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The Dynamic Cycle of Legal Change

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ARTICLE

THE DYNAMIC CYCLE OF LEGAL CHANGE

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The life of the law has not been logic: it has been experience. . . .
The law embodies the story of a nation's development through many centuries,
and it cannot be dealt with as if it contained only the axioms and corollaries
of a book of mathematics.[2]

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[2] OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1-2 (1881).

TABLE OF CONTENTS

Introduction

Justice Holmes's observation that the law is a product of empirical experience, not a problem of mathematics, leaves us with the task of figuring out how the legal system actually works. Although Holmes made his statement over 130 years ago, there is still no universally accepted analytical approach for describing how the American legal system creates and changes the law. This article proposes a "Dynamic Cycle of Legal Change" as a model for understanding the structure and operation of the American legal system.

Part I first posits that we should consider the legal system from an "information systems" perspective. Part II then describes the proposed "Dynamic Cycle of Legal Change" (DCLC) as an information system model of the legal system. Part III illustrates the operation of the DCLC in three settings: common law, legislation, and direct democracy. Illustrations include settings of gender equality, fame as a property asset, palimony claims, crime victims' bills of rights, same-sex marriage statutes, solar acts, and the California coastal protection initiative and subsequent statute.

I. An Information Systems Approach to the American Legal System

Systems theory conceives of modern societies as comprised of systems of communication for processing information.[3] Examples of such systems include private

[3] Benjamin J. Richardson, *Financing Environmental Change: A New Role for Canadian Environmental Law*, 49 MCGILL L.J. 145, 170 (2004). *See generally* NIKLAS LUHMANN, LAW AS A SOCIAL SYSTEM (Klaus A. Ziegert trans., Fatima Kastner, Richard Nobles, David Schiff & Rosamund Ziegert eds., 2009).

entities — such as corporations or partnerships — and public entities — such as cities or state highway departments.

Information systems engage in dynamic, continuous processes of inputs, reactions, and feedback.[4] A corporation, for example, obtains inputs of information regarding how its products or services are received by the market, reacts to that information by adjusting its production or marketing, and then repeats the cycle. Similarly, a city obtains inputs of information regarding its operations from the citizenry, reacts to that information by adjusting the manner in which it provides public services, and then repeats the cycle.

Herbert Simon, in his path breaking work, *The Sciences of the Artificial*, emphasized that the structure and operation of society's information systems is the result of human design.[5] Thus, he suggested that we can design information systems, or "artifacts," on a societal scale.[6]

Only until comparatively recently, however, has the American legal system been viewed as an information system.[7] Henry Smith has studied specific fields of law — such as contract, tort, or intellectual property — using an information systems approach.[8] Other scholars have

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[4] Peter Brandon Bayer, *Sacrifice and Sacred Honor: Why the Constitution is a "Suicide Pact,"* 20 WM. & MARY BILL RTS. J. 287, 332 n.244 (2011); *see also* FREDERICK L. BATES, SOCIOPOLITICAL ECOLOGY: HUMAN SYSTEMS AND ECOLOGICAL FIELDS 80 (1997).

[5] HERBERT A. SIMON, THE SCIENCES OF THE ARTIFICIAL 111 (3rd ed. 1996) ("Everyone designs who devises courses of action aimed at changing existing situations into preferred ones.").

[6] *Id.* at 141.

[7] *See, e.g.*, Gunther Teubner, *How the Law Thinks: Toward a Constructivist Epistemology of Law*, 23 LAW & SOC'Y REV. 727, 739 (1989) ("The law autonomously processes information, creates worlds of meaning, sets goals and purposes, produces reality constructions, and defines normative expectations . . . .").

[8] Particularly significant in this regard is Henry Smith's work: Henry E. Smith, *Property as the Law of Things*, 125 HARV. L. REV. 1691

applied variants of complex adaptive systems theory — such as game theory and chaos theory — to the study of the legal system, but such efforts have foundered on the shoals of indeterminacy that such variants produce.[9]

There is no universally accepted analytical approach for describing how the American legal system creates and changes law.[10] Systems theory can inform understanding of the American legal system, but we need a model for understanding its structure and operation.[11] This article proposes a "Dynamic Cycle of Legal Change" as such a model.

(2012); Henry E. Smith, *Modularity and Morality in the Law of Torts*, 4 J. TORT L. 1 (2011); Henry E. Smith, *Institutions and Indirectness in Intellectual Property*, 157 U. PA. L. REV. 2083 (2009); Henry E. Smith, *Modularity in Contracts: Boilerplate and Information Flow*, 104 MICH. L. REV. 1175 (2006).

[9] *See, e.g.*, J.B. Ruhl, *Law's Complexity: A Primer*, 24 GA. ST. U. L. REV. 885 (2008). On the problems of indeterminacy, which such variants produce, see Jeffrey D. Rudd, *J.B. Ruhl's A Law and Society System: Burying Norms and Democracy under Complexity Theory's Foundation*, 29 WM. & MARY ENVTL. L. & POL'Y REV. 551 (2005) (critically analyzing J.B. Ruhl, *Complexity Theory as a Paradigm for Dynamical Law-and-Society System: Wake-Up Call for Legal Reductionism and the Modern Administrative State*, 45 DUKE L.J. 849, 861 (1996), which concludes that "[Y]ou can't ever reach absolute system predictability for a nonlinear dynamical system. . . . [Just] blame it on chaos, emergence, and catastrophe.").

[10] *See generally* David T. Richie, *Using John Dewey's Pragmatism Epistemology to Teach Legal Analysis and Communication*, 5 CRIT: CRITICAL LEGAL STUD. J. 1 (2012) (discussing various approaches for describing the American legal system).

[11] Niklas Luhmann suggested that the legal system could be understood by examining its underlying structure, but he did not formulate an explanation of how the legal system actually works. NIKLAS LUHMANN, LAW AS A SOCIAL SYSTEM 140 (Klaus A. Ziegert trans., Fatima Kastner et al. eds. (1993) (2004)) ("This does not mean, as one might suspect at first glance, that the legal system and the political system form one system together. But they do resort to special forms of structural coupling and are linked to each other through that coupling.").

II. The American Legal System as a "Dynamic Cycle of Legal Change"

A. Creation of Law

The following diagram depicts the "Dynamic Cycle of Legal Change."[12]

Courts/Legislatures/Populace
/ \
Legal Doctrine/Rules of Law (Means) Social Values/Norms (Ends)
\ /
Social Reality

The DCLC is a graphic representation[13] of how the legal system makes and remakes the law over time. It is composed of four major interrelated structures: (1) the *Institutions of Law Creation and Change*, in the form of courts,[14] legislatures,[15] and the populace[16] acting through

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[12] I have set out a slightly modified version of this diagram, which is included in DAVID L. CALLIES ET AL., CONCISE INTRODUCTION TO PROPERTY LAW 9 (Lexis-Nexis 2011).

[13] Graphic representations illustrate the operation of dynamic systems. These representations serve to explain the acquisition, processing, and use of information to achieve meaning. *See generally* Jay M. Feinman, *The Jurisprudence of Classification*, 41 STAN. L. REV. 661 (1989); Gerald P. López, *Lay Lawyering*, 32 UCLA L. REV. 1 (1984); John Martinez, *A Cognitive Science Approach to Teaching Property Rights in Body Parts*, 42 J. LEGAL EDUC. 290 (1992); Pierre Schlag, *Missing Pieces: A Cognitive Approach to Law*, 67 TEX. L. REV. 1195 (1989). *See also* Timothy P. Terrell, *Flatlaw: An Essay on the Dimensions of Legal Reasoning and the Development of Fundamental Normative Principles*, 72 CALIF. L. REV. 288 (1984) (application of cognitive principles to explain legal reasoning by means of graphic representations, such as lines, planes, and cubes).

[14] Courts "make" law. The now outdated "declaratory" or "Blackstonian" theory of judicial decision making posits that courts merely "find" the law rather than "make" it. For discussions of the declaratory theory, see Linkletter v. Walker, 381 U.S. 618, 622-29

(1964); Great N. Ry. v. Sunburst Oil & Ref. Co., 287 U.S. 358, 364-65 (1932); J. GRAY, NATURE AND SOURCES OF LAW 218-27 (1921). In contrast, the modern Legal Realist position is that courts indeed "make" law. *See* Levy, *Realist Jurisprudence and Prospective Overruling*, 109 U. PA. L. REV. 1, 2, 6 (1960) (judges as much as legislators exercise an ineluctable law-creating function). *See generally* Gilmore, *Legal Realism: Its Cause and Cure*, 70 YALE L.J. 1037 (1961); BENJAMIN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921).

In an earlier article, I suggested that both approaches can be mapped onto an analytical framework that considers judicial decision making as involving three decisions: (1) the substantive decision to change the law; (2) the temporal decision to identify the transactions to which the change applies; and (3) the remedial decision to determine whether a remedy should be provided to those who have reasonably relied on the prior law to their detriment. *See* John Martinez, *Taking Time Seriously: The Federal Constitutional Right to be Free from "Startling" State Court Overrulings*, 11 HARV. J.L. & PUB. POL'Y 297, 299-300 (1988).

Both theories therefore entail the threshold decision whether to change the substantive law. The difference comes in the second, temporal, decision identifying the transactions to which the change will apply and in the third, remedial, decision whether to provide a remedy to those who reasonably relied on the prior law. Under the "declaratory" theory, all substantive changes are by definition retroactive, since the change in the law already "existed." And since it therefore was not a "change" at all, because everyone is presumed to know the law, no remedy is required.

In contrast, as set out in my earlier article, the Legal Realist conception that courts indeed "make" law requires serious consideration of the second two decisions. *See* John Martinez, *Taking Time Seriously: The Federal Constitutional Right to be Free from "Startling" State Court Overrulings*, 11 HARV. J.L. & PUB. POL'Y 297, 346 (1988) (suggesting that either compensation, or a reasonable period of time to amortize their investments, should be provided to those who reasonably rely on common law property rules that are subsequently overruled by state courts).

[15] "Legislatures" includes Congress at the federal level, state legislatures, and local government legislative bodies, such as city councils.

[16] There is no national "power of initiative." The only way for the general public to impose a rational legislating requirement on Congress would be through the cumbersome constitutional amendment process. David B. Magleby, *Let the Voters Decide: An Assessment of the*

initiatives or referenda;[17] (2) *Social Reality*, as perceived by the institutions of legal change; (3) *Social Values (or "Norms")*, inferred as "should" statements, from social reality as perceived by the institutions of legal creation and change; and (4) *Legal Doctrine* (or "rules of law"), whereby the institutions of legal creation and change seek to implement the derived social values or norms.

The components and operation of the DCLC confirm that "every legal decision is a moral decision."[18]

Initiative and Referendum Process, 66 U. COLO. L. REV. 13, 42 (1995) ("The United States is one of only five democracies which has never held a national referendum . . . ."). However, about half the states do have the initiative mechanism in place whereby citizens may enact statutory or constitutional amendments through popular vote. *See, e.g.*, CAL. CONST. art. IV, § 1 ("The legislative power of this State is vested in the California Legislature which consists of the Senate and Assembly, but the people reserve to themselves the powers of initiative and referendum."); OR. CONST. art. IV, § 1 ("The legislative power of the state, except for the initiative and referendum powers reserved to the people, is vested in a Legislative Assembly, consisting of a Senate and a House of Representatives."). David B. Magleby, *Let the Voters Decide: An Assessment of the Initiative and Referendum Process*, 66 U. COLO. L. REV. 13, 15 (1995) ("Only six states west of the Mississippi River do not have some form of initiative . . . while only eight states east of the Mississippi have the process."). *See generally* K.K. DuVivier, *By Going Wrong All Things Come Right: Using Alternate Initiatives to Improve Citizen Lawmaking*, 63 U. CIN. L. REV. 1185 (1995) (discussing history of initiatives).

[17] Executives, such as the President, governors, and mayors also "make" law but usually through authority delegated by legislative bodies. When they do have independent authority to make law, the mechanism and constraints applicable to legislatures, the other elected institutions of legal change, apply to executives as well. Accordingly, executives are not treated as separate institutions of legal change in the DCLC.

[18] My good friend and mentor, John J. Flynn, late Hugh B. Brown Professor at the S.J. Quinney College of Law at the University of Utah, used to tell me this all the time. This article is the fruition of my understanding of that phrase and is dedicated to his memory.

The entire DCLC is a design of the legal system. The institutions of law creation and change (courts, legislatures, or the people acting through direct democracy in the form of initiatives and referenda) comprise the "modules" or "subsystems," which are the engines of the DCLC.[19] Social Reality is the object "data" used by the institutions of law creation and change. The Norms derived from social reality and the Legal Doctrine to implement those norms are the "output" of the institutions of legal change.[20]

The operation of the DCLC consists of a dynamic process: From a perceived social reality, social values or norms ("should" statements) are inferred by the institutions of law creation and change.[21] Those institutions then transform the inferred "should" into enforceable legal doctrine, which is then applied to society.[22] Legal doctrine is thus the *means* whereby social values or norms, as *ends*,

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Cf. Arthur J. Jacobson, *Autopoietic Law: The New Science of Niklas Luhmann*, 87 MICH. L. REV. 1647, 1652 (1989) ("The norm is the application of the norm. It is not *prior* to application.").

[19] HERBERT A. SIMON, THE SCIENCES OF THE ARTIFICIAL 184 (3rd ed. 1996) (noting that systems may be composed of interrelated subsystems — which in turn may be composed of sub-subsystems and so on — "until we reach some lowest level of elementary subsystem").

[20] *Id.* at 146-47 (society is the "data" used by institutions in the legal system).

[21] *See generally* Lawrence A. Cunningham, *The Common Law as an Iterative Process*, 81 NOTRE DAME L. REV. 747 (2006). *See also* Guido Westkamp, *Code, Copying, Competition: The Subversive Force of Para-copyright and the Need for an Unfair Competition Based Reassessment of DRM Laws after INFOPAQ*, 58 J. COPYRIGHT SOC'Y U.S.A. 665, 724-25 (2011) ("Normativity depends on recognizing structural changes between the legal and social sub-systems to which the law is to apply . . . .").

[22] *See* Thomas O. Beebee, *Can Law-and-Humanities Survive Systems Theory?*, 22 L. & LITERATURE 244, 263 (2010) (describing this process as "formalization," which can also be termed "channeling" or "translation," whereby legal institutions elicit norms from social reality and "formalize," "channel," or "translate" such norms into legal doctrine).

are implemented.[23] The cycle then begins again: The institutions of legal creation and change use the feedback from social reality to infer new norms ("should") and/or to modify legal doctrine.[24]

B. Change of Law

The operation of the DCLC shows how a change of law may occur at the level of legal doctrine or, more fundamentally, at the level of social values or norms.

1. Change in Legal Doctrine

Legal doctrine is adjusted from time to time to ensure that the "fit" between the inferred social values or norms and their implementation is appropriately "close." In this form of legal change, the social values or norms are

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[23] Gunther Teubner similarly describes the operation of the legal system as a "hypercycle": "Law . . . distinguishes itself from society . . . by constituting components in a self-referential way and linking them together in a hypercycle." GUNTHER TEUBNER, LAW AS AN AUTOPOIETIC SYSTEM 25 (Anne Bankowska & Ruth Adler trans., Zenon Bankowski ed., 1993).

[24] This has been described as a "positive institutional feedback loop." Daria Roithmayr, *Them That Has, Gets*, 27 MISS. C. L. REV. 373, 376-77 (2008). *See also* Peter Brandon Bayer, *Sacrifice and Sacred Honor: Why the Constitution is a "Suicide Pact,"* 20 WM. & MARY BILL RTS. J. 287, 332 n.244 (2011):

> A "system" that promotes interplay or interaction is always ongoing and active, never static or inert. A system is a dynamic, continuous process of actions and reflection based on inputs, reactions and feedback to assess the inputs and reactions which, in turn, inspire successive sets of inputs, reactions and feedback. Under systems theory, unlike pure structural-functional analysis, things and events, because they move in time, cannot be understood simply by scrutinizing them at any given moment.

not questioned, but the efficacy with which the legal doctrine implements those social values or norms is examined and, if necessary, modified.

For example, in examining social reality, a legislature may find that vehicle manufacturers have installed additional or more effective safety devices. Accordingly, the legislature may increase speed limits because vehicles have become safer. The underlying norm that people should be protected from driving faster than is safe remains the same.[25]

2. Change in Social Values or Norms

More fundamentally, legal doctrine may be adjusted because the underlying social norms or values derived from social reality have changed. In this form of legal change, when social reality changes — or at least when the institutions of legal creation and change perceive that reality has changed significantly — the social norms or values inferred by the institutions may be modified as well.[26]

For example, in examining social reality, Congress and the state legislatures perceived that society had changed such that human beings should not be owned as

[25] Of course, competing norms, such as environmental protection from vehicle pollution or fuel conservation, may make increasing the speed limit inadvisable.

[26] Niklas Luhmann describes this as the "*temporalization of the validity of norms.*" NIKLAS LUHMANN, LAW AS A SOCIAL SYSTEM 469 (Klaus A. Ziegert trans., Fatima Kastner et al. eds., 2009) ("Norms, and the validity that supports them, are no longer based on the constants of religion or nature or an unchallenged social structure, but are now experienced and dealt with as time projections. They are valid 'until further notice'. This not only makes them felt as contingent but also as cognitively sensitized. . . . What is meant is only that norms are equipped with assumptions of reality . . . .").

objects of property rights and implemented that norm through the adoption of the Thirteenth Amendment.[27]

III. Illustrations of the Operation of the Dynamic Cycle of Legal Change

A. Common Law — Courts as Institutions of Legal Change

1. Gender Equality

In Kirchberg v. Feenstra,[28] the United States Supreme Court held that a mortgage on the home of a married couple, signed only by the husband without the notice or consent of the wife, violated the federal Equal Protection Clause. The mortgagee had obtained the mortgage pursuant to the Louisiana "Head and Master" statute, which authorized the husband to alienate the property of the marriage without his wife's prior notice or consent.[29]

In terms of the DCLC, Social Reality prior to the Court's decision viewed women as incapable of managing their own property once married.[30] The Norm (or "should"

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[27] U.S. CONST. amend. XIII, § 1 ("Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."). That change, of course, occurred only after the trauma of the Civil War.

[28] Kirchberg v. Feenstra, 450 U.S. 455 (1981).

[29] LA. CIV. CODE ANN. art. 2404 (West 1971). The statute was repealed effective on January 1, 1980. *See* LA. CIV. CODE ANN. art. 2325-76 (West 1979). The Feenstra mortgage had been signed in 1974. Kirchberg v. Feenstra, 450 U.S. 455, 457 (1981).

[30] For a discussion of the Napoleonic Code and Spanish law as the sources of the Head and Master statute, see Louis F. Del Duca & Alain A. Levasseur, *Impact of Legal Culture and Legal Transplants on the Evolution of the U.S. Legal System*, 58 AM. J. COMP. L. 1, 25-29 (2010). Married women "owned" equally with their husbands, but only

statement) from that perceived reality was that a man should be the "head and master" insofar as property of the marriage was concerned. The Louisiana Legislature, as the instrument of implementation of that Norm, enacted the Head and Master statute, which embodied the following Legal Doctrine: If a husband signs a mortgage on marital property without the notice or consent of the wife, such mortgage is enforceable.

Mrs. Feenstra got the Court to acknowledge the existence of a different Social Reality: Married women can manage their own property affairs. The Court derived a new social norm: Women should have an equal voice in how marital property is alienated. Accordingly, as the instrument of legal change, the Court modified the Legal Doctrine: If a husband signs a mortgage on marital property without the notice or consent of the wife, such mortgage is *not* enforceable.

2. Fame

In Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.,[31] the court held that fame was protectable as a property asset called the "right of publicity."[32] Thus, the court held, a first transferee of the right of publicity of

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the husband was empowered to act in regard to assets of the marriage. Nina Nichols Pugh, *The Spanish Community of Gains in 1803: Sociedad De Gananciales*, 30 LA. L. REV. 1, 12 (1969) ("Whereas the wife owned equally with her husband, he, as "business manager," of the partnership, actually administered the community of gains. . . . He was described as '*in actu*' (in control) as well as '*in habitu*' (in present interest). The wife was only '*in habitu*' or '*in habitu et in creditu*' (in present interest as creditor) in regard to the *bienes gananciales*, but no less a co-owner.").

[31] Haelan Lab., Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866 (2d Cir. 1953).

[32] *Id.* at 868. *See generally* STUART BANNER, AMERICAN PROPERTY-THE HISTORY OF HOW, WHY, AND WHAT WE OWN 130-61 (2011) (discussing the evolution of "owning fame").

certain baseball players could enforce such right against a subsequent transferee.[33]

In terms of the DCLC, Social Reality prior to the court's decision did not acknowledge "fame" as a proper object of property rights. The Norm (or "should" statement) from that perceived reality was that people should not be able to exercise any of the sticks in the bundle of rights — transfer, use, or exclusion — against others in regard to fame. Previous courts had not conceived of such a property right. Thus, the operative legal doctrine was as follows: If a person contracts to allow another to use his or her photographs, and also subsequently contracts with a third party to also use his or her photographs, then the first contracting party has no claim against the third party.[34]

The first contracting party in the *Haelan* case got the court to acknowledge the existence of a different Social Reality: Fame has pecuniary value.[35] The court derived a new social norm: People should be able to treat their "fame" as an object of property rights.[36] Thus, the

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[33] Haelan Lab., Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866, 869 (2d Cir. 1953).

[34] Indeed, that is what the defendants in the *Haelan* case asserted. *Id.* at 868.

[35] For it is common knowledge that many prominent persons (especially actors and ball-players), far from having their feelings bruised through public exposure of their likenesses, would feel sorely deprived if they no longer received money for authorizing advertisements and popularizing their countenances, as displayed in newspapers, magazines, buses, trains, and subways. This right of publicity would usually yield them no money unless it could be made the subject of an exclusive grant that barred any other advertiser from using their pictures. *Id.* at 868.

[36] But plaintiff, in its capacity as exclusive grantee of player's right of publicity, has a valid claim against defendant if defendant used that player's photograph during the term of plaintiff's grant and with knowledge of it. It is no defense to such a claim that defendant is the assignee of a subsequent contract between that player and Russell, purporting to make a grant to Russell or its assignees. For the prior

operative legal doctrine became as follows: If a person contracts to allow another to use his or her photographs, and also subsequently contracts with a third party to also use his or her photographs, then the first contracting party has a property claim against the third party.

3. Palimony

In Marvin v. Marvin,[37] the California Supreme Court held that unmarried cohabitants could enforce rights against each other as to assets acquired during the duration of the cohabitation.

In terms of the DCLC, Social Reality prior to the court's decision refused to acknowledge the existence of unmarried cohabitation. The Norm (or "should" statement) from that perceived reality was that people should not cohabit other than in the status of marriage. The courts, as the instruments of implementation of that Norm, followed the Legal Doctrine that, if property had been acquired only in the name of one of the parties to such relationships (typically the man in a heterosexual relationship), then all such property belonged to that party.[38]

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grant to plaintiff renders that subsequent grant invalid during the period of the grant (including an exercised option) to plaintiff but not thereafter. *Id.* at 869.

[37] Marvin v. Marvin, 557 P.2d 106 (1976).

[38] This was the ruling of the lower court in Marvin v. Marvin:

> In the instant case plaintiff and defendant lived together for seven years without marrying; all property acquired during this period was taken in defendant's name. When plaintiff sued to enforce a contract under which she was entitled to half the property and to support payments, the trial court granted judgment on the pleadings for defendant, thus leaving him with all property accumulated by the couple during their relationship.

Id. at 110.

Michelle Marvin persuaded the California Supreme Court to acknowledge the existence of a different Social Reality: "The 1970 census figures indicate that today perhaps eight times as many couples are living together without being married as cohabited ten years ago."[39] The court derived a new social norm: "The courts should enforce express contracts between non-marital partners except to the extent that the contract is explicitly founded on the consideration of meretricious sexual services."[40] Accordingly, as the instrument of legal change, the court modified the Legal Doctrine:

> In the absence of an express contract, the courts should inquire into the conduct of the parties to determine whether that conduct demonstrates an implied contract, agreement of partnership or joint venture, or some other tacit understanding between the parties. The courts may also employ the doctrine of quantum meruit, or equitable remedies such as constructive or resulting trusts, when warranted by the facts of the case.[41]

B. Legislation — Legislatures as Institutions of Legal Change

1. Crime Victims' Bills of Rights

In 1994 the Utah Legislature proposed for adoption[42] what subsequently became the Victims' Rights

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[39] *Id.* at 110 n.1.
[40] *Id.* at 110.
[41] *Id.*
[42] S.J. Res. 6, 1994 Utah Laws 1610, 1610-11.

Amendment to the state constitution.[43] The Amendment and the subsequent implementing legislation gave crime victims numerous substantive and procedural rights that they did not have before, including the right to be informed of, be present at, and be heard at important criminal justice proceedings and to have the judge consider victims' statements as relevant information in sentencing.[44]

In terms of the DCLC, Social Reality prior to the Amendment did not view crime victims as proper participants in criminal justice proceedings involving the crimes committed against them. The derived Norm was that crime victims should not be allowed to participate in criminal proceedings. Legislatures and common law courts, as the instruments of implementation of that Norm, followed criminal procedure rules that excluded evidence from such crime victims as well.

My colleague, Professor Paul Cassel, was extremely instrumental in getting the Utah Legislature to acknowledge a different Social Reality: Victims of crime are deeply affected and are often anxious to participate in subsequent criminal proceedings involving defendants charged with the crimes against them. The new derived Norm became as follows: A crime victim should have a right to participate in criminal proceedings involving his/her victimization. Accordingly, both the Utah

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[43] Paul G. Cassell, *Balancing the Scales of Justice: The Case for and the Effects of Utah's Victims' Rights Amendment*, 1994 UTAH L. REV. 1373. Professor Cassell was also instrumental in the subsequent enactment of The Crime Victims' Rights Act ("CVRA") in 2004. Pub. L. No. 108-405, tit. I, 118 Stat. 2260, 2261-65 (2004) (codified as amended at 18 U.S.C. § 3771 (2006)). Paul G. Cassell & Steven Joffee, *The Crime Victim's Expanding Role in a System of Public Prosecution: A Response to the Critics of the Crime Victims' Rights Act*, 105 NW. U. L. REV. COLLOQUY 164 (2011).

[44] Paul G. Cassell, *Balancing the Scales of Justice: The Case for and the Effects of Utah's Victims' Rights Amendment*, 1994 UTAH L. REV. 1373, 1386-1416.

Legislature and the populace enacted a new legal doctrine: A crime victim has the right to offer evidence in subsequent criminal proceedings involving his/her victimization.

2. Same-Sex Marriage Statutes

Same-sex marriage statutes are increasingly proliferating across the United States.[45] In terms of the DCLC, Social Reality prior to the statutes viewed the status of marriage as reserved for couples comprised of a man and a woman. The derived Norm was that same-sex couples should not be able to marry. Accordingly, marriage licenses were issued only to heterosexual couples.

The gay and lesbian community and their supporters, in an ongoing struggle, have been able to convince state legislatures to acknowledge a different Social Reality: Same-sex couples are "couples" in the same sense as heterosexual couples. The newly derived Norm, still in the process of development, is that same-sex couples should be able to acquire the status of marriage. Thus, at least some states have enacted a new legal doctrine: Marriage licenses may be issued to same-sex couples.

3. Solar Acts

The rejection of the "right to light" doctrine at common law meant that landowners with solar collectors could not prevent their neighbors from shading the collectors.[46] In terms of the DCLC, this reflected a Social

[45] *See generally* Clifford J. Rosky, Perry v. Schwarzenegger *and the Future of Same-Sex Marriage Law*, 53 ARIZ. L. REV. 913 (2011); Laurence H. Tribe, *The Constitutional Inevitability of Same-Sex Marriage*, 71 MD. L. REV. 471 (2012).

[46] *See* Prah v. Maretti, 321 N.W.2d 182 (1982) (discussing evolution of "right to light" doctrine at common law).

Reality whereby access to sunlight was viewed as merely for aesthetic purposes. The derived Norm was that solar collectors, whether in the form of trees, swimming pools, or solar arrays, should not be allowed to prevent development of adjacent lands. Thus, landowners could develop their land regardless whether such development shaded adjacent parcels.[47]

Environmentalists have persuaded state legislatures to acknowledge a different Social Reality: Solar collectors aid in reducing dependency on other forms of energy.[48] The newly derived Norm is that solar collectors — variously defined among the different statutes — should be protected against shading by neighboring landowners.[49] Solar acts embody a new legal doctrine: Landowners with solar collectors have rights against neighboring landowners who would shade the solar collectors.

C. Direct Democracy — The Populace as the Institution of Legal Change

California voters passed Proposition 20 in 1972 because of concerns that cities and counties along California's coastline were allowing overdevelopment of coastal lands.[50] The initiative measure enacted substantive

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[47] *See, e.g.,* Fontainebleau Hotel Corp. v. Forty-Five Twenty-Five, Inc., 114 So. 2d 357 (Fla. App. 1959), *cert. denied*, 117 So. 2d 842 (Fla. 1960) (hotel owner may shade adjacent hotel's swimming pool).

[48] *See generally* Uma Outka, *Siting Renewable Energy: Land Use and Regulatory Context*, 37 ECOLOGY L.Q. 1041 (2010).

[49] For an analysis of the different definitions of solar collectors in solar acts, see Troy A. Rule, *Shadows on the Cathedral: Solar Access Laws in a Different Light*, 2010 U. ILL. L. REV. 851 (2010). *See generally* Sara C. Bronin, *Modern Lights*, 80 U. COLO. L. REV. 881 (2009).

[50] Codified originally at CAL. PUB. RES. CODE § 27000 as a temporary measure and subsequently replaced by the Coastal Act of 1976, CAL. PUB. RES. CODE §§ 30000-30900. *See* Marc B. Mihaly, *Living in the Past: The* Kelo *Court and Public-Private Economic Development*, 34 ECOLOGY L.Q. 1, 50-51 (2007) (popular concern about

and procedural constraints on such development and provided that those restrictions would be administered by a state coastal commission and regional coastal commissions.[51]

In terms of the DCLC, land use regulation along California's coastline prior to the coastal initiative reflected a Social Reality whereby city and county governments were responsible for such regulation. The derived Norm was that coastal landowners should only be concerned about what such local governments demanded — or did not demand — in regard to coastal land development. Thus, the operative land-use regulation rules were contained only in the land-use codes of the coastal cities and counties.

Environmentalists seeking to prevent overdevelopment of coastal lands, as well as inland residents who could not influence the land-use codes enacted by coastal cities and counties, mobilized on a statewide basis and passed the coastal initiative. The initiative reflected a different Social Reality: Development of the coastline was a concern not only of coastal landowners and coastal cities and counties but of all of California's population. The newly derived Norm was that coastal landowners should be accountable to a statewide agency, not just to local cities and counties. The initiative thus enacted a new legal doctrine: Coastal landowners became subject to the statewide initiative and the regulations promulgated by the state coastal commission, pursuant to the initiative and subsequent statute.

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overdevelopment of the coast led to passing of California Coastal Initiative).

[51] *See* Avco Cmty. Developers, Inc. v. South Coast Reg'l Comm'n, 553 P.2d 546 (1976) (discussing coastal initiative and subsequent statute).

Conclusion

The Dynamic Cycle of Legal Change primarily seeks to describe how the legal system operates. It may also have a prescriptive dimension if it helps understanding of how the processes of legal creation and change *should* work.[52] However, I will leave that task for a future article.

[52] *See* HELEN NISSENBAUM, PRIVACY IN CONTEXT: TECHNOLOGY, POLICY, AND THE INTEGRITY OF SOCIAL LIFE 138-39 (2009) (descriptive norms merely purport to represent reality; prescriptive norms seek to mandate that certain actions be performed).