

**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. Shelldrake 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.

CHAPTER ONE

RESEARCH METHODOLOGY

Introduction

This work is a qualitative case study in applied research. The units of analysis are:

- the empirical and theoretical factors that differentiate social workers from attorneys
- the way these differences evolve as a dialectic between individual and social dynamics and
- the relationship between this juxtaposition and the social setting in the operations of law

Attention in this and the next chapter is mainly given to the empirical aspect of the research, such as the ways in which data (D) were gathered from social workers and attorneys about how they experienced the court operating: this data helps to capture key dynamics in the system of law studied (SL). Theory development (HDLA) and attention to social setting dynamics (^{SA}) are sketched toward the end of this chapter.

Chapter Three starts to explain the link between data and Kegan's theory, the main theory to explore differences between social systems and self-systems (or individuals).

Synopsis of the problem

In San Diego complaints were made in official reports and the media, particularly by individual members of an advocacy group, that the child dependency court (which includes the DSS:CSB and legal agencies acting in the court) was failing. The complaints led to significant changes in system operations. Despite the frequency and gravity of the complaints and the impact that the court can have in families' lives,

there is a paucity of research into the processes that occur between the dominant professions said to make decisions in the court – attorneys and social workers – and also a paucity of knowledge about the influence of media and advocacy groups on dependency court proceedings. This study is an effort to correct this imbalance.

Research conceptualization

The first dominant influence on this research arose in graduate studies in San Diego when I became alert to the role that professionals play in how the dependency system operates. In a one-year interdisciplinary graduate training program I observed different patterns of communication and struggles for power between representatives from law, medicine, psychology and social work. Differences in professional status and philosophical views about intervention in abuse seemed to underpin competing opinions about how to proceed in a case. When conflict escalated, one's place in the discipline hierarchy often became the tool to decide who held the ideologically and academically superior view, and herein, who should dominate the decisions made in a case. Watching these processes were the first thing to stimulate interest in how the legal system worked, *not just in theory but also in action*.

The second main factor that influenced conceptualization of this project was the theory from legal sociology that social factors influence different outcomes in technically similar cases.²¹ This theory not only inspired an already established interest in issues that go beyond strict adherence to rules, but also drew my attention

²¹ Literature to first sway my thinking included Black 1989; Lempert & Sanders 1986; Kidder 1983.

to the influence of a ‘backlash movement’ on systemic responses to abused children.²² On the one hand these different fields of study stimulated attention to *micro*-sociological influences on court proceedings (later embodied in this work for example, as the impact of professional relationships and roles on law). On the other hand, they also stimulated interest in the *macro*-sociological influences on legal processes (eventually embodied as the affect of social advocacy groups and the media on system operative structures and legal change).

The research question

The first component of the research question is: how, and under what circumstances, do social factors such as roles and relationships between social workers and attorneys, and media and advocacy group activities, influence dependency court proceedings? The second component, which arose when examining how it was possible that respondents had such competing views about how the court works is: how do theories about individuals and the social system help to explain how law operates and evolves?

The empirical study into two professions in the court

Qualitative research methods were used to gather and analyze empirical data about differences between the two dominant professions in the court. This methodology was chosen mainly because it facilitated an open approach to emergent dynamics in

²² The backlash movement is a conglomeration of grassroots lobby groups that have strongly promoted views (not *always* accurate) about false allegations of child sexual abuse ([US Department of Health and Human Services](#) (1993) “Legal Issues: 1990-1993 Publications”; also see Hechler (1988)).

the court setting and interviews: and its orientation towards discovery and inductive logic was appealing as advance conceptualization of the research did not eliminate the development and verification of new data as the study progressed (Patton 1990: 44).

Respondents from six agencies participated in the empirical study. They were from the Department of Social Services: Children's Services Bureau (DSS:CSB); the County Counsel (CC); the Alternate Public Defender's Office (APDO); the Public Defender's Office: Child Advocacy Division (PDO:CAD); the Private Panel of Attorneys (PP); and Dependency Division of the Juvenile Court (JDC).

A pilot study was done at the JDC and the PDO:CAD. Procedures in the pilot study and research itself included: field observations; participant observer activities; informal interviews; development of a research instrument; in-depth formal interviews; discourse analysis of interview transcripts; review of documents collected at the participating agencies; library; inter-net and archives searches; and literature reviews.

Research population: sample size and selection

Twenty-eight interviews were conducted in the pilot study. In phase one this involved 17 informal (non-structured) interviews, which included a representative from the bench, attorneys from all agencies detailed above and professionals from DSS working as court officers, and in adoption, immediate response and family reunification. In phase two 11 formal interviews were conducted for the pilot study:

they included one judge, and six attorneys and four investigators (social workers) from the PDO:CAD. Upon completion of the pilot study and design of the research instrument 43 formal interviews were conducted, meaning they were structured and transcribed from recordings. This brings the total number of interviews to 71. The overriding criterion for selection from all cohorts was a minimum of 12 months experience in the dependency court system.

In the formal study itself 19 attorneys, 4 judges, and 20 social workers/child protection workers were interviewed. Six (children's) attorneys were from the PDO:CAD; three (parents') attorneys were from the APDO and five were from the PP; and five attorneys (for the DSS:CSB) were from the County Counsel. Thirteen social workers were from DSS:CSB and seven were investigators (social workers) from the PDO:CAD. The judges were in or had just transferred from the JDC. The sample size is large enough to draw meaningful results. Importantly, however – although random – the sample is not statistically representative of those at the DSS:CSB who are not qualified in social work.

The research population were derived from several methods and represented an attempt to conduct maximum variation sampling (Patton 1990: 172-177). Lawyers and social workers represented two separate homogeneous cohorts: both had legal responsibilities linked with the welfare of the family in the court. However, each cohort was internally differentiated by the competing interests associated with the role and function of the agency they represented; therefore on many occasions the two disciplines represented heterogeneous interests. The desire to establish whether shared patterns emerged despite the population's heterogeneity, and the desire to

identify key internally differentiated interests in homogeneous groups (Patton 1990) encouraged the need to conduct interviews across the six agencies operating in the court system.

Gaining access to the research population

Gaining and keeping access to the field was particularly difficult in two agencies where the gatekeepers were on heightened alert to any activity that may jeopardize the tenuous nature of their standing in institutional and community settings. One agency imposed tight controls over access to participants. Another gatekeeper tried to co-opt me into using the findings to advance their own ends. Others responded openly. Overall, the process of keeping access to the field served to reinforce the theory that “access is not just the initial phase of entry to a setting around which a bargain can be struck, but a continuing process of negotiation and re-negotiation” (Johnson 1975: Chapter Three).

To gain access to one cohort of social workers (and child protection workers) I met with the head of DSS:CSB to elicit their support. After documenting and meeting DSS requirements the department distributed a county-wide circular advising social workers and child protection workers of its approval for them to self select into the study. I gained access to another social work cohort by meeting with the head of the agency at the Public Defenders Office: Child Advocacy Division (see Chapter Two).

Attorneys were selected in two ways. I approached department heads from the APDO, The Private Panel and the County Counsel, and they suggested people who

they thought would contribute to the study. The process was different at the PDO:CAD. The manager gave me approval to approach attorneys (and social workers) at random. Four judges were approached at random. A fifth judge contacted me to be interviewed but my scheduling restraints prevented it. Everyone who was approached responded: interest and participation in the project was high.

Key strengths of the sample include the large number of participants and the range of selection. A weakness is the use of a snowballing technique in three settings to access names of attorneys who might participate in the project: I may have been given names of the most opinionated or assertive in the profession. A weakness in the samples from the 'humanities' is that by far, most respondents were qualified social workers. This means that the research may not represent 'child protection workers' at the DSS.

Interview: strategy, protocols and limitations

In-depth interviews took about one and a half hours and were held in a respondent's office or the court. All interviews were confidential, and approval was gained for them to be audio-taped and transcribed. Some respondents asked questions in response to the standard interview introduction. Occasionally caught by their cross-examination skills, I may have inadvertently given information that caused some to formalize their answers differently from others. I also had to closely watch my alignment with the PDO:CAD. Professionals could use objective criteria to make decisions and support the position held by any of the agencies responding in a case: I liked this approach.

I took a “seeker’s posture” (Lofland & Lofland 1984) and “interpretive stance” (Fielding 1993) to the interviews, where one is interested and sympathetic but undecided about what is said. While I was cautious not to adopt Douglas’ position, such as the need to distrust the information being given (1990: 55-57), deductive questions were asked to confirm or negate exploratory findings (Patton 1990); and I often pursued topics that respondents raised, exploring what a point meant to them.

Specific methodology for the empirical study

During the pilot study, key topics were organized into analytical constructs. Deductive analysis indicated empirical differences between the professions pivoted on perceptions and beliefs in the following four analytical constructs: *roles; power; ideology; and relationships and communication patterns* that arose in cases before the court.

Pilot analysis also suggested that the framework to *properly* address the empirical data should fuse phenomenological, ethno-methodological, ethnological, hermeneutic, feminist and holistic elements of inquiry. The need for such an eclectic method led to academic and personal concerns. Patton (1990: 39) best summarizes the issues faced: even though appropriateness of choice is the main criterion for judging methodological quality, methodological orthodoxy enjoys the highest regard.

Professional concern about using an eclectic approach lessened when I came to respect the following issues: the importance of “empathic neutrality” above

adherence to one method; the need to attend to theory construction and verification as dominant factors in research (Blumer 1969: 127-134); the interwoven dynamics and impact of interview techniques; and the relationship of the researcher to the researched. Janesick's views about the 'elasticity of design' and the importance of returning to 'the center' also facilitated the use of different methods (Janesick 1994: 209-219).

The role of specific frameworks of study

Ethno-methodology constituted the central framework for the study. It "gets at the norms, understandings, and assumptions that are taken for granted by people in a setting because they are so deeply understood that people don't even think about why they do what they do" (Patton 1990: 74). The goal in the empirical study was to get at each discipline's tacit knowledge about the "taken-for-granted realities" of their everyday routine in court operations. One example was learning how professionals responded in unexpected situations, such as the perceived abuse of power by another professional on a case. Another example was looking into their patterns of informal communications, which particularly helped to capture how the court operated.

The phenomenological inquiry pivoted on the attempt to capture how social workers and attorneys *experienced and interpreted* the influences on and impact of their role in the court. This contrasted with the a priori assumption that all their experiences were dominated by and stemmed from rules and adherence to the dictates of the system.

Ethnographic methods encouraged inquiry into the culture of each agency and the court. Particular interest was in helping to establish the “standards for deciding what can be, standards for deciding how one feels about it, and standards for deciding how to go about doing it” (Goodenough 1971 In Patton 1990: 68). In this study such inquiry particularly helped to illuminate that professional training and dictates have an influence on how the system operates.

Feminist methodologies were drawn from feminist jurisprudence (Minow 1990; Fineman & Thomadsen 1991), and research into sensitive topics (Renzetti & Lee 1993). This eclectic approach reflects a belief that there is “no single unified feminist method” (Renzetti & Lee 1993: 177). Nonetheless there are key tenets in feminist methodological strategies: they mainly debunk the myth of value-free scientific inquiry. This overlaps with *hermeneutics*, detailed below.

Before describing the aspect of feminist theory that most stimulated this work, several areas are listed that diverge from feminist methods. This study questions the use of self-disclosure, reciprocity and the need to place the researcher and participants on an equal footing as vital tools in qualitative research (Mies 1983: 117-139). First, self-disclosure was not relevant; participants were well-educated and did not need to know my views in order to overcome inhibitions and share their experiences. Second, the ‘equal footing’ approach gained through self-disclosure and reciprocity strategies denies the value of participants feeling superior to the researcher and, in this light, telling more about their views than might occur between equals. Such was the case when respondents seemed to enjoy expressing their sagacity in certain cases.

Overall, the use of ‘disclosure’ to establish an equal footing would have also meant ignoring the effect of disclosure on how participants responded. I think it can influence people to tailor their answers either in their effort to reduce conflict, such as when their views or experiences differ from the researcher’s, or when they wish to gain the researcher’s support. Finally, feminist methods such as those outlined deny the value of having an “outsider” conduct research. In this study several people mentioned how easy it was to speak with someone who was not in the system.

Drawing attention to these concerns does not negate the fact that feminist methodology is suited for research that seeks to understand how women’s experience is affected by structured gender inequality (Fineman & Thomadsen 1991). Of particular concern here is the dismissal of feminist writing about legal theory as being irrelevant or unprofessional when it departs from our understanding of ‘law’ as “legal doctrine and other rulings or interpretations of officials” (Grbich 1991: 68).

Feminist perspectives propose that “part of the feminist legal theory project must include inquiry into the ways in which legal reasoning transforms the embodied imaginings from male lives into the ‘objective’ form of doctrine which passes for ‘normative’ ” (Grbich 1991: 65). This thesis reflects an interest in this form of analysis because it also speaks to the way law is portrayed as reproducing itself by itself.

Specifically, this research was found to support the view that the paradigms that underlie the ‘objective’ and ‘normative’ in law result from an epistemology where “there is no space provided for the negotiation of subjectivity, identity, or

personhood” (Grbich 1991: 65). This finding arose when examining the history of law and its profession, and it was shown that *legal theory* is achieved by a process which relies on the assumption that “the individual, the subject” is constituted by the terms of legal discourse. Rather than reinforce this approach, and bolster separation of the knower from the known as occurs in legal autopoiesis, data in this project links them.

Finally, to accurately represent the *non-linear* nature of the research process, and the interrelatedness of the process, the subjects covered, and my own views, *hermeneutics* underpins the research method. Patton describes this method as recognition of a situational context where a praxis develops and the construction of ‘reality’ is known to stem from the interpretations of participants *and* the researcher (1990: 85). Before addressing this topic by identifying factors that may have affected my approach to this work, it is noted that not every influence is presented here. The length of this thesis urges the use of intermittent methodological updates; the goal being to help carry the work into a more coherent argument, not only between theory and data but also methodological and structural choices that had to be made as the work evolved.

Personal influences during the fieldwork

Of the many abused children I interacted with as a student at the San Diego Center for Child Protection, the most enduring contact was with three children who became “Special Friends.” One case involved a child who was the subject of a bitter custody dispute in a well established Jewish family where complaints of neglect and serious emotional abuse had been lodged. Another case involved severe physical abuse in an

upper middle-class, educated, professional family. The third case involved physical, emotional and sexual abuse in a blended and interracial, single-parent welfare family, where the mother had grown up in institutions and the mostly absent father was a drug addict who periodically gained access to and battered his estranged wife.

Seeing what happened to these children and their families as a result of legal and DSS intervention – over an extended period – exposed me to the range of problems that exist in institutional responses to abused children. Having seen on their faces, the tragic impact of separation and loss when they were removed from their homes, or the torment when they were forced to endure contact with an abusing parent, left memories not easily ignored or erased; and this may color my account of the actions or in-actions of the system. The experiences also made me more alert to the impact of communication problems on how cases proceed through the system.

Finally, as well as interdisciplinary graduate training, course work in law and sociology outlined earlier, and a degree in psychology, this study was also influenced by work as a teaching assistant in the interdisciplinary program; and two internships – one training as a Court Appointed Special Advocate (CASA), the other researching the backlash to child protection. These experiences alerted me to the importance of balancing social and legal interests in cases, and legal standards in dependency court with the principles of two competing disciplines.

The remainder of this chapter introduces: the decision to include a review of the social setting in the study; how data were analyzed; and what led to the selection of the theories used.

The social setting (or research environment) ^(SA)

The data were mostly collected between 1992 and 1994, during which time there was intense public and political scrutiny on the system. What became a media and backlash campaign against the system led to a volatile atmosphere that accentuated the existence of vested interests often found when researching sensitive topics. As Lee and Renzetti (1993) caution, the needs and fears of the research population were affected by unstable social and systemic moods. This research climate not only heightened the need for cultural sensitivity about the different values or political agendas that might affect the views held by respondents (Sieber 1992: 129-130), but also eventually led to the inclusion of the social setting as a research topic in the thesis.

Originally, I thought analysis of the two professions was enough, and that all that was needed was awareness of the relationship between the social context and the potential impact of this context when posing research questions (Punch 1994: 83-97). This view changed, largely after data findings from each profession reinforced the position that to factor out the social context is to factor out the exact dynamics that triggered the dilemma being studied: an exclusion which has been said to render a version of methodological choice “awesome in its banality” (Fielding & Fielding 1986).

Although it was not until I was well into the project that it was obvious the social setting had to be included in this thesis, its inclusion nonetheless occurs naturally. This is mainly because reports from media and advocacy groups that formed the central part of analysis about events in the social setting had been gathered for a

doctoral internship (Sinclair 1995: 153) that was conducted in parallel with the empirical study outlined here between professions in the dependency court.

One example of how analysis of the social setting merged with empirical research is that discourse analysis of media stories; material from a parents' lobby group; and the subsequent grand jury reports about the system studied; spoke to many of the system changes that respondents identified in my interviews with them. Overall, these combined sources were found to support King's (1997: 70-106; 1991) views about law and social work, such that: social work is vulnerable to dependence on other systems; and child abuse scandals have led social work to be seen as the enemy of family rights. Analysis of events in San Diego that led to these findings similarly pointed to aspects of the different operative structures (or cultures) for the systems where law and social work is practiced.²³

Treatment of the data (D)

Attention to process was central in the empirical study into professionals and observations at the dependency court. Patton noted that how processes lead to outcomes is open to speculation, interpretation and hypothesizing. In particular, the theorist said statements about linear order may be more distorting than illuminating. To avoid this outcome Patton suggested focusing on the complexity of reality, not our simplifications of those complexities (1990: 422). Utility and meaningfulness of data therefore became the focus of analysis: data were examined to establish what

²³ Part Five will address this aspect of individual and system analysis.

provided a context (not just causal explanation) through which to view how the court operated.

Initially focus was given to individual responses, elucidated from the framework of the four analytical constructs that emerged during the pilot study: *roles; power; ideology; and relationship and communication patterns*. Data were also sorted by discipline.

Questions were raised to see if early findings might be due to methodological idiosyncrasies, such as: did the selection sample, especially in the pilot study, skew the type of data collected? The answer was yes: if the *formal* interviews in the pilot study had included parents' attorneys, different questions may have arisen for the research; but this in no way detracts from the validity of the data for answering the research questions posed earlier.

Discourse analysis was used to determine the indigenous concepts from across the cohorts (Patton 1987: 146:151), such as identifying and coding the most frequent topics in the interview transcripts. Eventually, many of the indigenous topics began to be seen as potential patterns of influence for individual and system responses.²⁴ These topics were then listed under headings developed from analyst constructs – that is, the most frequent indigenous themes now appear as organized lists under a variety

²⁴ Although competing perspectives from fieldwork pervade the entire thesis, Chapters 20-22 in particular explore why deviant cases did not fit into dominant patterns.

of headings in tables that I constructed after it became evident that data should be categorized into a ‘typology’ of individual, professional and system self-concepts.²⁵

Of most importance, it is emphasized that the analytical process for the empirical study inspired movement *away* from an exclusive focus on the four analytical constructs (roles; power; ideology; and relationship and communication patterns) and led to:

- a systems theoretical framework to analyze how law and individuals evolve
- the development of a typology of self-concepts and,
- attention to the influence of social action and the different operative structures for the systems of law and social work

In order to begin linking data within the conceptual framework and systems theoretical structure from Kegan’s and Luhmann’s individual and social system theories, Patton’s method of testing the viability of interpretations was used. This included:

[A]ttaching significance to what was found, offering explanations, drawing conclusions, extrapolating lessons, making inferences, building linkages, attaching meanings, imposing order, and dealing with rival explanations, disconfirming cases, and data irregularities (1990: 423).

Theory triangulation was used to see how data were affected by fundamental premises and different assumptions. For example, how did findings change when viewed from

²⁵ One reader of this thesis said: “Excerpts of interviews are presented, but these cannot be called data, as it is not clear what these excerpts represent” (McCallum 04/2001). As I do not concur, I decline to change this thesis, but do welcome impartial feedback regarding the suitability of the self-concept typology that emerged in this work as a relevant tool within which to embed data findings.

developmental theories about different voices (Gilligan 1982; Kegan 1982, 1994; & Kohlberg 1976) in contrast with Luhmann's systems theory about how the legal system operated (1993, 1995)? Bracketing was also used: this means data were not just interpreted using "standard meanings in existing literature" (Patton 1990: 408). As one example, coder analysis was used to develop the self-concept typology: while in the process of sorting indigenous data into the categories of individual, professional, or system self-concepts (all of which are parts of just one self-concept), I eventually began to distinguish data that helped to identify a particular aspect of the self-concept typology,²⁶ from data which suggested that particular experiences a professional described influenced changes at an individual, professional or system level of self-concept operation.²⁷ Another example of bracketing is the attention I gave to social action, and the relationship drawn between this issue, the self-concept typology, and the operative structure of the court system.²⁸

To conclude, Table Three, which integrates data with theoretical analysis, summarizes the research in this thesis. It shows that analyst constructs were built for the patterns that the population did not directly label, such as the different voices of social work and law (or DSS and legal agencies in the court); the humanities being mainly interpersonally oriented and law proving to be more institutionally oriented. These findings were cross-validated with a triangulation of sources such as: interview transcripts and participant observations and field notes about respondents' affect and

²⁶ Shown in Parts One and Four in sets of tables headed One (a), Four (a) and Five (a).

²⁷ Shown in the same set of tables listed above, which are in this case headed One (b), Four (b) and Five (b) – and all of which it is emphasized are presented as an exploratory work for later research.

²⁸ Shown in Part Five, Chapters 23-24.

communication style, literature about each discipline and the court itself, and theoretical analyses primarily from Kegan and Luhmann.

One causal link from the empirical study is made in this thesis: it is between relationships and informal communication patterns and their impact on cases. The size of the sample allows the findings to be cautiously applied to similar settings.

Choosing systems theories (HD:LA)

As noted, I gave attention to theories after an initial comparative analysis of data. As the field of analysis was law I started with Luhmann's theory about how law operates. Although I had had an introduction to Kegan in undergraduate studies and was aware at the time of conducting the empirical study that I may revisit his work, it was not until I began studying Luhmann that my attention to Kegan became focused.

The level of attention given to Kegan first intensified when I found that Luhmann's theory had the fundamental earmarks of Kegan's constructive-developmental theory. Both authors, for example, speak to the development of self-concepts and the evolution of object relations and boundary differentiation to show how a system operates and acts upon its interpretations. As the theoretical analysis developed, and I gained a better understanding of Kegan's theory, it also became clear that Kegan's theory not only offered the best possibility of capturing the interrelationship between individual and system influences in the system but also the differences that emerged between the two disciplines studied. However, rather than rely solely on Luhmann

and Kegan, in an effort to support or critique the theories developed I also integrate the arguments from both theorists with analysis from related theories.²⁹

The factors that influenced the decision whether to direct research data *more* through Kegan's theory (HD) than that of Luhmann's (LA) also warrants brief attention. At one level the decision was easy: empirical data did not reflect systems theory of legal autopoiesis – in and of itself.³⁰

While recognizing this dynamic, it is noted that this study had not been designed to analyze social systems, therefore how could I be sure that my interpretation of Luhmann's theory was correct? While answers were initially found in my critique of Luhmann's use of object relations theory, which poorly replicates human development theory, by the end of the thesis reading had also touched on physics, neurophysiology and cognitive science. What I learned from these fields of study was that no research has ever been designed, or can be at this time, that can prove Luhmann's theory.³¹

²⁹ Importantly, as my attention to stages of development is focused solely on the processes of operation involved in system change and not in the hierarchical or gender-based aspects of evolution, I do not critique what might be regarded as the outdated, contentious aspects of human development theory.

³⁰ Just as it was shown that matter did not disappear when energy was created, but rather it was transformed (Bodanis 2000: Ch5), this research suggested that individuals did not disappear when law was created, but rather, they helped to transform it through the evolution of *their* meaning-making.

³¹ In the absence of the ability to prove the theory examined, I reiterate that Luhmann and King often advance their tenet that the 'social' is *separate* from the individual by reference to events in the legal system. I do not consider that this form of evidence can be substantiated because events in the system reflect research intrinsically linked with individual meaning-making which builds to reflect the 'group mind'. Also see Nelken's views about the use of "social scientific assumptions about law" by the law as communication (or law and literature/autopoiesis) movement (1996: 120; 2001: 292).

A multitude of theorists — including Nobel laureates in physics such as Bohm (1980) and Feynman (1995), and other respected scientists such as Hawking (1988; 2001), Sheldrake (1988), Capra (1975) and Penfield (1975) – have all addressed questions about systems, what type of measurements identify them, and what factors explain them. However, the dialectical, complex and expansive nature of issues raised by these theorists makes it impossible to properly cover how systems operate in one thesis. As a result, other than an abridged snapshot of key topics in Appendix One, analysis in this thesis relies on the occasional and rudimentary reference to research findings from these theorists. I have adopted this approach in the interests of remaining focused on what was found to be most pertinent in this study: individual and social system dynamics and the influence of social action on how the system of law operates – both of which speak to the key question that unfolded as the research evolved: *how is it possible* that respondents’ views are poles apart about how the court operates?

In making the linkages outlined here it is recognized that I found it necessary to qualify the theory of autopoiesis to such an extent “as to remove the theory’s distinctiveness”: a process Cotterrell also suggested was necessary in order to avoid the “misleading” and “harmful” claims about the theory as guides for socio-legal analysis (2001: 80).

To conclude, as this research originated as an empirical study and shifted heavily to a theoretical analysis, the thesis subsequently reflects an attempt to move sequentially between data and theory. Sometimes this occurs with synthesis, sometimes however, before I can present the analysis of data and properly locate it in the theoretical

structure identified it is essential to engage in extended theoretical exploration. This occurs mainly when analyzing processes linked with the *evolution* of individual and social systems. It is also worth noting why attention to the social setting does not occur until late in the thesis, until, that is, I have established the relationship between theory and data as operating in a cycle of system change. Although it was preferable not to introduce yet another element of the study late in the work, it became clear that if I brought the social setting forward it was at the expense of not placing events within a conceptual apparatus from which to consider the overarching impact of social action.

The next chapter, on the pilot study, identifies the main steps linked with development of the empirical aspect of this project. Due to the size and range of topics eventually integrated in this work, I will take the somewhat unusual approach of showing early relationships between the pilot study and the dominant themes argued in this thesis.

CHAPTER TWO

RESEARCH METHODOLOGY: THE PILOT STUDY

Introduction

An interview with a judge in the dependency court provided a bridge between prior research conceptualizations outlined in the last chapter, and the initial direction in the pilot study. The judge's view that there were distinct differences between social work and law and that the differences had an impact on how cases moved through the court, as well as his opinion that there was a difference between the law in books *and* the law in action, encouraged the need to research the two professions and operations of the court at an empirical level of analysis.

I conducted the pilot study in two phases (Yin 1989: 61-83). The *first phase* involved: observation of the physical setting, cases, and operations at the dependency court; this provided the basis from which to form preliminary views about people in the court system, and stimulated questions in informal interviews with professionals in the court. The unstructured interviews culminated in information that I categorized into several analytical constructs, and these constructs provided the basis for the research interviews in the formal pilot study. *Phase two* involved formal interviews with social workers, a judge, and children's attorneys and analysis of these interviews: this analysis was used to refine the research instrument for the empirical study in the court.

This chapter, which begins with a description of the court setting, provides a snapshot of these two phases. In the interest of not complicating a large study, attention is instantly directed to the analytical constructs that dominated the work (with the exception of one topic, the numerous categories that once existed are not recorded).

Phase One – Stage one:

The physical setting

The courthouse reflected the sterility often found in modern architecture. It has ten courtrooms; this includes portable rooms attached to the new structure to accommodate an unanticipated explosion in caseload. Security guards and electronic screening equipment, clearly squeezed in as an afterthought to the building's design, confront every person entering the facility. Beyond the entrance is an open-plan central foyer where bedlam most frequently invaded the senses.

A few people working behind a large desk in the center of the foyer are the link between the citizens mandated to attend, the professionals representing them, interpreters, and the courts. Rows of seats, built as if to accommodate a large group viewing a movie, face the desk enclosure and separate some of the courtrooms from the washrooms. A small play area for children occupies one corner in the corridor.

The courtrooms are mostly small box-type structures where elements of the court's protocol are set in concrete. The dominant feature is the judge's bench, which is pivotal, symbolically and practically speaking, to everything else in the room. It occupies a disproportionate space and sets the tone of separation and formality that ensues throughout the court sessions. Softening this formality, some benches display a bunch of flowers. The side of each bench contains a built-in booth where secretaries work. There is an American flag behind every judge.

The court clerk and security guard for each room sit at individually placed small tables, situated at either side of the judge's bench. Immediately below and in front of the judge is a smaller table, two-thirds the size of the bench. It is here that the parties in a case sit with attorneys for the County Council and from the PDO:CAD, PDO, APDO and the Private Panel. Behind the table is a hip-height wooden fence, which separates those involved in the proceedings from those at the back of the room such as extended family, interpreters and professionals who observe cases. The public cannot attend.

The client population is heavily stratified toward the lower socioeconomic class, with consistent overrepresentation of Mexican, Afro-American and Hispanic people filling the corridors and courtrooms. The ratio of males to females in the client and professional cohorts changed daily and was not easily discernible. Professionals were primarily white, well educated, and appeared to be from middle-class backgrounds.

Observing cases, court operations: interpretive reactions of people to the setting

The court corridors were constantly and excessively crowded, and clients often looked worn and confused. They had to wade their way through the system to their eventual place, if they were lucky, on the rows of seating, where they might sit for the day waiting to be called. Next to them attorneys or social workers juggled their brief cases as desks on their knees, from which they took notes for the next session. They had to cram for whisper holes to discuss the fate of a family's life. The chaotic hub of activity in the foyer was worsened by the incessantly used loudspeaker through

which, in the rapid succession of case turnover, predominantly Hispanic names were called.

Up to thirty cases could be heard in a morning in one room; the main interruption was professionals dashing in to glance over the courtroom in the hope they would find an attorney who was wanted in another case. Disregarding the visible lethargy of the people who were permanent fixtures in each court, such as the security guard and clerk, the overall impression was that most professionals were on the run and this prevented their full attention in one room at a given time. This raised questions about where they were – mentally – while they *engaged* in ‘legal’ proceedings.

Overall, I observed court cases and operations for six months. I observed a trial between biological and foster parents, hearings on re-abuse, breaches of reunification plans, placement changes, and service and treatment problems. Contrary to the setting being changed “by the intrusion of field workers” (Patton 1990: 270), I sat at the back of the courtroom and as professionals were accustomed to people occupying this space, my presence was of little or no relevance to their official role in the court.

Lofland and Lofland believe it is intolerable not to make your purpose known to the people being researched (Lofland & Lofland 1984: 22-23). However, in this project professionals or parties to a case did not have to identify with or oppose me in the course of their business. As a result, I chose to accept the decision of each judge as sufficient to observe the court’s operations. Contingent on proceedings, some judges briefly explained my presence and entered it on court records.

My prior exposure to the court setting diluted the affect of “the observer on the observed”; and my experience verifies that “the conditions under which an initial entree is negotiated may have important consequences for how the research is socially defined by the members of the setting” (Johnson 1975: 50). Before starting this work I had observed court proceedings over five years: first as a trainee in the Parent Aide Program, then as an interdisciplinary graduate student, a Special Friend, a teaching assistant, and a student in the Court Appointed Special Advocate program. These experiences meant I was not a total stranger and could readily blend into the setting.

Note-taking was unobtrusive. When a judge (the only person facing me) ‘appeared’ to have confidentiality concerns, I documented observations in between cases. My pre-occupation with writing coincidentally served to desensitize professionals to my presence in the court: they often engaged in informal discussions about confidential matters while the judge was not at the bench. Some professionals also shared confidential ‘snippets’ with me as they filtered in and out of the court. In this environment an exchange process evolved where I was able to ask “testing questions” about the setting being studied (Converse & Presser 1986: 52-60).

I noticed a social worker often sitting in the back row of one courtroom. Eventually I wondered aloud why she was observing the sessions. Louisa said that when she was waiting to be called for a case she preferred to spend her time inside a courtroom, “out of the war-zone” in the corridors. This is an example of the “emic-perspective”: or what is called the “insider’s perspective on reality” (Fetterman 1989: 30-31; Patton 1987: 150). The fact that Louisa fulfilled her need to escape the “war” by *entering* a territory that for most epitomized confrontation, heightened my attention to the

impact that events in the corridors may have on other professionals working in the system.

An experience that I had while observing the court system further contributed to my need to consider why the corridors were a place of perhaps more intense exchange than the court itself: it is at one and the same time an experience that exemplifies and yet trivializes how the court system operates. The observation occurred during a court recess when I tried to get a refreshment. After a few unsuccessful minutes of exploring the court I started asking for directions. Finally an answer sent me on a clear path, or so it seemed: up the stairs, to the right, through the swing doors, and I was standing in an office. Belief in the authority of the person who had given the directions compelled the statement, “I’m looking for the candy machine”. In response, the clerk sitting behind the reception desk inquired about my purpose for being in the courthouse.

After establishing myself as a researcher, the next inquisition was what sort of candy I wanted. Being in a qualitative mode of thinking I answered in a jovial but perplexed tone, “I won’t know until I see what’s there”. I was then instructed to wait. The clerk buzzed for assistance. Then, after being escorted through computerized security doors and while under the guard of a polite but *clearly* inconvenienced person, I purchased a candy and was led to the exit, surprised and slightly bemused by the process.

The ‘candy machine story’ is somewhat mocking of the bureaucratic process. It is used because it speaks to the speed with which an issue can become complex and, one

might say, out of proportion or control from the initial intention. This research study suggested that the time wasted, the unproductive use of personnel, and the unnecessary steps needed to get a candy were a microcosm of the excess in court processes; to say nothing of the metaphorical hoops to replenish oneself. Overall, the experience helps to explain what eventually became a dominant finding in this study, introduced later in the analytical construct of relationship and communication patterns. In general terms the candy machine story provides a glimpse into the official barriers that exist – and sheds light on why professionals rely heavily on *informal* negotiations, conducted in the court corridors. I will discuss this topic after introducing the first two analytical constructs: power and ideology.

Phase One – Stages two and three:

Informal interviews and analysis of notes

Issues of power

As mentioned when discussing ethno-methodology in Chapter One, the topic of power arose as a way to examine how professionals respond in situations where they don't even think about what they do. Issues about power first emerged in the informal interviews when attorneys said that social workers were often emotionally attached to the outcome of a case, and as a result went beyond their role. Attorneys also said the court gave social workers too much power, mainly by allowing their reports into evidence, which according to the way attorneys make meaning, were inaccurate and contained hearsay. In contrast, social workers were telling me that the court belonged to attorneys – in short, attorneys had the most power. Attorneys were also seen to have excessive power because they could be uncritical of their clients'

responses to allegations of abuse, and had the right to put their clients' interests above a child's.

As well as helping to explore the (common-sense) systems theory that legal agencies and the DSS:CSB are functionally differentiated, the topic of power, along with the next analytical construct about ideology, will be later connected to the following theoretical components of analysis that were flagged in the introduction to this thesis:

- each system produces its own internally generated version of reality
- the ability of a system to change is restricted by its own selectivity

The ways that power and ideology are linked with the above two aspects of how a system evolves is suggested for example, in the ways that attorneys and social workers are trained (for the most part) to observe, value and respond to different dynamics in abuse cases; and change to these dynamics is restricted by the different ways that social workers and attorneys make meaning about intervention in a case and court practices.

Ideology: justice

Whereas the social workers I met at the court said the court was not structured to properly address the needs of abused children, attorneys at the court said it was a rubber stamp for DSS. Social work voices spoke to the need for a better response, and attorneys to the need for more restraint. These differences initially encouraged inquiry into Gilligan's rights and caring dichotomy (1982) as a tool to help distinguish between the professions.

Ideology: rights and caring

Two observations reinforced perspectives that influenced the early conceptualization of this project from the interdisciplinary training program; they were that a rights and caring dichotomy hierarchically elevated law over social work.

Example 1

The first observation speaks to the pervasiveness of the *caring* role of social workers, and how this quality may occur at a cost of professional status in the court. A woman baby-sitting her grandchildren at the court wanted to observe the hearing at which the children's future home was being decided. The court wanted to support her and an attorney asked, "Is there a social worker outside who can take over the baby-sitting?" Other attorneys discussed how they could find a social worker. To put this incident in context, social workers rarely attend court sessions. The courthouse, however, is full of attorneys. In short, both professions were in the court to fulfill their respective *legal* roles, with a strong dominance of lawyers present, but strict adherence to lawyers representing rules and rights prevented them from momentarily taking on a caring position, whereas there was a tacit view that social workers should shift into this role.

Example 2

The second observation – a custody case between a child's biological and foster parents – speaks to the system hierarchy of rules over caring. After having cared for a child most of its life the foster parents initiated proceedings to adopt her. The biological parents wanted their child returned to them; and their case prevailed

because the law read that “bonding” (read ‘caring and connection’ – which was reflected in the DSS stance of support for the adoption) could not be used to determine where to place a child. It held that parental rights (read ‘non-intervention and constraint’ by the State) governed how to determine placement.

These two themes of a rights versus caring response – later developed into different ‘voices’ and ways of meaning-making – were broadly indicated by the emphasis of a rights or caring orientation in a discipline’s primary approach to case intervention (eventually linked with individual and professional self-concepts) *and* an institution’s practices (eventually linked with system self-concepts and system operative structures).

Relationships and Communication

Picking up on the early lesson from Louisa about the ‘war zone’ in the court corridors, and the root metaphor about bureaucratic red tape derived from the candy machine story, observations in the court corridors (and parking lot) revealed that professionals engaged in informal interactions. They were often heard as negotiations: they were case-specific and occurred just before a court session began. The frequency of informal contact begged the question: what might occur if the interactions did not take place? After making this observation I again drew on previous training and field experiences, thinking that if relationships were good, informal communications were more likely to occur: and if they were bad, negotiations would be fractured or, in extreme cases, non-existent. To explore the possibility of these connections I started asking people in the unstructured interviews

if the quality of relationships that people shared might heighten or reduce the likelihood that an informal meeting would occur.

Another relationship observation focused on how professionals responded to criticism. Social workers often denied the legitimacy of attacks against them, saying that attorneys were just not in touch with dynamics in abuse cases. Attorneys interpreted social workers' criticisms as validation that social workers were not in touch with the law. These responses suggest how the argument between each discipline spins on itself. Each profession has a blind spot, and this seemed to hinder professional unity.

Analysis of data about the influence of these different relationship and communication patterns will be used in this study to help explore and contrast theories that:

- 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

Links that emerge later between relationships and informal communication patterns and the above two factors (which in generic terms speak to aspects of Luhmann's and Kegan's theories about how social systems and individuals evolve) include the association of data about relationships with the way professionals reject strategies or information (called 'noise') that does not have meaning for the *self*-system. This is interwoven, as one example, with the role of informal communication in the system itself, which will be shown to offer professionals a chance to reconstruct details about a case (in ways not used in the court) so that the information complies with the voice

and/or the meaning that is made by another professional working on a case; thus raising the likelihood of case resolution.

Phase Two – Stages one and two:
Formal pilot interviews and data analysis

Ten formal interviews were held at the Public Defender’s Office: Child Advocacy Division. (The eleventh was with a judge.) The PDO:CAD is unique, in that lawyers and social workers work together. The department was new and this was reflected in its fresh decor and enthusiastic staff. Computerized security doors segregated the reception area from the professional offices. After several visits I was given the entry code to use at my convenience.

While remaining open to emergent topics, the initial focus in the formal pilot interviews was on the three analytical constructs just introduced: (i) power, and how it was perceived to be abused; (ii) ideological views about justice, distinguished by voices that emphasize rights or caring; and (iii) the influence of professional relationships and patterns of communication on decision-making. During the interviews other topics arose, with professionals adding views about how the system operated, and as stated, I pursued topics to understand what particular issues meant to them.

It is also noteworthy that at the time of data collection it was not known that the information gathered in the research would provide significantly rich material to question and challenge the central aspects of the autopoietic theory of law.³²

³² These central aspects were outlined in the introduction as being the tenets that: society cannot be analyzed *as if* it consists of people, it consists of communications; the defining feature *distinguishing*

Q.1 Power

Respondents' answers in formal interviews indicated that complaints about the abuse of power were influenced by multiple factors, which analysis suggested often tacitly pivoted more on what a person thought another person's role should be rather than what it actually was. This early data finding became the basis of a new analytical construct by drawing attention beyond the topic of power itself, to that of questions about each profession's role and perceptions about how it was performed.

Q.2 Ideology: justice

In phase one of the field study, attorneys thought the court over-responded to allegations of child abuse and described justice in a context of non intervention (rights). Conversely, social workers linked it with the need for a better response (caring). Formal interviews supported these differences about justice, but not to the same extent as that noted. This result may have been influenced by the close working relationship between social workers and attorneys at the PDO:CAD. As the setting for the *formal* pilot study did not reflect the structure of other agencies in the system I decided to continue inquiry into early links between justice, and the rights and caring ideologies.

people from society is social communications; social events are separate from the factors that inspire or inhibit individuals; there is no direct communication between individuals and social systems.

Q.3 Ideology: rights and caring

While data lent some support to the elevation of a rights orientation in law over a caring orientation in the humanities, at an individual level social norms about gender differences – which place males more closely with a rules orientation and females with a caring orientation – contradicted early gender research. In the formal interviews of the pilot study only, most of the attorneys interviewed were female and they most often talked in what Gilligan (1982) called male voices (rights). Most social workers (investigators) were male and they often talked in female voices (caring).

One example is a male social worker who investigated a case where a 14-year-old gave birth to a child who died several days later. He wanted to report this to the girl's social worker at DSS, but the attorney prohibited him. She used the authority of attorney-client privilege to restrict his response. As it was not within the scope of the project to conduct individual gender analysis, early findings simply put me on alert not to integrate the rights and caring approaches tentatively linked with the *disciplines* of law and social work respectively, with *individual* gender norms for men and women.

Another compelling topic in pilot interviews was that of language. For example, social workers struggled to understand the language attorneys used, which translated into difficulties in understanding the priorities or reasons behind attorney decisions. The depth needed to research this topic meant that it was not possible to add this subject to the thesis. However, and quite unwittingly, it remains that later in the

study, analysis into how it was possible that such competing views emerged about how the system operated contributed to identification of the most dominant ‘voice’ for each discipline.

Q.4 Relationships and Communication

All respondents said informal negotiations occur. Relationships between professionals and the likelihood of informal negotiations occurring were also strongly linked with decision-making in abuse cases. Informal negotiations were found to increase the chance of agreement on how to proceed, and were linked with speedy case resolution. If the interactions did not occur there was a higher chance of dispute or delay.

Notwithstanding the strength of these early findings, several factors were considered before pursuing this topic. Research on decision-making in law cautions against over-simplifying processes “by focusing exclusively on single decision making stages” (Bortner & Reed 1985: 414). Bortner and Reed also warn against the “creation and perpetuation of an untenable dichotomy between legal and extra legal variables [rather than] an examination of the interplay between junctures in the process” (1985: 414).

The dynamics thought to limit the isolation of views about the impact of relationships and informal negotiations include the fact that: legal outcomes are influenced by evidence, the seriousness of the offense, abuse history, family dynamics, the age of a child, the judge, and the status of the parties in a case. With these limitations in mind,

the influence of relationship and informal negotiations on proceedings was pursued as an exploratory study for future empirical testing.

Exclusion of a previously dominant topic: Ideological views – guilt v. innocence

During the pilot study the media often leveled the complaint that social workers treated those accused of child sex-abuse as guilty, and had abandoned investigation practices that assumed innocence. Social workers told me they were not assuming guilt so much as they were allowing for the possibility of deception. Some reported that guilt or innocence was not their concern; in dependency cases their goal was child protection.

As the media attention to this topic was immense, I decided to keep asking questions about it in Phase Two of the pilot study. Notably, both professions suggested that the guilt versus innocence issue did not help to describe the dichotomous particularities that fractured the disciplines. Early analysis indicated the issue was not so much that social workers *assumed* people were guilty but that evidence was poorly collected, unsubstantiated, incorrectly recorded, and wrongly presented. The use of evidence of this nature may be tantamount to an assumption of guilt, but in and of itself it is not.

Overall, as I was more interested at that time, in capturing data about the differences between the professions that resonated from the professions – and not media reports – I chose to exclude analysis of this topic (allegation) from the empirical study. Having said this, analysis of the data presented later, such as in the chapters on the system

self-concept, will present findings about how social workers are perceived to breach legal standards.

Emergent topics: Expansion of the research pool

Although I had initially only looked to a judge for his early views about this research, the pilot study indicated there was a need to include judges as a cohort in the study.

Two reasons propelled this need: the first is that the comments participants made about the role of the judge in dependency cases went beyond the traditional recognition of judges impartially assessing the facts of a case and applying the law. Respondents spoke about personal bias in the judiciary and the influence of a judge's 'own tendencies' in their decision-making practices. The second reason pivoted on the importance that was emerging in data about the use of informal communications as a tool to address case issues before professionals entered the court.

The existence of these dynamics meant having to make a choice about including judges in the study with social workers and attorneys or devising a separate study into judicial practices. I opted for the former and chose to use the same research instrument for judges as for the other two cohorts, with the addition of two formal questions: they go to judicial opinions about the practice of informal negotiations. As for the topic of judicial bias, I chose not to give this dominant focus, and to just add informal questions as the interviews progressed with judges about their role in cases.

Phase Two - Stage three:

Research instrument

The last stage of the pilot study was to refine the research instrument for use in the formal project. The following analytical constructs show the research instrument used:

Roles and role performance

Q.1 What are your perceptions, values, or beliefs about what attorneys are trying to accomplish in juvenile court? What are your perceptions, values, or beliefs about what social workers are trying to accomplish in the court?

Q.2 How does your profession achieve what it is trying to accomplish? How does the other profession achieve what it is trying to accomplish?

Power

Q.3 How would you talk about power as it relates to the disciplines of social work and law in dependency cases? If there is a difference between the professions how does this difference manifest in the system?

Ideology

Q.4 Attorneys appear to predominantly choose a framework of rights and rules as the basis from which they make decisions, and social workers appear to predominantly choose a framework of protection and caring as the basis from which they make decisions. Do you agree with this statement? What do you think influences each profession to choose between rights and caring when making decisions?

Q.5 Please describe what you think justice is: what is justice?

Relationships and communication

Q.6 On the basis of what you have described so far, do you think differences between a rights or caring-oriented response influences relationships between the disciplines?

Q.7 I observed attorneys and attorneys, and attorneys and social workers, informally interacting – negotiating – just prior to a case being heard. Do you agree that informal negotiations occur between professionals? What do you think would happen in Juvenile court proceedings if the informal system disintegrated? (I wish to thank Dr. Don Bross from the Kempe Center in Colorado for his contribution to this last question.)

Q.8 Does the existence of a good or a bad relationship have any impact on whether or not the informal interactions take place? Can you describe, without identifying any party or case name, a case where the outcome was positive because of good relationships between professionals? Can you describe a case where the outcome was negative because of bad relationships between professionals? Are there cases that contradict this scenario?

Judges' interviews

Q.1 Do you know if attorneys and attorneys, or attorneys and social workers, have met informally in the court to discuss case details and direction prior to the court session? Can you describe how you determine if this form of interaction occurs?

Q.2 Can you predict the direction of a case by knowing the professionals involved?

The next chapter expands on the links that I have made thus far between field work, researcher analysis, and theory development. In particular, the chapter outlines field observations that initially stimulated my attention to the ways in which attorneys suppressed their emotions in legal proceedings. Observations about how attorneys managed emotions not only suggested that representatives from law might respond in a very different way from social workers when issues of power, competing values, and relationship and communication matters arise in the court system. Of equal significance, the topic of emotion had mostly been associated with social work, such as the negative role their 'caring' was said to have on how some social workers

responded to allegations of child abuse (occasionally disparagingly referred to in interviews as their 'bleeding heart'). In comparison, it has long been held that emotion does not influence the practice of law: my observations questioned this maxim.

To conclude, the field observations in Chapter Three unsuspectingly contributed to later theoretical analysis about how much weight to give to theories from Luhmann and Kegan.

CHAPTER THREE

LINKING

HERMENEUTIC INFLUENCES:

DATA AND THEORY

Introduction

This chapter introduces field data and participant observations that not only suggest a wide range of emotions influence decisions in the system of law studied, but also reinforces the existence of an hierarchical difference where law is elevated over social work. It describes five field observations; all of which took on greater relevance during my analysis of the autopoietic (or operatively closed) systems theory of law. Rather than support Luhmann's sharp distinction between the individual and the social, the observations help to identify the less obvious aspects of the juxtaposition between individual and system influences on how law operates. The nature of observations – which are introduced in bullet point form and then later discussed – also lead to a brief introduction of Kegan's original perspectives about 'interpersonal' and 'institutional' orientations of meaning making (1982), which are linked respectively throughout this work with the 'voices' (Kegan 1994) of social work and law, and the systems in which they operate.

Five observations

- I observed a judge give a controversial legal decision in a case with clear logical arguments. *Immediately* after the case finished I visited the judge's chambers. As he welcomed me he spontaneously said: "I just get a *g o o d* feeling about that guy." Knowing what the judge meant, I acknowledged his (individual) "feeling."
- At the end of what had been a hard-fought trial an attorney made a gesture to shake the hand of the attorney he had successfully opposed. In what might

normally be thought of as a rude response, the attorney for the losing side refused the gesture and left the courtroom in an abrupt manner. When I saw this occur I said to the attorney who had made the gesture: “He’s very upset by the decision.” The attorney responded empathically: “He is, but he’ll be O.K. tomorrow.”

- An observation of a non-verbal nature similarly draws attention to how emotions are ‘managed’ in the court. It occurred in a volatile case; extra security guards were brought into a courtroom in anticipation of an outburst when the judge read his decision. The parties and their attorneys were already seated around the same table in front of the judge’s bench, anxiously anticipating his finding, and the entrance of the three armed (and ready) men into the small room overwhelmed it.

Tension escalated when the direction of the judge’s decision unfolded. In the middle of the decision the party who was losing custody of the child abruptly came to his feet. The judge’s eyes lifted from his report. The security guards gripped their holsters ready to intervene. The tension magnified as the man briskly walked over to where the other party was sitting. All eyes were now intensely focused on the man. Just as he was to be grabbed from being so dangerously close to his opponent, the man reached out and snatched a tissue from the box on the table. With the same swiftness of action he returned to his seat, where he cried quietly.

- The fourth observation occurred when I tried to talk with a judge. It was between sessions and only court officials were in the room. Thinking it would be rude to ask sensitive questions from across the room, I walked through the hip-level

swing-gate, around the table where the parties and their attorneys usually sit, and approached the bench. As previous visits to the judge's chambers had taken me on the same path, I did not anticipate people's response to my approach. The judge, his secretary, the clerk and the guard all looked at each other; two of them gasped. Then the judge put his arm up in my defense and said: "It's O.K.; she doesn't realize." He was right, and nor was I to find out at that time.

- Another observation, one that touched me personally and academically, was to see a judge who came to the bench wearing regular clothes. Once at his chair he would put on his black robe. This process came to symbolize how the judge officiated in the court. It was a simple process that at one and the same time had the effect of showing both his informal, human side and the formal, official side.

Discussion

The incident where I wrongly walked toward a judge's bench shows my ignorance of court protocol at that time *and* speaks to the complexity of how the system influences individuals. An invisible moat remains drawn around the judge's bench, across which no-one shall walk without approval. The continued existence of this symbolizes more than an historic relic of the days when modern technology and security did not exist. The presence of a moat is used here as a metaphor to symbolize what some call archaic modes of legal practice, exemplified by invisible obstacles that can separate judges from people, or people from justice. As it stands, I was permitted to cross the moat and I learned more about judges than is visible to the public upon whom their

decisions are visited. One lesson was that their decisions involve more than ‘legal’ reasoning.

Two things came to my attention when the judge said that he “felt” *good* about a party in a case. First, was that he had been moved by emotion to make an unsolicited statement of this nature *straight* after his (controversial) decision. Second, was the contrast between the personal perceptions he expressed in the privacy of his chambers, and the legal dogma he had used to present his decision at the bench. The *potency* of his personally held view raised the question about the extent to which his substantive legal argument had been affected by his ‘instinct’ about the party in question. In short, while the moat example suggested that the system indirectly influenced individuals; as seen here, individual emotion also seemed to indirectly influence the practice of law.

A similar observation about the possible impact of emotion (or the individual) on legal decisions occurred when I talked with the attorney who had refused to shake the hand of his professional adversary after a ruling was made against the side he represented. When we talked in the courthouse parking lot he was still reeling from the case decision. Uppermost in his mind was the struggle his client would have in funding what the attorney thought was an irrefutable need for an appeal. His caring feelings for his client’s trauma seemed heartfelt. The depth of his passion (and vehemence) however, left me wondering about the extent to which emotion – rightly or wrongly used – might be influencing his assessment of the next *legal* steps for his client.

These examples all spoke to emotions being expressed *after* proceedings, and with this realization drew my attention to the possibility of attorneys masking them *during* a case. The thought that emotions had an impact on attorneys' *legal* decisions also led me to consider why complaints about the influence of emotions were mostly focused on social workers.

Similar to the examples above, social workers experience “good” feelings about clients, or heartfelt (caring) concerns about case decisions. However, one insight into the criticisms leveled by attorneys against social workers in this study occurred after closely observing how they expressed themselves in court. Some social workers based the need for action on relational issues rather than on factual evidence or, as most glaringly illustrated in one case where a social worker was shown not to have recorded the conversations she now claimed occurred, they failed to document their interactions in a case. In other words, they did not make the shift from emotion (caring) and oral interactions in the field, to logic (rights) when preparing to advocate for a child in the court setting. (The person accused of abuse won the case that I use in this example.)

Watching the judge put his robe on helped me to create a visual image of a shift from emotion to logic (from individual to system). The human being (who was caring) was visible, but logic took unmistakable dominance when delivering the reasons for his decisions. Over time, seeing the judge make the shift from his everyday-suit into his official robe became a metaphor for the type of balance needed in the courtroom.

The case when the attorney refused to shake his adversary's hand also speaks to the way some attorneys manage emotion and logic. The attorney who had made the hand-shake gesture indicated he understood the other attorney's feelings when he said: "He is [upset], but he'll be O.K. tomorrow." This was not just a socially acceptable answer in what could be construed as an embarrassing moment: his communication suggested he respected the attorney's need to process the case, and he was untroubled by the highly emotional, angry reaction, some of which was negatively directed toward him.

Once again, this interchange made me wonder what had contributed to his tolerance for a behavior that, if shown by a social worker, would invite ridicule. But it was not until I looked at my own response to attorneys' emotionally charged interactions that I had to question my tolerance (or elevation) for the feelings attorneys express, and my hesitation to respond in the same way when some social workers show their feelings.

Self-questioning led me to a hidden assumption – one which generally gives attorneys more legitimacy than that accorded to those from the humanities: it rests in the (false) paradigm that attorneys know what is 'right' (they follow rules) and they are more objective than 'caring' (or to repeat the worst stereotype used by attorneys, the media, and critics of the system – 'bleeding heart') social workers. Moreover, when attorneys are linked with emotions, it is often over issues of logic. The social workers I watched in the court who had failed to make the shift to logic were mostly emotional about 'caring' (relational) issues associated with their goal to help a child.

These dynamics led to the question: is the emotion that social workers show over perceived failings of the court to properly ‘care’ for children downplayed as excessive or out of touch with legal dictates, mainly because it arises from experiences (or a form of meaning making) that has less status than the expression of emotion that can be associated with the ‘rational’ operations of law? Put another way, is the emotion shown by attorneys about the perceived failings of the court to exercise logic elevated as a *normal* response to all the abhorrence that goes with injustice (whatever it is perceived to be) within the context of ‘the rational?’ If there is legitimacy to this scenario, does it affect relationships between the disciplines, and how a case proceeds?

Clearly, more questions than answers arose when witnessing the emotional responses and exchanges between professionals in the court, such that it is only possible to touch the surface of these dynamics in this work. Perhaps the event that best symbolizes the court’s ultimate approach, favoring a systems response, and its rejection (suppression) of individual caring responses, is the scene where three armed guards were about to pounce on a man who, in reality, was only getting a tissue to wipe his tears. This incident provides an exaggerated way of seeing where emphasis appears in operations.

The case in which the story emerged presented layer upon layer of formality, and in anticipation of a violent outburst upon the judge’s decision an abundance of weapons had been rallied to manage the situation. In contrast (without trivializing the drama) there was a scarcity of support systems and, in a skit that might belong in a theater, there was a glaring shortage of tissues. To operationalize the event, the question was

(internally) posed: do guarded responses, the strategic use of “enforcement” resources, and formal planning and system structures in the court take precedence over alertness to and the availability of individual support services? Does the need for law to emphasize rationality usurp the importance of practices associated with caring?

While I will try to address the underlying theme of questions that my field study stimulated, which involves attention to multiple topics, there is one question for which I could not find a satisfactory answer that arose much later in the research: Namely, given the highly intricate, often abstrusely structured interwoven influences that I observed in court operations, on what basis did the proponents of legal autopoiesis advance that the (social) system of law operates and evolves in isolation from the factors that inhibit or inspire people?

I looked for answers in several schools of thought and although there was much rhetorical argument could not find scientific evidence that an individual’s aspirations and constraints are separate from our social environment, or the group mind intrinsic to specific settings. In my readings, however, I came across Kegan’s tenet about the interrelationship between the psyche and the social as factors to influence how people make meaning and therefore, how self-systems (and social systems) become gradually more complex. It was through the location of this literature that the relationship between data and theory began to take shape. Attention to Kegan’s constructive developmental theory helped to explore and explain key differences in the voices and meaning made by attorneys and social workers, and in what might first appear to be a

circuitous link within a theory, evolution of these different ways of making meaning are grounded in the relationship between individual and social influences.

Integrating data, discipline differences, & theory on the individual and the social

Until recently, the cultures (explained later as the holding environments) in which rational and caring responses evolved, were different for men and women. However, this difference was found to still influence operations in the *systems* of law and social work. Through court observations, data and theory analysis, I found the legal system was most related to Kegan's evolutionary truce of an *institutional* balance: it reflects a system of meaning-making that *favors* differentiation. The human services system was found to mainly reflect Kegan's *interpersonal* balance: which is a system of meaning-making that *favors* inclusion. Making these distinctions is not to say that either system operates exclusively from one form of meaning-making; it simply suggests the dominant orientation.

In addition, while the use of Kegan's interpersonal and institutional 'truces' helps to distinguish how the *systems* of law and human services mainly make meaning, in this study the global distinctions made about those who represent the two professions are related more often to 'voice' and orientation of meaning making than 'stage' of development (Kegan 1994): such as styles of communication of a caring nature in social work, and the independent voice in law.

Parts One and Four examine how these differences – in voices and the ways that both *disciplines*' mainly make meaning – impact on legal operations (seen through the

accumulation of how individual professionals make meaning).³³ At this point Kegan's description of the human experience of inclusion or connection and the competing qualities of differentiation or separateness, helps to show a key 'system' difference that will be applied to analysis of data in this thesis:

Of the multitude of hopes and yearnings we experience, these two seem to subsume the others. One of these might be called yearning to be included, to be a part of, close to, joined with, to be held, admitted, accompanied. The other might be called the yearning to be independent or autonomous, to experience one's distinctness, the self-chosenness of one's directions, one's individual integrity (Kegan 1982: 107).

Just as people move "back and forth between resolving the tension slightly in the favor of autonomy, at one stage, in the favor of inclusion, at the next" (Kegan 1982: 108), the systems of law and social work were found to similarly struggle to find the best balance in dependency law. This struggle, which is stimulated by the interrelationship between the individual and the social, will be seen particularly in Part Five, where 'the pendulum swing' that respondents identified is introduced: it reveals how 'system' changes are characterized by periods of moving back and forth, between practices that favor caring and those that favor independence – both of which are respectively linked in this thesis with periods of allegedly over-and under-responding to abuse reports.

³³ It is iterated, when I refer to changes in meaning making I refer to changes relevant to operations in the host setting – the court system. The methodology for this study prevents me from generalizing findings about change as being definitive of *complete* developmental shifts in how a person makes meaning. Overall, the goal is to simply draw attention to these rudimentary findings for future study.

Analysis in Part Five will show that the pendulum to which I refer pivots around the data finding that when the interpersonal truce is dominant in system (read professional) practices, ‘system’ intervention on behalf of children is increased. As elucidated through the use of Kegan’s theory, this is because “the interpersonalist balance ... with its orientation to nurturance, affiliation, and the organization of the self around the expectations of the other, conforms to the traditional stereotype of femininity” (Kegan 1982: 211); and the need to care (and protect children) – a quality demonstrated by male and female social workers in this study – dominates the decisions made.

The interpersonal balance (and its correlate where the theme that underpins social work dominates system practice at a given time) contrasts with the self-authoring identity of the institutional truce which Kegan sometimes associates with law. Data indicated that when this latter balance dominates, systemic responses to allegations of child abuse declines – as occurred during this study when the system was pressured over excessive involvement (caring) in children’s lives, and as a result of the complaints leveled, professionals more rigidly focused on *well established* rights – which exist for parents.

Discussion

It is noteworthy that flagging the types of difference that arise in this thesis between social work and law (and embedding the evolution of these differences in the interconnection between individual and system influences) is not meant to place one form of meaning-making – or one profession’s voice – above another. The central

point at this stage is that key differences between the two professions exist that must be identified and considered when addressing how a legal system operates that incorporates the views held by social workers and attorneys. It is also clear that the differences to which I will refer are changing: analysis will show that some social workers have an institutional voice and some attorneys have an interpersonal voice. At a general level of analysis, one factor thought to influence changes of this nature in discipline responses has been associated with interagency collaboration (Byles 1985: 549-554), and the evolution of university-based interdisciplinary training projects (Gallmeier & Bonner 1992: 513).

However, data will show that when this study was conducted the dominant institutional and interpersonal meaning-making that distinguishes the historical memory of the disciplines of law from social work remained intact. It appears that this is because the newness and paucity of interdisciplinary training for those in the child protection field means the self-concepts demonstrated to drive responses to abuse are still shaped by competing ideological beliefs and educational backgrounds (see Henderson 1997: 39). In other words, while this thesis looks at processes associated with system change, the point for now is that (at a metaphorical level) each 'discipline' still produces its own internally generated version of reality.

PART ONE

THE SYSTEM OF LAW AND ITS BASIS IN A TYPOLOGY OF SELF- CONCEPTS

(SL)

INTRODUCTION

Introduction

Part One introduces the system of law and data from the system studied (or SL+D).³⁴

It presents the system in a typology of individual, professional and system self-concepts that arose during this research, and in so doing begins to lay the foundation for the theory that the evolution of the individual and the social are intricately interwoven.

The *individual* self-concept – which is built from psychology theory – is encouraged by the fact that legal proceedings are never based on *one universally valid translation* of legal text or asymmetrical analysis into logic, scholarly neutrality, or legal science. As well as using science and text, interpretations about law are ideological expressions that arise from the meanings people make. Such meanings include a person's level of *awareness and intention*: factors which contribute significantly to individualized versions of 'the system' and as a result, make the individual self-concept the most dominant aspect of the typology that helps to explain how it is possible that professionals hold such competing views about how the system operates.

Overall, the individual self-concept also developed into the most dominant aspect of the self-concept typology to challenge the sharp distinction that is made in the autopoietic systems theory of law between individual and social operations. To

³⁴ The full equation that underpins the arguments in this thesis is $SL=HDLA+D^{SA}$. It means: *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.*

remind readers about the nature of this sharp distinction, system theory tenets that are critiqued in this thesis pivot on the issue of separation, such as proposals that:

- 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
- there is *no direct* communication between individuals and social systems

The *professional* self-concept emerged in this thesis when data indicated that attorneys and social workers had very different training and roles and responsibilities, and as such often operated as competing systems of response in ‘the system’. To lay the building blocks for the professional self-concept of each discipline Part One will explore some of the most fundamental aspects intrinsic to the historical memories and hierarchical factors that underpin the practice of law and social work.

Overall, the professional self-concept will help to support King’s theory (1997) that:

- law’s truth-validating procedures serve a different social function than does social work
- ‘child protecting’ social work is not pre-programmed to operate from legal criteria

Data and theory about different professional self-concepts will also help to reinforce tenets in Luhmann’s systems theory (1993) (through Kegan’s theory 1982; 1994) that:

- each system produces its own internally generated version of reality
- the ability of a system to change is restricted by its own selectivity

The *system* self-concept is built by reviewing the rules that characterize the operations of the court, and its underlying ideological foundations and practices – as described in literature *and* by the people who operate the rules of the system. The system self-

concept will not only help to show that functionally differentiated systems exist – such as law and social work – but, as the arguments are eventually developed using data from those who operate the court, will also show that:

- 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

Whereas King holds that *law* reconstructs information to comply with *its* own host discourse: making it difficult to merge social work into the system of law (because law's reconstruction of information increases its scope of interference with social work discourse) (1991: 319), in the typology of self-concepts these system tenets will be explored for example, through the theory that *professionals* reduce information that does not have meaning to the status of noise, and later reconstruct it to comply with the way *they* make meaning.³⁵

More generally, the three self-concepts are developed to help scrutinize, at a closer level than would otherwise be possible, the dyad between the social and the individual in legal operations. Importantly, all the self-concepts can only be considered as parts which belong to the whole. The *individual* self-concept helps to describe what undergirds the operations of professional and system self-concepts. The *professional* self-concept helps to describe how individuals interpret experiences and present observations in ways that reflect the dominant historical orientation of the meaning made in their training and agencies of employment. The *system* self-concept is the

³⁵ Processes of individual and professional (thereby 'system') change, are sketched in Part Three using empirical data from the court setting; this is after having laid the foundation of the self-concept typology, and having explored how social systems and self-systems are said to evolve (in Part Two).

self-concept through which individual and professional self-concepts emerged in this study and took their shape.

Methodological limitations: the self-concept typology and ‘the system’

To avoid individual self-concepts becoming a thesis (in and of itself) on individual development, the analysis here is limited to data that help to understand how *individual professionals* operate in their own discipline and in the court. Another consideration is that the self-concepts are not meant to provide definitive categories in which specific issues become locked into and the subject of box-type analysis. Topics presented in each of the self-concepts overlap, and although they are likely to be a source of contention, to go beyond drawing interwoven links would impose an unnatural rigidity on each self-concept. In simple terms, all that is attempted is to sketch the structure of the building blocks of each self-concept and suggest the possible links that unite them. The importance of this approach – emphasizing the interrelated nature of individual, professional and system dynamics studied – is reinforced by the overriding theory that although a system has to be isolated so that it can be defined, it must also be interacting so it can be observed. This dynamic applies to *all studies*, even the *subatomic* world of a system: one can not decompose it into constituent parts and then depict it as if representing events that are not interwoven (Capra 1975: 138-145).

In this work the interconnected dynamic of system operations and observations also means that the multitude of factors that influence ‘the system’ can not be identified in one study. Keeping this in mind, what this project tries to establish is the

appropriateness and context from within which theory and data are examined. Overall, does the analysis of a self-concept typology – and its association with theories about the evolution of the social and the individual – advance our understanding of how the system of law operates, and improve insight into *how it is possible* that professionals hold polar opinions about how law operates? To put these questions in terms of the theory developed in this thesis: does $SL=HDLA+D^{SA}$.

CHAPTER FOUR

THE SYSTEM SELF-CONCEPT

(PART ONE)

(underlying rules and associated issues)

Children's attorney

The system requires every side to be properly represented. *Now when you get to juvenile dependency court you have to define what the role of the system is.*

Parents' attorney

The trouble is these social workers have much more credibility with the court than my client does. And often our clients do lie and are deceitful, that's especially intrinsic when people have got problems. But at a certain point I can tell when a social worker is lying or heavy-handed, because I hear it from person after person the same sort of complaint about the same sort of social worker.

Social worker

Attorneys don't have to go out and talk to their client; one time before the court hearing *they might have a conversation out in the hallway* before they get in there and they just learn what the client tells them. *I think we have a bigger picture.*

Introduction

This is the first of two chapters which identify the central operations performed in the dependency court system. Topics in this chapter include the rules or mechanistic (text-based) aspects that characterize court operations, and research that speaks to the data finding that the court was failing; such as research about child deaths and the perceived impact of this issue on decision-making. The fragmented and strongly held views that combine to form the system self-concept reflect the general sense of alarm and debate in case law and academic and theoretical literature at the time this study was done.

The chapter partly supports concepts later explored about the autopoiesis of law, and the theory that the *system* influences individuals. However, the opening quotes suggest that as well as defining the role of the system, other issues exist which will be shown to go beyond the emphasis in legal autopoiesis on social operations; such as the problem identified by a parents' attorney where social workers are said to have more credibility than a parent, and conversely as a social worker indicated, attorneys are not thought to have the full picture. Difference perspectives of this nature, which go beyond the direct *self*-reproduction of law (by itself), will be later shown to be as integral to the evolution of the system as are the rules underpinning its operations.

System change and the influence of Senate bill 243

A review of the rules that underpin the system self-concept (which were implemented a few years before this study began), starts with the reasons that propelled the need to

reform dependency law. Under the legislative charge of Senate bill 1195 (Presley - Chapter 1122 Statutes of 1986) the California Senate Select Committee on Children and Youth established a task force to examine, among other things, juvenile court dependency statutes and practices. Two years later, in 1988, and eighty-nine years after the inception of a dependency court, the California State legislature enacted Senate bill 243. The bill made the major categories of abuse more specific through new definitions of abuse and neglect (1988: iii). It reflected the recommendations made by the Senate bill 1195 task force to achieve greater specificity about subject matter jurisdictions, and to clearly delineate the type of families best served in the court (SB 1195 Task Force, January 1988: i-iii, 20).

The task force that developed Senate bill 243 also thought it vital to restrain what some believed was unbridled judicial discretion, such as the ability of judges to give parents extended periods to reunify with their children. This practice contributed to 'foster care drift' and the intent of new legislation was to stem this outcome. As a result, in addition to providing detailed definitions of abuse the bill authorized the implementation of very specific legal proceedings that were time-bound (1988: 3).

It is noteworthy that the philosophies that encouraged the development of dependency law at the turn of the century were significantly different from the thinking that fostered the legislative changes seen in the new bill. Prior to Senate bill 243 the dependency court had enjoyed an unusually high level of commitment to judicial discretion (Minow 1990; see also *In re Robinson* 1970). However, many of the changes associated with the bill were highly contentious. The impact of the bill,

especially its definitions and time schedules, led to extensive debate (and activism) about the role and purpose of the dependency court. As one interview indicated:

Judge

If we had a driving central philosophy, then other definitions could be components of that philosophy, and we could all have the same direction. And that's what we need. *In my judgment Senate bill 243 was the antithesis of that. It became a road map for severe fragmentation ... Parents and kids got chewed up in the process.* The irony is that I think the parents emerged stronger because their platform began to form and it got recognition and that's a breath of fresh air. The children's platform got cracked and until we repair the crack we're not going to have enough of a footing to really do good.

It is significant that attorneys for parents saw the bill as unconstitutional because its time-bound demands for a “permanent plan” ignored due process rights, and it propelled the State to sever parental rights: issues that a lobby group for parents strongly resisted.³⁶

Whereas parents' attorneys saw the court as failing because it was not operating as a highly tuned legal instrument – one focused on rights already well established, such as those for parents (a finding which changed over the period of the study) – data also reinforced the judge's opinion that “the children's platform got cracked” with the repeatedly expressed opinion, mainly from social workers, that the court was failing children: this was largely because it was seen to be too legalistic for intervention in

³⁶ This topic is discussed in detail in Part Five when examining how social action accumulates to influence how professionals operate – thus changing ‘the system’.

abuse cases. In short, each cohort thought the court was failing but revealed competing opinions about what was wrong with ‘the system’ to support this view.³⁷

Key factors are now introduced that underlie these beliefs and views about the system. Topics include: the nature and severity of child abuse; the difficulty in defining, assessing and identifying abuse, and the associated systemic problems in response to child maltreatment. The chapter concludes with a summary of procedural rules related to professional roles in the court.

The nature and the severity of child abuse

“In 1990, the U.S. Advisory Board on Child Abuse and Neglect declared the maltreatment of children to be a national emergency” (Durfee 1994: 3). In one (sensational) article about the Board’s findings the chairperson of the Board wrote:

The Board presented 31 critical steps in response to the tragic reality that each year, hundreds of thousands of our nation’s children are starved and abandoned, severely burned and beaten, raped and sodomized, berated and belittled. They are also killed (Durfee 1994: 3).

The issues that preceded the Board’s announcement about the national emergency help to show the issues that are fought out daily in the court. In particular, fear about serious harm occurring, or the actual death of a child, is a significant aspect of the self-concept of the system. Another key aspect is the exponential rate of increase in

³⁷ Part Four will present tables that capture the data gathered which suggests the system self-concept.

reports of abuse, which began to skyrocket in the early 1980s. The U.S. Department of Health and Human Services, Office of Human Development Services said:

In comparing the 1986 overall incidence rate to the 1980 rate, the number of children who experienced demonstrable harm from abuse or neglect increased 66 percent. The national incidence study concludes that this increase is probably more reflective of increased recognition than of an actual increase in incidence (Clearinghouse on Child Abuse and Neglect Information, March 1989: 4).³⁸

Statistics on the abuse of children which results in death, a category of abuse said to be poorly documented, also escalated. Tigpen and Bonner cite a study conducted by The National Committee to Prevent Child Abuse which “found a 49% increase in reports of child deaths by state CPS agencies since 1985”. Contrary to the report issued by the U.S. Department of Health and Human Services quoted above, which proposes that increases in child abuse may reflect better recognition rather than elevated instances of abuse, Tigpen and Bonner write:

It is unknown whether the increase in child deaths is due to a recent escalation in fatal violence against children or is the result of improved detection and documentation. What is known, is that approximately three children die each day as a result of abuse or neglect (1994: 5).

³⁸ Citing the *Study of National Incidence and Prevalence of Child Abuse and Neglect*: the report indicated that “the majority of child maltreatment cases (63 percent) involved neglect (1,003,600 children or 15.9 per 1,000) and less than half (43 percent) involved abuse (675,000 children or 10.7 per 1,000)”. In 1986: “358,300 children or 5.7 children per 1,000 were physically abused”. “The next most frequently occurring type of abuse is emotional abuse, involving 211,100 children or 3.4 children per 1,000”. “155,900 children, or 2.5 per 1,000, were sexually abused.” Notably, the incidence of sexual abuse “more than tripled since 1980” (Clearinghouse, 1989: 4). A more recent study which goes beyond the time period of empirical research for this thesis indicates that in 1995 “996,000 children were substantiated by CPS as victims of child maltreatment. This represents 15 out of every 1,000 U.S. children”. NCPA Statistics (www.childabuse.org/rsrch2.html).

Defining, assessing and identifying child abuse

There is an ongoing dispute in the system about how to define child abuse. As a result, it is believed that a large number of cases either go undetected, unreported or are not substantiated (National Research Council 1993). There is a chance that this outcome has not been helped by the different focus found to exist between legal and research definitions of abuse. Statutory definitions of child abuse have been found to emphasize “observable harms”, and research definitions have focused more on demographic and coercion factors (Kaufman, Hilliker, Lathrop et al 1996). At an indirect level, attention to definition issues in this thesis goes to the theory that ‘the system’ (ultimately decision making and actions by professionals) treats that which does not have meaning as if it is ‘noise’; and the discussion will eventually show that what does and does not have meaning (the ability to reconstruct information to comply with the host environment: the court) largely depends on one’s discipline and the interpretation and subsequent relevance that individual professionals give to case dynamics.

First, difficulties in defining abuse often arise from difficulties in identifying that it has occurred. Standards of neglect are said to be always changing and many times “the difference between death, major injuries, or no injuries is a matter of small circumstances” (Alexander 1994: 1). Alexander, a pediatrician, also said the difference between accidental deaths and deaths caused by abuse or neglect are at times, “a matter of definition” (1994: 1). Similarly, Lanning, a Senior Special Agent at the FBI, said “one impediment to any productive and intelligent discussion of

sexual homicide of children is the lack of a uniform and consistent definition of the term” (1994: 40).³⁹

The culture of the system also adds to the complexity of defining and identifying abuse. As was mentioned at the introduction to this thesis: after an intense campaign against the system, professionals changed the way they practiced to the extent that the system became a risk factor thought to “endanger children”.⁴⁰

At this point let it suffice to say that the culture of the system (or the ‘operative structure’ of the system) leaves it vulnerable to criticism from child advocates that it is failing to protect children; when the system then takes action to prevent this outcome it becomes vulnerable to criticism from lobby groups for parents that it is *needlessly* tearing families apart – thus contributing to the subsequent pendulum swings that occur in ‘system’ practices. It is reiterated that in the ever circuitous debate about how to respond to abuse – about how to balance the yearning for connection and the need for agency – this system vulnerability is accentuated by the difficulty linked with distinguishing the risk of harm, which according to some is only a heartbeat away from serious injury:

The death of any child from abuse is only a heartbeat away from the serious injuries, permanent disabilities and near fatal experiences that

³⁹ Chapters by Archard, and Carney, in Moral Agendas for Children’s Welfare (King 1999) provide more recent analysis of these issues, particularly as they relate to the theory developed in this thesis.

⁴⁰ A review of international literature (Part Five) suggests that rather than being an anomaly, the events that unfolded in San Diego reflect a volatility in the system that is worldwide. Readers are reminded it is a volatility captured later through Kegan’s theory about interpersonal and institutional themes of meaning making, which are used to explain how a pendulum swing in the system shifts between over- and under-responding to allegations of abuse.

thousands of children survive each year (Durfee 1994: 3, italics added).

To operationalize this finding in the terms of this thesis, it means that a professional's ability to distinguish what is 'noise' when they assess a case, as well as their ability to reconstruct noise into meaningful information for the host discourse – the court – is a very difficult task, the nature of which is seen even more distinctly in the following discussion.

Deaths: children known to the system

The system self-concept often pivots on *the allocation of weight* to competing information about abuse. Korbin writes about the problems experienced by Child Protection Services in allocating this weight, which begins when DSS first responds:

[U]nfortunately, the combinations of risk and protective factors are poorly understood, and most characteristics identified for fatally abusing parents do not differentiate fatal from nonfatal maltreatment, and in fact are not particularly good predictive factors in differentiating maltreating from non-maltreating parents (Korbin 1994: 46).

A study by the New York City Mayor's Task Force on Child Abuse and Neglect in conjunction with the National Center on Child Abuse and Neglect – along with other studies by child-death review teams – support the finding that fatal and nonfatal CPS (DSS) cases are more alike than different (Wells 1994: 32).

Having said this, most cases that result in the death of a child are *not* investigated by DSS and therefore do not get to the juvenile court. The reasons may be partly linked to the issue that social workers repeatedly raised in this research: the law was focused on the protection of parents' rights and it failed to protect children in too many cases. Although not confirming this exact sentiment, when reviewing the role of Child Protection Services in responding to and preventing child deaths Wells said:

Of children in the U.S. known by community professionals to have been fatally or seriously injured by abuse or neglect in 1986, only 35% had been investigated by CPS. The other 65% of these children either were not reported to the CPS agency or were not investigated by CPS when a report regarding their welfare was made. *The decision not to investigate is usually made due to a judgment that the case does not fit within the legal definitions which mandate CPS involvement* (Wells 1994: 31 italics added).

This research study was not based on events in Australia; however, the fact should not be by-passed that similar issues reflect literature published in this country. Sheehan, for example, recently found that “Whilst the intent of legislation is to enhance children’s rights, in reality parents’ rights appeared to be more protected by the legal process than children’s rights” (2000: 46). Also reflecting the themes of this chapter, systemic responses to children in Australia were found to be made highly complex by the “uncertainty” that still exists about what constitutes child abuse, and these factors may contribute to an under-response to abused children (Sheehan 2000: 46).

In making these points it is noted that some professionals have been known to view the system as possibly over-responding to allegations of abuse. Besharov, the Director of the U.S. National Center on Child Abuse and Neglect (1975-1979), made one of the most polemic statements that child advocates were still debating almost ten years later, when he said that “65 percent” of reports of abuse were made “inappropriately” (L. A. Daily Journal 1986: 1). Rather than enter into analysis of the multiple meanings and implications of this opinion, the issue emphasized is that it can be extremely difficult to determine if a child is at risk of harm *and this* underpins the self-concept of the system.

Of equal importance to the difficulty of determining risk, the system self-concept is also characterized by varying degrees of knowledge and skill between psychologists, therapists, child protection and social workers, law enforcement officers, medical experts and legal advocates; and professionals from this wide range of disciplines often approach their responsibilities related to the assessment of child abuse and intervention in such cases with values that compete (Interdisciplinary Graduate Training 1990).

As noted in Chapter Three, specialized education for all professionals is gathering momentum, another example of which is the training attorneys and judges receive about critical issues such as testimony and guidelines for questioning children (Buckley, Sandt, Berliner et al 1994). Despite this change, it still remains that close relationships have been found to *detract from* law intervening (Snyder 2000): this means, for example, that when it comes to child sexual abuse professionals are

mandated to *take* action for a crime in a system that in reality may unwittingly repel such intervention.

In summary, the system self-concept revolves around abstruse issues and includes an ever-changing tension within and between agencies, disciplines *and* professionals, about how to respond to abuse. Moreover, DSS and the court are known to fail when they should not, and this keeps the system self-concept tension alive and present *in all cases*. Returning to the driving force of the worst case scenario, as Wells articulated:

Every state can readily name fatally abused children who were known to the system, children who should have been protected from their caretakers. For some of these children there was no way to predict the violence they would suffer. Yet for others, systematic intervention by the state and court system could have made a difference (1994: 32).

The type of problems that led to these outcomes has gradually stimulated legislation in some states; the goal of which is to facilitate more coordinated responses to abuse that focus on the best interests of the child (US Department of Health and Human Services 1999). In addition to legal changes, recent research has also suggested that a social-cognitive model of child abuse and neglect has begun to evolve, which considers social ecologies, and adults' expectations and interpersonal skills (Lutzker 1998). These important legal and research developments (along with the interdisciplinary training changes noted) may take some time to filter into field practices that can be analyzed, such that may eventually lead to different findings from those that arose in this particular study.

Key procedural and role demands on the court

Discussion about mechanistic – or text-based – responses to abuse cases begins with the role of the social worker in lodging a petition. Court processes and procedures and the statutory scheme within dependency proceedings are outlined, especially those processes related to time constraints and standards of evidence. A snapshot of procedural rights for parents is also provided.

Section 306 of the Welfare and Institutions Code, which was operating in January 1989, indicates social workers can take a minor into temporary custody “without a warrant” if they have reasonable cause to believe that:

the minor has an immediate need for medical care or is in immediate danger of physical or sexual abuse or the physical environment poses an immediate threat to the child’s health or safety (January 1 1989).

First reading of this section may provide support for the view expressed by attorneys for parents (and some children’s attorneys, judges, and social workers) that the social worker has a lot of power in the system. However, it is helpful to view the directives in the code within the context of the overall picture in which social workers or child protection workers must operate. They take action only when “serious” injury has or is likely to occur, and they cannot establish grounds for dependency without first showing that “reasonable efforts” have been made to prevent the removal of a child.

As one example of the mechanistic component – or the rigid demands of ‘the system’ – social workers are under formal obligation to:

consider whether a referral to public assistance pursuant to Chapter 2 (commencing with Section 11200) of Part 3, Chapter 7 (commencing with Section 14000) of Part 3, Chapter 1 (commencing with Section 17000) of Part 5, and Chapter 10 (commencing with Section 18900) of Part 6, of Division 9 would eliminate the need to take temporary custody of the minor (Welfare and Institutions Code Section 300).

Without detracting from social work's use of rules, the chapter on the professional self-concept of the discipline will provide another layer from which to view 'system' operations. For example, the chapter will discuss the finding that some social workers develop their own theories, and this has been said to influence a range of different decisions under similar circumstances. When this finding about social work influences is applied to this study it may partly explain why attorneys expressed distrust about the way social workers follow legal rules: individual theory building within the discipline may explain why, according to attorneys, there was too much inconsistency, and too many decisions that social workers could not justify.

To briefly place these different opinions and the possible reasons for them within the context of the overarching theory developed in this thesis about the interrelationship between the individual and the social, while it can also be argued that the application of law is inconsistent (and unjustifiably so) – it remains that the internally generated 'system' version of what constitutes social work *ultimately* reflects less rigidity (and more interpersonal interpretation) than the internally generated 'system' version of what constitutes the practice of law. More will be said on this topic in Part Three.

The role of the court: time frames and evidence standards

If a social worker finds it necessary to remove a child they must file a petition within 48 hours with the juvenile court (313; Cal. Rules of Court, rule 1440 (a)). The court must respond by holding a “*detention hearing*” within 24 hours (315; Rule 1440 (d)). Seiser writes that in addition to making findings regarding whether reasonable efforts were made to prevent or eliminate the need for a child’s removal from their home, if the court detains the minor it must also order services “to be provided as soon as possible to reunify the minor and his or her family if appropriate” (Seiser 1992: 3-7).

The court must hold what is known as a “*jurisdictional hearing*” within 15 days of the detention hearing to determine if the allegations in the petition are true – and thereby – if the child is a minor under section 300 of the Welfare and Institutions Code (334; Rule 1447 (b)). If the court makes a true finding in this hearing it then conducts a “*disposition hearing*” (358; Rules 1451, 1455). At this time the court can either ‘dismiss the case, order informal services without declaring the child a dependent of the court, or declare the child a dependent child’. If this latter choice is made the court must decide if the child is to remain with or to be removed from the parents.

After the detention, jurisdiction and disposition hearings, the court is under a statutory obligation to hold a hearing every six months. A permanent plan must be made within 18 months of the detention hearing. However, this reflects the worst case scenario. The goal is to return children to their custodial parent as early as possible. If reunification is taking longer than that stated to develop a permanent plan, and the court finds that reasonable services have not been provided, it can continue the matter

past the 18 month timeline. This safeguard prevents red-tape or system failure from derailing the legislative intent to reunify a family (see *In re Dino E.* (1992) 6 Cal.App.4th 1768) (In Seiser G 1992: 3-7).

DSS bears the burden of proof to show that a child continues to be at risk of *serious* harm. The standard of proof in detention and jurisdictional hearings is preponderance of the evidence (355; *In re Bernadette C.* (1982) Rule 1450 (f)). In disposition hearings the standard is clear and convincing (361, subd. (b); *In re Bernadette C.* 624; Rule 1456 (c), In Seiser G (1992: 3-7)). This standard also applies at review hearings where: DSS must show a child would be placed at substantial risk if returned home (366.21 subds. (e). (f); 366.22, subd. (a)); or when a child is likely to be adopted if parental rights are terminated when a permanent plan is made (*In re Amelia S.* 1991: 1060, 1065).

Parents' rights

If a parent cannot afford legal counsel the court will appoint an attorney (317, subd. (a) (b) and (d)). Seiser writes that:

parents have the continuing right to counsel, the right to utilize the court's subpoena power, and the right to present evidence (341; Rule 1455). Parents also have the right of appeal to challenge both the jurisdictional and dispositional findings and orders (395; *In re Kelvin M.* (1978) 77 Cal.App.3d 396, 399) (1992: 3-7).

In review hearings – where suitability and progress in reunification services are evaluated – parents have the right to petition the court to modify any of its previous orders if there is any change in circumstance or if new evidence arises. “Such petitions are to be liberally construed in favor of granting a hearing to consider the parent’s requests (Rule 1432 (a); see also In re Heather P. (1989) 209 Cal.App.3d 886, 891.)” (In Seiser 1992: 3-7).

Purifying the logic of legal theory?

Legal theories abound about the factors that influence the implementation and practice of legal rules, such as those outlined above, and the system of law in which they are embedded. Specific to this study, and overlapping with concepts that I will link with the professional self-concept of law, Luhmann has suggested that legal theories “which are produced by legal practice and legal education are, alongside with positive law texts, the form in which law presents itself as a result of interpretations” (1993: C1/1/3-4). The point emphasized from this discussion is that in his comprehensive review of this topic Luhmann said legal theories align themselves with the legal system: they are “products of the legal system observing itself” (Luhmann 1993: C1/1/3-4).

Although legal theories are discussed in Part Two, for now, if such theories *reflect* the legal system then this factor reinforces the imperative argued in this thesis not to just study legal theories, but rather, to examine the system itself (which is suggested in the equation $SL=HDLA+D^{SA}$). In saying this I am rejecting the conceptualization of the system captured in the autopoietic systems theory of law, which Part Two will show

is itself, an attempt to escape the ‘values’ trap in general legal theory. I will argue that it is not possible to side-step the topic of ideology either in legal theories or in the outcomes that they purport to address (which Luhmann proposes occurs in his autopoietic theory). Rather than trying to purify the logic of a theory of law, when I advance the need to examine the system I mean both the range and intersection of epistemological underpinnings of the system, such as the values and thinking styles that have permeated the development of law and its profession over the centuries: a form of examination that the self-concept typology may help to illuminate.

As one component of this focus, when the second chapter on the ‘system self-concept’ is presented (in Chapter 22) the system rules that have been outlined above will be contrasted against data findings. In other words, the system self-concept is operationalized, and it explores how professionals approach and respond to system rules and procedures. The reason why the interrelationship between professionals and the operation of ‘system’ rules is not examined at this particular stage is that to make the arguments that arose in the study, it has to first be shown that individuals play a role in how law evolves, and system operations also have to be integrated with theories about how people (self-systems) and social systems evolve.

Toward this end, using data from social workers, attorneys and judges from empirical research conducted in the dependency court, the next chapter begins to build the individual self-concept. The chapter will categorize the type of individual influences that arose most frequently in interviews; briefly explain some of the reasons why people (can not but) use their own individual dynamics in the performance of their respective roles; and continue to build a theoretical context for the juxtaposition

between the individual and the social in the evolution of law. It is emphasized that the chapter on the individual self-concept is an introduction to the concept and to this extent, provides the basis to signpost how findings about individual influences are used in the rest of the thesis.

CHAPTER FIVE

THE INDIVIDUAL SELF-CONCEPT

Judge

What continues to be surprising to me is that *individuals* in various disciplines *seem to me too ready to take on the responsibility to make decisions about the case*. I would be the last person to want to do that. I unfortunately have the responsibility, and frankly I'd rather not have it, very often. *So it's beyond me why one particular link in the chain of people would be so ready to think that they are the ones that should make the decisions and try to influence others*. That's not the way I see the system.

Introduction

As the judge indicates, regardless of rules stating who makes a decision, some people work to influence others in the system. In short, people work to operate more than legal rules – as the following data excerpts help to illustrate – they work to influence how a case proceeds (wittingly and unwittingly) through their own individuality.

Social worker

I think that if the humanness of our contact comes out, invariably you will make better decisions. If you look at each other as individuals and not that of social worker versus attorney, ultimately it will benefit the family and the decision will be much more artful I think – maybe that’s an improper word ...

It is as if we’re dancing ... we’re engaged in this dance and there’s a certain rhythm to our interventions, to our dialogue. *And every now and then you kind of get in that groove and in the end it just falls right into place. Every now and then it’s like dancing with Frankenstein: one, two, three, four, and it’s real frightening.*

Researcher: It’s a wonderful analogy. Tell me about dancing with Frankenstein?

... there was *an attorney who didn’t know me*. She was a new public defender. We check the report, go through it ... And she looked at me like: What kind of a moron are you? I said: Anything you want to know. Come on! – that kind of approach. She was kind of taken aback, and then we started talking about the people behind the report. If you *put some fabric to the individual it isn’t always reflected in the black and white pages* of the social study report – once we started talking about the people and we started talking about one another and we found out ... [and then] ***it was two human beings*** going towards this directive and we were far more able to strike some kind of compromise because there were these individual kinds of roles.

Children's attorney

I had an experience with an attorney for an appellate court justice: he is really a wonderful human being. *But he actually took the position with me in a discussion we had that individual people don't have philosophies that affect their interpretation of the law.* This brilliant man: and I was so taken aback.

To me it's so blatantly obvious that first of all, **every human being** has a philosophical perspective, whether or not they are conscious of it, and secondly that's the filter through which they perceive reality: and that filter is definitely going to affect how they see a certain set of facts and how they apply the law as they understand it ... He's a brilliant person; I'll never come close to his concept of the law ... yet *he makes a statement that is, from my point of view, blatantly wrong and completely inconsistent with ordinary human experience.*

Both quotes speak to the data finding that individual professionals influence how law operates: this is sometimes visible and at other times less evident. At a micro-level of analysis quotes of this nature speak to Kegan's observation that "what it means to be 'professional' might have less to do with an external social definition than with internal psychological capacity" (1994: 158).⁴¹ This dynamic may be obvious for some, but recognition of psychological capacity as a factor that can influence individual responses in professional settings varies significantly between law and the humanities.

Analysis of individual influences in the practice of law receives scant attention in traditional legal literature. However, the burgeoning school of Critical Legal Studies (CLS) does address the role of individual consciousness and the cognitive and

⁴¹ The argument advanced by Fish that "we cannot theorise law as having any necessary properties outside those of our interpretive accounts" helps to illustrate this point (In Nelken 1996: 123-4).

affective circumstances of the knower and the known in legal practice (Farmer 1993: 393-397; Douzinas et al 1994: 3-6; Habermas 1988: 254-259; Unger 1983: 25). As Chapter Six on the professional self-concept for attorneys will show, concern about the individual in law appears to be overshadowed by the belief that attorneys operate as if 'legal personalities': as if they think like mathematical equations when practicing law. In contrast and as will be shown in Chapter Seven, the profession of social work pays much attention to the influence that individual professionals can have in a case: this is bolstered by the theoretical basis of the discipline, the interpersonal nature of social work, and the therapeutic aspect of supervision practices for the profession.

Despite disproportionate levels of interest between the professions about the roles that individuals play in systems operations, the next quote begins to show individual influences on legal proceedings at a micro level of analysis and, at the same time, also highlights data about the competing voices that arise in court operations between social workers and attorneys.

Social worker: *Individuals and their role perceptions impacts how a case proceeds*

Lack of communication and strong personal feelings against individuals has an impact. I know one attorney who had a particular conflict with a social worker who was really making it difficult in the courtroom. She would try to build her case ... but the social worker felt her role was very different ... Ultimately they were battling and it did draw out the case in court ... It even closed in a very personally negative way ... And it certainly affected what happened in court.

This excerpt goes to the data finding that events in the court can pivot on individual perceptions about what the other's role should be, not just what the role actually is. The excerpt also goes to the finding that rather than exclude individual differences, the adversarial nature of the court can accentuate them. Dynamics such as this, and those presented below, are a prelude to the power that individuals are perceived to have to generate and distinguish the way they use their professional self-concept in 'the system' – and to this extent, also speak to the inseparable link between individual and social factors in the operation of law. The quotes reflect data that – regardless of the policies, practice guidelines, ethical requirements and laws that dictate proper conduct and decision-making – factors of an individual nature interact with the dictates imposed by the system and, as a result, influence decision-making. The next quote shows this link can take shape not only in open disputes, but also in less obvious ('system') ways.

Children's attorney: *Individual influences can arise in technically proper ways (using text)*

*You get certain combinations of attorneys and social workers and you know the case is doomed because they're just not going to be able to work together ... And you end up in trial all the time ... sometimes there are attorneys who are technically doing what's proper but *they're doing it because* they can't stand another attorney and they're going to try and piss them off ... [or] an attorney can take it out on the parent, *or the attorney could be pissed off with the social worker and take it out on the legal process* instead of trying to work things out with that social worker.*

The idea that a case is “doomed” due to the combination of professionals involved in it spurs the need to know how individual influences work. To this end, we turn

briefly to theories about the individual self-concept and discuss how they apply to this study.

Individual self-concept: theory

The term ‘individual self-concept’ generally refers to the perceptions a person has about themselves (March 1990: 83). Markus and Wurf approach the study of self-concepts as a dynamic, working self-concept whereby “the self-concept is viewed as a collection of self-representations, and the working self-concept is that subset of representations which is accessible at a given moment” (1987: 314). This interpretation is adopted in this research. Moreover, this work is about a specific rather than a general dimension of self which operates in a complex of multiple dimensions (March 1990: 83): it is about the dynamic self-concept of individuals in their experiences and interpretations of the court system – at the time of the interview.

Markus and Wurf found that the self-concept “does not just reflect on-going behavior but instead mediates and regulates this behavior” (1987: 299-302). Central conceptions of the self or the ‘well-elaborated conceptions’ are said to have the most powerful effect on how a person processes information and behaves. The primary ways that a self-concept mediates and regulates behavior will be introduced in Chapter Twelve, on object relations theory. Briefly here, Kegan describes the development of a self-concept as an evolutionary activity that “involves the very creating of the object (a process of differentiation) as well as our relating to it (a process of integration)”. It will be shown that subject-object relations (self-concepts) are a natural process of development over the lifespan and represent “successive

triumphs of ‘relationship to’ rather than ‘embeddedness in’ a particular state of existence” (Kegan 1982: 75-77).

Self-concepts mediate processes of an interpersonal and intrapersonal nature. *Interpersonal* processes relate to a person’s social perceptions and the way they seek out and shape their interaction with others. *Intrapersonal* processes relate to those activities that help the individual to establish a feeling of continuity in time and space. Intrapersonal processes work as “an integrating function for the individual’s self-relevant experiences, regulating and organizing the individual’s affective state, and providing a source of incentive or motivation for the individual” (Markus & Wurf 1987: 310). I will flag instances of interpersonal and intrapersonal processes in ‘system’ operations after first giving a broad outline of individual factors.

Tables One (a) and (b)

Tables One (a) and (b) below provide *a snapshot* of individual influences that emerged during discourse analysis of interview transcripts and field observations. The tables were built from participants’ comments – which both ridiculed and welcomed the power of individuals to influence the direction and/or outcome of a case. In many interviews respondents expressed their views about the type of influences that now constitute the lists in the two tables as if they were divulging privately held opinions about the pervasive power people have to shape how they respond in a case. Overall, the mostly informal and unsolicited way in which the influence of individual factors emerged, suggested that in the dependency court system this dynamic is tacit.

Table 1(a) lists key individual influences such as family background, and the individual psychological and motivational factors that appeared to influence a person’s response. Topics will be explained in coming chapters that are not self-explanatory, such as the term ‘decontextualized voice of reason’ (which is mostly associated with the practice of law) versus the voice of ‘personalized narration’ (which is mostly associated with social work).⁴²

1(a) The Individual Self-concept: as a component of the system self-concept

<u>Individual Background</u>	<u>Individual Differences</u>	<u>Individual Drive</u>
Family of origin	Voice of decontextualized reason	Protect child from re-abuse
Culture of origin	v. that of personalized narration	Prevent premature return
Personality	Self-concept development stage	Concern for family preservation
Communication style	‘institutional v. interpersonal’	at cost to child & vice versa
Training:	truce and/or transition stage	Impact of private agendas
training experiences	Intimidated: prefers mutuality	Covering tracks / play the game
career stability	Fears exposure for inadequacy	Commitment level to case
career goals	Risk of failure as professional	Career goals & responsibilities
qualifications	Worries - making wrong choice	Personal financial goals
Personal & professional	Pressured by budget cuts	Desire to maintain / enhance
successes and	v.	agency / interagency relations
disappointments	Comfortable with confrontation	Morality / values align or clash
Personal & professional	Will actively defend rules	Status & recognition needs
networks / reputation	Belief in adversarial system	Response to politics – to other
Range of case exposure	Flexible or rigid approach	professionals & the setting

In conjunction with the above table, case experiences, which largely turn on interactions with a child and other professionals in the system about a child’s experiences, can as one example influence a professional to reconstruct their views about how they perform their given role. At a rudimentary level of examination, Table 1(b) shows four categories of (social) system influences gleaned from discourse analysis that can lead a professional – depending on the individual – to change how

⁴² In Chapter 14, for example, Kegan’s theory will be applied to help explore the relationships that arise between these different voices in the court setting.

they make meaning in the court system. The self-explanatory categories are based on the interactions a professional has with and/or about: a child’s parents; the family; the foster care system; and the interactions linked with a child and case investigation.

1(b) Factors of influence in the host culture (the court): The Individual Self-concept System change: empirical factors from cases influencing change in individual self-concepts

<u>Client (Parents)</u>	<u>Family</u>
Education / Employment status Social class and race considerations Social connections v. isolated Anger v. desire to participate Denial v. desire to reunify Willingness to meet legal demands Personal power & motivation Familiarity with system operations Availability of family support Public profile of case Previous case history Trustworthiness between system/client Ability to communicate (with authorities)	Availability of necessary services Access to transportation Geography / location issues Able to use social support Sibling concerns Internal agreement about case Relations with professionals Drug / substance abuse issues Quality of investigation Quality of evidence Nature and number of offenses Perceived relationship with child Report findings
<u>Foster Care</u>	<u>Investigation for Child</u>
Availability of foster care and funding Training of foster parents Previous experience with foster care Child’s age & response in foster care Siblings united or separated Cultural cohesion – child & new family Adaptability to changing role of such care Relationship with agency & professionals	Data complete v. incomplete Response effective v. ineffective Timeliness of decisions Ongoing therapeutic evidence Medical and legal evidence Strength of social work report Agency and System responses Court opinion about case material

Sketching the type of factors associated with changes in individual meaning-making that respondents often unconsciously reported when describing their experiences in the system, competes with the autopoietic theory of law which holds that social events are separate from factors that inspire and inhibit individuals (King 1997: 25). The relationship that tables 1(a) and (b) begin to address between system operations and individuals, also brings into question the autopoietic theory that *no* direct communication exists between individuals and social systems (King & Piper 1995: 23-35; Luhmann 1985: 282).

As well as there being an absence of scientific validation for this theory (see Part Two), when analyzing the data in this present study it was not possible, to take just one example, to find a suitable way to separate social from individual influences in the collision that occurred in the hearts, minds, and subsequent (social communication) responses reported by professionals who had taken a position in a case that ultimately resulted in a child being seriously harmed.

The *Interpersonal* component of the individual self-concept: Dynamic and Impact

As noted, the *interpersonal* aspect of the individual self-concept is mainly defined as the influence of a person's perspectives that become manifest in actions or decisions in case proceedings. The following data excerpts suggest that interpersonal processes go to the heart of a dominant number of 'system' operations, such as how a professional:

- approaches their relationships with other professionals in the system
- responds to formal and informal negotiations
- responds to different skills that various individuals bring to the same role and
- responds to different styles of communication or ways of meaning making

Individual influences and relationships between professionals

Although Chapter 21 is dedicated to the topic of relationships between professionals, the concept is introduced below to flag the commonsense concept that professionals respond differently in a case if they know and trust each other. The relationship may well be professional in nature, but as the quote suggests, the power of the relationship is inextricably interwoven with personal interpretation (it is not just social operations or communications).

Parents' attorney:

I had a case where the parents snatched the kids from the foster home and took off; they were caught four months later. But the social worker on that case and I have a very good relationship, she is a commonsense person. *And having her on that case made that case just go very smoothly ...* This worker's attitude towards the parents and me was one of helping, and **I have the same attitude** towards her *because I've worked with her in the past and we've kind of become chummy.* And **I recognize** that this is a person whose opinion I value and respect.

Notably, when looking at the research construct of relationships, data often indicated that social workers were intimidated by attorneys in the court; but as the next quote suggests, this is also linked with an individual's own self-concept.⁴³

Social worker:

Most of the people I work with they're really intimidated by court and by attorneys and they think the attorneys run the show and that they have more power. But I don't think that's true.

⁴³ Chapters 14; 17-21 connect the topic of relationships and that of intimidation to system operations.

The individual influence in approaches to informal negotiations

All respondents indicated that informal negotiations occur. What was more implicit than explicit in data analysis was that a professional's individual characteristics (or their own self-concept) has an influence on how they approach such negotiations.

Parents' attorney:

I can understand how [informal negotiations] might freak people out but *if you didn't do that you'd get hammered. If I can grab the social worker in the hallway and whine at her* and, you know: Oh, come on, isn't this reasonable? Isn't this stupid? *Now why don't we do this instead*, you know what I mean? I can back her in court and she gives me what I want, I am much better off. My client is much better off.

Chapters Eight and 19-22 explore informal negotiations. As one example of how topics will be gradually interwoven, individual views about how an attorney treats clients can affect the relationship professionals share: this in turn can have an impact on the patterns of informal contact one professional has with another about a case. In blunt terms, views about attorney/client interactions can sway how a case proceeds.

Changes in individual influence – daily

In contrast with the systems theory of autopoiesis argument that *law* reproduces itself – by itself (Luhmann 1993: C1/111/4), research respondents often spoke of the inconsistency associated with law (which is not just about 'social' operations) but also as the next excerpt shows, some directly related this dynamic to individual factors. Although the quote is of a generic nature its relevance at this point is that it flags, like the opening quotes to this chapter, the more pervasive existence of factors

that are not necessarily related to text-based practices in the operation and subsequent evolution of law.

Children's attorney:

We would like to think of the law as the great leveler; and that it makes everybody equal. The problem is that equality, like justice, is a dream. Some lawyers are better than others; some witnesses are better than others; some judges have a better day today than they're going to have tomorrow. There is always the opportunity for one side or the other to win the case for reasons that are not part of the case, or shouldn't be part of the case.

The Intrapersonal component of the Individual self-concept

Although intrapersonal and interpersonal components of the individual self-concept are not separate, distinctions between these two aspects of meaning-making are *sketched* to help strengthen understanding of how individual self-concepts operate in the system. The intrapersonal element arose when interpreting transcripts and notes about the interviews and field observations, and it was clearly wrong to ignore or separate the strong personal attachment or association with which many professionals observed and subsequently framed their responses in a case.

The Intrapersonal *Dynamic*: The existence of a person's own meaning-making

Respondents (often unintentionally) indicated that topics such as a professional's ego, the existence of racial bias, and gender differences, were behind individual factors of influence in case decision-making. The following examples reflect opinions of this nature from across three cohorts in this study.

Social worker: *The existence of ego*

Researcher: What factors do you think predict a higher likelihood of justice being achieved?

Respondent: When egos don't get in the way. Whether it's attorney egos or social worker egos. *I think when egos don't get in the way, things go more smoothly.*

Parents' attorney: *The existence of racial bias*

I've seen the [DSS:CSB] supervisor – where *there is a lot of bias against the family because of their color, race* – take a view of the case where they look at the particular fact and think the worst of everything.

Children's attorney: *The existence of gender differences*

I would bet a lot of money that not one of those men [on the appellate court] ever changed a diaper or ever took any real custodial responsibility for their children in terms of providing actual care over a sustained period of time. That was a responsibility that they delegated to their spouses, and so *they have no conception of what's happening in a child's psyche ... and therefore no appreciation of what liberty and the pursuit of happiness means to a four-year-old.*

In the above three examples, respondents were describing the type of individual factors that *they* thought influenced what *others* did. In the next examples (also from three cohorts) respondents again unwittingly identify various individual factors of influence on how a case proceeds, and at the same time, include how their own individual meaning-making influences their response to the individual dynamic that they describe.

The Intrapersonal Impact: The influence of a person's own meaning-making

Children's attorney: *The interwoven nature of attitudes on trust and distrust*

Social workers want to direct what your client's going to do and they want you to support that contrary to your client's wishes. *Those cases can just slow down; information gets held up. Phone calls don't get returned. They don't want to tell you stuff. You don't want to tell them stuff. For me I find they don't trust having to respond to information as well. I'm not as confident* that no matter what happens I can work with them and we can resolve certain problems that will come up *without calling a child back into court, pulling kids from their homes.* Once those attitudes come to the surface it just slows things down. *You're much more apt to be in a contested hearing or trial with those cases.*

Parents' attorney: *The influence of (perceived) reasonableness*

It's easier to talk to people [in informal negotiations about a case] that you believe are more reasonable, but *there are some people I just don't even talk to – some attorneys. There's no point in talking to them,* they're not going to change or agree to anything. And **I can** be that way at times too.

Social worker: *The influence of individual meanings in communications*

If I was unable to talk to an attorney off the record I would lose a humanness, *without that humanness, without that communication **from the heart, I really think** you would lose the purpose and direction of our interventions* to a point that it could be done by a robot.

To confirm the intrapsychic dynamic, it is the social worker's own intrapsychic concept (*his way of making meaning*) that leads him to interpret that without interpersonal interactions professionals would lose the purpose and direction of their interventions. Chapters 17 and 18 will move from the generic type of individual influences identified throughout this chapter to distinguish the differences in data and theory found to be most representative of the individual self-concepts for attorneys and social workers. Examples already introduced include the voice of social work mostly reflecting a process orientation to 'experiential' fact-finding; which often competed with attorney voices of objectivity, and product orientation to 'proving' case issues.

The individual influence of the judge

Respondents spontaneously and overwhelmingly answered questions by frequently reporting that the individual influence of a judge has an impact on how a case proceeds. The next quote establishes that this influence exists in system operations.

Social worker: *The individual influence of a judge – not just the rule of law*

Respondent: We all work on the assumption that the court remains impartial and *we all know it's not true.*

Researcher: The court doesn't remain impartial?

Respondent: *Of course not.* There are judges you know who'll do certain things, they always lean this way ... and you try to figure out what's going to happen.

Researcher: It sounds to me that you're saying a lot of what's going to happen in a case depends on the individuals involved?

Respondent: **Yes it does.**

The next two examples refer to the perceived individual impact that judges have, such that professionals can predict what a particular judge will do in response to issues presented before the court. In presenting this finding it is also recognized that what an attorney may perceive as the unnecessary individual influence of a judge, may be described by a social worker as the professional operations of a judge who knows what they are doing: such is the nature of individual interpretation that underpins views about how the system operates.

Social worker: *The individual influence of a judge – likes, dislikes and patterns*

Researcher: Is there anything that you can add to what you've said ... about your beliefs or attitudes or perceptions about your profession, and the legal profession, that influence legal proceedings?

Respondent: *I think there is too much individual influence in the juvenile courts.* When I sit and write a report or when I investigate a case I think who is the judge, I think who the attorneys are, who's the social worker, if this is a high profile case, who is the county council? I mean that's life. You realize that. *But when you start seeing patterns, when this judge will always do this, this judge has this pet peeve, this judge does not like this attorney. I think then you're getting into an area where you're not being professional.*

You know certain judges have reputations as **the hang'em judge or the send-'em-home judge**, or whatever, and you try to keep that out. But when you see *individuals that consistently develop a pattern, you start predicting* what they're going to do: and it's scary sometimes how accurate your predictions can be.

Parents' attorney: *The individual influence of a judge – weak or confident*

Respondent: *If the bench officer is an independent thinker and demands that these people prove what they say then there's no power issue: it is equally distributed, and the person with the most convincing argument and best evidence wins.*

Researcher: So how power is distributed is contingent predominantly upon who's sitting on the bench?

Respondent: I think so. Let me just add something else: ***a really good judge is able to have confidence in his or her own abilities to decide. What the weak judge will do is look to the safest place to find the answers.*** Well, the safest place has always been with the government [DSS:CSB].

In summary, data indicated that professionals *perceive* judges to influence case findings through their professionally formed opinions *and* personal tendencies, fears or biases. Importantly, social workers and attorneys reported that they may tailor their responses in anticipation of what they have observed to be the *individual* preferences of a judge.

In some literature this factor has been called “the creative role” of the judge, and it has *long* been recognized as a dynamic to help explain and analyze legal proceedings (Hughes 1968). It is also known that the judge can influence who comes before the court to advance an opinion: “In inquisitorial systems experts may be selected and

their opinions heeded according to whether their perspective on child care coincides with that of the judge deciding the case” (King 1991: 314). This finding supports the view that how judges make decisions goes beyond legal criteria (Mackie 1991: 181-187). To operationalize this point, despite the fact that the court’s language:

suggests that some specific empirical basis may support its analyses, the reality is that the Court’s opinions represent inherently unstable compounds of intuition, hunches, and occasional pieces of partial and often inconclusive data (Tremper 1987: 272).

I asked judges for their views about the individual influence of a judge:

Judge:

I would like to think no judge will substitute the standards that are described by the law with his or her own standards. *There clearly is a difference in interpretations, and that is reasonable ... and to that extent I think you’ll find a lot of variation on the bench.* There are judges who will be *more* strict in their interpretation of the law; there are judges who will be *less* strict and be much *more liberal, infuse the wrong standards and moral perspectives to those described, and that’s perhaps a looseness that exists with the judicial officers.* [Later the judge said]: The danger of some of us as judges and referees is that some have a tendency to want to be their own expert, which is a big danger.

This response is in contrast with other judges who acknowledged the existence of individual differences, some without being asked, with a tone of personal impact. One judge pre-empted the topic when he described justice as balancing the requirements of law and “*your own personal experience*”. Significantly, this study does not purport to identify the *degree* to which personal experience acts as a factor of influence that goes beyond professional experience or legal parameters in the

decisions that judges make. The general point is that more is occurring than the simple reproduction of legal rules.

The next chapter continues to advance this argument: it outlines the early historical memory of law, and in so doing provides a foundation for the professional self-concept of attorneys. To say this another way, research in this thesis led to the analysis of factors that help to differentiate between the individual self-concept and what might be called the 'group mind' (Sheldrake 1988: 311-323) of a profession (which also constitutes a system). These differentiations start to be made through the events in the early history of law that helped to shape the memory from which the Western system of law has evolved: particular attention is also given to those issues that help to explain the nature of differences that exist between law and social work, especially the hierarchical factors that divide them.

The next chapter also speaks briefly about the general direction of the thesis and Luhmann's theory of autopoiesis, but in common with other chapters in Part One, rather than delve into the more complex level of theoretical development about the interwoven evolution of individual and social systems, the chapter continues to touch the surface of the individual/social juxtaposition (HD+LA) (the connection between human development and legal autopoiesis). It does this indirectly by reinforcing the research finding that the system studied is not explained as if interdependently existing 'things' are operating simultaneously but rather, that 'the system' *consists of interactions* which pivot on an ongoing relationship between individual, professional and system self-concepts; all of which speak to the theory that the social and the individual each gives rise to the other.

CHAPTER SIX

HISTORICAL OVERVIEW: THE PROFESSIONAL SELF-CONCEPT OF LAW (and social work)

Introduction

This chapter sketches the foundation from which to build the professional self-concept for attorneys: thus building on one aspect of the $SL=HDLA+D$ component of the formula that symbolizes the thesis theory. Topics will touch on “the relationship between education, practice, and the organization of occupational groups” (Dingwall & Lewis 1983: 234), but at this point the link between law and religion occupies the dominant focus. The reason for this is twofold. On the one hand it helps to highlight how the power given to law has dominated over other forms of social control, and thereby helps to highlight what lies at the base of the hierarchical difference between law and social work. On the other hand the topics help to lay the groundwork for two tenets from systems theory that this study was (metaphorically) found to support: systems produce their own internally generated version of reality; and the ability of a system to change is restricted by its own selectivity.⁴⁴

The range of subjects covered means that multiple topics are continuously being interwoven at an introductory level throughout the chapter.⁴⁵ Although attention to the professional self-concept of law in this thesis is focused on the issues that go to the historically embedded power of law over social work, more detailed aspects of the self-concept of attorneys will be built up in following chapters. Topics will include:

⁴⁴ These points will be more salient when the competing versions of reality that the functionally differentiated systems of law and social work produce can be interwoven, at a later point in the thesis, and the limits on the ability of each system to give meaning to ‘noise’ is noted (see Parts 2, 3 & 4).

⁴⁵ One of the weaknesses in this thesis is that in having identified the existence of a typology of self-concepts, and having identified the need to ground these self-concepts in the evolutionary processes of social and individual influences, means that the demand to cover an expansive range of topics – from law, psychology, sociology, and social work – (to name a few), has been great. Subsequently, so too has the demand been great to minimize what can be said about these fields.

how attorneys operate as (institutionally oriented) systems (Chapter 10); theories about the legal culture dominating attorneys and vice versa (Chapter 11); competing views about how the boundaries of law are achieved (Chapter 12); the clash between the respective decontextualized and process-oriented voices of law and social work in the court system (Chapter 14); and the ways in which the professional self-concepts of law and social work appear to change (Chapters 15 & 16).⁴⁶

A systems theory for law and social work

Attention in this thesis to the competing self-concepts of law and social work contrasts significantly with King's theory (1997). Although on the one hand King has articulately captured the differences that exist between law and social work in child abuse cases (1991, 1997; King & Piper 1995), the theorist has nonetheless, shifted the way to analyze dynamics that arise in such cases away from disputes between competing belief systems (or in the language of this study, competing professional self-concepts). King has moved the debate about law and social work to Luhmann's systems theory of autopoiesis (King 1997: 91), which in effect neutralizes the importance of ideological differences under the claim that events take place "in a world of functionally differentiated systems rather than in less complex moral (or ideological) constructions of society" (King 1997: 29, parentheses original).

⁴⁶ Overall, these chapters identify key dynamics relevant to this study that appear to inspire and restrain the evolution of the 'group mind' for those who practice law and social work. Tables that capture field-data at a generic level of professional self-concept (such as that presented in Chapter Five for the individual self-concept) will be shown in Part Four.

Although there is some metaphorical value gained through the application of the above noted systems theory to the analysis of events in child abuse cases, rather than support the nature of King's shift away from the differences that exist between professions, this study led to the opposite conclusion. Research into the competing belief systems (or self-concepts) that arose in this project about the child dependency court gradually (and unexpectedly) indicated that differences between the disciplines played a vital role in the evolution of 'the system'. As the thesis will show, it is the very *interactions* that arise from competing self-concepts (that operate both within and outside 'the system') which bring about system 'irritants' (contradictions) and thus act as a stimulus for 'system' change (empirically studied most clearly in individual change amongst professionals within the court).⁴⁷

Overview: differences between social workers and attorneys

The main contrast – indeed, ideological difference – between the professions of law and social work in this research is the impact of adherence to logic in law and the reality of pervasive ambiguity and unavoidable exposure to the vicissitudes of human experience in social work. These dynamics, which manifest in competing professional self-concepts, are encapsulated as abiding by rules versus responding to ambiguity.⁴⁸

⁴⁷ The direction of the argument which becomes more clear in Parts Two and Three, is that *self*-systems (individuals, rather than separately operating social systems) internally generate their own version of reality, and limits on individual change arise from the self-system's own processes of selectivity. Importantly however, this study shows that these operations are stimulated within and have an impact on the social systems where individuals evolve.

⁴⁸ It is recognized that the attempt to construct a theme – or to 'typify' attorneys (and social workers) – has an inherent weakness: it often involves selecting out that which does not match the pattern of typification being built (see eg, Tomasic R (1985)). I try to minimize this outcome by including data and theoretical analysis that contradicts the theme built in this thesis (eg Ch. 19-21).

The term legal personality (Derham 1958: 5) is said to capture how attorneys make decisions: it portrays them as if ‘unidimensional psychological figures’ (Smith & Weisstub 1983: x) totally divorced from their emotions when they practice law (Lawson 1957: 914). This contrasts significantly with the “conscious use of self” in social work where studies indicate professionals “must regulate, adjust, and fine-tune themselves to the specific needs and situation of their client” (Garvin & Seabury 1997: 90). Noting that data gathered in this study reflect these competing precepts is not to say that all professionals function in lock step calibration to them.

Having briefly distinguished one discipline from another – and thus alluded to the central differences from which irritants can arise between the two professions – we turn to the history and training that informs us about the social system memories that lie at the core of the evolution of meaning making and style of communication adopted (and defended) by the system of law.

The discussion begins by questioning the idea of legal completeness, and connecting religion and myth with the power that society gave to law as a tool for social control. It then progresses to the key dynamics (mainly those linked with religion) that are associated with the early development and power of a rational system of law. The chapter concludes with the view that the competing themes respectively reflected in patriarchal and matriarchal forms of thinking underpin the social histories of law and social work. Reviewing these topics helps to give substance to the voices and different orientations of meaning making that emerged in this study.

Purifying the logic of law: myth and religion

In his critique of the field, Barkun described law as a fiction of completeness. He also questioned why law presents itself as beyond uncertainties and as possessing the capacity to access a perfect and complete knowledge (Barkun 1968: 130). Particularly relevant to the suggestion here that an elevated view of what law can achieve may pervade attorney self-concepts, Smith and Weisstub explain that fiction about what the law is capable of achieving is maintained through the preoccupation in the legal system with purifying the logic of law and the rationality of its institutions (1983: 119-120).

The idea that fiction exists about what law can achieve, and that the processes lawyers engage in on a routine basis facilitate this fiction, may be a confronting way to begin discussing the professional self-concept of law. However, the way the rational style of thinking that drives attorneys' preoccupation with logic became dominant over other forms of social control – such as myth and religion – begins to show that the seeds of beliefs that go beyond the realm of non-fiction were planted at the inception of the rational system of law. The discussion will ultimately show that rather than override the historically existing social structures (or ways of making meaning), the evolution of a rational system of law incorporated religion and myth into its operations: and did this in a way that bolstered its power. In short, religion and myth underpin the early construction (or historical memory) of law, the sediments of which are said to still exist today.

Smith and Weisstub write that “law emerged from mythology and was at one time doubtlessly intertwined with mythopoeic conceptions of the universe” (1983: 119). The authors indicate that some theorists propose myths are still found in ideological and theoretical constructs of law. They believe there has been little more than a shift in the place where myth is occupied, and question why views are upheld that there is an absence of myth in law (Bachofen 1967: 75-76). One point that may help to explain this view is that rather than simply relegating myths to the status of social dynamics that reside in symbols, some theorists describe ‘genuine’ myth as also living in images that are regarded as reality; in this case, the law (Cassirer 1946: 47-48).

From an historical perspective the interrelationship between adherence to mythical perspectives and religion – and the evolution of law’s social memory – can be traced back to ancient times. Law was first understood as “something eternal which rules the whole universe by its wisdom in command and prohibition” (Cicero 1928: 381). The type of thinking that supported the power of law described here is linked with myth and religion operating as the first systems of law. As discussed in The Ancient City:

The ancients said their laws came from the gods. The Cretans attributed their laws, not to Minos, but to Jupiter. The Lacedaemonians believed that their legislator was not Lycurgus, but Apollo. The Romans believed that Numa wrote under the dictation of one of the most powerful divinities of ancient Italy – the goddess Egeria. The Etruscans had received their laws from the god Tages. There is truth in all these traditions (de Coulanges 1873: 189).

The fact that: “The veritable legislator among the ancients was not a man, but the religious belief which men entertained” explains the *early* power of ‘law’ as a tool for social control. The author concluded, “From this we can understand the respect and attachment which the ancients long had for their laws. In them they saw no human work, but one whose origin was holy” (Fustel de Coulanges 1873: 189).

Religion and a rational system of law

Early forms of worship and religion are at the foundation of Western law, the evolution of which was strongly influenced by Judeo-Christian and Greco-Roman cultures. The latter culture brought a scientific, reason-based approach to Western law, and the former compelled commitment largely because the rules that law espoused were seen to stem from and maintain an interrelationship with ideological adherence to the deity.

Respect for the deity as the author of law (Sabine 1937: 164), and the integration of this respect and early legal thinking, is found in Plato’s and Aristotle’s works. Plato introduced the concept of a rational theory of the State. He also promoted the view that “To obey the law is to obey the gods” (Fustel de Coulanges 1873: 189). Aristotle makes a similar link between commitment to the concept of rationality in legal thinking and obeying God, especially through adherence to his legal command:

He who commands that law should rule may thus be regarded as commanding that God and reason alone should rule; he who commands that a man should rule adds the character of the beast. Appetite has that character; and high spirit, too, perverts the holders of

office, even when they are all the best of men. Law [as the pure voice of God and reason] may thus be defined as ‘*Reason free from all passion.*’ (Aristotle (Trans.) Barker 1946: 146 block parentheses original, italics added; see also Aristotle (Trans.) Warrington 1959: 97).

In recent times commitment to legal thought as ‘reason free from all passion’ or, as it is better known, commitment to rationality as the basis from which to find truth, has been the subject of much criticism: it has been called “rationality without life” (Smith & Weisstub 1983: viii).⁴⁹ I will return to this topic later when contrasting the rational, logical properties in law and the more sensed qualities and relations in social work. For the moment, the topic brings us to the larger theoretical framework of the thesis: competing theories about the evolution of the social or historical memory of law.

Legal theory and the continuation of myth

The most extreme form of ‘rationality without life’ has extended beyond the practice of law noted above, into a theory of law, such as that which King and Piper (1995) align with in Teubner’s systems theory – which includes the opinion that *law* thinks. While there is some merit to the idea (in a loose sense), attention to this issue helps to ground the historical memory of law in the overarching theory here that systems are not just interdependently operating things, but exist and can only be observed through interaction.

⁴⁹ Literature from the Critical Legal Studies movement perhaps best speaks to this concept.

In order to accept that *law* thinks (a view also reflected in Luhmann's autopoietic theory of law, which will be examined in Chapter 12 on object relations) it is necessary to find that discourse is "an anonymous, impersonal, intention-free chain of linguistic events" (Teubner In King & Piper 1995: 24). The need to affirm this idea – which King and Piper regard is appropriate (with qualification (p29)) – is explained when Teubner carries this tenet to its systems theoretical conclusion. The theorist reported:

The human subject is no longer the author of the discourse. Just the opposite. The discourse produces the human subject as a semantic artifact (In King & Piper 1995: 24). [This theme also arises in another quote:] The 'persons' the law as a social process deals with are not real flesh-and-blood people, are not human beings with brains and minds ... (Teubner In King & Piper p63)⁵⁰

These examples of 'rationality without life' help to show the extent to which a systems theory of law has separated conscious-systems (individuals) from a social system. Rather than support this separation, this research led to an emphasis on the interaction between the historical memory of law introduced in this chapter – and thereby the basis of the 'group mind' behind attorney professional self-concepts – and the evolution of a typology of individual, professional and system self-concepts in the court system.

The tenet that the social and the individual each gives rise to the other (Kegan 1982: 215), a tenet often used here to reinforce a relationship that should not be minimized,

⁵⁰ King and Piper (1995: 63) quote Teubner's view as going on to say: "They are mere constructs, semantic artifacts produced by the legal discourse itself" (Teubner 1989: 741).

is perhaps best conceptualized at this particular point through Unger's analysis of law. When discussing the dynamics that propel the legal system, Unger said that "the power of the *self* eternally to transcend the limited imaginative and social world it constructs" is at the heart of "the reordering of both personal relations and institutional arrangements" (1983: 26 italics added).

Placing emphasis in this thesis on the power of *self*-systems to change the institutional arrangements of law (through the interactions that arise in a typology of self-concepts) should not detract from the postulate that to some extent *law* thinks. Just as a rationale – or the existence of 'reason' – has been found to lie at the core of non-human nature, such as that which governs the laws in physical, astronomical and chemical worlds (Kant 1985: 178; Hawking 2001: 86), similar theories exist that 'reason' or an ability to think, exists in the social domain (Kegan 1982: 43; Luhmann 1985: 212; King 1991: 306, 318; Penfield 1975); and in the more rudimentary context of topics examined here, rationality also exists in the respective 'process oriented' and 'decontextualized' voices (Kegan 1994: 212) of social work and law – these latter examples however, reflect a theory that embodies rationality *with* life which can be empirically tested.⁵¹

The demand to place the processes of 'reason' that exist in different systems as arising within the context of interactions between the social and the individual should also not detract from the (metaphorical) tenet adopted in this thesis that the social systems of law and social work produce their own internally generated versions of

⁵¹ Although the author recognizes problems with the analogy, Clam (2000: 70-73) draws an association between Luhmann's autopoietic theory and Aristotle's act theory to similarly depict the concept that the existence of 'reason' – has been found to lie at the core of non-human nature.

reality; and that the ability of each system to change is restricted by its own respective processes of selectivity. We will revisit this topic in the next chapter after better linkages are established between religion, law and attorney professional self-concepts.

Religion, the State and a new legal system

The law embodied in adherence to religious beliefs – commonly known as Canon law, or ecclesiastical law – was so successful (and as the events below indicate, so blatant) that it led to the foundation of the first modern legal system in the West. Berman’s research into The Interaction of Law and Religion helps to explain what occurred.

In the late Middle Ages canon law prevailed through every country in Europe (Berman 1974: 58). In the most renowned authority that the church exercised over the State, in 1075 it asserted its supremacy over secular matters “including the authority to depose emperors and kings” (Berman 1977: 897). Pope Gregory VII (1073-85) set out this authority in the *Dictatus Papae* (the Pope’s Memorandum) (Duffy 1997: 94-5). Overall, these events and the success of Canon law:

stimulated secular authorities to create their own professional courts and a professional legal literature, to transform tribal, local, and feudal custom, and to create their own rival legal systems to govern feudal property relations, crimes of violence, mercantile transactions, and many other matters (Berman 1974: 58-59).

These historical influences means that notions of absolute right were not the sole basis upon which the Western legal system was first established; in parallel with goals of an altruistic and secular nature, the system's hierarchical structure, rules and processes, emerged in competition against the success of the church as the authority of the State.

As suggested in the earlier discussion about Plato and Aristotle, the nature of this shift, however, established the continuation of then existing practices as being dictated by God himself; a way of thinking that was transposed in early concepts of law, monarchy, and the authority of the king being rooted in the gods. Of equal significance, showing the reach of one powerful system of meaning making over another – which evolved from the power primarily vested in men – the subordination of children was said to be the fountain of all regal authority, by the ordination of God (Laslett 1949: 57). Thomas Aquinas expressed similar views:

Just as the sovereign of a state governs the state, so every father of a family governs his household. But the sovereign of a state can make laws for the state. Therefore every father of a family can make laws for his household (Aquinas In Feinberg & Gross 1991: 13).

Although some might argue that for a brief period in the last century the pendulum swung from paternal to maternal dominance in family life,⁵² the belief that a family should govern its own direction has been transposed in the strict notions embodied in current law that it should not interfere in family life (which as Chapter Twenty will

⁵² While it could be argued that this shift involved paternal neglect rather than a leveling of the playing fields, this pendulum swing is suggested here in the breakthroughs feminists briefly made for improvements in women's legal rights for the custody of their children after divorce (Minow 1990).

show when discussing this topic, for some attorneys even includes not intervening when child abuse might be occurring).⁵³ Again, staying with the current topic, the extent to which the ‘new’ legal system reflected that which was codified in religious doctrine, which strengthened its power base, is also found in the way law was first taught:

The law that was first taught and studied systematically in the West was not the prevailing law; it was the law contained in an ancient manuscript ... which had been compiled under the Roman Emperor Justinian in about 534 A. D. [a text influenced by religion] (Berman 1977: 898).

While there is no questions that the social memory of law has evolved extensively since its inception, two other factors are at the core of the Western legal tradition which speak to its power base, and to the social sediments of early practices influencing how law operates today: one is the method of analysis and synthesis applied to ancient legal texts – a method which in modern times is called scholasticism; another is the way in which the scholastic method was applied to the books of Roman law – namely, it occurred within the context of “the university” (Berman 1977: 899). Of particular salience to the long-standing (hierarchically based) academic, analytical and practice differences that underpin the systems of law and the humanities – the legal profession:

⁵³ Beliefs about the need to subjugate women (and the thinking they represented), which pre-existed the Bible, were also carried into legal practice. Emblematic of early beliefs about women, in 195 B.C. Cato the Elder said: “Suffer women once to arrive at an equality with you, and they will from that moment become your superiors” (Morgan 1970: 32). The Bible – and eventually Western law – just formalized the dominant form of meaning making already established about how to rule society.

produced a science of law ... Legal science was, in the first instance, an institutionalization of the process of resolving social-political conflict by resolving conflicts in authoritative legal texts (Berman 1977: 938).

These factors begin to speak to the way that law's truth-validating procedures operate, (and thus serves a different social function than social work) (King 1991: 308). The following discussion weaves this maxim with the interrelated view that child protecting social work is not pre-programmed to operate from legal criteria (King 1997: 81): at the same time it proceeds to flag historical dynamics that elevate law over social work.

The development of Western law: some contrasts with social work

The fact that law was established as a science and grounded in authoritative texts – and the vital need for it to remain predictable through methodological strategies of a rational nature (see Chapter 8) – has contributed to the elevation of law over disciplines that have a paucity of scientific or text-based structures of thinking, such as social work, which until the last decade often relied on oral communications.⁵⁴

The elevation of law over systems of thought such as social work has also been bolstered by the training of legal representatives in techniques of argument and reasoning (Morris 1958: 150-152); operations that are supported by “duty-imposing and power-conferring rules” and canons about “standards of interpretation” (Hughes 1968: 436). The power of law and thereby the self-concept of attorneys also remains

⁵⁴ See Chapters Seven, 13-14 and 17-22.

dominant through the continuation of the threat of punishment for non compliance with legal dictates – embodied in the necessary coercive measures that law can exercise if its rules are breached, and in the very existence of contempt laws – which work to ensure that law is practiced according to its own selective processes of making meaning.

In mentioning the power of the ‘rule of law’ it is emphasized that in and of itself this topic is insufficient to address all that is involved in ‘rational’ legal decision-making (Hughes 1967: 437). The main point, as alluded to at the opening of the chapter, is that the truth-validating procedures of law are premised on adherence to rules, and the system of law has evolved in such a way that “legal personality and legal persons are, as it were, mathematical creations devised for the purpose of simplifying legal calculations” (Lawson 1957: 914-915):⁵⁵ the seeds of which were noted earlier in Aristotle’s view that “*Law [as the pure voice of God and reason] may thus be defined as ‘Reason free from all passion’*” (parentheses original, see full quote above, and Barker 1946: 146).

To summarize, the seeds of patriarchal dominance in religion, particularly its association with power and orientation to rules, has been transposed to the practice of law. The long-term outcome of this historical social memory on legal operations (and consequently on attorney professional self-concepts), is that rather than law reflecting “sensed qualities, sensed relations or sensed events” law has been defined in – and its truth-validating procedures operate in – terms of “imageless, formal, logical

⁵⁵ Chapters 8 and 10-12 explore key psychological and sociological factors behind how this occurs.

properties and procedural rules” (Northrup 1960: 650). As Chapter Seven starts to show, this contrasts with the early historical memory of social work, which was linked with matriarchal thinking and the non-rational side of consciousness, or as described by one theorist, with the qualities of “love, altruism and kindness” (King 1997: 106).⁵⁶

Law and social work: patriarchal and matriarchal forms of meaning making

The argument in this thesis that law and social work continue to carry patriarchal and matriarchal sediments of thinking from their respective historical social memories (largely because they each reproduce their own internally generated versions of reality), is sustained at this point by the terms de Riencourt uses to distinguish patriarchal from matriarchal thinking, and the natural overlap between these terms with Kegan’s theory about different ways of meaning making. Distinctions between ‘unification and conservation’ in matriarchal structures, and the patriarchal era which emphasized ‘independence’ (de Riencourt 1974: 28-35), (once again unexpectedly) comport respectively with the use of Kegan’s interpersonal and institutional truces of meaning making in this study (see Chapters 17 and 18).⁵⁷

To show the seeds of an interpersonal and institutional form of tension at the core of the historical memories in rule-versus caring-based systems of social control – which

⁵⁶ Other chapters will show that social work has evolved to incorporate a managerial approach to its operations, but this does not negate the fact that practices often pivot on a strong interpersonal basis.

⁵⁷ Briefly, in matriarchal society in the Bronze Age there was no overriding set of rules maintaining a hierarchy of social relations or regulating transactions among individuals (de Riencourt 1974: 17-41). While the sediments of patriarchy and autonomy in law is well accepted, matriarchal themes of mutuality in social work are seen in later chapters mainly in its ‘helping’ strategies.

includes sketching the historical propensity of religion (then law) to quash this latter form of thinking *as a method of social rule* – I will build a root metaphor from the rules and events described in the Bible. The extreme nature of the metaphor helps to capture a key concern that arose in interviews with social workers in this research: attorneys reject their calls to intervene in cases because legal rules prevent it.⁵⁸

The metaphor is extrapolated from Eve’s expulsion from the Garden of Eden for enticing Adam to eat fruit from the tree of knowledge, and Adam’s expulsion for responding to her (Genesis 3: 16, 3: 17). When these actions were documented in the Bible, and the punishments were dictated that emphasized the everlasting subjugation of women to men, in a generic sense it formalized the framework which accentuated that people must obey rules, and men must not listen to women’s pleas that things can be better.

While underscoring the roots of the historical dynamics between the professions is clearly an exaggerated way of spotlighting the differences that exist, and similarly is not meant to overlook the fact that things change, it remains a fact that for centuries law has stressed ‘the rational’ and maintained a fear and rejection of ‘the intuitive’. Because law actively prohibits sensed qualities and intuitive thinking there is a constant tension between law and social work in child abuse cases. Smith and Weisstub said: “those who propound intuition as a theoretical basis may well be attacked as being unjust, uncertain and illegal” (1983: 122): attacks, the nature of

⁵⁸ It was also found in this study that some social workers did not seek intervention even when they believed it was justified because they ‘knew’ it would be rejected.

which are mirrored in this study in the analysis of the social setting and in attorney data about their experiences with social workers in the child dependency court.⁵⁹

Questioning the extent of the rational basis of law

To conclude this discussion it is recognized that critiques about law, especially from the schools of Critical Legal Studies and Feminist Jurisprudence, have rejected the maxim that all attorneys' decisions are grounded in rational analysis.⁶⁰ Theorists have also questioned: claims about the 'neutrality' of law; the source of legal rules and purpose of commitment to such rules; and the framework that is used for legal interpretation (Littleton C 1987; Minow M 1990; Fineman M & Thomadsen N 1991; Unger R 1976, 1983, 1996). One recurrent theme unites these issues: concern that the custodians of law (or the self-concept of the profession) either take on, or are expected to take on, non-human characteristics. Smith and Weisstub best capture this concern: "to think of a man as a unidimensional psychological figure, devoid of feelings, may in some way be the error of the concept of the rational man produced by Western law" (1983: x).

The rational elements noted in this chapter that underpin the professional self-concept of law might lead readers to regard the self-concept for attorneys as being more closely related to social or mechanistic evolutionary processes than to those of individual development. At one level, as will be shown in Part Two, this attribution is

⁵⁹ Themes of this nature are addressed in Part Three when the thesis presents a theory that helps to explain why social workers' and attorneys' voices often collide in system operations (Chapter Fourteen); and again when the thesis examines the operative structure of each system (Part Five), and explores why the DSS responds to pressure differently from that of the legal system.

⁶⁰ A topic first introduced in Chapter Three when showing data about attorneys feelings.

(superficially) appropriate. At another level of analysis the processes of evolution tell us that a professional self-concept is the culmination of the way the world has constructed the individual and how the individual has chosen to make meaning about their experiences. We turn now to the professional self-concept of social work, and the factors that underpin the internally produced versions of reality – and its own form of selectivity – which distinguishes it from law.

CHAPTER SEVEN

HISTORICAL OVERVIEW: THE PROFESSIONAL SELF-CONCEPT OF SOCIAL WORK

(and law)

Introduction

This chapter sketches the historical memory that has influenced the professional self-concept of social work: it does this through a generic overview of factors associated with the evolution of the profession and its practices. While this focus might appear to reflect the last chapter – unlike the ease with which it was possible to identify the early historical forces that under-girds the evolution of law, and thereby the nature of forces behind the power and autonomy associated with the self-concept of legal practitioners – it was not possible to capture the self concept of social work in a direct way. Indeed, social work literature suggests that what the profession stands for, what its theories have been, how its knowledge base evolved, or what it believes its knowledge base and goals should be (along with its vulnerability to political and economic forces (Dominelli 1997: 23; Vigilante 1997: 115; Jordan 1998: 221)) reflects a professional self-concept that is eclectic in nature.

As well as sketching these dynamics, this chapter will also build on key differences between law and social work. The chapter concludes by continuing to expand on the relationship between the present topic and the overarching theory in the thesis: (SL=HDLA+D^{SA}).⁶¹ This focus will take us to King's views, and in the process of questioning his ultimate perspective on systems theory, examples will be shown from *individual, professional and system* influences, all of which help to flag how the self-concept typology might provide a more comprehensive tool to examine how law operates than that offered by the theory of legal autopoiesis. This discussion occupies

⁶¹ To iterate: to examine how a system of law operates it is necessary to apply theories about human development and the systems theory of autopoiesis to data from the court being studied, and to consider how social action accumulates to influence system structures and operations of the court.

several pages and is presented at the end of the chapter in order to ground the relationships between the theories being argued before moving to Part Two, where Kegan's and Luhmann's theories about the evolution of systems will take center stage.

Introducing social work – in contrast with law

On the one hand, it can be argued that the eclectic nature of the professional self-concept of social work is highly appropriate as it is needed to maintain a diverse range of responses when dealing with the ambiguities and layers of complexity associated with human crisis. On the other hand, the mostly eclectic (and often interpersonal) nature of the profession has contributed to enormous difficulties in the interactions that occur with attorneys in child abuse cases. The following quote captures one of the main dynamics that this study identified as crucial to the difficulties that arise between the two professions in court operations:

Children's attorney

Social workers aren't concerned about having to prove things: since they talked to the witness they know it ... Whereas the lawyer's concern is: **I may think I know** what's going on in this family but I've got to prove it to somebody else. *And that difference of task and that difference of orientation causes innumerable difficulties with social workers and lawyers as they interact. Is the social worker approach more right? Not in a court room it's not right, but in the real world it may well be the more right one.*

Whereas attorneys try to prove things by referring to rules (which as the above quote (and Chapter Six) suggested, may not reflect the real world) this chapter will show

that the self-concept of social work evolved in ways that were the antithesis of “proving” observations using rules at legal standards of analysis. The ability of social work to now adopt legal practice may be hampered by its historical memory, a memory which reflects the profession’s struggle to integrate knowledge from a variety of competing and inconsistent frameworks that were developed for fields of practice other than the one in which they function (Bartlett 1976: 287-302; Brennan & Parker 1966; Davies 1997; King 1997: 82). Issues such as this will be linked in this chapter with the organistic (or ecosystem) model in which social workers have mainly worked.

While contrasting the historical basis of social work’s knowledge, theories and system structure with that of law, this chapter also touches on the “crisis of identity” that forms part of the professional self-concept of social work.⁶² Although the argument can be mounted that law is also in crisis, as the thesis will explain, the mostly institutional self-concept of attorneys (and the legal system’s ‘normative closure’) helps to protect its *operations* (and to some extent its representatives) from attack. This is not the case for social workers, who at the same time as striving for highly esteemed qualities, such as “tolerance for ambiguity and high frustration” (Malekoff 2000: 313), represent a discipline where it has been said that “there is no professional group about which there is such universal disenchantment” (Gilbert & Specht 1976: 485).⁶³ This schism, between the pursuit of esteemed qualities and the often poor way

⁶² Richan and Mendelsohn write that: “In the past, social work has experienced institutional schizophrenia, its several parts going their own ways. Once it could do this and still pretend it was a single profession because of the looseness of its self-conception. But as the issues have sharpened in recent decades, it has become harder and harder to ignore the internal contradictions” (1973: 188).

⁶³ In a polemic against their profession Richan and Mendelsohn said: “It is easy to see social work as a dying institution, destined to be unmourned in death as it has been unloved in life” (1973: 126).

in which the profession is regarded (shown in this study in data from attorneys), is partly explained below by the association of social work with ambiguity, rigidity and inconsistency: dynamics which do not heighten respect for their role in legal operations, and dynamics about which the profession is keenly aware.

Social work has recognized that the way it has traditionally worked to achieve its status “may no longer be viable as a mode of organization for the profession”. It is notable that analysis of data and social work literature communicate a familiar historical theme propelling this call for change: “Practitioners’ stories of ... role confusion and loss of identity” (McDonald & Jones 2000: 3-9).

Later chapters will show that the profession has tried to address its image and reduce role confusion – such that it has changed its own ‘noise reducing’ operations so that it is seen to operate in a rational manner in child abuse cases (King 1997: 104) – but this chapter supports King’s view (1997: 81), and the ultimate finding in this work, that ‘child protecting social work is not pre-programmed to operate from *legal* criteria’.

Although there has been a general systemic shift in child abuse cases from attention to ‘need’ to one of ‘risk’ analysis (King 1997: 101; Carney 1999: 58),⁶⁴ the most dominant historical self-concept of social work is its association with the role of helping. Such helping is most often aimed at “transactions of understanding, of feelings and of care” (Camilleri 1996: 175), which is interwoven with social work’s frequent reliance on “mutually beneficial interaction[s]” (Camilleri 1996: 54). As

⁶⁴ First introduced in the system self-concept as the focus of attention shifting to “observable harms”.

part of this self-concept, rather than emphasize rational, text-based communications and attempts to 'prove' things as seen in law, social workers have a more established history of recording their "interactional and active" observations about case dynamics in "narratives" (Hall 1997: 9-22).

Practice dynamics of this nature, and what will emerge as the propensity of social workers to formulate theories in a case based on their own experiences (Schon 1987), means that to understand a social worker's decision-making (or why they have been found to self-select particular knowledge) it is necessary to understand how they make meaning *as a discipline*: and toward this end, what has propelled the historical memory of the discipline's evolution.

Development of the social work profession

Social work has been described as the "invisible trade" (Pithouse 1987). In the United States the profession "has come to represent society's attitude of responsibility towards its less fortunate members" (Valletutti & Christophor 1977: 374). This reflects a change from earlier perspectives where social work was seen as "the profession dealing with the diagnosis, prevention and correction of social maladjustments" (Panunzio 1939: 442, 451, 561). Philosophical foundations at the root of social work's efforts for the less fortunate range from the opinion that it developed from altruistic ideals about shared social responsibility, to the view that it stems from the humanity of the privileged to the poor (King 1997: 90), or to the less favorable interpretation of the protection of self-interest by the rich: the idea being

that if the poor were not helped (controlled) they would revolt (McCarthy 1982: 99, 125, 148).

Despite these mixed influences, literature consistently shows that the profession evolved from charity organizations and the work of women volunteers who were church parishioners and wives of businessmen and politicians. They worked for the community ideal that home-life should be revered (McCarthy 1982: 3-24). Social work's association with domestic life also overlaps with the historical division of labor in employment: it "developed along lines dictated by sex-roles" (Walton 1975: 36). In other words, when the discipline formed it was influenced by the allocation of power along lines reflective of that in society more generally (see, for example, Chapter Six).

Historical influences on social work systems and the profession

The way society has distributed power in the evolution of social welfare activities and human service work (such as the evolution of DSS) has been "shaped by deep-seated beliefs about the goals of government, the rights of citizens, the nature of political or civil liberty, and the nature of social justice" (Reamer 1993: 2). We briefly turn to historical and contemporary social theories that help to capture how power has been organized and managed – and thus impacts on social work. This topic is particularly relevant because this research indicated that power not only becomes authority (Tripp 1993: 19) but, of most interest, multiple layers of power discrepancies exist between DSS and the dependency court system.

The first link between social welfare activities and views about law and government is sketched here through Plato's social theories on class struggle. His desire for justice and community, and attention to the ambiguity that exists in dialectical analysis, may on first glance appear to comport with the self-concept of social work. However, as becomes evident in The Republic (n.d.: pvii-xi, 207-237), the philosopher's preference for a highly centralized (hierarchical) form of rule and reduced individual autonomy, in essence appear to repel rather than enhance concepts of social work or its correlate in a social welfare system (such as the organistic approach which is noted below).

Aristotle also influenced the development of hierarchical social systems. His views about social order, such that: "the male is by nature superior and the female inferior; one rules and the other is ruled - a principle which necessarily extends to all mankind" (Aristotle, In Politics 1959: 11), were arguably adopted by law with a more natural synergy than that which can occur in systems that house the practice of social work.

As shown in the chapter introducing the professional self-concept of law, social theories about groups and families and the laws that structure such relations, also have an established historical background in their interconnection with religious and scientific beliefs.⁶⁵ Consistent with the influence of historical memories on current thought, the difference between philosophies with a matriarchal and patriarchal

⁶⁵ Literature predating the examples shown in Chapter Six includes theories that date back to 1750 B. C. in the Code (laws) of Hammurabi of Babylon (Edwards 1971); early A. D. developments in the codification of the Twelve Tables which marked the beginning of Roman legal history (Scott 1973); and the movement of Greek philosophy into dialectical thinking (Schultz 1936).

orientation and the subsequent social theories about how to organize society that ensue, continue to reflect the *type* of differences that one might say, have been argued since eternity. As a snapshot of how long-standing disputes arise in contemporary thinking: Rousseau promoted the need for a social contract for the ‘general will’ of the community (Rousseau 1967). Mill advanced utilitarianism through agency and liberty (Mill 1910): views which contrast with Hobbs, who proposed the need to prevent the inevitable ‘war against all’ through subjugation to a ruler (Hobbs 1949). Positing a very different perspective, Locke advocated a theory to achieve community through mutual consent (In Tully 1993).

Of most importance, the seeds of historical themes of social control shown in the wealth of literature about how to structure society emerge in philosophical beliefs (and social theories) about societal responses to those in need, through professional and systemic practices. Marx, as one example, is said to have influenced social work, having espoused concerns that continue to occupy the attention of the profession today: class struggle and oppression (Reamer 1993: 8). The two themes that best capture how society responds to class struggle and oppression are reflected in the concepts of ‘agency and community’: or institutionalism and interpersonalism respectively. While both forms of response (or meaning-making) operate in mechanistic and organistic systems such as law *and* social work, they exhibit different levels of dominance in each.

Social work structures: systems and the profession

First, Bakan's use of concepts about 'community and agency' provides a background for interpersonal and institutional forms of meaning-making respectively. Bakan said:

Agency manifests itself in self-protection, self-assertion, and self-expansion; communion manifests itself in the sense of being at one with other organisms. Agency manifests itself in the formation of separations; communion in the lack of separations. Agency manifests itself in isolation, alienation, and aloneness; communion in contact, openness, and union. Agency manifests itself in the urge to master; communion in non-contractual cooperation (Bakan 1966: 15).

These differences are captured below in the concepts of 'organic' and 'mechanistic' systems, which by coincidence overlap with the type of competing differences found to exist in this study between social work and law and the systems in which they operate.

Mechanistic (or 'bureaucratic') *structures are characterized by hierarchical systems of authority and control*; and by predetermined allocation of tasks and roles that are predefined by senior managers. [Alternatively, in] organistic structures ... emphasis is placed upon processes of adjustment and re-definition of individual roles through informal [structures] as well as *informal interaction with others, and where individuals' particular expertise and task-interests are 'negotiated'* [and re-negotiated] (Sibeon 1991: 103 italics added).⁶⁶

According to Burns and Stalker, mechanistic systems (most saliently here, institutional systems of law) are characterized by: "the precise definition of rights

⁶⁶ Both systems "represent a 'rational' form of organization", because both may be created "to exploit the human resource of a concern in the most efficient manner feasible in the circumstances of the

and obligations and technical methods attached to each functional role and the translation of rights and obligations and methods into the responsibilities of a functional position” (1994: 120). Contrasting this, and more closely resembling the social work self-concept, roles are sanctioned in organic systems more from a “community of interest with the rest of the organization and less from contractual relationship”: issues are settled by consensus not authority, and communication tends to be lateral – not vertical (Burns & Stalker 1994: 119-122).

Concepts about organic systems can not only be linked with systems such as the DSS, but also in social work’s approach to systems theory itself, where “regularly interacting variables” in a system are regarded as being “parts of a synergetic totality” (Chetkow-Yanoov 1997: 134-136). Specific to the contrasts between law and social work in this thesis, whereas the mechanistic, hierarchically oriented practice of law operates by excluding the multifaceted aspects of life,⁶⁷ social work literature shows that “systems thinking emphasizes the contribution of every participant in the helping process” (Chetkow-Yanoov 1997: 134-136).

New versions of the organistic concept that underpins the historical memory of social work continue to unfold (along with more rigid strategies of response), but the main organic system adopted for social work practice has been the ecosystem model. In it:

concern” (Burns & Stalker 1994: 119). Interpersonal and institutional themes used later to explore differences between law and social work also reflect Kegan’s concept of “rational” voices (1994: 212).

⁶⁷ Luhmann 1993: C2/V/7; also see Chapter Eight.

Emphasis is placed on processes of mutual adaptation ... People are viewed as evolving and adapting by means of transactions with all elements of their environments (Fischer 1981: 542 italics added).

Once the mainstay of the profession, this model is now seen as *perhaps* less conducive to professional development than once thought (McDonald & Jones 2000): and the person/environment relationship once said to spur social work practice is also receiving critical scrutiny (Teare & Sheafor 1995: 95). But the main issue here is that commitment to the ecosystems (or organistic) perspective did not historically ground decision-making strategies for social work in practices that focused on '*proving*' *facts*. The model:

does not embrace any one system of practice; indeed, it does not prescribe any specific techniques of practice ... the ecosystems model provides a conceptual framework for understanding social work practice at the broadest level and also provides a particular view with which social workers deal. *An eclectic approach to practice adds flesh and bones to the ecosystem model (Fischer 1981: 542 italics added).*

At one point, social work's historically eclectic nature included an interpersonal approach in its management style, such as a helping role toward employees through relationships (Johnston 1947: 257). Management strategies and social welfare policies have now evolved to reflect a stronger business orientation (Poppo & Leighninger 1998; Garvin & Tropman 1998), but administrative commitment to processes of conciliation still appears to place DSS:CSB more in the rubric of shared exchange than that seen in law.

Paradoxes in social work: rigidity, openness and the interpersonal

Historical factors that may keep DSS and social work practices in the rubric of shared exchange are rooted in a system structure that is highly influenced by the labor market, political forces (Malekoff 2000: 305), and a global economy (Reisch & Gorin 2001: 9). In the main, political and economic factors contribute to social work dependence on other systems for approval and support (King 1997: 82): thus the demand is high for social workers to constantly adapt to these forces. In their quest to maintain approval in volatile times the self-concept of social work includes ever-changing “performance expectations and multiple priorities”: and notably, while agencies and professionals must show constant vigilance over these factors, Part Five in this thesis shows that they are factors over which social work has little control (Moxley & Manela 2000: 316, 326). These dynamics are interwoven with paradoxes in social work.

External forces – and the demand on social work to remain flexible to such forces – appear to have (ironically and in a circuitous way) contributed to ‘an abundance of directives and codes, regulations and checklists’ to guide social work practice (King 1997: 96-106; Dominelli 1997: 13-26). Overall, paradoxes in social work can leave the question wide open as to what social work is⁶⁸ – but as was found in this study, and as Ramos argues – while social workers may have an infrastructure that can

⁶⁸ For example, one reader of this thesis said that I needed: “to adequately establish what social work is – this did not occur in the thesis, and so the differences between the professions were not established” (McCallum 04/2001). When I then looked at McCallum’s thesis to consider her views on what social work is in child abuse cases I was *amazed* to see the **first** finding in her abstract was the *importance* of “the interpersonal process between worker and client”. In short, as our research led us both to the interpersonal, and McCallum denounced this exact finding in my thesis by failing to even note it, I regard this experience with social work (which I certainly found perplexing but chose not to allow to hinder this research project) as indicative of the paradoxes that underpin what social work is.

“represent rigidity” their eclectic practices often continue to reflect “general systems theory as it applies to interpersonal relations” (1997: 129).

The difficulty associated with trying to merge these paradoxical elements of social work practice (which once again go to the self-concept of the profession) is captured in the discipline’s literature, which recognizes the fact that society “does not contain concepts for simultaneously thinking about *rationality and indeterminateness*” (In Gilbert & Specht 1981: 357 italics added). The following discussion shows that these competing social work dynamics are linked with and complicated by different sources of knowledge, theoretical uncertainty and cultural factors. The themes that emerge continue to reflect a self-concept that has evolved from interpersonally related ‘helping’, and is embedded in a system and practices that embody ambiguity, rigidity and inconsistency.⁶⁹

The historical source of social work knowledge (and professionalism)

Kadushin said that in social work: “borrowed material is translated, amended, [and] reshaped for use often beyond recognition of the discipline which conceived it” (1962: 39-43).⁷⁰ The author found problems arise because a “seemingly truthful, self-evident hypothesis achieves the status of a fact by sheer repetition”. While Kadushin recognizes that science is generally “strewn with the debris of self-evident

⁶⁹ Qualities that this and other research suggests, have advantageous and disadvantageous attributes.

⁷⁰ Changes are in progress: “social work’s approach to practice theory should be focused on specific knowledge and skills related to specific issues and contexts, rather than in broad organizational themes that currently preoccupy many in the profession” (McDonald & Jones 2000: 10); but of most importance here are the dynamics that best explain the historical memory and data gathered.

propositions” (1962: 43-48), the discipline’s use of borrowed sources of knowledge is compounded by the type of knowledge upon which social work was first built; this thesis shows it is one that still impacts practice:

Social work knowledge at first consisted largely of sophistication in the use of community resources and the insight of ‘wisdom’ into human motivation and behaviour ... such practice is pragmatic, based on rule-of-thumb experience rather than on theory (Wilensky & Lebaux 1958: 289).

At one point attention to issues such as insight or rule-of-thumb experience (Tone 1997) culminated in social workers being advised “to concentrate on the business of the day and leave the realizations to others”: a form of practice guided under the manifesto “Don’t think. Act” (Rein & White 1981: 633). While this particular approach is not promoted today, and it is recognized that the divide between “systematic intellectual inquiry” and the “tough minded realities of life in social-care agencies” are not necessarily opposed (Fuller & Petch 1995: 3), social work literature nonetheless, gives the strong impression that the profession is still plagued by multiple unresolved issues.

Although the qualities of “love altruism and kindness” appear to have been transformed into terms that have “meaning for society via its social systems” – (where “love” evolved first into the realm of social science, and which now enters social work “transformed into risk factors” (King 1997: 106)), these changes have not quelled the frequently recurring concerns evident, for example, in literature about the

“role and the purpose of the profession” and the “knowledge and skills required for practice” (Secker 1993: 5).

Ambiguity in these areas is said to make complex the task of conducting research into the profession and its activities (Camilleri 1996: 54, 138-144); a goal that is made even more complex once research in the field branches into the socio-legal arena (Swain 1999: 35-43). Indeed, even the basis of what constitutes ‘evidence’ in the quest for an ‘evidence-based’ source of knowledge is in dispute (O’Connor 2000: 19):⁷¹ and all of this ultimately speaks to social work literature about problems associated with the professionalization of the discipline.

In what might be seen as a polemic against the profession, the question has been raised if social work education even belongs in academic institutions? Sibeon (1991: 56) indicates that some have gone as far as to suggest, and others have rejected the view, that social worker claims about their professional status have more to do with their occupational ambition than with the existence of unique, academically gained skills.

Questions about social work as a profession necessarily pivot on how the term ‘profession’ is defined. Wilensky and Lebaux describe a profession as having “a systematic body of knowledge”, acquired through specific training. Social work literature suggests that this dynamic is evolving, but is not firmly established in the

⁷¹ To help illustrate this dispute, literature in this thesis came from social work professors, researchers and theorists who consistently referenced studies and research into social work to support the views they advanced. Nonetheless one reader of this thesis said: “Much of the social work literature used by the student is opinion, not evidence, or research based. This makes the foundation of the arguments weak” (McCallum 04/2001). I have since decided to add more recent quotes, but my source of social work material remains the same: one that can be used to dismiss this research as “weak”.

discipline's historical memory. Another reason why social work may struggle to receive instant recognition as a highly respected profession (as opposed to the respect held for individual in it) is that nor does it have a broad-reaching established historical memory for another quality intrinsic to 'professional' status: to be regarded as a profession "not just anyone can do the job ... the job territory is marked 'off limits' to the amateur, often by law" (Wilensky & Lebaux 1958: 284).

Many attorneys in this study for instance said that they perform social work functions; in effect, they are saying that they think *anyone* can do the job. In addition to earlier points noted, attorneys' views about their ability to do social work may be perpetuated by the fact that since the inception of social work, it has been plagued by a significant paucity of theory (Richan & Mendelsohn 1973: 98-112). The shortage of solid theory contributes to a circuitous dynamic whereby the profession's constant experience of being in "crisis" is said to feed an *unrelenting* search "for a coherent theory base" (Furlong 2000: 15-16).

Social work theory

Social workers adopted theories after the profession formed.⁷² For several decades the most dominant perspective was Freudian psychoanalytic theory, which was at its prime as a tool to understand and address issues with clients in the 1970s. It was also used to study the individual personality of social workers, a practice that continued when they entered the work force (Hollis 1963: Ch1; Secker 1993: 13). The purpose

⁷² Similarly, Chapter Four noted that legal theories evolved in a way that reflects the legal system.

was to prevent inappropriate personal views from influencing their responses to clients.

Although no longer formally used, fieldwork data suggest that the historical seeds of this practice appear to have evolved into the use of concepts about ‘internal frames of reference’ from the humanist movement (Combs et al 1971: 3-23) in the supervision of social workers today. Moreover, the basis of a psychoanalytic approach to social work theory (also interwoven with ‘medico-scientific’ responses by the profession (King 1997: 75)) is still found in “a therapeutic model” of intervention which, as Cannan and Warren (1997: 10) report, has wrongly helped to give the discipline a sense of purpose.

Like most of the topics addressed in this chapter, the seeds of change are also evident. A shift away from the therapeutic model has been influenced by the political and economic climate of the last decade (Dominelli 1997: 23); and by the more specific finding that social workers have been trained to “focus on the individual problems of their clients rather than larger, systemic issues”: a practice that has caused frustration with the recognition by some that the discipline has not been trained adequately enough about how to frame human behavior in non-clinical ways (Jacobson 2001: 53). Despite changes of this nature, it remains that social work theory and practice continue to be influenced by “a passionate interest in and concern for the quality of human experience” (Howe 1997: 175).

Reflecting the eclectic nature of social work practice, one theory gaining popularity is the concept of the social worker as “theory builder” (Secker 1993: 12; Howe 1997:

167-176). This overlaps with the finding in several studies that social workers often do not use theories from their academic training in field practice (Reamer 1993: 46-51,152; Camilleri 1996: 62). As a theory builder the social worker integrates what are termed 'ready made theories' with other sources of knowledge, including their 'everyday knowledge' – or what is sometimes referred to as “practice wisdom” (McCallum 1995) – to formulate responses to clients with whom they interact (Secker 1993: 24; Pithouse 1987: 3). This approach comports with the view from some in the profession that:

practice is not a rational-technical application of scientific principles of 'helping', but essentially a practice. By that they mean helping is a personal interaction between two people and the knowledge that is used by the practitioner is contextualized within the experiences of that interaction (Camilleri 1996: 138).

Camilleri's analysis about contextualized knowledge comports with the interpersonal voice and theme of meaning making that emerged in social work data in this study. It is also consistent with the new “strengths perspective” which has its historical seeds in the ecosystems model introduced earlier. The 'strengths' model is said to offer more than the problem-focused clinical or intrapsychic-based practice methods previously noted. However, despite the perceived benefits, the strengths model *eliminates the expert* (Cox 2001: 307). As a result of this factor, the model may not be to the advantage of social work in the evolution of its self-concept (particularly when contrasted with the level of expertise intrinsic to the professional self-concept of law):

The social worker is a co-participant in the quest for meaning and respectful of the clients interpretation of the situation. Worker - client interactions are characterized as collaborative conversations designed to create a crafted mutual understanding of the client's life events and issues ... One must become a co-participant with a client in the relationship, which eliminates the role of the expert (Cox 2001: 307).

Overall, the strengths model appears to reflect the social work practice of borrowing from 'reflective theories', which in reality, all professions use in one form or another to make decisions (Schon 1987: 40; Fuller & Petch 1995). The difference is that, while attorneys may use reflexive thinking, legal theories and law underpin the way decisions are presented. This difference may leave attorneys *looking* as though they have a consistent, respected source from which they make decisions; whereas social workers may *look* as though their decisions stem from inconsistent and personal sources. This impression may not be helped by the fact that at this stage in its evolution social work is still being urged to clarify "what it is seeking to achieve" (O'Connor 2000: 17).

Cultural considerations in social work systems

On one level the culture of social work has placed multiple pressures on the profession to challenge the status quo and social and economic distribution of goods (Moroney & Krysik 1998). Specific to this study, the discipline endeavors to establish new social norms such as State intervention in families to prevent abuse: as Chapter Four noted, this is a difficult task because uncertainties continue to exist about what constitutes child abuse (Sheehan 2000: 46). On another level there is

pressure to conform to the internal group function of the profession itself (de Montigny 1995).

The reason why the profession places a premium on group solidarity and makes an implicit demand that they act like their colleagues (Satyamuri 1981:63), may be partly explained by research showing that the absence of conflict in child welfare systems is equated with effectiveness (Scott 1993:4). And, consistent with the inconsistency that permeates the literature, pressure to conform to group dynamics means constraints exist on the theories practitioners build to guide their decisions. Pressure to conform is sustained by the professional need on the one hand to share responsibility – which is also interwoven with ethical issues about client confidentiality (Millstein 2000: 281) – and on the other to prevent guilt being carried by one person if there is a failure (Richan & Mendelsohn 1973: 99,193; Scott 1993: 3-8; Morrison 1996: 127-140).

Returning to the dominance of the social v. the individual

To place the discussion in this chapter within the context of the overarching theory in this thesis, it may be observed that while King preeminently locates what occurs between social work and law “at the level of social systems of communication” (1997: 205), this research does the opposite: it locates events as being part of an intrinsic, ongoing evolution where individuals give rise to the social and vice versa (Kegan 1982: 43).

Having once again reiterated this distinction, it is timely to recognize King's postulate that there is "an interdependence" between individual and social systems (1997: 18). Although some readers may regard this interdependence as being aligned with Kegan's theory that we evolve and operate "in a single energy system of all living things" (1982: 43), I believe that the possibility of (full) alignment between the two theorists is canceled out by King's concluding perspective, when he indicates that there should be:

A clear recognition of the *impossibility* of direct communication between systems and, in particular, between morality and social systems and between those social systems which society has designated as the sites of authoritative accounts [such as law] (King 1997: 207 italics added).

Like Luhmann, King's opinion about "system non-communication" (King 1997: 207) suggests that individuals and social systems (ultimately) evolve as if separate entities. This view is reminiscent of the example in the introduction to this work, where it was noted that like research that dominated thinking before Einstein, energy and mass were regarded as if two separate domed cities (Bodanis 2000).

In addition to this above premise having been found to be false, it is also impossible to empirically observe the alleged tenet about the "impossibility of direct communication between systems" at a scientific level of reliability and verification.⁷³

Of most concern here, as noted in Chapter Six, King's tenets (and Luhmann's

⁷³ See the thesis Introduction; Appendix One; and Part Two. Footnotes in Chapters 12 and 13 also discuss the theory that there is no-direct communication, and asks if this is accurate, why can autistic people retrieve "unanalyzed wholes" – without the ability to internalize rules intrinsic for effective functioning, such as the ability to assimilate and accommodate symbolic and representational systems.

autopoietic systems theory of law) in effect sideline the competing ways of making meaning for professionals who operate the systems of social work and law. To be clear, this result occurs when interactions between *professionals* are placed and analyzed in the context of “social systems” *and*, such systems are held out as evolving separately from conscious-systems (people) (King 1997: 26).⁷⁴

Take for example, King’s tenet that “systems are able to relate to one another (only) by attempting to impose their own self-generated evaluations and criteria for success upon the other” (1997: 205 parentheses added). The difference between what King is saying and what I propose is that when we talk about a “system” imposing its own self-generated form of meaning-making on another system, we need to consider that the operations evolve in a dynamic *interaction* between individual, professional and ‘system’ influences (not interdependently existing things operating simultaneously).⁷⁵

In order to help conceptualize these arguments within the context of this study I will give a brief overview of what I mean at individual, professional and system levels, and sketch links between these topics and discussion about the forces that have influenced the historical memory – and thereby professional and systemic practices in social work.

⁷⁴ Various distinctions between social and conscious-systems are noted in Parts Two and Three.

Readers might well ask that if this study has led me to disagree with a key aspect of King’s theory, is it appropriate to use his research in this work? I argue that it is, on the basis that theories about social systems can be separated from research about the differences that exist between law and social work.

⁷⁵ 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* individual *self*-systems and the *social* system of law.

Self-generated *individual* influences as part of a larger interaction

Some of the ways *individuals* use their own self-generated forms of evaluation to relate to another person were alluded to in Chapter Five on the individual self-concept. Examples included the attorney who described using informal negotiations to change a social worker's opinion about what was *reasonable* in a case; and the social worker who believed case records take on more meaning in 'system' operations through communications from the *heart*: each individual used their own self-generated form of criteria (or way of making meaning) to relate to and sway the other (self-system).

Rather than confirming 'system non-communication' (between individual and social systems) this study found that the above-noted individual differences in the voice of the attorney and social worker respectively reflect the institutional and interpersonal ways that the disciplines of law and social work make meaning. These themes, explored mostly in Parts Three and Four, are linked with Barkan's concepts of 'agency versus community' (1966: 15), and the historical concepts introduced above from social work about mechanistic and organistic systems. (In short, just as system communications are united in the operation of energy and mass, so are individual and social forces.)

Self-generated *professional* influences as part of a larger interaction

Although it is clear that this study found the opposite of ‘system non-communication’ between individual and social forces,⁷⁶ it is yet to be established why the idea that systems generate their own criteria, or why the impact of this on other systems, should not be ignored. As one example, King said:

From within each system this [self-generation] may give the impression of success or at least give rise to the belief that success is possible, but from outside the system this impression is likely to appear as illusory, or even as the ‘enslavement’ of one system by another (1997: 205).

The metaphorical merit of these points is grounded in this study with the above-noted operations evolving in an *interaction* between the social (or historical) memories of the systems in which social work and law are practiced *and* – the factors that inspire or inhibit professionals. Kegan’s analysis is used in Chapters 17 and 18 to help explain, for example, how interpersonally oriented social workers view their own approach to cases as reflecting a high likelihood of success (without the interference or irritants imposed by law), and they may *hear* institutionally oriented attorney practices as illusory (or misplaced according to the self-generated criteria used by social work) – through their interpretation of attorney adherence to legal rules as reflecting psychological isolation.⁷⁷ Specific to King’s above-noted tenet about the interpretation by one *system* that it is being enslaved by the other, Chapter 14 will

⁷⁶ For example, this research did not support the tenet first proposed by Luhmann and supported by King that social events are “separate” from factors that inspire or inhibit individuals (King 1997: 25). Also iterating, it is not scientifically possible in this or other work to examine ‘non-communication’.

⁷⁷ Conversely, future chapters will discuss how the institutional orientation of attorneys reflects the belief that their practices hold a high likelihood of success in case proceedings, and sometimes (rightly or wrongly) they *hear* the more interpersonal orientation of social work as ‘smothering’ (a practice regarded as illusory when it comes to the use of rules by those who operate law).

show for example, that despite having a statutory role, foremost it is *social workers* (not just a social system) who *feel* treated like unwelcome visitors by *attorneys* in the court; *and it is the interwoven dynamic of their response* to this treatment that helps to propel the evolution of the competing institutional and interpersonal self-concepts between the two disciplines in the court setting: thus influencing how law operates.

Although some of the links that I refer to here are new, the ability to connect the historically entrenched and often eclectic practices particular to social work with the self-generated factors that may inspire or inhibit those in the profession, and the often organistic nature of the system in which they operate (such as DSS:CSB), are already supported at a generic level of analysis.⁷⁸ Briefly, contrary to the position adopted by Witmer who “draws a sharp distinction between social work and social welfare” (Cohn 1962), Warham believes “the development of social services and that of social work have interacted with each other from their very beginning” (1977: 30).⁷⁹ Moreover, as noted earlier, and reflecting findings in this study, Sibeon (1991: 103-4) found most social work organizations have a flexible organistic structure, and this (self-generated) structure is vital for the changes that occur in systems such as DSS.

⁷⁸ Many adherents of systems theory may regard the links drawn here as reflecting systems theory (the system is reproducing itself); but the main difference is the epistemological basis of my arguments.

⁷⁹ Warham said: “An understanding of their interdependence, and of the nature of social services as a particular type of social institution is a prerequisite of any effective analysis by social workers either of their roles and position within individual organizations or of social work as an occupation” (1977:30).

Self-generated *system* influences as part of a larger interaction

Of most relevance to the challenges posed here to King's (and Luhmann's) theory, this study found that at a *systems* level, while DSS dictated policies and was committed to uphold its statutory responsibilities in abuse cases, it was not just analysis of the DSS:CSB that revealed how it operated, but *also* the interpretations *social workers* made about DSS policy and laws, and the impact of this on cases.⁸⁰ Overall, data and theoretical analysis indicated that the organistic nature of DSS:CSB made it vulnerable to change from external influences (described in Part Five as a 'normatively pervious' system) *and*, rather than reflecting separate spheres of communication, what unfolded as the 'normatively flexible' self-concept of social work, further contributed to the vulnerability of 'DSS' as an organistic system which is under constant pressure to change how it defined child abuse.⁸¹ We will revisit how this occurs in Part Three, after establishing how systems operate.

⁸⁰ Part Five on the system operative structure discusses as one example how the 1993 San Diego Grand Jury found employees at DSS:CSB had interpreted system policy differently than that intended.

⁸¹ At a *system* level of analysis this study is metaphorically aligned with Luhmann's theory that the *legal system* is "normatively closed" (Luhmann 1986: 113; 1993). This concept does not negate the earlier point that attorneys' decisions are influenced by emotions; it just places the emphasis where it belongs: when institutionally oriented attorneys interpret how to respond in a case, they do so within the confines of adherence to statutes and precedent and they conduct proceedings with a commitment to uphold specific rights that are achieved within the constraints imposed by rules (Hart 1961; 1976).

Whereas Chapter Four on the system self-concept outlined various rules from the Welfare and Institution Code used in the dependency court to define systemic responses to child abuse, or in other terms – the rules around which the 'normative closure' of law could be upheld in such cases – this thesis differs from King's tenet on system non-communication, by showing that some of the ways professionals were found to respond to system rules were intrinsic to how law operated in the court.

PART TWO

SYSTEMS THEORIES: HOW INDIVIDUAL AND SOCIAL SYSTEMS OPERATE (SL=HD+LA)

INTRODUCTION

ANIMATE AND MECHANISTIC SYSTEMS: SUB-TOTALITIES THAT UNITE

Introduction

This section of the thesis is about the relationship between the system of law (SL), human development theory (HD), and the systems theory of legal autopoiesis (LA). It is about the interwoven influence that individuals have on the law and that the system has on individuals: or in terms of the thesis formula $SL=HD+LA$.

So far it has been flagged that Kegan's human development theory (HD) is mainly used to explore meaning-making and to help distinguish the different 'voices' and orientations to meaning making in legal and human service systems. The two themes of his theory found to be most dominant in this analysis pivot on the oscillating tension between institutionalism and interpersonalism: the former favoring differentiation, the latter integration. And just as these two themes were generically woven in Part One into analysis of mechanistic and organistic systems respectively from social work literature, this section of the thesis continues to weave these characteristics of operation into data analysis and theory development for law.

It will be shown, however, that Luhmann's (mechanistic) systems theory of autopoiesis (LA) is at the extreme end of agency: it is about separation.⁸² Part Two examines this form of emphasis through Luhmann's particular interest in the *self*-reproducing nature of law; it also examines the emphasis in Kegan's (organistic) theory which, stated generically, reflects the operations of the social and the individual.

⁸² When presented in the last section the theory was contrasted with thinking that dominated analysis before Einstein, where energy and mass were once regarded as if two separate domed cities.

Pointing to these differences between Kegan and Luhmann should not detract from the relationship that unfolds in the following analysis between HD and LA. There are, for instance, many similarities. Overall, Kegan's psycho-social theory is based on constructive-developmental theory. It explains the evolutionary processes by which we achieve, maintain, and change the way we make meaning. Luhmann's socio-legal theory of law is also based on constructive-evolutionary theory. His theory explains how *law* selects what belongs to *it* and what belongs to its environment. As part of this, Luhmann's reference to 'operations', which he also calls observations, means "the realisation of meaningful options" that are made by law (1993: C2/11/8).

Most crucial to the relationship that unfolds in this section, the way that law is said to make *its* selections strongly resembles Kegan's analysis of how meaning-making occurs. The extent of overlap could lead some to forget that Luhmann is mainly talking about how 'meaning' evolves within a 'social' system, and Kegan is mainly talking about how individuals make meaning and thereby evolve in social systems. We return briefly to this central difference.

While both authors introduce quite complex theories, Luhmann presents a range of compelling concepts that are *highly* abstracted, to the point where people are relegated as secondary observers in legal operations. Rather than include people, Luhmann proposes that "law produces by itself all the distinctions and concepts which it uses" (1993: C1/111/4). It is particularly significant that the author expressly

asserts that this theory *is not a metaphor* to explain how the legal system operates (Luhmann 1993: C2/11/6/ft9).

Notwithstanding Luhmann's position on this matter, I found it difficult to understand the theory in its full dimension, *and conduct analysis on it*, without the use of metaphor. The way people are constructed in Luhmann's theory – in effect, as artifacts of the social system – is so far removed from data findings about how the court operates that the only way to accept autopoiesis, *in its entirety*, would be at the price of ignoring the views held by research participants. Rather than sacrifice the empirical data for the adoption of a theoretical tool or vice versa, I try to take what works (according to data collected and other theoretical analyses) about Luhmann's theory, and use it to build a new paradigm to explain how the legal system operates – such as that embodied in the equation $SL=HDLA+D^{SA}$.

The new framework (shown in Part Three) is not built from a comprehensive analysis of all of Luhmann's theory. When I found that the core tenets of systems theory about legal autopoiesis were flawed – such as object relations – I decided to focus on exposing those weaknesses of the theory which prevented me from adopting it as a tool to explain my data; the discussion which follows will therefore not proceed beyond that which underpins the theory's structure.

While the position that I adopt contrasts with Luhmann's theory that “*Above all, social and interhuman interpretation are separate from each other*” (1995: 253 italics added), as noted throughout Part One, the research does suggest that systems theory about the autopoiesis of law has some credence as a conceptual tool to explain how

law operates. However, it will be argued that the usefulness of the theory is intricately linked with the need to treat the role of people in legal operations as equal, not secondary, to the system's self-producing operations. This is supported by Kegan's position that "neither the psychological nor the social has priority: meaning-constitutive evolutionary activity gives rise to both" (1982: 215).

Although literature on the topic strongly suggests that adherents of the autopoiesis of law would reject the analysis that follows, using the claim that the theory allows for a rich and meaningful integration between "psychic systems and social systems" (King 2001: 123-156; Paterson 1996: 81-104), this section of the thesis attempts to address the *radical* aspect of legal autopoiesis – which in contrast to King and Peterson – is described by Bankowski as being a theory that the law " 'thinks' independently of the minds of individual actors" (1996: 65).

CHAPTER EIGHT

SHARP DISTINCTIONS: THEORY V. EMPIRICAL DATA

Introduction

This chapter helps to build the case that logic *and* emotion impact on legal matters; and it starts to weave some of the similarities and differences between Kegan's and Luhmann's theories with the empirical findings in this study about the dependency court system. The chapter introduces the informal system that respondents in this study were found to use to bypass restraints imposed by the rationality of law. Conversely, the chapter also helps to build the case for law's rationality and why it turns people into 'legal personalities'. It does this by discussing why law is differentiated from society and the full expanse of human emotions that exist – dynamics which, as noted, compete strongly with the self-concept of social work.

Similarities and differences between human development and legal autopoiesis

In a somewhat unusual way to describe an idea, Kegan and Luhmann approach their analyses of organic and inorganic systems by respectively focusing on the 'doing' that humans and law 'do'. Kegan posits that human beings 'do' being human through a continuous process of differentiation and interaction between their organism and the world (1982: 7). Kegan's theory is about "human being as an activity". He reports that this "is not about the doing which a human does; it is about the *doing* which a human is" (1982: 8 italics added). In *exactly* the same vein, Luhmann's theory is about how the legal system 'does' society's law. He writes that "the legal system 'does' society by differentiating the social system". The author explains this by

saying, “in other words, the legal system cuts its own way with its operations” (Luhmann 1993: C1/V/1).

Theories on how individuals construct meaning (or do being human in the world), and how operations in the legal system cut their own way (or do law in society), are about how systems – organic and mechanistic (or individual and social) – ‘make realizations of meaningful options’. This means that both theories are about common concerns: how systems continue to evolve as systems distinct from other systems, how they accumulate internal complexity, defend their structures, experience transition, and exchange energy and information. In short, it means that both theorists are talking about *how* systems cohere.

As shown, the difference between Kegan and Luhmann is that Kegan unites the social and the individual:⁸³ Luhmann does the opposite, *separating* people from the social.⁸⁴ Although it is recognized that Luhmann has also written that the individual and the social exist as part of a co-evolution that is based on meaning (1995: Ch2), his forthcoming English translation stating “*it is impossible to take psychic systems, consciousness or even the whole human individual as a part or as an internal component of the legal system*” (1993: C2/11/7) is taken here as the dominant concept of legal autopoiesis.

⁸³ To put this in other terms, empirical and rational operations each give rise to the other.

⁸⁴ This difference stems from a key tenet in autopoiesis whereby: “law produces by itself all the distinctions and concepts which it uses and that the unity of law is nothing but the fact of this self-production, this ‘autopoiesis’ ” (Luhmann 1993: C1/111/4).

Empirical data: the informal system in law

It is argued here that Luhmann's separation of the individual and the social (1986; 1988; 1993; 1995) results in his theory being so focused on the rational structure of law that it overlooks the influence of individual emotions and cognitions – or how law operates *in action*. Although law must emphasize rationality and exclude the full expression of life experiences (topics explored below) it was recognized in Part One that rational *and* empirical operations influence how law operates. While Chapter Three explored how an invisible moat around the judge's bench came to represent how the legal system draws artificial barriers between its institution (its social structure) and the individual (the empirical world), another example in the same chapter explored how a judge had given his finding using legalese and rationality, but it became evident that logic *and* emotion had influenced his decision (with his unsolicited personal comment about the 'good feeling' he had about the party in whose favor he had just ruled).

Evidence that individual emotions and thinking influence cases not only arose in the formal, but also the informal system of law. Contrary to the mechanistic emphasis in the systems theory of autopoiesis, data show that informal negotiations, mainly in the courthouse corridors, are a crucial aspect of how law operates in the dependency court. Respondents' answers to the question: 'What would happen if the informal (negotiation) system disintegrated?' – speak to the strong finding that without the informal system, the *formal* system of law would disintegrate. In other words, the following quotes (indirectly) support the argument in this thesis that while the legal

system must be differentiated from society its (mechanistic) social components can not operate in isolation from individual meaning making.

Parents' attorney

If the informal system disintegrated everything would go to trial. Nothing would ever settle and *the system would break down*.

Children's attorney

If the informal communication network broke down *the system would be destroyed ...* Trials are long, complicated, and take up incredible chunks of time; that is money, from the judge, the use of the courtroom, the use of the clerks, the lawyers who are involved in the case; and it is very hard work in the sense that it is high-stress work. *So the system would either burn out or bankrupt itself* if there were not effective communication between the parties.

These examples by attorneys speak mainly to the *institutional* aspect of the system being changed by informal discussions. This contrasts with the more *interpersonally* oriented responses from social workers who, instead of emphasizing the impact on the court, emphasized the relationship between informal negotiations and human dynamics.

Social worker

It would be terrible. The system would be backlogged, attorneys and social workers *would look like fools in front of the judge*, more-so than they do now. It would be a disaster, more of a disaster than it is now. The attorneys and social workers need to know that you're people: yes, this is your profession but *we're people here; we're dealing with humans*. They can sit and get to know each other, and come to agreements, understandings and exchange information.

Although social workers may emphasize human dynamics, attorneys did suggest that the use of rules is but one aspect of legal operations. Excerpts from an interview with a judge – when asked what would happen if the informal negotiations disintegrated – reflect the opinion often voiced in the study that *strict* adherence to law is inadequate.

Judge

It would make life out here very difficult. *And sometimes it disintegrates when only one party takes on a very strict stance.* For example, some parents' attorneys take their role very strictly. Which is perfectly sanctioned by the attorneys' ethical canons. It is what their *legal profession and their history tells them* that they need to do ... And *by one attorney taking that [strict] posture, that will pretty much disrupt the ability of everyone else to work together,* and I would expect an alliance to form.

Researcher: [Rephrasing the original question] What sort of impact does it have when informal negotiations break down?

It usually means protracted litigation and the polarization of issues and very often polarization means people digging in their heels and not compromising. *It makes things very rigid and it makes resolution of these particular situations very, very difficult, very acrimonious.*

While the most common reason for informal negotiations was to avoid 'protracted litigation and polarization', the reasons varied why people felt the need to do this. Many did not want to risk coming before a judge who did not represent their opinions. When the layers of reasons were removed, as the data excerpt shows, one consistent theme propelled the negotiations: without them the outcome is detrimental to a family.

Judge

[As said above, when informal negotiations disintegrate and issues (people) become polarized] It makes for a worse situation because what risk there may be in the home may not be amenable to being managed as easily because of the acrimony. *The family is not going to want the social worker in the home*; because they're not going to trust the department or anyone else to come in the home. That utilization of the community services which is part of being an adequate parent is not going to be there; *so that's one of the consequences.*

In summary, informal negotiations serve multiple purposes and are integral to understanding how law operates in the dependency court system. While this topic is discussed in Part Four, the point here is that professionals want to create a space in which a more diverse range of meaning-making can occur than that which *law* can be seen to legitimately tolerate; and they want to avoid rigid approaches to law because it prevents the outcome that they most strive to achieve: *rapid* reunification of broken families or resolution of a permanent placement for a child. These goals and patterns of influence on case proceedings that were repeatedly voiced by research respondents led to a question often asked in this thesis: On what basis does Luhmann argue that the inanimate (or the social) dominates the animate (or the individual) in legal operations?

Empirical data: a strong point of conflict with legal autopoiesis

An easy answer to the above question is to say that Luhmann's emphasis of the social over the individual is incorrect because his theory fails to consider the impact of the informal system on law. But this does not address Luhmann's view that people are *not part of the formal* system of law (1993: C1/111/4). At this point it is timely to recognize that some readers of this thesis may argue that it is obvious people *are* a part of the system, so why analyze a theory that suggests otherwise? The answer is that, without analysis of the conceptual apparatus of Kegan's *and* Luhmann's theories, a vital aspect of the research could not be shown: how the individual/social juxtaposition evolves *in the court*; and without this the ability to explain *how it is possible* that people can be poles apart in their views about the court is also reduced.⁸⁵

Of course, some readers may counter by saying that the latter arguments can be made without analysis of Luhmann, but a fact of great influence when I analyzed data was that advocates of the systems theory of autopoiesis did not concur with this opinion. As it stands, legal autopoiesis is lauded in some quarters as a credible exploratory tool to examine and explain how law operates. Notwithstanding its theoretical values, this empirical study found that a more complete model emerges of how law operates when the theory of autopoiesis is submerged into the constructive-developmental theory.⁸⁶

⁸⁵ It is recognized in the conclusions chapter, however, that there maybe another socio-legal theory that helps to address these topics.

⁸⁶ To iterate the thesis argument: *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 need to place Kegan's theory over Luhmann's arose when research found that the only empirical basis that can be scientifically observed at this point in time, is that the evolution of law (or progress in law) is about human development: it is through *our* evolution that greater and greater levels of complexity in 'legal' operations can occur. As the discussion that follows shows, the ability to integrate a theory of human development (HD) with that of legal autopoiesis (LA) emerges in the *natural synergy* that exists between the theories about human development and legal autopoiesis.

A synergy: constructivist theory in human development and legal autopoiesis

Kegan describes 'constructivism' as the idea that people (individual systems) construct reality (1982: 8): 'developmentalism' is the idea that "organic systems evolve through eras according to regular principles of stability and change" (1982: 13). Constructive-developmental theory (HD) speaks to the evolution of new meanings. It is about:

the way that activity [meaning-making] is experienced by a dynamically maintained 'self', the rhythms and labors of the struggle to make meaning, to have meaning, to protect meaning, to enhance meaning, to lose meaning, and to lose the 'self' [the way we make meaning at a given time] along the way (1982: 12).

Kegan said that in "different ways both ideas [constructivism and developmentalism] insist on a recognition that behind the form (or thing) there exists a process which

creates it, or which leads to its coming into being” (1982: 8). This concept draws attention to the relationship between the individual and the social.⁸⁷

Along very similar lines, Luhmann advances the maxim that the legal system constructs its own meanings. His theory resembles human evolution where a continuous cycle of initially reducing stimuli allows connections and meanings to be made, sustained and enhanced. This resemblance emerges in Luhmann’s proposal that by observing and describing *itself*, a process done through its operations (*its* meaning-making), the social system of law “has to proceed in a ‘constructivist’ mode”. Constructivism means that the system does not make “any attempt to represent in the system what is external to it” (1993: C1/11/6). Like humans, when deciding what belongs *in it*, the legal system is said to evolve at an internal level in a continuous cycle of “reduction ... and enrichment with meaning” (1993: C1/1/1).

At this introductory stage of analysis, one way to conceptualize how law decides what belongs in it is through the way Luhmann treats ‘legal theories’. Just as humans engage in a process akin to the construction of ‘life theories’, Luhmann treats legal theories as if living things, which are said to classify the subject matter to “guide the process of decision-making” (1993: C1/1/1). Overall, legal theories are portrayed as a tool to help the law understand and describe itself.

Legal theories achieve this operation by aligning themselves with law in input and output operations, and engaging in a process that Luhmann describes as “a reflexive

⁸⁷ Kegan also links constructive-developmental processes with Wells’ (1972) theories about modes of scientific thought, which includes a shift in focus about the human endeavor to mean “from entity to process” (1982: 13).

attempt which wants to find out what the law is all about and which can do this only on its own terms” (1993: C1/1/4). Once again, the theory reflects human development: Chapter 13 will outline how we move through stages of growth – and change the way we understand life – based on our own internalized processes of input and output (associated with psychology theory and processes of assimilation and accommodation). These processes occur as a means to better understand ourselves and enhance the relationship of our organism to its environment.⁸⁸

Moving beyond theoretical similarities in this analysis, we shift briefly to data and the individual/social juxtaposition. Interviews suggest that social workers do not see the legal system (the social) observing itself or describing its own theories. They see, first hand, *those* who represent and advance ‘rational’ theories that can cause chaos. To illustrate, the theory that justice is served by zealously defending an accused may be rational, but it becomes a concern for the caring profession when as a result of such advocacy a child is returned to an abusive parent. Significantly, when observing these events social workers do so through a system of meaning-making that revolves around themes of inclusion; which can clash with the differentiation that embodies law.

⁸⁸ After Luhmann reported that legal theories classify the subject matter to “guide the process of decision-making” (1993: C1/1/1), he said that such theories are produced and operate in ways that they can give the appearance to outsiders as being “rational and chaotic at the same time” (1993: C1/11/1). This again can reflect human development, where we evolve through eras according to regular principles of stability and change, and contingent on the person our transitions can have aspects of rationality and imbalance (Kegan 1982: 13).

The system of law: a theme of differentiation

Whereas Kegan's theory is applied in this thesis to help illustrate the finding from fieldwork data that the profession of attorneys operates primarily from an institutional (or rational) form of meaning making, Luhmann's theory captures the extent to which *law* itself operates as a (rational) system differentiated from other social systems. Indeed, Priban and Nelken describe a "significant novelty of autopoietic social systems theory ... [as being that Luhmann] perceives the very differences between a system and its environment as the most important element of the whole system/environment loop" (2001: 2).

Luhmann's emphasis on the relationship of law to processes of difference is instructive to how law operates (at a metaphorical level of analysis), such that the unity of law "can only be produced and reproduced by the system itself and not by any factors in its environment" (Luhmann 1993: C1/V/1).

Reflecting this line of thought Luhmann identifies a range of operations that amount to the need for law to: establish, respond to, determine, incorporate, reject, maintain, and change what constitutes, and the construction of, 'difference' – mainly between – the legal system and its environment (1993: C2/111/5), decisions about what is law/not law (C2/V/4) and decisions about like/unlike cases (C2/IX/3). Overall, for law to exist as a system it must differentiate itself from society, and operate in a way that is "indifferent" to a general assessment of people, mainly because it cannot consider the totality of dimensions in which life evolves. Luhmann said "the

administration of justice had to ‘de-identify’ itself from society” (C2/111/5). It also had to “de-differentiate” itself from the political system (C2/V11/3):

the embedding of law in socially given structures can only be neutralized [and therefore adopted] with the help of a *legally specific* distinction, and not by powerful claims of the ruler or through the religious conditioning of chances for salvation (C2/111/5 italics added). [These operations are said to be achieved] primarily and above all, when the law itself recognizes the dominant social structures and replicates them in the forms of distinctions which are relevant for law (Luhmann 1993: C2/111/6).

It is reiterated that these points are taken in metaphorical rather than literal form. They mean that on the one hand law is described as being a self-organizing, self-transforming system. However, the need for differentiation between the legal system and society, and the separation of law from a general appraisal of people, is complicated by the fact that law and the legal system must represent that which it is differentiated from. This brings us to a fascinating aspect of how law manages its competing goals – to be distinct from that which it stands to represent.

The legal system manages its competing demands by actively trying *not* to “attract as much communication as possible and to retain it in the system”: it does this because “the more multifaceted the facts of life are which appear under the observation of the legal system, the more difficult it is to maintain a sufficient consistency” (Luhmann 1993: C2/V/7). One avenue for law to achieve its consistency and stability (to achieve its separation) is to impose its own rationality on other systems, such that equally constitute subsystems of the social system – of which law is but one part.

Rationality and differentiation in legal discourse

It is significant to the analysis about the disputes that arise between social work and law that law has the ability to enslave systems that are known to make meaning in very different ways from the structure within which law operates. King's work helps to illustrate this point. He argues that many operations in law result in a distortion, mainly because its institutional objectives and truth-validating procedures are very different from those of the child welfare institution "where that particular version of truth or reality was constructed" (King 1991: 314). As noted in Chapter Five on the individual self-concept, law's control over the construction of truth is not just in texts, but also in its approach to people:

Just as law enslaves the scientific discourse of child welfare, so it subjugates the welfare expert. Within common-law adversary systems, the reliability of welfare experts may be judged not according to any scientific criteria but by their performance in court (King 1991: 314).

Discussion

Data from this study expand on King's argument, and show that the subjugation of truth-validating procedures of social work at *official* levels in legal operations also occur in informal processes. Conversely, when *informal* operations occur, some attorneys also grapple with the realities of social welfare. These points are explored in Parts Three and Four, in the finding that a professional's 'individual self-concept'

may become quite pronounced in court operations due to a perceived need to make one's position known – and thus avoid the official structure in which law functions.

In summary, theoretical analysis supports the view that law must remain differentiated as a system in and of itself – and as unfolds in the chapters that follow, this contributes to a profession that is dedicated to perform, in effect, as though ‘legal personalities’ where they (the legal system) ‘appear’ to be divorced from their emotions. However, notwithstanding this relationship, data do not support the sharp distinction in the autopoietic theory whereby *law produces by itself* all that it needs for its reproduction. The next chapter examines the theoretical basis upon which Luhmann develops this position.

CHAPTER NINE

INDIVIDUAL AND SOCIAL SYSTEMS:

THE ROLES PEOPLE PLAY

Introduction

This chapter explains the origins of the autopoietic theory, explores how Luhmann uses it, and presents literature critiquing its applicability as a theory for law. The analysis raises questions about how Luhmann *reconstructs* the original concept of autopoiesis. In the process, it begins to explain how the theory of legal autopoiesis contradicts the original autopoietic theory by treating law as if it has a life of its own and (often) treating people as if they do not.⁸⁹

The origin of the autopoietic theory

The autopoietic theory originates from Maturana's research on color vision in frogs. Maturana's work in the 1950s identified problems in the epistemological basis used to understand cognition. His research led him "to treat seriously the activity of the nervous system as determined by the nervous system itself, and not by the external world" (Maturana & Varela 1980: 78-79). This finding helps to fuel the idea that the system is self-reproducing.

Maturana found that the external world only had "a triggering role in the release of the internally-determined activity of the nervous system" (1980: 78-79). The finding most highly relevant here is that "one had to close off the nervous system to account for its operation, and that perception should not be viewed as a grasping of an external reality, but rather as the specification of one" (1980: 78-79). This led Maturana and Varela, two biologists, to develop the concept of an autopoietic system. It is:

a machine organized (defined as a unity) as a network of processes of production (transformation and destruction) of components that produces the components which: (i) through their interactions and transformations continuously regenerate and realize the network of processes (relations) that produced them; and (ii) constitute it (the machine) as a concrete unity in the space in which they (the components) exist by specifying the topological domain of its realization as such a network (Maturana & Varela 1980: 78-9).

Before continuing this quote, attention is drawn to Maturana's and Varela's language that emphasizes the machine-like operations that are characteristic of the self-regenerating nature of autopoiesis, and the way the system is said to make its own specification of what belongs to it. Luhmann similarly emphasizes the self-reproducing aspect of the social system of law and its own selection of properties that belong to it. Maturana and Varela go on to say:

It follows that an autopoietic machine continuously generates and specifies its own organization through its operation as a system of production of its own components, and does this in an endless turnover of components under conditions of continuous perturbations and compensation of perturbations. Therefore an autopoietic machine is an homeostatic (or rather a relations-static) system which has its own organization (defining network of relations) as the fundamental variable which it maintains constant (Maturana & Varela 1980: 78-9).

Some of the concepts in this quote are not explored until Part Three, at which stage it becomes possible to integrate ideas about the need for 'contradiction and continuity' –

⁸⁹ It is iterated that at this point in time we can only empirically study the meanings made *by* the social system of law through analysis of the meanings made by (and voices of) those who operate the system.

which are integral to the evolution of meaning-making – with Luhmann’s generic use of autopoietic concepts about “continuous perturbations and compensation of perturbations” in his adaptation of the theory to law.⁹⁰ For now, the fields of knowledge relied upon to develop the original autopoietic theory, *which was said to treat the world as an interacting system*, included systems theory, biology, cybernetics and psychology. When introducing Maturana and Varela’s book Autopoiesis: The Organization of the Living, Beer said the autopoietic theory was a *metasystemic* concept, one that transcends rather than simply inter-relates disciplines (1980: 65-72).

Maturana and Varela had a particular interest “in processes and relations between processes” within a system (Beer 1980: 65). This interest is also reflected in Kegan’s and Luhmann’s works. However, Maturana and Varela, and Kegan, all place primacy on the impact of the observer on the observed in system operations. Luhmann does not follow this same line of thought: this is a major point of divergence from autopoiesis and is discussed in Chapter Twelve. Maturana and Varela report:

an explanation is always given by us as observers, *and it is central to distinguish in it what pertains to the system as constitutive of its phenomenology from what pertains to our domain of description, and hence to our interactions with it, its components and the context in which it is observed* (1980: 75 italics added).

⁹⁰ Kegan’s and Luhmann’s concepts about contradictions and perturbations will also be linked with King’s analysis of the role of irritants in social systems, and his view that ‘the system reconstitutes an irritant into 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).

Views about the centrality of an observer go to the topic of system “subjectivity”. The researchers found that “a system is not something presented to the observer, it is something recognized by him” (Beer 1980: 67-72). The autopoietic theory addressed how this occurs mainly through its attention to coding. The theory holds that coding information in a system is a cognitive process “which represents the interactions of the observer, not a phenomenon operative in the physical domain” (Beer 1980: 67-72).

Without diverting too far from discussion about the original theory, the concept of coding in legal operations carries a similar theme; but it is based on a different premise. In legal autopoiesis the law is said to be observing itself, and in this context coding represents the interactions that occur when ‘law is doing law’. People are not involved in coding; law is. The following exploration of the genesis of the theory helps to show why this misrepresents ‘the centrality of the observer’ in system operations.

To explain how coding operated in autopoiesis Beer critiqued biology theory, saying it wrongly emphasized survival of the biological code through DNA: this emphasis means “the individual becomes insignificant, because the species is in the code” (1980: 67-69). Beer said autopoiesis led to a different outcome: Maturana’s and Varela’s thinking was informed by the view that “nature is not about codes: we observers invent the codes in order to codify what nature is about” (Beer 1980: 67-69).

Overall, the first theory of autopoiesis found that *individuals cannot be subordinated* to the species. “Biology cannot be used any more to justify the dispensability of the individual for the benefit of the species, society or mankind, under the pretense that its role is to perpetuate them” (Beer 1980: 69). This leads us to ask why autopoiesis *now* subordinates individuals and importantly, why it approaches the legal system as if alive.

Luhmann’s use of the autopoietic theory

Various scholars accept or reject the theory of legal autopoiesis on concepts of aliveness. The way Luhmann excludes people from the theory when explaining social system operations makes his concept about the life of law quite complex. He writes:

neither paper nor ink, neither people nor other organisms, neither the court-house or its rooms nor the telephones or computers are part of the system. Society has already constituted this externalization (Luhmann 1993: C1/V/2).

Just as individuals were treated as insignificant in biology theory under the pretext that their role was to perpetuate the species (the DNA code), Luhmann’s analysis infers that individuals are treated as insignificant – under a similar sort of pretext – their role is to perpetuate the law (the legal code). In short, Luhmann’s use of the theory is the antithesis of what the original authors of autopoiesis intended: the elevation of the observer as vital to understand how a system operates. Luhmann’s response to the type of concern expressed here does little to resolve issues of this nature. He writes:

[T]here is no point in arguing whether or not the concept can be applied to living systems. Therefore it is not a valid objection to argue that the application of the concept to social systems represents a falsification of the meaning given to it by Maturana and Varela ... All that matters in the sociological context is whether or not the concept of autopoiesis leads to the formulation of hypotheses which are fruitful science (Luhmann 1993: C2/11/6/ft 9).

Critics who have stirred Luhmann to respond like this include Jacobson, who proposed that the autopoietic theory “may not be transferable from individual organisms to social systems” (Jacobson 1989: 1649). He sees the absence of “real individuals” in the theory as “marginalizing the individual” and believes Luhmann’s position denies “the origin of the autopoietic paradigm in the consciousness of an observer” (1989: 1662).

An example of how Luhmann denies the consciousness of an observer is his view that “law always has to prove by reference to legal texts that it is law” (1993: C2/V1/4). Habermas, a critic of Luhmann’s theory, argues that “the autonomy of the legal system is not already guaranteed simply because all arguments of extralegal origin are translated into the language of positive law and connected with legal texts” (1988: 259; 1987: 311-312). It is, however, noteworthy that Luhmann may by-pass criticism such as that made by Habermas. Luhmann does propose there is “a minimum convergence of reasoning” in autopoietic operations (1993: C2/V1/4). Notwithstanding this, Habermas’s criticisms may resurface with reference to Luhmann’s ultimate view where the observer is not given *equal* consideration to determine how law operates (1993: C2/V1/4; 1995: Ch7).

Some theorists have responded to the position given to people in legal autopoiesis by looking to external influences on law. Evan, for example, focuses much of his critique on the view that the legal system is more appropriately termed “allopoietic”. Whereas Maturana and Varela said allopoietic systems have characteristics based on an external context, autopoietic systems are based on self-referencing procedures known as a “circular organization”, and have their own internal dynamism (Evan 1990).

Theorists look to external factors in their response to the autopoietic theory for reasons that go beyond the diminished role of observers: it is that people are portrayed as if they operate like systems. Although the case is made in the next chapter that there is valid data to argue this point, it is the extent to which this concept is stretched that causes theorists most alarm. To better understand the nature of this debate the reasons are explored below as to why Luhmann relegates people to a position of secondary observation in system operations; in particular, *why* he divorces meaning from the interpreting subject and allocates it as a function that is performed mainly by law.

While Peterson (1996: 93) argues that “private calculation” (or meaning making) is included in Luhmann’s theory, my concern about the theory’s contradictions resonate with Bankowski’s view that: “the theory assumes the *functional equivalence* of the non-existence of human beings” (1996: 69 italics added). Chapters that follow will explore *how* this is done in the theory of autopoiesis. Overall, the discussion

contributes to the analysis in this thesis by helping to illustrate why legal autopoiesis needs to be integrated with Kegan's theory of human development.

Meaning making: psychological, legal or sociological perspectives

Luhmann's construction of autopoiesis reflects his goal to elevate scientific systems theory over humanistic studies as the basis of sociological theory (Wolfe 1992: 1737-8). Two factors appear to drive this goal. First, Luhmann links his move away from concepts about the powers of the individual and their meaning-making with his desire to move away from the production of views that serve ideological or political needs (1995). There is some irony in how Luhmann achieves this goal.

Analysis in this research suggests that the way Luhmann constructs autopoiesis reflects Kohlberg's stage four of the way meaning is constructed, which itself, is identified as a system of *ideological* meaning "that is above all factional" (In Kegan 1982: 63). Similarly, the basis upon which the autopoietic theory is built also reflects Kegan's institutional truce, where the structure of "authorship, identity, psychic administration and ideology" remain subject (blind) to the meaning that is made (1982: 52).⁹¹ As one early illustration of this point, the constraints within this 'institutional' stage of meaning-making can manifest as a:

law-and-order philosophy in which the right is defined *by* the law rather than seeing the law as an imperfect, organic, in-process attempt to serve the right (Kegan 1982: 63 italics original).

⁹¹ When I first made this 'blind spot' link I found myself up against a fervent advocate of Luhmann's theory who instantly recognized that in fact, it was my blind spot that prevented me from accepting the theory. Several years after writing this I now regard arguments about blind spots in debates on the theory (somewhat amusingly) as '*the blind spot shoot-out*': devotees and detractors of the theory each point to the others' blind spot as the source of dispute preventing approval or rejection of the theory and simultaneously get nowhere because the others' blind spot prohibits the type of insight needed.

Luhmann uses the concept of "blind spots" to describe social system operations (see eg Peterson 1996: 91, 99), in the same way it is used in human development theory.

These points lead to the question: is it possible to avoid political or *ideological* undertones in a theory that arises from a psychology based in ideological thinking? As an interrelated but broader-reaching question: is it possible to avoid political or ideological undertones in a theory about a topic that goes to the heart of social values, social control and the collective representation of shared visions of society?⁹² It is proposed here, that the idea that a ‘value-free theory’ exists to capture how law operates can only be adopted if one also adopts the idea that it is possible for humans not to be embedded in that which directs their meaning. In this thesis constructive-developmental theory dispels any notions of this kind.

The second reason for Luhmann’s attention to autopoiesis is his desire to merge science and humanity into one form of study. Interestingly, the author attributes science to its focus on complexity, and the study of humanity to its focus on meaning, both of which are rightfully seen as needing to belong in one conceptualization. However, while it is curious to infer that both fields do not involve meaning *and* complexity, it is noted that those in the humanities might focus on meaning more than those in the ‘hard’ sciences, and those in the hard sciences might focus on more abstract issues than the former.

⁹² It is also said Luhmann’s theory is “very clearly one of a post-metaphysical theory of society”. This is linked with Luhmann’s “acute consciousness of the need for non-metaphysical frameworks for the description and comprehension of ‘what is’ ” (Clam 2000: 64). Rather than exploring this, it is noted that in The Metaphysical Foundations of Modern Science (revised 1932) Burt argues: “there is no escape from metaphysics, that is, from the final implications of any proposition or set of propositions. The only way to avoid becoming a meta physician is to say nothing” (reprinted 1964: 224).

The absence of empirical verification

Concerns about the autopoietic theory are heightened by the fact that Luhmann rejects the need for empirical studies into the concept of legal autopoiesis (1993: C2/X/1). He calls the need for empirical studies a reflex response “when people are lured on to unknown territory”. He also dismisses the view that the theory is *too* abstract; arguing that empirical studies have a much higher level of abstraction than systems theory (because of methodological factors) and that researchers “are just not aware of it” (1993: C2/X/1). By rejecting the need for empirical studies, and downplaying the abstract nature of the theory, legal autopoiesis remains for many either inaccessible, unrealistic or, at worst, lacking utility in the real world it is said to describe.

Having highlighted these discrepancies, it should be noted that Luhmann proposes that the cognitive base of systems theory is interdisciplinary and “can only be accessed in segments when approached with conventional means of scientific disciplines” (1993: C2/11/6). At one and the same time, this statement suggests that *aspects* of autopoiesis can be put to the test; and it infers that the nature of the theory makes it impossible to comprehensively examine it in its *entirety* under scientifically accepted empirical conditions: meaning we cannot know with certainty if the theory reflects fact.⁹³

⁹³ Take for example, Luhmann’s (and King’s) theory about the role irritants play in social system change. They propose that an irritant becomes a stimulus for a social system to vary what it does; which is achieved when the system reaches a stage of evolution that it can perceive the irritant – can recognize (hear it?) it. With this new-found ability instead of being heard by the system as ‘noise’, the irritant has become an impetus for the system to change its practices (Luhmann 1993: C6/111/257-265). There is no empirical evidence for how this occurs in a social system. Kegan’s theory, however, sheds light on this process. He writes that a *self*-system (a person) cannot even begin to hear “however irritably” issues that speak to the need for them to change until the self-system reaches a stage of development that is “up for renegotiation” (Kegan 1982: 242). (This was noted on p18-21, also see discussion on individual and social system change in Chs13-16 of this thesis.)

Why use autopoiesis at all?

Given the extent of intense attack against the autopoietic theory one might wonder why it survives and still stimulates debate. While reasons for this are identified throughout this work, I will provide a quick overview of accolades for the theory, first from those who advance its use and then from those who are more critical of it.

Adherents of the autopoietic theory of law, such as King, have argued that those who do not look closely at the theory are “turning their backs on one of the major achievements in social theory of the last century” (King 2001: 154). Clam attributes a similar distinction writing that “Autopoiesis expresses the most momentous concept ... bound to obliterate classical action sociology as an ontologising design still working with the supposedly firm identities of subject, action and meaning” (2001: 48). Arguing that the theory does not just subsist on the fringe of intellectual debate, Orts cites recent issues of the Harvard Law Review to show that “the idea of autopoiesis has begun to enter the lexicon of American legal thought” (2001: 159). It seems that in the process of reaching this esteemed place in sociological analysis, the work of intellectual giants has been usurped, with the recognition that “Habermas and Foucault have been in part cannibalised by Autopoietic theorists!” (Nelken 2001: 265). Overall, staunch defenders of the autopoiesis of law can be encapsulated as proposing that contrary to Luhmann’s “formulation of meaning” leading us into the “Age of Resignation” use of the theory is said to leave us remaining on solid ground in the “Age of Reason” (Peterson 1996: 84-87).

Even scholars who criticize the autopoietic theory of law and/or Luhmann for forcefully, but not substantively, advancing a concept without proper foundation and for dismissing critics in a similar fashion (Evan, Jacobson, Wolfe, van Zandt, Habermas, Nelken, Bankowski, and Cotterrell) similarly recognize the benefits of the theory and discuss various ways in which it resonates with current legal thinking. Van Zandt, for example, says “the autopoietic idea that the law does have some life of its own has a long pedigree in American jurisprudence”. It is thought to resonate “with widely held beliefs about the law and how it changes” (1992: 1747, 1753). Similarly, Jacobson comments that:

Autopoiesis is a wonderful image for a system dynamically generating and transforming its own elements. Autopoietic law expresses the essential dynamism of certain modern legal systems more effectively than any prior theory (1989: 1648).

Wolfe reports that Luhmann “does us an important service by concentrating his attention on information theory, communication, and the problem of meaning” (1992: 1736). Evan, who poses numerous challenges against the theory, describes Luhmann himself as “an outstanding German theorist and jurist” (Evan 1990).

For Cotterrell, the theory of legal autopoiesis “has stimulated attention to a very important matter – the nature of the discursive structuring of legal doctrine – which modern legal sociology has neglected for too long” (2001: 80). Nelken similarly writes that the theory has been “both provocative and helpful in a wide range of inquiries” (2001: 266).

With these points in mind it is also true that these theorists return to the same issue that arose in this research project. It is the virtual absence of people to explain the workings of a system the essence of which is about the resolution of human conflict. To refer to perhaps the most clever deconstruction of the theory, Bankowski's views are notable for his forthright opinion that "At times systems theory, applied to psychic systems, seems most appropriate to describing the process of mental illness" (Bankowski 1996: 71). One reason that might explain this outcome is the view that the theory leads us into a search for meaning that is 'prioritizing text over context' – the conceptualization of text including its appropriation to culture as text – which some believe individuals simply *reproduce* (Nelken 1996: 108-111).

The next chapter discusses how the theory's appearance that it excludes people *altogether* may arise from the way it portrays people as thinking. Addressing how the perception of total exclusion arises in the theory – and in chapters that follow, identifying other perceived weaknesses in the theory – contributes to the case made in this study that legal autopoiesis is more useful if integrated into constructive-developmental theory.

CHAPTER TEN

PEOPLE AS SYSTEMS

Introduction

Attention is now given to the criticism most often lodged against legal autopoiesis: namely that people are marginalized or ignored. Discussion will show that the theory rests largely on the view that people operate as if they themselves are the system: it will also show that this form of operation strongly reflects Kegan's theory of the institutional truce.

A review of the autopoietic theory's approach to how people operate in law means that readers must grapple with the 'yes they are: no they are not' arguments that many theorists have been caught in about the position accorded to people in the theory. What may not be so evident in this chapter is that dialogue of a contradictory nature about the role people play reflects the fact that the theory does not progress in a simple linear path of sequentially argued and logically consistent theoretical constructions.

Luhmann's attempt to put to rest any argument about the competing dynamics that underpin his theory has also not solved the issue. He has strongly resisted "unrelenting criticisms" against the complaint that people are not part of the theory, saying: "unfortunately, the opponents of the consequences of the concept of autopoietic closure restrict themselves to the trivial remark that nothing works without people". The author believes: "precisely the theory of autopoietic systems takes human individuals seriously in contrast to humanist theories". He emphasized this, saying that the theory "could be headed 'taking individuals seriously' " (1993: C2/11/7/ft 11).

This opinion raises the question: How can legal autopoiesis hold that people are not a part of the system and simultaneously take them seriously? The following exploration of the view that ‘people think like systems’ is an attempt to unravel this inconsistency. It will be argued that Luhmann only partially supports his analysis: the autopoietic theory does not *totally* exclude people, but it does not explain how it takes them seriously enough to elevate them as equally important to legal text or, more accurately, to the social system in which communications of law are said to be *self-reproduced*.

Luhmann: people as systems

Luhmann’s view that it is law that defines law relies strongly on the concept that people operate as ‘psychic systems’ who observe the law – observing itself:

[A]n individual must be able to refer to a *social system* [of] law which is already constituted or to the textual sediments of such a system. The answer to the question as to which operations reproduce law as law must be taken for granted. *Psychic systems observe the law but they do not produce it*, otherwise law would be locked away deeply in what Hegel once called “the dark innermost of thought”. *Therefore, it is impossible to take psychic systems, consciousness or even the whole human individual as a part or as an internal component of the legal system*. The autopoiesis of law can only be realised through *social operations* (Luhmann 1993: C2/11/7 italics and underlining added).

This quote means that people follow the law, including when they create, construct, enact or interpret it. But rather than resolve the question about the role of people, this

begs the question raised above: in what way does the construction of legal autopoiesis 'take people seriously'? The answer may be found in the next quote, such that it partly speaks to the role of observers. However, at one and the same time as helping to resolve a question, in the abstruse way that the theory proceeds it also goes to an issue of inconsistency: that is, to the 'yes they are - no they are not' dialogue about the role people play. The quote tells us that the relationship between the observer and the unity of the system cannot be separated (interpreted as the individual and social not being separated); but this concept of unity appears contradictory because it competes with the above conclusion that people are not a part of the system. Luhmann writes:

the function of the determination of the current state and of the selection of structures can be distinguished by an observer but operatively they cannot be held apart. The operation provides its unity as an autopoietic element precisely through serving both (1993: C2/11/8).

This quote might be heard to explain that distinctions can be made between law and decisions about practices in the legal system, but the autopoietic nature of the system means that they cannot be separated in operations of the system itself. Again, where does this leave the theory that the social system of law reproduces itself – *by itself*? As said at the opening of this thesis, these questions may be partly addressed through research in physics – yet this field *ultimately* holds that systems are interconnected and lose their meaning if isolated (Capra 1975: 82-83). Rather than divert into physics, analysis of people's role in autopoiesis is contrasted against Kegan and empirical data.

First, Teubner – who advocates a different version of the autopoietic theory of law from that promoted by Luhmann (1986; 1993) – believes (along with other theorists, such as Paterson (1996: 82-6) and King (2001: 147)) that “the objection that systems theory marginalizes the human individual ... is without foundation” (1993: 45):

despite the rumours of the destruction of the individual, ‘the autopoiesis of consciousness’ is a radical attempt to reformulate the individual’s consciousness and his capacity for self-reflection in a system-theoretical way ... the human subject which is consigned to the social environment involves society to a considerable extent (Teubner 1993: 45).

Along the same lines that people can have ‘self-reflection in a system-theoretical way’, and that it is acceptable to consign people to the ‘social’ environment, Luhmann writes that “observers are systems” whose meaning is made through *social* communications in the system (1993: C2/11/5-8). These very similar concepts about how people operate in law brings us to Kegan, because his theory of human development sets out a clear foundation which explains how people operate as if they are the social system of law.

Kohlberg and Kegan: people as systems

Citing Kohlberg, Kegan explains that when people primarily make meaning from the “*social* systems and conscience” perspective they are motivated to “work to keep the institution going as a whole”. This view is founded on “the imperative of conscience to meet one’s defined obligations” (Kegan 1982: 52 italics added). Yes, Luhmann uses the same theme, but takes this imperative to the extreme whereby people’s

individual commitment to meet their defined obligations is being portrayed as dictated by the social system of law.

The data excerpts below help to show that more is occurring in legal operations than the ‘social’ system of law; such that the activity of thinking as systems *and* individual meaning-making are inseparable. Graham’s interview shows this juxtaposition: the first paragraph reveals systems thinking; the second, how this is linked with individual processes.⁹⁴ The dialectic of dynamics arose when Graham contrasted social workers and attorneys, and explained why attorneys can ‘protect’ the guilty; that is, how attorneys can work to keep the institution – that is, the *self*-system and the social system – going as a whole.⁹⁵

Children’s attorney

The law is ultimate: it has to be ultimate because there has to be a set of rules which we all play by ... I see an effective lawyer that doesn’t let your emotions get involved in the decisions you have to make as a good attorney [this includes zealously defending murderers who are guilty and getting them off]. I’m saying: *I am part of the system; the system requires someone to do this. Attorneys all play a role ... the system only works if everybody does their job. If people don’t do their job that’s when we have failure ... justice has failed because the system requires every side to be properly represented; everybody has a role to do.*

Morality by definition is: am I doing what I’m hired to do – what I’m ethically required to do. I’m immoral if I don’t do that ... That’s how you get

⁹⁴ Graham was introduced on page nine of this thesis and – like all respondents who are given names – is identified by pseudonym because his interview is used here as a case study.

⁹⁵ Advocates of legal autopoiesis interpret critics of the theory as wanting socio-legal theory to reflect an established ideology (and morality) within *firm* boundaries of meaning making (see eg, Paterson 1996; King 2001). While such attributions are interesting, topics in this thesis reflect the need for a suitable tool to examine and explain how law operates – which allows for diversity and uncertainty.

around the morality issue. *It's as long as you're doing what you believe the system demands of you, then you can accept the morality of what you do.*

Graham's voice typifies the theme in Kegan's 'institutional' stage four of development. Particularly significant to this analysis, the author proposed that when people are in this stage they have separated themselves from the context of 'interpersonalism' (a way of making meaning often associated in this thesis with the practice of social work). When Kegan diffused any sense of alarm that people "transcend the interpersonal" to make meaning from the 'institutional' perspective (1982: 101), the word *transcend* was instantly reminiscent of the elevation in Luhmann's theory when he said "in contrast to humanist theories" (interpersonalism?) he took people seriously (1993: C2/11/7/ft11).

Kegan's theory may shed light on what Luhmann meant: "on the contrary" to people being lost when they think as if a system "in a sense they are found" (Kegan 1982: 101). This is because the institutional balance embodies *self*-dependence and *self*-ownership:

In moving from 'I am my relationships' [interpersonalism] to 'I have my relationships' [institutionalism] there is now somebody who is doing the having, the new I, who, in coordinating or reflecting upon mutuality, brings into being a kind of psychic institution (in + statuere; to set up; statutum; law, regulation; as in 'statute' and 'state') (Kegan 1982: 100).

This strong link between how Kegan's "psychic institution" operates and what Luhmann attempts to ascribe to people and the role they play in legal operations is not

superficial. Kegan based the institutional truce on: “that whole construction of the self as a system, form or institution of which ‘I’ am the administrator who must keep the organization intact”. Indeed, the type of meaning made ultimate in the institutional balance is “the psychic institution and the time-bound constructions of role, norm, self-concept, [and] auto-regulation which maintain that institution” (Kegan 1982: 101).

Another link is in Luhmann’s proposal that the autonomy of law can *only* be realized through ‘social’ operations (1993: C2/11/7), which appears to dovetail into Kegan’s theory that the institutional balance ‘is the societal’. According to Kegan stage four brings into being “the societal group as an institution regulated by rules and laws rather than a collection of affiliations regulated by particular affections” (1982: 71). While Kegan’s theory simultaneously includes the role of social structures, his stage four institutional truce is linked with Kohlberg’s stage four, where “social objects of the world (people) are not guaranteed their distinctness apart from their identification with the social order” (In Kegan 1982: 63 parentheses original).

An integration of theories

The main difference here is that rather than elevate the social system (that people may feel connected to) as having primacy, Kegan’s theory appears to place the production and reproduction of ‘the system’ in the meanings people and the social system make (which ensures the evolution of both). His tenet that the socio-moral implications of the institutional truce “are the construction of the legal, societal, normative system” (1982: 101) strengthens this association. In short, construction of the normative

system of law is a process of development grounded in the individual/social juxtaposition:

What I am suggesting is that these social constructions are reflective of that deeper structure which constructs the self itself as a system and makes ultimate ... the maintenance of its integrity (1982: 101) ... [He goes on to say]: [T]hat which is a kind of theory of the legal institution may be an expression, in the moral domain, of the deep structure which is a theory of the self as institutional (Kegan 1982: 104).

It is recognized that in one analysis on the individuality of psychic systems Luhmann proposes similar dynamics to those presented above (1995: Ch7): he also proposes the opposite (1995: 480-488). What I keep returning to in this thesis is that *ultimately* Luhmann positions the development of an organization in the organization – or the social system itself – not the person and the interrelationship that exists with the social system. Luhmann does this by elevating how people make meaning to a systems construction of operation, and simultaneously divorcing them from the meanings they make. In so doing, he allocates the definition of the boundaries of the object (law) to the object itself (law), not to the people who construct the system – their own system as a system, which includes law and the legal system. It is an allocation that is examined in the following chapters and which is rejected in this work.

People create not just reproduce the system

Kegan said that in stage four we *do not* “become cowardly conformists. We do not so much submit to a system as create it”.⁹⁶ Importantly, a person in this stage is “not controlled by what others think so much as he is the others who are thinking” (Kegan 1982: 64). Luhmann might argue that he accounts for this in his theory – it could even be said that it is the law that is thinking for others; but this cannot be achieved unless the underlying premise is accepted that law defines its own boundaries. This exact premise in autopoiesis is refuted in Chapter Twelve and in the self-concept typology. Data show adherence to the system occurs in unison with the belief that individuals create it, such as in the way *they work* to achieve justice. However, to be sure that the distinctions made at this particular point are properly explained, an example is provided.

As seen above, Graham’s commitment to think in a systems way is strong: but he is not simply *reproducing* law or its system. The next data excerpt shows that two activities are occurring simultaneously. It supports what Luhmann says, which in effect is that attorneys think in a systems way, and that which Kegan says, with the added view that the institutional truce creates the system. The quote is taken from Graham’s response to the question: What is justice? He gives his answer as if he is talking with someone who holds an opposing view (which may reflect the questioning tone of the interview).

Children’s attorney

⁹⁶ People operating from the interpersonal truce similarly create the way they make meaning in conjunction with the social systems in which they operate, the difference is the type of meaning made.

Taking a set of facts and having the ‘right thing’ happen ... *Justice means you make the system, you bend the system to make it fit the facts of the case.* There’s no law you write that’s ever going to be applicable to every single case. This fact is law. When they wrote that law they didn’t intend it to cover this situation. Well, but that’s what it says. I understand that’s what it says but they really didn’t intend to do it so let’s see if we can kind of fix it a little bit to make it work better. And so that’s really what we’ll do: *we’re all kind of architects of our own justice system. Each individual lawyer involved in it bends and pushes it a little bit to make it work to the best of his ability.* It’s when we don’t bend, when we become rigid and say: I’m sorry, I don’t care what the facts dictate; in this case this is what we’re supposed to do [that problems arise].

This example and the one given earlier point to the fact that Graham is strongly committed to doing what the system requires; but this arises from his own individual judgment. He also sees other professionals operating in the same way, expressed in the view that “we’re *all* kind of architects of *our own* justice system”. To explore this point further we return to the interview, and pick up the earlier discussion about how a defense attorney can ‘protect’ the guilty – and the associated ethics and morality:

Children’s attorney

We all have our own morality ... To me, you have to look inside yourself and know what you can do. Ethical: well, *ethics mean to do the very best you can within the confines of the law ...* it was a three-hour class in law school. Basically it’s what’s inside of you ... But there is a balance: in my opinion it’s more than merely getting your client off; *it’s to make sure the system works*, to make sure if your client needs help they get help.

Researcher: I was thinking as I heard you: it depends on the definition – on how we define the system; what we define the purpose of the system to be.

That's exactly right. And that's why the lawyers do what they do, live with themselves, because of how they define their role and responsibility. I define it differently. I happen to think I'm right. They happen to think they're right ... [But] this is something so ambiguous that nobody really knows ... *The people that are most effective* that I've seen, look at the totality of the system ... you've got to stay away from being so focused that you don't see both sides.

Advocates of autopoiesis may not interpret this quote as showing individual judgment. They could say that law decides what belongs to it and what does not, as seen in the statement about the responsibility "to do the very best you can within the confines of the law". But this cannot be taken in isolation from the rest of the answer, particularly that "the people that are most effective ... look at the totality of the system". This totality is suggested in Graham's voice where the system sets forth rules but *he* determines how he makes meaning about those rules; a point which is exemplified by the events that occurred in San Diego: when the system was under pressure the law did not change, but the laws that people *practiced* did.⁹⁷

These dynamics lead us to explore arguments that support or refute the theory that the social dominates the individual. The analysis of animate and inanimate systems in Chapter Eleven expands the range of subjects that challenge the theoretical ground upon which the social system in legal autopoiesis rests. It expands the debate by

⁹⁷ There is significant dispute about where the theory of legal autopoiesis locates 'responsibility'. See King's analysis on this topic (2001: 145-151). Also see Cotterrell (2001: 95) and Bankowski (1996: 69) who clearly find the theory lacking as a tool to address responsibility in legal operations. As it is not possible to address this topic here, let it suffice to say that in Kegan's outline of highly evolved individual and organizational operations he wrote: "Rather than expressing itself in terms of a loyalty or fidelity to an abstracted system-preserving form (of the self or the actual institution), responsibility would seem to be more saliently a matter of taking responsibility for one's construction and transformation *of* the form (Kegan 1982: 247 italics and parentheses original).

moving away from Kegan and Luhmann and exploring generic ideas about systems theories, be they conceptualized as rational and empirical or mechanistic and organistic systems: it also returns to concepts of aliveness in the legal system. Overall, the topics add to the argument that in order to examine how law operates it is necessary to consider the joint influences of social and individual evolutionary processes on legal operations – such as those outlined in legal autopoiesis (LA) and human development (HD) theory.

CHAPTER ELEVEN

THE ANIMATE VERSUS THE INANIMATE: A QUESTION OF DOMINATION

Introduction

Theories are explored in this chapter about inanimate systems dominating the animate and vice versa. The need for this discussion is propelled by analysis of literature and the emphasis it placed on not making sharp distinctions between systems – a practice which underpins the autopoietic systems theory of law.⁹⁸ This chapter shows that the sharp distinctions that characterize legal autopoiesis are insupportable, whether they infer that the rational mind operates in isolation from emotions or that the legal system operates without people. When sharp distinctions are avoided, and LA is integrated into HD, a more comprehensive tool is accessible to explain law.

The influence of people in social systems

Van Zandt suggests that social order itself is achieved through a combination of multiple decisions and actions by *individuals* in a process where specific authors are generally not recognized or known: that is, the individual may not be overtly visible. In stating this, the author still places the individual at the center of law, which he described is a product of “the complex interactions of uncounted human decisions about the invocation or avoidance of the power of the state” (1992: 1754). He reports:

The appearance of organic autonomy, systematicity, and dynamism in the law is merely that, an appearance. That appearance results from the fact that no one person intends all the results of the legal system or is its author (van Zandt 1992: 1754).

⁹⁸ Iterating: “law produces by itself all the distinctions and concepts which it uses and that the unity of law is nothing but the fact of this self-production, this ‘autopoiesis’ ” (Luhmann 1993: C1/111/4).

A concept that highlights individual participation in law *and* perceptions about an autonomous and dynamic legal system is the analogy drawn from the ‘Market’. The concept – first analogized to the law by Hayak – describes how the stock market is viewed as having a life of its own. People talk about it “moving”, “drifting” or “turning”: references that can infer *it* operates its own system. People also attribute the results of economic market transactions to a “hypothetical entity”; and they attempt to predict future events by examining *its* prior movements. In the theory, those who use the stock or commodity exchanges become “price takers” (as opposed to making the price), and market forces constrain their decisions (van Zandt 1992: 1755).

The inanimate legal system works in a similar way. Individuals who operate (make meaning and decisions) about law are constrained by ‘system’ decisions. They also experience psychological, sociological and legal forces such as “self-imposed guilt, social approbation, or material sanctions” (van Zandt 1992: 1755). But as this analysis shows, these operations and special restraints do not translate to law producing *itself*.

The concept of law dominating its subjects

To examine this issue we continue looking at legal theories about the aliveness – or the animate versus inanimate nature of law. Competing concepts about the autonomy and dynamism of the legal system pivot on views between instrumentalists and

formalists. Whereas instrumentalists “deny that the legal order possesses any autonomy from the demands imposed upon it by actors”, formalists “assert an absolutist, unqualified autonomy of the legal order from this society” (Balbus 1977: 571-88).

Balbus considered these competing perspectives and examined people’s relationship to the law by drawing on the theory of object relations (discussed in Chapter Twelve). He saw law as having its own internal dynamism, and said that individuals “conceive of themselves as its object or creations”. This conceptualization led the author to say that it is unlikely people will question the legal order, mainly because it is “impossible to evaluate an entity which is conceived of as the independent source of one’s existence and values” (1977: 582-3). Views of this nature support the systems theory of legal autopoiesis and dominance of the system – or the social – over people. Yet doubt is cast here that people have fully capitulated to the law as if their ruler; one that permanently bypasses electoral processes.

It is true that most people abide by the law, it is slow to develop, and comparatively only few engage themselves in activities to change it. But these facts, or tantalizing arguments about people being law’s puppet, should not be translated as meaning that people regard themselves as (or indeed, are) *its* object. To accept this argument, which Luhmann also makes (see the next chapter), is akin to saying that our evolution mirrors aspects of autism: just as people with this disorder have been found to retrieve and reproduce “unanalyzed wholes in response to a particular situation” (Menyuk 1978: 106), the theory studied here portrays people as if they simply retrieve and reproduce ‘unanalyzed wholes’ of what *law* has produced as law (that is, humans

reproduce law without individual analyses or more saliently, without meaning making).

To see how people are not law's object one need look no further than the failure of the law when it is not considered legitimate, is not supported by the populace, or is not enforced. Moreover, standards of strict scrutiny are applied within the system itself. Habermas said "along with the procedural distribution of burdens of proof, a self-critical impulse also becomes institutionalized" within the legal system (1988: 257). Other factors preventing mass capitulation to the law pivot on the influence of individuals, such as that identified by Frank in his discussion about the judiciary (Frank 1949: Ch xiv). Questions that challenge (analyze) law and how it operates are also raised from outside its system.

Chapters 23 and 24 address this topic when discussing the operative structure of the system, and the impact of social movements on law. Briefly, data show that people in systems external to the law may not instantly create new laws, but their influence through external pressure on what professionals do can create dramatic changes to the laws that are used *by* (people) the system. These factors, which suggest a relationship between individuals *and* the social system of law, continue to be explored, this time through competing theories about the relationship between culture and human beings.

The concept of culture dominating people

White's theory about how culture operates reflects Balbus and his view about legal fetishism, such that: "individuals affirm that they owe their existence to the law

rather than the reverse” (Balbus 1977: 583). White said that ‘culture’ has a life of its own *and* operates to direct and control human behavior. He writes: “Flowing down the ages, it embraces the members of each generation at birth and molds them into human beings, equipping them with their beliefs, patterns of behavior, sentiments, and attitudes” (In Lumsden & Wilson 1981: 176). The theory reflects a belief that culture:

changes and develops in accordance with laws of its own, not in obedience to man’s desire or will. A science of culture would not put into man’s hands the power to control or direct its course (White 1948:213 In Lumsden & Wilson 1981: 177).

Just as many theorists oppose the concept of law as acting independently from individuals, Lumsden and Wilson similarly challenge White’s views. The basis of their argument is detailed here to support the theory that human systems interact to *create* their experience with social or mechanistic systems. The central maxim, useful to the theory built here against strict legal autopoiesis, is that the laws governing culture are synthesized from principles governing the mind (Lumsden & Wilson 1981: 177).

The authors propose that gene-culture theory (which is an extension of sociobiology) more accurately explains how culture operates than that proposed by White and others. The theorists indicate that genes generate organic processes (epigenetic rules) “that feed on culture to assemble the mind and channel its operations”. This renders behavior as a product of the mind which develops as it “deals with the contingencies of day-to-day existence” (1981: 349). Bringing us to a key theme of the chapter,

Lumsden and Wilson do however, caution against making sharp distinctions between systems:

[N]o sharp line can be drawn between genetic and cultural evolution. Paradoxically, the distinction becomes even less clear and useful as the analysis of gene-culture co-evolution gains in precision (1981: 344).

Concepts about sharp distinctions: the individual, the social and ‘the system’

Beyond theorists from sociobiology warning against making sharp distinctions between the social and the individual (elaborated in the above example through the relationship between cultural and genetic evolution), theorists from law, sociology and, as introduced earlier, from psychology and physics, also provide a strong contrast to the autopoietic theory and its sharp distinction between ‘psychic systems’ and the social system of law as a *self*-reproducing machine. To ground the importance that is given to not making sharp distinctions – even for a theory of law – we return to theoretical analysis and other concepts about sharp distinctions specific to the operations of law.

Podgorecki, Whelan and Khosla caution readers that the political culture of any social system is closely linked with its general culture and this in turn is linked with the legal culture and its profession. The authors indicate that: “it is too risky to search for too sharp a distinction between the two sets of systems since they belong to the same realm” (1985: xv). Podgorecki and his colleagues see legal systems as being maintained on the basis of a complicated infrastructure of “mutually interdependent

interests”. As part of this they describe “self-generated” legal systems as “deeply embodied into the values and attitudes of the population at large”:

Self-generated legal institutions are adjusted to the particular historical climate of the country, to various economic changes which took place in it and are more responsive to the social problems and needs of the people. Self-generated legal systems carry on through themselves the accumulated wisdom of several generations which produce them through the painful process of trial and error accommodations (Podgorecki et al 1985: 16).

Adherents of the autopoietic theory may see the language of ‘self-generated’ legal institutions as consistent with concepts of legal autopoiesis. Rather than slip into this same interpretation, which is refuted by Podgorecki’s position against making sharp distinctions, readers are reminded of the finding that: “the sharp break between abstract logical thought and concrete immediate experience, that has pervaded our culture for so long, need no longer be maintained” (Bohm 1980: 203,211). Some of the science behind this conclusion – reached by Bohm (a Nobel laureate in physics) – was that “a sharp distinction between space and time cannot be maintained” (1980: 203, 211).

Another perspective that suggests the importance of not making sharp distinctions in legal theory is Hardin’s view that legal decisions are not only about rigid adherence to system rules; they equally pivot on human experiences. When outlining the structural and cognitive processes in decision-making Hardin notes that there are: “limits on mental ability, limits on time available for deciding, limits on information, and limits on relevant theory”. He proposes that a central issue associated with the interactive

nature of law is “the inability of a single individual to determine an outcome independently of the actions of others” (1988: xvii). Continuing this theme, theorists also describe how our humanness pervades every level of law, including judicial levels:

judges are human instruments, with prejudices, passions and weaknesses. As it is, they often decide a new point or a doubtful point, ignore a principle, narrow a rule, or explain a concept under the influence of these human limitations (Frank 1949: 155).

The interdependent dynamics identified in this chapter and how systems accumulate wisdom, are comprehensively explained in Durkheim’s theories of knowledge (1915). His sociological analysis is used to strengthen the logic proposed in this thesis that to understand the rational basis of a social setting it is vital to *equally* consider the juxtaposition between the social and the individual, including the meanings they make (literally in the former and metaphorically in the latter).

Sociology: an integration of the social and the individual

Durkheim’s thesis, which clearly advances the existence of the social and its collective representations, proceeds from the principle that “knowledge is made up of two sorts of elements, which cannot be reduced into one another, and which are like two distinct layers superimposed one upon the other”. Empirical knowledge cannot be separated from “what is essentially individual and subjective”: and rational knowledge goes beyond the limits of empirical knowledge and it cannot be reduced to empirical data (Durkheim 1915: 26-29).

Luhmann inconsistently embodies these distinctions. However, his theory does not appear to account for Durkheim's *ultimate* position that rationality (the social) cannot be liberated from empiricism (the individual) and vice versa without one destroying the other. Crucial to this argument, Durkheim cautions readers that his attention to the 'irreducible' quality between the rational and the empirical is not meant to be absolute:

We do not wish to say that there is nothing in the empirical representation which shows rational ones, nor that there is nothing in the individual which could be taken as a sign of social life. If experience were completely separated from all that is rational, reason could not operate upon it, in the same way, if the psychic nature of the individual were absolutely opposed to the social life, society would be impossible (Durkheim 1915: 28-29).

The empirical is experienced through a sensation or image. It "always relies on a determined object, or upon a collection of objects of the same sort, and expresses the momentary condition of a particular consciousness" (Durkheim 1915: 26-27). In contrast with this – and reflecting the type of criticism made here against Luhmann – Durkheim notes that the rationalists (known as the a priorists) fail to admit that the categories of rational thought "are made up of the same elements as our sensual representations" (1915: 27). They fail to do this because they give to the mind "a certain power of transcending experience". The next quote shows that Durkheim believes rationalists give this particular attribution without justification:

Saying that only on this condition is experience itself possible changes the problem perhaps, but does not answer it. For the real question is to

know how it comes that experience is not sufficient unto itself, but presupposes certain conditions which are exterior and prior to it, and how it happens that these conditions are realized at the moment and in the manner that is desirable. To answer this question it has sometimes been assumed that above the reason of [the] individual there is a superior and perfect reason from which the others emanate and from which they get this marvelous power (1915: 27).

Notwithstanding this position, it is noted that Durkheim speaks about two aspects of life that constitute reality. They are:

an individual being which has its foundations in the organism and the circle of whose activities is therefore strictly limited, and a social being which represents the highest reality in the intellectual and moral order that we can know by observation – I mean society (1915: 29).

While these views are not only reflected in findings from other fields of study (such as Penfield's analysis in neurophysiology about the relationship between the operation of brain mechanisms and the role of the 'mind' (1975: 74-79)), they also *ultimately* lead to the same outcome as other research. Durkheim's central point is his proposal that:

thinking conceptually is not simply isolating and grouping together the common characteristics of a certain number of objects; it is relating the variable to the permanent, the individual to the social (1915: 487).

In this project "thinking conceptually" is about relating the organism to the mechanistic: the experience of the individual professional and their profession to the rational operations in society's law. To further develop this relationship we return to

expand upon a field of study that *ultimately* supports the importance of not making sharp distinctions in how the individual and the social operate: constructivist theory.

Constructivist theory

A literature review on constructivist theory (mainly from Schwandt's chapter in Denzin and Lincoln's Handbook on Qualitative Research (1994: 118-137)) shows that adherents of constructivism do not sever the knower from the known to the same extent as that which occurs in Luhmann's theory of legal autopoiesis. This includes analysis by von Glasersfeld and his view on radical constructivism, which he links with processes of knowing and theories of adaptation (von Glasersfeld 1991: Ch 1).

Other constructivist theorists, such as Gergen and Gergen, focus primarily on the social construction of meaning and knowledge – viewing the world as an artifact of communal interchange (Gergen & Gergen 1991: Ch5). While Gergen's earlier analysis encourages practitioners to view social rules as historically and culturally situated, it does not sever individual meaning-making from the influences of language and historically constructed interchanges between people (Gergen 1985: 266-275). Consistent with the author's analysis, in a different article he writes that what counts as facts depends on one's perspective (Gergen 1991: 90-93).

Jackson's views about a systems theoretical approach to scientific analysis similarly respect the need not to sever representations from experience. Raising a topic that emerges frequently in literature about the methodology used to describe how a system operates, Jackson spoke of the refusal in radical empiricism to “reduce lived

experience to mathematical or mechanical models and then claim that these models are evidence or representations of the essential character of experience”. The author goes on to say:

we must critically examine the ways in which a preoccupation with pattern and order is linked historically to a concern for controlling nature and other human beings, a form of instrumental rationality (Jackson 1989: 13).

Theorists from other fields of study who have also spoken against reliance on mathematical models to examine any system – thus including the nature of which is studied in this thesis – were outlined earlier, such as: Hawking (1988: 174); Sheldrake (1988: 184); Capra (1975: 75,141); Bohm (1980: 196) and Feynman (1995: xi).

More generally, and consistent with Schwandt’s view that the future of constructivist persuasions is contingent on people becoming comfortable with the need to dissolve dichotomous forms of thinking – such as concepts about subject and object and the knower and the known (1994: 132) – the next chapter begins to dissolve the dichotomy between social systems and individuals. It forms a critical aspect of the argument that $SL=(HD+LA)$. It does this by showing that it is not possible for *law* to define *its* own object: rather it is defined by a dialectic of the social and the individual each giving rise to the other through the fundamental evolutionary activity of meaning-making.

CHAPTER TWELVE

INDIVIDUAL & SOCIAL SYSTEMS: OBJECT RELATIONS THEORY

Introduction

Luhmann and Kegan both say that a system is differentiated as a system when it is not fused with but has boundaries and can relate to the environment known as society. Whereas Kegan uses the theory of subject-object relations to describe the process of differentiation *between* the individual and the social, Luhmann uses it to ground the same process of differentiation as occurring *in* the social.

Clam, who said “the social – is communication as a system”, called Luhmann’s theory “The new subject-object of sociology” (2000: 67).⁹⁹ Overall, the chapter questions the theory that *law* differentiates itself by defining its own boundaries (and its object), and shows that this tenet is not supported by the theory of subject-object relations theory.

Attention to these topics forms a vital part of the case against the theory of autopoiesis, especially the claim that it can stand in and of itself to explain how law operates, largely because such attention debunks an axiomatic premise intrinsic to the theory’s structure. This is to say, without object relations the rest of the autopoietic theory loses significance. It does this because Luhmann uses object relations as the main device to draw a dichotomy between the observer and the observed – psychic systems and the system of law – and when this dichotomy is shown to rest on shaky ground the remainder of the theory is weakened.

⁹⁹ Clam reinforces a key aspect of Luhmann’s theory being questioned in this thesis – the role of the actor. He said: “Communication is the last constituent of the social, behind which there are neither actors nor things, but only operations” (2000: 67). King calls all communications ‘social’ (1997: 26).

The internalization of ‘the other’

Kegan and Luhmann both describe how systems construct their own meaning by recursively referring to internalized operations. A direct way to see the importance of internalized operations in the legal system is to view how they work in human development. Primarily, if a person does not have the internalization of others’ voices in their *own* construction of *self*, how they feel and what they do in different situations is said to be “much more a matter of how actual external others will react” (Kegan 1982: 180). Kegan said that this means the person’s emotional experience is:

always changing, depending on the action and reaction of others who are not easily decipherable since their interior life cannot be constructed by the subject any more complexly than [they] can construct [their] own (Kegan 1982: 180).

The same concept metaphorically applies to law. In order to function the legal system must have the internalization of *others’* ‘voices’ in its *own* construction of *self* (or system self-concept). The legal system achieves this through reliance on precedence, statutes and case law, all of which operate within well-defined boundaries. If however these operations did not exist, it would be vulnerable to responses of a kind described for people who lack the ability to refer to an internalized voice about self: it would struggle to make meaning about what is ‘other’. Before examining how law is said to distinguish between self and other in legal autopoiesis – and thereby makes meaningful realizations about what belongs to it and what belongs to its environment – the theory of object relations is used in a way that reflects how it was first

conceived. In addition to serving the purpose outlined above for this chapter, the discussion also contributes to the theoretical analysis in Part Four when we return to analysis of data and the tool through which it is examined – the typology of individual, professional and system self-concepts.

Object relations theory: self-concepts, boundaries, and meaning making

In constructive-developmental theory the emergence of an individual self-concept arises from the development of subject-object – or self-other relations. As introduced in Chapter Five, development of a self-concept is an evolutionary activity that “involves the very creating of the object (a process of differentiation) as well as our relating to it (a process of integration)”. Subject-object relations (self-concepts) reflect a natural process of lifespan development and represent “successive triumphs of ‘relationship to’ rather than ‘embeddedness in’ a particular state of existence” (Kegan 1982: 75-77). The centrality of object relations in constructive-developmental theory is seen in a case study discussed by Kegan, where a man’s movement from one ‘subject-object balance’ to the next – that is, a person’s evolution into new ways of making meaning – led to:

a better guarantee to the world of [his] distinct integrity, qualitatively reducing each time a fusion of himself with the world, thereby creating a wider and wider community in which to participate, to which to be connected, for which to direct his concern (Kegan 1982: 71).¹⁰⁰

¹⁰⁰ In autopoiesis the way “internal and external observations” are achieved are similarly important for law: “The legal system is less free in the ways in which it observes itself and describes itself, but to make up for it as it were, it is more secure and it is better informed ... the theory of operatively closed self-referential systems is not only a theory of objects but it includes also the reflexive performances of the described system; it describes the system as a system which describes itself” (1993: C/V/10).

This topic was mentioned in Chapter Eight when the synergy between Kegan's and Luhmann's theories was flagged, such as how systems evolved through a reduction and enrichment with meaning. As becomes evident later, both authors say that the less fused a system is with its environment the greater the ability to undertake more and more complex processes of meaning-making. For now, given that autopoiesis rests on a sharp distinction between people and the social system of law, we turn briefly to examine the etymology of the word "object". It helps to conceptualize its original use to explain how a person is not fused with, but is able to relate to their environment:

[T]he root (ject) speaks first of all to a motion ... Taken with the prefix, the word suggests that motion or consequence of 'thrown from' or 'thrown away from.' 'Object' speaks to that which some motion has made separate and distinct from, or to the motion itself. 'Object relation' by this line of reasoning, might be expected to have to do with our relations to that which some motion has made separate or distinct from us (Kegan 1982: 75).

These points are emphasized: ideas about boundaries are integral to object relations theory, in the main because that which is not seen or known (observed) cannot be given a boundary: it cannot be distinguished from itself. The ability of a *self* to form a boundary means that something is no longer subject to (or embedded in) but is separate from (it has become object) and can be observed.

Another significant aspect of object relations theory to this analysis is that it informs us that "development occurs in the context of interaction" (Kegan 1982: 7). It is the

existence of others – *not just internal states of being* – that provides the ground upon which the evolutionary processes of thinking and feeling can become an object:

object relations (*really, subject-object relations*) are not something that go on in the “space” between a worldless person and a personless world; rather *they bring into being the very distinction in the first place* (Kegan 1982: 75 italics added).

Object relations theory is about the relationship of the organism to its environment (seen often through the individual to the social). It could be asked: “what is the subject-object relationship that person has become in the world?” (Kegan 1982: 114). Subject-object relations, *or what is self and what is other*, are influenced by a person’s ‘biology’ and their ‘philosophy’; and how a person evolves is as much about how they construct their environment as it is about how the environment constructs them.

Subject-object relations *become*; they are not static; their study is the study of a motion ... [and] subject-object relations live in the world; they are not simply abstractions, but take form in actual *human relations and social contexts* (Kegan 1982: 114 italics added).

Luhmann and object relations theory

Contrary to Kegan’s analysis, which places the evolution of object relations in “human relations and social contexts”, the autopoietic theory was shown in Chapter Nine to render a view that the social (law) operates in a personless world. We now examine how Luhmann reaches this rival distinction through object relations. The author uses the theory to explore “the boundaries of law”, which he proposes – rather

than being defined by an observer – are defined by the object itself (1993: C1/1/6). The theory that law, as object, defines the boundaries of its own system is best seen through the idea that law must refer to law to distinguish itself as law. It does this by observing itself – a process said to occur on the basis of a distinction. Reflecting generic application of the concept of object relations Luhmann reports:

an observation must first of all be able to distinguish something in order to describe (intend, thematise) it. As far as an observation distinguishes one thing from another it describes objects (1993: C1/111/1).

Expanding this, when the theorist describes how the legal system is able to observe and make distinctions Luhmann portrays the system as if it has a life of its own. He writes:

it could also be said that the system has to assume its own existence in order to engage in its own reproduction ... or in other words: the system produces its operations by going back to and anticipating its other operations and it can only determine in this way what belongs to the system and what belongs to the environment (1993: C2/11/3).

Similar to the processes of assimilation and accommodation in psychology, the operations detailed above are said to occur through input and output processes (topics explained in Chapter Thirteen). For now, these operations – which help the system achieve its differentiation – are self-performed: and boundaries are maintained through observation processes said to involve ‘self-reference’ and ‘other-reference’. Luhmann writes that “self-reference always implies other-reference” (1993:

C2/11/10). His attention to these processes – to “object relations” – is based on the premise that:

the legal system is able - as a system with its operations tied to self-observations - to reintroduce the difference between system and environment, which is reproduced by these operations, into its system and to observe itself by using the distinction between system (self-reference) and environment (other-reference) (1993: C2/11/11).

If questions about the life of law are *briefly* suspended and ideas about self-reference and other-reference are used from human development theory, just as individuals must undergo a process of separation so that they are not fused with but can relate to their environment, law must do the same. Earlier we saw that when the legal system is distinguished as a system an exchange can occur: law can have relationship with society, because it can be related to *by* society (rather than being invisible in or subject to it). Temporarily viewing law through the lens of concepts from human development helps to explain why Luhmann rejected criticism that the autopoietic theory “advocates the total isolation of law from society” (1993: C1/111/4): it exists because it is *distinct*.

The place that Luhmann allocates to people can also be viewed from self-concept theory in human development. When Luhmann writes about people constituting part of the environment of social systems, and not being ‘elements’ of social systems, it starts to become clear how the author emphasized rather than denied their existence. This is because subject-object theory tells us that Luhmann sees people as being differentiated from (not an element of) the *social* environment, and because of this

they are related to and “constitute part of the environment” (King 1991: 304). This places people as part of the larger environment of the social system in which law is a subsystem.

The theoretical problems that concepts of legal autopoiesis solve, therefore the advantages that such concepts offer, are also briefly outlined.

Luhmann indicates it is valid to say that “everything is said by an observer”. But when he makes this recognition he also writes that autopoiesis remains “a theory that leaves the definition of the boundaries of the object to the object” (1993: C1/1/7). The construction of the object defining the object is said to address a vital aspect of how law operates: it pivots on the identity and predictability of law, qualities that are crucial to its legitimacy. Specifically, the vital need for law to define law is suggested through the dynamics perceived to arise if law could not control how it was defined: such that if the definitions of the boundaries of law (what is law/what is not law) were left to the behest of observers (rather than law) its boundaries would – from moment to moment – be indistinguishable. In autopoiesis, where the definition of law is left to its object, then *only* law can determine what is law: this guarantees normative expectations in the system. This approach has led autopoiesis to become (for some) a theoretical apparatus through which to view how law operates – and importantly, how it does not fall apart at the whims of conflicting opinions. How Luhmann achieves this perceived advantage in autopoiesis and the way it rests on a poor foundation is now explored.

The use of a theory as being a fact: object relations and the role of the observer

Luhmann inverts the original use of the theory of autopoiesis which placed centrality on the role of the observer. He places *centrality* on law as the observer of itself. This reflects an abstracted version of the original autopoietic concept where “coding” information in a system is a cognitive process “which represents the interactions of the observer, not a phenomenon operative in the physical domain” (Beer 1980: 69-71). The way Luhmann uses this concept allows him to say that law, as an observer, is defined internally (by law) and not through the grasping of an external objective reality.

The problem with this approach is that the theory takes ‘the life of law’ to the extreme, and in the process strips it of its human content. When Luhmann explains how law makes its own internal specifications – how it is internally defined and makes its own meaning – he attributes it as having a quality that is more conceptual rather than factual. He relies on concepts of *coding and recognition* processes within autopoietic systems (topics first mentioned in Chapter Nine) to portray law as having the capacity for cognition: this gives it more life than it has – *as an isolated system*. Nonetheless, the theory attributes law as having these qualities – which includes the ability to communicate – thus allowing the theory to advance the position that people are not a part of the system.

Overall, Luhmann takes *a theory* that the law defines its own boundaries (not people) and treats it as a conclusive fact that human beings observe the law as an object that defines its own boundaries. The author writes:

observers have to organise their observations on a second order level if they want to do justice to an object which defines its own boundaries, [this applies] even if they only want to bring the object up as a topic. Observers must observe their object as observers, and that means, they must observe it as an object which is orientated by observing a distinction between system and environment (Luhmann 1993: C1/1/7).

A theory that the law defines its own boundaries does not mean ipso facto that people observe law the way the theory outlines. If empirical data are given due weight, the position taken here demands that law is defined through legal precedence with reference to case law and texts; this is done by people who respond to and interpret law as an object from *their own* system of meaning-making. In short, to examine and explain how law operates there is a need to recognize the dialectic between the individual and the social – between HD+LA. Law and the legal system involve operations that are, at one and the same time, set in text (which supports a mechanistic systems approach to law) *and* are the product of (from moment to moment) cognitive and affective processes.¹⁰¹

The use of object relations in this thesis

To support the imperative that theories about how law operates must take into consideration theories about how people make meaning, Piaget's position is noted that "all objects are simultaneously cognitive and affective" (In Kegan 1982: 83). Kegan writes: "this is because all objects are themselves the elaboration of an activity

¹⁰¹ It is shown later that this approach does not conflict with the concept that the legal system takes notice of external facts in the form of internally produced information (Luhmann 1993: C2/V1/9).

which is simultaneously cognitive and affective” (1982: 83). Although this point may seem obvious, one common element underpins data analysis: it is that the typology of self-concepts (presented in Parts One and Four) reflects the theory that individuals are actors who distinguish (make meaning about) their own experiences. This means that individuals – their range of emotions, affect, drive, spirit, values, intuitions, integrity, intentions and interpretations – exists at a functional level not only in the person, but also the professional and system self-concepts that underpin how law operates in ‘the system’.

To strengthen the need to use both aspects of object relations theory (which is similar in concept to that proposed by Habermas in his discussion about the subject-object relationship in *Interpretations* 1971: 261-262), the following topics continue to expand the reasons why legal autopoiesis is an inadequate construction of how law operates.

Sharp distinctions in autopoiesis: and ‘formal operational thought’

In order for Luhmann to hold steadfast in his sharp distinction that law observes itself and defines its own object, which he believes is a superior form of theory construction, he seems to ignore a key scientific finding: “the fullest notion of maturity in the domain of science” *is not achieved* if objectivity is defined in terms of abstract principles, and the rules of order are presented as if they are independent of “the phenomena they govern” (Kegan 1982: 228). This finding applies to that which is social and individual.

In physics this position means that the abilities of the observer and the observed do not exist autonomously. In law this same scientific rule means that the independence of law and the rules of order that organize it cannot be separated from the people it governs – and indeed, from the people who govern it. While Luhmann and advocates of legal autopoiesis argue that these connections are made in the theory, I argue that Luhmann is inconsistent.¹⁰² Chapter Ten for example, identified that his distinction between the observer and the observed is at one time merged, at another, more sharply differentiated than can be supported by scientific observation.¹⁰³

Research analysis for this thesis suggests that the failure of legal autopoiesis to *properly and consistently* connect the observer and the observed stems from its fixation on formal operational thought, which is a dualistic school of thought. Citing Koplowitz, Kegan indicates that: formal operational thought “draws sharp distinctions between the knower and the known, between one object (or variable) and another, and between pairs and opposites (e.g., good and bad)” (1982: 229). Examples of this exact theme of formal operational thought in Luhmann’s theory arise in his strong emphasis on the processes of choice that exist in a “binary coding of the system through a scheme which provides a positive value (law) and a negative value (not law)” (1993: C2/111/5-6).¹⁰⁴

¹⁰² For example, Luhmann does argue: “Only those who participate in the logic of condensation and confirmation of meaning can participate in language communication and couple their consciousness with social operations” (1993: C3/1/120). Also see King’s response to critics of the autopoietic theory of law (2001: Ch6); Paterson, who writes on the same topic (1996: Ch5); and Luhmann (1995: Ch7).

¹⁰³ See for example, Luhmann (1985: 205; 281-2; 1995: 480-488).

¹⁰⁴ Advancing the theme of binary coding as integral to autopoietic operations, Luhmann writes that systems “*can assume two states (positive/negative, in/out, on/off etc.) on which all further operations depend*” (1993: C4/11/164, italics added). Another example is Luhmann’s theory about the way in which a system’s programming involves a guiding distinction: this includes “the distinction between the right and wrong applications of criteria for the allocation of law and non-law” (1993: C4/VI/193).

Expanding on the importance established in the last chapter about *not* making sharp distinctions, Kegan describes the shift from theoretical analysis driven by this form of thinking to ‘post-formal thought’.

In psychology, post-formal thought means that despite the existence of internally consistent generalized rules in a person’s meaning-making, such rules cannot operate in isolation if they “seem perilously to ignore the particulars they organize” (Kegan 1982: 228-9).¹⁰⁵ To illustrate, Graham’s interview suggested he had strongly internalized rules about working within the constraints of law: *and* he works from the premise that rather than just applying the law, “you make the system, you bend the system to make it fit the facts of the case”. In short, as the next quote shows, he does not isolate his internalized rule to work within the law as if independent from what that rule governs:

Children’s attorney

A lot of people think issues. I say, what’s the big picture: what are *we* trying to do here? What do *you* want? How can we make the system fit the system? How can we solve this problem? ... I think the people who work within the system master the big picture ... *There isn’t a rule that’s ever made that can’t be bent or can’t be changed or we can’t find a way around it.*

Adherents of autopoiesis might argue that regardless of people bending or changing rules, the outcome still reflects law. I argue that the imprimatur of law on a

¹⁰⁵ Although it seems that a similar interpretation has also been advanced by Beck, King thinks if Beck had gone beyond generic terms he would have seen that the autopoietic theory does in fact reflect the phenomena observed (King 2001: 129-131).

conclusion does not authenticate the theory that the social system of law operates without people. The formal operational thought that might have once supported a proposition closing off the individual from the social has been replaced by “post-formal” thinking which: “Rather than making the form or closed system ultimate, it orients to the relationship between systems” (Basseches in Kegan 1982: 229-230).

Different approaches to contradiction and paradox in system operations

Kegan’s interest in post-formal thought and Luhmann’s in formal operational thought may partly arise from their respective interpretation of processes linked with paradox and contradiction in systems theory. For Kegan, post-formal thought approaches objects as a continuum in which opposites are seen as poles of one concept; *it reflects a dialectical approach to the oscillating tension between inclusion and distinctness in meaning-making*. Referencing the work of Gilligan and Murphy (1979) Kegan said:

among the central features of this new way of thinking seems to be a new orientation to contradiction and paradox. Rather than completely threatening the system, or mobilizing the need for resolution at all costs, the contradiction becomes more recognizable as contradiction; the orientation seems to shift to the relationship between poles in a paradox *rather than a choice between the poles* (1982: 229 italics added).

In contrast to this approach (and the above topic on Luhmann’s emphasis about a choice between binary codes such as “law/not law”), the autopoietic theory indicates the coding processes of law/not law “cannot be applied to itself” without the system “running into paradox which bars further observation” (1993: C2/V/7). While this is

legitimately interrelated with concepts explored in Part Three about the system being resistant to learning, and Luhmann sometimes indirectly speaks about the relationship between poles in a paradox, the emphasis in the theory is nonetheless, about the choice between poles through the processes of binary coding (primarily of “law/not law”).¹⁰⁶

Suggesting that this concept is linked with mechanistic thinking (like Teubner, whose views on autopoiesis similarly reflect formal operational thought, and a “logical circularity in mathematically axiomatized structures” (1993: 9-10)), Luhmann’s attention to autopoiesis is also partly built through subjects derived from the field of mathematics. Luhmann takes this as far as saying that “an ontological understanding of the world” *is* “expressed in a binary logic” (1993: C1/111/1).

Chapter Eleven noted that theorists including Hawking (the Lucasian Professor of Mathematics at Cambridge) and Feynman (Nobel laureate for his work in quantum electrodynamics), have gone beyond mathematical formulae to explain how objects operate and evolve. Indeed, Feynman diagrams, used routinely in calculations in physics to describe what occurs when electrons, photons, and other particles interact, were developed “to aid his extraordinary feat of intuition” (1995: xi).

¹⁰⁶ Luhmann links binary codes and paradox with system unity: “The unity of a system in a binary code can be described only as existing in the form of a paradox; operatively, the unity of the system is continually being reproduced but one cannot observe it within the system” (1993: C4/11/163). Also see Luhmann (1993: 4/V/190) for one description of how the “paradox of binary coding” unfolds.

Advocates of the theory might point to the argument that Luhmann speaks about a relaxation of “the unambiguity of the code” but this is for “the purposes of programming” (1993: C4/111/179) which he goes on to argue is “*completed*” by a “guiding distinction” such as between “the right and wrong application of criteria for the allocation of law and non-law” (C4/V1/193). The binary code reigns.

To summarize topics in this chapter and those preceding it, the arguments amount to the theory expressed by Bohm that *reality* is about ‘the relationship between phases of what is – not between what is and what is not’ (1980: 203). This theme is captured in this analysis in $SL=HDLA+D^{SA}$: a theory that suggests rather than one dynamic canceling out the other, as shown through data and analysis of what occurs in the court, they each give rise to the other.

PART THREE

A NEW SYSTEMS MODEL: UNITING SYSTEMS THEORIES WITH COURT DATA ($SL=HDLA+D$)

INTRODUCTION

SYSTEM DEVELOPMENT: A RELATIONSHIP BETWEEN PHASES OF WHAT IS

Introduction

Part Three is pivotal to the relationship between theory and data in this thesis. It is the link between the typology of self-concepts in Parts One and Four; the theoretical analysis in the last section; and system operative structures in Part Five. It is about the relationship between the system of law, human development theory, the autopoietic systems theory of law, and the way in which this relationship arises through data from the dependency court. In mapping a relationship between $SL=HDLA+D$ this section starts to sketch how integrated concepts form a new model about how law operates.

Part Three draws together the life of law and the life of individuals in it. At a theoretical level this argument is supported by van Zandt's view: "the autopoietic idea that the law does have *some* life of its own has a long pedigree in American jurisprudence" (1992: 1747 italics added); and it is added to and builds upon Kegan's view that as stated, "neither the psychological nor the social has priority: meaning-constitutive evolutionary activity gives rise to both" (1982: 215).

At one level of analysis, this section explores data from attorneys and social workers showing how the force for 'system' (individual) change arises in the way professionals experience and respond to the relationship between the individual and the social. This discussion adds to the thesis analysis about what occurs between two competing 'voices' and orientations of meaning-making in 'the system' itself, and it is used later to build on the differences that exist at individual, professional and system levels of operation in law.

At another level of analysis, Part Three begins to integrate the individual/social juxtaposition that emerges from fieldwork court data with the ways in which Kegan and Luhmann particularize the processes by which systems change. Beyond the constructivist epistemologies already used to explain how both systems engage in evolutionary differentiation, this section will demonstrate how the individual and the social are said to change in the same way. While the theorists do not use identical headings, they nonetheless speak to processes about individual and social systems needing to confirm (hold on to), contradict (let go of), and provide continuity (a bridge or anchor) for them to accumulate complexity, change, and thereby continue to exist.

CHAPTER THIRTEEN

SYSTEM CHANGE: AN INTEGRATION OF TWO THEORIES

Children's attorney

I feel that what has contributed significantly to the tension and the friction and the distrust in the system is that you have relatively new agencies that have been created and this has, *in a very dramatic fashion, not a gradual kind of change but in a very dramatic fashion, impacted what were long-standing traditional jobs and responsibilities.*

The change that is happening is neither good nor bad in and of itself, but ... what is needed is: a systems analysis, and goals and plans as to how you educate, as to how you evolve, as to how you grow, as to how you resolve conflict, as to how you communicate information – as to how you share and when you share and don't share. All of those kinds of things [are needed].

*Right now, what happens, it's done, and it's incredible, it's done on an individual basis. And you're talking about hundreds and hundreds of people in DSS, in the Public Defenders and Alternate Public Defenders Office: and yet basically, *the level to which I am successful and the way I resolve problems with other workers, depends entirely on me and the worker.* There is nothing systematic to deal with that ... Rather, it's John X and Sue B has this problem.*

Introduction

This chapter compares data about how ‘the system’ that was studied operates and changes in *practice*, with theories about the way individuals and social systems are *said* to operate and change: these system processes arise as occurring in the same way, and as a result, the chapter shows multiple similarities between Luhmann and Kegan.

The chapter begins with the general changes that have occurred in ‘the system’, and then uses the influence of new legislation to introduce the specific dynamics of system change. The legislation, which was stimulated to reduce a system ‘irritant’, in turn introduced a new irritant. These changes are consistent with the autopoietic theory that a legal irritant “triggers off a set of new and unexpected events” (Nelken 2001: 275). However, the discussion places changes that occurred in ‘the system’ where data suggested they belonged: in the way *people* stimulated new legislation and the way they responded to the irritant that it stirred. In short, the chapter also speaks to differences between Luhmann’s and Kegan’s theories.

System change

The dependency system is highly vulnerable to rapid and significant change. Two factors summarize why: (i) the relative newness of agencies for abused children, and (ii) discord about whether to protect children by taking them from abusive environments or preserving the family. This conflict is often complicated by disputes about whether abuse did occur, or if intervention is or is not needed. In San Diego,

where this study was conducted, The County Board of Supervisors inferred the extent of circuitous debate that has occurred about how the system should manage these competing demands, when it said that “Since 1988 there have been 26 reports, studies and reviews ... [and] *435 recommendations*” (1992: IV:1 italics added). Focusing on the *most* dominant issues, preceding the research for this study individual professionals had undergone changes:

- in the structure of the system, particularly the development of a new legal agency
- in the type of legal responses made with changes to legislation and case law
- in the *constant* implementation of new policy and practice procedures and
- in the development of new roles for the professions of social work and law

As the attorney in the opening quote indicated, the amount, type, and reach of system change created an environment of confusion and distrust. In this culture, when the system was attacked a pendulum swing occurred: it began to *strongly* favor the social differentiation of law as a rational object of logic, one that is distant from, rather than representative of, the ‘inclusion orientation’ embodied in social work. To begin exploring the relationship between these ‘system’ changes and individual meaning making we first turn to how legislation (rationality) backfired that was specially designed to limit the impact of individual differences in the child dependency system.

Official restraints: change and the self-concept typology

Senate bill 243, introduced in Chapter Four on the system self-concept, is an example of a formal attempt to limit differences (and to address irritants or contradictions) that

arise between professionals in ‘the system’. The bill was an attempt to achieve “specificity” and thus strengthen the Welfare and Institutions Code 300. Its authors recognized that “substantial disagreements” existed between professionals in defining child abuse, and criticized the use of individual “value judgments”:

resolution of (these) value conflicts and differences in professional judgment should not be left to individual workers. SB243 reflects the task force’s beliefs that these judgments should be made within the context of clear legislative guidelines (1988: 4).

Data show that Senate bill 243 accentuated (more than limited) individual differences. As the excerpts below from an interview with a judge indicate, this is because, rather than law just reproducing itself, system operations are underpinned by multiple patterns of influence and layers of change processes – which involve change at individual, professional and system levels (explored later in the self-concept typology). The first link between Senate bill 243, or rational operations of law, and these combined change processes, began to arise when a judge answered if his perception of law had changed from when he originally came into the dependency court. Ian said:

Judge

That’s a tough one. As far as the law itself, I’ve always respected it. If you don’t respect the law then you have anarchy by definition ... I think you can respect the law although you can still prod it aggressively to effect change. In fact that’s the only way to broaden the frontiers of law. And that’s what we’re seeing in dependency. We’ve undergone a very grand experiment with Senate bill 243.

Ian shows respect for the law: but virtually in the same breath he indicates the question is tough and mentions prodding the law *aggressively* to effect change. After he discussed the legislation I sought to explore the feelings behind his initial response:

Judge:

Researcher: Before we continue, I don't know if you fully answered the question about how you made meaning about law when you first started here and how you make meaning now. Can you just spend a little time on that? Has it changed?

Respondent: *Every aspect of it has changed.* When I first started I think I was far more idealistic than I am now. Being involved in the bloody wars down here for several years it's a struggle not to become cynical. There are a lot of breaths of fresh air around but I think *the system has become Swiss cheese because we don't have any central philosophy and we're being torn by different philosophical points of view ...* I don't want to sound openly pessimistic ... I still think in the majority of cases we do good work. But *I no longer have the idealism that given these forces we can reunify families.* That's changing, but right now, the last year has been the dark age and hopefully by the beginning of the next year we'll enter a more enlightened period of time.

Ian unwittingly revealed a process of change in his individual self-concept when he said that "every aspect" of how *he* made meaning about law had changed. This change is then linked with a change in his professional self-concept whereby he no longer holds *the forces* of law (could he mean the strict application of legal rules?) as ultimate in the meaning he makes about what the system can achieve. Discourse analysis of the full interview also indicates that changes in Ian's meaning-making are interwoven with the system self-concept. The judge said that Senate bill 243 "became

a road map for severe fragmentation” (a view also implicit in the image of Swiss cheese – a system that has many holes in it). Overall, rather than limit individual influences, the bill accentuated long-standing philosophical “wars” and the system *itself* was torn apart.

Consistent with the logic argued here, the system erupted because changes in the legal system reflect processes of interpretation that are at one and the same time influenced by social factors *and* individual meaning-making (with each giving rise to the other). One of the key ways in which this argument differs from the theory advanced by Luhmann is glimpsed through a comparative analysis of the role said to be played by ‘irritants’ in the evolution of individual and social systems (shown in Chapters 15 and 16 under the more general terms of ‘contradiction’ in constructive developmental theory and ‘perturbations’ in legal autopoiesis).

System change: a typology of self-concepts v. the social

As noted at the introduction to the thesis, Luhmann proposes that 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. When a system has evolved to this stage, instead of being heard as ‘noise’, the irritant has become an impetus for the system to change its practices (Luhmann 1993: C6/111/257-265). To apply these concepts to this study, Luhmann’s theory would explain the development of Senate bill 243 as a reflection of the social system having turned an irritant (the unwanted influence of individual values and conflicts on case decision-making) into something that had meaning for *its* operations: evident in the *system’s* ability to hear

individual values and conflicts and address (limit) this unwanted factor through new legislation.

At a metaphorical level, this analysis also reflects King's perspective that the social system must reconstitute an irritant into information because *it* needs to make sense of the principles being advanced according to *its* own selective way of programming and operating information (King 1997: 25, 91, 207). Indeed, the system operations around the development of Senate bill 243 reflected these exact dynamics when it tried to make sense of (and reduce the noise created by) individual influences through its own programming in legislative action.

Putting metaphorical advantages aside, the findings in this thesis do not comport with King's tenet that campaigns for change "can serve *only* as 'irritants' to social systems" (1997: 25 italics added).¹⁰⁷ However, Kegan's theory about how *self*-systems respond to irritants, such as that suggested in a generic form by the judge in the above excerpts, does provide a glimpse into how 'system' change occurs – through individual meaning making (which is influenced by the social).

¹⁰⁷ What prevents this argument from being adopted in real terms is that there is no accepted scientific way to empirically examine and verify how these processes occur in 'social' systems. Also see Nelken: "social scientists are on stronger ground when they argue that members of the 'law and literature' movement cannot, even if they wanted to, avoid making social scientific assumptions about law" (1996: 120).

System change: the role of the individual and the social

In accord with the various schools of thought that caution against making a sharp distinction between the individual and the social, Kegan indicates that a powerful feature of constructive-developmental theory is that it:

reconceives the whole question of the relationship between the individual and the social by reminding that the distinction is not absolute, that development is intrinsically about the continual settling and resettling of this very distinction (1982: 115).

It has been said in this thesis that the changes Kegan refers to are first about human change which leads to 'system' development and that both arise from meaning-making:

meaning is, in its origins, a physical activity (grasping, seeing), a social activity (it requires another), a survival activity (in doing it, we live). Meaning, understood in this way, is the primary human motion, irreducible. It cannot be divorced from the body, from social experience, or from the very survival of the organism (Kegan 1982: 18).

With this key difference between the two theories in mind we now return to similarities between them. The topics under the following four headings, which are presented below, reflect the point made in Chapter Eight that the integrated theory advanced here is not just constructed by hierarchically placing a theory of law over a theory of development: it is based on the remarkable similarities between Kegan and Luhmann about *how* systems change. Topics from the four headings shown will be

linked with the way meaning is made and evolves in ‘the system’ in the remaining chapters.

<u>Kegan: Individual system change</u>	<u>Luhmann: Legal system change</u>
Ultimacy in meaning-making	Leadership in system observations: meaning
Evolutionary truces	Emergent units
Assimilation and accommodation	Normative closure and cognitive openness
Concepts of limitation and possibility	Concepts of limitation and guidance

Kegan and Luhmann: Ultimacy and Leadership

From a human development perspective, the concept of ultimacy reflects the ever-changing process of individual adaptation, which in the most simple terms suggests a new level of meaning making has been achieved *from* the earlier level. “[W]e are ‘hatched out’- but over and over again” (Kegan 1982: 85). Ultimacy reflects a process:

in which the whole becomes a part to a new whole; in which what was structure becomes content on behalf of a new structure; in which what was ultimate becomes preliminary on behalf of a new ultimacy; in which what was immediate gets mediated by a new immediacy. All of these descriptions speak to the same process, which is essentially that of adaptation, a differentiation from that which was the very subject of my personal organization and which becomes thereby the object of a new organization on behalf of a new subjectivity that coordinates it (Kegan 1982: 85).

Luhmann describes a similar process about the evolution of meaning-making in law. He said: “*the system* gains the freedom to change ‘leadership’ in what it refers to for

guiding its own (and always only its own) operations”. Reflecting human development theory, Luhmann goes on to write that “the [legal] system can oscillate between internal reference and external reference without ever having to step outside its boundaries”: and this contributes to the way “past and future facts can be attributed with present meaning” (Luhmann 1993: C2/V1/16 italics added). Overall, these topics speak to the way law is ‘hatched out’ over and over again, and what was structure becomes content on behalf of a new structure.

Kegan and Luhmann: Evolutionary truces and Emergent units

Luhmann places the evolution of ‘past and future facts to present meanings’ as occurring in a context of ‘*emergent units*’. This term expresses the concept that there are stages of containment in the type of meaning that is made within the system of law; it mirrors the concept of ‘*evolutionary truces*’ in constructive-developmental theory – which is more commonly known as stages of development. Evolutionary truces also incorporate a person’s need for stable boundaries of selection, from within which they can choose what belongs to their system of meaning and what does not.

To explain why selection processes are demanded: a person cannot consider everything that exists – *and* they cannot cut themselves off from exchange with society. Kegan said when a “person has largely cut himself or herself off *from the informing complexity* which nourishes development” they have cut themselves off from interactions *with* their environment (1982: 170 italics added): which can stunt development and lead to mental health problems. A person’s constantly evolving ability to balance what they have selected to exist (based on assimilation, introduced

below) with not being cut off from their environment (based on accommodation, also introduced below), is reflected in their movement from one evolutionary truce of meaning-making to another (developmental stage) (Kegan: 1982: 28, 44).

Each evolutionary truce represents different ways of how information is internally processed or, how a *reduction in complexity* is achieved in order to reach more sophisticated levels of meaning-making. Luhmann explains exactly the same thing:

We can only talk of autopoiesis and operative closure if the operations which reproduce each other – and so the system – show certain characteristics. They form *emergent units* which can only come about through the operative closure of the system; and they achieve as such units an *independent reduction of complexity* – both of the environment of the system and of the system [itself]. The fact of the performance alone requires that not everything that exists can be considered; the selective, but operative coupling and the recursive network of the autopoietic reproduction are substitutes for such a complete correspondence of relations between the system and its environment (Luhmann 1993: C2/11/12 italics original; also see C/111/8).

In order to understand *how* the concepts identified operate in psycho-social and socio-legal theories, parallels are drawn between concepts about normative closure and cognitive opening in law, and assimilation and accommodation in psychology. The parallels that arise form part of the SL=HDLA+D integration made in Table Three which sketches how inanimate and animate systems change as one system.

Normatively closed/cognitively open: Assimilation/accommodation

Luhmann uses the concept of *normative closure* to help explain that law is an anchor to itself. Conversely, he uses the concept of *cognitive opening* to help explain that law learns from its environment. Both concepts were first proposed by Ashby in the view that “the legal system is open to cognitive information but closed to normative control” (Luhmann 1986: 113). Luhmann attempts to build this concept and suggests that:

the norm quality serves the autopoiesis of the system, its self-continuation in difference [from] the environment. The cognitive quality serves the coordination of this process with the system’s environment (In Evans 1990: 42).

Reflecting the same interwoven relationship between assimilation and accommodation processes in human development, Luhmann said that normative closure and cognitive openness represent reciprocal conditions: one does not exclude but complements the other. Before taking this theory further it may help to flag an issue that has led some theorists to reject the concepts now being explored. Jacobson, for example, said:

Luhmann’s definition ... deprives legal norms of any reference to real individuals. Luhmann dumps everything that is real about individuals into the cognitive part of the legal system, the exact part that is not autopoietically closed, according to Luhmann’s formula (1989: 1652).

Without confounding the key concern in this work about the role allocated to people in legal autopoiesis, this analysis did not support the above explication: the normative and cognitive aspects of Luhmann’s theory are both part of an operatively closed

system. Equally contentious is Luhmann's tenet that cognitive opening is more important to a system than normative closure: he equates the cognitive component of operations with system learning, such as new legislation; and the normative component as facilitating a stability of expectations. The way these two concepts explain how a system operates is best seen in topics about 'self-reference' and 'other-reference' and the theory of assimilation and accommodation in psychology.

The role of normative closure in law and assimilation in human development

In human development "assimilation" (or what Freud called the pleasure principle) is like an anchor: it involves meaning-making operations that *refer back to themselves*, thereby allowing a person (defined earlier by Kegan as defended differentiation) to try to resolve a problem without having to completely reorganize their own system of meaning that is made (Kegan 1982: 41). HD+LA start to be seen to change as one system when Luhmann proposes the same concept through "*differentiation and self-reference*" in law, which he bases on normative closure.

Like assimilation in human development, law is said to be closed to normative definitions from external sources; it differentiates itself as a system by referring to itself to determine law. A key role for normative closure in the system of law is to make it "resistant to learning". As established, this aspect of operations is needed because, just as a person cannot absorb everything from their environment, the legal system must similarly protect itself from an excess of information: hence the 'legal personality'.

Chapters Three to Eight above indicated that the information law is resistant to incorporate into its system of meaning-making (seen as what law is differentiated from), can revolve around emotions and intuitive or common-sense impressions. Normative closure facilitates this exclusion, and other forms of differentiation, thus – like assimilation in human development – ensuring that the system does not have to reorganize itself every time it is pressured to change. The way these theories merge with data findings, the way they allow a stability of expectations in law, are suggested in events in San Diego.

The operative structures of the system (Part Five) shows how the normative closure of law (at a metaphorical level) and the processes of individual assimilation operated when special-interest groups pressured ‘the system’. The law did not instantly change because the normative closure of law *and* assimilation in individuals meant that people followed the system rule of defining law by referring to law. This operation contrasted with the DSS:CSB which, as suggested earlier, rather than being normatively closed in a strict sense of the concept, is normatively pervious. Use of the term pervious means open to both reason *and* feeling: and it captures the fluid role of the human services system in child abuse cases and its susceptibility to normative change (how it defines ‘abuse’); such that the legal system is structured to control with normative closure.

The role of cognitive openness in law and accommodation in human development

Once again, like human development theory, Luhmann bases the ability of law to learn from its environment on system operations of “*differentiation and other-reference*”: processes said to be achieved through cognitive openness. This reflects the concept of accommodation (or what Freud called the reality principle (see Kegan 1982)). A person learns and grows by accommodating new information from their environment with what they have already assimilated (Kegan 1982: 44). Luhmann (unwittingly?) reinforces transferring the concept of assimilation *and* accommodation to law by proposing that “law-related communications have, as operations of the legal system, always a double function as factors for production and as preservers of structure”. This link is punctuated by the view: “all repetitions are a matter of the artificial fixation of structure [assimilation]. And they are historical in the further sense that they owe their structures to the sequence of their operating” (Luhmann 1993: C2/11/8): operations it is argued here, that involve the realizations of meaningful options through individual (and system) accommodation.

The juxtaposition between these individual and social system operations begs the question: if both systems are in effect assimilating and accommodating information – or being resistant to learning and yet not closed off from adapting to their environment – how do they balance these processes? How are self-other observations controlled?

Striking a balance: Limitation and Possibility or Limitation and Guidance

In constructive-developmental theory the operations of *limit and possibility* help to stabilize and encourage processes of assimilation and accommodation. In autopoiesis these same operations permeate Luhmann's description of the theory in the themes of *limit and guidance*. Just as in human development, operations of limitation and guidance in law similarly help to stabilize and encourage processes of normative closure and cognitive opening.¹⁰⁸ Again, both theories speak to the same dynamics. Kegan indicates: if people were "all assimilation or all accommodation", development would not take place. Luhmann similarly indicates that a system cannot operate if it is all normative or all cognitive.¹⁰⁹

Kegan relates his views about these dynamics to Holmes' (1974) position that *preserving and transforming the system* involves "a dialectic of limit and possibility" – and proposes that: "were we 'all limit' (all 'assimilation'), there would be no hope; 'all possibility' (all 'accommodation'), no need for it" (1982: 45). Kegan's position is linked to "adaptation theory" from evolutionary biology; a theory which Luhmann also uses to detail how law adapts to the demands of its environment on its own terms, within the parameters provided by the processes of limit and guidance. When these aspects of social and individual theories are superimposed one could say that the legal system cannot be completely resistant to learning: it cannot be all normative (system

¹⁰⁸ Luhmann also contrasts how a "self-referential norm can be specified" with the "principle of limitationality in the science system" (C5/11/205). Also see Luhmann's views about *how* the program "which is limited by coding completes the guiding distinction of the system"; which the theorist again brings back to his focus on binary coding, in this case – "right and wrong applications" (C4/VI/193).

¹⁰⁹ See eg Luhmann (1993: C3/11; C3/111); also see other topics where Luhmann discusses how "the contrafactual structure of normativity" still does not guarantee that "all expectations will be met. One has to resort to compensations for non-fulfillment, above all to punishment and penalties" (C2/X/5-6).

defense or assimilation through *total* limitation); nor can it be all cognitive (system learning or accommodation through *total* possibility). In short, it changes the same way as people change.

Two final ‘system operations’ warrant *mention* under this heading. The first recognizes that Kegan and Luhmann both address the concept of “reflexivity”.¹¹⁰ The second concept – about inputs and outputs (which is interrelated with the role of reflexivity) – is used in legal autopoiesis to explain processes by which normative expectations and closure are established and maintained. Just as processes of assimilation and accommodation stimulate an ongoing system exchange in people, Luhmann said that “the input/output models allow for systems to use their outputs as inputs”. Continuing the theme of human development theory Luhmann went on to say “the later development of the theory ‘internalizes’ this feed-back and declares it as necessary” (1993: C2/11/1).¹¹¹

Superimposing one theory on the other and vice versa

The key processes Luhmann has chosen to build his theory of legal autopoiesis mirrors those associated with human development, as seen when his themes are used to explain how people evolve. Using Luhmann’s language: people engage in self-

¹¹⁰ See, for example Kegan (1982: 30-32; 82-84, 179) and Luhmann (1993: C3/111/133-136) where they respectively emphasize that processes of reflexivity underpin the effective operations of assimilation and accommodation and normative and cognitive expectations.

¹¹¹ An example from autism helps to show how poorly functioning input/output processes can prevent a system from operating effectively. Some people with autism “deal with input purely in terms of an unclassified immediate memory system”. Reflecting the need for the system processes shown in this work, this faulty modulation occurs because the disorder “affects those underlying processes which are necessary for the development of representational and symbolic systems” (Hermelin 1978: 153).

reference and other-reference to transform information in a process of inputs to outputs and vice versa. As they cannot absorb everything from their environment they must be resistant to learning: they must be normatively closed. But to survive, they must learn from exchange with their environment, therefore they must remain cognitively open. These processes rely on a stable base or plateau that facilitates the evolution of an informing complexity. This stable base, seen in emergent units, allows the selective realizations of meaningful options – where leadership is given to different forms of meaning (or new levels of complexity) – as a person evolves. These combined operations are integral for people to remain differentiated from other systems.

In contrast, if Kegan's language is applied to explain the autopoietic theory of law, it might read: Law needs an anchor from which meaning is made so that it can test (assimilate) new information and develop legal theories. At the same time, consistent with the concept of subject-object relations, or self-other exchange, the system must accommodate information from its environment by assessing the implications of the new meanings that it develops. Significant changes to the way it makes meaning – and its ability to perform increasingly more complex operations – reflect the development of evolutionary truces. Overall, these operations mean that law is continuously engaged in processes: of defending its system, so that it is not continuously reorganizing itself; and of accommodation, so that it continues to reflect developments that occur in society. These processes facilitate the evolution of law and its normative structure as a distinct, self-preserving and self-transforming system.

To conclude, what can we learn from the multiple levels of overlap between Kegan's and Luhmann's theories about how people and law evolve? Clearly there is much more to study than can ever be properly analyzed in one thesis. What has been sketched, however, is the early development of processes in which the social and the individual can be seen to change in the same way. The next three chapters continue to build on these linkages, between the knower and the known and the way in which the individual and the social change. Chapter 14 returns to fieldwork data, focusing on differences between the two professions and how those who work in the court *experience* 'system' operations and change. Chapters 15 and 16 will then connect the experiences that social workers, attorneys and judges reported in this study with the theories about how systems change.

CHAPTER FOURTEEN

PROFESSIONAL SELF-CONCEPTS

FOR

ATTORNEYS AND SOCIAL WORKERS:

THE FORCES BEHIND CHANGE

Social worker

The attorney's perspective is: How can I protect my client? *What has my client done right?* And what's the limit here to which they need to be punished? And is the department going overboard? *What can the department really prove* and what do they only suspect? And, yeah, well, *the kid's got a broken leg but can they prove that the parent did it?* ... That kind of process is going on!

Parents' attorney

Historically they haven't been sending children home to marginal parents. *They haven't even been sending children home to parents that have done everything, they're perfect:* [and DSS still wants to separate them from their children].

Introduction

Just as the last chapter started to weave ‘system’ change and a judge’s experiences with the self-concept typology, this chapter continues to build the competing forces behind ‘system’ change: it is about the people who operate law. Data are linked with Luhmann’s theory, but the chapter represents a significant shift in analysis about how systems operate and change; it looks at the impact of difference in ‘the system’ through the histories and voices of social work and law. Using terms in this study, the chapter is about professional self-concepts and their impact on how ‘the system’ operates.¹¹²

Attention to these topics also means that the analysis in this chapter moves into a very different aspect of Kegan’s constructive-developmental theory. As mentioned, Kegan’s theory was found to not only speak to the juxtaposition between the individual and the social, *but also* the different voices (and meaning-making) that arose between each discipline. This chapter integrates Kegan’s theory about different voices with data gathered from three of the four analytical constructs in the study: roles, power and justice. (The fourth analytical construct, communications and relationships, is reviewed in Chapter Twenty-one.) The links that are drawn pay particular attention to the ways in which an ‘exclusionary’ approach to the treatment of difference, such as that seen in law, leaves “the least powerful in the hierarchy of influence” with the responsibility to adapt and change to another’s form of meaning (Kegan 1994: 209).

¹¹² First introduced in Chapters Four, Six and Seven.

Importantly, the meaning making themes of independence in law and interpersonal mutuality in social work are conceptual tools, first to draw boundaries around the two professions, and later in Part Five, between the systems in which they operate: they only help to assemble the distinctions found, and are not definitive in their explanatory power about all the factors to influence decision-making. The main goal is to strengthen analysis into how it is possible that people have diametrically opposing views about how the dependency court operates (in the process, the analysis speaks to SL=HDLA+D). An excerpt from an interview with a judge suggests the type of difference explored:

Judge

Social workers probably feel that the law is a meddlesome entity in this area and certainly the law was written by individuals who don't have the background that social workers *perceive is needed* ... The court is law oriented, not social work oriented.

In generic terms, data and theory from each discipline suggest that different professional self-concepts about how 'the system' operates pivot on: different reasons for intervention and strategies of response in cases; different ideological views; and different styles of communication and problem-solving skills. Parts One and Four suggest that different self-concepts evolve from different:

- philosophical commitments and professional status
- knowledge bases and training methods
- work settings and bureaucratic structures
- role definitions and relationships with clients
- access to resources and case-load pressures

Overall, data and theory show that the main impact of the differences between law and social work is that the institutional operations of law enslave the practices and language of social work (King 1991): a discipline whose contribution is vital to our understanding of children’s experiences in abusive homes. Associated with this, it is instructive to outline key differences in the voices that emerged from each discipline.

Table Two

The first section of Table Two is about how people perceive *their own* profession; the second is about how they perceive *the other* profession. Importantly, building on the individual/social juxtaposition, the meanings made by each discipline reflect feelings and cognitions; which involves an interrelationship with the social system of law.¹¹³

KEY ASPECTS:

HOW PROFESSIONS PERCEIVE **THEIR OWN** PROFESSION

	<u>SOCIAL WORK (S.W.)</u>	<u>LAW</u>
Dominant perspective of professional in role	Caretaker of people; focused on children	Committed to system, operations and their client
Dominant perspective of profession on justice protecting	Social justice; interested in protecting people (mostly children) through quality parenting and abuse intervention	Legal justice; interested in people (mostly adults) through attention to due process
Dominant perspective of hierarchical position	Bottom of the hierarchy	Top of the hierarchy
Dominant perspective of profession on professional responsibility	Protect children; ensure children’s needs are represented	Uphold the law; ensure clients’ rights are represented
Dominant perspective of hierarchical position	Bottom of the hierarchy	Top of the hierarchy
Dominant perspective of profession on professional responsibility	Protect children; ensure children’s needs are represented	Uphold the law; ensure clients’ rights are represented

¹¹³ This table was built when conducting interviews with professionals in the court system, before Kegan’s theory on institutional and interpersonal forms of meaning making was applied to this thesis.

KEY ASPECTS:

HOW EACH PROFESSION PERCEIVES THE OTHER PROFESSION

	<u>S.W. VIEW OF LAW</u>	<u>LAW VIEW OF S.W.</u>
Dominant concern about ethics of the other profession	Protect own professional image and the need to win even at cost to child	Protect own personal desire to help a child even at a cost of family life
Dominant concern on expertise of the other profession	Decisions guided by inappropriate rules; untrained in child abuse; legal rules prevent seeing the full picture	Decisions guided by inappropriate emotions; untrained in legal matters; personal biases prevent seeing the full picture
Dominant perspective of profession on who has the most power	Held by lawyers through control of legal proceedings via their position	Held by social workers through control of legal proceedings via their reports
Dominant concern about personality profile of the other profession	Insensitive, detached; over-zealous; politically oriented; power seekers	Over-sensitive, attached; bleeding hearts; agenda oriented; punitive accusers
Dominant concern about the reputation of the other profession	Righteous about professional responsibility; governed by legal dictates	Restricted view about professional responsibility; governed by personal values

Differences: at cursory and core levels of operation

As well as showing professional differences, the table also reflects historic differences between the male-dominated work world, which Kegan characterizes as having an ‘objective decontextualized’ (or in this thesis, institutional) form of communication; and the female-dominated (or interpersonal) voice, which he characterizes as a style of ‘personalized narration’. Kegan said that when both are in the same setting, those with the latter style become “keenly aware that how they are speaking is seen as ‘wrong’ ”; and they soon stop speaking, or stop speaking in their own voice (Kegan 1994: 209).

Resembling data findings about operations in the court, the author described that those who become silent can be viewed as angry or as knowing nothing, and those who try to speak in what they think is ‘the proper mode’ (which in effect they have

learned from a foreign language), can be viewed as being constricted or calculating. These topics also indirectly speak to the point explored later, that when *self*-systems enhance their development by generating their own internalized version of reality, this same process also involves operations that limit a person's ability to change, forcing them to reduce information that does not have meaning (irritants) to the status of 'noise'. For now however, it is noted that the impact of these different styles goes both ways:

Each sees the other as in some way avoiding or too indirectly engaging the task at hand. These are fascinating but costly attributions, since they are so likely to be wrong and to lead to an ongoing succession of subtle and overtly unpleasant actions and reactions, resulting in a highly complex tangle of chronically impaired communications (Kegan 1994: 213).

The rest of this chapter explores fieldwork data that illustrate these exact dynamics in the dependency court system. It informs us about the voices (and ways of making meaning) that characterize 'system' operations and conversations for change about the operations performed. To address these points, at one and the same time the chapter revisits some of the distinctions made in Chapters Six and Seven on the professional self-concepts of law and social work, and it foreshadows topics explored in Part Four.

Competing professional self-concepts: Roles

Children's attorney

Attorneys focus on rules passed by the legislature, and on decisions of the higher courts ... The perception of the attorney is ... my whole time in this case will be spent learning facts which I can apply to the law or learning law which I can apply to the facts so that I can come to the right legal conclusion. The social worker will be trying to use social worker skills and life experience to get a feeling for the family dynamics, and to the social worker those become facts. These two things have little in common with each other. The fact is this is a dysfunctional family. But to a lawyer that's not a fact, that's a conclusion. And that conclusion of dysfunction could only be reached by the proof of facts.

Because “the border line between social work hypothesis and fact is often tenuous” (Kadushin 1962: 48), the role of social work is vulnerable to criticism in the legal system. As shown, the science of law metaphorically supports Luhmann’s analysis that the legal system can only recognize external facts “as internally produced information” (1993: C2/VI/9). Law’s approach to logic, such as Aristotle’s “utmost attention to precision of language” (Lukasiewicz 1957: 15), and its rigid reliance on text, are pivotal to this process. While social work is adapting to law (King 1997) rather than enshrine precision in language, the profession (which initially shunned science (Reamer 1993: 122)) has mostly operated in an “oral culture” (Sibeon 1991: 64), which emphasized “mutual adaptation” (Fischer 1981: 542) and the ability to engage in “reciprocally reflective dialogue” (Schon 1987: 40).

Social work: In search of Voice

The impact of social work history and practices, and the interpersonal nature of the work, has increased the struggle within the profession to be recognized as experts. In particular, questions have been raised about the sustainability of their claims to

having professional status without there being “an identifiable, distinctive formal written knowledge base” (Sibeon 1991: 69). In this study, questions about the professional status of social workers arose in data from attorneys showing a clear lack of respect for the discipline and a tentative approach to their ability to make decisions in cases. As a representative from social work has suggested, this dynamic is compounded by the fact that they are not accepted in the court:

Social worker

The attorney *can interrupt or can interject anything that they want to* during court proceedings. The social worker is usually *shuffled off aside if they're there at all*, and not allowed, not encouraged, to participate in the process because it's a “legal” process.

The relevance of this experience to how the system operates is explained by Kegan's theory: it explains the impact of being in a system where decontextualized voices, such as those found in law, dominate the voice of mutuality often found in social work:

Stylistic differences become matters of power and influence, when one style is granted ‘home court advantage’ and those who prefer a different style are seen, and come to see themselves, as ‘visitors’ (1994: 214).

Although social work has a legislated role in the dependency court, thus suggesting that they are not ‘visitors’, and ‘home court advantage’ is imperative for law to achieve its differentiation, it remains that attorneys are seen as powerful and social workers feel shuffled aside in “legal” operations. To explain the clash between these

differences we return to Kegan and see how the dynamics identified in his theory apply to this study:

If the work place (or the academy) is one that advantages a particular style and that style is more closely associated with men [read law], then women [read social work], no matter how vigorously recruited [such as through legislative changes] or warmly received [such as by legal professionals who recognize the need for case input from social workers], will remain visitors where they work (1994: 214).

The next quote captures the extent to which the decontextualized (institutional) voice of attorneys, who work to achieve law's differentiation, impacts on those whose voice (or meaning-making) is excluded by the system, leaving them as visitors to the court.

Social worker

I've seen it where, I've been in court and an attorney stood up and said: Well, I know for a fact, your honor ... And then like, *I'm sitting right there; talk to me. What am I? Chopped liver? Talk to me. I'm sitting right there.* Why do you get up and tell the judge ... I think it's not good. It's not professional.

As well as reflecting the reality of social work in the court, this experience suggests how overtly unpleasant actions and reactions can develop that lead to what Kegan called a highly complex tangle of chronically impaired communications. A topic that helps to show how this complex tangle of interactions evolves in the system – thereby expanding on how 'the system' operates – is social work training. Although it was not on the research instrument, several social workers said they were *taught* to distrust attorneys: this influences their interpretations and interactions about cases:

Social worker

Some social workers do not take time to know the attorneys, and to look at them as someone who can help facilitate the course of least resistance on the case. *When we were trained the social worker said: don't talk to your attorneys, don't trust them.* The trainer basically *set up the department policy* that has since come back to us toward this adversarial process.

I think the trainer recognizes that these attorneys, that you're around them all the time, and are willing to kind of maneuver things and resented it ... the trainer then took it one step further and said: *these guys are slick operators*, you've got to be wary of them. Well yes, they're slick operators but *so are social workers.*

Some of the other differences in data between the professions continue to expose the dynamics that lead to this type of breakdown where suspicion and negative attributions abound. They also provide a context from which to explore the *intricate* connections that arise between different social systems (settings) and differences between people.

Roles, Rights and Caring: the independent and the interpersonal

Each discipline described their role in 'the system' differently: attorneys focused on rights and rules and social workers on the more ambiguous elements of being human. First, data revealed that lawyers used the power of the law to explain and justify their decisions and actions, especially those actions that caused social workers most alarm.

Parents' attorney

The attorney's role is to ensure your client has *all the rights, statutory and constitutional rights available to them* as far as they understand them. Their right to a trial, their right to due process, all those kind of things are important ... *The role of the attorney is not to protect children*, the role of the attorney is to represent the attorney's client. So *even if the client's wishes are not in the benefit of the child, the attorney has to represent his client.*

When attorneys rely on the law in this way, they have a solid base from which to 'hold' their decisions, regardless of how controversial they are. In contrast, social work interviews indicated that instead of using the sanction given to them by law, many were tentatively grounded in a variety of subjects, and when faced with (legal) adversity it was reported that many became intimidated. Chapters 17 to 21 show the impact of intimidation and begin to show how the professional self-concept of social work can include meaning-making derived from what *others think*. These chapters will also outline how some social workers changed with 'system' pressure: that is, some have reconstituted what was once noise into meaningful information.

For now, fieldwork data about roles such as how each profession described the role of the other, showed that what social workers said attorneys did, mirrored attorney data: but attorneys were not as accurate about the role of the other discipline. Social workers saw themselves as investigators (without supporting this description with recognition of their legal mandate) but most attorneys said that social workers were 'service providers'. One attorney captured the perceived interpersonal nature of social work when he said their role was to "give a family encouragement".

These different perceptions are interwoven with the finding that both disciplines were tacitly influenced not so much by what a person's role is but by what they thought it should be. It is argued here that in the cycle of chronically impaired communications introduced earlier, this dynamic contributed to attorneys thinking that social workers avoided the *real* task: engagement in legal processes, and to social workers thinking attorneys were not interested in the *most* important task at hand: children's safety. One example from social work (which overlaps with the topic of power) is seen in the way the profession recognizes what the role of the attorney is, but consistent with their interpersonal focus, they struggle to accept how an attorney can successfully represent their client regardless of the attorney's own personal views on the matter.

Social worker

I don't think social workers act out of their own bias. My quarrel with attorneys and how they respond is that they're going to represent the client *whether they believe in the client or not* and sometimes they are defending people who are pretty difficult to defend and they can do an *extremely good job* ... they'll do their job *to the best of their ability* whether they agree or not.

This brings us back to the opening point: when social workers attempt to advance concerns that children are not protected, they are hampered by their lack of authority in the court.

Rights and caring: at the bench

Data and theory explored in this thesis suggest that a lack of social work authority has evolved in part through their voice of caring, *and* their use of feeling rather than law as a tool for case analysis. The way that many attorneys make meaning – as people more interested in regulating than sharing values – means that when they interpret the voices (practices) that represent interpersonal observations, it can boost *their* opinion that social workers “don’t know what they’re doing”. This feeds the view that social workers cannot meet the demands of legal practice; and in turn it fosters law’s need for an exclusionary approach to the treatment of difference in the court. These dynamics appear to underpin ‘system’ operations, the basis of which is clear in the next excerpt where a judge shows how he observes law and social work. It reflects the hierarchy between disciplines, and the framework of institutional and interpersonal operations.

Judge

There are a lot of competing principles ... Parents’ attorneys will look at these actions as a **legal** construct, and being trained to be attorneys they will zealously represent their clients *no matter* what the positions are; they will fight and scrap because they sense that they’re **obligated** to do that. That’s their perspective. Very often, social workers **feel** that they know what is best in a particular situation ... *and historically the court has been seen kind of as a nuisance*. They have to accommodate the court. But they usually **don’t know what they’re doing** so very often the social worker, *instead of accurately and fairly representing the facts* and putting the burden on the court’s shoulders, where the burden ought to be, they want to make a decision as to what happens in a particular case. So *facts* may be *bent*, perspectives may be slanted. (italics and bolding added)

Without dismissing the truth of this view, it may be influenced by the generic factors indicated by Kegan: ‘objective’ voices (law) and ‘experiential’ voices (social work) make highly costly attributions about each other’s responses in the work setting – and each thinks the other is not ‘taking the work seriously, and engaging it directly’ (1994: 213). While this type of attribution largely arises because the historical memory of each discipline ensures professionals select and maintain an internalized version of reality that reflects and perpetuates the discipline they represent, the next topic continues to explain the dynamics that arose in fieldwork interviews shown to contribute to each profession seeing the other as not engaging the task at hand.

Power differences between the professions

Chapter Two introduced the attorney perspective that social workers were poorly trained to operate in the court, and this hindered their ability to remain objective. In contrast, social workers said attorneys were not trained for child abuse work and this hindered their understanding of child development and family (case) dynamics. These influences were compounded by the way the system was seen to accord power. Attorneys said the court weighed on the side of child protection (social work) because it could “*breach the hearsay rule*”. This was seen to give social workers more power than attorneys felt they had in cases. However, one female judge validated social workers’ views about attorneys having the bulk of ‘system’ power. It emerged as attorneys not doing what they ‘should’ do.

Judge

DSS sends a letter: Your client is not in compliance with the reunification plan. I would say by far the *minority* of attorneys follow up on that letter ... *So the tool that the social worker was giving to the attorneys to use the power was not being acted on.* So I think the social workers are resentful because they see the power that's exerted right at the hearing times, and the judge makes the decision which they think is done without the proper background and knowledge.

Disputes of this nature arise at formal and informal levels in court operations. In particular, given the crucial role of informal negotiations in case proceedings – such that “the system would disintegrate without them” – the theoretical issues raised in this chapter about impaired communications between different voices strengthens the need to understand how the observations that people make lead to successful or fractious relationships in the court.¹¹⁴

The need to understand the nature of these combined dynamics is also elevated by the correlation between data gathered in this study and literature showing that those concerned with appearing to be fair “refrain from exploiting the power advantage” but, if relationships are negative “advantageous inequality becomes most preferable” (Tripp 1993: 19-22). Having said this, it is highly relevant to the argument that has evolved in this research that any claim about the advantageous use of inequality is linked with how individuals interpret (or make meaning about) cases in the system.

¹¹⁴ The salience of this distinct aspect of ‘system’ operations was identified in Chapter Eight such that the type of relationships professionals share not only impacts the likelihood of informal negotiations occurring in the court but also the outcome of a case.

To illustrate the individual nature of perceptions evident in fieldwork data, the interpersonal voice of social workers – which is explained in Part Four as often reflecting the golden rule ‘do unto others’ – hears the ability of an attorney to act in ways that can place a child ‘at risk’ as an abuse of power. I watched an example of how this manifests, when a judge found in favor of (abusive) parents in a case and ruled that their child be returned home. The attorney for the parents had argued forcefully, with much legal rhetoric about the US Constitution, for this *exact* finding; but he was stunned by the decision.

When the judge left the court the attorney made a spontaneous comment that shows a difference between his professional role and his personal belief about what should have occurred. He said in a state of shock to the opposing attorney: “*I didn’t want that to happen*”. Social workers point to events of this nature – where children are thought to be put in harm’s way – and disrespect the attorney. Chapters Seventeen to Twenty Two explore the dynamics behind this type of attribution and its impact.

The influence of difference: change

The next excerpt reminds readers that while collecting data ‘the system’ changed extensively; and in response to media attacks the rights/caring dichotomy moved. Some social workers began overemphasizing rules, and some children’s attorneys became emotionally involved in cases. Like other points here, its relevance is that ‘system’ change arose in changes at an individual level – that is, in the way *people* operated law.

Social worker

I think that social workers too, sometimes get accused of just going by *the rules* [especially] now as we're sort of shifting back into making sure we're protecting the rights of parents. Sometimes the minors' attorneys get *emotionally invested in their children* and have difficulty seeing it like the parents. So it goes both ways but there is some truth in it too.

Rather than highlight another point of difference, the next excerpt dissipates one. It is important as it suggests that differences between the meaning made in the systems of law and social welfare should not be assessed around the commonly argued (media) point that social workers are so child-oriented that they do not respect the family.

Social worker

I know a lot of workers ... were very offended at this notion that the department had been just tossing aside the rights of parents and just removing kids willy nilly ... And *I think that the truth was more that the system didn't support there being a lot of services* to be able to put in the home – to be able to protect the children as an option instead of just removing them.

This excerpt reflects data where many social workers were trying to protect children however they could in 'the system'. The views also indirectly suggest that they feel less powerful to overcome criticism than attorneys. The next chapter – which includes a methodological update – provides a conceptual tool to examine how these and other dynamics explored contribute to the juxtaposition that exists between individual and social system change: which are both incorporated into references to 'the system'.

The chapter explores how the meaning-making that characterizes a system as a system involves both an 'adaptive and an eternal conversation': it is reflected in a process of communications that occur in a series of 'holding environments', and which include system change processes of 'confirmation', 'contradiction' and 'continuity'. In short, the chapter brings us back to Kegan and Luhmann and their analysis of how individual and social systems change. The main point of returning to this topic is that it helps to eventually show how system theories illuminate the processes of professional and 'system' change. It strengthens the associations between SL=HDLA+D through the relationship that exists between data from the court and system theories that explain the dynamics captured.

CHAPTER FIFTEEN

THE CYCLE OF SYSTEM CHANGE (PART ONE)

Introduction

This chapter is mainly theoretical: it continues to show how mechanistic and organistic systems change in the same way, and simultaneously lends weight to the theoretical argument that individual and social systems each give rise to the other. It begins with the concept of embeddedness cultures (or holding environments): the ground from which individual and social systems evolve, and after linking this with data, reviews how, in order to evolve, both systems require the processes of confirmation, contradiction, and continuity. To this end, the chapter preempts the creation of Table Three in Chapter Sixteen, which sketches an integration of HD+LA with court data.

Methodological strengths and limitations

In an endeavor to make the material in this and following chapters as accessible as possible to as many as possible, rather than continuing with an in-depth critique of Luhmann and Kegan, the remainder of this section unfolds as a direct comparative analysis between matching concepts in theories about how individuals and social systems operate and evolve. In short, rather than contrasting differences, I now only (briefly) identify aspects of Luhmann's and Kegan's theories that are similar: a weakness in theoretical construction done in the name of being understood; and not losing readers in what could be a thesis twice the size that it is. Having said this, I think the cumulative effect of the striking similarities between Kegan and Luhmann is a theoretical strength of the analysis.

Some explanation is also warranted about the structure of the thesis – and the constant weaving process between two often competing professions and two broadly similar yet intrinsically different theories. At the outset I had hoped to present like material with like material (thus simplifying what quickly becomes a complex topic). However, the impact of this structural approach would be akin to: conducting research into a dysfunctional family, claiming to identify how the family operates as ‘a unit’, and then explaining the family system by placing its members in separate homes, ordered by age, gender or addiction: one might say as if living separate – not enmeshed lives.

The hard truth is that in order to explain, build and integrate the multiple pieces of disparate information in this *interdisciplinary* thesis – *and stay as close to reality as possible to analysis about a highly contentious court system and two complex theories* – it has been and remains necessary to move back and forth, weaving: contradictory data; theories; analysis; themes; points of dissonance; amalgamation; and discussion. The progression of empirical and theoretical synthesis that unfolds is at an exploratory stage of analysis – and it is done for the purpose of future research.

The purpose of holding environments: for individuals and law

Human development (system development) relies on an eternal conversation which occurs “in the context of the established relationship struck between the organism and the world” (Kegan 1982: 44). For this conversation or exchange to occur, there must be a ‘holding’ that takes place: and it must be done in a way so the *holding* remains in place for a system to process its operations (1982: 17). What is known as holding

environments (or cultures of embeddedness) serve the primary function of holding the ‘meaning’ system in place. Embeddedness cultures range from our immediate and extended family, to work, education or community settings. Kegan noted that:

[T]here is not one holding environment early in life, but a succession of holding environments, a life history of cultures of embeddedness. They are the psycho-social environments which hold us (with which we are fused) and which let go of us (from which we differentiate) (1982: 116).

In this thesis the holding environment for the experiential or process-oriented voice of social work is the DSS:CSB; for the often decontextualized or product-oriented voice of attorneys it is the legal agencies that are linked with the court. Both settings are the place where professionals find confirmation for the meanings their disciplines make. In Chapter 16 it will be shown that the dependency court can help to keep these different ‘meaning’ systems in place, while competing court decisions can also make it a holding environment where both professions must confront significant demand for change.

The use of these concepts in this research is supported beyond Kegan’s theory that holding environments operate concurrently within the larger social structure, with Luhmann (C2/111/5) similarly arguing: “the law remains embedded in general social arrangements [and] remains dependent on structures which also serve other functions”.¹¹⁵

¹¹⁵ Many interpret Luhmann’s theory as going beyond the social. Paterson cites King to make this point: “individuals, as psychic systems, are uniquely able to reconstruct these different social systems in a way that allows them to operate simultaneously within two or more social meaning systems” (1996: 90). My own analysis of legal autopoiesis does not reflect the attributions made here by King.

A topic linked with this concept later in this chapter is that at a metaphorical level, law itself is held and cultured by the legal system: it is this system that ensures law is reproduced as law (rather than external sources transforming outputs to inputs and vice versa). To apply Kegan's terms to the concept, law is able to increase its levels of complexity because as the host environment for law, the legal system '*holds the structure of meaning firmly in place*'. To apply Luhmann's terms, the legal system needs to hold the meaning system of law firmly in place because: "legal practice always operates with a law which historically has always been there ... otherwise it could not entertain distinguishing itself as legal practice" (1993: C2/111/4).

For now, Kegan shows that a holding environment has three main functions. Although one function may play a greater role than another in facilitating differentiation, all of the functions identified – confirmation, contradiction and continuity – ultimately help a system to remain differentiated as a system. A holding environment:

must hold securely (confirmation and recognition); it must let go in a timely fashion (assist in differentiation, contradiction); and it must remain for recovery [continuity] during that delicate period when [a person] is leaving behind what seems like itself and which [they] must recover as part of [their] new organization (Kegan 1982: 158).

Once again, to place this concept within the context of this study, when the operations of the holding environment (or culture of embeddedness) of the dependency court (incidentally) provide individual professionals with the experiences of *confirmation*,

contradiction and continuity, these system processes of change help professionals to move from one evolutionary truce to another – relevant to meaning making in the host culture – the court system.¹¹⁶

Luhmann builds on the same three concepts (not in name but practice, outlined below) to depict how the social system of law differentiates itself from its environment: which as identified in Chapter Nine, was itself partly built from the position adopted by the original authors of autopoiesis who described “an endless turnover of components under conditions of continuous perturbations and compensation of perturbations” (Maturana & Varela 1980: 78).¹¹⁷

While Luhmann emphasizes that these operations – captured below as confirmation, contradiction and continuity – occur *in* the social system which holds law, it is iterated that the argument developed in this study reflects Kegan’s emphasis that these operations occur *between* the individual and the social.

To reinforce the overarching logic in this study we return to events in San Diego, where the explanation of what occurred is interwoven *between* individual and social influences.¹¹⁸ The reasoning shown reflects the premise that as people evolve, and develop their ability to make meaning at increased levels of complexity, this complexity evolves into the communicative operations that help to organize a given social system which in turn impinges on or enhances the meaning making of other

¹¹⁶ Processes viewed in Table Three and in detail in Chapters 19 to 24 through changes in voices.

¹¹⁷ Although it has been established that Luhmann draws on multiple sources to build his theory, he frequently refers to the work of George Spencer Brown, Laws and Forms (1979), to advance his views.

¹¹⁸ Events explored fully in Part Five.

individuals in that system (a logic supported by Kegan's research that "neither the psychological nor the social has priority: meaning-constitutive evolutionary activity gives rise to both" (1982: 215)).

At the same time as continuing to flag the relationship between individual and social forces in this thesis, the discussion also flags how the processes of confirmation, contradiction and continuity are integrated with the processes presented in Chapter 13 that were associated with system stability and change.

System change in San Diego (self-concepts and operative structures)

The central alliances for 'system' change in San Diego were a grass-roots group for parents, some attorneys for parents, the media, and the 1992 county grand jury. In the face of intense pressure from these alliances to change the direction of 'the system', in particular court decisions, professionals had to keep a very firm hold on law – its rules and regulations (or the social). This was needed to ensure that rather than those with the loudest voice controlling the norms used by law, the law was defined (controlled) from *within* the legal system (from *within* law's host culture or holding environment).

The need to hold law firmly was achieved through assimilation (and normative closure): professionals (law) continued to refer to law to define child abuse, and these dynamics allowed professionals, and thereby law ('the system') to respond without having to reorganize itself: *professionals* did not have to change the current law *on instant demand* from external influences. Equally, the system (professionals) had to

be open (cognitively) to information in order to learn about the changes being demanded of it (of them) from different social sectors. This meant that to respond to the high rate of change demanded, professionals had to engage in processes of accommodation: Part Five shows that at a formal level this culminated in efforts for new legislation. At another level the combined change process resulted in a more rigid use of law.

Overall, the extent of pressure for change meant that processes of normative closure and cognitive opening (or assimilation and accommodation) in legal system operations were on overload. In the context of a backlash campaign, the system's *resilience and flexibility* to, as Kegan and Luhmann say – both preserve and transform the system – were pushed to the limit, identified in this study at individual, professional and system levels of subject-object (or self-other) operations: and which manifest as a (system or a person's) self-concept.

While making these points, successful campaigns against 'the system' do not create a setting that overburdens the self-concept of *all* people: this is because if professionals are aligned with the changes being made – such as was the case for parents' attorneys in this study – the way they make meaning is confirmed (thus they are protected from feeling overburdened by such change). If professionals are not aligned with 'system' change – such as was the case for most social workers in this study – the way they make meaning is contradicted. This is to say that empirical data and analysis of material about the court studied shows that the type of ideological shift that occurred and changes to practice methods corresponding this shift better represented parents' attorneys own individual and professional self-concepts of 'the system'.

Whereas parents' attorneys welcomed the return to a stronger rules orientation, 'system' change in San Diego meant that for those social workers who appeared to make meaning from the interpersonal truce (detailed in Part Four), where "social order gets conceived of in dyadic relations of mutual role taking" (Kegan 1982: 57-58), this orientation to meaning making was *contradicted*. As one illustration, new 'tick the box' risk-assessments were implemented to determine if abuse had occurred. All in all, instead of relying on professional insight (or 'practice wisdom'), social workers began to shift from a process orientation to a product focus, such as that which holds and cultures law through text and precedence in the legal system. This is expanded on in Chapter 16; so too is the finding that for some social workers, 'system' changes confirmed what was occurring at an individual level and thus gave them a sense of *continuity* in the way their meaning making had evolved in the host setting.

For the most part, however, social workers in this study said DSS was failing children largely because it shifted its emphasis from children too far in the direction of parents' rights: a shift which simultaneously flags the concept of the social welfare system being normatively pervious. While Part Five shows how DSS changed its response to cases to meet external demands, this topic brings us back to the importance of 'healthy holding' in order for a system to change. We will address, at a generic level, how individual and social systems engage in "healthy holding" so that confirmation and contradiction can operate as effective factors of system change. This continues to build on the natural synergy between Kegan and Luhmann and leads to SL=HDLA+D.

System change: contradiction and confirmation - law and human development

Luhmann and Kegan both speak about the countervailing demands on a system in the performance of its operations. Kegan said “[G]ood-host” environments are needed to provide cultures of embeddedness that simultaneously provide “careful attention, recognition, confirmation, and company in the experience”. Kegan also said it is crucial to healthy evolution that they do not “tighten the grip by creating a dependence on the host to solve or manage the experiences of disequilibrium” (1982: 126-127):

The seemingly countervailing demands upon a culture of embeddedness – that it be good both at holding on and at letting go – are not really opposed to each other. Healthy holding lays the stage for separation even as it meets, acknowledges, and accepts its guest. [The author goes on to say:] All the same, the shift from embeddedness to differentiation must be to some extent as difficult for the host as it is for the guest. Something is leaving, being lost (Kegan 1982: 126-127).

Reinforcing the previous points about what was necessary for decisions about law to remain within the legal system during the San Diego backlash, if Kegan’s above noted concept is metaphorically applied to law it tells us that law must not depend on the legal system – on its holding environment – to *over*-manage law’s experience of disequilibrium. Instead, the law itself must change to meet the changing societal demands upon it. Conversely, while the legal system must not hold on too tightly, and must let law resolve most of its ‘disappointments’ (*contradictions*), as suggested earlier, it is vital that it holds the meaning system of law firmly in place, so that law

can be *confirmed* as law. The legal system must hold law steadily so it can establish new meanings within the context of legal operations and history; and it has to do this in ways that the legal system can assist law to constantly differentiate itself from other social structures in which the legal system is embedded. Without these operations the system would not exist.

At the same time as explaining a point of synthesis in this thesis – which is supported below with Luhmann’s analysis of autopoiesis – this explanation leads to the question: how does this occur? To answer, we look *briefly* at each system process of confirmation, contradiction and continuity independently, beginning with Kegan’s theory about the role of confirmation. As I am limited to skimming the surface of six topics, each of which could occupy a chapter – it is not possible to capture the full meaning of each concept. Although we will revisit the relationships that I draw here between Kegan and Luhmann, it is also important to note that the goal in this work is not to prove that the relationships exist but to signpost their existence.

Holding environments: System Confirmation (staying put)

When Kegan places the first function of the culturing environment as “recognition, confirmation of who the person has become” (1982: 162), this external recognition is interwoven with internally processed operations of confirmation (1982: 123, 140); without which disequilibrium arises and in turn can lead to a crisis in meaning and identity (1982: 240). Particular to the focus here on change, during transitions of meaning making, at a core level system processes do not deny “the integrity of [previous] evolutionary gains”(Kegan 1982: 242-3): the purpose of which is to assist

an individual – in their operations of “defended differentiation” (Kegan 1982: 116) – to expand their ability to process complexity.

Luhmann describes similar processes whereby the differentiated system of law orients to “self-confirmation” (1993: C4/11/166, C2/111/2) within the boundaries of the legal system. Similar to confirmation in psychology this involves recognition processes: “in order to be able to specify its operations as legal, it has to establish what it has done so far, or what it will also do in the future in order to specify its own operations as legal ones” (Luhmann 1993: C2/111/2). Building on how this occurs (in Chapter Thirteen as reflecting normative closure and cognitive opening, or assimilation and accommodation), and consistent with the concept in developmental theory of preserving previous gains, Luhmann indicates that for successful system transformation to occur, the legal system has to, in effect, hold law in such a way that it can be “reprocessed and kept for further use”. He writes:

On the one hand, concepts and theories have to be distilled in such a way that they keep their identity while being processed. On the other hand, such reprocessing happens in different situations and is occasioned by new cases; nevertheless, *the original meaning has to be confirmed* (Luhmann 1993: C1/1/1 italics added).

As established in Chapter 13, a system (individuals or an institution) cannot confirm everything it experiences: people and the law cannot meet all expectations. The following discussion is about system defenses against this impossibility: it is inter-related with the topic of system contradiction and responses to irritants (or paradox).

Holding environments: System Defenses; Contradiction (letting go) & Continuity

According to Kegan the defenses: “so pejorative a category from most theoretical points of view are first of all a sign of the integrity of an overarching system of meaning; they are what makes the system a system” (1982: 170). Luhmann writes about a similar point in the operative closure of law. In order to remain stable, the system must attain and secure “a contrafactual resistance against disappointment” (the ability to defend against contradiction).¹¹⁹ Luhmann indicates such resistance is not about preventing, but facilitating change in the system; that is, the integrity of the system depends on it (1993: C2/VI/5).

Kegan describes how this form of integrity operates in human development when a system is threatened against the specter of losing the meaning it makes:

For a time I ‘test’ my ‘theory’ (my way of making meaning) according to the principle that if the facts do not support the theory, so much the worse for the facts (Kegan 1982: 169).

Kegan said that if a system lacks the ability to “reduce or confine the impinging environment”, the threat would not just be to the loss of meaning it makes at a given time, but rather, to the system’s ability to maintain its “basic *presuppositions*” (1982: 170 italics original). Luhmann similarly writes that the legal system attends to threats (or irritants) against the way it makes meaning within its “self-referencing” operations – which are premised on its own “solutions which suit the system”– this is to say, “problems” are addressed according to the way facts are decided in the system

¹¹⁹ This is interwoven with Luhmann’s theory that if the system is to remain differentiated from its environment norms must be maintained (1993: C5/11/208).

by the system (1993: C6/IV/266). Another reviewer of the autopoietic theory of law noted “Luhmann’s insistence” that “if a system cannot try and test so as to achieve internal conviction then it cannot go on” (Paterson 1996: 93). And consistent with both theories, the vital need for system defenses to ensure system stability arises most clearly when the system’s meaning is contradicted.

Preempting discussion in Part Four: if a person’s meaning-making pivots around “inclusion” (or interpersonalism), contradiction arises in the qualities of over-involvement (Kegan 1982: 168). It would lead social workers, for example, to experience an excess of emotions about their bonds with children who need assistance. In contrast, if the meaning that is made pivots around ‘differentiation’ (or institutionalism), contradiction arises in the qualities of over-differentiation (Kegan 1982: 246). An example from the legal system in San Diego is given in Chapter 16 where attorneys for parents had lobbied for an emphasis to be placed on legal rules, but when this occurred some of these same attorneys started expressing concern during the research interviews that ‘the system’ had gone too far – and children were not being protected.

In psychology the experience of contradiction (letting go) can involve separation from the structure of (the meaning that is made in and about) a relationship, rather than movement away from the relationship itself. The same thing is reflected when changes occur to the meaning made about law.¹²⁰ In terms of this thesis, when

¹²⁰ As contradiction in legal autopoiesis has multiple layers (the full meaning of which I place at risk in a thesis not focused on this topic), I refer readers with a special interest in it to Luhmann’s concepts and operations of binary codes (1993: C4/VI); programming and evolutionary differentiation through provocation in law (C3/I); and the scheme for making like/unlike differentiations (C2/IX; C5/IV).

contradictions arise the law itself does not cease to exist – nor does the legal system thwart the change necessary for law to evolve – instead there is a letting go of the structure of meaning that is made about what is considered to be law or not law; new law is then created. However, to create new law processes of continuity are also involved; this is touched on in the following example and then explored in more detail below.

The initial use of the US Constitution to support slavery provides an example of how law has managed contradiction. Rather than the *legal system* holding on to practices that allowed the slave trade to thrive, the Constitutional contradictions that emerged over time about ‘all men being born free and equal’ had to be addressed by making changes to the law itself. To link this argument with Kegan’s theory (see below), and with Luhmann’s theory that “the undoing of the paradox is achieved by a re-entry of the distinction into what has already been distinguished”,¹²¹ the legal system did not over-manage law’s disequilibrium that arose in the Constitution: nor did the law evaporate; change involved a new (and formal) interpretation of an old law.

In making these links, consistent with the logic advanced in this thesis from Kegan’s theory, *the people* who constructed this change (in relationship with the social) had separated from the meanings people once made about an established law – and *they* recovered anew that which had existed in another form.

While this overview helps to show the interwoven nature of the individual and social each giving rise to the other *in the same way*, overall, Kegan and Luhmann both

¹²¹ Luhmann 1993: C5/111/179; also see Luhmann 1993: C2/V.

indicate that the experience of contradiction assists a developing system to let go of its holding environment, to become more distinguished as its own system, and thereby, to increase its *own* ability to manage complexity (Luhmann 1993: C2/111/7; Kegan 1982: 257-261). Importantly, these operations occur in conjunction with the processes of continuity and bridging.

Continuity (remaining in place) and Bridging in law and human development

The concept of continuity in human development is based on the premise that growth not only involves separating from past holding environments (or meaning-making activity) but also “the reconciliation, the recovery, the recognition of that which before was confused with the self” (Kegan 1982: 129). Although I have alluded to this operation in the above example of changes in the Constitution (and linked this concept with Luhmann), as an anecdotal example, rather than experience multiple placements in foster care drift, a child must have a stable setting whereby they can relinquish the self that they had been and reincorporate it into a new self-concept. If a stable embeddedness culture does not exist to act as a bridge during transitions, growth may be experienced as unrecoverable loss (Kegan 1982: 149).

As a hint of the processes of contradiction and continuity as it relates to changes in social work practices (flagged in Chapter Seven and covered in Chapter 16 and Part Four), many social workers were found to oppose the way DSS operated and in order to remain in ‘the system’ it could be said that their evolution (in ‘the system’) involved redefining their relationship to it. To explain this process at a generic level of change, when a person first differentiates from a way of making meaning they may

need to oppose the culture of embeddedness from which they have emerged – so as to initially prevent their re-incorporation back into it. Kegan writes that the newly ‘thrown over’ culture is seen as the old me (and the not-me), and it is vital that the culture “remain in place for [the person] to gradually redefine [their] relationship to it” (Kegan 1982: 129). These are natural processes of development which involve recoverable loss: “what we separate from we find anew” (Kegan 1982: 129).

When Luhmann said that a precondition of evolutionary structural change is that “the system also recalls what it has discarded” (1993: C2/11/2/ft4), he continued to position autopoietic operations as resembling the experience in human development where a holding environment is needed to ‘remain in place’ so that a person can redefine their relationship to the old culture of meaning making from which they have separated. According to the autopoietic theory of law this same process operates as separation through distinction, and law recalls what it has discarded in the form of a new relationship or connection to the old law, which is seen in the structure (meaning made) in the new law (Luhmann 1993: C1/11/3). As an expansion of this, Luhmann discussed the dynamics that arose when law “still preserved the old priority of natural law, though in a fashion which essentially was no longer justified” (1993: C2/1/2). He describes the process involved in changes to such law:

Once the distinction between natural law and positive law had been given up and the unchangeability had to be mandated in positive law by “constitutions”, the guarantee for the unchangeability of an unchangeable law which is founded on ‘nature’ could [then] be dispensed with (Luhmann 1993: C2/1/2).

The guarantee for the unchangeability of an unchangeable law could be dispensed with only after the bridge provided by a constitution had been formally established, thus ensuring continuity. To place this concept in human development terms, “the provision of a bridge from the old culture (now increasingly becoming other and separate rather than a medium of embeddedness) to the new culture to come” facilitates system processes of ‘continuity’ in the new meanings that are made, particularly during periods of transitions (Kegan 1982: 159).

Similarly, Luhmann’s focus on “transitional problems” in the changes that occur to law shows that it results “from old claims for the density of legal regulations and new conditions for their application” (1993: C1/11/8). Strengthening these links, Luhmann also said that for law to operate it “requires that stable external references are relinquished, but [the historical machine] provides a kind of existential anchorage in the system” which allows law to change from within its own structure (1993: C2/V/9).

Having now outlined the theoretical concepts about system change and sketched their relationship with data, the next chapter is more data oriented. It outlines a framework to conceptualize how the interactions that occur in the court between attorneys and social workers stimulate confirmation, contradiction and continuity – resulting in professional and ‘system’ change. It is important to note that the chapter is an outline. What is attempted at this stage is to show what the various pieces of SL=HDLA+D look like within an integrated framework: one that uses the theories presented to shed light on how the *cycle of system change* between two disciplines in

the dependency court occurs. Parts Four and Five will elaborate on the concepts identified and the relationships drawn.

CHAPTER SIXTEEN

THE CYCLE OF SYSTEM CHANGE (PART TWO)

Introduction

This chapter uses system theories to capture the law in action. It uses data findings and the events in San Diego to draw the juxtaposition between individuals and social systems into one system: suggesting how each system may give rise to the other. Table Three outlines this relationship: it suggests how the meaning that individuals make evolves through new embeddedness cultures – in this case, from the disciplines of law and social work – to the culture of the court system itself. Due to the amount of detail required to properly address each topic at individual, professional and system levels of operation, Parts Four and Five explore the main points raised in each segment of the table. They detail how the court provides a culture of embeddedness that stimulates an interaction between the cultures of institutionalism and interpersonalism, such that can lead to increased adversity or prompt some professionals to limit the differences that divide them.

Sketching the cycle of system change

Table Three is an exploratory work and is based on the finding that individual responses vary as information (evidence, interpretation, new data, emotions) informs and impinges upon what becomes a fusion of human and social (or organic and mechanistic) system operations. It reflects the finding that events in the legal system are fluid and, as a result, analysis only captures what is collected at a given time. While this dynamic makes it difficult to accurately represent traditional research concepts of validity and reliability, the findings may more accurately reflect system operations which in reality can change with unprecedented speed contingent on the

case, the professionals involved, and the intensity of systemic, economic, political and media influences on how the system operates.

Table Three

Integration of Psycho-social and Socio-legal theories

<p><u>System of operation</u> <u>Individual, Professional and System self-concept</u></p>	<p><u>Psychological and Social System Embeddedness</u> <u>Takes Living Form in Holding Environment: Evolutionary host</u> <u>Host Environment / Culture of Embeddedness</u></p>	
<p><u>Individual Self-concept</u> <u>Psychological Embeddedness</u> <u>Interpersonal self-concept</u> <u>Institutional self-concept</u></p>	<p>General social structures in which experiences facilitate normative selections of different orientations of meaning-making for social workers and attorneys.</p>	<p><u>Social Work:</u> Mutuality Connection <u>Law:</u> Independence Self-authorship</p>
<p><u>Professional Self-concept</u> <u>Social Work</u> The Voice of an Interpersonal structure of meaning-making</p>	<p>Social work practices and tasks evolve primarily around training to care for others; in a profession guided by the dynamics of belonging and affiliation – which often manifest in a process-oriented voice of personalized narration.</p>	<p>DSS:CSB Normatively pervious Cognitively open. Self and professional system operates mainly on basis of shared reality and reciprocal interactions: Case conference. Seeking collegiate opinion. Confirming interpersonal nature of work with others.</p>
<p><u>Professional Self-concept</u> <u>Law</u> The Voice of an Institutional structure of meaning-making</p>	<p>Legal practices and tasks evolve primarily around training to represent rules and adhere to strictly documented procedure: in a profession guided by product-orientation – which often manifests in decontextualized voices.</p>	<p>Legal agencies: Normatively closed - Cognitively open. Self and professional system operates mainly on basis of self-regulation, autonomy and procedures / processes for expectation of certainty through reference to laws, its rules and rights, and professional oaths.</p>
<p><u>Juvenile Court System</u> The Voice of Interpersonal and Institutional meaning-making structures which constitute the System Self-concept</p>	<p>Dominant self-concept shaped by legal system as institutional orientation of meaning-making; with attempt to facilitate and incorporate social work self-concepts into this same orientation without losing the ability for attorneys to reproduce the self-concept of law.</p>	<p>Professional system levels of strict operative closure for law and loose operative closure for DSS cohere on tentative basis, supported by individual self-concept of institutional and interpersonal orientations for law and social work respectively.</p>

How Do Operations of the Self-concepts Happen?			
<u>Confirmation</u>	<u>Contradiction (Irritants)</u>	<u>Continuity</u>	<u>Bridges</u>
What holds the ideology	Letting go	Staying put for reintegration	
Operative basis of meaning-making from which to make reference. Individual attempts to reproduce self-system through professional self-concept.	Disequilibrium in individual self-concept when operations in professional and system host environments are antithetical to a person's current evolutionary truce.	Individuals permit interpersonal / institutional ways of meaning-making to be relativized on behalf of larger goal to achieve case resolution in timely and suitable manner.	Professionals incorporate aspects of the other discipline's self-concept into their own individual self-system of meaning-making from links built in work with the other.
<u>Social work</u> : confirmed by culture of collaborative self-sacrifice. Orients to shared internal state and subjective experience with other individual workers and clients. <u>Defense</u> : Group resistance to DSS 'noise' about 'system' change facilitates their ability to continue to work in the face of conflicting demands.	DSS system buckles to political and media pressures; becoming more rule oriented to ensure policies and procedures are kept. Decision-making is more formalized, with restrictions on meaning-making practices at the historical core of social work. Contradiction can also occur when a social worker's <i>self</i> -system identifies problems with the practice orientation of their own profession in court operations.	<u>Social work and law</u> SW less likely to act on normative projections without referencing law and practice theories. Law begins to shift to a form of institutional meaning-making using a more flexible approach – not just following the rules set by the system. Both start to find self-containment in balance between interactions of mutual reciprocity and adherence to due process without large psychological toll once experienced when trying to meet both demands.	<u>Social work and law</u> New work practices naturally facilitate relations of cooperation rather than just avoidance of constraints in the system itself. This is not only at a superficial level of system operation but at a fundamental level of individually developed meaning-making. Professionals integrate key aspects of the other discipline into how they <i>define their own role in 'the system'</i> . They have reconstituted the central tenets of their own discipline for new ways.
<u>Lawyers</u> : Confirmed by culture of self-authority, established achievement and definitions in text. <u>Defense</u> : Unity of law encapsulated in rules and dogmas which can prevent hidden assumptions (or noise) from being revealed.	Legislation / case law decisions contravene established legal practice: e.g. hearsay permitted in social work report and time demand for permanent plan seen to violate constitutional rights. Or attorneys see system failing children.	Self-system (and system) containment found in balance between adherence to logical consistency and shift from strict rules orientation to wider perspective of issue considered through interpersonal exchange.	Paradox in <i>self</i> -produced observations not assessed through group conventions but in operative way. Both disciplines actively work in a relationship <i>between</i> the dynamism of law and social work.
Cultural imperatives of institut. & interpersonal individ. & professional self-concepts confirmed through court decisions that align with particular orientation of law or social work.	Over-embedded institut. & interpersonal individ. & professional self-concept are accentuated when emphasis on own meaning-making takes too much time & causes family disruption.	Self and professional self-concepts more often transforming noise into meaningful information for the host culture; and begin incorporating the other's self-concept – formally and informally.	Law's shield for certainty maintained by using it only in extreme cases. Professionals integrate judgment and instinct & seek out inter-dependence & unity for selves & case outcome.

Self-concepts and holding environments

The first heading from the top to the bottom of the table refers to the typology of self-concepts. Moving down the table is a condensed view of individual, professional and system self-concepts – which is the main tool to capture changes in the juxtaposition between individual and social influences in dependency court operations. Chapter Five introduced data and gave a generic basis for the individual self-concept; it is expanded upon in terms of the interpersonal and institutional orientations of meaning making in Chapters Seventeen and Eighteen. Preludes to professional and system self-concepts appear in Chapters Four, Six, Seven, Ten, Thirteen and Fourteen and are explored further in Chapters Nineteen to Twenty-four.

The heading in the second cell across the top of the table is about ‘host environments’. It begins by recognizing that there is an interplay between different individuals and social structures, such that stimulates some people to become attorneys and others to become social workers. Moving down the table it shows the ‘cultures of embeddedness’ in which each system self-concept *initially* operates. One cell reflects the self-concept for DSS:CSB (social work); the other reflects the self-concept for legal agencies (attorneys).¹²² These cells are discussed in greater detail below. The final holding environment – the court – influences the most significant changes in the meaning made by individuals from the host cultures of law and social work. It becomes the dominant ‘system’ in which decisions are made, thus providing

¹²² These categories do not suggest that all social workers and all attorneys respond in the same way. As the table indicates, there are various stages of meaning making and transitions from resistance to noise to that of information becoming more meaningful – *as it relates to the host culture of the court*. The points under the heading of Continuity sketch the type of changes suggested in data and theory.

the primary embeddedness culture in which system developmental processes of ‘confirmation’, ‘contradiction’, ‘continuity’, and ‘bridging’ are most strongly stimulated.

Confirmation: professional and ‘system’ defenses

The third cell across the top of Table Three, reinforces the second cell, showing that people try to reproduce (confirm) their individual self-concept through the profession they choose to represent. The training social workers receive builds on interpersonal forms of interaction (more than decontextualized responses). The ‘confirmation’ heading shows DSS once held and cultured the profession in a similar manner that was also experienced in social work training: as Chapter Seven noted, it was a system of collaborative self-sacrifice oriented toward shared internal states.

Data suggests that changing system demands means that the normatively pervious system of DSS now only partially confirms the meaning made by social workers.¹²³ Reflecting human development theory and concepts of assimilation and accommodation, to defend (hold on to) the meaning *they* make – and thus continue to exist in the face of constant contradictions – the profession has had to distance itself (psychologically) from the way DSS operates (Scott 1996: 3). Without diverting into the burgeoning amount of literature on this topic, the best analysis at the time of this writing is still Morrison’s theory about “The Professional Accommodation

¹²³ Several years after drafting the above Table, and drawing the conclusion from data analysis that the DSS:CSB had a ‘normatively pervious’ operative structure, I came across literature from social work suggesting similar findings about “open systems” and the “permeability” of human service agencies (Moxley & Manela 2000: 316; McDonald & Jones 2000: 10; Chetkow-Yanoov 1997: 39-49). This is discussed in Part Five, and contrasted with Luhmann’s theory of the “normative closure” of law.

Syndrome” (1997: 12). Morrison speaks articulately and convincingly to this controversial issue, identifying how those working in human service agencies avoid the mismatch between their expectations and experiences, such that they manage to stay in ‘the system’.

On the other hand, the meaning made by attorneys is held and cultured in the environment of the legal agencies in which they work; the host culture builds and confirms their reliance on oaths and on rules inscribed in text. However, reflecting the autopoietic idea of normative closure and cognitive opening in the legal system (which can be empirically examined through analysis of individual assimilation and accommodation), when the profession works in the normatively closed system of law and attorneys come face to face with cases of child abuse – rather than having to rally their defenses at the first point of contradiction – the demand to follow system rules can prevent them from being exposed to the hidden assumptions in legal dogma. The oaths attorneys make similarly provide a buffer against the *constant* forms of contradiction that emerge in the operations *they* perform to achieve law’s differentiation as a system (thus preventing *them* from having to reorganize their system of meaning-making every time ‘the system’ is put to the test).

As well as finding confirmation and defense for the way they make meaning in their respective agencies of operation – which are replicated with favorable legal decisions in the court system itself – fieldwork data also very strongly indicated that the court acts as a culture of embeddedness where both professions collide. Chapter Three

introduced this collision as being one part of constant ‘system’ change, which during this study saw a strong pendulum shift primarily against social work (DSS).¹²⁴

Contradictions and defenses for social workers

As established in Chapter 15 when discussing the San Diego experience – when the pendulum swings to the extreme in one direction, be it to an institutional or interpersonal emphasis, the profession whose meaning-making is minimized experiences contradiction – otherwise known as ‘irritation’ or noise.

Notably, Chapter 14 placed the system change and thereby the contradiction that social workers experienced in San Diego, as occurring in a setting that at one and the same time welcomes and rejects social work. It has also been iterated that the law says one thing, but what social workers experience in the court contradicts the stated ‘legal’ position. Significantly, these dynamics go to the logic that mechanistic rules and *how people experience and respond* to those rules contribute to the system self-concept *and* the way it changes.

Children’s attorney

As we enter the modern system the social worker is trying to adjust to his or her changed legal reality ... But that’s difficult for the social worker. The social worker is now, to listen to social workers, *a minor player in the court scheme. That’s not what the law says.* The law says that the social worker is

¹²⁴ While this is explored later in Chapters 23 and 24, for purposes here, Dale observed the “pendulum” that is similarly found in this research (Dale 1998); and Scott uses the terms “false negative” and “false positive” to describe the swing between low and high levels of coercive intervention into families (Scott 1995: 71-94).

a fundamentally important player ... because the law says that the court is *supposed* to give great weight to the recommendation of the social worker.

As the attorney said, social workers were in a position of adjustment (rather than one of established credibility). Expanding on the points made in Chapters Seven and Fourteen, as most social workers were struggling to both establish and adapt *their* voices and form of meaning-making in the court, the profession was found to be particularly vulnerable to criticism. When the parents' lobby in San Diego then mobilized and attacked them (Chapters 23 and 24 below), the vulnerability of social work was also not helped by their host environment (DSS), which this study suggested had failed to adequately 'hold' them during a crisis.

To briefly sketch some of the findings related to this topic that are discussed in Parts Four and Five, during the course of this research certain types of contradiction became evident. One form of contradiction that invited (what will be argued later) a superficial end to interpersonalism in social work was less about the *self*-generated recognition by individual professionals that they were 'over-involved' in cases, and more about complaints (from parents and their attorneys) to the effect that the 'bleeding heart' stereotype of social work caused unnecessary intervention. As suggested in Chapters 14 and 15, how these criticisms led to 'system' change was contingent on how social workers responded at an individual level. It will be shown that many worked with what became an excess of contradiction by redefining 'abuse' and/or the circumstances considered appropriate to leave children with their parents. In forming a new 'unofficial' definition/reasons for (non-)removal dialogue these social workers changed their discourse about abuse but not the meaning they made

about it, and put fewer matters before the court, allowing children to stay in highly questionable settings.¹²⁵

The excerpt below provides one case scenario which sheds light on how this behavior, in turn, led attorneys to experience contradiction. Touching on this subject also goes to the topic of irritation in the autopoietic theory. Although Nelken shows that irritation is often approached as having metaphorical application, it remains that issues exist in interpretation of the theory as to when an irritant will be a strong irritant or not an irritant (2001: 275-279). The answer to such questions is partly addressed by the attention given in this thesis to Kegan's constructive developmental theory.

Parents' attorney

It's outrageous. I have a case where the father is an alcoholic and hasn't had the children for five years. It appears that what he did when he did have the children was to tie them up naked and perform [sexual acts] upon them. They just decided to send the kids home ... *The children weren't adopted because they were so psychologically unbalanced* because of the acts that were perpetrated on them. They can't even stay in foster homes because they have so many problems, *and here they are sending the children home to dad on an experiment.* Dad's still drinking and everybody knows it. They're not worried about the [case] any more because they think the children are old enough to protect themselves; *it's the craziest thing I've ever seen. I represent the father, I can't go into court and say: this is a bad idea, judge; don't give this guy the kids.* I can't allow that to happen because of my role.

¹²⁵ Reports by the 1993 San Diego County Grand Jury provide the best source of material about these general issues in the system studied. The reports also discuss findings from the previous Grand Jury.

Contradiction and defenses for attorneys; and protection from it

The above excerpt indirectly speaks to the type of contradiction that for some attorneys can invite an end to the balance that favors institutionalism: it is the experience of ‘over-differentiation’.¹²⁶ This dynamic arose in data when attorneys saw social workers failing to become involved in cases, saw the court supporting them *and* did not sit comfortably with the consequences: which for some amounted to an over-holding of law in the institutional balance.

The attorneys who *personally addressed* their experience of excessive contradiction at what appears to be a core level of how they made meaning in ‘the system’ are not the ones of immediate interest. Rather, it is the more common pattern that arose in data where the court system itself prevented attorneys from fully experiencing (or having to address) ‘over-differentiation’. Emblematic of the role of informal operations in ‘the system’, the attorney quoted above said that he handled the matter, and decisions of a similar nature by other social workers, by asking them if they were absolutely sure of their position. That is, the contradiction was addressed through unofficial dialogue:

Parents’ attorney

It bemuses me to have to be dealing with this rather [unusual] problem [failure of the court to protect children] ... The way I generally handle it is

¹²⁶ It is iterated, when I refer to changes in meaning making I refer to changes relevant to operations in the host setting – the court system. The methodology for this study prevents me from generalizing findings about change as being definitive of *complete* developmental shifts in how a person makes meaning. Overall, the goal is to simply draw attention to these rudimentary findings for future study.

that I will speak to the social worker and say: are you sure this is what you want to do?

Although the attorney saw the matter as outrageous he was clearly not outraged. Nor was he pressured to operate in ways that went against *his* core values or beliefs, such as that evident in the interviews with most of the social workers. This is because, when an excess of contradiction develops for attorneys, they are not always *forced* to change their practices: ‘the system’ is meant to make the necessary adjustments itself. However, whereas the autopoietic systems theory of law explains how this occurs through abstract concepts about the structure and operations *in* the social system, this study found contradiction is managed in the system in two ways: through the roles people play and their own meaning making from which they interpret case issues.¹²⁷

Emphasizing this point is not to detract from the concept Luhmann advances about the need for the system to remain differentiated: it is to simply bring it into balance with Kegan’s definition of individuals as “defended differentiation” (Kegan 1982: 116), and to recognize that without the processes that make individual differentiation possible, ‘system’ differentiation itself would not exist.¹²⁸

An example of the way the legal system prevents attorneys from having to face over-differentiation (or facilitates complexity through indifference) is seen in the next

¹²⁷ Chapter 20 notes that contradiction can influence changes in discourse and changes in meaning making: it appears to be linked with superficial change in the former and deeper change in the latter.

¹²⁸ Linked with contradiction or irritants, Luhmann said a system must “protect the build-up of its own complexity by high thresholds of indifference” (1993: C5/11/211). Chapter 15 noted that in human a person can achieve this same operation by testing their theories “according to the principle that if the facts do not support the theory so much the worse for the facts” (Kegan 1982: 169).

quote, although the attorney's role prevents him from advising the court not to place the children with their father, he can rely on other parties to make this point.

Parents' attorney

I want to make sure that when we are sending the children home, the client has a high level of success or that we can predict, or whatever. But there's usually another party or maybe even *two other parties that can complain*. So *the mother's lawyer*, if I represent the father, or the *minor's lawyer usually complains*, so that's a counterbalance that we have.

Contradiction between individuals and 'system' change

Notwithstanding the ability of attorneys to often rely on 'the system' to manage contradiction, the equally compelling demand to expedite cases for children and families means that *both* professions, to some extent, accommodate change. Table Three indicates that some respondents gradually shift from their original (limited) professional perspective, and the poles that separate the disciplines begin to dissipate; with an expansion into more interdisciplinary forms of practice being suggested from some of the data gathered.¹²⁹

At the risk of being too repetitive, one explanation that helps to illuminate why this shift can be a complex process of *personal* change (and thereby difficult to achieve 'system' change) is the logical insight introduced in Chapter 15 from constructive-developmental theory: what is a contradiction to one 'balance' (to one person) is in another stage of meaning-making a confirmation.

¹²⁹ Part Four will draw on data and theory to chart the process of this 'system' change.

On the basis of Kegan's theory it seems evident that those professionals who are able to successfully process contradictory information (or irritants), have reached a stage of development where the self-system is "up for renegotiation" (Kegan 1982: 242). As stated in the introduction, it is in this phase that:

The self-system seems available to 'hear' negative reports about its activities; [which as the author explains] before, it was those activities and therefore literally 'irritable' in the face of those reports (Kegan 1982: 105).

Rather than locate these changes as occurring *in* the social system – when *it* can perceive the irritant (hear it), and then turn it into meaningful information – the following discussion continues to explain that the ability to make this 'system' change primarily arises in the people who operate the system.¹³⁰

Continuity and bridging in San Diego

The next data excerpt is from an attorney who has moved beyond the strict approach to rules that once confirmed her professional self-concept. The quote, which is taken from the attorney's response to the question – what is justice? – suggests that the attorney has had to process the contradictions that arise between following law, and

¹³⁰ A contradictory approach arises in Luhmann's theory where he notes that "differentiation does not really mean the dissolution of every connection" (1985: 205), and on the other hand, he emphasizes communications as operating at a social rather than social *and* individual level (1985: 282).

the need to engage in practices that go beyond law to achieve the most desirable case ('system') outcome.

Children's attorney

What I strive for as an attorney is certainly to meet the duties and responsibilities and intent and purpose of the law ... [but] you are looking at not only whether the letter of the law is being met ... *You are making assessments that go beyond the letter of the law* and dealing then with the human dynamics.

The attorney gave an example where the parents in a case had met all the legal requirements to have their child returned. However, their child did not want to return home. The attorney had to find ways to represent what the law required, and at the same time represent the child's basic concerns about not wanting to return home. As the above quote suggests, and as reflected in the progression of change outlined across Table Three, the attorney placed importance on balancing adherence to logic and wider issues through attention to interpersonal considerations. Discourse analysis of the full interview indicated that, rather than simply reflecting strict adherence to the operation of rules (such that many respondents suggested occurred at the point of their entry into 'the system'), the attorney appeared to have internalized 'the system' self-concept in such a way that she played an instrumental role in how *it* operated (she was not its instrument). Part Four will illustrate this same form of change in social work.

To conclude, Part Three of the thesis has sketched a relationship between the social and the individual, and elucidated the need to give data findings equal consideration to that of theoretical analysis about how law operates: it introduced SL=HDLA+D.

The need to draw this relationship was spurred by the finding that rather than law being defined and operated through processes of *law* referencing *law*, data and theory suggest that law and its definitions are inseparable from the definitions given to it and operations performed by people. Whereas Luhmann describes the legal system as observing and describing *itself*, and as one “which develops *its* own theories” (1993: C1/11/6) the following reference from an attorney in this study who participated in writing Californian legislation for the protection of children provides a contrasting view. It reaffirms a simple, yet often minimized point by adherents of legal autopoiesis:

Attorney

You cannot envision every possible factual setting in which laws are going to be applied. So you try to envision all the ones you can, and to draft laws that will follow the principles you’re concerned with in those settings, *realizing that the drafters of laws are human, as are the people who implement them.*

Part Four of the thesis examines the relationship between the arguments made in this section of the thesis and the data gathered in San Diego. In so doing, it provides an exploratory synthesis for future research into the juxtaposition between the individual and the social in the evolution of the dependency court system – through analysis of the perspectives held by those who operate ‘the system’.

PART FOUR

THE CYCLE OF SYSTEM CHANGE IN A TYPOLOGY OF SELF-CONCEPTS

SL=HDLA+D

INTRODUCTION

Introduction

This section of the thesis will integrate the fundamental elements of Part One about the self-concept typology with key aspects of the cycle of system change that were just sketched in Part Three.¹³¹ It does this by integrating theories about *how* individual and social systems operate with empirical data gathered from people who operate the system of law studied. In the process of making the linkages described, this section builds upon Part Two of the thesis where it was argued that the individual and the social are sub-totalities that unite – each giving rise to the other.¹³²

While it is argued that development in the ‘system’ primarily reflects the relationship between the individual and the social suggested in Kegan’s constructive developmental theory, the self-concept typology also metaphorically supports the following aspects of Luhmann’s autopoietic systems theory of law:

- each system produces its own internally generated version of reality
- 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

Notwithstanding these similarities between the theories, the most vital aspect of legal autopoiesis that the self-concept typology challenges, is Luhmann’s tenet (and

¹³¹ While the individual, professional and system self-concepts are developed to help scrutinize the dyad between the social and the individual in legal operations, at a closer level than would otherwise be possible, all the self-concepts can only be considered as parts which belong to the whole.

¹³² To return to a fundamental aspect behind this point: just as it was found that matter did not disappear when energy was created – it was transformed (Bodanis 2000: Ch5), this study found that individuals did not disappear when law was created; rather, they helped to transform it through the evolution of their own meaning-making. As noted earlier, Salk spoke to this theme when he said he did not just experience evolution, he guided it with his choices (Jaworski 1998: 204).

King's) that social events are separate from the factors that inspire and inhibit individuals.

The typology of self-concepts

As noted in Part One, the individual self-concept – which is based on psychology theory – was encouraged by the fact that legal proceedings are never based on *one universally valid translation* of legal text or pure analysis of logic, scholarly neutrality, or legal science. It has been emphasized that as well as using science and text, interpretations about law are ideological expressions that arise from the meanings people make: which include their *awareness and intention*, characteristics that contribute significantly to individualized versions of ‘the system’ and how it should operate.

Part Four moves from what was a rather general discussion about individual self-concepts in Part One to a more detailed analysis which helps to explore patterns that emerged in research interviews that reflect individually held values and beliefs between social workers and attorneys. Kegan's theory of development, which is about “epistemological and ontological activity” or “knowing and being” (1982: 45), also continues to be the central tool through which the institutional voice of attorneys and the primarily interpersonal voice of social workers is explored and explained.

The *professional* self-concept emerged when data indicated that attorneys and social workers had very different training and roles and responsibilities, and as such operated as distinct systems of response in ‘the system’. Part Four builds on literature

already covered about law and social work and the key factors associated with the historic memories of each profession. It presents empirical data for the self concept of each profession, and shows how the relationship between data and theories outlined in Part One occurs within the processes of confirmation, contradiction and continuity in the cycle of system change, such as that shown in Table Three. A brief distinction will also be made between changes in discourse versus changes in how meaning is made – with the likelihood of real system change being more associated with the latter than the former.

The *system* self-concept was initially built in Part One by reviewing the rules that characterize the operations of the court, and its underlying ideological foundations and practices. In Part Four the system self-concept is operationalized. This is done by contrasting system (legal) rules with data about how social workers and attorneys respond to such rules. Particular attention is given to the hearsay rule which frequently arose in data as being a key source of dispute about how the court system operates.

Showing *what* individuals said about legal operations – within the cycle of system change – gives empirical substance to the thesis logic that, rather than a theory of law promoting the isolated social operations of law as a self-reproducing system, a theory of law should breathe life into the interwoven nature of social and individual influences, such as that expressed in the formula $SL=HDLA+D^{SA}$.

CHAPTER SEVENTEEN

THE FUNCTIONAL COMPONENT OF THE INDIVIDUAL SELF-CONCEPT: THEORY

Introduction

In the introduction to this thesis it was noted that a theory that refers to events in the system of law to explain and/or analyze how law operates at one and the same time as speaking about a social system inextricably involves the influences of meaning making. In Chapter Five concepts of meaning making were introduced within the context of the individual self-concept. This chapter builds on this material: it is about theories that support the development of what is called here the functional component of the individual self-concept for social workers and attorneys. Whereas the concept itself provides a way to describe patterns in interviews that were associated with individually held values and beliefs, the purpose of this particular chapter is to provide a theoretical basis from which to explore such patterns.

Overall, the topics in this chapter are examined because data findings urged the need to draw attention to the relationship between respondents' voices as individuals speaking about their observations in the system, and the patterns of interpretation in their voices about the meaning they make as professionals. As well as Kegan, Kohlberg's theory of moral development is also used to explore the relationship between these dynamics.

The ultimate goal of this preliminary work is to advance the need for in-depth research, not only about the boundaries around social workers', attorneys' and judges' meaning-making and decision-making strategies that are externally dictated by professional or systemic directives and constraints, but also the boundaries that are

individually generated or imposed, such as those that give rise to how professional and systemic directives are interpreted and subsequently acted upon.

Before discussing the topics outlined some of the chapter's limitations are noted. An explanation is also given as to why concepts of justice became the first main analytical tool from which to view individual self-concepts within the court system studied.

Limitations and the use of justice concepts

First, it is noted that the extrapolation of an individual's value system (or their beliefs) into a self-concept – such as that outlined in this study for the operations of law in the dependency court – should be treated with caution. Aronfreed wrote:

An individual's values are rarely constructed around a few very specific or isolated acts of conduct, or around a highly limited set of external social contexts. A system of values will ordinarily give representation to complex interrelationships among a wide spectrum of alternative actions, the conditions under which the actions can occur, and the possible outcomes of the actions (Aronfreed 1976: 65).

As part of this concern, in this analysis respondents' values and motives may be merged as one and the same. This differs from some psychology literature in which values and motives are separated (McClelland 1985: 812-825).

In the empirical study people's values and motives were (understandably) incorporated into their response to the research question: What is justice? Without

making this work a critique about theories of justice or debunking the work explored later, in the analysis of data from the empirical study in the dependency court, virtually all respondents were found to equate justice with fairness. This is consistent with theoretical views about what is considered to be 'justice' (Rawls 1971; Kohlberg 1976). When addressing the link between justice, legal systems, family systems, and the autopoietic systems theory of law Ziegert noted that:

justice concepts are operated by individuals as a conceptualisation of self. However, in doing so individuals use justice concepts as an observational base for the operation of the systems which they constitute by their observations, communications and actions as an on-going process. "Fair" and "unfair" become important short-hand markers for how individuals feel that relevant social systems operate and in which way they feel they take part in system operations (Ziegert 1994: 7 italics added).

Those strongly aligned with the autopoietic systems theory of law interpret the view that 'justice concepts are operated by individuals as a conceptualization of self' to mean that people *reproduce* that which has been produced by the social system itself. To some extent this interpretation may be supported by Feibleman and Tubane's view that "the entire legal machinery turns on the idea of justice"; and as part of this, they report that justice "cannot be allowed to rest on what strikes one as fair" (1985: 192). Conclusions drawn from data support the need for this position, mainly because participant concepts about 'fairness' ranged dramatically.¹³³ To protect against a 'free

¹³³. Chapters Two and Fourteen noted that attorneys often wanted to see more law practiced, with greater attention to due process rights, while social workers wanted to see less of law and more respect for children practiced in the court.

for all' (so to speak) around the practice of justice concepts, the system self-concept is structured to manage how individual professionals 'do' justice.¹³⁴

While at one level this can be seen to indicate that people operate justice concepts as conceptualizations of self, it is argued here that what people experience as 'the system' self-concept (as a system that aims to achieve justice) has arisen from the fusion of the historical social memory of each discipline and the more temporal experiential operations that professionals perform in the court – both of which pivot at any given point in time *on their own felt sense of what justice is*. Importantly, as these processes unite – as these historical and individual influences about what is fair and unfair merge to create 'the system' – it is imperative to be clear about the source of fairness:

Fairness is a description of a conscious process: it is a question of how something strikes one: it seems fair or it does not. This conception allows for no deep structures of belief held in the conscious mind. And if there are correlates in the society, such as established laws and the machinery for their administration, they have their source in a psychological feeling, nothing more logical than that (Feibleman & Tubane 1985: 199).

In what may initially appear to be a circuitous discussion, if competing concepts of fairness that overarch 'system' decision-making arise from *and* give rise to people's psychological feelings (thoughts and emotions), then the difficulty identified below by Twining and Miers about how to decide *which rule* to follow should be

¹³⁴ One example was shown in Chapter Four where some of the rules were presented from the Welfare and Institutions Code. Another example was also in Chapter Four in the discussion about Senate bill 243, which was an attempt to limit individual influences in the dependency court system.

approached through attention to the role that cognition and affect play in legal operations. The need to consider the influence of these factors is especially necessary in the dependency court, which must balance the way meaning is made in law against aspects of the way meaning is made in human service systems about what constitutes fair or unfair practices for children. The outcome of these often competing dynamics is that the system must simultaneously embody some characteristics while differentiating itself from other aspects of the way meaning is made in *both* law and human services.

Even without a hybrid system of law, at a general level of analysis about how to achieve things with rules, Twining and Miers said “The root of the difficulty is to settle on a point at which a reasoned answer can be given to the question: Why here?” (Twining & Miers 1982: 215). This is to say, why is a rule applied and why is a decision made not to apply it? Kegan’s model helps to answer this question, especially as it pertains to the difficulties that arise as a result of the differences at play when institutional and interpersonal voices or ways of making meaning collide in the same system.

Revisiting Kegan’s model & theories of independence v. inclusion

Kegan’s theory explains why professionals might apply or reject a particular rule through its recognition of the relationship between psychic and social influences on the way a person makes meaning. The theory (linked in Chapters Three and Seven with the tension between communion and agency) is significant to the argument developed because historically speaking, and until the last decade, research and

literature on development indicate that those who represent law more closely reflect differentiation as a way of making meaning and this has (wrongly) been elevated over the more inclusive orientation that was shown in this study to more closely reflect the way social workers make meaning:

differentiation (the stereotypically male overemphasis in this most human ambivalence) is favored with the language of growth and development, while integration (the stereotypically female overemphasis) gets spoken of in terms of dependency and immaturity (Kegan 1982: 109 parentheses in original).

These two themes in Kegan's theory are different from other developmental frameworks in that the theory moves beyond prior definitions of growth, which emphasized "differentiation, separation, [and] increasing autonomy", to consider the *equally important* processes of adaptation associated with "integration, attachment and inclusion" (Kegan 1982: 108). It is stressed that Kegan diffuses the hierarchical dominance of institutional versus interpersonal ways of making meaning: his model provides a framework for the analysis in this thesis because its main focus is about the oscillating tensions between the two.

Notably, the use of Kegan's theory to distinguish the differences found between attorneys and social workers does not stand in isolation. Theories that reinforce how tensions between institutionalism and interpersonalism (agency and community or autonomy and connection) manifest at professional and agency levels of operation in 'the system' include: Burns and Stalker's themes about mechanistic and organic systems (1996: 119-122); Gilbert and Specht's view that social welfare

administration systems focus on concepts of mutuality (1981: 257) (along with a wealth of more recent literature in previous and coming chapters about the interpersonal nature of social work); other theories in similar vein include Luhmann's theory that law is a 'self-authoring' system (1993: C2/11/3); and King's theory which places law in the same rubric of social differentiation as that described by Luhmann (1997).¹³⁵

Kegan and Kohlberg: theories to view the individual in law and social work

Some of the broad connections are now introduced between the findings in this research and stages three and four in Kegan's theory of lifespan development (interpersonalism and institutionalism) – which build upon Kohlberg's stages three and four of moral development. Although the remainder of this chapter is 'thick' with theories about how people function and develop, as already mentioned, the material will be brought to life in the next chapter when it is integrated with data to help examine how the social and the individual give rise to each other.

Social work and DSS: Kegan and Kohlberg-Stage 3

To recap what was established in Part Three, analysis of empirical data in this study found that many of the respondents from social work were distinguished by themes that characterize subject-object relations in stage three of the conventional level of moral reasoning: social work data more closely represented themes of "Mutual

¹³⁵ Although only a limited amount can be identified and explored in one thesis, the way that the characteristics linked with interpersonalism and institutionalism apply to DSS and law is sketched in Chapters Twenty-three and Twenty-four when outlining the operative structure of the system.

Interpersonal, Expectations, Relationships, and Interpersonal Conformity” (Kohlberg 1976: 34; Kegan 1982: 71) than did the themes that emerged in data gathered from those representing law. The links that are made between these themes and those in the humanities are also connected in this project with Kegan’s later work (1994: 209), which as discussed in Chapter 14 was used to flag that social work data reflected voices of ‘personalized narration’ or process orientations.

Kohlberg describes that in stage three people feel the need to be good, to show concern about others and to keep mutual relationships with an internalization of “rules and expectations of others, especially those of authorities” (1976: 33). In this stage a person’s moral development, measured mainly through their reasons for doing right, is characterized by “Belief in the Golden Rule [and] desire to maintain rules and authority which support stereotypical good behavior” (Kohlberg 1976: 34).¹³⁶

The social perspective of stage three is when individuals have shared feelings, and expectations “which take primacy over individual interests [and] relates points of view through the concrete Golden Rule, putting yourself in the other guy’s shoes” (Kohlberg 1976: 34-35 Table 2.1).

Kegan’s stage three - the Interpersonal - is built with similar references to Kohlberg’s stage three. According to Kegan, reciprocal role-taking is a central aspect of

¹³⁶ Participants in this study did not reflect the radical voice of social workers who are clearly not motivated by a desire for another’s approval. See for example, McDonald and Jones (September 2000) discussion “Reconstructing and Re-conceptualizing Social Work in the Emerging Milieu”, where social workers who act as agents of reform are described as “oppositional” (p7). The themes associated with interpersonalism may also appear to contradict the research findings explored later in Chapters 23 and 24 where it is shown that social workers were *perceived* as interventionist and illiberal (Franklin & Parton 1991), or what King described as the enemy of family rights (1997: 7).

functioning in this stage and, like all stages, can be overly subjective. This leads to the problem of “over-embeddedness in the interpersonal”. Kegan writes:

It is a way of making meaning lodged in the structures and benefits of the interpersonal context, unable to appeal the demands of the context to any higher or mediating authority – for this *is* the highest authority. There is no-one who runs the interpersonal; rather than “having” the interpersonal, one *is* the interpersonal (1982: 57). [Kegan goes on to say that a person’s meaning-making in this stage is] *highly vulnerable to the influence of the social environment* (1982: 57 italics added).

When this theory is applied at a ‘system’ level of analysis it helps to explain the volatility of DSS when it is under pressure from external social sources to change the nature of decisions ‘it’ makes about how to respond to allegations of child abuse. To illustrate this point at a generic level of analysis, if Kegan’s theory about how the interpersonal stage (or orientation) operates is expanded from data reflecting individual social workers to that of DSS itself – it could be argued that it is difficult for DSS:CSB to construct a social order that is regulative of the interpersonal. Indeed, this difficulty and the vulnerability of DSS to the influences of the social environment is reinforced not only by the generic application of Kegan’s theory but also by the frequently recurring argument in literature about the vulnerability of social workers (and agencies in which they function) to dependency on other systems (see as one example, King 1997: 82).

To accentuate these generic links between Kegan’s theory, social work, and DSS – when there is an over-embeddedness in the interpersonal truce – social order itself is

regarded as being “primarily composed of dyadic relations of mutual role-taking, mutual affection, gratitude and concern for one another’s approval” (Kegan 1982: 57).

Attorneys and legal agencies: Kegan and Kohlberg - Stage 4

Empirical data in this study suggested that attorneys are differentiated from social workers by the themes that characterize stage four operations, which are based on the representation of “Social Systems and Conscience” (Kegan 1982). One example was given in excerpts from Graham’s interview in Chapter Nine, where it was shown that his adherence to the law (or the system) was ultimate. (When viewed from Kegan’s theory about differences between people’s voices Graham’s decontextualized or product-oriented voice was shown to reflect a systems perspective and to be detached from emotional responses about the negative impact of legal practices in abuse cases.)

Kegan built stage four from Kohlberg’s Conventional level, which is recognized by the focus individuals place on fulfilling the duties they have agreed to undertake. Kohlberg wrote: “laws are to be upheld except in *extreme* cases where they conflict with other fixed social duties” (1976: 34-35). ‘Right’ is seen as contributing to society, the group, or institutions. As evidenced in the data from attorneys in this study (more than was evident in data from social workers), the social perspective of those in stage four “takes the point of view of the system that defines roles and rules [and] considers individual relations in terms of place in the system” (Kohlberg 1976: 34-35 Table 2.1).

Kegan describes his stage four as having wrested the self from the context of interpersonalism: rather than being its relationships, a person in this stage *has* its relationships. The strength of this orientation of meaning making is said to be “its capacity for self-regulation, its capacity to sustain itself, to parent itself, to name itself – its autonomy” (1982: 222). These concepts were first introduced in Chapter Ten when contrasting Kegan’s and Luhmann’s theories about how people think as if they are the system, and when exploring how Luhmann might consider his theory to be elevated over ‘humanist’ theories about the role people play in system operations. It was noted that when Luhmann said his theory could have been headed “taking individuals seriously” (1993: C2/11/7/ft 11) this may have reflected the perspective described by Kegan where “on the contrary” to people being lost, when they think as if a system “in a sense they are found” (Kegan 1982: 101) – this is because the institutional balance embodies *self*-dependence and *self*-ownership.

Continuing his links with Kohlberg, Kegan indicates that stage four is characterized by “the extent to which it makes the maintenance and protection of its own group the ultimate basis of valuing, so that ‘right’ is defined on behalf of the group, rather than group being defined on behalf of the right” (Kegan 1982: 62). The classic limits of the stage four construction introduced here arise in “ ‘the law-and-order’ philosophy in which the right is defined by the law rather than seeing the law as an imperfect, organic, in-process attempt to serve the right” (Kegan 1982: 63).

These topics bring us briefly back to the point that contradictions (or irritants) operate as a vital part of development in individuals and ultimately (metaphorically speaking) in the system itself. As one example, while a person in the institutional evolutionary

truce may experience themselves as independent and self-regulated, such as that experienced by attorneys about themselves (and the legal system they represent), their behavior seen from beyond the balance (for example, by social workers who participated in this study) may appear to be “a kind of psychological isolation” (Kegan 1982: 223). When the interpersonally embedded social workers interpret the institutionally embedded attorneys as being psychologically isolated, fieldwork data suggested that they perceive the need for attorneys to change, and social workers attempts to create (system) change can (depending on the individual) lead to a contradiction in the way attorneys make decisions.

Although Luhmann’s theory speaks about the role of irritants in system change (1993: C6/111/257-9) – a theme which is also reflected in King’s theory (1997: 25, 91, 207) – as noted in the introduction to this thesis, both their theories fail to scientifically show the process by which irritants create ‘social’ change. Rather than relying on an abstract, unverified theory, Kegan’s theory allows the role of irritants to be observed through the contradictions that attorneys and social workers create for each other in system operations and the subsequent ‘system’ developments that occur in *their* practices.

Having now outlined some of the key theoretical differences between the two disciplines, in the next chapter case studies are used to show how these dynamics emerged in empirical data from individual respondents. The long-term goal is not only about identifying influences in the juxtaposition between social and individual forces in ‘the system’ but also to move the way problems are addressed that arise

about the court beyond proclamations about the need to *be professional* – to analysis of what ‘professional’ means to a person who is *doing* ‘professional’.¹³⁷

¹³⁷ Analysis of reports from the 1992 San Diego County Grand Jury show that complaints against the system led the Grand Jury to call for those in the system to “be professional”: a call which was echoed in the print media – particularly for those working at DSS:CSB. The Grand Jury and media calls seemed oblivious of the point that representatives from each profession believed that it was the other profession (not they as individuals or their profession) who had failed to be professional and, as a result, calls for professionalism did nothing but fuel the fire that raged about how the system worked.

CHAPTER EIGHTEEN

THE FUNCTIONAL COMPONENT OF THE INDIVIDUAL SELF-CONCEPT: DATA AND THEORY

Introduction

This chapter gives empirical substance to interpersonal and institutional distinctions between law and social work. It also shows the functional component of the individual self-concept – or the relationship between respondents’ voices as individuals and the patterns of interpretation about the way they make meaning as professionals. It does this by identifying the link between how individuals make meaning, and how *they* observe and operate the system as professionals. This is presented through an in-depth analysis of two case-studies: one for law, the other for social work. Specific to the juxtaposition argued about social and individual factors of influence in the cycle of system change (outlined in Chapter 16), this chapter ultimately helps to reinforce the following constructive developmental (HD) and autopoietic systems theory (LA) tenets:¹³⁸

- each system produces its own internally generated version of reality
- the ability of a system to change is restricted by its own selectivity

Conversely, the chapter also serves to refute Luhmann’s (and King’s) theory that:¹³⁹

- 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

Limitations

¹³⁸ See Luhmann (1985; 1993); King (1997: 20-30, 91; 1991: 306-319); and the analysis in this thesis.

¹³⁹ See eg Luhmann (1985: 281-282; 1993: C2/11/7); King M (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 Part Two, particularly Chapters 9-12 of this thesis.

Although this study was not constructed to conduct analysis about stages of meaning-making, data clearly suggested that different stages were occurring. This chapter identifies these differences (using them as different orientations rather than stages of meaning making) and in so doing, provides a basis for later research into how different ways of making meaning influence how ‘the system’ operates. In addition, it has been established that this work is not about hierarchical distinctions between developmental stages; but it is indisputable that the practice of law enjoys an elevated position over that of social work. As such, the themes that characterize the dichotomy between the stages help to explain how differentiation in law manifests as an elevated position over the theme of mutual expectations which was most often associated with data gathered from the profession of social work.

Case study: Parents’ attorney

The interview with Rick, introduced at the opening of the thesis (p7), helps to spotlight the themes of Kegan’s institutional stage four in attorneys’ voices. Rick’s views about justice – which are representative of those held by parents’ attorneys – are largely based on anti-government sentiments, and this sets the theme for the entire interview. In short, Rick’s concept of justice – his concept of what is fair or unfair and which he operates as a conceptualization of self – will be shown to pivot on the theme of differentiation, separation, independence and autonomy.

The nothing more nothing less concept of justice

An excerpt from Rick's response to the question: What is justice?:

Justice! Where's justice: that's the real question ... I don't know what justice is. I think true justice perhaps is the government being as little involved with people as is possible and then when they are involved, the level of involvement is what should happen under the circumstances. Nothing more and nothing less.

When Rick asks where justice can be found he sounds dubious about the ability of the system to achieve it. His view that true justice, in effect, is achieved through (legal) controls to ensure that government intervention is kept within tight boundaries also suggests he may be strongly rule-oriented in the way he makes meaning.

Children's attorneys and competing concepts of justice

Before progressing with excerpts from the interview two things are noted. First, attorneys for children often referenced the need for rules and due process but they did not once equate justice with restraints around how much law was involved in people's lives. This difference between the two cohorts studied appears to reflect the fact that people's propensity to advocate for vastly different types of rules emanates from their own individual perception of what is *right*. This is to say that professionals determine which side of the fence they sit on in legal operations based on their own values and beliefs. This topic is also interrelated with the second point. Consistent with the autopoietic systems theory of law, Chapter 17 noted that some theorists regard justice concepts as being operated by individuals as conceptualizations of self. If taken in isolation this view can be used to minimize people's roles because for some it portrays them as reproducing the system (and themselves) through 'the system's'

concept of justice. The following excerpts from Rick's interview begins to challenge this aspect of the autopoiesis of law by showing that a person's own meaning-making influences which concept of justice they stand for (and not vice versa).

Systems theory v. people operating as the system

An excerpt from Rick's response to the question about professional roles

Our job as an attorney is defined by the state law, and it's an inflexible thing. When I represent a father I am not allowed to act in the best interests of the child, rather than the best interests of the father.

Rick's belief that his job is "inflexible" demonstrates his strong orientation to rules, first hinted at in his views about justice. *He* operates as if he is the system. For this to occur there is an interwoven exchange between justice concepts (from the social system) and self-concepts (from individuals) – the nature of which comes to life most clearly through a person's professional self-concept when 'system' rules are not followed according to the meaning a person makes. This contradiction or irritant begins to emerge when Rick responds to questions about power in the system.

An excerpt from Rick's response to the question about power between professionals

The department has all the power. The judges, up to this point, almost always do what DSS tells them to do. If that isn't power I don't know what is.

Rick's "where is justice" sentiment now takes on substance: DSS controls judges. This means that he sees the court as operating in complete contradiction to his views about justice and the need for minimal government action. On a different note, Rick's

choice of words, “the department has all the power” (while not the best data example) reflects a theme in attorney interviews where their responses were often couched in language about ‘the system’. This is in contrast with most social work interviews where their responses had more to do with issues about individuals, not systems.

This difference does not infer that those in the interpersonal truce do not speak about systems, or that people in the institutional balance are not motivated by relationships: it is a matter of degree. The next point suggests that although attorney relationships appear to emerge from a connection with people, in fact their *professional* relationships arise from and are primarily organized by their commitment to the system.

The institutional self-concept

An excerpt from Rick’s response to the question on a rights and caring dichotomy

My relationship is with my client; if that’s the father that’s who it is with. I might personally think in a case that the father’s ability to care for a child is marginal, I may think that the foster parents are superb, much better equipped to handle raising a child than the father. Actually that’s very common ... [but] my job is to protect the father and his right to have his child; the constitutional right to raise your child in America is important. Rights cannot be lightly set aside.

The way Rick connects his actions as being for the good of the group – through the American Constitution – ahead of his personal opinion that a father may not be as good a parent as a foster parent, reflects stage four operations which place the need to adhere to the rules “for the good of the group” above one’s own individual preferences or beliefs (Kegan 1982: 62). Rick’s relationship is with his client, but the

need for this is dominated by his relationship with society, and what the American people value.

Also consistent with Kegan's theme of institutional meaning-making, Rick's own position of doing right is influenced by his belief that "rights [rules] cannot be lightly set aside". In other words, established concepts of justice and Rick's own institutional self-concept are interacting: the social and the individual are each giving rise to the other. An example is seen when he indicates that nefarious activities had occurred in the system and, as part of this, described the San Diego system as being "the Black Pit of Calcutta in juvenile dependency". I asked what led him to hold this opinion:

I've seen some terrible things happen in families ... cases where children *have literally been stolen* from their parents and the parents have been nothing to the level where they should have their children taken from them.

While this statement is at the extreme end of opinions about how DSS and the court operate, the general interview theme from parents' attorneys is reinforced: they often expressed that social workers do not have appropriate reasons to justify legal action. In this example, I found myself questioning if Rick's views about the need for minimal government intervention influenced his belief that children are "*stolen*".

Self-concepts establish individual measures for justice concepts

To better grasp how Rick made meaning – how his self-concept observed and interpreted the system – I sought his approval to play the devil's advocate, a position

played in many interviews. I asked if he could help me understand why social workers indicated the opposite from his description of how the system operated, especially that the law favored parents and it often prevented intervention in abuse cases. He said:

They're wrong. To a certain extent what they are saying is true. However, it doesn't take much. When I was doing jury trial work I tried, I think, *thirty jury trials and never lost one. I've tried maybe one hundred and fifty juvenile court jurisdiction trials and I've won two ... Statistically that's obviously skewed.* We have a joke that the judges at juvenile court think that children are born dependent. That's almost how it is treated.

To prevent these comparisons from being misleading, Jurisdictional hearings occur within 15 days of a case entering the system. A child is not declared a dependent of the court until the Detention hearing which follows. As outlined in the system self-concept in Chapter Four, it is at this point that the standard of evidence shifts from a preponderance of the evidence to 'clear and convincing'. The higher standard used in the Detention hearing increases the likelihood that the position advanced by parents' attorneys will be given more weight than that applied in the Jurisdictional hearings to which Rick referred. In addition, the primary focus of the court is the safety of children: this prohibits emphasis on upholding standards of evidence comparable to jury trials. These topics are discussed later in Chapter Twenty-two.

Overall, while the way Rick measures justice has led him to joke that judges think children are born dependent, attorneys for children reported the opposite experience. These different observations occur in a context where attorneys wholeheartedly want the same outcome. As illustrated by Rick, and Graham (the children's attorney in

Part Two), they both want to make the system work. But due to the influence of individual self-concepts, making the system work means very different things to each cohort.

The protection of fundamental principles

When discussing the adversarial roles that underpin responses to abuse cases, the interview led to the topic about the demand on attorneys to represent their clients even if it is not in the best interests of a child. I asked Rick: “Can you see where social workers might perceive this as being a breach of what’s right, of what’s morally right?”

What you’re asking me is: Can I understand that a social worker might hear my explanation of how ethics constrains my actions, and might be perplexed about how I think that those ethical rules make sense and why I don’t rebel against those ethical rules in the interests of protecting a child? Well, the answer to that is: *these rules exist for a really good reason. They were developed by the court system to protect clients* because otherwise what happens is a client would have to have two trials, the first trial would be with the attorney, convincing the attorney to do his job ... [continues below].

Rick’s response strengthens the need for the system to stay as it is. As part of this, his answer below continues to show that his ability to ‘operate as if he is the system’ reflects the unidimensional psychological figure in law, or the legal personality, first introduced in Chapter Six. The excerpt shows how Rick subordinates his own experience to the system: thus allowing the operations of law to evolve as law.

Experience as subordinate to the system (continued from the excerpt above)

But there are still rules to protect society from attorneys; they are not supposed to lie, distort, destroy evidence. For example, if you came to me and said, in a child dependency situation, that you had molested your child, and we were going to have a trial ... because you've been denying it, I could represent you and say: Yes, OK, thank you for telling me that. And I will represent you and will make the government prove it. There's nothing that says, even though you told me ... you have to admit it. But I can't allow you to take the stand and lie. And that's all there is to it. We have rules along these lines.

The way Rick reduces experience as subordinate to a system means that the self almost appears as its “duties, roles or institutions” rather than the “haver” of them (Kegan 1982: 238-9). This supports Luhmann’s theory that the system influences individuals more than they influence it. The impact of Rick’s successful defense of an abusive parent on a child does not enter his equation about what to do in a case. As dictated by ‘the system’, his concern is not about the continuation of crimes being perpetrated against a child but rather that “*There’s nothing that says, even though you told me ... you have to admit it*”. Like a mathematical formula, Rick’s role is “inflexible” and his responsibility is to zealously represent his client. However, this formula operates as it does not just because it is what the system dictates *but* also because it is what Rick believes wholeheartedly. In the cycle of system change where the social and the individual each give rise to the other, the rules that Rick chooses to focus on and the way he interprets and represents them over a long period in the court must resonate in his own individual self-concept and it is the exchange that occurs between this particular self-concept and his interpretation of law that creates one of the multiple aspects of legal operations that underpin development of the dependency court system.

Attorneys as self-authoring (creating a self-authoring social system)

The next excerpt suggests what Kohlberg meant about individuals taking the point of view of the system, with Rick considering individual relations in terms of ‘the system’.

Excerpts from Rick’s response to questions: informal communications/relationships

Of course [informal negotiations occur]. But there isn’t any negotiation that goes on like: should the child go home with mom or not today? [This is the only view in this case study that is in stark contrast with other opinions from parents’ attorneys]. That’s decided by the Department before you get to court.

[When speaking specifically about social workers Rick said:]

Some of the social workers I get along with very well; some of them I don’t get along with very well, and don’t trust them because to me, I think they are just evil, bad, satanic people. So I think we communicate pretty well [sic]. The problem’s not communication, it’s the fact that the Department does certain things and the social workers are told they have to [even if] they disagree with that. They’ll tell me why they’re doing it, but I think that’s wrong.

In both examples Rick shifts problems in communications with social workers into a point of view about the system “that defines roles and rules”: it is the department that has the problem. On the topic of relationships, his position reinforces Kegan’s description which indicates that in stage four the strength of the meaning that is made “is its capacity for self-regulation” (Kegan 1982: 222). And building on the way individuals and systems operate, it is also noted that while Rick produces his own internally generated version of reality, his ability to change the way he is shown to

make meaning in this interview, is restricted by his own selectivity (or as noted in Part Three, by his ability to assimilate and accommodate information). To conclude, this case example begins to show how it is the people who practice law, not law itself as an observer that determines its own boundaries and, as such, it is through the meanings that people make that law's recursive network of meaning-making continues to evolve in a relationship with the social system.

Social worker: functional component of the individual self-concept

The functional component of a social worker's individual self-concept is introduced with Ashley's interview; her profile was sketched on page seven. In contrast with Rick's focus on the system, Ashley's views about justice pivot on her concern about people's behavior. This theme, which is representative of her profession, shows strong criticism against attorneys and the excessive expectations placed on her profession. The interview will also show that themes linked with interpersonalism are not well suited for the institutional rigors of law and its focus on self-authorship: a point which reinforces King's (1997) general analysis of the profession. And consistent with King's argument (and also the cycle of system change in Chapter 16), in what might appear as a contradiction, several data excerpts are used to show that a transition for social work about how to make meaning in 'the system' is also occurring.

Justice concepts, self-concepts: wanting more from people

An excerpt from Ashley's response to the question: What is justice?

I feel that justice, *you need to look at it in terms of everybody's behavior* and how it impacts on other people, not just on that one particular person getting justice because they've been accused of a crime.

Whereas Rick equated justice with limited government, Ashley describes it as paying attention to everybody's behavior and how it impacts others. Specifically, Rick was dissatisfied with *the system* and its approach to justice mainly because DSS controlled the courts; interview excerpts from Ashley will show she is dissatisfied with the system because of the way attorneys, judges, social workers and supervisors at DSS operate.

The responsibility of others

Consistent with her perspective of 'justice', and the way interpersonal themes characterize how social workers observe and respond in the system, Ashley describes roles within the context of what others (attorneys) should be getting their clients to do.

Excerpts from Ashley's response to the question on professional roles:

Social workers are criticized every step of the way ... [But] *Attorneys should be telling their clients ... these are the facts and you need to cooperate with the social worker* so that we can work on things being different and the court is no longer involved in your life. Instead ... it's all the social worker's fault and the responsibility is not where it should be. *The responsibility should be on the client* because it's their behavior that brought the situation before the juvenile court and the DSS in the first place. That's really lost in all this.

Ashley's views about what attorneys should do contrast strongly with how attorneys see their role. Expectations about others continue below, where Ashley indicates, in effect, that people at DSS fail to provide the holding environment necessary for her interpersonally embedded self to engage in shared realities and mutual relations.

Anybody can do anything and then the social worker is always put up on trial and *they* [DSS] don't really give you a lot of support. *No one says: You know what? I really trust what you did.* This person obviously has problems and we have a policy and we want to respond, but I'm not questioning you. *They* never say that ... even though I think they know that the person was unreasonable ... Too bad you had to go through all that because obviously this guy's got problems. *They never make the social workers feel better.*

Ashley's desire for support from others (in authority) and a preference for shared realities and mutual relations is clear. So is a rather tenuous relationship with others in the system, suggested first in her hurt that "they" don't make social workers feel better, and second in the way this was couched with a mix of anger and underlying disillusion. The social worker's expressed need for support is consistent with Kegan's theory, where those in the interpersonal truce are more inclined than others (not necessarily verbally or consciously) to ask: "Do you still like me?". For those in the institutional truce (such as Rick), Kegan writes that the question becomes: "Does my government still stand?" (1982: 102).

However, rather than see the 'system/people' interaction in this narrow context, these views should also be considered in light of the entire interview.

The crisis of loss in all transitions

Ashley's interview suggests that the early stages of stage 3/4 transition may be occurring.¹⁴⁰ Kegan said that the transition from stage three can arise "if the expectations or obligations of the relationship – the very connective weave in which I locate myself – become excessive" (1982: 207). Evidence that the burden of expectations in her professional relationships has reached this point is seen in Ashley's *repeated* reference to unrealistic expectations being made upon her profession. Other social workers spoke about this dynamic, but Ashley's exhaustion and frustration over the demands resembled collapse.

Bringing the conflict inside

Having said that a process of change may be occurring in the way Ashley makes meaning, the following excerpt suggests that in addition to wanting support from others, elements of "a sealed-up self" already exist. The data excerpt below suggests that the self is not *all* derived from how others "see me" (Kegan 1982: 197).

An excerpt from Ashley's response to the question on power:

A lot of the problem is that the social worker doesn't attend every hearing. So attorneys just say these things that are absolute lies sometimes and totally distort it. *I'm going to be in court because I want to set down my position but a lot of social workers don't do that. I'm able to articulate myself in the courtroom better than a lot of social workers ...* but I've been around a lot longer than a lot of them. But it's really unfortunate, what happens in the courtroom ... It's just absolutely incredible how they give all this clout to

¹⁴⁰ See Chapters 15, 16 and 20 for a glimpse into how 'contradiction' can contribute to transitions.

these people who a lot of times don't have a clue. [Quote is continued below].

This excerpt flags the emergence of the “I’m different” pattern of response. This pattern, which was prevalent in social workers’ interviews, arises in *their* observation that they are better than their colleagues, in that they have more skills or are tougher than others. As the social work cohort from DSS:CSB self-selected into the project it is not known if this finding is limited to those interviewed. In other words, it is not known if most of the workforce think they are coping but that their colleagues are intimidated. The one interview pattern that suggests a link with the self-perception of being better equipped than others is reference to ‘having been around a while’. Discourse analysis of other interviews suggests that the impact of staying in the system for a long time is to encourage a more ‘sealed-up self’: not just in terms of silence (or passive resignation) but in seeking and finding satisfaction in one’s own counsel.

The second point to be made is about Ashley’s belief that attorneys often “don’t have a clue”. Section Three noted that a judge expressed the same opinion about social workers. Could these views reflect what Kegan describes as competing voices (or meanings) which lead each to interpret the other as not engaging the ‘real task’ at hand? Moreover, Ashley and Rick both *spontaneously* indicated that those in the other discipline have lied. Without completely discounting their opinions, could this also be an exaggerated way of seeing how a person makes meaning by reducing that which does not have meaning to the status of ‘noise’? Ashley’s and Rick’s views also strongly represent the intense feelings that can often underpin the nature of the clash

in the system, such that it leads each person to firmly hold onto their own position when they disagree with another professional: that is, when they disagree with how ‘the system’ is operating if a particular decision is made. As such this tendency reinforces the processes outlined in the cycle of system change (introduced in Part Three), whereby the ability of a system (a person) to change how they make meaning is restricted by their own selectivity.

Nesting the system *and* the judge in the interpersonal

The next excerpt – which is also taken from Ashley’s response to the topic of power – reinforces Kegan’s theory that in stage three “a person is likely to nest ‘the judicial system’ and the ‘judge’ within the interpersonal” (Kegan 1982: 194). In so doing, the quote continues to strengthen the convergence that arose in this research between the theory under discussion and the patterns that emerged from the fieldwork data.

I’d like to see one of those judges take a caseload and do this job and have people start telling them, treating them as if they were any social worker and getting bashed, the social worker this, the social worker that, have orders come up they have to comply with that they know are totally unreasonable. None of these attorneys could deal with it for a minute.

Kegan writes that in the interpersonal stage the judge might be expected “to ‘put himself in the place of [another]’ and see that he would do the same thing” (1982: 194). Accordingly, Ashley believes that if judges put themselves in her position (or her profession) they would also feel the expectations placed on them as being intolerable.

This approach to making meaning contrasts with the institutional truce which makes pleas for recognition of the individual from the perspective of the priority of persons *to the social order* (Kegan 1982: 195). This was seen in the reasons Rick gave for protecting a father's rights to his child: they reflected the principles valued by American society. Overall, differences of this nature between the professions continue to emerge where individual interpretations about justice in the social work cohort were often more focused on people than on the structure of the system or its laws.

Individual self-concepts and justice concepts

An excerpt from Ashley's response to the dichotomy of rights and caring:

I think *people that work for children's services became social workers because they were interested in people, so that's their orientation*. And a lot of attorneys, to be honest with you ... I don't think they're capable, a lot of these attorneys, or they don't allow themselves, not that they're not capable. They don't care enough. I've heard them say: I don't care. They just don't get into it.

I found myself wondering if Ashley's view about attorneys 'not caring enough' was interrelated with the unlabeled perception that institutionally embedded attorneys are psychologically isolated – operating law without the appearance of emotion.

In response to the question on rights and caring Rick described *the system* as the 'Black Pit of Calcutta', because DSS had stolen children from their parents. His institutionally oriented individual self-concept appeared to play a role in how he interpreted these events. Similarly, does Ashley's interpretation arise because

attorneys do not approach justice from the same interpersonally oriented concept that has helped to shape her own observations? The influence of her own perceptions and the continued emphasis she places on people (over the system) is seen below.

An excerpt from Ashley's response about informal negotiations disintegrating:

[If informal negotiations disintegrated] I think that it would probably make the attorneys mad and they'd put everything on for trial and make the court let them. *I think the court needs to get more control down there; they let attorneys run the show too much.*

When Rick answered this question his self-concept led him to interpret that the government wrongly exercised excessive control over the court. The way Ashley forms her views leads her to interpret that it is the attorneys who wrongly exercise control over the court: it lets "attorneys run the show too much". While the example only hints at the interpersonal truce, it becomes more apparent in the next question.

Self-concepts: perceptions about power and relationships

An excerpt from Ashley's response to the question on good relationships:

I think it's more the attitude of attorneys that set the tone and the social worker responds to that. I'm always willing to work with the attorneys and I talk to them about what I'm going to do, but when they say these unreasonable things that are off the wall, I'm just not going to listen ... they want to get something for their client, and this is a game to these people. I think if they'd really start acknowledging most people that come before that

court have got some significant problems, and therefore *we need to work together to make sure the child is not at risk, and we need a team to do that.*

Rick tells us that the important things are decided by DSS before informal negotiations occur. Ashley tells us that ‘the attorneys set the tone’. Overall, the different self-concepts lead to different perceptions about who has the power – each often thinking that the other discipline has it. Moreover, Ashley’s intrapersonal perception of justice appears again in the view that attorneys should be getting parents to behave differently: *they* should shift their focus to consider the potential risk that a child may face.

This perspective raises a dilemma for social workers. At the same time that they hold strong views about what others need to do to protect children, many do not want to ‘appear’ like the “bad guy”. While Kegan attributes concerns about being the “bad guy” as belonging to stage three, its emergence in Ashley’s interview helps to illuminate the way in which this form of meaning-making influences how social workers operate.

An excerpt from Ashley’s response to the question about bad relationships:

Yes, for sure, I've had a lot of them ... I'm pretty clear about what I want to do and why, that's something that happens to be one of my strengths: that I just know, and if I am questioning myself I'll take the people that I really trust and discuss it with them. I feel secure enough about my decisions that they can't change them if I don't want them to be changed. But I don't think all social workers feel that secure about their decisions and they don't want to be the bad guy: there are some social workers that are loved a lot of times, because they're enabling like crazy and they're not making their clients do what they need to do.

The insecurity identified above was often reported in interviews with social workers and is discussed in Chapters Nineteen and Twenty. Briefly, people in the interpersonal truce derive a self from their relations with others; when this does not occur in the court in ways that reflect social workers' expectations for reciprocity some get intimidated. This experience is made more complex as they do not want to appear to be the "bad guy".

To conclude, in response to the same question above, Rick spontaneously identified that his opinion will not change regardless of having spoken with social workers. This same perspective emerges in Ashley's similarly unsolicited opinion that she 'feels secure' in her decisions and "*they* can't change them if I don't want them to be changed". As such, each individual's internally generated version of reality is restricted by their own respective form of selectivity. As a result of being unchanged in their views they each maintain the integrity of their individual self-concept; therefore, *their* professional and system self-concepts stay embedded in perspectives shaped by the boundaries of their respective individual self-concepts.

The next chapter continues to build on these links between interpersonalism in social work and institutionalism in law, and at the same time, builds on the relationship drawn between individual and social influences in the cycle of system change. It approaches these topics by exploring how professionals experience confirmation in the meanings they make – which, like the misleading concept of 'total justice', can never be approached in terms of 'total confirmation'.

CHAPTER NINETEEN

PROFESSIONAL SELF-CONCEPTS: PROCESSES OF CONFIRMATION (and contradiction)

Introduction

Having now set the foundation for the different patterns of individually held values and beliefs that arose for attorneys and social workers, this chapter builds on the concepts just presented through the analysis of professional self-concepts. As well as reviewing and strengthening key dynamics associated with this topic, the chapter also reviews the role of professional self-concept 'confirmation' in the cycle of system change (introduced in Chapters 15 and 16). To review this theme, the role of confirmation supports the evolutionary processes whereby systems – in this study, professionals – produce their own version of reality (in their discipline); and their ability to change is restricted by their individual processes of selectivity: although 'confirmation' sustains these processes it can seem to the other discipline as a contradiction or 'irritant' to how *they* make meaning.

Review: key differences between the professions

Analysis of the system studied (SL) indicated that in the most *extreme* scenarios, the emotion-bound social workers who were portrayed in the San Diego press as crusaders, child savers and zealots (see below: Chapters 23 and 24) were pitted against 'legal personalities' in the dependency court. Part One flagged this term as referring to attorneys as if operating law without emotion – and it was illustrated in the last chapter with Rick performing legal operations as if doing mathematical

equations. Differences of this nature were found to contribute significantly to the clash that arose between professionals in court operations.¹⁴¹

Importantly, the extremes outlined above have at their core an historical and pervasive superiority of the male-dominated profession of law over the female-dominated profession of social work. This matters because it goes to the topic of the historical memory of each discipline and therefore, the ‘social’ communications that underpin the way meaning is made by each profession. As explored in Chapters Six and Seven, the elevated status of law over social work is bolstered by a range of diverse and interacting factors such as: centuries of social history in which males have been regarded as being superior to females; the rational as superior to the use of intuitive wisdom; hierarchical structures superior to structures of mutual consent; scientific objectivity regarded superior to the empirical and experiential; and established authority superior to amorphous boundaries (such as that seen in matriarchal thinking).

Chapters 17 and 18 explored how these dynamics are partly explained through the psychologies of interpersonal attachment and institutional differentiation. These psychologies simultaneously reflect the evolution of individual factors operating in an exchange with social dynamics. This is to say that *we* have created and continue to transform the different forms of meaning-making about communion and agency in processes that operate in conjunction with the primary structures that bind our environment into cohesive social systems. Or to put this in other terms, such as those

¹⁴¹ As one example, Chapter 14 explained how the decontextualized voice of law and the more process-oriented voice of social work each make negative attributions about the other and this hinders ongoing interactions about how to best proceed in a case.

disputed in this thesis about the autopoietic systems theory of law, social events are not separate from the factors that inspire or inhibit individuals in the operations of law.

The Professional Self-concept: Tables Four (a) and Four (b)

Tables 4(a) and 4(b) provide a glimpse into the relationship between the individual and social forces identified at a professional self-concept level of operation. Both tables are built from analysis of empirical data about the dependency court and expand on the issues noted in Chapters Five, Seventeen and Eighteen on the individual self-concept.

The tables help to conceptualize the interconnection between individual factors of a professional nature and perceptions about socially established restraints and support mechanisms in the system, both of which often fall under the umbrella of a 'system' response. The first table (4(a)), showing three overlapping categories, indicates key issues that fieldwork data suggested exist at individual levels of professional practice.

4(a) The Professional self-concept: a component of the system self-concept

Issues summary: Primary difference - Institutional and Interpersonal meaning-making

<u>Professional Practice</u>	<u>Professional Approach</u>	<u>Professional Standing</u>
Work habits: well / poorly structured	Independence v Mutuality	Reputation: established / building
Professional ethics: strict adherence / equivocate	Well informed v. ill informed	disrespected or trusted
Injects or separates own values	Response to pressure: buckles / confronts	Career stability / aspirations
Communication style: text v. oral orientation	Returning / doing a favor	Promotion track
Level of knowledge disciplinary/interdisciplinary	Trade-off for other cases	Status of position
Ability to manage time issues	Desire to resolve case	Competition for job
Work experience outside office	Desire for adversarial process	Professional qualifications
	Attitude towards informal communication	Successes & disappointments
	Relationships with others	Grudges & favoritisms
		Peer membership needs

Aspects of this table are discussed after introducing Table 4(b). It identifies the main socially established patterns of influence that arose in analysis of data from the host culture that appear to affect how professionals continue to make meaning in the system. This concept was first introduced in Chapter Five. It was reinforced in Chapters 14-16 where data helped to show that the observations and operations occurring in the cycle of system change ultimately reflect the inseparable nature of social and individual forces in the court.

4 (b) Factors of influence in the host culture: Professional self-concept

System change: empirical factors likely to influence change in professional self-concepts

<u>Workplace Culture</u>	<u>Institutional Direction</u>	<u>Interagency Relationships</u>
Institutional or Interpersonal	Philosophical direction	Competition for funds
Political culture & conflicts	Policy - practice guidelines	Different commitments / goals
Services available for clients	Administrative changes	Pressure for allegiances
Access to support systems	Political agendas	Interagency wars & power issues
Quality of supervision	Administration: organized / disorganized	Political maneuvering / position
Teamwork structure and role in decision making	Nature of leadership	Communication between leaders
In-service training	Stability of leadership	Response to politics
Caseload & debriefings	Funding issues	Communication policy / patterns
Controls or lacks control over change processes	Staff levels / resources	Infrastructure: established / discredited / fluid
Response to external forces	Community liaison	External pressures to change interagency relations
	Training requirements identified	

The next quote helps to illustrate the relationship that exists between both tables. It also shows a link between individual and professional self-concepts, and supports the theory that the historical memory of social work is not pre-programmed to reflect the rigors of law (King 1997: 81). As well as reflecting data in this study which suggest that many in social work look externally to confirm the meanings they make (their meanings can be vulnerable to being derived from what others think), the excerpt speaks to the topic of social work intimidation for some working in the court system.¹⁴²

Social worker

I tend to question myself a lot and question my decisions a lot and never be very sure of what I'm doing, probably I feel because I don't have a masters in social work, though I can see from other people who do have a masters it doesn't really make a lot of difference ... It's very scary for me to feel like perhaps I've done the wrong thing. So when I go to court and I've already got that feeling that maybe I've done the wrong thing, and then I have attorneys who are arguing that I have, it makes it a really scary place to be. I think in a way it's good because it makes me be very careful about my decisions ... That makes me a very careful social worker but it also makes me a very anxious social worker.

I guess I could tell you that I'm not sure I'm going to stay in this field because of the anxiety that it causes me. I've been accepted to do a masters of social work and *I feel so ambivalent about it that I'm not sure I want to make a commitment of that amount of time and money when I'm feeling so anxious all the time.*

This quote suggests that there is an interplay between a person's experiences outlined in Table 4(a), and the social dynamics outlined in Table 4(b). Specifically, it

¹⁴² I have also chosen the excerpt because it offers the opportunity to simultaneously show how 'coder

suggests an interaction between the following three aspects in Table 4(a) and three aspects in Table 4(b):

- individual levels of professional knowledge and work experience linked with professional practice (cell one, 4(a))
- a professional's approach to their experiences in 'the system' – such as where some buckle to pressure (cell two, 4(a)) and
- a professional's standing in the system – such as their own aspirations and qualifications (cell three, 4(a)), and the social dynamics in Table 4(b), such as:
- workplace culture – which includes (the lack of) suitable supervision (cell one)
- the institutional direction taken by an agency – as in the nature of leadership or the appropriate/inappropriate identification of training requirements (cell two) and
- the nature of interagency relations – where power issues or different commitments may contribute to fractured rather than collaborative communications (cell three).

While some may argue that the *individual* social worker in the above interview excerpt is experiencing a personal crisis around how she makes meaning in her profession, an earlier investigation into 'the system' by the San Diego County Grand Jury noted that “most social workers stated that even with a Masters degree in social work they were not prepared for the job of handling child abuse cases and agreed the job is a ‘learn as you go process’ ” (“Children in Crisis” Report No 6, 1989: 11).

While this surprise finding reinforces literature and data about social workers using their everyday experiences to perform their roles, discourse analysis of interviews also indicates that to stay in the system social workers find ways to confirm the meanings they make.

analysis' influenced interpretation of data on key topics that emerged for the typology of self-concepts.

The rest of this chapter builds on the ‘cycle of system change’, by showing individual and social aspects of how professionals confirm the way they make meaning. It begins with the agency professionals represent. Issues are also looked at from the perspective of how one profession views the confirmation processes of the other: which can be experienced as a contradiction.

Agencies as the source of professional confirmation

Theory and data suggest that the perceived legitimacy of the institution that a profession represents and the way an institution “holds” that profession plays a role in the way professionals see themselves and confirm their meaning. To illustrate, the fact that courts are seen as more legitimate than DSS – particularly by those who operate courts – gives attorneys more legitimacy and confirmation in the meaning they make than social workers at DSS. Courts have greater legitimacy because they *are said to*:

make decisions on the basis of merit and logic, shunning the favoritism, logrolling, and pork barreling so central to decision-making in other political institutions. In courts, it is not who one knows that controls the decision, but rather it is the merits of one’s case (Gibson 1989: 471).

Institutionally embedded attorneys use social perspectives of this nature to elevate their position over social workers.¹⁴³ However, this practice does not prevent interpersonally embedded social workers from (temporarily) finding confirmation in

¹⁴³ Specific to the findings that arose directly from the research instrument in this study, Chapter 14 noted that while attorneys used the power of the law to justify their role (and merits of their (social) decisions), social workers did not couch their role or decisions in language about their legal mandates.

their own 'system'. DSS confirms the meaning that social workers make (more implicitly than explicitly) to the extent that it provides a basis for them to occasionally use "insight" and individual interpretation in their interactions with clients.

While the topic of social worker interpretation is discussed later in this chapter, this particular issue warrants brief explanation. Social workers have long recognized: "the offering of insight by means of interpretations is limited in casework settings" (Ferard & Hunnybun 1962: 65). Moreover, their practices are increasingly geared to meet DSS institutional rules and management systems (King 1997: 96-106). However, as noted earlier (and discussed again below), their helping role is still described as being based on transactions of feeling and care (see for example, Camilleri 1996: 175). While attorneys' roles are also influenced by feelings, it is held that they channel their feelings so they reflect evidence, and what can be established in text before the court.

Competing perspectives about confirmation: social workers on law

In contrast to seeing attorneys as deciding issues on 'the merits of a case', social work interviews often reflected the general view that success at law is "a function of one's cleverness, not of the strength of one's complaint" (Vining 1978: 125). Social workers in this study reflected the popular view:

against which lawyers with a concern for their personal integrity have struggled for centuries, that law is a thing to be used and the profession

a place for persons of manipulative mind and empty heart (Vining 1978: 125).

Although many social workers may regard attorneys in this way, readers are reminded of Kegan's theory that others can experience the institutional truce as manipulative (see Chapter Seventeen). However, notwithstanding any reasoned psychological basis for the *appearance* of manipulation, as Vining indicates, it remains that claims about legal decisions being based on instruments such as text or case law (claims which serve to confirm the professional self-concept of attorneys and the way they make meaning), will not diminish the fact that people often feel manipulated or perceive a schism between what is asserted about law and what occurs:

Constant explanations of the adversarial system as a machine that turns vice to virtue understandably fail to dispel this suspicion, for opportunities and rewards for manipulation can be found in doctrines (Vining 1978: 125).

These quotes, which suggest that manipulation in law has both an individual and a social element, hint at the level of contradiction that many social workers perceive in child abuse cases. Notably, they must accept what appear to be manipulative practices while the way they make meaning is enslaved by law: done under the guise that it will result in the most just outcome (King 1991: 313; 1997: 80). The following discussion partly explains how it is possible for attorneys to enslave the meanings made by others, by looking at how attorneys confirm *their own* feelings as individuals. The discussion also sheds light on why attorneys may seem but are not (at core) manipulative or heartless.

Attorney self-concept confirmation: the administration of feelings

Kegan said that in the institutional truce “one’s feelings seem often to be regarded as a kind of recurring administration problem which the successful ego-administrator resolves without damage to the smooth function of the organization” (1982: 105). The next excerpt, the first of many from Graham’s interview, begins to address this topic. It builds on Chapter Ten about how attorneys think like systems (or the role of the individual in law) and also metaphorically reinforces an aspect of legal autopoiesis.

Children’s attorney

The fact of the system, kids will die and kids will continue to get hurt. The system is not perfect. Of those kids that die, you feel badly, you feel awful, you look inside yourself; what did I do? You start to blame yourself. You’ve got to say: I did the best I can; *the system is flawed – let’s move on. How many did I save?*

Graham typifies many in his field where conflict in the institutional truce ‘comes inside’. He sees himself as just one part of a system and he is responsible to manage how he feels. This differs from the interpersonal truce where one *is* one’s relationships. An earlier example from Ashley where she blamed DSS management because “*they do not make you feel better*” helps to contrast this point, suggesting the very different ways professionals in each discipline can seek to confirm how they make meaning.

Whereas Ashley can now hold her own opinions but looks (angrily) to external sources for support, Graham sees the system as flawed but moves on to focus on his successes. The next excerpt exemplifies this latter approach. Graham talks about the ‘Attaboy File’ he uses to console himself if feeling low. His commitment to the system is paramount and the way he administrates over his feelings shows how he manages them in ways, typical of what Kegan depicted for the institutional truce, without disrupting the system (in this case his system of meaning-making about the system of law).

Children’s attorney

Researcher: When Graham commented that kids will die and ‘you have to look at how many you save’ I said: “I’ve seen some people become so embroiled in failures and disappointments that they end up being unable to give anything”.

Respondent: I keep a file in here, and *it’s called “Attaboy”*. *It’s my Attaboy File*. [Graham opened his desk drawer and started sharing the contents of ‘The File’. He said:] Whenever I start feeling badly I pull this file out and it’s essentially postcards, thank-you notes, thank you for all the energy and time, you did this, pictures of kids; and I read this over and I say: *Isn’t that something! I make some things happen that wouldn’t happen if I weren’t in this job. And I say it’s not perfect, everything can’t be perfect. But, you see the little pictures they sent you at Christmas time ... and it makes me feel better and I can get on.*

This is from a family that we were able to get adopted by somebody else, and just this kind of stuff where -- *my Attaboy File -- it makes me put it all in perspective and realize I do more good than harm; I help more people than I hurt and I like to think that I hurt very few and none intentionally, and **more people that are hurt in this system are hurt by the system, not by the individuals who are in it, and it’s the only way you can get through this.***

Because if you start blaming yourself for everything that happens, as long as you've been professional and do the best you can, there's no perfection in the system, mistakes happen, and you've just got to accept that fact. . .

Researcher: I feel very touched by the interview. You seem to be able to work in extremes: you're talking about people being hurt and protecting children and you're showing me pictures of kids, and there's such a level of gentleness and caring coming through: you need to protect people from being hurt. And then I hear such a commitment to rules and regulations [where it is OK to zealously defend and 'get a person off' who is guilty of murder] and they seem like such polar differences. I'm sitting here thinking: how can this be so?

Respondent: It's balancing; *it's balancing a role.* It's putting it all in perspective and not getting caught up in any of it ... When you have a system where there are failings you say to yourself: *I feel badly because I'm part of a system that failed ... But that doesn't mean you die and it doesn't mean that you have to change: it means you have to try to work within the system, to change the rules to make them work.* You write new bills ... or where there's ambiguity, or where there's discretion to change the rule a little but you do that to make the system work. My goal is to make the system work. If I do that, then I've done my job.

Researcher: And so your ultimate commitment is to the system?

Respondent: Absolutely. As long as I've done my fair share I can live with the mistakes.

'Confirmation' and a question of commitment: institutional v. interpersonal

Whereas attorneys can appear manipulative, and may respond to social workers' requests in child abuse cases to be more caring as if they are speaking to a 'brick wall' – reducing their requests to the status of noise – this interview reflects data that attorneys often do care and have heart: however, it is shown through the use of rules.

The fact is emphasized that caring, and how it is confirmed, manifests differently for each discipline. It seems to be linked with data on the one hand showing that attorneys are committed to the system (including changing it), and on the other hand in the *total absence* of social workers indicating they are committed to either DSS or the court. Although many social workers seek mutual relations, and avoid being regarded as the bad guy, data analysis suggests they mainly care about their commitment to children.

These differences also mean that when attorneys subordinate their caring to the system it helps them to see mistakes in the way Graham described: as a fact of system life.¹⁴⁴ If the mistakes cause problems ‘it doesn’t mean that you have to change – you change the rules within the system’. This approach contrasts with the interpersonal truce where, because people *are* their experiences and relationships, mistakes are more likely to be personalized.

Processes of confirmation: social workers as theory builders

The most personal aspect of social work confirmation arose not in the ‘social’ (or in the blunt form, through reference to text) but, in the practices embedded in individual interpretations. This is seen primarily through their activity as “theory builders”: a process grounded in the use of their everyday experience (Secker 1993: 30-110) and one that is predicated on the work performed by the profession as being “the use of

¹⁴⁴ Like Rick (Ch 18), Graham reduces experience as subordinate to a system such that the self almost appears as its “duties, roles or institutions” rather than the “haver” of them (Kegan 1982: 238-9).

self” (Garvin & Seabury 1997: 90). Factors associated with social workers structuring their activities around their own interpretations (Satyamuri 1981: 32-76) include weak leadership (Lesnik 1997; Ramos 1997; Jordan 1998) (a finding mirrored in this study) and rejection of formalized theories from their educators or agency of employment (Secker 1993: 110). Although Chapter Seven suggested that there is a shift in recent research indicating social workers are using their theories more often as a guide to the meaning they make (Camilleri 1996: 138), one overriding fact remains constant:

the use of theories and models appear to be a very personal choice ...
used in a mix and match way ... and not subject to control at collegiate
or organizational levels (Camilleri 1996: 141).

The fact that text-based (social) aspects of social work are more subject to personal choice than that which appears in the operations performed by attorneys, may be compounded by what those in the interpersonal truce experience as being “torn between [the] demands” that arise between one interpersonal space and another (Kegan 1982: 106). Interview data suggested for example that some social workers do not want to alienate attorneys and this can compete with their desire to help children. Unlike attorneys whose meanings are confirmed within the parameters of legal text or rules, these more personal elements of social work practice help to explain the general issue where “social work has had to fight a constant rearguard action against the pervasive notion that any man with love in his heart can do the job” (Wilensky & Lebaux 1958: 17).

Being perceived as more personally than professionally based has been the bane of the discipline's history, and as King notes, in the face of extensive criticism in order to keep operating as a self-reproducing system social work has had to pull itself up by "its own boot straps":¹⁴⁵ it had to do this to reassure the public of its competence (1997: 96). We now discuss another way social workers achieve this system confirmation.

Sticking together: a shaky environment for self-concept confirmation

Empirical findings and literature show that in the event of and in anticipation of failure, social workers "stick together". As outlined in Chapters Seven and Fourteen, and as will be discussed in the remaining chapters of this thesis, in this study there were many factors that combined to give social workers very solid reasons to support each other. They ranged from the perceived absence of strong leadership (for children), which was compounded by their own absence of authority – and voice – in the legal system, to the level of attack the profession endured in San Diego during the backlash against the system (October 1991 to early 1994).

At one stage the profession's need to stick together went beyond the conferencing and informal exchanges that were noted in Chapter Seven. In the face of immense attack social workers from DSS:CSB in San Diego tried to promote the solidarity of their group by holding a public rally which was attended by and reported in the print media. It seems that sticking together in this very public way may have improved their stamina in the short-term by lifting their individual self-concept, which in turn

¹⁴⁵ A demand increased by social work's vulnerability to dependence on other systems (see Ch 23-24).

may have strengthened their professional self-concept, within the context of how *they think* meaning should be made in the system – regardless of what was being said in the press.

Specific to the court setting, social workers have to stick together when attorneys such as Rick (Chapter 18) regard some of them as “evil people”; or as seen in Chapter 14, when judges believe that social workers “usually don’t know what they’re doing”.

One of the ways social workers at DSS stay together (and confirm meaning making in personal ways which allow them to continue to generate their own internalized version of reality in the court) is to ‘demonize the other’. An interrelated process, which may also enhance the solidarity of their group, is to turn other agencies into “the common enemy” (Scott 1993: 3,8). Notably, these practices help social workers “to avoid feeling that they have failed and that they were responsible for the plight of the child” (Scott 1995: 3).

The next chapter continues to review these dynamics through the processes of confirmation and contradiction that characterized system operations in this study: they speak to individual and social processes that influence attorneys and social workers to change, and in the process speak to how the system of law operates and changes.

CHAPTER TWENTY

PROFESSIONAL SELF-CONCEPTS: PROCESSES OF CONTRADICTION (and confirmation)

Introduction

This chapter builds on the cycle of system change presented in Table Three through its focus on the relationship between confirmation and contradiction in system change. Based on theoretical literature and the accumulation of data from respondents, it is argued that contradiction (or system irritants) mostly occurs when each profession perceives inconsistencies in the other's discipline during court operations, and they each point to these 'shortfalls' while calling for justice; which as established has very different meanings for people.¹⁴⁶ As the chapter explores how different opinions are maintained, it helps to show the system theory process which indicates that a system initially reduces that which does not have meaning to the status of noise.¹⁴⁷

This chapter also plays a role in continuing to develop the overarching theory that in order to explain how law operates – HD+LA or the interaction of social and individual forces – belongs in one theory. It does this by providing data which challenges the autopoietic systems theory that social events are separate from the factors that inspire or inhibit individuals. Significantly, whereas it has been noted that Luhmann and King describe system change as being stimulated by irritants, and place this as occurring in the social, this chapter starts to explore how *people* resist irritants

¹⁴⁶ Chapters 23 and 24 will also show that the cycle of system change – which in this study underwent a pendulum swing from an interpersonal orientation to an institutional emphasis – is also stimulated by the accumulation of social action on the interpretations that social workers and attorneys make.

¹⁴⁷ Processes influenced by the different historical memories of each discipline (Chapters Six & Seven).

by confirming their own meanings and, how irritants or contradictions presented by other *people* can help them to change.

As one example of the difference in theoretical approach that I am talking about, King and Piper place the need for change in *discourse*, which they lodge in the social. They write that “there can be no real meeting of minds, *no real communication* between lawyers and [the helping professions] as long as each remain within their own discourse” (1995: 34 italics added). These views are not entirely wrong, but they infer that “real communication” does not include attention to the more intricate aspect of what occurs between disciplines: not just the words that people speak but *how they make meaning* about their experiences; that is, how *professionals* cohere as systems. Until this is addressed, any changes to discourse will be superficial and it is suggested ineffectual.

The second half of this chapter explores a very different form of contradiction; it is that which arises as a result of the way data are interpreted. This is to say that rather than placing law as mainly reflecting agency and social work as communion, key contradictions are outlined about the allocation of these themes to each discipline.

Contradiction in social work: unequal professional status

First, it is recognized that contradiction is an inherent aspect of social work. Franklin and Parton best capture this point. The authors report that the profession is portrayed “on the one hand, as inefficient and incapable of meeting the various demands placed upon it while, on the other hand, it is allegedly repressive, interventionist and

illiberal” (1991: 15). These polarities of “inefficiency and bureaucratic authoritarianism” occur in a context where the profession is trying to achieve contradictory objectives which amount to “the negotiation of care and control” (Franklin & Parton 1991: 35-36).

Expanding on previous chapters, these competing negative attributions associated with the profession are compounded by the contradiction social workers experience when their discipline is not respected as one that involves training, has ethics, and demands specialized knowledge and skills to perform. This empirical study found that as a result, resentment has festered for those practicing in the dependency court. The data excerpt below expresses this sentiment; it speaks to the impact of two factors. One is the view that anyone with love in their heart can do social work, the other is that attorneys’ views about social workers’ roles in the court and their lack of respect for the profession has culminated in them thinking they can perform social work roles.

Social worker

I was trained, went to college, specifically for development and counseling; this is my expertise. Mister Attorney, yours is in law not child development. *Unless you want to get a double degree, then I’m willing to give you your due.* You want to get a Ph.D. in Psych and JD, that’s great, and then maybe you could do both jobs.

This response is linked with the profession's view that they lack authority, which arose in their criticism about not having an official voice in the court.¹⁴⁸ As one social worker said: *“you have to listen to all this rubbish ... it's not like we are counted as an important person in the court scenario. I'm like a non-person. I'm just sitting there”*.

It is consistent with logic that if a professional feels treated “like a non-person” when they act in a professional capacity, they either leave their place of employment or endeavor to change the circumstances around which such feelings arise. This study suggests that both of these dynamics occur: as well as County Grand Jury reports indicating high rates of turnover in DSS, data show that some social workers succeed in penetrating the bastion of rationality – according to them *“by joining attorneys in the language they use and adopting a confrontational approach: [as in] ‘you want to go to court, OK let's go!’ ”*.

The chapter now explores what occurs in-between these two forms of response. The discussion is about the type of factors that were shown to (unwittingly) protect social workers from having to change when faced with the nature of irritants outlined above.

Social work resistance to irritants (contradiction)

One finding from this study, called here ‘the five-minute factor’, not only helps social workers confirm the meaning they make: at one and the same time it contradicts the

¹⁴⁸ In King's analysis of social work and law he said it was unthinkable to social work that it would fail “to make noise comprehensible” to the systems it viewed as needing to change (1997: 95). Kegan's theory sheds light on why the “unthinkable” has occurred through its focus on how meaning is made.

claim that attorneys' decision-making is based on the facts of a case, and challenges the complaint that social workers "don't have a clue" about what is going on in the system.

The 'five-minute factor' refers to the way attorneys gather information. Although some may argue that attorneys can quickly reduce that which does not have meaning to the status of noise, it remains that they are perceived to meet with their client in the court corridors just before a proceeding starts, and on the basis of this very brief meeting, they purport to know the facts of a case. Social workers do not believe this is possible and it is argued here that this is but one of the dynamics that shift their need to adapt to the system – even in the face of intense contradiction to the way they make meaning – to the need for others (attorneys) to change.

The next excerpt begins to show the relationship between social workers' views about the five-minute factor, their professional self-concept, and the type of observations and expectations that reinforce the meaning they make (that is, not just the words they speak). Their desire for connection and for others to operate from the same viewpoint is evident. The unanticipated but frequent reports about their colleagues' discomfort and feelings of intimidation is also indicated.

Social worker

Unfortunately, I see some attorneys, *very few really get invested with their clients, really communicate* with them. *Other ones don't talk to their clients until five minutes before the court hearing and it's – what do you want? And they try to negotiate with us and they don't have that bond with their client.* They just want to push the case through ... I can sympathize with their

caseloads but I'm not impressed with the ones that are very pushy ... Social workers get intimidated and they avoid going to trial when they should be going to trial.

The interwoven contradiction of intimidation and power

This discussion now moves to a competing perspective with that presented here and in the previous two chapters about the many unsolicited reports from social workers in this study that their colleagues were intimidated because they were afraid of the court system.¹⁴⁹ It begins to integrate how *attorneys* can experience social work practices as causing irritants (or a contradiction) for the operation of law in the dependency court. Once again, this is to say that the issue it is not just about discourse but the impact on the way people in the different professions make meaning.

Social worker

I think social workers initially, *they're scared to death of the court process and of the intimidation and I think they're not prepared always initially for that kind of finesse, finessing relationships with attorneys.* They're too caught up in developing their sense of power because they don't actually think they have it ... *They need to prove they're in control because they're scared of the court process* ... they want to hold their cards right, close to their chest, and so they get to court and they don't want to say anything to an attorney because quite frankly they're not quite sure what it all means.

When social workers hold their cards close to their chest, attorneys experience this as withholding information (which is a contradiction to what attorneys perceive as the role of social work in child abuse cases). Rather than react as a social worker might,

with compassion about the fear of being in court, attorneys' main concern is with the impact of withholding information on their client.

De Montigny captures the view reported by most attorneys for parents in this study about working with social workers. Speaking from his experience as a social worker in child protection the author said his profession had the power:

to deny power itself and *to disguise it as a mutual transaction process*. They had the power to then promote their analysis as 'truth', 'knowledge', 'right', and 'objective science'. As writers, researchers, professors, and practitioners theirs was the power to rewrite people's lives and experiences (de Montigny 1995: xiii, italics added).

The view that social workers can rewrite people's lives, while disguising their activities as a mutual transaction process, speaks to how the interpersonal truce that characterizes the profession's operations can be *experienced by others* as "suffocating" – or over-embedded in the mutuality that underpins the interpersonal. However, reflecting just one of the ways that a discipline can reduce irritants from another discipline to the status of noise, when attorneys discuss criticisms of the sort voiced by de Montigny, social workers can fall back on *their experience* of the institutionally embedded attorney as being psychologically isolated. In short, individual professionals – not an obscure social system – have established ways of dismissing complaints against them, and in this way show resistance to change through their own individual forms of professional meaning making.

¹⁴⁹ As seen in a direct example of the interwoven processes of actions and reactions in Chapter 19, in the feeling expressed that they (or colleagues in their profession) wrongly buckle to attorney pressure.

While the following examples expand on the above points, it is reiterated that what constitutes ‘noise’ has its roots in the particular rationality associated with the way meaning is made in a given evolutionary truce. In short, each truce has its own form of selectivity; these different forms of selectivity contribute to the ongoing process, whereby it can be seen to be appropriate to reject views advanced by another discipline that do not comport with one’s own perspective.

The topic of accountability helps to further illustrate the range of contradictions that arise for professionals in dependency cases. Rather than going straight to field-data, the next quote is taken from a dated but historically relevant review of the system that was conducted by the 1989 San Diego County Grand Jury. It captures a more general – and perhaps on a lighter side, a more humorous (but succinct) approach – to concerns about accountability than is possible to explore in this thesis:

Accountability is difficult in all areas of this system. The lawyers are “just doing their job”; the therapists “have a confidential relationship with the client”; the social workers are “doing the best they can”; and judges “are not to be questioned” (“Children in Crisis” Report No 6: 1989: 2).

Contradictions in professional accountability – and to mutuality

The contradictions social workers experience about attorneys, such as their seeming lack of caring and practices identified in the ‘five-minute factor’, are bolstered by social workers’ views (unexpectedly raised in this study) that the court does not hold attorneys accountable for their actions. One example is that attorneys earn money for

a continuance if they have not had time to see a client.¹⁵⁰ This is a contradiction for the interpersonalist social worker at an individual and social level of observation. For example, social workers reported that DSS punishes those who fail to achieve certain tasks. The legal system is perceived to do the opposite: *attorneys* can be rewarded if their responsibilities are not met.

Social worker

I don't see who the attorneys answer to: when an attorney is delaying the case, when an attorney is refusing to negotiate, when an attorney is calling a trial because of their own interests ... who do they answer to? ... they answer to the court I suppose; the court does hold attorneys accountable once in a while, however, I've been in court so many times when the attorney says: I didn't see my client. So there is a continuance. If I said I didn't see my client I would get in trouble for that, not get paid more because there's a continuance.

It is iterated: what is a contradiction to one discipline can be a confirmation to the other. Attorneys for example, would consider it abhorrent not to be able to argue (or be paid) for a continuance: a request made on behalf of *representing* a client.

Another point of contradiction for social workers emerged in this study when attorneys said one thing in the corridor and then zealously represented another position in court. While the theme of this topic has been linked in every section of this thesis with attorneys doing what is demanded of them regardless of their personal views, it is suggested that *some* of the complaints by social workers about this

¹⁵⁰ This problem was also noted by the 1989 San Diego Grand Jury. At a rate of \$40 per hour "One dependency attorney was paid \$111,463 during a seven month period ... No controls are in place for monitoring the payments to these appointed attorneys ... The expense statements submitted by the attorneys are not reviewed or signed by any staff at Juvenile Court" ("Children in Crisis" 1989: 16).

practice may have arisen because it interfered with them building what Kegan termed “dyadic relations of mutual role taking” (1982).¹⁵¹

Analysis in this study suggests that professionals may continue to see a practice as a contradiction despite knowing why others engage in particular actions, because people develop opinions about others on the basis of their own form of meaning making and observations, not just the discourse a discipline (such as law) uses inside or outside a courtroom.

The following data findings support this premise by contrasting change in the discourse that a profession uses versus change in how meaning is made. It suggests that even the discourse that a profession uses itself does not always reflect a core level of change in ‘the system’. This is relevant as it is tied to the conditions under which irritants operate to stimulate change.¹⁵² In particular, they influence change at a core level of system operations when the system (when a profession) is ready to hear – *able to give meaning to the discourse* – rather than hear it as noise. In other words, what a person resists (and dismisses as noise) and what acts as an irritant to create change, is contingent on movement in an evolutionary truce toward a new stage of development.¹⁵³

¹⁵¹ The importance of mutuality is also significant due to the role it plays in confidentiality. In social work “the essence of confidentiality is mutual consent to a promise” (Franklin and Parton 1991: 85).

¹⁵² Kegan said that all evolutionary truces have “a built-in falsehood or subjectivity which forms the seeds of its own undoing” (1982: 223). As discussed, stage three is over-embedded in mutuality or the interpersonal truce and stage four is over-embedded in agency or the institutional truce (1982: 220). The unfolding of the subjectivity in these stages starts with recognition of these excesses in each truce.

¹⁵³ Chapter 16 discussed Kegan’s theory that a *self*-system cannot even begin to hear “however irritably” issues that speak to the need for change 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).

Contradiction as a tool for superficial and core level change: social work

The process of contradiction for social work through superficial or forced change was identified earlier, such as the introduction of a tick-the-box risk-assessment form by the San Diego DSS. Social work data suggest that this change in discourse about how to assess abuse (which in effect, downgraded practice wisdom and elevated text-based analysis) was not regarded as a respectable tool to respond to abuse. To this extent, while social workers' discourse entered the rubric of legal practice, *social workers* did not shift the way they made meaning about what occurred in child abuse or law; and to extrapolate concepts from the data, they did not gain attorneys' respect for this action.¹⁵⁴

It is suggested that the way in which social workers change how they make meaning (relevant to 'system' operations) occurs when they respond to irritants as part of a normal process of development. This arises in their own perception of excess (arguably heightened by their exposure to practices in the legal system), such as when a self begins to make relationships relative rather than ultimate. For example, social workers may see the extent to which they are the subject of interpersonal scrutiny

Luhmann's theory reflects these ideas but rather than placing the process of change in the relationship *between* the social and the individual, he proposes that a *social* system changes only after *it* develops the ability to turn a contradiction into something that has meaning to its operations. Luhmann proposes that a system has this ability when *its* operations reach a stage of complexity that allow the social system to recognize – or find a form for – irritating information (1993: C6/111/257-9).

¹⁵⁴ The switch to risk-assessment forms meant a change of discourse in the social setting but not to how all attorneys or social workers made meaning about child abuse or law.

under the banner of professional assessment.¹⁵⁵ De Montigny's review of his profession captures this issue – which goes beyond discourse:

Our experiences, our history, our emotions, our very selves became material to be entered and worked up inside the frames of an extended professional discourse (de Montigny 1995: 66).¹⁵⁶

While making these distinctions about differences between changes in discourse and changes at a core level of meaning making, it remains that the theme of arguments in this thesis about hierarchical differences between law and social work means that even if social workers see their over-embeddedness in the interpersonal (without labeling it as such) they will not *always* surmount the long-standing social perceptions that still linger about their 'caring' role in society, which can all too easily bring their emotions into question.¹⁵⁷ The established importance of the relationship between social workers and their clients (Garvin & Seabury 1997: 90), in part speaks to their inability to totally shun the very factor (interpersonalism) that leads to criticism about them in the legal setting.

¹⁵⁵ Ashley's interview excerpts in Chapter 18 also hint at this transition, where the relationships that were once made ultimate give the appearance of becoming relative. Also see Kegan (1982: 207).

¹⁵⁶ Rather than see social events as separate from the factors that inspire or inhibit individuals (King 1997: 25, 91, 207), this quote suggests the individual/social juxtaposition is intricately interwoven.

¹⁵⁷ Data from attorneys loosely support this point. Chapter 14 indicated that most attorneys described social workers as service providers. Social workers mainly said they were investigators. As *all* social workers clearly do not act as service providers (or operate from the interpersonal) further study might examine the type of links between attorneys' views and the truce from which social workers operate.

Contradiction as a tool for superficial and core level change: attorneys

As noted in Chapter 16 attorneys often rely on ‘the system’ to manage contradiction (see heading ‘Attorney protection from contradiction’). The strong *system* link in the way attorneys respond to contradiction means that this topic is mainly addressed in Chapters 21 and 22 when respectively exploring relationships and the system self-concept, and Chapters 23 and 24 when looking at system operative structures.

Briefly, interview transcripts suggest that when attorneys respond to ‘system’ contradictions by making a core-level shift in how they make meaning they recognize the limits of law and – consistent with Kegan’s theory that change from the institutional truce includes “the relaxation of one’s vigilance” (1982: 231) – some attorneys described a less rigid orientation to rules, recognizing they did not necessarily solve the issues their clients faced through the use of law. Rather than make rules ultimate, their approach reflects the general view in which rules are made relative:

Every event in life is unique and infinitely complex. Rules are blunt instruments which lump together fact-situations into classes to be treated alike; they generalise and they simplify. Every decision to resort to rules involves a decision to treat certain differences as immaterial and to treat complex events as if they were simple (Twining & Miers 1982: 191).

Contrasting the type of change noted above – which is illustrated with data in the next chapter – superficial change was categorized in this study as arising when two key

factors appeared to exist.¹⁵⁸ First, some attorneys said they engaged in social work practices and spoke in terms that it was for the purpose of gaining advantages for their clients.¹⁵⁹ The second factor to suggest that attorneys remained over-embedded in the institutional truce, such that they had changed their discourse but not *how* they made meaning, was the appearance in data analysis that they still made the rigid use of law as primary.¹⁶⁰

The meanings given to words depends on how meaning is made

Contradictions about the way my field-data relates to the constructive-developmental theory in this thesis are now identified: they touch on the type of dynamics that serve to contradict and confirm professional self-concepts in the court – and thus speak to the underlying tension found to characterize the system self-concept. Rather than focus on the decontextualized or institutional voice of attorneys and the process oriented or interpersonal voice of social work, focus shifts to what each discipline can also be said to *represent*.

It can be argued for example that most legal practice serves to *support* dynamics that pivot on attachment and interpersonal mutuality (albeit through attention to rules and

¹⁵⁸ A data example of superficial change was shown in Chapter 16 where an attorney was outraged at the failure of the system to protect children but he was clearly not outraged.

¹⁵⁹ Social workers also complained that attorneys engage in social work activities and they decide how a case should be managed: such as whether a client needs therapy, whether unsupervised visitations should take place, if a child is traumatized, or if abuse has or has not occurred. Social workers regard practices such as these as problematic, and have led some in the profession to develop the skills to maneuver around the rigid use of the law *and* the dismissal of their specialized role in abuse cases.

¹⁶⁰ Such as the example in the introduction where the attorney regards justice as crossing every T and dotting every I.

rights): this includes court support for families and standards for State intervention when children are abused.

Conversely, it can also be argued that DSS represents a system established by law, with all the rights, rules and privileges inherent in its operation as a system to advance the rights of children. In the extreme, rules have been used to support what one judge called “indifference” by DSS in its response to children. The complex nature of the system self-concept means these competing opinions about the system must be considered in tandem with the argument that attorneys tend to function from the perspective of autonomy and social workers tend to reflect interpersonal mutuality.

Before presenting this overview it is helpful to consider the context in which the juvenile court system developed. Minow writes that the court “emerged in part from a conception of children as people fundamentally in relationship to others”; the term ‘others’ meaning the relationship of children to society at large (1990: 259). The court was *not* based on a polarization of human service and legal system strategies: it was originally designed as a system (as a host environment) to meet the needs of children and their families through an integration of child welfare and legal requirements.

The concept of law representing inclusion

The family epitomizes societal concepts of inclusion. The need for law to uphold the integrity of the family, which finds resonance with my data findings from parents' attorneys and analysis of the social setting in this study, is addressed in many law journals:

[T]he family is recognized as a pivotal and basic institution in society – the glue which holds the other institutions together ... 'ruin families and you ruin all' (Peirce 1988: 185).

Views of this nature reinforce the obligation in the legal system to prevent children from being taken from their home, and for tight controls over State involvement. Three key factors that constitute the culture of embeddedness for the system are now described, such that serve to support attorneys in their efforts to keep families united.

The first factor most closely reflects the individual self-concept. Attorneys' distrust of government, especially those representing parents, and more generally their elevation of the family as a system to be revered, leads many individuals to still place primacy on the integrity of the family even in the event that abuse is known to have occurred:

[Families] perform functions that are beyond the resources of government. Families can treat their members as individuals thereby encouraging the diversity that is essential to a free society. The errors made by one family are far more easily corrected than an error which has become institutionalized by state edict (Peirce 1988: 218).

The view that errors made by a family are in effect less harmful than errors made by the State (because errors made by the latter are more long lasting or less easily erased than those made by a family), reinforces the type of tension that underpins the system self-concept (introduced in Chapter Four and examined again in Chapter Twenty-two).

The second factor to support attorneys keeping families together – which overlaps more with professional and system self-concepts – is Public Law 96-272. Legislated in 1980 as part of *The Adoption Assistance and Child Welfare Act*, this law created title IV-E of the Social Security Act – which set out federal policy for dependent children to be maintained *in their own homes*. In short, the law protects the interpersonal.

The third factor that speaks to attorneys representing inclusion, which belongs primarily to the system self-concept, is the influence of foster care: it lacks stability, predictability and continuity for children. Around the time of this study more than one fourth of children in the system endured “three or more placement settings”, and many [were] still in care after 2 years (Schor 1989: 210). These experiences are recognized as aggravating “the emotional trauma” that has been associated with such placement. Findings of this nature – where the foster care system has been found to be less in reality than had been promised in theory – has encouraged the need for legal processes that prevent children being removed from their home.

The use of law to sever family ties and protect against poor standards of ‘care’

In contrast with concepts that speak to attorneys representing ‘inclusion’ through legal action, social workers can represent positions of detachment through the use of laws that permit a family to be severed. The case of *Micah S.* (again, a case relevant to legal decisions when data were gathered) suggests how the culture of embeddedness that holds and cultures change in system operations can facilitate the evolution of legal rules that terminate a parent’s right to care for their child. A judge said:

[T]he pendulum must swing farther away from preoccupation with parents’ rights and towards the protection of the waifs. It cannot be doubted that the Legislature’s well-meaning pronouncements in favor of the child’s best interests and speedy adjudication have been palliatives at best ... *I would favor an amendment broadening the dispensation where the court can make specific findings of probable futility of [reunification] services and detriment to the child* (In re *Micah S.* 1988: 567 italics added).

Laws have also been written to protect children from poor standards of care in State intervention. Of particular interest to the current analysis of contradiction in the way data has been analyzed: since the passage of PL 96-272 child welfare agencies have experienced the use of legal apparatus to condemn their failure to become appropriately *involved* in a child’s family life. Schor indicates that successful law suits against agencies for failing to meet their statutory responsibilities reveal a variety of problems. Child welfare agencies have been found to have:

harmed children in their care through inadequately selecting, licensing, training, and supervising foster parents, failing to match foster children with suitable homes, overcrowding foster homes, failing to provide adequate medical, psychological, and educational services, and assigning excessive case loads to child care workers (Schor 1989: 210).

As well as law suits against DSS across the country for neglecting children in their care, caseworkers have been sued for “malfeasance” and at worst, as noted in Chapter Four, children meant to be protected by the State have died (Schor 1989: 209).

The concept of social welfare agencies using rules to support ‘indifference’

To continue the theme outlined above, the decision in *DeShaney v. Winnebago* (1989) supports DSS when it *does not* intervene. The legal decision indicates: “States have no affirmative duty to protect children from abuse unless they have first become the guarantor of their security by placing them in care or custody” (Tomlinson 1990: 649). The decision means that legal rules can be used to protect DSS from criticism (and law suits) when it fails to intervene. However, in his dissent against *DeShaney* Justice Brennan took the majority to task for failing to see the harm caused by *State inaction*:

[I]naction can be every bit as abusive of power as action, [and] oppression can result when a State undertakes vital duty and then ignores it (Tomlinson 1990: 650).

In his dissent Justice Brennan goes on to write that “the constitution could not be indifferent to such indifference” (Tomlinson 1990: 650) – which the judge believed was shown by the Winnebago County DSS when it failed to take appropriate action.

Discussion

In a position that exemplifies the complex role performed by social workers, it is noteworthy that as argued by the DSS in *DeShaney*, child protection workers operate on a ‘razor’s edge’. Consistent with other literature about the contradictions that pervade social work (such as earlier examples from Franklin & Parton), arguments in the case indicated “they face liability for failing to remove children, on the one hand, and for prematurely terminating parental rights on the other” (Tomlinson 1990: 650).

To conclude, the uses of law to uphold parental rights or prevent them from being severed, as well as its uses to protect DSS for failing to become involved or wrongly intervening when it does take action, all serve vital and highly complex social functions. At one and the same time the court system manages the institutional dispersion of State-based intervention of a relational nature, through a rules-and rights-based approach. *At worst*, the balancing involved in this approach pivots on the competing forces of excessive involvement and institutional indifference – the identification of which is contingent on the interpersonal or institutional perspective that governs the meaning-making of those who operate the system.

The extent of multiple and abstruse demands in the system brings us to the topic of informal negotiations and the way professionals use the relationships they share to

operate 'the system'. When discussing these topics some connections are drawn between data and theory about the system process of confirmation, contradiction and continuity in the way people make meaning and experience change.

CHAPTER TWENTY-ONE

PROFESSIONAL SELF-CONCEPTS: RELATIONSHIPS AND INFORMAL COMMUNICATIONS (confirmation, contradiction, continuity)

Introduction

This chapter explores data findings about relationships *between* professionals. In the process, the discussion continues to ground the operations of law within a *cycle of system change*.¹⁶¹ It explores links between informal negotiations, relationships, and system operations – and it concludes by exploring how those who master the difficulties outlined in the previous two chapters have evolved into new ‘balances’ where meaning is made in the court system on an ‘integrated disciplinary’ basis.¹⁶²

While this thesis has explored and debunked the autopoietic systems theory that law reproduces itself by itself, this chapter serves to strengthen the arguments built thus far by challenging the overarching theory in which legal autopoiesis is embedded: society cannot be analyzed *as if it consists of people*, it consists of communications (King 1997: 26).¹⁶³ Perhaps the quickest way to point to the existence of people in social operations of the court (and the ability to go beyond analysis of society as if people are separate from their own communications) is to go straight to a data excerpt from a judge.

Relationships influence legal operations

¹⁶¹ Such as the processes of Confirmation, Contradiction and Continuity outlined in Table Three.

¹⁶² See for example, the headings of Continuity and Bridging in Table Three (Chapter 16).

¹⁶³ King writes that each is necessary for the other’s existence, but he goes on to say: “we need to make a clear distinction between people (or conscious systems) and society (social systems). The defining feature of society and what distinguishes it from people, therefore, is communications”. Communications is “everything that can be communicated by words, gestures and actions and understood as having meaning” (1997: 26). “People” are said to have beliefs and attitudes, but when consciousness is communicated the meanings given to them depends on “their interpretations within social systems” (p26). I question how something articulated by people is ‘distinct from them’, such that *their* communications become the very tool used to define a system said to operate separately from

Chapter Three, on the methodology adopted in this research, outlined how observations in the court corridors led me to explore if a case was more likely to be resolved if professionals had good relationships, and that this outcome was less likely if relationships were bad and professionals were not talking to each other. The response from one judge to this speculation reflects data findings from all cohorts in this study.

Judge

Precisely. And I agree with that. I do agree with that. Absolutely. Because you can have differences of opinion, *there's no problem with differences of opinion, but the relationships, if they're acrimonious, will so deteriorate the fabric of what we're all trying to do,* and will create their own curved alliances, **people** working against each other, that a controversy is just generated and certainly our goal is not shared in that case.¹⁶⁴

One of the most visible ways relationships were initially seen to influence court operations in this study was through the observation that professionals engaged in informal negotiations: this link was later confirmed through the research instrument.

their existence. Also, if interpretations occur in the social system, and social systems are distinct from conscious system, does the said social system doing the interpreting have, or not have, a conscience?

¹⁶⁴ Proponents of the systems theory of autopoiesis would argue that the judge's views reflect the social — but readers are reminded that in order for a system to be observed it must be interacting; this applies even to the subatomic world of a system. In lay terms, and as discussed earlier in this thesis, no

The importance of informal negotiations

The strong finding was noted in Chapter Eight that without informal negotiations professionals said “the system would breakdown”.¹⁶⁵

Judges were less definite than attorneys and social workers about the importance of informal negotiations in the system. Some appeared defensive. Nevertheless, all judges said these interactions did occur, and one indicated that she would use them as a way to find the ‘truth’. She also said: “*the more work that is done outside, the better as far as I’m concerned*”.

The judge said that she could tell if informal negotiations had occurred because the attorneys “*fight about some silly thing that somebody should have been able to agree upon*”. The interview continues as follows:

Judge

Researcher: Is there anything that you do when you sense that there is possibly a relationship difficulty and they aren’t attempting to be conciliatory or resolve it?

Respondent: Sure. You can kind of knock their heads *so they get kind of shamefaced* and bury their differences, at least in front of you. *And you can*

system can be decomposed into constituent parts and then be depicted as if representing events that are not interconnected (Capra 1975: 138-145).

¹⁶⁵ As well as reflecting a natural extension of people’s need to communicate, respondents described engaging in informal negotiations in order to have allegations changed, and said the system could not tolerate the impact on the court if negotiations did not take place: such as blowouts to cost, calendar scheduling and delays to family reunification. In short, rightly or wrongly, the system *strongly relies* on informal negotiations.

force them out in the corridor and you say: I'm not going to listen to this any more. You two get out there and settle it and tell me what the truth is.

The fact that truth can be thought to be found this way in the practice of law, and that many professionals rely on informal interactions either to decide what to do in a case or to influence what another does, emphasizes the need to understand what transpires between professionals *before* they enter the court. This need is heightened by the fact that data indicated a strong correlation between a positive and a negative relationship and the frequency with which informal negotiations occur.¹⁶⁶

In addition to sketching why this happens, this chapter will also show that disputes not only arise between social work and law but also between individuals in the same discipline. First, the factors found to contribute to 'good' relationships are presented, along with the factors that might contradict findings about this topic. Although this work has given significant attention to the reasons for differences and disputes between the disciplines,¹⁶⁷ this analysis will show how the absence of some of the qualities which exist in good relationships can influence a reduction in communications.

Good relationships

Respondents automatically gave their own interpretation of what constituted a 'good' or 'bad' relationship. Good relationships were linked with trust and a person's

¹⁶⁶ In the worst case scenario, reported often, cases go to trial because professionals will not talk informally.

¹⁶⁷ See Chapters Six and Seven in Part One, 13 to 16 in Part Three, and 17 to 19 in this section.

reputation in the system, and they were said to develop naturally after working successfully together. Common factors that contribute to the development of good relationships include: the appearance of collaboration, willingness to compromise *and* take action in a timely manner and, contingent on the meaning made, the perceived interest in or connection a professional is perceived to share with a client.

The next example from research interviews is about the way good relationships between professionals facilitated a minimal level of informal exchange; and this worked to support a survivor of abuse.

Social worker

There is one teenage girl in the system, father molested her, he's in a different state, she's placed here in California, mom is, we don't know where. And the girl contacted me and said she wanted dad at her graduation. ***It involved getting a court order rescinded.***

I contacted dad's attorney and said so and so would like to see her dad; I have no problems with it; she's old enough to protect herself, she wants her father here. What I'm going to do is try to work on rescinding that court order for the graduation. And the attorney said: Fine. So I called up minor's attorney and he said: No problems. I said: I'll put an ex parte through to court saying ... And the minor's attorney said: Yes, great, I'll push it through. I'll go to court and get it through. Because it all had to be done very quickly because the poor kids don't decide anything until the week before. And it worked out well; we got the order rescinded. Dad flew in the day before graduation. They hadn't seen each other in years. The attorney was at the graduation, the attorney's assistant. I was there, the foster parents. She had all this support.

Importantly, good professional relationships that led to the efficiency, speed of decision making in the court, and successful union between a father and his daughter for an important occasion do not always result in the same type of positive outcome.

Counter-indicators to the impact of good relationships

Problems can still arise if a professional has a good relationship with a colleague, particularly if the decontextualized voice of attorneys gives emphasis to rules, or the process-oriented voice of social workers accentuates issues linked with mutuality. This type of situation is seen below when an attorney rejects a particular intervention for his client, mainly because he operates from the book. In contrast, the social worker wants the attorney to base his interactions (case decisions) on a position of trust.

Social worker

I showed up when [the attorney] was with his client. *He said [to her]: “Don’t sign the [approval] form yet; I want to find out what this is about and – I don’t think she needs this [referral to a regional center for assessment]” ... Which is O.K. He’s representing her interests. But this is something that could really help her.* They’re going to be confidential *so he’s delayed this* and I’m going to try to get her set up with it again. His job is to protect her constitutional rights and ... *even though I believe he’s a very good attorney* here’s a situation where I can’t get the client into this resource which is a very benign thing and it’s just because he doesn’t know about it; I respect – he’s got to check it out, but how long is it going to take him? ... *I think they can over-represent someone’s interests.* I’m her advocate, that’s my job to advocate for families. So he should, I believe, work with me, *trust me a little more* and *accept that I know what I’m doing.*

This quote speaks to the dynamics discussed in Chapters Ten, Seventeen and Eighteen. People over-embedded in the institutional truce are unlikely to engage in activities that by-pass basic rules of practice: consistent with Kegan's theory, when they emphasize maintenance of the system they can be seen to "over-represent someone's interests" (and be perceived as being psychologically isolated from the real issues at hand). Conversely, it has been noted that when social workers are over-embedded in the interpersonal truce they represent goals that can be perceived by the institutionalist as over-involved or suffocating: such as wanting to "help" a client when the attorney "does not think [the client] needs it".

These differences give further substance to and challenge aspects of King's theory about the dynamics that occur between social work and law. Foremost, the interactions that the social worker describes having with the attorney – a professional she respects – helps to illustrate King's tenet that any attempt to merge social work into the system of law is difficult because it increases law's scope of interference into social work discourse (1991: 319). However, as shown, this thesis goes beyond the need to consider discourse and urges the need to consider the role played by how professionals make meaning in the events that evolve in the court.

Second, the quote also supports King's tenet that law's truth-validating procedures serve a different social function than social work (1991: 308): it suggests, however, that the different social functions are based on the juxtaposition between individual and social dynamics – where the competing perspectives that support communion and agency evolve through the meanings that human beings make when *they* operate law.

The perceived relationship with a client: contradiction and continuity

Lending further support to the importance of the interaction between individual and social dynamics in the operations of law, this study indicated that some professionals determined that colleagues were not doing their job on the basis of the relationship they shared with their own client. If a professional was not seen to adequately represent the client's interests (contingent on how this is defined), the person observing this behavior reported that communications were reduced with the other professional – an outcome which mostly *appeared* to occur after failed attempts to create change.¹⁶⁸

The dynamic emerged in data from both disciplines with one key difference. Attorneys mainly talked about the relationships that other attorneys had with their clients in language about how their colleagues (and adversaries) represented a client's rights, and how they demonstrated fairness in their dealings with the case. In contrast, although social workers knew attorneys were embedded in adherence to rights, they often described the quality of attorney/client relationship on the basis of the connection that existed: one example was in Chapter 20 when discussing the 'five-minute factor' where a social worker said that attorneys try to negotiate with them despite not having developed a bond with their client (inferring an attempt to do the former is hindered by the absence of the latter). Not all social work data, however, reflected this position.

¹⁶⁸ The impact of the relationship that another professional is perceived to hold with *their client* was not anticipated in this study; as such, similar to other aspects of this work, this finding should not be generalized until a separate study has been conducted specifically designed to look into this dynamic.

In the social work example presented below it becomes evident that issues related to assessments about the attorney/client connection do not always arise from a strictly interpersonal perspective: rather than capitulate to an attorney, the social worker in the next interview engages in an extended battle when she argues against the termination of parental rights. The excerpt has been chosen because as well as speaking to these issues it also helps to illustrate how a social worker may be operating from the continuity cell (presented in Table Three):

Social worker

Respondent: The attorney didn't do his job and kind of made the communications not good. He was a minor's attorney who didn't visit the child ... and the attorney tried to thwart my every effort to work towards returning this child or to discuss with him my reasons why. He hadn't seen the child, he wasn't keeping himself apprised of what was going on with the parents and he didn't seem interested in doing it either.

Researcher: And yet he was from your experience trying to thwart the process by causing delays, because he didn't want the child -- ?

*Respondent: He didn't want the child to go home and he believed that that child should have been adopted. But I couldn't see any basis for his beliefs **because** he wasn't seeing the child, had possibly never seen the child, and could not give an accurate representation or description of how this child acts around his parents or how these parents act around this child.*

Researcher: On what basis was he arguing?

Respondent: I don't know ... I think his lack of doing his job ended up putting a block on our communications.

Researcher: And the fact that there was a trial originally set for April and the contested hearing ends up occurring when?

Respondent: In November, *seven months later*.

Researcher: There was a seven-month delay as a result of asking for continuances?

Respondent: Right!

Although the social worker clearly did not want to go into detail about the basis of the attorney's position, it is noted that from a legal standpoint, for the case to get to the adoption phase court records must have existed indicating that the reunification plan had not been met. Having said this, it is also noted that parents change (even if outside the court schedule dictated in Senate bill 243); so do the workers who assess them.

While analysis of the whole interview suggests that the meaning the social worker made may have been more closely aligned with the institutional than interpersonal truce, the respondent also indicates that respect for assessments about the interpersonal interactions that occur between parents and children is still required. This leads to the suggestion that social workers who develop the ability to meet 'system' demands may do so without necessarily abandoning their primary focus on interpersonal qualities.

Conversely, without seeing an interview from the attorney, *the idea* is extrapolated from the interview that the attorney was operating from the confirmation stage of the institutional truce: he relied heavily on what was first reported and accepted by the

court and, important to this analysis, as well as working to preserve previous *system* findings he was said to have rejected any other process of information-gathering.¹⁶⁹

Relationships between attorneys and with clients

Relationships attorneys have with each other are as crucial to system operations as they are between the disciplines. The next data excerpt, which is about bad relationships, only hints at this importance. It has been chosen for several reasons: it competes with what has just been described and it expands on the topic that some attorneys rigidly follow rules, and others recognize the limits of law when they strictly adhere to the rules: that is, they move into the continuity cycle of operations when practicing law where a wider perspective of issues is involved in case decision-making. The interview – which is about two attorneys for parents – also shows that differences in meaning-making exist even when people are: in the same role, under the same ethical constraints, and obligated to follow the same rules.

Similar to the interest social workers have in “bonding” and the need to look at connections, the attorney in the next quote describes how another attorney’s absence of empathy or rapport with his client influenced her response to him.

Parents’ attorney

Respondent: It is not so much as what I perceive to be his lack of participation with his client, as *his lack of support* ... I think he may respond to his clients ... but ***I don’t think he has the emotional empathy, rapport,***

¹⁶⁹ It is reinforced that these points require research that is designed, at the next level by psychologists, to examine what at present can only be conceptualized.

with his clients that I think is needed out here and that makes, I think, more success ... I don't take cases with him any more ... It's informal. I don't have any lists and I don't tell anybody that, but I just don't do it.

Researcher: How do you get out of it?

Respondent: By giving the case to somebody else ... I don't want to be on a case with him, ***I just find it personally difficult because I don't have a lot of respect for him ... I think he is a very good trial attorney***, he's an horrendous adversary and from that standpoint, *I certainly respect his ability at trials.*

Researcher: I asked the attorney about the origins of the problems. She described a case where she concluded that his anger interfered with his role.

Respondent: *I thought he'd lost track of what was important, which was the child ... But that's where it started, his sort of indifference to that, in my mind, and his focus on the error in the department because he was very conscious of that.* And things just never have repaired themselves.

This excerpt expands on the earlier finding, suggesting here that respect for another person's skills may reduce but not prevent bad relationships from occurring. Consistent with the type of change found in this study to occur in the host environment of the court, the interview also suggests that the attorney is possibly operating in the 'continuity stage' of development, where the way meaning is made *about what is right* is not just about what the law defines as right but also what leads to "more success" in the court.¹⁷⁰

The interview shows that the attorney places importance on the 'emotional empathy' and rapport that her colleagues have with their clients. She also places importance on

¹⁷⁰ As one possible example of this shift, see Kegan's views on organizational change (1982: 244-7).

the child over and above focusing on errors in the department. In the incident that is described as fracturing the relationship, the attorney for the other parent did, however, act consistent with his *system role* by focusing on errors: suggesting the confirmation cycle of the institutional truce influenced respect for rules (and deconstruction when they were not followed) as paramount: that is, over and above the interests of a child.

Continuity in professional self-concepts

Expanding on discussions about how ‘the system’ changes, significant change in professionals is distinguished in data by those who did, versus those who did not, make meaning *and* take action at a notable level of difference from their own training and protocol. This was evident when respondents exercised their own discretion about whether to follow court orders or system rules *and* stepped outside their role to achieve what *they* believed was important in a case. In selecting this as a topic, I chose not to consider interviews where respondents gave the impression that they had always operated on the fringe of their profession, and just disagreed with or ignored orders.

The excerpts below illustrate these points: they show how some people from each discipline make meaning – *and* take actions – that indicate respect for the boundaries of their respective professional self-concepts but go beyond the strict dictates that define their disciplines. The first excerpt is from a social worker’s interview when she describes her response after an attorney did not do his job. It is particularly significant that the attorney’s actions towards his client *did not* conflict with the case outcome the social worker wanted. Nonetheless, his actions (or failure to act) stirred

her to promote a parent's rights. This occurred when an attorney told a parent he represented that he could not assist her.

Social worker

The attorney told the parent: 'The department has already made up their minds about what they want and that's what's going to happen, so you may as well give up.' As much as I would agree that *I was going to fight for my recommendations and what I felt was going to be in the best interests of the child, and I was going to be in a disagreement with what the parent's attorney wanted, I didn't feel it was appropriate for an attorney to represent a client in that manner.*

I advised the client to bring it to the judge's attention ... And as a matter of fact, that case did go to the appellate court and the court took it back to us and that was one of the issues that the court cited, that this woman did not get adequate representation.

This quote suggests that the social worker gave meaning to information that some may experience as 'noise' (a dispute against their recommendation); and she reconstructed it to comply with its host discourse – the court system. The next excerpt gives an example from an attorney's interview. The attorney goes beyond the over-embedded professional self-concept of law in the confirmation stage of the institutional truce: she reveals that she has gone beyond this level when she reports sharing privileged information during informal negotiations. As with all findings, the context in which consistencies or contradictions to themes arise has an important bearing on analysis and interpretation. In this case it is noted that adherence to, or respect for, rules is not abandoned altogether; rather, an expansion has occurred in the meaning made about when to *strictly* follow system rules. This flexibility happens at some risk, but is strongly client-focused.

Parents' attorney

*I think in the informal situation we lay ourselves open to censure or problems with doing what we do sometimes. And I'm admitting that: I think that that's true. But I don't see any other way to do it. I see other people doing it that way – without sharing a lot of information. But ... **most of them do breach the attorney / client privilege on a pretty regular basis and that's pretty deadly, for I think we take a risk by doing that.***

I risk being sued by a client if they wanted to. I think we just rely on the fact that they don't, or *they rely on the fact that because of that breaching of the attorney /client privilege we are able to achieve something on their behalf.* So in that sense they don't have a beef with us. *It's when you risk it and it doesn't benefit them and all of a sudden the privileged information is known. **But it's also the judgment of the attorney: I don't reveal privileged information that's not helpful.***

These examples reinforce that people's self-concepts are consistently under pressure to change, such as the need to change the way they interpret information on a case-by-case basis, and their choice to abide with or to reconstruct the rules dictating how they should function. They also suggest that a professional's stage in the cycle of system change in the court influences how they respond. To conclude: it is proposed that the underlying perspectives that a professional holds about how the system works are of equal importance to those which formally determine system operations.

The following chapter builds on the conclusion that, how individual professionals view the system and how it operates are of equal importance in any analysis of how law operates. It returns to and develops the argument made in Chapter Four about the system self-concept and, in so doing, strengthens the need to consider the relationship between SL=HDLA+D. The chapter does this by drawing attention to the inter-

relationship between rules and policies – or what is officially sanctioned in system operations – and the way in which professionals make meaning about and respond to what the system dictates.

CHAPTER TWENTY-TWO

THE SYSTEM SELF-CONCEPT: THE OPERATION OF RULES (PART TWO)

Judge

The legal choosing, the “legal” weighing process, is the court’s function.

That’s what we are supposed to do. Who tells us to do that? *The law tells us to do that. These are legal constructs that we’re dealing with* and we have to understand these cases ... *The code really, the Welfare and Institutions Code that deals with this section, is a remarkable instrument. I marvel at it ...* There really does seem to be *a rational basis* for it all. And that’s why it’s a legal construct and that’s what gives the various players here the authority to do certain things.

Not everyone understands what these rules are and perhaps sometimes it’s a lack of understanding those rules that permits people to cross the boundaries and to act in ways other than how they should act.

Introduction

This thesis has established that law must limit individual influences. It has also established that people cross boundaries and, as indicated by the judge in the opening quote, they “act in ways other than how they should act”. As well as approaching the court as the judge does – as a set of rules to be understood and followed – this chapter expands on this approach through the interconnection that exists between people and ‘the system’. It shows how individual and professional self-concepts provide an experiential overlay to the social aspect of the system self-concept: which occurs when *people* interpret and decide which rules to apply – or ignore – in a case.

The chapter first shows the link between individual, professional and system influences in a table which reflects my data findings about the self-concept typology. Following the table the chapter explores the hearsay rule. Discussion will show how operations and communications associated with this rule are influenced by the competing perspectives held by those at DSS, attorneys representing parents and children, and the court.

The System Self-concept: Table Five (a)

Although the system self-concept was built from an integration of empirical data, case law, statute and academic literature, Table 5(a) summarizes data that emerged as reflecting the system self-concept in the empirical study in the court. It incorporates the findings outlined earlier in Table 1(a) (Chapter Five, on the individual self concept) and Table 4(a) (Chapter 19, on the professional self concept). (These

generic findings were connected to the juxtaposition between the individual and the social – and the institutional and interpersonal – in Table Three.)

In previous chapters on the individual and professional self-concepts, tables were presented in pairs: one suggesting general issues, the other outlining the type of events that may influence changes in the way meaning is made at individual and professional levels of operation. The factors suggested in this study to influence changes in the system self-concept will be outlined in Table 5(b), which is presented in Part Five when exploring the operative structure of systems for law, human services and the court itself. Table 5(b) is presented in Part Five because it identifies the key external forces that act to create an exchange between systems: it shows the main categories of influence that operate between people, ‘the system’ itself and society (such as media and political influences on how the court operates).

Five (a) The System self-concept: incorporating individual and professional self-concepts
Issues summary: (Main emphasis– Interpersonal and Institutional voices for each discipline)

<u>Agency & Professional Issues</u>	<u>Professional & Individual Issues</u>	<u>Court Issues</u>
Emotional investment or detachment of each profession Role of agency accepted / rejected Particular bias for case outcome Political agenda History between professionals and agencies Interaction between professionals Changes to professionals on case Range of case complexities Inconsistent verbal/ written report Time and report considerations changes / delays / clarifications Family in case participates / not Extended family / sibling issues Cultural factors influencing case Geography / transport issues Previous injuries / offenses Stage of case	Withholds or shares information Type of response to client and family, child and other experts Professional nature: cooperative / will compromise suspicious / acts with caution judgmental / rigid approach Ability to establish / maintain boundaries & address conflict Training & investigation skills Ideological commitments Cultural sensitivity Communication skills General professional allegiances Current relationship with judge, family and other professionals Inter-agency network style / reach Reputation Ability to influence case outcome	Judge on the case Current ideological emphasis Professional self-concepts Trustworthiness of social worker and their report Agency power of influence Media attention on case Political issues at stake Financial restraints Constitution & case law Legislative changes Legal precedent & appeals Legal weight given to particular issues & errors Admissibility of evidence Legal rules and due process considerations / pressures Calendar scheduling problems Informal negotiations

Discussion about the hearsay rule touches on the issues raised in this table. A data example of Agency and Professional Issues from cell one, shows that the way attorneys responded to the California Supreme Court opinion about the hearsay rule, particularly its opinion about the role of social workers from DSS, was influenced by the history between professionals and agencies. This is interwoven with dynamics in cell two, covering Professional and Individual issues. Here ideological commitments held by attorneys for parents versus those held by attorneys for children ‘compete’ about the use of the hearsay rule. An example of data that speaks to the third cell, Court Issues, arises when attorneys use the US Constitution to dispute the Supreme Court’s decision on the hearsay rule.

Importantly, though, in reality all cells reflect an integrated process of evolution.

The hearsay rule

The dependency court allows hearsay mainly through its use of ‘social study’ reports. The reports are constructed by social workers or child protection workers as evidence for or against a parent. The next quote from an attorney for parents reflects the views expressed from this cohort about the hearsay rule.

Parents’ attorney

In any court proceeding where there’s one side against the other, there’s something called a hearsay rule, bringing in statements from other people. Here *the law has built in a preference that a social worker can submit a report. They control what’s in that report 100 percent and many of my earlier complaints* about omissions and half-truths go into those court

documents and we can ask the social worker about them but we don't have a right to generate a contrary report; **that's something that exists only for the government.**

Reflecting the perspective often voiced in this study from parents' attorneys, William Patton believes that social study reports contain irrelevant evidence and on this basis the court does not have the authority to admit them (Patton 1987: 299-352). Conversely, children's attorneys believe such reports should be admitted (Edwards 1987: 219); a topic which is discussed below. Because ideological opinions compete: the former believing that harm is caused when the court is exposed to hearsay, the latter believing it is harmful to reject hearsay, the attorney whose views are not met in a case thinks the court is not acting how 'it should': this stimulates them to advance the need for change. And as the following discussion suggests, it is the tension over issues of this nature that contributes to the system self-concept.

The Malinda S. Ruling

The case of *Malinda S.* (1990) (highly relevant at the time of the empirical study) addressed the legal issues linked with the admission of hearsay in the dependency court. In *Malinda S.* the court in San Diego went against a father's objections and admitted original and supplemental social study reports into evidence. The court found jurisdiction on the basis of the studies. When the case went to the Supreme Court of California it affirmed the decision of the Court of Appeal which had concluded that "the trial court acted properly in receiving and considering all the material contained in the social studies" (In Re Malinda S. 1990: 368). The decision

indicated that procedures for use of the reports were consistent with the ‘due process’ protections of the US Constitution:

[W]hen a social study is admitted in a proceeding under s300, procedures under which each party receives a copy of the report, is given an opportunity to examine the investigative officer and subpoena and examine persons whose hearsay statements are contained in the report, and is permitted to introduce evidence by way of rebuttal, are reasonable and accord with due process principles (*Malinda S.* 1990: 368).

The next topic continues to build on data from attorneys for parents in this study, who thought the Supreme Court did not interpret the constitution ‘properly’. It shows that the history between professionals and agencies plays a role in the views that are expressed and in the process, places the *interpretation* that one group is not acting as it should act, as a reflection of how individual professionals make meaning. To begin this discussion, it is suggested here that the Supreme Court decision in *Malinda S.* itself reflects an overlap of individual, professional and system self-concepts – shown when judges must make assessments about how ‘the system’ operates in order to decide on a legal issue – and incorporate *their* interpretations into previously established laws.

Trust: social workers as disinterested parties

In *Malinda S.* the California Supreme Court supported its case for the admission of social workers’ reports on the basis that they were prepared by “disinterested parties in the course of their professional duties.” The court said these factors “of objectivity

and expertise lend [social workers] a degree of reliability and trustworthiness” (1990: 377). The clash of self-concepts arises when parents’ attorneys do not regard social workers (as a group) as being disinterested parties, or objective and trustworthy.

Parents’ attorney

They [social workers] are supposed to be an independent unbiased investigator of the court. Well it’s just malarkey a lot of the time; that’s power. They’re allowed to submit hearsay, it’s weird, that’s power too.

The topic of trust – listed under ‘Court Issues’ in Table 5(a) – helps to illustrate why the self-concepts of *some* who operate law on a day-to-day, case-by-case basis, did not comport with the rule or the reasoning behind the Malinda S. decision.¹⁷¹ When the topic of trust arose in data it was *strongly* linked to individual communications, the growth of professional relationships over time, and a person’s reputation. Not one respondent who raised the topic of trust linked it with title, qualification, or sweeping respect for an agency. Instead, individual and professional self-concepts were shown to influence perceptions of trust, and this influences relationships *and* the rate at which professionals engage in informal interactions. As it has been established that the system often hinges on such negotiations, the importance of trust cannot be minimized.

¹⁷¹ This issue is also consistent with basic common-sense: what is a confirmation for the way some professionals make meaning, is for others, a contradiction. Also, in the interests of development, the rational cannot totally dictate the experiential or vice versa (also see Chapter 11 for Durkheim’s views on the connection between these forces and the importance of relating the variable to the permanent).

Staying for now with the people/system juxtaposition linked with the hearsay rule, the next topic provides a context from which to see how parents' attorneys use their professional self-concept to wage battles about the rule.

Standards of evidence: attorney professional self-concepts

Attorneys from the Public Defender's Office and the private panel said that the standard of evidence in dependency court should be of a criminal rather than a civil standard. In the eyes of those who adhere to the criminal standard, until law upgrades how the court assesses the admissibility of evidence, the juvenile court is doomed to do little more than fail in the administration of justice. They see the court as an inferior system, one that to be effective must replicate the 'real' system upon which legal practice is predicated: that is, how they see the social is influenced by individual views.

Parents' attorney

I came from a criminal defense standpoint ... a system where it had to be proved beyond a reasonable doubt before there would be a finding against a person, and being in this system made me appreciate what true protections are.

Higher standards were regarded to be necessary largely due to the frequently expressed view that *the government lies*; but this issue cannot stand in isolation from the relationship the court shares with DSS.

Parents' attorney

I've learned that the more you work with the government the more you find out, the more reason there is to be distrustful ... *I wish there were a few changes to the law so the law applied equally to the government and parents, and that judges acted as neutral finders of fact, plain fact of the law, the way they're supposed to*, instead of helping to facilitate the DSS reach their goal.

The opinion that the court would continue to fail without the use of higher standards was typically held in conjunction with the view that the court favored the rights of children. These combined topics lead to discussion about the relationship between DSS and the court.

DSS and the court: in bed or not?

In Malinda S. the Supreme Court supported its position with reference to *Swain v. Swain* which recognized social workers as being “a special arm of the court”. This concept provoked the view among parents' attorneys that the court and DSS are one and the same. As data from attorneys about the court being a rubber stamp for DSS were shown earlier, interest at this point in the analysis is in how *the courts* interpret the relationship they share with DSS. Two examples are seen below in appeal court rulings.

The case of Allen M

The case of *Allen M* was dominant at the time of data collection. DSS had tried to have a sexual abuse case dismissed on the grounds that it did not have enough evidence. The attorney for the minor challenged this position and the parent petitioned for a writ of mandate. As a respondent in the case the department unsuccessfully used the ‘arm of the state’ argument to advance its right to dismiss the sexual abuse petition (*In Allen M.* May 1992: 1072).

The judges found that DSS has the discretion to file a petition but it cannot “invoke and then divest the court of jurisdiction” (Allen M. 1992: 1073). As well as indicating that the court, not the department, has the power to examine and determine the sufficiency of evidence, the appellate court said:

Although the court may accord great deference to the Department’s expertise, the primary focus of the court is the determination of whether dismissal is in the interests of justice and the welfare of the minor. On that basis the court may either grant the dismissal or order the Department to proceed with the petition (Allen M. 1992: 1074).

Again, this ruling and views held by parents’ attorneys compete about how the court operates. Identifying differences of this nature illustrates the type of dynamics that constitute the ongoing tension in the system self-concept and the *constant* interaction between system rules and individual interpretations by professionals (from different agencies) about what the rules mean and how the system is or should be observed.

The case of Robert A

The case of Robert A – which is linked with the constitutional separation of powers – similarly speaks to these dynamics. Critical to disputes about who should do what, and when (about which agencies and therefore professionals have a right to act in particular ways), the appeal court judges noted that judicial power was not to be interfered with by executive or administrative officers. However, of equal importance to the peculiarities of the system self-concept the court makes the point: “such separation of powers, need not and cannot be absolute” (citing *In re Danielle W: In Re Robert A.* 1992: 16). The following statement seems to make this point clear:

As an arm of the court, the Department is naturally interested in following the instructions of the court and carrying out its wishes, consistent with the exercise of its own expertise in the area, on which the court depends for guidance. *As a party in the case*, the Department remains subject to the juvenile court’s orders (*In Re Robert A. et. al.*, 1992: 22, italics added).

In summary, in contrast with the view held by many attorneys that the dependency court is a rubber stamp for DSS, the appeal court (law) indicates that both as an arm of the court and as a party in a case, DSS follows the court’s instructions. Notwithstanding the clarity identified in this quote, the finding does not preclude it – as is the case with all legal rulings (as is the essence of law) – from becoming the subject of interpretation.

The system self-concept and guess-work

To briefly divert from topics associated with the hearsay rule, the most blatant example of individual *interpretations* by professionals (and thereby, the most blatant question about the said ‘clarity’ of law), arises from interview data showing that in the dependency court law involves guess work: the individual and social are not isolated dynamics operating as if independent of each other: they give rise to each other.

Children’s attorney

The thing about this job that I dislike the most is that it is a job of judgment calls, and I don’t like that and yet that’s all you can do ... *You make a judgment call on what you recommend, the judge makes a judgment call and you leave a situation and you hope that you’ve made the right call, but you know perfectly well that the chances are also there that you’ve made the wrong call.*

There are some hearings where I leave and I’m just sick, because I’m guessing and my best guess is that this is safe. But you know that you’re guessing. You can only hope that this one’s not going to come back and bite you, in the sense that the child’s going to get injured after one of your calls. You tell yourself stuff like this, you didn’t make the decision, you investigated the best information you had, but still you know you walk away from that saying: did I make a mistake? Did I call it wrong?

This excerpt – which was in response to the question: what is justice? – reflects the opinion of a highly experienced, well-educated attorney. Two weeks after the attorney participated in this interview her deepest fears about how the system operated were realized: a child she had had placed in foster care died as a result of neglect.

Without over-stressing the reports by participants that decision-making is based on more than adherence to legal rules, brief recognition is given to the central perspective held by attorneys for children about the use of the hearsay rule (about how the system should operate) in the dependency court.

The hearsay rule, children's attorneys, and the issue of power in the court

Judge Edwards' position on the admissibility of social study reports reflects empirical data collected from social workers, attorneys for children and judges.¹⁷² Edwards contrasts two competing policies: "the policy that only reliable evidence be the basis for legal decisions, and the policy that the trier of fact should be given all relevant information about a child protection issue even if it does not satisfy normal evidentiary standards". His opinion, which reflects that used by the court, is that the latter policy is "the preferable position" (Edwards 1987: 219).

The court's preference for the collection of relevant information over and above the established (rational) standards of reliable evidence, occurs in a context of balance between a child's best interests and the rights of parents to raise their children. However, Edwards writes: "The juvenile court can condition return of a dependent child to a parent on any conditions reasonably related to the protection of the child" (1987: 233).

¹⁷² Social workers' perspectives about 'the five-minute factor' overlap with the belief that attorneys often fail to read the social study report. Some social workers also said that attorneys do not collect (or disclose) information that will indicate the inadequacies of their client to parent their children.

In the ever-contrasting self-concept of the system, while there is no doubt that the court has the power to coerce a parent's participation it is equally true that different individuals can influence different legal outcomes. When conducting field research I observed many cases where attorneys for parents successfully argued against court-mandated therapy, visitation arrangements unfavorable to their client, or fought against court decisions for parents to participate in parenting skills classes after they were found to be abusive. The court's response to these issues – which social workers say often reflects the insensitivity of the court to the developmental needs of children – was shown to contribute to their view that the legal system errs by exposing children to the risk of abuse.

The relationship between DSS and the court: a social worker's perception

The next quote summarizes the unsolicited view frequently reported by social workers that the court makes unreasonable orders – that is, it acts in ways other than how it should act. Reflecting the theme in the quote from the judge at the opening of this chapter, but in the reverse order of interpretation, social workers explained that attorneys and judges do not understand the rules that underpin *their* 'system'.

Social worker

Just like attorneys, in some instances judges don't understand our rules and regulations; and they don't understand our caseload and the kids. And sometimes they get caught up ... I've seen courts make orders like: social worker will find extra funds so minor can visit relatives in Georgia. Last time I looked I wasn't a miracle worker. Social worker will find parents, or social worker will: I mean, there's things that we can't do when we don't have the

time and some things we want to do but we can't because those rules prohibit us from doing that.

Once again, like the judge whose similar perception reflected his professional self-concept, the perception expressed in the above quote is linked with the professional self-concept of social workers which, as shown, is strongly influenced by the lack of respect they feel from attorneys, judges and the court itself. These differences manifest in court operations, under the worst conditions seen during this study, with the self-concept of the system operating at the extreme end of a pendulum. The next topic brings the differences that emerged in how the system operates into focus.

The pendulum in the system-self-concept

Field data and court observations led to the suggestion that in one period the system self-concept emphasizes legal action for children. It is called here the interpersonal phase, mainly because research respondents described this period as having a heightened focus on assessments that facilitated the State's responsibility for children; several interviews also suggested that decision-making included a professional's *insights and relationship* observations in a case.¹⁷³ In another period the system self-concept focuses on legal rights for parents, often portrayed in terms of family integrity. This is called the institutional phase, mainly because many of the respondents indicated that the decision-making formula (during this study) had switched to an increased attention on *regulations or rules* that minimize State intervention in a family's life.

¹⁷³ This topic mostly arose in comments about what was no longer possible when performing given roles within the system – and the switch to more risk-oriented assessments that followed a set formula.

It is critical to the theory being developed in this thesis, particularly that which is explored in the coming section about system operative structures, that when the pendulum resides at the top end of either one of these phases, the system was found to be *over-embedded* in *one* way of making meaning. At the height of this over-embedded phase, analysis in this study suggests that the system functions mostly in a dichotomous rather than a dialectical form of response to cases of abuse.

Notably, observations of court operations during, and for a few years before doing this study, lead to the suggestion that some professionals operate in a third phase of operation.¹⁷⁴ Although further in-depth study is needed, like any pendulum that finds its own center, this phase seems to be characterized in two ways: some professionals ‘do’ the system ‘naturally’ when they are not under social pressure to operate at either extreme of the pendulum; or they can keep functioning in the face of external pressure without it having an adverse effect on how they make decisions. Tentatively called the inter-institutional phase, it arises in the court in the dynamic way some professionals work to avoid cases staying in the system: they are willing to be flexible but are not *totally* threatened that their perspective does not stand a chance in the courtroom.

¹⁷⁴ Although I did not begin to identify, label, or examine the role of relationships until doing the Pilot study for this research in 1991, my observations in the dependency court between 1988 and 1991 now lead me to add some of them to this new category, on the basis of what might be called ‘retrospective insight’ about what was occurring during some operations (including those as a participant observer).

System observations lead me to tentatively suggest that in the inter-institutional phase professionals operate the system largely through the relationships they create.¹⁷⁵ While there is only anecdotal evidence about the impact of relationships on court operations during this study, some professional relationships seemed to embody a dialectic form of operations, where their relationship allowed a flow in communication between the poles of their disciplines, reducing not only the chasm that otherwise divided them but also the suffering created when only one form of response controls the decisions made in cases. In a desire not to paint too fine a gloss on what is suggested as being the inter-institutional phase, it was found that the tension between communion and agency – the interpersonal and the institutional – ensures that the inadequacies of ‘the system’, according to one’s own self-concept, are always present. Part Five introduces how this particular conclusion is drawn and outlines the forces behind the system pendulum.

¹⁷⁵ As one example, I am reminded of my own experience after a hearing when two professionals asked me to reveal confidential details against a parent in the said name of protecting a child’s best interests.

PART FIVE

SYSTEM OPERATIVE STRUCTURES

WHY DSS AND LAW RESPOND

DIFFERENTLY

$$**SL=HDLA+D^{SA}**$$

INTRODUCTION

SOCIAL ACTION AS THE CONVERSION FACTOR BETWEEN TWO SYSTEMS

Introduction

In Part Five, the research finding that a theory about the system of law includes human development theory, the autopoietic systems theory of law, and data from a court setting (or $SL=HDLA+D$), is linked with the finding that social action accumulates (or SA) – to influence the relationship between these dynamics – which in other words, is to influence how the system operates. Fundamental to data and theoretical analysis presented thus far, rather than support the theory that law reproduces itself through *its own* recursive network of operations, this section of work explores the finding noted in the introduction to the thesis, that the type of change that arose in San Diego was *most* influenced by the way individuals responded (in collectives) to pressure.

The first chapter of Part Five identifies the type of external forces found to influence system (professional) operations, with particular attention on two powerful influences: the media and the backlash movement to child protection. It shows that ideas about logic and emotion are not just intrinsic to the internal operations of the system but also, to the way individuals who are external to the system work to change how it operates. In short, it links the meaning individuals make outside the system with system change.

The second chapter of Part Five connects the external influences found in this research with the historical memory of ‘the system’, and draws a relationship between these influences – which includes attention to competing grand jury reports – and what emerged in this study as the system pendulum. When this framework is

sketched, the chapter then outlines concepts about system operative structures for legal agencies and the DSS:CSB – both of which ultimately form the operative structure of the court.

System operative structures capture what Kegan identified as the host environments or cultures of embeddedness in which people develop. Attention to what emerged as the normatively closed (institutional) operative structure of law, and the normatively pervious (interpersonal) operative structure of DSS (reflective of the respective professional self-concepts of law and social work), helps to show that these system cultures contributed to the different ways that each system (influenced by individual professionals) responded to the accumulation of social action in San Diego.

Overall, Part Five reinforces King's analysis about social workers (and their systems of operation): such that they are vulnerable to dependence on other systems, and that child abuse scandals (and the way the discipline responds to them) have contributed to social workers being seen as the enemy of family rights (1997: 72-82). Importantly, however, this research found the opposite from King's study (1997: 73), when he used the 'Orkney scandal' in Scotland as one example to argue that it is suitable to give life to, or animate social systems, such as that argued in Luhmann's theory of autopoiesis.

Although 'the system' in San Diego was pilloried in a backlash scandal for some of the same reasons that arose in Orkney, rather than becoming further evidence of the autopoietic nature of DSS:CSB or the legal system, this research study led to the conclusion that the 'life' of the system is found through analysis of the

interrelationship between how professionals make meaning and how *they* interpret and respond to their experiences in the system – including criticisms – lodged against it by other systems.

CHAPTER TWENTY-THREE

SYSTEM OPERATIVE STRUCTURES: THE SYSTEM PENDULUM AND ITS EXTERNAL FORCES

August 3 1993: Children's attorney

Respondent: We have a three-year-old child that's been sexually abused in the perpetrator's home, continue to get molested, and *the grand jury* see keeping the kid in the home is more important than protecting the child.

It's the old scale; **the old pendulum is swinging back and forth** ... *The grand jury* report that was in 1989 attacked the system because children were being harmed and we weren't protecting enough kids. We ought to take kids out. Now they come back and say just the opposite. *Now we're going to have about 25 children die in the next year. There's no doubt in my mind.*

Researcher: Whereas over the last *four* years I think 24 or 25 children died who were either in the system or were known to the system.

Respondent: **Oh, twenty-five will die in a year. We're going to have a lot of kids die. There's no doubt in my mind we're going to have them die.** *We're putting kids into homes that we never would have considered putting them in a year ago; we're subjecting kids to risks that are unbelievable.*

March 6 1994: Front Page Headline

FROM CRADLE TO GRAVE: Child Abuse deaths soared in 1993 leaving authorities seeking answers (Sauer & Wilkins San Diego Union Tribune).

Introduction

This chapter begins to explain how social action can accumulate and become a force for professionals to change their practices (often called system change). As the first quote suggested, the system change that occurred during this study manifested in an exponential increase in child deaths from abuse. The changes in professional practice that preceded this increase occurred during the backlash (strategic lobbying by parents and individual professionals) against the San Diego system.¹⁷⁶ Addressing the events in the social system and their impact on the system speaks to some of the forces behind the pendulum swings that were found to characterize how the system operates.

As noted in Chapter One, the empirical basis of analysis stems from two projects: data gathered from the empirical study of ‘the system’ for this thesis, and a separate study conducted at the same time for a doctoral internship (Sinclair 1995: 153-175). The first study provides data on the experiences of those in the system, the latter on the external social dynamics, meaning making and activities that influenced their actions.

The topics that are examined continue to speak to the argument that evolved during this research – the individual and the social are interconnected – by contrasting aspects of the self-concept typology in Part Four, with some of the individual, professional and system dynamics that were found to characterize the nature of

¹⁷⁶ Goddard and Saunders (2001: 14-16) denounce use of the term “backlash”, preferring the term “contested aspects” (of child abuse). I do not adopt this latter term largely because it fails to recognize the existence of an established ‘system’ that has been organized for the express purpose of lobbying for legislative change, with a view to limiting systemic intervention to allegations of child abuse.

external forces working for 'system' change. On the basis of literature examined, it is suggested that the type of external forces that combined with the internal dynamics (or operative structures) of the system to create change in San Diego (see Table 5(b)), may be the same dynamics that contribute to the culture of systems for children in the Western world.

External forces: Table Five (b)

To flag the general theme in the literature, for the last decade the dominant financial and therefore resource influence on how the system operates, especially on DSS, has been the new "global economy" and the drive to "cut welfare" (Barker 1996: 28-39; Dominelli 1997: 13-26; Reish & Gorin 2001: 9-22). Cutbacks and system strain have been said to be interrelated with eroding values about the welfare state, "a global swell of political conservatism", and waning public support for social caring via bureaucratic systems (Katz et al 1997: 113-115; Jacobson 2001: 51-61). The increasing popularity of these views appears to suggest that the case for 'agency' may currently occupy the dominant position in the ongoing debate about whether social structures for the abused – disadvantaged or disenfranchised – should be modeled on the basis of communion or agency (McDonald & Jones 2000: 8; Schmitz & Goodwin 1998; Jordan 1998).

At a more specific level of analysis, Franklin and Parton's (1991) research has found, in effect, that a social environment that emphasizes agency (more than community) has a bearing on the weight given in the media, community groups, and ultimately, in

the court of public opinion, about how complaints against ‘the system’ are received. This study supports this interpretation. Most of the categories of influence found to impact the San Diego system (the social environment; politics; social movements; backlash status and activities; the public; and the media) stressed agency more than community.

Table 5(b) which summarizes these influences, was built by integrating what professionals said in the empirical study in the court setting, with analysis of events in the social setting and the factors found to be operating to create system change from September 1991 to March 1994.¹⁷⁷

The external forces identified in Table 5(b) are interrelated with Table Five (a) and the system self-concept presented in Chapter Twenty-two. The nature of this connection reflects the set of tables for the individual self-concept (Chapter Five), and the professional self-concept (Chapter Nineteen), where a relationship was drawn between factors of an individual and professional nature and the factors that contributed to changes in the way individual professionals made meaning about their experiences.

¹⁷⁷ Topics from the empirical study in the court setting were selected if they arose in several interviews across the participating cohorts. Topics from analysis of the social setting were selected on the basis of field notes that I took while attending a range of professional meetings over the two year period – these included: County Board of Supervisor and Juvenile Justice Committee forums; case conferences at San Diego Children’s Hospital; seminars held by the San Diego society for psychology and law; meetings with journalists, and an editor of the San Diego Union Tribune; and discussions with representatives from the District Attorney’s Office, the Public Defender’s Office, law enforcement, and psychologists providing evidence in dependency court proceedings. Discourse analysis was also conducted into an extensive range of reports from the San Diego print media, spanning over one-hundred articles, and a review of television and radio programs about ‘the system’.

Importantly, as neither study from which Table 5(b) is built, was originally designed to examine the type of findings that arose as a result of putting both studies together, a key limitation is noted. Although a compelling relationship is drawn below between the external forces shown in Table 5(b) and the different characteristics of the system operative structures for law and human services, further study is needed, and current findings cannot be taken as definitive of how all such systems may respond to similar events – the nature of which are detailed below and in Chapter Twenty-four.

Table 5(b)

System Operative Structures: The System Self-concept

System change: external factors influencing change (in people) in system host environments

<u>Politics</u>	<u>Social Movements</u>	<u>Backlash Status & Activities</u>
Emphasis: independence v. unity Focus of spending/funds available Governments: state / national Election issues (Social environ.) Lobbying from grassroots Dominant legislative agenda Appeals Court current direction Public profile given to a case Family role in case politics Impact of professional groups & advocacy groups on official agencies such as Grand Jury & County Board of Supervisors	Christians mobilize to support or refute allegations Feminists mobilize to promote investigation into cases Men’s groups mobilize for protection of due process Community groups mobilize for the safety of children Grandparents mobilize to fight for access rights Parents mobilize to change laws & limit State intervention into the home	Use media to create change Represent traditional values Acting on behalf of community Individuals perceived legitimate Background of group unknown Attribute negative motivations against ‘the system’ Heavily promote slogans: False allegations False memory syndrome Lobby for legislative change Develop political alliances Disparate self-concepts
<u>The Public</u>	<u>Social Environment</u>	<u>The Media</u>
Level of awareness about abuse Response to media: accept or criticize media reports Unaware of organized grassroots Swayed by slogans & rhetoric Changing views of a family Changing opinions about child abuse system : emphasis system failures v. its successes	Economy and social stability Unemployment levels Health care issues – agenda Immigration / cultural issues Elections: Political & Judiciary Juvenile justice system issues Current views on substance abuse & domestic violence Crime & law and order issues	Blame given: system or parents Debate: balanced / not balanced New angles: wrong with system Negative coverage saturation Sensational: intervene v. do not Reports politically driven Media ownership - political conservative orientation favors independence v. inclusion

As the San Diego system shifted during the course of this research to what was termed earlier – an institutional (rules oriented) phase of response – this work can

only explore how the pendulum swings to this extreme.¹⁷⁸ The external forces at the heart of this institutional swing that had the most impact on system host environments (in a social setting where the public at that time emphasized agency) were the media, the backlash and the 1992 grand jury. These topics are discussed after showing that in fact, external forces were operating against the system, and an over-embedded pendulum change occurred.

San Diego media and system change

Highly critical media against the system began in San Diego after a child identified her father as having perpetrated serious sex offenses against her. The child's disclosure in the case came months into receiving therapy and it was later found to be false.

October 20 1991: San Diego Union Tribune

Victims of Rape and the System: Tragedy, errors shatter a family
(Okerblom & Wilkins 1991: 1)

The case coincided with parents mobilizing against Senate bill 243 (see Chapters Four and Thirteen); and although it was a criminal matter, it became the launching pad

¹⁷⁸ Empirical data can only provide anecdotal evidence that 'the system' had previously operated from a more interpersonally (child) oriented focus. The 1989 San Diego County Grand Jury Report (No. 6), to which the attorney in the opening quote referred, may lend some support to the view that a shift occurred with the identification of the need to better respond to children 'at risk'. A report by the D. A. (Edwin L Miller Oct. 30 1992: 12) to the Presiding Judge of the San Diego Superior Court, similarly suggests that grand jury reports in 1990 and 1991 welcomed this trend. Notably, the 1993 grand jury cited the 1991 finding by the Children's Advocacy Institute (at the University of San Diego School of Law), that the system may engage in precipitous child removal (Report 13, 1993: 15-16).

from which to also make sweeping claims that the dependency system was “out of control”.

November 1991: San Diego Union Tribune

A Family Torn Apart, Allegation: Zealous county workers take children away (Okerblom & Wilkins, Nov. 8 1991: 14 Section A). A father falsely accused reflects on his ruin by perverse system (Nov. 19)

The changes that occurred in the system when pressure of this nature continued against it for an extended period (outlined in Chapter Twenty-four) led the 1993 San Diego County Grand Jury to conduct an investigation. It linked changes to system practices – which eventually contributed to serious harm to children – with the media, the backlash, and 1992 grand jury reports (“Protect the Child, Preserve the Family”, 1993: 2-15; see Chapter Twenty-three below).¹⁷⁹ The extent of system change is emphasized. As well as the 1993 grand jury finding “a current imbalance” in the system and warning that it may “endanger children”, it wrote that there were:

serious indicators that recent events within San Diego County [have] created an atmosphere where *errors are more likely to be made in the failure to remove children than in their inappropriate removal* (“Protect the Child, Preserve the Family”, 1993: 15 italics added).

A San Diego County Juvenile Justice Commission investigation into the way DSS:CSB handled several “troublesome” cases similarly indicated that:

¹⁷⁹ Judges apparently reported their concerns about changes in the system to the grand jury, and the judges linked such changes with the 1992 grand jury reports (Report No. 13, 1993: 2).

the media review of several of these cases has become so focused on adult issues that the well-being of the children seems to have been discounted (Case Review Report, February 1992: 3).¹⁸⁰

These facts bring us back to the question asked at the opening of this thesis when explaining why I could not fully adopt Luhmann's systems theory of law: how is it possible that a system established to protect children – one managed by educated and dedicated professionals and supported by community values and years of research – can evolve in such a way that it can “endanger” children? Answering this question involves weaving multiple schools of thought, the first of which explores how the media and backlash, which become intertwined in this study, can create system change.

The media, social movements, child abuse coverage, and system change

The media is defined here as a shifting, dynamic, and volatile amalgam of institutions, technologies, interests and cultural elements that form a conduit through which information is relayed, be it in print, visual, electronic and/or auditory forms. It has been found to shape public perceptions on crime, play a role in producing public ideas and to be a tool for social control (Carey 1988: 67-86; Linsky 1988; Barak 1994).

¹⁸⁰ Noting these changes is not to say that all ‘system’ change was negative. Consistent with King's analysis of child abuse scandals and the finding that it can force the system to ‘look at itself’ (1997: 101), the 1993 grand jury report expressed this exact opinion (Report No 13, 1993: 16).

The media also help to construct the community and its sense of order (Ericson et al 1991: 11) by reporting about enduring values and evoking public indignation at their violation (Avery & Eason 1991: 221). In terms common to this study, there is an exchange between social systems, where the media's "fixation on procedural justice" is seen as "the primary means by which the news media and law join in helping to constitute the legitimacy of institutions, including their own" (Ericson et al 1991: 343).

Research from the United States, Australia and England documents the positive and negative impact of media coverage on policy and practice changes in systems for children (Wilczynski & Sinclair 1999: 262-283; 2002: 523-544; Goddard and Saunders 2001: 5-12). Focusing in particular on media scandals, Franklin and others have found that journalistic viewpoints about abuse have turned public opinion against social workers; modified professional willingness to intervene in abuse cases; and stimulated new policies "as defined and structured by media discussions" (Franklin 1989: 5-15; also see Franklin & Parton 1991; Sinclair 1995).

The power of the media to influence swings in social and legal responses to abuse is recognized by groups for and against 'the system': such as The National Committee on the Prevention of Child Abuse (NCPA); and a national backlash group such as VOCAL (Victims of Child Abuse Laws) – which was formed in 1984 by people who claimed to be falsely accused in a preschool sexual abuse case in Jordan, Minnesota. Long before this study began both groups had advised their members to use the media

to promote their views, and had well-established practices to promote their respective (and competing) goals to change ‘the system’ (NCPCA 1988; VOCAL 1985: 2).

While much is known about the success of movements to prevent abuse, such as the NCPCA, between 1992 and 1994 little was known about the grass-roots group set-up to protect adults who report they are victims of child abuse laws. It is significant to this research that VOCAL had taken the position that the system should change because, it considered, in the zeal to prosecute “anyone” accused of sexual abuse:

thousands of innocent citizens [were] being rubber-stamped as guilty regardless of the facts and evidence of the case (National Association of State VOCAL Organizations News 1993: 1).

Although the movement was not known in the public forum as an established entity, it had played a notable role in culturing the evolution of change in system operations:

The most remarkable thing about VOCAL is the swift and unbelievable success in beginning the turn around in the country (VOCAL National Newsletter 1985: 7).

Its success led VOCAL to become an international body (National Association of State Vocal Organizations News 1993: 1). While its ability to change both social views and the system itself may stem from the legitimacy of some of its claims, this study is most interested in two issues: one is the contrast between VOCAL’s self-concept against that of ‘the system’; the other is the way that backlash proponents use the media and concepts of agency *and* communion to limit and/or resist intervention by the system.

These topics not only go to the way that child abuse scandals operate to create system change, but are interwoven with the argument that the way in which social workers and attorneys make meaning is intrinsic to the way in which their respective ‘systems’ respond in the face of ongoing attack. In short, the relevance of the topics will return us to Luhmann and Kegan and the connection between individual and social systems.

The backlash self-concept and the media

According to the author of The Battle and the Backlash: The Child Sexual Abuse War, media advocacy from VOCAL led it to become the most successful group in the United States for those accused of child sexual abuse (Hechler 1988). One early example of why this is so is found in VOCAL’s first newsletter where, under the headline “Legislative Notes”, readers are advised to “find a reporter who will do an article expressing VOCAL’s views, or invite one to a VOCAL meeting” (VOCAL National Newsletter 1985: 3). Their goal is to ensure the law protects the accused.

As becomes evident in this and the next chapter, themes in backlash literature which are carried in some media reports, such that push the pendulum in a direction that may harm children (as occurred in San Diego), reflect the effort to shift the focus of abuse away from the accused to the easier-to-digest formula as arising from ‘system’ issues.¹⁸¹

¹⁸¹ As one example, in an article in the national media: *From the Mouths of Babes to a Jail Cell: Child Abuse and the Abuse of Justice*, it is claimed: “The justice system is about to send two people to jail because their daughter had a dream”. Consistent with what this study found as characteristic backlash themes, the article attacks the “feverish imagination” of prosecutors, and links it with the view that “the hunt for child abusers has become a national pathology” (Rabinowitz 1990; 1993).

Backlash themes in the media reflect the legal case that spurred the movement's development. Media reports in the Jordan case condemned and scapegoated police, prosecutors and therapists, and portrayed child advocates as conspiring to entrap children and destroy families. It is noteworthy that when these backlash allegations about the Jordan case "were examined in the Federal Court of Appeals (Eighth Circuit, District of Minnesota, No. 85-5243) the justices found them groundless, endorsing the motives and the methods of the child advocates" in the case (Summit 1987: 6). The fact that VOCAL continued to promote these themes despite the above noted Federal Court finding, is illustrative of rather than an exception to its own system self-concept.

In summary, the backlash system self-concept is distinguished by the type of criticisms it makes against 'the system' and the techniques it uses to resist criticisms about the legitimacy of its complaints.¹⁸² The next topic identifies and explores backlash themes which, as emerges, are linked with established norms that reinforce dominant social preconceptions. This has significance because, as several theorists report, if ideas reflect rather than attempt to establish social norms they are more likely to be accepted (Minow 1990; Moore 1988: Ch 3; Reich 1988: 157).

Table Six

¹⁸² In 1993 the abstruse array of issues that divided child protection and backlash advocates culminated in analysis in law journals: an overview of which is included in a publication by The US Department of Health and Human Services ("Legal Issues 1990-1993 Publications" June 1993: 1-105).

Table Six is about the *type* of meaning that is made in systems for children and systems known as the backlash. The system self-concepts are primarily based on discourse analysis from San Diego media reports about ‘the system’, and from backlash material. The style of comparison in the table is not meant to encourage or enshrine analysis by categories, and the views expressed are not exclusive to either group. Views change according to a professional’s self-concept and the strength of demands on ‘the system’.

Table Six

COMPETING INTERPRETATIONS

CHILD PROTECTION ENVIRONMENT	BACKLASH MOVEMENT
<i>The central message</i>	
Children are abused.	Adults are falsely accused.
<i>Focused on accused and children</i>	
Children are abused and victimized by adults who are close to them.	Families are abused and victimized by the child protection system.
Abusers control children through coercion, manipulation or threat.	"Child savers" control children by coercion, manipulation or threat.
Some accused who claim they are innocent are guilty.	In child abuse the presumption of innocence is frequently abandoned.
Some abusers remain in denial about their abusive behavior until they have therapy.	Some accused are forced into therapy, and under pressure, admit to abuse they did not commit.
Abusers are from all walks of life. Those who abuse children cannot be defined by race, class, religion or social status.	Many accused are upstanding citizens; or the accused are targeted because of vulnerability, or without reason.
<i>Focus on adult victims</i>	
Many adults who say they were abused as children are reporting true experiences.	Many adults who say they were abused as children are making false reports.
Some adults abused as children work to prevent child abuse.	Some adults abused as children have a personal agenda to fulfill.
False memory syndrome (FMS) is rare.	False memory syndrome (FMS) is pervasive.
<i>System issues</i>	
The abuse of children is out of control.	‘The system’ is out of control.
Be sure to protect your child from abusers. It-	Be sure to protect your family from false

could-happen-to-your-child.	accusations. It-could-happen-to-your-family.
Abuse by adults harms children and may impair their development.	Abuse by the system harms children and destroys families.
The system protects the rights of abusers to the detriment of children's rights.	The system protects children to the detriment of the rights of the accused.
<i>Investigation issues</i>	
The investigators were fair and impartial.	The investigators were biased.
Parents asked questions to determine if their children had been abused.	Parents planted stories of abuse in their children's minds.
The complainant is credible. Or, emotional problems do not make the complaint false.	The person reporting abuse is disturbed. Emotional problems caused a false complaint.
Children make false statements to protect their abuser from being punished.	Professionals make false statements because they were abused themselves.
Children need support when they are subjected to the ordeal of an abuse investigation.	Children are coached what to say and rewarded when they repeat what investigators want to hear.

<i>Legal system issues</i>	
Legal commitment to family preservation, rules of evidence, and defendants' rights often limit children's rights.	Legal checks and balances often fail. The rights of the accused are ignored, and too many accused are denied due process.
It is too traumatic for some children to face their abuser in a court setting.	People have a constitutional right to face their accuser in court.
The court does not always see the complexities in child protection.	The court is a rubber stamp for the child protection system.
There was evidence of abuse, but key evidence was not permitted in court.	There was no evidence of abuse, but the court found abuse anyway.
Lack of medical evidence does not mean the child was not abused.	Lack of medical evidence means sexual abuse did not occur.
<i>Clinical issues</i>	
Therapeutic techniques were appropriate.	Therapeutic techniques were improper.
Many children are threatened by their abuser; they need to feel safe before they will talk about being abused.	Many children report abuse after months of therapy, isolation from parents, or leading questions.
The child recanted the disclosure; the child believed the abuser's threats.	The child admitted there was no abuse; therapy caused the child to lie.
The research was objective, and sound methodological standards were used.	The research was biased, and poor methodological standards were used.
<i>Financial issues</i>	
Not enough money is available for the services that children and families need.	Cases of abuse are "created" to bolster the money given to the child abuse industry.
<i>Social focus</i>	
The case demands an investigation. The child's report cannot be ignored.	The case is a witch hunt. The child has been brainwashed.
Listen to children who talk about being abused by people they know.	Listen to adults who talk about being abused by the system.

Abuse occurred; the abuse of children is not logical. Deception masks reality.	There was no abuse; it is just not logical. We need reason not emotion.
Denial of abuse by the accused causes people not to believe children's reports.	Social hysteria about abuse causes people to make false accusations of abuse.

The backlash self-concept ‘edge’

Table Six shows that the backlash attempts to culture system change by promoting the need to resist intrusive government action, protect parents’ rights, and care for families. Backlash language was found to reflect ‘a vocabulary of justice’, it makes sense and reflects traditional values about what is just. In particular, it emphasizes cherished (institutionally established) norms upon which the fabric of society evolves: the right of parents to raise their own children free from *unwarranted* State intrusion. One example taken from backlash material early in this study is the movement’s Colorado Bill (1991) “*A Bill for An Act Concerning The Preservation of Family Rights in Regard to Child Abuse and Neglect Proceedings*”. VOCAL writes: “the family has ... privacy interests ... [and] the right to be free from arbitrary government intrusion” (House Bill 91: 1311).¹⁸³

When advancing this theme backlash members reflect the voice of the mainstream. Their views engender support, such as that found in a report by the San Diego County Board of Supervisors, whose members were lobbied by VOCAL proponents. In its analysis of “system” issues the Board of Supervisors indicated: “The juvenile

¹⁸³ Analysis of the Bill – which passed House Appropriations – and a review of backlash legislative goals (one of which was an unpublished document entitled “Contents of the Bill” (1993: 1-16)), indicates the movement support the family but may weaken laws that protect children. If enacted into law, the movement would have been influential in creating changes that: limited which child abuse cases were reported; limited which sex abuse cases could be prosecuted; limited the cases heard in dependency court; limited the legal rights of children; and expanded the rights of the accused.

dependency system is not family oriented, not focused on preserving families and reunifying families” (March 1992: IV-9). Although backlash proponents had argued this exact opinion, it had been highly contested by those at DSS.¹⁸⁴ Nonetheless, the County Supervisor’s report stressed the need to change. It said: “Family preservation must be the core philosophy of the service system” (March 10 1992: IV-10).¹⁸⁵

While there was solid research already disputing this particular focus in 1992 (such as an article in the monthly circular by the American Prosecutor’s Research Institute),¹⁸⁶ the Board of Supervisors rejection of views from those at DSS, appears to mirror Franklin and Parton’s research into child abuse scandals. The authors found that such scandals often involved uncritical advocacy of the parents’ accounts of events as truth. Similarly, just as these researchers identified the acceptance of unsupported attacks against social workers, who were said to be portrayed in the media as bullies who lacked regard for civil liberties, discourse analysis of print media in San Diego reflected this same theme.¹⁸⁷

¹⁸⁴ The D. A.’s report (E. Miller Oct. 30 1992) to the Presiding Judge of the Superior Court also lent support to views by DSS, when it questioned many of the ‘facts’ in the complaints against the system.

¹⁸⁵ The minutes from a Board of Supervisors meeting (July 14 1992, Order No 2 p1) show that a speaker invited the Board to endorse a Bill saying: “social workers, attorneys, and foster care is a huge industry destroying the American family and children”.

¹⁸⁶ In the monthly circular (Aug. 1992, Vol 5 No 8: 1), Gelles noted the opposite position, stating that “‘Child protection’ and ‘child advocacy’ needs to replace family reunification as the guiding policy of child welfare agencies”. Gelles (Director of the Family Violence Research Program at the University of Rhode Island), who had “long been an active supporter of family reunification” based his change in opinion on research showing the policy places some children at an unacceptable risk of harm.

¹⁸⁷ Speaking to the system pendulum in this work, such findings contrast with other media reports when social workers are depicted as wimps reluctant to intervene in real cases (Franklin 1989: 69-73).

This brings us to the question: what might contribute to authorities (and the public) accepting attacks against professionals without in-depth review of what is claimed? To consider this question – and thus, what gives the backlash an edge – we build on the topics in Table Six by turning to the clash in self-concepts that arise for social workers and attorneys for children, when they face criticisms from proponents of the backlash.

A clash in self-concepts: social workers, children’s attorneys, and the backlash

In his book, Legal Issues in Child Abuse and Neglect, Myers indicates that ‘false allegations’ are promoted by defense attorneys as a tactic to portray the role of therapists and social workers in child abuse cases as having coerced false reports from children (1992: 30). Backlash newsletters reviewed in this study suggest that the movement engage in the same practice by criticizing the ‘over-involved’ nature of social workers or therapists (those in the interpersonal truce): such as the claims that their emotions allow them to extract false reports when they interview children.¹⁸⁸

While this thesis has established that the self-concept of social work is often associated with emotion, it is equally relevant that this research found that in contrast to backlash claims (such as in Table Six), social workers take action for more complex reasons than the traditional themes and slogans that the backlash use to advance their case. To illustrate, those who interview children are in an ever-present ‘catch 22’: if they do not ask children specific questions there can be a lack of essential information forthcoming, and if they do ask specific questions there is a risk

¹⁸⁸ For the range of backlash material that contributed to the findings in this study see Sinclair 1995.

that children will give untrue information (Berliner & Loftus 1992: 576). These opinions are well supported by other research indicating that the risk of false positives and the certainty of false negatives must be considered in systemic responses when investigating allegations of sexual abuse (Saywitz et al 1991: 682). Overall, this means that the social work self-concept – while vulnerable to attack – is not in a position to counter attacks against the discipline with simple messages that demand nothing more than instant agreement.

The backlash also attack the law, and those in the institutional truce who do not control the interpersonalist through the strict use of rules – rules, that is, that focus on the rights of the accused. The backlash theme against the legal system is that in order to get a conviction in sexual abuse cases criminal justice professionals are ‘dishonest, break rules, cheat and obstruct justice’ (Wakefield & Underwager 1988: 127-8). While attorneys with a defense orientation (Odgers & Richardson 1995: 119-121) are strongly aligned with Wakefield and Underwager’s analysis and see work of this nature as sophisticated, analysis in this study suggests that the main way that attorneys who represent children resist these complaints is by responding to attacks with factual data.

The self-concept of attorneys who work to challenge attacks against the system is exemplified by Myers, who tries to address the problem of false reports by promoting the fact that “clinical experience and systematic studies confirm that deliberately false allegations of sexual abuse are infrequent” (Myers et al 1989: 115; Myers 1994). Drawing attention to this practice is not to dismiss the validity of arguing the facts.

Myers' position is also strongly supported by other research which brings into question the frequency of false allegations of abuse that is claimed in literature from the counter-movement (Salter 1991). The main point is that authorities and the public are likely to respond to attacks against the system without in-depth review because rather than the facts of a case being the paramount focus of attention, many are influenced by emotion. Foremost, and with some qualification, this study found that when the two system self-concepts in Table Six clash in the public forum, the self-concepts work to the advantage of the backlash.¹⁸⁹ It is a clash that permits social action to cumulate, and thus affects how the system operates.

A competition in the public forum

It is emphasized that the system self-concept of the backlash was presented in the public setting in the form of *individual* people who claimed to be innocent victims of a system gone terribly wrong. This meant that as a group, the movement by-passed the usual analysis given to formalized systems that advocate system change. As a result, during this study the public were spared the details of the forces that give the backlash shape and direction and therefore, they did not have to engage in complex analysis; *the public just heard the outrage and pain about false allegations in individual cases.*¹⁹⁰ They also heard professionals who supported “victims of the system”; professionals whose self-concept was portrayed as reflecting a desire for rational decision-making.

¹⁸⁹ This occurs in the absence of public knowledge about an organized backlash system and is largely contingent on the media slant towards or against ‘system’ intervention at any given time.

¹⁹⁰ Goddard and Saunders (2001: 14-16) may continue to perpetuate this focus on individual cases through their recent analysis which by-passes the role of an organized backlash system and its goals.

The *individual* nature of the backlash system self-concept – bolstered by individual (independently supportive) professionals – and the public arena where the battle is fought, facilitates processes that culture the repudiation of one way of knowing for the emphasis of another: that is, it enhances the likelihood that a child (interpersonally) focused system will be given less credence than a rules-based (institutionally) focused system. One of several reasons why the dynamics noted lead to this form of change is because it goes against the professional self-concept of attorneys and social workers who are advocates for children working in ‘the system’ to *publicly* discuss the associations of the backlash, and its use of research by people who lack credibility in the field of child abuse. The next topic shows that as a result, the disparity between the backlash persona in the media and their individual self-concept is not exposed.

A clash - logic v. emotion: individual and professional backlash self-concepts

Backlash allies call for system change by advancing the need for *rational discourse and reduced emotion*.¹⁹¹ One example, which is easy to align with, appeared in a prominent article in an Australian national magazine in a discussion about how key proponents of the movement (without labeling it as such) are viewed in the USA. Although reference to this material dated it is highly relevant as it is from the same group and reflects the same themes found to underpin the accumulation of social action against the San Diego system:

¹⁹¹ The first review of the media, backlash material, and the literature (1994), pointed to the general themes of ‘logic and emotion’ (Sinclair 1995). After then studying Kegan in-depth from 1996-2000 for the empirical study, the ‘insight’ arose that ‘logic and emotion’ were very loosely interrelated with Kegan’s themes of insitucionalism and interpersonalism, and the dynamics of change in ‘the system’.

Those who take the position that we [the Institute] *roundly* criticize, see us as the enemy. Those who see us as taking a view which they accept and regard as *rational*, identify us as the leaders (Crisp Interview of Dr. Underwager, 12 December 1989: 140-145 italics added).

The interview reinforces this theme, with proponents *subtly* associating themselves with rationality and attributing how others respond to child abuse with an excess of emotion:

[T]here has developed such a polarisation, such a level of emotion, that it's impossible to carry out a rational discourse. I would plead for those who truly want to protect children, let's try to talk together. We can do it better (Crisp Interview of Dr. Underwager, 12 Dec 1989: 140-145). [In the article Dr. Underwager referred to himself as being a scientist].

Reflecting this portrayal of professionalism, the interviewee is introduced in an article in a Dutch journal of pedophilia as a member of the National Council for Children's Rights in the United States. However, in complete contrast with his professional self-concept, in the Dutch article he apparently claimed that pedophilia is an acceptable expression of God's will (Gerace 1993: 1): a view the public is not aware of.¹⁹² They are more likely to only see the director's plea for a rational discussion about children.

Research in this study into social influences to change how the system operates led to other questions about the neutrality of individual professionals advocating backlash

¹⁹² One court ruling refers to views of this nature (Underwager & Wakefield v. Salter et al., No 93-2422 *US Court of Appeals*, (April 25 1994 WL 145010 (7th Cir. (Wis.))).

calls for system restraint: for example, the director of the Institute – a psychologist and expert witness for the defense – housed and provided staff during the start-up period of VOCAL after the Jordan case (see Barnes v. Barnes 1989: 278-280). Of interest, at the time of this study he had dismissed the majority of allegations in the system as false. The following quote is from a national television program in Australia:

It turns out for every one person in America where the system correctly identifies that person as an abuser, you will get nine non-abusers incorrectly identified as abusers (Australian Broadcasting Commission Parliament of Australia Transcript, June 1989: 2).

Rather than challenge Dr. Underwager's views, this thesis simply points to the type of inconsistency that has raised concern amongst child protection professionals about how the backlash works and its potential impact on children.¹⁹³ Indicative of the interacting and complex issues associated with how social action accumulates to influence change, in a feature article in the San Diego Union Tribune that attacked how the system responded to abuse, the Institute's research was promoted with a 1-800 number for the public to contact if they were victims of the system (Okerblom,

¹⁹³ See for example, the article by the former Director of the Center for Child Protection, San Diego Children's Hospital, (Chadwick 1989, *Journal of American Medical Association*), which brings into question views that Dr. Underwager may have superior objectivity over advocates for children. As another example from events in San Diego, Dr. Roland Summit (Clinical Associate Professor of Psychiatry Harbor-UCLA Medical Center, and author of the Child Sexual Abuse Accommodation Syndrome) wrote to the Union-Tribune Publishing Company in April 1993 (Personal communication). He documented inaccuracies in the press and informed the publisher that the positions in its newspaper on multi-victim cases (especially articles by Okerblom) echoed "the sexual abuse backlash, aligned with a number of individuals and organizations which are anything but responsible". Summit's 1989 article (*Psychiatric Clinics of North America* Vol 12, No 2 pp413-430) explores reasons why professionals responding to allegations of abuse are vulnerable to ridicule.

Jan. 25 1992: B5-1).¹⁹⁴ Illustrating the power of individuals to unite to change opinions and decision making in ‘the system’, soon after this the False Memory Syndrome Foundation (FMS) was started, and the Institute’s director was on its first board. The Foundation’s membership was said to include families who had talked to the Institute about being falsely accused (FMS Foundation Newsletter 1992).

Another example of what was not publicly examined at the time of this research was VOCAL’s promotion of a book on its membership form: The Politics of Child Abuse. It was written by people formerly linked with the tabloid, L. A. Star, and publishers of a child pornography magazine, Finger.¹⁹⁵ The authors, whose backgrounds are not on VOCAL’s membership form, present multiple issues to argue that due to excessive injustices in the system “*every molestation case* in which there has been a conviction should be *re-opened* and reviewed” (Eberle & Eberle 1986: 284 italics added).

The professional self-concept of those working for children in ‘the system’ means that they critique the research, thus keeping the debate at an acceptable standard of dispute consistent with the limits that are both self-imposed and dictated by ‘the system’. But empirical analysis and research of the social setting in this study found that without a full picture of the forces linked with complaints, the public are ill-informed and respond to criticisms with alarm about the abuses said to be perpetrated by ‘the system’.¹⁹⁶

¹⁹⁴ Also see Okerblom article, “Caution Advised in ‘Memories’ Interpretation” (January 23 1992 B-2).

¹⁹⁵ Personal communication (May 1993), American Prosecutor’s Research Institute (Virginia).

¹⁹⁶ Limits on this thesis prevent analysis of media coverage as “careless reporting”. See for example Hughes, San Diego Union Tribune (SDUT) 24 Feb. ‘92; Broder (Washington Post) SDUT 19 Jan. ‘94.

The System Self-concept: bureaucracy v. backlash

To bring the dynamics outlined in this chapter into the overall framework of this thesis, child protection professionals work in officially structured groups that are essentially *bureaucratic in nature*. They are formally trained, their conduct is guided by professional self-concepts and ethical standards, and they are bound by confidentiality laws. While confidentiality laws can be used as a tool to prevent DSS from exposing its inadequacies (Hechler 1993: 703-708), such laws can also become a limitation when the backlash associates the illogical nature of complaints with the implausibility of abuse claims and the DSS is unable to respond with details of the case in question.

Further informing the type of restraints that manifest for professionals in the system, and how the battle over the type of decisions made in ‘the system’ is fought, see for example, the case where a key backlash ally tried to sue professionals after they had attempted to address backlash misinformation (Underwager & Wakefield v. Salter et al., No 93-2422 *US Court of Appeals*, (April 25 1994 WL 145010 (7th Cir. (Wis.))).

In contrast to the multiple restraints on professionals, those linked with the backlash often work in *flexible* self-help teams. As one example in this study, VOCAL members were found to be fluid in their response to events as they unfolded. The

impact of these differences is most evident when all the worst images of bureaucratic bungling and the conventions of officialdom are challenged by the courageous and spirited resolve often found in self-directed organization and accord. Differences of this nature seem to contribute to the backlash edge in the child abuse debate. Child advocates can attempt to counter untrue reports with facts, but as Giandomenico found (1988: 176), the use of “purely factual arguments may not be psychologically strong enough to overcome the inertia of long-established patterns of thought”, such as the importance of family integrity and parents’ rights to raise their children free from State intrusion.

This chapter introduced key interacting patterns of influence in San Diego that during the course of this study, resulted in ‘the system’ pendulum swinging too far in one direction – such that children became endangered by the very system that was designed to protect them. Chapter Twenty-four gives further substance to how this occurred.

CHAPTER TWENTY-FOUR

SYSTEM OPERATIVE STRUCTURES: THE INTERFACE BETWEEN INTERNAL AND EXTERNAL FORCES

Introduction

In Handler's analysis of law reform and social change the author warned that social movements "rarely achieve results in isolation from other events" (1978: 39). The last chapter supported this precept, embedding the accumulation of social action and its impact on the legal system in six interacting categories of influence (see Table 5(b)).¹⁹⁷ This chapter expands on the most dominant forms of system influence at the time of this study – such as findings about the role of the backlash movement, the media, and the 1992 San Diego County grand jury – by addressing three key points of interaction.

First, this chapter suggests that the pendulum swing in San Diego to an institutional emphasis in system practices is consistent with the historical memory and the swings that have occurred in the system since its inception. Second, the relationship between social factors of influence and the type of system changes that took place in San Diego is partly explained through the operative structures (or host environments) of each discipline (which leads to the operative structure of the dependency court). Third, the way that change occurs between the historical memories, system operative structures and 'the system,' is mostly shown through the ways in which professionals change their practices – a process ultimately located in the way they make meaning and how they change. Overall, rather than support the theory that it is appropriate to give life to the social system as if it operates in isolation from individual meaning making, as ultimately occurs in Luhmann's theory, this chapter continues to support

¹⁹⁷ The findings were also embedded in the larger societal context found to be dominant at the time of data collection, where more emphasis was on agency (or independence) than on community (union).

the argument that evolved in this research about the interaction of social and individual forces in the operations of law.

System change in San Diego

During 1992/93 professionals ceased using the laws that had dominated their decision-making with the same frequency as had been the case before a campaign against the system. Although there was also a decline in child abuse complaints, thus contributing to a drop in cases (see below), changes in legal practice are suggested in the figures collected from the County Council during the empirical study into the court system. The figures support the 1993 grand jury finding that the monthly average for case petitions filed in the dependency court in 1991 was 277; in 1992 this number dropped to 239. The 1992/93 monthly average then decreased to 183 (Report 13 1993: 2).¹⁹⁸

Similarly, The Judicial Council of California noted that in 1992 there was a 28 percent decline in court petitions in San Diego. It is highly relevant that during the same 12 months, sociological factors that *increase* the possibility of abuse occurring were heightened, such as a recession and a simmering war in the Gulf; additionally, “filings in other major counties had increased” (Grand Jury, Report No 13, 1993: 2-14 emphasis original). As flagged in the last chapter, the system changes that evolved in

¹⁹⁸ A similar pattern arose in the criminal justice system. Statistics for *child sexual abuse* show that in 1991, 578 defendants were reviewed by the San Diego District Attorney’s Office. By 1993 this figure had dropped to 365. In 1991, 324 defendants were charged. By 1993 this figure had dropped to 225. (1994 San Diego County Grand Jury, Report No 7 “Analysis of Child Molestation Issues” App. B.)

San Diego were the result of multiple influences, which included interactions between:

- The 1992 San Diego County Grand Jury
- The organization of VOCAL and proponents of the backlash movement
- The nature of print media coverage – and professional and public reactions to it
- The interrelationship between internal and external forces for the system to change
- The normatively closed and normatively pervious operative structures for the respective systems of law and DSS – and the historical memories of the system.

Social movements, the media and the 1992 grand jury

In order to firmly establish *the interaction* of multiple accumulating influences on ‘system’ change I will begin by building on the examples shown in Chapter 23. First, direct involvement of the backlash movement in San Diego is seen in a quote from the National Association of Victims of Child Abuse Laws (NASVO), when its members were congratulated for their efforts:

Special congratulations to successful pickets and demonstrations to ...
San Diego VOCAL ... All demonstrations were attended by press.
Keep up the good work! (Organizations News June 1993: 3).¹⁹⁹

¹⁹⁹ Reinforcing the backlash theme in Chapter 23, the logo for NASVO was *Joining Hands to Protect the Integrity of the American Family*. Media coverage that as noted, ensued for two years, reinforced NASVO’s underlying message with headings in the print media such as “Abuse: Molestation Charges Spin Out of Control”, and the continued emphasis placed on there having been a “massive miscarriage of justice” (San Diego Union Tribune, Nov. 28 1993 G-1: 6). Overall, media, backlash and 1992 grand jury themes served to bolster the cherished social myth that only the believable is true.

The media were not the only ones listening to VOCAL.²⁰⁰ Several respondents in this study reported that the 1992 County Grand Jury had a sympathetic ear to proponents of the backlash. The success of the backlash in lobbying the media and the grand jury, and in subsequently contributing to change in the San Diego system, is suggested in the 1992 grand jury report which acknowledged the response to its critical reports about the need for system change as being rapid and comprehensive (“Families in Crisis Report” Supplement, Report No 2. 1992: 1).²⁰¹ The rate of (and by inference the state of) system change about which I write is captured in the following quote: “It is impossible to report on what ‘is’ at this moment, because much is changing on an almost daily basis” (Supplement, Report No 2 1992: 1).

It is particularly relevant to any understanding about the rate of ‘system’ change and interacting factors associated with what took place, that while social movements do not create change in a social vacuum, they are nonetheless, “probably the most interesting and least obvious context in which ideas might [become] powerful” (Moore 1988: 74). As one example, in contrast with the alignment between the 1992 grand jury and the views advanced by backlash proponents, the 1993 grand jury spoke to the “least obvious” element of an organized social movement advancing ideas that had become disturbingly powerful (through media and earlier jury reports) in San Diego:

²⁰⁰ The County Board of Supervisors report (March 1992: IV-9) speaks to the number of complaints: “Develop immediately an interim complaint process to address the large volume of complaints regarding child protection issues that have been sent to the Grand Jury, Juvenile Justice Commission and Board of Supervisors offices”. Notably, the source of complaints went beyond VOCAL members.

²⁰¹ One exception is the County Council (attorneys for DSS) which the jury said were slow to respond. Also see Grand Jury Report No. 4, “Problem Areas in the Office of County Counsel” (June 2 1992).

Adults can organize politically, contribute to campaigns, issue press releases, grant interviews to the media, testify before the legislature, and attempt to persuade the grand jury. In fact, adults have done so – particularly those accused of sexual abuse of their children.

The troubling question is, who speaks for the errors made among the 64,400 in which no action takes place? Here, there is no articulate spokesperson ...

[The 1993 grand jury spoke about changes in ‘the system’ and said:] the *current imbalance* may be the result of the ‘91-’92 [grand jury] reports and the attendant news stories (Report 13 1993: 14-15 italics added).

The links shown here between social action – by parents who were politically organized, the 1992 grand jury, the media, and the outcome of system ‘imbalance’ – speaks to the accumulation of social action that was found in this study. Notably, “over 2,300 copies” of the 1992 scathing grand jury reports against the system were sent to, among several places, news media outlets nationwide. This high circulation meant the reports were “the subject of network television programs as well as newspaper and magazine articles” (Grand Jury, Rpt.13 1993: 1).

System operative structures

The above connection between a social movement, the media and system change, also brings us back to Luhmann’s theory about how law operates. He discusses social movements in his analysis of whether the legal system is forced to change by society. While it can be argued that law must yield to social pressure in order to maintain its legitimacy, the theorist said: “fortunately, no social movement and no media

campaign can change the law”. He supports this by saying “change is not possible other than through the legal system choosing by itself the forms with which it accounts for the change in public opinion” (1993: C2/VI/18). Although this said form of unitary operation in isolation from professional meaning-making is explored later, one way to see what Luhmann is arguing, which is that law has a ‘*normatively closed operative structure*’, is by flagging how DSS:CSB was found to function in a more open (flexible) way than law.

What emerged in this study as a ‘*normatively pervious operative structure*’ of DSS, first arose in data (see below) suggesting that DSS has a history of vulnerability – in changing its definitions of child abuse and the services thought to be appropriate for intervention – according to external forces; such as political and economic issues and views about how it should operate. This finding (and development of this term) coincides with what I later discovered in Moxley and Manela’s research into human service systems, and their finding of “organizational permeability” (2000: 316). The changeable nature of DSS that was evident in this study also seems to overlap with King’s finding (1997: 82) that social workers (and their systems) are vulnerable to dependence on other systems for their continuance, such that results in an ongoing demand for social workers to be ever vigilant about changing the way they practice.

Parents’ attorney

DSS has no money ... In my opinion the definition of a protective issue varies with the DSS budget. *We terminate cases now saying that there is no protective issue that three, four years ago, we would have never in a million years terminated*. Because there is nothing we can do for them anymore

therefore there's no protective issue. That seems to be the standard now, instead of, has anything changed in the family to make it safe?

Children's attorney

It seems to me that the [social workers'] policy manual as I read it *is less driven by laws and rules than it is driven by decisions made in the higher reaches of the DSS over how much money can be spent* on this or that.

Social worker

What we run into is, especially more recently ... the *DSS is governed by politics and by money problems* ... what was adequate services six months ago is not the same thing today.

Social work literature in this thesis reinforces the above field data and the more general long-standing view that the profession and its system are always under pressure to change. “[T]he reality is”, the development of theories about how to respond in cases “constitute[s] responses to social and political changes in the society in which the profession has continuously to redefine its role” (Bitensky 1973: 2; see also Reamer 1993: 152-153; Howe 1997: 173-175; Moxley & Manela 2000: 316). While it is true that *all* professions must change, the next quote reinforces the view that social workers *continuously* redefine their role. It also captures the frequently recurring theme that social workers must go beyond legal rules when responding to allegations of abuse:

Social worker

They [DSS/social workers] go to the extreme. Then they get criticized for that so they overreact and *they start taking too many cases to court or being so gun-shy that they want to remove every kid who gets hurt*. It goes back

and forth and I don't know that there's an answer for that because this kind of work is not like black and white. *There's a certain amount of judgment involved: it's not just legality ...* that's the tricky part of this whole system.

Although social work practice undergoes a “back and forth” pendulum form of response to child abuse allegations, and is “not just legality”, the next topic introduces the historical memory that bolsters an exaggerated emphasis on parents' rights – such that led to an institutional, rules-oriented form of ‘system’ response during this study.

Historical forces in the system pendulum

A long history has been identified where child abuse is signaled and later suppressed.²⁰² Summit's analysis of therapeutic responses to abuse is one of the most detailed reviews of the cycle where the abuse of children has been signaled and then abandoned by those in the caring professions.²⁰³

The psychiatrist (and author of The Child Sexual Abuse Accommodation Syndrome) shows a 35-year cycle of new and then stifled attempts to recognize abuse (1988: Ch 3; 1989: 413-430). Summit links the disclosure/suppression cycle of (system) responses to abuse with the derision of those who have advanced the existence of abuse, indicating that professionals have been “faced with the alternative of denouncing the discovery or succumbing to scorn and disgrace” (1989: 427).

²⁰² It is a history that has rested on questions that *ultimately* come down to the veracity of those claiming abuse (Olafesen et al 1993: 7-24).

²⁰³ Existence of this cycle does not infer that advances for children come to an abrupt halt. For example, during the San Diego backlash, a Symposium on Judicial Needs Relating to Child Sexual Abuse in Washington D. C. found that “Much of the necessary research regarding child sexual abuse has been done, but little of that information had found its way to the Nation's courtrooms” (1991: 5).

The earliest example of these ‘alternatives’ is Freud’s 1896 presentation, *The Aetiology of Hysteria*, to the Vienna Society of Psychiatry and Neurology (Summit 1988: 45-50; 1989: 424), where the psychotherapist said that some women were sexually abused as children. Within weeks of his presentation Freud spoke about the peer alienation he felt. He said: “I am as isolated as you could wish me to be: the word has been given out to abandon me, and a void is forming around me” (Masson in Summit 1988: 48).

In a process of individual change that is reflective of the pressures that now influence ‘the system’ pendulum, Freud is said to have regained status among his colleagues by replacing his views about sexual abuse with the Oedipus Complex. This theory explained that children were “traumatized not by actual sexual assault but by projections of their own wishful masturbatory fantasies” (Summit 1988: 48). This historic, and many say exaggerated link between fantasy and reports of sexual abuse, provides just one of the foundations today for backlash claims about false allegations and false memory: that is, reports are said to be false because they stem from fantasy, and/or, ‘the professional representing the voice of the child has got it terribly wrong’.

The history of identifying and responding to physical abuse has a less notable cycle of disclosure and suppression. Nonetheless, a century passed between the time physical harm to children was documented as abuse and its eventual recognition as The Battered Child Syndrome in the early 1960s. One early example of denial is Tardieu’s 1860 publication, “*A Medico-Legal Study of Cruelty and Brutal Treatment*

Inflicted on Children”, which was “totally ignored by his peers” (Summit 1988: 45; 1989: 414).

Social forces of an anti-system nature

The historic memory of social forces in the cycle of abuse suppression, which includes the portrayal of professionals as “dangerous fanatics” (Berliner et al 1990: 8), has been validated by the rediscovery of arguments about gender credibility, child witness capacity, and mass ‘sexual hysteria’ (Olafesen et al 1993: 7-24). Ancient prejudices about the lying child, and the hysterical woman (such as that documented by Scull 1979), are frequent sources of suppression; these historical memories have been sustained worldwide not only through established patterns of political, economic and legal power, but also age and gender hierarchies in institutions and family structures (Olafesen 1994).

Specific to systemic responses in the United States, Minow indicates that at the turn of the 20th century attempts by ‘the progressives’ to prevent child deaths were slandered as a “conspiracy” (1990: Ch8-9). Moreover, reformers in the Children’s Bureau were linked with communist and socialist ideologies when they tried to have legislation enacted to educate women about prenatal and infant care (Minow 1990: 247-251).

The conspiracy theme is found almost 100 years later in material distributed by VOCAL, and the association of child abuse investigations with ‘witch hunts’ and ‘McCarthyism’ (Sinclair 1995: 153-175; Myers 1994; Summit 1989: 44; Hechler

1988). As one example, allegations of “criminal conspiracy” were also made against *social workers* during the backlash against the San Diego ‘system’ (Juvenile Justice Commission, Case Review Report, Feb. 1992: 3).

Views about women’s role in society and the link of such roles with social work also continue to underpin criticisms about ‘system’ intervention to prevent child abuse. Although Platt distances “the child-saving movement” from humanistic foundations, associating its impetus instead with middle-to upper-class elitist efforts to maintain social order and privilege, his description of social work in *‘the child abuse industry’* shows the type of self-serving (job creation) theme the backlash attaches to social workers, and reinforces the gender-oriented views and social dynamics linked with the self-concept of the profession in this thesis:²⁰⁴

Despite the regressive and nostalgic thrust of the child-saving movement, it generated new social and professional roles, especially for women. The new job of social work combined elements of an old and partly fictitious role – stalwart of family life – with elements of a new role – emancipated career woman and social servant (Platt 1977: 177).²⁰⁵

This opinion is interwoven with the point in Chapter 23, where criticism of social work is carried over to the attorneys who work for children. Platt goes on to say:

²⁰⁴ Minutes from a County Board of Supervisors meeting in San Diego reflect the backlash theme to cut the employment of social workers and DSS intervention. One speaker is quoted as having: “affirmed the grand jury reports, and asked why there had not been a reduction in Child Protection Services staff. He asked that the Board look at the financial impacts, recommending that social workers and foster homes be *reduced by 50 percent*” (July 14 1992, Order No 2 p1 italics added).

²⁰⁵ This dated literature example is chosen for its representativeness of what in reality are the type of denigrating links that have long been made against systemic intervention on behalf of children.

“The introduction of lawyers into juvenile court runs the risk of improving procedural efficiency and reinforcing the child-saving ethic” (1977: 178).

It is significant that complaints such as these are *now* heard by major segments of the American population within the context that social services “are often more harmful than productive” (Ramos 1997: 138). And it is in this context that the cycle of anti-system responses that first arose in reply to reforms over a century ago resurfaced in the form of a backlash in San Diego: it was one which successfully built momentum in politically suitable ways, to keep established social patterns (or historical memories) of hierarchy intact. The following quote helps to illustrate this point, showing that the public and system swing *away from* attention to allegations of child abuse that took place in San Diego reflected the type of change the 1992 grand jury wanted to see:

Since the media coverage of the Juvenile Dependency System the jury has received testimony that hot-line calls are down sharply but that the ‘real’ child abuse calls are still coming. Also, fewer petitions are being filed. Perhaps both the public and the initial gatekeepers (hot-line receivers, emergency response workers, court investigators, and County Counsel screening deputies) are now starting to make the distinction between abuse/neglect and unfounded allegations ... (Grand Jury “Families in Crisis” Report, Feb. 1992: 41 italics added).

While the historical memory of anti-system forces holds that a reduction in systemic responses means a reduction in abuses ‘perpetrated by the system’ – the following three *interacting* factors cast doubt about the extent to which ‘real’ cases of child abuse were in fact being adequately addressed. One is the 28 percent drop in legal

petitions to protect children in San Diego in 1992 (while other counties in the area increased); another is the simultaneous forewarnings by respondents from every cohort in this study that ‘the system’ was turning its back on children who were being abused; third, is the more than doubling of child deaths that followed – which included cases known to the system.

The changes in system practices associated with these outcomes – which this study found reflected a swing to an over-embeddedness in an institutional, defense-rules orientation of system practice – were also linked with the synergy that existed between internal and external forces for the system to change its focus.²⁰⁶

Interacting internal and external forces: the historical ‘pro-parent’ focus

Analysis of the social setting indicates that parents’ attorneys were initially aligned with attempts by external forces to achieve a more parent oriented ‘system’ focus. The following quote, from the Case Review Report by the San Diego Juvenile Justice Commission, shows that parents’ attorneys lobbied for change:

Attorneys representing parents in the Juvenile Court express a sense of frustration and impotence in their positions. Repeatedly, they say that they feel they cannot practice law in the Juvenile Court ... and that they have no hope of real justice being done (February 1992: 16).

²⁰⁶ The increased emphasis on a defense orientation – some of which appears to have been appropriate – is also suggested in the Fourth District Court of Appeal’s reversal of a number of child abuse cases from the dependency and criminal courts in San Diego. The 1992 grand jury “Families in Crisis” report (Supplement No 2: 2) also noted that the California Supreme Court had agreed to hear several case appeals. The jury saw the pending decisions as possibly eliminating the need for legislation – legislation which some child advocates saw as turning back the clock in the field of child protection. An example is given later in this chapter when integrating findings with the autopoietic theory of law.

Similar references to views of this nature (also mirroring parents' attorneys opinions in this study) were made in the County Board of Supervisors Report; as one example, "The court is viewed as automatically concurring with the social worker" (March 10 1992: IV-7). The 1992 San Diego County grand jury reports echo similar views, with the emphasis once again on difficulties arising from poor social work practice. In short, attention to the way social action accumulates includes the lobbying by one cohort against another, which in this study served to strengthen the perspective that social workers (and DSS) needed to change how they responded to child abuse cases:

There are some misdirected social workers. Unfortunately, the Department appears incapable of policing its own ... Attorneys, psychologists, and parents have testified that some social workers lie routinely, even when under oath in court (Grand Jury Rpt. 2 1992: 21).

Although criticisms were lodged against children's attorneys, findings by the San Diego Juvenile Justice Commission not only serve to reinforce the focus against social work practices, but also that there was in fact a real need for *some* change to occur:

The committee had the distinct impression that social workers in some of these cases made decisions in the early stages and did not want to be bothered with contradictory information. There was clear evidence of disinterest in the opinions of other professionals and of *an inability to handle differences of opinion*. Some workers demonstrated *hostility* and anger when their judgment was questioned ... [T]he fact that a true finding had occurred seemed to set *an intractable course marked*

by myopia and rigidity (Case Review Report, Feb. 1992: 7 italics added).

Having established the nature of interacting forces for change (and without losing sight of the point that the criticisms against the system, and its response, both became excessive), the topic now shifts to an overview of how change manifested in the system. This is explored first by establishing the key influence from grass-roots lobbying and media advocacy for changes to DSS operations. It is followed by the influence of the same interwoven forces to changes in legal agencies and operations in the court.

The interface between social forces, social work and DSS

As an agency, the DSS responded to the media and 1992 grand jury attacks against it by publicly emphasizing the need to preserve families. However, reflecting the professional self-concept of social work, workers responded to statements about preserving the family through their own *perceptions* – or ways of making meaning. A link between the self-concept of the profession captured in this thesis – such as social work’s vulnerability to dependence on other systems (and constantly redefining their role), and differences between social work theories and official policy and the development of unofficial interpretations in their day-to-day practices – is drawn from the 1993 grand jury’s review of events, which found that the dynamics in San Diego led to:

an environment in which many front-line social workers had *the perception* that they must carry out a ‘*family preservation at all costs*’

policy, with the result that a child's welfare could be subordinated to that *perceived* policy (San Diego County Grand Jury, Report No 13 1993: 3, italics and underline added).

The following quote further strengthens the argument that evolved in this thesis that social workers *interpretations* about child abuse (and thereby DSS operations) changed when under attack. The 1993 grand jury wrote that meetings with the:

County Counsel, Public Defender, Alternate Public Defender and the District Attorney's Office, confirmed a broad dissatisfaction with the way the '91-'92 reports had been *interpreted and acted upon by the front line social workers* who had been heavily criticized (Report No 13, 1993: 3 italics added).

Rather than ridicule this social work response, when it identified the adverse effects of the previous grand jury reports, which it said impugned the competence, character and motivations of professionals, the 1993 grand jury expressed concern that the previous jury's reports were "now held up as authoritative proof of a malaise in child protection services, and by implication, those associated with the process" (Report 13, 1993: 3).

Significant to the type of system change that unfolded, analysis of articles in the San Diego print media indicates that the 1993 grand jury's concerns of this nature were overlooked in press reports about 'the system'. It is suggested here that the failure to publicly rectify exaggerated criticisms against those at DSS meant the system remained under a cloud: in this setting it continued to over-emphasize parents' rights. This emphasis appears to have contributed significantly to the trend of decline that

was reported earlier in petitions filed for abuse cases, and this drop in public and system response can not be isolated from the dramatic increase in child deaths that occurred.

It is also noteworthy that respondents from all cohorts in this study forewarned of a sharp rise in child deaths, thus bringing into question any inference in press reports that ‘the system’ was caught off-guard by the large increase in deaths (see opening quote). It is also iterated that child deaths occur in the context of a larger systemic failure to protect children, and it is an indication that other children have also been placed at risk.

The interface between social forces, the law, and system change

The way in which the legal system became a target of backlash, media and grand jury criticism is summarized in the nature of pressure for legal change documented by the 1992 grand jury:

The legal system’s traditional truth-finding tools – witness confrontation, cross-examination, restrictions on hearsay and expert testimony *have been abandoned* in a rush to protect [children] (“Child Sexual Abuse, Assault, and Molest Issues” June 1992: 1 italics added).²⁰⁷

While these views mirror backlash perspectives on the criminal justice and dependency system that were explored in Chapter 23, they are also views that contrast

²⁰⁷ Also see the 1992 grand jury, Report No 4, where complaints are listed against County Counsel, such as: “The current system is designed to cover-up mistakes instead of learning from them” (p11).

strongly with the District Attorney's opinion about what occurred in the legal system. In his official response to the presiding judge of the Superior Court in San Diego the District Attorney wrote:

[Many of the 1992 grand jury criticisms] are so far removed from accuracy and fairness they are inconsistent with the work of impartial fact finders (Edwin Miller (District Attorney) October 30 1992: 4).²⁰⁸

In the same way that the media failed to provide a balanced analysis about attacks against DSS, an analysis of print media reports indicates that The San Diego Union Tribune did not properly examine or give sufficient credence to the District Attorney's response, or the 1993 grand jury investigation into what had occurred. Nor did the media explore the role of the backlash, despite being advised about the potential harm being caused to children, and discrepancies between its rhetoric and its legislative agenda.²⁰⁹

To better understand the nature of the multiple interactions being reviewed – which occur at individual and system levels of evolution – we return to the topic of attorney and social work professional self-concepts, and the perceived and real restraints that exist; such that influence how professionals and 'the system' respond to attack.

²⁰⁸ The 1993 grand jury gave credence to this view, writing that its investigation into claims made by the 1992 grand jury: "was hampered by missing 1991-92 Grand Jury files, which had been removed from the Grand Jury offices. Fourteen files were returned [in June 1993], following a court hearing. After an exhaustive review of these files ... and records obtained from both the District Attorney and DSS, we found that the District Attorney's version of the facts, as stated in his response to the Grand Jury report, dated October 30, 1992, was accurate" (Grand Jury, Report 13 1993: 7).

²⁰⁹ As the empirical study in the court exposed me to a range of views about the serious harm being caused to children through the backlash and media campaign, and as I had inadvertently been given information about a link between VOCAL and the 1992 grand jury, I made the unusual choice to meet an editor of the San Diego Union Tribune (in 1992) to inform the press of my research findings about harmful system changes and the backlash. The editor knew of the group: the material was not used.

Professional self-concepts and their impact on public discussion

As introduced in Chapter 23, it is antithetical for most professionals in the system to present their views in a forum where carefully articulated abstracts and well-constructed journal articles can be replaced by slogans, jargon or sensationalism; or where the occasional fabrication or fudging of data occur. Professionals who work with rigor to find and support the truth are reticent to engage with media representatives known to work with zeal to find the ‘scoop’ (Sinclair 1995: 174). In other words, the failure of the media to accurately cover child abuse issues is often linked with the failure of child advocates to suitably relate to media representatives.

Although a National Institute of Justice study into the San Diego system’s response to physical abuse reported that some highly publicized cases had caused “a backlash among the public” (Smith B 1995: 11), it is argued here that the professional self-concept of those who operate the system contributed to a paucity of *public* discussion about the complex dynamics that had evolved in the county. This paucity of discussion gave the backlash leverage. With complaints not adequately addressed in the media, as noted, analysis of public and professional responses to reports of child abuse indicates there was a sharp drop in intervention. These topics are once again linked back to Luhmann’s systems theory of law.

The autopoietic theory of law and social movements

When the system was attacked, attorneys and judges did not instantly reorganize how law defined abuse. Also, the system was not “all limit” (it was not all defense explained as assimilation or normative closure). The law was open to learn from its environment, that is from ‘other reference’, through cognitive openness (explained through accommodation to new experiences) which, as described by Luhmann, mainly occurs through legislation. As one example of this form of accommodation to legal change in this study, much to the concern of child advocates, The County Board of Supervisors responded to the accumulation of social pressure by proposing that the Commission on Children and Youth:

make recommendations on the following State and federal legislative issues: anonymous abuse reporting law ... data bases on ... unsubstantiated abuse reports, confidentiality law, immunity for mandatory reporters, burden of proof requirements, and time frames for family reunification (Board of Supervisors Report 1992: IV-12).²¹⁰

This formalized structure of response becomes more significant when it is contrasted against what occurred at DSS. As discussed, factors that began to dictate how social workers defined and responded to cases of child abuse included a (wrongly) “*perceived*” DSS policy, and their own “*interpretations*” of 1992 grand jury reports.

The very different forms of (professional) ‘system’ responses between DSS and law that have been outlined throughout this chapter (where the former unofficially

²¹⁰ The San Diego County Grand Jury “Families in Crisis” report (Supplement No 2 1992: 2) similarly draws attention to its support for legislative changes in the dependency system.

redefined abuse and the latter did not) lends support to Luhmann's position that "no social movement and no media campaign can change the law". At a metaphorical level, law is changed through reference to the law (not the media or a social movement). However, support for this concept cannot be interpreted to mean that Luhmann's systems theory adequately explains how law operates, largely because significant changes did occur to decisions about which laws to use, and this involved the way in which *people* operating the system made meaning and interpreted events.

Change: professional self-concepts and the operative structure of each system

The conclusions drawn above may be more easily understood when the final aspect about how 'the system' repudiates one form of knowing for another is outlined. It is proposed that when the system is under threat – as has been shown through the analysis of events occurring during this study – the way 'the system' changes is experienced by people from law and social work in the same way that the interpersonal and the institutional balances change when an individual is experiencing ongoing contradiction and threat to the way *they* make meaning.

Three main themes in this thesis support this premise. First, the fundamental dynamic is reinforced that what people experience in the court (through their case experiences, interactions with other people, and interpretation of social action) leads to transitions in how professionals make meaning. Tables 1(b), 4(b) and 5(b), (Chapters Five, Nineteen and Twenty-three respectively) outline the type of individual, professional and system factors found in this study to most frequently stimulate people ('the system') to change.

Second, there is a relationship between the processes of transition from one way of making meaning to another (such as confirmation, contradiction and continuity) and the host environment (or operative structure) of the systems in which professionals work (as outlined in Chapters 15 and 16, and summarized in Table Three).

Third, it is also reinforced that people experience transition into new ways of making meaning as threatening. This threat (which can be conscious or unconscious) largely occurs when professionals face extensive contradictions – or irritations – in ‘the system’, and in order for them to continue operating they have to deal with these contradictions at an individual and professional level of meaning-making (such as the themes shown between theory and data in Chapters 13-22). According to Kegan:

When the institutional balance is threatened we hear about a threat to the self, a concern about the self, the self that has been in control. This is not what we heard from the interpersonal balance under threat, where the concern for oneself is expressed in terms of the other. In the earlier [interpersonal] balance we are hearing about a threat to the sense of inclusion; in [the institutional] balance we are hearing about a threat to the sense of independence, distinctness, agency (Kegan 1982: 231).

The following points translate these particular processes associated with individual change to the way the system changes. The points made help to capture how the operative structure (historical memory/host environment) of each ‘system’ cultures change when it is contradicted and threatened. To put this in a snapshot: this study

suggests that when under threat, the operative structure of the legal system facilitates increased rigidity, and the operative structure of DSS facilitates more permeability.²¹¹

The operative structure of law and DSS - and individual change

It is suggested that an institutionally oriented (normatively closed) system of law experiences a threat or irritant (metaphorically speaking) as one that may undermine the actual system. As the importance of the system and its continued emphasis on differentiation (or independence) is the very self-concept that has dictated the need for law to be in control of its system – its initial defense against the threat to its operations being undermined – is to rigidly adhere to ‘system’ rules. This finding not only builds on Kegan’s constructive developmental theory about change, but also the theory that in times of uncertainty “the [legal] *profession* protects itself by moving back in the direction of structure and rigidity” (Smith & Weisstub 1983: 122 italics added).

Conversely, although the law officially defines child abuse, an interpersonally oriented (permeable) system such as DSS experiences a threat as one that may undermine the system’s ability to respond to others – which is the very self-concept behind the purpose for DSS existing. Data from this study and analysis of the social setting suggest that the DSS defense against this threat is to expand its definition of

²¹¹ These different forms of ‘system’ response are respectively interwoven with the more institutional orientation of law and the interpersonal orientation of social work – and the self-concepts that have been found to underpin how professionals in each discipline make meaning (Chapters Four to Seven, Thirteen, Fourteen, Sixteen and Part Four).

‘other’, broadening the reaches of its efforts for inclusion and caring from the perception of being focused on children to that of representing families.²¹²

However, placing the change processes for the operative structures of law and DSS (which become evident in events in the court) as ultimately occurring within the rubric of individual professional change, conflicts (somewhat) with Luhmann’s theory that change involves the *system* reaching a stage of evolution that *it* can recognize an irritant (1993: C6/111/257-9).

Clearly, while this study has rejected the theory that law reproduces itself “by itself”, it nonetheless reinforces the importance of the concept of an historical memory (in the vein of Jung’s archetypes (1968), Sheldrake’s collective field or group mind (1988: 320), or Kegan’s “single energy system of all living things” 1982: 43).²¹³ The analysis throughout this thesis indicates that this complex and largely inaccessible aspect of ‘the system’ plays a role in how DSS, legal agencies, and ultimately the court, respond to an event – the dynamics of which, however, are inextricably interwoven with individual meaning making.

²¹² King said that social work changed by shifting the object of its focus from society’s risk-creating systems to ‘itself’: to “its own capacity to identify risk situations ... and take steps to intervene and so prevent the potential harm to children” (1997: 101). While not mirroring my finding, the *theme* is that the discipline reacted to its crisis by focusing on itself in order to keep *being able to help others*.

²¹³ Aspects of Luhmann’s theory lend itself to the same idea, such that there is a primary object that is “prior to any set of observations or cognitions, and [has] something of a founding performance” Clam (2000: 76). (Also see Kegan 1982: 8 for this view). Clam also draws an analogy between Luhmann’s autopoietic theory and ‘social communication’ with Freud’s ‘invention’ of the unconscious – both of which are said to reflect “anonymous and autonomous primary objects who allow the observation of a level of reality in its own right” (p77). This concept, however, is embedded in Luhmann’s theory that “an operation of social communication cannot be connected with an operation of life or of consciousness” (Clam 2000: 74); which is an extension of the overarching tenet that the autopoietic theory “demand[s] an abandoning of the assumption that there is an actor or an action behind social communication” (Clam 2000: 67). Also see Chapter Six discussion in this thesis.

Processes of change: institutionalism, interpersonalism; the social / the individual

This discussion foreshadows the conclusions chapter. Briefly, although the pendulum shifts because people work to prevent harm (be it through their emphasis on adults or children), multiple factors serve to perpetuate the very outcome that people work to avoid. Contributing patterns of influence that lead to harm, which were found to exist in this work in the dichotomous nature of a system pendulum, include the inescapable tension between the need for communion or agency, the enduring passion with which these competing views are held, and the interaction between internal and external system forces that rally to advance or suppress State intervention into the maltreatment of children.

These combined dynamics mean that the system is a setting where the pressure to change how it is operating – for it to be more interpersonally or institutionally oriented – will always remain a fundamental characteristic of ‘the system’ self-concept. System operations reflect this tension not through the separation of people from the social system that underpins the practice of law, but rather through an integration of individual, professional and system self-concepts that are developed and continue to evolve through the cognitions and emotions of the people who operate ‘the system’ – and who respond to the accumulation of social action for or on behalf of abused children or accused adults.

This finding does not ignore that systems can operate in self-generating ways: it simply emphasizes the research which *ultimately* indicates there is no duality between the observer and the observed, or empty spaces and our nervous system – which are reflected in the object of our consciousness – and manifest as matter (or information in legal text and case decisions). Put in another way, *all* systems exist as relatively independent sub-totalities. Crucial to the overall finding of this study (and as summarized in Appendix One), when systems are observed as if they are isolated entities, their meaning is lost.

CHAPTER TWENTY-FIVE

CONCLUSIONS

Introduction

While much is yet to be achieved in the development of a legal theory that recognizes the multiple diverse forces at the core of how law evolves, this *exploratory* interdisciplinary study advances some distance in this direction. In particular, data and theory from the court system and the social setting indicated that the system of law evolves through the interaction of social and individual forces, and as a result, this thesis lays the foundation to respectively unite socio-legal and psycho-social theories. While it remains that the latter theory emerged as a better tool than the former to examine and explain empirical findings, for now, the relationship between data and theories about the legal system studied was captured in the equation $SL=HDLA+D^{SA}$.

Dominant findings

Three dominant findings arose in the study. First, multiple similarities emerged between Kegan's and Luhmann's theories about how individuals and law evolve. However, the finding that the meanings people make *and*, at a deeper level of analysis, the *processes* by which *their* meaning making evolves are pivotal to any explanation about how the legal system evolves – urged the need to elevate Kegan's constructive developmental theory over Luhmann's autopoietic theory of law in order to examine and explain how 'the system' operates and evolves.

The second dominant finding from analysis of empirical data and the social setting was that key differences between law and social work were mainly examined and explained through the generic integration of Kegan's theory about interpersonal and

institutional orientations of meaning making into a typology of individual, professional and system self-concepts. As Kegan's theory did not focus on the social system of law (or any specific social system), Luhmann's theory was used as a metaphorical tool (only) to explain concepts about how law evolves in order to remain a differentiated system.

The third key finding from empirical data and the social setting was about the 'operative structures' of the systems of law and human services. This concept helped to show that each of these 'systems' not only responded differently to the accumulation of social action (or ^{SA}), but that each system's response was linked with the different meaning making orientations for attorneys and social workers and the way they subsequently responded to social action about the system.

To summarize these findings (shown in $SL=HDLA+D^{SA}$), the evolution of the system of law can not be fully examined or explained in isolation from analysis of the meanings professionals make and changes to their decision making in a court setting.

Methodology and fieldwork

Data findings from the court were based on analysis of seventy-one interviews with respondents from six agencies (28 in the Pilot study; 43 in the formal study).²¹⁴

²¹⁴ The *quotes* used in the thesis – selected because they either represented or contradicted dominant themes and findings – were taken from the formal interviews that were recorded and transcribed.

The initial interest in examining differences between social work and law, with attention on the processes associated with court operations, made it necessary to continuously stay open to new perspectives that arose in the data: this openness included exploring what particular points meant to the professionals being interviewed. Later in this research, my interest in understanding what explained the extent of differences that emerged in data about how the court operates meant staying open to new theoretical possibilities.

The pilot study suggested that the framework to *properly* address the empirical data should fuse phenomenological, ethno-methodological, ethnological, hermeneutic, feminist and holistic elements of inquiry. Although the need for such an eclectic method led to several concerns, which were addressed by identifying methodological limitations in each section of the thesis, it is noteworthy that Chapters Eight to Thirteen explored theories, and Chapters Fourteen to Twenty-four outlined a wealth of data, much of which would have been overlooked if just one method had been employed.

Of most significance, the analysis of data from the empirical study in the court and the study into factors from the social setting that influenced the court, encouraged the need to integrate the data with a systems theoretical framework to analyze how law and individuals evolve. More generally, the key findings from the empirical study were cross-validated with a triangulation of sources such as: interview transcripts and participant observations and field notes about respondents' affect and communication style, literature from a variety of schools of thought about each discipline and the

court itself, and theoretical analysis about how individual and social systems operate and change, primarily from Kegan (1982; 1994) and Luhmann (1993; 1995).

To begin discussion about the three dominant research findings listed above, key similarities are first noted that arose in this study between theories from Kegan and Luhmann. This will be followed by discussion about the distinctions that arose which urged the need to bring Luhmann's autopoietic systems theory of law into Kegan's more complete theory as a tool to study how law operates. As part of this, I will address why I found it necessary to subjugate what has been called a 'grand theory' to one previously not associated with legal theory.

THE DOMINANCE OF THE PSYCHO-SOCIAL OVER THE SOCIO-LEGAL

Theory synergy: Kegan and Luhmann

The fact that Luhmann and Kegan identified virtually the same processes to describe how law and people respectively change as systems, meant that the integration of their theories in this thesis was not based on an abstract or synthetic reconstruction, but rather, through the natural synergy of concepts that characterize the way that social and individual systems are said to operate and change. Some of the main parallels that were shown to exist included Luhmann's and Kegan's use of constructivist theories, and the following processes in system operations:²¹⁵

²¹⁵ As one example, a relationship was drawn between limit and guidance and normative closure and cognitive openness in legal system operations, and limitation and possibility and assimilation and accommodation processes in human development. The nature of this relationship showed that the legal system cannot be completely resistant to learning: it cannot be all normative (system defense or assimilation through *total* limitation); nor can it be all cognitive (system learning or accommodation

- Concepts about system self-preservation and self-transformation and boundary differentiation, all achieved through processes of self-reference and other reference
- Concepts about limitation and possibility in human development, and limitation and guidance in the way law operates, both of which are interwoven with and facilitate processes of self-reference and other-reference
- Concepts about ultimacy and leadership in the meaning made – where the whole becomes a part to a new whole, or what was once ultimate becomes preliminary on behalf of a new ultimacy; with both concepts anchored by processes of reflexivity
- Concepts about evolutionary truces and emergent units – which reflect a person's (and the legal system's) need for stable boundaries of selection from within which to choose what belongs to their system of meaning and what does not²¹⁶
- Concepts about assimilation and accommodation processes that underpin the ability of individuals to anchor their experiences to old perspectives and to gradually increase the complexity of the meaning they make. Parallels arise in the normative closure and cognitive opening of law, which is at the foundation of its ability to operate in a stable manner while still adapting to new demands from society
- Concepts about confirmation, contradiction, and continuity as processes by which individuals and social systems maintain and transform the meaning that is made
- Interwoven with the above topic is the concept of system irritants: they play the same role in individual/system change and their processes unfold in the way.

While these similarities facilitated the natural channeling of concepts of legal autopoiesis into Kegan's theory, the following two topics summarize why Luhmann's systems theory of autopoiesis could not stand in isolation as a theory of law in this work. The first is about one of the ways Luhmann emphasizes operations *in* the social system; the second illustrates one of the ways he builds this argument.

through *total* possibility). Similarly, individuals cannot be all assimilation (system defense through total limitation); nor can they be all accommodation (system learning through total possibility).

²¹⁶ Each evolutionary truce or emergent unit represents different ways of how information is internally processed or, how a *reduction in complexity* is achieved in order to reach more sophisticated levels of meaning-making.

Theory disparity: the location of change

Luhmann *ultimately* positions the development of a system *in* the social system itself. Chapters Nine to Eleven led to the overall view that Luhmann lodges change in the social system by elevating how people make meaning to a systems construction of operation, and then divorcing them from the meanings *they* make, such as their ability to make their own normative specifications.²¹⁷ Chapter Twelve, which was on object relations and is summarized below, showed that as part of this separation Luhmann allocated the definition of the boundaries of the object (law) to the object itself (law), not to the people who construct the system – with the social system.

In contrast, Kegan positions the evolution of a system in the interrelationship that exists *between* people and the social system.²¹⁸ Specific to Luhmann’s argument that the social system makes its own normative specifications, Chapter Ten introduced Kegan’s finding that people in the institutional truce (such as most attorneys in this study) produce their own meaning-making *as if* they are a *social* system. Importantly, the institutional orientation of meaning making includes an individual’s “construction of the legal, societal, normative system” (1982: 101).²¹⁹ As Parts Three, Four, and Five went on to identify, the juxtaposition in Kegan’s theory between the individual and the system (from within which normative specifications evolve) was shown

²¹⁷ As well as the variety of arguments against autopoiesis in this thesis, the exceptional abilities some autistic people demonstrate (Rutter & Schopler 1978) helps to further show why I doubt Luhmann’s claim, for example, that there is ‘no direct communication’ between the individual and the social.

²¹⁸ Chapter 10 noted that in one analysis on the individuality of psychic systems Luhmann (1995: Ch7) proposes similar dynamics of an interrelationship to those proposed by Kegan: he also proposes the opposite (1995: 480-488). Part Four also drew attention to a similar contradiction (Luhmann 1985: 205; 281-2). This thesis pivoted on Luhmann’s ultimate opinion: ‘people are *not* part of the system’.

through the relationship that exists between individuals and the host environment that holds and cultures the experiences professionals reported in this study, such as their agencies of employment and the court system (which always includes the social).

Theory disparity: Object relations - self-reference and other-reference

Doubts were also raised about how Luhmann's theory locates legal operations as occurring in the 'social', through attention to the theory of object relations. This critique against Luhmann's approach was supported by theories advancing the importance of not making sharp distinctions between the individual and the social. Theories about the inability to separate the observations and operations in a system were presented from a selection of research from the fields of psychology, law, physics, sociobiology and sociology. Durkheim's theory is a case in point: it argues that it is through the individual that rationality and collective representations of the social arise – and each gives rise to the other.

Chapter Twelve on object relations discussed how Luhmann's theory fails to *consistently* reflect this crucial interwoven aspect of system operations (see the discussion below). Instead, he inverts the original use of the theory of autopoiesis (presented in Chapter Nine), and rather than placing centrality on the role of the observer he places centrality on law as the observer of itself. This inversion where law is portrayed as *the observer*, allows the theorist to say that law is defined

²¹⁹ Chapters Seven, 13 and 14 established a basis from which to view social work and Chapters 16 to 21 grounded the experiences reported about the court with the normative processes of the profession.

internally (by law) and, consistent with the original autopoietic theory, its object is not defined through the grasping of an external objective reality.

When Luhmann used object relations in this way he portrayed the system of law as having the capacity for self-reference and other-reference – which (consistently reflecting processes established in human development) he proposed were achieved through concepts of coding and recognition processes within autopoietic systems. Reliance on these operations was shown to give *law* more life than it can be scientifically proven to have.

On the basis of theoretical and fieldwork analysis, the position developed in this work was that law is defined by using legal precedence with reference to case law and texts, by people who consider and respond to law as an object from *their own* system of meaning-making (that is, as opposed to observing law as an object that observes and defines itself). This finding does not negate the validity of some aspects of the theoretical argument that the social and the individual may be different systems: it simply gives credence to the overriding fact that neither system can operate or be observed in isolation from the other.

In summary, rather than support what Luhmann can not scientifically establish – that the individual and the social operate as separate self-referencing systems – empirical analysis and research into Kegan's constructive developmental theory encouraged that emphasis be given to the unifying dynamic between systems: *all* objects 'are the elaboration of activities that are at one and the same time cognitive and affective'. The conclusion in this thesis, that *all* objects pivot on meaning-making, is

fundamental to any interpretation about law, and therefore, pivotal to how the system of law itself can be seen to evolve.

Subjugating a 'grand theory'

The above conclusion is one of several in this thesis which not only contrasts drastically with Luhmann's opinion that the systems theory of autopoiesis goes to the "genesis of meaning" (1993: C3/1/120), but also the opinions argued fervently by others that the theory provides fundamental insights into the formulation of meaning hitherto unrealized (Clam 2000, 2001; King 1997, 2001; Paterson 1996; Teubner 1993). Most specifically, opinions were outlined in Part Two showing that some argue the theory addresses what I claim that it does not. Luhmann does advance, for example, the perspective that:

Only those who participate in the logic of condensation and confirmation of meaning can participate in language communication and couple their consciousness with social operations (1993: C3/1/120).

Adherents of legal autopoiesis reach for quotes of this nature from Luhmann to argue two key issues: one is that the theory *does not* "privilege any bearer of meaning"; the other is that Luhmann regards it to be "falsely selected anthropocentrism" if people "assign a kind of ontological primacy to consciousness-based or mental anchoring over social anchoring" (Paterson 1996: 88-89). Overall, it is said that the theory of the autopoiesis of law holds that the individual and the social are interdependent.

To have aligned with this view about the individual and the social in the autopoietic theory – and thus not have turned to the type of analysis that I ultimately found was necessary in this research – I would have had to have seen three things:

- I needed to see a comprehensive analysis – with congruence rather than contradictions between pivotal aspects of the theory – identifying how the interdependence between the individual and social operates *within* a framework that is championed for its very uniqueness and explanatory power about a *separate* social system, and how *its* communications (observations and meanings) evolve *in it*.²²⁰
- Arguments about the individual and the social also needed to be lodged within a conceptual framework that had solid scientific backing – such as a grounding for the assertion that they are interdependent while simultaneously advancing the tenet – in the strongest of terms – that there is ‘no direct communication’ between them.
- Third, there was a need to present some form of evidence about the proposed ways in which irritants operate and lead to change in a *social* system. Teubner’s respect for the role of irritants in the theory has led him to propose that “the proof of the pudding is in the irritating” (2001: 39), but this study shows that the essence of the pudding is invisible and therefore can not be put to the taste test, and it is made of ingredients about which we know too little to advance as the preferred recipe.

While Chapters Nine to Twelve indicated that many of the concerns outlined here have been raised in various forms by established academics and theorists (Bankowski 1996; Cotterrell 1996, 2001; Habermas 1987; Nelken 1996, 2001), I will conclude this particular aspect of the argument with Luhmann’s own words:

The function of law deals with expectations; this means, having regard to society and not to individuals, a capacity to communicate expectations and to have them accepted in communication. ‘Expectation’, then, does not refer to a current state of consciousness

²²⁰ My readings on an aspect of autopoiesis that was not possible to include in this thesis – structural coupling – did not alleviate my concerns about the incongruence within the theory’s own structure.

of a given individual but to the time dimension of the meanings of communications (Luhmann 1993: C3/1/118).

The argument about the argument

The research findings that led me to integrate (recast) Luhmann's theory into Kegan's goes against the strong opinion expressed by King that when it comes to the use of legal autopoiesis "You cannot pick and mix" (2001: 126). This means the formula developed as part of this research – $SL=HDLA+D^{SA}$ – may fall short not only of the opinions that arise in the particular disciplinary perspectives of law or social work,²²¹ but also those held by one of the most dominant and respected theorist in the interdisciplinary field of law *and* social work *and* the analysis of systems for abused and disadvantaged children.

The exigent factors that propelled me to take a position that will undoubtedly be met by some in the field with derision,²²² were the interview data, and the opinion that we have moved past the point of academic and intellectual pursuit to be now turning to a theory that for the most part, and notwithstanding the strength of protestations to counter it, is an instrument for research that is used as a metaphor.²²³

²²¹ For example, a renowned social worker said at a children's conference in Australia: "The problem is the system *not the people in it*". I doubt King intended use of the theory for blanket attribution of responsibility to the system, but the findings here about the role *people* play in it contest such usage.

²²² All analysis is legitimately subjected to some criticism, but controversy over the legitimacy of legal autopoiesis has reached a crescendo with the depth of difference in interpretation being so great it is sometimes caustic: and work that I think reflects the sound of Beethoven's Ninth (such as Bankowski 1996), has been received by others, in effect, as being the clang of tin cups (such as King 2001).

²²³ To some extent this work belongs in this category: I could only use the theory as a metaphor. The integration of Luhmann's theory into Kegan's theory may to some extent reduce its use as a metaphor:

Indeed, even King has referred to use of the theory as a metaphor (1997). King, who clearly has a great deal of respect for both Luhmann and the autopoietic systems theory – has also (very admirably) recognized that “One could also argue that the theory offers only observation and does not begin to provide a guide to practice or even to ways of understanding the experiences of practice” (2001: 153).

Although this statement does not say that in fact, the theory fails to explain practice, the work in this thesis leads to the conclusion that just as we do not call florescent lighting sunshine, polyester silk, or plagiarism seminal intellectual thought, nor can we call a theory that “does not begin to provide a guide ... to ways of understanding the experiences of practice” (King 2001: 153) “a grand theory, a total vision” (King 2001: 126).²²⁴

THE SYSTEM OF LAW THROUGH A TYPOLOGY OF SELF-CONCEPTS

Different self-concepts and different voices

A typology of individual, professional and system self-concepts emerged as the tool through which to explore and explain both the experiences reported by professionals about how the dependency court operates, and the theories that arose in the course of this study. The typology provided a basis to explore the relationship between

it is also true that the LA component of the formula developed to bring the logic in this thesis together might be legitimately substituted with a more appropriate socio-legal theory that I have not examined.

²²⁴ King writes “a total vision, covering everything in the social world” (2001: 126). His definition of the social world pivots on “communications” which include: “everything that can be communicated by words, gestures and actions and understood as having meaning” (King 1997: 26).

individual and system influences, and in the process, gave metaphorical credence to the concept in Luhmann's theory that the legal system takes notice of external facts only in the form of internally produced information (thus enhancing law as a system). Overall, the self-concept typology reflects operations that belong as an integrated body of knowledge, the interconnection of which is perhaps best summarized (and extrapolated from data and theory to the extent possible in this exploratory study) in Table Three (Chapter Sixteen).

As a whole, the way Kegan's theory emerged to best explain the types of differences that arose in this study between social workers and attorneys, was its contribution to understanding about the competing themes in data where, for example, attorneys were found to focus mainly on the system and social workers focused mainly on people. One illustration of differences of this nature (which were first introduced in generic terms in Chapters Six and Seven and later embedded in individual, professional and system self-concept levels of operation), is captured in the case study in Chapter 18, when an attorney equated justice with "limited government involvement", and a social worker associated it with paying attention to "everybody's behavior and how it impacts on other people".

The competing approaches that emerged between attorneys and social workers at professional (and individual) levels of self-concept were shown in Chapters 13 to 16 to reflect different styles of communication and meaning-making: they were encapsulated in the 'decontextualized' voices of law, and 'personalized process'

orientation of social work; or the juxtapositions of the institutional/interpersonal and agency/community.²²⁵

Significant to how ‘the system’ operates, when these competing interpersonally and institutionally oriented themes operate in a setting where one group has home court advantage and the other is regarded as visitors, Chapter 14 introduced how these different orientations ultimately lead to a dysfunctional cycle of actions and reactions in the court system; such that the competing themes influenced each discipline to draw negative attributions and to think the other is not seriously engaging the task at hand.

Competing forces behind the typology: the practice of science v. the invisible trade

The extremes found to contribute in meaningful ways to the professional and system self-concepts of each discipline were summarized throughout this thesis as: the emotion-bound social workers who were occasionally depicted as crusaders, child savers, and zealots, being pitted against ‘legal personalities’, who were shown to be attorneys performing legal operations as if they were doing mathematical equations.

At a general level of research, Parts One and Three explored how such extremes have at their core an historical and pervasive superiority of the male-dominated profession of law over the female-dominated profession of social work. This difference in status

²²⁵ One link between data and Kegan’s theory – explored throughout Part Four – was that contrary to the social work perception that attorneys are manipulative, uncaring or psychologically isolated, when making meaning in the institutional subject-object truce, attorneys act on ‘the imperative of conscience to meet their defined obligations’. Conversely, rather than attorney perceptions that social workers are calculating, this study found that the profession is in fact speaking in a voice that is often struggling to adapt to a system where, in reality, they do not have professional standing in the court.

was shown to be bolstered by a range of diverse and interacting factors such as: centuries of social history in which males have been regarded as superior to females; the rational superior to the use of intuitive wisdom; hierarchical structures superior to structures of mutual consent; scientific objectivity regarded superior to the empirical and experiential; and established authority superior to the concept of amorphous boundaries. Data and theoretical analysis suggested that remnants of such thinking exist in the historical memories of law and social work and are conveyed through the social systems of each discipline to the meaning that is made by individual professionals in ‘the system’ – and in this way are kept alive for further reprocessing.

OPERATIVE STRUCTURES & ACCUMULATION OF SOCIAL ACTION

System operative structures and social action

The differences that exist between law and social work were found to manifest in an ongoing struggle which is characterized by a permanent tension in system operations. Research participants often referred to the tension as arising in ‘a pendulum swing’, which was first linked with processes of human development in Chapter Three. Overall, just as theoretical analysis indicated that individuals move back and forth resolving the tension between communion and agency (at one stage favoring a connective form of response, at another favoring independence), the systems of law and social work in this study were shown to similarly struggle to find the most appropriate balance between communion and agency in their operations in the dependency court system.

Although Chapters Eight and Twenty-one explored the data finding that professionals strongly rely on informal negotiations as a way to ameliorate the struggles that arise in the court system – showing that the negotiations not only have a significant impact on legal operations but also a stabilizing effect on the system itself – Chapters 23 and 24 presented the reasons why such negotiations were not enough to prevent the impact of the ‘back-and-forth’ pendulum in the system. In particular, external forces, such as the backlash and the media, were shown to play a large role in creating ideological shifts (summarized in Tables Five (b) and Six), which during the course of this study reflected a swing to an institutional (over an interpersonal) phase of system operations.

In addition to changes in the way the system operates (in the way professionals operate the system) being linked to external forces, and to processes of human development, ‘system’ changes were also linked with the operative structure of legal and human service systems – which together, reflected the operative structure of the court. On the one hand, this study described the interwoven nature of a normatively pervious DSS system. Definitions of abuse in this system were shown to be vulnerable to change from external sources, and social work practices were shown to be largely derived from norms of *experience*: both of these dynamics supported the need for the profession of social work to remain open and flexible, in what emerged as an often inconsistent, unsupportive work environment.

Conversely, the normatively closed system of law was found to (officially) rely on a system of institutional rules, not interpersonal exchange. In such a system this study

found that definitions (norms) were not as vulnerable to being changed as occurs in less historically structured systems such as DSS. As a result, when faced with criticism from external sources – or the accumulation of social action against the system – people in the legal profession are in a more stable position than social workers find themselves.²²⁶

JUSTICE CONCEPTS, THE ‘ENACTIVE’ WORLD, & A THEORY OF LAW

The theory that ‘justice concepts are operated by individuals as conceptualizations of self’ was examined in relation to arguments advanced by adherents of the autopoietic systems theory of law. Chapter 17 indicated that the legal autopoietic conclusion that people *reproduce* the self-concept of the system – which the system itself produces – was not supported by data, other theories, and the events that occurred in San Diego.

This research project found that – rather than simply reproducing what the system has already produced – when individuals operate justice concepts as conceptualizations of self an inseparable system/people interaction occurs: people draw upon their own meaning-making *and* the social system in which law is practiced; and in the recursive

²²⁶ Further sociological research is needed to confirm the distinctions that were drawn between the different operative structures of DSS and the legal system, and the ways in which these structures influence the culture of the court. Studies are also needed to investigate how law and DSS react to the external dynamics outlined in Table Three, and the interrelationship between these dynamics and the ways in which a person’s agency of employment facilitates or limits change in how *they* operate ‘the system’. This form of study should include legal research into the responses of the dependency court to external dynamics, such as the backlash movement and the media.

In addition, Table Three outlines a framework to conceptualize how the experiences that professionals have in ‘the system’ stimulate the processes of confirmation, contradiction and continuity; all of which lead to professional (system) change. Future research in psychology and law should be designed to examine if the table’s framework helps to accurately depict the types of processes that were suggested in this study about how and why individuals change as professionals in ‘the system’.

network of operations that underpin social and individual systems, this contributes not only to *their* evolution but also to that of the system itself. In short, people help construct their own and the system's self-concept and vice versa.

These findings are consistent with Bohm's conclusions about transformation and system change: "We are all connected and operate within living fields of thought and perception" (In Jaworski 1998: 149). They are also endorsed by Francisco Varela (In Jaworski 1998: 149), one of the original pioneers of the theory of autopoiesis. Varela found: "The notion that the world and our universe are made up of separate 'things' is an illusion and leads to endless confusion" (In Jaworski p176). The theorist also said:

our language and our nervous system combine to constantly construct our environment ... It is by languaging *and recurrent actions or human practices* that we create meaning together. This is what I call the *enactive view of knowing* the world; we lay it down as we walk on its path (Varela In Jaworski 1998: 177 italics added).

Senge's findings with his colleagues at the MIT Center for Organizational Learning similarly reflect this view. They conclude that individual and collective shifts of mind are at the core of emergent change in systems (Senge In Jaworski 1998: 1-14). The relationship between these conclusions and this study is encapsulated in the finding:

cognition is not a representation of the world 'out there' but rather a 'bringing forth of the world through the process of living itself' ... [As

a result of this dynamic operation between the social and the individual] our world, our communities, our organizations will change **only if *we*** change (Jaworski 1998: 175 bold added, italics original).

To conclude, theoretical and empirical analysis that informs this study demonstrates that the evolution of ‘the system’ cannot be isolated from human development. Because each gives rise to the other it is not possible to argue that the system of law reproduces *itself* by itself, or that people are not a part of the system.

In the absence of evidence that there is no direct communication between the individual and the social, or that social systems evolve without people, the autopoietic systems theory of law can only allude to the past or the hypothetical. If we are to understand how law operates *at a given moment in time* the homology between the social and the individual must be used as the conceptual tool through which to examine the operations of law. That is, it is suggested that a theory of law should consider that $SL=HDLA+D^{SA}$.

While this thesis demonstrates that this formula provides an expansive and generic approach to the analysis of how law operates and evolves, it is not purported to be a conceptual apparatus that can capture all we could ever hope to know about law, society and its systems (be they individuals or institutions). There is however, one thing about which we can be absolutely certain: “There is much we still don’t know, such as what happens to objects and information that fall into a black hole.” As Stephen Hawking goes on to say: “Maybe someone will come back from the future and tell us the answers” (In Thorne 1994: 23).

APPENDIX ONE

WHICH ASPECTS OF SYSTEMS THEORY

Some topics involved in system theories

The three sets of contrasts below spotlight the sometimes dichotomous, often dialectical and consistently expansive nature of topics debated in systems theory. I organized the topics into the three headings identified below when deciding the most relevant aspects of physics, cognitive science and neuro-physics relevant for this research project. The types of issues contrasted help to highlight why it was impossible to properly address every important aspect of systems theory in this thesis.

The three lists – which were constructed from literature by respected scientists, such as Bohm (1980), Feynman (1995), Hawking (1988), Shelldrake (1988), Capra (1975) and Penfield (1975) – summarize what measurements are about, what system theories involve, and what systems are explained by.

Measurements are about:

Matter & solid objects	and/or	Energy & the universal
Isolated particles & empty spaces	and/or	Fields & waves as mutable
Localization of energy	and/or	Non-localization of energy
Forces & depersonified thought	and/or	Interaction & unity
Reality as pre-existing	and/or	Reality as evolution
Independent or static change	and/or	Higher-dimensions / God / Spirit
Isolated systems	and/or	Movement as relationship with
Probabilities of things	and/or	Probabilities of interconnections

System theories involve:

Rational knowledge	and/or	Nature / the unexplainable
Binary systems	and/or	Sets of integral numbers
Artificial intelligence	and/or	Creative organizing principles
Evolutionary copyright	and/or	Evolutionary convergence
The observed	and/or	Observing systems
Classical physics	and/or	Evolutionary physics
Predictability & control	and/or	Unpredictability
Mechanistic / post-mechanistic theory	and/or	Quantum physics & relativity theory

Systems are explained by:

Rigorous determinism	and/or	Ontogenetic symbiosis
Discontinuity	and/or	Continuity
Sequential abstractions	and/or	Unbroken wholeness
Duality	and/or	Singularity
Uninterrupted evolution	and/or	Punctuated equilibria
The nervous system	and/or	Morphic fields
Physical self-generation	and/or	Organic aliveness
Operations of the brain	and/or	Operations of the mind

These lists are not meant to be exhaustive or to reflect scientific study that confirms the categories in which they are organized. They are presented here for conceptualization purposes only, such that allows a quick synopsis of the multiple and complex number of topics that warrant some consideration when analyzing how systems operate.

What was of ultimate importance for use in this study was that overall, rather than the relationship between ‘form and empty space’ being conceived of as mutually exclusive opposites, Bohm found that all matter in our bodies “enfolds the universe in some way”: a finding which contributes to his conclusion that there is an “unbroken wholeness” at the core of our existence (1980: 198).

BIBLIOGRAPHY

- Abel R (1989) American Lawyers New York: Oxford University Press.
- Alexander R (1994) "Introduction" The APSAC Advisor Vol 7 No 4 p1.
- Allen M. v. Superior Court, 6 Cal. App. 4th 1069; -- Cal. Rptr. 2d -- [May 1992].
- Aquinas T (1991) "Concerning the Nature of Law" In Feinberg G & Gross H The Philosophy of Law Ca: Wadsworth Inc. pp12-24.
- Aristotle (1959) Warrington J (Trans.) (Ed) Politics: The Athenian Constitution Heron Books: JM Dent & Sons.
- Aronfreed J (1976) "Moral Development from the Standpoint of a General Psychological Theory" In Lickona (Ed) Moral Development and Behavior New York: Holt Rinehart and Winston, p54-69.
- Attwood T (1998) Asperger's Syndrome: A Guide for Professionals and Parents Philadelphia: Jessica Kingsley Publishers.
- Bachofen J (1967) Myth, Religion and Mother Right: Selected Writings London: Routledge & Kegan Paul.
- Bakan D (1966) The Duality of Human Existence: Isolation and Communion in Western Man Boston: Beacon Press.
- Balbus I (1977) "Commodity Form and Legal Form: An Essay on the 'Relative Autonomy' of the Law" Law and Society Review Vol 11 pp571-587.
- Bankowski Z (1996) "How does it Feel to be on Your Own? The Person in the Sight of Autopoiesis" In Nelken D Law As Communication Brookfield USA: Dartmouth, pp63-80.
- Barak G (1994) (Ed) Media, Process, and the Social Construction of Crime: Studies in News-making Criminology New York: Garland Publications.
- Barker R (1996) "Child Protection, Public Services and the Chimera of Market Force Efficiency" Children and Society Vol 10 pp28-39.
- Barkun M (1968) Law Without Sanctions New Haven: Yale University Press.
- Barnes v. Barnes (1989) Pulaski Circuit Court, Winamac Indiana (case transcript).
- Bartlett M (1976) "Early Trends" In Gilbert N & Specht H (Eds) The Emergence of Social Welfare and Social Work Illinois: Peacock Publishers, pp287-302.
- Beer S (1980) Preface by Sir Stafford Beer In Maturana H & Varela F Autopoiesis and Cognition: The Realization of the Living Dordrecht, Holland: D. Reidel Publishing Co.

Berliner L & Loftus E (1992) "Sexual Abuse Accusations: Desperately Seeking Reconciliation" Journal of Interpersonal Violence (December) Vol 7 No 4 pp570-578.

Berliner L, Bulkley J, Meyer Williams L & Myers J (1990) "Coping with A Hostile Media" The Advisor Vol 3 No 4 American Professional Society on the Abuse of Children (APSAC) pp6-7.

Berman H (1974) The Interaction of Law and Religion London: SCM Press.

Berman H (1977) "The Origins of Western Legal Science" Harvard Law Review Vol 90 pp894-943.

Bitensky R (1973) "The Influence of Political Power in Determining the Theoretical Development of Social Work" Journal of Social Policy Vol 2 pp119-130.

Blumer H (1969) Symbolic Interactionism: Perspective and Method New Jersey: Prentice Hall.

Bodanis D (2000) E=mc²: A Biography of the World's Most Famous Equation London: Macmillan Publishers.

Bohm D (1980) Wholeness and the Implicate Order Boston: Routledge and Kegan Paul.

Bortner M & Reed W (1985) "The Preeminence of Process: An Example of Refocused Justice Research" Social Science Quarterly Vol 66 No 2 pp413-425.

Brennan T & Parker N (1966) (Eds.) The Foundations of Social Casework Sydney: Halstead Press.

Brest P & Levinson S (1983) (2nd Ed) Processes of Constitutional Decision-making: Cases and Materials Boston: Little Brown & Co.

Burns T & Stalker G (1994) (revised edition) The Management of Innovation NY: Oxford University Press.

Byles J (1985) "Problems in Interagency Collaboration: Lessons from a Project that Failed" Child Abuse & Neglect Vol 9 pp549-554.

Cahn S, Kitcher P & Sher G (1990) Reason At Work: Introductory Readings on Philosophy Florida: Harcourt Brace Jovanovich.

Camilleri P (1996) (Re)Constructing Social Work: Exploring Social Work through Text and Talk Aldershot England: Avebury.

Capra F (1975) The Tao of Physics London: Wildwood House.

Carey J (1988) (Ed) Media, Myths, and Narrative: Television and the Press Ca: Sage.

Carney T (1999) "Liberalism or Distributional Justice?" In King (Ed.) Moral Agendas for Children's Welfare NY: Routledge, pp53-73.

Cassirer E (1946) The Myth of the State New Haven: Yale University Press.

Chadwick D (1989) Book review, Child Abuse: Accusations of Child Sexual Abuse Wakefield H & Underwager R, In Journal of American Medical Association (May 26) Vol 261 No 20 pp3035.

Chetkow-Yanoov B (1997) (2nd Ed) Social Work Practice - A Systems Approach New York: Haworth Press.

Churchill D (1978) "Language: The Problem Beyond Conditioning" In Rutter M & Schopler E (Eds.) Autism: A Reappraisal of Concepts and Treatments NY: Plenum Press, pp71-84.

Cicero (1928) Clinton Walker Keyes (Trans.) De Re Publica de Legibus London: William Heineman.

Clam J (2000) "System's Sole Constituent, the Operation: Clarifying a Central Concept of Luhmannian Theory" ACTA Sociologica Vol 43 pp63-79.

Clearinghouse on Child Abuse and Neglect Information (1989) "Child Abuse and Neglect: A Shared Community Concern" Washington DC: U.S. Department of Health and Human Services, Office of Human Development Services.

Cohen N (1962) "Reversing the Process of Social Disorganization" In Kahn A (Ed) Issues in American Social Work New York: Columbia University Press, pp138-158.

Colorado Bill (1991) "A Bill for An Act Concerning The Preservation of Family Rights in Regard to Child Abuse and Neglect Proceedings" House Bill 91:1311 VOCAL.

Combs A, Avila D & Purkey W (1971) Helping Relationships: Basic Concepts for the Helping Professions Boston: Allyn & Bacon.

Converse J & Presser S (1986) Survey Questions: Handcrafting The Standardized Questionnaire Qualitative Applications in the Social Sciences Ca: Sage Publications.

Cotterrell R (2001) "The Representation of Law's Autonomy in Autopoiesis Theory" In Priban J & Nelken D (2001) (Eds.) Law's New Boundaries: The consequences of legal Autopoiesis Burlington USA: Ashgate Dartmouth, pp80-103.

Council on the Cost of Government (1997) "Review of Aspects of the Management of the NSW Department of Community Services" NSW: Council on Cost of Government.

Cox L (2001) "BSW Students Favor Strengths/Empowerment-Based Generalist Practice" Families in Society: The Journal of Contemporary Human Services Vol 82 No 3 pp305-313.

Crisp L (1989) "When a child's word is the only evidence" The Bulletin December 12.

Dale P (1998) "Protection or Prevention? An integrated Approach to Services for Children and Parents." Paper presented at the 'Kids First – Agenda for Change' Conference Melbourne Convention Centre, Australia (2nd April).

de Coulanges F (1873) Small W (Trans.) The Ancient City New York: Doubleday.

de Montigny G (1995) Social Working: An Ethnography of Front-Line Practice Toronto: University of Toronto Press.

de Riencourt A (1974) Sex and Power In History New York: McKay.

Derham D (1958) "Theories of Legal Personality" In Webb L C (Ed) Legal Personality and Political Pluralism London & New York: Cambridge University Press, pp1-19.

Dickson D (1998) Confidentiality and Privacy in Social Work New York: Free Press.

Dingwall R & Lewis P (1983) (Eds.) The Sociology of the Professions: Lawyers, Doctors and Others London: Macmillan Press.

Dominelli L (1997) "The Changing Face of Social Work: Globalisation, Privatisation and the Technocratisation of Professional Practice" In Lesnik B Change in Social Work (Ed.) Vermont: Ashgate Publishing, pp13-26.

Douglas J (1976) Investigative Social Research: Individual and Team Field Research Ca: Sage Publications.

Douzinias C, Goodrich P & Hachamovitch Y (1994) (Eds.) Politics, Post-modernity and Critical Legal Studies: The Legality of the Contingent New York: Routledge.

Duffy E (1997) Saints and Sinners: A History of the Popes New Haven: Yale University Press (in association with S4C).

Durfee D (1994) "Perspectives of the U.S. Advisory Board on Child Abuse and Neglect" The APSAC Advisor Vol 7 No 4.

Durkheim E (1915) Swain J (Trans.) The Elementary Forms of Religious Life USA: Allen and Unwin.

Durkheim E (1960) Simpson G (Trans.) The Division of Labor in Society USA: MacMillan.

Durkheim E (1960) Wolfe K (Ed) Emile Durkheim, 1958-1917: A Collection of Essays (with Translations and a Bibliography) Columbus: Ohio State University Press.

Eberle P & Eberle S (1986) The Politics of Child Abuse New Jersey: L Stuart.

Edwards C (1971) (Trans.) The Hammurabi Code and the Sinaitic Legislation NY: Kennikat Press.

Edwards L (1987) "The Relationship of Family and Juvenile Courts in Child Abuse Cases" Santa Clara Law Review Vol 27 No 2 pp201-278.

Ericson R, Baranek P & Chan J (1991) Representing Order: Crime, Law, and Justice in the News Media Toronto: University of Toronto Press.

Evan W (1990) Social Structure and Law: Theoretical and Empirical Perspectives Ca: Sage Publications.

Farmer J (1993) "A Poststructuralist Analysis of The Legal Research Process" American Association of Law Libraries Law Library Journal Vol 85 No 2 pp391-404.

Feibleman J & Tubane U (1985) Justice, Law and Culture Ma: Kluwer Academic Press.

Feinberg J (1990) Harmless Wrong-Doing: The Moral Limits of the Criminal Law Oxford: Oxford University Press.

Ferard M & Hunnybun N (1962) The Caseworker's Use of Relationships London: Tavistock.

Fetterman D (1989) Ethnography Step By Step Newbury Park Ca: Sage Publications.

Feynman R (1995) Six Easy Pieces Mass: Addison-Wesley Publishing Company.

Fielding N & Fielding J (1986) Linking Data: Qualitative Research Methods Series No 4 Ca: Sage.

Fielding N (1993) "Mediating the Message: Affinity and Hostility in Research on Sensitive Topics" In Renzetti C & Lee R (Eds.) Researching Sensitive Topics Ca: Sage Publications, p146.

Fineman M & Thomadsen N (1991) (Eds.) At The Boundaries of Law: Feminism and Legal Theory New York: Routledge.

Finkelhor D (1986) A Sourcebook on Child Sexual Abuse Ca: Sage.

Fischer J (1981) "New & Emerging Methods of Direct Practice: The Revolution in Social Work" In Gilbert N & Specht H (Eds.) Handbook of the Social Services New Jersey: Prentice Hall, pp525-547.

FMS Foundation Newsletter (1992) (False Memory Syndrome Newsletter) (February 29).

Foucault M (1980) Gordon C (Ed). Power / Knowledge: Selected Interviews and Other Writings 1972-1977 New York: Pantheon Books.

Frank J (1930) Law and the Modern Mind Bretano's Inc.

Frank J (1949) Law and the Modern Mind London: Stevens & Sons.

Franklin B & Parton N (1991) (Eds.) Social Work, the Media and Public Relations New York: Routledge.

Franklin B "Wimps and Bullies: Press Reporting of Child Abuse" Social Welfare and Social Policy Year Book, England: Open University Press (forthcoming copy, final version not available in Australia) (1989).

Fuller R & Petch A (1995) Practitioner Research: The Reflexive Social Worker Buckingham & Bristol USA: Open University Press.

Furlong M (2000) "Being Neither Pollyanna nor Henny Penny: Responding to McDonald and Jones" Australian Social Work Vol 53 No 3 pp15-16.

Gallmeier T & Bonner B (1992) "University-Based Interdisciplinary Training in Child Abuse and Neglect" Child Abuse & Neglect Vol 16 p513.

Garvin C & Seabury B (1997) (2nd Ed) Interpersonal Practice in Social Work: Promoting Competence and Social Justice Needham Heights Ma: Allyn & Bacon.

Garvin C & Tropman J (1998) (2nd Ed) Social Work in Contemporary Society Needham Heights Ma: Allyn & Bacon.

Gerace J (1993) "Interview: Hollidia Wakefield and Ralph Underwager" Paidika: The Journal of Paedophilia No 1 Issue 9 p1.

Gergen K & Gergen M (1991) "From Theory to Reflexivity in Research Practice" In Steier F (Ed) Research and Reflexivity: Inquiries in Social Construction London: Sage Publications, pp76-95.

Gergen K (1985) "The Social Constructionist Movement in Modern Psychology" American Psychologist Vol 40 No 3 pp266-275.

Gergen K 1991 The Saturated Self Dilemmas of Identity in Contemporary Life New York: Basic Books.

Gibson J (1989) "Understandings of Justice: Institutional Legitimacy, Procedural Justice, and Political Tolerance" Law and Society Review Vol 23 No 3 pp469-496.

Gilbert N & Specht H (1981) (Eds.) Handbook of the Social Services New Jersey: Prentice Hall.

Gilligan C (1982) In a Different Voice Cambridge Ma: Harvard University Press.

Goddard C & Saunders B “Child abuse and the media” Issues in Child Abuse Prevention Number 14 Winter 2001 National Child Protection Clearinghouse pp1-22.

Gray D (1998) Autism And The Family: Problems, Prospects, and Coping with the Disorder Springfield Ill. Charles C Thomas Publisher, Ltd.

Grbich J (1991) “The Body in Legal Theory” In Fineman M & Thomadsen N (Eds.) At The Boundaries of Law: Feminism and Legal Theory New York: Routledge, pp61-76.

Habermas J (1971) Shapiro J (Trans.) Knowledge and Human Interests Boston: Beacon Press.

Habermas J (1987) McCarthy T (Trans.) The Theory of Communicative Action: Lifeworld and System: a Critique of Functionalist Reason Vol 2 Boston: Beacon Press.

Habermas J (1988) Baynes (Trans.) The Tanner Lectures on Human Values V. V111 Salt Lake City: University of Utah Press.

Hall C (1997) Social Work as Narrative: Storytelling and Persuasion in Professional Texts Aldershot England: Ashgate.

Handler J (1978) Social Movements and the Legal System: A Theory of Law Reform and Social Change New York: Academic Press.

Hardin R (1988) Morality within the Limits of Reason Chicago: Univ. of Chicago Press.

Hart H L A (1961) The Concept of Law Cambridge: Oxford University Press.

Hart H L A (1976) “Law in the Perspective of Philosophy 1776-1976” New York University Law Review Vol 51 pp538-551.

Hawking S (1988) A Brief History of Time New York: Bantam Books.

Hawking S (2001) The Universe in a Nutshell New York: Bantam Press.

Hayek F (1960) The Construction of Liberty Chicago: Chicago University Press.

Hechler D (1988) The Battle and the Backlash: The Child Sexual Abuse War Lexington, Mass: Lexington Books

Hechler D (1993) “Damage Control” Child Abuse & Neglect Vol 17 pp703-708.

Hefler R & Kempe R (1987) (Eds.) The Battered Child (Fourth Edition) Chicago: University of Chicago Press.

Henderson P (1997) "Community Development and Children: A Contemporary Agenda" In Cannan C & Warren C (1997) (Ed) Social Action with Children and Families: A Community Development Approach to Child and Family Welfare NY: Routledge, pp23-42.

Hermelin B (1978) "Images and Languages" In Rutter M & Schopler E (Eds.) Autism: A Reappraisal of Concepts and Treatments NY: Plenum Press, pp141-162.

Hewlett S A (1991) When the Bough Breaks: The Cost of Neglecting Our Children USA: Basic Books.

Hobbs T (1949) Leviathan NY: E. P. Dutton & Co Inc.

Hollis F (1963) "Contemporary Issues for Caseworkers" In Parad H & Miller R Ego-Oriented Casework: Problems and Perspectives NY: Family Service Association of America, pp7-23.

Hughes G (1968) "Rules, Policy and Decision Making" The Yale Law Journal Vol 77 No 3 pp411-439.

Hunt A (1978) The Sociological Movement in Law London: Macmillan Press Ltd.

Ife J (2000) "A Comment on Reconstructing and Re-conceptualizing Social Work in the Emerging Milieu" Australian Social Work Vol 53 No 2 pp13-14.

In Re Bernadette C. (1982) 127 Cal.App.3d 618, 623, Rule 1450 (f), 624, Rule 1456 (c)

In Re Malinda S. 51 Cal. 3d 368; - Cal. Rptr. -, -P.2d [Sept. 1990] No S012792

In Re Micah S. 198 Cal. App. 3d 557; 243 Cal Rptr. 756 [Feb 1998]

In Re Robinson. 8 Cal. App. 3d. 783, 786, 87, Cal. Rptr. 678, 680 (1970)

Interdisciplinary Graduate Training (1989/1990) Field notes, Convened at San Diego Children's Hospital.

Jackson M (1989) Paths Towards a Clearing: Radical Empiricism and Ethnographic Inquiry Bloomington: Indiana University Press.

Jacobson A (1989) "Autopoietic Law: The New Science of Niklas Luhmann" Michigan Law Review Vol 87 pp1647-1689.

Jacobson W (2001) "Beyond Therapy: Bringing Social Work Back to Human Services Reform" Journal of the National Association of Social Work Vol 46 No 1 pp51-61.

Janesick V (1994) "The Dance of Qualitative Research Design: Metaphor, Methodolatry and Meaning" In Denzin N & Lincoln Y (Eds.) Handbook of Qualitative Research Ca: Sage Publications, pp209-219.

Jaworski J (1998) Synchronicity: The Inner Path of Leadership San Francisco: Berrett-Koehler Publishers.

Johnson J (1975) Doing Field Research New York: The Free Press.

Johnston (1947) "The Administrative Process in Social Work" Proceedings of the National Conference of Social Work New York: Columbia University Press.

Jordan B (1998) The New Politics of Welfare: Social Justice in a Global Context Ca: Sage Publications.

Jung C (1968) Man and His Symbols New York Dell.

Kadushin A (1962) "The Knowledge Base of Social Work" In Kahn A Issues in American Social Work New York: Columbia University Press, p39.

Kaufman K; Hilliker D; Lathrop P; Daleiden E; Ruby L; (1996) "Sexual Offenders' Modus Operandi: A Comparison of Structured Interview and Questionnaire Approaches" Journal of Interpersonal Violence 11 (1) California: Sage, pp19-34.

Kegan R (1982) The Evolving Self: Problems and Processes in Human Development Cambridge: Harvard University Press.

Kegan R (1994) In Over Our Heads: The Mental demands of Modern Life Cambridge: Harvard University Press.

King M (1991) "Child Welfare within Law: The Emergence of a Hybrid Discourse" Journal of Law and Society Vol 18 No 3 pp303-322.

King M & Piper C (1995) (2nd Ed.) How the Law Thinks About Children Vermont: Ashgate Publishing.

King M (1997) A Better World for Children: Explorations in Morality and Authority NY: Routledge

King M (1999) (Ed.) Moral Agenda's For Children's Welfare NY: Routledge.

King M (2001) "The Construction and Demolition of the Luhmann Heresy" In Priban J & Nelken D (2001) (Eds.) Law's New Boundaries: The consequences of legal Autopoiesis Burlington USA: Ashgate Dartmouth, pp123-156.

Kohlberg L (1976) "Moral Stages and Moralization: The Cognitive-Developmental Approach" In Lickona (Ed) Moral Development and Behavior: Theory Research, and Social Issues New York: Holt Rinehart and Winston, pp31-53.

Korbin J (1994) "Perpetrators of Fatal Child Maltreatment" The APSAC Advisor Vol 7 No 4 pp45-46.

L.A. Daily Journal (1986) "Deliverance: The Duty to Report Child Abuse" Sept 4.

Lanning K (1994) "Sexual Homicide of Children" The APSAC Advisor Vol 7 No 4 pp40-44.

Larana E, Johnston H & Gusfield J (1994) (Eds.) New Social Movements: From Ideology to Identity Temple University Press: Philadelphia.

Laslett (1949) (Ed) Patriarcha and Other Political Works of Sir Robert Filmer Oxford: Blackwell Press.

Lawson F (1957) "The Creative Use of Legal Concepts" New York University Law Review Vol 32 pp909-925.

Linsky M (1988) "The Media and Public Deliberation" In Reich R The Power of Public Ideas Cambridge, Mass: Ballinger Publishing, pp205-227.

Littleton C (1987) "In Search Of A Feminist Jurisprudence" Harvard Women's Law Journal Vol 10 pp1-7.

Lofland J & Lofland L (1984) Analyzing Social Settings: A Guide to Qualitative Observation and Analysis Ca: Wadsworth.

Luhmann N (1986) "The Self-Reproduction of Law and its Limits" In Teubner (Ed) Dilemmas of Law in the Welfare State Berlin: Walter De Gruyter, pp111-127.

Luhmann N (1993) Das Recht Der Gesellschaft Frankfurt: Suhrkamp; English translation Luhmann N (forthcoming) Zeigert K (Trans.) Society's Law Cambridge: Oxford University Press.

Luhmann N (1995) Bednarz J Jr. (with Baecher D) (Trans.) Social Systems Stanford California: Stanford University Press.

Lukasiewicz J (1957) (2nd Ed) Aristotle's Syllogistic: From the Standpoint of Modern Formal Logic Oxford: Oxford University Press.

Lumsden C & Wilson E (1981) Genes, Mind, and Culture: The Co-Evolutionary Process Cambridge: Harvard University Press.

Lutzker J (1998) (Ed.) Handbook on Child Abuse Research and Treatment NY: NY Plenum Publishing Co.

Mackie J (1991) (4th Ed) "The Third Theory of Law" In Feinberg J & Gross H (Eds.) Philosophy of Law California: Wadsworth Inc. pp181-187.

Majone G (1988) "Policy Analysis and Public Deliberation" In Reich R (Ed) The Power of Public Ideas Cambridge Mass: Ballinger Publishing, pp157-178.

Malekoff A (2000) "Bureaucratic Barriers to Service Delivery: Administrative Advocacy and Mother Goose" Families in Society: The Journal of Contemporary Human Services Vol 81 No 3 pp304-314.

Mancuso J & Sarbin T (1976) "A Paradigmatic Analysis of Psychological Issues at the Interface of Jurisprudence and Moral Conduct" In Lickona (Ed) Moral Development and Behavior: Theory, Research, And Social Issues New York: Holt Rinehart and Winston, pp326-341.

Manyuk P (1978) "Language: What's Wrong and Why" In Rutter M & Schopler E (Eds.) Autism: A Reappraisal of Concepts and Treatments NY: Plenum Press, pp105-116.

March H (1990) "A Multi Dimensional, Hierarchical Model of Self-concept: Theoretical and Empirical Justification" Educational Psychology Review Vol 2 No 2.

Markus H & Wurf E (1987) "The Dynamic Self-concept: A Social Psychology Perspective" Annual Review of Psychology Vol 38 pp299-337.

Maturana H & Varela F (1980) "Autopoiesis: The Organization of the Living" (1973) In Autopoiesis and Cognition: The Realization of the Living Dordrecht, Holland: D. Reidel Publishing Co.

Maturana H & Varela F (1987) The Tree of Knowledge Boston: Shambhala.

McCarthy K (1982) Noblesse Oblige: Charity and Cultural Philanthropy in Chicago University of Chicago Press.

McClelland D (1985) "How Motives, Skills, and Values Determine What People Do" American Psychologist Vol 40 No 7 pp812-825.

McCallum S (1995) "Safe Families: A Model of Child Protection Intervention Based on Parental Voice and Wisdom (Family Violence)" DSW Thesis Wilfred Laurier University (Canada), Publication No: AAT NNO1820, pp1-202.

McDonald C & Jones A (2000) "Reconstructing and Re-conceptualizing Social Work in the Emerging Milieu" Australian Social Work Vol 53 No 3 pp3-11.

Mies M & Shiva V (1993) Ecofeminism Victoria: Spinifex Press.

Mies M (1983) "Towards a Methodology for Feminist Research" In Bowles G & Duelli-Klein R (Eds.) Theories of Women's Studies London: Routledge & Kegan Paul, pp137-139.

- Mill J (1978) Rapaport E (Ed) On Liberty Indiana: Hackett Publishing.
- Miller E (District Attorney) (1992) "Response to 1992 San Diego County Grand Jury Report" to Hon. A. Jones Presiding Judge, San Diego Superior Court (October 30).
- Mills J (1910) Utilitarianism, Liberty, and Representative Government London: J. M. Dent & Sons.
- Millstein K (2000) "Confidentiality in Direct Social Work Practice: Inevitable Challenges and Ethical Demands" Families in Society: The Journal of Contemporary Human Services Vol 81 No 3 pp270-282.
- Minow M (1990) Making all the Difference: Inclusion, Exclusion and American Law Ithaca: Cornell University Press.
- Moore M (1988) "What Sort of Ideas Become Public Ideas" In Reich R (Ed) The Power of Public Ideas Cambridge Mass: Ballinger Publishing, pp55-83.
- Morgan R (1970) Sisterhood is Powerful NY: Random House.
- Moroney R & Krysik J (1998) (2nd Ed) Social Policy and Social Work: Critical Essays on the Welfare State New York: Walter de Gruyter Inc.
- Morris C (1958) "Law, Reason and Sociology" University of Pennsylvania Law Review Vol 107 No 2 pp147-165.
- Morrison T (1996) "Partnership and Collaboration: Rhetoric and Reality" Child Abuse & Neglect Vol 20 No 2 pp127-140.
- Morrison T (1997) "Emotionally Competent Child Protection Organisations: Fallacy, Fiction or Necessity" In Bates J, Pugh R & Thompson N (Eds.) Protecting Children: Challenges and Change Aldershot England: Ashgate Publishing, pp193-211.
- Moxley D & Manela R (2000) "Agency-Based Evaluation and Organizational Change in the Human Services" Families in Society: The Journal of Contemporary Human Services Vol 81 No 3 pp316-327.
- Myers J (1994) The Backlash: Child Protection Under Fire Ca: Sage Publications.
- Myers J (1992) Legal Issues in Child Abuse and Neglect Ca: Sage Publications.
- Myers J, Bayes J, Becker J, Berliner L, Corwin D & Saywitz K (1989) "Expert Testimony in Child Sexual Abuse Litigation" Nebraska Law Review Vol 68 pp1-145.
- National Association of State VOCAL Organizations News (1993) Vol 11 No 1.
- National Center on Child Abuse and Neglect (1992) Working With the Courts in Child Protection US Department of Health and Human Services.

National Research Council (1993) Understanding Child Abuse and Neglect Washington: National Academy Press.

NCPCA (1988) Fact Sheet National Committee on the Prevention of Child Abuse.

Nejelski P (1976) Social Research in Conflict with Law and Ethics USA: Ballinger Pub Co.

Nelken D (1996) Law As Communication Brookfield USA: Dartmouth.

Nelken D (2001) "Beyond the Metaphor of Legal Transplants?: Consequences of Autopoietic Theory for the Study of Cross-Cultural Legal Adaptation" In Priban J & Nelken D (2001) (Eds.) Law's New Boundaries: The consequences of legal Autopoiesis Burlington USA: Ashgate Dartmouth, pp265-302.

Nelson R & Heinz J (1988) "Lawyers and the Structure of Influence in Washington" Law and Society Review Vol 22 No 2 pp237-300.

Noda Y (1976) "The Character of the Japanese People and Their Conception of Law", In Tanaka H The Japanese Legal System: Introductory Cases and Materials University of Tokyo Press, pp259-300.

Northrup F (1959) The Complexity of Legal and Ethical Experience Little Brown & Co.

Northrup F (1960) "The Comparative Philosophy of Comparative Law" Cornell Law Quarterly Vol 45 pp617-658.

O'Connor I (2000) "Mission, Evidence and Outcomes: Building a Future for Social Work" Australian Social Work Vol 53 No 3 pp17-18.

Odgers S & Richardson J (1995) "Keeping Bad Science out of the Courtroom - Changes in American and Australian Expert Evidence Law" UNSW Law Journal Vol 18 No 1 pp108:129.

Okerblom J (1992) "Ritual Abuse: Psychologists look closer" The San Diego Union Tribune (January 25).

Olafesen E, Corwin D & Summit R (1993) "Modern history of child sexual abuse awareness: Cycles of discovery and suppression" Child Abuse & Neglect Vol 17 No 1 pp7-24.

Olafesen E (1994) Presentation at The San Diego Conference on Responding to Child Maltreatment Sponsored by San Diego Children's Hospital: California.

Panunzio C (1939) Major Social Institutions NY: MacMillan.

Parliament of the Commonwealth of Australia Department of the Parliamentary Library Media Information and Hansard, (14 June 1989) Transcript of Couchman interview with R. Underwager & H Wakefield “Child abuse: A comparison of cases in Australia and USA” Australian Broadcasting Commission (ABC - Television).

Paterson J (1996) “Who is Zenon Bankowski Talking to? The Person in the Sight of Autopoiesis” In Nelken D (Ed.) Law As Communication Brookfield USA: Dartmouth, pp81-104.

Patton M (Ed) (1991) Family Sexual Abuse: Frontline Research and Evaluation Ca: Sage.

Patton M Q (1987) How to Use Qualitative Methods in Evaluation Ca: Sage Publications.

Patton M Q (1990) Qualitative Evaluation and Research Methods Ca: Sage Publications.

Patton W (1987) “Forever Torn Asunder: Charting Evidentiary Parameters, the Right to Competent Counsel and the Privilege Against Self-incrimination in California Child Dependency and Parental Severance Cases” Santa Clara Law Review Vol 27 No 2 pp299-352.

Peirce D (1988) “BRI v. Leonard: The Role of the Courts in Preserving Family Integrity” New England Law Review Vol 23 No 151 pp185-219.

Penfield W (1975) The Mystery of the Mind: A Critical Study of Consciousness and the Human Brain Princeton: Princeton University Press.

Pithouse A (1987) Social Work: The Social Organization of an Invisible Trade Brookfield USA: Gower Publishing.

Plato (n. d.) (Trans.) Lindsay A The Republic New York: JM Dent & Sons.

Platt A (1977) (2nd Ed) The Child Savers: The Intervention of Delinquency Chicago: University of Chicago Press.

Podgorecki A, Whelan C & Khosla D (1985) (Eds.) Legal Systems and Social Systems New Hampshire: Croom Helm.

Popple P & Leighninger L (1998) The Policy-based Profession: An Introduction to Social Welfare Policy for Social Workers Needham Heights Ma: Allyn & Bacon.

Priban J & Nelken D (2001) (Eds.) Law’s New Boundaries: The consequences of legal Autopoiesis Burlington USA: Ashgate Dartmouth.

Punch M (1994) “Politics and Ethics in Qualitative Research” In Denzin N & Lincoln Y (Eds.) Handbook of Qualitative Research Ca: Sage Publications, pp83-97.

Rabinowitz D (1990) "From the Mouths of Babes to a Jail Cell: Child Abuse and the Abuse of Justice: A Case Study" USA: Harpers (May).

Rabinowitz D (1993) "Deception in the Movies, on the News" USA: The Wall Street Journal (February 22).

Ramos J (1997) "Legal Regulation and Accreditation: Obstacles to Practice" In Katz A, Lurie A & Vidal C (Eds.) Critical Social Welfare Issues: Tools for Social Work and Health Care Professionals New York: Haworth Press, pp129-142.

Rawls J (1971) A Theory of Justice Cambridge: Belknap Press, Harvard University.

Reamer F (1993) The Philosophical Foundations of Social Work New York: Columbia University Press.

Rein M & White R (1981) "Knowledge for Practice" In Gilbert N & Specht H (Eds.) Handbook of the Social Services New Jersey: Prentice Hall, pp620-637.

Reisch M & Gorin S (2001) "Nature of Work and Future of the Social Work Profession" Journal of the National Association of Social Work Vol 46 No 1 pp9-22.

Renzetti C & Lee R (1993) (Eds.) Researching Sensitive Topics Ca: Sage Publications.

Richan W & Mendelsohn A (1973) Social Work: The Unloved Profession – New Viewpoints New York: Franklin Watts Inc.

Rousseau J (1967) The Social Contract: Discourse on the Origin and Foundation of Inequality in Mankind NY: Washington Square.

Rutter M (1978) "Language Disorder and Infantile Autism" In Rutter M & Schopler E (Eds.) Autism: A Reappraisal of Concepts and Treatments NY: Plenum Press, pp85-104.

Sabine G (1937) A History of Political Theory New York: Holt, Rinehart & Winston.

Salter A (1991) "Accuracy of Expert Testimony in Child Sexual Abuse Cases: A Case Study of Ralph Underwager and Hollida Wakefield" Alexandria VA: National Center for the Prosecution of Child Abuse.

San Diego County Board of Supervisors Reports on the Child Protection System "Conference on Families in The Juvenile Dependency System" (March 10 1992).

San Diego County Department of Social Services v. Robert A et al. Cal. App. 4th 1d Ca DO 14489 [March 4] (Super. Ct. No J506161) (1992).

San Diego County Grand Jury (June 29 1992) "Child Sexual Abuse Assault and Molest Issues" (Report No 8).

- San Diego County Grand Jury (February 6 1992) "Families in Crisis" (Report No 2).
- San Diego County Grand Jury (June 29 1992) "Families in Crisis" (Report No 2) Supplement.
- San Diego County Grand Jury (June 2 1992) "Problem Areas in the Office of County Council" (Report No 4).
- San Diego County Grand Jury (June 29 1993) "Protect the Child Preserve the Family" (Report No 13).
- San Diego County Grand Jury (June 1 1994) "Analysis of Child Molestation Issues" (Report No 7).
- San Diego County Juvenile Justice Commission (Feb. 1992) "Case Review Report".
- Satyamuri C (1981) Occupational Survival Oxford: Basil Blackwell Press.
- Saywitz K, Goodman G, Nicholas E & Moan S (1991) "Children's Memories of a Physical Examination Involving Genital Touch: Implications for Reports of Child Sexual Abuse" Journal of Consulting and Clinical Psychology Vol 59 No 5 pp682-691.
- SB 1195 Task Force (1988) California Senate Select Committee on Children and Youth
- Schmidtz D & Goodwin R (1998) Social Welfare and Individual Responsibility: For and Against UK: Cambridge University Press.
- Schon D (1987) Educating the Reflective Practitioner San Francisco: Jossey-Bass.
- Schor E (1989) "Foster Care" Pediatrics in Review Vol 10 No 7 pp209-216.
- Schultz F(1936) Principles of Roman Law Oxford: Clarendon University Press
- Schwandt T (1994) "Constructivist, Interpretivist Approaches to Human Inquiry" In Denzin N & Lincoln Y (Eds.) Handbook of Qualitative Research Ca: Sage Publications, pp118-137.
- Scott D (1993) "Inter-agency Collaboration: Why is it so difficult? Can we do it better?" Children Australia Vol 18 No 4 pp4:9.
- Scott D (1995) "Child Protection: Paradoxes of Publicity, Policy and Practice" Australian Journal of Social Issues Vol 30 No 1 pp71-94.
- Scott S (1973) (Trans.) "The Law of the 12 Tables" In The Civil Law New York: AMS Press.

Scull A (1979) Museums of Madness: The Social Organization of Insanity in Nineteenth-Century England London: Allen Lane.

Secker J (1993) From Theory to Practice in Social Work: The Development of Social Work Student Practice Vermont: Ashgate Publishing.

Seiser G (1992) unpublished paper (attorney) San Diego County Council.

Sheehan R (2000) "Family Preservation and Child Protection: The Reality of Children's Court Decision-Making" Australian Social Work Vol 53 No 4 pp41-46.

Sheldrake R (1988) The Presence of the Past: Morphic Resonance and the Habits of Nature London: William Collins.

Sibeon R (1991) Towards a New Sociology of Social Work Brookfield Vermont: Gower Publishing.

Sieber J (1992) Planning Ethically Responsible Research Ca: Sage Publications.

Sinclair K (1995) "Responding to Abuse: A Matter of Perspective" Current Issues in Criminal Justice Vol 7 No 2 pp153-175.

Sinclair K (1996) "Systems Bashing: Some Illustrations and Patterns of Influence" Australian Child Welfare Association Conference Choosing Better Practice NSW (Aug.)

Smith B (1995) "Prosecuting Child Physical Abuse Cases: A Case Study in San Diego" Washington DC: Office of Juvenile Justice and Delinquency Prevention (June).

Smith J & Weistubb D (1983) The Western Idea of Law Toronto: Butterworths.

Spence G (1989) With Justice for None: Destroying an American Myth NY: Penguin.

Stone J (1965) Human Law and Human Justice Stanford: Stanford University Press.

Summit R (1983) "The Child Sexual Abuse Accommodation Syndrome" Child Abuse & Neglect Vol 7 pp177-193.

Summit R (1987) "Too Terrible to Hear: Barriers to Perception of Child Sexual Abuse" Unpublished paper received from author. Head Physician Psychiatric Community Consultation Service. Harbor/UCLA Medical Center 1000 West Carson St. Torrance Ca. Adapted from a paper written in support of testimony before the US Attorney General's Commission on Pornography, Miami Florida (20 November 1985).

Summit R (1988) "Hidden Victims, Hidden Pain: Societal Avoidance of Child Sexual Abuse" In Wyatt G & Johnson-Powell G (Eds.) Lasting Effects of Child Sexual Abuse Ca: Sage Publications, pp39-60.

Summit R (1989) "The Centrality of Victimization" Psychiatric Clinics of North America Vol 12 No 2 pp413-430.

Swain P (1999) "Keeping the Straight and Narrow: Issues in Researching Socio-legal Practice" Australian Social Work Vol 52 No 2 pp35-43.

"Symposium on Judicial Needs Relating to Child Sexual Abuse" National Center on Child Abuse and Neglect Washington, D. C. January 8-10, 1991.

Teare R & Sheafor B (1995) Practice-Sensitive Social Work Education: An Empirical Analysis of Social Work Practice and Practitioners 1995 Council on Social Work Education: Alexandria Va.

Teubner G (1986) (Ed) "After Legal Instrumentalism" In Teubner G Dilemmas of Law in the Welfare State Berlin: Walter De Gruyter, pp299-321.

Teubner G (1993) Bankowska A (Trans.), Adler R & Bankowski Z (Eds.) Law as an Autopoietic System Cambridge USA: The European University Institute Press Series.

Teubner G (2001) "Alienating Justice: On the Surplus Value of the Twelfth Camel" In Priban J & Nelken D (Eds.) Law's New Boundaries: The consequences of legal Autopoiesis Burlington USA: Ashgate Dartmouth, pp21-44.

Thorne K (1994) Black Holes and Time Warps: Einstein's Outrageous Legacy London: McMillan General Books.

Tigpen & Bonner (1994) "Child Death Review Teams in Action" The APSAC Advisor Vol 7 No 4 pp5-8.

Tomasic R (1985) The Sociology of Law Ca: Sage.

Tomlinson J (1990) "Constitutional law - States have no affirmative duty to protect abused children" *DeShaney v. Winnebago County Department of Social Services* (1989) 109 S.Ct.998 University of Detroit Law Review Vol 67 No 4 pp649-651.

Tone A (1997) The Business of Benevolence: Industrial Paternalism in Progressive America Ithaca New York: Cornell University.

Tremper C (1987) "Sanguinity and Dissillusionment where Law Meets Social Science" Law and Human Behavior Vol 11 No 4 pp267-276.

Tripp T (1993) "Power and Fairness in Negotiations" Social Justice Research Vol 6 No 1.

Tully J (1993) An Approach to Political Philosophy: Locke In Context Cambridge University Press.

Twining W & Miers D (1982) How To Do Things with Rules London: Weidenfeld & Nicolson Ltd.

Underwager & Wakefield v. Salter et al No 93-2422 Seventh Circuit (1994) WL 145010 (7th Circuit (Wis))

Unger R (1976) Law in Modern Society: Toward a Criticism of Social Theory London: Collier Macmillan Publishers.

Unger R (1983) The Critical Legal Studies Movement Cambridge: Harvard University Press.

Unger R (1996) What Should Legal Analysis Become New York: Verso.

Urofsky M (1991) The Continuity of Change: The Supreme Court and Individual Liberties Ca: Wadsworth.

US Department of Health and Human Services (June 1993) Legal Issues 1990-1993 Publications National Clearinghouse on Child Abuse and Neglect Information, Washington DC National Center on Child Abuse and Neglect.

US Department of Health and Human Services (2000) Administration for Children and Families Administration on Children, Youth and Families Children's Bureaus. National Clearinghouse on Child Abuse and Neglect Information, Washington DC.

Valletutti P & Christophor F (1977) (Eds.) Interdisciplinary Approaches to Human Services Baltimore: University Park Press.

van Zandt D (1992) "The Breath of Life in the Law" Cardozo Law Review Vol 13 pp1745-1761.

Vigilante J (1997) "Health and Human Services for Profit" In Katz A, Lurie A & Vidal C (Eds.) Critical Social Welfare Issues: Tools for Social Work and Health Care Professionals New York: Haworth Press, pp111-127.

Vining J (1978) Legal Identity: The Coming of Age of Public Law New Haven: Yale University Press.

VOCAL (1985) National Newsletter Victims of Child Abuse Laws (May/June 1).

von Glasersfeld E (1991) "Knowing without Metaphysics: Aspects of the Radical Constructivist Position" In Steier F (Ed) Research and Reflexivity Ca: Sage Publications.

Wagner D (1990) The Quest for a Radical Profession: Social Service Careers and Political Ideology Lanham Md: University Press of America.

Wakefield H & Underwager R (1988) Accusations of Child Sexual Abuse Springfield Ill: C.C. Thomas.

- Walton R (1975) Women in Social Work Boston: Routledge and Kegan Paul.
- Warham J (1977) “An Open Case: The Organisational Context of Social Work” London: Routledge & Kegan Paul.
- Weisstub D & Smith J (1983) (Eds.) The Western Idea of Law Toronto: Butterworths.
- Welfare and Institutions Code, “Performance of social worker of certain probation officer functions” Section 306, In Court Appointed Special Advocate Training Manual (1992) Appendix 111.
- Wells S (1994) “The Role of Child Protective Services in Responding to and Preventing Child Deaths” The APSAC Advisor Vol 7 No 4 pp31-34.
- Wilczynski A & Sinclair K (2002) “Moral Tales: representations of child abuse in the quality and tabloid media” In Stanko E (Ed.) Violence The International Library of Criminal Justice and Penology, Dartmouth: Ashgate Publishing, pp523-544.
- Wilczynski A & Sinclair K (1999) “Moral Tales: representations of child abuse in the quality and tabloid media” Australia and New Zealand Journal of Criminology Vol 32 No 3 pp262-283.
- Wilensky H & Lebaux C (1958) Industrial Society and Social Welfare New York: Russell Sage Foundation.
- Wiseman J (1987) “The Development of Generic Concepts in Qualitative Research through Cumulative Application” Qualitative Sociology Vol 10 No 4.
- Wolfe A (1992) “Sociological Theory in the Absence of People: The Limits of Luhmann’s System’s Theory” Cardozo Law Review Vol 13 pp1729-1743.
- Yin R (1989) Case Study Research: Design and Methods Applied Social Science Research Series Volume 2 Ca: Sage Publications.
- Yngvesson B (1988) “Making Law At The Doorway: The Clerk, The Court, And The Construction of Community in a New England Town” Law & Society Review Vol 22 No 3 pp409-448.
- Ziegert K (1994) “Legal Systems, Family Systems, and the Sense of Justice”, Paper presented at The 56th Annual Conference of NCFR Minneapolis Minnesota (Nov 10-13).