer be the head of the family.

Characterization, of course, is not unique to conflict of laws. As will be apparent, at least two of these possible characterizations map onto possible substantive law theories of the case. And, in the feminist context, the innovation of Shachar’s multicultural-jurisdictions approach rests on what is essentially a characterization question (in her example, is the issue of divorce one of membership or resources?).¹⁸¹

What is unique to characterization in conflicts, however, is a combination of two features: self-reflexivity paired with what we will call an “as if” modality. As to the first, the very structure of a conflicts problem is reflexive because, as explained above, a conflict of laws by definition involves two or more legal systems imagined as laterally rather than hierarchically related to one another.¹⁸² Conflicts recognizes that even the initial characterization of the issue must take place from the situated viewpoint of one system or another. There is no “view from nowhere” that can be used to capture the legal essence of the institution or conflict in question. Similarly, much feminist analysis, informed by the insights of cultural relativism, will quickly recognize in our hypothetical the need to be suspicious of our immediate instincts about the cultural and legal facts. As we saw in Part II, at issue is a company that is actually a family, in a cultural context in which family is more like the forum legal system’s conception of a company to begin with.

181. See SHACHAR, *supra* note 77, at 131-32.

182. Even when a conflict involves political units that are hierarchically arranged, such as a conflict between state law and customary law, the conflicts move is to think more laterally about the relationship between the two.

In contrast, although Shachar's approach divides jurisdiction between the minority community and the larger state based on characterization of the issue, she leaves unexamined whether a given issue can be said in essence to have one character or another. Also unexamined is the possibility that the community and the state might disagree on the characterization of a given issue, perhaps precisely because of their different cultural standpoints. In other words, Shachar grants the decisionmaker (the judge or bureaucrat, as agents of one interested party, the state) the power to characterize without coming to terms with how the characterization of an issue is in itself a highly loaded cultural practice about which there may be significant and legitimate disagreement. Moreover, as conflicts scholars know well, the characterization of a dispute one chooses may ultimately dictate the outcome.

Thus the reflexive orientation of conflicts shares with the most sophisticated feminist critiques of multiculturalism a deep, persistent, and framing awareness of the situatedness of one's claims. In this sense, conflicts thoroughly absorbs the relativist critique that emerged in response to the Okin-style framing of the debate as equality versus culture. Yet if such feminist theory tends to bog down in reflexivity, the response of conflicts as a field is dramatically different. The decisionmaker makes her own characterization, while fully recognizing that other jurisdictions implicated in the case might characterize the issues differently. The conflicts approach is to say, for example, "We call this transaction a matter of family law, recognizing all the while that it would also have been perfectly legitimate to frame it as a matter of property law." Characterization is in this sense not a truth claim; it is a provisional technique for resolving a very real clash of values, an "as if." This stance has a certain resonance with the idea of positionality found in more general feminist theory, which acknowledges truth as situated, partial, and therefore provisional, but nevertheless as a basis for feminist commitment and political action.¹⁸³

Conflicts' open acknowledgement of the normative situatedness of characterization, it should be added, is a function of the field's history. Characterization was a prime target in the early twentieth-century realist critique of traditional conflict of laws.¹⁸⁴ First, characterization was critiqued as ontologically

183. Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 880-86 (1990).

184. See Ernest G. Lorenzen, *The Theory of Qualifications and the Conflict of Laws*, 20 COLUM. L. REV. 247 (1920); see also Walter Wheeler Cook, "Characterization" in the *Conflict of Laws*, 51 YALE L.J. 191, 194 (1941); Ernest G. Lorenzen, *The Qualification, Classification, or Characterization Problem in the Conflict of Laws*, 50 YALE L.J. 743 (1941). The criticism of ontological naïveté is justified only insofar as characterization is viewed as a way to determine the "true" nature of an issue—in other words, as an ontological claim. Although language in judicial opinions occasionally suggests such an (ill-fated) search for a "true nature," a proper understanding of characterization, and the one prevalent in Europe and arguably also in the United States, does not make such ontological claims. Instead, characterization is functional. GERHARD KEGEL & KLAUS SCHURIG, *INTERNATIONALES PRIVATRECHT [PRIVATE INTERNATIONAL LAW]* 346-56 (9th ed. 2004).

naive. No issue is, ontologically speaking, “tort” or “contract”—it becomes a matter of tort or contract because actual legal thinkers choose to frame it as such. The critics argued that the assumption that there were “right answers” to characterization questions concealed underlying policy considerations guiding the judicial determination of the applicable law, since the choice of characterization often dictated outcomes.¹⁸⁵ Second, and relatedly, characterization was portrayed as an “escape device”: according to the critique, judges faced with unpalatable outcomes to their choice of law analysis could simply (re)characterize the issues in order to avoid the application of an undesired law.¹⁸⁶ The sedimenting of these critiques over the last century has meant that when conflicts specialists characterize, they do so with a deep sensitivity to the fact that *there is no single “right answer” to the characterization question.*

3. *Slicing issue by issue—dépeçage*

Conflicts takes the foregoing analysis one step further. To give one example, assume we characterize our hypothetical dispute between Toru and Yoshiko as a general matter of corporate law. Under the conflicts doctrine of *dépeçage* (from the French *dépecer*, meaning “to carve up”), we might then decide to apply Japanese corporate law to the substantive question of whether the transfer of shares transferred both ownership and control or only ownership, but to slice out the subquestion of whether Toru’s subjective understanding of the transfer is relevant. This subquestion could in turn be characterized as a procedural question concerning when exceptions to the parol evidence rule should be entertained, and the forum might choose to apply its own procedural law to that question even as it recognizes that Japanese norms should govern the general question of whether control is separable from ownership of shares.

As the example of *dépeçage* illustrates, the ingenious insight of conflicts is that we can gain purchase on a clash of cultures by *slicing it down issue by issue*. Two societies may have conflicting views of women’s authority over religious affairs but not over economic affairs, for instance. Although this insight is commonsensical among conflicts specialists, it is worth pausing to understand how avant-garde it is, theoretically speaking: When faced with a clash of normative values—a clash between, say, certain liberal feminist values and certain other values—one need not decide which trumps in the abstract or in general. One can focus rather on the specific legal question at hand and slice the problem down, recognizing that one normative system might trump for some purposes, and another might trump for other purposes.

To illustrate further, if we characterize our hypothetical dispute as a question of gift law, then the general question is whether this gift gave Yoshiko the

185. See Cook, *supra* note 184, at 200-01.

186. Brainerd Currie, *Notes on Methods and Objectives in the Conflict of Laws*, 1959 DUKE L.J. 171, 175.

power to do as she wishes with the company. This legal question about power and control in the context of hierarchical kinship relations raises dilemmas for feminism/culture analysis. As we saw, the common law's suspicion of gifts, embodied in its formal delivery requirements, reflects a general preference for "contract" relations over "status" relations, and for arm's-length transfers over gifts in which the *quid pro quo* is not clearly defined. Part of the normative underpinning of the common law rules, therefore, is a concern for the inequalities of bargaining power and the potential for exploitation that inheres in gift economies.

However, an inquiry into the requirements for making a gift in Japan would reveal an important legal fact: the strong emphasis on delivery as a necessary element for effectuating a gift under California law—upon which Toru hangs his substantive legal claim that the transfer was invalid—does not exist under Japanese law.¹⁸⁷ The Japanese law's lack of suspicion about gifts, embodied in its lack of a formal delivery rule or insistence on notarization,¹⁸⁸ expresses a very different normative paradigm: namely, that the pooling of resources and noncontractual forms of exchange are expected and normatively favored, and hierarchy is not necessarily equated with exploitation. But this simple normative clash between Japanese and California gift law looks even more complicated if we consider that one of the key insights of feminist legal scholarship has been to bring attention to the normative value of altruism, sharing, and relational and affective forms of economic transactions.

Conflicts doctrine differs crucially from much of the feminism/culture debate in that it does not seek to resolve the question of whether gifts are more or less patriarchal and exploitative than contracts as a general matter. It directs our attention only to this particular gift, between these particular parties. Thus one might ask whether *this particular gift* was exploitative or empowering of Yoshiko. And here, the parties actually agree: Toru testifies that his intent was precisely to empower Yoshiko in a context in which he feared that she might lose out to her brother. Likewise, Yoshiko interprets this gift as a source of her power and authority to act independently. There is, in fact, no conflict about the normative question in this case. The insight here—at once highly practical and deeply profound—in turn reflects a subtle recognition that no single value system can possibly have all the answers all the time; indeed, the insight is that to allow any one system to win out in absolute terms would often be unwise at best and unjust at worst.

Like philosophical pragmatism¹⁸⁹ or practical reasoning in legal feminism,¹⁹⁰ then, conflicts takes on the particularities of the individual case. The

187. See *supra* note 126.

188. But see J. MARK RAMSEYER & MINORU NAKAZATO, *JAPANESE LAW: AN ECONOMIC APPROACH* 46-47 (1999).

189. See, e.g., AMÉLIE OKSENBERG RORTY, *MIND IN ACTION* 274 (1988), quoted in Bartlett, *supra* note 183, at 851 n.82.

technical approach differs from pragmatism in a number of ways, however. For example, conflicts does not attempt to resolve the case at large, taking all factors into account at once; instead, it slices the issues up to create manageable smaller units to be combined later.

Practically speaking, this slicing move also gives us a handle on the potentially endless complexity of deep reflexivity. The judge need not have a full understanding of the foreign culture. Her task, at the end of the day, is not to say what the gift ultimately means in Japan or how the corporation is intertwined with the family.¹⁹¹ The judge's task, instead, is to decide the limited question of whether Yoshiko or Toru should have the ultimate right to render decisions for this corporation.

4. "As if" (II)—as if the conflict could disappear

But perhaps the most shocking move in conflicts—and the one that is most controversial in the discipline itself—is the move simply to act "as if" the conflict of values was not a conflict at all. The European and American traditions perform this move in different ways, but each achieves similar miraculous results and is subject to similar political and theoretical criticisms. In U.S. conflict of laws, one standard move when faced with an apparent clash of cultural values is to question whether, notwithstanding the fact that the conflict may suggest such a clash, the interests at stake in effectuating those values are not actually in conflict in this case. The move here is to introduce a key concept into the debate—the notion of disinterestedness. The term "false conflict" refers to the situation where there is a conflict at a general normative or legal level, but there is not actually a conflict between the laws as applied to this particular dispute, because no more than one jurisdiction is actually interested in seeing its norms effectuated in this particular case.¹⁹²

For example, if we characterize this dispute as a matter of gift law, then we find that Toru is asking the court to apply California law to this issue, and is arguing that his gift failed because under California law delivery is required to effectuate a gift, and the fact that he retained control over the shares meant that the shares were not in fact delivered. Yoshiko, meanwhile, is asserting that Japanese law should apply to this issue because under Japanese law delivery is not a necessary element of a legally recognizable gift.

At a surface level, there is most definitely a conflict between Japanese and California gift law, since the laws differ. Yet the U.S. conflicts lawyer next

190. See, e.g., Bartlett, *supra* note 183, at 849; Margaret Jane Radin, *The Pragmatist and the Feminist*, 63 S. CAL. L. REV. 1699 (1990).

191. Cf. Marilyn Strathern, *A Community of Critics? Thoughts on New Knowledge*, 12 J. ROYAL ANTHROPOLOGICAL INST. 191, 204 (2006) ("[J]udges in truth do not *distort* anthropological knowledge, for it is not placed before the courts as knowledge in which they need to have any informed interest.").

192. HAY ET AL., *supra* note 165, at 30 & n.15.

proceeds to ask, “Is there actually a conflict as concerns the application of these laws to this particular dispute?” In order to answer this question, we first ask whom California law, with its stringent delivery requirements, aims to protect. The answer is that it aims to protect gift *givers* from being tricked or manipulated into giving something away against their better judgment. On the other hand, whom does Japanese law, with its lack of such requirements, aim to protect? The answer arguably is the reverse—gift *receivers* who have relied on promises from gift givers. Now in this case, the gift receiver has made her life in California, where she lives and works, and Japan therefore has relatively little interest in protecting her. Conversely, the gift giver is a Japanese national living in Japan, and California has relatively little interest in him. Thus both jurisdictions are in fact disinterested in seeing their own law applied, and an actual conflict does not exist.¹⁹³

This is another difference between a conflicts paradigm and Shachar’s multicultural-jurisdictions paradigm, which divides up the balance of authority between the state and the cultural group and sticks to the terms of this bargain regardless of the specifics of the concrete dispute. Conflicts, in contrast, recognizes that even if as a general matter a jurisdiction should have authority in a particular area, in some cases that jurisdiction may not have an interest in applying its law. Why, for example, should we apply a group’s patriarchal membership rules if it turns out that the group is indifferent to whether they are applied in the given case?

Now it will be obvious that this kind of interest analysis involves something of a sleight of hand. To say that California law’s delivery requirements only aim to protect gift givers and that Japan’s lack of such requirements aims to protect gift receivers is an “as if” assertion. That is, although it is not necessarily false, it is not necessarily true, and it cannot be refuted.¹⁹⁴ Nevertheless, if we act “as if” this assertion holds, the conflict disappears in this particular case.

In the civil law tradition, in which state interests do not play as prominent a role in conflicts analysis, other “as if” devices are available. In German conflict of laws, for example, the court might resort to the “as if” that what the parties actually had in mind was a “name-only” transfer of the shares, as a way to maintain both the corporation and the family. The doctrine of “acting under the wrong law” (*Handeln unter falschem Recht*),¹⁹⁵ as it is called, is intended to account for situations in which parties set up their legal affairs with a law in mind other than the one that actually applies. In such situations, foreign law is

193. Technically, a case in which neither jurisdiction has an interest is termed an “unprovided for” case, and the term “false conflict” is reserved for cases in which only one jurisdiction has an interest in applying its law. *See id.*

194. *See infra* Part IV.

195. KEGEL & SCHURIG, *supra* note 184; *see also* CORNELIA MÜNZER, *HANDELN UNTER FALSCEM RECHT* (1992).

not actually applied, but is taken into account. Examples include cases in which officers of a corporation acted as though it were an English corporation even though, under German principles of choice of law, the applicable law remained German law.¹⁹⁶ Now, given that the civil law tradition is far more focused on individual rights than on state interests, it is no surprise that the German method of “acting as if the conflict disappears” focuses much more on an “as if” ascription of the parties’ intent. And again, this is not to say that such intent is necessarily false—it may well have been what Toru and Yoshiko intended. But again, this doctrine is open to the same kind of challenge: What does it mean to say the parties intended one thing and did another? Why would they now dispute this? The fuzziness of this doctrine is precisely what makes it an attractive technique for tackling cultural conflicts.¹⁹⁷

More importantly, this doctrine captures something powerful about how individuals who move across borders experience culture clash, something we might term “transposition.” Individuals do not always mix and match cultures through deliberate acts of choice. Instead, individuals *transpose* cultures, only semiconsciously seeing one culture through the lens of another, understanding and organizing their lives in accordance with a system of norms from elsewhere. This is different from the idea of hybridity, ubiquitous in post-essentialist debates about feminism and culture, which emphasizes the blending of cultural elements. The “acting under the wrong law” doctrine, in contrast, draws attention to how actors knowingly or unknowingly shift or superimpose cultural elements.

5. *The ethical moment—public policy*

The final step in a conflict of laws analysis picks up the recognition that there must be a decision—an ethical moment, as we called it in our discussion of Susan Moller Okin’s framing of the issue as equality versus culture. Ordinarily, conflicts proceeds to apply the chosen law to the relevant issues. However in some rare cases, an adjudicator may invoke a “public policy exception” and refuse to do so because if the foreign law were applied, it would violate core elements of the forum’s values. The public policy exception has been used, for example, to avoid the recognition of polygamous or gay marriages, or to avoid application of foreign laws that discriminate against women. The existence of the public policy exception is a way of asking the “how different is too different” question, which, as explained above, is so immediate and so central to dis-

196. Bundesgerichtshof [BGH] [Federal Court of Justice] July 1, 2002, ENTSCHIEDUNGEN DES BUNDESGERICHTSHOFES IN ZIVILSACHEN [BGHZ] 204, 2002.

197. Erik Jayme, *Identité culturelle et intégration: le droit international privé postmoderne* [Cultural Identity and Integration: Postmodern Private International Law], 251 RECUEIL DES COURS 9, 120-21 (1996).

cussions about the right compromise or balance to be struck between feminist values and respect for cultural autonomy.

The public policy exception is considered exceptional, and many critics have supported its use only in situations in which the application of foreign law would violate a fundamental principle of local justice.¹⁹⁸ By contrast, some commentators have embraced the public policy exception as a normatively legitimate doctrine reflecting the adjudicator's primary obligation to give effect to the norms of her own community.¹⁹⁹ Nevertheless, this step of the conflicts analysis is important because it represents an ethical moment in which the decisionmaker decides to decide, so to speak. Even when the public policy exception is invisible, because the dispute is resolved without recourse to it, the existence of the exception means that the decisionmaker has chosen not to apply it, and hence the ethical moment is always reached. Thus, unlike some interventions in the feminism/culture literature, conflicts does not end on a note of critique or complexity; it ultimately decides.

At the same time, it is also important to recognize that the public policy exception does not permit compromise or balancing. If the conflict is fundamental, the judge's only choice is not to apply foreign law to the issue at hand. Thus, conflicts ultimately does not have room for policy compromise. Compromise is not its style.

Nor is dialogue, in the potentially transformative sense of some direct commentary on the foreign law. The public policy exception does not rest on some values claimed to be objective, but explicitly on the values of the deciding court's community. For the exception to apply, it is sufficient to demonstrate that the forum's public policy is violated. The exception thus leaves unanswered whether the practice in question is objectionable in some objective sense, and whether it should be changed in the foreign culture.

While this final step represents an ethical moment, the feel here is quite unlike the Okin-style framing of ethical moments. We have already shown how through the processual layering of its techniques, conflicts analysis systematically defers and thus ironically often ultimately resolves the opposition between feminism and culture. Although the public policy question always appears at the end, it need not bear all of the weight.

Moreover, if the judge does reach the public policy question, its treatment holds still further opportunities to narrow or resolve the opposition between feminism and culture. The judge may approach the potential conflict with public policy in the concrete rather than in the abstract (dealing only with this particular case rather than the foreign law in general). For example, recognizing polygamy in general may be oppressive to women, but recognizing a polygamous union between particular parties may not be oppressive with respect to par-

198. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 90 cmt. c (1971).

199. Cf. LUTHER L. MCDUGAL, III ET AL., AMERICAN CONFLICTS LAW 160 (5th ed. 2001).

ticular issues, such as inheritance rights.²⁰⁰ In addition, the public policy analysis may involve a reflexive exercise akin to relativist critiques of feminists like Okin: the judge must interrogate her own community's laws to determine whether the public policy conflict is deep-seated and fundamental, or is superficial and belies an underlying similarity.²⁰¹

IV. "AS IF": LEGAL THEORY THROUGH TECHNIQUE

To be clear, we are not suggesting that every feminism/culture problem should be turned into an actual doctrinal conflicts problem, or that theorists of feminism and culture need to become conflicts lawyers. What interests us here is how legal theory might be revitalized if it took on board some of the ethos, the habitus, the style of conflicts, as a modality of theorizing.

In seeing conflict of laws as fruitful for understanding, structuring, or dealing with value pluralism²⁰² or legal pluralism,²⁰³ our argument allies with recent work by several other scholars. For those authors, however, the promise of conflicts lies in the big picture summoned up by more fashionable policy-driven approaches to the field and typical of public law, whereas for us, its promise is largely in the *démodées* techniques typical of traditional private law.²⁰⁴ The legal techniques we have described emanate from historical traditions of argument and interpretation, and are learned and taught through practices of professionalization varying from formalized legal education to guild-like mentorship. One important dimension of this set of skills and evaluative criteria is a sense of constraint: only certain uses of the tools, certain arguments, and certain analogies will do when thinking through political problems.

200. Different European countries have taken different public policy approaches to recognizing the dissolution of a marriage abroad based on the husband's unilateral request. See Marie-Claire Foblets, *The Admissibility of Repudiation: Recent Developments in Dutch, French and Belgian Private International Law*, 5 HAWWA 10 (2007).

201. See *Yahoo!, Inc. v. La Ligue Contre Le Racisme et l'Antisemitisme*, 169 F. Supp. 2d 1181, 1187 (N.D. Cal. 2001) (engaging in reflexive analysis of the way its decision might be perceived abroad before ruling that the First Amendment right to free speech trumps French bans on racist speech), *rev'd en banc on other grounds*, 433 F.3d 1199 (9th Cir. 2006).

202. See Martha Minow & Joseph William Singer, *In Favor of Foxes: Pluralism as Fact and Aid to the Pursuit of Justice*, 90 B.U. L. REV. 903, 909-16 (2010).

203. See Paul Schiff Berman, *Global Legal Pluralism*, 80 S. CAL. L. REV. 1155, 1155 (2007) [hereinafter Berman, *Global Legal Pluralism*]; Paul Schiff Berman, *The New Legal Pluralism*, 5 ANN. REV. L. & SOC. SCI. 225 (2009) [hereinafter Berman, *The New Legal Pluralism*]; Jayme, *supra* note 197; Horatia Muir Watt, *Experiences from Europe: Legal Diversity and the Internal Market*, 39 TEX. INT'L L.J. 429 (2004); see also Ralf Michaels, *Global Legal Pluralism*, 5 ANN. REV. L. & SOC. SCI. 243, 248-49 (2009).

204. Cf. Annelise Riles, *A New Agenda for the Cultural Study of Law: Taking On the Technicalities*, 53 BUFF. L. REV. 973, 976-77 (2005) [hereinafter Riles, *A New Agenda*]; Annelise Riles, *Cultural Conflicts*, LAW & CONTEMP. PROBS., Summer 2008, at 273.

Another is a practical sense that one's own professional agency, with respect to any particular problem, is constrained at least to some degree by the possibilities and the limitations of one's tools. All of this adds up to a particular habitus, a particular modality of thinking through political problems, in which the tools are in the foreground, no matter how large or unwieldy the political conflict might be. We term this mode "theory through technique," to capture the affect, and aesthetics, through which theoretical problems are captured and processed.

Before moving to the implications of our argument for the impasse in feminism, we want to address a likely objection to our argument so far: does our fascination with the wondrous possibilities of the technical not ignore how technicalities often obscure or dilute political conflict?²⁰⁵ After all, the key insight of legal realism was precisely that technical legal form sanitizes social conflict, turning real questions of whose interests should be favored—the interests of, say, fathers and daughters—into technical questions of, say, the transjurisdictional enforceability of gift agreements. And of course, conflict of laws comes with its own baggage: it bears responsibility, arguably, for upholding slavery and for tolerating and even furthering Nazi laws, all under the veil of formalist considerations like sovereignty and the equivalence of different private law rules.²⁰⁶

One version of the objection might note that our interest in private law techniques rather than more administrative and managerial approaches to multicultural accommodation exaggerates the divide between public and private, and ignores the ways in which private law moves are always intricately enmeshed in public law regimes of administration, regulation, and enforcement.²⁰⁷ Indeed, the public/private distinction has long attracted these sorts of critiques from feminists.²⁰⁸

Another version of the critique might query the unintended consequences of the techniques we have described. The experience of many colonial societies with the importation of seemingly neutral private law demonstrates how devices such as property-recording systems or background contract rules can become

205. See, e.g., PIERRE SCHLAG, *THE ENCHANTMENT OF REASON* 111-12 (1998). For a detailed response to Schlag's critique of the direction we take here, see Annelise Riles, *Is the Law Hopeful?*, in *HOPE IN THE ECONOMY* (Hirokazu Miyazaki & Richard Swedberg eds., forthcoming 2012) (manuscript at 16-20), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1408522.

206. See, e.g., PAUL FINKELMAN, *AN IMPERFECT UNION: SLAVERY, FEDERALISM, AND COMITY* 3-4 (1981); David Fraser, "This Is Not Like Any Other Legal Question": A Brief History of Nazi Law Before U.K. and U.S. Courts, 19 *CONN. J. INT'L L.* 59 (2003).

207. See Joseph William Singer, *Real Conflicts*, 69 *B.U. L. REV.* 1, 110 (1989) (arguing that the policy in favor of validating private contracts "oversimplifies contract law by failing to recognize that different states may have differing judgments about what the intent of the parties—their justified expectation—actually was, or whether enforcement would contravene forum policies regulating freedom of contract").

208. See Ruth Gavison, *Feminism and the Public/Private Distinction*, 45 *STAN. L. REV.* 1 (1992).

tools of hegemony and exploitation.²⁰⁹ Likewise, feminists have demonstrated that these consequences persist in international development assistance projects—even those specifically aimed at “investing in women.”²¹⁰ On the other hand, as Prabha Kotiswaran has shown for the case of sex workers in Calcutta, very large questions of women’s welfare often turn on technical differences in background local laws governing landlord-tenant relations.²¹¹ How can one tell whether technologies are “good” or “bad”? How do we know whether these techniques we have described open up space for a new kind of political contestation or shut that space down?

A related possible objection to our argument, emerging out of the legal realist tradition, concerns the malleability of legal technique. As discussed earlier in the context of characterization, the field of conflicts was, in fact, the showcase for the legal realist demonstration that formal legal rules do not constrain ethical decisionmaking—because rules are subject to multiple levels of exceptions, because choices must be made between competing rules, because there is ambiguity in how facts should be related to applicable rules, because the content of rules is subject to contestation in the process of analogizing the facts at hand to existing case law or in the hermeneutics of statutory interpretation, and much more.²¹² The technical doctrine of conflicts, in this view, is largely incoherent, and judges manipulate it at will to reach whatever results they wish to reach.²¹³ From this point of view, what we need is not more emphasis on the technical, but more honest conversation about the political conflicts and choices at stake.²¹⁴ Another related concern might be that conflicts methods fail to wrestle adequately with the indeterminacy of culture. The process of finding foreign law seems to make truth claims about domestic or foreign cultures that are in fact highly contestable and highly politicized representations.

209. See BERNARD S. COHN, *The Census, Social Structure and Objectification in South Asia*, in AN ANTHROPOLOGIST AMONG THE HISTORIANS AND OTHER ESSAYS 224, 241 (1987); TIMOTHY MITCHELL, *RULE OF EXPERTS: EGYPT, TECHNO-POLITICS, MODERNITY* 57-58, 76 (2002).

210. See, e.g., Rittich, *supra* note 154, at 1025, 1040.

211. See PRABHA KOTISWARAN, *DANGEROUS SEX, INVISIBLE LABOR: SEX WORK AND THE LAW IN INDIA* 158-71 (2011).

212. See David F. Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173, 183-87 (1933); cf. Cook, *supra* note 184, at 200-02; Walter Wheeler Cook, “Immovables” and the “Law” of the “Situs”: *A Study in the Ambiguity of Legal Terminology*, 52 HARV. L. REV. 1246, 1249, 1258 (1939).

213. See, e.g., Patrick J. Borchers, *Courts and the Second Conflicts Restatement: Some Observations and an Empirical Note*, 56 MD. L. REV. 1232, 1233 (1997). *But cf.* Christopher A. Whytock, *Myth of Mess? International Choice of Law in Action*, 84 N.Y.U. L. REV. 719, 764-77 (2009) (presenting empirical evidence that different approaches to choice of law do lead to somewhat predictable outcomes). See generally Michael H. Gottesman, *Adrift on the Sea of Indeterminacy*, 75 IND. L.J. 527 (2000).

214. See, e.g., Singer, *supra* note 207, at 6.

These critiques are not wrong in our view. It is just that they fail to appreciate the extent to which practitioners of conflicts reasoning are aware of the limitations of their tools. Hence, the critiques miss the creative paradox of conflicts reasoning as self-conscious impossibility.

Consider, for example, the problem of proving foreign law. As we saw in our hypothetical case, it was far from clear what the “law of Japan” was on the status of “name-only” gifts. Ask three experts and you are likely to get three answers.²¹⁵ The problem the legal decisionmaker encounters here is precisely the invention-of-tradition problem: there is no singular thing called “Japanese culture” or “Japanese law.” There are only competing norms, competing interests, and competing interpretive traditions and institutions. When Toru asks the court to honor Japanese law, therefore, he is also simultaneously making a discursive claim for a particular version of Japanese law and cultural tradition, one Yoshiko might contest. So as legal realist critics might point out, even this simple technical step of “finding and proving foreign law” turns out to be a highly malleable, highly contested, even relatively incoherent mess.

Conflict of laws is hardly naive about these challenges and limitations, however, as we have already seen with characterization. On the contrary, almost every conflicts textbook dutifully walks students through the manipulability of doctrine, the impossible double binds, and the incoherence and multiplicity of rules. In the United States, not only was conflicts one of the premier doctrinal sites of the legal realist revolution, those revolutionaries—Cook, Lorenzen, Yntema, Cavers—remain the revered icons of the field.²¹⁶ Far from having a case of critical amnesia, the discipline today is an improbable mix of doctrinal tools paired with normative and practical critiques of those tools. The discipline comes prepackaged with its own critiques.

What we have then is a discipline that asks its practitioners to self-consciously engage in an impossible exercise: to find foreign law, recognizing that there is really no such thing to be found. And yet the judge must do the impossible, recognizing that it is an impossibility: she must ultimately find the foreign law to be *this* or *that*.

This move of doing the impossible, knowing full well that it is impossible, is not unique to conflicts. It is one of the key modalities of private law reasoning.²¹⁷ Borrowing from Hans Vaihinger, Lon Fuller named this modality “as-if” legal thought.²¹⁸ In *The Philosophy of “As If,”*²¹⁹ Vaihinger defined an “as

215. For a famous example from Germany, involving seven competing expert opinions, see BGH Jan. 21, 1991, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 1418, 1991. For a critique of the futile hope of gaining objective truth from expert opinions, see Jansen & Michaels, *supra* note 169, at 14.

216. See SYMEON C. SYMEONIDES, AMERICAN PRIVATE INTERNATIONAL LAW 92-100 (2008).

217. See generally RILES, *supra* note 15.

218. L.L. Fuller, *Legal Fictions* (pt. 1), 25 ILL. L. REV. 363, 390 (1930); see also L.L. Fuller, *Legal Fictions* (pt. 2), 25 ILL. L. REV. 513 (1930).

if" as knowledge that is consciously false and hence, for this very reason, irrefutable.²²⁰ Such "as ifs," he argued, enable forms of agreement and imagination in all aspects of knowledge.²²¹ In mathematics, for example, the concept of a line is an "as if," since mathematicians work with lines as one-dimensional while knowing that such infinitely thin lines do not exist in reality. And yet acting "as if" there is such a thing as a line in the mathematical sense allows for all of the insights of geometry.²²² Likewise, a legal fiction differs from a hypothesis because it cannot be proved or disproved.²²³ Vaihinger draws attention to the delicate epistemological stance of the "as if"—to its subtle, ambivalent "tension." The "as if" is neither true nor not true, he insisted, but rather is itself the tension between what is true and not true.²²⁴ It is this tension, for Vaihinger, that is the fountain of all growth in knowledge: "The 'As if' world, which is formed in this manner, the world of the 'unreal' is just as important as the world of the so-called real or actual (in the ordinary sense of the word); indeed it is far more important for ethics and aesthetics."²²⁵ Vaihinger calls for remaining open to what he terms the "as if" quality of knowledge rather than critiquing its distance from reality: "We can only say that objective phenomena can be regarded *as if* they behaved in such and such a way, and there is absolutely no justification for assuming any dogmatic attitude and changing the 'as if' into a 'that.'"²²⁶

In the context of the problems of representation, cultural description, and hybridity that pervade debates about feminism and multiculturalism, this "as if" modality has a special salience. Unlike even postmodern feminists who fashion vocabulary after vocabulary to try to capture the hybrid, polyphonic, fluid character of cosmopolitan cultural life, as though the latest vocabulary could finally nail it, conflicts takes a different tack on the same problem: it willfully abandons the project of describing the "truth" about culture. Conflicts turns its back on truth not by refusing to "find the law," but by finding it in an "as if" modality: that is, conflicts recognizes all the while (crucially) that its own representations about, say, Japanese law or culture, are only fictions.

The contribution of conflicts to the debates and problems of multiculturalism, then, is the suggestion that we act "as if" it were possible to turn an irresolvable political conflict into a narrowly tailored and technically specific

219. H. VAHINGER, *THE PHILOSOPHY OF "AS IF": A SYSTEM OF THE THEORETICAL, PRACTICAL AND RELIGIOUS FICTIONS OF MANKIND* (C.K. Ogden trans., 2d ed. reprint 1949) (1911).

220. *See, e.g., id.* at 86-88.

221. *See id.* at xli, xlv-xlvii.

222. *See id.* at 222-27.

223. *See* Fuller (pt. 1), *supra* note 218, at 367; *see also* Riles, *supra* note 205, at 4.

224. *See* VAHINGER, *supra* note 219, at 125-26.

225. Riles, *supra* note 205, at 7 (quoting H. VAHINGER, *THE PHILOSOPHY OF "AS IF,"* at xlvii (C.K. Ogden trans., 1924) (1911)).

226. VAHINGER, *supra* note 219, at 31.

one.²²⁷ We do not resolve the question of whether feminist values trump other normative concerns, or even whether, say, the rights of girls to education trump other local economic imperatives. We seek only to answer the question of whether this particular claim should be heard with respect to these parties and these specific issues according to this particular set of doctrinal categories.

One way of thinking about this approach is as an “as if” *constraint of legal form*.²²⁸ The insight of conflicts methodologies is that the tools sometimes exceed themselves, if we allow them to do so. It may be that limiting the possibilities at one methodological or disciplinary level creates inadvertent surprises, unexpected discoveries in other places. For legal scholars and lawyers this means recommitting to law, as opposed to, say, popular culture, or cultural theory, or fiction, as a medium of social change.

However, and importantly, this submission to the constraint of this legal form is always done with full realization that the issues cannot really be cordoned off this way—that they are in fact related to many other problems, and conflicts, and doctrines, and political imaginations. It is done with full appreciation that indeed the very question of how you slice—how you characterize the issues—is highly malleable. Hence it is crucial that the “as if” modality of engagement with legal technique never devolve into blind formalism. As Vaihinger insists, one must fight to maintain the uncomfortable tension of “as if” and not allow it to devolve into “is,” or even worse, into “ought.” This suggests how the “as if” modality of legal technique can be its own kind of ethical commitment in the context of the shifting terrain of cosmopolitan politics. The point of form is not, in other words, to avoid questions of values and politics, but the exact opposite: to provide us with a language within which to formulate, assess, and ultimately resolve, at least for the specific case, clashes of values that would remain irresolvable if taken in another way.

Indeed, in conflicts, the merely “as if” nature of the constraint of form is expressed doctrinally in the availability of the public policy exception as a necessary element of ethical choice at the close of the analysis. There will come a point at which the “as if” must stop. But as we argued in the previous Subpart, we think it is significant that this moment occurs at the end of the analysis, after the techniques have had their moment of agency.

What we are calling legal theory as technique, then, is an approach to politics that is purposely oblique *for the moment*. To paraphrase a comment made to us by Chantal Thomas, it is an approach that (temporarily) tries out the indeterminacy of formalism as a respite from the up-front and head-on certainty of politics. In this respect, “as if” thinking is very different from, say, narrative or contextualizing modalities of thought that dominate feminist and cultural theory. Professionalism at the level of the constraint of form allows for a cer-

227. Cf. Robyn Wiegman, *Feminism's Apocalyptic Futures*, 31 NEW LITERARY HIST. 805, 822 (2000) (calling for “feminism in the meantime”).

228. See *infra* note 236.

tain creative amateurism, or experimentation, at the level of the political and cultural encounter.

V. FEMINISM AS TECHNIQUE

The problem of culture is a central problem for feminist legal theory. Thus far, this Article has sought to demonstrate how the conflict of laws mode might respond. We are also intrigued by the implications of responding in this mode for feminist legal theory writ large. What we would like to call “feminism as technique” is appealing to us in part because it refuses to dissolve the opposition between feminist values and cultural concerns through any of the three common strategies introduced in Part I, namely dialogue, tolerance, and compromise. In this Part, we join with important voices who have raised doubts about some or all of these commitments and show how conflicts offers one picture of an alternative.

A. *No Dialogue, No Tolerance, No Compromise*

1. *No dialogue*

As described earlier, faced with conflicting political positions or cultural communities, many feminist approaches stage a dialogue of one kind or another between differently situated women.²²⁹ In the context of cultural relativism and the self-reflexive recognition that “we” and “they” both face the dilemma of culturally conditioned choice,²³⁰ the dialogue may aim simply at shared understanding. In comparison, feminists drawing on the post-essentialist conception of culture as “invented tradition” often ascribe transformational value to institutional arrangements or procedural solutions aimed at dialogue, arguing that they will bring the particular cultural community’s norms into closer alignment with gender equality.²³¹ For these feminists, the idea that culture is already a fluid, contested, and changing set of values and practices implies that transformation is not at odds with respect for culture.

In contrast, one of the core insights of poststructuralist, queer, and postcolonial feminisms is that dialogue with dignity is not always possible, and demanding dialogue can have its own unintended and hegemonic consequences.²³² For example, the legal philosopher Mikhail Xifaras argues that the notion of dialogue with the “other” through law partakes of an imperial “Na-

229. See, e.g., HOLTMAAT & NABER, *supra* note 33, at 3 & n.14, 87-89; Sunder, *supra* note 69, at 902.

230. See *supra* Part I.B.

231. See *supra* Part I.D.

232. See generally MARIANNE CONSTABLE, JUST SILENCES: THE LIMITS AND POSSIBILITIES OF MODERN LAW 86 (2005).

poleonic” ideal in which “others” are slowly incorporated and rationalized through legal discourse. For Xifaras, following Rancière on this point, dissensus and struggle are fundamental to politics, and hence proposals for dialogue that posit even a fantasy of the end of dissensus are in fact dangerously apolitical.²³³

While the conflicts approach to multiculturalism may in fact achieve shared understandings and enable uncanny alliances—that is, while it may in fact foster dialogue—it does not explicitly aim to do so. Its objectives are much more modest and far less utopian. It aims only to bring the current dispute to an (equitable and legally defensible) end.

It is not that conflicts as a field is uninterested in dialogue, mutual understanding, and reciprocity. It is that it chooses to come at these questions sideways—by foregrounding other more technical legal questions. To illustrate, a false conflicts analysis may indeed generate deference to foreign law.²³⁴ And the very process of going through a false conflicts analysis ideally demands carefully contextualized attention to the purposes and scope of foreign law. Hence, the orientation of the analysis is quite different from the view now advocated by some prominent legal theorists that an understanding of the “other” in legal terms is ultimately impossible and even irrelevant as a normative goal because legal discourse and practice simply translate everything outside themselves into their own existing categories, and therefore serious engagement with the “other” need not be attempted at all.²³⁵ But although this encounter with the “other” may turn out to be expansive, it is nevertheless framed as a matter of narrow doctrinal manipulation in order to reach a specific legal end. Ironically, we believe, it is the narrow lens, the “constraint of form”²³⁶ described in Part IV, that ultimately allows for the breadth of the encounter.

2. *No tolerance*

Another core value implicitly or explicitly underlying much of the multiculturalism debate is tolerance.²³⁷ In *Regulating Aversion*, Wendy Brown articulates a powerful critique of the seemingly benign emphasis on tolerance of

233. Mikhail Xifaras, Professor of Pub. Law, Sciences Po, Research Seminar: Is Global Law Universal (Jan. 31, 2011); cf. JACQUES RANCIÈRE, *DISSENSUS: ON POLITICS AND AESTHETICS* 37-40 (2010) (discussing dissensus).

234. See HAY ET AL., *supra* note 165, at 31 (“[I]n false conflicts, Currie would apply the law of the only interested state . . .”).

235. See, e.g., Gunther Teubner & Andreas Fischer-Lescano, *Cannibalizing Epistemes: Will Modern Law Protect Traditional Cultural Expressions?*, in *INTELLECTUAL PROPERTY AND TRADITIONAL CULTURAL EXPRESSIONS IN A DIGITAL ENVIRONMENT* 17, 19 (Christoph Beat Graber & Mira Burri-Nenova eds., 2008).

236. See MARILYN STRATHERN, *THE GENDER OF THE GIFT: PROBLEMS WITH WOMEN AND PROBLEMS WITH SOCIETY IN MELANESIA* 180-82 (1988) (describing the efficacy of the “constraint of form”).

237. See SHACHAR, *supra* note 77, at 10.

other value systems in American political life.²³⁸ The surface-level egalitarian ethos of tolerance, Brown points out, hides a pernicious hierarchy: one only tolerates those whom one believes to be in some sense inferior to oneself.²³⁹ Martha Minow likewise has illustrated how “tolerance presents the dilemma of its own limits.”²⁴⁰ As she puts it, “Liberal tolerance has always struck me as a second-best, a kind of ‘putting up with’ difference that falls short of genuine respect. Tolerance implies an imbalance of power: some have the power to grant—or withhold—tolerance toward others.”²⁴¹

From a different vantage point, the anthropologist James Weiner has critiqued the essentialist underpinnings of tolerance.²⁴² Echoing the insights of the invented-tradition literature, he reminds us that the very differences that get the debate over multiculturalism going are often products of the interventions of the state law apparatus through the “tremendous burgeoning of the institutional relationships, buttressings, laws, procedures, and so on, between any indigenous community and . . . governments, companies, [and] non-government organisations.”²⁴³ If one truly takes this insight seriously, Weiner argues, then the very idea of recognition and tolerance is somewhat nonsensical since the differences to be tolerated are actually products of the institutions of toleration.²⁴⁴

One of the attractions of the conflicts approach in our view is that tolerance is simply not part of its vocabulary. Of course, as in the case of dialogue, conflicts may result in tolerance of a kind: the forum may choose to defer to another value system even on issues of deep concern to the forum’s own political community. As Weiner suggests, the technical machinations of state law generate their own cultural effects.²⁴⁵ Yet conflicts does not aim at toleration.²⁴⁶ It aims at resolving a particular conflict.

238. BROWN, *supra* note 40.

239. *See id.* at 22-24.

240. Martha Minow, *Tolerance in an Age of Terror*, 16 S. CAL. INTERDISC. L.J. 453, 461 (2007).

241. *Id.* at 457.

242. *See* James Weiner, *Eliciting Customary Law*, 7 ASIA PAC. J. ANTHROPOLOGY 15 (2006).

243. *Id.* at 18.

244. *See id.* at 17.

245. *See id.* at 22.

246. The doctrine of comity arguably gives some voice to values of tolerance. For a critique of tolerance in the guise of comity that tracks the critique of feminist tolerance we describe here, see Ralf Michaels, *Empagran’s Empire: International Law and Statutory Interpretation in the U.S. Supreme Court of the Twenty-First Century*, in *INTERNATIONAL LAW IN THE U.S. SUPREME COURT: CONTINUITY AND CHANGE* 533 (David L. Sloss et al. eds., 2011). However, although conflicts is often associated with comity in the abstract, *see* Donald Earl Childress III, *Comity as Conflict: Resituating International Comity as Conflict of Laws*, 44 U.C. DAVIS L. REV. 11, 15 (2010), doctrinal conflicts analysis actually rarely turns on comity arguments. Conflicts rather addresses such concerns through other more technical doctrinal means such as an analysis of the extent to which deferral to another state’s law might serve the policy goal of “maintenance of interstate and international order.” *See* Robert A. Leflar,

One doctrinal marker of the conflicts alternative to toleration discussed earlier is the public policy exception. As we indicated, the doctrines of conflicts are invoked always with the awareness that what we term an ethical moment must come to pass: the decisionmaker must decide whether to stand by the results of doctrine or to disregard them. But if this option is always on the table, it is refined, limited, and postponed.

Again, conflicts' seeming lack of awareness of the wider political and theoretical imperatives at stake in a choice between normative systems makes it a refreshing alternative to the tolerance that Brown and Minow cogently describe as an orientation that, while well-intentioned, often slips into its own form of self-righteousness.

3. *No compromise*

A third thread that runs through much of the feminism/culture debate is the search for the perfectly calibrated middle ground. Many public law doctrines for thinking about the accommodation of feminism and multiculturalism explicitly deploy frameworks such as balancing tests that turn this normative imperative into a methodology. Here, the idea is that it is the job of the scholar, judge, or policymaker to find the perfectly calibrated balance between opposing interests, to split the baby precisely in two, to find the sweet spot at which all sides give up precisely appropriate amounts in favor of the common good. Recall, for example, Shachar's slicing of jurisdiction between the minority and the state so as to transform culture from within over time by "equipping members with means of combating unjust internal restrictions."²⁴⁷ Some conflicts scholars have advocated similar approaches to conflicts.²⁴⁸

These approaches are clearly well-intended. But as Carol Greenhouse argues about this "discourse of solutions," it also inadvertently sets the liberal state up as the arbiter of the middle ground.²⁴⁹ As Prabha Kotiswaran further suggests, there is both a lack of theoretical rigor and a certain arrogance, a seduction toward "governance mode,"²⁵⁰ in this search for the middle ground—a sense that it is the scholar's or policymaker's privilege and duty to find the balance point, as if we scholars and policymakers were not already invested in one

Choice-Influencing Considerations in Conflicts Law, 41 N.Y.U. L. REV. 267, 285-87 (1966). In contrast, comity is an active doctrine in public international law. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 403 (1987).

247. SHACHAR, *supra* note 77, at 14.

248. See, e.g., Berman, *Global Legal Pluralism*, *supra* note 203; Berman, *The New Legal Pluralism*, *supra* note 203; see also Minow & Singer, *supra* note 202.

249. See CAROL J. GREENHOUSE, *THE PARADOX OF RELEVANCE: ETHNOGRAPHY AND CITIZENSHIP IN THE UNITED STATES* 142, 170-73 (2011).

250. See Janet Halley, Prabha Kotiswaran, Hila Shamir & Chantal Thomas, *From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism*, 29 HARV. J.L. & GENDER 335, 410-11 (2006).

side or the other, as if we came to the table without our own normative commitments built in. And as a practical matter, the proliferation of such proposals suggests the difficulty—dare we say the impossibility—of finding such middle ground. Here again, while conflict of laws does not oppose compromise as an end result—after all, decisional harmony is sometimes mentioned as an important goal of all conflicts decisions—it does not explicitly seek it.

B. *Feminism in the Conflicts Style*

In light of the problems with proposals to find the middle ground, what we find appealing about the conflicts approach is the adherence to the constraints of technical form, with all its faux, tongue-in-cheek depoliticization of the issues.²⁵¹ Rather than opening up all the politics and choosing a middle way, conflicts methodologies actually point away from substance for a moment.

It is an oblique response, but again one that we believe institutionalizes into a practice a strong form of recognition of one's own situatedness in the conflicts at issue. The conflicts judge has no illusions of being above the fray; she entertains no ambition to choose an objective middle ground. She refuses that task—but she does not refuse to reach a legal conclusion. Again, in contrast with Shachar's proposal, the conflicts move we call "slicing" is effectuated in a far less instrumental modality.²⁵² Conflicts, too, slices the problem down, recognizing that one normative system might trump for some purposes, and another might trump for other purposes. But the aim is not to transform the other system. It is rather to resolve the technical question of what law applies to the case at hand.

The appeal of the "as if" modality already has a strong feminist pedigree. The postmodern feminist political philosopher Rosi Braidotti has described her approach to philosophy as an "as if" modality of theorization, akin to inhabiting a nomadic identity.²⁵³ She argues that this "as if" modality can be a tool for opening up transformative possibilities:

It is *as if* some experiences were reminiscent or evocative of others; this ability to flow from one set of experiences to another is a quality of interconnectedness that I value highly. . . . [N]omadic becoming is neither reproduction nor just imitation, but rather emphatic proximity, intensive interconnectedness. Some states or experiences can merge simply because they share certain attributes.²⁵⁴

251. It will be apparent that for this reason, unlike some other progressive conflicts scholars, we prefer those conflicts methodologies—traditional and modern—that constrain and limit the issues to those that open up the issues and face their politics head on.

252. As noted earlier, another important distinction is that Shachar is slicing jurisdiction and not choice of law. *See supra* notes 77-78, 178-79, 247, and accompanying text.

253. *See* ROSI BRAIDOTTI, *NOMADIC SUBJECTS: EMBODIMENT AND SEXUAL DIFFERENCE IN CONTEMPORARY FEMINIST THEORY* (1994).

254. *Id.* at 5-6.

Her discussion of the counterintuitive possibilities that inhere in turning away from the “real” help to articulate what legal technique has to offer philosophy. For her, the “as if” of the nomadic legal subject

allows me to think through and move across established categories and levels of experience: blurring boundaries without burning bridges. Implicit in my choice is the belief in the potency and relevance of the imagination, of myth-making, as a way to step out of the political and intellectual stasis of these postmodern times. Political fictions may be more effective, here and now, than theoretical systems.²⁵⁵

The “as if” also has strong proponents among both theorists of culture and feminist theorists who have struggled with the question of what an ethical representational politics might look like. Since the work of Edmund Leach,²⁵⁶ Vaihinger has gained a following among generations of anthropologists searching for ways of responding to critiques of representation in that field. The anthropologist and cultural theorist Roy Wagner, for example, has described Vaihinger’s “as if” as the basis for cultural description after postmodernism: “A relative perspective *within* the province of cultural construction, taking the referentialism of the symbol, the ‘is’ of convention, as a kind of subjunctive, is to enter a tentative suspension—Vaihinger’s world of ‘as if.’”²⁵⁷

The feminist anthropologist Marilyn Strathern points out that the epistemological openness and ambivalence of the “as if”—whether in ritual practice or in ethnographic writing—is enabled by a rigidity at the level of form.²⁵⁸ That is, people substitute agreement about “the truth” with agreement to act or argue or sing or dress or analyze or write according to a very specific set of aesthetic criteria. The analogue to legal technique concerns the way one might embrace the ambiguity of legal argumentation while still conforming carefully to the criteria of what constitutes a good argument—rather than, say, abandoning legal argumentation altogether for policy arguments, or for that matter, political theory arguments, poetry, or political demonstrations in the streets. In a later work, Strathern specifically describes legal tools as “non-epistemological” knowledge: legal technique, in her view, is knowledge that self-consciously does not describe the world but rather serves as a “tool” within that world.²⁵⁹ In our view, this “non-epistemological” or nonrepresentational quality of the “as if” of legal technique—the way it papers over description—is a crucial element of its transformative power.

255. *Id.* at 4.

256. See E.R. LEACH, *POLITICAL SYSTEMS OF HIGHLAND BURMA: A STUDY OF KACHIN SOCIAL STRUCTURE* 285 (2d ed. 1964).

257. ROY WAGNER, *SYMBOLS THAT STAND FOR THEMSELVES* 9 (1986).

258. See STRATHERN, *supra* note 236, at 180-81.

259. See MARILYN STRATHERN, *KINSHIP, LAW AND THE UNEXPECTED: RELATIVES ARE ALWAYS A SURPRISE* 111 (2005) (noting “the role played by legal technique in the fabrication of persons and things”).

This subtle epistemological and ethical stance is quite different from the more totalizing and directly instrumental feminist initiatives we have termed dialogue, tolerance, and compromise. But it is also different, we believe, from projects that have been our own in the past—attempts to describe the conflicts between feminism and culture in ever more fine-grained contextual or hybridic analyses, for example, or the choice to simply “take a break” from feminism. From the point of view of feminism as technique, all these approaches share a certain head-on and up-front way of addressing their problems, and hence a great ethical and epistemological burden to “get it right”—something quite distinct from the more oblique and “for the moment” approach of the “as if.”

Again, we want to emphasize that just because the conflicts perspective rejects the authority to define the middle ground does not mean that the decisionmaker has *carte blanche* to ignore difference, dismiss all attempts to reach out beyond one’s own values and vocabularies as a liberal fantasy, and settle into a bubble of postmodern legalism in which one safely asserts that the “other” is unknowable anyway and so why bother. In other words, we want to reject the false choice between technocratic managerialism on the one hand and legal chauvinism or ironic cynicism on the other. Rather, as we have explained, we view the constraint of form as an improbable, but ultimately powerful tool of political engagement, one that preserves curiosity by allowing for the unexpected and the surprising in the midst of the legal mundane.

CONCLUSION

In Germany, France, Britain, and many other societies, the state’s multiculturalism policies have become a political flashpoint. Often, what ignites proposals for rollback takes the form of a defense of women. Much the same is true in foreign policy debates about the rights of women abroad. If feminism has become the *bête noire* of multiculturalism, the opposite is also true. As we described in Part II, the problem of culture—of the very concept itself—has mired feminist theory and practice in circles of debate and counterdebate. If the political mainstream is concentrated on *l’affaire du foulard*, girls who vanish from school in Britain to be married off in their family’s homeland, or synagogue windows in Montreal overlooking a women’s gym²⁶⁰—if President Bush included “saving Afghan women” among the justifications for U.S. military ac-

260. See GÉRARD BOUCHARD & CHARLES TAYLOR, CONSULTATION COMM’N ON ACCOMMODATION PRACTICES RELATED TO CULTURAL DIFFERENCES, BUILDING THE FUTURE: A TIME FOR RECONCILIATION 53 (2008). The creation of Quebec’s Consultation Commission on Accommodation Practices Related to Cultural Differences was prompted by hot-button social issues in the province of Quebec, many of which involved women and religion. The contentious questions included whether a Montreal YMCA had to install frosted windows in its gym to prevent young boys and teenagers studying at the synagogue across the street from having a full view of the women exercising. See *id.* at 45-60.

tion in Afghanistan after 9/11²⁶¹—academic feminism in the West seems to be disoriented, even exhausted, in part by multiculturalism.

And yet, the problems do not go away. The failure of societies to reconcile their commitments to gender equality and respect for cultural difference has profound consequences for many women's lives, and also threatens to become an increasing source of tension in those societies. At the same time, the academic downward spiral we have described surrounding feminism/culture analysis has its own consequences. As feminist legal scholars, this issue matters to us personally as well as professionally. Simply put, we want to live in an academic world in which feminist legal theory once again engages our passions and aspirations. In short, the crisis around feminism/culture theory matters practically, politically, and theoretically.

This Article began by broadening the scope of the debate, showing by example that unlikely issues of private law, not commonly coded as either feminist or cultural, can raise the same complications of culture for feminism. Next, the Article found help in a similarly unlikely place: the legal technicalities at work in conflict of laws. Understood as we suggest, the subtle ethical positioning of the conflicts method, effectuated all along in a particular technical aesthetic style, offers new energy and opportunity to the feminism/culture quagmire. Its very different orientation towards cultural conflict helps us to appreciate and advance the strengths of the debate. But conflicts also illuminates the limitations of the taken-for-granted orientations to the problem in feminist theory that we referred to as dialogue, tolerance, and compromise.

A close look at the intellectual moves at the heart of conflicts doctrines suggests that many of these moves are quite avant-garde relative to the state of critical and cultural theory. We showed how some of these doctrines take into account and amplify some of the cutting-edge insights of feminist cultural theory. For example, the very existence of the field of conflict of laws is a reminder of the fact that other frameworks for understanding gender and culture exist on par with our own.

We also showed how some of the moves of conflicts as a field actually go beyond the current state of critical and cultural theory and suggest new avenues for thinking about feminism/culture problems. One example is conflicts' signal move of slicing issue by issue the question of which value system should govern. While feminists who employ contextualism or practical reasoning, for instance, would also refuse to join the politicians in endless debates about headscarves and child marriage in general, a conflicts sensibility is distinctive in moving to a narrow and technical conversation about the appropriateness of *this* headscarf as concerns *this* school and *this* girl at *this* moment. Slicing separates the areas of disagreement and agreement and thus opens up the possibility

261. See, e.g., Ann Russo, *The Feminist Majority Foundation's Campaign to Stop Gender Apartheid*, 8 INT'L FEMINIST J. POL. 557, 558, 560-62 (2006) (quoting from various addresses by President George W. Bush and First Lady Laura Bush).

of dealing with each separately. Likewise, the sequenced coupling of a deep commitment to the recognition of relativist concerns with what we have termed an ethical moment—a final analytical moment of decision and closure—takes us beyond both muddled debates about the complexity of representation on the one hand and well-intentioned but ultimately somewhat arrogant assertions of the primacy of one's own feminist ethical values on the other.

Some of the techniques we have described are not unique to conflicts; they are part of the private law toolbox. Our interest in private law methodology echoes but also advances a growing interest among specialists of international law, legal pluralism, and globalization in private law.²⁶² In our view, what ultimately defines private law is not a particular rapport with economic transactions, or a particular distance from administrative practice, or a link to the authority and legitimacy of market forces relative to the state, but rather a particular set of techniques.²⁶³ And although to our knowledge we are the first to explore the implications of legal technique for the feminism/culture debate,²⁶⁴ our analysis joins a growing interest in legal technique in areas of law more traditionally associated with market relations.²⁶⁵

Yet in conflicts these tools take on a particular valence. They become ways of grasping a wider conversation about overlapping and contested sovereignties, about how to talk about culture after the critiques of essentialism, about how to conceptualize agency and power without falling into methodological individualism,²⁶⁶ about the linkages, overlaps, and proximities between political positions and also the points of disconnect. Technique, in short, can sometimes be a way of getting at the political in a way that theorizing cannot do. Our larger aim in this Article has been to suggest how the constraints of technical legal form might open up new ethical, transformative, and interpretive possibilities for legal theory.

262. See, e.g., GHALF-PETER CALLIESS & PEER ZUMBANSEN, *ROUGH CONSENSUS AND RUNNING CODE: A THEORY OF TRANSNATIONAL PRIVATE LAW* (2010); JAMES THUO GATHII, *WAR, COMMERCE, AND INTERNATIONAL LAW* (2010); 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); David Kennedy, *The Mystery of Global Governance*, 34 OHIO N.U. L. REV. 827 (2008); Kennedy, *supra* note 36; Martti Koskenniemi, *Empire and International Law: The Real Spanish Contribution*, 61 U. TORONTO L.J. 1 (2011); Robert Wai, *Transnational Private Law and Private Ordering in a Contested Global Society*, 46 HARV. INT'L L.J. 471 (2005); Fleur Johns, *Performing Party Autonomy*, 71 LAW & CONTEMP. PROBS., Summer 2008, at 243.

263. See RILES, *supra* note 15, at 242.

264. For a forthcoming work drawing on our approach, see Justin Desautels-Stein, *Race as a Legal Concept*, 3 COLUM. J. RACE & L. (forthcoming 2012).

265. See GUNTHER TEUBNER, *LAW AS AN AUTOPOIETIC SYSTEM* 64-99 (Zenon Bankowski ed., Anne Bankowska & Ruth Adler trans., 1993); Alain Pottage, *Conflicts of Laws: Comparing Autochthonous Legal Cultures*, in *TERRITORIAL CONFLICTS IN WORLD SOCIETY: MODERN SYSTEMS THEORY, INTERNATIONAL RELATIONS AND CONFLICT STUDIES* (Stephen Stetter ed., 2007); Riles, *A New Agenda*, *supra* note 204; Johns, *supra* note 262.

266. See, e.g., Mahmood, *supra* note 46.