SPACE, TIME, AND HISTORICAL INJUSTICE: A FEMINIST CONFLICT-OF-LAWS APPROACH TO THE "COMFORT WOMEN" AGREEMENT

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After more than twenty years of worldwide feminist activism, transnational litigation, and diplomatic stalemate, on December 28, 2015, Japan and South Korea announced a historic agreement intended to provide closure to the so-called "Comfort Women issue"—the issue of what Japan must do to atone for the sexual enslavement of up to 200,000 women from throughout Asia in service to the Japanese troops before and during World War II. Reactions to this landmark agreement continue to be mixed, and the question for many is whether it will hold. One challenge is how to respect the scale and systematicity of the crimes without imposing a single narrative, or without projecting an overdetermined understanding of the gendered past onto the future. We offer an analysis of this question in a wider lens: how to address grave historical injustices when legal claims and advocacy goals spread and metamorphose not only over time, but also across jurisdictions.

Focusing on one high profile and particularly contentious provision of the agreement, concerning a privately erected statue honoring the Comfort Women outside the Japanese embassy in Seoul, we first show that the usual questions about settlements for historical injustices—whether they will achieve closure and what kind—can productively be traded for attention to where *and* when *closure and reopening occur.*

Borrowing our analytical lens from conflict of laws, we refine the problem as a manifestation of a pervasive issue for feminist justice in a globalized world that we call "spatio-

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temporal diffusion." We argue that a novel response to this diffusion of historical injustices can be grounded in conflict-of-laws techniques. Using the hypothetical of a case brought by Korean Comfort Women in California, we redescribe the field's techniques for dealing with time across space as a matter of what we term the "sequencing" of different spatio-temporal horizons. This approach resonates with, but also goes a step beyond, the arguments of certain feminist social theorists that feminist politics must be polytemporal. In the mode of an interdisciplinary experiment, we deploy the conflicts technique of sequencing spatio-temporal horizons as a more specified and hopeful approach to a feminist future.

INTRODUCTION

On December 28, 2015, Japan and South Korea[1] announced a historic agreement[2] intended to provide closure to the so-called "Comfort Women issue"[3]—the issue of what Japan must do to atone for the sexual enslavement of up to 200,000 women from throughout Asia in service to the Japanese troops before and during World War II.[4] Women and girls were captured, coerced, or deceived with promises of employment and sent to military brothels, including on the frontlines,

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1 The Republic of Korea (ROK) is also known as South Korea. *See Korea, South*, WORLD FACTBOOK, https://www.cia.gov/library/publications/the-world-factbook/geos/ks.html [https://perma.cc/W522-HTKG] (last updated Jan. 12, 2017). In this Article, we will refer to it as "Korea" except when distinguishing South from North Korea.

2 *See Full Text of Announcement on 'Comfort Women' Issue by Japanese, South Korean Foreign Ministers*, JAPAN TIMES (Dec. 28, 2015), http://www.japantimes.co.jp/news/2015/12/28/national/politics-diplomacy/full-text-announcement-comfort-women-issue-japanese-south-korean-foreign-ministers/ [https://perma.cc/C6XD-CLS5] [hereinafter *Agreement*].

3 The Japanese term "Comfort Women" reflects the rationale that sex provided Japanese soldiers a form of comfort from the battlefield. The principal reasons given for the establishment of the Comfort Women system, though, were to prevent the troops from contracting sexually transmitted diseases and to counteract the anti-Japanese sentiment caused by Japanese soldiers' sexual abuse of civilian women. *See* Prosecutors and the Peoples of the Asia-Pacific Region v. Showa, No. PT-2000-1-T, Judgment on the Common Indictment and the Application for Restitution and Reparation at 43 (Women's Int'l War Crimes Tribunal for the Trial of Japan's Military Sexual Slavery Corr. 2002) [hereinafter Judgment of the Tokyo Women's Tribunal]; On the Issue of "Comfort Women," MINISTRY FOREIGN AFF. JAPAN (Aug. 4, 1993), http://www.mofa.go.jp/policy/postwar/issue9308.html [https://perma.cc/9PXU-Z3WH]. In this Article, we will use the terms "Comfort Women" and the "Comfort Women issue" because this terminology is pervasive in the relevant debates. We do so recognizing that the euphemism of "Comfort Women" is problematic for its erasure of the violence at issue in these cases and that many activists prefer the label of "sexual slavery." In our view, however, the reference to all of the victims as "slaves" also limits our appreciation of the full historical complexity of the relevant events, including the agency of the women involved.

4 *See generally* USTINIA DOLGOPOL & SNEHAL PARANJAPE, COMFORT WOMEN: AN UNFINISHED ORDEAL (1994); DAI SIL KIM-GIBSON, SILENCE BROKEN: KOREAN COMFORT WOMEN (1999); MAKI KIMURA, UNFOLDING THE 'COMFORT WOMEN' DEBATES: MODERNITY, VIOLENCE, WOMEN'S VOICES (2016); IN-HWAN PARK, CAN YOU HEAR US? THE UNTOLD NARRATIVES OF COMFORT WOMEN (2014); CRISTINA LOPE YL. ROSELLO, DISCONNECT: THE FILIPINO COMFORT WOMEN (2011); DAVID ANDREW SCHMIDT, IANFU— THE COMFORT WOMEN OF THE JAPANESE IMPERIAL ARMY OF THE PACIFIC WAR: BROKEN SILENCE (2000); C. SARAH SOH, THE COMFORT WOMEN: SEXUAL VIOLENCE AND POSTCOLONIAL MEMORY IN KOREA AND JAPAN (2008); YUKI TANAKA, JAPAN'S COMFORT WOMEN: SEXUAL SLAVERY AND PROSTITUTION DURING WORLD WAR II AND THE US OCCUPATION (2002); YOSHIMI YOSHIAKI, COMFORT WOMEN: SEXUAL SLAVERY IN THE JAPANESE MILITARY DURING WORLD WAR II (Suzanne O'Brien trans., Columbia Univ. Press 2000) (1995); COMFORT WOMEN SPEAK: TESTIMONY BY SEX SLAVES OF THE JAPANESE MILITARY (Sangmie Choi Schellstede ed., 2000); LEGACIES OF THE COMFORT WOMEN OF WORLD WAR II (Margaret Stetz & Bonnie B. C. Oh eds., 2001).

to provide sexual services to Japanese soldiers where they were held for months or years.[5] The agreement includes an official apology by Japan's Prime Minister and a payment of ¥1 billion (approximately U.S. $8.3 million) from the state budget to establish a foundation that will provide aid to the surviving victims.[6] The two governments also agreed that "this issue is resolved finally and irreversibly" and that they "will refrain from accusing or criticizing each other regarding this issue in the international community."[7]

To most observers, the sheer fact of serious negotiations, let alone a settlement, came as a considerable surprise.[8] For over twenty years, feminist activists in South Korea, elsewhere in Asia, and around the world, the South Korean and other governments, and a remarkable array of other international actors have raised the issue of justice for the Comfort Women with little result.[9] The conclusion of a state-to-state agreement specifically focused on harms to women represents a major development in feminist international jurisprudence.

The most pressing question for many, however, is whether the December 28 agreement will hold. Reactions continue to be mixed. Some victims have accepted the agreement, while others have decried the lack of consultation with them during the negotiation process,[10] pledged to ignore it,[11] or even sued

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5 *See* TANAKA, *supra* note 4, at 37–44; Judgment of the Tokyo Women's Tribunal, *supra* note 3, at 74–81; YOSHIAKI, *supra* note 4, at 103–10.

6 *Agreement*, *supra* note 2, § 1(1)–(2); *see also Japan Completes Transfer of ¥1 Billion to South Korean 'Comfort Women' Fund*, JAPAN TIMES (Sept. 1, 2016), http://www.japantimes.co.jp/news/2016/09/01/national/politics-diplomacy/japan-completes-transfer-¥1-billion-south-korean-comfort-women-fund/ [https://perma.cc/V66T-VHUA] (discussing payment specifics).

7 *Agreement*, *supra* note 2, §§ 1(3), 2(1), 2(3).

8 See Justin McCurry, *Japan and South Korea Agree to Settle Wartime Sex Slaves Row*, GUARDIAN (Dec. 28, 2015, 7:19 AM), https://www.theguardian.com/world/2015/dec/28/japan-to-say-sorry-to-south-korea-in-deal-to-end-dispute-over-wartime-sex-slaves/ [https://perma.cc/D4R5-AGRV].

9 *See infra* subpart II.A.

10 *See Lack of Consultation with Victims Means 'Comfort Women' Deal Should Not Be Final: Support Group*, JAPAN TIMES (Dec. 31, 2015), http://www.japantimes.co.jp/news/2015/12/31/national/politics-diplomacy/group-says-as-victims-were-not-consulted-comfort-women-deal-not-final/ [https://perma.cc/H95N-C578].

11 *See Former 'Comfort Women' Are Asked by South Korean Officials to Accept Accord with Japan*, JAPAN TIMES (Dec. 29, 2015), http://www.japantimes.co.jp/news/2015/12/29/national/korean-former-comfort-women-divided-agreement-japan/ [https://perma.cc/KNM6-VEZ9]. Two Korean Comfort Women who rejected the agreement travelled to Japan to obtain a face-to-face apology from the Prime Minister and official compensation. *See* Justin McCurry, *Former Sex Slaves Reject Japan and South Korea's 'Comfort Women' Accord*, GUARDIAN (Jan. 26, 2016, 7:20 AM), http://www.theguardian.com/world/2016/jan/26/former-sex-

the Korean government for making the deal when Japan still refuses to acknowledge legal responsibility.[12] The United States, which played an active role in encouraging both sides to resolve the issue in order to foster closer economic, diplomatic, and military ties among its allies in Asia, has embraced the agreement as "an important gesture of healing and reconciliation that should be welcomed by the international community."[13] In contrast, one Korean activist organization has described the agreement as reflecting "diplomatic collusion that betrays the victims and citizens."[14] In response to urgings from the U.S. State Department to support the agreement,[15] some Korean-American groups have suspended anti-Japanese protests, while others have criticized the agreement as limited and flawed.[16] A Korean court has already defied the Korean President's negotiation of finality by opening a damages suit against the Japanese government on behalf of ten Comfort Women.[17] And following the inaugural board meeting of the Reconciliation and Healing Foundation set up under the

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slaves-reject-japan-south-koreas-comfort-women-accord/ [https://perma.cc/RF42-BHUW].

12 *See South Korea Faces Lawsuit over Sex Slave Agreement as a Dozen Survivors Rebel*, JAPAN TIMES (Aug. 30, 2016), http://www.japantimes.co.jp/news/2016/08/30/national/crime-legal/south-korean-government-faces-lawsuit-comfort-women-agreement/ [https://perma.cc/5EYQ-K6WE].

13 Sam Kim & Maiko Takahashi, *'Comfort Women' Deal Likely to Fuel Tokyo-Seoul Military Cooperation, Aid Obama Pivot*, JAPAN TIMES (Dec. 29, 2015), http://www.japantimes.co.jp/news/2015/12/29/national/politics-diplomacy/key-official-tokyo-seoul-resolution-war-legacy-beef-looks-fuel-military-cooperation-aide-obama-pivot/ [https://perma.cc/R2N2-U67D] (quoting Susan Rice, U.S. National Security Advisor).

14 *Park Hopes 'Comfort Women' Deal Helps Reset Tokyo Ties; Victims, Critics Displeased*, JAPAN TIMES (Dec. 29, 2015), http://www.japantimes.co.jp/news/2015/12/29/national/politics-diplomacy/park-hopes-comfort-women-deal-helps-reset-tokyo-ties-victims-critics-displeased/ [https://perma.cc/ADL3-JRV9].

15 *See* Press Release, John Kerry, Sec'y of State, U.S. Dep't of State, *Resolution of the Comfort Women Issue* (Dec. 28, 2015), http://www.state.gov/secretary/remarks/2015/12/250874.htm [https://perma.cc/X5RT-5V6V].

16 *See Korean-American Group Suspends Activities Related to 'Comfort Women,'* JAPAN TIMES (Dec. 30, 2015), http://www.japantimes.co.jp/news/2015/12/30/national/korean-american-group-suspends-activities-related-to-comfort-women/ [https://perma.cc/HT68-DSJD]; *KAFC Statement on the Japan-S.Korea Deal*, KOREAN AM. F. CAL. (Apr. 23, 2016), http://kaforumca.org/kafc-statement-on-the-japan-s-korea-deal/ [https://perma.cc/J5DE-UMFY].

17 *See* Alastair Gale, *Japan-South Korea 'Comfort Women' Deal Faces Backlash in Seoul*, WALL STREET J. (Jan. 3, 2016, 12:29 AM), http://www.wsj.com/articles/comfort-women-deal-faces-backlash-in-seoul-1451557585 [https://perma.cc/KF6R-TNN2]; Elizabeth Shim, *Japan Could Face Lawsuit From Former 'Comfort Women,'* UPI (Dec 31, 2015, 12:14 PM), http://www.upi.com/Top_News/World-News/2015/12/31/Japan-could-face-lawsuit-from-former-comfort-women/2081451580990/ [https://perma.cc/8KG6-LDDW].

agreement, a protester tear-gassed the Foundation's chief.[18] On December 28, 2016, the first anniversary of the agreement, Korean activists put up a statue of a Comfort Woman outside the Japanese consulate in Busan, Korea's second-largest city, leading Japan to recall its ambassador to Korea and suspend various high-level economic talks between the two countries.[19] Japan's Prime Minister Shinzo Abe has suggested that Korea is now in violation of the spirit of the agreement.[20] Meanwhile, some Philippine Comfort Women are pressing their country's President to negotiate a similar agreement on their behalf.[21]

In a globalized world, no one settlement can possibly resolve the Comfort Women issue once and for all. Legal efforts to address the issue prior to the December 28 agreement included conflict-of-laws and other cases brought in a number of countries to obtain an apology and compensation, and the agreement does not explicitly bar private suits against private parties.[22] Beyond its paramount significance for the women

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18 *See Violent Protests Mar Seoul Launch of 'Comfort Women' Fund*, JAPAN TIMES (July 29, 2016), http://www.japantimes.co.jp/news/2016/07/29/national/politics-diplomacy/¥1-billion-comfort-women-fund-launched-south-korea-japan-not-yet-sent-cash/ [https://perma.cc/P6WS-V6FR] [hereinafter *Violent Protests Mar Seoul Launch*].

19 *See* Editorial, *No Closure on the 'Comfort Women*,' N.Y. TIMES (Jan. 6, 2017), https://www.nytimes.com/2017/01/06/opinion/no-closure-on-the-comfort-women.html [https://perma.cc/3EHV-NUTY].

20 *See Abe Urges South Korea to Remove 'Comfort Women' Statue at Busan, Claims 2015 Agreement at Stake*, JAPAN TIMES (Jan. 8, 2017), http://www.japantimes.co.jp/news/2017/01/08/national/abe-urges-south-korea-remove-comfort-women-statue-says-agreements-credibility-stake/ [https://perma.cc/HH86-R322].

21 *See* McCurry, *supra* note 11. Japan has said that it has no plans to conclude agreements with any other countries. *Id.*

22 *See Agreement*, *supra* note 2. On the one hand, comments on the December 28 settlement by the leader of Korea's opposition party seem to assume that it bars private suits: "Despite the treaty in 1965, (South Korea's) Supreme Court recognized that individuals' right of claim has not dissipated and the Constitutional Court clarified the government's duty to make an effort to protect the individuals' right of claim . . . . [T]he Park[ ] administration suddenly abolished this policy, which buried numerous endeavors." Rob York & Ha-young Choi, *Unresolved Issues Haunt Comfort Women Agreement*, N. KOR. NEWS (Jan. 5, 2016), https://www.nknews.org/2016/01/unresolved-issues-haunt-comfort-women-agreement/ [https://perma.cc/TZ8L-UJ8K]. On the other hand, a South Korean legal academic notes that the agreement does not resolve the controversy between Japan and Korea over whether the 1965 bilateral agreement on war reparations extinguishes all claims. *Id.* Moreover, a case has been brought in Korea since the settlement. *See* Shim, *supra* note 17.

In foreign courts, the treatment of the December 28 agreement might vary. For example, a private lawsuit brought in the United States might be precluded as raising a "political question" better left to the executive branch. In a 2005 Comfort Women case, on which we base our hypothetical in Part III *infra*, the U.S. State Department submitted a Statement of Interest to this effect regarding the World

themselves, the dispute has assumed importance for the national identities of Japan and Korea,[23] has merged with international feminist activism around the prosecution of sexual violence in current conflicts as a profound injustice for women everywhere,[24] has led to tensions between Japanese and Korean diasporas abroad,[25] and has even become enmeshed with territorial disputes.[26] Conversely, cross-border historical wrongs come to have new domestic implications, as in a January 2017 ruling of a Korean court that the Korean government maintained a "Comfort Women" system of its own for the U.S. military in the 1960s and 70s, analogous to the Japanese Comfort Women system, and systematically violated the human rights of the Korean women who worked as prostitutes there.[27]

What interests us in this Article is the "spatio-temporal diffusion" of historical injustice, as we call this phenomenon. Experiences of historical injustice are multiplied, accelerated, slowed down, revived, and continually transformed by global circulations of persons, resources, media, documentation, and forms of legal argumentation. Even domestic issues of the past are increasingly spreading, refracting, and combining across space, and the truth and reconciliation processes and other remedies developed for those domestic issues are contributing

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War II peace treaties with Japan. Joo v. Japan, 413 F.3d 45, 48–52 (D.C. Cir. 2005). Unlike our hypothetical below, this case was brought under the Alien Tort Statute, 28 U.S.C. § 1350 (2015), and was against Japan, as opposed to invoking private law against a private party. Most recently, see You v. Japan, 150 F. Supp. 3d 1140, 1144–48 (N.D. Cal. 2015). It is also possible that a U.S. court might interpret Japan's official acceptance of wrongdoing in the December 28 agreement as consistent with a subsequent case seeking an apology from an individual.

23 *See* SCHMIDT, *supra* note 4, at 2–7; CHIZUKO UENO, NATIONALISM AND GENDER 73–79 (Beverley Yamamoto trans., 2004).

24 *See* Karen Knop, *The Tokyo Women's Tribunal and the Turn to Fiction*, *in* EVENTS: THE FORCE OF INTERNATIONAL LAW 145, 150–153, 156 (Fleur Johns, Richard Joyce & Sundhya Pahuja eds., 2011).

25 *See infra* subpart I.B.

26 *See* Mikyoung Kim, *Memorializing Comfort Women*, 6 ASIAN POL. & POL'Y 83, 88–89 (describing a banner added to a Comfort Women memorial in Seoul by a Japanese right-wing group asserting Japan's sovereignty over islands disputed with Korea) [hereinafter Kim, *Memorializing Comfort Women*]; *Seoul to Propose Mediation Over 'Comfort Women' Issue*, JAPAN TIMES (Aug. 28, 2012), http://www.japantimes.co.jp/news/2012/08/28/news/seoul-to-propose-mediation-over-comfort-women-issue/ [https://perma.cc/C9RU-7A4V]; Adam Westlake, *Lawsuit Forces Japanese Government to Disclose 1965 Korean Treaty Documents*, JAPAN DAILY PRESS (Oct. 12, 2012), http://japandailypress.com/lawsuit-forces-japanese-government-to-disclose-1965-korean-treaty-documents-1215741/ [https://perma.cc/5UZ8-WWTG].

27 *See* Choe Sang-Hun, *South Korea Illegally Held Prostitutes Who Catered to G.I.s Decades Ago, Court Says*, N.Y. TIMES (Jan. 20, 2017), https://www.nytimes.com/2017/01/20/world/asia/south-korea-court-comfort-women.html [https://perma.cc/72MH-ZSRS].

to expectations for international legal resolutions such as the December 28 agreement.[28] Wrongs of sexual violence are especially amplified because rape is often used as a deliberate tactic against an enemy in war, an ethnic nation, or women in general.[29] Spatio-temporal diffusion affects the way that time itself is experienced, history is remembered, and the future is anticipated in different jurisdictions.

While a conflicts case would potentially be available as a strategy for reopening the December 28 agreement, what inspires us more is the style of analysis that this field would bring to the larger question of closure. Rather than the familiar questions about settlements for historical injustices—whether they will achieve closure and what kind[30]—conflicts as a style of analysis argues for and sharpens attention to *where* and *when*. The result is a different vision of the problem. Equally important, a conflicts lens suggests a new way forward that seeks to work with this spatio-temporal diffusion.

Conflict of laws, or private international law as it is known outside the United States, is the part of the state's law that deals with cases involving a "foreign element," meaning a connection to some legal system other than that of the jurisdiction in which the case is being tried. Courts hearing such cases must decide not only whether their own or some other jurisdiction's substantive law applies, but which jurisdiction's law determines whether the case is out of time.[31] As any conflicts

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28 *See* RUTI G. TEITEL, GLOBALIZING TRANSITIONAL JUSTICE: CONTEMPORARY ESSAYS xiv–xv (2014) [hereinafter TEITEL, GLOBALIZING TRANSITIONAL JUSTICE].

29 *See* BRENDA FITZPATRICK, TACTICAL RAPE IN WAR AND CONFLICT: INTERNATIONAL RECOGNITION AND RESPONSE 5–7 (2016).

30 *See, e.g.*, Courtney Jung, *Walls and Bridges: Competing Agendas in Transitional Justice*, *in* FROM RECOGNITION TO RECONCILIATION: ESSAYS ON THE CONSTITUTIONAL ENTRENCHMENT OF ABORIGINAL AND TREATY RIGHTS 357, 358 (Patrick Macklem & Douglas Sanderson eds., 2016) (observing that "governments may try to use transitional justice to draw a line through history and legitimate present policy, whereas Indigenous peoples may try to use the past to critique present policy and conditions"). While our interest is in drawing attention to "where" and "when," we share Leora Bilsky's view that the question of "what kind of settlement?" is an important advance on "whether or not settlement." *See* LEORA BILSKY, THE HOLOCAUST, CORPORATIONS AND THE LAW: UNFINISHED BUSINESS (forthcoming) (manuscript at 250–52) (on file with authors).

31 *See* FRANÇOIS RIGAUX, LE CONFLIT MOBILE EN DROIT INTERNATIONAL PRIVÉ 17 (1966) (noting that "la dimension temporelle des conflits de lois dans l'espace doit y être jugée inhérente: elle correspond à la nécessité . . . d'assigner à toute règle de droit son domaine de validité dans le temps" ["the temporal dimension of conflict of laws in space must be understood as inherent: it corresponds to the necessity of assigning to every legal rule a temporal scope of validity"]).

In this Article, we focus on the question of endpoints, but conflict of laws also deals with other temporal issues. *See, e.g.*, F.A. Mann, *The Time Element in the Conflict of Laws*, 31 BRIT. Y.B. INT'L L. 217 (1954); J.H.C. Morris, *The Time Factor*

lawyer knows, changing jurisdictions (so-called forum shopping) can be a strategy for opening or reopening a historical wrong such as the Comfort Women issue. Our aim, however, is not to present conflict of laws as a practitioner might, but to redescribe its approach, its doctrines, and its debates in a way that relates more broadly to the law's treatment of space-time and the longstanding feminist concern with fashioning a politics oriented toward the future. We contend that conflicts has untapped resources for thinking about space and time together—ethnographically and theoretically, as well as legally.

This methodology builds on ethnographic work by one of us on law as technique[32] and on our work with Ralf Michaels in which we demonstrate how critical problems in feminist theory can, surprisingly, be reimagined by examining them through the mundane technicalities of conflict of laws.[33] We will argue similarly that conflicts yields a unique and powerful way of seeing, organizing, and approaching the Comfort Women issue and other refracted issues of historical injustice. While the failure after the war to prosecute or compensate the wrongs suffered by the Comfort Women was deeply discriminatory, and while the ongoing controversies are reflective of persistent stereotypes of women and the harmful uses of these stereotypes in international law, we describe our conflict-of-laws approach as "feminist" more because it engages problems of time, space, and the future central to feminist social theory.[34]

The Article proceeds as follows. Focusing on a high-profile and particularly contentious provision of the December 28 agreement concerning the status of a privately erected statue honoring Comfort Women outside the Japanese embassy in

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in the Conflict of Laws, 15 INT'L & COMP. L.Q. 422 (1966). In addition, some conflicts theorists have argued that conflicts holds lessons for thinking about conflicts between past and present laws (for example, the issue of retroactivity in criminal law). *See* CHRISTIAN GAVALDA, LES CONFLITS DANS LE TEMPS EN DROIT INTERNATIONAL PRIVÉ (1955); FRIEDRICH CARL VON SAVIGNY, A TREATISE ON THE CONFLICT OF LAWS, AND THE LIMITS OF THEIR OPERATION IN RESPECT OF PLACE AND TIME 45 (William Guthrie trans., 2d ed. 1880); John K. McNulty, *Corporations and the Intertemporal Conflict of Laws*, 55 CALIF. L. REV. 12 (1967); Roger J. Traynor, *Conflict of Laws in Time: The Sweep of New Rules in Criminal Law*, 4 DUKE L.J. 713 (1967).

32 ANNELISE RILES, COLLATERAL KNOWLEDGE: LEGAL REASONING IN THE GLOBAL FINANCIAL MARKETS (2011) [hereinafter RILES, COLLATERAL KNOWLEDGE].

33 Karen Knop, Ralf Michaels & Annelise Riles, *From Multiculturalism to Technique: Feminism, Culture, and the Conflict of Laws Style*, 64 STAN. L. REV. 589 (2012) [hereinafter Knop, Michaels & Riles, *From Multiculturalism*].

34 *See* Nicola Lacey, *Feminist Legal Theory and the Rights of Women*, *in* GENDER AND HUMAN RIGHTS 13, 13–30 (Karen Knop ed., 2004) (distinguishing varieties of feminist legal theory, their substantive and methodological continuities with other legal and social theories, and the ways in which abstract ideas not specifically about men or women can nevertheless reflect male perspectives).

Seoul, Part I illustrates how trading the usual questions about settlements—whether they will achieve closure and what kind—for attention to *where* and *when* helps to envisage the problem as a manifestation of spatio-temporal diffusion. Part II discusses the history of efforts to obtain justice for the Comfort Women, the key features of the December 28 agreement, the cracks that are already emerging in the agreement, and the debate about kinds of closure that it reflects and provokes. Part III describes the derivation of the feminist conflict-of-laws approach that we propose and uses the hypothetical of a lawsuit brought by Korean Comfort Women in California to introduce conflicts insights into the analysis of space-time. Revisiting the problem of spatio-temporal diffusion as it manifests in the Comfort Women issue, Part IV applies this feminist conflict-of-laws approach to refine an understanding of the condition and to draw out resonances with ideas of time, space, and the future developed by certain feminist social theorists. In the mode of an interdisciplinary experiment, Part V returns to our hypothetical lawsuit to identify the conflicts technique of sequencing spatio-temporal horizons as a more specified vision of a hopeful feminist future that these feminist social theorists are searching for.

I
CONTROVERSY OVER A STATUE

Whether the December 28 agreement will resolve the Comfort Women issue hinges as much on controversies over the appropriate kind of closure as on the substance of the remedy. It is striking that although financial compensation for the Comfort Women, many of whom returned as outcasts to lives in poverty,[35] has for decades been central to activism on their behalf, the relatively small size of the settlement fund specified in the agreement has provoked much less attention in both Korea and Japan than its treatment of a statue.[36]

The statue referenced in the December 28 agreement is a bronze figure of a young Korean woman erected by non-governmental organizations ("NGOs") in front of the Japanese embassy in Seoul.[37] Dressed in simple traditional clothes, the

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35 *See* Pyong Gap Min, *Korean "Comfort Women": The Intersection of Colonial Power, Gender, and Class*, 17 GENDER & SOC'Y 938, 948 (2003).

36 *See Agreement*, *supra* note 2, § 2(2).

37 *Historic South Korea-Japan Deal Stumbles over Comfort Women Statue*, STRAITS TIMES (Jan. 6, 2016, 9:57 AM), http://www.straitstimes.com/asia/east-asia/historic-south-korea-japan-deal-stumbles-over-comfort-woman-statue [https://perma.cc/QP5Q-PYSX] [hereinafter *Deal Stumbles*].

figure sits impassively facing the embassy. An empty chair next to her represents the Comfort Women who have died since the war, and the shadow of a frail elderly woman engraved on the base "reflect[s] the agony that still haunts the survivors."[38] Over one thousand weekly demonstrations seeking justice for the Comfort Women have been held at this location,[39] and the statue has, in turn, been subject to counter-reaction. Whereas supporters regularly wrap the figure in clothing depending on the season—a knitted hat and scarf in winter[40]—a Japanese right-wing group in 2012 mounted a banner on the empty chair asserting Japan's sovereignty over a group of small islands disputed with Korea.[41]

A. What Closure Is Possible?

News reports suggest that the removal of the statue was central among Japan's demands, and the agreement commits Korea to address the issue:

> The Government of the ROK acknowledges the fact that the Government of Japan is concerned about the statue built in front of the Embassy of Japan in Seoul from the viewpoint of preventing any disturbance of the peace of the mission or impairment of its dignity, and will strive to solve this issue in an appropriate manner through taking measures such as consulting with related organizations about possible ways of addressing this issue.[42]

In Korea, NGOs responded with anger to the possibility that the statue should be removed and pledged to erect replicas of the statue throughout the country.[43] A dispute persists between the two states over whether the agreement actually commits Korea to remove the Comfort Woman statue, with some in the Japanese ruling party insisting that no funds ought to be transferred until it is removed[44] and the Korean government stressing that it has no authority to remove a privately erected statue.[45]

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38 *Id.*

39 Kim, *Memorializing Comfort Women*, *supra* note 26, at 88.

40 *Deal Stumbles*, *supra* note 37.

41 *See* Kim, *Memorializing Comfort Women*, *supra* note 26, at 88–89.

42 *Agreement*, *supra* note 2, § 2(2).

43 *See Park Calls on S. Korea to Support 'Comfort Women' Deal with Japan*, JAPAN TIMES (Dec. 31 2015), http://www.japantimes.co.jp/news/2015/12/31/national/south-korean-group-pledges-to-erect-more-comfort-women-statues/ [https://perma.cc/FYF5-EF4W]. There are already over two-dozen similar monuments around South Korea. *See Deal Stumbles*, *supra* note 37.

44 *Violent Protests Mar Seoul Launch*, *supra* note 18.

45 *Deal Stumbles*, *supra* note 37.

Why has the statue provoked such ire? Settlements for historical wrongs increasingly provide for ways of keeping the memory of the wrong alive,[46] and the December 28 agreement can be read in this vein. Its general tenor commits Japan to a position of remorse, and the foundation established under the agreement with Japan's payment of ¥1 billion will not only provide support for the former Comfort Women but also carry out "projects for recovering the honor and dignity and healing the psychological wounds of all former comfort women."[47] Respect for the memorial would seem to be entirely in keeping with these terms. A good example is the British government's 2013 settlement of the claims of Kenyan citizens who were victims of violence during the Mau Mau insurgency of 1952–53 in the then-British colony.[48] As part of the settlement, the British government supported "the construction of a memorial in Nairobi to the victims of torture and ill-treatment during the colonial era" that would "stand alongside others that are already being established in Kenya as the country continues to heal the wounds of the past."[49]

A closer look, however, reveals that the Comfort Woman statue commemorates not the suffering inflicted by the Comfort

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46 *See* U.N. Human Rights Comm., *International Covenant on Civil and Political Rights, General Comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, ¶ 16, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004) (stating that reparation can involve measures of satisfaction such as public apologies and public memorials); Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, G.A. Res. 60/147 (Dec. 16, 2005) [hereinafter U.N. Basic Principles on the Right to a Remedy]. The U.N. Basic Principles on the Right to a Remedy envisage access to justice, reparation, and access to relevant information as among the components of victims' right to a remedy. U.N. Basic Principles on the Right to a Remedy, *supra*, ¶ 11. Reparation might consist of satisfaction, which, in turn, might involve a "[p]ublic apology, including acknowledgement of the facts and acceptance of responsibility[,]" "[c]ommemorations and tributes to the victims[,]" and "[i]nclusion of an accurate account of the violations that occurred . . . in educational material at all levels." *Id.* ¶ 22. On the U.N. Basic Principles on the Right to a Remedy and their impact, despite their non-binding status in international law, see CHRISTINE EVANS, THE RIGHT TO REPARATION IN INTERNATIONAL LAW FOR VICTIMS OF ARMED CONFLICT 36–39 (2012).

47 *Agreement*, *supra* note 2, § 1(2); *see also Japan Completes Transfer of ¥1 Billion to South Korean 'Comfort Women' Fund*, *supra* note 6 (discussing payment specifics).

48 *See* Foreign & Commonwealth Office & Right Honourable William Hague, Foreign Secretary, *Statement to Parliament on Settlement of Mau Mau Claims*, GOV.UK (June 6, 2013), https://www.gov.uk/government/news/statement-to-parliament-on-settlement-of-mau-mau-claims/ [https://perma.cc/GCR8-U4ER].

49 *Id.* The statue was unveiled in 2015. *See Kenya Mau Mau Memorial Funded by UK Unveiled*, BBC (Sept. 12, 2015), http://www.bbc.com/news/world-africa-34231890/ [https://perma.cc/7N24-CZUU].

Women system during World War II per se, but rather "the spirit and the deep history of the Wednesday Demonstration,"[50] in the words of its inscription. It marks an open issue—an issue in need of present and future legal and political attention. This visual marker is out of sync with the key term of the agreement, from the Japanese point of view, that this "issue is resolved finally and irreversibly."[51] Indeed, Japan's Prime Minister Shinzo Abe has spoken of a desire to draw a line under the past for the sake of future generations: "We must not let our children, grandchildren, and even further generations to come, who have nothing to do with that war, be predestined to apologize."[52]

In this respect, as we will discuss further in Part II, Japan and Korea's approach resembles the public international law framework that prevailed after World War II, when Japan purported to settle all individual claims arising from the war by lump-sum payment to their states.[53] This approach presumes that complete closure effectuated through states is both possible and desirable. Indeed, until the 1980s, very few World War II memorials even alluded to innocent victims, as opposed to fallen heroes.[54] On this state-centered approach, moreover, Japan is entirely within its rights to ask Korea to address the issue of a statue outside its embassy in Seoul. Both states are party to the Vienna Convention on Diplomatic Relations, which places a "special duty" on the receiving state "to take all appropriate steps . . . to prevent any disturbance of the peace of the

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50 Kim, *Memorializing Comfort Women*, *supra* note 26, at 88.

51 *Agreement*, *supra* note 2, at §§ 1(3), 2(1).

52 Statement by Shinzo Abe, Prime Minister of Japan (Aug. 14, 2015), http://japan.kantei.go.jp/97_abe/statement/201508/0814statement.html [https://perma.cc/BDB6-EC8S]; *see also* Kazuhiko Togo, *What's Behind Abe's New Position on 'Comfort Women'?*, E. ASIA F. (Jan. 3, 2016), http://www.eastasiaforum.org/2016/01/03/whats-behind-abes-new-position-on-comfort-women/ [https://perma.cc/7WU4-J6B2] (describing possible motivations underlying Prime Minister Abe's willingness to address the Comfort Women issue). *Cf.* YUKIKO KOGA, INHERITANCE OF LOSS: CHINA, JAPAN, AND THE POLITICAL ECONOMY OF REDEMPTION AFTER EMPIRE 198 (2016) (quoting the feeling of a Japanese lawyer representing Chinese victims of chemical weapons abandoned by the Japanese army after World War II that "[a]s the postwar generation, we inherit the burden of the past" and must repay that debt).

53 Japan and Korea disagree on whether all claims were actually covered. *See* Constitutional Court [Const. Ct.], 2006Hun-Ma788, Aug. 30, 2011, (23-2(A) KCCR, 366, 385–86) (S. Kor.), *translated in* http://search.ccourt.go.kr/ths/pr/eng_pr0101_E1.do?seq=1&cname=%EC%98%81%EB%AC%B8%ED%8C%90%EB%A1%80&eventNum=17450&eventNo=2006%ED%97%8C%EB%A7%88788&pubFlag=0&cId=010400 [https://perma.cc/K29K-M9NA] [hereinafter Lee, O-Soo v. Minister of Foreign Affairs].

54 *See* Samuel Moyn, *You Must Remember This: Do Our Memorials to the Dead Do More Harm Than Good?*, NEW REPUBLIC, June 2016, at 80, 80.

mission or impairment of its dignity."[55] The weekly demonstrations are arguably inconsistent with the functioning of diplomatic relations since their very purpose is to provoke and embarrass the Japanese government. Even the statue alone, according to one critic of the new agreement, "silently highlights the short-sightedness of this new deal by pointing up the fact that both the Japanese and Korean government officials apparently do not understand the depth of the pain experienced by those who were forced to be comfort women."[56] Whether the Vienna Convention would require the relocation of the statue is an open question of interpretation, but it would make inter-state diplomacy the terms of the argument rather than the commemoration of victims.

In contrast, support for the statue tends to emanate from a transitional justice framework, developed more recently in domestic societies dealing with regime change and now also invoked to address specific historical wrongs in stable regimes, and from victim-oriented perspectives in contemporary international human rights law and international humanitarian law.[57] From this vantage point, rather than closing an issue, resolution should keep it open to continual exploration by state and non-state actors through such techniques as memorializing and collective justice partnerships between individuals, groups, and states.

B. Not What Closure, but Where and When?

The conflict surrounding the Comfort Woman statue in Seoul has proliferated around the globe. The following artistic and activist interventions across jurisdictions and the legal and political controversies they have provoked illustrate the problem that we will develop through a conflict-of-laws lens: how historical events have a spatio-temporal expansiveness.

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55 Vienna Convention on Diplomatic Relations art. 22(2), Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95.

56 D'Elia Chandler, *Korean Comfort Women: Bargaining Chips in East-Asian International Relations*, RE: REFLECTIONS AND EXPLORATIONS (Jan. 28, 2016), https://blogs.lt.vt.edu/reflectionsandexplorations/2016/01/28/korean-comfort-women-bargaining-chips-in-east-asian-international-relations/ [https://perma.cc/FY69-M6DA].

57 *See* TEITEL, GLOBALIZING TRANSITIONAL JUSTICE, *supra* note 28, at xiv–xix (providing background on the contemporary transitional justice framework); *see also* RUTI G. TEITEL, TRANSITIONAL JUSTICE (2000) (articulating her original concept of transitional justice) [hereinafter TEITEL, TRANSITIONAL JUSTICE]. We will use "transitional justice" loosely so as to encompass the spread of its orientation into stable societies and into certain areas of international law.

- Glendale, California, 2013: In response to advocacy by Korean-Americans, a local city council in California erects a replica of the Seoul statue in a local public park in order to commemorate the Comfort Women.[58] Claiming that he would use the park were it not for the statue, a Japanese-American man files a lawsuit seeking its removal on the grounds that the city council intruded on the federal government's power to conduct foreign affairs.[59]
- Southfield, Michigan, 2014: A replica of the Comfort Woman statue is put up outside a Korean American cultural center in a Detroit suburb after protests by a Japanese auto parts manufacturer in the area and by the Japanese consulate prevent the statue from being placed in a public library.[60]
- Fairfax, Virginia, 2014: Another copy, the seventh Comfort Women memorial in the United States, is installed outside a Fairfax County government building with little fanfare so as to avoid protests from Japan.[61]
- Burnaby, British Columbia, 2015: Plans for a Comfort Woman statue in a Canadian suburb are scrapped after objections that the statue would conflict with the country's tradition of multiculturalism, although a professor of community planning and gender studies laments the decision because of the scarcity of monuments to women who suffered in wartime.[62]
- San Francisco, California, 2015: A proposal by the city's board of supervisors to install a Comfort Women memo-

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58 *See* Jeyup S. Kwaak, *California City Unveils 'Comfort Women' Statue*, WALL STREET J. (Aug. 2, 2013, 6:50 PM), http://blogs.wsj.com/korearealtime/2013/08/02/california-city-unveils-comfort-women-statue/ [https://perma.cc/D4HB-GKQF].

59 *See* Julian Ku, *Japan and Korea Take Their (History) Wars to U.S. State and Local Legislatures*, OPINIO JURIS (Feb. 24, 2014, 2:04 PM), http://opiniojuris.org/2014/02/24/japan-korea-take-history-wars-u-s-state-local-legislatures/ [https://perma.cc/7858-6WZC]; Adam Poulisse, *Glendale Comfort Women Statue Controversy Goes to U.S. District Court*, L.A. DAILY NEWS (Apr. 18, 2014, 6:14 PM), http://www.dailynews.com/general-news/20140418/glendale-comfort-women-statue-controversy-goes-to-us-district-court [https://perma.cc/SSN3-JRLZ]. The case was dismissed on appeal. Gingery v. City of Glendale, 831 F.3d 1222 (9th Cir. 2016).

60 *See Michigan Latest to Install Comfort Woman Statue*, KOREA TIMES (Aug. 18, 2014), http://www.koreatimesus.com/michigan-gets-a-comfort-woman-statue-also/ [https://perma.cc/W3T3-S3RH].

61 *See* Ida Torres, '*Comfort Women*' *Monument to be Unveiled in Northern Virginia*, JAPAN DAILY PRESS (May 27, 2014), http://japandailypress.com/comfort-women-monument-to-be-unveiled-in-northern-virginia-2748762/ [https://perma.cc/CAC8-VSJD].

62 *See* Janaya Fuller-Evans, *Comfort Women Statue Proposal Riles Group of Japanese Canadians in Burnaby*, BURNABY NOW (Mar. 19, 2015, 10:55 AM), http://www.burnabynow.com/news/comfort-women-statue-proposal-riles-group-of-japanese-canadians-in-burnaby-1.1798189/ [https://perma.cc/7ZE3-SC34].

rial, the first in a major U.S. destination, prompts a harsh letter of condemnation from Osaka's ultra-right wing mayor,[63] as well as criticism from the Japanese-American community in San Francisco, while a Korean Comfort Woman flies in to give testimony at the board meeting.[64] The supervisor who proposed the resolution states that it is "not about Japanese people or the Japanese-American community at all" but rather "a way for San Francisco . . . to engage young people to understand what happened but also to be vigilant about stopping human trafficking for the future."[65]

- Seoul, Korea, 2015: Days before the arrival of the Japanese Prime Minister, two life-size bronze statues are unveiled in a park, described by the New York Times as "[a]n unsmiling South Korean girl star[ing] forward with an accusatory expression" and in a chair beside her "a Chinese girl, her fists clenched on her lap into balls of defiance."[66] Apparently the first to depict a Chinese Comfort Woman, the monument was organized by a Chinese-American filmmaker inspired by the Glendale statue, a Chinese sculptor, and South Korean civic groups and artists. As in the case of the other statues, their creators describe them as "peace monuments."[67] South Korean organizers of the new monument in Seoul plan to invite sculptors from other Asian countries where the women were recruited to build replicas there.[68]
- Ashfield, New South Wales, Australia, 2016: A local Korean group commissions a replica of the Seoul statue and Reverend Bill Crews, a minister with no particular relationship to the dispute, offers his church's grounds as its

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63 *See* Toyohiro Horikoshi, *San Francisco Japanese-Americans Ask Why City Needs a 'Comfort Women' Memorial*, JAPAN TIMES (Nov. 3, 2015), http://www.japantimes.co.jp/news/2015/11/03/national/politics-diplomacy/san-francisco-japanese-americans-ask-city-needs-comfort-women-memorial/ [https://perma.cc/VL2W-E7M8].

64 *See* Joshua Sabatini, *Supervisors' Support of a 'Comfort Women' Memorial in San Francisco Sparks Debate*, S.F. EXAMINER (Sept. 15, 2015, 1:00 AM), http://www.sfexaminer.com/supervisors-support-of-a-comfort-women-memorial-in-san-francisco-sparks-debate/ [https://perma.cc/2CW4-27RK].

65 *Id.*

66 Choe Sang-Hun, *Statues Placed in South Korea Honor 'Comfort Women' Enslaved for Japan's Troops*, N.Y. TIMES (Oct. 28, 2015), http://www.nytimes.com/2015/10/29/world/asia/south-korea-statues-honor-wartime-comfort-women-japan.html [https://perma.cc/84C2-8RQ3].

67 *Id. But see* Kim, *Memorializing Comfort Women*, supra note 26, at 90 (contrasting "peace" in the title of the Seoul statue with the reference to "human rights" in the inscription on a New Jersey Comfort Women monument and attributing the difference to tactical appeals to Japan's postwar pacifist identity and the U.S. self-image as a human rights standard-bearer respectively).

68 Sang-Hun, *supra* note 66.

home.[69] He comes under pressure, however, from the Japanese consul-general and New South Wales's minister of multiculturalism. A Japanese community network threatens legal action on grounds that the statue is a "hurtful historical symbol" that is "racially discriminatory" and promotes hatred against Japanese.[70] Mr. Crews himself is puzzled by the response because he interprets the statue as standing for a general message: "It's more than just one country abusing women. It's about the way men abuse women and the way women get treated in war as well."[71]

- Freiburg, Germany, 2016: A Comfort Woman statue accepted by Freiburg from its South Korean sister city was to have been the first erected in Europe.[72] A Freiburg official said that the statue would express opposition to violence against women. The plan was dropped, however, after strong opposition from Freiburg's Japanese sister city.[73]
- Taipei, Taiwan, 2016: Activists calling for an apology and compensation for Taiwanese Comfort Women stage a protest outside the office of a Japan-Taiwan liaison organization in which a performer sprayed bronze poses as a Comfort Woman statue.[74]

Thus, beyond the control of states and civil society alike, the statue's replication again and again diffuses the issue of wartime sexual slavery into ever more spatio-temporal contexts: from Japanese-Korean relations, to diaspora politics, to U.S. foreign affairs, to Canadian and Australian multiculturalism, to women victims of war, human trafficking, peace, racial discrimination, and violence against women. Replicas of the Seoul statue proliferate, change, and even remanifest as people replicating replicas. There is, here, a sense of what we will call

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69 *See* Lisa Visentin, *WWII Peace Statue in Canterbury-Bankstown Divides Community Groups*, SYDNEY MORNING HERALD (Aug. 1, 2016), http://www.smh.com.au/nsw/wwii-peace-statue-in-canterburybankstown-divides-community-groups-20160801-gqi99s.html [https://perma.cc/TMW4-3CZV].

70 *Id.*

71 *Id.*

72 *See Europe's First 'Comfort Women' Statue Planned for German City*, JAPAN TIMES (Sept. 8, 2016), http://www.japantimes.co.jp/news/2016/09/08/national/plan-afoot-install-europes-first-comfort-women-statue-freiburg/ [https://perma.cc/WM8T-UKXZ].

73 *See German City Drops Plan to Install First 'Comfort Women' Statue in Europe*, JAPAN TIMES (Sept. 22, 2016), http://www.japantimes.co.jp/news/2016/09/22/national/german-city-drops-plan-install-first-comfort-women-statue-europe/ [https://perma.cc/VM5C-3Q4E].

74 *See Taiwanese Group Calls for Japan's Apology to Former 'Comfort Women,'* MAINICHI (Aug. 16, 2016), http://www.mainichi.jp/english/articles/20160816/p2a/00m/0na/002000c/ [https://perma.cc/7N8D-F4PA].

"Comfort Women Trouble"[75]—an experience of interminability and exhaustion and a reversion to simplistic narratives on all sides accompanied by lingering self-doubts and internal conflicts within all camps. At the same time, this "trouble" also involves violence to, even the retraumatization of, those involved in the process of seeking healing and justice.

In our view, much of Comfort Women Trouble may be, in effect, a symptom of the issue's diffusion. Accordingly, we will argue in this Article for redirecting feminist attention. The problem of what closure is possible for issues of historical gender injustice must be understood in light of the spatial and temporal diffusion of these issues. The question is not *what* closure, but *when* and *where* are reopening and closure effectuated? The potentialities of this kind of diffusion are, we venture, a crucial question for feminist jurisprudence at this juncture.[76]

We see Comfort Women Trouble as emblematic of a wider ethical and aesthetic condition of feminist concern. For many people, traumatic events from the past are continually diffusing geographically and resurfacing temporally, in bursts, after lulls, in different locations, in different forms of expression, with different protagonists and different audiences. Who might have a claim on the resulting trauma—as authors, as victims, as engaged audiences—becomes difficult to sort out in such scenarios. So, too, does the chameleon-like quality of the harm in question, as it takes on new meanings, and as it moves across boundaries of time and space and into the hands of communities with different experiences and concerns. Is a Comfort Woman statue a memorial to a particular political movement in Seoul, or a statement about gender violence in war writ large? Are the relevant victims the surviving Comfort Women of a particular country, all Comfort Women, women in general, humanity which suffers in war, victims of human trafficking, or indeed members of the Japanese diaspora? Is the

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75 The analogy here is with "gender trouble." *See* JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY xxix–xxxvi, 195, 199, 202 (Routledge Classics 2006) (arguing that "'effects' of gender hierarchy and compulsory heterosexuality are . . . misdescribed as foundations" and demonstrating, rather, that "there need not be a 'doer behind the deed,' but that the 'doer' is variably constructed in and through the deed" and there can therefore be "subversive repetition within signifying practices of gender"—that is, "trouble"). We are grateful to Janet Halley for this formulation.

76 *Cf.* WILLIAM TWINING, GENERAL JURISPRUDENCE: UNDERSTANDING LAW FROM A GLOBAL PERSPECTIVE 13–18 (2009); WILLIAM TWINING, GLOBALISATION AND LEGAL THEORY 50–54 (2000) (maintaining that the implications of globalization should be a crucial question for legal theory).

relevant moment of the harm World War II, or the present, or a future moment yet to come?

Crucial to the shift in direction that we propose is an appreciation that time is relationally produced rather than a given external constraint. The feminist historian Victoria Browne, for example, borrows from anthropology to emphasize the practice of "sharing time" even across historical periods.[77] Redescribed as an analytical lens, conflict of laws will add an appreciation that it is not only time, but space-times that are relationally constituted. The relations and even the actors themselves are, in turn, effects of those colliding space-times. From the outset, efforts to raise the Comfort Women issue have entailed its geographic diffusion into other conflicts and jurisdictions. It was only in the 1990s that Korean Comfort Women began to make their stories public and to demand an apology and compensation from the Japanese government.[78] The existence of Comfort Women was not unknown before then, but the wrongs done to them were rarely regarded as criminal.[79] In the 1990s, the recognition that rape was being deployed as an instrument of ethnic cleansing in Yugoslavia and Rwanda led to a global feminist movement to end impunity for sexual violence in armed conflict, which influenced the 1998 treaty creating a permanent international criminal court.[80] The Comfort Women's public demands were contemporaneous with and became part of this movement.[81] We will return to the diagnosis of spatio-temporal diffusion and Comfort Women Trouble in

77 VICTORIA BROWNE, FEMINISM, TIME, AND NONLINEAR HISTORY 39 (2014) (citing anthropologist Johannes Fabian).

78 *See* GEORGE HICKS, THE COMFORT WOMEN: JAPAN'S BRUTAL REGIME OF ENFORCED PROSTITUTION IN THE SECOND WORLD WAR 196–219 (1995).

79 *See id.* at 67–71, 180, 194–96; Maki Kimura, *Narrative as a Site of Subject Construction: The 'Comfort Women' Debate*, 9 FEMINIST THEORY 5, 13–15 (2008); KIMURA, *supra* note 4, at 4–11.

80 *See generally* Janet Halley, *Rape at Rome: Feminist Interventions in the Criminalization of Sex-Related Violence in Positive International Criminal Law*, 30 MICH. J. INT'L L. 1 (2008); Valerie Oosterveld, *Sexual Slavery and the International Criminal Court: Advancing International Law*, 25 MICH. J. INT'L L. 605 (2004).

81 *See* Knop, *supra* note 24, at 150–51; *see also* Comm'n on Human Rights, Subcomm. on Prevention of Discrimination and Protection of Minorities, *Systemic Rape, Sexual Slavery and Slavery-Like Practices During Armed Conflict*, U.N. Doc. E/CN.4/Sub.2/1998/13, app. (June 22, 1998); U.N. Comm'n on Human Rights, *Report on the Mission to the Democratic People's Republic of Korea, the Republic of Korea and Japan on the Issue of Military Sexual Slavery in Wartime*, U.N. Doc. E/CN.4/1996/53/Add.1 (Jan. 4, 1996); *but see* C. Sarah Soh, *Japan's National/Asian Women's Fund for "Comfort Women,"* 76 PAC. AFF. 209, 214–15 (2003) (tracing the 1990s transnational Comfort Women movement also to a 1970s South Korean women's campaign against international sex tourism).

Part IV, after situating the December 28 agreement in more detail and introducing our feminist conflict-of-laws lens.

II
CLOSURE AND THE COMFORT WOMEN AGREEMENT

A. After World War II: Prosecution and Compensation

By the time of the December 28 agreement between Japan and South Korea, the issue of justice for the Comfort Women had long been effectively foreclosed in both criminal and civil law. After World War II, the Allied Powers established the International Military Tribunal for the Far East (or the "Tokyo Tribunal")—the Tokyo counterpart of the better-known Nuremberg tribunal—to prosecute high-ranking Japanese officials for war crimes.[82] Although the Chinese and Dutch prosecution teams at the Tokyo Tribunal did offer some evidence of the Japanese military's Comfort Women system,[83] the judgment contains only two passing mentions of it,[84] and crimes against *Korean* Comfort Women were not prosecuted.[85] In subsidiary war crimes prosecutions in the Netherlands East Indies, the Dutch held at least two trials for crimes against Dutch Comfort Women.[86] However, the Dutch trial records were later sealed, which meant that no legal or historical record was established by those trials.[87] Thus, insofar as the Comfort Women issue was criminally prosecuted in the aftermath of World War II, it was virtually invisible and, in any event, did not address the harms to Korean Comfort Women.[88]

Victims' claims for compensation, as distinct from war crimes prosecutions, were governed by the San Francisco

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82 *See* NEIL BOISTER & ROBERT CRYER, THE TOKYO INTERNATIONAL MILITARY TRIBUNAL: A REAPPRAISAL (2008).

83 *See* YUMA TOTANI, THE TOKYO WAR CRIMES TRIAL: THE PURSUIT OF JUSTICE IN THE WAKE OF WORLD WAR II 13–14, 153, 174, 176–79, 253 (2008). Prior to Totani's study, the understanding was that the Comfort Women issue "appear[ed] to have been ignored, perhaps deliberately" at Tokyo. *See, e.g.*, BOISTER & CRYER, *supra* note 82, at 64.

84 DOCUMENTS ON THE TOKYO INTERNATIONAL MILITARY TRIBUNAL: CHARTER, INDICTMENT AND JUDGMENTS 540, 1348 (Neil Boister & Robert Cryer eds., 2008).

85 *See* TOTANI, *supra* note 83, at 13–14.

86 *See* Trial of Washio Awochi (1946), *in* 8 LAW REPORTS OF TRIALS OF WAR CRIMINALS 122, 122–25 (U.N. War Crimes Comm'n ed., 1949); YOSHIAKI, *supra* note 4, at 163–73.

87 *See* STEPHANIE WOLFE, THE POLITICS OF REPARATIONS AND APOLOGIES 245 (2014).

88 *Cf.* Nicola Henry, *Memory of an Injustice: The "Comfort Women" and the Legacy of the Tokyo Trial*, 37 ASIAN STUD. REV. 362, 372–75 (2013) (arguing that silence can constitute a collective memory and that this was one such silence).

peace treaty with Japan.[89] The peace treaty recognized Japan's obligation in principle to pay reparations to the states that it had invaded and left the exact amount of reparations for later bilateral agreements to determine. The 1965 bilateral agreement that restored diplomatic ties between Japan and South Korea resulted in more than $845 million in economic loans, grants-in-aid, and property claims. The bilateral agreement explicitly provides that it settles all claims between the two states and their peoples completely and finally.[90]

The postwar reparation agreements with Japan exhibit the features of traditional inter-state settlements in that lump-sum payments went to the state to apportion to the victims as it wished and individual claims were excluded.[91] The compensation was more a reflection of the early twentieth-century norm that belligerent states that violate the international regulations on war must compensate the affected states than it was an expression of apology or remorse toward specific victims for specific wartime atrocities, as was the case with West Germany.[92] The monies paid by Japan were not associated with any particular past military crime. Indeed, the lump-sum settlement amount was never imagined to be an accurate accounting for the totality of individual losses.[93] It was actually

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89 Treaty of Peace with Japan, chs. V, VII, Sept. 8, 1951, 3 U.S.T. 3169, 136 U.N.T.S. 45 [hereinafter San Francisco Peace Treaty]; *see* Rainer Hofmann, *Compensation for Personal Damages Suffered During World War II*, *in* 2 MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 508, ¶ 9 (Rüdiger Wolfrum ed., Oxford Univ. Press 2013).

90 Agreement on the Settlement of Problems Concerning Property and Claims and on Economic Co-operation Between Japan and the Republic of Korea, arts. 1(1), 2(1), June 22, 1965, 583 U.N.T.S. 173 [hereinafter 1965 Agreement]; San Francisco Peace Treaty, *supra* note 89, at art. 4(a); Scott A. Snyder, *South Korea, Japan, and Wartime Shadows*, COUNCIL ON FOREIGN REL. (Aug. 11, 2015), http://www.cfr.org/south-korea/south-korea-japan-wartime-shadows/p36889 [https://perma.cc/QQZ9-99NF].

91 *See* Hofmann, *supra* note 89, ¶ 9; INT'L LAW ASS'N COMM. ON COMP. FOR VICTIMS OF WAR, COMPENSATION FOR VICTIMS OF WAR: BACKGROUND REPORT 13 (2004) [hereinafter INT'L L. ASS'N BACKGROUND REPORT]. The work of the International Law Association ("ILA") Committee on Compensation for Victims of War, later known as the Committee on Reparations for Victims of Armed Conflict, led to the adoption of two ILA resolutions. Int'l L. Ass'n Res. 1/2014, Reparation for Victims of Armed Conflict (2014); Int'l L. Ass'n Res. 2/2010, Reparation for Victims of Armed Conflict (2010). Contemporary conflicts may now give rise to mass-claims mechanisms. *See* INT'L L. ASS'N BACKGROUND REPORT, *supra*, at 16–19.

92 *See* WOLFE, *supra* note 87, at 245; Hofmann, *supra* note 89, ¶ 5–9. In some Japanese cases, including cases brought by Comfort Women, it has been unsuccessfully argued that the international law of the time did support claims by individuals. *See* Hofmann, *supra* note 89, ¶ 26.

93 *See* San Francisco Peace Treaty, *supra* note 89, at art. 14(a) ("It is recognized that Japan should pay reparations to the Allied Powers for the damage and suffering caused by it during the war. Nevertheless it is also recognized that the

intended to protect Japan against the specter of such an accounting because given Japan's poverty after the war, the United States would have had to cover any shortfall.[94] The 1965 bilateral agreement between Japan and Korea was oriented more toward the economic future of trade within the region[95] than toward atonement for the past, since compensation took the form of grants, loans, products, and services used by the Korean government for the industrial development of the nation. While the 1965 agreement does not acknowledge the Comfort Women in any way, Japan's view is that this treaty's explicit provision about finality forecloses all claims.[96]

Likewise, Japan's position on individual suits brought in Japan and the United States has been that the peace treaty and related bilateral agreements terminate all claims.[97] In the United States most recently, a California court in late 2015 rendered two decisions in a putative class action for personal injury and crimes against humanity brought by Korean Comfort Women against Japan and Japanese corporations and their U.S. subsidiaries under the Alien Tort Statute, Torture

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resources of Japan are not presently sufficient, if it is to maintain a viable economy, to make complete reparation for all such damage and suffering and at the same time meet its other obligations.").

94 *See* SAYURI UMEDA, THE LAW LIBRARY OF CONGRESS, JAPAN: WWII POW AND FORCED LABOR COMPENSATION CASES 19–20 (2008), http://www.loc.gov/law/help/pow-compensation/japan.php [https://perma.cc/KP8Y-VDND].

95 *See* 1965 Agreement, *supra* note 90, pmbl. (referring to the parties' desire "to promote economic co-operation between the two countries").

96 *See* U.N. Human Rights Comm., Sixth Periodic Report of States Parties: Japan, ¶ 129, U.N. Doc. CCPR/C/JPN/6 (Apr. 26, 2012),.

97 For a list of the law suits, see WOLFE, *supra* note 87, at 254–55. On these suits, see Maki Arakawa, *A New Forum for Comfort Women: Fighting Japan in United States Federal Court*, 16 BERKELEY WOMEN'S L.J. 174 (2001); Masahiko Asada & Trevor Ryan, *Post-War Reparations Between Japan and China and Individual Claims: The Supreme Court Judgments in the Nishimatsu Construction Case and the Second Chinese "Comfort Women" Case*, 14 ZEITSCHRIFT FÜR JAPANISCHES RECHT / J. JAPANESE L. 257 (2009); Shin Hae Bong, *Compensation for Victims of Wartime Atrocities: Recent Developments in Japan's Case Law*, 3 J. INT'L CRIM. JUST. 187, 194–95, 200–01 (2005); Micaela Frulli, *When Are States Liable Towards Individuals for Serious Violations of Humanitarian Law? The* Markovic *Case*, 1 J. INT'L CRIM. JUST. 406, 419–20 (2003); John Haberstroh, In Re *World War II Era Japanese Forced Labor Litigation and Obstacles to International Human Rights Claims in U.S. Courts*, 10 ASIAN L.J. 253 (2003); INT'L L. ASS'N BACKGROUND REPORT, *supra* note 91, at 25–26; KOGA, *supra* note 52, at 196–219; Yukiko Koga, *Accounting for Silence: Inheritance, Debt, and the Moral Economy of Legal Redress in China and Japan*, 40 AM. ETHNOLOGIST 494 (2013) [hereinafter Koga, *Accounting for Silence*]; Yukiko Koga, *Between the Law: The Unmaking of Empire and Law's Imperial Amnesia*, 41 L. & SOC. INQUIRY 402 (2016) [hereinafter Koga, *Between the Law*]; Christopher P. Meade, Note, *From Shanghai to Globocourt: An Analysis of the "Comfort Women's" Defeat in* Hwang v. Japan, 35 VAND. J. TRANSNAT'L L. 211 (2002); Byoungwook Park, Comment, *Comfort Women During WWII: Are U.S. Courts a Final Resort for Justice?*, 17 AM. U. INT'L L. REV. 403 (2002).

Victim Protection Act, and Racketeer Influenced and Corrupt Organizations Act. In one decision, the court accepted the argument that the treaties rendered the suit nonjusticiable under the political question doctrine,[98] although the argument did not arise in the companion suit for defamation.[99] In contrast, the Supreme Court of Korea in 2012 recognized an individual's right to claim compensation from a Japanese corporation for wartime forced labor, remanding a case against Mitsubishi.[100] In lawsuits against the Japanese government both inside and outside Japan, sovereign immunity is also an important obstacle.[101]

Peace treaties can be ambiguous endpoints, however: are they settlements in the past or do they establish relationships that continue into the present? In a successful constitutional case brought by Korean Comfort Women plaintiffs to compel their government to reopen the 1965 agreement with Japan on postwar compensation, the plaintiffs overcame the statute of limitations by marshaling a constitutional-law argument about a continuing treaty relationship and the continuing effect on their present-day dignity.[102] Similarly, in the case of historical

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98 You v. Japan, 150 F. Supp. 3d 1140, 1144–48 (N.D. Cal. 2015).

99 You v. Japan, No. C 15-03257, 2015 WL 7454031 (N.D. Cal. Nov. 24, 2015).

100 Supreme Court [S. Ct.], 2009Da22549, May 24, 2012 (2 S. CT. L.J. 233, 233–34, 250) (S. Kor.). For a snapshot of the successful cases against Japanese corporations that followed, see Koga, *Between the Law*, *supra* note 97, at 430 n.45.

101 *See* Hofmann, *supra* note 89, ¶¶ 27–28; Koga, *Between the Law*, *supra* note 97, at 421–23; UMEDA, *supra* note 94, at 5–8. As our interest in this Article is in a conflict-of-laws approach to the legal construction of space-time, we will focus on domestic statutes of limitations as an obstacle to civil actions against private parties in some jurisdictions and will not canvas such treaty and sovereign immunity arguments. We touch on the treaty argument in note 22, *supra*, and on the implications of a long-shot limitations argument in note 295, *infra*. We also note that other causes of action were possible. A lower court in Japan found unconstitutional the legislature's failure to enact a reparations law after a reasonable length of time. This judgment, however, was overruled. *The "Comfort Women" Case: Judgment of April 27, 1998, Shimonoseki Branch, Yamaguchi Prefectural Court, Japan*, 8 PAC. RIM L. & POL'Y J. 63, 94–102 (Taihei Okada trans., 1999) [hereinafter *The "Comfort Women" Case*]. *See* also Bong, *supra* note 97, at 194–95.

102 Lee, O-Soo v. Minister of Foreign Affairs, *supra* note 53. *But see* Vinuya v. Executive Secretary, G.R. No. 162230 (S.C., Apr. 28, 2010) (Phil.) http://sc.judiciary.gov.ph/jurisprudence/2010/april2010/162230.htm [https://perma.cc/C83Z-UFXP] (holding that the Supreme Court of the Philippines could not question the Philippine government's diplomatic position that all postwar claims against Japan had been settled by its peace treaty with Japan). A motion for reconsideration was denied in 2014. *Philippine Top Court Ends 'Comfort Women' Group's Legal Battle*, JAPAN TIMES (Aug. 13, 2014), http://www.japantimes.co.jp/news/2014/08/13/national/crime-legal/philippine-top-

wrongs that predate a state's obligations under an international human rights treaty, a scheme for redress may nevertheless violate the treaty by discriminating between groups of victims.[103]

B. The Agreement

The December 28 agreement is not the first effort by Japan to address the Comfort Women issue. Earlier Japanese initiatives had been rejected by many victims, women's groups, and governments as insufficient to bring about closure. These include a 1993 statement of apology by Japanese Chief Cabinet Secretary Yohei Kono[104] and the 1995 establishment of an Asian Women's Fund coordinated by the Japanese government using private funds to provide financial compensation to victims, collect historical documentation, and support projects relating to current women's issues, such as violence against women.[105]

Compared to these earlier efforts, two features of the December 28 agreement stand out. First, the fact that the apology contained in the agreement is addressed to the Comfort Women by Prime Minister Abe "[a]s Prime Minister of Japan"[106] responds to criticisms that earlier apologies by members of the Japanese Cabinet were merely personal expressions of remorse.[107] Second, unlike the Asian Women's Fund, the funds

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courts-denial-ends-filipino-comfort-women-groups-legal-battle/#.WJ1XOfK8osI [https://perma.cc/C5PR-HLGA].

103 Patrick Macklem thus analyzes the right to equality in the International Covenant on Civil and Political Rights as a "memorial site" in law that "possess[es] the potential to rearrange the present to restore what we remember—through these sites—as fragments of the past." International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; Patrick Macklem, *Rybná 9, Praha 1: Restitution and Memory in International Human Rights Law*, 16 EUR. J. INT'L L. 1, 15 (2005).

104 *Statement by the Chief Cabinet Secretary Yohei Kono on the Result of the Study of the Issue of "Comfort Women,"* MINISTRY FOREIGN AFF. JAPAN (Aug. 4, 1993), http://www.mofa.go.jp/policy/women/fund/state9308.html [https://perma.cc/U66S-2TBV] [hereinafter *Kono Statement*].

105 *See Closing of the Asian Women's Fund*, ASIAN WOMEN'S FUND, http://www.awf.or.jp/e3/dissolution.html [https://perma.cc/Q2Z6-QPHF]; Soh, *supra* note 81.

106 *Agreement*, *supra* note 2, § 1(1).

107 *See* Yuki Tatsumi, *Japan, South Korea Reach Agreement on 'Comfort Women,'* DIPLOMAT (Dec. 28, 2015), http://thediplomat.com/2015/12/japan-south-korea-reach-agreement-on-comfort-women/ [https://perma.cc/Y5GN-2VBL]. For the previous statements, see *Kono Statement*, *supra* note 104; *Statement by Prime Minister Tomiichi Murayama on the Occasion of the Establishment of the "Asian Women's Fund,"* MINISTRY FOREIGN AFF. JAPAN (July 1995), http://www.mofa.go.jp/policy/women/fund/state9507.html [https://perma.cc/ZAJ9-UCK7].

for the new foundation come from the budget of the government of Japan.[108] Equally significant, the two states decided that the Korean government would be the one to establish the foundation. This arrangement represents an important diplomatic innovation in that it allows Japan to apologize and compensate the victims while maintaining its position that it has no legal liability to individuals under international law.[109] The designation of the funds "for the purpose of providing support for the former comfort women"[110] and the mandate that the two states cooperate on "projects for recovering the honor and dignity and healing the psychological wounds of all former comfort women"[111] also go a step beyond the traditional international law framework. Yet they do not go so far as to overturn the doctrine of diplomatic protection, under which the authority to determine and apportion compensation rests with states.[112] Activists in both Japan and Korea have raised concerns that the agreement assigns only moral and not legal responsibility to the Japanese government.[113] The Korean Council for Women Forced Into Sexual Slavery, which represents some of the victims, has objected that the agreement does not make clear enough that the recruitment of women into the Comfort Women system "was a crime done by the Japanese government and military systematically[,]"[114] and has insisted that Japan compensate the victims directly.[115]

In other ways, the December 28 agreement also combines international law's traditional state-centered approach to individual claims with more recent transitional justice-inspired approaches. The Japanese government's "one-time contribution"

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108 *Agreement*, *supra* note 2, § 1(2).

109 *See* Tatsumi, *supra* note 107.

110 *Agreement*, *supra* note 2, § 1(2).

111 *Id.*

112 *See* Draft Articles on Diplomatic Protection, art. 19 and commentary, *in* Int'l Law Comm'n, Rep. on the Work of Its Fifty-Eighth Session, U.N. GAOR, 61st Sess., Supp. No. 10, U.N. Doc. A/61/10, at 94–100 (2006) (formulating recommended practices that give the individual greater weight, but recognizing that these practices have not yet become customary international law).

113 *See Japan-South Korea Deal on 'Comfort Women' Draws Mixed Reaction*, JAPAN TIMES (Dec. 29, 2015), http://www.japantimes.co.jp/news/2015/12/29/national/politics-diplomacy/japan-south-korea-deal-comfort-women-draws-mixed-reaction/ [https://perma.cc/9TWT-PHJE].

114 Kwanwoo Jun & Alexander Martin, *Japan, South Korea Agree to Aid for 'Comfort Women*,*'* WALL STREET J. (Dec. 28, 2015, 1:45 PM), http://www.wsj.com/articles/japan-south-korea-reach-comfort-women-agreement-1451286347 [https://perma.cc/5RGN-QYVD].

115 See *id.*; *NCRR Statement on Comfort Woman 'Settlement*,*'* NCRR, http://www.ncrr-la.org/news/comfortwomen/comfortwomesettlement_ncrr.html [https://perma.cc/XFE5-PKB8].

to the establishment of the new foundation resembles the sort of lump-sum bookkeeping found in earlier treaties. It seeks to draw a line under the past so that relations between states can move ahead on common concerns unencumbered by old debts and liabilities. For example, Korea has linked the resolution of the Comfort Women issue to bilateral issues such as military intelligence sharing with Japan[116] and a currency swap pact,[117] and the United States regarded the issue as impeding the twelve-nation Trans-Pacific Partnership trade agreement reached in October 2015.[118] At the same time, the December 28 agreement reflects the fact that expectations about the appropriate kind of closure have changed: transitional justice-inspired approaches anticipate a process of reconciliation that involves but exceeds the state and is not limited to the law.[119] Techniques range from compensating individuals, including for mental harm and moral damage, to public apologies and tributes to the victims.[120] It is true that apologies are already recognized in international law as a form of satisfaction between states for an internationally wrongful act where restitu-

116 *See* Gale, *supra* note 17.

117 *See* Munenori Inoue, *Japan, ROK Agree to Currency Swap Talks*, JAPAN NEWS (Aug. 28, 2016, 8:48 PM), http://the-japan-news.com/news/article/0003179130 [https://perma.cc/27V9-TQ69]; *see also* Hyunah Yang, *Revisiting the Issue of Korean "Military Comfort Women": The Question of Truth and Positionality*, 5 POSITIONS 51, 56 (1997) (contrasting the Korean government's assertion that history must be differentiated from pressing current issues with its leveraging of the past in dealing with Japan on present-day economic problems).

118 *See* Jun & Martin, *supra* note 114. The United States has since withdrawn from the Trans-Pacific Partnership. *See* Ylan Q. Mui, *Withdrawal from Trans-Pacific Partnership Shifts U.S. Role in World Economy*, WASH. POST (Jan. 23, 2017), https://www.washingtonpost.com/business/economy/withdrawal-from-trans-pacific-partnership-shifts-us-role-in-world-economy/2017/01/23/05720df6-e1a6-11e6-a453-19ec4b3d09ba_story.html [https://perma.cc/PB42-V9A6].

119 There is also a growing international human rights and humanitarian law literature on reparations that focuses on the status of an emerging right of the victim to reparation, as opposed to her state; and on truth commissions and reparations as complementary, rather than alternatives to one another. *See, e.g.*, EVANS, *supra* note 46, at 1–10.

Anthropologist Yukiko Koga argues that in compensation lawsuits in China and Japan brought by Comfort Women and wartime forced laborers, the accounting of bookkeeping is revealed as intertwined with the accounting of giving voice and assigning responsibility, both at the macro-level between the two states and their corporations and at the micro-level of the parties and their lawyers. Koga, *Accounting for Silence*, *supra* note 97, at 495–96. Koga analyzes both as forms of economy based on gift relations in which moral and monetary debts circulate and feed into one another. *Id.* at 503.

120 *See* U.N. Basic Principles on the Right to a Remedy, *supra* note 46, at pt. IX.

tion or compensation is insufficient.[121] Nonetheless, the nature of the apology and its addressees in the agreement seem more in keeping with apologies to groups for historical wrongs in the contemporary sense:

> The issue of comfort women, with an involvement of the Japanese military authorities at that time, was a grave affront to the honor and dignity of large numbers of women, and the Government of Japan is painfully aware of responsibilities from this perspective.
>
> As Prime Minister of Japan, Prime Minister Abe expresses anew his most sincere apologies and remorse to all the women who underwent immeasurable and painful experiences and suffered incurable physical and psychological wounds as comfort women.[122]

Another transitional justice element might be the agreement's anticipation of "projects for recovering the honor and dignity and healing the psychological wounds of all former comfort women,"[123] which seems to reflect an understanding that Japan cannot simply transfer funds whereupon the two states will move on.

By the same token, however, Japan and Korea's attempt to resolve the Comfort Women issue "finally and irreversibly" has attracted criticism. "An apology should open up space for accountability rather than close it," commented the president of the International Center for Transitional Justice: "[A]pologies should not end truth seeking nor stifle truth telling by vic-

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121 *See* Articles on Responsibility of States for Internationally Wrongful Acts, art. 37, *in* Int'l Law Comm'n Rep. on the Work of Its Fifty-Third Session, U.N. GAOR, 56th Sess., Supp. No. 10, U.N. Doc. A/56/10, at 52–53 (2001) (including that satisfaction may not take a form "humiliating" to the responsible state).

122 *Agreement*, *supra* note 2, § 1(1); *see also* Richard B. Bilder, *The Role of Apology in International Law and Diplomacy*, 46 VA. J. INT'L L. 433, 461–69 (2006) (comparing the traditional international law remedy of a state-to-state apology to contemporary governments' apologies to victims for past wrongs).

123 *Agreement*, *supra* note 2, § 1(2). How the funds would be used was a significant hurdle for Japan. *See* Ayako Mie, *Tokyo, Seoul Agree Part of 'Comfort Women' Funds to Be Spent on Medical, Nursing Care*, JAPAN TIMES (Aug. 12, 2016), http://www.japantimes.co.jp/news/2016/08/12/national/politics-diplomacy/tokyo-seoul-agree-part-comfort-women-funds-spent-medical-nursing-care/ [https://perma.cc/H2PP-SVY4]. "A total of 245 women, living and deceased, and their relatives are eligible to receive the money . . . . Around ¥2 million will be disbursed to each family of any comfort woman who had died by the end of last year, while those still alive will get about ¥10 million each." *Japan Completes Transfer of ¥1 Billion to South Korean 'Comfort Women' Fund*, *supra* note 6. As of the time of transfer, Japan assumed that the money would go to medical and nursing expenses, funeral costs, and scholarships for relatives. *See id.*

tims."[124] Similarly, the U.N. Committee on the Elimination of Discrimination Against Women voiced regret that the agreement "did not fully adopt a victim-centred approach."[125] The agreement also did not budge the U.N. Human Rights Committee from its earlier recommendations that, given the time bar before its courts, Japan should take legislative and administrative measures to ensure that all allegations of wartime sexual slavery or other human rights violations perpetrated by the Japanese military against the Comfort Women are investigated, prosecuted, and punished, that the victims and their families receive full reparations, that all available evidence is disclosed, that attempts to defame victims or deny the events are condemned, and that students are educated through references in textbooks.[126]

C. Cracks in the Agreement

Prime Minister Abe initially took the position that no Japanese funds would be paid into the settlement fund until the Comfort Woman statue outside Japan's embassy in Seoul was removed.[127] In August 2016, however, Japan transferred the full amount, despite opposition from elements within Abe's ruling party, leaving Abe at a later summit to ask Korean Presi-

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124 David Tolbert, *Japan's Apology to South Korea Shows What Public Apologies Should (Not) Do*, HUFFINGTON POST (Jan. 29, 2016, 10:59 AM), http://www.huffingtonpost.com/david-tolbert/japans-apology-to-south-k_b_9111566.html [https://perma.cc/W9J8-2NZ6]; *see also* RUBEN CARRANZA ET AL., INT'L CTR. FOR TRANSITIONAL JUSTICE, MORE THAN WORDS: APOLOGIES AS A FORM OF REPARATION 19 (2015) (discussing how apologies can motivate accountability, reparation, and truth seeking).

125 Comm. on the Elimination of Discrimination Against Women, Concluding Observations on the Combined Seventh and Eighth Periodic Reports of Japan, U.N. Doc. CEDAW/C/JPN/CO/7-8, at 8 (Mar. 7, 2016).

126 *See* Letter from the Special Rapporteur for Follow-up to Concluding Observations, Human Rights Comm., to His Excellency M. Junichi Ihara (Apr. 19, 2016), http://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/JPN/INT_CCPR_FUL_JPN_23627_E.pdf [https://perma.cc/UF6G-PRJC] (referencing Human Rights Comm., Concluding Observations on the Sixth Periodic Report of Japan, U.N. Doc. CCPR/C/JPN/CO/6, ¶ 14 (Aug. 20, 2014) and Human Rights Comm., Additional Information on the Issue of Comfort Women to the Comments by the Government of Japan on the Recommendations made in Paragraph 14 of the Concluding Observations of the Human Rights Committee (CCPR/C/JPN/CO/6) (n.d.), http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCCPR%2fFCO%2fJPN%2f23340&Lang=EN [https://perma.cc/X2NX-KFTJ]).

127 *See 'Comfort Women' Funds Won't Be Paid Until Sex Slave Statue Outside Japanese Embassy Removed: Source*, JAPAN TIMES (Dec. 31, 2015), http://www.japantimes.co.jp/news/2015/12/31/national/politics-diplomacy/comfort-women-funds-wont-be-paid-until-sex-slave-statue-by-japanese-embassy-removed-source/ [https://perma.cc/NWP2-TDXF].

dent Geun-hye Park again to remove the statue.[128] Korea reportedly takes the position that the statue is not included in the agreement,[129] although another account of the summit interprets Park's response that "steady implementation of the agreement is important" as an acknowledgement of Abe's request.[130]

Other signs are emerging that this internationally negotiated closure to the Comfort Women issue may not hold.[131] Foreign ministry talks are expected to be held to clarify the meaning of the funds used to establish the reconciliation and healing fund anticipated by the agreement.[132] Japan seeks confirmation that the transfer of funds does not constitute reparations, whereas Korea recognizes that the agreement's opponents who support the Comfort Women want Japan to take legal responsibility. Similar uncertainty surrounds the two states' commitment to avoid "accusing or criticizing each other regarding this issue in the international community."[133] The Korean government's view is that a white paper being prepared by Korea's Gender Equality and Family Ministry on the Comfort Women issue is "unrelated" to the December 28 agreement, but the Japanese government disagrees and has stated that it expects the Korean government to react to the white paper in light of its commitment not to raise the Comfort Women issue internationally.[134]

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128 *See* Kang Seung-woo, *Comfort Woman Statue Remains Sticking Point in Park-Abe Talks*, KOREA TIMES (Sept. 8, 2016, 5:53 PM), http://www.koreatimes.co.kr/www/news/nation/2016/09/116_213749.html [https://perma.cc/4928-MS8V].

129 *See id.*

130 *Abe, Park Agree to Coordinate Response on North Korea Missile Launches*, JAPAN TIMES (Sept. 7, 2016), http://www.japantimes.co.jp/news/2016/09/07/national/abe-asks-park-to-address-issue-of-seoul-comfort-woman-statue/ [https://perma.cc/U8PH-SAWC].

131 Another question is whether the December 28 agreement is binding in international law, given that it consists simply of parallel statements by Japan's and Korea's foreign ministers. *See* Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, art. 2(1)(a) (Parties include Japan and Korea); *see, e.g.*, Chandler, *supra* note 56 (assuming that the agreement is not legally binding).

132 *See Tokyo Seeks Semantic Clarity on 'Comfort Women' Cash*, JAPAN TIMES (July 31, 2016), http://www.japantimes.co.jp/news/2016/07/31/national/politics-diplomacy/tokyo-seeks-semantic-clarity-comfort-women-cash/ [https://perma.cc/E6E4-YC3J].

133 *Agreement, supra* note 2, §§ 1(3), 2(3).

134 *Tokyo Alarmed by Seoul's Plan to Press Ahead with 'Comfort Women' White Paper*, JAPAN TIMES (Jan. 6, 2016), http://www.japantimes.co.jp/news/2016/01/06/national/politics-diplomacy/tokyo-keep-close-tabs-seoul-ministrys-planned-comfort-women-white-paper/ [https://perma.cc/L8CS-KL8B].

D. Feminism and the Future

It is easy to dismiss the two governments' desire for a clean pivot from past to future. Yet there might be other reasons to support such a move. "[T]he deep worry," as historian Samuel Moyn recently put it, is that "'the memory industry' has . . . taken up the cultural space our more willingly forgetful ancestors made for forging a common future."[135] In postwar Asia in particular, the future and how to construct a future are particularly salient themes. The anthropology and cultural historiography of both Japan and Korea return again and again to questions of how futures are imagined, created, and valued.[136]

Indeed, the argument for closure may find unexpected support from current debates within legal feminism. In recent years, some feminists have taken issue with the very feminist achievements of the 1990s in international criminal law that made visible the wrongs suffered by the Comfort Women a half century earlier.[137] One concern is that the identification of sexual violence as the gendered dimension of the most serious crimes against a group, such as genocide, reinforces the idea that rape leaves women forever victimized and thus perpetuates stigma against them.[138] It thereby helps to obscure the possibility of other subjective experiences of wartime sexual violence and other kinds of gendered harms that may be felt as violence.[139] Another criticism of international criminal law approaches is that the association of sexual violence against wo-

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135 Moyn, *supra* note 54, at 83.

136 *See, e.g.*, MARILYN IVY, DISCOURSES OF THE VANISHING: MODERNITY, PHANTASM, JAPAN (1995); HIROKAZU MIYAZAKI, ARBITRAGING JAPAN: DREAMS OF CAPITALISM AT THE END OF FINANCE (2013); LISA YONEYAMA, HIROSHIMA TRACES: TIME, SPACE, AND THE DIALECTICS OF MEMORY (1999).

137 *See* CHISECHE SALOME MIBENGE, SEX AND INTERNATIONAL TRIBUNALS: THE ERASURE OF GENDER FROM THE WAR NARRATIVE (2013) (providing an account of the gains made and challenges remaining); Nicola Henry, *The Fixation on Wartime Rape: Feminist Critique and International Criminal Law*, 23 SOC. & LEGAL STUD. 93, 94 (2014) (describing "the so-called feminist 'success' story . . . that sought to clearly delineate wartime rape as a crime of grave magnitude that warranted explicit treatment as a crime that offended humanity" and examining "postmodern feminist debates that question the desirability of fixating on sexual violence against women in post-conflict justice initiatives").

138 Janet Halley, *Rape in Berlin: Reconsidering the Criminalisation of Rape in the International Law of Armed Conflict*, 9 MELB. J. INT'L L. 78, 113–14 (2008); Vasuki Nesiah, *Discussion Lines on Gender and Transitional Justice: An Introductory Essay Reflecting on the ICTJ Bellagio Workshop on Gender and Transitional Justice*, 15 COLUM. J. GENDER & L. 799, 805–06 (2006).

139 *See* Fionnuala Ní Aoláin, *Political Violence and Gender During Times of Transition*, 15 COLUM. J. GENDER & L. 829, 838–39 (2006); Halley, *supra* note 138, at 112–13; Neha Jain, *Forced Marriage as a Crime Against Humanity: Problems of Definition and Prosecution*, 6 J. INT'L CRIM. JUST. 1013, 1021(2008).

men with the violation of their state or the eradication of their group in the legal construction of war crimes and the crime of genocide reinforces the nationalist patriarchal story of the raped woman as "culturally contaminated."[140] Problems are also associated with the use of international criminal trials as a way to establish history.[141] The development of the international criminal trial's history-telling function leads to the framing of women as never-ending victims because their victimhood becomes inscribed in the nation's history.[142] The danger for the Comfort Women, Hyunah Yang cautions, is that their identity will "freeze . . . as international victims, 'existential' comfort women."[143]

These critiques of the status of women as victims can be understood as raising concerns about the dominant style of closure. The concern is that international criminal prosecutions project the individual woman's experience (framed as the victim's experience) into the future in less than empowering

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140 *See, e.g.*, ELISSA HELMS, INNOCENCE AND VICTIMHOOD: GENDER, NATION, AND WOMEN'S ACTIVISM IN POSTWAR BOSNIA-HERZEGOVINA (2013); Pascale R. Bos, *Feminists Interpreting the Politics of Wartime Rape: Berlin, 1945; Yugoslavia, 1992–1993*, 31 SIGNS 995, 1016–19, 1021–22 (2006); Karen Engle, *Feminism and Its (Dis)Contents: Criminalizing Wartime Rape in Bosnia and Herzegovina*, 99 AM. J. INT'L L. 778, 784 (2005). For other difficulties raised by international criminal tribunals' consideration of rape "only within the tightly scripted dominant narratives of . . . rapes as extensions of nationalism," see Doris E. Buss, *The Curious Visibility of Wartime Rape: Gender and Ethnicity in International Criminal Law*, 25 WINDSOR Y.B. ACCESS JUST. 3, 22 (2007).

141 *See* HANNAH ARENDT, EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL (1963); LAWRENCE DOUGLAS, THE MEMORY OF JUDGMENT: MAKING LAW AND HISTORY IN THE TRIALS OF THE HOLOCAUST (2001); ED MORGAN, THE AESTHETICS OF INTERNATIONAL LAW ch. 2 (2007); MARK OSIEL, MASS ATROCITY, COLLECTIVE MEMORY, AND THE LAW (1997); JUDITH N. SHKLAR, LEGALISM (1st ed. 1964); GERRY SIMPSON, LAW, WAR AND CRIME: WAR CRIMES, TRIALS AND THE REINVENTION OF INTERNATIONAL LAW (2007); TEITEL, GLOBALIZING TRANSITIONAL JUSTICE, *supra* note 28; TEITEL, TRANSITIONAL JUSTICE, *supra* note 57; RICHARD ASHBY WILSON, WRITING HISTORY IN INTERNATIONAL CRIMINAL TRIALS (2011); Martti Koskenniemi, *Between Impunity and Show Trials*, 6 MAX PLANCK Y.B. U.N. L. 1 (2002); Saira Mohamed, *Deviance, Aspiration, and the Stories We Tell: Reconciling Mass Atrocity and the Criminal Law*, 124 YALE L.J. 1628 (2015).

142 *See* Katherine M. Franke, *Gendered Subjects of Transitional Justice*, 15 COLUM. J. GENDER & L. 813, 823–25 (2006); Ratna Kapur, *Normalizing Violence: Transitional Justice and the Gujarat Riots*, 15 COLUM. J. GENDER & L. 885, 914–17 (2006). The roles of women as reproducers and symbols of the nation are well studied in the feminist literature on nationalism. *See, e.g.*, NIRA YUVAL-DAVIS, GENDER AND NATION (1997). While very different from international criminal trials, truth and reconciliation commissions have been criticized for imposing an unjust narrative burden on women as rape victims, given that the silence of the rapists can remain undisturbed. *See, e.g.*, Kimberly Theidon, *Gender in Transition: Common Sense, Women, and War*, 6 J. HUM. RTS. 453 (2007) (discussing the Peruvian Truth and Reconciliation Commission).

143 Yang, *supra* note 117, at 66.

ways. For example, her victimhood is assumed to degrade her entire experience of her biological lifetime, or her victimhood comes to stand for national shame vis-à-vis aggressor nations.[144] Indeed, in pushing for criminal prosecutions, international feminists also become troublingly allied with ethnic nationalists in the legal characterization of rape as a genocidal or military strategy in particular conflicts,[145] and with political chivalrists ("women and children first").[146] Katherine Franke points to the dilemma in the context of transitional justice initiatives: in order to bring closure, feminists seek to foreground sexual violence against women by acknowledging the trauma so that healing can occur. But in doing so, they may also be immortalizing the violence by projecting it onto the nation's history:

> Often women's stories, women's memories, and women's experiences are appropriated in the service of this rebuilding project . . . . [T]heir sexual violation can come to stand for the violation of the nation as a whole. So too, the fact that the nation's men were unable to protect "their" women from the violence of the recent past can be rendered as a metaphor for the emasculinization of the culture more broadly . . . .
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> . . . .
>
> In different ways, and by different means, rebuilding post conflict societies is almost inevitably a process of re-masculinization . . . .
>
> While these concerns should be attended to with respect to all of the mechanisms of transitional justice, they have particular purchase in the context of criminal prosecutions . . . .[147]

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144 *See* Franke, *supra* note 142, at 822–23. Regarding the Comfort Women, see Yang, *supra* note 117, at 62–65 (applying feminist analyses of rape developed in the context of ethnic conflict in Yugoslavia, but differentiating based on Korea's identity as a colony of Japan). While the projection of the individual's victimhood onto the nation is particularly striking in the prosecution of wartime sexual violence, in part because it is exploited as a military tactic, it may also occur in other cases. *See, e.g.*, KOGA, *supra* note 52, at 197–99 (describing a lawsuit brought in Japan by Chinese plaintiffs exposed to mustard gas from chemical weapons abandoned by the Japanese army at the end of World War II).

145 *See* Halley, *Rape in Berlin*, *supra* note 138, at 115. An example is feminists' acceptance that children born of rape do not belong to the mother's ethnic group. *See* HELMS, *supra* note 140, at 58, 67–71; Engle, *supra* note 140, at 807–10.

146 *See* Engle, *supra* note 140, at 780.

147 Franke, *supra* note 142, at 823–25. *Cf.* Lauren Berlant, *The Subject of True Feeling: Pain, Privacy, and Politics*, *in* LEFT LEGALISM/LEFT CRITIQUE 105, 108–09 (Wendy Brown & Janet Halley eds., 2002) (questioning whether giving pride of place to pain as a progressive strategy will work at cross purposes with future possibilities for structural change in society); Vanessa Pupavac, *International Therapeutic Peace and Justice in Bosnia*, 13 SOC. & LEGAL STUD. 377, 396 (2004)

The legal literature on gender and reparations within the field of post-conflict justice[148] is therefore attentive to its relationship to wider societal transformation and, to some degree, to questions of women's empowerment through forward-looking initiatives such as the redistribution of resources.[149] With these dilemmas among legal feminists in mind, then, we turn from their question of whether closure is possible to the question of where and when opening or closure can occur.

III
A FEMINIST CONFLICT-OF-LAWS APPROACH

Our engagement with conflict of laws in this Article builds on work in conflict of laws, feminist theory, and legal anthropology. A growing body of conflicts scholarship explores the potential of the field as an approach to problems conventionally treated as problems of public law, whether domestic or international.[150] As distinct from earlier efforts, beginning with the

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(pointing to "inherent contradictions in a radical therapeutic agenda of social and cultural transformation in the absence of material advancement").

148 *See, e.g.*, FIONNUALA NÍ AOLÁIN ET AL., ON THE FRONTLINES: GENDER, WAR, AND THE POST-CONFLICT PROCESS (2011).

149 *See, e.g.*, THE GENDER OF REPARATIONS: UNSETTLING SEXUAL HIERARCHIES WHILE REDRESSING HUMAN RIGHTS VIOLATIONS (Ruth Rubio-Marín ed., 2009); *see also* Ruth Rubio-Marín, *The Gender of Reparations in Transitional Societies*, *in id.*, at 63, 66 (exploring "ways to optimize the (admittedly modest) transformative potential of reparations programs so that they serve . . . the ideal of a society altogether free of gender subordination"); Andrea Durbach & Louise Chappell, *Leaving Behind the Age of Impunity: Victims of Gender Violence and the Promise of Reparations*, 16 INT'L FEM. J. POL. 543, 545 (2014) (examining what features would be essential to "a 'transformative' reparations framework capable of addressing the structural causes of sexual violence").

Truth and reconciliation commissions ("TRCs") are also often contrasted with international criminal trials in that they aim to enable victims to tell their stories in their own way without attempting to develop a single historical narrative or set of factual findings. *See, e.g.*, Martha Minow, *Between Vengeance and Forgiveness: South Africa's Truth and Reconciliation Commission*, 14 NEGOT. J. 319, 326–33, 338–39 (1998). TRCs loosen or uncouple victim testimony and compensation from the objective proof of facts and determination of culpability central to litigation. Truth telling is often conceived of as healing in and of itself. *See id.* at 329–33; LAWRENCE WESCHLER, A MIRACLE, A UNIVERSE: SETTLING ACCOUNTS WITH TORTURERS 245–46 (1990) (quoting Chile's truth commissioner, José Zalaquett).

150 *See, e.g.*, PAUL SCHIFF BERMAN, GLOBAL LEGAL PLURALISM: A JURISPRUDENCE OF LAW BEYOND BORDERS (2012); ALEX MILLS, THE CONFLUENCE OF PUBLIC AND PRIVATE INTERNATIONAL LAW: JUSTICE, PLURALISM AND SUBSIDIARITY IN THE INTERNATIONAL CONSTITUTIONAL ORDERING OF PRIVATE LAW (2009); PRIVATE INTERNATIONAL LAW AND GLOBAL GOVERNANCE (Horatia Muir Watt & Diego P. Fernández Arroyo eds., 2014); GUNTHER TEUBNER, CONSTITUTIONAL FRAGMENTS: SOCIETAL CONSTITUTIONALISM AND GLOBALIZATION (Gareth Norbury trans., 2012); Jacco Bomhoff, *The Constitution of the Conflict of Laws*, *in* PRIVATE INTERNATIONAL LAW AND GLOBAL GOVERNANCE, *supra*, at 262; Hisashi Harata, *An Interim Report on Savigny's Methodology and His Founding of a Modern Historical Jurisprudence*, 8 U. TOKYO L. REV. 125 (2013); Christian

work of Philip Jessup in the 1950s to combine conflict of laws with these other fields into a single body of transnational law,[151] the interest of a number of current conflicts scholars is in generalizing a distinctive conflicts approach to global governance.[152] Our previous conflicts writings, separately and together with Ralf Michaels, contribute to this new transdisciplinary direction,[153] as does the present Article.

Our conflict-of-laws scholarship, in turn, draws on ethnographic work that one of us has conducted among lawyers in the global financial markets, for whom conflicts is a key tool of the trade.[154] In that work, Riles describes the formidable power of private legal form to reverse, redirect, and reorder the temporality of politics through a series of aesthetic devices. She refers to these as "legal techniques," by which she means "the skill and the art, the aesthetics and the bricolage, the satisfaction of rehearsing and perhaps innovating upon or adding to a set of moves and postures one has observed, apprenticed, debated with other initiates."[155]

Riles's interest in legal technique is informed by feminist anthropologist Marilyn Strathern's work, in a very different context, on the aesthetics of knowledge. Strathern describes the power of the "constraint of form": the appreciation that in ritual and other contexts, aesthetic limitations in one dimen-

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Joerges et al., *A New Type of Conflicts Law as Constitutional Form in the Postnational Constellation*, 2 TRANSNATIONAL LEGAL THEORY 153 (2011) (introducing a special issue on this topic); Theodora Kostakopoulou, *Citizenship Goes Public: The Institutional Design of Anational Citizenship*, 17 J. POL. PHIL. 275 (2009); Robert Wai, *The Interlegality of Transnational Private Law*, 71 LAW & CONTEMP. PROBS. 107 (2008); Dai Yokomizo, *Conflict of Laws in the Era of Globalization*, 57 JAPANESE Y.B. INT'L LAW 179 (2014); Hanoch Dagan & Avihay Dorfman, Interpersonal Human Rights and Transnational Private Law (Oct. 27, 2016) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2860275 [https://perma.cc/BNS5-BJA7].

151 PHILIP C. JESSUP, TRANSNATIONAL LAW 2, 106 (1956). For background on transnational law, see Peer Zumbansen, *Transnational Law*, *Evolving*, *in* ELGAR ENCYCLOPEDIA OF COMPARATIVE LAW 898 (Jan M. Smits ed., 2d ed. 2012).

152 *See, e.g.*, BERMAN, *supra* note 150; MILLS, *supra* note 150; PRIVATE INTERNATIONAL LAW AND GLOBAL GOVERNANCE, *supra* note 150; TEUBNER, *supra* note 150; Joerges et al., *supra* note 150; Wai, *supra* note 150.

153 Ralf Michaels, *Post-Critical Private International Law: From Politics to Technique*, *in* PRIVATE INTERNATIONAL LAW AND GLOBAL GOVERNANCE, *supra* note 150, at 54; Karen Knop, *Citizenship, Public and Private*, 71 LAW & CONTEMP. PROBS. 309 (2008); Karen Knop, Ralf Michaels & Annelise Riles, *Foreword*, 71 LAW & CONTEMP. PROBS. 1 (2008); Karen Knop, Ralf Michaels & Annelise Riles, *International Law in Domestic Courts: A Conflict of Laws Approach*, 103 PROC. AM. SOC'Y INT'L L. 269 (2009); Annelise Riles, *Cultural Conflicts*, 71 LAW & CONTEMP. PROBS. 273 (2008).

154 *See* RILES, COLLATERAL KNOWLEDGE, *supra* note 32.

155 *Id.* at 70, 72.

sion author or engender powerful effects in others.[156] Whereas legal realists criticize legal form as a kind of sham and a mere obfuscation of politics, Strathern's insight led Riles to question such critiques.[157] In particular, Riles is interested in the temporal uses of private law technique—that is, as a device for managing the future.[158]

The present Article builds particularly on our earlier article co-authored with Ralf Michaels on the debate over women and cultural accommodation, in which we show how conflicts thinking—taken outside the context of actual disputes and redeployed as a modality for theory—can offer new ways of approaching problems in feminist legal theory.[159] In that article, bringing together insights about transdisciplinary conflicts, legal technique, and the constraint of form, we suggested that the very nuts-and-bolts technicalities that render conflicts so implausible as a source of insight and strategy are what, ironically, give the field its potential for feminism:

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156 MARILYN STRATHERN, THE GENDER OF THE GIFT: PROBLEMS WITH WOMEN AND PROBLEMS WITH SOCIETY IN MELANESIA 180–82 (1988).

157 Riles writes:

> [A]n ethnography of lawyers in practice suggests that such [critiques of legal form] are deficient in two crucial aspects. First, they take too simplistic a view of practitioners' commitments to their tools. A lawyer may assert that the language of a statute constrains and also, at another moment, assert that it does not. Far from being a naive formalist, she is actually a most sophisticated epistemologist: she can take both positions at once . . . . Second, such arguments fail to account for the appreciation for the craft of legal form, the pleasure and satisfaction and power and also humility of skating a perfect figure eight, knowing that it has been skated countless times before . . . .
>
> It is in this complicated sense that I will speak of legal technique as having certain degree of agency of its own. Now, to be clear, our tools do not turn us into automatons; technology can always be resisted, or broken, or abandoned, or tinkered with, or replaced altogether, or ignored. But as anyone who has ever used a word processor, or picked up a tennis racquet, or ridden on a subway surely knows, our tools also shape how we think, what we aspire to achieve, where we choose to go.

RILES, COLLATERAL KNOWLEDGE, *supra* note 32, at 71–72.

158 Riles identifies what she terms the "placeholder" effect of legal technique: "The placeholder's central feature is that it forecloses a question . . . for the moment—not by resolving it, but by papering over it—by creating a provisional solution subject to future reevaluation." *Id.* at 176. In other words, legal technique is not concerned with "the utopian time of the distant future"; instead, it is a device for producing near futures. *Id.* at 175.

159 Knop, Michaels & Riles, *From Multiculturalism*, *supra* note 33; *cf.* Roxana Banu, *A Relational Feminist Approach to Conflict of Laws*, 47 MICH. J. GENDER & LAW (forthcoming 2017) (conversely, bringing feminist legal theory to bear on conflict of laws).

> [T]hese technicalities bring to the fore a vital level of detail that feminism/culture analyses must generate from first principles—and seldom achieve. Moreover, . . . 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 . . . .[160]

In this Part, we will show, with reference to the reopening of the Comfort Women issue, that conflict of laws reveals, tolerates, and enables an almost unfathomable proliferation of temporalities in space.

A. Private

Unlike the postwar Tokyo war crimes trials and the lump-sum settlements between states, which sought to bring closure once and for all, private-law doctrines offer far more quotidian pathways forward.[161] One avenue left unresolved by the December 28 agreement, for example, is a private lawsuit with links to more than one jurisdiction.[162] One could imagine, therefore, a torts case brought in California by individual Korean Comfort Women against an individual former Japanese soldier or brothel operator with bank accounts in California regarding a "comfort station" in Korea.[163] Or again, one could imagine a lawsuit in Japan by individual Korean Comfort Women against the Japanese men who coerced or sold them into the Comfort Women system in China. Or one could imagine that the Korean Comfort Women who recently won damages for defamation from a Korean professor over her book urging a

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160 Knop, Michaels & Riles, *From Multiculturalism*, *supra* note 33, at 594.

161 Consistent with newer approaches to closure, states may choose to acknowledge such remaining legal openings publically. Announcing the Mau Mau settlement in Parliament, the British Foreign Secretary stated: "It is of course right that those who feel they have a case are free to bring it to the courts. However we will also continue to exercise our own right to defend . . . ." *Statement to Parliament on Settlement of Mau Mau Claims*, *supra* note 48.

162 *See supra* note 22 (discussing opposing views on whether the December 28 agreement bars private suits).

163 *See, e.g.*, Judgment of the Tokyo Women's Tribunal, *supra* note 3, at 52–59 (describing the sexual enslavement of Korean women and girls with reference to testimony before the Tribunal). Note that the hypotheticals we give here do not raise two problems of legal time often found in campaigns for redress for historical injustice. There is no issue of inter-generational responsibility since the plaintiffs are the Comfort Women themselves, as opposed to their descendants, and no issue of retroactivity arises since there is a strong case that the harms they suffered were illegal under both domestic and international law at the time they occurred.

more nuanced view of the lives of women in the brothels[164] might want to enforce that Korean judgment against the defendant's assets in another country.[165]

For some, the private nature of conflict of laws is part of the problem because it seems to risk taking politics out of the equation.[166] While we do not wish to rule out other valuable areas of redress, a private lawsuit holds out the hope of a new approach developed through the lens of the concerns and specific experiences of real people in real places. In the aftermath of a political solution, namely, the December 28 agreement, activists may wish for a genre of engagement that does not link the resolution of the Comfort Women issue to geopolitics, trade, and other issues of high diplomacy in the way that politics is prone to do. Prominent Japanese feminist sociologist Chizuko Ueno shares the feminist concerns canvassed earlier[167] that individual women and their individual experiences of wartime sexual violence are being subsumed in the competing narra-

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164 In January 2016, a Seoul court ordered a Korean professor of Japanese literature to pay damages to nine Korean Comfort Women for defaming them in her book, which depicted a range of relations between Japanese soldiers and Comfort Women from rape to prostitution to a "comradelike relationship." *See* Choe Sang-Hun, *Professor Ordered to Pay 9 Who Said 'Comfort Women' Book Defamed Them*, N.Y. TIMES (Jan. 13, 2016), http://www.nytimes.com/2016/01/14/world/asia/south-korea-park-yu-ha-verdict.html [https://perma.cc/9N5S-XJAQ].

165 Indeed, a wide range of individual or collective private causes of action related to the Comfort Women might arise. A California court recently dismissed a case brought by Korean Comfort Women against a Japanese newspaper publisher whose paper had espoused the view that the Comfort Women were paid volunteers and had called for an end to references to their "coercive recruitment." You v. Japan, No. C 15-03257, 2015 WL 7454031 at *1–3 (N.D. Cal. Nov. 24, 2015). The case was dismissed for want of personal jurisdiction over the publisher, but the court might have found otherwise had the online articles been substantially directed at the Japanese diaspora in the United States, for instance.

166 A classic critique is Joel R. Paul, *The Isolation of Private International Law*, 7 WISC. INT'L L.J. 149, 177 (1988). Within private law, a variation would be those authors who argue that sexual slavery should be prosecuted as such and not as a tort because tort does not capture the nature of the harm. *See, e.g.*, Jan Klabbers, *Doing the Right Thing? Foreign Tort Law and Human Rights*, *in* TORTURE AS TORT: COMPARATIVE PERSPECTIVES ON THE DEVELOPMENT OF TRANSNATIONAL HUMAN RIGHTS LITIGATION 553, 556–59 (Craig Scott ed., 2001); Nathan J. Miller, *Human Rights Abuses as Tort Harms: Losses in Translation*, 46 SETON HALL L. REV. 505 (2016). This critique depends on a standard view of the bilateral relationship in private law. *Contra* BILSKY, *supra* note 30, at 264–65 (referring to Hanoch Dagan and Avihay Dorfman's alternative view). Note too that Jan Klabbers assumes that litigation "starts from the mistaken presumption that political problems can ever be 'solved' to begin with. Instead, we may have to get accustomed to the idea of having to live with ambivalence, and organise our political behaviour accordingly." Klabbers, *supra*, at 566. On our account, conflict of laws does not make this mistake.

167 *See supra* subpart II.D.

tives and agendas of others that, in turn, may impact their possibilities for recovery.[168] Among these grand narratives, she identifies not only patriarchal and revisionist accounts that characterize the Comfort Women as willing prostitutes, but also victim-centered accounts that foreground racism, ethnic genocide, and violence, leaving no room for women's agency. Ueno writes:

> The lawsuits brought by the former "comfort women" for individual compensation and formal apology from the Japanese government are remarkable in the sense that they refuse to subsume the survivors' individual rights under national interests . . . . If their claim succeeds in establishing the logic that "My body and my life do not belong to the state", the paradigm of the modern nation-state will be seriously imperiled. The same logic is available to men as well . . . .
>
> This interpretation, nuanced though it may seem, is provisional, as a new narrative can create an alternative view at any moment . . . . I do not subscribe to the view that entire historical projects serve a single truth, or that conflicting narratives must be reconciled for the purpose of promoting "truer" truths. Instead, what I propose here is a project of multiple histories in which reality may be seen in different ways from different perspectives. What is required is an imagination broad and generous enough to recognize simultaneously unfolding multiple realities some of which may be invisible to you or even to me, but quite real to the other we address, and want to be heard by.[169]

Thus, a private lawsuit provides individual victims with a chance to frame the claim in their own terms. In effect, it is diplomacy from the ground up: driven by the victims themselves, and in which the alleged perpetrators must respond, also as individuals. What is hopeful about the private claim, moreover, is precisely its partiality. Any lawsuit, by individual women against individual men, can claim to resolve only a sliver of the more general problem. It makes no claim to be a totalizing solution to or narrative about the Comfort Women controversy; it concerns only the specific obligations of these parties to one another.

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168 Chizuko Ueno, *Narratives of the Past: Against Historical Revisionism on 'Comfort Women,' in* APPROCHES CRITIQUES DE LA PENSÉE JAPONAISE DU XX^{E} SIÈCLE [CRITICAL READINGS IN TWENTIETH CENTURY JAPANESE THOUGHT] 303, 321 (Livia Monnet ed., 2001); *see also* UENO, *supra* note 23, at 69–105.

169 Ueno, *supra* note 168, at 322–23. *Cf.* Yang, *supra* note 117, at 57–61, 66–68 (addressing the problem of positionality and advocating the rehabilitation of collective and personal memories to contest official representations of history).

For the sake of simplicity, we will work with the hypothetical example of the torts case brought in California by Korean Comfort Women against a former Japanese soldier or brothel operator with bank accounts in that state. We use California as the forum because of its well-developed twentieth-century conflicts jurisprudence and elaborate contemporary techniques. To be clear, we are not proposing that anyone bring such a lawsuit—although it might be that some would wish to do this—nor do we attempt to predict what a California court would decide. Our interest in this hypothetical is in thinking through the conflict-of-laws *approach* to openness and closure for issues of historical injustice as diffused across time and space, and to ask what it would mean for us as feminists to live through this moment by refashioning some of the conflicts lawyer's techniques. What we offer here, then, is an ethnographically informed deployment of conflict-of-laws techniques—one that is, like all ethnographic experiments, inevitably quite different from those produced by the subjects themselves. Methodologically speaking, we join here with a growing body of work by anthropologists that, rather than treating knowledge practices they encounter as mere objects of description, experiments with thinking *through* these practices, treating them as theoretical techniques.[170]

B. Noticing Time Across Space

In a private lawsuit, the openness of an issue is addressed through statutes of limitations. The defendant in our hypothetical California lawsuit would immediately file for dismissal on the ground that the limitation period for a claim in California has already expired, and time has therefore run out. But in a suit with a foreign element, that is, a conflicts case, the defendant's assertion that the claim is time barred raises the choice-of-law question: *whose* statute of limitations governs this claim?[171] Should the court look to the statute of limitations of

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170 *See* DOUGLAS R. HOLMES, ECONOMY OF WORDS: COMMUNICATIVE IMPERATIVES IN CENTRAL BANKS (2014); EDUARDO KOHN, HOW FORESTS THINK: TOWARD AN ANTHROPOLOGY BEYOND THE HUMAN (2013); BILL MAURER, MUTUAL LIFE, LIMITED: ISLAMIC BANKING, ALTERNATIVE CURRENCIES, LATERAL REASON (2005); MIYAZAKI, *supra* note 136; STRATHERN, *supra* note 156; Eduardo Viveiros De Castro, *Cosmological Deixis and Amerindian Perspectivism*, 4 J. ROYAL ANTHROPOLOGICAL INST. 469 (1998).

171 In conflict of laws, the question of the applicable law is separate from the prior question of jurisdiction. Thus, a court might decide to hear a case but apply another state's limitations period.

California (where the suit is brought), of Korea (where the torts occurred),[172] or of Japan (where the defendant is domiciled)?

In this respect, a conflict-of-laws approach to historical injustice is less open than international criminal law. In international criminal law, it is increasingly accepted as customary international law that statutes of limitations do not apply to genocide, crimes against humanity, and war crimes.[173] In other words, the past is never and nowhere closed by law. There is also treaty law on this point,[174] although the nonapplicability of statutes of limitations with retroactive effect has been challenged in international and domestic courts as a violation of the defendant's human rights, with courts reaching differing outcomes.[175] In a certain way, transitional justice is temporally similar to international criminal law. A framework originally devised to facilitate reconciliation in countries undergoing transitions from authoritarianism to democracy, it is now increasingly used to respond to historical injustices in societies not undergoing regime change.[176] Particularly in the latter

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172 A tort is traditionally deemed to have occurred where the last act that perfected the tort occurred, or in more modern terms where the "center of gravity" of the elements of the tort is located. *See* RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 394 (6th ed. 2010). In this case, this is clearly Korea: this is where the defendant allegedly committed the acts in question and also the domicile of the plaintiffs.

173 *See* Jan Arno Hessbruegge, *Justice Delayed, Not Denied: Statutory Limitations and Human Rights Crimes*, 43 GEO. J. INT'L L. 335, 348–56 (2012). *But see* You v. Japan, 150 F. Supp. 3d 1140 (N.D. Cal. 2015) (rejecting this argument because the Comfort Women plaintiffs did not offer any authority).

State practice does not currently make reparations claims for these crimes imprescriptible. *See* Hessbruegge, *supra*, at 372–84. In comparison, the U.N. Basic Principles on the Right to a Remedy only asks that domestic statutes of limitations for violations that do not constitute international crimes, including those applicable to civil claims, not be "unduly restrictive." U.N. Basic Principles on the Right to a Remedy, *supra* note 46, ¶ 7.

174 *See* Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, Nov. 26, 1968, 754 U.N.T.S. 73 [hereinafter 1968 Treaty]; European Convention on the Non-Applicability of Statutory Limitation to Crimes Against Humanity and War Crimes, Jan. 25, 1971, ETS No. 82, http://www.coe.int/en/web/conventions/full-list/-/conventions/rms/0900001680007617f [https://perma.cc/UB96-XPY9]. The Comfort Women system could be characterized as a crime against humanity as well as a war crime. *See* Judgment of the Tokyo Women's Tribunal, *supra* note 3, at 188–89. Japan, South Korea, and the United States are parties to neither treaty.

175 *See, e.g.*, Hessbruegge, *supra* note 173, at 364–68. At the time the 1968 Treaty, *supra* note 174, was concluded, many states argued that its application to war crimes and crimes against humanity "irrespective of their date of commission," *id.* art. 1, violated the prohibition on the retroactive application of criminal offences (found, for example, in the ICCPR, *supra* note 103, at art. 15).

176 *See* Paige Arthur, *How "Transitions" Reshaped Human Rights: A Conceptual History of Transitional Justice*, 31 HUM. RTS. Q. 321 (2009) (giving an intellectual history of transitional justice).

role, transitional justice resembles international criminal law in that it understands any historical claim as always morally or politically openable.[177] Compared to a peace treaty, however, the conflicts approach is more open because peace treaties, as we saw, generally established a relationship between states by closing off individual claims.

What conflict of laws particularly registers is that legal time is not simply a reflection of calendar time or historical time.[178] The law's clock starts, runs, stops, and restarts differently in different places. The very first move a court must make in a choice-of-law analysis is to notice legal time across space.[179] Thus a court must recognize that legal time is *local* and acknowledge a plurality of legal approaches to discerning an endpoint to any highly charged political moment.[180] In our hypothetical, the court would discover that the relevant California statute of limitations for these actions is two years from the date on which the tort was committed,[181] whereas the relevant Korean statute of limitations is three years from the date on which the plaintiff became aware of the identity of the tortfeasor.[182] Under Japan's Civil Code as interpreted by the courts, the relevant statute of limitations is three years from the date when the identity of the perpetrator became known or

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177 See, in the context of statutes of limitations, Suzette M. Malveaux, *Statutes of Limitations: A Policy Analysis in the Context of Reparations Litigation*, 74 GEO. WASH. L. REV. 68 (2005) (using the case of the 1921 Tulsa race riots—in which a white mob killed up to 300 African-Americans, left thousands homeless, and burnt a largely Black community to the ground—to argue that time-barring claims for reparations is against public policy).

178 *Cf.* EMILY GRABHAM, BREWING LEGAL TIMES: THINGS, FORM, AND THE ENACTMENT OF LAW 6 (2016) (arguing that our relationship with objects such as case reports, medical reports, files, and classification systems and ways of using them to do law create legal time); CAROL J. GREENHOUSE, A MOMENT'S NOTICE: TIME POLITICS ACROSS CULTURES 1 (1996) (seeing time as cultural and analyzing "the ways that people talk about and use representations of time in social life, ideas that developed independently of whatever 'real time' might be") By "legal time," we mean issues such as the definition of a "day" for the purposes of filing a document, as distinct from the time of the law's own existence. For a study of the latter, see KUNAL M. PARKER, COMMON LAW, HISTORY, AND DEMOCRACY IN AMERICA, 1790–1900: LEGAL THOUGHT BEFORE MODERNISM 15–16, 25–66 (2011) (probing, for example, the "immemoriality" of the common law and its implications for the common law's ability to change).

179 *See* Alexandre Pilenko, *Le droit spatial et le droit international privé dans le projet du nouveau code Civil français* [Spatial Law and Private International Law in the Draft of the New French Civil Code], 6 REVUE HELLÉNIQUE DE DROIT INT'L 319, 351 (1953) (stating that "[s]i on parle du temps, il faut parler, aussi, de l'espace" ["if we speak of time, we must also speak of space"]).

180 *Cf.* David M. Engel, *Law, Time, and Community*, 21 LAW & SOC'Y. REV. 605 (1987).

181 CAL. CIV. PROC. CODE § 335.1 (West 2003).

182 Minbeob [Civil Act], Act No. 471, Feb. 22, 1958, art. 766(1) (S. Kor.).

twenty years from the date of the harm, whichever is longer.[183] We will assume that the plaintiff did not know the identity of the defendant until less than three years ago. Accordingly, the statute of limitations would have run if this were a purely domestic Californian case, but not if it were a purely Korean case brought in Korea or a purely Japanese case brought in Japan.

Even if a California court concludes that it should apply the Korean or Japanese statute of limitations instead of its own, conflicts doctrine recognizes that it may not do so exactly as a Korean court or a Japanese court might. In California, a doctrine of equitable tolling gives the court discretion to avoid the strict application of a statute of limitations where justice so demands.[184] The Supreme Court of Korea, likewise, has allowed individual claims for wartime compensation to proceed despite the Korean statute of limitations.[185] The application of Japan's statute of limitations may involve, on the one hand, the theory of *Ausschlussfrist* or *délai préfix*, according to which the passage of time extinguishes the right altogether, and, on the other, the finding that interpreting the time bar as *Ausschlussfrist* would be contrary to ideals of justice and fairness in cases of postwar reparations claims.[186] Our conflicts inquiry could

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183 *See* MINPO [CIV. C.] art. 724 (Japan) ("The right to demand compensation for damages in tort shall be extinguished by the operation of prescription if it is not exercised by the victim or his/her legal representative within three years from the time when he/she comes to know of the damages and the identity of the perpetrator. The same shall apply when twenty years have elapsed from the time of the tortious act."); Saiko Saibansho [Sup. Ct.] Apr. 22, 2011, Hei 23 no. 236 SAIKO SAIBANSHO SAIBANSHU MINJI [SAISHU MINJI] 443, 446 (Japan); Saiko Saibansho [Sup. Ct.] Jan. 29, 2002, Hei 14 no. 56, 1 SAIKO SAIBANSHO MINJI HANREISHU [MINSHU] 218, 222 (Japan); Saiko Saibansho [Sup. Ct.] Nov. 16, 1973, Sho 48 no. 27, 10 SAIKO SAIBANSHO MINJI HANREISHU [MINSHU] 1374, 1375 (Japan); Saiko Saibansho [Sup. Ct.] Nov. 30, 1967, Sho 42 no. 89 SAIKO SAIBANSHO SAIBANSHU MINJI [SAISHU MINJI] 279, 280 (Japan); *see also* MINPO [CIV. C.] art. 166 (Japan) ("The extinctive prescription commences to run when it has become possible to exercise the right.").

184 Equitable tolling applies when extraordinary circumstances make it impossible for a plaintiff to file the claim on time. On this basis, it could be argued that our hypothetical suit is also not time-barred under California law. *See* You v. Japan, 150 F. Supp. 3d 1140, 1148–49 (N.D. Cal. 2015).

185 *See supra* note 100 and accompanying text.

186 *See* Bong, *supra* note 97, at 197–200. Anthropologist Yukiko Koga describes how the ideals of justice and fairness have prevailed over the time bar in several cases brought by Chinese victims of wartime forced labor, contrary to the conventional wisdom that the plaintiffs' Japanese lawyers were "insane" to try to overcome the statute of limitations. Koga, *Between the Law*, *supra* note 97, at 420–21 (quoting Japanese lawyer Hayashi Toshitaka).

Although lower Japanese courts have quite often courageously mapped out new ways of thinking about important issues of social justice in cases ranging from environmental damage to minority rights to the presence of U.S. bases and national electoral politics, such decisions usually have been summarily overturned on appeal as higher courts shy away from issuing rulings that directly

go on, then, as some conflicts cases have,[187] to ask *whose* sense of justice and fairness applies: the forum's, or that of the foreign legal system?

This inquiry into endpoints also brings the court into intellectual contact with the postcolonial histories at issue in this case. On one legal approach, the relevant statute of limitations would be the statute in force at the time the harms occurred. But what are "Korea" and "Korean law" for these purposes? When the Comfort Women system was instituted for the Japanese troops before and during World War II, Korea was already a Japanese colony.[188] Its legal system consisted of a complex mix of national law and imperial law. Was Korea a territory of Japan, a colony, or an occupied state?[189] If the court were to conclude instead, as many scholars recommend, that the forum apply the current law of the foreign jurisdiction,[190] it

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conflict with government policy. *See generally* FRANK K. UPHAM, LAW AND SOCIAL CHANGE IN POSTWAR JAPAN (1987). In this vein, consider the overruling of a lower court's judgment that the legislature's failure to pass a reparations law regarding the Comfort Women was unconstitutional. Bong, *supra* note 97, at 194–95; *The "Comfort Women" Case*, *supra* note 101. In an analogous case involving forced labor, for example, a Japanese district court waived the statute of limitations bar to the claim on the ground that to refuse to allow such claims to go forward would be contrary to the ideal of justice and fairness. Koga, *Between the Law*, *supra* note 97, at 405 (internal citations omitted); *see also* Hiroshi Matsubara, *Mitsui Case Breaks New Ground for Wartime Redress*, JAPAN TIMES (Apr. 27, 2002), http://www.japantimes.co.jp/news/2002/04/27/national/mitsui-case-breaks-new-ground-for-wartime-redress/ [https://perma.cc/ELQ3-FQPG]. The decision was overturned by the High Court on appeal. Bong, *supra* note 97, at 199; Fukuoka Koto Saibansho [High Ct.] May 24, 2004, Hei 14 (ne) no. 511, 1875 HANREI JIHO 62 (Japan).

187 *Compare* Desautels v. Katimavik [2003], 174 O.A.C. 201 (Can. Ont. C.A.) (stating, in the concurrence, that a forum court could not avoid a foreign limitations period by exercising its inherent discretion), *with Mercantile Mut Ins (Austl) Ltd v Neilson*, [2004] WASCA 60 (finding that the forum judge must look to how foreign judge would exercise discretion regarding the time bar in the foreign law), *rev'd on other grounds sub nom. Neilson v Overseas Projects Corp of Victoria Ltd* [2005] HCA 54 (Gummow and Hayne JJ. finding, on a different point about discretion, that if expert evidence fails to establish how a foreign court would exercise its discretion, the forum court must presume that it would be exercised the same way as in the forum court). For a recent example of the complexity of exercising discretion as a foreign judge would, see Ministry of Defence v. Iraqi Civilians [2016] UKSC 25 (appeal taken from Eng.).

188 *See* MARIE SEONG-HAK KIM, LAW AND CUSTOM IN KOREA: COMPARATIVE LEGAL HISTORY 181 (2012).

189 *See id.* (describing shifts in Japan's own legal interpretation of Korea's legal status from the early 1900s through World War II).

190 *See* Mann, *supra* note 31, at 233. *But see* PATRICK COURBE, LES OBJECTIFS TEMPORELS DES RÈGLES DE DROIT INTERNATIONAL PRIVÉ [THE TEMPORAL OBJECTIVES OF THE RULES OF PRIVATE INTERNATIONAL LAW] 251 (1981) (arguing that courts should interpret the conflict between the old and new laws of the foreign jurisdiction as a conflict-of-laws problem of its own to be addressed using the forum's conflicts principles).

would look to postwar Korean law rather than to the prior colonial law. One legacy of Japanese imperialism, though, has been the legal transplantation of many key elements of Japanese law to Korea, and for this reason, Japanese and Korean procedural law are still quite similar.[191] Indeed, on the applicable statute of limitations for torts, they are functionally identical.[192] Ironically, the legacy of Japan's colonization of Korea would give the Korean plaintiffs a tactical advantage because both Korean and Japanese laws favor the Korean plaintiffs.

Thus a seemingly mundane question in conflict of laws—which jurisdiction's statute of limitations applies—begins with a core insight: legal time is local. It is politically as well as spatially dispersed.

C. Relative Time

Conflict techniques also proceed from the strong normative assumption that legal time is *relative*. In our hypothetical, the judge must choose between the statutes of limitations of three jurisdictions: California, Japan, and Korea. This decision does not entail a normative choice of one over the other; it is not that one is superior or preferable in some universal sense. Rather, the choice is more narrow and technical: which of these applies in this particular case? Other legal perspectives on time can thus be relevant without being applicable, and inapplicable without being wrong. The judge's choice is a limited and circumspect one, made with full awareness that another court in another jurisdiction might have good reasons to choose differently.[193]

A California court would analyze the choice-of-law question for the statute of limitations independent of the choice-of-law question for the underlying tort, such that the court might find that the law of State A applies to the underlying substantive claim while the law of State B applies to whether or not the statute of limitations has run on that claim.[194] Thus, even if

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191 *See* KIM, *supra* note 188, at 271 (concluding that the drafters of the Korean Civil Code, which includes the statute of limitations for tort, "made little attempt to depart drastically from Japanese law").

192 *See supra* notes 182–183.

193 *See* Knop, Michaels & Riles, *From Multiculturalism*, *supra* note 33, at 634–35.

194 Courts traditionally treated statutes of limitations as procedural and mandated that the court apply its own statute of limitations to the case in much the same way as it would follow its own procedural rules. *See* Sam Walker, *Forum Shopping for Stale Claims: Statutes of Limitations and Conflict of Laws*, 23 AKRON L. REV 19, 21–22 (1989). Underpinning this view was the traditional common law characterization of statutes of limitations as part of the legal process and as a

California's own statute of limitations would direct the court to dismiss, its conflicts law might lead it to hear the case on the basis of the application of a foreign statute of limitations. Or, conversely, even if the foreign state's law would draw the past to a close, the forum might adjudicate a wrong committed there nonetheless because the forum's conflicts law directs the court to apply some other statute of limitations—either its own or that of yet a third jurisdiction.

What intrigues us here is the normative assumption behind such strategic possibilities. The conflicts approach to time, unlike international criminal law's approach, for example, is not universal. It acknowledges that individuals from different states, and even states beyond those of the individuals' nationality or that of the territory where the wrong occurred, each bring to the dispute their own local understandings of when a matter might be open or closed.

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limitation on the remedy, rather than the right to recover. *See* David G. Owen, *Special Defenses in Modern Products Liability Law*, 70 MO. L. REV. 1, 43–44 (2005); Walker, *supra*, at 21–22; Ibrahim J. Wani, *Borrowing Statutes, Statutes of Limitations and Modern Choice of Law*, 57 UMKC L. Rev. 681, 685–86 (1989). During the twentieth century, this approach met increasing criticism, much of which focused on the meaninglessness of suggesting that the legal right in a cause of action remained even though a remedy was unavailable. *See, e.g.*, James A. Martin, *Statutes of Limitations and Rationality in the Conflict of Laws*, 19 WASHBURN L.J. 405, 419–20 (1980). Another concern was the incentive that existed to forum shop for long limitation periods if the statute of limitations varied with the forum. *See* CLYDE SPILLENGER, PRINCIPLES OF CONFLICT OF LAWS 39 (2010); Robert Allen Sedler, *The Truly Disinterested Forum in the Conflict of Laws:* Ratliff v. Cooper Laboratories, 25 S.C. L. REV. 185, 197 (1973); Symeon C. Symeonides, *Louisiana Conflicts Law: Two "Surprises,"* 54 LA. L. REV. 497, 532 (1994); Walker, *supra*, at 19.

Approximately half of U.S. jurisdictions currently follow one of three modern approaches. The first is to treat statutes of limitation as substantive: the limitations period comes from whichever jurisdiction provides the bulk of the substantive law. This approach has been codified in the Uniform Conflict of Laws-Limitations Act, which has been adopted by seven states. Outside of the United States, much of the common law and civilian world also follows this model. *See* PETER HAY ET AL., CONFLICT OF LAWS 175 (5th ed. 2010); STEPHEN G.A. PITEL ET AL., PRIVATE INTERNATIONAL LAW IN COMMON LAW CANADA: CASES, TEXT AND MATERIALS 592–601 (4th ed. 2016); WEINTRAUB, *supra* note 172, at 72–73. Second, the U.S. Second Restatement of Conflict of Laws goes a step further and does away with the language of substance and procedure altogether in favor of a rebuttable presumption that the forum's shorter statute of limitations applies. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 142 (AM. LAW INST. 1971). In general, unless the exceptional circumstances of the case make such a result unreasonable, the forum will apply its own statute of limitations barring the claim. The last modern alternative is the approach followed by California courts. *See* Symeon C. Symeonides, *Choice of Law in the American Courts in 2012: Twenty-Sixth Annual Survey*, 61 AM. J. COMP. L. 217, 280 n.352 (2013) [hereinafter Symeonides, *Choice of Law in American Courts in 2012*].

Therefore, shutting down or reopening the past in any jurisdiction is always contingent and particular.

D. Mixing and Matching Time

Indeed, conflict of laws comfortably tolerates temporal complexity. What if, as between California, Japan, and Korea, the rules of conflict of laws themselves conflict? Can we have a conflict of conflict of laws—a thinking in multi-temporal terms about that very act of thinking?[195] And can we carve up the issues and imagine that, for example, Japanese law governs whether the Comfort Women plaintiffs were falsely imprisoned and California law decides whether that claim is time barred, while Korean law governs whether they have a cause of action for intentional infliction of emotional distress, for which California law determines the quantification of damages?

The answer is yes. Under a conflicts doctrine known as *dépeçage*, literally "dividing or carving up," the court slices the issues so as to recognize that an injury has many different angles and dimensions, each of which might fall under different authorities and have different sources of legitimacy. Furthermore, if the substance of the claim is split into different issues that are not all governed by the same jurisdiction's law, then more than one jurisdiction's statute of limitations may likewise apply.[196] The result is that some issues may be time-barred, while others are governed by a longer limitation period.

To some, this mixing and matching of time may sound absurd and possibly dangerous. But it takes for granted something that pervades the experience of the Comfort Women issue: the way things bubble up, uncannily, and recombine in all sorts of distant spaces, expected and unexpected. It is quite literally the decentered global perspective—neither here nor there—that Stuart Hall has termed "postcolonial."[197]

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195 As our Article is intended as an interdisciplinary experiment, we do not pursue all of the possible doctrinal complexities. *See, e.g.*, RICHARD GARNETT, SUBSTANCE AND PROCEDURE IN PRIVATE INTERNATIONAL LAW 278–81 (2012) (discussing the complex issue known as "*renvoi*": once a court has determined that the applicable law is that of country X, does it apply the domestic limitation law of X even if a court in X would not apply its limitation law on the facts of the case?).

196 On the view that a statute of limitations can be substantive rather than procedural, see *supra* note 194.

197 *See* Stuart Hall, *When Was 'The Post-Colonial'? Thinking at the Limit*, *in* THE POST-COLONIAL QUESTION: COMMON SKIES, DIVIDED HORIZONS 242, 247 (Iain Chambers & Lidia Curti eds., 1996).

IV
SPATIO-TEMPORAL DIFFUSION

The three conflict-of-laws techniques just described give us a new appreciation for the challenges, consequences, and opportunities posed by spatio-temporal diffusion. In this light, we now return to Comfort Women Trouble.

A. Noticing Time Across Space: Proliferation, Dispersion, and Undecidability

Let us start with the most basic conflicts insight: that "the problem" takes different forms in different jurisdictions. We called this "noticing time across space" because *when* a harm occurred, when it might come to an end, and when an issue opens or achieves closure depend very much on *where*—on the locales in which the harms, the remedies, the strategies, and the responses are framed. Rather than understanding the following snapshots as pieces of a singular movement toward one comprehensive resolution of the Comfort Women issue, we now can notice how they refract the issue, changing time by changing place, opening it where it was closed, spreading it into locales where it had no history, making past and present into their own conflict of laws:

- South Korea, 2011: The Constitutional Court of Korea holds the Korean government liable for violating the present-day constitutional rights of the Comfort Women plaintiffs because it has not done enough to seek compensation from Japan.[198]
- 2011: *Onward Towards Our Noble Deaths*, by the Japanese manga artist Shigeru Mizuki, known for his children's cartoons, becomes his first book to be translated into English.[199] A "devastatingly blunt portrayal[ ]" of his time as a Japanese infantry soldier and of Japan's wartime behavior, this illustrated memoir describes a "comfort station" in detail and is greeted as an important act of witnessing.[200]

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198 Lee, O-Soo v. Minister of Foreign Affairs, *supra* note 53. *See also* Monica Eppinger, Karen Knop & Annelise Riles, *Diplomacy and Its Others: The Case of the Comfort Women*, 6 EWHA J. GENDER & LAW 1, 23 (2014) (analyzing the judgment and its legal, diplomatic, and political effects).

199 Matt Alt, *Shigeru Mizuki's War-Haunted Art and Life*, NEW YORKER (Dec. 10, 2015), http://www.newyorker.com/culture/culture-desk/shigeru-mizukis-war-haunted-creatures [https://perma.cc/3Y22-ZXYN]; *Onward Towards Our Noble Deaths by Shigeru Mizuki*, DRAWN & QUARTERLY, https://www.drawnandquarterly.com/onward-towards-our-noble-deaths [https://perma.cc/ERD6-UHCD].

200 Alt, *supra* note 199; Okano Yayo, *Toward Resolution of the Comfort Women Issue—The 1000th Wednesday Protest in Seoul and Japanese Intransigence*, ASIA-

- North Korea, 2012: South Korean activists representing Comfort Women work with their North Korean counterparts on a statement calling for an apology from Japan.[201] They are fined for making unauthorized contact with North Koreans.
- Tokyo, 2012: A photography exhibit featuring close-ups of the aged faces of living Comfort Women creates political controversy for Nikon, which owns the gallery.[202] When Nikon tries to shut down the exhibit, a Japanese court orders the corporation to let it proceed. In December 2015, the Tokyo District Court orders Nikon to pay damages to the photographer.[203]
- The Internet, 2012: Japanese and Korean activists file suit demanding that the Japanese government release historical documents related to the Comfort Women.[204] When a Japanese court rules in their favor, they post the documents on the Internet.[205]
- New York City, 2013: As part of a travelling multimedia exhibition, a Korean-born, New York-based artist designs authentic-looking "Comfort Women Wanted" recruiting

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PACIFIC J., Dec. 2012, at 1 (A. Tawara et al. trans.), http://apjjf.org/-Okano-Yayo/3863/article.pdf [https://perma.cc/2GVK-GWGP].

201 *See* Adam Westlake, *'Comfort Women' Activists Fined for Making Illegal Contact with North Korea*, JAPAN DAILY PRESS (Sept. 21, 2012), http://japandailypress.com/comfort-women-activists-fined-for-making-illegal-contact-with-north-korea-2112858/ [https://perma.cc/YTJ3-X8Y4]. The claims of North Korean Comfort Women are not covered by the 1965 bilateral agreement between Japan and South Korea. *See* 1965 Agreement, *supra* note 90; Rob York & Hayoung Choi, *Unresolved Issues Haunt Comfort Women Agreement*, N. KOR. NEWS (Jan. 5, 2016), https://www.nknews.org/2016/01/unresolved-issues-haunt-comfort-women-agreement/ [https://perma.cc/TZ8L-UJ8K].

202 *See* Miho Inada, *Judge Orders Nikon to Hold 'Comfort Women' Photo Exhibit*, WALL STREET J. (Jun. 25, 2012, 7:49 PM), http://blogs.wsj.com/japanrealtime/2012/06/25/judge-orders-nikon-to-hold-comfort-women-photo-exhibit/?mod=WSJBlog [https://perma.cc/4RUW-X5MV]; Miho Inada, *Nikon Cancels 'Comfort Women' Photo Exhibit*, WALL STREET J. (May 28, 2012, 7:52 PM), http://blogs.wsj.com/japanrealtime/2012/05/28/nikon-cancels-comfort-women-photo-exhibit/ [https://perma.cc/9MJ5-P3AX].

203 *Korean 'Comfort Women' Photographer Wins Lawsuit Against Nikon*, YAHOO! NEWS (Dec. 25, 2015), https://www.yahoo.com/news/korean-comfort-women-photographer-wins-lawsuit-against-nikon-104837488.html [https://perma.cc/282C-TJM9].

204 *See* Max Slater, *Japan Court Orders Government to Disclose Treaty with Korea on Sex Slavery*, JURIST (Oct. 11, 2012, 10:35 AM), http://jurist.org/paperchase/2012/10/japan-court-orders-government-to-disclose-treaty-with-korea-on-sexual-slavery.php [https://perma.cc/K7A7-39D6].

205 *JWRC Home Page*, CTR. RES. & DOCUMENTATION ON JAPAN'S WAR RESP., http://space.geocities.jp/japanwarres/center/english/index-english.htm [https://perma.cc/MV66-SBZS].

> posters that she displays as advertisements on a Times Square phone booth and a Chelsea street.[206]

In each of these examples, the trauma of the past is very much a problem for the present, whether it is the first person account of long-kept secrets, the aging of biological bodies that physically connects past to present, or performance art that interpolates us into the past in the form of an advertisement stylistically queued to its time. In his work on memory in the aftermath of the Holocaust, historian Dominick LaCapra points to the "repetitive temporality" of experiences and efforts to represent the trauma of extraordinary violence.[207] This repetitive quality—the way the past pops up again and again—has to do with the larger impossibility of representing such trauma for oneself or to others:

> Trauma brings about a dissociation of affect and representation: one disorientingly feels what one cannot represent; one numbingly represents what one cannot feel. Working through trauma involves the effort to articulate or rearticulate affect and representation in a manner that may never transcend, but may to some viable extent counteract, a reenactment, or acting out, of that disabling dissociation.[208]

The popularity in contemporary Japan of magical realist novels in which characters moving through everyday life suddenly fall into a rabbit hole of time and find themselves in the midst of violent scenes from World War II, or through happenstance come into contact with family secrets and the legacies of family members' wartime actions, gives expression to the experience of being caught in and tormented by the past, despite one's full integration into the present.[209]

One implication is that any particular moment of closure produces traces or remainders for reopening elsewhere. In this vein, the feminist philosopher and historian Elizabeth Grosz has critiqued "the very idea that we can find a solution to . . .

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206 *See* Chang-Jin Lee, *Comfort Women Wanted*, CHANGJINLEE.NET, http://www.changjinlee.net/cww/index.html [https://perma.cc/4EMJ-QHHS]; Katherine Brooks, *The History of 'Comfort Women': A WWII Tragedy We Can't Forget*, HUFFINGTON POST (Nov. 25, 2013, 8:52 AM), http://www.huffingtonpost.com/2013/11/25/comfort-women-wanted_n_4325584.html [https://perma.cc/J7M4-WLR4].

207 DOMINICK LACAPRA, REPRESENTING THE HOLOCAUST: HISTORY, THEORY, TRAUMA 9 (1994).

208 DOMINICK LACAPRA, WRITING HISTORY, WRITING TRAUMA 42 (2014).

209 *See, e.g.*, MATTHEW CARL STRECHER, DANCES WITH SHEEP: THE QUEST FOR IDENTITY IN THE FICTION OF MURAKAMI HARUKI (2002) (examining Murakami's treatment of the past).

the question of violence."[210] Grosz borrows Jacques Derrida's term "undecidability" to highlight the violence at stake in any political or legal decision that aims to resolve past acts of violence: "[N]o political protocol, no rhetorical or intellectual ploy is simply innocent, motivated by reason, knowledge, or truth alone, but carries with it an inherent undecidability, an inherent iterability or repeatability that recontextualizes it and frees it from any specifiable or definitive origin or end."[211]

From this point of view, an obsessive desire to reach resolution in the law encounters time and again the law's own undecidability:

> Undecidability dictates that the signification and effect of events or representations can never be self-present insofar as they always remain open to what befalls them, always liable to be placed elsewhere: in other words, it dictates that it is only futurity, itself endlessly extended to infinity, that gives any event its signification, force, or effect. Which has terrifying consequences for those who would like to correct situations or contexts here and now, and once and for all. What the principle of undecidability implies is that the control over either the reception or the effect of events is out of our hands . . . .[212]

Some feminists have responded to this condition, in which the past haunts the present and the future, with calls for more "polytemporal" forms of politics: celebrations of nonlinear temporalities that would blend recollection and expectation, would be "multidirectional," and thus could "facilitate productive conversations between feminisms of the past and the present."[213] Victoria Browne proposes that

> historical time should be understood as *polytemporal*. It is an internally complex, "composite" time, generated through the interweaving of different temporal layers and strands. As such, there is no "one" historical time or temporal structure within which diverse histories are all embroiled. On the contrary, there will always be multiple, shifting patterns of historical time, as different histories have their own mixes of time and their own temporalities.[214]

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210 ELIZABETH GROSZ, TIME TRAVELS: FEMINISM, NATURE, POWER 57 (2005).
211 *Id.* at 59.
212 *Id.* at 65.
213 BROWNE, *supra* note 77, at 2 (citations omitted).
214 *Id.*

B. Mixing and Matching Time: Recognizing Polytemporality and Being Out of Sync

If polytemporality sounds like a bizarre flight of theory, it is not so different from the conflicts technique of *dépeçage*, in which time is mixed and matched because each issue is potentially subject to the statute of limitations of a different jurisdiction. Moreover, the explicit nature of the expression of polytemporality in conflicts helps us to notice similar polytemporal exercises in other political and legal projects. Consider the construction of time in the following remarkable effort by the NGO community to address the Comfort Women issue—a legal fiction that passed virtually unnoticed, or at least unremarked on, other than by one of us whose analysis reflects a conflict-of-laws sensibility.[215]

When global feminists turned their attention to sexual violence in armed conflict in the 1990s, there seemed to be little prospect of achieving official justice for the increasingly frail and elderly Comfort Women. The postwar Tokyo Tribunal had long ceased to exist, and the International Criminal Court, not established until 2002, would have no jurisdiction over earlier international crimes.[216] In response, women's and human rights NGOs from across Asia staged a Women's International War Crimes Tribunal for the Trial of Japan's Military Sexual Slavery (the "Tokyo Women's Tribunal") in 2000 to prosecute rape and sexual slavery in the Comfort Women system as crimes against humanity.[217] Despite its unofficial nature, the Tokyo Women's Tribunal adhered meticulously to legal processes and formalities.[218] Prosecution teams came from ten countries; an amicus curiae represented Japan based on the Japanese government's position in related cases; sixty-four

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215 Knop, *supra* note 24.

216 Rome Statute of the International Criminal Court art. 11, July 17, 1998, 2187 U.N.T.S. 3 (entered into force July 1, 2002).

217 Judgment of the Tokyo Women's Tribunal, *supra* note 3. On the Tokyo Women's Tribunal, see, for example, Christine Chinkin, *Peoples' Tribunals: Legitimate or Rough Justice*, 24 WINDSOR Y.B. ACCESS JUST. 201 (2006); Alexis Dudden, *"We Came to Tell the Truth": Reflections on the Tokyo Women's Tribunal*, 33 CRITICAL ASIAN STUD. 591 (2001); Knop, *supra* note 24; Yayori Matsui, *Women's International War Crimes Tribunal on Japan's Military Sexual Slavery: Memory, Identity, and Society*, 19 E. ASIA 119 (2001); Indai L. Sajor, *Challenging International Law: The Quest for Justice of the Former "Comfort Women," in* GLOBAL ISSUES: WOMEN AND JUSTICE (Sharon Pickering & Caroline Lambert eds., 2004); Rumi Sakamoto, *The Women's International War Crimes Tribunal on Japan's Military Sexual Slavery: A Legal and Feminist Approach to the 'Comfort Women' Issue*, 3 N.Z. J. ASIAN STUD. 49 (2001).

218 Vera Mackie, *In Search of Innocence: Feminist Historians Debate the Legacy of Wartime Japan*, 20 AUSTL. FEMINIST STUD. 207, 207 (2005).

Comfort Women attended; and the witnesses included two Japanese soldiers who testified about their participation in the Comfort Women system.[219] A panel of internationally recognized experts, including former international and national judges, found the late Emperor Hirohito and nine other defendants guilty before an audience of over a thousand people and subsequently issued a written judgment of over 250 pages.[220] The Tribunal also received considerable media attention, enhanced by a lawsuit over the Japan Broadcasting Corporation's ("NKH") decision to censor and alter a documentary about it at the request of conservative Japanese politicians.[221] Indeed, the Philippine Supreme Court cites the judgment of this unofficial tribunal in its own Comfort Women judgment.[222] In the context of polytemporality and *dépeçage*, what is perhaps most intriguing about the Tokyo Women's Tribunal, and yet is scarcely registered in the literature, is the novel temporal identity that it adopted for itself. The Tribunal asserted that it was judging the crimes "*as if it were* a reopening or continuation" of the official postwar Tokyo Tribunal and subsidiary trials.[223] As a practical legal matter, the fiction that the tribunal was sitting in the 1940s overcame a series of time-related obstacles, including amnesties, statutes of limitations, and double jeopardy. This fiction also had the moral and political effect of showing that the original tribunal *could* have convicted with the legal and evidentiary resources available at the time.[224] Further, as with *dépeçage*, the Tokyo Women's Tribunal did

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219 Judgment of the Tokyo Women's Tribunal, *supra* note 3, at 3, 8–9.

220 *See id.*; Chinkin, *supra* note 217, at 214–15.

221 *See "NHK ga Bangumi Kaihen" 200-man'en Baijou Meijiru Tokyo Kousai*, ASAHI SHIMBUN, Jan. 30, 2007, at 1; Matthew Penny, *The NHK Comfort Women Documentary – 10 Years Later*, ASIA-PACIFIC J., http://www.japanfocus.org/events/view/39 [https://perma.cc/94LX-5BL9]; Saiko Saibansho [Sup. Ct.], June 12, 2008, Hei 2007 (Ju) No. 808, 62 SAIKO SAIBANSHO MINJI HANREISHU [MINSHU] 6 (Japan), http://www.courts.go.jp/english/judgments/text/2008.06.12-2007.-Ju-.No. .808.to.813.html [https://perma.cc/Q84N-DBHP]; *see also* Yayori Matsui, *Why Do We Sue NHK?*, DOAM (July 24, 2001), http://www.doam.org/index.php/projekte/menschenrechte/trostfrauen/273-pr-mr-cw-nhk-matsui [https://perma.cc/V9MZ-H2DH] (describing the case from her perspective as plaintiff and Chairperson of the Violence Against Women in War - Network Japan ("VAWW-Net Japan")); Lisa Yoneyama, *Letter of Protest to NHK*, KOREANSTUDIES.COM (Mar. 1, 2001), http://koreanstudies.com/pipermail/ksopen_koreanstudies.com/2001-March/000213.html [https://perma.cc/ER37-Q3MP].

222 Vinuya v. Executive Secretary, G.R. No. 162230, 10 nn.31–32 (S.C., Apr. 28, 2010) (Phil.), http://sc.judiciary.gov.ph/jurisprudence/2010/april2010/162230.htm [https://perma.cc/C83Z-UFXP] (describing the effort and legal expertise involved but stressing that the judgment was not legally binding).

223 Judgment of the Tokyo Women's Tribunal, *supra* note 3, at 19 (emphasis added); Knop, *supra* note 24, at 146.

224 Knop, *supra* note 24, at 147–48, 157–58.

not retain its 1940s identity throughout the judgment. It also went on to try present-day Japan; specifically, whether the state had a duty to prevent and repair the crimes against the Comfort Women and if so, whether Japan's failure to fulfill this duty amounted to a continuing breach of its responsibility.[225]

Yet, despite these temporal innovations, the Tokyo Women's Tribunal and the larger impulse to make feminist politics more "polytemporal" pay little attention to a crucial point about Comfort Women Trouble: all of these repetitions, the way in which what is repressed returns over and over, are engendered by the spatial, or jurisdictional, dispersion of the problem. It is not only that Comfort Women Trouble keeps reappearing; it is that each time it seems to be put to rest in one locale, it reappears somewhere else. As space-times proliferate, a new kind of problem—a new kind of harm—comes to characterize the trans-local experience of injustice: other temporalities continually intrude, elsewhere, continually reappear unannounced and uninvited, here and everywhere.

One of the features of this condition is that events seem continually out of sync with one another. For example, Korean feminist anthropologists have expressed confusion and even exasperation at the obsession of Korean-Americans with the Comfort Women issue. They argue that Korean women face more pressing problems, such as economic inequality,[226] and they worry about the appropriation of the issue by Korean nationalists.[227] To them, Korean-American women who agitate

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225 *See* Judgment of the Tokyo Women's Tribunal, *supra* note 3, at 205–53; Knop, *supra* note 24, at 158.

226 *See, e.g.*, Hae-Joang Cho Han "조한혜정의 세번째 편지" ["Hae-Joang Cho Han's Third Letter"], 당대비평, No. 24 (2004); Eun-shil Kim "민족담론과 여성: 문화, 권력, 주체에 관한 비판적 읽기를 위하여" ["Nationalist Discourse and Women: Toward a Critical Reading of Culture, Power, and Subject"] (1994).

227 *See, e.g.*, Hyunah Yang, *Re-membering the Korean Military Comfort Women: Nationalism, Sexuality, and Silencing*, *in* DANGEROUS WOMEN: GENDER AND KOREAN NATIONALISM 123, 129 (Elaine H. Kim & Chungmoo Choi eds., 1998) (arguing that Koreans' us/them attitude toward Japan casts Japan as the offender and solidifies Korea's collective identity as the victim and, in turn, "provides convenient as well as obfuscating logic through which complex issues such as the history of Military Comfort Women have been explained"); Hae-Joang Cho Han, *supra* note 226, at 140 (noting that "when the Comfort Women issue exploded . . . in 1992, the issue was promptly articulated in terms of . . . nation-state" and describing her feelings of shock at the courageous testimonies but also a feeling of strangeness that "the sexual victimization of women is only problematized when it serves nationalism"); Kim, *supra* note 226, at 41 ("The comfort women who were violated by the Japanese military are a symbol of anti-imperialism that recreates the suffering of the Korean people. Nationalist discourse denies the specificity of women's experience and universalizes them as a national issue by imposing a

about Comfort Women are "behind" cutting-edge feminist positions. Some Korean-American scholars counter that the Comfort Women issue is not only a Korean issue but also a "Korean-American" issue, with different implications for the latter than for the former.[228] For them, it is Korean feminism that is behind. This curious and disjunctive temporality is in part a condition of the spatial diffusion of the event itself, accelerated by the global circulation of people, resources, and ideas—a diffusion that becomes more intensified and pronounced by the very time lag between the events at issue and the present.

Here, a conflicts approach echoes insights from parallel fields such as critical geography, phenomenological anthropology, and postcolonial theory. Feminist legal sociologist Mariana Valverde has powerfully argued that space and time need to be treated together in socio-legal studies.[229] Valverde borrows Mikhail Bakhtin's notion of the "chronotope," itself transposed from 1920s science to literary analysis, to urge scholars to "explore how different legal times create or shape legal spaces, and how the spatial location and spatial dynamics of legal processes in turn shape law's times—how spatial dynamics 'thicken' time."[230]

Working from a phenomenological perspective, likewise, anthropologist Nancy Munn outlines a notion of spatiotemporalization that "views time as a symbolic process contin-

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greater symbolic meaning on sexual violence. In other words, it is the Korean people, not the women, who are taken to have been abused by the Japanese. Since the nation itself is the problem, the crime of rape is not given much meaning in the national discourse until it is committed by Japanese colonial rule.").

228 *Compare* Kandice Chuh, *Discomforting Knowledge: Or, Korean "Comfort Women" and Asian Americanist Critical Practice*, 6 J. ASIAN AM. STUD. 5, 9–10 (2003) (arguing that "the claiming of 'comfort woman' as an Asian American issue might productively shape Asian Americanist inquiry insofar as it translates into the advancement of a critique of the racialized and sexualized practices of the intersecting modernities of Japan, Korea, and the United States . . . . '[C]omfort woman' . . . speaks to the operations of . . . gender, sexuality, race, class, empire, and nation [and, as a] . . . formation that is excessive to any of those frames, . . . leverages our critique of each, actively challenging Asian American studies to recognize critically their intimate interrelation"), *with* Laura Hyun Yi Kang, *Conjuring "Comfort Women": Mediated Affiliations and Disciplined Subjects in Korean/Asian Transnationality*, 6 J. ASIAN AM. STUD. 25, 44, 47 (2003) (contesting what she refers to as the "discursive Americanization" of Comfort Women and arguing that "[t]he Korean/American conjuring[ ] of comfort women must resist the drawing of our intense investments toward the 'back then' and 'over there' if that would make us forget the possibilities and pitfalls of our vexed and incomplete entanglements in the here and now").

229 *See* Mariana Valverde, *"Time Thickens, Takes on Flesh": Spatiotemporal Dynamics in Law*, *in* THE EXPANDING SPACES OF LAW: A TIMELY LEGAL GEOGRAPHY 67 (Irus Braverman et al. eds., 2014).

230 *Id.* at 69.

ually being produced in everyday practices."[231] Her feminist redescription of Melanesian Kula exchange (once portrayed by Malinowski in terms that emphasized the agentive power of men conducting the exchanges) emphasizes the relational and intersubjective construction of "space-times" in ways that valorize the most mundane forms of labor as constitutive of the "givens" of time and space.[232] For example, the physically laborious and time-delimited act of creating a canoe to be exchanged at a wedding or funeral for the islanders that Munn studied, engenders the longer-term temporality of a debt that must be reciprocated in future years or generations, but also provides the means for geographical travel, literally bringing one island into co-spatiality with the next.[233] As she explains elsewhere:

> [T]ime-reckoning in general is constituted not merely in the conceptual reference point or codified system of timing, but also in the actor's "attending to" such a reference point as part of a project that engages the past and future in the present—the space-time or "here-now" of the project. Actors are not only "in" this time (space-time), but they are constructing it and their own time in the particular kinds of relations they form between themselves (and their purposes) and the temporal reference points (which are also spatial forms).[234]

From this point of view, "[p]eople are 'in' a sociocultural time of multiple dimensions (sequencing, timing, past-present-future relations, etc) that they are forming in their 'projects.'"[235]

Working in a postcolonial tradition, Michael Rothenberg uncovers successive periods of cross-referencing between the legacies of the Holocaust and colonialism, leading him to propose an ethics of "multidirectional memory" that would be faithful to ways that collective memory is formed and reformed in multicultural and transnational spaces, and thereby contribute to a better framing of justice in a globalizing world.[236]

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231 Nancy D. Munn, *The Cultural Anthropology of Time: A Critical Essay*, 21 ANN. REV. ANTHROPOLOGY 93, 116 (1992).

232 *See* NANCY D. MUNN, THE FAME OF GAWA: A SYMBOLIC STUDY OF VALUE TRANSFORMATION IN A MASSIM (PAPUA NEW GUINEA) SOCIETY 9 (1992); *see also* ANNETTE WEINER, WOMEN OF VALUE, MEN OF RENOWN: NEW PERSPECTIVES IN TROBRIAND EXCHANGE xvii (1976) (arguing that Malinowski "neglected the active role that women play in exchange").

233 *See* MUNN, *supra* note 232, at 8–9.

234 Munn, *supra* note 231, at 104 (internal citations omitted).

235 *Id.* at 116.

236 MICHAEL ROTHBERG, MULTIDIRECTIONAL MEMORY: REMEMBERING THE HOLOCAUST IN THE AGE OF DECOLONIZATION 1–29 (2009). Rothberg's idea of multidirectional

For his part, the postcolonial theorist Dipesh Chakrabarty argues that the shared historical moment or present must be appreciated as plural and "not-one."[237] The temporal condition of postcolonial existence means living in "time-knots" composed of traces and fragments of the multiple pasts that we inhabit, and also "the futurity that laces every moment of human existence."[238]

These "time knots" can take hold and block the present, as some young feminists who organized the Tokyo Women's Tribunal sought to explain to one of its judges, Professor Christine Chinkin. Professor Chinkin told one of us of a reason that young Japanese activists often gave her for their involvement with the Tribunal.[239] They felt that they could not address their own current feminist problems until this past was somehow resolved or closed. Their efforts to advocate for other feminist causes in the present—whether problems of present-day sexual violence, sexual harassment, sex tourism, or women's inequality in the household—kept bumping into the Comfort Women problem in one way or another, they told her.

C. Relative Time: Ghosts

Once we notice time across space, we cannot avoid the second premise of conflicts reasoning that we described: that the temporality of Comfort Women Trouble is relative, different in different places and for different people. In East Asia, one particularly salient way of talking about Comfort Women Trouble is as the trouble that the Comfort Women as ghosts will pose for the living.

One often hears throughout East Asia that if nothing is done about the Comfort Women problem before the death of the last living Comfort Woman, their ghosts will haunt the

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memory has recently been echoed in a feminist key, together with Astrid Erll's idea of "travelling memory." *See* Ayse Gül Altinay & Andrea Peto, *Introduction: Uncomfortable Connections: Gender, Memory, War*, *in* GENDERED WARS, GENDERED MEMORIES: FEMINIST CONVERSATIONS ON WAR, GENOCIDE AND POLITICAL VIOLENCE 1, 4 (Ayse Gül Altinay & Andrea Peto eds., 2016); Astrid Erll, *Travelling Memory*, 17 PARALLAX 4, 10–16 (2011). Feminist theory emphasizes the significance of "context, positionality and multiple structures of inequality." Gül Altinay & Peto, *supra*, at 10.

237 DIPESH CHAKRABARTY, PROVINCIALIZING EUROPE: POSTCOLONIAL THOUGHT AND HISTORICAL DIFFERENCE 250 (2000).

238 *Id.* at 112, 250.

239 Personal conversation between Christine Chinkin, Professor, London Sch. of Econ. & Political Sci., and Annelise Riles (May 16, 2014).

living forever.[240] Sometimes this is expressed as a kind of threat, as if justice will come from the afterlife. At other times it is expressed in a tone of dread, as if one can never be sure of how or what type of revenge an angry ghost might take. This observation comes from men and women, from young and old, from ordinary people and experts alike, often as an aside to forms of argumentation more easily recognizable to a global modernist legal audience.[241]

Understandings of the afterlife throughout East Asia are shaped by shared Confucian and Buddhist traditions.[242] In the case of Japan, anthropologist Marilyn Ivy has written of the need to "settle" the dead through burial practices.[243] According to Ivy, Japanese make a distinction between "unsettled newly dead" and "ancestral dead."[244] "Those that are not remembered—or who have not been remembered adequately—remain unsettled and are thus on the loose, dangerous: if the living forget or neglect the dead, then the dead can haunt them as ghosts."[245] Those who for whatever reason—improper burial or an unresolved matter during their lifetime—cannot "settle" become ghosts. As a result, a ghost is "someone who should be absent but is uncannily present."[246] As anthropologist Lisa Yoneyama argues, the dead can be truth speakers whose challenge or reproach brings danger: "The desire to ap-

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240 See TINA CHEN, DOUBLE AGENCY: ACTS OF IMPERSONATION IN ASIAN AMERICAN LITERATURE AND CULTURE 114–15 (2005) (describing how novelist Nora Okja Keller became haunted after hearing a Comfort Woman bear witness, and "in order to wrestle with the ghosts peopling her dreams, [she] had to imagine herself surviving 'their daily lives, their physical and emotional anguish, the aftermath'"). Comfort Women also appear in other writers' work as ghosts who have not attained justice. *Id.* at 115.

241 As Marilyn Ivy observes of Japan, "traditional" beliefs and modalities of life persist alongside, in the interstices of, globalized modernist discourses and indeed are often even creations of those modern discourses. *See* IVY, *supra* note 136, at 29–40.

242 *See* HEONIK KWON, AFTER THE MASSACRE: COMMEMORATION AND CONSOLATION IN HA MY AND MY LAI 71 (2006) (observing that "Vietnam's eclectic religious tradition . . . has other ways to absorb untimely and genealogically disorderly death. The names and identities of dead children may be brought to a Buddhist pagoda, a Taoist temple, or the spirit shrine of a local medium"); MICHAEL DYLAN FOSTER, THE BOOK OF YŌKAI: MYSTERIOUS CREATURES OF JAPANESE FOLKLORE 20 (2015) (describing Buddhism and Shintoism as "the two dominant strains of thought . . . intertwined" in Japanese religion); Keith Howard, *Preserving the Spirits? Rituals, State Sponsorship, and Performance*, *in* KOREAN SHAMANISM: REVIVALS, SURVIVALS, AND CHANGE 187, 195 (Keith Howard ed., 1998) (elaborating how a Confucian understanding of death and the afterlife influence death ritual in Korea).

243 IVY, *supra* note 136, at 149–50.

244 *Id.* at 150.

245 *Id.*

246 *Id.* at 163.

pease the dead rests on self-affirming forgetfulness; conversely, reminders of the restless dead, unable ever to be fully conciliated, prevent such self-contentment."[247] People tell stories of voices, singing or crying or speaking incomprehensible words, of people appearing and then disappearing, of tormenting particular people whom they hold responsible for their anguish.[248]

One source of the remarkable political authority of the remaining Comfort Women is that everyone recognizes that they will soon be dead.[249] They could be thought of almost as "predead": existing in a sense between life and death, as symbolized by the many demonstrations in which they are offered the empty chair in the Comfort Woman memorial statue that is reserved for the dead.[250] Stuck between the dead and the living, they speak for the Comfort Women who have already passed on, and their presence raises the possibility that they themselves, like those who went before them, could die angry.

Yoneyama finds that survivors of another war atrocity, the atomic bombings at Hiroshima and Nagasaki, who have been pressed into national service to tell their stories, carry the burden of speaking for, connecting with, and even consoling classmates, family members, or neighbors who did not survive the bombing.[251] In Korea, likewise, the feminist anthropologist Eun-shil Kim has written about the surviving widows of the Jeju Island massacres who, Kim argues, sealed off their memories and words, remaining in another time in order to protect themselves and their sons from the past, and who now, confronted with demands that they tell their stories, find that there are no words, persons, or actions that can serve as a bridge between their time and others' times.[252] Kim writes that some

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247 YONEYAMA, *supra* note 136, at 82.

248 *See* IVY, *supra* note 136, at 163–67.

249 Feminist theorists also bring attention to the specific temporality of the human biological body in a way that is illuminating for the Comfort Women issue as the number of survivors who might receive some form of compensation or apology dwindles year by year. As Grosz points out, "[w]hereas time is a continuous movement, our time, the time of the living, is finite, limited, linked to mortality, and thus irreplaceably precious." GROSZ, *supra* note 210, at 4.

250 *See California City Unveils Memorial Statue of Korean 'Comfort Woman*,' JAPAN TIMES (July 31, 2013), http://www.japantimes.co.jp/news/2013/07/31/national/california-city-unveils-memorial-statue-of-korean-comfort-woman/ [https://perma.cc/K27Z-G66S] (showing a photograph of a Comfort Woman seated next to a Comfort Woman statute with her hand on its arm).

251 *See* YONEYAMA, *supra* note 136, at 137–38.

252 Eun-shil Kim, Professor, Ewha Womans Univ., Address at Cornell Law School Clarke Program in East Asian Law and Culture Colloquium: The Politics of Speaking and Despair/Defilement Experienced by the 4.3 *Holomong* (Nov. 17, 2015) (transcript on file with authors) [hereinafter Kim, Politics of Speaking].

widows decide to keep their secrets during their lifetime, and yet in their final years they identify a spirit medium through whom, after their death, they will choose to tell their stories.

The "trouble" of ghosts presents a stark rejoinder to those who either hope or fear that the Comfort Women issue will simply end and be forgotten with the biological death of the last living survivor.[253]

The standard anthropological interpretation of such beliefs and practices is psychoanalytic. It reads such experiences of the "phantasmic" and the "uncanny" as evidence of societal displacement and trauma.[254] In so doing, it builds on a long tradition of interpreting interactions with the dead as a medium for politics among the living.

If this is the case, then it is useful to pay attention to the specific character of the trauma at issue here. Ghosts are different from gods in the East Asian conception.[255] They can pop up anywhere, but they are not everywhere at once. Moreover, they are associated with (although also exceed) particular places—a burial place, or a particular mountain or temple that, in Ivy's terms, "claim[s] jurisdiction" over them.[256]

Even more important, the problem of ghosts makes plain that Comfort Women Trouble belongs not only to the victim, the individual perpetrator, or the state. Ghosts can torment anyone and everyone all at once. They strike with impunity, in an excessive manner, without respect for rules of standing, or res judicata, or due process. The fear of Comfort Women ghosts is thus symptomatic of a broader political, existential, and ontological condition. As problems diffuse through diasporic populations and across new communications technologies, other

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253 *See* Mina Chang, *The Politics of an Apology: Japan and Resolving the "Comfort Women" Issue*, HARV. INT'L REV., Fall 2009, at 34, 37 (remarking that "[w]aiting for the issue to fade away with the deaths of former victims would not only be short-sighted, but also compound the crime in the eyes of supporters").

254 *See* Andrew Alan Johnson, *Progress and Its Ruins: Ghosts, Migrants, and the Uncanny in Thailand*, 28 CULTURAL ANTHROPOLOGY 299, 300 (2013) (evoking psychoanalytic understandings of the uncanny to explain the experience of haunting); Jean M. Langford, *Gifts Intercepted: Biopolitics and Spirit Debt*, 24 CULTURAL ANTHROPOLOGY 681, 704 (2009) (analyzing the presence of the dead in terms of the psychoanalytic category of the uncanny); Jeffrey G. Snodgrass, *Imitation Is Far More than the Sincerest of Flattery: The Mimetic Power of Spirit Possession in Rajasthan, India*, 17 CULTURAL ANTHROPOLOGY 32, 48 (2002) (explaining spirit possession in Freudian terms).

255 *See* Stephen Teiser, *The Spirits of Chinese Religion, in* RELIGIONS OF CHINA IN PRACTICE 1, 11–14 (Donald S. Lopez, Jr. ed., 1996) (stating that "[l]ife takes six forms: at the top are gods, demigods, and human beings, while animals, hungry ghosts, and hell beings occupy the lower rungs of the hierarchy").

256 IVY, *supra* note 136, at 144.

times, places, and people become embroiled, engaged, and implicated. This condition is not so much a problem of the past but a problem for the present. It is not just a problem for victims so much as it is a problem for all of us, everywhere, interpolated into the past in the present.[257]

A sophisticated debate about the responsibility of later generations for historical wrongs has already expanded our notion of responsibility beyond the singular perpetrator.[258] Perhaps the danger of ghosts likewise provides a way to think about expanding the notion of victimhood beyond the singular victim. If the vocabulary of ghosts and ghostliness captures something about the often traumatic experience of the spatio-temporal diffusion of violence and injustice, then it also cautions against the sometimes celebratory tone of certain feminist theories of polytemporality. The "ghosts" of the past can strike anyone, anywhere. Living with spatio-temporal diffusion can be disorienting and painful.

V
SEQUENCING

We have shown how a conflict-of-laws approach resonates with insights about time and space found in feminist social theory, and indeed, how conflicts techniques can make more salient and concrete ideas like polytemporality. In this Part, we describe how a conflicts approach might help us to manage, and act within, this spatio-temporal diffusion.

As we saw earlier,[259] feminist historians insist on the undesirability, as well as the impossibility, of closure as a way to guard against what Ghassan Hage calls "paranoid national-

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257 Kim, Politics of Speaking, *supra* note 252. *Cf.* KOGA, *supra* note 52, at 199 (in her ethnographic account of a lawsuit brought in Japan by Japanese lawyers representing Chinese plaintiffs injured by mustard gas from abandoned World War II Japanese chemical weapons, quoting CATHY CARUTH, UNCLAIMED EXPERIENCE: TRAUMA, NARRATIVE, AND HISTORY 24 (1996) that "history, like trauma, is never simply one's own, that history is precisely the way we are implicated in each other's traumas").

258 In the context of the Tokyo Women's Tribunal, Vera Mackie describes supporters of the Comfort Women survivors as "acting through a recognition of their implication or imbrication in the events of the past," where the notion of "implication" captures a more subtle "consciousness of connectedness" than guilt or innocence. Mackie, *supra* note 218, at 214–15 (citing Tessa Morris-Suzuki, *Unquiet Graves: Kato Norihiro and the Politics of Mourning*, 18 JAPANESE STUD. 21, 30 (1998)). This connectedness might come from claiming a particular collective identity, perceiving a similarity of situation, or reflecting on a shared "imbrication" in a relationship of inequality. *Id.*

259 *See supra* notes 210–214 and accompanying text.

ism."[260] Their work suggests the urgent need to creatively and courageously reimagine what styles of engagement and what modes of apprehension of the past might produce hopeful futures, beyond efforts at total closure, on the one hand, and counter-efforts to keep things always open everywhere, on the other. Victoria Browne acknowledges, however, that there is "work to be done unpacking and explaining exactly what this might mean."[261] On this point, they are reaching for images and imaginaries.

Drawing on Eric Santner's reflections on the legacy of fascism in Germany, anthropologist of Japan Marilyn Ivy aptly calls for a cultural politics of "mourning" as a response to the lingering effects of wartime violence and aggression in the postmodern present.[262] After all, mourning is a set of techniques for putting ghosts to rest. Mourning practices, she argues, are "more renunciatory modes and strategies of engagement."[263] But mourning also takes a very specific form: prayers, offerings, festivals, pilgrimages.[264] Ritual—the practice of proper form in time—offers a "sediment[ed]" way through memory to appease the ghosts of the past.[265]

Thus, Ivy calls for engaging the techniques and methods of ritual to address a very real political problem. What form might this take in the context of feminist futures? Here, we return to the relatively humdrum and technical field of conflict of laws for a possible way forward. We propose as a form the *sequence* that conflict of laws applies to an ordinary issue of legal time, the statute-of-limitations issue in our hypothetical. As we will show, a choice-of-law analysis in conflicts proceeds in a series of steps, with each step conjuring up a distinct spatio-temporal horizon, that is, a different experience and imagination of the space, the time, and the relevant agents.[266] To do choice-of-law analysis in conflicts is to demonstrate a commitment to

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260 GHASSAN HAGE, AGAINST PARANOID NATIONALISM: SEARCHING FOR HOPE IN A SHRINKING SOCIETY 20–21 (2003); *see* Kelly Oliver, *Perpetual War, in* FEMINIST TIME AGAINST NATION TIME: GENDER, POLITICS AND THE NATION-STATE IN AN AGE OF PERMANENT WAR 185, 200–01 (Victoria Hesford & Lisa Diedrich eds., 2008) (developing the idea of "feminist time" as an alternative to "nation time in the form of paranoid patriotism").

261 BROWNE, *supra* note 77, at 2.

262 *See* IVY, *supra* note 136, at 14.

263 *Id.*

264 *See id.* at 145–46.

265 *Id.* at 14, 146.

266 *Cf.* Hirokazu Miyazaki, *Documenting the Present*, *in* DOCUMENTS: ARTIFACTS OF MODERN KNOWLEDGE 206, 207 (Annelise Riles ed., 2006) (describing a similar sequence of temporalities within the practice of filling out a bureaucratic record in the context of mortuary exchange).

moving through this sequence of steps. Each moment in the sequence has its own spatio-temporal orientation and yet also anticipates a moment in which that orientation will be superseded by a different space-time altogether. Through the constraint of form, as anthropologist Marilyn Strathern has called it,[267] a conflicts approach enables us to inhabit each of these spatio-temporal positions in turn. In what follows, we first describe this sequencing effect and then return to its wider potential for a feminist politics of the future.

A. The Private Space-Time of the Wrong

As already noted, a choice-of-law analysis begins with the parties, who must define for themselves the spatio-temporal horizon of the wrong at issue. Plaintiff alleges that an injustice occurred at a particular time and place. She takes us to that time and place. Defendant, in turn, has multiple doctrinal vocabularies available for rejecting this temporal frame or offering another. The point, however, is simply that the analysis begins with an event, somewhere, sometime. This is the private space-time of the wrong.

B. The Present Duration and Ambit of State Interests

While conflict of laws is driven by individual claimants, its choice-of-law techniques recognize that it is also potentially foreign affairs in a private-law key. That is, states are involved, and the agency of individual parties must yield, at key moments, to that of states. Thus the view of conflicts thinking as purely "private" and "individual" is not entirely accurate. In the next steps of a choice-of-law analysis, a court adjudicating our hypothetical lawsuit would reframe the dispute between the plaintiff and the defendant as a conflict between states.

In the modern American choice-of-law methodology known as governmental interest analysis, the court flattens and narrows the conflict to focus on the domestic interests of states.[268] Specifically, governmental interest analysis approaches the conflict between states as a conflict of *state* laws. Ventriloquized by the parties, each state is assumed to be asking to have its law—in our hypothetical, its statute of limitations—applied. The question for the court then becomes whether each state's demand is legitimate in this case. This is a delicate

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267 *See* STRATHERN, *supra* note 156, at 180 and text accompanying note.

268 *See* Brainerd Currie, *Married Women's Contracts: A Study in Conflict-of-Laws Method*, 25 U. CHI. L. REV. 227, 237 (1958).

question. Given the comparative and reflexive analysis that came before,[269] the court is well aware that its perspective is a partial, situated one. Who is the court to make judgments about the legitimacy of its own state's or other states' assertions of authority? The court therefore scrutinizes these assertions of authority on their own terms. To do so, it employs the core modernist assumption that laws are tools with purposes.[270] Governmental interest analysis evaluates whether each state involved has an interest in seeing its law applied from the point of view of the underlying purposes of that law.[271] Accordingly, the court's task is to analyze the purposes of the tool to determine whether those purposes really come into play in this dispute, to sharpen our understanding of the stakes for each of the states involved.

On this reasoning, statutes of limitations, like all laws, are tools of state policy. What are their purposes? Commentators usually identify statutes of limitations as serving three purposes. Two concern substantive justice and pull in opposite directions:[272] to provide a venue for legitimate plaintiffs to exercise their rights to seek redress, and to protect defendants from stale claims and thereby encourage freedom of action. Statutes of limitations strike a balance between these two purposes by notionally allowing the past to continue for a certain period of time and then declaring the past closed. A third purpose is more practical and utilitarian. Lawsuits are expensive, and states must make choices about how to allocate their judicial resources. Claims that exceed the statute of limitations will not be heard because the forum cannot afford to allocate resources to this issue at this time and in this location.[273]

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269 *Supra* subparts III.B–C.

270 For the argument that law is a specific social means rather than an end, see, for example, RUDOLF VON IHERING, LAW AS A MEANS TO AN END (Isaac Husik trans., Boston Book Co. 1913) (1903); Hans Kelsen, *The Law as a Specific Social Technique*, 9 U. CHI. L. REV. 75, 80 (1941); *see also* ROBERT SAMUEL SUMMERS, INSTRUMENTALISM AND AMERICAN LEGAL THEORY (1982) (arguing that most of twentieth-century American legal thought conceives of law as a means to an end).

271 BRAINERD CURRIE, *The Verdict of Quiescent Years*, *in* SELECTED ESSAYS ON THE CONFLICT OF LAWS 584, 621 (1963) ("'Interest' . . . is the product of *(a)* a governmental policy and *(b)* the concurrent existence of an appropriate relationship between the state having the policy and the transaction, the parties, or the litigation.").

272 Traditionally, the justification for the existence of a limitations period was a substantive one. There was a presumption that after a certain amount of time the debt must have been satisfied. *See* Laura E. Little, *Hairsplitting and Complexity in Conflict of Laws: The Paradox of Formalism*, 37 U.C. DAVIS L. REV. 925 (2004).

273 The distinction between the purposes of a fixed endpoint in legal time, in turn, has implications for the reach of that endpoint in legal space. If the purpose relates to scarce judicial resources, then the plaintiff presumably should be free to pursue the claim in a jurisdiction where judicial resources are available. Dismis-

Accordingly, if one purpose of the Korean statute of limitations is to provide plaintiffs with a venue for legitimate claims, then that purpose clearly comes into play here. The plaintiffs are Korean, and Korea has a legitimate interest in assuring that Korean plaintiffs have a chance to have their claims heard. The wrinkle for Japan in this case is that Japanese law actually works against the Japanese defendant since under Japanese law, as under Korean law, the claim could go forward. Since the Korean and Japanese statutes of limitations are functionally identical, an application of Korean law cannot be objectionable for Japan. The only relevant purpose of the Japanese statute of limitations in this case—to protect defendants from stale claims—does not come into play since the Japanese statute of limitations does not bar the claim. Thus Japan has no legitimate interest in seeing its law apply. Finally, California has a legitimate procedural interest in ensuring that its judicial resources are not wasted on outdated lawsuits since California is the forum.

Between Korean law and California law, then, there is what conflicts scholars call a "true conflict."[274] Each state has a legitimate interest in the application of its own statute of limitations to this case.[275] The court cannot evaluate whether Korea's interest in seeing plaintiffs have their day in court is greater or lesser than California's interest in preserving judicial

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sal should have no *res judicata* effect. In contrast, dismissal on the basis of the first two purposes should have more universal implications and be binding on future disputes.

> Traditionally, a dismissal of a lawsuit on statute of limitations grounds has been considered a dismissal "not on the merits," and thus it did not bar refiling the lawsuit in another state that had a longer statute of limitations. This principle should hold firm in cases in which the first forum state follows the traditional procedural characterization of statutes of limitation. In contrast, the premise underlying this principle is weakened when that state . . . follows a substantive characterization.

Symeonides, *Choice of Law in American Courts in 2012*, *supra* note 194, at 310.

274 The term was originated by Brainerd Currie. *See, e.g.*, Currie, *supra* note 268, at 263; *see also* Donald T. Trautman, *Reflections on Conflict-of-Laws Methodology*, 32 HASTINGS L.J 1612, 1619 (1981) ("Professor Currie's interest analysis uses the distinction between false and true conflicts to decide the issue of how far a forum with some concern in a matter will go in judging that its concern should be interpreted with moderation and restraint in light of another community's conflicting concern.").

275 We leave aside here, for the sake of simplicity, whether any of these statutes of limitations can be extended through judicial discretion in particular circumstances. *See supra* notes 184–187 and text accompanying notes.

resources because these interests are incommensurable, and the court's own perspective is situated, not universal.[276]

For our purposes, what is key in governmental interest analysis is that the perspective shifts from the time-place of the legal wrong done to individuals in the past, to the ongoing interests of states in using time as a legal tool to achieve a particular domestic purpose in the present, whether that purpose is protecting present-day Korean domiciliaries or preserving present-day Californian resources.

Obviously, in the context of gender, violence, and war memory, this attempt to reduce the temporality question to current "state interests" is almost farcically simplistic. To limit Korea's interest in this dispute to the plaintiff's recovery or to limit California's interest to the protection of its judicial resources is patently absurd. And the purposes of statutes of limitations, being myopically domestic, entirely ignore the ways the harms, the interests, the parties, and even the truth spill over from one place to another—the very complexities that the previous analysis highlighted. But missing the complexities is precisely the point. The trick of the technique is its claim to (momentarily) turn a complex, multifaceted question about individual time in a particular place into a narrow technical one about state time and state space. We will elaborate on the value of this sequencing after we canvas two further steps in a choice-of-law analysis.

C. The Fictional Time Horizon of Hypothetical Inter-State Relations

In the case of a true conflict between the interests of two states, a California court would turn to the doctrine of "comparative impairment" to break the tie.[277] This doctrine directs attention to the extent to which a state's interests would be impaired if its law were not applied in this case and tells the court to apply the law of the state whose interests would be most impaired. First proposed by William Baxter, it recognizes that in addition to the "internal objectives" embodied in their laws, states also have "external objectives," including developing working relations with other states based on principles of

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276 Governmental interest analysis has often harbored a preference for the forum's law. *See, e.g.*, You v. Japan, 150 F. Supp 3d 1140, 1149 (N.D. Cal. 2015) (citing the proposition that only "an extraordinarily strong interest of a foreign state" will overcome the forum's interest in not hearing claims that are stale under its own law) (citation omitted).

277 *See, e.g.*, Bernhard v. Harrah's Club, 546 P.2d 719, 723–24 (Cal. 1976) (explaining the comparative impairment approach).

reciprocity.[278] Comparative impairment analysis asks the court to posit a fictional or hypothetical negotiation among states in which the parties have roughly equivalent information and bargaining power.[279] In such a scenario, Baxter argues, "each would cautiously give up what it wanted less to obtain what it wanted more, each side's perception of its own self-interest and of the other's objectives would sharpen, and the final agreement would approximate maximum utility to each."[280]

Some courts have suggested that a state's interests are more impaired when a law enshrines a protective principle and its own citizens come under the protection of that law,[281] for example, and others have suggested that a state's interests are less impaired when a law has not been enforced regularly or the international trend is strongly against this law.[282] Larry Kramer suggests that when a purely procedural rule comes into conflict with a more substantive rule, "[t]he forum sacrifices its procedural policies in favor of another state's substantive policies, but gains by having its substantive policies similarly preferred when they conflict with procedural rules in cases outside the forum."[283] Thus, in a recent case involving the confiscation of funds from Turkish bank accounts in the context of genocide, the California court applied Turkey's statute of limitations rather than California's because the Turkish law at stake involved a substantive regulatory matter, the rights of depositors vis-à-vis banks, while California's statute of limitations was merely a docket-clearing mechanism as applied to this case.[284] In our hypothetical, a California court might also be willing to defer to Korea because California arguably has only a procedural interest in the application of its limitations period, namely, the allocation of judicial resources, whereas the Korean interest goes to substantive matters.

The court's entering into a fictional time-space of hypothetical negotiations broadens the frame beyond that of the parties,

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278 *See* William F. Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1, 17 (1963); *see also* Harold Horowitz, *The Law of Choice of Law in California—A Restatement*, 21 UCLA L. REV. 719 (1974).

279 Baxter, *supra* note 278, at 7.

280 *Id.*

281 *See, e.g.*, Butler v. Adoption Media, 486 F. Supp. 2d 1022, 1041 (N.D. Cal. 2007).

282 *See, e.g.*, Offshore Rental Co. v. Cont'l Oil Co., 583 P.2d 721, 726 (Cal. 1978).

283 Larry Kramer, *Return of the Renvoi*, 66 N.Y.U. L. REV. 979, 1021 (1991).

284 Deirmenjian v. Deutsche Bank AG, 548 F. App'x 461, 464–65 (9th Cir. 2013).

the governments, and the activists engaged in this dispute. The imagined interests of governments may differ from actual governments' wishes in this analysis because the imagined negotiation is not about whether the plaintiffs recover or not, but about whether this is the kind of case in which the state really cares about seeing its own legal principles applied, regardless of the outcome. Likewise, in contrast to real negotiations centered on a particular issue—claims arising at the close of a war, for example—we now imagine this claim alongside every kind of case, from garden-variety contract disputes to environmental issues and national security issues.

Coming after interest analysis, comparative impairment analysis reverses the narrowing and flattening of the issues involving states by explicitly bringing in the international dimension of the case. It asks the court to reflect carefully on states' interests over the *longue durée*, given principles of reciprocity and an inter-state, inter-temporal context in which each state knows there will be repeat plays of the game. The notion of comparative impairment reframes the problem of time once again, not as a matter of domestic policy needs, but in terms of its iterative dimension in the foreign affairs context.

D. The Present Time and Place of the Judgment

The final moment in the sequence returns us to the present time and place of the case and, in particular, to the court's real present power over the defendant. In the United States, this is a check in the form of a due process review.[285] The question is whether the application of the Korean statute of limitations by a California court would violate the defendant's constitutional due process rights, given that an analogous purely domestic case would be barred by the California statute of limitations. Is the application of Korean law by a California court foreseeable enough to this defendant that there is no unfair surprise? Here, a court would likely find that the application of Korean law is foreseeable since the events occurred in Korea and since, in any case, Korean law is functionally the same as the defendant's own national law (Japanese law). Hence, there is no unfair surprise to the defendant. When we add to this that current U.S. due process jurisprudence in the conflict-of-laws arena posits an extremely permissive test,[286] it is likely that the

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285 HAY ET AL., *supra* note 194.

286 *See* Allstate Ins. Co. v. Hague, 449 U.S. 302, 313 (1981) (holding that as long as a state has "a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor funda-

application of a Korean statute of limitations would survive constitutional challenges.

Again, what is important for our purposes is the temporality of this analysis. In this final step in the sequence, the focus returns to the present time and place. Something powerful and potentially hegemonic is happening, here and now, in the actions of the court itself vis-à-vis the defendant. Is it acceptable? Is it fair?

E. The Power of Sequences

As just shown, a choice-of-law analysis involves a sequence of steps, beginning with attention to individual concerns[287] and moving to comparison of the affected states' general domestic interests,[288] followed by consideration of their diplomatically negotiated interests,[289] and, finally, a consideration of fundamental rights.[290] At each step, the spatio-temporal horizon of the legal problem is different. The initial framing of the issues focuses narrowly on the particular place and time of the victim's experience. With governmental interest analysis, the focus moves to the space and time of the nation-state and its laws. Then, both of these unilateral perspectives are obviated by a multilateral focus on the imaginary time of the international system of states projected into the future. Finally, we return to a particularized, narrow focus on the space-time of the present day encounter between the defendant and court.

As one spatio-temporal horizon after another is foregrounded, the set of actors also changes. A focus on the particular dyad of the victim/perpetrator, in the guise of plaintiff and defendant, shifts to the clashing agencies of nation-states, which is replaced by attention to international society between states, which, in turn, gives way to the encounter between the individual and the state. This way of thinking about agency and responsibility is not a zero-sum game. Instead, it treats agency as successive sets of positions in which individual and state can displace one another. In short, con-

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mentally unfair," a state may apply its own law without violating the Constitution).

287 Subpart V.A *supra*.

288 Subpart V.B *supra*.

289 Subpart V.C *supra*.

290 Subpart V.D *supra*.

flict of laws does not so much resolve as *sequence* the colliding spatio-temporal worlds at play in the Comfort Women issue.[291]

Although many practicing lawyers may have some intuitive sense of the power of sequences, the concept of a sequence has attracted little notice in academic legal thought. Legal scholars routinely think about balancing tests, multi-factor analyses, steps, and other structures of legal reasoning, but not sequences, even though we find instances of (simpler) sequences in fields such as human rights law.[292] Unlike these other legal reasoning tools, a sequence is not a causal pathway, linking one position to another, like a flowchart or a logic tree. Rather, it is a temporal experience of taking on one framework, and then trading it for another.

Were legal theorists to turn their mind to the power of sequences, one inclination might be to treat them as a kind of legal process. Sequences can help to legitimate the outcome of a case by ensuring that all sides have been appropriately heard. Socio-legal research shows that whatever the outcome, parties are more willing to accept it if they believe that they have been heard. This has led some scholars to conclude that one function of proper legal process is to aid personal and collective healing.[293]

As a supplement to any potential process legitimacy or therapeutic function, however, the power of sequences emanates from the succession of self-contained worlds they present and the after-effects of these worlds. As courts themselves have recognized,[294] a lawsuit can have important benefits even for the losing party because the reasoning in the judgment can

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291 On the need to move between levels, see PHILIPP SCHULZ & CATHERINE O'ROURKE, LEGACY GENDER INTEGRATION GRP., DEVELOPING GENDER PRINCIPLES FOR DEALING WITH THE LEGACY OF THE PAST 13–20 (2015).

292 *See* Lorraine E. Weinrib, *The Postwar Paradigm and American Exceptionalism*, *in* THE MIGRATION OF CONSTITUTIONAL IDEAS 84, 93–97 (Sujit Choudhry ed., 2006) (analyzing the two-stage analysis that she presents as paradigmatic of post-World War II rights-protecting documents).

293 *Cf.* John Braithwaite, *Restorative Justice and Therapeutic Jurisprudence*, 38 CRIM. L. BULL. 244, 245–47 (2002) (describing restorative justice and therapeutic jurisprudence as similar in needing "to see the same case as many things at once, with respect for the dignity of all actors involved" and in emphasizing the consequences for restorative or therapeutic values, respectively, but different insofar as only restorative justice has a process ideal).

294 In overturning the trial judge's dismissal at the jurisdictional stage of an action to enforce a foreign judgment for massive environmental damage, a Canadian appeals court recently held, in effect, that the foreign plaintiff has a right to lose. *See* Yaiguaje v. Chevron Corp., 2013 ONCA 758, ¶ 70 (Can. Ont.) (stating "[a] party may bring an action for all kinds of strategic reasons, recognizing that their chances of collection on the judgment are minimal. It is not the role of the court to weed out cases on this basis . . ."). The Supreme Court of Canada subsequently

structure wider social and political debates, closing some avenues for change and opening others.[295]

Thus, to return to the problem of historical injustice, a sequenced style of reasoning, in which every possible spatiotemporal horizon is inhabited in turn, gives the parties and also the court and its publics a structured, livable way of experiencing and acknowledging the multiple temporal realities that the

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ruled that the case could proceed. Chevron Corp. v. Yaiguaje [2015] 3 S.C.R. 69 (Can.).

295 In our hypothetical, it is, of course, the case that a court might not work all the way through the sequence because the plaintiff fails at one step. Or the lawsuit might be otherwise barred. *See supra* note 22. With civil litigation for wide-scale historical wrongs, however, even a time-barred suit may have an impact. *Cf.* MICHAEL J. BAZYLER, HOLOCAUST JUSTICE: THE BATTLE FOR RESTITUTION IN AMERICA'S COURTS 53–54, 323 (2003) (showing, in the context of Holocaust restitution, how a "one-two punch"—U.S. class action lawsuits against Swiss banks followed by the threat of sanctions against the banks by U.S. state and local officials if they did not settle—overcame the limitations problem that had led courts to dismiss earlier Holocaust cases as time-barred); *id.* at 218–21, 251 (discussing the rethinking of limitations law and choice of law in Holocaust cases concerning stolen art); Mayo Moran, *The Role of Reparative Justice in Responding to the Legacy of Indian Residential Schools*, 64 U. TORONTO L.J. 529, 534–36 (2014) (highlighting how decades-old claims of childhood sexual abuse in Indian Residential Schools that would otherwise be time-barred became possible when Canadian courts dramatically rethought limitations law and provincial legislatures began to enact special limitation schemes).

Yukiko Koga's account of the wartime compensation suits brought in Japan by Chinese victims of forced labor is illuminating. Koga highlights the role of *fugen* in these judgments:

> *Fugen*, or supplement . . . . follows *shubun* (summary of the decision) and "facts and reasons" (the main argument of the ruling), often as a paragraph or two at the end of the ruling. The function of *fugen* is disputed among legal professionals. Some call it extralegal, a nonintegral part of the decision, and therefore not having the same legal effect as the preceding text. Some call it the essence of the conscience of the judges, which is expressed outside of the constraints of law. In either case, both views share an understanding that *fugen* is something external to the actual ruling . . . .
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> In the *fugen* written for the forced labor case, the Supreme Court judges' deeply emotional and strong language emphasized the sufferings the plaintiffs endured not only during the war but also over the ensuing years. They contrasted the plaintiffs' psychological and physical sufferings to the economic benefits that the defendant, Nishimatsu Construction Corporation, enjoyed through its wartime use of forced labor *and* through the inverted compensation it received from the Japanese government after the war ended. The judges further reminded the defendant and the Japanese government that the Chinese plaintiffs' lack of individual legal rights to claim compensation did not prohibit the Nishimatsu Corporation and the Japanese government from making their own voluntary arrangements for redress, and strongly encouraged them to make such efforts to provide compensation for the Chinese.

Koga, *Between the Law*, *supra* note 97, at 424. Koga elsewhere emphasizes individual affective ties between Japanese lawyers and Chinese victims as a kind of alternative. *See* Koga, *Accounting for Silence*, *supra* note 97, at 501–03.

spatio-temporal diffusion of historical wrongs brings into play. The sequence not only differs from the chaotic and traumatic way that multiple temporalities crash into one another in ordinary life; it also goes beyond the efforts of feminist social theorists to imagine a polytemporal world because it addresses the challenges of how to manage the dangers and excesses of polytemporality—the "ghosts" of the past.

It is ultimately, then, in this humble conflict-of-laws technique that we find a possible technology for feminist futures. The sequence, by definition, moves forward, if simply to the next predetermined step in the sequence. It allows only for some forms of closure in a particular moment, yet also for other forms of openings and closings in other venues, contexts, and moments. The sequence can thus become a way of working through the personal and collective trauma of historical injustice.

Yet, in our view, the power of a sequence is ultimately even broader than an opportunity for an individual or a collective healing experience. If legal theorists have neglected the sequence as a concept, anthropologists have analyzed its power in great detail. A generation ago, Strathern,[296] Roy Wagner,[297] and other anthropologists[298] described this kind of sequencing in ritual action as the power of "obviation." Marriage ceremony is an example. Its ritual practices transform a daughter into a wife: from being an intimate member of her native kin group, to being separated from, but also standing for, her native kin group as a whole in relation to the kin group of her spouse. The transformation of a daughter into a wife is also the transformation of the participants' *collective* world view—from a moment of focus on internal relations to a moment of focus on relations among kin groups as totalities.[299] In this respect, ritual is world-making. This dramatic transformation is an effect of ritual form. Ritual moments, or symbolic forms, unfold, one from the other, in ways that are literally unthinkable in totality. The power of the sequence inheres in the way in which each moment or trope is its own totality and is also transformed, in turn, by the sequence itself.

Seen in this light, what is the broader power of the choice-of-law sequence that we described? A comparison with public international law may help here. Lawyers are accustomed to

296 STRATHERN, *supra* note 156.
297 ROY WAGNER, SYMBOLS THAT STAND FOR THEMSELVES (1986).
298 JAMES F. WEINER, THE HEART OF THE PEARL SHELL (1988).
299 STRATHERN, *supra* note 156, at 229.

thinking about the world-making capacities of public international law.[300] The very point of public international law—its treaties, its international organizations—is to transform the world.[301] In contrast, we often imagine that private international law takes the world as given (from public international law) and merely fills in some of the gaps, by addressing the left-over individual experiences, traumas, or needs of private parties.[302] In a sense, this is understandable: private international law is more unassuming and self-consciously workaday. But analogizing to anthropologists' studies of obviation, we want to suggest that its choice-of-law sequence nonetheless has powerful world-making capacities.

Rather than understanding private rights simply as predefined wrongs in search of a transnational legal remedy,[303] we need to recognize the transformative potential of the search. We must engage this spatio-temporal diffusion as a modality of world-making, rather than, for example, ignoring or dismissing it as a byproduct of transnational legal processes,[304] deploring it as appropriation of the victims' experience,[305] or presenting it as the global production of the local.[306]

The way in which the Comfort Woman statue has multiplied across jurisdictions, creating new "time knots" here and

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300 *See* MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT (Cambridge Univ. Press 2006) (1989) (arguing that all international legal argument is a composite of competing realist and idealist visions of international legal order).

301 *See, e.g.*, MARK MAZOWER, GOVERNING THE WORLD: THE HISTORY OF AN IDEA (2012).

302 *See* Horatia Muir Watt, *Private International Law Beyond the Schism*, 2 TRANSNAT'L LEGAL THEORY 347 (2011) (describing this posture of private international law).

303 On transnational legal process theories of international law, see OONA A. HATHAWAY & HAROLD HONGJU KOH, FOUNDATIONS OF INTERNATIONAL LAW AND POLITICS 190–204 (2005). Harold Koh, for example, "develop[s] the idea of transnational legal process, in which legal interactions provoke a process of norm-internalization that involves both the international and domestic levels." *Id.* at 191. Because Koh's interest tends to be why states obey global norms, for example, *id.* at 195–201, he does not explore ways in which the wrong itself can change character through the process. For a close study of the role of conflict of laws in transnational legal process, see TORTURE AS TORT: COMPARATIVE PERSPECTIVES ON THE DEVELOPMENT OF TRANSNATIONAL HUMAN RIGHTS LITIGATION, *supra* note 166.

304 Somewhat in this vein, Mikyoung Kim argues that memories are "becom[ing] increasingly transnational and even global" and describes local differences in the framing of the Comfort Women issue in terms of tactics. Kim, *Memorializing Comfort Women*, *supra* note 26, at 90, 93.

305 *Cf., e.g.*, MARIANNE HIRSCH, THE GENERATION OF POSTMEMORY: WRITING AND VISUAL CULTURE AFTER THE HOLOCAUST (2012) (discussing whether we can "remember" other people's memories).

306 *See* ARJUN APPADURAI, MODERNITY AT LARGE: CULTURAL DIMENSIONS OF GLOBALIZATION 188–92 (1996).

there, already suggests that the consequences of the Comfort Women issue extend beyond the victims' personal experiences to the very nature of the present and the future for all of us. The choice-of-law sequence that we described gives order to such spatio-temporal diffusion from one moment to the next. Each moment has its own approach to the openness or closure of the past and its relationship to the present and future. At the same time, the interplay of closure and openness is mediated by conceptual techniques that move the sequence along such that there can be partial resolutions and movement forward, even if these point to other kinds of linkages in other domains such as politics or diplomacy. The sequence literally becomes a tool for fashioning a future for the case at hand, and hence also for the politics that animate it. Conflicts may turn out to change the conversation, acknowledging, structuring, and transforming the pieces of one claim into another claim. The constraint of form in one meaning-less register may enable the toleration of multiplicity in other meaning-full ones. While the purpose of the sequence is not to change the world, in practice it is transformative. The time and place of the state of California are no longer the same once the analysis has incorporated these other horizons. The time and place of historical injustice, too, are no longer the same.

As we stated at the outset, our main point is not to advocate for more actual conflicts cases. Rather, in the mode of an interdisciplinary experiment, we offer the conflicts technique of sequencing spatio-temporal horizons as a concrete contribution to theoretical inquiries about a feminist politics of the future. The feminist philosopher Elizabeth Grosz, for example, argues for "a politics of surprise, a politics that cannot be mapped out in advance, a politics linked to invention, directed more at experimentation in ways of living than in policy and step-by-step directed change, a politics invested more in its processes than in its results."[307] The practical implication is that feminist criticism and politics must be future oriented. Grosz seeks

> a concept of temporality not under the domination or privilege of the present, that is, a temporality directed to a future that is unattainable and unknowable in the present, and overwrites and redirects the present in an indeterminacy that

307 GROSZ, *supra* note 210, at 2.

> also inhabits and transforms our understanding of the privilege of the present.[308]

We have shown how a set of legal techniques, ironically, produces the kind of "politics of surprise" and direction toward the future that Grosz is searching for.

Reflecting back on these feminist inquiries from the vantage point of conflict of laws, we would like to suggest that perhaps what a feminist future demands is not so much a "concept" of temporality (as Grosz and other theorists assume) as a collectively enactable "form." Like the mourning rituals studied by anthropologists, our choice-of-law sequence offers a simple way of working with political commitments, experiences, memories, and lifeworlds that are so incommensurable as to be unthinkable in any singular totality. The form that we have described, again like the mourning rituals, is not so much a theory as it is a collective social practice. As such, it is collectively, rather than merely individually, transformative—world-making.

Given its global reach and its particular expertise in addressing space and time, conflict of laws is a particularly suggestive form for apprehending globally proliferating historical injustice. However, we are not claiming that it is the only possible form for generating new feminist futures. On the contrary, we believe that such forms surround us, in ordinary social life as in expert knowledge practices such as law. Thus, we hope that our analysis might encourage those working in other areas of law to examine the collective uses of form in time in their own areas. Beyond the law, we hope that our juxtaposition of something as technical as conflict of laws with something as affective as the experience of hauntings by the past and the rituals that people invoke to put an end to those hauntings may also spark interest in the workings of form in every corner of life and to its potential as a source of feminist transformation.

CONCLUSION

The agreement between Japan and Korea aims to foreclose the problem of justice for the Comfort Women and, in this respect, deserves the criticism it has attracted. One of the lessons of twenty years of global activism leading to the recent

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308 *Id.* at 1–2; *see also* Elizabeth Grosz, *The Time of Thought*, *in* FEMINIST TIME AGAINST NATION TIME: GENDER, POLITICS, AND THE NATION-STATE IN AN AGE OF PERMANENT WAR, *supra* note 260, at 41 (theorizing feminist futures).

agreement is that states can no longer hold onto issues as theirs alone to resolve, to prosecute, to apologize for, or to compensate.

Yet this loss of state control engenders its own dilemmas. The reopening of the past as a legal issue in search of a forum anywhere in the world casts the victims, the perpetrators, the states, the activists, and all of us into a topsy-turvy world where each new episode in each new locale sets more in motion than it purports to resolve. For a San Francisco politician who proposed a Comfort Women memorial for his city, or a Sydney minister who offered his church grounds as a home for a replica of the Seoul statue, the issue may in fact have little or nothing to do with Japan. Conversely, Korean-American feminists in the United States may identify more strongly with the Comfort Women issue than some feminists in Korea, for whom the appropriation of the Comfort Women issue by nationalists is a pressing concern.

Conflict of laws takes for granted this kind of postmodern world as its starting point. From this point of view, the crucial question becomes not *whether* or *what* closure of the Comfort Women issue is possible, but *when* and *where* reopening and reclosing will occur. Our first contribution from conflicts has been to redeploy the field's know-how on a different moral and political terrain—the problem of living in the subaltern present. Seen through a feminist conflict-of-laws lens, Comfort Women Trouble appears as an effect of what we have termed the spatio-temporal diffusion of historical injustice.

Moving beyond diagnostics, we have also shown how conflict of laws provides fresh techniques for managing, and living with, spatio-temporal diffusion. By redescribing the field's techniques for dealing with time across space, we have shown how they resonate with and also take us further than recent debates about temporality in feminist social theory. In particular, our second contribution from conflicts has been to suggest the potential of the technique that we identify as the *sequencing* of spatio-temporal horizons. Sequencing involves inhabiting different points of openness and closure in turn. Building on the anthropology of ritual, we emphasize how such sequences have a "world-making" capacity—how they transform the very space-times they act upon. This, we argue, is a more specified and more powerful vision of a hopeful feminist future that feminist social theorists are searching for.