

Portability of Legal Craft:
Using "Legal Moves" to Attain Adaptable Legal Expertise

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Abstract: Legal training in the global setting must impart *more portable* legal expertise *more quickly*. This article posits “legal moves” as the ideal tool for achieving that goal. A legal move is an abstract device that lawyers utilize in legal analysis. Legal scholarship has flirted with this idea under different names, but never precisely framed it in a unified theory. This article explores two defining features of legal moves. First, legal moves are abstract, in the sense that they require a higher-order cognitive interface between other legal concepts such as doctrine and institutions. Second, legal moves are portable, in the sense that they transcend doctrinal, jurisdictional and professional boundaries. Due to these two features – abstraction and portability – legal moves are an excellent way to conceptualize the law and frame modern legal education. This article not only proves the common features of legal moves, but also offers a workable taxonomic framework – classifying each legal move according to its cognitive complexity – in an effort to adapt it to modern legal education. The result is that legal moves can help address two shortcomings of legal education in modern global legal education: *quick* attainment of *portable* legal expertise.

I. Introduction

The uneasy relationship between the doctrinal rigidity of law and the increasing market demand for adaptable legal thinking is striking. While the history of our legal scholarship is rooted in taxonomy – the science of rigid categorization – the increasingly global and interactive market requires legal minds that can transcend various disciplines, jurisdictions and languages. To help reconcile this stress point in our system of legal education and thinking, this article proposes a new parameter of legal thought that operates at a higher level of abstraction than doctrine. This parameter is labelled a "legal move" in this article. The pragmatic goal of this article is to show that "legal moves" should be consciously used in training lawyers in today's complex legal landscape.

Legal scholarship has flirted with "legal moves" under different names, but never precisely framed it in a unified theory. In essence, a legal move is an abstract device that lawyers utilize in achieving a desired result, with a more complete definition to be developed below. Two defining features of legal moves are relevant to the pragmatic goals of this paper. First, legal moves are abstract, in the sense that they require a higher-order cognitive interface between other legal concepts such as doctrine and institutions. Second, legal moves are portable, in the sense that they transcend jurisdictional, professional and doctrinal boundaries. The first part of this article will illustrate these qualities in a selected number of legal moves, with the goal of showing why legal moves are a suitable parameter for framing contemporary legal training.

The second part of this article will take legal moves studied earlier, and place them in a larger theoretical framework. Specifically, it will show that legal moves are an integral part of the lawyer's cognitive being. In fact, cognitive science scholarship has explored expertise in almost every conceivable domain – including chess, sports, music, military and sciences – except for law. This article will use existing cognitive science theories to propose that legal expertise is built by thinking at various levels of abstraction, achieved by cumulative “chunking” of information. Moreover, it will identify three distinct levels of legal moves and classifies them according to their cognitive complexity. These three levels present a novel taxonomy of legal moves. Thus ultimately, this article will challenge doctrinal taxonomy, and offer a new taxonomy in its place.²

The pragmatic implications of this article should be clear. We are living in a world of increasing connectivity – among jurisdictions, among legal professions, and among doctrinal disciplines. The legal taxonomies created in the late nineteenth century simply did not have such concerns to address. A new taxonomy strongly founded in the cognitive processes of lawyers, and appropriately focused on cross-jurisdictional elements, can have the ultimate effect of increasing lawyer productivity on the global market. This goal is vital to the fundamental objectives of law schools and law firms, among other legal institutions. The outstanding reality is that the market needs lawyers who can show enough cognitive flexibility to understand and solve legal problems of

² In fact, a fresh model of taxonomy can be more constructive than further analysis of existing models, partially because it would not be constrained by all the historical boundaries of the existing taxonomies. See e.g., Heikki Pihlajamäki, *Against Metaphysics in Law: The Historical Background of American and Scandinavian Legal Realism Compared*, 52 AM. J. COMP. L. 469, 469 (2004) (arguing that “[o]ne of the problems with the traditional classifications is that they are too history-based to cope with apparent similarities with some of the world's legal systems which historically have little in common. The benefit of the newer taxonomies is that they are not solely built on history.”).

increasing legal complexity. The model proposed by this article promises to give just that – an expedited attainment of more portable legal expertise.

This article is organized as follows. Part II defines legal moves. Part III reviews scholarly literature to show that (i) there has been a trend toward distaste for legal moves; and (ii) a taxonomy of legal moves with a cross-jurisdictional model has never been attempted. Part IV studies three legal moves, in an effort to show that they (i) transcend doctrines, jurisdictions and professions; (ii) help lawyers distil abstract tools that enhance legal analysis; and (iii) entail levels of complexity that parallel the cognitive thinking of lawyers. Part V discusses the cognitive theory of expertise in order to reinforce the taxonomical framework for the moves studied in the previous section. Part VI concludes.

II. Definition of Legal Move

A legal move is an abstract concept that underlies legal constructs, which can be operated to achieve specific pragmatic goals. Specifically, lawyers use them to achieve a desired impact – legislators use them to make laws (regulatory impact), business lawyers use them to write contracts (risk-allocation impact), litigators use them to argue cases (persuasive impact), and so on. For example, one can spot various legal constructs based on the common sense idea of “burden.” Drafters of the U.S. Constitution placed the procedural burden on the prosecution to prove the elements of a criminal charge. Business lawyers routinely write contracts allocating the burden of certain conditions

precedent to the closing of a transaction.³ Likewise, a litigation lawyer's routine task of discovery is really an effort to meet the burden of persuasion in court.

Thus, legal moves are instruments of craft that are integrally related to experience. They are developed, tested, honed and perfected through the reiterative process of legal practice. In the sense that they are the product of expertise, legal moves are analogous to chess moves deployed by master chess players.⁴ Accordingly, the attainment of legal expertise is very much related to the continued practice of legal moves.

Legal moves must be strictly distinguished from other related notions: legal rules, legal reasoning, legal product and legal strategy. The following section uses the example of strict liability under U.S. tort law in order to distinguish the concepts listed above. It is premised on the common law tort principle that actors should be held strictly liable for injuries resulting from activities that pose an unusually high risk of injury.

- (i) Legal rule: This is the doctrinal statement of the liability or enforcement standard. It is the positive legal norm. The source of the legal rule may be either legislative or judicial. For example, the general U.S. formulation of the strict liability doctrine reads: "One who carries on an abnormally dangerous activity is subject to liability for harm to the person, land or chattels of another resulting from the activity, although he has exercised the utmost care to prevent the harm."⁵
- (ii) Legal move: This is the abstract device that underlies the mechanical operation of the legal rule. Specifically, the legal move deployed in the above example is a

³ For example, see the discussions of securitization transactions *infra*. Another example, not studied in this note but a compelling legal move for further research, is the use of poison pills as a defense to hostile corporate takeover bids.

⁴ See H.J. van den Herik, *From Chess Moves to Legal Decisions: A Position Statement*, The Foundation for Legal Knowledge Based Systems (suggesting that scientific progress in mimicking human chess performances can be transferable to the domain of law), available at <http://www.jurix.nl/pdf/j97-09.pdf> (last visited on November 28, 2005).

⁵ Restatement (Second) of Torts, §519(1) (1979).

burden shift.⁶ While under the ordinary negligence regime the plaintiff has the burden of proving that the defendant failed to exercise due care, in the strict liability regime the plaintiff only has to show that the defendant carried out an abnormally dangerous activity, without having to prove that due care was neglected. The burden shifts to the defendant to prove that he either did not carry out the activity at all, or that the plaintiff assumed risk. The move is not explicit in the legal rule defined above, but it is nevertheless integral to its operation.

- (iii) Legal reasoning: This is the methodology used by lawyers to apply the above legal rule to a specific set of facts. For example in the common law system, a lawyer arguing strict liability would first synthesize the applicable rule of law by reading binding tort cases in her jurisdiction (inductive), and second apply that rule of law by comparing or distinguishing the facts of the current case to those of the precedent cases (deductive).⁷ This process is different than legal moves because it involves facts, while legal moves can be operational purely in the abstract.
- (iv) Legal strategy: This is a tactical decision made by a lawyer – for example in litigation concerning the above rule of law, or in a transaction that could be affected by it. For example, a defendant’s attorney in a strict liability case may advise her client that it is wiser to settle the case than go to trial, based on her professional conclusion that her client has no defenses in the action. Legal strategy is different from legal moves because it is a concrete decision that is taken with respect to some facts, whereas legal moves can be operational purely in the abstract.⁸

A legal move is a distinct concept. It is broader than a legal rule because it applies outside of one doctrine and jurisdiction. It is more abstract than legal strategy because it is controlled by intellectual considerations rather than concrete ones such as

⁶ While the burden shift move is not studied in this article, it is a topic for further research.

⁷ Together, this technique of reasoning is also known as argument by analogy. See BRIAN L. PORTO, *THE CRAFT OF LEGAL REASONING* (Fort Worth: Harcourt Brace 1998) (arguing that legal reasoning is composed of three main components : (1) reasoning by analogy; (2) linguistic analysis; and (3) judicial discretion). See also Philip C. Kissam, *Law School Examinations*, 42 VAND. L. REV. 433 (1989) (attributing three basic characteristics to legal analysis: “The first . . . is issue spotting or, more precisely, perceiving analogies between the stated facts of an examination problem and professionally recognized legal issues, standards, and precedents . . . The second . . . requires the identification of relevant legal authorities or, in other words, a specification of legal rules and other relevant facts or holdings of precedents. The third . . . requires the application of legal authorities to complex fact situations. . . .”).

⁸ Legal strategy, as distinct from legal moves, has also been analogized to chess. See, e.g., Gregg L. Weiner, *Chess and the Art of Litigation*, 75 N.Y. ST. B. J. 46 (2003) (pointing out similarities between litigation tactics and chess strategy). This should not be confused with the extended metaphor of this paper, which compares legal moves to chess moves.

settlement value. It is broader than legal reasoning, because it is used not only to apply the law to certain facts, but to also analyze the operation of a legal rule in the abstract.

Legal moves are effective because they are portable, abstract and teachable. First, they transcend doctrinal, jurisdictional and professional boundaries. Their portable quality affords a user of legal moves a more adaptable craft – a vital quality in the modern legal market.⁹ Second, they facilitate legal analysis because of their abstract quality. An expert in command of these abstractions analyzes legal problems more efficiently than a novice who takes concrete and inefficient steps.¹⁰ Third, legal moves are easy to teach because they are prone to internal organization within their abstract system.¹¹ Legal moves can be made more cognitively accessible to students by an intelligible taxonomy in line with the cognitive processes of expertise. This article will illustrate each quality – portable, abstract, teachable – by studying three core legal moves below.¹²

⁹ See e.g., David S. Clark, *Transnational Legal Practice: The Need for Global Law Schools*, 46 AM. J. COMP. L. 261 (1998) (arguing that the growing demand for global lawyers necessitates a more global approach toward education in law schools across the world).

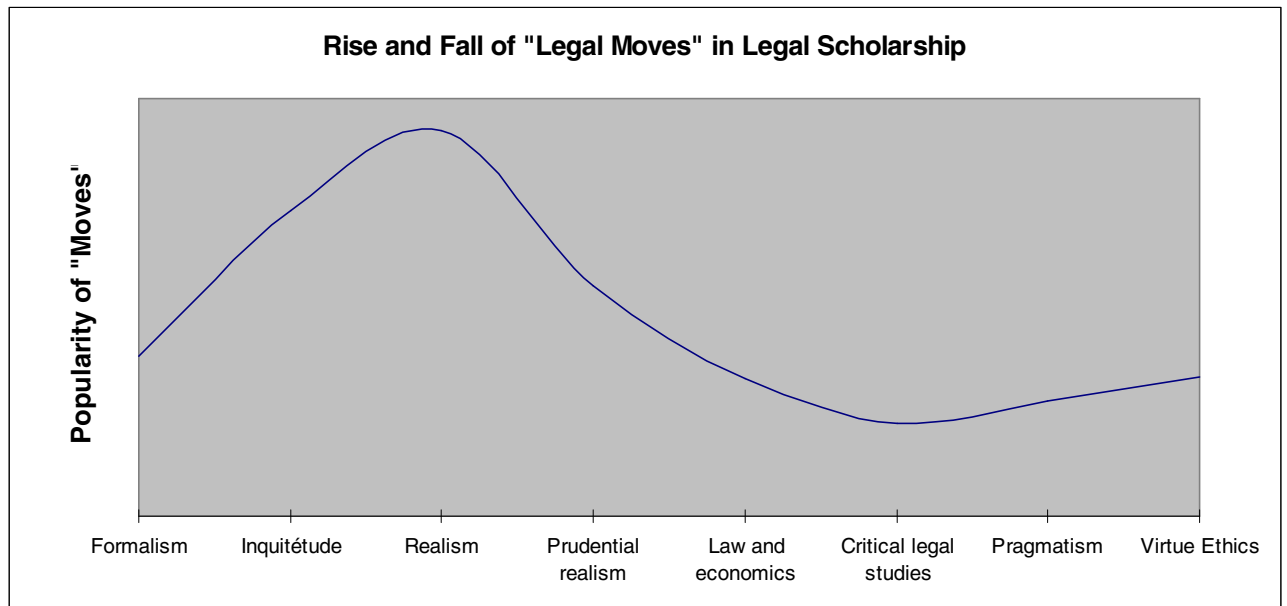
¹⁰ Legal systems have evolved, at least intellectually, by achieving leaps in abstraction. For example under common law, the shift from formal writs (eg. *assumpsit*) to general obligations (eg. *contract*) was a significant leap in abstraction, with all its attendant practical benefits. Similarly under civil law, the abstractions achieved by Roman law vis-à-vis preexisting legal systems were tremendous. This article suggests that by using legal moves, we can achieve still higher levels of abstraction than what our legal system currently sustains. However it does so without studying the historical development of law, which is a compelling perspective for further research.

¹¹ It has been shown in other disciplines that abstract organization is a preferred method of education. See e.g., Pat Langley, *Concrete and Abstract Models of Category Learning*, in PROCEEDINGS OF THE TWENTY-FIRST ANNUAL CONFERENCE OF THE COGNITIVE SCIENCE SOCIETY 288-94 (Martin Hahn & Scott C. Stoness ed., Lawrence Erlbaum Associates 1999) (arguing generally that abstract learning is more effective than concrete learning in various respects); Michael Mitchelmore & Paul White, *Abstraction in Mathematics and Mathematics Learning*, 3 PROC. OF THE 28TH CONF. OF THE INT'L GROUP FOR THE PSYCHOL. OF MATHEMATICS EDUC. 329 (2004) (arguing that a key component of learning mathematics is the formalization of empirical real-world concepts into more abstract concepts).

¹² The moves studied, *infra* part IV, are proportionality, comparativism, and arbitrage.

III. The Growing Distaste for Legal Moves in Legal Scholarship

Ever since early attempts by Langdell to taxonomize the law in the 1870s, scholarly literature has flirted with the concept of legal moves – though without ever using that term or offering a unified theory for their taxonomy. The review of scholarly literature below will show that (i) there has been a trend for decades toward a distaste for concepts akin to legal moves, (ii) the idea of taxonomy has experienced a similar decline; and (iii) a taxonomy of legal moves with a cross-jurisdictional model has never been attempted. The goal of this article is to fill that void by proposing a new model of taxonomizing legal moves – based on their abstract quality – which promises to serve the purposes of global legal training – based on their portable quality.



A. Formalism – Denial of Legal Moves

The legal movement of formalism, as represented by the scholarship of Langdell, marks the height of taxonomy and the denial of legal moves.¹³ Langdell is best known for two formal elements in the legal discourse – the scientific method for understanding the law, and the case method of study as a means of achieving this understanding.¹⁴ His concept of legal science entailed “a comprehensive scheme of classification in which every individual case might be fit under its controlling rule in much the same way that a biologist fits individual birds, fish, and so on under their appropriate species-types.”¹⁵ For example, in a typical top-down exercise of classifying doctrinal rules, (i) public law would be juxtaposed against private law; (ii) within private law tort would be juxtaposed against contract; (iii) within contract law a true contract would be juxtaposed against a quasi-contract; (iv) so on indefinitely.¹⁶ This type of classification necessarily gave rise to the second novel concept – the case method of study – because Langdell believed the

¹³ Note that there were other extensive legal taxonomy projects long before Langdell, such as the Roman classification of doctrinal fields. Some of these projects may have been more extensive than the Langdellian project and indeed are very interesting. However, this note will not survey those projects, because it focuses on modern legal scholarship and education.

¹⁴ There were parallel movements in European legal education during Langdell’s time. See Laura I. Appleman, *The Rise of the Modern American Law School: How Professionalization, German Scholarship, and Legal Reform Shaped our System of Legal Education*, 39 NEW ENG. L. REV. 251, 253 (2005) (illustrating that, during Langdell’s time, “law’s ‘scientific methodology,’ and even the concept of ‘thinking like a lawyer,’ was, in truth, a combination of German scholastic methods, theories of ‘legal science,’ and English common law materials.”). Meanwhile, during Langdell’s innovations in U.S. legal education, the scientific method was also being emphasized by German scholars such as Leopold von Ranke, who also preached absolute fidelity to sources of law. *Id.* citing Humboldt University website at <http://www.geschichte.hu-berlin.de/galerie/texte/ranke.htm> (last visited Nov. 30, 2005).

¹⁵ ANTHONY KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION 170-71* (The Belknap Press of Harvard University Press 1993). It has also been suggested that Langdell’s organic conception of the law should be viewed in the context of Charles Darwin’s “The Origin of Species,” insofar as the evolution of species can be seen as parallel to the nature of laws as immutable, but at the same time alterable and contingent. See Appleman, *supra* note 11, at 284 (citing David S. Clark, *Tracing the Roots of American Legal Education – A Nineteenth Century German Connection*, in 1 THE HIST. OF LEGAL EDUC. 499 (Steve Sheppard ed., 1999)).

¹⁶ Duncan Kennedy, *From the Will Theory to the Principle of Private Autonomy: Lon Fuller’s “Consideration and Form,”* 100 COLUM. L. REV. 94 (2000)

classificatory system was a product of the historical evolution of the common law, and that one could only unravel the latent logic of the common law by studying the cases that represent that history.¹⁷

Langdell's principles signify the height of taxonomization because of its formal approach to law. In fact, that they have been compared to the system of axioms and corollaries in the science of geometry. As regards axioms, one must start by identifying the elementary principles on which a legal doctrine is based (for example in contract law, the principle that contract formation requires a meeting-of-the-minds).¹⁸ As regards corollaries, one then identifies the subordinate principles and defines the relationship between all these principles. The result is a well-ordered system of rules that offers the best description of that branch of law. Cases fit into a rational geometry that can be deciphered with little experience, and those cases that do not fit into this system must be purged as mistakes.¹⁹

Langdell's model of geometry does not rely on experience. According to Langdell, the axioms of legal science can be understood by sole use of logical thought and case law, just as geometry's starting point is a set of axioms which do not require experience to understand.²⁰ In other words, the only experience necessary to grasp legal

¹⁷ CHRISTOPHER COLUMBUS LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS vi-vii (Legal Classics Library 1983) (1879) (stating that “[l]aw, considered as science, consists of certain principles or doctrines . . . It seemed to me, therefore, to be possible to take such a branch of the law as Contracts, for example, and, without exceeding comparatively moderate limits, *to select, classify, and arrange* all the cases which had contributed in any important degree to the growth, development, or establishment of any of its essential doctrines . . .”) (emphasis added).

¹⁸ Kronman, *supra* note 14, at 171.

¹⁹ *Id.* at 171

²⁰ *Id.* at 172

doctrine is mastering the taxonomy of cases. In a universe where experience is not valued, legal moves cannot be held in high respect. That is the reason legal moves were at the bottom of their popularity during the Langdell period.

Moreover, the geometric conception of the legal system may work domestically, but not internationally, because different legal systems have different axiomatic starting points. For example, consideration is a fundamental requirement of contract formation in the U.S. but not under Turkish contract law.²¹ Without experiencing other legal systems, Langdell's model of education becomes difficult to apply to today's interactive legal training. This is especially true because in most countries case law is not recorded as extensively as in the common law systems, making it close to impossible to taxonomize case law. So if some taxonomy is going to help international education, it cannot be the taxonomy of legal rules derived from axioms found in case law, but the taxonomy of some other cross-jurisdictional concept – such as legal moves.

B. Inquiétude – Acknowledgement of Legal Moves

Soon after Langdell, René Demogue acknowledged a concept akin to legal moves in Europe. Though his work is presently largely forgotten in French legal culture,²² as well as in U.S. legal culture,²³ it is significant for the history of legal moves. Demogue belonged to a group of jurists sometimes referred to as the “jurists inquiéts” (the worried

²¹ See Turkish Code of Obligations.

²² Kennedy, *supra* note 15, fn. 40.

²³ A search with the keyword “Demogue” in the Westlaw database for all law journals produced only 49 documents citing Demogue since 1951 – an average of less than one citation per year.

or anxious jurists), who reacted to the clash between the formalism of classic legal thought and the rapidly changing modern world.²⁴ While his masterpiece mainly criticized classical legal thought, it also embarked on its own legal theoretical project of taxonomizing the basic concepts in legal thought.²⁵ Specifically, Demogue suggested that there is a limited number of basic concepts that animate the design of private law rules, namely (i) static and dynamic security; (ii) economy of time and activity; (iii) justice; (iv) equality; (v) liberty; (vi) solidarity and the notion of apportioning losses; (vii) public interest; (ix) protection of future as opposed to present interests; and (x) protection of emotional as opposed to material interests.²⁶ These concepts were akin to legal moves in the sense that they conceptualized the law at a higher level of abstraction than doctrine.

Demogue discussed each of these concepts in depth in his book, but it is unclear exactly what he was attempting to taxonomize: legal rules, moves, policies or techniques? At least one commentator suggests that Demogue presents an unstructured list of policies, legal concepts, institutional descriptions, abstract values, concepts, and stereotypes about social life – a mix of factors that are not classifiable under any one title such as legal moves or legal rules.²⁷ For example, under his analysis of “economy of time and activity,” Demogue seems to give generalized policy reasons for efficiency, rather than analyze how a particular legal move operates to serve the policy of efficiency.²⁸

²⁴ Marie-Claire Belleau, *The “Jurists Inquiets”: Legal Classicism and Criticism in Early Twentieth-Century France*, 1997 UTAH L. REV. 379 (1997).

²⁵ Rene Demogue, *Analysis of Fundamental Notions*, in MODERN FRENCH PHILOSOPHY 345 (Mrs. Franklin W. Scott & Joseph P. Chamberlain trans., Augustus M. Kelley 1968) (1911).

²⁶ *Id.* at 345.

²⁷ Kennedy, *supra* note 15, at 110.

²⁸ “The legal systems of the western world, inspired largely by the wish to encourage business and the active life, have sought to arrange the performance of juridical acts . . . as to economize time to the utmost, thus making it easier for individuals to act and thereby create wealth.” Demogue, *supra* note 27, at 471.

Moreover, with regard to globalization, Demogue suggested harmonization of legal doctrines, not of legal moves: “If all civilized States would adopt a common body of law, if there existed a common law for Europe or for the world, there would be an end to much study and to the perplexing conflicts arising in private international law.”²⁹ This suggestion may be valuable in its own right,³⁰ but it responds to an entirely different concern than the one addressed in the discourse of legal moves – Demogue was worried about lack of harmony in substantive rules of law, while this article identifies harmony among legal moves, regardless of the substantive doctrines that overlay them.

Demogue himself conceded that his project was not very successful: “[t]he simplicity which our minds requires does not appear to be the law of the exterior world.”³¹ At least one commentator adds that Demogue was unable to “forc[e] [the collection of concepts] into his own meta-theory.”³² Nonetheless, Demogue started giving hope to the idea of legal moves, as he represented a shift away from Langdell’s pure doctrinal taxonomy, toward the analysis of some abstract ideas, whatever those may be. Moreover, Demogue gave more deference to the idea of cross-doctrinal concepts than Langdell. For example, in his abstract discussion of the principle of “security,” he made specific reference to how security affects certain legal relationships, in the areas of property, agency, tort and contract law³³ – thus acknowledging that certain considerations can transcend doctrinal boundaries. In summary, while Demogue did not precisely frame

²⁹ *Id.* at 474.

³⁰ In fact, it can be viewed as a prescient foreshadowing of the current twenty-first century harmonizing among European legal systems.

³¹ *Id.* at 564.

³² Kennedy, *supra* note 15, at 110-11.

³³ Demogue, *supra* note 27, at 424-25.

the concept of legal moves, he paved the way by shifting away from doctrinal taxonomy and flagging the importance of certain cross-doctrinal principles.

C. Realism – Llewellyn, Frank, Laswell and McDougal

The movement of legal realism marks the height of legal moves, before its subsequent decline.³⁴ As shown below, the constituent strands of the realism first acknowledged legal moves, then attempted to use them, and finally tried to taxonomize them – though under a different rubric each time. In particular, none of the realist attempts ever posited a unified theory that would serve the needs of contemporary legal training. Incident to this shortage, the realism movement came under severe attack from modern legal scholarship.

In general terms, realism opposed Langdell's conception of formal legal science, and viewed the law largely as a tool to achieve certain stated ends.³⁵ Historically, the movement was seen as a leftist-oriented social tool, which purported to remedy the problems caused by late nineteenth-century industrialization and urbanization.³⁶ In that sense, it shared the "worried" state of Demogue and the *jurists inquiets*. However its tools relied more sharply on experience as a way of effecting change, which is its relevant feature for purposes of this article. The role of experience in the legal realism movement

³⁴ Oliver Wendell Holmes, "*The life of the law has not been logic; it has been experience*" , Book Review, 14 AM. L. REV. 233, 234 (1880) (reviewing CHRISTOPHER C. LANGDELL, SUMMARY OF THE LAW OF CONTRACTS (1880)).

³⁵ Annelise Riles, *A New Agenda for the Cultural Study of Law: Taking on the Technicalities*, 53 BUFF. L. REV. 973 (2005).

³⁶ See Pihlajamäki, *supra* note 1, at 471.

has been described in the following way: “If law was to be a tool in social engineering, facts and expert judgment had to replace doctrine and tradition.”³⁷ This emphasis on expert judgment meant that legal realism was a large step in the direction of endorsing legal moves, although still its proponents did not complete a unified theory of legal moves. In that regard, the section below surveys the relevant strands of legal realism.

1. Judicial Discretion – Recognition of Legal Moves

The realist model of judicial discretion, posited by Jerome Frank, was an early recognition of legal moves. Frank disagreed with Langdell’s geometric axioms because he believed a judge making decisions must rely on his real-world experience, and inevitably make some discretionary choices that have no corollary in science or geometry.³⁸ For example, a judge must use discretion in choosing between conflicting starting principles in resolving a dispute – such as the choice between a consideration-based and an intent-based starting point in resolving a contract dispute.³⁹ Accordingly, the Langdellian study of the cases in a particular doctrine does not necessarily produce one set of internally consistent principles – instead the results are more likely to yield conflicting principles subject to debate and resolution.⁴⁰ In short, Frank substituted discretion for reason as the main faculty in adjudication.⁴¹ This conception of discretion

³⁷ Stewart Macaulay, *The New versus the Old Legal Realism: “Things Ain’t What They Used to Be,”* 2005 WIS. L. REV. 365, 367 (2005).

³⁸ *Id.* at 189

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* at 191

(and inevitably experience) was the first reference in American legal scholarship to an idea that comes close to legal moves.⁴²

Conceiving discretion as the main building block of adjudication had strong implications for legal training, too. In fact, Frank was a vocal proponent of clinical law education, defending the position that legal education should be primarily experiential.⁴³ To this day, Frank's writing has been described as "the most prominent effort to apply realist insights to legal education."⁴⁴ He posited that doctrinal analysis of cases does not optimally prepare the law student for practice, for three reasons. First, judicial decisions are *post hoc* rationalizations of decisions made for a variety of real-world reasons; second, controlling factors of litigation often are found in the social interactions among real-world players; and third, the facts of the case are not found but created in the course of litigation and negotiation.⁴⁵ Accordingly, his espousal of an experiential model of legal education was a brilliant step forward in recognizing legal moves.⁴⁶ However Frank still left work to be done: he never attempted to taxonomize the very practical moves which he proposed to teach.

⁴² Perhaps Frank's emphasis on experience came from his own diverse real-world endeavors as a corporate attorney, a scholar, an administrator and a federal appellate court judge. See Matthew W. Frank, *Book Report*, 84 MICH. L. REV. 866 (1986) (reviewing ROBERT J. GLENNON, *THE ICONOCLAST AS REFORMER: JEROME FRANK'S IMPACT ON AMERICAN LAW* (1985)). As this note will demonstrate below, cross-practice experience is indeed one of the motivations for attempting to taxonomize legal moves.

⁴³ Jerome Frank, *Why Not a Clinical Lawyer-School?*, 81 U. PA. L. REV. 907 (1933).

⁴⁴ Morris D. Bernstein, *Learning From Experience: Montaigne, Jerome Frank and the Clinical Habit of Mind*, 25 CAP. U. L. REV. 517, 528 (1996).

⁴⁵ *Id.*, citing Frank, *supra* note 46 at 911-13.

⁴⁶ See Bruce A. Ackerman, *Law and the Modern Mind by Jerome Frank*, 103 DAEDALUS 119 (1974) (noting the unappreciated brilliance of Frank's contribution); see also Part VI *supra* for particular recommendations of how legal education can benefit from the study of legal moves.

2. Values – Early Use of Legal Moves

Two scholars – Laswell and McDougal – issued an early invitation for lawyers to use legal moves. Specifically, while Frank had asserted that judicial discretion helps describe the law, Laswell and McDougal posited a set of values that lawyers should normatively choose in practicing their craft.⁴⁷ They advocated a new legal science, with a value framework at its core, where lawyers must employ “naturalistic skills of observation and analysis.”⁴⁸ They contended that the law school curriculum should not be organized around traditional doctrinal boundaries, but instead around certain value and skill principles.⁴⁹ They developed a list of values to serve as a guide: power, enlightenment, respect, well-being, skill, affection, and rectitude, and wealth.⁵⁰ As for skills, they believed students should focus on the three broad categories of thought, observation and management.⁵¹ They believed those skills should also be taught outside the classroom.⁵² This was a powerful suggestion of clinical education, and some commentators believe that to this day clinical education has not reached the standard established by Laswell and McDougal.⁵³ In short, while Frank had acknowledged legal

⁴⁷ Harold D. Lasswell & Myres S. McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 YALE L.J. 203 (1943).

⁴⁸ Kronman, *supra* note 14, at 203.

⁴⁹ Laswell and McDougal, *supra* note 49, at 247-89.

⁵⁰ HAROLD D. LASSWELL & MYRES S. MCDUGAL, *JURISPRUDENCE FOR A FREE SOCIETY: STUDIES IN LAW, SCIENCE AND POLICY*, at 30-31 (1992).

⁵¹ Laswell and McDougal, *supra* at note 49, at 265-89.

⁵² “Very often it has been pointed out that the training of modern students deflects their attention from the factual contexts in which legal technicalities are made functional and that this cannot receive entirely satisfactory correction by providing more fact books. The recommendation is that opportunities be provided for direct contacts with courts, administrative agencies and other parts of our social process.” *Id.* at 291.

⁵³ Luther L. McDougal III, *Professor Myers S. McDougal’s Contribution to Legal Education*, 66 MISS. L.J. 27 (1996).

moves, Laswell and McDougal urged use of legal moves. However they did not attempt to identify or taxonomize them.

3. Prudential Realism – Attempted Taxonomy of Legal Moves

Prudential realism, embodied largely in the work of Karl Llewellyn, is an early attempt to taxonomize legal moves. Llewellyn asked the question that other realists left unanswered: do judicial decisions have some intelligible order independent from doctrinal boundaries?

Llewellyn believed judicial decisions could be arranged according to a set of organizing principles, which included non-legal practical factors.⁵⁴ This was the first time someone had suggested using a parameter other than doctrine to organize the law. Llewellyn believed this was necessary because doctrinal rules did not reflect the full reality: “the rules not only fail to tell the full tale, taken literally they tell much of it wrong; and while words can set forth such facts and needs as ideals, craft-conscience, and morale, these things are bodied forth, they live and work, primarily in ways and attitudes which are much more and better felt and done than they are said.”⁵⁵ He set out to seek a taxonomizing principle to understand the craft of lawyers.

⁵⁴ See generally, KARL LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* (William S. Hein & Co., Inc 1996) (1960).

⁵⁵ Kronman, *supra* note 14, at 214.

Accordingly, Llewellyn identified a long list of legal moves that gave judges discretionary power, and fourteen factors generally constraining this discretion.⁵⁶ The idea was that appellate judges had the freedom to engage in certain legal moves, and their discretion was only checked by some institutional factors. In simplified terms, these legal moves fell under the three large categories of (i) following precedent; (ii) avoiding precedent; and (iii) expanding precedent.⁵⁷ He then identified various sub-moves for each one of the main moves, and further sub-moves under those, giving examples from case law to illustrate the use of each.⁵⁸ On the aggregate, the project consisted of three layers of precedent-treating techniques, culminating in sixty-four discrete moves.

For example, under the general move of “avoiding precedent” Llewellyn identified a sub-move called “avoidance without accepting responsibility for the future” and under that a further sub-move under called “the rule (or principle) was there recognized, the only difficulty being its application.”⁵⁹ He illustrated the applicability of this move by citing to the famous tort case of *McPherson v. Buick*, in which the judge had avoided precedent.⁶⁰ In another example, under the general move of “expanding precedent,” Llewellyn identified a sub-move called “fresh starts from old materials” and under that a further sub-move called “material enlargement or subdivision of a

⁵⁶ These factors are: (i) law-conditioned officials; (ii) legal doctrine; (iii) known doctrinal techniques; (iv) responsibility for justice; (v) one single right answer; (vi) an opinion for the court; (vii) a frozen record from below; (viii) issues limited, sharpened, and phrased in advance; (ix) adversary argument by counsel; (x) group decision; (xi) judicial security and honesty; (xii) a known bench; (xiii) the general period-style and its promise; and (xiv) professional judicial office. See Llewellyn, *supra* note 58, at 19-51.

⁵⁷ *Id.* at 77-91.

⁵⁸ *Id.*

⁵⁹ *Id.* at 84.

⁶⁰ In that case, the judge opined, in reference to a precedent which he did not want to follow: “Thomas v. Winchester became quickly a landmark of the law. In the application of its principle there may at times have been uncertainty or even error. There has never in this state been doubt or disavowal of the principle itself.” *McPherson v. Buick*, 217 N.Y. 382, 385 (1916).

concept.”⁶¹ He then illustrated the application of this move by citing to *Nelson v. West Coast Dairy Co.*, in which the judge had expanded the applicability of a rule of law to a new class of defendants.⁶² Each one of the sixty four moves identified have at least one case reference illustrating its application.

Llewellyn described his project as “set[ting] up such a workbench of tools as the foregoing.”⁶³ His desire of creating a toolbox of legal moves is exactly parallel to the purported methodology of this article. Furthermore, the practical impact of such a toolbox on lawyer productivity is also a shared element between Llewellyn’s project and this article. In fact Llewellyn predicted, if optimistically, that “. . . the revivifying of a few simple ideas and ideals all ancient in our tradition can also, within the craft of appellate judging itself, step up the level of performance and of the craftsmen’s intangible income of satisfaction in their work.”⁶⁴

Once the lawyer has a toolbox, how does she know which tool to use and when? According to Llewellyn, another experience-based concept dubbed “horse sense” allows the lawyer to navigate the contents of the toolbox: “With such assorted wealth of tools at hand, their choice and use become in part a key to craftsman and to craft.”⁶⁵ The ability to navigate the toolbox becomes an integral part of the legal craft. Experienced practitioners build this “extraordinary and uncommon kind of experience, sense and

⁶¹ Llewellyn, *supra* note 57, at 89.

⁶² “From the necessities of such situations, and in reason, the consumer’s right of recovery is not limited to an action against his own immediate vendor, but reaches the retailer, wholesaler, producer, and all others who participate in the sale and distribution of such deleterious notes of food.” *Nelson v. West Coast Dairy Co.*, 5 Wash. 2d 284, 290 (1940).

⁶³ Llewellyn, *supra* note 57, at 91.

⁶⁴ *Id.* at 155.

⁶⁵ *Id.* at 100.

intuition which was characteristic of an old-fashioned skilled horse trader in his dealings either with horses or with other horse traders.”⁶⁶ To date, Llewellyn’s formulation of “horse sense” is as close as legal scholars ever came to taxonomizing legal moves – as a set of professional reflex muscles made up of intuitional tissue. However for the reasons stated below, this formulation still fell short of what global legal training requires today.

First, Llewellyn’s taxonomy is confined to the narrow field of appellate judging. However modern legal training must also prepare lawyers for private practice, policy-making and scholarship. This is especially true in an era where private law firms are building an institution of legal practice that is comparable in magnitude and resources even to the judiciary (a fact which was not true in Llewellyn’s time).⁶⁷ While Llewellyn wrote the following words with the appellate bench in mind, he might as well have written them for the contemporary law firm: “Tradition grips them, shapes them, limits them, guides them; not for nothing do we speak of *ingrained* ways of work or thought, or men *experienced* or case-hardened, of *habits* of mind.”⁶⁸

Second, Llewellyn’s taxonomy is not organized in a rigorous fashion and therefore not suitable for systematic teaching. Llewellyn himself concedes that horse-sense is not reducible to a method.⁶⁹ Therefore no analytical description of it can be complete.⁷⁰ Moreover, Llewellyn believes that horse sense is an unconscious process

⁶⁶ Kronman, *supra* note 14, at 223.

⁶⁷ *Id.* at 271-314 (illustrating generally the growing number and power of private law firms).

⁶⁸ Llewellyn, *supra* note 57, at 53 (emphasis in original).

⁶⁹ Kronman, *supra* note 14, at 223.

⁷⁰ *Id.* at 223.

which “just happens as you go.”⁷¹ He concedes that it is not easily imparted to law students: “[t]he trained always have more of it than the untrained or the recruits. The experienced always have more of it than the green . . .”⁷² In sum, Llewellyn’s model was deficient in its organization as well as its teaching capacity. This article will eradicate both deficiencies by proposing a taxonomy that can be rigorously organized and taught.

D. Contemporary Scholarship

Despite his initial influence, Llewellyn does not have a large following today. His scholarship has largely been marginalized by two new movements, Law and Economics and Critical Legal Studies, both of which are descendents of Langdell’s scientific realism.⁷³ These two movements virtually annihilated the regard for legal moves in American legal scholarship. Whatever faith remains in legal moves today, it exists under the umbrellas of Pragmatism and Virtue Ethics. Scholars belonging to those movements have salvaged a residual portion of Llewellyn’s experiential values, although it is hard to say that realism carries its initial force today.

1. Law and Economics – Criticism of Legal Moves

Law and Economics, an influential contemporary movement, has catalyzed the decline of legal moves by presenting the opposing force of economic moves. Richard Posner, the leading voice in this movement, had argued that the law has

⁷¹ *Id.* at 217.

⁷² *Id.* at 217.

⁷³ *Id.* at 225.

an intelligible structure, though not in the working vocabulary of lawyers themselves – but in the language of economics.⁷⁴ The structure of the law is best described by concepts such as scarcity, efficiency, welfare and waste-minimizing rationality.⁷⁵ This economic conception of the law takes a large bite into the value of legal moves because it makes a significant conceptual leap by asserting the language of the law is itself irrelevant. In fact, Posner himself predicts that Law and Economics will rapidly become the prominent legal theory, replacing the older theories that endorse legal moves.⁷⁶

Posner sees the legal profession in a state of self-delusion, and ascribes that state to the profession's persistent embrace of its archaic legal concepts, which include legal doctrine as well as legal moves.⁷⁷ He criticizes the profession's pride with its "craft" because even the traditionally most craft-worthy tasks are now assigned to young and inexperienced lawyers.⁷⁸ He implies that legal scholars resisting Law and Economics "do not want to risk undermining their claim to professional autonomy by getting into areas where they do not command all the tools of the inquiry."⁷⁹ As for legal training, Posner suggests that law schools de-emphasize the non-scientific skills that lawyers have traditionally employed and instead focus on law and economics.⁸⁰

⁷⁴ RICHARD A. POSNER, *OVERCOMING LAW* (Harvard University Press 2000) (1995).

⁷⁵ For example when a Law and Economics scholar studies even the most noncommercial legal subject of criminal law, he relies on tools such as price theory – based on the conception that severe criminal punishments have deterring effects similar to those of high prices. *Id.* at 439.

⁷⁶ *See generally id.*

⁷⁷ "The complexity of the law's doctrines, the obscurity of its jargon, and the objectifying of 'the law' are in part endogenous to the organization of the legal profession, rather than being exogenous factors to which the profession has adapted by setting high and uniform standards for qualification." Posner, *supra* note 77, at 58.

⁷⁸ *Id.* at 68-69.

⁷⁹ *Id.* at 73.

⁸⁰ Kronman, *supra* note 14, at 239.

This is a dismal portrayal of the legal profession's autonomy. Law and Economics asserts that autonomy of the law has been declining steadily for the following reasons.⁸¹ First, there are internal reasons, such as the collapse of political consensus among academics, and the boredom of the most imaginative practitioners with the old techniques of the profession. Second, there is a surge in more exact and exciting disciplines such as science, economics and philosophy, which make "traditional legal doctrinal analysis . . . to many young scholars, old-fashioned, passé, tired."⁸² Third, there is a collapse in the confidence in the ability of lawyers to deal with major problems of the legal system. For example, earlier successes of the bar such the Federal Rules of Civil Procedure left their place to new failures such as a bankruptcy code that led to an increase in the number of bankruptcies, an overwhelming expansion of tort liability that may be destroying the institution of liability insurance, and additional failures other areas of law.⁸³ Fourth, there is the increasing importance of statutes and the Constitution as sources of law, which have made obsolete the skill of inductive and deductive legal reasoning traditionally associated with the common law. He uses these sets of dynamics to discredit the work of the realists discussed above.⁸⁴

It is easy to see that each of these criticisms falls apart when viewed in the global context. First, there is no boredom in the comparative law field because that is where some very imaginative scholars are working currently. Second, the surge of more

⁸¹ See generally, Richard A. Posner, *The Decline of Law as an Autonomous Discipline: 1962-1987*, 100 HARV. L. REV. 761 (1987).

⁸² *Id.* at 773.

⁸³ *Id.* at 771.

⁸⁴ He impliedly agrees with the description that "naughty boys like Jerome Frank and Karl Llewellyn chase[d] the formalist butterflies until they turn[ed] into formalist butterflies themselves." *Id.* at 775.

exact sciences such as economics does not make legal analysis unappealing to young lawyers, so long as the legal profession keeps adopting its methodologies to the modern global world, through projects such as the current article. Third, so-called failures of the bar are not universal. For example, it may be proved that the overhaul of Turkish competition law is offering benefits to society at the same time as the new U.S. bankruptcy code is arguably creating more bankruptcies. Fourth, the move toward heavier statutory interpretation in the U.S. is arguably paralleled with the move toward heavier use of case precedent in civil law systems. In short, Posner's reasons for criticizing the law's autonomy are very American-centric and do not take into account the global state of the legal profession. Accordingly, the cross-jurisdictional theory of legal moves, which is presented in this article, is largely immune to the main criticisms of the Law and Economics movement.

2. Critical Legal Studies – Downfall of Legal Moves

Critical Legal Studies has been equally hostile toward legal moves, but its weapon of choice is policy rather than economics. Notably, this movement asserts that the organizing principles of law are the competing forces of individualism and altruism.⁸⁵ Accordingly, no matter the substance of the legal issue, lawyers will always make one of few available stereotyped arguments, every single argument being reducible to a balance between individualism and altruism – two competing values in the realm of policy.⁸⁶

⁸⁵ Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976).

⁸⁶ *Id.* at 1713.

Duncan Kennedy gives some examples of how these values operate. For instance, he categorizes contracts under individualism because the right to expect performance of a promise is born out of an individualistic preference for furtherance of one's interests.⁸⁷ By contrast, he categorizes progressive taxation under altruism because it is designed to "force people with power to have due regard for the interest of others."⁸⁸ In addition to these two examples, all other modes of legal argument also fall somewhere on the continuum of individualism and altruism. Accordingly, every legal conclusion must be a function of a policy balancing, and ultimately it is impossible for legal argument to be autonomous from moral, economic, and political discourse.⁸⁹

Critical Legal Studies becomes antagonistic toward the legal craft in Kennedy's narrative of a hypothetical judge, whose desired outcome for a case diverges from the obvious outcome suggested by a straight application of the law.⁹⁰ The hypothetical judge uses a series of tricks to put a favorable twist on the law and facts, and to come out triumphantly ruling the case in line with his personal views. His skill in reaching this result is described in terms of his ability to manipulate legal thought, by using his own political interpretation of law, facts and precedent.⁹¹ The lesson of the hypothetical is that legal rules never determine the outcome of a case, because all

⁸⁷ *Id.* at 1715.

⁸⁸ *Id.* at 1719.

⁸⁹ *Id.* at 1724.

⁹⁰ Duncan Kennedy, *Toward a Critical Phenomenology of Judging*, in *THE RULE OF LAW: IDEAL OR IDEOLOGY*, 141-67 (Hutchinson and Monahan 1987).

⁹¹ Kennedy offers the visual metaphor of the law as a field, with doctrinal principles that are separated by boundaries (reminiscent of Langdell's geometry), delimited by case precedents. *Id.* For another very interesting composition on visual metaphors describing the law, see Pierre Schlag, *The Aesthetics of American Law*, 115 *HARV. L. REV.* 2047 (2002). Schlag offers four alternative metaphors for visualizing the legal system: (i) the grid aesthetic; (ii) the energy aesthetic; (iii) perspectivism; and (iv) the disassociative aesthetic.

variables in legal reasoning are indeterminate and subject to interpretation depending on the judge's own politics.⁹² Judges merely “respond to [hard cases] with legalistic mumbo jumbo, that is, by appealing to the concepts and pretending that they have decided the case for him.”⁹³ Separately from judges, scholarly legal arguments in the academia “are just made up out of whole cloth to wile away the evening or get tenure or legitimate the status quo or make pretty patterns or scratch the itch of existentialist dread before the unknowableness of the most important things in life.”⁹⁴

At a point where legal reasoning was described as “mumbo jumbo,” “existentialist,” “old-fashioned” and “passé,” the credibility of legal moves as an autonomous device had lost most of its appeal in legal scholarship. Llewellyn's conception of practical wisdom had eroded almost completely, and scholars were starting to look outside the law to describe the processes of legal reasoning.

3. Pragmatism – Salvaging of Legal Moves

The respect for legal craft had reached an historical minimum with Critical Legal Studies – until a group of self-proclaimed “pragmatists” emerged in the late 1980s to salvage what was left of Llewellyn's conception of practical experience. While the legal pragmatists were a diverse group of thinkers,⁹⁵ they shared a general theoretical

⁹² Kennedy, *supra* note 98, at 164-66.

⁹³ *Id.* at 1732.

⁹⁴ *Id.* at 166-67.

⁹⁵ A confusing fact is that Richard Posner is also a self-proclaimed pragmatist, even though the bulk of his philosophical commitment up to the late 1980s had been to the movement of law and economics.

outlook that tied Aristotle's concept of practical wisdom to various other philosophies.⁹⁶ The pragmatists perceived human thought as both a product of past experience and an instrument for predicting the future environment, and they were met with hostility from the Law and Economics camp.⁹⁷ Clearly, they did not find economics or policy as relevant parameters of the law, because they were not intrinsic to the human experience.

The pragmatists' contextual view of knowledge was significant for legal moves, because it considered knowledge as being subject to modification in light of additional experience.⁹⁸ It follows from this formulation that there is little advantage in taxonomizing rules of law, because laws change over time and they vary across jurisdictions. On the contrary, legal moves are more stable over time, as well as across many jurisdictions – as shown in the next chapter. Moreover, they are a product of years of human experience in dealing with rules of law. Therefore according to the legal pragmatist conception of practical wisdom, legal moves would have been a perfect candidate for taxonomization. The problem is that while the pragmatists recognized the principles underlying legal moves (ie. practice, craft, and experience), they never attempted to frame legal moves in a unified theory, much less to taxonomize them.⁹⁹

Pragmatism therefore opened the door to reconsider legal moves in legal scholarship, but left work to be done in terms of a more specific formulation of legal moves.

⁹⁶ Thomas F. Cotter, *Legal Pragmatism and the Law and Economics Movement*, 84 GEO. L.J. 2071 (1996).

⁹⁷ For example, Posner asserted that practical reason “denotes the methods by which people who are not credulous form beliefs about matter that cannot be verified by logic or exact observation [and consists of] a grab bag [of methods] that include anecdote, introspection, imagination, common sense, empathy, imputation of motives, speaker's authority, metaphor, analogy, precedent, custom, memory, “experience,” intuition, and induction.” RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* (1990), at 71-73.

⁹⁸ *Id.* at 2077.

⁹⁹ See generally Daniel A. Farber, *The Inevitability of Practical Reason: Statutes, Formalism, and the Rule of Law*, 45 VAND. L. REV. 533, 542 (1992).

At an empirical level, pragmatism asserted that “practical sense” exists in the legal brain, in the form of a learnable cognitive skill parallel to Llewellyn’s “situation sense.”¹⁰⁰ In a gripping article, Daniel Farber suggests that expertise in fields other than law, such as chess, mirrors the use of practical sense in law.¹⁰¹ He references scientific experiments showing that in the field of chess, there is a cognitive skill set that is acquired through experience.¹⁰² He suggests that chess masters have some type of Llewellynian “situational sense,” which is not attained simply by understanding the rules of the chess game, but through experience. In fact, Farber points out that chess masters have spent ten to twenty thousand hours staring at chess positions during their career – the equivalent of full time study for ten academic years on a single subject.¹⁰³ The suggestion is that legal “practical sense” is also attained through experience.

4. Virtue Ethics – Revival of Legal Moves

Another living strand of contemporary legal thought that still endorses practical wisdom is virtue ethics. This field applies a particular category of practical wisdom – intellectual virtues – to a variety of legal situations. For example, Heidi Feldman uses virtue ethics and moral theory to interpret the tripartite quality of the

¹⁰⁰ *See generally id.*

¹⁰¹ *Id.* at 554-58. *See also* van den Herik, *supra* note 4, for possible future applications of artificial intelligence to the practice of law.

¹⁰² “In these experiments, the subject was shown a slide of a chess board briefly and afterwards asked to recall the positions of the pieces. Novices were lucky to be able to remember the positions of five or six pieces after seeing a board for five seconds, while chess masters were able to reconstruct the positions of twenty pieces . . . But in other areas, chess masters have no better than average memories (nor typically, are they particularly intelligent outside of their field).” Farber, *supra* note 108, at 555.

¹⁰³ *Id.*, *citing* estimates in M.H. CHI, R. GLASER & M.J. FARR, *THE NATURE OF EXPERTISE*, at xxxi (Lawrence Erlbaum Associates 1988).

ordinary liability standard in tort law – consisting of prudence, benevolence, and negligence – and suggests that practical wisdom is an inherent component of the prudence prong.¹⁰⁴ Feldman relies on the Aristotelian model of virtue ethics, where practical wisdom means the ability “to deliberate well about what is good and expedient for himself.”¹⁰⁵ She then posits that prudence cannot be measured by economic efficiency or utility maximization alone, because those do not evaluate our actions accurately.¹⁰⁶ As an alternative, prudence should be measured by the more nuanced concept of virtue – a “context-sensitive, deliberative evaluation of actions traditionally invited by the reasonable person standard.”¹⁰⁷ She argues that by using a calculus of negligence based on practical wisdom, rather than an economic or utilitarian calculus, we get closer to how juries think about real life negligence.¹⁰⁸ This application of practical wisdom is encouraging at a point where legal moves are in need of revival. The following sections of this article build on this encouragement to analyze legal moves.

E. Summary

Legal scholars have had an evolving conception of legal taxonomy, and legal moves have had varying relevance to that conception. While they never precisely framed the definition of legal moves as an abstract and portable tool, they have flirted with the concept under different rubrics – such as “horse sense,” “practical wisdom” and “virtue

¹⁰⁴ See Heidi Li Feldman, *Prudence, Benevolence, and Negligence: Virtue Ethics and Tort Law*, 74 CHL.-KENT L. REV. 1431 (2000).

¹⁰⁵ *Id.* at 1439.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 1433.

¹⁰⁸ *Id.*

ethics.” However no one ever presented a unified theory of how legal moves operate or classify. Consequently, both taxonomy and legal moves lost most of their popularity. Specifically, there has been a trend toward an economics and policy-based understanding of the law, moving away from the earlier attempts to taxonomize rules of law and to use various legal and extralegal factors in that exercise. Despite this powerful trend, some legal scholars have recently started to revive the idea of legal moves. This article strives to contribute to that upswing by positing a new model of utility for both legal moves and taxonomy: namely in the field of global legal training. In the remainder of this article, it will be shown that legal moves are an excellent candidate for conceptualizing the law in the modern day, and for inclusion in modern legal training. In so doing, the article will build on Llewellyn’s idea of “horse sense” and explore its features more precisely under the rubric of legal moves, and in the context of modern legal training.

IV. Illustrative Legal Moves

Legal moves are portable across various aspects of law. This chapter demonstrates how certain legal moves can (i) transcend doctrines; (ii) transcend jurisdictions; (iii) transcend professions; and (iv) be categorized according to some internal logic. Under these features, each legal move will be analyzed with an eye to how it can improve a legal thinker’s navigation of otherwise diverse and complex legal issues. The result will be an unveiling of common threads of legal thinking – which can potentially accelerate the attainment of expertise in the legal field.

First, a number of legal moves repeat across doctrinal fields of law – international, domestic, public, private, substantive and procedural. These moves provide a common and abstract framework for legal analysis *independent of doctrinal classifications*. The liberation from doctrinal boundaries is important both functionally and theoretically. Functionally, it gives lawyers some fluency in doctrines where they are not expert – portability of legal craft – and it renders legal analysis more efficient – attainment of legal expertise. Theoretically, it provides a new plane of abstraction, higher than doctrine, along which the law can be conceptualized.

Second, certain legal moves recur as a common element across diverse jurisdictions – civil, common and mixed law jurisdictions. These common moves apply *independent from the different institutional or doctrinal structures of these jurisdictions*. The practical implication of this recurrence with regard to portability is even stronger than recurrence across doctrines. Specifically, it implies that lawyer trained in one jurisdiction can have productive capacity in another jurisdiction. Despite unfamiliarity with languages or legal institutions, a basic ability to apply core legal moves can give that lawyer a substantial level of competency.

Third, legal moves also repeat across different types of law practice – litigation, adjudication, legislation, transactional and academic. These moves are a common practical tool *independent from the professional goals and methods of the various legal practices*. For example, a transactional lawyer offers contract drafting and negotiation

services, with a goal of minimizing forward-going risk for his client.¹⁰⁹ By contrast, a litigator offers legal argumentation services, with a goal of ensuring the most favorable application of the law to her client’s past actions. However both lawyers may resort to the same legal move quite heavily. The main functional result of focusing on cross-professional legal moves is enhanced dialogue among actors in the legal community.

Under each of these parameters – doctrine, jurisdiction and practice – one legal move will be studied with the pragmatic goal of improving modern legal training. In order to pinpoint exactly where each move fits into the larger theory (to be explored in the next chapter) a nametag will be assigned to each move according to its cognitive complexity. Specifically, each move in this chapter is categorized as a (i) ground, (ii) assembled, or (iii) meta move. The factor determining which move belongs in which category is the level of cognitive abstraction required to master and implement the move.

A. Legal Moves Across Doctrines: Proportionality

A number of legal moves repeat across doctrinal fields of law – international, domestic, public, private, substantive and procedural. These legal moves provide a common abstract starting point for analyzing legal issues *independent of doctrinal classifications*. The following analysis uses the example of the “proportionality” move to highlight the cross-doctrinal feature of legal moves.

¹⁰⁹ See, eg., Ronald J. Gilson, *Value Creation by Business Lawyers: Legal Skills and Asset Pricing*, 94 YALE L. J. 239 (1984) (showing how transactional lawyers provide services that create real economic value for clients engaged in corporate transactions such as mergers and acquisitions).

Proportionality is a tool used to assess whether the merits of a certain conduct comport with the legal standard governing that conduct. It has application that transcends doctrinal boundaries – it is used in the public, private, substantive, procedural, domestic and international law domains. Legislators make these moves by enacting laws, litigants by arguing their application, adjudicators by interpreting them, scholars by analyzing them, and transactional lawyers by using them in business deals. Proportionality is a fundamental move that is used in many different national jurisdictions around the globe. It can appear under variant forms under different doctrines, but a solid understanding of the move in its abstracted form can help lawyers navigate some very complex doctrinal waters, as discussed below.

Under customary public international law governing the use of force, the doctrine of proportionality developed as a fundamental tool to assess the legality of international reprisals. The widely accepted rule on reprisals was articulated in the seminal arbitral decision in *The Naulilaa Case*.¹¹⁰ In the underlying case, Portuguese troops had killed three Germans in a skirmish that resulted from an innocent translation error in early twentieth century colonial Africa. In response, the local German governor sent an entire punitive force that invaded local territories and defeated Portuguese troops. The tribunal found the German reprisal illegal because it was disproportionate to the injury suffered by Germany.¹¹¹ This standard expresses the fundamental understanding of fair reprisals that has survived since the Naulilaa incident. However the tribunal did

¹¹⁰ *The Naulilaa Case* (Port. v. F.R.G.), 8 Trib. Arb. Mixtes 422 (1928).

¹¹¹ *Id.*

not hone the legal move to its perfection: for example it did not specify what factors it used in calculating the comparative severity of the initial attack and the reprisal.

Modern reprisals often take the form of economic retaliation. However despite the doctrinal differences between the law of armed conflict and the law of commerce, the same move of proportionality governs the legality of the conduct in question. For example, the main body of law governing international trade is the treaty regime embodied in World Trade Organization (“WTO”) treaties. The regime provides complex liability rules, and an enforcement mechanism that relies heavily on retaliation. Under the treaty terms, a signatory nation may bring a complaint against another for implementing national laws that allegedly violate the terms of the treaty. The complaint is resolved by an international tribunal. If the tribunal finds for the complainant, then the offending party must bring its laws into compliance with the treaty. If it fails to do so, however, its obligation cannot be enforced using the same mechanisms that local courts use to enforce private contracts, because the defendant is a sovereign nation which does not submit to the jurisdiction of any tribunal.¹¹² Without more, this WTO regime would be completely ineffective, along with its complex liability rules, because it would have no working enforcement mechanism.¹¹³

¹¹² In the purely domestic scenario, things work differently. If the defendant loses a contract suit but refuses to pay the judgment, then the plaintiff can bring an enforcement action. If the defendant still resists the enforcement, then the government can ultimately seize the non-performing defendant’s property (such as garnishment of wages) or even jail the non-performing defendant, because the state has personal jurisdiction over the defendant’s person. That jurisdiction is absent over sovereign nations.

¹¹³ Moreover, the deficiency in the enforcement mechanism would be difficult to overcome because the sovereignty of nations is a long-standing principle of public international law that is unshakable.

However the ingenious move of proportional retaliation solves the problem. Under the current regime, if the offending nation refuses to comply with the tribunal's ruling, then the complainant has the right to retaliate, in the form of suspending its own trade concessions vis-à-vis the offending party. Scholars argue that such retaliation provides an effective policing system in the WTO mechanism.¹¹⁴ In turn, the treaty states that such retaliation must be “equivalent to the level of nullification and impairment” caused by the initial offense – a measure of proportionality.¹¹⁵ Thus the entire WTO mechanism gains its operational force from the presence of a proportionality move. Unlike the principle of military reprisals discussed above, the WTO treaty also gives computational guidance on how to measure proportionality, which is necessitated by the economic nature of the domain. Despite the inherent differences between war and commerce in terms of computing proportionality, the move of proportionality occupies an equally central position under each doctrine.

Application of proportionality is not limited to international law. In fact, it also lies at the core of some extremely complex domestic law doctrines, including certain areas of constitutional law. Its application can be more opaque in those instances, but it can nevertheless be dispositive to the resolution of the legal issue. For instance, one of the most complex areas of U.S. constitutional law is Eleventh Amendment state sovereign immunity, and it often confuses law students so much that it is sometimes

¹¹⁴ See John H. Jackson, *International Law Status of WTO Dispute Settlement Reports: Obligation to Comply or Option to “Buy Out”?*, 98 AM. J. INT'L L. 109 (2004) (arguing that while WTO rules may not be binding in the traditional sense of governments using their police powers to enforce legal obligations, the retaliation mechanism nevertheless provides a working enforcement mechanism rather than a purely economic, but not legally enforceable, efficient breach option).

¹¹⁵ World Trade Organization Dispute Settlement Understanding, art. 22, §3.

skipped in basic constitutional law courses. However despite that complexity, the familiar move of proportionality plays a central role in understanding its dynamics.

In very simple terms, the Eleventh Amendment immunizes sovereign states from suit by private individuals without the state's consent.¹¹⁶ At the same time the Fourteenth Amendment authorizes Congress to protect certain freedoms of individual citizens, if necessary abrogating states' sovereign immunities in the process.¹¹⁷ At first sight these two clauses seem to clash in situations where the state violates the Fourteenth Amendment rights of individuals.¹¹⁸ However Congress's power to abrogate sovereign immunity is restricted by principles of federalism – it can only do so if it identifies widespread state violation of the Fourteenth Amendment, and if abrogation is a *congruent and proportional* remedy to such state violation.¹¹⁹ Thus, the move that resolves the tension between the Eleventh and Fourteenth Amendments is proportionality. For example in *City of Boerne v. Flores*, the question presented was whether the federal Religious Freedom Restoration Act of 1993 (RFRA), in an effort to protect Fourteenth Amendment rights, validly abrogated the Eleventh Amendment immunity of the State of Texas from private suits – thus allowing private plaintiffs to sue the sovereign state.¹²⁰ The Court held that the federal act did not validly abrogate

¹¹⁶ U.S. CONST. amend. XI.

¹¹⁷ U.S. CONST. amend. XIV.

¹¹⁸ The apparent clash is the following: If the state violates individuals' Fourteenth Amendment rights, then Congress is supposed to have the power to protect the individuals by abrogating state sovereign immunity. However if Congress goes around abrogating sovereign immunity, then the protection of the Eleventh Amendment protecting sovereign states from private suits is undermined.

¹¹⁹ *Nevada Dep't of Human Resources v. Hibbs*, 538 U.S. 721 (2003) (holding that Congress acted within its authority under the enforcement section of the Fourteenth Amendment when it sought to abrogate Eleventh Amendment immunity for purposes of the family-leave provision of the Family and Medical Leave Act, as the provision is congruent and proportional to the targeted gender discrimination).

¹²⁰ *City of Boerne v. Flores*, 521 U.S. 507 (1997).

Eleventh Amendment sovereign immunity, essentially because its reach was disproportionate to allegedly unconstitutional conduct carried out by the state.¹²¹ The Court noted that Congress had uncovered only "anecdotal evidence" that did not by itself reveal a "widespread pattern of religious discrimination [by the state]."¹²² Accordingly, the RFRA was found to be "so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior."¹²³ Even though the structural frame of the issue was very complex – involving the federal constitution, a federal law, a state law, state practice and even municipal laws and practice – the basic move of proportionality was the dispositive tool used by the Court.

In short, this multi-faceted constitutional issue was solved, at its core, by use of the familiar move of proportionality. Perhaps of all examples, this one should provide the strongest evidence of the utility of legal moves. If law students were taught that proportionality is one of the core legal moves used in various doctrinal areas and given opportunity to observe the cross-disciplinary nature of the move, then fewer students might be baffled by the intricacies of the Eleventh Amendment.

Legal expertise can also benefit from the proportionality move in solving complex legal questions under private law doctrine. In particular, the doctrine of hostile corporate takeovers provides an excellent example. Traditionally in a hostile takeover,

¹²¹ The local zoning authorities had denied the Catholic Archbishop a building permit necessary to enlarge a church under an ordinance governing historic preservation, and the Archbishop wanted to bring a private suit against the sovereign state. *Id.*

¹²² *Id.* at 531.

¹²³ *Id.* at 532.

executives of the target company have strong incentives to resist takeover, mainly to entrench themselves in office. However such incentives may conflict with the liquidity rights of the shareholders, who may want to sell their company for a good price to the hostile bidder. Accordingly, U.S. state laws have developed doctrines to determine the propriety of takeover defenses. These doctrines revolve around proportionality.

Specifically, the Delaware Supreme Court articulated in *Unocal Corp. v. Mesa Petroleum Co.* that any defensive measure the board adopts must be reasonable in relation to the threat posed – which is widely known as the “proportionality test.”¹²⁴ In *Unocal*, the board effected a self-tender for its own shares at a high price in order to defend against a hostile offer from a minority shareholder. The court upheld the takeover defense because it was proportional to the threat posed by the minority shareholder, since the threat was a serious attempt at greenmail via a coercive two-tier tender offer with an inadequate price at the front-end and junk-bonds at the back-end.¹²⁵

Again, while the mechanics of takeover threats and defenses may appear confusing to a student who is not very well-versed in corporate law, the implementation of the proportionality move is not much different than those studied above, namely a balancing of two countervailing considerations under the facts of the case. A mastery of the proportionality move could allow expertise from other areas of law to travel comfortably to this unfamiliar area.

¹²⁴ *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985). The court also articulated factors to consider in assessing whether defenses are proportional to takeover threats: “inadequacy of the price offered, nature and timing of the offer, questions of illegality, the impact on “constituencies” other than shareholders (i.e., creditors, customers, employees, and perhaps even the community generally), the risk of nonconsummation, and the quality of securities being offered in the exchange.” *Id.* at 955.

¹²⁵ *Id.*

In summary, the proportionality move applies widely across doctrinal boundaries. It applies under both public international law (military reprisals) and private international law (economic retaliation). It applies under both public domestic law (constitutional state sovereign immunity) and private domestic law (hostile corporate takeovers). These examples are far from exhaustive.¹²⁶ In many of these examples, the legal landscape surrounding the problem is rather complex with structural elements, but the core move of proportionality lies at the operational core of its resolution. A lawyer who can perform that operational move, regardless of her familiarity with the structure of that doctrine, can analyze that problem more comfortably than a lawyer who cannot. The portability of legal craft, along with its positive practical implications, could be heavily enhanced if legal training around the world paid more attention to explicit study of legal moves – such as proportionality.

B. Legal Moves Across Jurisdictions: Comparativism

Certain legal moves recur as a common element across diverse jurisdictions, notwithstanding the fundamentally different institutional and doctrinal structures of each jurisdiction. The implication of this recurrence is even stronger than cross-doctrinal recurrence. Specifically, if we can identify legal moves common across jurisdictions, then a lawyer trained in one jurisdiction will have productive capacity in another jurisdiction. Despite unfamiliar languages or legal institutions, a basic ability to apply

¹²⁶ More focused and extensive study of each move should be a fruitful project for future scholarship. This article sets the theoretical framework for such studies.

the core legal moves will give that lawyer a substantial level of competency. The following section analyses the legal move of “comparativism” and illustrates how it applies across three national jurisdictions – Turkey (civil law tradition), Pakistan (mixed tradition), and the United States (common law tradition).

Comparativism is a subspecies of reasoning by analogy,¹²⁷ which operates by referencing the law of another jurisdiction in order to solve a legal problem.¹²⁸ It can be used as a tool to justify or buttress a legal conclusion already reached, to reach a legal conclusion at the first instance, or to extend interpretations of the law. It is a cognitively complex move because it can require the synthesis of various jurisprudences, regimes or philosophies. As such, it usually involves a higher degree of abstraction than structural or operational moves, and a more complex chunking of information pockets. For example, a lawyer who extends domestic law in reference to a foreign law performs a cognitive chunking of the two systems, but that exercise inherently requires a solid understanding of how each body of law operates in itself. As such, comparativism requires more prior knowledge of the law and how it developed (including knowledge of relevant history, politics, culture and society) and thus inherently contains multiple cognitive exercises in its implementation. In a globalizing world, comparativism is increasingly used as an analytical tool by legal thinkers. A lawyer who appreciates the function of this move will likely navigate foreign legal landscapes more efficiently.

¹²⁷ See Porto, *supra* note 6 (arguing that legal reasoning comprises three main components: (1) reasoning by analogy; (2) linguistic analysis; and (3) judicial discretion).

¹²⁸ Analogical reasoning, by contrast, is broader because it may include analogy of facts as well as law.

Comparativism can be used as an *ex-post* move to buttress a legal conclusion that is reached through the regular channels of structural and operational thinking. In such cases, its utility lies in increasing the credibility of the legal moves implemented beforehand – which can be necessary in politically controversial issues. For example, the Turkish Constitutional Court used the comparativism move in 1996 when it struck down the controversial adultery provision of the criminal code.¹²⁹ The challenged criminal code had different liability standards for men and women committing adultery, respectively.¹³⁰ The petitioner complained that such discrepancy violated the equal protection clause of the Turkish Constitution.¹³¹ The Constitutional Court reasoned that the Turkish Civil Code accords an equal burden of loyalty to husband and wife within the family, and that the double-standard in the criminal code was a form of gender-based discrimination that violated the equal protection promise of the Constitution without having the defense of any just reasons.¹³² This move based on gender equality (akin to proportionality) was actually sufficient to resolve the issue within the bounds of Turkish constitutional law.

¹²⁹ See Turkish Constitutional Court, Decision No. 1996/15 (1996), published in the *Official Gazette* (Turk.) No. 22860 (December 27, 1996).

¹³⁰ For a woman, the liability standard was that “A wife who commits adultery will be convicted to a prison sentence of six months to three years.” CRIMINAL CODE (Turk.), art. 440. For a man, the liability standard was that “A husband who maintains an unmarried woman in the home where he resides with his own wife or in another place known by everybody for the sake leading a husband-and-wife like relationship will be convicted to a prison sentence of six months to three years.” *Id.* at art. 441. From the foregoing, it is obvious that a man’s conduct had to meet more elements to rise to the level of adultery.

¹³¹ TURKISH CONST. art. 10 (guaranteeing that “[a]ll individuals are equal without any discrimination before the law, irrespective of language, race, colour, sex, political opinion, philosophical belief, religion and sect, or any such considerations. No privilege shall be granted to any individual, family, group or class. State organs and administrative authorities shall act in compliance with the principle of equality before the law in all their proceedings.”).

¹³² See Turkish Constitutional Court, Decision No. 1996/15, *supra* note 232.

However the Court proceeded into a long discussion of non-binding international law to support its conclusion. Referring to the European Convention on Human Rights, the Court stated that “international documents are considered in the analysis of constitutionality even though they are not binding on such analysis . . . [because these] documents reflect the common ideals of humanity among nations, where the principle of ‘equality’ is the starting point for the enjoyment of rights and freedoms.”¹³³ The Court went even further to assert that nations should keep their laws up-to-date with international legal developments: “[s]uch developments in contemporary legal understanding necessitate nations to reconsider their legal order and to eradicate incongruities that they identify.”¹³⁴ This move incorporated a fair amount of extra-legal analysis into the legal move, which required more cultural expertise in the specific jurisdictions in question than a novice legal thinker might have. It is also noteworthy that the decision came from a continental civil law jurisdiction, even though those jurisdictions have a reputation for strictly interpreting the text of the governing law (in this case the Turkish Constitution) without incorporation of case law (in the case European law), much less when the case law is not binding but only persuasive. This suggests that when it comes to legal moves, jurisdictional differences are not as important one might extrapolate from different institutions, languages, or doctrinal taxonomy.

The comparativism move can have even more utility in circumstances where a legal conclusion seriously clashes with the political landscape. Under those circumstances, the move is not only an optional tool to buttress a legal conclusion, but

¹³³ *Id.*

¹³⁴ *Id.*

necessary for *justifying and defending* it against potential attack. The Pakistan Supreme Court recently deployed the move in that manner, in order to defend a potentially unpopular opinion.¹³⁵ The issue was an inheritance claim by a woman against her brothers,¹³⁶ and the court wanted to favor the woman's position on the merits. However such a decision would risk severe criticism from fundamentalist factions at that time, especially because it would vindicate a woman's rights at the expense of her two brothers.¹³⁷ In anticipation of such attack, the court deployed a comparative move *before* it analyzed the merits of the case. In particular, it referenced various foreign bodies of law to illustrate that Islamic laws protects women and that it should be cleansed of alien customs and laws denigrating the status of women. It illustrated with extensive quotes how Roman law originally gave very little personal and proprietary independence to women, how under early English Canon law women had no separate legal existence, and how the position of the woman under Hindu law is one of perpetual tutelage under her father, husband or son.¹³⁸ After this survey, the Court illustrated how women generally had superior rights under Islamic law, and concluded that "under the Islamic law . . . woman occupies a superior legal position in comparison to her English or Hindu sister."¹³⁹ The ingenuity of the move was in appeasing the potential opponents of the decision while at the same time reaching a decision that they would ideologically oppose.

¹³⁵ Ghulam Ali v. Mst Ghulam Sarwar Naqvi, PLD 1990 SC 1 (Pakistan Supreme Court) (1990).

¹³⁶ The respondent sought to claim under Islamic law her share of property left by her father to her and her three brothers. The brothers opposed her suit on the grounds that she had relinquished her claim because they had expended sums of money on her maintenance, her two marriages, and a murder case in which she was involved. *Id.*

¹³⁷ See, e.g., Human Rights Watch, *Developments Report* (1993) (reporting that "[w]omen in Pakistan also continued to suffer severe discrimination under the law . . . [and there was] bias against women in the courts."), available at <http://www.hrw.org> (last visited March 31, 2006).

¹³⁸ Ghulam Ali, PLD 1990 SC 1 (note the chronological weakness in the reasoning: the Court did not reference modern foreign laws, but those which existed at the time when Islamic law first came into existence – in effect avoiding a direct comparison of the legal systems at the same point in history).

¹³⁹ *Id.* at 43.

Only *after* setting the comparative setting in this manner did the court proceed to resolve the merits of the case in favor of the woman. Therefore unlike the Turkish Court which used the move as an *ex-post* buttressing factor, the Pakistani Court used it as a *preliminary* method to ensure popularity of the merits analysis.

Comparativism is also used to decide cases at the first instance. For example, in *Greenspan v. Slate*, a doctor sued a minor child's parents for failure to pay for the necessities supplied to their child in the case of an emergency.¹⁴⁰ The judge wanted to resolve the case in the plaintiff's favor, but could not find the basic moves to do so – either in common law or in criminal law. Under common law, he found that the moral obligation of the parents would flow not to the plaintiff, but to the child. Under criminal law he found that even if there were a remedy it would flow not to the plaintiff, but to the state. His last resort was the doctrine of equity. In order to grant relief under the equity, the judge had to discredit the unfavorable rules of positive law, and elect the application of equity over them. He did so by referring to the positive laws of various European jurisdictions (where there is no equity doctrine), where modern civil law in fact favored the equitable outcome in this case. In particular, he quoted the civil codes of Austria, France, Germany, Italy and Switzerland to support a conclusion that the plaintiffs had a civil remedy.¹⁴¹ In the final analysis, this judge used comparativism to give effect to the doctrine of equity over the competing doctrines of positive U.S. law.

¹⁴⁰ *Greenspan v. Slate*, 97 A.2d 390 (N.J. 1953) (where the child had injured her foot playing basketball, which injury a doctor discovered by chance. The doctor treated her without contract or express authorization from her parents, and then sent home a bill for his services, which the parents refused to pay).

¹⁴¹ *Id.*, quoting CIVIL CODE (Aus.) art. 143; CIVIL CODE (Fr.) art. 203; CIVIL CODE (F.R.G.) art. 1601; CIVIL CODE (Italy) art. 147; CIVIL CODE (Switz.) art. 271.

This is a powerful result because it suggests comparativism can be used as a substitute for equity whenever the rules of domestic positive law do not produce the desired result.

Finally, comparativism can be used to reverse the law. In contrast to the examples above where it was used to effect, buttress or justify an interpretation of law, reversal is a more extreme and rare outcome.¹⁴² In that sense, comparativism is an even more powerful tool when it is used to effect a reversal. The U.S. Supreme Court recently used the tool to overrule itself and reverse the law of sodomy under the U.S. constitution. In *Lawrence v. Texas*,¹⁴³ the Court reviewed the constitutionality of a Texas law that outlawed sodomy.¹⁴⁴ The petitioners challenged the law for violating both the Equal Protection and the Due Process clauses of the Fourteenth Amendment to the Constitution.¹⁴⁵ The Supreme Court had already ruled on the same legal issue in *Bowers v. Hardwick*, where a Georgia law prohibiting sodomy had been upheld in the face of the same constitutional challenge.¹⁴⁶ The Court would have to overrule its own holding in *Bowers* in order to strike down the statute challenged in *Lawrence*, a rare outcome in constitutional jurisprudence due to the *stare decisis* doctrine. Nonetheless, the Court overruled itself, and it used comparativism to justify the reversal. Specifically, it cited an opinion by the European Court of Human Rights, where an Irish law prohibiting consensual sodomy had been held invalid under the European Convention of Human

¹⁴² Note that the Turkish Supreme Court did not reverse its own jurisprudence on adultery law in the example above, but struck down at first instance a national legislation for being unconstitutional.

¹⁴³ *Lawrence v. Texas*, 539 U.S. 558 (2003).

¹⁴⁴ Tex. Penal Code Ann. §21.06(a) (2003) (reading “[a] person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex.”).

¹⁴⁵ U.S. CONST. amend. XIV (reading “. . . nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”).

¹⁴⁶ *Bowers v. Hardwick*, 478 U.S. 186 (1986).

Rights.¹⁴⁷ The Court emphasized the growing popularity of this European holding, by pointing out that it was binding in 21 countries when it was made, and in 45 countries as of the *Lawrence* opinion.¹⁴⁸ It went even further by generalizing that to the extent “we [share] values with a wider civilization . . . [t]he right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries.”¹⁴⁹ In this complex move synthesizing fundamental American and European values, the Court acted on a highly abstracted vision of social change.

In summary, the comparativism move transcends jurisdictional boundaries. It is used in civil law traditions (Turkish Supreme Court), in common law traditions (U.S. Supreme Court) and mixed law traditions (Pakistan Supreme Court). It also transcends doctrinal boundaries. It is used in criminal law (adultery in Turkey and sodomy in the U.S.), family law (inheritance in Pakistan) and civil law (contracts in the U.S.). These examples are far from exhaustive. In fact, scholarly literature has recognized comparativism as an increasingly popular methodology in legal thinking.¹⁵⁰ Understanding the comparativism move would not only increase the cross-border fluency of the modern lawyer but also provide “an avenue to new insights about one's own legal system.”¹⁵¹ While each comparativism move requires a deep understanding of certain legal and cultural factors, the use of the move as an abstract tool can enhance the portability of legal craft and the expedition of legal expertise. Yet because the cultural

¹⁴⁷ *Dudgeon v. United Kingdom*, 45 Eur. Ct. H. R. (1981).

¹⁴⁸ *Lawrence*, 539 U.S. at 558.

¹⁴⁹ *Id.* at 577.

¹⁵⁰ See generally, Hiram E. Chodosh, *Comparing Comparisons: In Search of Methodology*, 84 IOWA L. REV. 1025 (1999).

¹⁵¹ Kai Schadbach, *The Benefits of Comparative Law: A Continental European View*, 16 B.U. INT'L L.J. 331, 333 (1998).

undertones of the move are so inlaid, its implementation requires a higher-degree cognition process with more levels of chunking.

C. Legal Moves Across Professions: Arbitrage

Legal moves also repeat across different types of law practice – namely litigation, adjudication, legislation, scholarly and transactional practices. Lawyers practicing in different domains offer different services and have different goals. For example, a transactional lawyer offers contract drafting and negotiation services, and his goal is to minimize contractual risk for his client on a forward-going basis.¹⁵² By contrast, a litigator offers adversary argumentation services, and her goal is to effect the most favorable application of the law to her client’s past actions. Yet again, a judge offers supervision and adjudication services, and her job is to ensure equity in individual cases and to preserve the integrity of the legal system in the long run. This section will study the move of “arbitrage” to show that despite the immensely diverse functions and goals of different legal actors, certain legal moves are common to their core practices. The practical implication of focusing on legal moves common to these actors, then, is enhanced dialogue among actors in the legal community.

The term arbitrage is most widely used in finance, and it refers to “a trading strategy that looks to take advantage of price differences of the same security,

¹⁵² See, eg. Ronald J. Gilson, *Value Creation by Business Lawyers: Legal Skills and Asset Pricing*, 94 *YALE L. J.* 239 (1984) (showing how transactional lawyers provide services that create real economic value for clients engaged in corporate transactions such as mergers and acquisitions).

currency or commodity, trading on different exchanges.”¹⁵³ In law, the concept of arbitrage arises when the same subject is treated differently under two legal systems, either under two different jurisdictions or under two different bodies of law in the same jurisdiction. An arbitrage move takes advantage of that discrepancy to reach a desired legal result, whatever it may be. The field is not limited to finance. For example, the entire concept of high courts adjudicating to harmonize diverging interpretations of the law in lower courts is one based on arbitrage.¹⁵⁴ Arbitrage is a complex move that requires abstract formulations of the discrepancy, and it can require creative ways of chunking information in ways that have no precedent.

Transactional law is probably where arbitrage is used most frequently. Securitization transactions are a brilliant example from the finance world. Securitization is a technique used to raise financing, and it is premised on the concept of regulatory arbitrage.¹⁵⁵ In a typical securitization transaction, the originating firm sells its rights to certain future monies (“receivables”) to an entity (“the pool”). The pool’s assets consist almost entirely of those receivables. The pool then sells interests (“pool securities”) to investors, who get a right to receive payments from the receivables in the pool. The terms of the pool securities are often significantly different from the terms of the underlying receivables,¹⁵⁶ which allows them to sell (i) in more markets and (ii) for

¹⁵³ Investor Dictionary, available at <https://www.investordictionary.com> (last visited March 17, 2006).

¹⁵⁴ For example, the Turkish Yargıtay (Supreme Court of Appeal), has a council whose exclusive mandate is to “unify” divergent interpretations of the law made in the various branches of the court. Similarly, the United States Supreme Court hears issues where there is a “circuit split” among the various United States judicial districts on the interpretation of a federal law.

¹⁵⁵ See TAMAR FRANKEL, SECURITIZATION: STRUCTURED FINANCING, FINANCIAL ASSET POOLS, AND ASSET-BACKED SECURITIES (Aspen Publishers, Inc. 1994) (1991).

¹⁵⁶ There are three reasons for this. First, the pool securities are “overcollateralized” – meaning their face value is less than the face value of the receivables in the pool. Second, the pool securities are rated by

higher prices than the originating firm's underlying securities would. To complete the circle, the pool uses proceeds from the sale of the pool securities to pay the originating firm for the receivables. Ultimately, the originating firm with mediocre-quality underlying securities is able to extract the value of high-quality securities from the transaction. In the process, all it has to do is isolate its receivables from the general capital structure of the entire firm.

Securitization transaction based on arbitrage because it requires the transfer to be deemed a *sale* under bankruptcy law, but a *borrowing* under tax law – a regulatory discrepancy that lawyers take advantage of in structuring these transactions. In theory, it is possible to treat the transfer either as a sale¹⁵⁷ or a borrowing.¹⁵⁸ In the United States, bankruptcy law characterizes the transfer as a sale, while tax law sees it as secured lending.¹⁵⁹ If it were otherwise, securitizations could not be structured as described above. Under bankruptcy, it is important to characterize the receivables as a “true sale” so that they can be isolated from the property of the bankrupt estate, and thus immune from attack by creditors.¹⁶⁰ Otherwise, as soon as the originating firm files for bankruptcy, all of its assets (including the receivables which were lent to the pool but not

reputable credit rating agencies, especially if they are offered publicly. These securities receive a higher rating than the selling firm's underlying securities would, because they only take into account the payment risk of the firms' receivables, leaving behind all other assets of the firm's business. Third, transactions sometimes include a guarantee of repayment of the pool securities by a highly rated third party guarantor. Of course the guaranty, similar to overcollateralization and favorable rating, increases the investor's comfort in the pool securities. See generally Claire A. Hill, *Securitization: A Low-Cost Sweetener for Lemons*, 74 WASH. U. L. Q. 1061 (1996).

¹⁵⁷ The originating firm *sells* the receivables to the pool. In return, the pool pays to the originating firm the proceeds from the sale of pools securities.

¹⁵⁸ The originating firm *lends* the receivables to the pool. The pool intends to pay back using the proceeds from the sale of pools securities.

¹⁵⁹ See Michael C. McGrath, *Structural and Legal Issues in Securitization Transactions*, Practising Law Institute, PLI Order Number 6021 (2005). The historical reasons for this discrepancy are outside the scope of this note and the potential subject of further research.

¹⁶⁰ See *id.*; 11 U.S.C.A. § 541 (2005).

sold) become property of the estate, the further transfer of which is subject to special rules and attack from the creditors. Of course, such restriction on the transferability of the receivables undermines the entire system of securitization, because without having those receivable in hand the pool cannot issue pool securities to the investors. By contrast, it is essential under tax law that the transfer *not* be characterized as a true sale. Under current U.S. federal tax laws, treating the transfer as a borrowing rather than a sale (i) avoids entity-level taxation of the pool; (ii) permits the seller to deduct interest payments made on pool securities; and (iii) prevents the recognition of gain or loss on the conveyance of securities to the pool.¹⁶¹ But for these major tax advantages (which only accrue if the transfer is characterized as a borrowing), many securities transactions would not be profitable. In summary, a securitization transaction requires the transfer to be deemed a *sale* under bankruptcy law, but a *borrowing* under tax law. Lawyers who see this discrepancy and structure these transactions engage in regulatory arbitrage.

The move described above applies beyond the United States, and its international application often raises more complex issues due to the interaction between various local laws. Securitizations in many other countries (as well as cross-border securitizations) are premised on the same structure described above, which requires a sale under bankruptcy law but a borrowing under tax law.¹⁶² For example, one of the

¹⁶¹ See Hill, *supra* note 168, at 1082.

¹⁶² See, e.g. Hui (Hannah) Cao, *Asset Securitization: Is it a Resolution Option for China's Non-Performing Loans?*, 28 BROOK. J. INT'L L. 565 (2003); Parikshit Dasgupta, *Securitization: Crossing Borders and Heading Towards Globalization*, 27 SUFFOLK TRANSNAT'L L. REV. 243 (2004); Nicholas J. Faleris, *Cross-Border Securitization: The Missing Link in Establishing a Viable Chinese Securitization Market*, 26 NW. J. INT'L L. & BUS. 201 (2005); Hideki Kanda, *Securitization in Japan*, 8 DUKE J. COMP. & INT'L L. 359 (1998); Cathy M. Kaplan, *International Securitization*, Practising Law Institute, PLI Order Number 3023 (2004); Selam Stern, *What Banks Need to Know About Securitization of Future Cash Flows in Emerging Markets*, 122 BANKING L. J. 953 (2005).

groundbreaking securitizations in emerging markets was structured in Turkey in 1999.¹⁶³ The defining features of the transaction required isolation from the risk of bankruptcy and favorable tax treatment.¹⁶⁴ The lawyers structuring the deal clearly had to use regulatory arbitrage, and additionally had to look for opportunities presented by discrepancies among the various jurisdictions involved.

Transactional lawyers perform regulatory arbitrage to benefit their clients. On the flip side, legislators respond to this behavior by enacting laws that eliminate arbitrage opportunities. Tax is an area where this dialogue occurs frequently. For example under the U.S. tax code, there could be arbitrage possibilities originating from the Tax Code's different treatment of interest, when received as income (non-taxable) and when paid out as an expense (deductible). More specifically, the Code does not include in taxable income the interest *earned* from state and local bonds¹⁶⁵ but generally allows deduction of interest *payment* as a business expense. This discrepancy creates the opportunity for arbitrage because it allows a taxpayer to borrow money in order to finance tax-exempt bonds, deduct the expense for the borrowing, and keep the difference.¹⁶⁶ In response to this regulatory arbitrage opportunity, the legislature enacted

¹⁶³ The transaction was groundbreaking because it identified an asset class for securitization for the first time – namely trade finance payment rights. *See generally* Douglas Doetsch & Denis Petkovic, *Securitising Trade Finance Cash Flows* (1999) (discussing the particular aspects of the Turkish securitization deal), available at <http://www.securitization.net> (last visited March 17, 2006).

¹⁶⁴ *Id.*

¹⁶⁵ 26 U.S.C. §103 (a) (2006) (stating “gross income does not include interest on any state or local bond.”). Note that separate from the arbitrage concept, this move is also a scope move (the income is excluded from tax consideration) and a legal fiction move (the income is deemed non-existent for tax purposes). This example shows that one legal move may be categorized under various titles.

¹⁶⁶ For a useful illustrative example, *see* MARVIN A. CHIRELSTEIN, *FEDERAL INCOME TAXATION* 146 (Foundation Press 2002) (1977) (hypothesizing a 35% taxpayer, who buys \$1,000,000 worth of local bonds yielding 8% or \$80,000 a year [non-taxable], and borrowing \$1,000,000 from a lender at an interest cost of 10% or 100,000 a year, to finance her investment [deductible]. Her 100,000 expenditure saves her \$35,000 at her 35% tax rate because it is tax-deductible, and her general loss from the transaction is \$20,000 due to

a provision disallowing the deduction of interest payment on borrowings used to finance purchase of tax-exempt securities.¹⁶⁷ The purpose of this legislative move was to eliminate tax-arbitrage and achieve tax-symmetry – treating both the income side and the deduction side of the interest nonexistent for tax purposes, so that taxpayers could not achieve the windfall outcome described above.¹⁶⁸ In fact, the legislators were so concerned about regulatory arbitrage that they also included a provision specifically against “arbitrage bonds” in the same section that exempts interest income from state and local bonds.¹⁶⁹ This is one of the clearest possible examples of how legislators use the arbitrage move in their profession.

The examples above suggest that the regulatory arbitrage dialogue takes place between opportunist transactional lawyers and legislators trying to stop them. However arbitrage transcends practice boundaries and also reaches into completely different domains of the law – such as appellate adjudication. In particular, appellate judges often harmonize divergent lower court interpretations of the law, so that plaintiffs do not have the opportunity of forum shopping. Forum shopping is a form of arbitrage in the sense that it allows a private actor to take advantage of inconsistent applications of the law in two different fora – by bringing an action in the forum where the law is interpreted more favorably to that party. This type of arbitrage has two particular results

the different interest rates, but her overall profit still stands at \$15,000 when all is considered. Thus, by manipulating the inconsistency between (i) the non-taxability of the bond interest received and (ii) the deductibility of the private investment interest paid out, she ends up pocketing the difference of \$15,000).

¹⁶⁷ 26 U.S.C. §265(a)(2) (2005).

¹⁶⁸ See also Stanley A. Koppelman, *Tax Arbitrage and the Interest Deduction*, 61 S. CAL. L. REV. 1143 (1988).

¹⁶⁹ 26 U.S.C. §103 (b) (2006) (stating “[s]ubsection (a) shall not apply to . . . Any *arbitrage* bond (within the meaning of section 148) (emphasis added)).

in the legal system: unfairness to the defendant who does not have the choice of forum, and inefficiency in the court system where one law has multiple interpretations.¹⁷⁰

Courts respond to opportunities for arbitrage in the legal system. For example, the U.S. Supreme Court hears “split circuit” cases where at least two judicial districts have different interpretations of a federal law, in an effort to unify the federal law.¹⁷¹ Thus appellate judges, whose professional roles include doing justice in individual cases and preserving the legal system over the long run, make moves in response to the concept of arbitrage, just as private transactional lawyers whose professional roles are to minimize risk and maximize monetary profit for clients.

This principle applies equally in civil law systems. For example, the Turkish Court of Cassation acts as the highest appellate court in civil and criminal matters. It is comprised of various specialized chambers, each one with the authority to hear cases arising from certain specified legislative provisions.¹⁷² The system is based on the division of labor: twenty-one civil chambers divide among them civil causes of action, and eleven criminal chambers do the same in the criminal domain.¹⁷³ In addition, the Court has a *Grand General Council for the Unification of Case Law* (“Grand

¹⁷⁰ See, e.g., Daniel J. Doward, *The Forum Non Conveniens Doctrine and the Judicial Protection of the Multinational Corporations from Forum Shopping Plaintiffs*, 19 U. PA. J. INT'L ECON. L. 141 (1998) (arguing that forum shopping against multinational corporations creates unfairness and inefficiency, both of which U.S. courts have managed to control by using the doctrine of *forum non conveniens*).

¹⁷¹ For a recent example of a U.S. circuit split on a federal securities statute, see Erin M. O’Gara, *Comfort with the Majority: The Eighth Circuit Weighs in on the Proper Pleading Test for a Securities Fraud Claim in Florida State Board of Administration v. Green Tree Financial Corporation*, 270 F.3d 645 (8th Cir. 2001), 82 NEB. L. REV. 1276, 1307-08 (2004) (stating “[a]s with any circuit split, there are two avenues for resolution. The Supreme Court could untangle the Reform Act’s legislative history and set forth the appropriate pleading test under the Reform Act. Or, Congress could act by passing legislation that clearly sets forth the appropriate pleading test.”).

¹⁷² LAW NO. 2797 ON THE COURT OF CASSATION (Turk.) art. 14.

¹⁷³ *Id.*

Council”), whose exclusive mandate is to harmonize inconsistent decisions that originate in the lower chambers or councils.¹⁷⁴ The Grand Council has the definitive decision-making power where lower case law is inconsistent, whose decisions bind both lower and intermediate courts.¹⁷⁵ Therefore the supreme appellate court of Turkey has a division strictly dedicated to preventing regulatory arbitrage and forum shopping.

A recent opinion of the Grand Council highlights its harmonizing mandate. The issue arose under the Turkish Social Insurance Act, which, *inter alia*, governs the time calculation for pension eligibility.¹⁷⁶ The statute set three criteria for meeting the pension eligibility requirement: (i) duration of insured status; (ii) days of active premium payment; and (iii) age.¹⁷⁷ The statute also provided preferential treatment to workers employed in especially wearisome jobs, by automatically adding a certain number of days to the calculation – effectively allowing them earlier pension eligibility.¹⁷⁸ The ambiguity in the statute was whether those preferential days are added to (i) the duration of insured status; or (ii) the duration of insured status *plus* the days of active premium payment.¹⁷⁹ The law in the lower chambers had developed in different directions. While the Twenty-First Civil Chamber had favored addition to the duration of insured status, the Tenth Civil Chamber had favored addition to that period *plus* the days

¹⁷⁴ *Id.* at art. 16. It also has other councils, including the Civil General Council and Criminal General Council, which harmonize decisions originating from the civil and criminal chambers, respectively. *Id.*

¹⁷⁵ *Id.* at Art. 58.

¹⁷⁶ See SOCIAL INSURANCE ACT NO. 506 (Turk.), available at http://www.ssk.gov.tr/wps/portal/!ut/p/_s.7_0_A/7_0_HE?cpid=353 (last visited on April 3, 2006).

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at supp. art. 5 (covering dangerous industries such as coal mining).

¹⁷⁹ The former is calculated by taking the difference between the day the insured was first employed and the day he submitted a pension claim. The latter is calculated by counting the number of discrete days on which the insured made premium payments into the social security system. Thus the two calculations are different, and the question of which one is used for pension purposes gains practical importance.

of active premium payment. This divergence was important because one interpretation gave the subject workers considerably more advantage than the other interpretation – opening the doors to forum shopping, regulatory arbitrage and general inconsistency in the legal system. Responding to this inconsistency arising from precedent, the Grand Council heard the issue and definitively determined that the preferential treatment must be added to the duration of insured status alone.¹⁸⁰ In so doing, it closed the doors to regulatory arbitrage and fulfilled its goal of upholding the consistency of the legal system. While this goal is very different than the goals of the transactional lawyers structuring securitization, in essence the move they used was the same – arbitrage.

In summary, the arbitrage move transcends legal practice boundaries. It is used by transactional lawyers (securitization), by legislators (tax legislation) and by judges (precedent unification). It also transcends jurisdictional boundaries. It is used in civil law traditions (Turkish Court of Cassation), common law jurisdictions (U.S. Tax Code) and many others where complex financings are common (securitization). The arbitrage move also transcends doctrinal boundaries. It is used in labor law (pension eligibility), corporate law (securitization), and tax law (interest deduction). The list is far from exhaustive. While the various legal actors using the arbitrage move have different goals, the move essentially operates in the same way – the actor identifies a discrepancy in the way that two rules treat the same subject differently, and manipulates that discrepancy to achieve her professional goal, whatever that may be. Implementing an arbitrage move requires intricate understanding of the two rules that give rise to the

¹⁸⁰ Turkish Court of Cassation Grand General Council for the Unification of Case Law, Decision No. 2000/1 (February 18, 2000).

discrepancy, as well as recognizing the opportunity provided thereby, which require its users to perform a cognitive exercise of synthesis

E. Summary

The preceding section illustrates that legal moves transcend doctrinal, jurisdictional and professional boundaries. The doctrines referenced include the constitutional, corporate, tax, contract, trade, criminal, tort, procedure, international, and family law domains. The jurisdictions studied include the Turkish, American and Pakistani national jurisdictions as well as international treaty regimes such as the WTO. The legal actors discussed include legislators, adjudicators, litigators, and transactional lawyers. Admittedly, neither the moves, doctrines, jurisdictions nor professions studied above are exhaustive. Rather than present an exhaustive list of legal moves, the goal of this note is to provide a real insight into how certain legal moves (i) exhibit genuinely parallel characteristics across doctrines, jurisdictions and professions; (ii) help lawyers distil abstract tools that enhance legal analysis along these different parameters; and (iii) entail various levels of complexity that may parallel the different degrees of cognitive abstraction under which lawyers think. From this preliminary starting point, three major tasks remain: (i) identifying and studying more legal moves in depth; (ii) empirically testing the hypothesis that studying legal moves enhances legal analysis; and (iii) organizing legal moves in an intelligible order for easier cognitive storing and access.

V. The Theory of Expertise: A Framework for Taxonomizing Legal Moves

Proportionality, comparativism and arbitrage are but three examples of abstract moves used in the legal profession.¹⁸¹ Rather than merely identify these concepts in a manner lacking theoretical coherence, this article will also strive to place legal moves in a theoretical framework. In particular, it will look to the cognitive theory of expertise to define a working relationship among the various legal moves. Built on that theory, it will offer a simple taxonomy for legal moves.

Cognitive theory is an appropriate domain for framing legal moves because organization of knowledge is the touchstone of attaining expertise, and offering lawyers a more efficient way to gain expertise is the pragmatic goal of this article.¹⁸² This chapter shows how the exercise of legal moves fits into the existing cognitive theory of expertise. First, it posits the premise that legal experts think along a continuum of abstractions consisting of chunks of knowledge. Second, it explains how the continuum of abstraction can be broken into three discrete categories for pragmatic purposes (dubbed *ground moves*, [] *moves* and *meta moves*). Third, it argues that taxonomizing legal moves under these three categories is an efficient way to train lawyers.

¹⁸¹ Other moves that deserve their own independent analysis include: scope, review, burden, proximity, fiction, hierarchy, incorporation and derivation, among others.

¹⁸² Any taxonomic model can be built along alternative sets of parameters. For example, countries of the world can be alternatively grouped according to geographical, political or linguistic parameters. The choice among these alternatives should be dictated by the practical outcome desired by the exercise of taxonomy.

A. Understanding Expertise: Organization, Chunking and Abstraction

Expertise has been defined as the ability to solve problems efficiently and accurately, which ability rests on two indispensable factors: (i) the amount of knowledge and (ii) the quality of its organization.¹⁸³ Simply knowing more does not make an expert. The distinguishing mark of an expert is the ability to *organize* her knowledge pool in ways that permit her to recognize patterns and retrieve information from the pool much more efficiently than novices. Operating that organizational structure often requires “chunking” groups of information together, and storing them in mental models with high levels of abstraction.¹⁸⁴ The relationship between organization, abstraction and chunking has been prevalent in the literature of expertise.¹⁸⁵

"Chunking" transforms novices into experts. One leading theory of expertise posits the main difference between experts and novices is the cognitive ability to access relevant knowledge efficiently, achieved by classifying the expert's entire knowledge pool into various “chunks” and using those chunks to access individual pieces of knowledge.¹⁸⁶ The chunks play a guiding role in the cognition process, ushering experts toward the small pockets of knowledge hidden in their long-term memories, and

¹⁸³ Gary L. Blasi, *What Lawyers Know: Lawyering Expertise, Cognitive Science, and the Functions of Theory*, 45 J. LEGAL EDUC. 313, 318 (1995). See also ERICSSON AND JACQUI, at 42 (postulating that skill is the function of knowledge and search, denoted by the author in the formula Skill = f (Knowledge, Search)).

¹⁸⁴ Following is a good definition of abstraction: “In philosophical terminology abstraction is the thought process wherein ideas are distanced from objects. Abstraction uses a strategy of simplification of detail, wherein formerly concrete details are left ambiguous, vague, or undefined; thus speaking of things in the abstract demands that the listener have an intuitive or common experience with the speaker, if the speaker expects to be understood.” <http://www.reference.com/browse/wiki/Abstraction>

¹⁸⁵ See e.g., K. ANDERS ERICSSON & JACQUI SMITH, TOWARD A GENERAL THEORY OF EXPERTISE: PROSPECTS AND LIMITS (Cambridge University Press 1991).

¹⁸⁶ *Id.* at 26, citing W. G. Chase & H. A. Simon, *The Mind's Eye in Chess*, in VISUAL INFORMATION PROCESSING, 215-81 (W. G. Chase ed. 1973).

eliminating the inefficient step-by-step process by which novices search each isolated pocket of knowledge. This theory has been proven in at least four domains of expertise: chess, sports, music and physics – as summarized below.

Chess masters retrieve superior chess moves from their long-term memories because they store configurations of chess pieces (chunks) in their memories better than novices, and those chunks serve as cues to elicit the best move possibilities.¹⁸⁷ With experience, chess masters are able to recognize more complex piece configurations as a discrete “chunk” and store it accordingly in their memories.¹⁸⁸ Likewise, it has been shown that expert basketball players classify player configurations on the court in more abstract terms than fans – while experts classify clusters of players in terms of offense, defense, zone-pressure, individual and team (abstract principles), fans simply classify them in terms of the number of players present (concrete objects).¹⁸⁹ Similarly, physics experts classify problems along deeper principles (such as point-masses and energy conservation) whereas novices often use superficial features more directly related to the real world (such as blocks, ropes and slopes).¹⁹⁰ The expert use of deeper principles guides physics experts more efficiently to retrieving the relevant information necessary for the right solution. Finally, it has been shown that expert reading of music depends on

¹⁸⁷ Chunks in chess can either static or dynamic. Clusters of chess pieces on the board are static chunks. Certain sequences of chess moves are dynamic chunks. Chess experts retain and use both types of chunks more accurately. *See id.* at 55.

¹⁸⁸ K. Anders Ericsson & Jacqui Smith, *Prospects and Limits of the Empirical Study of Expertise: An Introduction*, in TOWARD A GENERAL THEORY OF EXPERTISE: PROSPECTS AND LIMITS 1, 11 (K. Anders Ericsson & Jacqui Smith ed., Cambridge University Press 1991).

¹⁸⁹ Fran Allard & Janet L. Starkes, *Motor-skill Experts in Sports, Dance and Other Domains*, in TOWARD A GENERAL THEORY OF EXPERTISE: PROSPECTS AND LIMITS 126, 135 (K. Anders Ericsson & Jacqui Smith ed., Cambridge University Press 1991).

¹⁹⁰ *See id.* Yuichiro Anzai, *Learning and Use of Representation for Physics Expertise*, in TOWARD A GENERAL THEORY OF EXPERTISE: PROSPECTS AND LIMITS 64, 65 (K. Anders Ericsson & Jacqui Smith ed., Cambridge University Press 1991) (also showing that diagrams are an expert tool used to classify and solve physics problems).

the ability to “chunk” notes in certain patterns, which allows the expert musician to solve problems more efficiently – such as noticing notational mistakes out of character with the genre and automatically correcting them back to what the genre would have predicted.¹⁹¹

Some common results emerge from these examples. First, novices perceive problems in terms of concrete objects – such as (i) chess piece; (ii) basketball player; (iii) inclined slope; (iv) musical note – while experts think in terms of abstract principles that are comprised of chunks of concrete objects – such as (i) pin configuration involving one chess piece threatening two opponent pieces simultaneously; (ii) double-stack offense with one basketball player in the middle and two on the wings; (iii) energy conservation where energy can be transferred between two objects but cannot be created or destroyed; (iv) repeated syncopation where accents are on the notes played between the beats. Second, as a result of this difference in abstract thinking capacity, novices approach problems step-by-step (pondering from scratch the relationship between objects each time faced with a new problem) while experts can go to the crux of the problem more quickly because their abstract organizational framework rapidly guides them to the relevant piece of information without having to search their entire memory. In parallel with these various domains of expertise, this article contends that expertise in the legal field is also governed by the same theoretical principles summarized above.¹⁹²

¹⁹¹ See John Sloboda, *Musical Expertise*, in TOWARD A GENERAL THEORY OF EXPERTISE: PROSPECTS AND LIMITS 153, 156 (K. Anders Ericsson & Jacqui Smith ed., Cambridge University Press 1991).

¹⁹² Chunking is not the only cognitive theory of expertise, but it is one that has wide appeal. For alternative theories, see generally Ericsson & Smith, *supra* note 199.

B. Using Expertise: How Lawyers Use Elements of Expertise

The touchstones of expertise are knowledge and organization. Lawyers, like other experts, operate in complex knowledge fields and perform cognitive acts to organize that knowledge in ways that enable efficient access.¹⁹³ While each lawyer's cognitive process might be unique, it is desirable to identify a generalized pattern of how lawyers organize knowledge – at least for the purpose of organizing legal moves in a similar pattern. The following hypothetical suggests that abstraction (ie. distillation of abstract principles from concrete objects) guides lawyers in organizing their knowledge.

Lawyers think along various levels of abstraction. For example, ponder the hypothetical of a shipwreck in the English Channel. A non-lawyer would likely react to its concrete facts, such as the number of casualties or amount of monetary damage (zero degrees of abstraction). But a lawyer would probably invoke the English concept of common law tort and think about how the facts fit into that concept (one degree of abstraction). Moreover, she might invoke the concept of preemption and analyze whether any English statutes preempt the common law concepts already analyzed above, such as a statutory cap on remedies (two degrees of abstraction). Further, anticipating a conflict between French and English laws due to the location of the shipwreck, she might compare the results of her tort analysis (English law) and her delict analysis (French law),

¹⁹³ Despite the role of expertise in lawyering, the literature on expertise has not focused on law at all. For example, in a high-profile conference on the cutting-edge theories of expertise at the time, scholars studied the domains of chess, medicine, physics, sports, music, dance and reading (and further referenced domains such as military, business and transcription typing), but did not make any reference to lawyering. *See generally id.* Some law review notes have since recognized law as a domain of expertise, but none has rigorously tested current theories of expertise on the field of law. *See e.g.*, Blasi, *supra* note 196.

in an effort to anticipate where the victims would have a better chance of recovery (two degrees of abstraction). Whether anticipating litigation in England or France, she would probably invoke the concept of appellate review and consider the chances of winning should the trial be appealed under either jurisdiction, and then compare those results (three degrees of abstraction), and so on, with each new level of abstraction building on a combination of factors already analyzed in the preceding level of abstraction.¹⁹⁴

The hypothetical shows how one particular lawyer might store knowledge at various levels of abstraction. It spans a continuum from the concrete (monetary damage in accident) to the abstract (appellate review). It illustrates how lawyers generally move between levels of abstraction and suggests that some chunking may be present in navigating the framework. For example, the lawyer places (i) courts and legislatures in one chunk to arrive at the abstract idea of preemption; (ii) trial and appellate courts in another chunk to arrive at the abstract idea of review; (iii) English and French law in yet a separate chunk to arrive at the abstract idea of conflict of laws, and so on. This type of "chunking" is very similar to those cognitive processes discussed above for other domains such as chess. The similarity suggests that legal thinking may fit comfortably into the existing cognitive theories of expertise.

¹⁹⁴ The following caveats about the hypothetical do not take away from its practical use. First, the hypothetical forces the levels of abstraction into a stratified structure of numerical degrees rather than a continuum. Second, it suggests oversimplified instances of chunking (two objects chunked into one abstract idea) and omits the more complex interrelations that exist in law. Third, it provides a less than exhaustive list of factors that a lawyer would consider under the fact pattern. Fourth, it does not show how an equally expert lawyer might approach the problem from an alternative angle. Different lawyers might approach the same problem in variant organizational modes, and their switching points between levels of abstraction may vary. Despite these caveats, the general observation stands that lawyers universally operate along a continuum between the concrete and the abstract, and each lawyer has her own cognitive method for navigating that continuum, where "chunking" probably plays a role.

C. Dissecting Expertise: Three Discrete Levels of Abstraction

Because legal expertise is defined along a continuum of abstraction, as discussed above, it is challenging to taxonomize legal moves under various categories. However the challenge can be overcome by dissecting the continuum into three discrete points – a fictional tool used here for analytical purposes.¹⁹⁵ One can intelligently analyze the continuum by choosing three points: one closer to each extreme, and one closer to the middle. Accordingly, this article offers three categories of legal moves: *ground moves*, *[] moves* and *meta moves*. Each category is more abstract than the preceding one, in the sense that it requires the expert lawyer to delve deeper into the more complex territories of her organizational framework.

1. *Ground moves* are relatively obvious and easily accessible. They involve simple concepts such as time and scope, and are not very abstract. They require little or no prior legal knowledge to understand. The lawyer has to search little to find them, and she finds them on the surface of her knowledge pool. They are encountered early on in the lawyer's socialization into the field of expertise, and frequently thereafter. While each ground move may belong to a different doctrine or function, they all share the same cognitive aspect of being easy to access.
2. *[] moves* are less obvious. Implementing them requires more abstract organization of the mental framework, either because they require more prior legal knowledge or they require chunking of ground moves in a non-obvious way. For example the move of proportionality requires the lawyer to understand two prior concepts between which proportionality can be applied. The lawyer has to delve deeper into her reservoir of knowledge to find these moves. They involve more complex concepts such as proportionality and balancing.

¹⁹⁵ Dissecting a continuum for analytical purposes is a fictional move, in other words it pretends as if the continuum were a collection of discrete sections. Fiction is in fact one of the legal moves that deserves deeper study (such as the disaggregation of certain transactions under tax law), but such analysis is outside the scope of this article.

3. *Meta moves* are the most difficult to access. They require the most abstract organization, either because the prior knowledge required to implement them lies outside of the law or they require a second degree of chunking. They can also involve novel "chunking" experiences, where the law advances the most. The lawyer has to delve most deeply into her reservoir of legal and non-legal knowledge to find these moves. They involve complex concepts such as arbitration and comparativism.¹⁹⁶

This tripartite conception of taxonomy is a workable way to organize a toolbox of legal moves, because it traces the very cognitive process of the expert lawyer. Legal expertise is especially related to taxonomy because it involves the ability to taxonomize and re-taxonomize both at different levels of abstraction and from different starting points when confronting the same set of facts. Accordingly its implementation in legal training promises to be workable. In fact, other fields of expertise have used their own tripartite conceptions of abstraction, to reach specified pragmatic goals.¹⁹⁷ The two examples below reinforce the point. The first is the taxonomy of architectural moves for the practical purpose of copyright protection, and the second is the taxonomy of chess moves for the practical purpose of chess education.

Architecture is a domain of expertise that parallels law in relevant ways. Both the architect and the lawyer build structures that that will perform certain functions for a client, subject to certain constraints such as cost, building site, laws of gravity, legal regime, and ethics.¹⁹⁸ Both the architect and the lawyer solve the problem by deploying analysis at various levels of abstraction. For example, the architect has to think on a

¹⁹⁶ For a very compelling visual conception of the legal field, see Schlag, *supra* note 99 (offering four alternative metaphors for visualizing the legal system: (i) the grid aesthetic; (ii) the energy aesthetic; (iii) perspectivism; and (iv) the disassociative aesthetic).

¹⁹⁷ Lawyers use taxonomies for different purposes (persuasion, argumentation, justification).

¹⁹⁸ See generally, Blasi, *supra* note 196.

continuum of abstraction, from such tangible issues as what grade steel to use in reinforcing the concrete, to such abstract issues as how the client will experience the space in the finished structure. But that continuum has to be broken down to discrete categories for some practical purposes.

For example, U.S. copyright law protects certain elements of architectural design, but not other elements.¹⁹⁹ In delineating those elements protected by the law, one commentator has suggested that protected elements of design must track the three levels of abstraction at which architects think.²⁰⁰ He argues that copyrightable material may be divided into three general categories, because architects think at three levels of abstraction: (1) design elements, (2) relationships between the elements, and (3) ordering ideas. The first category (design elements) is the most concrete dimension of architectural creation, and includes concrete elements such as structure, space definition, and light. The second category (relationship between the elements) represents a more abstract dimension of the architect's mind, and includes more abstract comparisons such as building-to-context, unit-to-whole, and repetitive-to-unique. The third category (ordering ideas) is the most abstract depth of the architect's expertise, and includes complex ideas such as hierarchy, layering, and the choice among symmetry, balance-point and counterpoint. Similarly, the continuum of abstract legal thinking can be broken down for the pragmatic purposes of taxonomizing legal moves. In fact the tripartite dissection under each domain mirror one another. The design elements in architecture

¹⁹⁹ Architectural Works Copyright Protection Act of 1990, Pub. L. No. 101-650, 701-706, 104 Stat. 5133 (1990) (codified at scattered sections of 17 U.S.C.).

²⁰⁰ Raleigh W. Newsam, II, *Architecture and Copyright – Separating the Poetic From the Prosaic*, 71 TUL. L. REV. 1073, 1117 (1997) (footnotes omitted).

mirror the *ground* moves in law, the relationship between the architectural elements mirror the [] moves in law, and the ordering ideas in architecture mirror the *meta* moves in law.

The expertise domain of chess offers another parallel to law and another tripartite arrangement of abstract thinking levels, namely during the opening, middlegame and endgame of chess. Like a master chess player, a lawyer uses intelligence to "relate a perceived pattern to past patterns, and to develop the present position into an overall game plan."²⁰¹ While chess players think along a continuum of abstraction, this can be broken down for the pragmatic purpose of teaching chess. Chess literature asserts that expert thinking distinguishes itself from novice thinking most noticeably during the middlegame, then during the endgame, and least noticeably during the opening.²⁰² In the opening move of a chess game, it is nearly impossible to distinguish an expert from a novice, because the information on the board does not lend itself to abstract processing. Each player has a limited number of tangible moves available²⁰³ and it is too early at that stage to associate the discrete move with any abstract strategy. In the endgame, where there are usually very few pieces left, the catalogue of moves available to the player is again limited. However abstract thinking pays more in this scenario because the static skeleton of the pieces is unique in every endgame (while it is standard in the opening) and thus experts can use intuitive strategies to use that skeleton to their advantage.²⁰⁴

²⁰¹ HOWARD GARDNER, *FRAMES OF MIND: THE THEORY OF MULTIPLE INTELLIGENCES*, 192 (Basic Books 1993) (1983).

²⁰² JOHN NUNN, *LEARN CHESS* (Gambit Publications Ltd. 2000).

²⁰³ Only one of the eight pawns or two knights can be moved.

²⁰⁴ For example, take the premise that the object of the chess is to capture the opponent's king. A novice player may think he should conduct the middlegame by attacking the opponent king until it falls – an intuitive adversarial concept based on continual retorts and parries until one of the kings falls (winning by

Thus the middlegame is where the expert distinguishes himself most, because he can see the board in a more abstract manner.²⁰⁵

Architecture and chess illustrate how the cognitive process of abstraction can be captured in discrete categories, and how these categories can be used for pragmatic purposes. This article follows a similar theoretical framework for law, and proposes a tripartite classification of legal moves for the ultimate pragmatic goal of creating a legal training system that more effectively responds to the demands of the global market.

D. Teaching Expertise: Utility in Legal Education and Training

The tripartite taxonomy is especially useable in legal training because it is based on three levels of abstraction, which mirror the lawyer's own stages of cognitive development. In fact, clinical legal scholars have defined legal education as a process of socializing the student into the legal discourse.²⁰⁶ It has been demonstrated that students develop their skills through a process of moving from concrete to abstract knowledge.²⁰⁷

attack). However expert advice quickly reveals a second strategy: take one piece from the opponent early on, and then enter into a long series of bargains wherein you exchange pieces of equal value with the opponent, inevitably bringing you to an endgame where you are bound to win because you have a material advantage originating from your early capture (winning by material advantage). Many expert games are won by using the second strategy, and in fact many grandmasters surrender in the middle of the game when they lose a small piece because they foresee the impossibility of coming back from the material disadvantage. This second strategy is an expert's abstract conception of the chess middlegame, as opposed to the novice's simple logic of attacking the opponent's king.

²⁰⁵ See Nunn, *supra* note 234, at 142 (asserting “[t]he middlegame is perhaps the part of chess in which differences in skill are most apparent. To some extent, opening play is a matter of careful study, but in the middlegame there are fewer guidelines and the player’s skill is the dominant factor.”).

²⁰⁶ See e.g., Joseph M. Williams, *On the Maturing of Legal Writers: Two Models of Growth and Development*, 1 J. LEGAL WRITING INST. 1 (1991).

²⁰⁷ See *id.* at 11 (stating that “[t]he single common finding in the research has been that as novices start to formulate a solution to a problem, they tend to seize on the components of the problem statement that are most concrete, most visible . . . On the other hand, because the expert has seen and solved countless

In fact, one conception of legal writing socialization again divides the stages of abstract thinking into a tripartite structure: pre-socialized, socialized, post-socialized.²⁰⁸ In the pre-socialized stage, the student writes by giving excessive deference to the authority of the concrete, such as quoting the letter of the law in excessive amounts. In the socialized stage, the student starts writing in more abstract legal terms but fails to translate those concepts into words that are intelligible to non-lawyers. In the post-socialized stage, the student still conveys the abstract legal concepts in an efficient and effective manner, but goes beyond the opaque legalese jargon to convey her points to all readers. If socialization into the legal discourse is indeed a journey in various levels of abstraction, then a taxonomy of moves tracking those levels of abstraction will correspond perfectly to the cognitive processes of an inexperienced lawyer seeking expertise. Novice lawyers who are serious about building expertise can find that power in studying legal moves that are organized in the same very way that their cognition develops through the years of legal training.

E. Summary

Abstraction is a defining feature of legal moves. This feature is in keeping with the touchstone of other domains of expertise – the ability to organize information into abstract chunks. Other domains have used this touchstone as a guiding principle in

problems of this kind and others, he is able to transcend the concrete representation of the problem and categorize it at a more general level.”).

²⁰⁸ See *id.* at 24-30; see also Ericsson and Smith, *supra* note 199 (delineating three stages of expertise acquisition: the “cognitive stage” characterized by an effort to understand; the “associative stage” involving making the cognitive process efficient to allow rapid retrieval of required information; and the “autonomous stage” where performance is automatic and conscious cognition is minimal).

imparting expertise to novices. Specifically, they have done so by dissecting the abstract field into discrete groups, in a way that ensures the novice's cognition conforms with this partition. This article offers a way of performing that exercise in the legal domain – something that has never been done before – by dissecting the abstraction of legal thought into three discrete levels. The newly constructed categories are dubbed *ground*, [] and *meta* legal moves. This article establishes this theoretical framework for examining particular legal moves, because it has been proven that law novices develop their legal analytical skills by moving from a concrete to an abstract understanding of the law. If the legal moves examined are offered for use in legal training, then their organization must mirror the cognitive processes through which novices in the legal field advance.

VI. Conclusion

There is a striking incongruence between the doctrinal rigidity of law and the increasing market demand for adaptable legal thinking. In response to that concern, legal scholarship has largely discredited the rigidity of legal taxonomies, though without making any effort to fill its place with an alternative theory of taxonomy. As a result, our system lacks an ideal system for imparting legal expertise to novice lawyers who are looking to thrive in a competitive and interactive global market.

This article proposes a new arrangement of abstract legal concepts. Specifically, it suggests that an earlier introduction to this arrangement can expedite the process through which a novice lawyer becomes an expert lawyer. The abstract legal concepts

are called "legal moves." This article first discusses a selected number of legal moves to illustrate their core features: that they transcend doctrinal, jurisdictional and professional boundaries. Second, this article places these legal moves in a larger theoretical framework, and attempts to classify them according to their cognitive complexity. The new arrangement places each legal move into one of three categories: ground, [] and meta moves. Finally, this article shows how the tripartite conception mirrors the cognitive development of the legal mind, thus making legal moves an excellent candidate for catalyzing efficient legal training in the global market.

The framework proposed hereby can be of practical use in law schools and law firms, among other legal institutions. Sadly, our current legal education system does not deliberately focus on legal moves.²⁰⁹ In the late 1920s, Columbia Law School attempted to revise its curriculum and focus on the functions served by the law rather than traditional legal categories.²¹⁰ This approach had neither a cross-jurisdictional focus nor large following.²¹¹ Modern legal education has been more sensitive to cross-doctrinal and cross-jurisdictional needs. For example, the Georgetown University Law Center introduced an "alternative curriculum" years ago, where first year instruction is not categorized according to the traditional doctrinal boundaries.²¹² Nevertheless, programs such as this attract a very small portion of young legal minds. It is the contention of this article that such movements should be more widespread.

²⁰⁹ Roy T. Stuckey, *Preparing Students to Practice Law: A Global Problem in Need of Global Solutions*, 43 S. TEX. L. REV. 649 (2002) (showing evidence that lawyers in the United States have been inadequately prepared in law school and suggesting the same about legal education in other countries).

²¹⁰ See Macaulay, *supra* note 39.

²¹¹ See *id.*

²¹² See *id.*, available at <http://www.law.georgetown.edu/curriculum/jdprog.cfm#Curriculum%20B> (last visited on July 27, 2006).