

# The Shuffle of Things: Law and Knowledge in "Modern Society"

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*What are modernities? Can they be critical? What could it mean to imagine law beyond liberalism? This Article considers these questions from within the admittedly-limited scope of law and society in the United States. It argues, using an example drawn from a contemporary state law regulating the practice of law, that the "order of things" has changed. The systematicity of knowledge of modern law links it to the conditions of a sociological society whose stability involves both the management of risk (as others have argued) and the prevention of crisis. When interventions such as this Article — in common with modern law — seek to address the critical condition of a modern society and to avert crises in it, such interventions may paradoxically justify and reinforce the very tactics and terms of the expressive environment or system that constitutes modern sociological society.*

God guard me from those thoughts men think  
In the mind alone;  
He that sings a lasting song  
Thinks in a marrow-bone . . . .<sup>1</sup>

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<sup>1</sup> W.B. YEATS, *A Prayer for Old Age*, reprinted in *THE COLLECTED POEMS OF W.B. YEATS* 243 (Wordsworth Editions 1994) (1935).

When you realize how routinized legal work is, and how much information you can pack into an interactive CD-ROM, then you recognize how easy it is to substitute a computer for a lawyer.<sup>2</sup>

## I. MODERNITIES

What are modernities? Can they be critical? And what do they have to do with imagining law beyond liberalism? This Article addresses these questions, first, by offering an account of modernity that fits the admittedly limited example of lawmaking in the United States. It then asks what it is to know law in modern society; it answers by analyzing a U.S. state law regulating the unauthorized practice of law. It links the "systematicity" of modern law and legal knowledge in the U.S. to the conditions of a sociological society whose stability involves both the management of risk, as others have argued, and the prevention of crisis. Knowing the law today involves an endless proliferation of communicative strategies that minimize the risks and responsibilities of ostensibly "empowered" members of society. Finally, the Article considers its own critical role in imagining law beyond sociological society and the social policies of the neoliberal state. Insofar as interventions such as this Article, like modern law itself, seek to diagnose and address the conditions for averting crises of modern society, such interventions may paradoxically justify and reinforce the very tactics and terms of the expressive environment that constitutes sociological society.

It seems like modernities are everywhere: modern this and modern that. We have narratives of modernization, nation-states as symptoms of modernity, and anxieties about being truly modern, modern enough, and post-modern.<sup>3</sup> One's first impulse may be to ask: "When did modernity begin?" or "What did people think of themselves *as*, before they thought about themselves in terms of 'modern'?" These questions, implicitly invoking a "before," suggest that

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2 Steven Gillers, NYU law professor, *quoted in* John Greenwald, *A Legal Press in Texas*, TIME, Aug. 3, 1998, *cited in* William H. Brown, Comment, *Legal Software and the Unauthorized Practice of Law: Protection or Protectionism*, 36 CAL. W. L. REV. 157, 170 n.118 (1999).

3 Such claims are certainly not limited to the United States. *See, e.g.*, Ruth Levush, *A Guide to the Israeli Legal System* (Jan. 15, 2001), <http://www.llrx.com/features/israel.htm>: "Although the pre-existing [1948] law was retained at first by the independent State of Israel, new legislation enacted by the Knesset, as well as decisions of the Supreme Court, have completely transformed the legal system into a modern and sophisticated system."

modernity is already linked to the historical, to an understanding of oneself in one's time or in time.

To strive to place oneself in time is to attempt to give oneself a context — to avoid ascribing to one's being either mere particularity or grandiose universality. In this sense, modernity mediates between different registers. As "modern" law, for instance, the law of a nation-state today can stand for more than itself, without asserting itself as a universal principle of law. The modern law of a contemporary nation-state can reveal, as I have suggested elsewhere,<sup>4</sup> a philosophical understanding of law that characterizes not only the codes or rules of law of that state and the theories about them, but something else — something between particular rules and grand theories, perhaps; something akin to what Michel Foucault might have called (in English translation) the "order" of law.

Recall that in the preface to *The Order of Things* (*Les Mots et les Choses*, literally "*Words and Things*"),<sup>5</sup> Foucault writes of his concern with a "middle region" between the already encoded eye and reflective knowledge. He distinguishes between the "fundamental codes of a culture" which "establish for every man, from the very first, the empirical orders [of language, perception, values, practices] with which he will be dealing and within which he will be at home" and the "scientific theories or the philosophical interpretations which explain why order exists in general, what universal law it obeys, what principle can account for it, and why this particular order has been established and not some other."<sup>6</sup> Foucault writes that between these two regions (or perhaps containing them somehow) lies a more confused domain, where

a culture, imperceptibly deviating from the empirical orders prescribed for it by its primary codes, instituting an initial separation from them, causes them to lose their original transparency, relinquishes its immediate and invisible powers, frees itself sufficiently to discover that these orders are perhaps not the only possible ones or the best ones: this culture *then finds* itself faced with the stark fact that there exists, below the level of its spontaneous orders, things that are in themselves capable of being ordered, that belong to a certain unspoken order; the fact, in short, that order *exists*. . . . [O]n the basis of this

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4 MARIANNE CONSTABLE, *JUST SILENCES: THE LIMITS AND POSSIBILITIES OF MODERN LAW* (2005).

5 MICHEL FOUCAULT, *THE ORDER OF THINGS: AN ARCHEOLOGY OF HUMAN KNOWLEDGE* (Vintage Books 1973) (1966).

6 *Id.* at xx.

newly perceived order . . . the codes of language, perception, and practice are criticized and rendered partially invalid. . . . Thus, in every culture, between the use of what one might call the ordering codes and reflections upon order itself, there is the pure experience of order and its modes of being.<sup>7</sup>

The encounter of what Foucault calls "a culture" with a certain middle region is for Foucault a dynamic one, and it is to such a dynamic encounter — in which order is recognized, thus enabling codes to be criticized — that the "modern" today may speak.

Using "modern" as a way of figuring the "between" or order of law, of what does modernity consist? In law in the United States (and perhaps elsewhere), as we shall see, "society" or "the social" provides the sense of modernity or of order that Foucault identifies. That law can everywhere be a "social instrument," that law is everywhere social and sociological, provides an order of law, an order to law, which is — peculiarly — modern.

## II. SOCIOLOGICAL SOCIETY<sup>8</sup>

Law is social and sociological in multiple senses. It is hard to think of law as anything but social. Laws, even one's own, be they moral or religious or governmental, are acknowledged to be a product of one's society. That "society" is real and that reality is social and empirical seems to demand no explanation. As an aspect of society, law is the subject-matter of social sciences or socio-logies. Those sciences themselves often provide justifications for the modern law or social policies that are manifest in the regulations of governing states and that leave their traces in writings and records which become authorities of law and history.<sup>9</sup>

In an age of sociological law and written records, neoliberalism and the passage to the "late" welfare state point less to the much-proclaimed "death of the social" than to new constellations of relations between law, justice, and politics. Judgments of justice and injustice today issue from law, constituting a reversal of an earlier tradition in which law — however "unreal" in sociological terms — issued from justice. The necessity of law, as a human and social creation, lies in the social force or pressure that

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<sup>7</sup> *Id.* at xx-xxi (first emphasis added).

<sup>8</sup> This Part is abbreviated from CONSTABLE, *supra* note 4, at 22-28.

<sup>9</sup> MARIANNE CONSTABLE, *THE LAW OF THE OTHER: THE MIXED JURY AND CHANGING CONCEPTIONS OF CITIZENSHIP, LAW, AND KNOWLEDGE* (1994).

produces, through compulsion or persuasion, the obedience of subjects. Lawmakers and others appeal to technological concepts of social reality — such as legitimacy, welfare, efficiency — to design a correspondence between social needs and social policy. Claims of, and responses to, law are made in terms of the values — equality, liberty, fairness, toleration, self-rule — of society.

Foucault has shown how social projects — the leper colony, the plague city, the Panopticon — carry with them their own "political dreams."<sup>10</sup> In the 1990s, the "empowered community" emerges as the political dream of the projects of administrative agencies. This dream coincides with the privatization of formerly public functions. Concerns for security and democracy (identified by Foucault in his work on governmentality and elaborated in the work of others<sup>11</sup>) together with the growing significance to governance of nontherapeutic social sciences, contribute to the appeal of empowerment as political dream, political tool, and political project. As the expertise of the therapeutic professions to which Foucault points (e.g., public health, psychology, social welfare, city planning) gives way to that of experts in fields of financial planning, management, administration, and public accounting, the latter experts rely increasingly for their "substance" on local knowledge — the input of the democratic citizen or local community member. The adoption — by state agencies, quasi-public organizations, and private parties alike — of the techniques of management, accounting, and evaluation that characterize market enterprises has meant that expertise no longer belongs to specialists in given fields who are held accountable to professional norms and external goals, but neither does it belong exclusively to the social researchers, planners, and efficiency experts who now range

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10 MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* 198 (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1977).

11 Michel Foucault, *Governmentality*, 6 *IDEOLOGY & CONSCIOUSNESS* 5, 5-17 (1979); see also *THE FOUCAULT EFFECT: STUDIES IN GOVERNMENTALITY* (Gordon Burchell et al. eds., 1991); BARBARA CRUIKSHANK, *THE WILL TO EMPOWER: DEMOCRATIC CITIZENS AND OTHER SUBJECTS* (1999); THOMAS L. DUMM, *A POLITICS OF THE ORDINARY* (1999); Pat O'Malley, *Neo-Liberal Police: "Partnership Policing" and the "Empowered Community"* (1999) (paper presented at Law and Society Association Summer Legal Institute, Rutgers, New Jersey); NIKOLAS ROSE, *POWERS OF FREEDOM: REFRAMING POLITICAL THOUGHT* (1999); Jonathan Simon, *On Their Own: Delinquency Without Society*, 47 *KAN. L. REV.* 1 (1999); Jonathan Simon, *Megan's Law: Crime and Democracy in Late Modern America*, 25 *L. & SOC. INQUIRY* 1111 (2000); MARIANA VALVERDE ET AL., *DEMOCRACY IN GOVERNANCE: A SOCIO-LEGAL FRAMEWORK, A REPORT FOR THE LAW COMMISSION OF CANADA ON LAW AND GOVERNANCE RELATIONSHIPS* (1999).

across fields. Expertise today belongs concurrently to the latter and to the citizen, a citizen trained to community responsibility and appealed to, as responsible community member and local expert, to participate in government that increasingly administers the activities of everyday life — working, eating and drinking, learning, resting and recreating, traveling, reading, watching television, driving and so forth (OSHA, FDA, AAA, DMV, BCIS, etc.).

From community justice and neighborhood watch programs to transportation and education projects and the administration of block grants for the needy, citizens provide information about themselves, their habits, their concerns, their families and their neighbors, to promote public safety, health and welfare. They register to take tests, learn interactively and give feedback so that they themselves and future generations of test takers, interactive learners, and ballot punchers will be more ably served by colleges, banks, museums, departments of motor vehicles, election boards and so forth. They constitute the targets of opinion polls and of surveys of customer preferences and consumer satisfaction, the profiles of demographics and the more recent "psychographics" of media research services. Through the strategies of social science, mass media, and market capitalism, in which they participate, they are constituted as a public that in turn becomes the basis for local and national platforms and policies, as well as for less ostensibly political measures, such as dietary recommendations, for instance, which by law are disseminated via the market.

These regulatory legal engagements — the behaviors of subjects who are arguably both empowered citizens and tools of legitimation — are informed by social study and are the objects of it. They point to a new politics — new knowledges and practices — of association in a society in which narrowly "legal realist" social sciences may have had their heyday, as some claim,<sup>12</sup> but in which postrealism is by no means nonsociological. The dismantling of what Austin Sarat calls "the most florid forms of the social" (social insurance, public transportation and housing, public health and social medicine, as well as socialism) actually come in the *name of* the preferences of society and its ostensibly empowered service users. The citizen-expert as user of services is the complement to the *service provider* (as "consumer" is to "producer"). The word "user" reminds us of the absence of perfect freedom, as Peter Lyman puts it (in the context of digital library and computer technology), since "all of these choices are given by the technical structures designed by the

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12 Austin Sarat, *Visuality amidst Fragmentation: On the Emergence of Postrealist Law and Society Scholarship*, in *THE BLACKWELL COMPANION TO LAW AND SOCIETY* 5 (Austin Sarat ed., 2004).

programmer" and presented by the server.<sup>13</sup> In the context of social policies and expertise about human services, the "user" is the offspring of rational choice and marketing theory. S/he embodies the joint hopes born from the shortcomings of both "rational actor" and "consumer." While the "rational actor" assumed by policy-makers is too abstract and ethereal, too ungrounded in the things of the world, to serve as a model citizen, the market "consumer" is too indiscriminating and materially-oriented to be taken seriously as an expert. The "service user" is heir to both. The "user" combines the techniques of cost-benefit analysis and concern for economic efficiency with utilitarian calculations as to satisfactions — in new civic form. The user manipulates things of this world, while distinguishing needs from desires.

From the social study and public opinion of society's ostensibly empowered service users come evaluations of the design and fit of law to society and society to law. Modern society issues law and noisily announces, declares, and enacts its own — socially-constructed and socially-contested — values and norms into the social policies of modern law.

### III. KNOWING THE LAW

What is it to know the law, in the sense of knowing what to do, in modern sociological society? An example from the State of Texas provides an answer that may not be as farfetched as it first appears. The previous Part showed how interactions between social researchers and members of a sociological society make modern law or social policy. This Part suggests that law is known through another sort of interaction — and not simply, as might be supposed, through the interaction of professional lawyer and lay client.

In 1999, a U.S. District Court in Texas enjoined a software manufacturer from selling legal software in Texas under a statute regulating the "unauthorized practice of law" (UPL). Texas' Unauthorized Practice of Law Commission (UPLC) had brought suit against Parsons Manufacturing, alleging that the program, Quicken Family Lawyer (QFL), "acts as a 'high tech lawyer by interacting with its "client" while preparing legal instruments, giving legal advice, and suggesting legal instruments that should be employed by the user.' In other words, QFL is a 'cyber-lawyer.'"<sup>14</sup> A

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<sup>13</sup> Peter Lyman, *What is a Digital Library? Technology, Property, and the Public Interest*, 125(4) DAEDALUS 1 (1996).

<sup>14</sup> *Unauthorized Practice of Law Comm. v. Parsons Tech., Inc.*, No. 3:97-CV-2859-H, 1999 U.S. Dist. LEXIS 813, at \*14 (N.D. Tex. Jan. 22, 1999) (internal reference omitted).

commentator characterized the legal issue as whether using the program was more like "reading a book" — in which case the software would be protected speech under the First Amendment — or like "having a conversation" with a lawyer — in which case it would constitute unauthorized practice.<sup>15</sup> The court agreed with the UPLC that since the program asked questions on the basis of which it selected forms, filled in blanks and deleted clauses, the software was performing legal tasks. In addition, the court noted, the software package contained few disclaimers and encouraged users' reliance on the program as a substitute for a lawyer's advice.

A year after the *Parsons* decision, the Texas legislature amended its statutory description of the practice of law.<sup>16</sup> To its original definition of "practice," it simply — and very interestingly, as we shall see — added disclaimer requirements.<sup>17</sup> If *Parsons* made clear that its software was not a substitute for consulting a lawyer, then the manufacture, sale and distribution of QFL would no longer be enjoined.<sup>18</sup> The amendment and lifting of the injunction against *Parsons* bring the law regarding the UPL in Texas closer to that in the majority of U.S. states.<sup>19</sup>

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15 Andrew Kaufman, Harvard law professor, *quoted in* Steve Kaufman, *Self-Help Legal Software Tests Boundaries of Practice of Law*, KNIGHT-RIDDER TRIB. BUS. NEWS, Feb. 4, 1999, *cited in* Brown, *supra* note 2, at 163 n.57.

16 TEX. GOV'T CODE ANN. § 81.101(a) (Vernon 2006):

In this chapter the "practice of law" means the preparation of a pleading or other document incident to an action or special proceeding or the management of the action or proceeding on behalf of a client before a judge in court as well as a service rendered out of court, including the giving of advice or the rendering of any service requiring the use of legal skill or knowledge, such as preparing a will, contract, or other instrument, the legal effect of which under the facts and conclusions involved must be carefully determined.

17 "The 'practice of law' does not include the design, creation, publication, distribution, display, or sale . . . [of] computer software, or similar products if the products clearly and conspicuously state that the products are not a substitute for the advice of an attorney." 1999 Tex. Gen. Laws 799 (amending § 81.101).

18 *See* *Unauthorized Practice of Law Comm. v. Parsons Tech., Inc.*, 179 F.3d 956 (5th Cir. 1990).

19 In New York, for instance, "practice of law" requires a personal relation between attorney and client and since there was clearly no such relation between the manufacturer and user of QFL software, the sale of QFL would not have been banned in New York. Nor, apparently, would it have been banned in Oregon, where the State Bar Association Board of Governors in 1994 responded to a query about the status of an interactive online legal information system. The Bar wrote that the service

"[provided] customized information by generating responses from a database through the use of 'decision-tree' software, similar to using the index or table of contents in a book." Further, it found that the requisite "personal contact" was



Yet while the Texas legislation seems to bring Parsons' legal situation closer to what it is elsewhere, other Texas' UPL precedents still stand.<sup>20</sup> They continue to distinguish Texas law from that of other states. Texas' case law concerning the publication of legal self-help manuals, for instance, maintains that although publication of legal forms alone is fine, the publication of such forms in a manual *with instructions* constitutes unauthorized practice of law.<sup>21</sup>

If the manual is considered a "similar product" to software under the new legislation, appropriate disclaimers may of course also make this precedent moot. But the Texas situation is nevertheless revealing of contemporary ways of knowing and practicing law. The disclaimer requirements in Texas, established — like other UPL regulations — to protect the public from charlatans and inexperienced legal advice, highlight the difference between current self-help legal products, which must declare that they are not really the law and cannot substitute for a lawyer, and those of 125 years ago, which proudly announced that one could rely on them implicitly and with no need for a lawyer. "So thorough and critical has been the revision and completion," writes John Wells of the 1879 edition of *Every Man His Own Lawyer*, "that the most implicit reliance can be placed upon the work as *authority* on all the subjects of which it treats."<sup>22</sup>

Although current guides are different from the layman's guides to law

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lacking since, although the system was interactive, it was the customer that was actually operating the software and who would be doing the customizing, much in that same manner that a user of a self-help book or kit would do.

Steve French, Note and Comment, *When Public Policies Collide . . . Legal 'Self-Help' Software and the Unauthorized Practice of Law*, 27 RUTGERS COMPUTER & TECH. L.J. 93, 116 (2001) (citing OR. STATE BAR ASS'N BD. OF GOVERNORS, FORMAL OP. 1994-137 (1994)).

20 TEX. GOV'T CODE ANN. § 81.101(b) (Vernon 2006): "The definition in this section is not exclusive and does not deprive the judicial branch of the power and authority under both this chapter and the adjudicated cases to determine whether other services and acts not enumerated may constitute the practice of law."

21 *Fadia v. Unauthorized Practice of Law Comm.*, 830 S.W.2d 162 (Tex. App. 1992); *Palmer v. Unauthorized Practice of Law Comm.*, 4338 S.W.2d 374 (Tex. Ct. App. 1969).

22 JOHN G. WELLS, *EVERY MAN HIS OWN LAWYER AND BUSINESS FORM BOOK 7* (New York, J.G. Wells rev. ed. 1879). Full title on cover:

Wells' Every Man His Own Lawyer and Business Form Book. A Complete Guide in All Matters of Law and Business Negotiations, For Every State in the Union. With Legal Forms for Drawing the Necessary Papers, and Full Instructions for Proceeding without Legal Assistance, In Suits and Business Transactions of Every Description.

of the 18th and 19th centuries in terms of their disclaimers, their stated justifications are actually quite similar. Sometimes said to have begun in the 1960s and 1970s with the publication of self-help legal guides such as those of Berkeley's Nolo Press, the contemporary legal self-help movement (or industry) appeals to the everyman of popular democracy. Pointing to the paucity of access to legal representation for lower and middle-income persons, legal self-help products and entrepreneurs claim to provide a service to those who can least afford lawyers. Their relevance is greatest in more-or-less routine matters (wills, rental agreements, leases and contracts, marriage and divorce agreements, and so forth) in which the high-priced expertise, judgment and experience of lawyers seem unnecessary.

Through such ostensibly mundane areas of law, self-help legal literature presents itself as committed to access to justice. Nolo Press, for instance, grounds its *raison d'être* in democratic values of personal dignity and "access." In a suit that Nolo initiated against the Texas UPLC to preempt a threatened UPLC action against it, Nolo's co-plaintiffs included the Texas Library Association and the American Association of Law Libraries. The members of the latter "recognize that the availability of legal information to all people is a necessary requirement for a just and democratic society." Nolo's co-plaintiffs also included individuals concerned with preserving their rights "to make an informed decision as to whether to choose to hire an attorney" and "to obtain and use information about the legal system." The complaint described them as "know[ing] the difference between hiring a lawyer and buying a book" (and also presumably using a software system).

The legal self-help movement's faith in laypersons' ability to judge when to consult professionals collides with the UPL regulations' apprehension regarding a layperson's ability to rely on, or to accurately evaluate the reliability of, legal products. Concerns underlying UPL regulations have long been articulated in terms of balancing public access to legal information and assistance with protection of the public against inaccurate or harmful information and advice. This traditional sort of cost-benefit analysis changes somewhat when the information against which the public is to be protected is considered to be not simply inaccurate or harmful, but — as in Texas, but not only in Texas — "unreliable."

Concern with reliability means that in addition to evaluating the public benefit of a product or service and the risk of harm to a consumer of such a product or service, the "ability of a recipient to evaluate" the product or service becomes an issue or "prong" in the "test" for unauthorized practice. Different states and state bars have produced diverse legislative and judicial responses. The task here is not to sort out or reconcile minority and majority views. Let others seek effective legislative definitions of legal practice or

formulae to guide the judicial balancing, in particular cases, of the risk of harm to those who rely on self-help legal products with the benefits of low-cost access to legal materials. The point here is that in the name of democratization and accessibility to law, proper practice or authoritative knowledge of law is now formulated as an issue of the "risk" and "reliability" of products for users. In an age in which QFL only hints at the possibilities of on-line legal help, self-help legal materials that by law must warn and declare that they cannot substitute for authoritative law or lawyering in order to be constituted as an authorized non-practice of law not only present a paradox. They also suggest that human beings' knowing and doing of law are being transformed and reconfigured into an information system.

Concern with reliability has already spawned many recommendations for evaluation in law review articles and bar association reports. In Texas, recommendations concerning the reliability of legal software include: creating mandatory model disclosure language, requiring low cost or free attorney review of documents, unbundling attorney services, having state bars compile and publish customer complaints on websites, partnering the state bar with software manufacturers to produce materials, and gathering product information and ratings to be published in magazines or on specialized on-line sites. These recommendations all feed into an ever expanding cycle or system of information creation and supply that generates itself in the name of quality control.

On its own, such spiraling of information — accompanying as it does the recommendations surrounding an odd Texas holding which, in effect, maintains that software can act — might not be worth noting. But the development of expansive information systems also occurs in administrative law — through calls for transparency and public reviews, that must themselves be transparent and reviewable — and, increasingly, in constitutional law. In campaign finance law, for instance, federal and local laws limiting campaign spending have been struck down even as increasingly complex mandatory disclosure rules for campaign donations, which are considered "speech," are created.<sup>23</sup> Websites — still private, but which will no doubt soon be ranked for the quality of the services they offer — provide users the opportunity to look up records of donations by compiling what have become matters of public record. As in the area of UPL, law in

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<sup>23</sup> Richard Briffault, *Buckley Reconsidered: Campaign Spending Limits and the Constitution* (Nov. 21, 2005) (unpublished paper, presented at Law and Public Affairs Seminar, Princeton University).

these examples does not simply require information but itself becomes a communicative system.

The communicative and systemic quality of modern law moves it in some sense beyond the traditional liberal law that valorizes the active individual. Although subjects participate in the production of law, particular events of information transmission — or knowledge — no longer rely on persons as agents to "act." As in the systems thinking of sociologists such as Niklas Luhmann, who conceptualize society as a communicative system, the world of law is neither polis, divine creation, moral community, nor even quite strictly society, but what might better be called an expressive or information system or environment.

#### IV. SYSTEMS THINKING

A brief introduction to systems will help show what is at stake in the modern way of knowing law described above. Systems thinking occurs in many fields using different vocabularies.<sup>24</sup> "Cybernetics" or "the study of control and communication in machines and living beings" was an early way of talking about systems. In *God & Golem, Inc.*, Norbert Wiener (also author of *Cybernetics* and *The Human Use of Human Beings*) describes machines that can "learn":

[A]n organized system may be said to be one which transforms a certain incoming message into an outgoing message according to some principle of transformation. If this principle of transformation is subject to a certain criterion of merit of performance, and if the method of transformation is adjusted so as to tend to improve the performance of the system according to this criterion, the system is said to learn.<sup>25</sup>

Wiener uses the example of a computer that plays a game by fixed rules, then uses winning the game as a criterion of merit of performance that allows it to evaluate its past decisions and to generate better future principles of transformation (and hence decisional game-playing rules). Another example comes from contemporary HR, human resources or human personnel management: employees are asked to complete self-evaluations of their work

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24 The best sophisticated introduction I have found is JOHN MINGERS, *SELF-PRODUCING SYSTEMS: IMPLICATIONS AND APPLICATIONS OF AUTOPOIESIS* (1995).

25 NORBERT WIENER, *GOD & GOLEM, INC.* 14 (1964).

using set criteria and then to indicate, on the basis of their job descriptions and self-evaluations, how their performance could be improved. Both of these examples use what are referred to as "feedback loops" to generate "learning." In these examples, feedback loops begin with the communication or transmission of "information" from the outside — the rule for win/loss, the criteria for performance evaluation — that the entity uses internally to generate better or more efficient outcomes (the system is thus considered "open").

In the game-playing and personnel management examples, the messages transformed and the principles of evaluation can easily be conceived in terms of programming and/or of language. But not all "messages" or "information" need be "language" in this way. Rather, "information" — or what Bateson calls "news of a difference"<sup>26</sup> and Maturana calls "observation of distinction"<sup>27</sup> — may be communicated through transmission of chemical traces or physical movements to entities — from cells to ant colonies, for instance — structured to respond to particular sorts of transmissions.

The communication of information in this broad sense complicates notions of the "outside" of an entity. It allows one to describe not only the ability of machines to "reproduce" themselves but also the coordination of man with machine. Wiener argues that computers move human beings beyond the use of tools that are extensions of the body (prosthetics) to new forms of interaction between man and machine. Bateson argues that this renders Wiener's original distinction between user and tool, and between prosthetic system and interactive system, problematic.

Suppose I am a blind man, and I use a stick. I go tap, tap, tap. Where do I start? Is my mental system bounded at the handle of the stick? Is it bounded by my skin? Does it start halfway up the stick? Does it start at the tip of the stick? But these are nonsense questions. The stick is a pathway along which transforms of difference are being transmitted. The way to delineate the system is to draw the limiting line in such a way that you do not cut any of these pathways in ways which leave things inexplicable. If what you are trying to explain is a given piece of behavior, such as the locomotion of a blind man, then, for this purpose, you will need the street, the stick, the man; the street, the stick, and so on, round and round.<sup>28</sup>

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26 GREGORY BATESON, *STEPS TO AN ECOLOGY OF MIND* 490 (1972).

27 Humberto Maturana, *Reality: The Search for Objectivity or the Quest for a Compelling Argument*, 9 *IRISH J. PSYCHOL.* 25 (1988).

28 BATESON, *supra* note 26, at 465.

The integration of elements Bateson writes of is very like that which Maturana and Varela (in biology)<sup>29</sup> and Hagan (in criminology) call "structural coupling."<sup>30</sup> For Bateson, though, a communicative system is fundamentally an explanatory technique. "[W]hen the blind man sits down to eat his lunch," he continues, "his stick and its messages will no longer be relevant — if it is his eating that you want to understand."<sup>31</sup>

Structural coupling, by contrast, according to John Mingers, is a reformulation of the idea of adaptation, "but with the important proviso that the environment does not specify the adaptive changes that will occur."<sup>32</sup> An "entity" with a particular structure exists within an environment that perturbs it and can trigger changes. A human being in an environment may come into contact with a plant and produce a rash, for instance. The environment does not determine the changes (the rash in the example), but can be said, according to Mingers, to "select states" from among those made possible at any instant by the entity's sometimes "plastic" structure: human beings — and not birds or cows — are susceptible to a "poison oak" rash. In such analysis, neither the plant itself (here understood as an aspect of the environment) nor the environment is poisonous as such — the particular reaction to the ostensible "poison" is one of the states made possible by the human being's skin and other parts.

In an environment characterized by recurring states, the activity of selecting responses on the part of a particular organism (human being) will lead to selection in the organism of a perhaps-biological or other "structure" or "behavior" suitable for that environment. Poison-oak sensitive human beings develop increasingly severe skin irritations rather than coughing fits,

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29 HUMBERTO R. MATURANA & FRANCISCO J. VARELA, *AUTOPOIESIS AND COGNITION: THE REALIZATION OF THE LIVING* (1980); Humberto R. Maturana, *Biology of Language: The Epistemology of Reality*, in *PSYCHOLOGY AND BIOLOGY OF LANGUAGE AND THOUGHT: ESSAYS IN HONOR OF ERIC LENNEBERG* 27, 35 (George A. Miller & Elizabeth Lenneberg eds., 1978); see also Humberto R. Maturana, *Autopoiesis: Reproduction, Heredity and Evolution*, in *AUTOPOIESIS, DISSIPATIVE STRUCTURES AND SPONTANEOUS SOCIAL ORDER* 45, 70 (Mila Zeleny ed., 1980), cited in MINGERS, *supra* note 24, at 34-37.

30 John Hagan et al., *Ceremonial Justice: Crime and Punishment in a Loosely Coupled System*, 58 *SOC. FORCES* 506 (1979); John Hagan, *The Corporate Advantage: The Involvement of Corporate and Individual Victims in a Criminal Justice System*, 60 *SOC. FORCES* 993 (1982); see also John Meyer & Brian Rowan, *Institutionalized Organizations: Formal Structure as Myth and Ceremony*, 83 *AM. J. SOCIOL.* 340 (1977).

31 BATESON, *supra* note 26, at 465.

32 MINGERS, *supra* note 24, at 35.

for instance, and may also take to wearing long sleeves, grooming walking trails, or inventing and applying anti-poison oak gunk.

Organisms may become structurally coupled not only to their medium, but also to other organisms (or entities). Viewed as a system, Mingers writes, the behaviors of one structure-determined entity become triggers for the behaviors of others through the selections of their individual structures. In the case of a person interacting with a computer program, he writes,

The person can interact with the computer and can type in information and get appropriate responses. However, the computer is structure-determined since it is the structure of the program and that of the computer that determines what will or will not trigger it. Only pressing appropriate keys (or the like) will lead to appropriate responses, and those particular triggering mechanisms are determined entirely by the nature of the system. Even simple operations of a similar nature vary from one software package to another.

When beginning a new package, one has a feeling of uncertainty, not knowing how to achieve what one wants, not knowing whether one has performed the right actions, pressed the right keys. Gradually, through use, this feeling disappears until eventually one reaches a state in which it is almost unnecessary to think about the actual operations; one merely needs to think of what is to be achieved. This state of being able to interact without thinking consciously of what to do . . . [involves a] process of becoming attuned [which] is, in fact, the process of developing structural coupling.<sup>33</sup>

The move from feedback loops in an open system to structural coupling thus represents a move from input-output systems (in which criteria for evaluation are established from outside the system) to what Maturana and Varela first called autopoietic or self-making systems. Through the latter, the behavior of what was conceived as external to the input-output system — the scientific observer (or referee of a game or personnel manager) — may itself be incorporated into a system.

Basically, then, systems involve the following:<sup>34</sup>

- 1) A unity or entity observed against a background environment or medium.
- 2) The entity (cell, organism, machine) is composed of parts, but the

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<sup>33</sup> *Id.* at 35-36.

<sup>34</sup> Again this account relies very much on Mingers. *Id.*

entity is not defined by its components but rather by their *relations* to one another and to their environment.

3) The parts function in ways that are not governed by any central command in the entity (mitochondria does x; skin develops rash; "backspace" triggers cursor movement). Rather they react to stimuli that consist of news of a difference that is relevant to the part that responds and which an observer conceives as "information."

4) The most valuable information, Bateson and others explain, is that which is least expected or least probable, because such information most drastically reduces the likelihood of other possibilities. (When deciphering an English code word, for instance, being told that the letter Q occurs at the beginning provides more information than being told that the letter E occurs at the beginning.)

5) Contexts may be put in context; higher-order systems may include an observer and the system being observed. A big issue thus involves recursivity and sorting out the status of levels of systems in which observers operate within systems they observe. As when social research informs social policy, an observing entity (or social researcher) acts within a (legal) system and in so doing constitutes itself as something other than a "pure" observer outside the system. The system that incorporates the operating observer is constituted as another system than it would otherwise have been.

6) A system or its world is a network of activity — what Foucault may have meant by a "microphysics of power" — in which issues of circulation/transmission and flux/pattern/randomness are favored over issues of agency or the production or causing of effects. (Grammatically speaking, one can think of this network of activity as a sentence, which normally requires a subject and predicate, in which verb-ing or predicating displaces and replaces the controlling noun or subject.)

In the light of this brief account of systems thinking, Texas's belief in a computer's ability to substitute for some of the functions carried out by a lawyer makes some sense. When "communication" is grasped not as what Bateson considers it to be — a scientist's "explanatory principle" or metaphor — but as the activity itself of an abstracted system, then properly programmed legal software may be considered to communicate in a legal system in the same way that a lawyer is thought to communicate with a client. When "practice" consists of producing responses and selecting questions and forms from within a field of communicative possibilities, the interface between user and program constitutes a system comparable to the system of face-to-face interaction between lawyer and client. Although the processes internal to the software may not be the same as those *within*



a human lawyer,<sup>35</sup> information exchange *between* user and computer and between client and lawyer looks similar.

Using the terms of systems thinking, the Texas legislature's disclaimer requirements become an attempt to reintroduce "news of a difference" so as to trigger a change in a user's use of or reliance on the software. As disclaimers become boilerplate, though, they are less likely to impart information of value to the user. What was called the "spiraling" of information above constitutes the creation and reintegration of additional information into a higher-order system. The flurry of recommendations for websites and other mechanisms to assess and disseminate evaluations of the reliability of software based on user satisfaction and other expert opinion, that is, follows as a response to a perceived risk of structural coupling, in which users will adapt to recurring patterns of disclaimers by clicking, without reading, "I have read and accept" prompts. Measures proposed in law reviews to produce quality control through increased access and integration of users and experts into more and more sophisticated systems of assessment produce ever more structurally-coupled users, however, who, like the "empowered citizens" of sociological society discussed above, participate in a seemingly limitless self-generating system.

## V. CRITICAL ISSUES

The law of modern sociological society tells its addressees what to do via an ever expanding system of self-generating communication. It involves a shuffling of information that may not even any longer require papers, as users are integrated into a system of networks — or networks of systems. Like sociological society, law as a communicative system perpetuates itself. Modern sociological society appears as a seemingly limitless self-generating system of communicative law. It is characterized neither by "crisis" nor by a "critical condition" whose diagnosis would yield the imminent possibility of a turning point. For a critical condition involves some kind of system failure and instability in which the unstable body or entity cannot stay. Texas' disclaimer requirement concerning legal products, as well as other proposed interventions intended to promote transparency and accountability through

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35 This is the issue in the "Why Computers Can't Think" AI or artificial intelligence literature. *See, e.g.*, HUBERT DREYFUS, *WHAT COMPUTERS CAN'T DO: A CRITIQUE OF ARTIFICIAL REASON* (1972); HUBERT DREYFUS, *WHAT COMPUTERS STILL CAN'T DO: A CRITIQUE OF ARTIFICIAL REASON* (1992).

endless systems of reporting, stabilize law and society. Like incubators, drugs, and other life support measures, they diffuse potential difficulties before systems failures can occur. But the self-perpetuation of sociological society that occurs through such communicative strategies also defers the possibility of a critical moment — of passage from an unstable state into a stability that could be sustained without intervention. The social system — despite signs or claims of isolated crises that through interventions will be incorporated into its functioning — never fails.

Far from being in critical condition then, modern sociological society appears quite stable. It seems rather to be in a coma ("Talk to Her"<sup>36</sup>). To respond to sociological society as if it were in critical condition is to perpetuate the oxymoronic conditions — of averting crisis in the system — that enable sociological society to sustain itself through a limitless integration of communicative users, products, and services. To intervene in the expressive environment of modern society risks reinforcing and justifying the very sorts of self-generating communicative measures that are the hallmark of its law. Perhaps this is a risk one must take.

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<sup>36</sup> In Almodovar's film of this name, "talk to her" is a response to coma. In a coma, consciousness has apparently been lost and in deep senses, one is unaware. TALK TO HER (Sony Pictures 2002).