

A COMPARATIVE ANALYSIS OF SOCIO-
LEGAL AND PSYCHO-SOCIAL THEORIES
AND THE CONSTRUCTION OF A MODEL TO
EXPLAIN HOW LAW OPERATES AND
EVOLVES IN THE DEPENDENCY COURT

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THIS WORK IS DEDICATED TO AMERICA'S CHILDREN
AND THOSE WHO WORK
TO REPRESENT THEIR INTERESTS

ABSTRACT

This thesis examines data and theory about how the system of law (SL) operates and evolves: it contrasts data from social workers and attorneys working in the juvenile dependency court with theories about how individuals and social systems evolve. The analysis is based on research conducted in San Diego and revolves around a theory about human development, or the 'individual as a system' (HD), and a theory about social systems, such as the autopoietic theory of law and its *self*-reproducing system (LA). It is suggested that together, the theories of HD+LA help to examine how professionals and law operate and evolve in the legal system.

Overall, the thesis rejects the autopoietic systems theory that law reproduces itself, by itself. Instead, analysis in this study supports the finding that law is defined and operates through a *dialectic* of the individual and the social (or the organic and the mechanistic respectively) such that each gives rise to the other. On the basis of this system connection, aspects from systems theory about legal autopoiesis are integrated into concepts from constructive-developmental theory (HDLA), thus providing a new framework through which to examine how law and its system functions.

The new framework is built around an equation that emerged some time after data analysis and theoretical development: $SL=HDLA+D^{SA}$. The equation states that:

The evolution of the system of law involves processes of human development and to some but a much lesser degree, the autopoietic nature of law. The extent of this evolution is best determined by analyzing data from a court setting. The dialectical relationship between individual and social influences in the evolution of law is facilitated by the accumulation of social action – such as activity from media and advocacy groups – and the individual meaning that professionals make about this action, which in turn has an influence on the formal and informal operations that they perform when operating law.

The nature of these interacting dynamics will be shown through two interconnected tools of analysis: one is a typology of individual, professional and system self-concepts; the typology helps to show how a cycle of system change (human development giving rise to legal change and vice versa) occurs in the court; the other is the operative structure (or culture) of systems for law and social work in child abuse cases – which unite in court operations. These two interconnected tools help to show how the court operates and how social action (^{SA}) for change contributes to professional and system change in the evolution of law.

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PROJECT OVERVIEW

INTRODUCTION

THE INTERACTION

OF

INDIVIDUAL AND SOCIAL SYSTEMS

IN LAW

Introduction

Views expressed by three attorneys

“Social workers have all the power.”

“The social worker’s profession has maybe three times as much power as the attorney’s ... The social worker’s position is God in the courtroom.”

“The Bench officer [judge] always looks at the attorney for DSS for direction, or always looks to the social worker in the courtroom for the right answer.”

Views expressed by three social workers

“I don’t think social workers have any power in the courtroom ... You have these attorneys orchestrating whatever is going on and we end up with the fallout.”

“The court has a very condescending, patronizing attitude toward social workers.”

“Social workers don’t even go to court hearings [for most of their cases] ... the court is the arena for the attorney, run by an attorney – the judge – and the players are all attorneys and everyone else is just a pawn in their arena.”

The quotes above indicate diametrically opposite perspectives about what happens in ‘the system’ when child abuse cases come before the San Diego county juvenile dependency court.¹ The views reflect opinions that *repeatedly* surfaced in the fieldwork conducted for this thesis; views which were held with such conviction that readers might think the project represents an analysis of two distinct locations. The

¹ The dependency court hears cases involving the need for jurisdictional protection of children from abuse. Reference to ‘the system’ (or the system) means the dependency court; legal agencies involved in court operations; and the Department of Social Services Children’s Services Bureau (DSS:CSB): reference to the system studied also *includes* individuals (*self*-systems) and the *social* system of law.

disparity of viewpoints that emerged from one system of law inspired a new research question; one that now lies at the heart of this dissertation. Rather than just identify and discuss differences between law and social work – as was the original goal – the main topic expanded to include: *how is it possible* that many professionals have strong beliefs that are poles apart about what happens in one county court system in the United States?

The following profiles introduce the different ‘voices’ of response that emerged in this study and some of the individual characteristics behind interpretations about how law operates.

Social worker

Ashley has worked for the Department of Social Services: Children’s Services Bureau (DSS:CSB) for many years. She has a master’s degree in social work and her career is child protection. Ashley was outgoing, sharing her opinions with frustration, anger, and the rare glimpse of hope. Her image is one of a well-groomed, slightly eccentric woman who is articulate, with an assertive nature that borders on the parameter of aggression.

When interviewed, Ashley was reeling from the Department’s non-supportive response to a complaint lodged against her by a parent. She gave the impression she was both a victim and a survivor, if you will, of working in a system that she thought provided an abysmal response to children. Ashley’s level of anger was at the extreme end of the social work cohort but her concerns about system failure, inadequate DSS response and unreasonable attorney demands were repeatedly echoed by her colleagues.

Parents' attorney

Rick has been an attorney for parents in Juvenile Court for six years. His background as a trial lawyer results in a strong criminal defense orientation. He seemed to enjoy his work with a hint of playfulness that made him approachable and interesting. His casual, warm nature supported an informal, chatty style of interaction with colleagues and clients.

The light side of his personality was, however, countered by an unusual intensity. He used wit and the occasional suggestion of charm to soften a pervasive undercurrent of contempt, the root of which was the court's failure to fulfill its constitutional responsibility of due process. While the interview is noteworthy for its inflammatory opinions about social workers, the theme of Rick's opinions reflects the data collected from parents' attorneys.

Children's attorney

Graham has been an attorney for parents and children for over twenty years. He sees his prior experience in criminal defense *and* prosecution as being a distinct advantage in his current work for children. Graham's presence cannot be missed: his opinion of himself exudes a level of confidence that could be interpreted as having an air of superiority. Unequivocally committed to 'the system', Graham allowed me to plumb the depths of his thinking which unveiled sensitivity and caring made almost invisible by a camouflage of rigidity and legal speak.

Graham has seen the court favor DSS *and* weigh in the parent's favor, without foundation. He discussed his experiences with detached professionalism, and absent the resignation or blame in some interviews, he talked about accepting his role as one player in a 'system'. Graham reflects, perhaps without the same emotional distance, the concerns expressed by attorneys for children, who recognized the need for better rules to protect children and yet strongly held that social workers (DSS) operate within 'the system'.

Ashley's, Rick's, and Graham's interviews are used – along with a wealth of other data collected from social workers, attorneys and judges interviewed in this study – to demonstrate the pervasiveness of competing views about how the dependency court operated when this research was undertaken. The extent of the contradictions between the positions held by respondents eventually led me to concentrate on two factors in particular that were found to influence or explain people's interpretations about the court: theories about *individuals and social systems*. The central significance of these two topics was supported by data which, as might seem obvious, indicated that (as collectives) individuals influence the system *and*, the system influences individuals.²

Integrating the (social) system and the individual

The two central theoretical frameworks that were found to shed light on individual and system influences were those from Kegan (1982; 1994) and to a much lesser extent, Luhmann (1993; 1995). Luhmann's systems theory of operatively closed systems, the basis of which is the theory of autopoiesis, initially provided a conceptual tool through which to explore how law operated as a *social system*.³ This study (metaphorically) supported the following theoretical aspects about *social systems*:⁴

- functionally differentiated social systems exist: such as the DSS and legal systems
- each system produces its own internally generated version of reality

² Terms such as 'individuals' and 'social' systems, and 'the system' are defined later on p20-23.

³ Luhmann (1993: C1/111/4). I often refer to Luhmann's theory as the theory of legal autopoiesis. Part Two will show that other theorists use similar terms to that described here.

⁴ See Luhmann (1985; 1993); King (1997: 20-30, 91; 1991: 306-319); and the analysis in this thesis.

- the ability of a system to change is restricted by its own selectivity
- a system initially reduces that which does not have meaning to the status of noise
- information enters a system if it reconstructs it to comply with its host discourse

Of most significance, data and theoretical analysis indicated that both the meanings people made – commonly known in psychology as ‘meaning making’ (Kegan 1982:1-12) – and, at a deeper level of analysis, the *processes* by which meaning making *evolves*, were pivotal to any explanation about how the above listed (social) system dynamics operate. Moreover, Kegan’s psycho-social theory on development (1982:15) not only stood out as the main tool through which to conceptualize and explore the oscillation between individual and social influences, it also provided a strong theoretical means through which to examine key differences between law and social work.

Kegan embeds his theory which is located in the interrelationship between the individual and the social in the analysis of *how people evolve*, and at an exploratory level of analysis, this research study will show that the way in which this cycle of human evolution occurs similarly helps to capture how law evolves.

The lack of synthesis between individual and system theories

In taking up this exploration, it is crucial to the orientation of this study that empirical and theoretical findings about individual interpretation and the interrelationship between the individual and the social in human development (and therefore in law and its system) did not comport with a key tenet in Luhmann’s theory about how the system of law operates and evolves.

When research findings about the role of meaning making in law were contrasted with Luhmann’s theory it was found to over-stretch (contradict) the autopoietic explanation, which holds that *the ‘social’ system of law reproduces itself – by itself* (1993: C1/111/4). Luhmann’s theory resides in the portrayal of law as if it has a life

of its own. The life of law as a ‘social’ system, seen mainly in this work through reference to legal text, is said to have evolved into a life of law that operates outside (or apart from) individuals: along the lines of an unspoken collective energy that aligns the decisions and actions within particular groups. To abbreviate a very abstracted theory, in systems theory about legal autopoiesis *law* is defined by *law* – not by people – and the legal system dominates people rather than vice versa, because the system through *its* evolutionary operations is *self*-referencing and *self*-reproducing.

Although, like Kegan, Luhmann indicates a relationship exists between individuals and social systems, this thesis will show that a problem arises in Luhmann’s analysis when he draws a sharp distinction between the two, proposing that no direct communication occurs between the individual and the social; and that change in the system of law occurs *by itself* (1993: C6/111/241-260). To use an analogy, Luhmann’s theory is more about the mechanical aspects of how a musical score evolves, and Kegan’s is more about the interrelationship between a musical score and how a person experiences the music (it focuses on the link between matter and consciousness).⁵

The alignment that arose in this study between data gathered, Kegan’s theory and other theoretical analysis – and the inability of the autopoietic theory to adequately explain how the individual and the social cohere as separate yet interdependent systems – ultimately led to rejection of the following aspects of systems theory about

⁵ An experience which always varies according to the evolutionary stage of development of the listener/writer.

how law operates. The issues pivot on the topic of separation (such that the social or the mechanistic is wrongly detached from operations that people perform):⁶

- society cannot be analyzed *as if* it consists of people, it consists of communications
- the defining feature *distinguishing people from society* is social communications
- social events *are separate* from the factors that inspire or inhibit individuals
- *life* can be attributed to a social system through analysis of general social events
- there is *no* direct communication between individuals and social systems

Given the significant differences flagged thus far between a theory of evolution about human development and a theory of how law evolves, one might well ask: why do both theories play a role in this thesis? The answer has four parts – the latter components of which speak to why I found it necessary to reject the sharp distinction made between the individual and the social in Luhmann’s autopoietic theory of law.

Why two (competing) theories are used

The first part of the answer is that there are more similarities between the two theories than that which is now being addressed.⁷ Second, is that in addition to the (metaphorically based) system operations outlined on page ten (above), a theory about social systems is used because it helps to consider some of the systemic differences that arose between social work and law. The analysis conducted in this study supports, for example, the following points which are derived from King’s excellent

⁶ See for example Luhmann (1985: 281-282; 1993: C2/11/7); King (1997: 25-29, 73, 204-207); and King & Piper (1995: 23-35), where the authors align with Teubner’s view that “the human subject is no longer the author of the discourse”. Also see the arguments explored throughout this thesis.

⁷ Parts Two and Three explore the remarkable similarity between the two theories, and show how the evolution of law’s system is largely based on the same operations that explain human development.

analysis into the differences that exist between social work and law in child abuse cases:⁸

- law's truth-validating procedures serve a different social function than social work
- child protecting social work is not pre-programmed to operate from legal criteria
- social work is vulnerable to dependence on other systems
- any attempt to merge social work into the system of law is very difficult because it increases law's scope of interference into social work discourse
- child abuse scandals have led social work to be seen as the enemy of family rights

Analysis of events that occurred in San Diego – the social setting of the study – led to the third part of the answer as to why theories about individuals and social systems are used in this thesis. In particular, the events which are introduced below help to show why a theory about human development became the dominant tool through which to view what emerges later as *a cycle of 'system' operations* (seen in a cycle of changes in voices and the meaning made by professionals in the system) – and at the same time the events help to show why a theory about how law operates is needed to explain what occurs in the legal system.⁹

⁸ As well as this thesis, for discussion about the following points see eg King M (1997: 70-106; 1991: 308-319) and King and Piper (1995).

While findings in this study reinforce King's work on the differences that exist between the systems and professions of law and social work, they dispute his analysis of Luhmann's social system theory.

⁹ The events also flag what is introduced later as the 'operative structure' of the system.

The San Diego experience (The social setting)

The data reported in this study were gathered during a period when extensive societal pressure was placed on the system to change how it operated. In 1992 and 1993 there was an extended media and advocacy group campaign against ‘the system’, the crux of which was that when professionals responded to reports of child abuse they often abandoned parents’ rights and disregarded the need for family integrity. Many professionals reacted by strengthening their emphasis on parents’ rights. Later, when the 1993 county grand jury investigated the attacks against the system (which included serious allegations by the previous grand jury), it noted that the campaign had spurred changes to system practices that caused concern. The 1993 grand jury found that:

The *current* state of the dependency system in San Diego may *endanger* the health and safety of abused or neglected children (“Protect the Child, Preserve the Family” 1993: 15 italics added).

Even though law clearly defines child abuse and these definitions had been practiced in the system (see Chapter Four below), the 1993 grand jury warning proved to be prophetic. Child deaths jumped from eight to eighteen in one year. Elsewhere in the region they decreased. Importantly, the death of a child from abuse is known to represent only the tip of a serious system failure.¹⁰

How did this outcome evolve? I could not escape this question when analyzing data and theory. If the social system of law operates without people, and if, as the theory

¹⁰ Explored in Chapters Four, 23 and 24 of this thesis.

of legal autopoiesis holds – law defines law by itself – then why did the very system designed to protect children become a place that endangered them? If the theory of autopoiesis is correct that the *system* influences the people who operate it more than they influence how it operates, why did the system shift from an established position of protecting children to operations that saw an exponential increase in deaths?

This study found that changes in the San Diego system arose from how *professionals* responded to societal pressure.¹¹ People influenced system operations by using their *own* meaning-making about which laws should apply or which policies to follow. Many professionals independently stopped (that is, outside the formal positions adopted by the system itself) using laws they had previously used and this placed children at risk. However, changes of this nature, which manifested in large-scale non-intervention in abuse cases,¹² were interrelated with the fact that the system also influenced what people did: the influence of individuals was not isolated from the influence of the system. Luhmann’s theory about the normatively closed and cognitively open system of law helped to explain – at a metaphorical level of analysis – how the legal system played a role in the way the changes were managed. It explained why *the laws* that existed did not instantly change in response to media and advocacy group pressure.

¹¹ Chapters 23 and 24 – which outline system operative structures – link this response with historical social factors, and give examples of how social *and* individual influences are intricately interwoven.

¹² The monthly average for petitions filed in 1991 was 277 and in 1992, 239. The 1992/93 monthly average decreased to 183. In other regions in California petitions for cases of child abuse “increased” (San Diego Grand Jury “Protect the Child, Preserve the Family” Report No 13, 1993: 2-14).

Notwithstanding the stability of law, the fact that *the laws that were practiced* did change, suggested that organic forces (people) dominated how the system responded to pressure. The mechanistic (or social system), mainly visible through the use of legal text, provided the source to frame responses, but current scientific knowledge suggests that framing responses in law can not be equated with *the (social) system* having primacy over how individuals operate (or the selection of laws used). These findings are elucidated in this study through *a typology of individual, professional and system self-concepts* – which is introduced below. Overall, this study found the most that can be said is that the social and the individual each give rise to the other; they are interdependent.

The interdependent nature of the relationship between individual and social systems brings us to the last component of the answer as to why two competing theories are used in this thesis. Contrary to Luhmann's view that the systems theory of autopoiesis can stand alone as a research tool, data urged the need for a theory that emphasized the interrelationship (not separation) between the individual and the social. Kegan's constructive developmental theory of human development was found to be a more complete theoretical apparatus to examine court operations, largely because it places people "in a single energy system of all living things", and locates theoretical analysis in that "between the progressively individuated self and the bigger life field" (1982: 43). While Luhmann's theory of the social system helped to place metaphorical emphasis on the concept of an historical memory, an example of the issues raised in this work may help to clarify the type of theory difference that I am speaking about.

How does the social system reconstruct information?

In the main, like old theories that placed the energy system *in* the individual, Luhmann places the energy system *in* the social system of law. I will argue that there is no evidence for this sharp distinction, Luhmann's description of how a social system changes being a case in point. Luhmann proposed that a social system changes only after *it* develops the ability to turn an irritant into something that has meaning to its operations.¹³ The ability of a system to turn an irritant (or a contradiction) into something that has meaning for it – that is, to turn an irritant into useful information – is said to occur when a system's operations reach a stage of complexity that allow the social system to recognize – or find a form for – the (irritating) information. In other words, an irritant becomes a stimulus for a system to vary what it does when the system reaches a stage of evolution that it can perceive the irritant – can recognize (hear?) it: with this new found ability instead of being heard as 'noise', the irritant has become an impetus for the system to change its practices (1993: C6/111/257-9).

King's analysis of systemic operations in child abuse cases similarly relies on the concept that irritants play a role in 'system change'. King also proposes that people can *only serve as irritants* to social system change; and like Luhmann, holds that the *social system itself* must reconstitute information, for example, the moral principles that child advocates advance. The social 'system' must reconstitute an irritant into

¹³ While Kegan uses the same term, reference to 'irritants' in this thesis is largely akin to the role of 'contradiction' in Kegan's evolutionary process of human development. The idea that irritants play a role in system change is discussed in Part Three when Kegan's psycho-social and Luhmann's socio-legal theories are contrasted about how individual and social systems are respectively said to change.

information because *it* needs to make sense of the principles being advanced according to *its* own selective way of programming and operating information (King M 1997: 25, 91, 207). As this thesis explains, not one of my readings on this topic satisfied my inquiry into: *how* the **social** system transforms an irritant into information that has meaning for it; and importantly, *how* this theory is empirically examined, tested and verified. Rather, this study will show that (notwithstanding the remarkable overlap in the theoretical processes of evolution that underpin constructive development *and* legal autopoiesis) Kegan's theory from psychology *did* shed empirical light on the above social system theory about how a system changes.

Interestingly, Kegan holds that a *self*-system (a person) cannot even begin to hear “however irritably” issues (such as moral principles from child advocates) that speak to the need for a person to change (that speak to the need for change in professional operations in child abuse cases) until the self-system reaches a stage of development that is “up for renegotiation” (Kegan 1982: 242). It is in this phase that “The self seems available to ‘hear’ negative reports about its activities; [the author explains that] before, it was those activities and therefore literally ‘irritable’ in the face of those reports” (Kegan 1982: 105). Kegan goes on to say that: “Every new balance represents a capacity to listen to what before one could only hear irritably, and the capacity to hear irritably what before one could hear not at all” (Kegan 1982: 105). Kegan embeds this change in the self-system in the relationship between the psycho and the social. It is described later in how a person moves from one level of ‘defended differentiation’ (or way of being in the world) to make meaning in another way – such that what was once subject (or what a person could not grasp as a way to

understand or know the world) becomes object (and that which was unknowable is now known).

In summary, whereas Luhmann and King advance a theory about (social) system change which cannot be verified with empirical evidence – and they largely base such change on processes that are said to occur separate from individuals – Kegan’s theory does provide a source from which to glimpse such change. Kegan’s constructive developmental theory that a person’s ability to transform irritants into meaningful information in the self-system is contingent on the interrelationship between the self and the social suggests that (within the context of current limitations on scientific knowledge) analysis of change in social systems may be more suited to, and certainly more amenable to, examination through a more dominant focus on the evolution of meaning making in human development. This brings us to some of the more general factors that distinguish – and unite – the social and the individual in this thesis.

The social and the individual: points of disjunction and synthesis in ‘the system’

The influence of the *social* system of law is often referred to in this study as the ‘mechanistic’. References made by theorists to the mechanistic or *social* nature of the system are often captured as the ‘rational’ operations of law, as noted earlier, such as the application of legal text in a case. Reference to legal text as a ‘social’ operation is used largely for one reason: because it provides a *visible* way to respect past and present social influences on the operations of law. While some theorists hold that

social operations are seen through people's communications in law¹⁴ – I will argue this brings us back to the topic of meaning making and its evolution in the system.¹⁵

Without over-inflating the often tacit or imperceptible quality of the *social* system of law (or diminishing the existence of this highly complex dynamic) another strong reason why I use the term 'mechanistic' to describe the social system is due to Luhmann's tenet that "neither people nor other organisms ... are part of the system" (1993: C1/V/2). It is reinforced that like research that dominated thinking before Einstein, where energy and mass were regarded as if two separate domed cities (Bodanis 2000), Luhmann incorrectly treats individuals and social systems as if separate entities.

In the main, although Luhmann's theory reflects research about the *self*-interacting nature of system operations, analysis in this thesis is influenced by the broader and more compelling research finding that emerged from quantum physics and relativity theory. These combined theories indicate that systems *cannot be observed or operate* in isolation from each other (Bohm 1980; Hawking 1988, 2001; Sheldrake 1988; Capra 1975; Penfield 1975; Feynman 1995). It is emphasized that this dominant research finding means reference to 'the system' studied in this thesis is one that includes the larger social system from which language and discourse and a natural

¹⁴ King (1997: 26) called the 'social' as *all* communication. I do not use this definition as research did not support the sharp distinction between the individual and social forces from which it is derived.

¹⁵ Luhmann (1993) and King (1997: 73) view the *social* operations of law through analysis of events in the legal system. I argue that the minute we view operations through dynamics that involve people theories about individual meaning-making become instantly applicable. This does not disregard the influence of morphogenic fields (or "structures of probability") on people's actions, or the influence of what is more commonly known as the 'collective conscious' or 'group mind', but gives precedence to arguments against depersonified abstractions of modern thought (eg Sheldrake 1988: 311-323).

order of the universe emanates.¹⁶ In short, ultimately ‘the system’ is the individual and the social.

In contrast to calling the social system the mechanistic, I sometimes refer to the influence of *individuals* in the system as the ‘organic’ force in legal operations – which King has called “conscious systems” (1997: 26); Kegan (1982) and Luhmann (1993) have referred to as “psychic systems”; and still other theorists have called the empirical or experiential aspects of a system.

While Kegan’s definition of the individual as “defended differentiation” (1982: 116) is adopted in this work, consistent with the use of physics as fundamental to the definition given to social operations, it should be noted that some physicists suggest “the individual” does not exist. Sheldrake explains, “individuals respond as the collective field, the group mind or conscience collective” (1988: 320). This begs the question: how can I argue for the interconnectedness of the individual and the social (and ‘fields and matter’) and simultaneously claim the role of individuals is fundamental to examining how ‘the system’ operates? Indeed, am I not doing what I describe Luhmann as doing: isolating aspects of systems that cannot be observed or experienced separately?

The answer is that individuals are not treated here as if separate from the collective conscious that influences their operations: they are part of the *interwoven* relationship

¹⁶ One could interpret this to say that the formula that constitutes the set exists in the sub-set. Bohm’s research finding on the “unbroken wholeness” at the core of our existence is one example (1980: 198). Another is the absence of separation in the theory $E=MC^2$. Bodanis noted that rather than energy or mass being conserved, there is a “deeper unity” where one does not cancel out the other but instead, they add up (2000: Ch5): Chapter 25 and Appendix One below touch on this unity between systems.

that constitutes ‘the system’ (that which is visible and that which is not). Indeed, this study uses concepts that are not in and of themselves, seen, such as the group mind – for instance, when making distinctions between the profession of law and that of social work – but the group distinctions that arise and analysis of how the system evolves are built from the voices and meaning-making reported by individuals. Comments by Jonas Salk, who developed the polio vaccine, help to illustrate this point.

When discussing how he approached his own work Salk said: “I have come to recognize evolution not only as an active process that I am experiencing all the time, but as something I can guide by the choices I make” (Jaworski 1998: 204).¹⁷ This is to say that change does not just happen to a group mind (or social system), rather there is an active exchange between the meaning an individual makes about an experience at an internal level of operation, and the events that occur in the evolution of the external social system (and the operations of a group). Put in another way, there is a cycle of system change involving the individual and the social, and this study tries to capture this juxtaposition by examining how people evolve in the social system – through analysis of their experiences about legal operations in ‘the system’ studied.

In stating the nature of connections found necessary in this thesis, it is also recognized that adherents of the theory of legal autopoiesis purport that the theory itself is “about

¹⁷ As an extreme example of the importance of individual meaning making, but from a completely different angle, people with autism make “relatively little use of meaning in their memory and thought processes” (Rutter 1978: 88). See footnote comments in Chapters Twelve and Thirteen.

the creation and reformulation of meaning” (Nelken 2001: 269) – thus rendering the nature of interconnections drawn in this research (according to them) unnecessary. However, in a similar vein to Nelken’s analysis of the theory, this study will note some of the methodological problems associated with the utility of the theory of autopoiesis as a research tool to “grasp” changes in law as “meaning”.¹⁸

A typology of self-concepts

Data in this study indicated that two key components interacted to influence the choices professionals make and ultimately, how the individual and social both play a part in the evolution of ‘the system’. They were a typology of individual, professional and system self-concepts; and the system operative structure. In the typology of self-concepts:

- I mainly base the ‘individual self-concept’ on theories from psychology: it links the way individuals observe and make meaning with data about how cases proceed in the system
- The ‘professional self-concept’ is largely based on theories from sociology and key historical influences on the systems in which each profession functions
- The ‘system self-concept’ includes the system definition (on page 20 above); the two self-concepts outlined here; and the rules and policies that ground system operations in law. In short, it incorporates the typology of self-concepts

As well as helping to explicate the individual/social juxtaposition in legal operations, the self-concept typology also helps to draw distinctions that emerged in data between the professions of social work and law in the dependency court. The typology is used

¹⁸ Although I came across Nelken’s work at the end stage of this thesis, his similarly posed questions about the role of irritants in autopoiesis, and the difficulty of distinguishing claims about the theory of autopoiesis from research into legal cultures are highly pertinent to any analysis of the theory.

as an analytical tool to explore data which shows – at individual, professional and system levels of operation – that attorneys’ voices tended toward themes of independence and self-authorship in their views about how the court operates, and social workers’ voices tended toward themes of inclusion and interpersonal mutuality. Parts One, Three and Four address how these distinctions between the two professions arose in this study. Of more relevance for now is an introductory sketch of the type of characteristics that contributed to the development of a typology of self-concepts.¹⁹

The individual self-concept

The quote below from an interview with a judge highlights just one dynamic – emotional forces on meaning making (and decision making) – that propelled the need to look closely at the influence of individuals on system operations:

Judge – the influence of an individual self-concept

No professional who works with these cases is immune from the incredible tension and tugs of these cases. *I know of no other cases other than maybe death penalty criminal cases, where there are strong forces involved to build alliances to pull in various directions, to pull professionals off of their centered positions, off their detached professional positions where they ought to be.*

Researcher: Are you talking about emotional forces?

¹⁹ This research is based on qualitative analysis. Let it suffice to say here that the topics accorded dominance in this work occupy a feature role only if they arose *often* as a theme in discourse analysis.

Italics and bold help to emphasize the central point in many of the quotes throughout the thesis.

Emotional forces! And I think that precisely it has to do with wanting to rescue the child, it also has to do with for example, parents' attorneys wanting to be able to do something for their clients.

When exploring how the thinking and feeling (cognition and affect) that was evident in interviews with social workers, attorneys and judges – *evolves within the context of the social systems in which we function* – (in the professional and system self-concepts) fieldwork from this study unexpectedly built on Kegan's work to "liberate psychological theory from the study of decontextualized individuals" (1982: 115).

The professional self-concept

The professional self-concept is based on the question: what disciplinary factors influence each profession to make meaning differently, such that contributes to competing voices about how to proceed in a case? The example below shows an attorney's strong emphasis on text-based, rational responses to abuse cases. It contrasts with the emphasis shown by social workers in their mainly process-based interactions which, as will be discussed later, are interrelated with an historical social memory of experientially-oriented oral communications:

Parents' attorney – the influence of a professional self-concept

A fully litigated system – that I think is justice ... you have to force every issue. Not on every case ... [but] I think that if the government knows that the attorneys in question are going to push every issue, then the government's careful and they dot every I and cross every T. They're sure that everything is lined up. And, you know, that is justice. So you don't have empty allegations, you're not having to fight shadows, you have to fight real, concrete things.

Not one interview with social workers suggested the profession (or an individual in it) had any interest in crossing every T and dotting every I, or in making sure that others did the same. How these differences play out sheds light on how the system operates.

The system self-concept

The next quote shows an overlap between an attorney's professional self-concept and the system self-concept, which dictates the rules of the court. What is less evident is that the rules the attorney follows must comport with his individual self-concept:

Parents' attorney - the influence of the system (and professional) self-concept

If I know a client is lying I won't allow him to make a statement or to lie to the court. That's unethical and I won't do it. But ... it's my duty to represent the client's position even if I might disagree with it or disbelieve something he's saying. I am not omnipotent. I am there to represent the client and absent false representations to the court which I'm not going to do, I think it's pretty clear that's what I have to do.

This thesis will show that while the attorney is guided by adherence to text and the rules of the court (or the system self-concept) his *particular* role in the system is dictated by his professional self-concept, and the choice to play such a role is influenced by his *own* individual self-concept. This snapshot of professional, system, and to a lesser extent individual self-concepts, foreshadows the *interwoven* nature of the self-concept typology that underpins legal operations in the court.

System operative structures and the social setting

The second component that helps to reveal how the system evolves – called here the operative structure of ‘the system’ – is built from the *relationship* that arises between external influences on the system, such as social groups and the media, and the internal operations of legal agencies and the DSS. The ways in which these systems respond to the accumulation of social action – be they vulnerable or steadfast in the face of criticism – helps to explain the operative structure of the dependency court – and how law evolves under pressure.

The *interpersonal and institutional themes* that were found to characterize social workers’ and attorneys’ voices respectively in the self-concept typology, similarly help to distinguish the operative structure of agencies in which law and social work is practiced. In broad terms, the culture of the system in which a discipline worked was found to be interrelated with the culture of the profession. Research indicated that in order to be receptive to changing community demands, the DSS:CSB has a fluid, open system structure. Its openness (linked with interpersonal processes in social work) leads its norms, or how it defines child abuse, to be vulnerable to change from external social forces on how the department operates. In contrast, and consistent with Luhmann’s theory (and also with the institutionally focused meaning that attorneys were often found to make), the legal system has a closed self-authoring operative structure, seen in the mechanistic way it officially controls its norms, such as how it manages the definition of child abuse. These two differences combine to explain the operative structure of the court, and the pendulum swings that occur –

with operations shifting during the course of this study *from* an interpersonal to institutional focus.²⁰

Thesis overview

After presenting the methodology, pilot study, and early conceptualizations, Chapters Four to Seven (Part One) introduce the self-concept typology that underpins the system of law studied (SL). It introduces the dependency court system, the individual self-concept and key differences between the professions of law and social work.

Part Two (Chapters Eight to Twelve) is about Kegan's psycho-social theory of human development (HD) and Luhmann's socio-legal theory of autopoiesis (LA). It reviews differences and similarities between these two theories about *how* individuals and social systems evolve, and explores why an integrated theory, rather than one based on legal autopoiesis, is a more useful tool to explain how law operates (SL=HD+LA).

Part Three (Chapters 13-16) is pivotal to the relationship that is drawn between analysis of theories in Part Two; the self-concept typology in Parts One and Four; and system operative structures in Part Five. It integrates key aspects about the system of law, human development theory, and legal autopoiesis (SL=HDLA), using data analysis (D) about the differences between law and social work from an empirical study in the dependency court. In mapping the links between SL=HDLA+D a new model of how law evolves emerges; it is one that proposes how a *cycle of system*

²⁰ One form of this change is shown in Part Five where "errors [were] more likely to be made in the failure to remove children than in their inappropriate removal" (San Diego County Grand Jury, Report 13, 1993: 15). This shift in 'system' practice will be linked with changes in meaning making.

change operates within the context of an ongoing dialectic of individual and social influences.

Part Four (Chapters 17-22) brings the new model sketched in Part Three into focus – drawing together the relationship between theories about ‘system’ development, the cycle of system change, and the self-concept typology – by detailing how individual, professional and system operations influence and are influenced by the system of law. All in all, this section of the thesis gives empirical substance to theoretical reasons why HDLA belongs as one theory to examine how law operates and evolves.

Part Five (Chapters 23-24) introduces the concept of system operative structures. The events that occurred in San Diego help to show the operative structure of the system (or its culture) and the way that social action accumulates, ever shifting the relationship between the individual and the social – thus, ever shifting how a system operates. Part Five shows how the dynamics that constitute the equation ‘ $SL=HDLA+D$ ’ are influenced by the accumulation of social action on the legal operations that professionals perform in the system, resulting in the formula $SL=HDLA+D^{SA}$.

To conclude, this exploratory study and the subsequent equation outlined in this work are not about the essence of law or social work. This research is mainly about sketching the outline of a map to see how law evolves.

The equation that is used to symbolize the interrelated dynamics found to underpin the operations of law throughout this project is based on the adoption of Kegan's theory about how meaning-making (human development) evolves, and the use of Luhmann's theory in a revised form about how law evolves. The integrated theory that is sketched – which places the energy system not in the individual or in the social system but in both – differs from systems theory about legal autopoiesis in that it is built from the experiences reported by professionals working in the court system.