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What legal design is as opposed to could/should be

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Abstract: How come legal designers keep relying on design things that make change appear possible when we know that legal things are more reliable at making change actually possible? We argue for an understanding of what legal design is as opposed to could / should be in terms of actual change (sensed as changes of a world) and the appearance of change (sensed as changed in the world). We describe what things and background practices are and do, what design things and legal things are and do, and what designers and lawyers or judges are and tend to do. We conclude with a discussion of what legal designers could/should be doing and what will stand in their way.

Keywords: actual change, appearance of change, background practices, disclosive skills

1. Overview and concerns

1.1 *Where is this coming from and what are we calling for?*

Twenty-five years ago, Charles Spinosa, Fernando Flores, and Hubert Dreyfus put forward an unusual book, *Disclosing New Worlds*, in which they argued that we all could and should become intensely involved with bringing about meaningful historical change in our own lives. Drawing on the thinking of Martin Heidegger, these authors formulated *history-making* as an everyday phenomenon brought about through practices that are continuous with our pasts, revealed by anomalies that are common to our lives, sensed as changes of a world, and opened up by human skills. For them, making history is about refocusing us around what matters, remaking our familiar behaviors, and clarifying what we have actually been doing in our own lives. All such actions, they went on to argue, are sensed as historical in magnitude because they each introduce lasting shifts in the way that we see and deal with each other.

Interestingly, in its conclusion, *Disclosing New Worlds* identifies courts and universities as representing two of our last remaining history-making institutions today, before calling our attention to a need for schools to adapt their curricula around history-making. This is because when we lose our capacity for bringing about historical change, we tend to fall back on



customary ways of dealing with things and with others around us. In turn, this leads us to take for granted the way things are, making it difficult for us to change our own lives for the better. We believe that law can bring out our own roles as history-makers because, as these authors assert, what judges and lawyers are doing when they are at their best is making history. However, to preserve their role as history-makers, lawyers and judges must understand law as a kind of design that is capable of introducing lasting shifts in the way we see and deal with each other by bringing out the marginal, forgotten, or overlooked practices of our lives.

Except, we have noticed how many people who get into law end up not being able to make the difference they came to law school to learn how to make. We are concerned that many lawyers and judges are losing sight of and losing touch with their background practices as history-makers. We believe the world of legal education plays a foundational role in all of this, which is where legal design has its intellectual roots. We see in the norms, values, and institutions inherent in legal education a potential to create a sea change through teaching and addressing how to equip lawyers and judges in reprising their roles as history-makers.

We believe this can be done through legal design because we think its proponents are uniquely suited to equip people to get past barriers they face using their legal education to make a difference in the world. We are further motivated by the potential of identifying common ground between legal and design education, towards understanding the shared background practices of lawyers or judges and designers. We hope to offer legal designers a deeper understanding of their task today by introducing an alternative foundation through which we believe the field as a whole can have a more dramatic and fundamental impact. In this paper, we extend the notion of history-making put forward by *Disclosing New Worlds* twenty-five years ago into legal design today, arguing, first, that its proponents could and should recognise their task as putting lawyers and judges back in touch with law as a special kind of design capable of bringing out the marginal, overlooked, or forgotten practices of our lives, and second, that doing so will require them to learn its disclosive skills. We conclude with a remark calling for expanded practices that move beyond integrating design methods into a field of law, toward disclosing law as a particular and consequential form of designing.

1.2 What is a basic overview of this paper?

As a new field of practice, legal design has come to rely almost entirely on constructs that are borrowed from the world of design, as opposed to constructs from the world of law; that is unusual because most of its proponents went through law school, where they learned to harness legal constructs in their work as legal professionals. In response to this observation, our paper argues that legal constructs fit into the world of law better than design constructs do, and as such, upon closer look, they seem to be much stronger tools for bringing about actual change, as opposed to merely its appearance. In order to discern that difference, and the kind of redirection it would require of the field, we consolidate the notion of constructs into things, and argue that legal designers could and should turn back to and dig into legal things, in addition to design things. If they do that, legal designers will put lawyers or judges

back in touch with law as a special kind of design, capable of bringing out the marginal, overlooked, or forgotten practices of our lives, against institutions or professions that cover them up. To get there, legal designers must commit themselves to learning three disclosive skills.

2. Actual change and the appearance of change

2.1 What is actual change, and in what ways do we sense it around us?

We distinguish *actual change* (change that is actually possible whether or not it appears so), from *the appearance of change* (change that appears possible whether or not it actually is). We discern these kinds of changes through how we come to sense them across our everyday lives as well as when they are made possible. Actual changes are sensed as *changes of a world* and are made possible when we rely on background practices that make things what they are, thereby changing the way we see and deal with ourselves and things. In contrast, appearances of change are sensed as *changes in the world* and thus do not change how we see or deal with ourselves or others and such changes are all that is possible to make when people rely on things as they are, and not background practices that made them that way.

2.2 How do we fall out of touch with/sight of things and practices in the world?

Change appears possible when we rely on things as they are. Change becomes actually possible when we rely on background practices that make things what they are in order to use things as other than they are. To put that another way, when we rely on things as they are, we take for granted background practices that make them that way. In turn, we lose sight of and touch with how the things we rely on became what they are, so we do not see or use them other than how they are. Losing sight of background practices means that they no longer show up for us. Losing touch with background practices means that they no longer matter to us. When background practices no longer show up or matter to us, we cannot rely on them to bring about actual changes that we and others will sense as changes of a world.

3. The task of legal designers and law as a special kind of design

3.1 What do designers tend to do and what can they not do?

At their best, designers learn to rely on the background practices that make design things what they are, and because of this, designers are attuned to the ways that design things could and should be other than what they are. However, design things are not legal things, and so they cannot do what legal things do. What we mean here is that design things do not come from and therefore do not fit well into the world of law, so they cannot be relied on to bring about actual change from that world. Bringing about actual change requires designers to rely on the background practices that make legal things what they are, yet such significant learning would necessarily commit them to become intensely involved in the world of law. In contrast, legal designers who have already undertaken a legal education where they learned to use legal things in their work as legal professionals are well positioned to accomplish this.

3.2 What do lawyers and judges tend to do and why does that matter?

At their best, lawyers and judges have successfully brought about actual change, yet more often than not, they do not and this is a result of having lost touch/sight with their own background practices. Lawyers and judges tend to rely on legal things as they are, rather than relying on the background practices that make them that way. This is because legal things call us to use them as they are, because institutions and professions have covered up the background practices that make them that way, so lawyers and judges do not take up legal things as other than they are. When background practices are occluded by legal institutions or professions, lawyers and judges are kept from taking up legal things as other than they are. In contrast, legal designers who recognise this much may see their work as helping judges and lawyers overcome these challenges, and thus could/should be actively doing so.

3.4 What must legal designers do and why does that matter?

Throughout the development of this field, it is clear that legal designers have tended to rely on design things as they are, not the background practices that made them that way, thus legal designers tend to make change appear possible in design, when it actually is not in law. To make actual change, legal designers must rely neither on design things nor legal things as they are, yet instead must make the background practices that make legal things what they are show up for and matter to lawyers and judges who have lost sight of or touch with them. If they do this, legal designers would get lawyers and judges to see legal things as other than they are and use them that way, putting them back in touch with law as a special kind of design capable of bringing out marginal, forgotten, and overlooked practices of our own lives.

4. The challenges of institutions and professions

4.1 What makes actual change so difficult for lawyers and judges to make, and what must legal designers do to help them make it?

A first obstacle are professions, because in contrast to the practice of law, the profession of law covers up background practices making legal things what they are, so many lawyers and judges rely on them merely as they are, as opposed to seeing and using them as other than they are. In response, legal designers must work against this challenge of professions to keep such lawyers and judges in touch with/in sight of background practices that make legal things what they are. They can do this by relying on background practices that make design things what they are in order to bring out the background practices that make legal things what they are, each of which is covered up by the design and legal professions respectively.

A second obstacle are institutions that tend to cover up things as they are, and this is what keeps law schools narrowly focused on teaching law students what makes legal things as they are, without identifying their common ground with what makes design things as they are, so they do not recognise law as a kind of design, let alone what legal design could and should be as opposed to what it is. In response, legal designers must work against this chal-

lence of institutions to get law schools into teaching law as a kind of design by relying on legal things as if they were design things, so that their shared background practices cannot be ignored. To confront such challenges, legal designers commit themselves to changing the way their own background practices make things as they are by cultivating disclosive skills.

5. Disclosive skills and fundamental redirection

5.1 What skills can make actual change and what does learning them entail?

In order to bring about actual change, legal designers must recognise their most essential task today as putting lawyers and judges back in touch with law as a special kind of design capable of bringing out marginal, forgotten, or overlooked practices of our everyday lives. In so doing, legal designers would equip lawyers and judges to rely on legal things as other than they are by becoming intensely involved in the work of bringing out their shared background practices with design things against the institutions or professions covering them up. To get there, legal designers must cultivate disclosive skills introduced in *Disclosing New Worlds*, and summarized here, as: 1) *reconfiguration* (making a marginal practice central, remaking our familiar behaviors); 2) *cross-appropriation* (adopting a neighboring practice, clarifying what we are actually doing); and 3) *articulation* (focusing a dispersed practice, refocusing us around what matters). All three of these disclosive skills should be familiar to lawyers and designers alike, as each are what is required to skillfully rely on their background practices.

5.2 What would that entail for the field of legal design and its directions, now?

We conclude with a remark to distinguish what we have said legal design could/should be from what legal design is, directionally. In essence, existing practices of legal design involve the direction of *bringing in outside methods for insiders*. Initially developed through its *affirmative* capacities, in the work of navigating legal systems, accessing legal services, and interacting with legal products, this field of practice has since developed in its *critical* capacities, through the work of debating legal worldviews, challenging legal beliefs, or inquiring about legal values. Though these developments are important and have led to interesting work in the field over the past decade, they are not imperative. In our view, legal designers must recognise their most essential task today, not as integrating design methods into a field of law, but as disclosing law as a particular and consequential form of designing. We call for the field to undertake the learning necessary for a fundamental redirection of its practices, toward *bringing out inside methods for insiders*. Through the work of reconfiguring legal practices, cross-appropriating legal skills, or articulating legal concerns, legal design would develop its capacities in ways that are at once critical yet affirmative, or *critically-affirmative*. In so doing, legal designers would equip lawyers or judges who have lost sight or touch with their own background practices, in the work of remaking our familiar behaviors, refocusing us around what matters, and clarifying what we have actually been doing in our lives. Only then, will proponents of this field make actual change, not merely an appearance of change.

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Sankalp Bhatnagar works as a senior researcher at NuLawLab, Northeastern University.