OBJECT LESSONS: THE MATERIALITY OF DISPUTE RESOLUTION

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I. INTRODUCTION

The legal system works because people act—lawyers write briefs and they write contracts, they counsel clients and negotiate, they track their time and bill for it; in short, they *do stuff*.[1] And they don't act alone; they do stuff *with things* (things such as pen and paper, or computers, or desks and chairs—technologies both advanced and mundane).[2] We do not often talk about these kinds of ordinary, everyday things as active participants in our legal practices; they become invisible to us through their familiarity. But they can become visible once again when their use is no longer automatic and taken for granted—when there is some disruption to how we work with things.

The COVID-19 pandemic has created such a disruption. For all the changes to legal doctrine[3] and to the legal market[4] wrought by the COVID-19 pandemic, the most profound effects may be in the subtle evolution of legal *practices*. The practices of legal work changed in very concrete ways during the pandemic: in-person hearings migrated online;[5] hard-copy

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[1] The difficulties of analyzing law in terms of *what people do* were identified by Karl Llewellyn, the great Legal Realist, eighty years ago, and his warning remains apt: "The legal discipline has … always been focused on the Law, or Rules of Law and the like, and its current vocabulary makes discussion of behavior difficult to carry on without inviting misinterpretation." K. N. Llewellyn, *The Normative, the Legal, and the Law-Jobs: The Problem of Juristic Method*, 49 YALE L. J. 1355, 1357 (1940). This paper parts ways with the Legal Realist tradition by moving beyond the "discussion of behavior" to focus on the constitutive power of things.

[2] As Bruno Latour reminds us, "thing" originally referred to an assembly convened to address conflict. We can make room for "things" in our social analyses to understand what roles they play in disputes and dispute resolution. BRUNO LATOUR, THE POLITICS OF NATURE 250 (2004).

[3] *See, e.g.*, Andrew A. Schwartz, *Contracts and COVID-19*, 73 STAN. L. REV. ONLINE 48 (2020).

[4] *See* Lyle Moran, *Business as (Un)usual: Will the Covid-19 Pandemic Fundamentally Remake the Legal Industry?*, 106 A.B.A. J. 34 (2020); and Mark A. Cohen, *Covid-19 Is Transforming The Legal Industry: Macro and Micro Evidence*, FORBES (Sep. 15, 2020), https://www.forbes.com/sites/markcohen1/2020/09/15/covid-19-is-transforming-the-legal-industry-macro-and-micro-evidence. [https://perma.cc/8TKK-CDX4].

[5] *See, e.g.*, Alicia L. Bannon & Douglas Keith, *Remote Court: Principles for Virtual Proceedings During the Covid-19 Pandemic and Beyond*, 115 NW. U. L. REV. 1875 (2021).

documents became less accessible;[6] practices of collaboration and management in legal organizations had to be radically reconfigured;[7] and new technologies became routine parts of everyday legal work.[8] These changes occurred in multiple sites, including courthouses, offices, and law schools.9F

These changes clearly matter in some way: remote hearings, for example, affect how participants engage with the process.1[9] But it is less obvious that these changes to legal practice should affect our understanding of the law *as such*. This Article uses methods from Science & Technology Studies (STS) to examine dispute resolution practices, using Online Dispute Resolution (ODR) processes as a lens with which to see mediation in a new way. By analyzing traditional mediation in terms of high-tech dispute resolution concepts, I aim to denaturalize face-to-face mediation: as traditional practices are refracted through technological transformations, familiar processes are rendered unfamiliar and amenable to new forms of study.[10]

Studies of mediation have failed to pay adequate attention to its material circumstances—to appreciate the power of the objects that populate mediation rooms and their physical settings. ODR gives us the vocabulary with which to identify how these neglected material elements of mediation

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[6] *See, e.g.*, Margo H. K. Tank et al., *Coronavirus: Federal and State Governments Work Quickly to Enable Remote Online Notarization to meet Global Crisis*, DLA PIPER (Jun 29, 2021), https://www.dlapiper.com/en/us/insights/publications/2020/03/coronavirus-federal-and-state-governments-work-quickly-to-enable-remote-online-notarization/. [https://perma.cc/4GJ3-U5Q2].

[7] *See, e.g.*, Danielle Braff, *Remote Possibilities: Thanks to the COVID-19 Pandemic, Law Firms are Starting to Embrace Virtual Offices—but will it Last?*, 107 A.B.A. J. 20 (2021).

[8] *See, e.g.*, Christopher A. Suarez, *Disruptive Legal Technology, COVID-19, and Resilience in the Profession*, 72 SOUTH CAROLINA L. REV. 393 (2020).

[9] *See, e.g.*, Bannon & Keith, *supra* note 5; Susan A. Bandes & Neal Feigenson, *Virtual Trials: Necessity, Invention, and the Evolution of the Courtroom*, 68 BUFF. L. REV. 1275 (2020). Even the Supreme Court has held oral arguments remotely by telephone, which has led to a change in practice around questioning—and which has led to the robust participation of Justice Thomas after years of famously remaining silent during oral argument. *See* Debra Cassens Weiss, *Justice Thomas turns talkative in telephone arguments after years of mostly silence*, ABA JOURNAL (May 6, 2021), https://www.abajournal.com/news/article/justice-thomas-turns-talkative-in-new-online-arguments-after-years-of-mostly-silence. [https://perma.cc/A3AX-6UFJ].

[10] The approach taken in this Article is to take novel technologies, which, by virtue of their unfamiliarity, are present-at-hand, and then learn to see the familiar tools of legal practice that are ready-at-hand.

matter. And then we can reflect these lessons back onto ODR to understand how space and time—important elements in in-person mediations—still matter for online forms of dispute resolution; online processes don't eliminate the problems of making space and time for dispute resolution, they *multiply* them. This is not a study of ODR, nor is it a study of how dispute resolution has changed due to COVID-19. This is an effort in redescription that generates a model of dispute resolution that puts *things* at the center—whether a high-tech platform with AI capabilities or a simple conference room with tables and chairs.[11]

This analysis also poses the question of what work is performed by distinguishing between "traditional" and "technological" forms of legal practice. What is at stake in defining the boundaries of ODR to include or exclude virtual mediations, or in defining ODR in relation to ADR?[12] We can think more capaciously about the role of technology in the law, going beyond the binary celebration or denunciation of technology to see *all* legal and dispute resolution practices as always already technological by virtue of their embeddedness in the world. The method used here can illuminate areas of legal doctrine in which material practices are in flux, such as those associated with technological changes in commerce. It suggests that the materiality of legal work has *always* constituted the law, in ways that cannot be captured by looking to blackletter doctrine or theoretical principles or abstract social forces, or even the concrete practices of human actors.

A. *The role of objects in legal work*

This Article is concerned with understanding law through its practices, what people *do* when they are engaged in "the practice of law."[13] But limiting the analysis to what *people* do may be too narrow; to understand the practices through which we engage with the law, we must also bring the *technologies, objects, and other non-human elements* with which we interact

[11] The model is located at *infra* fig. 6.

[12] *See, e.g.*, Carrie Menkel-Meadow, *Is ODR ADR?*, 3 IJODR 4 (2016); Colin Rule, *Is ODR ADR? A Response to Carrie Menkel-Meadow*, 3 IJODR 8 (2016).

[13] This form of analysis goes beyond traditional sociolegal studies insofar as it "invites a conceptual (and speculative) rethinking of the nature of law as a field of practice (and its modes of action), which suggests that the boundaries of law should remain under close scrutiny, rather than be assumed as fixed, or even recognizable through pre-defined criteria. This thinking of law as practice is articulated through a reading of material connections, that opens up both the sites in which legal relations are played out, and the modalities through which they are enacted." Emilie Cloatre, *Law and ANT (and Its Kin): Possibilities, Challenges, and Ways Forward*, 45 J. L. & SOC'Y 646, 659 (2018).

into the analysis.[14] Working with objects in spaces—such as generating files with pen and paper at a desk, or organizing files within a cabinet or a computer database, or displaying files in a hearing or a mediation—is what I refer to as the material practice of the law. The material dimensions of legal practice are, in a word, *material* to understanding contemporary law.

This materiality takes many different forms: from the architecture and symbolism of courthouses and courtrooms[15] to the myriad ways in which the various actors in the legal system engage with documents, physical evidence, and other people in the course of doing legal work.[16] Things express meaning: certain values are manifested in the neoclassicism of so many courthouses, in the iconography of the scales of justice, in the placement of national and state flags, in judicial robes.[17] And things exert force: the ubiquity of guns in

[14] "Instead of relying on the humanist assumptions that inspired much ethnographic Law and Society work," in this analysis "human, physical, and discursive elements are all mapped out as part of the network of knowledge production." Ron Levi & Mariana Valverde, *Studying Law by Association: Bruno Latour Goes to the Conseil d'État*, 33 L. & SOC. INQUIRY 805, 809 (2008).

[15] *See* Norman W. Spaulding, *The Enclosure of Justice: Courthouse Architecture, Due Process, and the Dead Metaphor of Trial*, 24 YALE J. OF L & HUMAN. 311 (2012) and Judith Resnik & Dennis E. Curtis, *Representing Justice: From Renaissance Iconography to Twenty-First-Century Courthouses*, 151 PROC. AM. PHIL. SOC'Y 139 (2007). *See also* Toby S. Goldbach, *Building the Aboriginal Conference Settlement Suite: Hope and Realism in Law as a Tool for Social Change*, 46 L. & SOC. INQUIRY 116, 135–43 (2021).

[16] *See generally* BRUNO LATOUR, THE MAKING OF LAW: AN ETHNOGRAPHY OF THE CONSEIL D'ÉTAT (2010) [hereinafter LATOUR, MAKING]. And the significance of things for the law extends to the lowly question of document disposal; see Marianne Constable, *The Paper Shredder: Trails of Law*, 23 LAW TEXT CULTURE 276 (2019).

[17] The symbolism of justice continues to be a matter of contestation; see, e.g., Neda Ulaby & Elizabeth Blair, *Keep It Classical, Says Trump Order On Federal Architecture*, NPR (Dec. 21, 2020), https://www.npr.org/2020/12/21/948926995/keep-it-classical-says-trump-order-on-federal-architecture. [https://perma.cc/VB4A-ZHHY]; *See also* Peter Gabel & Paul Harris, *Building Power and Breaking Images: Critical Legal Theory and the Practice of Law*, 11 N.Y.U. REV. L. & SOC. CHANGE 369, 399 (1982) and Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359, 1383–89 (1985).