Judges as Architects

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In Representing Justice, Judith Resnik and Dennis Curtis call our attention to something hiding in plain sight: the iconography of justice. Their book, now out in the light of day after many years in the making, is a tour de force. It is monumental—literally about monuments to justice. It is also monumental in its scope and ambition, as well as in its sheer size, weight, number of images, and pages of footnotes. This is not a book for the faint of heart, those with lazy minds or, for that matter, those with weak backs.

Resnik and Curtis teach us to see how aspirations for justice are represented literally in the built environment of law. Resnik and Curtis give us permission to linger in the halls of justice, to pay attention to the statues and canvases that grace public buildings devoted to law, to notice the way in which law is a field of aesthetics in addition to being a field of pain and death (as Robert Cover famously reminded us). The art and architecture of law are not merely illustrations, placeholders, or simple representations; they are communicative acts designed to bring viewers into a closer connection with justice. Understanding this public aesthetics of law requires us to engage in “statue-tory” interpretation.

In this Essay, I want to honor what Resnik and Curtis have done, not by retracing their steps, adding more images to their catalogue, providing a sympathetic reading or even a tough critique. Instead, I would like to extend their analysis, inspired by their extraordinary efforts to map the representation of justice. In particular, I want to consider the architecture of justice in both more general and more specific senses than one finds in Resnik’s and Curtis’s book.

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My work will be more general than the Resnik/Curtis treatment because I will discuss twentieth and twenty-first century disputes within the field of architectural theory to explore how architecture understands itself as a field of practice beyond the specific case of the construction of courthouses. Modernist, postmodernist, and post-postmodernist architectural theory have dominated the twentieth and twenty-first centuries and all have been centrally concerned with the relationship between the site-specific character of construction and the non-site-specific universal values that buildings embed, between the intentionality of deliberately constructed space and the life that goes on spontaneously within this built environment, between the imperatives of engineering (making buildings stand up) and the aesthetics of construction (creating beauty, vision, disturbance). Architectural debates illuminate the general relationship between deliberate design and human improvement, a preoccupation also central to law. As with architecture, law also grapples with the tensions between the specific and the universal, the authoritarian and the spontaneous, the sobering effects of the possible and their relationship to the demands of the ideal.

In connecting architecture and law, my treatment here will also be more specific than the Resnik and Curtis discussion because I will take debates over the proper design of buildings to model a structure of thinking that help us very concretely to understand judging in law. Both architecture and law are fields of professional knowledge that come under similar real-world pressures and, as a result, share family resemblances in the ways that they are organized. The opportunities to practice both architecture and law are triggered by the needs of clients, and yet both architecture and law are also theoretical disciplines that live as public constructions in the world, constructions that must be understood and lived in by multiple audiences. The results of architecture and law are evaluated both by those who have an eye on the development of theoretical knowledge as well as by those who have to live in—or be disciplined by—the structures that result. Both architecture and law are therefore under similar crosspressures because practitioners attempt to use state-of-the-art theoretical knowledge to produce a specific construction that must be responsive to real-world demands.

In considering an intellectual space jointly inhabited by architecture and law, I am adding to a small but determined set of those who have attempted to see the tasks of judgment in the two professions together. William Blackstone was trained as an architect, and his thoughts about proper methods of design and construction had a large influence on his
important Commentaries. More recently, an architect, Peter Collins, went to Yale Law School for inspiration that went the other way around—from legal ideas of precedent and procedure back to similar architectural constructions. The literature on courthouse design, summarized and wonderfully elaborated by Linda Mulcahy, brings law and architecture together by examining the way in which the architecture of courthouses reflects the value of law. The Resnik and Curtis book takes the field and turbocharges it by relating artistic representations of justice to the actual practices of law. In their treatment, representation, architecture, and the details of legal practice intersect, and they show how they all work together to create the lived world of the law.

In this Essay, I take them up on their challenge to linger at this intersection and use their insights to help in forming a new perspective on law and justice. As Resnik and Curtis show, architecture can represent both law’s noblest ideals and sometimes its bloodiest practices. They allow us to see how law and architecture are twinned disciplines in which architecture has provided not only a site for the operation of law but also insight into law’s practices. Hard as it is to imagine any link between law and architecture that the Resnik and Curtis book does not already elaborate, there is one area where one might add to their encyclopedic treatment.

In discourse about law, the metaphor of architecture is everywhere to be found. In particular, judges are often described as architects because they

4. PETER COLLINS, ARCHITECTURAL JUDGEMENT (1971).
6. Although the whole book illuminates this intersection, Resnik and Curtis particularly call attention to the principles of balanced hearings, the independence and impartiality of judges and the public nature of judicial proceedings. RESNIK & CURTIS, supra note 1, at 289-94.
7. For an image of a discredited judge being flayed alive, see id. at 41.
8. For example, the model legal event is still the trial and courtrooms are designed to provide for public, accessible, and fair proceedings. But the number of trials has been declining precipitously because cases are settled in other venues, while new courtrooms are being built apace. The intersection of these two trends results in the typical courtroom being used less than half of all available workdays. Id. at 310-11.
9. See OLIVER WENDELL HOLMES, JR., THE PATH OF THE LAW, in COLLECTED LEGAL PAPERS 167, 200 (1920) (“Theory is the most important part of the dogma of the law, as the architect is the most important man who takes part in the building of a house.”). A biography of legal realist Felix Cohen was titled Architect of Justice. DALIA TSUK MITCHELL, ARCHITECT OF JUSTICE: FELIX S. COHEN AND THE FOUNDING OF AMERICAN LEGAL PLURALISM (2007). The U.S. constitutional “Framers” (itself an interesting metaphor) have often been referred to as “architects” of the American Constitution. See, e.g., SAMUEL J. KONEFSKY, JOHN MARSHALL AND ALEXANDER HAMILTON, ARCHITECTS OF THE AMERICAN CONSTITUTION (1964). My late colleague Walter Murphy used the metaphor in one of his last essays to describe those who write constitutions more generally. Walter F. Murphy, Theories of Constitutional Design: Designing a Constitution: Of Architects and Builders, 87 TEX. L. REV. 1303
build structures that shape people's lives and social practices.\textsuperscript{10} Judges

(2009).


The metaphor can be found in discussions of other legal systems as well, applied to both scholars and judges. See David Beatty, \textit{Essays in Honour of Frank Iacobucci: 1. Celebrating Frank's Career: Dean of Law, 57 U. TORONTO L.J. 145, 147 (2007) ("[T]hirteen and a half years later, when he retired from the bench, the judges were able to speak in a single voice on a variety of issues concerning equality rights, freedom of expression on public property, self-incrimination, and the standards they would use in reviewing the decisions of administrative officials that had divided them in the past. And it is also the case that, in many of these decisions, the architect of the analysis that appealed to everyone's sense of reason was Frank." (citations omitted)); William Ewald, \textit{James Wilson and the Scottish Enlightenment}, 12 U. PA. J. CONST. L. 1053, 1103 (2010) ("Such an architect has Mr. Hume been to the law of Scotland... combining the past state of our legal enactments with the present, and tracing clearly and judiciously the changes which took place, and the causes which led to them." (quoting 1 JOHN GIBSON LOCKHART, MEMOIRS OF THE LIFE OF SIR WALTER SCOTT, BART 58-59 (Edinburgh, Robert Cadell 1837))); Wael B. Hallaq, \textit{Was al-Shaf'i the Master Architect of Islamic Jurisprudence?}, \textit{In LAW AND LEGAL THEORY IN CLASSICAL AND MEDIEVAL ISLAM} 595 (1995); Jan Klabbers, \textit{Off Limits? International Law and the Excessive Use of Force}, 7 THEORETICAL INQUIRIES L. 59, 64 (2006) ("As Jean Pictet, one of the architects of today's international humanitarian law, stated in an admirably brief definition: [T]he law of war proper determines the rights and duties of belligerents in the conduct of operations and limits the choice of the means of doing harm." (internal quotation marks omitted)); Vijayashri Sripati, \textit{Human Rights In India—Fifty Years After Independence}, 26 DENY. J. INT'L L. & POL'y 93, 118 n.195 (1997) ("Justice Bhagwati, former Chief Justice of the Supreme Court of India, was the chief architect of the Social Action Litigation (or the Public Interest Litigation) movement."); Miguel Poiarz Maduro, \textit{How Constitutional Can the
themselves use architectural metaphors to describe what they do. When a petitioner before them raises a set of structural concerns that is larger than the facts of a particular matter, judges will often say that their role requires them to "fix the architecture" as they decide the individual case by dealing first with the structure that brought the complaint about. In short, using the language of architecture to describe aspects of judging is such a commonplace that it sounds simply like a description rather than a metaphor. That means that the metaphor may be disguised, or perhaps even dead, because it has become such a commonplace. The imagined qualities of architecture are simply seen as being now in the law.

Why, then, does aligning architecture with law in language occur so often? And what does it tell us when these two professions, law and architecture, are so often linked in ordinary language?

To answer these questions, we need to go beyond the slippery power of metaphor to a more embedded theory that envisions a deeply symbolic—and homologous—relationship between law and architecture. Architecture is often used as a metaphor for law precisely because the two fields have such similar ways of organizing themselves. They are connected more deeply than a simple metaphor implies because there are broader commonalities in their strategies for producing theoretical knowledge and communicating this theoretical knowledge to broader publics, including clients. To get at these deeper connections, we will find Pierre Bourdieu’s theory of fields helpful, particularly the corresponding concepts of habitus and homology. I will argue that law and architecture are linked by common dilemmas and some family-resemblance methods of solving them because both express the logic of fields in the Bourdieuvian sense. As a result, the internal culture (habitus) and the common adaptations to the broader social environment (homology) are likely to have grown up.

European Union Be? The Tension Between Intergovernmentalism and Constitutionalism in the European Union 8 (N.Y.U. Jean Monnet Working Grp., Paper No. 5, 2005) ("[T]he case law of the European Court of Justice developed a constitutional architecture for Community law founded on the principles of direct effect and supremacy.").

11. Although I cannot disclose the names of those whom I interviewed confidentially about their practices of judging, I can say that I have talked about this issue of judges as architects with judges from the Supreme Court of Canada, the European Court of Justice, the Supreme Court of the United Kingdom, the Supreme Court of Israel, the Federal Constitutional Court of Germany, the European Court of Human Rights, the Constitutional Court of Hungary, the Constitutional Court of Russia, and several US federal judges below the level of the US Supreme Court.

12. The metaphor is dead in the sense that it no longer calls up a vivid image, having become a commonplace. We no longer see the judge as a literal architect. But as George Lakoff has shown, some metaphors once given up for dead actually have quite a lot of life left in them when they connect up with a whole field of references that are all used as a cluster. In this way, the judge as architect carries over to a whole structure of metaphorical ideas that still are called up together, as when judges are considered designers, builders, those who outline things that others fill in—and so on. George Lakoff, The Death of Dead Metaphor, in 2 METAPHOR & SYMBOLIC ACTIVITY 143 (1987). The "source domain" cluster is still relevant because we can extend the metaphor of architecture through the field of law in multiple ways that make sense together.
around similar ways of framing problems, proposing solutions, and evaluating competencies. Using architectural terms to describe judging helps us to see features of the legal world that might otherwise go unnoticed—and there is a sociological reason why that is true.

I. FROM METAPHOR TO HOMOLOGY: A BOURDIEUIAN FRAMEWORK

For sociologist Pierre Bourdieu, people and ideas are organized within fields, relatively self-contained sets of social positions and social practices animated by a common conceptual framework. Fields are the social spaces within which people carry out their daily lives, environments that feel familiar because they are held together by taken-for-granted common knowledge. People both are shaped by these fields and shape them in turn.

In Bourdieu's theory of practice, every field is associated with a distinctive habitus. The habitus of a social space is the field's own conceptual map, its unremarkable habits and its specific set of dispositions. For Bourdieu, a habitus is not a set of rules that individuals decide (or not) to follow in order to participate in an orderly social world. The habitus is far less conscious and deliberate than that. A habitus emerges when a social environment develops a complex system of practices and habits, categories and concepts, the practical mastery of which by any particular individual signals membership in this field. But a habitus is also relatively invisible to those who live within it because it largely goes without saying. A habitus is lived in the regularities of daily practice, rituals and routines that constitute the familiar sense of belonging in the right place and understanding how that place works. As Bourdieu says, the habitus is "embodied history, internalized as second nature and so forgotten as history."[4]

Bourdieu analyzed a number of specific fields to show how they work. He took up the field of the state and its bureaucracy,[15] the literary field,[16]

13. By "dispositions," Bourdieu means to identify tendencies to act that do not have to be explicitly thought through before the action occurs, the sum total of which constitute a social environs that can feel familiar without being overdetermined in every respect. As he explains,

The word disposition seems particularly suited to express what is covered by the concept of habitus (defined as a system of dispositions). It expresses first the result of an organizing action, with a meaning close to that of words such as structure; it also designates a way of being, a habitual state (especially of the body) and, in particular, a predisposition, tendency, propensity or inclination.

PIERRE BOURDIEU, OUTLINE OF A THEORY OF PRACTICE 214 n.1 (1991) [hereinafter BOURDIEU, OUTLINE OF A THEORY].


the field of science,\textsuperscript{17} the field of sport,\textsuperscript{18} and more. Perhaps of most interest to legal academics, he also took up the juridical field,\textsuperscript{19} which would be one familiar place to start to make Bourdieu's framework more concrete.

The juridical field, according to Bourdieu, is experienced by its inhabitants as "relatively independent of external determinants and pressures."\textsuperscript{20} Like other fields, the juridical field develops its own internal practices, refusing, for example, to recognize outsiders' ideas as relevant to the determination of technical matters even while contestation over the specific solutions is still going on within the field. The very existence of a field, however, presupposes that there are some common markers that signal membership, markers of training and pedigree, as well as markers of insider knowledge.

Within any field, however, there is a struggle to determine just what values and practices the field maintains. Interpretive struggles over the meaning of the law, for example, are sharply delimited by well-understood field-specific rules that constrain what can count as a legal reading of a text.\textsuperscript{21} One of the battles currently taking place in American law, for example, concerns how far the reasoning and results of foreign courts should be used in developing legal arguments within the American context.\textsuperscript{22} Another is over how far the views of the framers should control current arguments.\textsuperscript{23} In the juridical field's sites of conflict, various readings compete for dominance in a hierarchical space in which all readings cannot be considered equally valid in the end.\textsuperscript{24} A field is the social terrain on which these struggles for meaning occur, while outsiders are kept from participating as equals in these arguments. While there may be national or other organized differences in the practice of a field,\textsuperscript{25} a

\begin{itemize}
  \item \textsuperscript{17} Pierre Bourdieu, \textit{The Peculiar History of Scientific Reason}, 6 SOC. FORUM 3 (1991).
  \item \textsuperscript{18} Pierre Bourdieu, \textit{Program for a Sociology of Sport}, 5 SOC. SPORT J. 153 (1988).
  \item \textsuperscript{20} Id. at 816.
  \item \textsuperscript{21} Jack Balkin has memorably described deviant legal interpretations as being "off the wall," and those taken as within the bounds of acceptability are "on the wall." Of course, the wall itself is not stable, as constitutional ideas regularly move from being off the wall to being on it—and vice versa. Jack M. Balkin, \textit{Agreements with Hell and Other Objects of Our Faith}, 65 FORDHAM L. REV. 1703, 1733 (1997).
  \item \textsuperscript{22} By now the literature has become enormous, but the canonical public debate is Antonin Scalia and Stephen Breyer. Transcript of Discussion between U.S. Supreme Court Justices Antonin Scalia and Stephen Breyer at the Washington College of Law, American University, Jan. 13, 2005, available at http://freerepublic.com/focusnews/l1352357/posts.
  \item \textsuperscript{23} James Fleming, \textit{The Balkanization of Originalism}, 67 MD. L. REV. 10 (2007) (denying that everyone is now an originalist and making a plea for a "moral reading" of the Constitution instead).
  \item \textsuperscript{24} Bourdieu, \textit{The Force of Law}, supra note 19, at 818.
  \item \textsuperscript{25} Id. at 822. Bourdieu knew the French legal system better than others and so a number of the qualities he attributes to law in general are actually characteristic more of French law than of other
\end{itemize}
field is characterized by its distinctive pattern of recruitment and education of insiders, by the specific roles it makes available to those who pass through these filters, and by the separation of that field from the rest of the social background.

One can identify that law is a field because non-jurists who enter into the juridical space—clients, adverse parties, those with injuries to compensate or charges to defend—feel that they have entered a social environment that is not primarily within their control. Instead, juridical experts clearly determine what happens in that space, down to the language spoken and what it means. Even though the disputes on which law works come largely from people outside the juridical field, the law "completely redefines ordinary experience and the whole situation at stake in any litigation." And how is this ordinary experience altered through law? Bourdieu claims that the lawyer's approach to the world is "shaped through legal studies and the practice of the legal professionals on the basis of a kind of common familial experience," so that it operates through "the perception and judgment of ordinary conflicts." In short, it is not the legal materials alone that command a particular result, but the immediate recognition by legal professions that a particular dispute should be classified and discussed in a particular way that creates the effect of stability and certainty in law.

While the law is produced through the internal struggles of those who are entitled to inhabit the field, the effects of law extend far beyond. Among other things, law possesses the "power of naming," the power to shape the social world through authoritative imposition of its vision of the social order. Law engages in "worldmaking"—through "marriages, divorces, substitutions, associations, dissolutions," among other things. As Bourdieu says:

It would not be excessive to say that [law] creates the social world, but only if we first remember that it is this world which first creates the law... Symbolic acts of naming achieve their power of creative utterance to the extent, and only to the extent, that they propose principles of vision and division objectively adapted to the

systems. During the time Bourdieu was working on understanding the juridical field, I talked to him about the organization of the common law and in fact published a chapter on common law reasoning in a volume he edited. Kim Lane Scheppele, Law Without Accidents, in SOCIAL THEORY FOR A CHANGING SOCIETY 267 (Pierre Bourdieu & James S. Coleman eds., 1991). Bourdieu was clearly interested in how the common law operated because it was, if anything, even more reliant on internal practices of norm elaboration than the French civil code model.

27. Id. at 833.
28. Id. at 837.
29. Id. at 838.
preexisting divisions of which they are the products.\textsuperscript{30}

In short, Bourdieu sees law simultaneously as the mover and the moved—as the institution that shapes the world through naming it but also as an institution that derives the power to name by relying for its materials on the broader social world it purports to regulate and within which it has to make sense. Law trades in symbolic power.\textsuperscript{31} But it does not do so in isolation from the world that its symbolic power shapes.

Even though any given field is self-contained, there are also deep similarities between the habitus of judges and the field-specific habitus of other members of the intellectual elite who share in the production and reproduction of symbolic power. A similarity in world views across a professional elite comes in part from the fact that those trained in the professions will tend to be members of the dominant class in any society, if not when they started, then at least by the time that they finish their training.\textsuperscript{32} As Bourdieu notes, professionals in general and legally trained professionals in particular tend to see the established order as both good and neutral, which is behind what Bourdieu calls “the nonaggression pact that links the magistracy to dominant power.”\textsuperscript{33} The ability to claim universality gives law its power. It does this by “transmuting regularity (that which is done regularly) into rule (that which must be done).”\textsuperscript{34} Against this background of normativity, practices that are merely different then appear deviant and even pathological. What is outside this normative space? The practices of those who do not share elite understandings of normalcy. As Bourdieu notes: “The tendency to universalize one’s mode of living, broadly experienced and recognized as exemplary, is one of the effects of the ethnocentrism of dominant groups.”\textsuperscript{35}

From this account of the juridical field, one can see how Bourdieu’s idea of the field works to organize the contestation over knowledge that occurs within professional communities more generally and how the solutions that win out in the end come to be normalized in practice and projected as universal. But law is only one professional community among many. In practice, all professional communities do something like this. But architecture does this in a way most similar to law, not surprising given how often architecture is used as a metaphor for judging.

The architect shares with the judge the task of creating major public works that shape the social space in profound ways. The architect and the

\textsuperscript{30} Id. at 839.
\textsuperscript{31} Id. at 840.
\textsuperscript{32} Id. at 842.
\textsuperscript{33} Id. at 843.
\textsuperscript{34} Id. at 846.
\textsuperscript{35} Id. at 847.
judge share an aspiration to achieve justifiable projects in the world—a building that projects its aesthetic judgment about beauty or a judicial opinion that projects its normative judgment about justice. As a result, both judges and architects merge real and ideal in their work; the description of facts in a legal opinion blends seamlessly with the construction of what ought to happen next (at least if a judicial opinion is well-constructed), and the peculiarities of a specific site are taken up into the aesthetics of a building (at least if a structure is well-designed). The architect and the judge are responding first to the felt needs of those specific individuals—clients or litigants—who seek their expertise, but then also both to the values of a broader community that must live with their decisions and to the theoretical currents moving among their professional peers. As a result, the architect and the judge must work out ways of juggling the multiple expectations that different audiences have of them as they create enduring works that advance theoretical knowledge and also solve practical problems. These similarities suggest that the field of architecture can help us to understand the field of law, and more specifically that the architect and the judge may find themselves in sociologically quite similar positions.

Bourdieu never turned his attention to architecture specifically, but from the way he analyzed law, we can work out how he might have seen a parallel profession. Bourdieu’s concept of homology provides the connection. Although Bourdieu’s concept of homology is not fully developed in his work, it is clear from the contexts in which he used the idea that he meant homology to signify family resemblances among different fields in a society, particularly similarities of social practices and similarities of representation. He used the concept of homology first in Outline of a Theory of Practice, where he summarized his ethnographic observations of the rituals and rites of the people of Kabylia. This agricultural community organized a vast array of social practices around the rhythms of the seasons, not surprising when it comes to agriculture but perhaps more surprising when that cyclical pattern of organization appears repeated over and over again in very different aspects of the community’s life—like women’s activities, food preparation, the layout of a day’s schedule, and classifications of objects. Bourdieu describes these relationships among the different fields of social activity as

36. The idea of family resemblances is generally associated with Ludwig Wittgenstein and Bourdieu explicitly took up many of Wittgenstein’s ideas in the course of creating his own approach. Therefore, the use of the term here would have been recognized by Bourdieu as deeply sympathetic to his own ideas. “Wittgenstein is probably the philosopher who has helped me most at moments of difficulty.” PIERRE BOURDIEU, IN OTHER WORDS: ESSAYS TOWARD A REFLEXIVE SOCIETY 9 (Matthew Adamson trans., 1990) [hereinafter BOURDIEU, IN OTHER WORDS].
37. BOURDIEU, OUTLINE OF A THEORY, supra note 13, at 143-58.
homologous because one pattern of social organization repeats itself in different aspects of the social life of the community when those different parts of society are not inhabited by the same people or concentrated around the same tasks. The patterns reflect a common infrastructure of knowledge. For example, as Bourdieu explained for the Kabylia, even though the two fields of agricultural production and household labor involved different specific knowledges, as well as different people and practices, these different fields nonetheless shared the same sense of cyclical rhythm, revealing the broader framework of Kabylian society which spreads homologous ideas across different self-contained fields.

Bourdieu’s idea of homology was developed in the context of his immersion in Erwin Panofsky’s book, *Gothic Architecture and Scholasticism.* In this book, Panofsky identified “habits of the mind” that lurked behind the field of Gothic architecture and philosophical scholasticism. Both were developed around the same time in very nearly the same place, and both valued transparency and clarity, as well as explicitness, symmetry, and totality. For Panofsky, even though a work of scholarship or a work of art was the creative result of an individual producer, nonetheless, it bore the stamp of the time and place. Panofsky used the idea of habitus to describe what enabled the observer to recognize the time and place of creation of any cultural product. Bourdieu translated Panofsky into French, finding this work an inspiration for his own, though Bourdieu himself later said that his idea of habitus was by no means confined to Panofsky’s specific invocation of the term. For Bourdieu, habitus is not just a field of ideas as it was for Panofsky, but also a set of material practices carried out by actual people within a specific field. For Bourdieu, the similarities among the practices across different fields of activity at any given time could be understood through the idea of homology.

Homology identifies the relationship among common frameworks and taken-for-granted assumptions that one sees throughout a society, across different fields, at any given point in time. If the habitus of a specific field


41. Habitus is “an old Aristotelian and Thomist conception that I completely rethought . . . as a way of escaping from the choice between a structuralism without subject and the philosophy of the subject.” BOURDIEU, IN OTHER WORDS, * supra* note 36, at 10. He describes his relationship with Panofsky as “rescu[ing] Panofsky from the Neo-Kantian tradition in which he was still imprisoned.” *Id.* at 12.
is developed over time within the field itself, then homology is what connects each field to others operating in the same time and place. To identify homological influence, one needs to look beyond one field to others to mark their similarities and difference and to understand these patterns as the culture of the time and place. As Bourdieu elaborated in *The Rules of Art*, social practices should be analyzed relationally by looking at individuals not in isolation but in their relation to others, at concepts not in isolation but in their relation to others, and at fields not in isolation but in their relation to others.\(^{42}\) If one looks not at the particular, substantive ideas of a particular field taken in isolation, but instead at the general properties of these ideas (like the relationship between expert and lay knowledge, the construction of the problem of judgment and the location of ethical dilemmas—seen across different fields), then one finds deep similarities across any particular society in how fields are structured. Homologies are the common patterns that locate each field in relationship to the others in its social space.

For Bourdieu, the ability of metaphors from one field of activity to illuminate other fields of activity is a symptom that fields are homologous. The disjunctures of metaphor, places where metaphors fail to work, are also revealing, for they highlight the places where fields fail to overlap. Bourdieu explained that the use of metaphors signals something much deeper than a figure of speech:

> Far from functioning as simple metaphors guided by rhetorical intentions of persuasion, the methodical transfer of general problems and concepts, each time made specific by their very application, relies on the hypothesis that structural and functional homologies exist between all the fields. This is a hypothesis which finds its confirmation in the heuristic effects these transfers produce, and finds its correlative in the difficulties to which they give rise.\(^{43}\)

In thinking about judges as architects, for example, we can say (in English) that they lay foundations, develop blueprints, create spaces within which people act, and design for the future, but not that they supervise construction sites, contribute to sustainable development, or take pride in completely novel design. So metaphor fails in places that are useful for highlighting the differences between two fields. In Bourdieu’s framework, metaphors are data.

With this introduction to Bourdieu’s major theoretical ideas, we can then explore the links between law and architecture as homologous fields existing in a common social space. But to see this, we next need an

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43. *Id.* at 182.
introduction to how architecture works.

II. HOMOLOGIES OF THE ARCHITECTURAL FIELD

Although Bourdieu did not analyze the operation of the field of architecture, we have an excellent account of how architecture works sociologically, seen from interviews and observations by Magali Sarfatti Larson. Larson examined the architectural turn away from modernism to postmodernism in the period between the mid-1960s and the late 1980s. From her account, we can see that the architectural field is organized very like the legal field. Why? They share many common features, as one would expect from Bourdieu’s account of homology across fields. Both architecture and law are professions, sequences of social positions that combine practical work with abstract knowledge that its practitioners organize themselves in competitions to control. And, beyond that, architecture, like law, possesses the same sort of internal struggles over what counts as good work, over how to balance the demands of clients against the internal logics of the field and over how the profession should achieve broader social authority through projecting the resolution of its internal disputes on the external world as both norm and fact.

Larson’s account of the field of architecture shows that it is organized very much like the law in having an internal taken-for-granted set of ideas that constitutes a habitus. In her many interviews with architects, Larson repeatedly encountered the same view of what architecture was:

In Western culture, architects profess to be specialists in transforming the complexity of buildings into beauty. Art critics and architectural historians specialize in telling us what that beauty consists of, but architects lay claim to its creation. Their claim implicitly rests on a syllogism characteristic of this profession: Architecture is an art. Only architects produce architecture. Architects are necessary to produce art.

The association of architecture with art defines the boundaries of the field—and precisely in setting these borders between architecture and neighboring practices, architecture constitutes itself as a field. To be an architect is to insist that one is not a mere engineer or a mere contractor, neither of whom is defined by a relationship to art. This is very like the relationship that lawyers also have with their neighboring fields. Judges are neither social workers who merely resolve disputes nor politicians

46. LARSON, supra note 44, at 144.
who act on behalf of constituencies. Architects, too, are concerned about not being either engineers only concerned with function or contractors for hire. Architecture and law also share the feature that being in the elite of the profession depends on the prestige of the clients with whom the professional works.\(^\text{47}\)

On the aesthetic side, within the field of architecture, as within the field of law, there is a struggle to define what is good work. In fact, as Bourdieu noted, a habitus is forged precisely over these kinds of struggles over excellence. Architects ask: What is a better solution to a design problem? What is the right theory from which to proceed (and is a theory needed at all)? And what is an appropriate definition of the problem at hand? For example, there was a legendary dispute between architect Peter Eisenman who wanted the field of architecture to be more self-consciously theoretical and architect Henry Cobb who thought that theory just got in the way of making excellent buildings.\(^\text{48}\) Disputes among architects over the nature of theory and its role in the development of architectural practice occur repeatedly, not least when architects are faced with the task of giving awards to outstanding design.\(^\text{49}\) That is why a field-defining preoccupation with big, ambitious, public projects led in the 1980s to the denigration of mere houses as examples of possible “best” work, though houses had their defenders.\(^\text{50}\) Earlier, a reaction against

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47. In architecture, being at the top of the field meant designing large singular projects, which only certain sorts of clients could afford. \textit{Id.} at 100. For lawyers, prestige generally meant working with corporate clients. See \textit{JOHN P. HEINZ \& EDWARD O. LAUMANN, CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR} 84-134 (1982). While I have not seen a study demonstrating this, I suspect that federal judges would be seen as more prestigious than state judges because many of the higher-prestige areas of legal practice are in federal topics like bankruptcy and securities law, as shown by Heinz and Laumann. Larson noted the similarities between the law and architecture, which extends beyond the observation that corporate money sustains the elite practice in both fields to the more nuanced picture that different sorts of moneyed clients want different sorts of things: “In architecture, as in law, sophisticated corporate clients tend to push the firms that provide them with professional services toward the organizational form that they, as clients, find most reliable. The market of services thus comes to consist of distinct niches.” \textit{LARSON, supra} note 44, at 117.


49. \textit{Id.} at 182-242. In order to examine how values animate the practice of architecture, Larson examined twenty years of prize competitions run by \textit{Progressive Architecture} magazine to determine how architects determined “winning” contributions to the field, and therefore how they elaborated norms of the field.

50. Larson’s reported dialogues among architects who were judging a competition shows how they struggled to define the terms of their own field:

\begin{itemize}
  \item \textbf{DINKELOO:} We have too many houses \{winning awards in this competition\}. If this is architecture, let’s forget it.
  \item \textbf{HODGETTS:} The houses have content; at least they have ideas.
  \item \textbf{DINKELOO:} The individual house has no place in American culture anymore.
  \item \textbf{HODGETTS:} Rather than ‘no place,’ it has a \textit{rare} place.
  \item \textbf{GWATHMEY:} The house has always been a critical reference point in design. It is a complex building. Architects learn by doing them.
\end{itemize}

\textit{Id.} at 193.
architectural eclecticism led to the insistence on a unified streamlined style: modernism.\footnote{Id. at 219.} By examining how a field provides symbolic rewards for those who win various internal struggles, one can see just how a field constitutes itself. Law does this too, as when we see different sorts of legal arguments winning with judges and within law schools at different historical moments. As Bourdieu reminds us, a field is a defined space of social disagreement, not a single recipe for how all things are done. Although there are winners and losers within a field at any given moment, winners and losers often cycle from one position to another as one set of ideas replaces another over time. In any event, the argument over which styles should win within the profession at any given moment is conducted within the broader constraints of a field that has its own habitus.

Fields generally make the cultural claim that they should be and are autonomous from outside influence. As Larson noted after interviewing a number of high-powered architects, while architecture proclaims its autonomy (just as law does), there is an ongoing negotiation between architects and their clients (just as one sees between lawyers and clients):

In architecture, . . . disciplinary legitimacy is founded on the aesthetics of design, a situation that gives elite designers a privileged position in the field. Elite standing is further aggrandized by the charismatic ideology of art. Yet, outside the delimited discursive field of professional architecture, even the elites' authority is undermined by their inescapable dependence on clients and on other technical experts. The ideological autonomy that our society accords to professionals and, even more so, to artists cannot hide the fundamental heteronomy of architectural work.\footnote{Id. at 12.}

Even though architects are dependent on clients, this does not for a minute stand in the way of the field's own claims of autonomy, just as the dependence of lawyers on clients does not jeopardize the claims to the autonomy of the legal field. One might expect that the claims to autonomy are even stronger for judges who stand outside the lawyer-client relationship and contribute to the development of "the law" as well as for architects who see themselves as contributing more generally to the history of architecture:

Indeed, the persistent claim of architects to a special role in the process of construction (against and, in fact, above the rival claims and encroachments of other specialties) depends on implicit ideological appeals to the telos, the cultural significance, and the noble tradition of architecture. Not merely adequate building, but culturally significant building is the lasting confirmation of the
Both architects and judges also share the attribute that their stock-in-trade is knowledge and their mandate is to fix problems in the world brought to them by those outside the field. All professionals—for this is what defines a job as a profession—work between the elaboration of purely theoretical knowledge and the production of concrete results in the “real world” in the course of solving “real-world” problems. Unlike academics of a more purely disciplinary sort for whom theoretical elaboration can be the primary goal without having to demonstrate concrete accomplishments in the world based on this knowledge, professionals have to solve practical problems at the same time. They cannot just create theoretical frameworks that interpret and explain existing materials, but they have to constantly refine their theoretical frameworks in the context of particular problems whose solutions they are called upon to provide. But unlike pure craft workers who need only to find solutions to particular problems that function in the concrete case, professionals are committed to the elaboration of general and theoretical knowledge, which they both develop in their professional lives and also bring to bear distinctively on the analysis of problems within their purview. It is in this tension between theoretical elaboration and the need to solve a particular client’s problems that professions come to develop homologous relations to each other.

In law, cases arise out of particular problems, where local injuries in particular places require an application of general knowledge to determine causation, responsibility, and blame. Law, therefore, generally traffics between the universal and the specific, just as architecture does. Judges must be sensitive to the specifics of the case, but also partake of the general norms that apply beyond the specific problem at issue. To ignore the details of a particular case would be to avoid the responsibility that judges have to resolve disputes. But judges must also attend to the development of the law as an ongoing coherent project. To ignore the implications of the case for the development of general norms would be just as unprofessional as failing to take the specifics of the individual problem into account in deciding the case. The same is true for architecture:

This ideology [of art that is a constitutive part of what it means to be an architect] assumes that the art of architecture transcends the utilitarian and technical tasks of building. Beauty is what justifies a building’s permanence in time and significance in history. Architects with an exalted conception of their work aspire to do something

53. Id. at 8.
beyond the practical services their clients require. Directly, in their work, and in indirectly, in what they say about it, they make rhetorical choices intended to prove architectural quality to their peers, their clients, themselves and something undefined they call "the public"—in this order. 54

This trafficking between the specific and the general as well as between the theoretical and the applied puts professionals in a tough position. Professionals produce answers to practical problems for audiences that care mostly about whether solutions work, and not whether the solutions advance the theoretical knowledge that professionals develop and apply in reaching these answers. But if the professional solves a practical problem with an ungainly workaround or a one-off fix, her fellow professionals are likely to think of her as untalented at the profession. Professionals, then, are different from ordinary problem-solvers because they are responsible both for the elaboration and use of general knowledge on one hand and the simultaneous solution of concrete problems on the other. As a result, professionals know all too well how theory and practice can come apart because it is a daily struggle to hold the two together.

From this account, we can now see why one might expect architecture and law to develop parallel ideas over time, because they are both enmeshed in a broader culture in which real-world clients come to professionals for solutions to practical problems. Family-resemblance ideas in law and architecture are therefore likely to develop for all of the reasons Bourdieu claims. For example, at any given moment, architecture and law will be elaborated in a society that shares a basic system of economic and political organization that one might expect to see reflected in professional knowledge. The demands of sites and the availability of financial resources will constrain what sorts of clients enter the professional system with which sorts of needs. At any given moment, the ideas from one field might usefully spill over directly into another field because the elites that produce both share a common set of values and a common frame of reference. Neither law nor architecture can ignore the increasing globalization of elite culture, nor can professionals in either area disregard the insistent public demand for "progress." At any given moment, the roles of experts relative to lay people or of theoretical knowledge relative to lay knowledge will be fought out on the same terrain of public opinion, and will result in victories or defeat for professional elites. Architecture and law may therefore come to share a related set of ideas because both are fields within a particular society at a particular time—and both the society and the time will generate common

54. Id. at 144-45.
pressures on all specialized forms of knowledge. Finding conceptual links between law and architecture, then, would not be at all surprising. But we will be particularly likely to find links between these two fields in particular because both law and architecture put their central professional figures—the judge and the architect—at the center of a process that not only marries general knowledge with specific claims but that does so in a context requiring complex and public normative judgment that engages ideals, of justice in the case of judges or beauty in the case of architects. The architect and the judge must address both lay and professional audiences with a single public statement and do so in such a way that both solves concrete problems and contributes to theoretical development in their fields. How architects have thought about these issues of the demands of multiple audiences and the relationship between the specific and the general might therefore be of some use in understanding these parallel issues in law.

To explore these ideas, we will next trace the primary trends in architectural theory over the last century to show how architecture has seen its primary tasks, its relationship to the broader society and its professional development as it has changed and developed over time. To do so, we will take high-profile architects who elaborated modernism, postmodernism and post-postmodernism to illuminate this trajectory of architectural thinking. In the Part that follows, we will take a similar tour through legal theory to show that there have been parallel movements on the theoretical side of law as well.

III. PROFESSIONAL KNOWLEDGES, ARCHITECTURAL UNDERSTANDINGS

A. The Morality of Modernism

Architects have always been active not just as designers of real-world structures but also as theory-builders. In the twentieth century, the dominant architectural form was modernism—utopian in aspiration and yet relentlessly pragmatic in the way that modernist architects designed buildings, furniture and tools for daily life. For the modernists, every human activity should occur within designed structures constructed precisely for the problem at hand. Modernist architects attacked the sorry state of the built environment in the early twentieth century which was characterized, as they saw it, by “deserts of ugliness” and “grey, hollow, spiritless mock-ups in which we live and work.”55 Eager to do away with

the “stylistic chaos of the nineteenth century,” they promised to remove this clutter by substituting the radically clean lines of pure function turned into form.

Architectural modernism was associated with the Bauhaus school in Germany, the elegant forms of Mies van der Rohe and Frank Lloyd Wright, the theoretically animated works of Le Corbusier (born Charles-Édouard Jeanneret-Gris) and others. Those architects joined a general movement of modernism in other fields of creative endeavor that rejected historical legacies of decoration and elaboration by exploring “pure” forms. Across their various projects in art, music, literature, and architecture, modernists promised to “make it new.” Architectural modernism got an additional push in the realization of its novel aspirations from the development of the new materials of concrete and steel that made possible the construction of wholly new forms that simply could not have been built before.

Modernist aspiration was radically utopian, and nowhere more so than in architecture. Walter Gropius and other founders of the Bauhaus School thought architecture could create spaces in which the highest aspiration of mankind could be made real. “What is architecture?” Gropius and his colleagues at Bauhaus asked. “The crystalline expression of man’s noblest sentiments, his ardour, his humanity, his faith, his religion!” Le Corbusier added to the sweeping aspirations of modernist architecture, promising that it could elevate those who inhabited it by providing daily encounters with beauty:

The Architect, by his arrangement of forms, realizes an order which is a pure creation of the spirit; by forms and shapes he affects our senses to an acute degree and provokes plastic emotions; by the relationships which he creates he wakes profound echoes in us, he gives us the measure of an order which we feel to be in accordance with that of our world, he determines the various movements of our heart and understanding; it is then that we experience the sense of beauty.

First, the encounter with beauty required sweeping away the clutter of the prior century. Then it required that beauty insinuate itself into the

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57. The phrase, and manifesto, originates with Ezra Pound's collection of essays by that name, published in 1934. Pound was a modernist and also, unfortunately, a fascist. For more about Pound's political sympathies, see TIM REDMAN, EZRA POUND AND ITALIAN FASCISM (1991). The general affinity between modernism and fascism is explored in ROGER GRIFFIN, MODERNISM AND FASCISM: THE SENSE OF A BEGINNING UNDER MUSSOLINI AND HITLER (2007).
58. Gropius et al., supra note 55, at 46.
most intimate spaces of personal life. Lewis Mumford quoted approvingly one of the founders of the Arts and Crafts movement, William Morris, when Morris argued that the home was to become “the nucleus of the biotechnic age”:

“Believe me,” William Morris wrote, “If you want art to begin at home, as it must, we must clear out houses of troublesome superfluities that are forever in our way; conventional comforts that are not real comforts, and do but make work for servants and doctors; if you want the golden rule that will fit everybody, this is it: have nothing in your house that you do not know to be useful or believe to be beautiful.” This clearing away of historic debris, this stripping to the skin, was the first essential mark of the new architecture....

How did modernism counsel a professional to work? Design should be driven by theory; buildings were to be aspirations realized in concrete and steel. Buildings would then, in turn, shape those who lived in them because the aspirations that went into the design would be felt in the harmony and beauty that resulted. In short, a professional should attempt to shape the world through design. Given the moral qualities of modern architecture, those who were to live in these new buildings would find themselves transformed and uplifted by theory made real. Architects were to design spaces to which people would adapt rather than spaces to which people were already adapted.

Perhaps the leading advocate of the utopian vision for architecture was Le Corbusier. In Towards a New Architecture, an exuberant work that envisioned a limitless potential for architecture to change the world, he announced, “[t]he business of architecture is to establish emotional relationships by means of raw materials.” Architecture, for Le Corbusier was “an admirable thing, the loveliest of all. A product of happy peoples and a thing which in itself produces happy peoples.”

How would architecture achieve this happiness? Through its deployment of beauty. And how could architecture do that?

Architecture is the masterly, correct and magnificent play of masses

60. LEWIS MUMFORD, THE CULTURE OF CITIES 407 (1938).
62. Jürgen Habermas noted that “this modern architecture remains the first and only binding style, the first and only style to have shaped even everyday life, since the days of classicism.” Jürgen Habermas, Modern and Post-Modern Architectures, in ARCHITECTURE THEORY SINCE 1968, at 412, 418-19 (K. Michael Hays ed., 1995).
63. HARRIES, supra note 56, at 6-7.
64. LE CORBUSIER, supra note 59, at 4.
65. Id. at 15.
brought together in light. Our eyes are made to see forms in light; light and shade reveal these forms; cubes, cones, spheres, cylinders or pyramids are the great primary forms which light reveals to advantage; the image of these is distinct and tangible within us and without ambiguity. It is for that reason that these are beautiful forms, the most beautiful forms. Everybody is agreed as to that, the child, the savage and the metaphysician.66

In practical building, this meant designing spaces that would make use of these shapes to create harmonious landscapes.

One of Le Corbusier’s most famous conceptual projects was the “City of Towers,” in which he designed a series of perfectly symmetrical x-shaped towers surrounded by parks. These towers placed people up into the sky in apartments where they would have plenty of clean air and bright light while leaving the grounds around these towers to be filled in with trees and grass, bringing nature back into the city. The movement of traffic could be channeled without interruptions on avenues through these parks, thus making the city function more fluidly, even though the density of people in these spaces was substantially increased over the previous low-rise uses.67 Each element—creating spaces full of light and air in which people could work, bringing greenery back into urban life to make it “verdure clad,” and nonetheless improving the daily functioning of the city’s endless streams of traffic—was designed to build function into form. Creating a City of Towers would require “repudiat[ing] the existing lay-out of our towns” which were full of “foul confusion.”68 Instead, the new design “corresponded to a need, was less costly and more rational than the aberrations of today.”69

Modern architecture, with its new sleek shapes and its ideology of violent unclutteredness, did not seek just a set of solutions to problems, but also the moral elevation of its audiences. Architecture could, to the modernists, model not only the beautiful, but also the good. Le Corbusier, again:

A supreme determinism illuminates for us the creations of nature and gives us the security of something poised and reasonably made, of something infinitely modulated, evolved, varied, and unified.

The primordial physical laws are simple and few in number. The moral laws are simple and few in number.70

66. Id. at 29.
67. His design of the City of Towers dates to the early 1920s. For his illustrations, see id. at 56-57.
68. Id. at 57.
69. Id. at 61.
70. Id. at 74.
To shape the moral landscape, architecture must respond to needs. But architecture did not exist only to satisfy needs:

Architecture has another meaning and other ends to pursue than showing construction and responding to needs (and by ‘needs’ I mean utility, comfort and practical arrangement).

Architecture is the art above all others which achieves a state of platonic grandeur, mathematical order, speculation, the perception of the harmony that lies in emotional relationships. This is the AIM of architecture.71

Fascinated with the airplane, the ocean liner, and other then-new modes of transportation whose design required removing excess and streamlining style, Le Corbusier took clarity of function as revealed in its form to be the marker of good design: “clear statement is essential in a work of art.” 72 Clarity in design reflected the modern age, which both made possible and encouraged mass production. Once houses could be designed simply, without ornament, with the simple functions required for living built into their plans, these houses could be multiplied endlessly to satisfy the needs of the masses, uplifting them at the same time:

A housing scheme . . . lends itself to design on a large scale and to real architectural rhythms. A well-mapped out scheme, constructed on a mass-production basis, can give a feeling of calm, order and neatness, and inevitably imposes discipline on its inhabitants.73

Architecture could cure the ills of society. So could revolution. Le Corbusier posed the question with his characteristic spare form: “Architecture or Revolution. Revolution can be avoided.”74

The practical accomplishments of modernist architecture were driven by a theory that was both aesthetic and moral. This theory led the modernists to design structures that were deliberately constructed to shape the social world into which they were inserted rather than merely reflect it. Theory led; facts on the ground were supposed to follow. Though the modernists were motivated by the desire to fill social needs, the social needs that they filled were ones that they had discerned from first principles rather than ones that they had learned from their clients. Moreover, these needs were perceived to be universal since the requirements for shelter and spaces for work were not confined to particular locales or even particular classes. Modernist architecture promised a universal, univocal moral education.

71. Id. at 110.
72. Id. at 212.
73. Id. at 242-43.
74. Id. at 289.
Architectural modernism stood for purity of form and economy of function. Modernist structures were radically theoretical, using the clean lines of perfect geometrical shapes as interventions in their environs, cutting into those surroundings rather than working with them. The simplicity of the profiles of modernist buildings radiated elegance; their uses of single coherent forms led to an immediate external comprehensibility; their lack of ornamentation signaled pure function. Modernism drove architecture through much of the twentieth century.

B. Critique of Modernism I: Double Coding

From the 1960s onward, modernism's moralism and univocality have come in for criticism. Reworking the relationship between theory and practice was central to the critique. While modernist buildings created an immense excitement among architects and architectural theorists, they were often hated by the publics that had to use them, navigate around them, live in them. This may have been because modernist buildings were often designed as social projects precisely to change the world around them. Modernism was utopian. Publics could feel that their lives within these spaces had to adapt to fit. And they resisted. Just as the 1960s are known for their rejection of rigid social practices and the drive for the personalization of culture, the 1960s in architecture was also accompanied by a rejection of the totalizing aspirations of modernist design and a move toward more contextual and individualized artistic practices.

Critics of modernism typically point to the deliberate destruction of the Pruitt-Igoe public housing project in 1972 as the most prominent marker of modernist collapse. The Pruitt-Igoe project was a set of buildings designed by Minoru Yamasaki, an architect who (ironically enough) later designed the World Trade Center. Pruitt-Igoe had been one of the leading examples of modernism, constructed according to the principles of the Congress of International Modern Architects (CIAM). It won one of CIAM's top prizes in 1951. Pruitt-Igoe was a close variant on Le Corbusier's City of Towers: simple, conceptual, and elegant. It had a moral mission: "Good form was to lead to good conduct; the intelligent planning of abstract space was to promote healthy behavior." But

75. See, e.g., Louis I. Kahn, Order Is, in PROGRAMS AND MANIFESTOES ON 20TH-CENTURY ARCHITECTURE 169 (Ulrich Conrad ed., Michael Bullock trans., 1970); Frederick Kiesler, Magical Architecture, in id. at 150; A Post-War Appeal: Fundamental Demands, in id. at 148; Hundertwasser: Mould Manifesto Against Rationalism in Architecture, in id. at 157.

76. One form of resistance to modernist architecture consisted in resistance to fascism, with which modernist architecture was unfortunately linked. See GRIFFIN, supra note 57, at 19-21, 234-38 (2007); HARRIES, supra note 56, at 337-39.

clearly, the towers didn’t succeed as workable spaces. The stairwells of the high-rises became hiding spaces for gangs; the parks between the towers fell into disuse because parents were reluctant to let their children play in a space they could not visually monitor from inside their homes; the towers came to stand for social isolation, dysfunction and crime. Its death was ritually marked:

Modern Architecture died in St. Louis, Missouri on July 15, 1972 at 3:32 pm (or thereabouts) when the infamous Pruitt-Igoe scheme, or rather several of its slab blocks, were given the final coup de grace by dynamite. Previously, it had been vandalized, mutilated, and defaced by its inhabitants, and although millions of dollars were pumped back, trying to keep it alive (fixing the broken elevators, repairing smashed windows, repainting), it was finally put out of its misery. Boom, boom, boom.78

The effects of the death of Pruitt-Igoe rippled through the world of architecture and urban planning. The problem of Pruitt-Igoe was diagnosed in Jane Jacobs’ influential book on accessible and multi-use urban space, which embodied the lessons learned from the failures of modernism and became the popular manifesto for doing architecture differently.79 Building on the critique that modernist spaces alienated their inhabitants instead of morally elevating them, Charles Jencks and others criticized the modernists for elevating theory above practical workability and monolithic purity over the lumpiness of lived experience. Modernist architects, their critics charged, forgot the people who needed to use their buildings.

But rather than change their ways, many modernist architects turbo-charged their design in a “late modernism” that exaggerated many of the controversial elements of the modernist project by making modernist buildings even more monumental. The gaps between design and audience appeal were widened even further as late-modern architects enlarged the key aspects of modern architecture through repetition, extreme articulation of elements and “complex simplicity.”80 Such buildings were often gigantic, impersonal, radical interruptions of the landscape into which they were inserted. They solved the problem of containing the monumental spaces required for commercial use but did so with aggressive forms that completely dominated the landscape rather than working in harmony with it.

Late modern architecture, like the World Trade Center complex itself,

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78. Id.
80. CHARLES A. JENCKS, LATE-MODERN ARCHITECTURE AND OTHER ESSAYS 50 (1980) [hereinafter JENCKS, LATE-MODERN ARCHITECTURE].
took modernist functionality to extremes, "shoot[ing] a stainless steel filigree of Gothic-arched mullions 110 storeys," and in so doing altering the surrounding environs in radical ways. In his design for the World Trade Center, Minoru Yamasaki interrupted the lower Manhattan street patterns to create superblocks that disrupted traffic and altered the flow of life in the neighborhood. As Charles Jencks editorialized on the way that this late-modern style proliferated throughout the world in ever-elaborating forms, "buildings today are nasty, brutal and too big, because they are produced for profit by absentee developers, for absentee landlords for absent users whose taste is assumed to be clichéd." 

What precisely was the problem with modernist and late-modernist architecture? According to Jencks, modernism tended to be associated with simplified values, creating a "univalence" that resulted from the unitary logic underlying the design. Modernist architecture could not, and would not, convey a diversity of messages or speak to a diversity of audiences. In fact, similar modernist designs were used for houses, office buildings, university libraries, art museums, power plants, and more. It became increasingly difficult to tell the different uses apart from the shape and the style of the building itself. If the use and the design came into conflict, modernists thought the use was to bend to the design.

To respond to the demands of publics seeking spaces that were more congenial to inhabit, Charles Jencks coined the concept of double coding to describe how design could express a theoretical message to its expert audience and yet be adaptable for those who have to use them. Double coding represented for Jencks a departure from the theories underlying modernist and late-modernist buildings that were not functioning well as lived spaces. In double coding, a professional tries to combine multiple messages in a single work product without sacrificing either. In particular, one message is addressed to lay people who will have to operate within the constructed space, and another message is addressed to those who are familiar with the theoretical field, enabling them to see the design behind the particular space. Architects embed these multiple messages by "coding" different aspects of the same design for different audiences, embedding theory into the ways that the practical solution is set up so that the elements of theory and the logics of practice are both deeply present while being addressed to different audiences.

Double coding does not mean literally that there are only two possible

81. Id. at 63.
82. JENCKS, THE NEW PARADIGM, supra note 77, at 12.
83. Id.
messages. Multiple messages can exist at each of these levels. A diverse public may approach a space in many different ways depending on the situation, needs, and desires of individual members and various fractions of that public. A diverse professional community may also understand a building in different ways as well, bringing a panoply of theoretical commitments to bear in the interpretation of that work.

Crucially, though, a double-coded work communicates at the same time to at least two very different audiences: (1) other professionals who situate the work within the knowledge-space of architects and (2) those who have to live in the spaces, who care first and foremost whether the building creates a satisfying physical space to inhabit. Working at these two levels—the theoretical frames of fellow professionals and the lay frames of the non-specialist users of the constructed spaces—requires that constructed spaces be encoded in multiple ways simultaneously. Some aspects of the design will “read” as a quotation, as an elaboration of a style or a totally novel move to fellow professionals; other aspects of the design (or perhaps even the same aspect, seen differently) will “read” as refreshing, enlivening, or elegant by those who live in the space. For Jencks, buildings should be doubly coded, capable of making sense to multiple audiences each in their own terms. A building is, after all, one single constructed space that needs to address multiple audiences. It must therefore contain within a single design messages that are directed to each of its very different audiences.

Jencks elaborated double coding to defend cultural intermingling within a single work. For him, design could combine both high and mass culture, the new and the old, the spare and the ornamented. It should include “an interest in popular and local codes of communication . . . , in historical memory, urban context, ornament, representation, metaphor, participation, the public realm, pluralism and eclecticism.”85 What it should not do is what modernism did: destroy living neighborhoods to build gargantuan single-structure office buildings, towers in a field, endless similar shopping malls, or housing units whose repetition generated boredom. While modernist buildings and their exaggerated late-modern successors beat the landscape into submission, postmodernism promised to bring design back into a relationship with its various publics, sites and histories.

How could architecture do this? A double-coded structure should, in Jencks’s view embrace pluralism, shun monism. It should not constantly claim to be new, but should valorize resuscitations of the old. Double-coded architecture could be more responsive to its environment, not

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85. Id. at 13.
cutting through it but adapting to it. It could respond to its various publics. As Jencks put it:

[T]he architect must design for different “taste cultures” (in the words of the sociologist Herbert Gans) and for differing views of the good life. In any complex building, in any large city building such as an office, there will be varying tastes and functions that have to be articulated, and these will inevitably lead, if the architect follows these hints, towards an eclectic style.86

But if an architect were really going to do this, she had to work in multiple registers at once. Double coding, therefore, emerged as the signature element of postmodern design because it emphasized that design is composed crucially of a combination of elements and does not rely on the purging of inconsistency, impurity, history. Jencks again: “Post-Modernists, in an attempt to reach the various users of their buildings, *doubly-code the architecture* and use a wide-spectrum of communicational means.”87

Double coding opens up the possibility of “multivalence”88 because the same constructed space would have different meanings to different audiences. Those who experienced the space from different angles or with different needs in mind would often find that the constructed space creates a completely different experience from that lived by others with different needs in the same space. Such a built-in multivalence did not signal a bottomless relativism; from any particular angle, there might be in fact better and worse readings of the design that would be debated and even resolved into a single understanding. But there would not be a universal perspective through which these different readings could be added up and ranked. A doubly coded cultural object would itself provide the opportunity for multiple perspectives in which its role was fixed in different ways for different audiences.

Jencks' understanding of multivalence relied on the observation that a cultural object may have different meanings over time. A work was a classic, for Jencks, when it could go on being reinterpreted by each successive generation in a different way. From one period to another, however, the meanings might be mutually opaque. Meaning that was obvious to one generation reading *Hamlet* or seeing the dome of Borromini’s Church of St. Ivo in Rome may be absolutely invisible to the next (to take two of his examples). But to each generation, certain meanings are obvious and may even be unitary. When works live through

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time, however, each generation’s understanding may be refined, elaborated or even superseded by understandings that come later. As Jencks notes:

[W]e can say that there are many wrong interpretations which simply do not work and, in the case of multivalent works, a smaller but open set of plausible ones which can only be actualized in time. Nothing would be more destructive of our intercourse with objects than to insist that there is only one right interpretation of them, even if it is claimed to be that of the creator’s original intention. This interpretation may be a privileged and primary one, but its exclusive acceptance leads to the sterility which stops growth of the mind and our interest in the object itself. . . . It is apparent that since meaning depends on human perception, any holistic theory of value must be irreducibly dualistic in nature: both concerned with relations intrinsic in the object and the extrinsic knowledge and beliefs within the observer. 89

A multivalent work, then, will register different relationships between intrinsic properties in the work on the one hand and the extrinsic perspectives of those who view the work with different background understandings in mind on the other. Moreover, because an interpretation is a combination of these two features—the elements of the object and the perspective of the observer—different interpretations may be invisible to those differently situated with respect to the object.

When Borromini combined features of Christian, Islamic, and Pagan iconography in his famous dome, he intended to convey that Catholicism had universal aspirations. When later generations failed to recognize the Islamic and Pagan elements, it was because they simply did not have that visual vocabulary available as popular knowledge any longer. As a result, the dome later came to be associated primarily with the tall spiral topping it, which alternatively symbolized Divine Wisdom or the Tower of Babel, depending upon the community of interpretation. As Jencks argued in his analysis of the dome, the single structure was a classic and well-functioning work because it brought together “a series of inventive combinations that unite previously separate meanings . . . , a great amount of meanings, both syntactic and semantic, which can be related, and a great deal of linkage between these meanings. . . . This ‘organicity’ of architecture ultimately keeps it alive to each generation. . . .”90

Multivalent interpretations are both a feature of the object that is interpreted and of the subjects doing the interpreting. Multiple interpretations of a single object may be intertwined, taking the same

89. Id. at 182.
90. Id. at 187.
elements of the object for different purposes. But a multivalent constructed space will contain with it and within its audiences the opportunity for interpretation, reinterpretation, and even diverse interpretations at once. Rather than think of these proliferating meanings of the object as identifying a problem that must be solved with a single answer that would settle for once and for all which interpretation was best or the most real, the idea of multivalence signaled that a crucial property of a successful constructed space was that it could in fact bear all of these interpretations across different audiences and over time. The very multiplicity of meanings of a constructed space made it a success.

From a substantive point of view, double coding sounds empty, encompassing any multi-message work and any set of messages. But Jencks was most interested in four dimensions. First, he was interested in the tensions between designing a constructed space for both a professional and a lay audience. Modernism in his view had valorized the theoretical perspective of the architect in order to shape mass experience in particular ways. Modernist architecture attempted to alter the world through its forceful design, but the result was often dysfunctional experience. A properly postmodern view would take both lay and elite perspectives into account in design and attempt to work with the daily experiences of the inhabitants of the space to create a structure that spoke to both.

Second, Jencks was concerned with the relationship between history and the present. Modernism, with its constant drive to “make it new,” had deliberately purged design of its historical references and created pure ahistorical—even anti-historical—forms. A properly pluralistic approach would create bridges to and quotations from the past even as it attempted something new. Postmodern spaces would feel familiar to their inhabitants precisely because they could reference the external world and cue up historical memory from features of new work. But postmodern spaces would also send important theoretical signals to architects because the historical elements would signal where in the architectural canon the new work fit, much as footnotes in a scholarly work signal not only the sources of ideas but also the community of conversation within which the work is located. As a result of incorporating all of these elements, postmodern spaces would always be calling upon their histories at the same time that they created something novel in the world. Complete newness was like a form of amnesia. No wonder people were disoriented in spaces that cut off references to the past.

Third, Jencks wanted to bring architecture into a relationship with its surroundings. While modernism had drawn radically clear lines through often lumpy spaces, restructuring the landscape so that it reflected rational design, the postmodern building was to work with its environs to accentuate the specificities of place. Buildings were to be designed in
ways that made them impossible to reproduce without being altered for different locations. Sites mattered, and the relationship between professional creation and the specifics of location was to be nourished and encouraged. This generally called for more tailoring of buildings to their locations, which itself counseled against the repetition of design so characteristic of the mass production that modernists had cheered. Architecture could play out its design sensibility by adapting more to its surroundings. In the view of the postmodernists, buildings should not fight their sites.

Above all, and finally, Jencks encouraged pluralism. Modernism attempted to purge all incoherent elements, creating pure monist forms of elegant coherence that could be understood properly only as an integrated whole with a single meaning. By contrast, a postmodern view could embrace pluralism and multivalence, creating the possibility of a constructed space that could mean different things to different people and be experienced in multiple ways depending on the context and background of those who inhabited the space.

C. Critique of Modernism II: The Event

Of course, embracing an architectural style that encodes multiple meanings, uses history, respects its sites, and celebrates pluralism is easier said than done. Critics of postmodern architectural theory have noted that attempting to realize such diverse desiderata easily produces incoherence, confusion and caricature. Locating elements from diverse trajectories and traditions in the same space can produce "formal violence," or a conflict among objects. And if the juxtaposition is disjunctive enough, it can produce farce. Criticizing postmodern design, Bernard Tschumi has conjured an image of a "door flanked by broken Corinthian columns supporting a twisted neon pediment." Having permission, and even a manifesto, for bringing back historical references into new buildings through postmodern design had converted architecture from "a form of knowledge to a knowledge of forms," because architects signaled to each other through quotation and repetition of earlier historic forms that were often opaque to a general public. The result, said the critics, was a mess.

How, then, could design recover its place in the world? A key idea underlying both modernism and postmodernism was that structures could be "read" and that therefore codes that were inserted into structures could be decoded by different audiences. But this tenet has come under attack

92. Id. at 134.
93. Id. at 140.
from the post-postmodernists like Bernard Tschumi because the relationship between cultural forms—architecture, novels, films, art, and even law—and their respective meanings is never fixed. Every interpretation of a cultural product gives rise to an interpretation of that interpretation and so on, with every interpretation dissolved in the latest critique. As a result, the post-postmodernists say, cultural objects cannot be coded and decoded for once and for all, singly, doubly, or otherwise. Cultural objects cannot therefore embed a code that is decoded by different audiences the way that dogs hear particularly high-pitched sounds that may be specially aimed at them. Instead, according to Bernard Tschumi, a leading theorist of this post-postmodern architecture, architects and other producers of cultural objects lose control of the meaning of their works as soon as they are inhabited because people come to use the buildings in ways that create new understandings of the architecture and its interpretations. The meaning of buildings is constantly being reinvented by those who use them. As Tschumi notes, "there is no architecture without program, without action, without event... Architecture is never autonomous, never pure form... architecture is not a matter of style and cannot be reduced to a language." 94

The move to consider program, action and event as elements of architectural practice signals a shift from locating the meaning of a building in its reading to locating the meaning in its use. After it is inhabited, a building constantly changes its valence through the transformative potential of events to give multiple meanings to a space. When design is conceptualized as static, a building is simply a thing placed in space that is "read" at varying intervals later. But buildings are experienced as well as interpreted, and the uses of space also come to be part of what architecture does in the world.

According to Tschumi, "architecture is defined as the pleasurable and sometimes violent confrontation between spaces and activities." 95 He argues that one-time design should not be the sole focus of architects: the diverse uses of a space also transform how that space is understood. Tschumi disrupts the relationship between design and function by conjuring up images of "pole-vaulting in the chapel, bicycling in the laundromat, sky diving in the elevator shaft." 96 Each of those activities alters an audience's sense of what the space is for, how it works, what it means. As a result, according to Tschumi, events that work within spaces must shape the meaning of those spaces for theory just as the design of those spaces once did. Once the potential of events to constitute the
meaning of architecture is taken on board, argues Tschumi, architecture is deregulated because its meanings are no longer controlled primarily by architects. Meanings are also constructed by the users of the spaces. Considering the event as part of the space means that architects lose their primary role as the agents who get to determine how architecture should be understood.

Tschumi is an architect as well as a theorist and so is acutely conscious of the dilemmas that his observations have for practicing architects. He counsels:

There is no longer a causal relationship between buildings and their content, their use, and, of course, their very improbable meaning. Space and its usage are two opposed notions that exclude one another, generating an endless array of uncertainties. Not unlike developments in modern scientific knowledge that dismantled the mechanistic and determinate vision of classical science, here we see disorder, collisions, and unpredictabilities entering the field of architecture.97

If meaning isn't something an architect puts into a building for others to take out, but is the result of things that happen to a building after it is constructed, then there is a great contingency in the fate of a building. A building that starts as a factory may end up divided for condos; a church may be converted to a shopping mall; an armory may become a museum. In these transformations, there may be collisions between the way that the architect designed the space and its eventual uses. But since the architect cannot predict these things, she could not have designed for all potential uses. As a result, some conflicts are inevitable. An architect may design for one “program” (that is, pattern of uses), and the building may wind up fitted out for another program. Architects should not expect to control their spaces because

[s]uch control is, of course, not likely to be achieved. Few regimes would survive if architects were to program every single movement of individual and society in a kind of ballet mécanique of architecture, a permanent Nuremberg Rally of everyday life, a puppet theatre of spatial intimacy. Nor would they survive if every spontaneous movement were immediately frozen into a solid corridor. The relationship is more subtle and moves beyond the question of power, beyond the question of whether architecture dominates events or vice versa. The relationship, then, is as symmetrical as the ineluctable one between guard and prisoner, hunter and hunted. . . . Only when they confront each other's reality are their strategies so totally interdependent that it becomes

97. Id. at 21.
impossible to determine which one initiates and which one responds. The same happens with architecture and the way that spaces relate to their users or spaces relate to programs or events.\footnote{Id. at 126-27.}

In an effort to control the spaces they have designed, architects might consider using notation for the movements imagined in the designed spaces, to choreograph uses in the site the way that dancers read movement notation to know what to do in a dance. But however attractive this may be for an architect who designs a space imagining what its uses would be, no architect ever retains that level of control over a project. Nor should she. Any project that imagined an architect with that much control would be dystopian in the extreme.

How then are architects to design, given that they cannot—and should not—control the spaces they create? Tschumi suggests that architects might design their buildings to have absolutely no necessary identification between architecture and program, between the space and its uses. As a result, “a bank must not look like a bank, nor an opera house like an opera house, nor a park like a park.”\footnote{Id. at 204.} This can be done by “crossprogramming” or using one form for another use, like a “church building for bowling.”\footnote{Id. at 205.} Alternatively, an architect can engage in “transprogramming” or combining two or more uses in a single structure, “Reference: planetarium + rollercoaster.”\footnote{Id.} More dysfunctionally, an architect could engage in “disprogramming,” where designing for a combination of uses makes it impossible to use the space for any of the designed uses because each interferes with the other.\footnote{Id.} In all of these cases, the architect refuses to design as if a space were to have a single and unitary use forever. In Tschumi’s view, architects should design for disjuncture. Since they can only begin a dialogue with those who use the space, they should design in anticipation that those who enter their spaces will add to them, subtract from them, and modify them through use. Anticipating this, architects can leave spaces for improvisation, embed imbalances that those entering the space can attempt to correct, create ruptures in the plan for the space that require others to add to the design. In this view, architecture is deregulated; it is no longer under the control of architects. Their works may stand as an opening salvo in a conversation, but their works can no more control how that conversation goes than they can end it.

Architecture theory has moved over the last century from a modernist program of general social improvement through design, to a
postmodernist program of professional eclecticism in which multiple messages are encoded in buildings, to a post-postmodernist program in which architects see themselves as opening a complex game with a bid that is then responded to and adapted by others. Through the last century of architectural theory, the architect has gone from being the master of everything about a building to a conductor of a vast symphony of different and perhaps clashing parts to a participant in a conversation.

IV. THE METAPHOR OF ARCHITECTURE FOR LAW: HOMOLOGIES OF PROFESSIONAL KNOWLEDGE

Bringing architecture theory over into law requires that we think in metaphor—or, as Bourdieu has elaborated, in homology. While architectural spaces are literally lived in, law comes to be inhabited by virtue of analogies developed between literal and social space. Physical space is shaped in architecture through walls and windows and their interaction with physical sites, but the space of law is shaped by its concepts and categories as well as its prohibitions and permissions. The activities of lawyers and the decisions of judges are important constitutive parts of that social landscape, creating opportunities and barriers, recourse and remorse. Because neighboring fields (in Bourdieu’s sense of “field”) are likely to have come under similar social pressures and to be shaped by social elites who share a common social space (that metaphor again!), one would expect to see homologous changes in the way that different professions conceive their tasks and organize their professional knowledge.

Architecture and law are likely to have particularly close ties. Both are professions in which very specific and knotty problems must be resolved in concrete cases, and yet the best solutions in the eyes of the profession are the ones that also express some sort of general vision. But these two imperatives—solving the problem and creating an exemplary solution—often come apart. In architecture, for example, the building known as the “Long Island Duckling” has become famous not only because it is a particularly egregious example of a building that looks exactly as its title suggests—a drive-in shaped like a duck—but also because it became a metaphor for a certain type of architecture described as a “building becoming sculpture,” which is a more general form. Similarly, in law, the Palsgraf case is famous not because Mrs. Palsgraf and her accident

103. Peter Blake, God’s Own Junkyard: The Planned Deterioration of America’s Landscape 101 (1964).
on the platform of the Long Island Railroad constituted a world-historical event, but instead because Cardozo's opinion in the case has been passed on to generations of law students as the way to think about causation and foreseeability in tort law. As it turns out, neither the Long Island Duckling nor the Palsgraf case provided a decent solution for the drive-in or Mrs. Palsgraf. But since the duck and the storied plaintiff had come to stand for more than themselves, they are guaranteed to live on in the halls of theory. Famous judges and noteworthy architects are often praised for their theoretical advancements more than for the trail of consequences they leave behind. One can become a famous architect or a famous judge by contributing to general theory even if in the course of doing so, the results on the ground for those directly involved are not so laudatory. In addition, architecture and law—architects and judges—must wrestle with the proper degree of structure measured against a reasonable amount of freedom. Both architects and judges are called upon to build something lasting within which those who have sought the aid of their profession must operate, and yet both architects and judges must respect the self-defining autonomy of those who will live with the results. As we saw, Le Corbusier was famous for designing structures that so shaped their inhabitants that the buildings practically recreated their moral lives. Judges, too, have been accused of failing to see how much their decisions create unworkable solutions in the world. For example, the 8-1 decision of the U.S. Supreme Court in Minersville School District v. Gobitis refused to intervene to provide exemptions to two school-age Jehovah's Witnesses from the requirement that they salute the flag. But just a few years later, in West Virginia State Board of Education v. Barnette, the Court abruptly reversed itself and found that the mandatory flag salute had to give way to religious freedom. In between the two decisions, the world had changed, and the judges in the second case were made aware of the very real consequences of their first decision. Perhaps judicial decisions are easier to change than architectural design, but both commit

106. For an account of both the factual background to the Palsgraf case as well as an account of its later impact, see John Noonan, The Passengers of Palsgraf, in JOHN NOONAN, PERSONS AND MASKS OF THE LAW 111-51 (1976).
107. On the duck: Venturi, Scott Brown and Izenour pronounce its death: It is an example of a form of architecture that now looks dreadfully passé. As they put it, "the duck is seldom relevant today." VENTURI ET AL., supra note 104, at 87. On Mrs. Palsgraf: "The effect of the judgment was to leave the plaintiff, four years after her case had begun, the debtor of her doctor, who was still unpaid; her lawyer, who must have advanced the trial court fees at least; and her adversary, who was now owed reimbursement for expenditures in the courts on appeal.... Only a judge who did not see what was before him could have decreed such a result." Noonan, supra note 106, at 144.
108. 310 U.S. 586 (1940).
to a view of the world at one moment in time and often find that their
designs do not work as planned. Good design in both cases involves being
able to predict a future that one also has a hand (but not complete control)
in planning.

Law and architecture also share a common problem in having to
negotiate the tension between the ideal and the real. Law should aspire to
justice, much as architecture should aspire to beauty. And yet the real-
world constraints under which both must operate provide many reasons
why neither justice nor beauty appears. As we have seen for architecture,
there are serious disagreements over what, exactly, beauty is—and there
are parallel arguments among lawyers and judges over justice. It is not so
simple within either profession to work out a common set of normative
ideas; those are at the very heart of the contested practices in the fields,
and also constitute the primary engine of theoretical change. To make
matters even more complicated, every building for an architect and every
case for a judge possess qualities that inhibit the realization of ideals in
any event—budget, zoning, and the limits of building materials for
architects; the specifics of the case, the procedural posture, and the limits
of existing doctrine for judges. The image of the soaring architect as the
lonely genius of design, is contradicted by the actual practice of architects
working in teams, with engineers, clients, and uncooperative zoning
boards. Similarly, the image of the judge as the towering representative of
justice is met by the reality of collegial benches, pressing case loads, less-
than-ideal facts, and unfriendly precedent. In neither law nor architecture
can normative ideals be realized in practice very easily, and yet in both
fields, the normative ideals are still crucial to the theory of the enterprise.
This builds in contradictions that animate both fields.

To make the architectural metaphor front and center in our legal
analysis, we need a vocabulary that allows us to embrace observations
across multiple professional knowledges at once. What follows is my
attempt to create this vocabulary.

Professionals share in common responsibility for creating what I will
call “living works.” A living work is a deliberately created social space
within which people live and interact. A park is a living work because it is
used (or avoided) by people in its vicinity. A building is a living work
because people live in it, work in it, walk through it, see it as they pass by.
A medical treatment creates a living work when the life of the person
experiencing the treatment is altered by the medicine or surgery or
diagnosis—or by the failure of all of them—and that life is embedded in a
social network altered by the treatment. A corporation is a living work
when people organize their activities within it, treating it like a feature of
the built environment as something that precedes and follows their
engagement with the particular locale. A financial instrument is a living
work when it creates opportunities for making money as well as for losing it, intersecting the lives of investors and others beyond. And, not least, law is a living work when it creates concepts, categories, decisions, and mechanisms of enforcement and redress that alter the life-world\textsuperscript{111} of many. Living works have effects in the social lives of those for whom the living works are designed. The professional knowledge that is brought to bear in constituting these living works brings theory into practice and uses practice to refine theory.

Professionals—architects, engineers, doctors, financiers, businessmen, lawyers—typically use their theoretical knowledge to create living works that are then inhabited by people other than (or in addition to) the professionals themselves. Those who inhabit these living works often have different uses, strategies, horizons, and goals than the professional who designed their spaces; their life-worlds may value different things. Theory and practice therefore run the risk of coming apart. Designs that work in theory among professionals may not work in practice for those who experience these living works as the everyday horizons, opportunities, and constraints of daily life in which they are simply trying to get things done. A park may deploy a gorgeous rolling landscape for aesthetic purposes, a landscape that then also provides many spaces for potential robbers to hide. A building may be elegant when seen from the outside, but its permanently sealed windows may make it hard for those inside to regulate the temperature, which in turn may make them miserable. The course of therapy for someone with a terrible disease may beautifully treat the illness but leave the patient muddle-headed and unable to function well with family and friends. A corporation may adopt the trendiest new management tools and yet be a horrible place to work because it has dehumanized (or perhaps over-humanized\textsuperscript{112}) the workplace. A financial instrument may be unveiled to the admiring appreciation of investment bankers but be incomprehensible with disastrous consequences to those who hold it as an investment. Laws may look constructive on paper but generate unanticipated disasters in practice. In short, the very accomplishments of professionals which allow them to be well considered in their colleagues’ eyes as masters of theoretical elaboration may prove in the end to be spectacular failures for


\textsuperscript{112} Financial Times’ columnist Lucy Kellaway hilariously sends up the way that new management philosophies have attempted to bring too much emotion and personal interaction to the work place. For example, talking about the new plan for the supermarket giant Tesco to “love” its staff so that they in turn will “love” their customers, Kellaway writes: “By talking incontinently about love to his staff, he [Tesco’s UK CEO] invites cynicism and looks like a fool to his staff.” Lucy Kellaway, Unrequited Love and Corporate Idiocy, FIN. TIMES, July 8, 2011.
those who actually live within these designs.

The reverse may also be true. Design of living works may enable clients for whom the work is designed to realize possibilities that neither the clients nor the designers knew they wanted to achieve at the time of the design. A park may encourage salutary meetings across a wide generational spectrum, even when those who wanted the park did not have this as the goal. A building’s design may make possible certain efficiencies that in turn allow the building to be more “green” than imagined. The course of therapy for someone with a terrible disease may not only treat the illness that it was designed to cure, but might also provide a reduction in risk of other diseases for that patient at the same time. A corporation may find that its new accounting practices also help management to improve supply chains in the organization. A financial instrument may be designed to capitalize on the risk of moral hazard but may actually build in ways of controlling it. Laws may be designed to solve one social problem and wind up having beneficial effects on others. In short, there are many ways that designers of living works are routinely surprised by the life of their creations in the world. Design of a living work will routinely accomplish more, fewer, and different things than its designers envision.

Lawyers and judges encounter many of the same problems that architects do in mediating between theoretical and applied knowledges to create living works, and they run similar risks of unintended positive and negative effects for the clients who call their creativity into existence. Lawsuits, like buildings, are rarely created purely from a professional’s abstract vision. Instead, they can only be brought into existence in the real world when a client has a need. The system of professional consultation is therefore initiated when a client requires professional knowledge to solve a task that she cannot solve alone. Just what sorts of living works can be constructed in response to the client’s needs depends on humble elements like budgets and the constraints of the site or jurisdiction. Limited budgets and cramped sites exist in both architecture and law, and they constrain the ways that solutions can be designed. No matter how theoretically inclined the practicing architect or the judge, the client’s or parties’ needs, resources and context determine in large measure the limits of what can be done. A professional therefore works within a world in which those with problems to be solved, their needs, and the site-specific opportunities and constraints are presented not as things that the professional can change at will but instead as constraints within which the professional must work. A living work is designed in light of the intellectual challenge raised by the puzzle that the people-with-problems bring, including elements of the situation that serve as constraints because they are beyond a professional’s jurisdiction.
Professions like architecture and law also similarly confront a tension between the generalizability of a site-specific solution and the responsiveness of a solution to the needs of particular clients. Many situations permit the professional to attempt to make more generalizable the demand for a solution in cases like this one so that the individual client can become a vehicle for working out a larger project. In law, a case can become a test case for a particular legal argument; in architecture, a building becomes a prototype for others.113 There are ethical and other limitations on the extent to which a professional can use the opportunity of a particular client to achieve a more generalizable result. For example, the judge must decide a specific case, making arguments that both respond directly and primarily to the needs of the parties even while they may also register simultaneously in the more abstract realm of legal innovation. Any particular case114 might give the judge the opportunity to elaborate a theory of law that appeals to her sense of justice, her philosophy of law, and her sense of what her professional responsibilities are. But every particular case also requires primary concern for the parties who are before the court with their concrete dilemma to address. To do anything else violates the ethical obligations of judges.115 Architects have similar duties to respond to the needs of their clients and to keep them informed about all relevant matters.116

113. For the discussion of the duck and Mrs. Palsgraf, see supra notes 105-107 and accompanying text.

114. Of course, as Resnik’s and Curtis’s book make clear, courtrooms are designed to house trials, that quintessential symbol of law in action—but trials in US courts are a vanishing species. Even though filings continue to rise, the number of these joined actions that actually produce trials is very small. RESNIK & CURTIS, supra note 1. That said, both law schools and legal practice imagine their field as one that is full of cases, even if those cases are generally resolved through mediation, often (but not always) done in the shadow of what might be expected if the case actually did go to trial. Judicial opinions are therefore a rare and unusual event in the ongoing practice of legal disputing. Given that trials, judging and opinion-writing are the dominant aspects of law that are elaborated in law school and in law as a doctrinal practice, my treatment here will proceed from the empirically questionable premise that law is elaborated through cases, particularly those cases that produce opinions. But this ideal of law may drive the development of theoretical knowledge as much as the actual practice of law. That is one of the key elements that makes law a profession.

115. The Code of Conduct for United States Judges expresses this principle as follows:

(1) A judge should be faithful to, and maintain professional competence in, the law and should not be swayed by partisan interests, public clamor, or fear of criticism.

(2) A judge should hear and decide matters assigned, unless disqualified, and should maintain order and decorum in all judicial proceedings.

Canon Code of Conduct for United States Judges, Canon 3A (1) and (2), available at http://www.uscourts.gov/RulesAndPolicies/CodesOfConduct/CodeConductUnitedStatesJudges.aspx. The general idea behind these principles requires judges to keep their eye on specific cases and not to be distracted by other agendas.

When a judge is called upon to decide a case, the same tensions between the appeal of theory and the requirements of applied knowledge are re-inscribed at another level. An opinion must register as legally sound for professionals and yet actually be responsive both to the concrete legal questions raised by the case and to the needs of the parties for whom the decision counts as a resolution of their practical concerns. Opinions are not primarily works of pure theory, but neither are they works that only provide hands-on solutions for particular problems. They must appeal to both levels at the same time. In these ways, and in others we will explore, similarities of legal and architectural practice provide a basis for finding homologies between them.

How can professionals maintain their commitments to theory while still doing justice to the press of practical problems? As we have seen, architectural theory provides multiple models for how professionals can create these complex living works—through elaborating purity of ideas into a discipline of use, with the theory tightly tied to the practice (modernism), double-coding multiple messages into a single design, so that the living work says different things to different audiences (postmodernism), or designing an opening bid in a multistage sequence of negotiation between the living work and its uses, so that the work of the professional is only part of the process of creating the final product (post-postmodernism). Seeing these possibilities in one profession, architecture, may enable us to see and distinguish these same possibilities in law.

The multiple similarities of law and architecture notwithstanding, the metaphor of architecture for law is not perfect. No two fields are completely homologous. Among other things, lawyers and judges may have a more constrained set of options in some ways than do architects for bringing theory and practice together. Legal professionals are inevitably obligated by the conventions of their profession to tether current arguments to historical ones. Law is an exegetical rather than a scientific or artistic field. In exegetical fields, one gets credit for being an excellent practitioner by using historical materials to make novel arguments that nonetheless are framed as what the sources have always said rather than as what they are now saying for the first time. In science and in art, novelty can be overtly trumpeted and in fact often must be for the work to count as a contribution to the theory of the enterprise. While architecture may have had the luxury of attempting to cut loose in an explicit way from its history, as one sees particularly with modernism’s imperative to “make it new,” legal argument cannot do that and still count as law. But legal arguments don’t go on saying the same thing over time even when these arguments are tied to historical sources. Legal arguments, particularly significant legal arguments, contain novel elements along with the traditional ones. As a professional practice, then, law is perched
between old and new. Lawyers and judges both reference history and innovate nonetheless. To apply old law to a new case, lawyers and judges must honor the past even as they forge the future. Architecture may appear to jettison the past entirely, even as it references it silently. But the overt strategies for justification in the two fields are different.

In addition, law and architecture differ in the internal specification of professional roles within each field. While lawyers deal directly with clients and their needs (as do practicing architects), judges hold a position of neutrality and distance from specific disputes. There are no roles in architecture like the role of the judge in law, whose pronouncements settle what shall count as the doctrine of the field. Not even the architectural critic holds the power that judges do to consolidate official knowledge in such an authoritative way. These differences in the internal differentiation of professional roles mean that no homology works perfectly. There is not a one-to-one correspondence between every aspect of law and every aspect of architecture.

That said, we can find elements of the same three sorts of approaches in legal theory that we spotted in tracing the last century of architectural theory, and we find them in the same order of appearance. That we can use the insights of one field to understand another because of homologous relations between the two is an idea perhaps most persuasive at the level of theoretical justification for various turns in the field, given differences in the precise structuring of social positions within the field. In the elaboration of jurisprudence, which is the field closest to the theoretical view we traced in architecture, American legal theory \(^{117}\) has had its modernist moments, its postmodern reaction, and its post-postmodern turn. While each of these approaches to the relationship between theory and practice has occurred in the same sequence as one finds in architecture, law’s full embrace of these approaches occurred some decades later than comparable developments in architecture. Architecture led the way, theoretically speaking, and the law followed at some

\(^{117}\) Among the differences between law and architecture is the importance of national styles. While there are clearly national styles in architecture, the rise of modernism coincided with a rejection of specifically nationalist aesthetics. Modernism, as a result, is often called the “international style.” See Henry-Russell Hitchcock & Philip Johnson, The International Style (W.W. Norton & Co. 1997) (1932). Law, by contrast, is still largely nationalist in content. French law is different from German law which in turn is different from American law. The relationship between the theoretical arc of architecture and the specific variants of it in the US will be quite different than that relationship would be in European legal systems. But elaborating the difference is a project for another day. Among other things, the flirtation of modernism with fascism was more pronounced in Europe than it was in the United States, and this difference immediately set the relationship between law and architecture off on divergent paths in the two places. Because of this flirtation, I would argue, it was difficult for courts in Europe to adopt the same self-confident views about social improvement through law that American courts exhibited in the immediate post-World War II period, at least not before the connection between modernism and fascism was definitely severed.
distance.

A. Legal Modernism

Architectural modernism rose to prominence in the 1920s and 1930s. While many judges and practicing lawyers during this period in the US were skeptical about the wisdom and power of law to promote comprehensive social change, legislators and then eventually judges joined the ranks of those who believed that the Constitution permitted the federal government during the New Deal to chart the course of mass social improvement through law. Such a new and aggressive role had been advocated for legislators and courts first by elite law schools. As Herbert Wechsler explained it, his generation of law students was taught a notably new approach to law in the late 1920s at Columbia Law School, an approach broadly consistent with modernist views about the social perfectibility of mankind through deliberate professional intervention:

Well, . . . four articles of faith seem to me to have developed during my years as a law student, from 1928 to 1931. The first is . . . the frontal challenge to the concept of the common law as a closed system.

The second point in the credo called for judicial receptivity to statutory changes of the common law and sympathetic treatment of administrative agencies entrusted with new regulatory functions. The third point was unqualified disdain for the then-dominant interpretation of the Constitution by the Supreme Court of the United States, precluding any governmental action in the ordering of the economy, despite the magnitude of the abuse, and the dislocation incident to the development of an industrial society.

The fourth article of faith, perhaps the most important in my present perspective, was the one affirming that legal understanding is imperfectly attained, so long as law is treated as an independent discipline consisting solely of an ordering of rules and doctrines drawn from statutes and decisions.

Wechsler's reflections evince a sensibility similar to the one that modernist architects were building at the time. As his comments reveal, the purpose of the profession was to make things better for people, and to do so by putting into effect a strong-form conception of what a more just


society would look like to which the lay public should adjust. The professional could look far and wide for inspiration, but usually to other forms of expert knowledge, rather than to ideas current in the general public. While professional wisdom from the immediate past was to be rejected (like the “clutter” of the nineteenth-century design that preceded architectural modernism120), new professional knowledge should aspire to improve social life by bending others to its vision. This idea of the judge as architect—of the core legal professional as the designer of the environment within which people were shaped—swept through law as it did through architecture. The job of the professional was to design a better world.

Even though Wechsler identifies this social perfectability with his time in law school in the late 1920s, it took until the post-war Warren Court and its well-placed team of academic supporters before such links between law and social perfectibility became the standard view in legal practice. As in architecture, the idea of social perfectibility was contested as an ideal. For every defender of the Warren Court’s ambition to increase justice in the world, there were those who counseled legal restraint. Alexander Bickel penned the most famous defense of judicial restraint.121 Another famous disagreement of the day that reflected this same divide occurred between Learned Hand who had a modest view of the role of the courts and the now-grown-up Herbert Wechsler who believed in an expansive view of judicial competence, as long as it was properly exercised.122 With the rise of the work of legal theorists explicitly putting equality at the center of American constitutional law, the principle became a central instrument for achieving a better world. Feminist legal theorists, critical race theorists, and legal philosophers like Ronald Dworkin made extraordinary efforts in the 1970s and 1980s to make the case for the use of law to improve social equality.123

From the end of World War II and through the 1980s, then, lawyers and judges came to see the law in general and litigation in particular as instruments for achieving social justice,124 much as modernist architects

120. Clutter appeared as the “stylistic chaos of the nineteenth century.” HARRIES, supra note 56, at 7.
122. For a summary of the debate, see Herbert Wechsler, Toward Neutral Principles of Constitutional Law, 73 HARV. L. REV. 1, 3-6 (1959).
123. For a survey of the legal theory terrain of the 1980s and early 1990s, see Kim Lane Scheppele, Social Theory and Legal Theory, 20 ANN. REV. SOC. 383 (1994).
124. The canonical story here is the strategic use of the NAACP’s Legal Defense Fund to achieve racial equality by using strategically designed test cases in U.S. courts. RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA’S STRUGGLE FOR EQUALITY (1976).
were committed to using their profession to achieve ideals of beauty. Just how justice was to be discovered was contested, but many legal theorists and practitioners came to believe that better law could lead to a better life for those who could benefit from professional work on behalf of ideals.

This idea that law could improve life for the disadvantaged was not confined to American lawyers and judges operating solely within the U.S. For the first couple of decades after the war, the drive for social improvability was directed even more outside the United States, as American lawyers, judges, and scholars concentrated on improving constitutional governance around the world:

The American legal profession was fascinated by the rest of the world during the Rise Era [between 1945 and 1972 when the study of comparative constitutional law in law schools was on the rise], and once World War II ended, it turned its attention to legal developments abroad. When it came to comparative constitutional law in particular, the years after World War II were the most active years the world had ever seen . . . In the first few decades after World War II constitutional law spread around the world . . . These developments outside of the United States captured the attention and commanded the energies of the legal profession inside of the United States.

As David Fontana notes in his analysis of the rise and fall of comparative constitutional law in the post-World War II period in the U.S., much of this interest in the rest of the world focused on social perfectibility; Americans in great numbers had had experience serving abroad during and immediately after World War II and retained a lively interest in making the rest of the world better. It took some time for American scholars to focus their views about social perfectibility through law on their own legal system. Once they did, however, there were

125. One important strand of this debate can be seen through Wechsler, who advocated "neutral principles"—which ultimately the watershed decision in Brown v. Board of Education did not satisfy—and a more substantive equality argument eventually fleshed out by Ronald Dworkin in Law's Empire (1986). As Cass Sunstein noted, Wechsler was very much a product of his particular place and time: "For current observers, Wechsler's demand for neutrality, as he understood that concept, seems to have an otherworldly quality." Cass Sunstein, Neutrality in Constitutional Law (With Special Reference to Pornography, Abortion, and Surrogacy), 92 COLUM. L. REV. 1, 5 (1992).


128. Id. at 19-20.

129. Fontana explains how the dominance of the Warren Court's views of social justice as the
Scheppele contested views about what counted as social improvement, but social improvement was clearly what the law was supposed to achieve regardless of one’s position on the political spectrum. The later counter-movements, law and economics and conservative constitutionalism, also shared the view that law could lead to the construction of a better world, even if their views of what constituted “ideal” were quite different than that of the Warren Court defenders. Modernism in law, mirroring the sort of architectural modernism in which the profession was called to use its service to clients to improve the world, was as major a force in the legal world as architectural modernism was in the construction of the built environment. Most of the developments since modernism took hold have been reactions against some of modernism’s central tenets, in law as well as in architecture.

B. Legal Postmodernism

While the early calls for postmodernism in architecture date to the late 1960s and early 1970s, an equivalent form of postmodernism hit legal scholarship in full force in the 1980s. In law, postmodernism came not directly from architectural theory but instead by way of literary theory, as legal scholars suddenly discovered that they had been reading texts all along and could do so differently. From literary theorists, legal scholars learned that which strategy of reading one would bring to bear in understanding a legal text required independent justification. The immediate result of adopting a postmodern approach to legal interpretation was a proliferation of different strategies of understanding what law required. Judges could attempt to resolve the tensions between theoretical and applied knowledges by reaching for pluralism as the postmodern architects did. How could postmodernism play out in law? As Jencks argued for architects, the multiple audiences for a living work

130. DONALD McCLOSKEY, THE RHETORIC OF ECONOMICS (1985) (showing how economics came to be committed to a certain version of public ideals); STEVEN TELES, THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT (2008) (showing how conservatism gripped the legal academy).

131. The focus on legal interpretation to the near exclusion of focus on legal outcomes and social perfectibility was represented by several key texts. For the earliest example of such interpretation, see JAMES BOYD WHITE, THE LEGAL IMAGINATION (1973). The turn to legal interpretation as a mainstream legal-theoretical activity could be associated with Stanley Fish’s book, Is THERE A TEXT IN THIS CLASS? THE AUTHORITY OF INTERPRETIVE COMMUNITIES (1980) and with the influential anthology INTERPRETING LAW AND LITERATURE (Sanford Levinson & Steven Mailloux eds., 1988). The move to constitutional originalism, in which an outcome is interpreted in terms of the strategy one takes in reading the constitutional text, is now widely accepted across the political spectrum as a major alternative. For an early view that “we are all originalists now,” see MICHAEL J. PERRY, MORALITY, POLITICS AND LAW 280 (1988). For current public opinion, see Jamal Greene, Nathaniel Persily & Stephen Ansolabehere, Profiling Originalism, 111 COLUM. L. REV. 356 (2011).
might counsel the professional to embed different messages in the same living work for those who have different uses of it in mind. Carried over to law, this would argue for building in different elements in a legal argument for the different parties or different interests affected by a case. For example, a judge could pitch the holding of a case for the judge’s fellow theorists while simultaneously designing the remedies section of the opinion to make that holding work (or not) for the party who brought the case. In another context, I have argued that this was precisely what American judges were doing in the post-9/11 terrorism cases. In a series of cases including Hamdi v. Rumsfeld, Rasul v. Bush, Hamdan v. Rumsfeld, and Boumediene v. Bush, the Supreme Court handed defeat after defeat to the Bush administration, refusing to defer to the administration’s assertions that it alone could set the standards for detention and trial of “enemy combatants.” And yet those who brought the cases did not see any immediate change in their situation because the Supreme Court failed to fill in the details of what should happen next in each case, leaving to future litigation the actual working-out of what these principles meant for the litigants. The result was a gap between right and remedy—where the right appeared to be vindicated to all except those who stood to benefit directly from its realization. We might understand this sort of judicial strategy, where one side wins the holding and the other side wins the facts on the ground, as a sort of double-coding of the result as postmodernism would encourage. I call the application of this principle in national security cases the “new judicial deference” to highlight the fact that the Court may appear to be non-deferential in elaborating doctrine while being highly deferential in designing remedies.

Most of the time, however, postmodernism in law resulted in a proliferation of interpretive approaches, sometimes presented as reasonable alternatives to reaching the same result, other times presented as the right way to truth, as modernists have argued. From the

138. Justice Antonin Scalia’s defense of originalism proceeds as if originalism is the one, true method that generates legitimate constitutional interpretation, in the manner of the modernists like Corbusier who were also convinced of the rightness of their strategy to the exclusion of others. ANTONIN SCALIA, A MATTER OF INTERPRETATION (1997). But, ironically, it was the postmodern movement in legal theory that shifted the conversation away from the concrete results of legal cases and their advancement of justice to methods of interpretation whose advocates proudly pointed to the neutrality of the methods. In postmodernist architecture as well, postmodernism worked better at producing an attention to method within the field rather than a focus on results evaluated for their
1980s onward, the methodology of legal interpretation—the strategy through which judges and legal analysts reach results—has been foregrounded as a crucial element of producing living works. The originalist movement, though portraying itself as having always been historically attuned, dates to this period precisely because it was a response to the proliferating interpretations that postmodernism made available. Postmodernism in architecture suffered from the criticism that the works were too clever by half—with various architectural references quoted through the works in ways that only other architects could understand. The same was true in law, as discussions of interpretive methodology filled pages of opinions and law reviews indicating, like a dog whistle only to part of its audience, special messages for that segment alone.

C. Legal Post-Postmodernism

Post-postmodernist architectural theory also has its homologies in similar turns in the law. The basic insight of the post-postmodernists is that the moment of design, the moment when professional knowledge is brought to bear in working out what to do in a concrete site, is never the final moment in which the understanding of the living work is fixed. This moment of design is, instead, just the beginning. Those for whom the living work is constructed as the horizon of daily life will have their own things to say about how the design is used, and they become very real co-participants in the construction of a living work.

An architect, therefore, participates in the construction of a living work not by designing every element down to the last detail, as the modernists aspired to do, but instead by making an opening bid for a solution to a practical problem and then watching (and perhaps participating) as that solution is adapted to their practical use by those for whom it was designed. Theoretical insight, in these cases, emerges from seeing the relationship between design and use, between the abstract qualities of the design and the specific events that occur within its purview.

In law, we have seen the recent emergence of several approaches that capture this insight that the architect-judge cannot be the main person in the picture of legal design. Theoretical attempts that decenter the judge and bring other actors into the picture have also spread throughout the law. The “Constitution outside the courts” movement focuses on the role of social movements and other lay interpreters of the Constitution as co-constructors of the meaning of the Constitution along with lay people. 139

139. See Mark Tushnet, Taking the Constitution Away from the Courts 181-82 (1999); James E. Fleming, Judicial Review Without Judicial Supremacy: Taking the Constitution Seriously
Sometimes this literature extends the co-construction to the other branches.\textsuperscript{140}

In addition, the theory of judicial dialogue\textsuperscript{141} captures this perspective perhaps even more fully. Developed in Canada, judicial dialogue theory assumes that courts are just one of multiple players on the stage that determines how law is acted out. The theory developed in Canada first perhaps because the 1982 Charter of Rights and Freedoms built in multiple ways for political bodies to elaborate or change interpretations of the Supreme Court of Canada. If provinces or even the national government disagreed with an interpretation of the Supreme Court, they could reenact offending legislation by noting that they were doing so "notwithstanding" the decision of the Court. If the Supreme Court went too far, there were also multiple different ways to change the Charter depending on which political bodies disputed the result. But unlike in the U.S., where a Supreme Court decision is hard to get around once it is made, short of changing the composition of the bench, legal systems like Canada’s actually built in opportunities for the political branches to evade—temporarily or permanently—decisions of a high court. That opened up possibilities for multiple branches to have a say about the final constitutional result.

Modernism, postmodernism, and post-postmodernism are theories about how theoretical knowledge should relate to practical problem-solving and applied knowledges. Both law and architecture, as we have seen, developed common sorts of conceptual frames over the last century


for accomplishing these purposes. Judges and lawyers, like architects, have chosen from within this conceptual space how they wanted theoretical and applied knowledges to be linked. The result in law, as in architecture, has been the move from grand and abstract designs meant to change the world, to more modest and plural attempts to create something for everyone, to the still more modest ambition of coming up with an opening gambit that others will have to complete.

V. SOME LESSONS FOR JUDGING IN LAW

Judges, like architects, construct living works in multiple ways depending on their philosophy of professional responsibility. They can be modernists and value the aesthetic coherence of the vision of the work, which they carry all of the way down into the details of how daily life can be lived in the space. Modernist judges will want to improve the world through design that affects daily practice and that will shape the population that has to interact with the living work of the judicial decision. Alternatively, judges can be postmodernists and see their job as speaking separately to the different audiences for their work, sacrificing coherence for responsiveness and purity for practicality. Postmodern judges will separately address the various audiences for a living work so that those who read decisions for the theoretical contribution the decision makes to jurisprudence may see something quite different than those who read the decision to determine what happens next on the ground. Alternatively again, judges can be post-postmodernists and see themselves as parrying back salvoes or (less belligerently) contributing to an ongoing negotiation with the audiences for their living works over the boundaries of their proper use. Post-postmodern judges will recognize that their interventions only set the terms of the initial conversation; they are not the only actors in the drama of what happens next. These are real choices that professionals face in matching theoretical with applied knowledges and in creating living works that simultaneously shape, limit, and facilitate what happens within those professionally created environs.

As we have seen, in architecture as in law, the front-line professionals—architects and judges—are tasked with creating complex constructions that are inhabited by multiple audiences simultaneously. The audience of experts that has been similarly trained in the profession will understand professionals’ work against a backdrop of specialized professional knowledge, while the generalist audience—both those who will appreciate the product from a distance as well as those who will actually live within the world it creates—will understand it differently. In public architecture as in public law, the audiences for a particular construction are multiple and they make different demands. Fellow
experts want something that will play to the theorists among them; people who have to live with what results may in fact want something else (and different "something elses" depending on their relation to the work). Satisfying them all within the space of a single creative design is often difficult. In fact, there is always a risk that theoretical knowledge will come apart from a workable practical effect even as the creator of a work of applied theory desperately attempts to encode multiple messages for multiple audiences within the confines of the same creative work. Architectural theory has dealt with this problem in a more explicit and systematic way than has legal theory, so law can stand to learn from architecture.

How can law learn from architecture? First, as we have seen, debates in the field of architecture over the last century have tended to occur a decade or two before their mirror-image theories come over into law. While this is more a contingent historical fact than a universal law, there may be reasons to believe that architectural theory will lead the way in modeling relationships between theory and practice for some time to come. Architecture sees itself as being edgy—on the forefront of critical practice. Law, generally, does not. Law catches what is going around, theoretically speaking, rather late in the dispersion of theoretical frameworks. The observant legal theorist will then want to keep an eye on what is happening in architecture to get ahead of the curve and to look for sources of inspiration in imaging how law might be done.

Second, the comparison between judging and architectural design calls attention to features of the practice of judging that are unlikely to change with more introspection or better theory. Some tensions are built into the way that living works are constructed. Both the judge and the architect are called upon to unveil their works in public, and the myriad forces that bear on a judicial opinion or an important new building will be revealed at that unveiling, if they were not evident before. Some perspectives are adopted in design while others are shunted aside; some interests receive more support than others. Some audiences are going to be pleased and even flattered while others will feel excluded. Moreover, some designs will stand the test of time while others will appear as if they are rooted in one time and place forever.

But, as we have seen in our review or architectural theory, each new generation of architects gets better at addressing the most egregious complaints generated by the generation that they just replaced. New theoretical frameworks do not resolve these tensions; they can instead make the judge or the architect more aware of what is at stake and also make unselfconscious practice more self-conscious. Architectural theory shows, and legal theory does too (though with a lag), that the path of professional knowledge is not linear toward some common unchanging
vision, but instead proceeds through innovative and bold moves followed by compensatory adjustments as the very goals of the enterprise change. These compensatory adjustments can occupy the profession for a long time after huge new statements are made. Postmodernism and post-postmodernism in architecture are still in conversation with the world-changing vision of modernism. And their equivalent theories in law are also still oriented toward the major push for justice that characterized the middle part of the twentieth century.

Architecture has had to rethink the relationship between aesthetic ideals and practical possibility to make architecture less prescriptive about what it might do and more responsive to the howl of critique. It should therefore not be surprising that corresponding normative visions of justice in law have gotten more precisely focused and less certain as those whom the professions tried to change mobilized their own resources and pushed back with their own ideas. We are currently in a moment in law when reaction provides the inspiration for innovation, when proving we do not have a theory of everything is considered evidence that one is a responsible professional. That moment came to architecture earlier than it came to law, as fierce reactions against modernism’s ambition forced later generations of theorists to wrestle with how to make their own designs more pluralistic and responsive to critics. In law and in architecture, as we can see better in the comparison than by examining either profession standing alone, bold normative moves were once the intellectual currency of the day. As those moves were met by a fierce counter-reaction, professions respond by generating new visions of the professional’s place in the world. It is a lot easier to see how another profession met thrust with parry than to see such moves clearly in one’s own space. And this is ultimately why examining another homologous profession can provide insight for one’s own.

Finding similarities between law and architecture therefore involves more than the construction of a particularly apt metaphor. The similarities between architectural theory and legal theory reflect deep homologies in the way that professional knowledge relates to social practice. As Bourdieu brought us to expect, at any particular time, there will be similarities in the social organization of life and parallel similarities in the intellectual mapping of that life. Fields—in Bourdieu’s technical sense of that term—may claim relative autonomy from other areas of social life, and yet they are also embedded in ways of thinking that are related to a common social landscape beyond the specific field. Particularly where one finds groups of people performing similar tasks (in this case constructing living works while reflecting on that construction), Bourdieu’s theory of fields help us to see why we should not be surprised to see the novel insights of one field reflected in the novel insights of
another. Law and architecture are joined through their common specification of a more general social relation between design and ways of life.