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A New Agenda for the Cultural Study of Law: Taking on the Technicalities

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I. INTRODUCTION

A. *Rediscovering the Technicalities*

The legal academy currently consists of roughly two groups, two kinds of scholars, two sets of questions and concerns. On the one hand are the constitutional theorists, the legal historians, the law and society scholars, the jurisprudes and legal philosophers, the literary theorists, the feminists, the anthropologists, the critical race scholars. On the other are the economists, the political scientists, the doctrinalists, the cognitive scientists, the corporate lawyers. We could call them the Culturalists and the Instrumentalists.

How do these two tribes divide up the world? The culturalists generally treat law as the embodiment of norms, the outcome of political compromise, and the repository of *social meanings*. For them, the task of legal scholarship should be to provide an account of the *content* of legal norms, the meaning of legal texts, or the place of law in culture.[1] The instrumentalists, in contrast, view law in

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1. *See, e.g.*, Guyora Binder, *Twentieth-Century Legal Metaphors for Self and Society, in* LOOKING BACK AT LAW'S CENTURY (Austin Sarat et al., eds., 2002); MARIANNE CONSTABLE, THE LAW OF THE OTHER: THE MIXED JURY AND CHANGING CONCEPTIONS OF CITIZENSHIP, LAW, AND KNOWLEDGE (1994); PETER FITZPATRICK, THE MYTHOLOGY OF MODERN LAW (1992); Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 395-96 (1992) (querying "the assumptions

primarily pragmatic instrumental terms, as a tool to be judged by its successes or failures in achieving stated ends.[2] For them, just as law is a means to an end, scholarship about the law should be evaluated as a means to an end: it should declare its uses and effects in the very design of its questions, and it should be evaluated according to its usefulness in solving actual legal problems.[3]

Of course feminists can also be cognitive scientists and doctrinalists can be jurisprudes, and literary theorists can care about devising useful solutions to concrete legal problems—indeed few legal scholars would define themselves solely in cultural or instrumental terms. But the premise of this Essay is that at the core of this tribal dispute is a surprising fact. Both groups have quite impoverished understanding of the very thing that defines our field, of what makes law as opposed to literature or economics or cognitive science: the technicalities of legal thought.

To the culturalist, the technical dimensions of law are a mundane and inherently uninteresting dimension of the law, the realm of practice rather than theory. He or she may also feel that the obsessive focus on law as a tool makes it difficult to talk about other, important questions. As James Boyd White put it long ago:

> Law then becomes reducible to two features: policy choices and techniques of their implementation. Our questions are 'What do we want?' and 'How do we get it?' In this way the conception of law as a set of rules merges with the conception of law as a set of institutions and processes. The overriding metaphor is that of the

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about the proper roles of men and women" at stake in state laws that compel pregnancy).

2. *See, e.g.*, GUIDO CALABRESI, THE COSTS OF ACCIDENTS (1970); DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE (1991). Susan Rose-Ackerman, for example, has proposed a technical and yet pragmatic role for judicial scrutiny of legislative decisions: "The courts would not engage in policy analysis when they review statutes, but they would insist that the legislators both articulate a set of purposes and consider the relationship between means and ends." Susan Rose-Ackerman, Comment, *Progressive Law and Economics—And the New Administrative Law*, 98 YALE L.J. 341, 352 (1988).

3. As Richard Posner has put it, cost-benefit analysis, which he describes as an up to date version of means-ends reasoning, is valuable because it "compels the decision maker to confront the costs of a proposed course of action." RICHARD A. POSNER, FRONTIERS OF LEGAL THEORY 105, 107, 123-24 (2001).

> machine; the overriding value is that of efficiency, conceived of as the attainment of certain ends with the smallest possible costs.[4]

To the instrumentalist, in contrast, the technical details of doctrine are interesting only insofar as they are relevant to what lawyers sometimes term "building a better mousetrap." They do not become the subject of any deeper or more critical inquiry. Consider, for example, John Merryman's definition of law: "Like other machines, the law machine is designed to perform work—in this case, legal work—in response to instructions. The operator of the machine supplies the appropriate instruction and the machine, if properly designed and powered, performs it."[5]

This Essay is a manifesto for the Culturalists in all of us. It argues that it is a mistake for Culturalists to ignore the technical aspects of legal thought for a number of reasons. First, any approach to the law that ignores what is the very core of legal thought cannot escape its own marginalization. Second, and more importantly, the technicalities of law are precisely where the questions that interest us actually are played out. Humanists should care about technical legal devices because the kind of politics that they purport to analyze is encapsulated there, along with the hopes, ambitions, fantasies and day-dreams of armies of legal engineers.[6] And third, and most important of all, we have many sophisticated methods of analysis that are uniquely suited to understanding this aspect of law, should we choose to use them. This Essay therefore proposes a new agenda for the cultural, or humanistic study of law that focuses specifically on the technical dimensions of law.[7] We culturalists need to take on the technicalities.

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4. James Boyd White, *Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life*, 52 U. CHI. L. REV. 684, 686 (1985).

5. John Henry Merryman, *Comparative Law Scholarship*, 21 HASTINGS INT'L & COMP. L. REV. 771, 778 (1998). *Cf.* James M. Cooper, Towards a New Architecture: Creative Problem Solving and the Evolution of Law, 34 CAL. W. L. REV. 297, 311 (1998) (celebrating law's role in social engineering by borrowing Le Corbusier's high modernist rhetoric to claim that law is "a machine for living").

6. BRUNO LATOUR, ARAMIS OR THE LOVE OF TECHNOLOGY iv (Catherine Porter trans., 1996).

7. I will use the terms "cultural" and "humanistic" interchangeably.

The technical character of law, as I will use the term, encompasses diverse and even at times contradictory subjects, ideologies, and practices. These include: (1) the ideologies—legal instrumentalism and managerialism; (2) the actors—the scholars and practitioners who treat the law as a kind of tool or machine and who see themselves as modest but expertly devoted technicians; (3) the problem-solving paradigm—the orientation toward defining concrete, practical problems and toward crafting solutions; (4) the *form* of technical legal doctrine and argumentation, from eight-part tests to the intricacies of the Rule Against Perpetuities, to the production of stock types of policy arguments such as appeals to uniformity of result and ease of administration on the one hand, or justice in the individual case on the other. These different subjects nevertheless share the simple fact that humanistically oriented legal scholars are liable to find them profoundly uninteresting at best, and offensive at worst.

What these add up to is a way of doing legal knowledge. I want to suggest that this way of doing legal knowledge, what I will call the *technical aesthetics of law,* is a rich and exciting subject, and one that deserves to be at the forefront of humanistic legal studies as a subject in its own right.

B. *The conflict of laws as an exemplary site*

I will argue the point by way of a demonstration: I want to test a humanistic methodology against a legal field that is so technical that even the instrumentalists seem close to giving up. The field I have in mind is the conflict of laws (Conflicts). I want to show the humanists on the one hand that the technicalities of Conflicts are far more surprising and interesting than they might imagine. And I want to show the instrumentalists, on the other hand, that sophisticated cultural analysis can at the very least clarify the nature of technical problems that their own methods now seem incapable of resolving.

The conflict of laws, or private international law as it is commonly known outside the United States, is the body of law that determines what law should regulate a dispute that has multi-jurisdictional elements. To choose the archetypal example, when residents of New York State travel by car to Ontario and are involved in a car accident there, should the law of New York or the law of Ontario

govern the suit by the passenger against the driver?[8] On the surface, there is nothing particularly exciting about these meta-rules, and that is precisely the point. They are mere technologies, procedures for a prologue to the real action of the legal dispute, simply a way of getting the contest going. In this sense, Conflicts is a self-consciously technical field. What distinguishes Conflicts from its practitioners' point of view is that it locates its energy in the production of a technology, a blueprint for a thing, a set of doctrines and methods for resolving real disputes. In the academy, the people who work most closely with its doctrines are practitioner-oriented trainers of future lawyers who on the whole eschew "high theory" in favor of an interest in real-world problems.

In recent years, the appetite for the technologies and theoretical problems in the field seem to have waned, leaving behind as many explanations for its demise as defenders and critics.[9] The subject is feared and disparaged by academics and practitioners alike as a maze of legal technicalities, the refuse of hopeless Realist idealism—"the dismal swamp" [10] and, "law's psychiatric ward."[11] Surprisingly, few American Conflicts teachers profess primary scholarly interest in their subject.

Moreover, the technology seems incapable of solving real-world problems: in practice, Lea Brilmayer argues, "identifying the instrumental purpose underlying a rule and deducing its appropriate territorial scope is not as simple as one might think."[12] None of the numerous doctrinal "approaches" invented by generations of post-Realist scholars has managed to enroll a majority of allies

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

9. Friedrich Juenger, for example, asserts that the revolution, has led us into a "dead-end alley." Friedrich K. Juenger, *Conflict of Laws: A Critique of Interest Analysis*, 32 AM. J. COMP. L. 1, 50 (1984). He argues that the Realists could not "fill the vacuum" left after their "relentless" critiques of Beale's theories. *Id.* at 45.

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

11. Perry Dane, *Conflicts of Laws*, *in* A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 209 (Dennis Patterson ed., 1996).

12. Lea Brilmayer, *Rights, Fairness, and Choice of Law*, 98 YALE L.J. 1277, 1284 (1989); *cf.* Lawrence Kramer, *Interest Analysis and the Presumption of Forum Law*, 56 U. CHI. L. REV. 1301, 1301, 1303 (1989).

in the academy or on the bench. Even the Second Restatement's compromise attempt to find common ground among these alternative approaches has been adopted only in a plurality of jurisdictions.[13] Today, Conflicts inspires more anxiety and frustration than interest or respect. Numerous methods of reasoning exist in overt conflict with one another such that there are few "right answers."[14] Most importantly perhaps, there is a sense among Conflicts scholars that the potentially rich questions raised by Conflicts cases—questions of cultural relativism, of individual rights, of the limits of state power, or the character of justice, for example—have been reduced to arid technicalities.[15]

What makes Conflicts an ideal site for a humanistic rediscovery of the technical, in this context, is precisely the way it appears so hopelessly uninteresting from both the humanistic and the instrumentalist points of view. The humanist will view Conflicts as essentially meaningless—as a morass of highly technical, atheoretical doctrines developed by largely unknown academics in relative isolation from the political process. These rules would seem to tell us relatively little about the character of the political community, for example, despite the best efforts of Conflicts scholars to read questions of cultural relativism, or assumptions about the nature of citizenship, into mundane rules of choice of law.[16] From an instrumentalist perspective, too, Conflicts is largely a mess: while the formalist theory of the First Restatement has been widely discredited as

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13. *See* Symeon C. Symeonides, *Choice of Law in the American Courts in 2002: Sixteenth Annual Survey*, 51 AM. J. COMP. L. 1, 4-5 (2003).

14. A typical casebook on the subject covers interest analysis, the "Second Restatement Approach," the "Better Law Approach," law and economics approaches, rule-based approaches, and critical legal studies approaches. *See generally* DAVID P. CURRIE ET AL., CONFLICT OF LAWS (6th ed. 2001).

15. *See* Perry Dane, *Vested Rights, "Vestedness," and Choice of Law*, 96 YALE L.J. 1191-1257 (1987); John Hart Ely, *Choice of Law and the State's Interest in Protecting Its Own*, 23 WM. & MARY L. REV. 173 (1981); Alfred Hill, *Governmental Interest and the Conflict of Laws—A Reply to Professor Currie*, 27 U. CHI. L. REV. 463, 504 (1960); Juenger, *supra* note 9.

16. *See, e.g.*, Joseph W. Singer, *Real Conflicts*, 69 B.U. L. REV. 1 (1989); Arthur T. von Mehren, *Choice of Law and the Problem of Justice*, 41 LAW & CONTEMP. PROBS. 27 (1977).

unworkable, the "new approaches"[17] that followed the early twentieth century Realist critiques of the First Restatement have proven even more so.

Unlike the theorist of law's meanings, who at best simply ignores the technical propensities of law, and unlike the technocratic instrumentalist, who is engaged in *doing* technical work, I want to use the history, doctrines, and practices of the field of Conflicts as a site for exploring the technical character of law with as much care and subtlety as humanists are accustomed to giving law's meanings. I will approach the technical in two ways in this Essay: first, through a close reading of the twentieth-century doctrinal canon, and second, through ethnographic materials collected in the course of my own experience of teaching Conflicts at two elite law schools at the end of the twentieth century.

An analogy may help to explain what I have in mind. As I have suggested, the dominant view of Conflicts today is that it is a necessary but uninteresting, and ultimately highly unsatisfactory, set of legal technologies. It is something like a very leaky faucet—a crucial but terribly dull piece of plumbing that becomes apparent only by virtue of the troublesome fact that it stubbornly refuses to work as it should. Now the faucet contains nothing that on its surface would render it of interest to those with a penchant for cultural questions: it is not adorned with interesting mouldings or set in unusual mosaic; it is just an old-fashioned, ordinary, leaky faucet.

To the extent that humanistic legal scholars would find any reason to pay attention to the poor device at all, it might be to *critique* the distributive consequences of plumbing, or the gendered division of labor it has produced, or to show the power of the plumber who comes each week to hoodwink the consumer into buying yet another new faucet-fixing gadget. Alternatively, a humanist with a great deal of creative energy might explore the persons and practices

17. *See, e.g.*, William F. Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1 (1963-1964); Albert A. Ehrenzweig, *A Proper Law in a Proper Forum: A "Restatement" of the "Lex Fori Approach,"* 18 OKLA. L. REV. 340 (1965); Robert A. Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U. L. REV. 267 (1966); Arthur T. von Mehren, *Comment: Special Substantive Rules for Multistate Problems: Their Role and Significance in Contemporary Choice of Law Methodology*, 88 HARV. L. REV. 347 (1974).

that produced the leaky faucet: he or she might describe the meetings of the leaky faucet fixers' association in all its exotic and ironic detail and show how the fantasies of repair and disrepair mirror wider forces at work in parallel fields of greater interest to humanists—perhaps he or she could find parallels to images of chaos and coherence in art or literature, for example.

Yet what of the faucet itself? In each of the above projects it is somewhat beside the point—a mere pretext for telling the story of persons, practices, economic incentives or power politics. Would it be possible for the humanist truly to find something of interest in the mundane technologies of (faulty) plumbing—to take this crucial territory back from the plumbers of the legal discipline? Here, we would want to find a way to describe these techniques as something more than just the consequence of wider cultural trends, and as something more robust than putty in the hands of the technocrat. In other words, we would want to account for the *agency of technocratic legal form*.

The argument proceeds as follows. In the following subsection, Part C, I describe the theoretical and methodological approach of this Essay and explain its relationship to other theoretical trends in areas such as Science and Technology Studies, anthropology, and critical theory. The demonstration begins in earnest in Part II. There, I trace the outlines of the early twentieth century debate between "formalist" and "Realist" approaches to Conflicts. I argue that by describing law as a tool, that is, by appealing to an instrumentalist view of law through the metaphor of the tool, Realist Conflicts scholars were able to recast their adversaries as historical antecedents, doctrinal dinosaurs who just didn't get instrumentalism.

In Part III, I make a crucial culturalist move: I put aside the *content* of this instrumentalist argument to focus on its *form*. Here, I argue that despite all the talk about instrumentalism, the key analytical form at issue in the modern Conflicts revolution was ironically a form that culturalists are uniquely experts in: metaphor. The principal insight of Realism was that law was best imagined *metaphorically* as a tool, and that the lawyer and legal theorist was best imagined metaphorically also *as if* he were a techno-scientist. The astounding success of the Realist project can be accounted for largely in terms of its sophisticated usage of metaphor.

But what happened to those metaphors in the decades after the Realists revolutionized Conflicts doctrines? In Part IV, I make a surprising discovery. Here, I take the analysis beyond traditional humanist interpretive methods and deploy insights from Science Studies and the anthropology of knowledge to point to something so exotic and strange right at the center of our legal doctrines that we lack the ability to even take notice of it. In mid-century Conflicts, I argue, the idea that law was like a tool quite literally became a tool of its own. When faced with a Conflict between two applicable laws, the judge was now to think of each law as a tool of social policy and ask whether the particular social policy the tool was designed to address was at issue in the present case. If it could be found that the policy was not at issue, the Conflicts problem could be "solved." In other words, the surprising fact is this: in midcentury, metaphorical use of technoscience in legal theory was *literalized*; it became a reality. It takes some thinking to appreciate the enormity of this development. We might think of the law as a Temple of Justice without expecting it one day to turn into a physical temple, but something analogous is what happened, beneath our noses, by force of our instrumental deployment of metaphor.

That something as strange and even surreal as this should come to pass in a mundane corner of technical doctrine should go much of the way in convincing humanists that the technicalities of law can turn out to be far more interesting than they might have imagined. But I go beyond this to demonstrate to the instrumentalists in all of us that a cultural approach to Conflicts can provide a convincing explanation of the much-touted late-twentieth-century "muddle" of Conflicts doctrines. Through a close reading of Conflicts texts, and through ethnographic materials gathered from my own experience teaching the doctrines of Conflicts, I explore some of the aesthetic dimensions of this literalization. I show that the decline of Conflicts is not so much the result of a failure to reach adequate solutions to concrete legal problems—current doctrine does this just as well as any other doctrinal approach—but rather that the literalization I uncover has an unintended consequence. Borrowing from sociology, anthropology, and cognate fields, I show how when any analysis, from ritual to board games, becomes too mechanical, too literal, that is, when it loses its metaphorical qual-

ity, it lacks the very formal qualities that *sustain interest.* The problem with Conflicts, I argue, is ultimately not that it is a bad set of doctrines; the problem is that the game is no longer fun to play.

Finally, in Part V, I leave Conflicts and return to the broader argument for attention to the technical dimensions of law often ignored by humanistic and cultural legal studies. Humanists need to devote themselves to a more sophisticated understanding of the tools of law, the technical dimensions of legal form. I argue that the Realist fascination with the intricacies of "legal tools" exemplified in debates about Conflicts jurisprudence provides a long-forgotten antecedent for the cultural study of legal technicalities.

C. *The Agency of Legal Form: A Methodological Proposal*

What might humanistic approaches contribute to an aspect of legal knowledge defined precisely by the absence of *meaning*, that traditional province of humanistic inquiry? Traditionally, humanistic scholars within and without the legal academy have approached the technical in one of two ways. The first has been *critique*: There is a rich tradition in legal scholarship and cognate fields of critiques of technocracy and of the power of the technocrat by virtue of his particular knowledge practices[18] that certainly could be extended to encompass the legal technicalities and the technocratic fantasies of modern conflict of laws doctrines. Critiques of the differential effects of technocratic power hidden beneath the technocrat's veneer of objective neutrality serve as a kind of refrain in critical legal studies,[19]

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18. *See, e.g.*, Michel Foucault, *Governmentality, in* THE FOUCAULT EFFECT: STUDIES IN GOVERNMENTALITY 87, 92 (Graham Burchell et al. eds., 1991); FRIEDRICH A. HAYEK, THE COUNTER-REVOLUTION OF SCIENCE: STUDIES ON THE ABUSE OF REASON (1952); MAX WEBER, MAX WEBER ON CHARISMA AND INSTITUTION BUILDING: SELECTED PAPERS (S.N. Eisenstadt ed., 1968); LANGDON WINNER, AUTONOMOUS TECHNOLOGY: TECHNICS-OUT-OF-CONTROL AS A THEME IN POLITICAL THOUGHT (1977).

19. James Boyle summarizes the early CLS critique of the legal realists' fascination with the "neutrality of technical knowledge." James Boyle, *The Politics of Reason: Critical Legal Theory and Local Social Thought,* 133 U. PA. L. REV. 685, 698 (1985). He echoes a wide spectrum of left political thought within and without the law where he argues that "by withdrawing political questions from the public sphere and giving them over to expert decision

feminist legal theory,[20] and the sociology of law.[21] Anthropologists and cultural historians, likewise, have followed early critics of technocracy[22] to draw attention to the politics of seemingly objective and transparent technocratic knowledge.[23] These critics of technocracy have been as interested in the limits and failures of technocratic planning as its enabling effects,[24] and they have shown how these failures often serve to create further "targets for intervention," as when a failed development project creates a demand for further development projects to rectify earlier errors.[25]

A second humanistic approach to the technical goes beyond critique to paint a rich picture of the *persons* and

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making, technocratic rationality actually diminishes the possibility of democratic debate over ends, in the name of an improved analysis of means." *Id.* at 751. *Cf.* FRANK FISCHER, CITIZENS, EXPERTS, AND THE ENVIRONMENT: THE POLITICS OF LOCAL KNOWLEDGE (2000).

20. *See, e.g.*, Anita Bernstein, *Engendered by Technologies*, 80 N.C. L. REV. 1, 12 (2001) (arguing that "technocentric expansionism" is a kind of "gender-segregation" that lawyers should oppose); Sarah S. Jain, *Inscription Fantasies and Interface Erotics: A Social-Material Analysis of Keyboards, Repetitive Strain Injuries and Products Liability Law*, 9 HASTINGS WOMEN'S L.J. 219 (1998) (arguing that culturally specific and gendered notions of pain and everyday practice are inscribed in both the technologies of the workplace and the products liability law that governs them).

21. *See, e.g.*, YVES DEZALAY & BRYANT G. GARTH, THE INTERNATIONALIZATION OF PALACE WARS: LAWYERS, ECONOMISTS, AND THE CONTEST TO TRANSFORM LATIN AMERICAN STATES (2002); Wendy Espeland, *Legally Mediated Identities: The National Environmental Policy Act and the Bureaucratic Construction of Interests*, 28 LAW & SOC'Y REV. 1149 (1994).

22. *See, e.g.*, HANNAH ARENDT, THE ORIGINS OF TOTALITARIANISM (1973); LEWIS MUMFORD, TECHNICS AND CIVILIZATION (1934); THEODORE ROSZAK, THE MAKING OF A COUNTERCULTURE: REFLECTIONS ON THE TECHNOCRATIC SOCIETY AND ITS YOUTHFUL OPPOSITION (1969).

23. *See, e.g.*, AUDIT CULTURES: ANTHROPOLOGICAL STUDIES IN ACCOUNTABILITY, ETHICS, AND THE ACADEMY (Marilyn Strathern ed., 2000); *cf.* TIMOTHY MITCHELL, RULE OF EXPERTS: EGYPT, TECHNO-POLITICS, MODERNITY (2002).

24. *See, e.g*, Robert Castel, *From Dangerousness to Risk*, *in* THE FOUCAULT EFFECT: STUDIES IN GOVERNMENTALITY 281, 288 (Graham Burchell et al. eds., 1991). *See generally* LEE CLARKE, MISSION IMPROBABLE: USING FANTASY DOCUMENTS TO TAME DISASTER (1999).

25. *See, e.g.*, Castel, *supra* note 24, at 288. *See generally* JAMES FERGUSON, THE ANTI-POLITICS MACHINE: "DEVELOPMENT," DEPOLITICIZATION, AND BUREAUCRATIC POWER IN LESOTHO (1990); KIM FORTUN, ADVOCACY AFTER BHOPAL: ENVIRONMENTALISM, DISASTER, NEW GLOBAL ORDERS (2001).

cultures that produce technical practices. The goal here has been to describe the ironies, double-binds, and self-aggrandizing rituals that characterize the technocratic life, and to explore the wider cultural milieu in which the technocrat finds himself.[26] Important contributions have also been made by scholars interested in the relationship of technocratic knowledge to the constellation of cultural practices and epistemological positions shorthanded as legal modernism.[27] Much progress has been made, also, in understanding the relationship between the aesthetics of mundane technocratic practices and modernist aesthetics, broadly conceived.[28]

This careful attention to the person of the technocrat and his mundane life, whether in legal scholarship or cognate fields, has produced some of the most exciting humanistic investigations of legal practices of recent decades. Yet I want to suggest that it would be of interest to talk not just about people and epistemes, but about technical legal knowledge itself—about the theories, the models, the arguments, the techniques.[29] In other words,

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26. *See, e.g.*, David Kennedy, *Autumn Weekends: An Essay on Law and Everyday Life*, *in* LAW IN EVERYDAY LIFE (Austin Sarat & Thomas R. Kearns eds., 1993); David Kennedy, *The Disciplines of International Law and Policy*, 12 LEIDEN J. INT'L L. 9 (1999); David Kennedy, *Spring Break*, 63 TEX. L. REV. 1377 (1985); David Kennedy, *When Renewal Repeats: Thinking Against the Box*, 32 N.Y.U. J. INT'L L. & POL. 335 (2000) (drawing attention to the "dark side of expertise" and the "blind spots" of well-intentioned technocratic projects).

27. *See, e.g,,* DAVID LUBAN, LEGAL MODERNISM (1994); PAUL RABINOW, FRENCH MODERN: NORMS AND FORMS OF THE SOCIAL ENVIRONMENT (1989); Nathaniel Berman, *'But the Alternative is Despair': European Nationalism and the Modernist Renewal of International Law*, 106 HARV. L. REV. 1792 (1993).

28. *See, e.g,,* GEORGINA BORN, RATIONALIZING CULTURE: IRCAM, BOULEZ, AND THE INSTITUTIONALIZATION OF THE MUSICAL AVANT-GARDE (1995); R.L. RUTSKY, HIGH TECHNĒ: ART & TECHNOLOGY FROM THE MACHINE AESTHETIC TO THE POSTHUMAN (1999). This interest in the aesthetics of technology, and the relationship between technology and aesthetics in knowledge practice, has a long and diverse pedigree. *See generally* MARTIN HEIDEGGER, THE QUESTION CONCERNING TECHNOLOGY AND OTHER ESSAYS (William Lovitt trans., 1977) (1952, 1954, & 1962).

29. I draw my inspiration here from a diverse and eclectic collection of projects that address questions of legal technology in whole or in part. *See* BRUCE A. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION. (1977); PAUL W. KAHN, THE REIGN OF LAW: *MARBURY V. MADISON* AND THE CONSTRUCTION OF AMERICA (1997); DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION [FIN DE SIÈCLE] (1997); MARIANA VALVERDE, LAW'S DREAM OF A COMMON KNOWLEDGE (2003);

the goal of this Essay is to bring the technical into view not as an effect or a byproduct, a tool of more important agents and forces, but as the protagonist of its own account.[30]

In thinking about this methodological problem, I have found it helpful to reflect laterally on theoretical innovations produced in two contexts that are admittedly quite distinct from the law: the fields of Science and Technology Studies and the Anthropology of Knowledge. Science and Technology Studies (STS) is a vast and heterogeneous field.[31] However, it becomes of interest in the present context because STS scholars have long recognized the value of an ethnographic approach to the production of scientific and technical thought. Beginning with a series of laboratory studies conducted in the 1970s,[32] STS scholars spent long hours observing the mundane daily routines of scientists in order to understand the social and material production of scientific truth, and in particular the "contrast between the situated and improvisational performances of actual practices in 'messy' practical and interactional circumstances" and "rationally reconstructed

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Kunal Parker, *The History of Experience: On the Historical Imagination of Oliver Wendell Holmes, Jr.*, 26 POL. & LEGAL ANTHROPOLOGY REV. 60 (2003)

30. *See* LATOUR, *supra* note 6, at vii.

31. It is generally acknowledged to have begun in the 1970s with the so-called "strong program" in the sociology of knowledge. Michael Lynch quotes its founder, David Bloor, on the ideal features of this project:

> 1. It would be causal, that is, concerned with the conditions which bring about belief or states of knowledge. . . .
>
> 2. It would be impartial with respect to truth and falsity, rationality or irrationality, success or failure. Both sides of these dichotomies will require explanation.
>
> 3. It would be symmetrical in its style of explanation. The same types of cause would explain, say, true and false beliefs.
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> 4. It would be reflexive. In principle its patterns of explanation would have to be applicable to sociology itself. . . . otherwise sociology would be a standing refutation of its own theories.

MICHAEL LYNCH, SCIENTIFIC PRACTICE AND ORDINARY ACTION: ETHNOMETHODOLOGY AND SOCIAL STUDIES OF SCIENCE 74 (1993) (footnote omitted).

32. *See generally* KARIN KNORR CETINA, EPISTEMIC CULTURES: HOW THE SCIENCES MAKE KNOWLEDGE (1999); BRUNO LATOUR & STEVE WOOLGAR, LABORATORY LIFE: THE CONSTRUCTION OF SCIENTIFIC FACTS (1986); MICHAEL LYNCH, ART AND ARTIFACT IN LABORATORY SCIENCE: A STUDY OF SHOP WORK AND SHOP TALK IN A RESEARCH LABORATORY (1985).

experimental reasoning in textbooks and research reports."[33] Latour and Woolgar, for example, argued for a kind of studied anthropological curiosity, in which the humanist would "bracket our familiarity with the object of study"[34] and adopt a posture of "artificial distance."[35]

A fundamental insight of STS is that the character of the tools matters: technologies come into being in order to overcome the political and epistemological limits of existing knowledge, and hence these technologies are best understood quite literally as politics by other means.[36] Because the tools play such an important role in the production of knowledge, changes in seemingly mundane tools can lead to fundamental epistemological shifts.[37] The ultimate lesson here is that the kinds of themes of traditional concern to humanists, such as the nature of politics, or debates in moral philosophy, are deeply embedded in the most mundane and material forms of the technocracy, that is, its tools.[38]

To date, this work has had only a limited impact on legal scholarship, as it has been confined to the more narrow and literal context in which science and law come into contact, such as debates over the uses of expert scientific testimony in the courtroom,[39] or the implications

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33. LYNCH, *supra* note 31, at 92.

34. LATOUR & WOOLGAR, *supra* note 32, at 277.

35. *Id.* at 279.

36. *See generally* LATOUR, *supra* note 6; Fabian Muniesa, *Un robot walrasien: cotation éléctronique et justesse de la découverte des Prix*, 13 POLITIX 121 (2000).

37. *See generally* THE RIGHT TOOLS FOR THE JOB: AT WORK IN TWENTIETH-CENTURY LIFE SCIENCES (Adele E. Clarke & Joan H. Fujimura eds., 1992).

38. For example, in her study of the representation of numbers, Mary Poovey shows how the invention of double-entry bookkeeping both enabled the exponential growth of mercantile capitalism and contributed to the "rule-governed system" that "provided *the* model for effective government" through its visual display of transparency, virtue, credit-worthiness. MARY POOVEY, A HISTORY OF THE MODERN FACT: PROBLEMS WITH KNOWLEDGE IN THE SCIENCES OF WEALTH AND SOCIETY xvi (1998).

39. *See, e.g.*, David S. Caudill, *Ethnography and the Idealized Accounts of Science in Law*, 39 SAN DIEGO L. REV. 269 (2002); David S. Caudill & Richard E. Redding, *Junk Philosophy of Science? The Paradox of Expertise and Interdisciplinarity in Federal Courts*, 57 WASH. & LEE L. REV. 685 (2000); Gary Edmond, *Comment, Azaria's Accessories: The Social (Legal-Scientific)*

of regulatory innovations on the practice of science.[40] In this Essay, I have in mind a more radical use of these approaches: if we take seriously Conflicts scholars' suggestion that law is a species of techno-science, why not borrow from the humanistic study of the character of techno-scientific knowledge methods for thinking about legal knowledge more broadly?[41]

One of the most controversial and interesting insights of the STS literature concerns the *agency of scientific tools* in the production of scientific truths. Truth, in this view, is an artifact of networks of material and non-material, human and non-human "actants." Concrete materials tools such as a microscope or a cyclotron enable humans to know certain things—microbes only come into being for the scientist with the invention of the microscope. These tools also guide and limit how humans will go about their work: although microbes are at the center of the scientific inquiry in the eighteenth century metropolis, those same microbes do not "exist" in quite the same way—they cannot be made to come into view—in an environment where the microscope cannot be made to function correctly, such as a distant colonial outpost. As Andrew Pickering puts it in his study of the deliberations of mathematicians, "[h]uman and nonhuman agents are associated with one another in networks, and evolve together within those networks."[42]

Construction of the Chamberlains' Guilt and Innocence, 22 MELB. U. L. REV. 396 (1998); Gary Edmond & David Mercer, *Litigation Life: Law-Science Knowledge Construction in (Bendectin) Mass Toxic Tort Litigation*, 30 SOC. STUD. SCI. 265 (2000); Jennifer L. Mnookin, *Comment: Scripting Expertise: The History of Handwriting Identification Evidence and the Judicial Construction of Reliability*, 87 VA. L. REV. 1723 (2001); Jennifer L. Mnookin, *Fingerprint Evidence in an Age of DNA Profiling*, 67 BROOK. L. REV. 13, 15 (2001) ("[S]crutiny of expert evidence does not take place in a cultural vacuum. What seems obvious, what needs to be proven, what can be taken for granted, and what is viewed as problematic all depend on cultural assumptions and shared beliefs, and these can change over time . . . .").

40. *See, e.g.*, Claire Polster, *How the Law Works: Exploring the Implications of Emerging Intellectual Property Regimes for Knowledge, Economy and Society*, 49(4) CURRENT SOC., July 2001, at 85.

41. Two important recent books extend the insights of STS to think about the practice of judging in this way. *See generally* BRUNO LATOUR, LA FABRIQUE DU DROIT: UNE ETHNOGRAPHIE DU CONSEIL D'ÉTAT (2002); VALVERDE, *supra* note 29.

42. ANDREW PICKERING, THE MANGLE OF PRACTICE: TIME, AGENCY, AND SCIENCE 11 (1995).

Pickering describes a "dance of agency" between the human and non-human:

> As active, intentional beings, scientists tentatively construct some new machine. They then adopt a passive role, monitoring the performance of the machine to see whatever capture of material agency it might affect. Symmetrically, this period of human passivity is the period in which material agency actively manifests itself.[43]

Pickering's work becomes particularly relevant to the technical dimensions of legal thought where he extends the notion of the tool to include not just material tools but theories.[44] The radical insight is that theoretical innovations are not simply the product of persons, or even of their social or epistemic contexts. Rather, some agency must be attributed to the machine or the model itself.

Another project in the anthropology of knowledge takes these same theoretical insights in a different direction, to explore questions of *aesthetics, or form*, in modern technocratic knowledge.[45] For example, Marilyn Strathern has described the taken for granted "aesthetics of scale" that pervade the modern social scientific imagination—the tendency to think in terms of levels of scale such that one can always switch to another level in the analysis—and when one does, one only encounters the same infinite quantity of information. This focus on questions of form resonates in turn with insights in literary and linguistic theory about the "performative" character of knowledge—

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43. *Id.* at 21-22. For example, he describes the discovery of a new algerbraic entity, the "quarternion," as a dance of agency between the mathematician and his models in which, in the first instance, the mathematician establishes a "bridgehead"—he creatively imagines a way of extending a theory to a new domain. Then, in the next stage of "transcription," it is the theory that does the work, as the analogy is deployed. This is followed by "further free moves" on the part of the mathematician and also by "resistance" on the part of the model—it does not do what the mathematician had hoped it would do, and this leads in turn to further "accommodation" on the part of the mathematician. *See id.* at 127-35.

44. *See id.* at 11.

45. *See generally* ANNELISE RILES, THE NETWORK INSIDE OUT (2000); MARILYN STRATHERN, PARTIAL CONNECTIONS (1991); MARILYN STRATHERN, THE RELATION: ISSUES IN COMPLEXITY AND SCALE (1995).

about how speech is not just a collection of meanings but an act with consequences in the world.[46]

In this Essay, I adapt these disparate insights and methodological proposals to focus on the *agency of legal form* as it has presented itself in modern conflict of laws doctrines. What I offer below is not an intellectual history of Conflicts, nor is it a sociological or anthropological account of the culture of Conflicts scholarship—it is not an account of persons and their ideas in time or in socio-cultural context. Rather, my aim is to focus on the agency of the technicalities themselves.

II. THE REALIST CRITIQUE

Today, Conflicts is taught and written about as a series of problem-solving methods, a way of disposing of actual cases.[47] Although these methods are diverse, the key modern insight is that Conflicts questions should be resolved by reflecting on the purposes of the laws at issue, and hence by asking a series of pragmatic, and technical questions about whether and how the purposes of the statutes ("state interests")[48] are served by the application of each state's law to the controversy. The questions in the casebooks and the hypotheticals teachers present to students cast the student in the role of the decision-maker continually faced with the task of coming up with a solution. The subject is presented as a body of technical and instrumental knowledge, a series of problem-solving "methods" rather than "theories."[49]

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46. *See generally* JOHN L. AUSTIN, HOW TO DO THINGS WITH WORDS (1975); JUDITH BUTLER, EXCITABLE SPEECH: A POLITICS OF THE PERFORMATIVE (1997). Austin offers the example of the utterance of the phrase "I do [take this woman to be my lawful wedded wife]," which is not simply a statement but an act. AUSTIN, *supra*, at 10, 12.

47. *See, e.g.*, Lawrence Kramer, *Return of the Renvoi*, 66 N.Y.U. L. REV. 979 (1991); Bruce Posnak, *Choice of Law: Interest Analysis and Its "New Crits,"* 36 AM. J. COMP. L. 681, 681-82 (1988); Robert A. Sedler, *Interest Analysis and Forum Preference in the Conflict of Laws: A Response to the "New Critics,"* 34 MERCER L. REV. 593 (1983); David E. Seidelson, *Interest Analysis: The Quest for Perfection and the Frailties of Man*, 19 DUQ. L. REV. 207 (1981).

48. *See* Brainerd Currie, *Notes on Methods and Objectives in the Conflict of Laws*, 1959 DUKE L.J. 171, 181.

49. *See, e.g.*, ERNST RABEL, THE CONFLICT OF LAWS: A COMPARATIVE STUDY (1945).

As every Conflicts student knows, this approach to the subject is deeply indebted to its history. For if the field now seems arid and technical, Conflicts professors never tire of reminding their students that it was once the site of high legal theory. In the 1930s, Conflicts was a crucial site for the Realist assault on legal formalism,[50] and in mid-century, it was the focus of intensive legal engineering, a place for doctrinal experimentation. What looks like a low-brow technical mess today, therefore, was once the showcase for a "paradigm shift" to pragmatic instrumentalism to be achieved, in the minds of its proponents, by substituting new legal tools for old.[51]

In this Part, I ask what this innovation was really about in Conflicts. As we will see, through innovations in Conflicts doctrines, early and mid-twentieth century scholars sought to redefine law as technology and legal scholars as scientifically informed technicians.[52] The fantasy of the Conflicts Revolution, as it is called,[53] was to engineer a technical system that would allow for both flexibility and durability; that would take into account both matters of individual choice and matters of collective costs; that would deliver both justice in the individual case and the maximization of general welfare; that would hybridize state-of-the-art technology with responsiveness to the concerns of the man on the street. In sum, the goal was to

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50. *See generally* GREGORY S. ALEXANDER, COMMODITY & PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT, 1776-1970, at 311-50 (1997); BARBARA H. FRIED, THE PROGRESSIVE ASSAULT ON LAISSEZ FAIRE: ROBERT HALE AND THE FIRST LAW AND ECONOMICS MOVEMENT (1998); MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY (1992); LAURA KALMAN, LEGAL REALISM AT YALE, 1927-1960 (1986).

51. *Cf.* THE RIGHT TOOLS FOR THE JOB: AT WORK IN TWENTIETH-CENTURY LIFE SCIENCES (Adele E. Clarke & Joan H. Fujimura eds., 1992) (commenting on the impact of the tools available to scientists on the evolution of scientific paradigms).

52. *See* Heinrich Kronstein, *Crisis of "Conflict of Laws,"* 37 GEO L.J. 483, 486-87 (1949); *cf.* ROBERT S. SUMMERS, INSTRUMENTALISM AND AMERICAN LEGAL THEORY (1982).

53. The term "conflicts revolution" has been used widely to denote the intellectual movement beginning in the 1930s and culminating in the 1960s that preached the demolition of the traditional choice-of-law methodology expressed in the First Restatement of Conflict of Laws (1934) and its replacement with a variety of so-called "modern approaches." *See generally* EUGENE F. SCOLES ET AL., CONFLICT OF LAWS 25-74 (3d ed. 2000).

create a legal device that would incorporate both a critique of modernity and a utopian vision of how it might be made better. The field of Conflicts has also long been a privileged place, in other words, of modernist innovation.[54]

In today's Conflicts hornbooks and casebooks, two approaches are presented in historical sequence, as if one displaced the other in time. The first is the so-called traditional approach, most often associated with Joseph Beale.[55] After this overview of vested rights theory, which is presented as a kind of prehistory of modern Conflicts doctrine, students learn "the modern approach," which is to say, the doctrines associated with the Realist Revolution in Conflicts.[56] I begin by summarizing each of these briefly.

A. *The Formalist Project in Conflicts*

Beginning with an article published in 1896,[57] and culminating in his work as reporter of the First

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54. On legal modernism, see generally LUBAN, *supra* note 27; Nathaniel Berman, *"But the Alternative Is Despair": European Nationalism and the Modernist Renewal of International Law*, 106 HARV. L. REV. 1792 (1993); Nathaniel Berman, *Modernism, Nationalism, and the Rhetoric of Reconstruction*, 4 YALE J.L. & HUMAN. 351 (1992); Nathaniel Berman, *A Perilous Ambivalence: Nationalist Desire, Legal Autonomy, and the Limits of the Interwar Framework*, 33 HARV INT'L L.J. 353 (1992).

55. Joseph Beale was a professor of law at Harvard Law School from 1892 to 1937. From 1902 to 1904, Beale also served as the first dean of the Chicago Law School. *See* JOHN H. SCHLEGEL, AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE 263 (1995). Beale was not alone in this project. *See also* HERBERT F. GOODRICH, HANDBOOK ON THE CONFLICT OF LAWS (1927).

56. *See, e.g.*, CURRIE ET AL., *supra* note 14. The teachers' manuals to Conflicts casebooks are particularly explicit sources of dogma on this point. Teachers are admonished again and again that the point of the lesson is to demonstrate the traditional doctrine's descriptive inaccuracy, its indeterminacy and its unjustness of results.

57. *See generally* Joseph H. Beale, *Dicey's "Conflict of Laws"*, 10 HARV. L. REV. 168 (1896-97); *see also* JOSEPH H. BEALE, A SELECTION OF CASES ON THE CONFLICT OF LAWS (1900-02); Joseph H. Beale, *What Law Governs the Validity of a Contract*, 23 HARV. L. REV. 1 (1909) [Beale, *Validity of a Contract I*]; Joseph H. Beale, *What Law Governs the Validity of a Contract: II. The Present Condition of the Authorities*, 23 HARV. L. REV. 79 (1909) [Beale, *Validity of a Contract II*]; Joseph H. Beale, *What Law Governs the Validity of a Contract: III. Theoretical and Practical Criticisms of Authority*, 23 HARV. L. REV. 260 (1910) [Beale, *Validity of a Contract III*].

Restatement of Conflict of Laws[58] and his treatise on the subject,[59] Joseph Beale unseated the approach to Conflicts developed by fellow Harvard Law School professor and Associate Supreme Court Justice Joseph Story—an approach founded on the quasi-legal, quasi-diplomatic, quasi-policy-oriented concept of comity,[60] in favor of a new theory of "vested rights." Beale argued that each legal right was created at a particular jurisdiction, the jurisdiction in which it vested. As such, the law of that jurisdiction was integral to the constitution of the right itself, and hence only the law of the jurisdiction of vesting could govern subsequent disputes. For another jurisdiction to apply its own law to the adjudication of the right simply because the adjudication took place in its forum would be to infringe on the sovereignty of the jurisdiction in which the right vested.[61]

Beale's vested rights theory offered a purposely mechanical methodology for deciding Conflicts cases: every case could be addressed through a two-step analysis. First, the judge was to ask what kind of law was at issue. Was the question of whether or not an employee could sue his employer for injuries sustained on the job a question of tort or contract? Next, a series of "localizing rules" would tell the judge where the rights had vested and hence what law

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58. *See generally* RESTATEMENT OF THE LAW OF CONFLICT OF LAWS (1934).

59. *See generally* JOSEPH H. BEALE, TREATISE ON THE CONFLICT OF LAWS (1935).

60. *See* JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS, FOREIGN AND DOMESTIC § 35, at 34 (1834):

> The true foundation on which the administration of international law must rest is that the rules which are to govern are those which arise from mutual interest and utility, from a sense of the inconveniences which would result from a contrary doctrine, and from a spirit of moral necessity to do justice, in order that justice may be done to us in return.

Id. Beale criticized the comity theory for its status as policy rather than law:

> The doctrine seems really to mean only that in certain cases the sovereign is not prevented by any principle of international law, but only by his own choice, from establishing any rule he pleases for the conflict of laws. In other words, it is an enabling principle rather than one which in any particular case would determine the actual rule of law.

BEALE, *supra* note 59, at app. § 71, at 1965.

61. *See* BEALE, *supra* note 59, at § 5.4, at 53.

governed them. In the case of tort, for example, the judge was to apply the law of the place of the last act that constituted the tort, since it was at that moment that the rights vested,[62] while in a case of contract, the place of vesting was the place of contracting.[63]

B. *The Realist Response*

Almost as soon as it was elaborated, however, Beale's vested rights theory emerged as an ideal target in the Legal Realists' larger critique of legal formalism. Chief among the Realist critics of vested rights theory was Walter Wheeler Cook, a specialist in Conflicts and Labor Law,[64] although other important Realist critics of Beale included David

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62. *See* RESTATEMENT OF THE LAW OF CONFLICT OF LAWS, *supra* note 58, at § 384 (1934).

63. *See id.* § 332. Beale did recognize a number of exceptions to his highly formalistic scheme, including the possibility that foreign law might be repugnant to domestic public policy. *See* Beale, *What Law Governs the Validity of a Contract; III. Theoretical and Practical Criticisms of Authority,* note 57.

64. Cook was hired at the Nebraska Law School in 1903 under Roscoe Pound's deanship. He taught at Missouri, Wisconsin and Chicago before moving to Yale in 1919. From 1935 to 1943, he helped found the Institute of Law at Johns Hopkins University with the goal of providing a more jurisprudential kind of training than was offered at American law schools and of promoting more empirical research in the law. When the Institute closed in 1933, Cook moved to Northwestern Law School where he taught until his death in 1943. *See* SCHLEGEL, *supra* note 55, at 147-210.

Cavers,[65] Hessel Yntema,[66] Elliott Cheatham,[67] and Ernest Lorenzen.[68]

Along with his Realist colleagues, Cook used Beale's Restatement as material for a prototypical realist critique of legal formalism.[69] As Cook described Beale and his cohort:

> Such writers begin with reflecting upon and establishing to their satisfaction the general or essential nature of law and legal rights. This leads them to certain general or fundamental principles, supposed to flow from the nature of law and legal rights as thus established. These fundamental principles take the form of general

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65. *See, e.g.*, David F. Cavers, *A Critique of the Choice of Law Problem*, 47 HARV. L. REV. 173 (1933). Cavers began his teaching career at the University of West Virginia in 1930 and taught at Duke from 1931 until he was appointed to the faculty at Harvard in 1945. He taught at Harvard until he retired in 1969 to become president of the Walter Meyer Research Institute in Law, a short-lived institute to promote social scientific research in the law, where he served until 1976. *See* SCHLEGEL, *supra* note 55, at 244-48, 264.

66. *See, e.g.*, Hessel E. Yntema, *The Hornbook Method and the Conflict of Laws*, 37 YALE L.J. 468 (1928). Yntema taught at Columbia Law School from 1921 to 1933, when he moved to Johns Hopkins to join Cook's project for a legal institute. He taught at Johns Hopkins and then at the University of Michigan Law School. *See* SCHLEGEL *supra* note 55, at 269.

67. *See, e.g.*, Elliott Cheatham, *American Theories of Conflict of Laws: Their Role and Utility*, 58 HARV. L. REV. 361 (1945).

68. *See, e.g.*, Ernest G. Lorenzen, *Territoriality, Public Policy and the Conflict of Laws*, 33 YALE L.J. 736 (1924). Lorenzen taught at Yale Law School from 1917. *See* LAURA KALMAN, LEGAL REALISM AT YALE, 1927-1960, at 101 (2001).

69. Laura Kalman recounts how Beale served as a kind of stock character in the realist critique of formalism, which Jerome Frank termed "Bealism." Kalman cites a short poem by Thurmond Arnold:

> Beale, Beale, marvelous Beale,
> Only in verse can we tell how we feel,
> When our efforts so strenuous to overthrow,
> Your reasoning tenuous, don't seem to go.
> For the law is a system of wheels within wheels.
> Invented by Thayers and Sayers and Beales,
> With each little wheel so exactly adjusted,
> That if it is damaged the whole thing is busted.
> So cease from refuting what can't be disputed,
> Abandon disputing what can't be refuted,
> and BOW to the frantic pedantic romantic
> Effusive abusive illusive conclusive
> Evasive, persuasive, marvelous Beale.

KALMAN, *supra* note 68, at 26.

> statements as to what—in view of the essential nature of law and legal rights—a state or country 'can' or 'cannot' do in the way of creating rights, duties, and other legal relations. They thus come to think that the conflict of laws 'deals with the recognition and enforcement of foreign-created rights' or that it has to do with the application of law in space . . . .[70]

Again and again, Cook demonstrated with regard to individual conflicts doctrines[71] that whatever courts might say about how they reached decisions, they could not possibly deduce outcomes from abstract principles such as the rule that property rights vest at the situs[72] or that rights in contract vest at the place of contracting.[73] What situs would apply in the case of intangible forms of property, or torts where the injury was spread across multiple jurisdictions, for example? Moreover, the very notion that rights "vested" in certain spaces was fundamentally, logically flawed. For this reason, Cook argued, Beale's vested rights theory in practice was neither easy to use nor consistent in its effects. "The final result of a confusion of terminology" like the first restatement, Cook wrote, "can only be that a general principle . . . adopted obviously for social convenience, will be applied by a pseudo-logical process so as to reach results which are required neither by principle itself nor by the social policy upon which the principle is supposed to be based.[74]

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70. Walter W. Cook, The Logical and Legal Bases of the Conflict of Law, 33 YALE L. J. 457, 459 (1924) (quoting Beale).

71. *See* Walter W. Cook, *'Characterization' in the Conflict of Laws*, 51 YALE L.J. 191, 210 (1941) [hereinafter Cook, *Characterization*] (demonstrating that the restatement's proposals on characterization provided no substantive guidance to courts because they were logically circular); Walter W. Cook, *"Substance" and "Procedure" in the Conflict of Laws*, 42 YALE L.J. 333 (1932-1933) (demonstrating that whether a rule is procedural or substantive can only be determined with reference to the context and purposes of the rule in question); Walter W. Cook, *Tort Liability and the Conflict of Laws*, 35 COLUM. L. REV. 202 (1935).

72. *See* Walter W. Cook, *'Immovables' and the 'Law' of the 'Situs': A Study in the Ambiguity of Legal Terminology*, 52 HARV. L. REV. 1246, 1264 (1939) (demonstrating that the restatement rule applying the law of the situs to conflicts over property logically means different things depending on whether the forum is the jurisdiction of the situs or another jurisdiction).

73. *See* Walter W. Cook, *'Contracts' and the Conflict of Laws*, 31 ILL. L. REV 143 (1936).

74. Cook, *supra* note 72, at 1274.

In attacking the doctrine of vested rights, Cook and his cohort were self-consciously taking on the paradigm of lawyerly thinking.[75] The Conflicts Revolution was framed as part of a wider assault on lawyerly knowledge that in turn belied the Realist antipathy towards the practicing bar.[76] Cook and Yntema severely criticized the restatement project and the "hornbook method" of Beale and his supporters as precisely the wrong way to think about Conflicts.[77] In his review of Beale's treatise, Cook belittles its orientation toward the practicing bar and its resulting relegation of all historical and theoretical questions to the appendix.[78]

Cook's own proposal was what he termed a theory of "local law." In fact, it was not so much a theory as an elaboration of the exact opposite premises to vested rights. It simply held, following standard Realist dogma, that the adjudication of a right in effect created the right, and hence:

> No court ever enforces foreign law as such. Under our system of the conflict of laws, an American court when asked to give damages for an alleged foreign tort . . . will 'apply' the 'substantive law' of the other state in question. Although it is often said that the 'substantive law' of the other state 'governs' the case, the word 'governs' is misleading: an American court does not hand the case over to the law of the foreign state for decision. If it allows a recovery, it merely decides, on grounds of social convenience, to give a right to damages as 'nearly homologous as possible' to the right given by the foreign law.[79]

C. *A Collection of Statements*

I mentioned at the outset of this Part that the two sides of this debate are taught in today's Conflicts classes as a kind of historical sequence in which realism replaces formalism in time, complete with periodizing terms such as

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75. I thank Robert Gordon for this insight.

76. *See* HORWITZ, *supra* note 50, at 183.

77. *See generally* Walter W. Cook, *Review of Joseph Beale, Treatise on the Conflict of Laws,* 35 COLUM. L. REV. 1154; *see also* Yntema, *supra* note 66, at 468-69.

78. *See* Cook, *supra* note 77, at 1154.

79. Cook, *Characterization, supra* note 71, at 200.

"traditional" and "modern" approaches. However, the two approaches were far more contemporaneous than this pedagogy suggests.[80] The so-called traditional approach was in fact very much a recent innovation at the time of the Realist critiques. The First Restatement's vested-right approach remains alive and well, moreover, in a minority of American jurisdictions (not to mention in the approaches to Private International Law used by most countries in the world) today.[81] Most importantly, what is lost in this temporal story is that Beale argued for his vested rights approach on the same kind of instrumental grounds as Realist interventions: resolving conflicts according to a theory of vested rights would ease administration and would best promote uniformity of decision and foreseeability of outcomes.[82]

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80. Cook was only thirteen years Beale's junior, and both scholars taught and wrote until their deaths in the same year, 1943. As Tom Grey points out, this contemporaneity is true of the relationship between Realism and formalism more generally: Langdell began teaching in the very year that Holmes wrote his first article. *See* Thomas C. Grey, *The New Formalism*, STANFORD LAW SCHOOL PUBLIC LAW AND LEGAL SERIES, 1999, http://papers.ssrn.com/sol3/papers.cfm?abstract_id+200732.

81. *See* Symeonides, *supra* note 13.

82. This shared instrumentalist orientation is particularly evident in a debate between Beale and the Realists over the proper choice of law rule concerning the validity of a contract. Against Beale's argument that the law of the place of contracting should determine a contract's validity (*see* Beale, *What Law Governs the Validity of a Contract*, *supra* note 57), the Realists proposed a rule of party autonomy: the validity of the contract should be judged by the law the parties expressly or implicitly chose for themselves. *See* Cook, *supra* note 73, at 899-920 (1936); Ernest G. Lorenzen, *Validity and Effects of Contracts in the Conflict of Laws*, 30 YALE L.J. 565 (1920-21). Beale responded that this would amount to allowing the parties to engage in a legislative act since by choosing an alternative law they could in essence legislate the terms of validity of contracts. Cook in turn responded that if the parties legislated, they did so only for themselves, and hence were not acts of law-making, a claim that finessed the realists' own deconstruction of the private quality of contracts. *See* WALTER W. COOK, THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS 399 (1942); *see also* Hessel E. Yntema, *Contract and Conflict of Laws: "Autonomy" in Choice of Law in the United States*, 1 N.Y.L.F. 46 (1955); Hessel E. Yntema, *"Autonomy" in Choice of Law*, 1 AM. J. COMP. L. 341 (1952). To this, Beale responded with precisely the internal Realist critique that had been leveled at him: marshalling the realists' own critiques of contract law, he asked how one could claim that a rule of party autonomy was foreseeable when in fact the question of what the parties intended was itself open to judicial manipulation and caprice? *See* Beale, *Validity of a Contract III*, *supra* note 57, at 260-61. As Joseph Singer has pointed out, the arguments in this debate contradict received

This now generally-accepted historical sequence (whatever one thinks of the Revolution, one knows that it displaced a formalist past) must be read, therefore, as a rhetorical achievement. As a first step toward a humanistic study of Conflicts, then, we would need to ask not just whether this historical claim is right or wrong, but what it achieves or performs; what are its effects?

On this point, STS offers a useful insight. STS scholars have shown again and again that what look like incontro-

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expectations that the formalist position would defend freedom of contract against a Realist argument for restricting party autonomy. *See* Singer, supra note 16, at 75-76 (1989).

At the time of these controversies, De Sloovere argued that Beale did not overlook "(1) the human elements involved, (2) judicial policies, (3) juristic theories, (4) the immediate and mediate ends of law even though these are not always extant in the cases." Frederick L. de Sloovere, *On Looking into Mr. Beale's Conflict of Laws*, 13 N.Y.U. L.Q. 333, 335 (1936); *cf.* Leon Arthur Harding, *Joseph Henry Beale: Pioneer*, 2 MO. L. REV. 131, 136-37 (1937); Hill, *supra* note 15, at 504. Henry McClintock likewise insisted that, "Professor Beale has more consistently followed the approved inductive method than have his critics." Henry L. McClintock, *Beale on the Conflict of Laws*, 84 U. PA. L. REV. 309, 310 (1936).

With hindsight, we can conclude that Beale in fact articulated the instrumentalist standard for *success* for a Conflicts theory against which his vested rights theory was later judged by his critics to have failed. This standard of success remains Beale's lasting achievement: the understanding that a Conflicts theory will have succeeded when it achieves ease of administration and uniformity of results, and will have failed if it does not, has achieved the status of a given in the field in a way that Beale's vested rights theory never did. Latent in this definition of success is a very modernist understanding of law as a tool. I follow Thomas Grey's suggestion that we understand "formalism" as a modernist approach to law rather than a premodernist one. *See* Grey, *supra* note 80. For examples of the realists' appropriation of this instrumentalist measure of the success of Conflicts doctrines, see Robert T. Donley, *The Modern Influence in the Conflict of Laws*, 36 W. VA. L.Q. 217, 243 (1930) ("But in the maturity of the law the very idea of stability and predictability is an interest to be secured, and is of the highest importance."); M. Hancock, *Choice-of-Law Policies in Multiple Contact Cases*, 5 U. TORONTO L. REV. 133, 135-36 (1943) (arguing for the choice of law policies of fairness to the parties, uniformity, predictability, and recognizing the interest of states in transactions occurring in their territories); Raymond J. Heilman, *Judicial Method and Economic Objectives in Conflict of Laws*, 43 YALE L.J. 1082, 1108 (1934) ("The chief functions which the rules of Conflict of Laws ought to be made to serve are: to provide certainty and uniformity as to predictability of legal consequences of specific factual situations; beyond that, to provide to the greatest extent possible through the imposition of legal consequences, uniformity of economic and other social consequences of the kind generally thought desirable throughout the larger commonwealth.").

vertible, natural facts are in fact best seen as "collections of statements."[83] One such collection of statements becomes "true" when (1) it enrolls sufficient allies such that it would not be politically feasible to contest it (it becomes "black boxed")[84] and (2) it proves to be "doable" (often in ways that have little inherently to do with the substance of the statements themselves)—it is cheaply verifiable in the laboratory or does not too dramatically change the necessary relations between scientists and lab technicians, for example.[85] In this understanding:

> the status of a statement depends on later statements. It is made more of a certainty or less of a certainty depending on the next sentence that takes it up; this retrospective attribution is repeated

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83. This point shares a genealogy with rhetorical and discursive approaches to law that predominate humanistic analyses of law where it suggests, in a parallel way to critical and cultural legal studies, that there is a politics to the seeming objectivity of scientific discourse and hence that rhetoric about and representations of truth are an important aspect of the production of that truth. *See generally,* GEOFFREY C. BOWKER & SUSAN LEIGH STAR, SORTING THINGS OUT: CLASSIFICATION AND ITS CONSEQUENCES (1999); POOVEY, *supra* note 38 (1998); STEVEN SHAPIN & SIMON SCHAFFER, LEVIATHAN AND THE AIR-PUMP: HOBBES, BOYLE AND THE EXPERIMENTAL LIFE (1985); STEVEN SHAPIN, A SOCIAL HISTORY OF TRUTH: CIVILITY AND SCIENCE IN SEVENTEENTH-CENTURY ENGLAND (1994); THE USES OF EXPERIMENT: STUDIES IN THE NATURAL SCIENCES (David Gooding, Trevor J. Pinch & Simon Schaffer eds., 1989); Bruno Latour, *Drawing Things Together, in* REPRESENTATION IN SCIENTIFIC PRACTICE 19 (Michael Lynch & Steve Woolgar eds., 1990).

84. A "black box" in STS terminology is that which, although once contested, has become part of the common sense of scientific practice such that it is just a fact, no longer open for debate. *See* BRUNO LATOUR, SCIENCE IN ACTION: HOW TO FOLLOW SCIENTISTS AND ENGINEERS THROUGH SOCIETY 2-3 (1987):

> The word black box is used by cyberneticians whenever a piece of machinery or a set of commands is too complex. In its place they draw a little box about which they need to know nothing but its input and output. As far as [the scientist] is concerned the double helix and the machine [used to measure it] are two black boxes. That is, no matter how controversial their history, how complex their inner workings, how large the commercial or academic networks that hold them in place, only their input and output count.

Id. See also Langdon Winner, *Upon Opening the Black Box and Finding It Empty: Social Constructivism and the Philosophy of Technology*, 18 SCI., TECH., AND HUM. VALUES 362, 362-78 (1993).

85. *See* THE RIGHT TOOLS FOR THE JOB: AT WORK IN TWENTIETH-CENTURY LIFE SCIENCES, *supra* note 37, at 20.

> for this next new sentence, which in turn might be made more of a fact or more of a fiction by a third, and so on . . . .[86]

From this point of view, we can see the rendering of a *debate* between formalists and Realists in Conflicts as a *historical trajectory* as a kind of "black box." The notion that Realism succeeded formalism has now simply become an accepted and undisputed fact. And, this fact subtly but powerfully bolsters the view that the Realist position was the more advanced, sophisticated, and modern of the two approaches. From a Science Studies point of view, the interesting question therefore becomes, *how* did the Realists manage to enroll sufficient allies in their project to render a political and epistemological dispute as a matter of historical sequence in time—a mere "fact" beyond dispute?

As any teacher of Conflicts today knows all too well, of course, this historical trajectory is not entirely settled: the notion that Realism is simply more modern and more advanced than formalism must be fought for pedagogically in the classroom today. A careful combination of rhetorical skill and authoritative pressure is required to convince students that the history of Conflicts is the story of the replacement of a backward and outdated theory with a modern and technologically advanced alternative.

What is at stake in the pedagogy of this historical claim is a fight over a second collection of claims about the doability of formalist analysis. The performative authority of the classroom must be deployed skillfully by the teacher to demonstrate that one type of reasoning, formalist reasoning, is incapable of producing coherent results, while another type of reasoning, Realist reasoning, is doable. From an STS point of view, a network of actants—arguments about history and about doability, theories, teachers, students, lawyers, judges, and restatements—that together coalesce to make a certain view of the Conflicts Revolution "true."

Of course, as I indicated in the introduction, what makes Conflicts intriguing at this moment is the renewed sense of doubt about the "doability" of the Realist project.

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86. LATOUR, *supra* note 84, at 27-28. The goal is "not to look for the intrinsic qualities of any given statement but to look instead for all the transformations it undergoes later in other hands." *Id.* at 59.

With the resurgence of formalism across the legal academy and on the bench, formalism is regaining appeal in Conflicts as well. One lesson of the above discussion, as we move in subsequent sections of this Essay to contemporary arguments for a return to formalism in Conflicts, then, is that we should be as suspicious of these recent claims about relative "doability" of any approach over another, and be willing to consider these as "collections of statements" on par with those of an earlier era.

III. THE TECHNOSCIENCE METAPHOR

But Langdellian formalism was always as much a set of metaphors as a set of doctrines. In particular, it was a metaphorical vision of the legal project as a science.[87] In order to enroll sufficient allies to their cause, the Realists therefore needed to do more than demolish the *logic* of Beale's doctrinal claims. They needed to propose an alternative set of metaphors that could displace the scientific metaphors of formalism. In this Part, I argue that in Conflicts, one of the ways Realism achieved its rhetorical success was through the introduction of a very particular set of metaphors into its collection of statements[88]—metaphors of law as a tool, and of legal knowledge as a kind of technoscience.

Today, the conception of law as a tool, as knowledge with intended consequences that serves practical purposes, is a taken-for-granted dimension of legal knowledge. And yet if forced to reflect on it explicitly, most lawyers would also acknowledge that it is foundational: it is what distinguishes legal knowledge from politics, or philosophy, in the modern lawyer's self-understanding. In fact, these tool metaphors have been black boxed in legal studies for so long that it is difficult even for humanistic legal scholars to hear them as metaphors or to imagine law in other terms.

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87. *See* Robert W. Gordon, *The Case for (and against) Harvard*, 93 MICH. L. REV. 1231, 1239-40 (1995) (emphasizing the generalizing ambitions of the scientific project); Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1, 17 (1983) (describing Langdellian legal science as attune to geometry); Anthony J. Sebok, *Misunderstanding Positivism*, 93 MICH. L. REV. 2054, 2084 (1995) (arguing that Langdell's conception of legal science was borrowed from biology).

88. *Cf.* JOHN LAW, AIRCRAFT STORIES: DECENTERING THE OBJECT IN TECHNOSCIENCE (2002).

In later parts of this Essay, I will trace the consequences and transformations of these technoscientific metaphors. In this Part, I want to consider in more detail their contours, uses, and effects as they were formulated by Realist Conflicts scholars. My argument will be that the metaphor of law as a technoscientific *tool* helped to enroll a series of human and non-human allies to the Realist cause, including in particular: (1) the legal tradition, by virtue of its appeal to an implicit and yet already canonical frame of reference in that tradition; (2) a wider Realist community, by virtue of its shared terms of reference with classic Realist themes; (3) a wider network of popular intellectual thought by virtue of its invocation of key buzzwords of American philosophical pragmatism; and most of all, perhaps, (4) Conflicts scholars and practitioners themselves, in the way it provided a vision of the practitioner of Conflicts and his project, and a fantasy about the practice of legal knowledge—an appealing method, and aesthetic for law.

In the place of Beale's theory of vested rights, Cook proposed a more pragmatic and practical, but equally "scientific" approach to Conflicts doctrine. As he put it, Realist critique "does not lead to the discarding of all principles and rules, but quite the contrary. It demands them as tools with which to work; as tools without which we cannot work effectively."[89] The image here is of law as a technical machine—not the machine of the classical era disparaged by the Realists as "mechanical jurisprudence"[90] but the modern mass of inter-related parts that is the tool of social and economic engineering. The lawyer and legal scholar is likened to a kind of mechanic or engineer—an expert to be sure, but a practically minded expert[91] focused on the perfection of the workings of the machine.

In her work on artificial intelligence engineers, Diane Forsythe describes the "engineering ethos" of her subjects

89. Cook, *supra* note 70, at 487.

90. *See* Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908).

91. Morton Horwitz has described how, for the Realists, modernity required *expertise*, a "scientific" as opposed to a "legalist" mode of engagement. *See* HORWITZ, *supra* note 50, at 216-21.

as a tendency to approach things practically rather than theoretically:

> Faced with a problem, the Lab's knowledge engineers prefer to try to solve it in a rough and ready way, refining the solution by trial and error. When building an expert system, they say, it is better to build a rapid prototype and see how it turns out than to map it out exhaustively beforehand . . . . Performance is the criterion here.[92]

Forsythe's description aptly captures Cook's vision of legal project. Cook advocated a more modest, applied, experimental vision of law, one grounded in practical, hands-on problems. But if this new technoscience was experimental, it was also fundamentally rational and scientific.[93] Cook took great pains to emphasize, as against what he termed the "mid-Victorian" understanding of science, that modern science was not about actual certainty but "warranted assertions" as in the nascent field of probability theory.[94] In the same way, legal reasoning should be a kind of "scientific empiricism"—a combination

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92. DIANA E. FORSYTHE, STUDYING THOSE WHO STUDY US: AN ANTHROPOLOGIST IN THE WORLD OF ARTIFICIAL INTELLIGENCE 44 (2001).

93. Dewey himself actually disputed Holmes' claim that the life of the law was not logic but experience, and sought to rehabilitate logic from Realist critique by casting legal rules as "working hypotheses" and "tools" which should be constantly re-evaluated and modified as they encountered concrete facts, means rather than ends. *See* 1 JOHN DEWEY, *Logical Method and Law*, *in* THE ESSENTIAL DEWEY: PRAGMATISM, EDUCATION, DEMOCRACY 361 (Larry A. Hickman & Thomas M. Alexander eds., 1998):

> [Logical systematization] is an instrumentality, not an end. It is a means of improving, facilitating, clarifying the inquiry that leads up to concrete decisions; primarily that particular inquiry which has just been engaged in, but secondarily, and of greater ultimate importance, other inquiries directed at making other decisions in similar fields. . . . It is most important that rules of law should form as coherent and generalized logical systems as possible. But these logical systematizations of law in any field. . .with their reduction of a multitude of decisions to a few general principles that are logically consistent with one another, while they may be an end in itself for a particular student, are clearly in last resort subservient to the economical and effective reaching of decisions in particular cases.

Id. at 356.

94. Walter W. Cook, *Walter Wheeler Cook*, *in* MY PHILOSOPHY OF LAW: CREDOS OF SIXTEEN AMERICAN SCHOLARS 51, 51-52 (1941).

of "radical empiricism, methodological rationalism, and critical pragmatism."[95]

Cook's analogies between the task of the lawyer and the tasks of the modern scientist also pointed to a particular vision of the lawyer and the legal scholar. Donna Haraway has coined the phrase "modest witness" to describe the self-image of the techno-scientist as a person who eschews glamorous, high-profile scientific discoveries in favor of the selfless task of providing for real needs (perfecting the genetic modification of the Flavr-savr™ Tomato, for example), and who imagines himself as a fortunate and respectful witness to the awesome truths of science.[96] This carefully disciplined modesty pervades Cook's vision of the legal project as well.

This substitution of Beale's metaphors of pure science for the metaphor of law as technoscientific tool or machine drew a number of new human and non-human allies to the cause of defeating the First Restatement in Conflicts. First, and most simply, it marshaled the authority of Realist scholars and Realist ideas from other areas of law. The foregrounding of the tools of legal reasoning showcased a wider Realist insight: that law was a tool—a means to an end—in a more general sense. In Roscoe Pound's words:

> Being scientific as a means to an end, [law] must be judged by the results it achieves, not by the niceties of internal structure; it must be valued by the extent to which it meets its end, not by the beauty of its logical processes or the strictness with which its rules proceed from the dogmas it takes as its foundation. [97]

For Benjamin Cardozo, likewise, "[f]ew rules in our time are so well established that they may not be called upon any day to justify their existence as means adapted to an end."[98] Karl Llewellyn insisted that Realism demanded a

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95. *Id.* at 57.

96. *See generally* Donna J. HARAWAY, MODEST_WITNESS@SECOND_MILLENNIUM. FEMALEMAN©_MEETS_ONCOMOUSE™: FEMINISM AND TECHNO-SCIENCE (1997). In Haraway's analysis, this technoscientist is gendered male; she is interested in how ideas about the modesty of the scientific endeavor necessitate the exclusion of the female from the scientific domain.

97. Pound, *supra* note 90, at 605.

98. BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 98 (1st ed. 1921).

"conception of law as a means to social ends and not as an end in itself; so that any part needs constantly to be examined for its purpose, and for its effect, and to be judged in the light of both and of their relation to each other."[99] Hence the metaphor implicitly or powerfully indexed (and hence brought into being) a political and intellectual alliance between this doctrinal dispute and wider disputes in the academy, the judiciary, and the political branches.

Yet if the technoscientific metaphor marshaled allies from a larger battle between formalism and Realism, paradoxically, it also indexed, in the way only metaphors can,[100] a somewhat contradictory idea of a wider unity of legal scholars. In seizing on the language of means and ends, Conflicts scholars were deploying a familiar legal tool with a long doctrinal pedigree.[101] Indeed, Beale himself had already demonstrated a commitment to this instrumentalist vision of law in his scholarship.[102] What was so powerful about the metaphor of law as a tool, in other words, was that Cook's claims for a "new" science of law notwithstanding, the metaphor was already a kind of implicit given of legal reasoning, and hence would have been received by most trained lawyers, whatever their views of formalism, as intuitively plausible.

In speaking of law as a means to an end, therefore, the Realists were appealing to a longstanding American understanding of law as a tool, something that exists for a purpose. This understanding was simply part of the taken-for-granted machinery of legal argument, the apparatus with which litigants, judges, politicians and academics argued about what *kind* of tool government might be. In

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99. Karl N. Llewellyn, *Some Realism about Realism–Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1236 (1931).

100. *See* ROY WAGNER, AN ANTHROPOLOGY OF THE SUBJECT: HOLOGRAPHIC WORLDVIEW IN NEW GUINEA AND ITS MEANING AND SIGNIFICANCE FOR THE WORLD OF ANTHROPOLOGY (2001).

101. Since *McCulloch v. Maryland*, courts had evaluated the limits of federal government authority by considering whether the act in question was a legitimate means to an expressly authorized end. *See* McCulloch v. Maryland, 17 U.S. 316, 421 (1819) (Marshall, J.) ("Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.").

102. *See* Beale, *What Law Governs the Validity of a Contract, supra* note 57.

fact, *Lochner v. New York* itself, the paradigm of legal formalism and beacon for Realist critique, was a decision about the legitimate scope of governmental power premised precisely on an analysis of the relationship of the means of regulation to their stated ends.[103] The understanding of the relationship between knowledge and its artifacts as a relationship of means to ends was something lawyers already shared with engineers and other technoscientists, in other words. The reconfiguration of law as a tool, a means to an end, therefore simply foregrounded a different thread in the fabric of legal rhetoric. By *foregrounding* it, by making it explicit, Cook and his cohort achieved the remarkable feat of proposing an approach that seemed both new and traditional at once.

The technoscientific metaphor also tapped into wider cultural trends. Specifically, its explicit affinities with a then popular philosophical tradition of thinking of knowledge as a tool or an instrument with practical uses

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103. *See* Lochner v. New York, 198 U.S. 45, 57-58 (1905). *Lochner* era judges had relied on a heightened scrutiny of the relations between the means and the ends of government regulation to strike down state regulation as unconstitutional encroachments on individual liberty interests. As the *Lochner* Court put the argument:

> The act must have a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate, before an act can be held to be valid which interferes with the general right of an individual to be free in his person and in his power to contract in relation to his own labor.

Id. See also Nebbia v. New York, 291 U.S. 502, 524, 556 (1930) ("Unless we can affirm that the end proposed is proper and the means adopted have reasonable relation to it, this action is unjustifiable."); House v. Mayes, 219 U.S. 270, 282 (1911) (Harlan, J.) ("that such a power in the State . . . is the power to so regulate the relative rights and duties of all within its jurisdiction so as to guard the public morals, the public safety and the public health, as well as to promote the public convenience and the common good; and that it is with the State to devise the means to be employed to such ends, taking care always that the means devised do not go beyond the necessities of the case, have some real or substantial relation to the objects to be accomplished, and are not inconsistent with its own constitution or the Constitution of the United States."); Welch v. Swasey, 214 U.S. 91, 105 (1909) ("If the means employed, pursuant to the statute, have no real, substantial relation to a public object which government can accomplish; if the statutes are arbitrary and unreasonable and beyond the necessities of the case; the courts will declare their invalidity.").

and consequences[104] drew into the battle between Cook and Beale powerful allies from beyond the legal academy altogether—it made this very discrete doctrinal dispute *about* something much larger. The pragmatist philosophical tradition, with its anti-foundationalist understanding of truth as the outcome of purposeful social practice,[105] had long sought to displace abstract philosophical questions with practical questions of means and ends.[106] The pragmatist dogma was that in confronting an analytical problem, "we start in the middle" and work out the ends of knowledge by reasoning through the means.[107]

Perhaps most importantly of all, the technoscientific metaphor also implied a kind of knowledge—a "technical" way of doing Conflicts—and a pitch for how addressing Conflicts problems could be engaging intellectual activity rather than dreary and esoteric doctrinal work. Cook's

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104. *See* Thomas C. Grey, *What Good is Legal Pragmatism?*, *in* PRAGMATISM IN LAW AND SOCIETY 9 (Michael Brint & William Weaver eds., 1991); POSNER, *supra* note 3. On the influence of pragmatism on legal realism, see generally HORWITZ, *supra* note 50; SCHLEGEL, *supra* note 55. As Cornell West has put it, the core of pragmatism consists in "a future-oriented instrumentalism that tries to deploy thought as a weapon to enable more effective action." CORNEL WEST, THE AMERICAN EVASION OF PHILOSOPHY: A GENEALOGY OF PRAGMATISM 5 (1989). In William James' words, "The pragmatic method . . . is to try to interpret each notion by tracing its respective practical consequences. What difference would it practically make to anyone if this notion rather than that notion were true?" William James, *What Pragmatism Means*, *in* PRAGMATISM AND CLASSICAL AMERICAN PHILOSOPHY: ESSENTIAL READINGS AND INTERPRETIVE ESSAYS 193, 194 (John J. Stuhr ed., 2d ed. 2000).

105. Holmes was an erratic participant in the so-called "metaphysical club" where Peirce, James and others developed the ideas that later came to be known as pragmatism, and his prediction theory of law bears the imprint of Peirce's instrumentalist, effect-centered understanding of meaning. *See* CHARLES S. PEIRCE, CHANCE, LOVE, AND LOGIC: PHILOSOPHICAL ESSAYS 45 (1949). On Holmes' pragmatism, see Parker, *supra* note 29; *see also* Edward J. Bloustein, *Holmes: His First Amendment Theory and His Pragmatist Bent*, 40 RUTGERS L. REV. 283 (1988); Note, *Holmes, Peirce and Legal Pragmatism*, 84 YALE L.J. 1123 (1975).

106. *Cf.* S. MORRIS EAMES, PRAGMATIC NATURALISM 90-91 (1977).

107. Frank X. Ryan, *Five Milestones of Pragmatism*, *in* DEWEY, PRAGMATISM, AND ECONOMIC METHODOLOGY 15, 18 (Elias L. Khalil ed., 2004); *see also* 2 JOHN DEWEY, *Importance, Significance, and Meaning*, *in* THE ESSENTIAL DEWEY: ETHICS, LOGIC, PSYCHOLOGY, *supra* note 93, at 216; 1 THE ESSENTIAL DEWEY: PRAGMATISM, EDUCATION, DEMOCRACY, *supra* note 93; 2 JOHN DEWEY, *Valuation and Experimental Knowledge*, *in* THE ESSENTIAL DEWEY: ETHICS, LOGIC, PSYCHOLOGY, *supra* note 93, at 273; Grey, *supra* note 104, at 14-15.

assertions that what made the new technoscience of law scientific was a more precise definition of the relationship of means to ends conveyed intellectual excitement. The chaotic, continually changing nature of social ends could be accommodated and even embraced by a highly rationalized means-ends framework: "an application of scientific methods to the field of 'values' . . . will make our choice of 'ends' 'more intelligent, better grounded, less subject to caprice.'"[108] It was this rational stability of the means-ends relationship that allowed (legal) means to define (political and social) ends as much as ends to define means, in Cook's view. Thinking through all the technicalities of means-ends relations was to be the job of the smart (but modest) lawyer, the expert technoscientist of the law.

If we accept that scientific or legal truths are a collection of statements, then we can also see that the technical dimensions of science or law are not so much artifacts of the inherently complex or technical nature of scientific or legal problems as they are a part of the rhetorical strategy of getting one's own collection of statements black boxed as truth. As Latour puts it, "When controversies flare up the literature becomes technical."[109] Yet what needs to be accounted for is *why* this technical analysis would have had the appeal that it did in Conflicts. What was the pleasure of solving Conflicts problems by thinking through the rationalized relationship of means and ends ? In order to answer this question, we will need to turn to ethnographic materials. That is the subject of Part V. But first, I want to trace what happened to the powerful metaphor of law as a tool as it shifted, with the success of the Realist Revolution, from a "collection of statements" to a simple "fact" about the law.

IV. THE LITERALIZATION OF A METAPHOR

By mid-century, the Realist revolution was in full swing, as courts in one jurisdiction after another abandoned the First Restatement and developed new doctrines inspired by Realist approaches. But in the aftermath of this doctrinal reform, a new kind of project emerged, a project

108. Cook, *supra* note 94, at 59 (quoting Dewey).

109. LATOUR, *supra* note 84, at 30.

defined by a *problem*: how to turn the theoretical insights of Realism into a tool for resolving actual choice of law disputes. In this Part, I trace how the Realist insight about the instrumental nature of law was itself fashioned into an *actual instrument*, a machine of its own. In the hands of mid-century Conflicts scholars, I argue, the metaphor—the idea that law was a tool—became, quite literally, a tool of legal knowledge. Drawing on insights in the anthropology of knowledge, I describe this remarkable but little-noticed ontological development—the transformation of a metaphor into an object. I argue that this doctrinal development is best understood as a transformation of legal form, a process I call "literalization." I suggest that this actualization, or mechanization of Realist metaphors as a kind of "aesthetic practice" has proven far more durable than the ideology of Realism itself.

A. *Problem-solving*

At mid-century, the goal of Conflicts scholars was to offer rationalizing "frameworks" for the evaluation of Conflicts problems of the same grand scale, if not the same epistemological content, as Beale's own. The goal was to systematize, to organize. This goal is epitomized by the production of a Second Restatement, the very kind of project that Cook and his colleagues had ridiculed. [110] The figure who best embodies the mid-century turn in Conflicts doctrine is Brainerd Currie.[111] Currie is best known for introducing to Conflicts the concept of "governmental

110. *See generally* RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1971). The Second Restatement in fact preserves many of the rules of the First Restatement (although the influence of the pragmatic epistemological stance is also evident in the softening of these rules from hard rules to rebuttable presumptions). *See id.*

111. *See* BRAINERD CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS (1963). Currie began teaching law at Mercer University immediately after graduation from that faculty in 1935. Prior to law school he had received only a junior college degree. After further study at Columbia Law School from 1940-41 and a period of work in government during the war, he joined the Duke law faculty in 1946. He taught for several years at the University of California at Los Angeles, served as dean of the University of Pittsburgh law school for almost a decade, and then returned to Duke in 1961 where he taught until his death in 1965. *See* Elvin R. Latty, *Brainerd Currie—Five Tributes*, 1966 DUKE L.J. 2.

interests"[112] and the "false conflicts" methodology, in which the judge was to examine competing laws in light of the interests they served in order to determine which State had an interest in the application of its law. Both were almost universally adopted in one form or another by scholars writing during this period. Currie's work will serve as an example of the mid-century approach to Conflicts in this Part.

Currie the mid-century man was almost the archetypal antithesis of Walter Wheeler Cook. A rural Southerner, he graduated from a local junior college, attended law school at a local university, excelled, and immediately joined its law faculty. Although he later pursued further studies, he lacked Cook's erudite sophistication and elite academic affiliations. Throughout his career, "his essential role was that of a teacher."[113] Those who knew him claimed that although mild-mannered, he could be antagonistic toward the kind of legal scholar he disparaged as "the modern intellectual."[114]

Currie's doctrinal approach to Conflicts was self-consciously technocratic. The contribution of mid-century Conflicts scholars, in Currie's words, was "a new

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112. *See, e.g.*, David F. Cavers, *The Changing Choice-of-Law Process and the Federal Courts*, 28 LAW & CONTEMP. PROBS. 732, 733 (1963); Elliott E. Cheatham & Willis L.M. Reese, *Choice of the Applicable Law*, 52 COLUM. L. REV. 959 (1952); Albert A. Ehrenzweig, *Choice of Law: Current Doctrine and "True Rules,"* 49 CAL. L. REV. 240 (1961).

113. Philip B. Kurland, *Brainerd Currie—Five Tributes*, 1966 DUKE L.J. 5; *see also* Elvin R. Latty, *Brainerd Currie—Five Tributes*, 1966 DUKE L.J. 2. Kurland was a co-author of Currie's. *See* Kurland, *supra*. He taught at the University of Chicago Law School. *See id.*

114. Phillip Kurland quotes a limerick Currie wrote that seems in its criticisms almost tailor-made for Cook:

> I am the very model of a modern intellectual;
> I know the ruddy answers though I'm rather ineffectual.
> I'm more sophisticated, son, than people clad in denim are:
> When I have nothing much to say, I say it in a seminar.
> I have a little paper on some matters psychological;
>
> The highest court knows less than I of subjects pedagogical;
> I know which books are best to read, which symphonies are better.
> Ah! I'm very well informed upon aesthetics and et cetera.
> I know a thing or two about the sciences behavioral—
> To which to foster, fellows stout, you sacrificed and gave your all.

Id. at 8.

technology."[115] Currie described his contribution as the mere rationalization of Conflicts methodology, a meticulously value-neutral scheme. It was a machine with the limited purpose of eradicating what he called "irrationality": its only contribution lay in showing how "the false problems created by [Conflicts] rules may be solved in a quite irrational way—e.g., by defeating the interest of one state without advancing the interest of another."[116] Where "real conflicts" between the laws of two states were at stake, Currie disclaimed all expertise on grounds that such cases were "a job for a legislative committee."[117]

Currie laid out a "basic method" for resolving Conflicts problems consisting of five steps, which he listed in the technical style of numbered paragraphs:

> 1. Normally, even in cases involving foreign factors, a court should as a matter of course look to the law of the forum as the source of the rule of decision.
>
> 2. When it is suggested that the law of a foreign state, rather than the law of the forum, should furnish the rule of decision, the court should first of all determine the governmental policy . . . expressed by the law of the forum. The court should then inquire whether the relation of the forum state to the case at bar—that is, to the parties, to the transaction, to the subject matter, to the litigation—is such as to bring the case within the scope of the state's governmental concern, and to provide a legitimate basis for the assertion that the state has an interest in the application of its policy in this instance.
>
> 3. If necessary, the court should similarly determine the policy expressed by the foreign law, and whether the foreign state has a legitimate interest in the application of that policy to the case at bar.
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> 4. If the court finds that the forum state has no interest in the application of its law and policy, but that the foreign state has such an interest, it should apply the foreign law.

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115. Brainerd Currie, *The Disinterested Third State,* 28 LAW & CONTEMP. PROBS. 754, 755 (1963).

116. Currie, *supra* note 48, at 174.

117. *Id.* at 176-77.

> 5. If the court finds that the forum state has an interest in the application of its law and policy, it should apply the law of the forum . . . .[118]

From the perspective of Currie and his colleagues, however, the greatest innovation of this technology over early Realist "theories" was an explicit focus on *problem solving*. Although mid-century Conflicts scholars paid tribute to their Realist forbearers' critique of formalism,[119] their project, they insisted, was differently situated. Currie criticizes the Conflicts revolutionaries for their "destructive" attitude and their failure to "advance solutions,"[120] and positions himself, in contrast to their "disillusionment," as a constructive problem-solver:

> [I]t is unlikely that congressional action will be forthcoming . . . unless the energies which are now consumed by the metaphysics and the frustrations of conflict of laws are diverted to the formulation and justification of specific legislative programs. Here is challenge enough. Here is the "grand objective' in an attainable, or at least approachable, form.[121]

Crucial here is the question of audience: Where Cook's scholarship was oriented primarily toward fellow academics within and without the legal academy, mid-century Conflicts scholarship, in contrast, is scholarship for the judge. Commenting on the practical difficulties associated with applying modern Conflicts doctrines, Currie wrote:

> We do not, however, despair. We turn, instead, to the resources of jurisprudence, placing our faith primarily in the judges rather than the lawmakers. The judicial function is not narrowly confined; we indulge the hope that it may even be equal

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118. Brainerd Currie, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function,* 26 U. CHI. L. REV. 9, 9-10 (1958-59).

119. *See* Currie, *supra* note 115, at 754 (describing the first Restatement as "rigid, theoretical, and vastly oversimplified").

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

121. *Id.* at 267-68 (citation omitted) (quoting Hessel E. Yntema, *The Historic Bases of Private International Law,* 2 AM. J. COMP. L. 297, 312 (1953)).

> to the ambitious task of bringing uniformity and certainty into a world whose conflicts political action has failed to resolve.[122]

Currie devotes a full chapter of his book to the celebration of the contributions of Judge Traynor in a way that would have been inconceivable for Cook to do.[123] If the Realist insight was that law is a tool, by mid-century it is clear whose tool the law is. There is a clear protagonist, now: the judge as a man of his tools.

This is apparent also in the form of academic argument. Where Cook's writing took the form of a close reading of Beale's text followed by a wider theoretical discussion, mid-century Conflicts articles largely take the form of discussions of actual or hypothetical cases[124] presented as puzzles or problems to be resolved by the scholar.

As the aesthetics of the presentation would suggest, Currie's approach celebrated a mechanistic form of reasoning. The engineer's skill for Currie inhered in a willingness to simplify, to think in a technical and outcome-oriented way. Currie dismissed earlier Realist critiques of mechanical styles of reasoning with the comment that although he was "mindful" that some would view his approach as a reductive definition of the relevant facts in a Conflicts problem, "one cannot very well begin a chess game with a stalemate."[125] And as the Restatement project

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122. Currie, *supra* note 48, at 173.

123. *See* CURRIE, *supra* note 111, at 629-89.

124. *See, e.g.*, Cavers, *supra* note 65; Brainerd Currie, *Conflict, Crisis and Confusion in New York,* 1963 DUKE L.J. 1. On the epistemology and aesthetics of the hypothetical form, see Annelise Riles, *Encountering Amateurism: John Henry Wigmore and the Uses of American Formalism*, *in* RETHINKING THE MASTERS OF COMPARATIVE LAW (Annelise Riles ed., 2001).

125. CURRIE, *supra* note 111, at 83 n.14. Latour points out in the scientific context that the act of ignoring another scientist's theory, or of treating it as just plain irrational, is a far more effective means of defeating it than is contesting it on the merits:

> Irrationality is always an accusation made by someone building a network over someone else who stands in the way; thus, there is no Great Divide between minds, but only shorter and longer networks; harder facts are not the rule but the exception, since they are needed only in a very few cases to displace others on a large scale out of their usual ways.

LATOUR, *supra* note 84, at 259.

further suggests, this mid-century reductiveness was also self-consciously lawyerly; the instrument at hand was now an explicitly *legal* instrument.[126] Currie insists again and again that Conflicts questions can best be resolved by thinking about them in traditional legal terms, as run-of-the-mill cases of statutory interpretation.

In the aftermath of the Realists' own negation of the autonomy of law as a discipline, therefore, the technical analysis of means and ends became its own disciplining force.[127] Unlike the Realists' *metaphorical* invocations of expertise and scientism, with their claims that the law was rational because it was *like* technoscience, mid-century Conflicts scholarship *performed* its own technicality.[128] It was this performance of the technical that recast the Realist slogan that law was a means to an end as something more than a theory; it became a way of doing legal analysis. In Currie's hands, the ideology that law is a means to an end actually became, literally, a means to an end—a means to the concrete end of solving Conflicts problems without abandoning a Realist epistemology.

How should we think about this strange turn of events in Conflicts—about the curious transformation of the Realist ideology that law should be tool-like into an *actual* tool of its own? There are three stories that late twentieth-century scholars might tell about the way the ideology of tools became a tool of its own. The first would view these events as an exemplification of the fact that standards-based approaches invariably metamorphose into rule-based approaches.[129] From this perspective, Cavers, Lorenzen and Cook's more open-ended Conflicts methodology was destined to evolve into more mechanistic rules over time.[130] Eight years after Cook first published his ideas, Cavers took the point even further to chastise his Realist

126. *See, e.g.*, ERNST RABEL, THE CONFLICT OF LAWS: A COMPARATIVE STUDY 638 (1945).

127. *See generally* LATOUR, *supra* note 84; LATOUR & WOOLGAR, *supra* note 32; PICKERING, *supra* note 42.

128. *Cf.* AUSTIN, *supra* note 46; BUTLER, *supra* note 46.

129. *See, e.g.*, Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976).

130. As Joseph Singer has put this argument, the choice between rules and standards in conflicts itself is a "false conflict." Singer, *supra* note 16, at 5.

colleagues for once again falling prey to the very legalistic thinking they had critiqued: "[Realist Conflicts proposals] are still harnessed to the old task of devising (or justifying) rules for selecting the appropriate jurisdiction whose law should govern in a given case. Like the forms of action, in Maitland's telling phrase, the territorial and vested rights theories rule us from the grave."[131]

But in point of fact, the transition from Cook to Currie was not a transition from standards-based forms of legal analysis to rule-based forms of analysis; it was a transition from an approach that *foregrounded theory* to one that *foregrounded problem-solving*.[132] On the relative merits of rules versus standards there was little disagreement between Cook and Currie. Although mid-century approaches shared a more mechanistic *aesthetic*, this did not mean that they were actually more rule-oriented than early twentieth-century approaches. Currie's Conflicts methodology in fact represents the epitome of standards-based adjudication. It would be for a later generation of Conflicts scholars to reject earlier modern approaches as too standards-based and to propose instead a new set of rules.[133]

A second story legal scholars might tell about these events would assert that an interdisciplinary, academic discourse of critique such as Cook's was destined to give way to a more traditionally legalistic way of thinking as youthful critics became senior legal scholars, judges and deans. This is a story about the hegemony of legal discourse: If one wishes to be accepted as a legal scholar, one must adopt the language of law, the argument goes. Cavers himself describes his move away from the critiques of his youth to his mid-century "principles of preference" approach in these terms:

> With the brashness of youth . . . I insisted . . . that these questions could not be answered as long as the questioners continued to seek what I termed "a jurisdiction-selecting" rule . . . .
>
> . . . .

131. Cavers, *supra* note 65, at 178.

132. *See* Posnak, *supra* note 47; Sedler, *supra* note 47; Seidelson, *supra* note 47.

133. *See, e.g.*, Michael H. Gottesman, *Draining the Dismal Swamp: The Case for Federal Choice of Law Statutes*, 80 GEO. L.J. 1 (1991).

> . . . As I explored these problems, the choice-of-law problems I had dealt with in my 1933 article began to shrink. Did it really matter whether one view or another prevailed in a field where law review articles and comments greatly outnumbered important judicial decisions? . . .
>
> This attitude was accentuated by World War II's challenges to legal creativity. As far as conflict of laws was concerned, I became "a tired progressive"; more aptly, perhaps, a "tired realist."[134]

It is clearly the case that mid-century conflicts analysis was performed in a lawyerly genre. If Cook backgrounded his debts to legal practice, Currie and his colleagues, in contrast, clearly foregrounded theirs. Yet this is not to say that the move from Cook's critiques of formalism to Currie's Conflicts methodology was a move from an extra-legal vocabulary to a legal one. As we saw, the Realist ideology of instrumentalism, the idea of law as a means to an end, represented not a position outside the law, but a powerful implicit appeal to the legal tradition.[135] The story of the co-opting of outsiders to the law into insiders does not do justice to the way the Realists' outsider position was always already built from within.

A third story would cast the technocratic turn in mid-century Conflicts as a consequence of wider changes in law and politics—of the closure of a space for creative experimentation in the legal academy as a consequence of changes in mid-century American political culture. A different version of this outside explanation of legal failure would emphasize political or economic interests to suggest that tools disappear or evolve when they cease to be useful to those in a position to use them.[136] Certainly, doctrinal developments in Conflicts had a relationship to the wider fascination with institutional settlement in postwar legal scholarship, such as the process school.[137]

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134. DAVID F. CAVERS, THE CHOICE OF LAW PROCESS 8-10 (1965).

135. *See supra* notes 100-103 and accompanying text.

136. *See, e.g.*, P.A. MCNUTT, THE ECONOMICS OF PUBLIC CHOICE (1996).

137. *See, e.g.*, HENRY M. HART, JR. & HERBERT WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM (1953); HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (1958); *cf.* William N. Eskridge, Jr. & Philip P. Frickey, *An Historical and Critical Introduction to The Legal Process*, *in* HENRY M. HART & ALBERT M. SACKS, THE LEGAL PROCESS *li* (William N. Eskridge & Phillip P. Frickey eds.,

Latter-day versions of this argument attribute transformations in the law to either a new condition of globalization or a new information economy.[138] Cook himself at times resorted to a version of this external explanation of legal change where he suggested that the failure of the First Restatement was attributable to its inability to adapt to the new scale of complexity of the modern world: "Just as in physics, chemistry and biology today's theories are much more complex than those current in the Victorian period, so in the field of legal science theories if they are to be adequate must take account of the complexities of modern social economic life."[139]

Against this external view, Paul Kahn has suggested a much more internal account of the transformations of law:

> Unlike scientific thought, old paradigms do not disappear in legal thought. They remain available for use, but become subthemes as new conceptual structures gain dominance. The catalyst for paradigm shifts in constitutional theory is not a dissonance between theory and fact—there are no facts of the matter in this field—but rather recognition of the internal incoherence of each paradigm. Paradigms shift when there is a sort of exhaustion of conceptual resources, i.e. when constitutional theory confronts a

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1994). Gary Peller has argued that a new conception of law emerged during this period in which:

> The legitimacy of law would not turn on the resolution of [questions about] the content of legal doctrine. Instead, . . .the fifties legal scholars believed that it was possible to distinguish legitimate and illegitimate exercises of official power while simultaneously transcending the centuries-old debate between positivism and natural law, between the 'is' and the 'ought' of legal criticism, through the adoption of a new perspective, one that focused attention on the question whether a particular decision was the 'duly arrived at result' of 'duly established procedures' for resolving disputes of that kind.

Gary Peller, *Neutral Principles in the 1950's*, 21 U. MICH. J.L. REFORM 561, 569 (1988).

138. *See, e.g.*, Lawrence Lessig, *Internet: The Architecture of Privacy*, 1 VAND. J. ENT. L. & PRAC. 56 (1999).

139. Walter Wheeler Cook, *An Unpublished Chapter of the Logical and Legal Bases of the Conflict of Laws*, 37 ILL. L. REV. 418, 423 (1943). This claim has been refuted by some analyses that suggest that vested rights doctrines can be preferable in economic terms to modern approaches. *See, e.g.*, Michael E. Solimine, *An Economic and Empirical Analysis of Choice of Law*, 24 GA. L. REV. 49 (1989).

> problem generated by, and unresolvable within, an existing paradigm.[140]

Although I do not deny the importance of external explanations, like Kahn I want to draw attention to other, more often-neglected internal dimensions of legal knowledge. In particular, I am interested in those aspects of legal knowledge practices that are so obvious and ubiquitous that they escape the attention of both legal practitioners and their humanistically-oriented critics.

But this poses a problem for scholarship: how to describe what is so obvious and fundamental that it becomes imperceptible? In my case, this is where ethnography comes in. The project of ethnography is to make what is so taken for granted that it becomes invisible, what is so commonplace that it falls beneath the radar screen, accessible as a theoretical subject.[141] I turn, therefore, to my own ethnographic experience of initiating law students into the practice of mid-century Conflicts problem-solving.

B. *Means and Ends: An Ethnographic Vignette*

Mid-century Conflicts is taught as a series of hypotheticals that ask the student to position herself in the role of the problem-solving judge. Consider for example the experience of teaching and learning Currie's false conflicts methodology with a hypothetical I use in class:

Two Californian domiciliaries are registered with California's domestic partnership registry. Upon the death of one partner without a will, the other files a claim in California to inherit a tract of land in Georgia owned by the deceased. The California courts have recognized such inheritance rights as required by California law prohibiting discrimination on the basis of sexual orientation. In Georgia, by contrast, there is no domestic partnership registry and no law prohibiting discrimination on the basis of sexual orientation; in fact, a 1996 law explicitly states

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140. PAUL W. KAHN, THE CULTURAL STUDY OF LAW: RECONSTRUCTING LEGAL SCHOLARSHIP 88 (1999).

141. I have written about this use of ethnography in another context. *See* ANNELISE RILES, THE NETWORK INSIDE OUT (2000).

that "it is declared to be the public policy of this state to recognize the unity only of man and woman."[142] Had the partner brought the claim in Georgia, a court there would have rejected it. Ms. X, you are the California judge hearing this case. Should you apply California law, and allow the plaintiff to inherit the property, or should you defer to Georgia law?

The law students who take Conflicts are comfortable with this exercise and quickly manipulate the doctrine towards problem-solving ends. Ms. X will first "spot the issue": she will point out that under the old territorial approach, the law of the place of the situs of the property would govern and so the court would apply Georgia law since that is where the land is located. If I have chosen the right student, she will then quickly identify the puzzle: this result does not seem "fair" to her. I then lead her through a series of further questions and answers:

"Ms. X, what purpose does the California law serve?"

Ms. X is likely to say that California law is aimed at treating its citizens equally regardless of sexual orientation.

"And what about Georgia law?"

She will remember that I mentioned that the Georgia legislature has stated that the law aims to affirm heterosexual marriage and to discourage other forms of partnership. What I am leading Ms. X to do here, in other words, is to think about each of these laws as a means to some end. In the dialogue, the insight that law is a means to an end becomes a tool of problem-solving—law should be a means to an end—that in turn implies a prior question to be answered on the way to solving the problem: what is the end of these particular laws? How exactly Ms. X reaches this answer is not entirely clear, and I do not provide her with any guidance on how to do so.[143]

Our interest at this point is in solving the problem. We will attempt to operationalize the Realist view of law as a stable and rational relationship of means to ends to answer the question at hand:

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142. GA. CODE ANN. § 19-3-3.1(a) (2001).

143. Robert Summers points out that in most instrumentalist reasoning, the goals or ends remain largely undefined. ROBERT S. SUMMERS, INSTRUMENTALISM AND AMERICAN LEGAL THEORY 62 (1982).

"Ms. X, is it reasonable to assume that when the California legislature passed this law, it wished to protect persons like the plaintiff?

Yes, she will say.

"What about Georgia—is it reasonable to assume that Georgia intended to condemn relationships like the plaintiff's relationship with the deceased?"

Under pressure from me, the students will ultimately agree that Georgia has an interest in the moral climate in Georgia, but not in what goes on in California, and hence cannot "rationally" claim an interest in this plaintiff and her domestic relations. Therefore, we will conclude that California law should apply to the case. If the students accept the reasoning, we have performed a stunning technical feat: we have reconciled fundamentally opposed political positions on a divisive social question, at least as it is expressed in the dispute between this hypothetical plaintiff and defendant. We have done so by redefining the ends (what the purpose of Georgia law might be) by thinking through the means—Georgia law and its application to these parties.

If the Realist critique sought to explain legal knowledge practices by showing how means were a function of ends beyond the law, in other words, what the students learn in this exercise in mid-century Conflicts analysis is that the resolution of Conflicts problems requires understanding social ends as defined, limited, and even constituted by legal means. Legal knowledge defines its own outside from the point of view of the inside even as it is presented as a "function" of other interests.

If this remarkable act of legal engineering, this displacement of social and political controversy by doctrinal manipulation, seems a step removed from the Realist insistence that legal tools exist only to serve social ends, we saw that ideologically, at least, this was already a tenet of Realist dogma. Cook himself suggested, following Dewey,[144] that ends should be redefined through the process of thinking through the means. The stunning innovation lies not in the substance of the claim, or in the philosophical or

144. *Cf.* 2 JOHN DEWEY, *The Place of Habit in Conduct*, *in* THE ESSENTIAL DEWEY: ETHICS, LOGIC, PSYCHOLOGY, *supra* note 93, at 24.

legal basis of the method, therefore. The innovation lies in the mechanistic genre of the argument. No wonder that the image of law as a kind of machine, and of engineering as a model for legal knowledge, continues to elicit our lawyerly commitments.[145]

C. *Literalization: A Transformation of Form*

With the help of this vignette, we can begin to see something quite remarkable in the mid-century doctrinal "rationalizations" in Conflicts. In mid-century, a theory became a kind of machine. That is, mid-century Conflicts methods were exercises in turning the insight that law is a means to an end *itself* into a means to an end—a means of resolving Conflicts problems. To assert that legal knowledge is a tool, as the Realists did, is very different than to actually use the theory that knowledge is a tool as a tool of its own, as my students learned to do in the episode I have described. And yet this was precisely Currie's innovation. Currie and his cohort transformed Realist theoretical insights about the tool-like quality of law quite *literally* into a set of tools. In the hands of the mid-century Conflicts scholar, a theory, a metaphor, a "collection of statements"—the rallying cry that law is a tool—became something of a very different order, that is, an *actual* tool of its own. It is at this point, the point at which the ends of legal knowledge could become the means of further legal work, that ideas could become tools, that law departs from the humanities and social sciences and *actually* becomes a species of technoscience.

That a theory could become a machine is a quite astounding fact. It would be as if a theory that law is a language became a language of its own. And yet the innovation remains imperceptible to legal theorists largely because the difference between the Realist and mid-century positions is not a theoretical difference (the Realists had already championed the notion that law was (like) a tool), but instead a difference in the form and in the performative character of law. Precisely because at a theoretical (if not at

145. *See, e.g.*, POSNER, *supra* note 3; *cf.* MICHAEL FOLEY, LAWS, MEN AND MACHINES: MODERN AMERICAN GOVERNMENT AND THE APPEAL OF NEWTONIAN MECHANICS (1990); ALEXANDER E. SILVERMAN, MIND, MACHINE, AND METAPHOR: AN ESSAY ON ARTIFICIAL INTELLIGENCE AND LEGAL REASONING (1993).

a performative) level, the Realists had argued that knowledge was a tool, the difference between the two positions easily escapes humanistic and critical theorizing. Hence the relative paucity of humanistic and critical theory about mid-century law, despite the mountains of monographs and articles about the Realist revolution.

And yet I want to suggest that what Currie and his cohort were up to is something that the cultural study of law is uniquely qualified to understand. What was really at stake here was a *transformation of legal form* in which a metaphor—law is like a tool, law is like a machine—was "literalized" in order to become the *tool* of further knowledge.

In his theories of metaphor, the anthropologist Roy Wagner has described the workings of metaphor in terms of what he calls the "obviation" of symbolic practices. When symbols are used in new ways, symbols are differentiated from their "context"—from the semiotic milieu in which they are grounded. In this process, they become what he terms "symbols that stand for themselves," that is, material objects.[146] Wagner's work revolutionized the anthropology of knowledge where it demonstrated convincingly that the "objects" one sees as material, and hence different in kind from "representations," are in fact the effects of particular objectifying symbolic practices. Hence the "natural" boundary between metaphorical and material realities is itself an effect of symbolic obviation.

It is possible to understand doctrinal developments in Conflicts as classic examples of obviation in Wagner's terms: an internal transformation of symbolic form produces, as its symbolic effect, an "actual" tool out of a metaphorical one. I propose that we understand the move from Cook to Currie as a transformation of legal form of this kind. Indeed, it is only from this point of view that we could take seriously Currie's claims to stand both as heir to Cook's Realist insights *and* as a displacement of them.

Wagner's work focused on symbolic practices in cultural contexts far afield from modernist American law. But in her work on mid-century modernism in the social sciences, the anthropologist Marilyn Strathern brings this approach to

146. *See generally* ROY WAGNER, SYMBOLS THAT STAND FOR THEMSELVES 26 (1975).

bear on modernist intellectual traditions. In Strathern's vocabulary, the literalization of previously metaphorical conceptual relations, a process of "making explicit" the implicit, agreed bases and practices of the working of knowledge, is a core modernist analytical move.[147] It is also a hallmark of pragmatism. She notes: "[pragmatists] love the literal-minded. Their fantasies are about 'the real world'—only clear away the assumptions and you will get to the truth; only clear away the constructions and you will get to the facts."[148] Strathern's description of the modernist pragmatist penchant for making the implicit workings of knowledge explicit aptly captures Currie's systematizing and rationalizing efforts, his numbered lists of the steps in the production of legal knowledge, and helps to see how these seemingly mundane practices could have effectuated such a fundamental shift from metaphors to literalizations. From this perspective, we can see the notion of state interests as the literalization of the Realist understanding that laws have instrumental uses, and again that Conflicts scholarship itself should be an instrumental means to an end.

Following Wagner and Strathern, we can understand these mid-century transformations in Conflicts doctrine as part of a larger transformation. As we saw, the Realists' replacement of the vocabulary of vested rights with a technoscientific vocabulary of means and ends was hardly a move away from legal knowledge. Doctrines of vested rights and of means and ends had long been alternatives to one another, variations from within a singular form.[149] Hence Cook's innovation represented an appeal to a different strand, a backgrounded dimension of legal form, rather than a position outside legal form altogether. The position "outside" the law assumed by the Realists was a position that was already defined from inside the legal tradition. In Wagner's terms, then, the movement from Beale to Cook to Currie represents successive steps or stages in the obviation of legal form.

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147. MARILYN STRATHERN, AFTER NATURE: ENGLISH KINSHIP IN THE LATE TWENTIETH CENTURY 7 (1992).

148. *Id.*

149. *Cf.* Annelise Riles, *Law as Object*, *in* LAW & EMPIRE IN THE PACIFIC: FIJI AND HAWAII 187, 190 (Sally Engle Merry & Donald Brenneis eds., 2003).

That mid-century Conflicts scholarship represented any kind of a break with the early Realist project would not have been immediately apparent because at the level of ideology, of the substance of the arguments, there was much continuity between Realist and mid-century approaches. The mid-century focus on state interests retains and indeed amplifies the Realist faith in technoscientific managerialism. Likewise, the idea of state interests at the heart of Currie's methodology explicitly builds on the Realist understanding of law as a tool discussed in the previous Part. In order to determine whether a state had a legitimate interest in a dispute, in Currie's program, it was necessary to think of each law as a tool of state power, to ask, what are its purposes, and then to ask whether these purposes rationally applied to the given fact pattern. The problem-solving orientation of the mid-century approach is, in many ways, more pragmatic still than the Realists' own. As in early Realist writings, the judge at the center of mid-century Conflicts texts is not a politician or a philosopher but an engineer engaged in a complex but crucial managerial task. Currie presents his innovation as simply an application, an act of taking the Realist insights and thinking about them practically.

I want to suggest that this literalization of Realist metaphors had such a profound impact in Conflicts precisely because it escaped the attention of legal scholars, practitioners, and judges at the time as well; it simply did not become a subject of explicit debate.

D. *A Humanistic Account of the Conflicts Muddle*

Yet it remains to be explained why Currie's literalization of Realist metaphors achieved the rhetorical and practical success that they did, and why, conversely, this approach now would be so frequently described by Conflicts scholars as a "dismal swamp." As mentioned at the outset, what makes Conflicts such an interesting example of the apotheosis of technocracy is that it is a field that seems to have failed in the eyes of its own practitioners. Why would this be so? If Currie's solution was once hailed as a panacea, why is it so assailed today?

Here, I want to return to the ethnographic vignette presented above to focus on the experience of "doing" Conflicts knowledge. Diane Forsythe describes the

"technical orientation" of the engineers she studied as an "intellectual style" that would be most recognizable to lawyers and legal scholars:[150]

> On the one hand, they are inclined to think of technical matters as posing interesting problems. In contrast, social matters are not conceived as problematic in an important way. This is not to suggest that social phenomena may not be *troublesome*—indeed, they often are . . . but they are not thought of as interesting.[151]

Forsythe points to an aspect of knowledge that Wagner and Strathern leave unexplored: the question of the capacity of expert tools to generate *interest.* I now explore this aspect of the mid-century methodology a bit further with help of the above vignette.

The point at which students first learn to resolve false conflicts is invariably one of their favorite moments in the Conflicts course. We are playing a game—I provide puzzles and the students respond enthusiastically by solving them. The form of the dialogue is highly structured and yet open; it invites their participation. The game in this particular hypothetical involves a friendly back-and-forth between myself and Ms. X which, as enjoyed by other students now cast into the role of observers, establishes a partnership, a shared community of problem solvers.

Since Currie himself compared the act of solving a Conflicts problem to the experience of playing a chess game,[152] it might be useful to think a bit further about how games capture their players' interest. Erving Goffman long ago argued that in order for a game to enlist participants' interest and commitment, it had to have certain well-defined and formal qualities. First, the play had to be sufficiently predictable with reference to a given set of rules, but it also had to be sufficiently contingent such that the performance, the play event, would channel participants' interest toward the small variations possible within a given form.[153] Second, a successful game had to

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150. FORSYTHE, *supra* note 92, at 45.

151. *Id.* at 44.

152. See *supra* note 136 and accompanying text.

153. *See* ERVING GOFFMAN, ENCOUNTERS: TWO STUDIES IN THE SOCIOLOGY OF INTERACTION 35 (1961).

delineate the sphere of play, what he termed "mutual focused activity," from the outside world by demanding that players agree to certain "rules of irrelevance" whereby they would not bring certain aspects of their shared experience to the table. And yet, at the same time, success or skill within the game would have to depend on the deployment of certain skills used in the outside world as well (intelligence, luck, memory), such that the game would speak metaphorically about life beyond its own well-defined parameters.[154]

Goffman's description captures the performative success of the false conflicts puzzle for law students. It is a puzzle that requires inventiveness and yet ultimately can be quite easily mastered; one that gestures beyond its own parameters by suggesting that real policy issues are at stake in this hypothetical plaintiff's dispute with this hypothetical defendant, while demanding also that participants agree to strict rules of irrelevance concerning what dimensions of the litigants' lives or their relationships to particular communities can be introduced.

Where most observers of the Socratic method have associated it with the indoctrination of students into a formalist legal ideology,[155] the ideology at issue in Conflicts—here, the resolution of false conflicts—is pragmatic and managerial. And yet, just as with the Socratic manipulations of Langdellian formalism, to the students, the game appeals precisely in the way it "feels" like law. What Currie has done, in other words, is to give us pragmatic managerialism in the performative guise of legal formalism.

This is possible only because as a genre of play, technical problem-solving has much the same formal features as formalistic legal reasoning. What the student learns, in the course of problem-solving, is an appreciation

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154. *Id.* at 68-77.

155. *See, e.g.*, Elizabeth Mertz, *Recontextualization as Socialization: Text and Pragmatics in the Law School Classroom, in* NATURAL HISTORIES OF DISCOURSE 229 (Michael Silverstein & Greg Urban eds., 1996) (suggesting that this experience socializes students to a particular attitude towards text through repeated acts of "decontextualization" and "recontextualization"); Edwin W. Patterson, *The Case Method in American Legal Education: Its Origins and Objectives*, 4 J. LEGAL EDUC. 1, 15 (1951) (describing the case method as a form of "vicarious experience"); Riles, *supra* note 124, at 94.

for the *aesthetics of legal knowledge*. How might doctrines be accommodated and reconciled? How should the scope of a statute be interpreted? What purchase is gained by re-imagining a conflict among jurisdictions as a question of statutory interpretation? If we define formalism not as an epistemological or political position, but as an aesthetic propensity, a genre of self-presentation, of engagement with argument and text,[156] it is easy to see that this technical aesthetic is by no means the exclusive province of legal formalism.

In other words, this appreciation of the tools of law does not mean that lawyers have abandoned their commitment to the idea that legal tools are means to some greater social, political or economic end, as the Realists and their progeny often asserted for their critiques of legal formalists. Indeed, if one were to ask any present-day American lawyer why law is important, one no doubt would get an answer about what law "does" or "accomplishes" in the world—an idea of law as a tool, a means to an end, an instrument, rather than an idea about form. Had lawyers abandoned this instrumentalist commitment, what they love would by definition no longer be a tool. But what the vignette above suggests is that this does not stop lawyers from loving their tools for their own sake, that is to say, from having a certain aesthetic appreciation for their uses. What defines the technical as a sphere of social practice, in other words, is lawyers' commitments to an *aesthetic* of instrumentality, not simply to an instrumentalist politics or project. It is a complicated aesthetic, one that asks lawyers to turn inward while it also gestures toward what is beyond the law, to the question of what instruments are *for*.

We can see now how the literalization of the Realist metaphor—the notion that law is an instrument or machine—is an achievement or effect of the aesthetic appreciation of legal form of the kind experienced in the classroom episode I have described. The *idea* of state interests becomes a *tool* for resolving Conflicts problems for these students through our shared moment of appreciation of technical form. Currie's achievement of turning an ideology of instrumentality into an actual instrument for

156. *See* Annelise Riles, The Transnational Appeal of Formalism: The Case of Japan's Netting Law (1999) (manuscript on file with the author).

solving Conflicts problems works to the extent that it works within lawyers' appreciation for an aesthetic of the technical. The first lesson we can draw from the ethnographic material I have presented is that in order for managerialism to work, it must enlist our lawyerly aesthetic commitments.

Of course, this love of and commitment to the tools also helps explain why it is that legal knowledge seems cut off from the "social ends" it purports to instrumentalize, to exist in what the legal theorist Gunther Teubner terms an "autopoetic" sphere of the technical[157] even as the stated goal of means-ends reasoning is precisely to make law relevant to real people, or real corporations, and their problems. Once reframed as a problem-solving device, the means-ends relationship serves to limit the scope of law, to draw the device back in. The aim in this particular hypothetical, the students quickly understand, is to restrict the conflicting purposes a judge might have to entertain. This aesthetic has a purposeful poverty of expressive capacities, in other words; it is defined by the way it refuses to signify. From this point of view, the "failure" of law's expressive capacities is precisely the engine of its success.[158]

And it is precisely this purposeful reductiveness of mid-century Conflicts scholarship that has recently come under attack as a kind of neo-formalism of its own.[159] As Brilmayer has argued, "the interest analysts have been allowed to argue, in effect, 'Our method may seem short-sighted and parochial, but it is not the courts' business to second-guess a state legislature.'"[160]

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157. *Cf.* GUNTHER TEUBNER, LAW AS AN AUTOPOIETIC SYSTEM (Anne Bankowska & Ruth Adler trans., Zenon Bankowski ed., 1993).

158. *See* RILES, *supra* note 141, at 20.

159. *See* Lea Brilmayer, *Interest Analysis and the Myth of Legislative Intent*, 78 MICH. L. REV. 392 (1980).

160. *Id.* at 392; *see also* Gary Simson, *The Choice-of-Law Revolution in the United States: Notes on Rereading von Mehren*, 36 CORNELL INT'L L.J. 125, 130-32 (pointing out a number of practical and substantive problems with von Mehren's proposal that courts craft new substantive rules in cases of conflict over choice of law). At the same time, the lawyerly turn to treating Conflicts as a subset of statutory interpretation has been revived and extended more recently by Larry Kramer, who proposes resolving conflicts questions with reference to a series of established "canons of interpretation." *See* Lawrence Kramer, *Rethinking Choice of Law*, 90 COLUM. L. REV. 277-345 (1990).

It is on these aesthetic grounds, rather than because the "modern approaches" could not decide cases, I want to suggest, that Conflicts ultimately has been experienced by its practitioners as in crisis. What has happened is that Conflicts scholars have *lost interest* in devising new solutions to their problems. Like a game that gets old when it is played too many times, the plays have become predictable. The technical vocabulary is a hermetic vocabulary by design, but as Goffman suggested, in order for such a vocabulary to succeed, it must always exist in a kind of metaphorical dialogue with the world outside that vocabulary. What differentiates Conflicts from other subjects in this regard is precisely what first attracted the Realists to the subject, namely the way it stands at one step removed, so to speak, from the actual controversy. The choice of law question is a prior question; it invites meta-reflection on the methods of deciding cases, we might say. It is first a subject *about* problems and solutions rather than a set of substantive norms; it foregrounds the technical in a more extreme way. Now that what was once implicit has been made explicit, Conflicts as a subject is too explicitly, too literally, too much about form.

V. CONCLUSION—TOWARDS THE CULTURAL STUDY OF LEGAL TECHNOLOGY

The previous parts aimed to demonstrate, by way of example, that those aspects of legal knowledge most often set aside by humanistically-oriented legal scholars nevertheless hold considerable theoretical interest and are amenable to sophisticated analysis from a humanistic perspective. The larger argument of the Essay is that it is the mundane technocratic dimensions of law, precisely those dimensions that fail to engage humanists' theoretical, critical, or reformist passions, that are the most interesting artifacts of lawyerly work. Hence it is time humanists take on the technical dimension of legal knowledge as a cultural practice of its own.

How should one study legal technology? I have offered only one idiosyncratic example of how legal technologies could be studied. No doubt there are many more. I would urge, however, that the cultural study of legal technology make a methodological commitment not to reduce technology to the politics, culture, history, or personalities sur-

rounding it—that we take the agency of technological form seriously, as a subject on its own terms, as the legal engineers among us do. The stylized account of one such transformation of legal form I provided in Parts II, III and IV was intended precisely to resist reducing this form to an artifact of its historical, political, or social context and to foreground instead the form itself, as a protagonist in its own right.

And it is on this point, I believe, that we can find in the work of Walter Wheeler Cook one model for our project. For what is quite difficult to grasp, given the astounding rhetorical success of Cook's revolution in Conflicts over the last century, is that the instrumental *uses* of Cook's theory to resolve cases just did not concern him terribly much. In fact, Cook fought the conversion of his insights into legal doctrines. When Judge Learned Hand adopted Cook's "local law" theory as doctrine, rather than relish in what by any standard was a major coup for his critique of vested rights,[161] Cook expressed dissatisfaction at the fact that Learned Hand had turned the theory into yet another mechanical doctrine. The theory could not be turned into hard doctrine in that way, Cook insisted, because the ends of law were inherently as plural as the diversity of legal contexts imaginable and hence could not be readily deduced from the legislation.[162]

This was because there was something larger at stake for Cook in this critique than a mere elucidation of the logical flaws in Beale's argument or a proposal for how better to oil the machine. The true achievement of Cook's work, in his own mind, lay in making explicit the tacit knowledge practices of lawyers and judges in all areas of law.[163] In fact, Cook insisted that his work was not so much

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161. *See* Guinness v. Miller, 291 F. 769 (S.D.N.Y. 1923).

162. COOK, THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS, *supra* note 82, at 28.

163. *See* Cook, *supra* note 70, at 460:

> In the present discussion it is proposed, instead of following the *a priori* method, to adopt the procedure which has proved so fruitful in other fields of science, viz., to observe concrete phenomena first and to form generalizations afterwards. We shall therefore undertake to formulate general statements as to what the "law" of a given country "can" or "cannot" do in the way of attaching legal consequences to situations and transactions by observing what has actually been done.

about Conflicts per se as about the character of legal knowledge more generally:

> What has been attempted is a study in 'legal method,' i.e., an analysis of some of the more common problems which present themselves in this field with special reference to the intellectual tools available for their solution. In order to accomplish this purpose it has been necessary to outline what–for want of a better term–may be called the author's 'philosophy of law.' By this phrase is meant not only theories of the nature of law, of legal rights, and of the judicial process, but also of such matters as the nature of logic and the use of what we may call 'scientific method.'[164]

The question of whether a case was a matter of tort or contract was not an ontological question, therefore, but the effect of the knowledge practices he sought to describe. Cook's goal was not just internal critique, but a richer, more nuanced account of the character of legal knowledge, a kind of sociology of legal knowledge. In Cook's texts, legal formalism is exceedingly carefully, even lovingly observed:[165]

> [I]n law as in the natural sciences, practice has preceded theory, at least to a considerable extent, and conclusions have not actually been reached purely deductively . . . . The actual process involved in settling a situation of doubt—a 'new' case, if we are dealing with law—involves a comparison of the data of the new situation with the facts of a large number of prior situations which have been subsumed under a 'rule' or 'principle' within the terms of which it is thought the new situation may be brought. This comparison, if carried on intelligently, necessarily involves a consideration of the policy involved in the prior decisions and of the effects which those

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Id.

164. COOK, THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS *supra* note 82, at ix. As Max Rheinstein put it in his review, "the author is not concerned primarily with the conflict of laws. Rather, he has attacked the role of logic in legal thought, and chosen the conflict of laws merely as a field of illustration. The choice is apt, since faulty logic has had even more pernicious results here than in other fields." Max Rheinstein, *Methods of Legal Thought and the Conflict of Laws: A Book* Review, 10 U. CHI. L. REV. 466, 466 (1943) (reviewing COOK, THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS, *supra* note 82).

165. This sociological curiosity about the character of modern legal reason was standard Realist fare. *See, e.g.*, CARDOZO, *supra* note 98; JEROME FRANK, LAW AND THE MODERN MIND (1930); KARL LLEWELLYN, THE BRAMBLE BUSH (1930).

> decisions have produced. . . . In doing this, the rule or principle as it existed has not been merely 'applied'; it has been extended to take in the new situation. In other words, however great the appearance of purely deductive reasoning may be, the real decision where a case presents novel elements consists in a redefining of the middle term in the major and minor premises of the syllogism; that is, of the construction or creation of premises for the case in hand, which premises did not preexist. The statement of the premises of the deductive syllogism is therefore a statement of the conclusion which has been reached on other grounds, and not of the real reason of the decision. When once the premises have been thus constructed, the conclusion inevitably follows.[166]

This focus on the actual practice of "doing" legal knowledge is a critical move that would be familiar to the authors of today's cultural studies of technoscience.[167] In fact, Cook's subtle tracking of formalist logic in order to demonstrate that it was in fact guided by pragmatic considerations, including the availability, agency, and limits of legal tools,[168] predates contemporary cultural theory by more than half a century. In much the same way STS scholars would do many decades later for the sciences, Realist Conflicts scholars drew attention to the instruments of legal reasoning—the intellectual tools of the lawyer, in Cook's terms—the inner workings of syllogisms, the way premises were constructed and then applied, the sleights of hand entailed in the mere "application" of rules. Ultimately, for Cook, however, the interesting questions in Conflicts were not particular to law: "It may be useful to emphasize

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166. Cook, *supra* note 70, at 487.

167. *See* LATOUR, *supra* note 84; PICKERING, *supra* note 42; LATOUR & WOOLGAR, *supra* note 32.

168. *Cf.* Cheatham, *supra* note 67. Cheatham pointed out that the real consequence of the vested rights theory was the agency the theory exercised over its own interpretation:

> The result of almost any case can be phrased in terms of any of the theories (Realist or formalist), and it may be thought that the differences between them are of no practical importance. But the attitude of mind engendered by acceptance of one of the theories may lead to practical consequences. The vivid language and conception of vested rights would naturally tend to induce a court to follow precisely the law of the place of occurrence or the law of some one technical element of the occurrence, while other theories would tend to greater freedom and flexibility in decision.

Id. at 392.

once more that these difficulties in 'applying' a verbal symbol to a new situation are not confined to the legal field, but are common to all fields of thought."[169] The footnotes to his famous 1924 Conflicts article are full of citations to the philosophy of science, to astronomy, and to physics[170] as much as to legal texts. [171]

I have sought to bring to the attention of legal scholars some approaches from cognate humanistic disciplines—in particular, Science and Technology Studies and the Anthropology of Knowledge—that may hold promise in the project of turning the technical dimensions of law into an object of humanistic inquiry. My larger claim is that ultimately, whether by these methods or others, humanists must imagine approaches to the technical that are richer, and more rhetorically effective, than traditional forms of critique. Here we would do well to keep in mind that Cook and his co-revolutionaries were studying not a distant past or an exotic other, but a proximate present. Beale was very much in their midst. The turn to the sociology of knowledge was, in other words, also a critical move. One might even say that the moment at which Cook succeeded in turning Beale into an anthropological object was the moment at which he defeated him. Following Cook, I want to suggest that we can do something other than ignore or critique the technocrats and the technologies in our midst: we can study them.

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169. COOK, THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS, *supra* note 82, at 184.

170. *See* Cook, *supra* note 70, at 475 ("[W]e as lawyers, like the physical scientists, are engaged in the study of objective physical phenomena. Instead of the behavior of electrons, atoms or planets, however, we are dealing with the behavior of human beings."); *see also* Cook, *Characterization, supra* note 71.

171. Of course, Cook's faith in scientism and of the possibility of analyzing human relationships with the tools of mathematics and physics seems highly dated from today's perspective. *Cf.* Simeon C.R. McIntosh, *A Poetic for Law: Constitutional Theory as Metaphor*, 30 HOW. L.J. 355 (1987).