# Post-critical Private International Law: From Politics to Technique

Ralf Michaels, Duke University

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Conflict of laws is en vogue again. After a period of intellectual fatigue with yet another methodological proposal in the United States, yet another legislative proposal in Europe, conflicts has become core of much legal analysis again, far outside its traditional realm of conflicts between sovereign states.

Unfortunately, much of the reception of conflict of laws is often done by outsiders to the discipline who pay insufficient attention to its intricacies. Andreas Maurer and Moritz Renner have recently summarized, very helpfully, the recent attention given to conflict of laws methods – or, perhaps more accurately, conflict of laws talk – in legal theory; others use conflicts, sometimes loosely defined, for other purposes. The reason for the recent rise in interest in conflict of laws is the combination of two facts. The first is, most generally speaking, the rise of legal fragmentation. The second reason for the rise of the discipline is the acknowledgment that if a conflict of laws is recognized, the discipline most suited to deal with that conflict is the discipline that was made for this precise purpose. Scholars are intrigued by the fact that conflct of laws deals with conflicts among incommensurate normative systems, but they ignore the precise ways in which conflict of laws does

this. As a result, their suggestions are often helpful and interesting, but cannot really be called conflicts approaches.

Another strand, represented by Robert Wai and especially Horatia Muir Watt, comes from conflict of laws and attempts to uncover its underlying potential for global governance. This literature is exciting and relevant, but it mostly remains, in its focus, within the general area of application of conflicts between legal orders.

This is different for Christian Joerges' conceptualization of EU law as a conflict of laws regime. Unlike the first strand I named, Joerges comes from conflict of laws—two of his earliest, and most influential, publications were devoted to the discipline—but applies conflicts to new areas. And although it may seem as though conflict of laws was only one of his various interests (others including private law and economic law), I think it can be said that, just as a specific idea of private law informed already his early analyses of conflict of laws, a certain conflict of laws sensitivity has characterized much of his work that is ostensibly in other areas. More than the second strand, Joerges has always been deeply interested in economic law.

It is for these reasons that his suggestion of a new conflicts law as constitutional law of Europe is the most sophisticated elaboration of such a system. I find myself in fundamental agreement with Joerges' attempt to use conflict of laws as a discipline for a more appropriate understanding of EU law. But I worry that the useful recognition of a number of areas in which conflicts of rationalities exists does not lead, in Joerges' approach and its reception in the literature, to an equally robust technique to deal with these conflicts. Essentially, although much energy is devoted on the recognition and classification of conflicts, less clarity exists with regard to the technique with which to deal with these conflicts. Or, more precisely, instead of such technique, what we find, frequently, is a recourse to some type of balancing, or a priority for one rationality over the other – a political, rather than a legal, response.

I believe (though I may of course be wrong) that Joerges' aversion to developing such a technique can be traced back to his preference for the work of Brainerd Currie in specific, and interest analysis more generally. Currie's analysis was extremely helpful, I believe, in unveiling the shortcomings of the formalist doctrine prevalent at his time. By contrast, I think his own aversion to the formulation of a new method to replace the old one was quite justified. Simply put, Currie's own analysis of conflict of laws is not equipped to generate a new positive approach to conflict of laws, and the later numerous attempts to build such an approach on the basis of his suggestions are therefore seriously misguided. What we need instead is to step beyon the realizations that conflicts exist everywhere, and that therefore a law of conflicts is needed, and actually use the existing techniques to deal with these conflicts.

In this brief paper, prepared for a workshop in Loccum, I first address what conflict of laws actually is, and how our description of the problem it tries to resolve is intimately connected with our methodological solutions to the problem. I then move to the politics of conflicts, in particular Brainer Currie's important but, as I argue, ultimately misunderstood contribution to the discipline. I then lay out how a return to technique, as an alternative to the open politicization of the discipline, is more promising.

## I. Foundations

I want to start with a curiosity of the field of conflict of laws. If you think about it, conflict of Laws is an ambiguous name for a legal discipline. It is ambiguous because it means two things at the same timethe problem with which the field deals, and the responses to this problem given by the law. Of course, other disciplines also use the problem addressed for the definition of the legal discipline –

consumer protection law (as opposed to consumer law); non-discrimination law, etc. But in these fields, the definition of the problem is an inspiration for, but analytically different from, the field's name: consumer protection is different from consumer protection law. By contrast, although we sometimes speak of a "law of conflicts" or even "law of conflict of laws," usually we refer to the field by the exact name of the problem it is aimed to resolve.

a) Conflicts as Problem

This implies two things. First, speaking of conflict of laws precommits us to thinking about issues in a certain way. If we speak of a conflict of laws, then the conflict is the problem we have to resolve, and the absence of a conflict means no problem actually emerges. This is somewhat problematic because, of course, a conflict of laws is a metaphor. Laws are never actually in conflict. Typically, not even sovereigns are in actual conflict. Who is in conflict are private parties, who invoke the conflict of laws (the question for the applicable law) as a trope in their quest for the ultimate result.

If this is true, it follows that whether an actual conflict of laws exists (as opposed to a mere difference between laws) is a matter not of observation but of construction. And we can see that such construction happens differently in different countries. It is in the common law world in particular (but, at least in terminology, also in France) that we speak of actual conflicts of law. Notably, the introduction of actual conflicts predates the conflicts revolution by several centuries. In fact, one of Currie's contributions to the field is not the insight that conflicts exist (as clashes of values and cultures) but to the contrary that fewer conflicts exist than we may thing, simply because laws do not claum universal application and thus many apparent conflicts are actually false conflicts. The avoidance of conflicts, rather than their resolution, is a relatively frequent topic in the literature.

Notably, German conflict of laws, tellingly entitled private international law, makes do without the concept of a conflict. The question which law applies is asked, typically, with no attention to the content oft that law, much less to whether several potentially applicable laws actually differ or are in conflict. Although in contemporary private international law substantive considerations come more and more to the fore, the notion of conflict is still, in almost all contexts, irrelevant.

It has been argued that this blindness for politics and actual conflicts make traditional savignyan conflict of laws normatively inadequate, at least for the law of the welfare state. I will have more to say about this later. For now, what is relevant is that such private international law is not a priori epistemologically inadequate.

b) Conflicts as non-law

A second implication, however, may be even more striking: If the field is defined as the problem it aims at resolving, this suggests that the problem has to be resolved without recourse to a separate body of law. Law appears as the object of conflict of laws, but not as its solution. That can mean two things: it can mean that conflict of laws is an area not of law but of something else – politics, ontology – or it can mean that conflict of laws is a matter for the laws in conflict themselves.

If conflicts of laws should be resolved without recourse to any law at all, this could be because these conflicts may belong to the realm of politics and, for that reason, not the realm of law. This is indeed a trope that exists, for a long time, in public international law when it is thought to be just politics (a thought that had some recurrence in recent US scholarship in public international law.) But it is also a trope in private international law.

The reason that the Dutch school of private international law in the 17th century places comity at the core of its analysis is precisely the absence of legal rules to deal with conflicts. The traditional source of private international law, the ius commune, has broken down under the pressure of

sovereignty. The idea that sovereign states should ever, for some legal reason, be bound to apply the law of another sovereign states, seems preposterous. At the same time, it seems desirable that foreign law is applied, at least sometimes. The consequence is comity, later defined by the US Supreme Court as "neither a matter of absolute obligation, nor of mere courtesy and good will," in other words, some type of quasi-legal obligation but certainly no law.

Today, when scholars focus on Huber, they focus almost exclusively at his famous three maxims of private international law as foundational for the field. They thereby overlook that Huber's main attention is to actual rules of conflict of laws. They also overlook that these rules provide, in substance, a striking continuity to the earlier statutist school of private international law. In the end, it seems almost as thoug Huber switched, quite radically, the foundations of the discipline, while leaving the discipline itself intact.

Remarkably, a similar idea – that conflicts of laws have to be resolved without recourse to a body of law – exists in the vested rights theory, the other grand theory of the common law. Here, the idea is that judges never apply foreign law at all. All that they do is to enforce rights vested under foreign law, which come to the court not as laws but as facts that the judge has to take into account.

That idea was discredited as circular as early as the 19th century: we cannot know whether a right vested under foreign law unless we know that the foreign law applies in the first place. This meant that the vested rights theory needed to rely on conflicts rules that determine the applicable law. And indeed, we find long and detailed treatises consisting of such rules both in England (Dicey) and the United States (Beale). Whether these rules are directly deduced from the non-law idea of vested rights or developed merely within its boundaries, what we see as a result are actual legal rules.

Another way to deal with conflicts of laws is the resort to the substantive las in question themselves. We can see this most obviously in the statutist school, which determined the respective scope of a statute in order to both recognize and resolve conflicts. Wächter presented a 19th century approach that, though unilateral rather than multilateral, suggested similar solutions. Finally, of course, the US conflicts revolution revived the idea of resolving conflicts on the basis of an interpretation of underlying statutes.

And yet, this approach has also been turned into a conflicts approach. The essential principle of the statutists is this: Personal statutes followed the person's origin; territoria statutes remained in the territory; so-called "mixed statutes" where allocate in one or the other realm. To some extent, this characterization of statutes as personal or territorial is a matter of statutory interpretation. When Bartolus takes the text of a statute as the starting point he suggests, if haphazardly, that the scope of such laws must be determined by these laws themselves. More often than not, however, the characterization occurred objectively, on the basis of the area of law. The same happens in interest analysis, where the question of whether legal rules are loss-allocating or conduct-regulating (which determines whether they are personal or territorial) is frequently typified.

c) The Alternative: Conflicts as Legal Technique

The idea that conflict of laws actually consists of law is thus new and old at the same time. It is new in the sense that an explicit treatment of such rules as legal rules, grounded neither in politics or nature or substantive law but in particular, political considerations. Traditionally, such positivization takes place in a decentralized way, in the respective member states. Of course, conflict of laws has long been an object for legislation (most famously perhaps in Article 3 of the French Civil Code of 1804). But at the same time legislators have long been hesitant to legislate on conflict of laws. The German lawmaker of 1896 for example refrained from laying down multilateral rules and merely

defined unilaterally the scope of German law; only courts and scholars interpreted these unilateral rules as multilateral. But scholars in the 19th century prepared the path towards such a positivization of conflicts. Mancini suggested that private international law, just as public international law, could and should be the object of treaties. This remains a trope until today. Kahn shared the preference for treaties but added significant analysis of the possibilty for states to lay down their own choice-of-law rules, different in substance from their substantive law counterparts. Schurig, finally, moves Kahn further still and suggests that the preference for treates is not automatic: it may make sense for states to develop their own autonomous approach to the resolution of conflicts of laws. Here, positivization comes with decentralization.

But positivization can also come from centralization. Federal systems in particular provide the unique opportunity for central allocation of issues to respective states. Remarkably, most federal systems do not provide such legislation. In the United States, for example, calls for a general federal statute on choice of law remained unheeded. At the same time, hopes that the US Constitution could be used as basis for the resolution of interstate conflicts have not yielded results; the US Supreme Court has mostly refrained from developing such a doctrine "without a rudder to steer us". The European Union is arguably the first federal system that has truly federalized and constitutionalized, in this sense, the conflict of laws between different member states – both through quasi-codification in a number of "Rome" conflict of laws regulations, and through ECJ case law on the common market, especially common market. This has been described as the core of the new European choice-of-law revolution.

The idea that conflict of laws creates a separate legal field is old, however, in another sense. I have tried to show that rules that look like legal rules have always characterized the discipline. Comity as a quasi-political way of resolving conflicts has been turned into doctrine; the vested rights theory has spawned detailed rules on conflict of laws, the statutists also developed such rules. Does this mean that such specific conflicts rules – technique – are a necessary element of the discipline? In order to approach this question, I now focus in some more detail on the work of Brainerd Currie.

## II. Politics, Approaches, and Theory: Currie, Again

Rules – technique – thus appear to be almost omnipresent in choice of law, even though they sometimes emerge, so to speak, sub rosa. This rule focus has been challenged in two strands of ideas in US conflict of laws in particular, of which only one is truly relevant to me.

The irrelevant strand sugests that rules should be replaced by approaches. This strand criticizes what it view, in traditional private international law, as an undue fixation on strict and inflexible rules (although at the same time it opposes the numerous so-called "escape clauses" like characterization and renvoi that make these rules flexible. It wants to substitute flexible approaches for these rigid rules. This approach resembles the rules vs. standards debate in general law. This changes the form of the normative demands on judges in determining the applicable law. It thereby changes, arguably, the institutional competence of such determination because it gives judges as decisionmakers more discretion. It does not, however, alter the general idea of conflict of laws as an area that creates normative demands on how an applicable law is to be determined in the first place.

The relevant strand for me is the one that refutes the idea of conflict of laws rules altogether. In my understanding, Brainerd Currie is the only proponent of such an idea. We can see in his work how he struggles with the idea (and ultimately comes close to giving it up), and we can see in the reception of his ideas how the non-law approach is ultimately given up.

a) Currie as Politics

Brainerd Currie's approach to conflict of laws is well-known in its core, though surprisingly badly known in many of its preconditions and implications. Normally, we view his main contribution to be that conflicts of laws should be resolved on the basis of the governmental interests involved. We thereby ignore to a considerable extent his elaboration of what this would mean in specific case situations, and we also undervalue his emphasis on the role that the Constitution should play.

It is important to note some elements in this approach that are often misunderstood. First, Currie's foundational question is not which law applies in the case of a conflict of laws. Instead, his question is when, if ever, forum law can be replaced by foreign law. Second, the reason that he opposes the application of foreign law is not parochialism, as has been argued frequently, but instead an idea about separation of powers: if law expresses societal policies and preferences, then it would be institutionally wrong for judges—including federal judges—to curtail its application. Third, Currie does not advocate for an unlimited imposition of the forum's own governmental interests. These interests are not just limited by the call for restratint and moderation that Currie borrows from his friend, Judge Traynor. More importantly, they are constrained, according to Currie, by the federal system and the US Constitution, which Currie thought should play an essential role ine the resolution of conflicts.

The background for Currie is then, as Joerges like others has rightly pointed out, is a political understanding of law, and – as a consequence – of conflict of laws. This conception has traditionally been juxtaposed with the allegedly apolitical conception of private law – and therefore of conflict of laws – in the 19th century, especially in the work of Savigny. Savigny, so the traditional story, supported a strictly apolitical private law that existed prior to intervention by the state and was, at the same time, strictly distinguished from public law. This enabled Savigny to strip conflict of laws from its relation to international politics: if private law relations predate the state and are of no interest to it, then conflicts of laws are not conflicts among sovereigns but merely technical questions of applicability. It is therefore possible to create strictly private rules of conflict of laws.

This picture is not fully accurate. It is not the case, for example, that Savigny detaches private law from the state. Most scholars, Savigny certainly included, were aware that the idea of a private, apolitical, law, was itself an eminently political one. Finally, the idea of conflict of laws rules as merely technical could suggest that any rules are equally appropriate as long as they favor predictability, whereas Savigny suggested that such a criterion exists in that of the seat of a legal relation, a criterion later developed into an idea of the closest connection.

In particular, there is a remarkable but normally overlooked similarity between Currie and Savigny. On the one hand, Savigny agrees with Currie that politically relevant laws of the forum trump any coliding claims for application from foreign law. On the other hand Currie agrees with Savigny that cases that do not involve policy interests of states – "no interest cases" – cannot be resolved with his method. Where they differ is the degree to which laws without policies exist. whereas Savigny considers substantive interests and policies in private law largely irrelevant (at least for the purpose of conflict of laws), they are central to Currie's analysis, which is deeply engrained in ideas of democratic self-determination and representation

b) Currie as Anti-Rules

What follows for Currie? The typical presentation of his theory, one that he himself endorsed in principle in one of his last publications, distinguishes three types of cases: true conflict (both states interested), false conflict (only one state interested, or policies of both states coincide), no-interest case (no state interested). In a false conflicts case, the law of the only affected state is applied. In a

true conflicts case that cannot be resolved by applying restraint and moderation in the reinterpretation of the respective interests, the forum law always applies if the forum is interested. The no-interest case does not really find a resolution in his approach.

This way of presenting the issue does not do justice to the fact that, for the early Currie at least, the forum is always the starting point; consequently, it makes Currie's preference for the forum law a contingent and surprising response instead of a logical implication. In this sense, an earloer formulation seems more accurate. Logically, the first step in the analysis is not to look for all states that have an interest, but only to determine whether the forum is interested – if that is the case, forum law applies and the analysis is over. Only if the forum is uninterested is it even necessary to analyze whether a foreign law is interested, in which case its law applies. Where no law is interested, Currie suggests application of forum law.

There is a way, however, in which both these formulations of clear rules seriously misrepresent Currie's own position. Currie was quite adamantly anti-rules, suggesting that "[w]e would be better off without choice-of-law rules," (though he added that Congress should legislate in some specific areas). Even more tellingly, he suggested that "we would indeed do well to scrap the system of choice-of-law rules for determining the rule of decision, though without entertaining vain hopes that a new 'system' will arise to take its place. We shall have to go back to the original problems, and the hard tass of dealing with them realistically by ordinary judicial methods, such as construction and interpretation, and by neglected political methods."

This opposition to rules – or approaches – telling us how to resolve conflicts has an actual pedigree in the conflicts revolution, thought that pedigree is rarely recognized. Thus, for example, we read the early critiques of conflicts by the likes of Cook and Cavers as attempts to improve the field. But quite arguably they were not. Cook, following his teacher Hohfeld, had in mind, it seems, an applied theory of law, for which conflict of laws just served as an appropriate field of application. Similarly, Cavers reports that he saw the entire law in development, and he picked conflict of laws almost at random as the field in which he was interested. Both, then, did not, at least by themselves, want to contribute to a further development of the field.

Of course, even if their ideas were largely theoretical, they were nonetheless taken as actual policy suggestions by later scholars – including Cavers himself, who later withdrew his opposition to rules and preferences and formulated his own list. This is how interesting suggestions were born, but it is also, as Riles argues, a reason for the decline of the field. She suggests that the attempt to turn theories into tools had to fail – especially if the theories themselves were deeply anti-instrumental theories.

I believe we can see the same struggle within the work of Currie. His analysis of governmental interests was an attempt at realist jurisprudence, but it was largely just a description of the problem that conflict of laws deals with, not, at the same time, an element in the solution of this problem. Time and time again, in his work, he points out how important it is that there are no easy solutions to conflicts problems. And yet, governmental interest analysis was turned into exactly that – a recipe that generates, nearly automatically, results.

## III. From Politics to Technique

It is plausible why Currie was so opposed to seeing his approach turned into rules. His whole impetus was to point out the political aspect of substantive law and the consequent political character of conflict of laws. If the political character of conflicts derives from that of substantive law, any attempt to distinguish the two would depoliticize conflict of laws. We are reminded of Wiethölter's

critique of Kegel, who, in Wiethölter's view, sharply recognized the Selbstherrlichkeit of substantive law and yet overlooked the Selbstherrlichkeit of private international law.

At the same time, however, the history of our field suggests that some type of rulification is unavoidable. (It is not just for political differences that Kegel has in the end been more influential on conflicts doctrine than has Wiethölter.) Antiformalism and politicization of conflicts, important as they were as political moves, have left us in dire need for a new technique, but they have at the same time given us reason to doubt any technique.

What we need then are two things—a workable technique, and a justification for such technique in the face of the politics of the field. I can only sketch here what that would imply.

a) The Need for Technique

First, the need for technique. Some conflict of laws technique is observable in most approaches: the combination between principled applicability of "foreign" law and a public policy exception. Cassis de Dijon: is an early example. This combination is unsuspicious for a political theory. A role of politics is preserved, and all that matters is the scope of the exception: narrow for liberal theory (and leading doctrine), broad for a more political approach.

At the same time, however, this two-step approach is intellectually unsatisfactory. Or, put differently, it requires us to deal with a lot of complexity under a very crude legal instrument. Although public policy represents a welcome re-entry of politics into the law, this re-entry takes place without much adaptation. The result is that the complexity of politics enters the law.

Now, although we all want the politics to be informative for the law, we do not, necessarily, want to have to translate all legal conflicts into political ones. This would rob law of its function to make political conflicts resoluble. Not surprisingly, the most radical (and consequent) critique of law (as superstructure, false consciousness, etc.) has always been not merely a critique of the particular form that law takes but of law at large. (Recall Pashukanis' biting criticism of attempts to replace "bad" liberal law with "good" socialist law.) This radical critique is reflected in the unwilllingess to replace "bad" formalist conflicts rules with good conflicts rules.

Thus, if we want the law to perform its function (and I will say more in the next paragrah about this) we need to resort to technique, and more than just public policy. The Viking case of the ECJ is a case in point: although it addresses what is essentially a conflict of laws, it does not treat it as such. Christian Joerges, like many others, has been critical of this methodological shortcoming. Unlike many others, however, he has linked the decision back to conflict of laws method, and here to a trope of the traditional method: characterization. At stake is, if I understand him correctly, whether we characterize the issue as one of labor law—In which case it is allocated to the member state – or as one of the internal market—In which case it is allocated with EU law.

I agree. But I would like to add that this move is actually more dramatic than it seems. Joerges rightly calls characterisation "the primary operation of conflicts law," but of course he is aware that precisely this operation has been a core object of critique in the conflict of laws revolution. And the hope of interest analysis (amongst other approaches to conflicts) was that characterization would become, if not unnecessary, then at least far less important.

On closer analysis, interest analysis cannot ultimately free itself from issues of characterization. If we are asked to distinguish, in choice of law for torts, between issues of loss allocation (that are governed by the parties' common domicile, if any) and issues of conduct regulation (that are governed by the law of the place of the tort), we face, quite obviously, a question of characterisation.

b) The Possibility of Technique

Does the fascination with the wondrous possibilities of the technical not ignore how technicalities often obscure or dilute political conflict? After all, the key in-sight of Legal Realism was precisely that technical legal form sanitizes social conflict, turning real questions of whose interests should be favored—the inter-ests of, say, fathers and daughters—into technical questions of, say, the transju-risdictional enforceability of a 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 pri-vate law rules.

One version of the objection might note that the interest in private law techniques over politics 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. Indeed, the public/private distinction has long attracted these sorts of critiques from feminists.

Another version of the critique might query the unintended consequences of the technologies we have described. The experience of many colonial socie-ties with the importation of seemingly neutral private law demonstrates how devices such as property recording systems or background contracts rules can become tools of hegemony and exploitation. 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 it down?

A related possible objection, emerging out of the 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 Realist demonstration that formal legal rules do not constrain ethical decision making—because rules are subject to multiple levels of exceptions, be-cause choices must be made between competing rules, because there is ambigu-ity 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 context of the hermeneutics of statutory interpreta-tion and much more. 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. 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. Another related concern might be that conflicts methods fail to wrestle adequately with the indeterminacy about 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 repre-sentations.

These critiques are not wrong. 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.

Conflict of laws is hardly naive about these challenges and limitations, however, as we have already seen with characterization. On the contrary, most every conflicts textbook dutifully walks the students through the manipulability of doctrine, the impossible double binds, the incoherence and multiplicity of rules. In the United States, not only was conflicts one of the premier doctrinal sites of the Realist revolution, those revolutionaries—Cook, Lorenzen, Yntema, Cavers—remain the revered

icons of the field. 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 reason-ing. Borrowing from Hans Vaihinger, Lon Fuller named this modality "As If" legal thought. In The Philosophy of "As If," Vaihinger defined an As If as knowledge that is consciously false and hence, for this very reason, irrefutable. Such As Ifs, he argued, enable forms of agreement and imagination in all aspects of knowledge. 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. Likewise, a legal fiction differs from a hypothesis because it can-not be proved or disproved. Vaihinger emphasized the delicate epistemolog-ical stance of the As If—what he termed its subtle, ambivalent, "tension." The As If is neither true nor not true, he insisted, but rather is itself the tension be-tween what is true and not true. It is this tension, for Vaihinger, that it 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.

Vaihinger called for remaining open to 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'".

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 attempt to capture the hybrid, polyphonic, fluid character of cosmopolitan cultural life, as though the latest vocabulary could finally nail it, and often lose themselves in the by definition impossibility of the task, conflicts takes a different tack on the same problem: it willfully abandons the project of describing the "truth" about culture. It turns its back on truth not by refusing to "find the law," but by finding it in an As If modality, that is, recognizing, all the while (crucially) that its own representations about, say, Japanese law or culture, are only fictions.

The contribution of conflicts to the multiculturalism debates and problems, 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 one. 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. 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 surprise, unex-pected 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 cor-doned 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 appre-ciation 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. Vaihing-er's insistence that one must "fight" to maintain the uncomfortable tension of As If and not to allow it to devolve into "is" or even worse, into "ought" sug-gests 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, taken in another way, remain irresoluble.

Indeed, in conflicts, the merely As If nature of the constraint of form is ex-pressed doctrinally in the availability of the public policy exception, as a neces-sary 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 section, we think it is significant that this moment is sequenced at the end of the analysis, after the techniques have had their moment of agency.

## IV. Conclusion

The argument just presented is thus fairly simple. A (pre-critical) formalism that is blind for the politics of conflicts is undesirable. However, a critical antiformalism that merely emphasizes the politics of the field without guiding response can lead to a critique of law altogether, but not to new law. A legal response to conflict of laws requires technique. Such technique can be justified with an as if attitude. Technique is not used in the ignorance of politics but, quite to the contrary, in sight of the impossibility of resolving political conflicts otherwise.

I have not said which technique is most helpful for these purposes. My sense is that traditional continental private international law tools are actually the most promising – precisely because they are not attempts to mirro some outside truth of politics or ontology (or even substantive law). Other techniques, however, may be useful, too. What would be the wrong way, however, would be to think that critique is all that it takes, and that any technique is necessarily a step back.