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Rationalising Mid-Century Choice of Law: Legal Technique and its Limits in the 'Dark Science' of Conflicts

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Under the common banner of a search for a 'more rational' approach to choice of law, US conflict-of-laws scholars of the late 1950s and the 1960s produced an impressive array of new technical instruments for their discipline. This article situates their work in the broader contexts of innovations in the social- and behavioural sciences and in legal- and political theory of this period. On this contextual reading, the methodological clashes of the so-called 'choice-of-law revolution' change in shape and become part of a much larger story – one with relevance also outside the discipline and beyond the United States. That story is about different degrees of faith in the capacities of technical instruments and practices, like legal doctrine, to manage and resolve conflict, by making disparate factors commensurable, and by affording outcomes that optimise all competing interests in play. By revisiting these mid-century battles over conflicts methods in light of contemporaneous understandings of 'rationality' and 'legitimacy' in other fields, the article contributes to our understanding of the genealogy of post-war choice of law, as well as of the history of these ideals – and their technical means – in modern legal thought.

INTRODUCTION: 'TOOL SHOCK' IN THE CONFLICT OF LAWS

The middle decades of the 20th century were a period of intellectual ferment within the conflict of laws.[1] In the United States, during the late 1950s and the 1960s, a small group of legal scholars developed a range of innovative approaches to choice of law that departed from pre-war orthodoxy. The main protagonist from among this cohort was Brainerd Currie, a law professor at the University of Chicago. Currie initially developed his ideas in a series of articles written during the academic year 1957–58, while he was on sabbatical at the recently established Center for the Advanced Study in the Behavioral Sciences in Palo

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1 While the focus of this article will be on the US, the central debates also drew immediate interest across the Atlantic. See for example Gerhard Kegel, 'The Crisis of Conflict of Laws' (1964) 112 *Collected Courses of the Hague Academy of International Law* 91. For an early and influential contribution to the relevant debates by an English scholar, see J. H. C. Morris, 'The Proper Law of a Tort' (1951) 64 *Harvard Law Review* 881.

Alto (CASBS). Currie's work was almost immediately hailed by colleagues in the field as strikingly innovative in some respects, but as clearly defective in others – his approach hovered between 'brilliance' and 'breakdown', as a friendly critic wrote at the time.[2] In the standard history of the field, other mid-century conflicts writers – William F. Baxter, Robert Leflar, and others – then built on Currie's key insights but 'modified' and 'improved' them.[3] Their work, together with the judicial endorsement of some of these new methods by courts across the US, has come to be known as the American choice-of-law revolution. This revolution, finally, resulted in a form of pragmatic choice-of-law 'eclecticism', which is the outlook that still largely dominates the field today, not just in the US, but in many other jurisdictions as well.[4]

This story, of Brainerd Currie, his cohort, and the choice-of-law revolution, is still familiar today to conflicts scholars both within and outside the US. The large literature on this episode, however, turns out to have a peculiar feature, in that it is almost entirely insular. Accounts of mid-century American choice of law are typically focused exclusively on the discipline of conflict of laws itself. On topics like the judicial and legislative uptake of the new proposals, on their pedagogical and scholarly influence, and on their doctrinal and theoretical soundness relative to standards internal to the field.[5] Conflicts scholars today, in other words, continue to debate with their mid-century predecessors.[6] What has largely been missing, however, are attempts to go beyond choice of law, and to situate these key late-1950s and 1960s writings within their broader intellectual contexts. There is hardly any work at all, for example, on how these ideas relate to currents and themes pervasive in other areas of legal scholarship at the time. Or to contemporaneous developments in political thought, in the social sciences, or in the then newly prominent behavioural sciences. This, even though some of these connections might be invited, for example, by Currie's sabbatical among economists, psychologists, and the latest IBM-machines, at Palo Alto. Or by the reliance of David Cavers – another conflicts scholar writing

2 Michael Traynor, 'Conflict of Laws: Professor Currie's Restrained and Enlightened Forum' (1961) 49 *California Law Review* 845, 876.

3 See for example Lea Brilmayer, *Conflict of Laws* (Boston, MA: Little, Brown, 1995) 68 ('even many of those who agreed with his basic arguments found the need for improvement'); Linda Silberman, 'Brainerd Currie' in *Elgar Encyclopedia of Private International Law* (Cheltenham: Edward Elgar, 2017) 506, 510 ('Many contemporary scholars of Currie embraced the methodology of "governmental interest analysis" but then took exception to the application of forum law for resolving "true conflicts" and offered their own solutions'); Germaine LaBerge, 'Interview with Herma Hill Kay' (2005) Oral History Center, The Bancroft Library, University of California, Berkeley, 32 ('Everybody has adopted parts of it. … Almost nobody, …, now follows it the way Currie set it forth').

4 cf Symeon C. Symeonides, *Codifying Choice of Law: An International Comparative Analysis* (Oxford: OUP, 2014).

5 Among many others, see Herma Hill Kay, 'A Defense of Currie's Governmental Interest Analysis' (1989-III) 215 *Collected Courses of the Hague Academy of International Law* 9; Symeon C. Symeonides, 'The Choice-of-Law Revolution Fifty Years after Currie: An End and a Beginning' (2015) *University of Illinois Law Review* 1847; Kermit Roosevelt III, 'Brainerd Currie's Contribution to Choice of Law: Looking Back, Looking Forward' (2014) 65 *Mercer Law Review* 501; Louise Weinberg, 'Theory Wars in the Conflict of Laws' (2005) 103 *Michigan Law Review* 1631. See also Silberman, n 3 above, 506.

6 This is visible, in particular, in debates over the draft Restatement (Third) Conflict of Laws.

around this time – on John Rawls' earliest articles on justice.[7] Equally striking, from the opposite direction, is the fact that these mid-century methodological debates in choice of law do not figure at all in leading generalist histories of twentieth-century American legal thought, let alone in broader histories of Cold War liberalism.[8] As a result of all this, the remarkable burst of scholarly creativity of the choice-of-law revolution occupies a curious and paradoxical place in academic legal thought. Its main protagonists still loom large within the field of conflict of laws but are really only minor figures outside of it. Their methodological and technical innovations seem to belong only to – and to be of interest only to those within – the discipline. And despite a vast and continuing engagement with the substance of these mid-century ideas, we still know rather little about how they fit into the early post-war, Cold War liberal, intellectual climate in which they were first formulated.

This article offers a new reading of late-1950s and 1960s innovation in choice of law, set in its intellectual contexts. One goal animating this reframing exercise – worth pointing out up-front but in need of further development later – is to make this episode relevant to generalist legal scholarship. The article does this by casting the scholarly choice-of-law revolution not just as a case study in legal-technical innovation, but also as an under-explored chapter in the emergence of versions of the ideals of rationality and legitimacy that have become central to modern law. These, in very brief, are understandings of rationality as a form of optimisation, and of legitimacy as intimately bound up with cosmopolitan concerns. The lens adopted for this project is drawn from the vocabulary in which leading authors themselves couched their reform efforts: that of 'rationalising' the field. Choice of law, at the time, was uniformly derided as being in desperate need of modernisation and rationalisation, with the two terms often being used as synonyms.[9] Its doctrines were said to languish in a state of 'generality and crudeness which would not be tolerated in any other field of the law'.[10] And so, for example, when Currie was awarded a major prize for his '*Selected*

7 There are of course partial exceptions. One is Lea Brilmayer's 1995 book, n 3 above, which relates Currie's work to Legal Realism and to realism in international thought. On Brilmayer's work, see further at n 65 below. Roxana Banu has studied mid-century conflicts debates from the perspective of 'justice'. See Roxana Banu, 'Conflicting Justice in Conflict of Laws' (2020) 53 *Vanderbilt Journal of Transnational Law* 461. Annelise Riles, in her seminal cultural study of conflict-of-laws technique, briefly suggests the potential relevance of the legal-process tradition to what she calls 'mid-century doctrinal "rationalizations" in Conflicts'. See Annelise Riles, 'A New Agenda for the Cultural Study of Law: Taking on the Technicalities' (2005) 53 *Buffalo Law Review* 973, 1021. On legal process, see further below under the heading 'Legal Process: Institutional Settlement and Political Realism'.

8 The mid-century methodological debates in conflict of laws do not figure in leading accounts of American legal thought during this period, such as those by G. Edward White, Neil Duxbury, or Morton J. Horwitz.

9 For a sampling of the use of the vocabulary of rationality, see for example Morris, n 1 above, 887 (arguing for a 'proper law of the tort' doctrine that would 'facilitate a more rational approach to the interstate tort problem than the Restatement's mechanistic last event doctrine'); David F. Cavers, *The Choice of Law Process* (Ann Arbor, MI: The University of Michigan Press, 1965) 79 (criticising the Restatement (First) of Conflict of Laws as 'essentially irrational and therefore unfair').

10 Max Rheinstein, 'Book Review' (1948) 15 *University of Chicago Law Review* 478, 483. William Prosser's 1953 indictment of the discipline as a 'dismal swamp' has become a commonplace.

Essays on the Conflict of Laws', the description of the awards ceremony – in *Time Magazine*, no less – captured the mood of the era: 'Though still controversial, Currie's doctrine is a more rational approach that courts are using increasingly. To Harvard Law Professor John P. Dawson, who presented the first Coif Award to Currie at a banquet in Chicago last week, "it seems clear that after Brainerd Currie, that dark science called the conflict of laws can never be the same."'[11]

'Rationality', of course, denotes ideals with long and often divergent histories, both in law and in other fields and disciplines.[12] Even just within major early twentieth-century American intellectual traditions, rationality had already been a central concern in both John Dewey's pragmatism and Talcott Parsons' work on the structure of social action.[13] But while there are certainly continuities with earlier periods as well as with later, post-1960s developments, there are also strong indications that the early post-war decades stand at least somewhat apart, as a recognisable, separate, 'chapter in the long history of reason'.[14] As the historian Andrew Jewett has observed, 'postwar American renderings of rationality differed significantly from earlier models, bearing the distinctive markings not only of the broad Enlightenment tradition but also of their specific historical contexts'.[15] This distinctive character can be seen especially clearly in two fields that will turn out to have particular relevance for mid-century innovations in choice of law. 'Ratonality', firstly, was a major unifying theme across the social and behavioural sciences of the early post-war period. In part spurred on by problems and funding related to strategic dilemmas of the Cold War, scientists – including notably at CASBS, the Palo Alto centre – used novel tools, such as small-group interactions observed through one-way mirrors, game theory, and other forms of modelling, in a search for 'the Holy Grail of *real* rationality'.[16] Secondly, within generalist US legal scholarship, the last few years of the 1950s were widely perceived as a period of a loss of faith in the 'rational' and 'reasoned' character of appellate court decisions. As one often-cited 1957 critique put it, using typical language: 'Opinions have, of late, said very little and have carried an air of assertion, as opposed to one of deliberation and rational choice'.[17] These critiques gave rise to a large literature under the broad heading of 'process jurisprudence', or 'legal process', which interrogated the judicial

11 'Lawyers: The Dark Science of Conflict' *Time Magazine* 8 January 1965 (emphasis added). The irony is that Currie himself thought that the idea of a 'science' of conflict of laws was misguided. See Brainerd Currie, 'Survival of Actions: Adjudication versus Automation in the Conflict of Laws' (1958) 10 *Stanford Law Review* 205, 239.

12 For the suggestion that abstract epistemological ideals like 'rationality' have histories, see for example Lorraine Daston and Peter Galison, *Objectivity* (Brooklyn, NY: Zone Books, 2007).

13 For Dewey's influence, see for example John Henry Schlegel, *American Legal Realism and Empirical Social Science* (Chapel Hill, NC: University of North Carolina Press, 1995). On Parsons, see Joel Isaac, *Working Knowledge: Making the Human Sciences from Parsons to Kuhn* (Cambridge, MA: Harvard University Press, 2012) 161.

14 Paul Erickson and others, *How Reason Almost Lost Its Mind: The Strange Career of Cold War Rationality* (Chicago, IL: The University of Chicago Press, 2013) 7.

15 Andrew Jewett, 'Parsing Postwar American Rationality' (2016) 13 *Modern Intellectual History* 555, 556. See further in the next section, 'Conflict and Rationality, in Law and the Human Sciences, around 1958'.

16 Erickson and others, n 14 above, 5 (emphasis in original).

17 Alexander M. Bickel and Harry H. Wellington, 'Legislative Purpose and the Judicial Process: The Lincoln Mills Case' (1957) 71 *Harvard Law Review*, 1, 3, cited in Neil Duxbury, *Patterns*

function and suggested quality standards for judicial reasoning. In this literature too, concepts like rational decision-making, objectivity, neutrality, and conflict, occupied centre stage. Within the legal-process tradition, moreover, rationality and reason became intimately intertwined with concerns over 'legitimacy', itself then a newly ascendant concept and term in legal and political thought.[18]

A first task for this article, then, will be to draw out parallels between these human-science and legal-process ideas of rationality, on the one hand, and the methodological innovations for choice of law formulated during this same period, on the other. Crucially, however, the theme of rationality does not just allow for connections to be drawn between the conflict of laws and these other disciplines; it also helps reframe relations *within* the cohort of mid-century conflicts scholars. Because while ideas connected to human-science, 'Cold-War' rationality and to legal process figure centrally in the work of many conflicts writers of the time, the precise use made of these ideas differs starkly as between Brainerd Currie, on one side, and writers like Baxter, Leflar, Cavers, Willis Reese, or Hessel Yntema, on the other. Bringing out these differences will be this article's second project. This will involve a reassessment, first, of what was most original and significant in Currie's work; and second of the received notion of a broadly cohesive cohort of mid-century conflicts writers building on Currie's insights and working mostly towards addressing some of the unsatisfactory 'gaps' he had left open and integrating his ideas into more comprehensive frameworks. Currie's most distinctive contributions, it will be argued, took the form of a synthesis of behavioural-science-like techniques to make conflict visible in a new way, together with a legal-process-like insistence on the un-resolvability of 'true' conflicts by way of legal technique alone. In developing this synthesis, Currie introduced a strikingly innovative tool: a diagrammatic representation of a conflict in all its possible configurations. These diagrams constitute a new form of legal knowledge that precisely mirrored the contemporaneous efforts by behavioural- and social scientists to find patterns in seemingly intractable constellations of interest and behaviours. For Brainerd Currie, however, technique – these diagrams, but also the tools of legal doctrine – could, rationally, do no more than *recognise* conflict, in the two senses of identifying true clashes where they existed, and of acknowledging the inevitably political character of the sacrifices they required. Such true conflicts, he wrote, were 'insoluble with the resources of conflict-of-laws law'.[19] Currie's contemporaries also fused both human-science-rationality and legal-process ideas. But they invoked them in pursuit of the goal of *resolving* conflict. Conflict resolution, in their proposals, firstly required judges to optimise all possible interests in play, neatly mirroring the concern with what economists and behavioural scientists at the time called the challenge of 'true optimisation'.[20] And secondly,

of American Jurisprudence (Oxford: OUP, 1995) 238. Duxbury also mentions the 'rationalistic premises of process thinking – in law as in political science and philosophy' (*ibid*, 298).

18 See for example Anne M. Kornhauser, *Debating the American State: Liberal Anxieties and the New Leviathan, 1930-1970* (Philadelphia, PA: University of Pennsylvania Press, 2015) 236 fn33.

19 Brainerd Currie, 'Married Women's Contracts: A Study in Conflict-of-Laws Method' (1958) 25 *University of Chicago Law Review* 227, 260.

20 Erickson and others, n 14 above, 79.

they emphasised the importance of technically well-crafted and principled decisions, sufficiently respectful of the need to avoid overextending local authority – two typical legal-process themes. Their key instruments, to this end, were new synthesising notions, such as that of 'comparative impairment', or the 'most significant relationship', by which disparate factors, policies, and values, were to be made commensurable.

On this contextual reading, the scholarly choice-of-law revolution changes in shape and scope. First, the episode emerges much more as a clash of visions, rather than as a broadly coherent wave of modernising projects.[21] And second, it becomes part of a larger story. Beyond the intra-disciplinary conversations over public policies and governmental interests or the status of forum law, the differences and commonalities between Currie and his contemporaries can now be seen as local instances of two broader, intertwined, clashes. First, over the meaning of conflict and how it could be known, managed, avoided, and resolved. And second, over faith in technique – legal or social-scientific – and its capacities to drive optimising outcomes by making things commensurable. Currie, as is well-known within the field, started by asking whether the problems framed by traditional doctrine did, in fact, present conflicts.[22] To this end, he devised a technical apparatus able to sort real clashes from merely apparent ones. But he also insisted, rather uniquely among conflicts scholars, on the limitations of legal tools – 'techniques purely jurisprudential', as he called them – in the face of true conflict, and on the illusory character of optimal solutions. His contemporaries, on the other hand, using a phrase popular during this period, rallied around a question that perhaps sounded similar but was in fact radically different. They asked '*Is this conflict really necessary?*'.[23] And their answer often was that it probably was not; at least in the sense that it could likely be painlessly resolved, by way of legal technique alone, in a way that did optimal justice to all possible interests at stake. Both of these very different approaches, strikingly, flew the banner of a more rational approach to conflicts of law.

These clashes, over conflict, rationality, and legal technique, then, finally, can themselves be read as part of the still more encompassing story of what the historian Joel Isaac has called 'the tool age' in the American social sciences. Like their behavioural- and social-science colleagues, legal scholars of the long 1950s in both the US and in Western Europe were faced with a radical expansion of their 'tool kits'.[24] Mid-century conflict of laws offers an important case-study for these broader tendencies. Currie's diagrams and his distinction

21 This observation refers only to the initial wave of 'revolutionary' writings, of the late 1950s and the 1960s. As regards later developments, the view of a discipline mired in 'theory wars' is common. See for example Weinberg, n 5 above.

22 For Currie, received choice-of-law doctrine was a badly constructed 'apparatus for the solution of problems of conflicting interests which obscures the real problems, deals with them blindly and badly, and creates problems of its own'. It had to be, in his words, destroyed. See Brainerd Currie, 'Notes on Methods and Objectives in the Conflict of Laws' (1959) *Duke Law Journal* 172, 179.

23 See for example Roger J. Traynor, 'Is This Conflict Really Necessary?' (1959) 37 *Texas Law Review* 657.

24 Examples could include, for the US: the expansion of jurisdictional techniques and standards of review in US civil rights jurisprudence; equal treatment; and social welfare case law; or the debate over 'balancing' as an appropriate technique in constitutional rights adjudication (on which

between true and false conflicts, are salient examples. But so too are the flexible, synthesising notions of 'grouping of contacts', 'comparative impairment', or the 'most significant relationship'. These conceptual and technical-doctrinal innovations provoked a period of 'reflexive self-awareness about the epistemic potentialities of the new tools' and of their political and ideological implications, in both the social sciences and in law.[25] Currie's innovations in particular, on this reading, emerge as an instance of what Isaac calls 'tool shock'. This is a combination of an increased awareness of the ways new theoretical and technical tools could shape 'what [scholars] could know and how they would know it', together with the inability to 'achieve more than local stabilization of these tools' within the relevant discipline.[26] This last point is important because it serves to underline how much Currie's work remains an outlier to the main trajectory of post-war choice of law. True, some of his basic insights were taken up and integrated into rival approaches, including into the structure of the Restatement (Second). But these subsequent 'adaptations' and 'modifications' of his approach rested on radically different assumptions than he would have subscribed to. The overall eclecticism that would come out of the choice-of-law revolution is, after all, itself premised on a commitment to commensurability and optimisation through legal technique – to the idea that it is possible to mix and optimise, not just as between the opposing interests of different states and individuals, but also as between different methods with widely diverging premises. Revisiting this mid-century episode of tool shock, through the lens of what different key actors took to be a rational approach to recognising, confronting, and solving conflict, can contribute to the elaboration of a genealogy of what has become an eclectic, 'post-war paradigm' within the conflict of laws – of pragmatic problem-solving through legal technique.[27] Such an account, in turn, can open up space for a reflexive engagement with some of the field's enduring premises and biases.

The article is structured as follows. The next section offers overviews of roles and meanings for 'conflict' and 'rationality' in the social- and behavioural

more below, text at n 105). And, in Europe, the *Bundesverfassungsgericht*'s foundational decisions for the post-war West-German constitutional order; the earliest developments in European human rights law; and the construction of a legal order for European economic integration. On these developments, see for example Robert J. Glennon, 'The Jurisdictional Legacy of the Civil Rights Movement' (1994) 61 *Tennessee Law Review* 869; Charles A. Reich, 'The New Property' (1964) 73 *Yale Law Journal* 733; Lorraine E. Weinrib, 'The Postwar Paradigm and American Exceptionalism' in Sujit Choudhry (ed), *The Migration of Constitutional Ideas* (Cambridge: CUP, 2006) 84; Michaela Hailbronner, *Traditions and Transformations: The Rise of German Constitutionalism* (Oxford: OUP, 2015); Antoine Vauchez, *L'Union par le Droit: L'invention d'un programme institutionnel pour l'Europe* (Paris: Presses de Sciences Po, 2013); Jacco Bomhoff, *Balancing Constitutional Rights: The Origins and Meanings of Postwar Legal Discourse* (Cambridge: CUP, 2013). For the notion of a 'long 1950s' see for example Jewett, n 15 above.

25 Joel Isaac, 'Tool Shock: Technique and Epistemology in the Postwar Social Sciences' (2010) 42 *History of Political Economy (Annual Supplement)*, 133, 136.

26 *ibid*, 135.

27 'Post-war paradigm' is not a commonly used term of art in the conflict of laws. To capture some of its main features, David Kennedy's reference to a 'transnational-liberal-legal-process mainstream' in public international law could usefully be extended also to private international law. See for example David Kennedy, 'My Talk at the ASIL: What Is New Thinking in International Law?' (2000) 94 *American Society of International Law Proceedings* 104, 119.

sciences, and in political and legal theory of the late 1950s and early 1960s. Against this background, the third section then presents Brainerd Currie's work and situates his innovations in relation to the broader intellectual contexts in which they were first developed. The fourth section introduces the writings of some of Currie's leading contemporaries, again revealing connections to trends in fields outside the conflict of laws and highlighting the contrasts between their approach to doctrinal fine-tuning, optimising, and pragmatic problem-solving, and Currie's far more limited and sceptical sense of what legal technique might be able to achieve.

CONFLICT AND RATIONALITY, IN LAW AND THE HUMAN SCIENCES, AROUND 1958

'Conflict' and 'rationality' are both perennial themes across the human sciences and in political and legal thought. But these notions also took on distinctive shapes – and a heightened prominence – around mid-century, at the time Brainerd Currie and other conflict-of-laws scholars set themselves the challenge of rationalising their discipline. The two topics, in particular, came to be closely intertwined, in ways they had not typically been before. 'Conflict' was now commonly conceived of in terms of the clashing 'interests' of rational, self-interested, actors. Rationality, in turn, came to figure as an instrument of decision-making or a tool of analysis in relation to such conflicts, between competing interests or over scarce resources. This section offers brief overviews of some of the roles and meanings for these two master-concepts in the social sciences and in political and legal thought in the late 1950s and early 1960s, in order to set the scene for the analysis of the rationalising efforts of Currie and his contemporaries, which will occupy the next two sections.

'Conflict', firstly, was a newly central theme across many disciplines in the social and behavioural sciences. 'After an interval of almost fifty years', Ralf Dahrendorf wrote in 1958 in the recently established *Journal of Conflict Resolution*, on the topic of 'social conflict', 'a theme has reappeared in sociology which has determined the origin of that discipline more than any other subject area'.[28] A year earlier, the pioneering game theorists R. Duncan Luce and Howard Raiffa had noted how the theme of 'conflicts of interest', both between individuals and institutions, had become 'one of the more dominant concerns of at least several of our academic departments: economics, sociology, political science, and other areas to a lesser degree'.[29] Importantly, it was not simply the case that more scholars, from more fields, were paying more attention to conflict. The kinds of approaches taken, and the questions asked, were also changing. The journal in which Dahrendorf wrote, for example, was set up specifically to provide a home for a new 'applied interdisciplinary social science', conceived

28 Ralf Dahrendorf, 'Toward a Theory of Social Conflict' (1958) 2 *Journal of Conflict Resolution* 170, 170. See also for example 'Approaches to the Study of Social Conflict: Introduction by the Editors' (1957) 1 *Journal of Conflict Resolution* 105.

29 R. Duncan Luce and Howard Raiffa, *Games and Decisions: Introduction and Critical Survey* (New York, NY: John Wiley & Sons, 1957) 1. Cited in Erickson and others, n 14 above, 45.

as a field with the aim of dealing with '*conflict in general* rather than particular kinds of conflicts'.[30] As the Editorial for its inaugural issue of March 1957 put it: 'Many of the patterns and processes which characterize conflict in one area also characterize it in others. Negotiation and mediation go on in labor disputes as well as in international relations. Price wars and domestic quarrels have much the pattern of an arms race'.[31] CASBS, where Currie was spending his sabbatical, was a prominent site for these cross-disciplinary conversations on 'conflict in general'.[32]

This preoccupation with social conflict and its resolution also spilled over into the more normative domains of political philosophy and law. John Rawls's 1958 article '*Justice as Fairness*', for example, defined justice as 'the virtue of practices where there are assumed to be competing interests and conflicting claims'. Rawls, incidentally, relied heavily on a presumption of 'mutually self-interested and rational persons', and claimed early studies in game theory as one of his main sources of inspiration.[33] In law, the widely influential 1958 collection of materials, '*The Legal Process*', by Henry M. Hart and Albert M. Sacks, on its opening page offered the confident assertion that 'the most fundamental of the conditions of human society' is that '[i]n the satisfaction of all their wants, people are continuously and inescapably dependent upon one another. This is obviously true of wants which are in conflict'.[34] In the international legal sphere, finally, Philip Jessup's 1956 essay with the field-defining title '*Transnational Law*', described 'transnational legal problems' as arising, in general, 'from conflicts of interest or desire, real or imagined'.[35] Across the social and behavioural sciences and in political and legal thought, then, a flurry of scholarly activity in the second half of the 1950s and the early 1960s sought to recast what conflict was; where it could be found; why it mattered; how it could be formalised and made visible, analysed, and compared; how it could be avoided, managed, or solved; and what acceptable resolutions could look like.

30 Martha Harty and John Modell, 'The First Conflict Resolution Movement, 1956-1971: An Attempt to Institutionalize Applied Interdisciplinary Social Science' (1991) 35 *Journal of Conflict Resolution* 720, 733 (emphasis added).

31 'An Editorial' (1957) 1 *Journal of Conflict Resolution* 1, 2.

32 In his correspondence with David Cavers, Currie mentions a CASBS-symposium on 'Conflict and its Regulation' with panels on psychotherapy, labour-management relations and due process rights. See David F. Cavers, 'A Correspondence with Brainerd Currie, 1957-1958' (1983) 34 *Mercer Law Review* 471, 495; cf also 'Approaches to the Study of Social Conflict: Introduction by the Editors' (1957) 1 *Journal of Conflict Resolution* 105.

33 John Rawls, 'Justice as Fairness' (1958) 67 *The Philosophical Review* 164, 175. Erickson and others, n 14 above, note that Rawls later abandoned his earlier view that his theory of justice was part of rational choice theory (*ibid*, 7 fn 9). See also Katrina Forrester, *In the Shadow of Justice: Postwar Liberalism and the Remaking of Political Philosophy* (Princeton, NJ: Princeton University Press, 2019) 35. For the role of Rawls's work in conflicts theory, see below under the heading 'Legitimacy: "Super-Value Judgments" and Principle'.

34 Henry M. Hart, Jr and Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* (tentative edition, 1958) 1.

35 Philip C. Jessup, *Transnational Law* (New Haven CT: Yale University Press, 1956) 11. See also for example Wolfgang Friedmann, *The Changing Structure of International Law* (New York, NY: Columbia University Press, 1964) 45.

In these efforts, the vocabulary, ideals, and practices of 'rationality' came to play a central role.[36] Before World War II, at least in legal scholarship, when 'rationality' was invoked explicitly, this was typically in debates over what made for a *scientific* approach to the study of law. These debates – to which, incidentally, conflict-of-laws scholars, made important contributions – essentially pursued two directions, both claiming inspiration from John Dewey.[37] The first emphasised doctrinal rationalisation, in the form of conceptual clarity and logical rigour. On the second, a scientific approach to the study of law meant developing 'a nascent empirical legal science'.[38] In these early writings, however, 'rationality' does not appear to do any specific work, beyond its role as a synonym for 'scientific' or 'empirical', and its opposition to a 'rationalism' uniformly rejected as 'traditional and authoritarian'.[39] This changes after the war, when 'rationality' begins to assume a range of more differentiated and specific meanings, both in legal and political thought, and in the social- and behavioural sciences. Two clusters of associations that will be especially relevant to the argument in this article are highlighted below. These connect rationality to instruments or tools (in the social sciences), and to process and legitimacy (in legal scholarship).

First, as already mentioned in the Introduction, this was the period of 'the tool age' of American social science.[40] Growing out of wartime research, and spurred on by the exigencies of Cold-War organisational and strategic dilemmas, researchers developed new mathematical, statistical, and observational techniques and modelling tools, which 'provided fresh ways to frame economic, political, and social problems'.[41] For at least some historians writing about this period, these new techniques taken together amounted to a distinctive 'Cold-War' style of rationality. Never, of course, so labelled by any contemporary actors, this style of reasoning was characterised by a 'distinctive combination of stripped-down formalism, economic calculation, optimization, analogical reasoning from experimental microcosms, and towering ambition', as well as an emphasis on the 'true optimization' of the interests and preferences, of individuals or larger groupings, regardless of their normative worth.[42] 'Cold War rationality' favoured forms of reasoning which sought 'to reduce complexity, either by stripping away all but the essential elements of a problem (as in a mathematical model) or by shrinking the issue to dimensions small enough to be observed under controlled circumstances (as in a laboratory experiment)'.[43] Many methodological tools in wide use today, such as the prisoners' dilemma

36 It is noteworthy that the work of Max Weber, who was one of the first writers to systematically explore different histories and varieties of 'rationality' and 'legitimacy', including in bureaucracy and in law specifically, was just becoming available in English during this period.

37 Schlegel, n 13 above, 68-69.

38 *ibid*, 73; Walter W. Cook, 'Scientific Method and the Law' (1927) 13 *American Bar Association Journal* 303; Hessel E. Yntema, 'The Rational Basis of Legal Science' (1931) 31 *Columbia Law Review* 925, 935 (emphasis added).

39 Yntema, *ibid*, 925.

40 Isaac, n 25 above, 136. See also Erickson and others, n 14 above, 7; Jewett, n 15 above, 566-567.

41 Isaac, *ibid*, 136-137. See also for example Nils Gilman, 'The Cold War as Intellectual Force Field' (2016) 13 *Modern Intellectual History* 507, 523.

42 Erickson and others, n 14 above, 5, 9. See also Jewett, n 15 above, 566.

43 Erickson and others, *ibid*, 9.

in game theory, or semi-scripted dialogues in behavioural psychology, were first developed and popularised during this period, including at CASBS, which offered computing facilities and a room set-up with a one-way mirror to observe and code small-group interactions.[44] The CASBS was, in fact, a particularly important site for the development of game theory during these years.[45] An especially popular tool in this game-theoretic research, used by both psychologists and economists, was the matrix. The matrix's technical capabilities proved a particularly close fit with the tendency, noted earlier, of framing 'conflict' as a generic issue. As Paul Erickson and his co-authors explain in their history of the behavioural sciences of this period: '[s]tripping a situation down to payoffs in a game matrix allowed game-theoretic rationality to vault between contexts and across disciplinary lines and spatial and temporal scales'.[46]

Social and behavioural scientists were not the only ones engaging in new forms of reflexivity with regard to their own instruments around this time. Legal scholars too, in the second half of the 1950s in particular, entered a period of sustained reflection on their tools. But where the scientists' reflexive turn went hand-in-hand with rapid technical innovation and resulted in an 'expansion of the domain of rationality at the expense of that of reason', the lawyers mostly turned rather towards tradition, and precisely to familiar ideals of reason – of reasoned argument, collective deliberation, and judgment.[47] A series of prominent publications by American legal scholars during the late 1950s gave voice to two related concerns. The first was that law and adjudication ought to be subject to special standards of justification, so as to remain distinct from other forms of decision-making. The second was that many decisions of appellate courts at the time did not, in the view of academic observers, do enough to meet these standards. Lon Fuller made the first point in a paper circulated for a discussion group at Harvard Law School in 1957, for example, when he referred to adjudication as a 'device which gives formal and institutional expression to the influence of reasoned argument in human affairs'. 'As such', he wrote, 'it assumes a burden of rationality not borne by any other form of social ordering'.[48] The second point is made in a wide range of publications, referring to judicial opinions with 'technical mistakes' and lacking 'the underpinning of principle', and diagnosing a general 'crisis of confidence in the work of appellate courts.[49] The scholarly response to these complaints came in the form of

44 See Harry Kalven Jr and Ralph W. Tyler, 'The Palo Alto Conference on Law and Behavioral Science' (1956) 9 *Journal of Legal Education* 366, 370.

45 See further below, section headed 'Currie at the "think factory": the game matrix and the situation'.

46 Erickson and others, n 14 above, 136.

47 *ibid*. See also Duxbury, n 17 above, 205; G. Edward White, 'The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change' (1973) 59 *Virginia Law Review* 279.

48 Cited in Duxbury, *ibid*, 231. The published version of Fuller's paper is Lon L. Fuller and Kenneth I. Winston, 'The Forms and Limits of Adjudication' (1978) 92 *Harvard Law Review* 353.

49 Henry M. Hart, Jr, 'The Supreme Court, 1958 Term – Foreword: The Time Chart of the Justices' (1959) 73 *Harvard Law Review* 84, 100, cited in Duxbury, *ibid*, 240. Karl N. Llewellyn, *The Common Law Tradition: Deciding Appeals* (Boston, MA: Little, Brown, 1960) 3-4, cited in Morton J. Horwitz, *The Transformation of American Law 1870-1960: The Crisis of Legal Orthodoxy* (New York, NY: OUP, 1992) 249.

what Neil Duxbury has called a jurisprudence of 'quality control'.[50] Its aim, as Henry M. Hart and Albert M. Sacks put it in their influential 1958 collection of materials on '*The Legal Process*', was 'rationalizing the fabric of [the] law as a whole'.[51] A first main theme of this body of work was the question of 'who should decide?'. Often called the issue of institutional settlement, this theme revolved around questions of jurisdiction, judicial competence, and separation of powers.[52] The centrality of this question, intriguingly, meant that 'choice of law issues', all of a sudden, commanded 'the attention of the most "rigorous" scholarship', with the choice-of-law question seen as representing 'in paradigm form the central questions of law generally'.[53] For Lon Fuller, for example, scholars like Hart and Sacks 'raised, in an unprecedented fashion' the question of 'who should do what?' as 'a fundamental question of modern jurisprudence'.[54] The second main theme concerned standards for what publicly-stated legal reasoning should look like. On this latter issue two related, but importantly different, main currents are visible: one stating that legal reasoning should be 'open' and 'realistic', and not hidden behind 'fictions' or 'fiat'; and the other demanding that such reasoning should be based on 'principle'.[55] A powerful background guiding idea for much of this work, finally, in tune with writing in political theory of the time, was a turn to rationalistic conceptions of 'process'.[56]

There were both overlaps and clear differences between the concerns of legal scholars working in this process tradition in jurisprudence and those of the social and behavioural scientists discussed earlier, even if both often used rather similar vocabulary. Ideals of consistency and predictability loomed large in both areas, as did attachment to method, process, procedure, and technique. If this was the 'tool age' for American social science, it was also a period of remarkable preoccupation with method and technique in jurisprudence, even if the two fields developed largely in isolation from each other.[57] But where scientists invoked the language of the skilled technician and their tools – instruments, charts, and diagrams – their counterparts in law emphasised craftsmanship and deliberation. The ideals of optimisation, maximisation, and 'efficiency' also play a role in both discourses, as did attention to the limits on the possibility of achieving optimal outcomes. These, finally, could be of a more practical variety – material constraints, such as limited available computing power, for example – or they could stem from more principled and politically charged limits to institutional

50 Duxbury, n 17 above, 236.
51 Hart and Sacks, n 35 above, 105, cited in Duxbury, *ibid*, 236.
52 See for example Fuller and Winston, n 48 above; Hart and Sacks, *ibid*. For detailed discussions, see Gary Peller, 'Neutral Principles in the 1950s' (1988) 21 *University of Michigan Journal of Law Reform* 561, 568; Duxbury, *ibid*, 255-256; Horwitz, n 49 above, 254-255.
53 Peller, *ibid*, 570.
54 Duxbury, n 17 above, 233.
55 See in particular Herbert Wechsler, 'Toward Neutral Principles of Constitutional Law' (1959) *Harvard Law Review* 1.
56 See for example Edward A. Purcell, *The Crisis of Democratic Theory: Scientific Naturalism and the Problem of Value* (Lexington, KY: The University Press of Kentucky, 1973); Peller, n 52 above; Horwitz, n 49 above, 254; Duxbury, n 17 above, 209, 241.
57 On the relationship between process jurisprudence and the social sciences, see for example Peller, n 52 above, 568; Duxbury, n 17 above, 209; G. Edward White, *Law in American History* vol I (New York, NY: OUP, 2019) 364.

competence and legitimacy.[58] This latter connection – between rationality and legitimacy – may be counted as one of process jurisprudence's most distinctive and important contributions. It will play a significant role, albeit in two radically different ways, in the work of Brainerd Currie and of his contemporaries, to which this article now turns.

BRAINERD CURRIE: *RECOGNISING* CONFLICT

The main aim for this article, to recall, is to explore how different mid-century scholars sought to rationalise the conflict of laws; how, in doing so, their work reflected very similar ideas, just then prominent in the social- and behavioural sciences and in legal-process scholarship; but how these were used in very different ways, with lasting implications for the development of the discipline. This exploration has to start with the remarkable series of long and dense articles that Brainerd Currie published in 1958, and that still count among the most intensely debated contributions to conflict-of-laws scholarship. In them, as mentioned, he sought to offer 'a rational and objective basis' for choice of law.[59] This section asks what this meant for Currie, and how the search for rationality shaped his methodological contributions, and in particular his sense of what choice of law, as legal technique, could – and could not – achieve.

From this perspective of tools and rationality, two aspects of Currie's work stand out. First, he replaced what he called 'the machine' of traditional choice-of-law reasoning with a new methodological apparatus dedicated to making conflict visible in a new way.[60] His new instrument was a matrix diagram, containing all possible versions of a conflict and opening the different permutations up for comparison. This format shows striking parallels to not just the game-scenarios behavioural scientists were learning to manipulate just around this time, but also to what they called a '*situation*' – a kind of comprehensive vantage point from which problems could be envisaged as containing their own solutions. Second, however, with this view of conflict in place, Currie insisted on the impossibility of resolving 'true' conflicts by way of legal technique alone. In this, his approach hewed closely to what, again just at this very moment, was coming to be called the principle of '*institutional settlement*' by legal scholars working in the legal-process tradition.[61] The next two subsections discuss these two aspects of Currie's work in more detail.

Currie at the 'think factory':[62] the game matrix and the situation

At the heart of Currie's approach lies a series of methodological moves that made a subset of what had always seemed 'tough legal problems' quite literally

58 See for example the quotations from Hart and Sacks in Duxbury, *ibid*, 254, 256. For the social sciences see for example Erickson and others, n 14 above, 71.
59 Currie, n 11 above, 245.
60 *ibid*, 242. Currie's subtitle is revealing: 'Adjudication versus Automation in the Conflict of Laws'.
61 See for example Duxbury, n 17 above, 255-256.
62 cf S.M. Amadae, *Rationalizing Capitalist Democracy: The Cold War Origins of Rational Choice Liberalism* (Chicago, IL: The University of Chicago Press, 2003) 79 (referring to CASBS).

'vanish', while simultaneously bringing the remaining instances of true conflicts into sharper focus, and highlighting their basic unresolvability, at least by way of conventional juridical techniques.[63] Currie achieved these twin effects – of making conflict disappear and bringing it into view – in large part through a process of radical simplification. His basic method, as David Cavers noted in their correspondence, consisted of 'reducing what actually are transactions with rather widely varying connections with the states involved down to a highly-stylized pattern'.[64] What has not been studied in any depth, however, is how Currie's methodological moves tracked formal modelling and representational techniques that were just then being widely propagated in the social and behavioural sciences. In essence, Currie worked to transform conflict-of-law cases into game scenarios, to be formalised in diagrams, and manipulated as in a lab experiment or a war-game exercise.[65] Viewing conflicts in this simplified, patterned way brought important benefits. First, it allowed Currie to isolate relevant variables and to keep them manageable. This, in turn, made it possible to show that certain factors central to conventional conflict-of-laws methods should not be relevant at all, or only in certain types of cases. Second, this new kind of diagrammatic presentation of conflict scenarios allowed Currie to zoom out and gain a totalising overview which offered a new form of understanding legal conflict. And third, finally, using the stripped-down game-matrix format increased the comparability of different kinds of conflict, involving different areas of law, thus expanding the reach of Currie's approach by allowing 'a single game to stand in for a common set of problems'.[66]

The construction of these diagrams, which appear in '*Married Women's Contracts*' and '*Survival of Actions*', began with the casting of the key actors. 'The basic problem in the conflict of laws', Currie wrote, famously, 'is to reconcile or resolve the conflicting interests *of different states*'.[67] The states central to his set-up, however, are not those found in the real world, but the kind of hypothesised players with stipulated interests commonly found in game-theoretical scenarios. In '*Married Women's Contracts*', for example, readers are asked to '[a]ssume a quite selfish state, concerned only with promoting its own interests … inter-

63 Quotes from Currie's poem, 'I am the Very Model of a Modern Intellectual', published in Philip B. Kurland, 'Brainerd Currie' [1966] *Duke Law Journal* 5, 8.

64 Cavers (1983) n 32 above, 476.

65 Professor Lea Brilmayer has built on Currie's analysis to develop a game-theoretical approach to choice of law. Her argument is not, however, that Currie *himself* made use of game-theoretical or formal modelling insights, or that his work mirrors that of contemporary scholars working in the behavioural sciences. Brilmayer's analysis is rather based on the idea that Currie's work can be distinguished from game theory, and that his theory is defective – in part – precisely because he does not incorporate game-theoretical insights (Brilmayer does note William Baxter's use of hypothetical negotiations). Note also that the game-theoretical literature Brilmayer relies on most – work of the 1980s and early 1990s – is, on the whole, much more cooperation-oriented than the earlier generation of literature of the 1940s and 1950s. This later emphasis within the field on cooperation and non-zero-sum benefits fits precisely with the approach to choice of law that Brilmayer herself advocates. See Brilmayer, n 3 above, 170-196. On Baxter, see further the section below headed, '*Resolving* conflicts: optimisation and legitimacy in mid-century choice of law'.

66 Erickson and others, n 14 above, 149.

67 Currie, n 11 above, 239 (emphasis added).

ested only in short-run "gains"'.[68] His conflict-of-laws colleagues were quick to denounce this assumption of 'egocentricity',[69] and Currie later modified his position somewhat.[70] But for Currie, the 'short-sighted, selfish state' was explicitly 'nothing more than an experimental model'. 'No such state exists', he wrote, 'at least in this country.'[71] His imagined 'selfish state' fulfilled very specific roles in his experimental set-up. First, a deliberately narrow definition of the potentially relevant governmental interests served the 'formal purposes' – Currie's words – of constructing a manageable grid for his analysis, on which more below.[72] And second, the hypothesised behaviour of the 'selfish state' could be used as a baseline for the subsequent critical examination of actual state behaviour.[73] Moreover, just like in many other discussions of rationality in the human sciences at that time, Currie also explicitly bracketed any further normative evaluation of his hypothesised states' imagined interests. Writing of their 'selfish' outlook, the question was not, he said, 'whether such an attitude would be shocking, or unwise, or unjust, or unconstitutional', but only 'whether it would be *rational*'. The answer, for Currie was that it would, 'in the sense that, in the short run, without considering how other states or higher authority might react, the state would in this manner be doing all it could to maximize its own interests'.[74]

With his key actors in place, Currie could now move on to the centrepiece of his analysis: the construction of a formal grid setting out all the different scenarios in which the interests of two 'selfish' states could come into conflict. 'Let us stipulate', he writes early on in '*Married Women's Contracts*', 'that in a case like *Milliken v. Pratt*, there are just four factors which may be significant for our purposes'.[75] This was the famous problem of married women standing guarantee for their husbands' business, where the law on such guarantees differed as between the state of the woman's domicile and that of the creditor. For this type of conflict, the stipulated factors were (1) the domicile, nationality, or residence, or place of business of the creditor invoking the guarantee; (2) the domicile, nationality, or residence of the married woman standing surety for her husband; (3) the place where the contract was made, as the place of the transaction; and (4) the forum, ie the place where the action is brought. Each of these factors could be either domestic or foreign to each of the two states concerned, and they could now be arranged in a matrix: 'There are therefore sixteen possible combinations – sixteen different cases which may arise. One of these is the purely domestic case, and one is purely foreign. That leaves fourteen conflict-of-laws cases. By oversimplifying the problem and making certain rather arbitrary assumptions we have been able to reduce the possibilities to this

68 Currie, n 19 above, 237.
69 Brainerd Currie, 'The Verdict of Quiescent Years: Mr. Hill and the Conflict of Laws' (1961) 28 *University of Chicago Law Review* 258, 265.
70 Brainerd Currie, 'The Disinterested Third State' (1963) 28 *Law and Contemporary Problems* 754, 757.
71 Currie, n 69 above, 286.
72 *ibid*, 266.
73 *ibid*, 286.
74 Currie, n 19 above, 237.
75 *ibid*, 231.

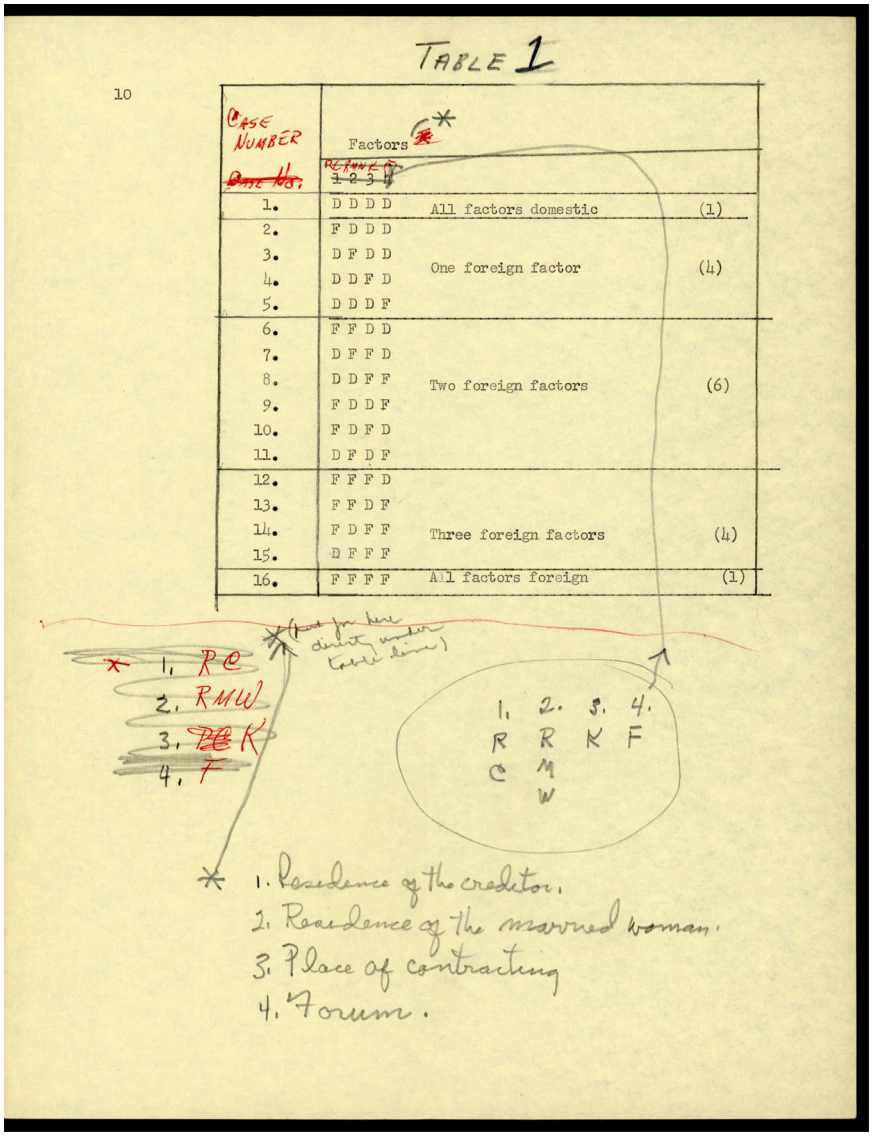

Figure 1: Currie's draft for 'Table 1' in '*Married Women's Contracts*'. [Colour figure can be viewed at wileyonlinelibrary.com]

relatively small range. Even so, the fourteen different conflict-of-laws cases are difficult to visualize'.[76]

Currie then presents a table of the 16 possible scenarios, figure 1 shown here in its draft version.[77]

76 *ibid*, 232.

77 Brainerd Currie Papers (1957-1960) (Currie Papers), University of Chicago Library, Hanna Holborn Gray Special Collections, Box 3, Folder 2, 10. The published version can be found in Currie, n 19 above, 233.

By simultaneously simplifying the issues and enlarging his focus, Currie transforms the case of Mrs Pratt – or of the survivors of a crash on Route 66, in '*Survival of Actions*' – into what social and behavioural scientists at the time called a 'situation', or a 'total situation'.[78] The situation, in post-war social-scientific writing, was a place 'where a problem occurred as well as its potential to be worked out'.[79] So pervasive was 'the situation' as a methodological tool in the early post-war social- and behavioural sciences, that its use can perhaps be seen as a 'style of thought' characteristic for this period.[80] As Erickson and others explain: 'At its most basic level, the situation was a mechanism to create consistency in the phenomena being studied. Complex as they may have been, they could be contained within a designated situation and thereby understood. Consistent, comparable units of behavior were in this way laid out for study'.[81]

A 'situation' could be the formally encoded interactions among a group of test subjects trying to solve a chess problem together. But it could also be a miniature 'dollhouse' recreation of a crime scene, or a comprehensive overview of all the 'information-processing operations' within the 'total organization' of an air-defence system.[82] 'Out of such situations', Erickson and others argue, 'issued a peculiar and short-lived yet powerful new vision of social order. It was based on a stripped-down, judgment-free, methodologically sound form of rationality', enabling a new way of perceiving conflicts and their internal configurations 'with special clarity'.[83]

Viewing 'the problem of *Milliken v. Pratt*' through a game-theoretic lens, as a 'situation', in this way, meant looking at not just *this* particular configuration of contacts and state interests, but also all other possible ones, including ones that, in traditional doctrinal terms, would seem to present entirely different problems, or no problems at all. The matrix made these different – hypothetical, additional – scenarios into versions of 'the same' situation, in this way making them comparable. Transforming a legal case into a 'situation' in this sense, allowed Currie to visualise, within one comprehensive framework, not just all the different possible permutations for conflict in this setting, but also, crucially, the specific subset of scenarios in which a 'conflict' between the different states involved proved merely illusory. His diagrams, quite literally, made both false and real conflicts visible for the first time. In this sense, they represent something quite remarkable: a genuinely new form of knowledge in the conflict of laws. At a second level, the situation format could be used to analyse not just *this* particular problem – of married women standing surety for their husbands – in all its different versions; but also a wide range of other problems, again made comparable through the use of the game matrix.[84]

When looked at in this way, Currie's work shows a clear fit with that of a wave of social and behavioural scientists working at the time, who were all using new tools to visualise what previously had been 'intractable' patterns of

78 Isaac, n 25 above, 153.
79 Erickson and others, n 14 above, 113.
80 *ibid*.
81 *ibid*, 112.
82 *ibid*, ch 4.
83 *ibid*, 131.
84 *ibid*, 112.

behaviour or constellations of interests.[85] But despite these remarkable parallels, the question of the precise source of inspiration for Currie's methodological innovations, remains at least somewhat open. The relevant published articles invoke only cases and legal-doctrinal studies. They do contain an explicit reference to a game, however, and offer language that suggests Currie must have been at least somewhat familiar with common methodological moves in behavioural-science literature.[86] The diagrams themselves appear essentially fully formed in the earliest surviving draft of the manuscript for '*Married Women's Contracts*'. The only footnote Currie offers contains the suggestion that '[t]he experimentally minded reader may wish to stop at this point and make the enumeration for himself', and that '[u]nless he is a bit of a mathematician, he is likely to find the process unexpectedly difficult (as I did)'.[87] Currie's papers at the University of Chicago Library contain extensive correspondence in relation to the key articles, but the surviving letters are all – with one exception, on which more below – from legal scholars.[88]

The most likely source for his inspiration, ultimately, has to be found in the informal exchanges and the research culture at CASBS – the behavioural sciences centre – where Currie was when he worked on '*Married Women's Contracts*' and '*Survival of Actions*'. It is difficult to overstate the role this centre played in the development of game theory and decision analysis in the US, during the time Currie was there.[89] Several leading authors in the field, such as R. Duncan Luce, Howard Raiffa, Anatol Rapoport, or Kenneth Arrow, spent time there in the two years before Currie arrived.[90] In previously published correspondence with David Cavers, Currie writes that he has 'certainly not given up the idea that law can learn from the behavioral sciences, and vice versa': 'I came here believing in good faith that in the process of trying to work through some problems of conflict of laws that have haunted me for years I could derive considerable benefit from colleagues in other fields. I still think so'. But while Currie thought that the questions he was interested in involved 'important problems for political science and sociology', he could not persuade resident colleagues from these disciplines, like Talcott Parsons or David Easton, to take an interest in his work.[91] In these letters, however, Currie does acknowledge the influence of the economists in residence at CASBS that year, describing how he

85 Isaac, n 25 above, 139.

86 See for example Currie, n 19 above, 231-233. Currie refers to an as of yet 'unimagined range of mixed configurations' to be mapped out; to the need to be 'a little arbitrary' to 'keep the problem of enumeration within manageable limits'; and to the proposition that 'one cannot very well begin a chess game with a stalemate'. It is also noteworthy that in editing an earlier draft of '*Married Women's Contracts*', Currie changed all references to 'the case' of *Milliken v. Pratt* to 'the problem' of *Milliken v. Pratt*. See Currie Papers, n 77 above, Box 3, Folder 2.

87 *ibid*.

88 Currie Papers, n 77 above, Box 3 and Box 5.

89 See for example Amadae, n 62 above, 79.

90 Erickson and others, n 14 above, 143.

91 Cavers, n 32 above, 495. Currie was intimately familiar with social-science literature from before World War II, which he studied for his doctorate on curriculum reform at Columbia Law School. One of the authors Currie looked at for that project – Underhill Moore – developed a diagrammatic representation technique for 'transaction series' in his late-1920s empirical work on banking law. While Moore's work had very little impact generally, Currie wrote that he found his studies 'remarkable'. It is a matter of speculation whether Moore's efforts at formal-

benefited from their 'tough-minded analytical approach to problems'.[92] Nothing further of these supposedly helpful interactions survives in Currie's papers. His archive does contain one surprising letter, however, that gives a striking glimpse, not just of what informal exchanges at the centre must have looked like more generally, but also of how the kind of methodological moves visible in Currie's work pervaded the atmosphere at CASBS. In November of 1957, the prominent literary scholar Kenneth Burke, who was also at the Centre that year, wrote to respond to a draft of '*Survival of Actions*' that Currie had shared with him. Like a true literary critic, Burke comments on Currie's writing style, noting that he particularly liked 'the way you mixed a bit of animus with your charts and legalisms'.[93] The letter offers two more substantive insights. First, Burke comments on Currie's apparently ambivalent attitude towards 'Technology' and 'Machinery as an Ideal' during a mealtime discussion, and contrasts this to his strident critique of 'automation' in the draft article. Secondly, still more revealing, Burke suggests parallels between Currie's diagrammatic representations of conflict, and his own 1945 study of rhetoric in '*A Grammar of Motives*', a copy of which he had offered Currie on loan. Burke's book proposed the formal tool of a 'pentad' – five questions necessary to any statement about 'what people are doing and why they are doing it' – in the form of act, scene, agent, agency, and purpose.[94] Other important methodological tools in Burke's approach included the practice of 'reduction' – creating 'vocabularies that are selections of reality' – and, similar to the behavioural scientists cited earlier: the concept of 'the situation', which he compares to his own notion of the '*scene-act ratio*', as a constellation of actions and their environment.[95] For Burke, Currie's representation of conflict could 'readily be translated into terms of my notion about "scene-act ratios" (as per my Grammar, which you probably never even looked at!)'.[96]

Burke's letter furnishes a window onto the culture of research and discussion at CASBS in the late 1950s, where even the literary scholars spoke in terms of diagrams and ratios, and where the language of conflict – diagrams, formal representations of 'permutations and combinations', reduction of social complexity, and 'the situation' – formed a shared vocabulary across disciplines, from the behavioural sciences, to economics, and law. But in the final instance, it is Currie himself who gives clearest evidence of his familiarity with what his behavioural-science colleagues were up to. A witty poem Currie wrote in Palo Alto ostensibly mocks his colleagues, but in the process also happens to neatly

isation (which were also aimed at making different factual and legal constellations visible and comparable) may have been an early source of inspiration for Currie's work on conflicts. See Brainerd Currie, 'The Materials of Law Study' (1955) 8 *Journal of Legal Education* 1, 52. On Underhill Moore, see Schlegel, n 13 above, ch 3.

92 *ibid*, 494.

93 Letter of Kenneth Burke to Brainerd Currie of 16 November 1957. Currie Papers, n 77 above, Box 5, Folder 6.

94 Kenneth Burke, *A Grammar of Motives* (Berkeley, CA: University of California Press, 1969 [1945]) xv. See also at xvi: 'We want to inquire into the purely internal relationships which the five terms bear to one another, considering their possibilities of transformation, their range of permutations and combinations'.

95 *ibid*, 59, 13.

96 Currie Papers, n 77 above, Box 5, Folder 6.

summarise at least this part of his own approach. Here he is, in '*I am the Very Model of a Modern Intellectual*':

> I'll tackle any snafu with a model mathematical.
> Tough legal problems vanish when I use my method graphical.
> My friends are IBM machines, my methods are statistical.[97]

Legal process: institutional settlement and political realism

Once both 'false' and 'true' conflicts have been made visible, what is the conflict of laws, as a discipline, to do with them? On this question, Currie's approach is again comprised of a striking synthesis of ideas, this time found in political science and in general jurisprudence, that were gaining currency just during the period he was writing. Currie, firstly, as Lea Brilmayer has already noted, is a realist, in the mode of international relations theory, in the way he acknowledges the limitations to the ability of any one state to unilaterally further either their own policy goals or some overarching common policy, such as the vaunted ideal of 'uniformity of result'.[98] This is simply because no legislature can hope to control the decisions of courts or legislatures in other states. The main goal of this subsection, however, is to highlight a second theme, in Currie's emphasis on the political nature of the trade-offs required for 'true' conflicts, and the limits this entailed for the judicial function. 'The considerations involved in a resolution of truly conflicting interests of different states', he writes, are *not* 'merely "economic and sociological" (which might lead us in these days to contemplate their evaluation by the courts), but political'. This, he says, 'should make us realize at once that the courts should have nothing to do with them'.[99] State interests cannot be 'weighed … in any scales furnished to judges by the science of conflict of laws'.[100] True conflicts, in other words, are *tragic* conflicts. They present 'the stubborn fact' that the interest of one state will have to be 'sacrificed'.[101] There is no way of avoiding 'the pain that must ensue when the policy of one state is made to yield to that of another.[102] And so, any choice between such irreconcilable interests requires the exercise of 'a legislative function of a high-political order', for which 'the resources of the law of conflict of laws' provide no solace.[103]

In what is by far the most widely criticised element of his writings, Currie then famously proposes that in true-conflict cases, an interested forum should

97 Published in Kurland, n 63 above, 8. For a different interpretation of the poem, though omitting reference to these lines, see Riles, n 7 above, 1010.
98 See especially Currie, n 19 above 263; Currie, n 11 above, 246-247. See also Brilmayer, n 3 above, 115.
99 Currie, n 19 above, 265.
100 Brainerd Currie, 'Conflict, Crisis and Confusion in New York' (1963) *Duke Law Journal* 1, 48.
101 Currie, n 11 above, 245.
102 Currie, n 19 above, 268.
103 Currie, n 100 above, 17; Brainerd Currie, 'The Constitution and the the Choice of Law: Governmental Interests and the Judicial Function' (1958) 26 *University of Chicago Law Review* 9, 77, 82.

always apply its own law. But while conflict-of-laws scholars have almost universally condemned this 'counsel of despair',[104] what has not been well-understood is the fact that, in voicing his concerns over the limits of the judicial function, Currie was invoking ideas that were just then gaining prominence in two other fields of jurisprudence and legal writing. First, in the context of free speech adjudication under the First Amendment, the late 1950s and early 1960s witnessed a vehement debate, between Justices on the US Supreme Court and among legal scholars, over the feasibility and appropriateness of the judicial 'balancing' or 'weighing' of competing interests.[105] The great 'balancing war' – so called at the time – consumed constitutional jurisprudence during these years, prompting well-known interventions from Supreme Court Justices Black, Douglas, Harlan, and Frankfurter, alongside those of numerous legal scholars.[106] Currie's insistence that competing public interests cannot be 'weighed' on scales provided by 'the science of conflict of laws' tracks precisely one side of the contributions to this debate. Second, this balancing debate was itself related to a much broader jurisprudential development, already mentioned, which was the rise of process jurisprudence as a widely shared jurisprudential outlook.[107] One of the main themes that leading scholars working in this vein, such as Lon Fuller, Henry Hart, or Albert Sacks, were concerned with, was the question of 'who should do what' in law. This was the question of institutional competence, or as it came to be called at the time, the principle of 'institutional settlement'.[108] These ideas were first being voiced in this vocabulary around 1957 and 1958.[109] In fact, given the almost exactly contemporaneous appearance of some of the key works, some of which were to remain in draft form for many years, it is not surprising that Currie, in his own 1958 articles, does not cite any writing from process-jurisprudence scholars in support of his views.[110] But it is clear that the question '[w]hat kinds of social tasks can properly be assigned to courts and other adjudicative agencies?' was being asked by scholars like Lon Fuller, at precisely the time that Currie set out his – immediately unpopular – position that the task of setting aside the forum's own legitimate interests in favour of those of another state was not one to be performed by courts, but rather 'a job for a legislative committee'.[111] Instead, Currie suggested, when it came to true conflicts, 'diplomatic and political techniques', such as uniform laws and negotiations, 'afford possibilities of rational solution which are not afforded by techniques purely jurisprudential'.[112]

104 Hessel E. Yntema, 'The Objectives of Private International Law' (1957) 35 *Canadian Bar Review* 721, 735.
105 For a general discussion see Bomhoff, n 24 above.
106 *ibid*, ch 4.
107 Duxbury, n 17 above, 207, 241.
108 *ibid*, 255.
109 *ibid*. See also above, under the heading 'Legal Process: Institutional Settlement and Political Realism'.
110 Michael Traynor mentions Herbert Wechsler and others in a footnote in his critique of Currie's work. See Traynor, n 2 above, 853.
111 Fuller and Winston, n 48 above, 354; Currie, n 22 above, 176-177. The title of Currie's article, 'The Constitution and the Choice of Law: Governmental Interest and the Judicial Function' n 103 above, adopts clear legal-process vocabulary, but does not cite any of the key authors.
112 Currie, 'The Constitution and the Choice of Law' *ibid*, 11

Rationality and legitimacy in Currie's choice of law

We are now in a position to assess Currie's writing on conflicts method in terms of its purported rational character. As noted before, Currie frequently used this language himself, as in this extract: 'The only virtue of the method proposed here is that it at least makes the choice of interests on a rational and objective basis: the forum consistently applies its own law in case of conflict, and thus at least advances its domestic policy. This is not an ideal; it is simply the best that is available'.[113]

'Rational' in this context cannot mean anything like 'efficient', from either the perspective of states or litigants, since Currie's approach will, as he admits, entail legislative overlaps and will likely reward one-sided forum-shopping by claimants. Given his persistent critique of 'mechanistic reasoning', 'automation', and choice-of-law rules in their traditional form, it can also not mean something along the lines of 'on the basis of predictable rules that can easily be worked out in advance'. On the contrary, following Currie's approach makes identifying the applicable rule in each case rather more difficult, and requires considerably more information, including on foreign laws and their policy background. And thirdly, a 'rational' approach, in Currie's view, certainly cannot mean an approach that offers the means to resolve all possible problems or promises to avoid *aporias*, as he explicitly acknowledges the basic unresolvability, at least by juridical means, of true conflicts.

What rationality *does* require, for Currie, consists of a synthesis of ideas central to the social and behavioural sciences at that time, and from the process tradition in jurisprudence. A 'rational' approach, firstly, is one that allows for the effective and coherent pursuit of legitimate state interests. This, in contrast to the classical system that, he says, solves problems 'in a quite irrational way – for example, by defeating the interest of one state without advancing the interest of another'.[114] It is irrational for states, in this sense, to give up something they need not give up. Legal doctrines that do not allow for the accurate and consistent determination of those cases where state interests *can* in fact be effectuated, and those where they *cannot*, operate randomly, and therefore are also irrational in this first sense.[115] But a rational approach is also one that operates with a rational allocation of competences, following the principle of institutional settlement. In this second sense, it would be irrational for courts to try to do things that courts cannot do. And, still in a legal-process vein, 'rational' decisions, for Currie, are also decisions that expressly state reasons that address the real issues at stake, and that do not hide their reasoning behind 'metaphysics'.[116] These last two facets of rationality can be joined to those regarding the effective pursuit of state interests, just listed, to show that explicit recognition of the unavoidable 'sacrifice' involved in cases of true conflict, also has to be part of what Currie understands by 'rationality' in choice of law. A rational

113 Currie, n 11 above, 245.
114 Currie, n 22 above, 174. This passage is also cited in Riles, n 7 above, 1011.
115 See also for example Currie, n 19 above, 267 (criticising 'the present metaphysical system, whereby state policies are frustrated irrationally and at random').
116 Currie, n 11 above, 209.

choice-of-law method, in other words, has to be cognisant of its own limits. In these various senses, Currie's demand for rational choice-of-law reasoning becomes intimately linked with the notion of legitimacy. It is important, finally, to note not just the content of, but also the relevant standpoint from which, Currie formulates his standards. This is neither the perspective of private litigants, nor that of some form of overarching community, but rather of the state in which litigation happens to occur – typically as one of two 'interested' states in the matter, or sometimes, with additional complications, as a 'disinterested third state'.[117] This domestic perspective explains the addition of the ideal of objectivity to that of rationality, as in the extract quoted above. 'Objective' here seems to signify 'on the basis of a course of action equally available, in principle, to all other states involved', the next time a similar case arises but litigation happens to take place in their courts. What disappears, then, in Currie's approach, is, to a large extent, the ideal that was central not only to classical conflict-of-laws thinking, but also in the writings of his contemporaries: the goal of uniformity of results. Also going by labels such as 'security of transactions', or 'protection of vested rights', the pursuit of uniformity of outcomes, no matter where an issue might be litigated, could also easily be cast in terms of rationality, in the sense of efficiency and predictability for business, or, as the 1971 Restatement would put it, 'the needs of the interstate and international system'. These ideas, in turn, were central to an understanding of rationality as *optimisation* which, in various ways, informed the work of Currie's contemporaries, as the next section will aim to show.

RESOLVING CONFLICTS: OPTIMISATION AND LEGITIMACY IN MID-CENTURY CHOICE OF LAW

If Currie's work was mostly aimed at making conflicts visible, his colleagues within the discipline were, as they are still today, largely devoted to solving them. As William Baxter voiced the animating idea that could have served as motto for this cohort of scholars: 'normative resolution of real conflicts cases *is* possible'.[118] This section analyses the technical-doctrinal apparatus devised for making this so, pointing to three main differences as compared to Currie's writing. First, if these scholars broadly shared the prevalent utilitarian outlook also evident in Currie's work, they differed in their view of the appropriate vantage point from which utility maximisation, or optimisation, was to be judged. Whereas Currie took the political-realist perspective of individual states as his point of departure, these writers typically included a view from some overarching interstate, international, or transnational 'system' or 'community'. Many also included the interests of private litigants, which typically pushed conflicts analysis in the same internationalising direction. Second, even if these writers often shared the basic concern with legitimacy familiar from the legal-process tradition, they differed from Currie in their view of where the principal threat

117 See Currie, n 100 above.

118 William F. Baxter, 'Choice of Law and the Federal System' (1963) 16 *Stanford Law Review* 1, 9 (emphasis added).

to legitimacy came from. In the approaches analysed below, the key concern was a fear of a 'parochial' imposition of local values on outsiders, rather than any worry about judicial overreach vis-à-vis the forum's own legislator. And third, finally, the scholars to be discussed below were, quite simply, much more optimistic about the capacity of judges and of legal technique to achieve rational and legitimate resolutions to conflict than Currie had been.

'True optimisation'

American conflict-of-laws writing of the 1950s and 1960s was often marked by a distinctive stylistic feature: the proliferation of lists, of the many different factors, interests, variables, principles, etc, that courts were meant to take into account in deciding disputes over the choice of law.[119] Like with Roscoe Pound's sociological jurisprudence some decades earlier, considerably more effort was spent on the elaboration and organisation of these lists themselves, than on any juridical techniques for applying and calibrating the factors they contained. Instead, typical contributions worked with an implicit aim, and an unstated assumption. The aim was for courts to, in some way, *optimise* all relevant interests in play. And the assumption was that, as against Currie's warnings, such optimisation was clearly within the competences and legitimate sphere of business of courts.

The starting point for many of these studies was a nine-factor list compiled by Elliot E. Cheatham and Willis L. M. Reese for their 1952 article 'Choice of the Applicable Law'.[120] Cheatham and Reese thought of the conflict of laws as still in such an early stage of development that mere 'discovery of the relevant policy considerations' was still 'a difficult job' that had to be undertaken before the field could achieve some sort of 'maturity'.[121] Their list of policies was constructed 'in what is conceived to be the order of their relative importance – subject to the constant warning that in large part this latter question depends on the facts of the particular case'.[122] The policies included those of 'the needs of the interstate and international systems' (1); 'certainty, predictability, uniformity of result' (5); 'protection of justified expectations' (6); 'ease in determination of applicable law, convenience of the court' (7); and 'justice in the individual case'. This list was to become especially important due to its influence on the drafting of the Restatement (Second) of Conflict of Laws, for which Reese was the principal author. Another influential attempt during this period was Hessel E. Yntema's distillation of a wide range of factors into two central ones of 'security' and 'comparative justice'. Security, in his account, essentially meant uniformity

119 Riles, n 7 above, 1011, sees the list-format also in Currie's work. Currie's 'list', however, is a step-by-step guide to conflicts cases, almost in the mode of an algorithm (albeit an algorithm that would insist on its own limitations). The lists referred to here, however, are precisely not step-by-step programmes but rather compilations of factors to be brought into some kind of harmony.

120 Elliott E. Cheatham and Willis M. Reese, 'Choice of the Applicable Law' (1952) 52 *Columbia Law Review* 959.

121 *ibid*, 960.

122 *ibid*, 962.

of outcomes and effective validation of transactions, while 'comparative justice' referred to a complex notion built upon the 'comparative study of general legal experience' across multiple jurisdictions.[123]

The aim of this section is not to rehearse the contents or relative merits of these lists. What matters here, rather, are the assumptions as to the judicial role and the character of multi-jurisdictional legal ordering that lie behind them and that they help to operationalise. It is, in other words, the popularity of these lists and their purported common-sense-like appeal, rather than their contents, that matter for our purposes. Particularly striking from this perspective is the way these different approaches share the premise that the various interests, policies, and values they articulate *can* be brought into some kind of optimal mix, in the circumstances of a particular case, and by way of legal reasoning. What these list-based approaches demand – and what they promise to work towards – is a distinct kind of rationality-ideal in choice-of-law reasoning. According to this ideal, a rational solution to a choice-of-law problem does justice to 'all interests so far as possible with the least sacrifice of the totality of interests or the scheme of interests as a whole'.[124] These interests, significantly, include those both of private litigants and of state actors, and those of both the forum state and other states, as well as of the 'interstate and international system'. All these different impulses in choice of law – 'the humanitarian, nationalistic, and international', in Yntema's words, could and ought to be 'nicely harmonized'.[125]

This particular brand of choice-of-law rationality did not have a specific name. The criterion of the law of 'the most significant relationship', as found in sections 145 and 188 of the Restatement (Second), which is to be identified using the factors listed earlier, perhaps comes closest as a general statement. For the purposes of the argument pursued in this article, four of its characteristics were especially significant. First, there is the fact that the kind of interest-optimisation sought by conflicts scholars showed clear parallels with the search for 'true optimisation' characteristic not just for behavioural- and social-science work in the mode of 'Cold War rationality', but also for the 'legal-process' tradition, both discussed earlier.[126] Second, this aim of optimisation presupposed a basic commensurability of interests, not just as between the private and the public, but also between the domestic and the foreign. Even if 'advancement of the forum's governmental interests' surfaced as an explicit separate criterion in several lists, the interests of other states enter the analysis on what is, in principle at least, an equal plane. Third, in addition to state interests, all these lists include distinctly

123 See also Leflar's list of five 'choice-influencing considerations', developed in the mid-1960s and reprised in a widely used textbook. His list, not intended in any order of priority, included: (a) Predictability of results; (b) Maintenance of interstate and international order; (c) Simplification of the judicial task; (d) Advancement of the forum's governmental interests; and (e) Application of the better rule of law: Robert A. Leflar, *American Conflicts Law* (Indianapolis, IN: The Bobbs-Merrill Company, 3rd ed, 1977) §96.

124 Traynor, n 2 above, 866 (quoting Roscoe Pound). See also Yntema's 'comparative justice' concept, quoted just above; and William Baxter's notion of 'comparative impairment', discussed below.

125 Yntema, n 104 above, 724 (reviewing the work of the French scholar Henri Batiffol).

126 For example, in the built-in limitation of the injunction to optimise 'subject to given conditions'. See for example Erickson and others, n 14 above, 71. On the role of optimisation in the legal-process tradition, see for example Duxbury, n 17 above, 263.

cosmopolitan values – those of the 'needs' of 'the interstate and international systems' or of the 'maintenance of interstate and international order', and of the protection of the expectations of private parties engaging in international commerce. This point is related to the commensuration issue just mentioned, in that the adoption of a vantage point at the level of an encompassing trans-jurisdictional 'system' or 'order', can be expected to aid in making disparate, more local, interests comparable. Fourth, and finally, all these approaches depend on a great deal of faith in the capacities of judges and of legal doctrine as an instrument for arbitrating between clashing local laws, interests, and values. This faith is all the more notable for including a reflexive component, as safeguarding 'ease of application' itself becomes a task for those in charge of developing the law.[127] This, of course, was precisely what Currie was so critical of. 'Professor Reese is currently restating the *Restatement*', he wrote, derisively; 'If he can blend his nine or ten principles into the impervious fabric of that document and come up with a rational and workable system he will have performed a superhuman task'.[128]

Legitimacy: 'super-value judgments' and principle

These extensive demands made of judges and of legal doctrine raised questions of their capacity and their legitimacy to carry out the required trade-offs. To these questions, mainstream conflict-of-laws scholarship of the kind just discussed, offered three basic types of answers. First, the idea that the kind of 'weighing' that Currie objected to for true-conflict cases was no different from what courts routinely did in many ordinary domestic cases – as mentioned, a phenomenon just then receiving considerable jurisprudential attention – and thus well within their sphere of competence.[129] What mattered was that judicial reasoning in conflicts cases, as in all cases, should be openly stated and offer a true reflection of the actual grounds of decision. This was Robert Leflar's point, for example, when he called for 'more realistic reasoning, more openly stated'.[130] A second response held that the exercise of judgement required in true-conflict cases was in fact very different from any sort of 'weighing' exercise (which would have been objectionable), but rather involved a distinctive kind of assessment that courts were in fact competent to make. And a third response argued that the value judgments required in true-conflict cases could indeed

127 See also for example Elliott E. Cheatham, 'Conflict of Laws: Some Developments and Some Questions' (1971) 25 *Arkansas Law Review* 9, 19, on law's 'total task' ('Consider the case in all its fullness. … Do not be too complex in the factors which are considered. Keep the considerations down to a number manageable by lawyers and courts').

128 Currie, n 69 above, 285.

129 See for example Traynor, n 2 above, 853, 876. Traynor refers to the high-profile debate over 'balancing' in US Supreme Court First Amendment decisions, which was just then getting underway, as mentioned above, in the section headed 'Legal Process: Institutional Settlement and Political Realism'. Traynor also invokes the argument that a refusal to 'weigh' would lead to 'irrational' outcomes in certain types of cases (*ibid*, 863). See also Leflar, n 123 above, §94.

130 Robert A. Leflar, 'Choice-Influencing Considerations in Conflicts Law' (1966) 41 *New York University Law Review* 267, 326-327. See also Leflar, n 123 above, *Preface*: 'My purpose is to bring judicial choice-of-law processes out in to the open'.

provoke legitimacy concerns, but these could be mitigated by insisting that the reasoning supporting them should be of a special kind.

In developing these answers, the main authors seeking to mitigate or deflect Currie's legitimacy concerns drew on very similar ideas and methodological devices as he had done, again combining legal-process concerns with insights just then being developed in other fields. The two most influential examples of this can be found in the work of William Baxter and David Cavers. It is important to note that in their responses, the target of the legitimacy critique shifted in a significant sense: from Currie's concern about courts sidestepping their own legislatures by giving way to foreign law, to the fear of a parochial imposition, by local courts, of local values on outsiders. With this shift, mainstream conflict-of-laws theory of this period aligned itself with a long tradition in the discipline favouring some form of overarching, internationalist or federalist, system-focused, vantage point from which to judge choice-of-law decisions.[131]

William Baxter, in a widely cited 1963 article, agreed that courts, as 'non-political actors' lacked legitimacy to engage in what he called 'super-value judgments'. These would be the kind of decisions holding, for example, that one legal system embodied a '*juster justice*' than another.[132] However, what was asked of courts in true-conflict cases was something quite different. The normative basis for choice of law, Baxter thought, was the utilitarian principle of 'the maximum attainment of underlying purpose by all governmental entities' involved.[133] In working out what this would mean for specific cases, he invoked a theoretical device closely related to Currie's game-theoretic matrices; that of hypothetical negotiations between state actors seeking to maximise their utility.[134] And because Baxter, unlike certainly Currie's early writings, did not think of governmental interests in an on-or-off way, he was much more optimistic on the scope for mutually beneficial outcomes in conflicts scenarios. 'The question "Will the social objective underlying the X rule be furthered by the application of the rule in cases like the present one?"', he wrote, 'need not necessarily be answered "Yes" or "No"; the answer will often be, "Yes, to some extent."'[135] Once the relevant state actors saw this, Baxter thought, they would realise that there was 'negotiating mileage' to be gained, in exchanging 'less wanted' spheres of legislative control for more wanted ones.[136] This, of course, left open the important question of what the appropriate role for judges should be in trying to approximate such hypothesised optimal negotiating outcomes. And on this key issue, Baxter brought together his hypothetical-negotiations model with legal-process concerns, to make his most distinctive contribution to conflicts theory. In a key footnote, he invoked Lon Fuller's working paper on 'The Forms and Limits of Adjudication', a draft of which had been included in the 1960 Proceedings

131 See for example Yntema, n 104 above, 733: 'Conflicts law is private law, but with international or federal orientation and objectives'. On these longer traditions, see notably Roxana Banu, *Nineteenth Century Perspectives on Private International Law* (Oxford: OUP, 2018); and Alex Mills, *The Confluence of Public and Private International Law* (Cambridge: CUP, 2009).
132 Baxter, n 118 above, 5.
133 *ibid*, 12.
134 *ibid*, 7–12.
135 *ibid*, 9.
136 *ibid*.

of the American Society of International Law, to reflect on the differences and similarities between negotiation and adjudication as complementary or alternative modes of dispute resolution.[137] And because his hypothetical negotiations took place against a background of an overarching common purpose – 'to allocate control over a mass of disparate situations in accordance with a single, objective, commonly held criterion' – they also fell squarely within the realm of adjudication.[138] This common criterion, in turn, was what Baxter called 'the principle of comparative impairment', which demanded subordination of the interests of the state whose general objectives would be least impaired by subordination in cases of the kind presented.[139] Crucially, for Baxter, this kind of relative assessment of the degree to which state policies would be undermined generally if they were made to give way in a particular type of case, was very different from the 'weighing' of the worth or importance of competing state interests. 'Super-value judgments' of the kind rejected by Currie, he concluded, 'are separable from the comparative-impairment principle'.[140]

If Baxter sought to distinguish choice-of-law reasoning from – admittedly problematic – judicial value judgments, David Cavers, a senior conflict-of-laws scholar at Harvard Law School and Currie's sometime correspondent, took the alternative approach, of suggesting ways to improve the *quality* of reasoning in choice-of-law decisions so as to increase their legitimacy. The main avenues for this attempt were the twin legal-process themes of expressly stated reasons and the search for principle. The choice between two laws 'inevitably represents the expression of a preference', Cavers said in his lectures at the Hague Academy of International Law. 'But should not that preference be both *articulate* and *principled*?'[141] As was mentioned earlier, in the second section above, 'Conflict and rationality, in law and the human sciences, around 1958', the search for 'principled' reasoning was an important theme in American jurisprudence of the late 1950s and early 1960s.[142] In his own search for a principled normative foundation for choice-of-law, Cavers became perhaps the first doctrinal legal scholar – not just in conflict of laws but generally – to make use of his Harvard colleague John Rawls's early articles on justice. For Cavers, states, through their courts, were in a position analogous to the individuals in the set-up for Rawls's criterion of justice, in having to commit in advance to principles 'without knowledge of what will be their peculiar condition'.[143] Cavers went on to formulate a series of 'principles of preference' for the resolution of true conflicts on this basis, which he hoped would be developed over time by courts. One, to give an example, would be 'the principle that, in a rational system of

137 *ibid*, 10 fn22. See also *ibid*, 19, for the typical legal-process question: 'Which is the most satisfactory of alternative modes of resolution?'

138 *ibid*. Note that Baxter argues – against prevailing doctrine – for a stronger role for federal courts and federal law in developing conflicts doctrine, including his 'comparative impairment' principle. See for example, *ibid*, 23 and 42.

139 *ibid*, 18.

140 *ibid*, 22.

141 David F. Cavers, 'Contemporary Conflicts Law in American Perspective' (1970) 131 *Collected Courses of the Hague Academy* 74, 145-146.

142 See Peller, n 52 above and the sources cited in the second section of this article.

143 Cavers, n 9 above, 130-131, citing Rawls, n 33 above.

allocating lawmaking responsibilities among states, the state in which harm is done should at least set the minimum rules and standards of conduct for those causing that harm and the minimum level of compensation for its victims'.[144]

As can be seen here: while any state court will normally be able to assess how a principle formulated in this way will work out in the precise case before it, it cannot know whether, in future cases, it will be the state of the place of conduct or rather of the harm, nor the affiliations of the victim and alleged tortfeasor. And it cannot know whether future claims will be brought within its jurisdiction, or in the courts of another state. Following Rawls in this way allows Cavers to argue that, yes, value judgments will be inevitable in conflicts cases (*pace* Baxter); that the appropriate vantage point for such value judgments has to be the local court – any forum, but 'the more interested the better'; and that these value judgments should be made on the basis of a 'principle of preference', 'in the hope, but not on the condition, that it will provide a mutually acceptable scheme of accommodation of the laws of the same general type as involved in the case before it'.[145]

Rationality, legitimacy, and cosmopolitanism

In mainstream conflicts writing after Currie, legitimacy concerns did not disappear; but they were focused elsewhere. Drawing on ideas similar to those visible in Currie's work, from both the legal-process tradition and from the social and behavioural sciences, conflicts scholars like William Baxter and Robert Leflar set out a very different path. Highlighting this difference is important, given the tendency to frame the work of these scholars as continuing and extending Currie's approach. In their work, unlike in Currie's, a synthesis of 'Cold-War rationality' ideas and legal-process concerns, all discussed earlier, in the second section above, came to reinforce each other. This synthesis resulted in an optimising, court-focused, and principled version of conflicts rationality that came with built-in internationalist and cosmopolitan biases. This is true, firstly, for the injunction to optimise all possibly relevant interests in play. Such an ideal presupposes and operationalises a basic level of commensurability between domestic and foreign interests. It favours giving independent value to the 'needs' of some posited international order or system. The further inclusion of private party expectations and interests, such as those of predictability, the security of transactions, and – especially – 'uniformity of outcomes', all combine to further limit local regulatory autonomy. Similar dynamics can be observed with regard to legal-process thinking. The principle of institutional settlement, in particular, asks a court to continuously reflect on its own institutional position, as merely one actor in a larger, overarching system of dispersed authority. Reasoning in terms of general principles, another key legal-process theme, requires reflection on the acceptability of one's own approach to others. In Cavers' case this demanded a Rawls-inspired thought experiment. The very structure of principled

144 David F. Cavers, 'Comment: The Value of Principled Preferences' (1971) 49 *Texas Law Review* 211, 217.

145 Cavers, n 9 above, 132.

reasoning of this kind, however, will again tend to reinforce internationalising impulses. In this way, in the context of multi-jurisdictional conflicts, critiques of 'unprincipled' reasoning merge with accusations of 'parochialism' or of the 'autarchic assertions of national policy'.[146] In more general terms: the concerns of legal process acquired a different target in this brand of conflicts writing. The same underlying general anxiety, over 'value imposition' by courts, was no longer primarily associated with the fear of courts sidestepping their own legislatures – as in Currie's work – but rather with the worry that the forum, through its courts, might unjustifiably impose its own values on outsiders.[147]

In mainstream mid-century American conflicts writing, then, the ideals of rationality, legitimacy, and of openness to the transnational, became conflated. Using Currie's own vocabulary against him: it was *irrational* for courts to 'abdicate' responsibility in choice-of-law cases.[148] It was also irrational for them to insist, 'parochially', on the interests or values of the forum. That could only lead to 'chaos', and would harm the certainty, predictability, and uniformity of outcomes that – rationally operating – business craved.[149] Instead, courts could deal with conflict, rationally and legitimately, by way of sophisticated legal doctrine: by optimising all possibly affected interests, and doing so in a way that was both principled and pragmatic; sensitive to the particular case and considerate of predictability, all while maintaining an eye on the user-friendliness of the doctrinal apparatus. The theoretical and doctrinal approaches suggested for the resolution of conflicts problems along these lines were, simultaneously, both strikingly modest and ambitious. Modest, in that fear of any unwarranted extension of local values or imposition of local interests, became a predominant concern, and ambitious in their confidence in the capacities of judges and legal technique to mediate between conflicting interests, and to achieve truly 'optimising' outcomes in concrete cases. These two outlooks, it turns out, are essentially two sides of the same coin. Both depend on – and work to make real – an underlying assumption of commensurability, through law, between the local and the foreign, the public and the private. In commenting acerbically on his colleagues' faith in juridical machinery and their badly concealed desire for litigation 'to proceed almost exactly as if there were one super-government', Brainerd Currie saw this, and took another path.[150]

CONCLUSION: FAITH IN TECHNIQUE

In the late 1950s and the 1960s, conflict-of-laws scholars in the US proposed two different visions of what a more rational approach to choice of law should look like. This article has offered a reading of these contrasting proposals in

146 For example Yntema, n 104 above, 733.
147 Peller, n 52 above, 563.
148 Traynor, n 2 above, 863.
149 Yntema, n 104 above, 736.
150 Currie, n 100 above, 20. For a contemporaneous account of conflict-of-laws 'internationalism' in England, see Otto Kahn-Freund, *The Growth of Internationalism in English Private International Law* (Oxford: OUP, 1960).

light of searches for rationality occurring in other fields at precisely this same time. Across the social and behavioural sciences, and in legal and political theory, scholars were using new tools to formulate and answer new questions of how conflict could be mapped, decision-making powers allocated, and competing interests identified and optimised. All these ideas can be observed in contemporaneous debates over choice of law. But, this article has argued, they were taken in two very different directions, with lasting relevance for the development of the discipline. In the vocabulary of the mid-century human sciences, Brainerd Currie made conflict visible in a new way, using a matrix diagram to capture the 'total situation' of all possible constellations of facts and interests. His colleagues on the other hand latched onto the idea of 'true optimisation' to develop synthesising notions – of 'comparative impairment', the 'most significant relationship', or 'comparative justice' – that could aid in resolving conflicts, by doing optimal justice to all interests in play. In legal-process terms, Currie was concerned about courts overstepping their limits vis-à-vis their own political branches. His colleagues' worries about legitimacy, on the other hand, targeted parochialism and the danger of local courts and domestic law imposing burdens on outsiders.

These debates over conflicts methods, the article has argued, can be read as manifestations of an underlying clash over faith in legal technique – over the tasks that doctrinal tools and 'techniques purely jurisprudential' can rationally and legitimately be entrusted with. As against Currie's insistence on the limitations of technique in the face of tragic choices, mainstream mid-century conflicts scholars showed their commitment to finetuning the doctrinal apparatus of choice of law. In their hands, choice-of-law technique could be counted on to optimise – to 'nicely harmonise', as Yntema put it – all sorts of competing approaches and conflicting interests. This latter vision for choice of law lies at the origins of a dominant post-war style of conflicts thinking, not just in the US but also elsewhere.[151] This article has been concerned with elucidating some of its key features and underlying assumptions, by way of a comparative contrast with the dissenting work of Brainerd Currie. Mainstream post-war choice-of-law thinking, on this account, can be characterised in terms of *optimism* and *optimisation*. It is the technical operationalisation of a basic faith in the capacities of legal technique to resolve conflicts by giving the greatest possible space to all relevant interests. This article has tried to throw new light on some of the origins, structural characteristics, initial appeal, and implications of this faith, in what Annelise Riles has called a form of 'pragmatic managerialism in the performative guise of legal formalism', which remains at the heart of choice of law today.[152] Two observations may be offered about this faith by way of conclusion.

First, there is the way choice-of-law doctrines can be seen as time-capsules of a distinctive late-1950s, early-1960s cultural and political outlook. What has

151 For just one example of this optimising drive in European private international law, see for example Paul Lagarde, 'Le Principe de Proximité dans le Droit International Privé Contemporain' (1986) 196 *Collected Courses of the Hague Academy of International Law* 9.

152 Riles, n 7 above, 1026. This article has sought to distinguish Currie from this pragmatic, problem-solving mainstream, rather than seeing him as 'emblematic' of this tendency, as Riles does.

been called here the 'optimising' approach to conflicts clearly does also have roots that go further back, notably to the writings of Friedrich Carl von Savigny. But its modern appeal also needs to be understood in light of a distinctive, mid-twentieth-century consensus orientation, and of the 'rationalistic versions of liberalism that characterised the postwar United States' more generally.[153] A pervasive assumption among intellectuals of this period – not just in the US, but also in much of Western Europe – was that a widespread consensus on fundamentals did *in fact* exist within society, and that this consensus could be counted on to contain and stabilise underpinning surface manifestations of diversity and pluralism.[154] The conflation of description and prescription commonly at work here may help explain, for example, the plausibility of ascribing worthy and uncontroversial 'needs' to an international 'system' or to a 'highly integrated world economy' in choice-of-law doctrine.[155] These same assumptions also coloured understandings of conflicts as typically concerned only with 'a set of alternatives that have already been winnowed down to those within a broad area of basic agreement'.[156] And they reinforced the appeal of 'the middle' as a preferred outcome to any conflict situation.[157] Within the field of choice of law, this broader intellectual and political context may again help explain the attraction of some widely-held views; in particular, the idea that legal conflicts should be eminently resolvable, by way of technical means alone, and without any real pain or sacrifice.

This characterisation of mid-century views comes with political implications. Because if legal-process concerns and social-science notions of 'optimisation relative to given constraints' may often have had a status-quo bias in the domestic context, this translated into liberalising, internationalising tendencies in transnational settings.[158] These tendencies were reinforced by a paradoxical feature of the faith in legal technique that lay behind mid-century conflicts thinking. Because while, on the one hand, mainstream writers operated with a view of legal doctrine as a malleable instrument of social engineering that lawyers and judges could use creatively, especially in pluralistic and fast-changing transnational spheres, the *ends* to which this creativity could be deployed were strictly circumscribed. On this point, this article has described how the legitimacy concerns of the legal-process tradition – as one expression of a rationalistic mid-century liberalism – translated, in a multi-jurisdictional context, into a fear of 'value imposition' on outsiders, a preoccupation with legal certainty, and a basic assumption of equivalence between domestic and foreign regulation.

153 Jewett, n 15 above, 568. See also for example Erickson and others, n 14 above; Amadae, n 62 above.

154 Laura Kalman, *The Strange Career of Legal Liberalism* (New Haven, CT: Yale University Press, 1996) 23: 'consensus allegedly made the United States unique'; White, n 57 above, 364 noting 'relatively low levels of social conflict'; Forrester, n 33 above, 39 referring to a 'Postwar ideology of political consensus'.

155 Yntema, n 104 above, 741. On this characteristic of post-war American liberalism, see for example Purcell, n 56 above, 261.

156 Robert A. Dahl, *A Preface to Democratic Theory* (Chicago, IL: University of Chicago Press, 1956) 132-133, quoted in Horwitz, n 49 above, 256-257. See also Kalman, n 154 above, 26.

157 cf Purcell, n 56 above, 253.

158 cf Peller, n 52 above 611.

A second concluding observation relates to the way mid-century rationalisations of choice of law married a methodological optimism to a broader, mid-century modern, politico-economic optimism.[159] This point is again brought out through the contrast with Currie's dissenting views. Faith in legal doctrine as an instrument went hand in hand with confidence in the achievability of optimising outcomes and painless trade-offs, which in turn was allied to a commitment to supporting the growth of the sphere of international commerce by facilitating frictionless trade and cross-border mobility. Doctrinal rationalisation, in this way, *implied* economic liberalisation. And on this last point, it seems fair to say that, at least in the case of mid-century choice of law, efforts to 'tidy up' – to rationalise – legal doctrine coincided with commitments to the construction of smooth, 'tidy', frictionless, inter-state and transnational legal realms.[160] The broader underlying question that this parallel raises, on the relationship between the inward and outward-looking aspects of the rationality of legal forms, is at least as old and grand as the work of Max Weber. But it deserves continued scrutiny, especially when it comes to law's many roles in making new transnational and global legal worlds.

159 On the latter, see David Singh Grewal and Jedediah Purdy, 'Inequality Rediscovered' (2017) 18 *Theoretical Inquiries in Law* 61, 64.

160 cf Karen Knop, 'Elegance in Global Law: Reading Neil Walker, *Intimations of Global Law*' (2017) 8 *Transnational Legal Theory* 330, 331, for critical reflection global law's 'smoothness'.