The Autonomy of Law: Two Visions Compared

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Visions of Legal Autonomy

During the past decade the effort to understand the place of the legal system in society has, in England and America, given rise to a renewed interest in the possibility of legal autonomy (Thompson, 1975; Balbus, 1973; 1977; Trubek, 1977). More recently, on the continent of Europe, especially in Germany, scholars have focused on an apparently radical form of autonomy—embodied in the idea of an autopoietic system—in an effort to understand how law functions (Luhmann, 1985d; Teubner, 1984). These two approaches to understanding the legal system paint pictures that have much in common, but they are differently developed; they are supported by different types of arguments and they are advanced at different levels of abstraction.

The Anglo-American approach grows out of the empirical untenability of a crudely instrumental Marxism which posits that law is the barely disguised instrument by which one class dominates another in all things. The clearly redistributive elements of the modern welfare state as well as empirical studies of the treatment of rioters (Balbus, 1973), the enforcement of Draconian, class-based legislation (Thompson, 1975), and even the law of slavery (Genovese, 1972; Tushnett, 1975) have shown that the generation and application of legal norms cannot be explained solely—and sometimes can hardly be explained at all—by the class positions of involved groups and parties. It appears, in particular, that the legal system's own norms of procedure and substance have important implications for the way the law in the first instance affects the distribution of wealth and power between parties. The rediscovery of Pashukanis (1980) and theories building on his work (see e.g., Balbus, 1977, Stone, 1985) have shown that Marxist theories of social organization are not necessarily threatened by legal norms that take no explicit account of the class positions of those whose behavior will fall within the ambit of the law or by the application of legal norms without regard to the social class or other socio-economic attributes of the parties. Indeed, some have suggested that legal autonomy in this sense or even, on occasion, special sensitivity to the interests of the less privileged may
contribute to capitalist domination by giving a legitimacy to law which ultimately makes the masses easier to govern (Hay, 1975; Thompson, 1975; but see Hyde, 1983).

The Continental interest in autopoiesis and its implications for legal autonomy grows, on the other hand, out of a larger concern with systems theory and what systems theory approaches imply for social systems. Its development, to date, is largely associated with the work of one man, Niklas Luhmann, but as the conference at which this paper was first presented attests, other Continental social theorists are becoming increasingly attracted to it (see e.g., Teubner, 1984; infra).

The vision of law as an autopoietic system is rooted, as I understand it, in the idea that society and its major subsystems may be profitably viewed as autopoietic systems, a perspective that is inspired by recent attempts to understand the integrity and functioning of biological systems. Autopoiesis implies a system which is completely closed in the sense that the constitutive elements of a system are all parts of it, and as such both reproduce and are reproduced by it. At the same time an autopoietic system is open to its environment in that the form in which the system reproduces itself takes account — in its own terms — of the behavior and activity that are ongoing in its environment. Put another way, environmental activity is not just or simply mediated by the system of interest (and in this respect autopoiesis is not just another open systems theory). Its implications are indirect as the system models the environment in its own terms (Teubner, 1984), proceeding perhaps to reconstitute or even change itself on the basis of the systemic representation of environmental contingencies. Environmental influences must be indirect because social meanings exist only within the context of social systems (Luhmann, 1985 b). In the case of law this involves — to use Luhmann’s ambiguous and problematic language — a system which is at the same time normatively closed and cognitively open (Luhmann: 1985 d: 6, 7; 1985 c: 113; supra: 19—21; see also the discussion in this paper, infra: 178—182). An important implication is that the legal system takes cognizance of extra-legal activity only in its own terms — that is, only in terms of what is, according to law, legally relevant.

Although the two visions of legal autonomy are not necessarily incompatible, there are important differences between them. In part these differences reflect the fact that the Continental vision involves an abstraction (the legal system as a subsystem of social systems) of an abstraction (social systems as in some sense like biological systems), while the Anglo-American vision of legal autonomy is rooted in the failure of earlier theoretical visions to meet the test of reality.¹ Thus, the Anglo-American vision is influenced by

¹ In addition to the crudely instrumentalist Marxist vision, there was the earlier formalistic vision which posited an autonomy so complete that legal action could be understood as a matter of common sense and logical analysis entirely on the law's own terms. This vision was destroyed forever when confronted with the common sense empiricism of the Realists.
and tends to hew closely to empirical studies of the way in which legal power articulates with other sources of power in society. The Continental vision, on the other hand, tends to be abstract — developed by logic, analogy and a firm *a priori* theoretical commitment to a model rather than by examples or confrontation with empirical facts. To the extent that there is an empirical puzzle that motivates the Continental model, it is found largely in the widespread sense that there is a law-related crisis in the regulatory state and that current theories of law neither adequately capture the reasons for the crisis or (if there is no crisis) for the sense of crisis, nor provide any guidance for those who would better adapt the legal system to the demands the regulatory state places on it.

A second difference between the Anglo-American and Continental perspectives on autonomy, which reflects the role that empirical studies have played in each, is that the Anglo-American approach seeks to abstract a theory of legal autonomy from the actual operations of the legal system in particular situations. This gives Anglo-American theories a somewhat static quality; so long as society is organized along essentially the same socioeconomic lines, the implications of autonomy for the legal system remain essentially the same. Autopoiesis in so far as it posits continual openness to the environment posits continual — albeit system dictated — responses to changes in environmental conditions, which means continual responses to changes in other subsystems of society and to changes in the encompassing social system. Indeed, autopoietic systems exist only through their autopoiesis which implies constant reconstitution with concomitant "molecular" changes. Thus, the Continental theory more than the American theory lends itself to the study of legal evolution or, more precisely, adaptation (Teubner, infra).

A third difference is most curious. Although conflict theory, including modern Marxism, is generally regarded as the dominant response to functionalist theories in sociology, a good deal of functionalism underlies the Anglo-American perspective on legal autonomy. This is, no doubt, in part because the theory has its genesis in the perceived failure of the conflict model — carried to an extreme — to explain legal behavior. Beyond this the idea of legal autonomy is tied to the ways law serves society. The predominant explanation of why something like the rule of law persists in modern capitalist societies — *legitimacy* — is functionalism in the service of a conflict perspective.

The idea of autopoiesis on the other hand, although advanced by the leading modern functionalist, does not in itself suggest a functionalist justification for the autonomy the legal system enjoys. If the legal system is autopoietically organized it will enjoy the autonomy associated with autopoietic systems regardless of whether and what social functions it fills. It could hardly be otherwise. The legal system reconstitutes itself according to distinctly legal values rather than under the direct influence of the needs of some other system of society. Functionalism is brought in only by the
back door, so to speak. The legal system, Luhmann hypothesizes in another of the more problematic aspects of his theory, fulfills a distinct function in society relating to the management of disputes (Luhmann, 1985 c: 120; supra: 27—29).² It is, according to Luhmann, only because the legal system fills this particular function and fills it uniquely that it is and can be autopoietically organized.

Given the basic convergence of two different perspectives on an idea of legal autonomy, together with the different sources of inspiration for the two perspectives, and the differences in the way the two theories have been advanced, it should be of interest and one hopes it will be instructive to confront one perspective with another. What I propose to do in this paper is to construct a theory of legal autonomy rooted in the Anglo-American perspective (although not derived from a concern for an empirically tenable Marxism).³ I shall then turn to Luhmann’s work on autopoiesis to examine ways in which the idea of autopoiesis accords or conflicts with the theory I develop and to contrast the theoretical adequacy of the two perspectives.⁴ Before doing this, however, we must confront one more issue, namely the theoretical status of Luhmann’s attempt to extend the ideal of autopoiesis from the living systems the term was coined to describe to social systems.

Theory or Metaphor

Some authors (e. g., Teubner, infra) suggest that the idea of autopoiesis as applied to social systems is essentially a metaphor. If it is only this, there

² Luhmann is obliged to allow for the creation of disputes to generate norms in order to maintain the integrity of his functionalism. The effort, as I will argue (infra: 182—185) seems strained and unsatisfactory.

³ The theory I construct draws heavily on portions of Chapters 12 and 13 in a book I have coauthored with Professor Joseph Sanders of the Houston Law School entitled, An Invitation to Law and Social Science (Lempert and Sanders, 1986). Although I may refer to this theory as the Anglo-American theory I do this for convenience and to indicate the origins of the work that immediately inspired it, rather than to claim a special status for it. The theory I offer is neither the Anglo-American theory nor necessarily a typical representative of the theoretical perspectives developed by Anglo-American writers. It is, however, heavily influenced by the theoretical and empirical work of authors in the Anglo-American tradition, although tracing it to its roots it is the influence of a continental scholar, Max Weber, that predominates. The work of two liberal theorists, Nonet and Selznick (1978) also contributed in important ways to the development of this theory.

⁴ Obviously, I cannot claim to be unbiased in this enterprise. My critique of the theory of autopoiesis is, however, not motivated by a desire to promote my own perspective, and I realize that the theoretical adequacy of the perspective I offer is neither established nor very much enhanced by questioning aspects of the theory of autopoiesis and suggesting that my theory compares favorably to it. It is, I assume, understandable if I leave to others the task of pointing out weaknesses in my preferred theoretical position.
are important implications for the likely utility of the concept and for the criticisms that may be fairly made of it (Rottleuthner, infra). Metaphors are useful because they provide a novel way of seeing. One thing unlike another in many respects is seen in some important respect to be similar. Metaphors, however, are neither false nor true; they cannot be tested against reality or some indication of it, and simpler metaphors are not necessarily preferable to more elaborate characterizations. Ultimately metaphors can only be judged by whether they are helpful or unhelpful. While it is often the case that the ability of a metaphor to stimulate insights will diminish with the distance between the original (ordinary) and metaphorical uses of a term, this is not necessarily the case, for even obviously false metaphors may lead to a greater understanding of both the object described and the perceptions of the observer ("What light through yonder window breaks? It is the east, and Juliet is the sun"). Thus, if the idea of the autopoietic social (legal) system is only a metaphor, we can suspect it of misleading because of the obvious differences between social and biological systems, or we may value it for the insight it gives us into the workings of social systems or into the perceptions of such an acute observer of social systems as Niklas Luhmann. We cannot, however, treat the application of the concept to social systems as valid or invalid. We can only react subjectively to its utility and try to say why we do or do not find it helpful to think about social systems as autopoietic entities.

I, however, read Luhmann as offering more than a metaphor. He offers a theory about how social systems work. He is, as I read his work, trying to persuade other social scientists that he has a generally useful, rather than an idiosyncratically stimulating, scheme for understanding the operation of actual legal systems and explaining problems they confront. This scheme or theory is, to be sure, born of the resemblance that Luhmann sees between social systems and biological systems that are, according to another theory, autopoietically organized. But as a social theory, Luhmann's autopoiesis is neither validated by that resemblance nor invalidated by the obvious differences between biological and social systems. Nor is the crucial question whether the idea of the autopoietic social system is subjectively enlightening. In evaluating theories and their likely utility, we confront different issues: we are concerned with whether a theory is empirically testable; we are concerned with how the theory, or the implication we draw from it, accords with our empirically-based perceptions of that which the theory purports to explain; and we are concerned with the position of the theory in relation to other theories. The theory should be consistent with other well-grounded theories, or it should, by explaining everything

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5 Luhmann notes that the concept of autopoiesis as originally developed in biology was not meant to be and cannot be applied to social systems (Luhmann, 1985 c: 122 at note 26; 1985 a: 2).
they do and more, supersede them. If the theory gives rise to the same
expectations as a plausible alternative, we should apply the test of Ockham’s
razor; that is, when two theoretical explanations are equally consistent with
the range of what can be observed, the simpler explanation is preferred.
Thus, in evaluating the Continental vision of legal autonomy exemplified
in Luhmann’s elaboration on the concept of autopoiesis and in contrasting
it with the (an) Anglo-American vision as represented by my views on the
partial autonomy of law, the Continental vision is not necessarily made
more plausible by the possibility or even the reality of autopoietic biological
systems nor is it made less plausible by the differences between biological
and social systems. What is crucial in considering each vision is how each
lends itself to empirical testing (at least “in principle”), how each accords
with reality in so far as we can determine it, and how each fares by the
criterion of simplicity. To put this another way, insofar as the goal is to
understand the workings of the legal system, I believe that theories of
legal autonomy, whether Anglo-American or Continental, are part of the
enterprise we call positivist social science.

The Requisites of Legal Autonomy

By an autonomous legal system I mean one which in the ideal case is
independent of other sources of power and authority in social life. Legal
action, be it a decision to prosecute, an award of damages, or the reappor-
tionment of a state legislature, is in an autonomous system influenced only
by the pre-established rules of the legal system. These rules determine not
only the consequences of social action, but also — for all legal purposes —
its meaning, and it is from the assigned meaning that legal consequences

If the law is to be autonomous in the sense of defining events in its own
terms and detailing the consequences that follow, it must be independent of
society’s other mechanisms of social control. Although law is itself part of
the governing apparatus of the state, its actions and conceptions must be
uncontrolled by the political branches of government; that is, free from
the influence of those branches that respond to and embody power relations
in society. Although it must abstract cases from and return solutions to
the larger society (Bohannan, 1965), it must be uninfluenced by the power
and status differences that permeate social life. And although law is itself
a normative system, it must remain impervious to the ethical codes of the
surrounding society.

If autonomy in these senses is to be realized, the legal system should be
autonomous in one further sense. It must be self-legitimating, for to depend
upon political, social or ethical forces for authority is to be vulnerable to
the encroachment of such forces on decision making. A legal system is
self-legitimating when its rules and rulings are accepted because they are legal, or to borrow Hart's (1961) helpful terms, a legal system is self-legitimating when its primary rules and statements of them are accepted as binding because they are enacted in accordance with the system's secondary rules. Thus, in a self-legitimating legal system, a law will be recognized if it is *duly* enacted and the legal system itself determines what is meant by "duly". Similarly, a court ruling will be regarded as binding because it specifies the implications of a primary rule (i.e., a substantive law, like the law of theft) for the parties in accordance with appropriate secondary rule procedures (i.e., procedural rules, like the rules of evidence and the rules of procedural due process).

Understood in these terms the autonomy of a legal system is, at best, a relative matter; that is, it can be at most *partial*. The legal system exists as part of the social system, and legal activity involves a constant interplay with other sectors of society. Empirically, it would be surprising if any legal system could fully resist the influences of popular ethics or political or social power. It would be similarly surprising if a legal system could maintain its legitimacy if its primary rules, however properly enacted, continually clashed with generally accepted ethical precepts or with the interests of those who enjoy political and social power.

But the problem is more than empirical. Complete legal autonomy is, even in theory, unattainable. Law is a normative system and its norms must, at least in the first instance, come from somewhere. Furthermore, most legal systems have secondary rules describing procedures by which new laws can be made. These procedures usually allow for the orderly incorporation of extralegal values into the legal system. In the process the legal system is necessarily penetrated by interests external to it.

Two aspects of the way law incorporates values are especially important. First, the values infused into law may be more or less specific. Thus, the law may seek to set the price of corn at the desired level of so many dollars per bushel or it may try to establish the conditions for a free market in corn on the theory that any price reached in a free market exchange is desirable. Second, except in periods of revolution or other massive social change, new laws — that is new instances of value infusion — are embedded in an encompassing legal culture. In the process, laws may be transformed so that their ultimate behavioral implications are not precisely as intended.

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6 Weber (1968), in describing rational legal authority, which is self-legitimating in the way I describe above, postulated a legal code that was gapless in the sense that one could derive logically from the code legal implications for any possible case that might arise under it. In this sense the legal system is fully self-contained. However, that code must have its roots in some external institution(s) and in this sense at least the legal system will be penetrated by the norms and power relations of the larger society.
The more autonomous the legal system, the greater the transformation is likely to be. In the extreme case a law, for example an *ex post facto* law, will have no legal effect because the legal culture will contain higher norms that nullify the attempt at value infusion.

To say that law is autonomous in the partial sense that is empirically possible is to say that law is to some extent a product of itself and implies that legal power alone may influence social life. The claim of partial autonomy does not deny the possibility that law, insofar as it purports to regulate social life, may do nothing more than reinstitutionalize the norms and values of some other authority system (Bohannan, 1965). But it does mean that once reinstitutionalization has occurred, legal norms and values and the actions these entail are no longer fully reducible to the actions, norms and values of that other system and so may have an independent influence on social life.

Law is influenced by the political, ethical or social order, but this does not mean that the law must be in essence a tool of the dominant class’s immediate self-interest, the plaything of those in high office or the obedient servant of some moral majority. If it is important to recognize that law is only partially autonomous, it is also important to realize that partial autonomy can allow for considerable self-direction.

**Relative Autonomy**

If legal autonomy is necessarily only partial, there is no point in simply asking whether a legal system is autonomous or not. We must focus instead on relative autonomy, for the interesting questions are whether and why legal autonomy is more or less achieved. We may think of the relative autonomy of law as *the degree to which the legal system looks to itself rather than to the standards of some external social, political or ethical system for guidance in making or applying law*. The legal system can look to itself because it has a set of forms (e.g., plaintiff, defendant, battery, divorce, contract, liable, guilty, etc.) to which it can fit actors and actions. These forms cloak behavior with distinctively legal meanings that entail specific consequences.

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7 While complete legal autonomy may be impossible empirically, the complete absence of autonomy in the sense that the law’s commands are reduced to those of some non-legal political or ethical system is conceivable from the Anglo-American perspective. Arguably the polity has dictated all important legal activity in some totalitarian states at some times and the extra-legal norms of religion have apparently had a similar influence in Calvin’s Geneva and Khomeni’s Iran, to name just two instances. The autopoietic perspective would treat these instances as examples of the replacement of law by another autopoietically organized control system. See the discussion in this paper, infra: 174.
Autonomy is infringed when a group or interest is able to influence the legal process so that its own standards or interests are embedded in forms the law recognizes or in the rules that link forms to consequences. Thus to understand why law is more or less autonomous, we must identify characteristics that distinguish legal systems that are substantially dominated by the interests and standards of external groups from those that are less so.

Distinctions may be made along two dimensions. The first involves the extent to which a standard once embedded in law acquires meaning through the law’s own canons of construction rather than by reference to the interests that gave it birth. Where the law’s canons of construction dominate, the law will be more autonomous of the external system than where they do not. For example, consider a law forbidding check forgery. Assume this law is designed to facilitate capitalist economic transactions. To this extent the law is penetrated by capitalist interests. At the same time the law appears to reflect a generally accepted ethical proposition about how people should and should not acquire property. Suppose Sam, a clever criminal, drains Jane’s bank account not by forging her check but by fraudulently inducing her to write a genuine check in exchange for a promise to deliver goods that Sam neither owned nor intended to deliver. Sam is then charged with forgery under the statute. If the legal system looks either to the capitalist interests that secured the forgery statute or to the popular ethical code, it might convict because fraud of this sort both threatens the free exchange of checks and offends popular morality. But by certain legal canons of construction forgery is not the same as fraud, and by a further canon no one should be punished unless his behavior has been previously and specifically declared criminal. Since the legislature seeking to protect the security of checks overlooked the need to protect against fraud, if the law’s canons of constructions control Sam will escape on a “technicality”: the legislature neglected to define his crime. Legal systems that look to their own canons of construction to determine the meaning of law rather than to external morality or the interests that support the law are more autonomous than those that take the opposite approach.8

The second dimension that allows us to distinguish more autonomous legal systems from less autonomous ones is the degree of generality in which laws are cast. The more general the form in which a law is cast, the less close will be the tie between the legal norm and the interests of a particular status group. Thus, a system that forbids anyone from forging

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8 I do not mean to suggest by this example that the law’s canons of construction are rigid or that a foreordained logic inexorably controls. Llewelyn (1950) has shown that the common law’s stock of canons is sufficiently diverse that it would allow considerable flexibility of interpretation even if there were a rule, which there is not, that in interpreting a statute a court must always cite some relevant canon.
a check is more autonomous than one which protects only capitalists from forgery.9 Put another way, a legal system characterized by general rules is likely to be more autonomous than one riddled with particularistic enactments.

The first of these dimensions, the degree to which external interests influence legal construction, is more important in assessing the degree of autonomy that characterizes the law application process while the second, the degree of generality, relates more closely to law making. One important point they have in common is that the more autonomous law is along both of these dimensions the more legal concepts can be manipulated without apparent reference to the particular substantive concerns that led to the legal norm in the first instance. Laws, in other words, are distanced from narrow, externally grounded, substantive concerns both through the generality of their content and by internally defined rules of interpretation.

The ideal of legal autonomy can be more closely achieved in the law application or judicial process10 than in the law creation or legislative process. The legislature sits at the intersection of the political and legal spheres. It may be captured by interests and organizations that have substantial social power, and it often responds to the entreaties of those who support private ethical systems. This does not mean that the concept of autonomy has no place in a discussion of legislation. I shall later discuss some senses in which we can speak of legislation as being more or less autonomous. But the bulk of what follows shall focus on the way laws are applied by courts.

**Judicial Formalism**

Autonomy in the law application process is characterized by and is to a large extent attributable to judicial formalism (cf. Nonet and Selznick, 1978: 60—65). Judicial formalism is in turn characterized by three concerns: a concern for procedure, a concern for rules, and a concern for legal categories.

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9 This might be done not only in so many words, but also by protecting business checks from forgery but not the checks of individuals. If the possibility that such an undisguised class-based distinction will enter the law appears remote, consider the numerous societies that had laws broadly protecting masters from violence at the hands of their slaves but only narrowly or not at all protecting slaves from violence at the hands of their masters.

10 Law application also involves nonjudicial agencies such as the police and prosecutors. The analysis of judicial autonomy might be extended to consider action in these spheres but for simplicity's sake we shall confine our textual attention to courts and administrative tribunals.
1. A Concern for Procedure

The elevation of procedural concerns above more immediately substantive ones is perhaps the distinguishing feature — and to some the most jarring feature — of a formal legal system. For example, in *Dobbert v. Wainwright* several courts, including the United States Supreme Court, refused to consider Dobbert's claim that he was about to be executed for behavior that under Florida law did not constitute a capital offense. Review was refused because ten years earlier in 1974, the accused's counsel had not objected at trial to a jury instruction that may have erroneously defined the accused's behavior as capital, and the matter was not raised on a first federal appeal.\(^1\) At the other extreme, likely murderers may go free because the rules of evidence preclude the admission of the most probative evidence against them. In between the extremes are more prosaic cases that arise every day in which outcomes are partly or entirely determined by a litigant's inability or failure to comply with one of the law's procedural rules.

To say that in these cases the law elevates procedure above substance is accurate when one considers only the substantive merits of a claim, but from the perspective of the legal system it is somewhat misleading. There are usually good substantive reasons that justify the law's procedural rules and the influence they have. The rule that conditions the preservation of error on objections at trial is, for example, justified by the praiseworthy objective of promoting efficiency since if objections are made at trial, errors might be corrected there and costly retrials avoided.

Thus, the fact that the law may insist on honoring its procedural rules when injustice apparently results should not be condemned as an elevation of form for its own sake over substance. Nevertheless, there is a problem here. Where judicial formalism prevails, the law's preference schedule appears to many as unduly self-regarding. The values that underlie legal procedures tend to "trump" the apparent demands of substantive justice without regard to the relative merits of the competing claims. In *Dobbert*, for example, we might think that preventing the execution of a man for behavior that the state never made punishable by death, is worth any slight, long run erosion in the rule requiring that objections be made at trial.

It is only the court's privileged position with respect to the law that allows it to impose system-regarding legal values in settings where ethical or political considerations call strongly for different action. It is this ability to hew to distinctively legal values and the propensity of courts to do so that makes the law's procedural orientation an important component of

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\(^1\) *Dobbert v. Wainwright*, cert. denied, 105 Sup. Ct. 34; 43 (1984), opinion of Marshall, J. dissenting. The case was also one in which the jury that convicted the defendant recommended mercy by a 10—2 vote, but the judge, as is permitted under Florida law, ignored the recommendation and imposed a death sentence.
legal autonomy. Moreover, this component can have important consequences when the law comes to be applied. As Thompson (1975), Balbus (1977), and others have shown, the formal requirement that those who proceed through law conform to pre-existing legal procedures has important implications for the realization of the values that law or its administration aim at.

2. A Concern for Rules

The second aspect of judicial formalism is a concern for what legal rules require. A formalist judge treats the law as given. He does not in deciding cases try to promote some extra-legal value system, even one congruent with the law, but looks to the law as the source of all values. What the law requires must be done, and what the law does not forbid is allowed. Thus, a hungry child may be sentenced to death for picking pockets in search of the wherewithal to live, and one who steals money entrusted to him for investment may escape without any punishment if the law of theft at the time forbids only forcible takings.

Being guided by exclusively legal norms does not mean that the formal judge looks only to the legislature for guidance. Depending on the system, legal norms may be drawn from such sources as constitutions, the rulings of administrative agencies, treaties, proclamations by high officials, and prior court decisions. Nor does the internal orientation mean that a court cannot declare a law invalid. Courts recognize hierarchies of law, and constitutional provisions can override legislation just as legislation can reverse non-constitutional judicial precedent. What distinguishes the formalist system with respect to both the sources of legal norms and the ways conflicts are resolved among them is that it is the legal system's rules that determine what is permissible. Thus, a formalist judge does not enforce administrative restrictions on pollution because he thinks they are desirable. Rather the rules are enforced because the legislature has delegated the authority to regulate by rule to an agency and the legislature has the legal

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12 In particular, attempts to use the law to achieve specific ends may be hampered by legal rules of procedure. The exclusionary rule, for example, has implications for how the war against narcotic drugs is fought. Advertisements found to be misleading by the Federal Trade Commission may be broadcast for years while advertisers exhaust their appeals. The right to jury trial has at one time or another helped injury victims secure adequate compensation from the giants of industry, restrained governmental efforts to censor or oppress those who disagreed with official policies, hampered efforts to enforce game laws in rural areas and allowed people who had violently resisted desegregation to escape punishment. As this potpourri of examples illustrates, procedural formalism may inhibit the law's ability to achieve a variety of political and legislative ends, for as measured by any external political or social standard there is no necessary consistency in how the law's allegiance to procedure will cut.
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(in this case constitutional) authority to do so. Similarly a formalist judge will strike down legislation he thinks desirable if it conflicts with the Constitution. Thus, a judge, citing the First Amendment, may strike down laws seeking to prevent the degradation of women through pornography although he subscribes to the ideological and empirical assumptions that motivated the legislation.

Perhaps most surprisingly, treating pre-existing law as the source of all legal norms does not prevent the formalist judge from making law, if by making law we mean the elaboration of doctrine to fit specific behavior. The important point is that in making law the formalist judge looks not to some external ethical system or political interest but looks inward to the law and asks what, if anything, the body of law fairly and logically implies for the behavior that has come to the court's attention. This determination involves a close inspection of the language of the law and an effort to interpret that language in the light of the lawgiver's meaning.

Taking rules as given enhances autonomy in the judicial or law application process because it relegates all political and ethical considerations to another sphere, the sphere of the lawmaker (Nonet and Selznick, 1978: 57—8). The concerns that motivate the lawmakers are taken into account only as an aid in interpreting language whose logical implications are not clear; so what may appear from one perspective as making new law is from another only the determination and logical application of what was meant by the old.  

3. A Concern for Legal Categories

The third element of formalism is the tendency to fit actions, actors, and, in particular, statutory language into legal forms. Thus, people and actions are in a formal legal system abstracted from their social settings and treated as members of predefined legal categories. Once this is done, applying law involves only the proper categorization of acts and actions and the logical manipulation of concepts internal to the legal system.

A formalist judge interprets a statute in terms of the rights and duties it creates and then applies the statute by logically analyzing the implication of these rights and duties for the parties before the court. The specification of the statutorily created rights may consider the purposes of the statute, but once the rights have been specified the original purpose fades from view. The system is autonomous in that it no longer attends to the political and ethical concerns that spurred the legislation but operates only with legal concepts. If the legislature did not specify rights sufficient to achieve the goals it had in mind, a formalist jurisprudence will mean that the goal

13 Attention to rules, like attention to procedure, may lead to substantive injustice and, for better or worse, interfere with attempts at regulation.
will not be achieved. This contrasts with a more substantively oriented jurisprudence that interprets rights on a case by case basis with an eye in each instance to the achievement of a legislative or constitutionally given end.

The tendency of courts to fit actors into legal categories that obscure social differences and to treat substantive legislation not entirely in its own purposive terms but in terms of the rights and obligations that can be abstracted out of the legislation poses problems for those who attempt to use the law to attain substantive ends. Statutes as reinterpreted by courts often do both more and less than is intended. They do less because the purposes of the statute may be blunted or its scope narrowed when the focus is on the rights or obligations the statute clearly entails. Furthermore, when the differential opportunities that people have to invoke the law are not acknowledged many potential litigants may be denied that access to the legal process which is necessary if the substantive goals of the statute are to be realized.

Formalism can allow legislation to do more than intended because the tendency to focus on formalistic abstractions may lead to a reading of the law that covers situations that were not within the intended scope of the Act or extends benefits to classes of litigants who were not intended beneficiaries of the law’s protections. Thus, a law that provides that medical school applicants may not be discriminated against because of sex may have been intended to eliminate discrimination in medical school admissions in order to open up to women a profession once largely closed to them. However, if a court focuses on the sex-neutral term “applicant” and ignores the substantive end in view, the law might be used to strike down, at the instance of a male applicant, an affirmative action program that promises to increase substantially the proportion of physicians who are female. In such circumstances a court by extending rights in ways not contemplated by the legislature may undermine the very goals a law was intended to serve.

The three aspects of formalism that we have just described all serve to distance the law as it applied from the interests of external ethical and political systems, even to some degree when those interests have captured the legislative process and embedded their preferences into law. For this reason judicial formalism goes a long way toward ensuring legal autonomy.

**Other Aspects of Autonomy**

While legal formalism as I have defined it is a central constituent of legal autonomy it is not the only one. If access to the law or the ability to use it effectively varies with political power or social status, these disparities will affect how the law is applied even if the court takes no official account
of extra-legal status. For example, if filing fees and attorneys’ costs are such that low income debtors cannot afford to defend themselves when sued, the judicial output will disproportionately reflect the interests of wealthy litigants. Legal rights belonging to the less well-off will not be recognized because they will not be effectively asserted. Also, if those legal norms the formalist court treats as given take extra-legal status into account, the judicial output will reflect this. While the formal application of a law designed to promote the ethics or interests of one group over another may leaven the substantive orientation of the law, the rights and duties that are abstracted from the law and enforced will consistently favor one set of interests over another.

Thus, the autonomy of the legal system in action also depends on the degree to which all actors can invoke the law effectively, a matter we may call legal competence (Galanter, 1974), and on the quality of the laws that are invoked.

1. Legal Competence

If those who use or are subject to the law are of unequal legal competence, the judicial output over the run of cases will reflect this inequality. For legal competence to be equal, parties to a dispute must have equal access to legal remedies and must be equally capable of influencing judicial outcomes. If such equality exists, the court’s decision should be determined entirely by the law as it applies to the facts of the case. Except insofar as the law takes into account the parties’ extra-legal status, extra-legal sources of authority will have no effect on the decision.

Thus, equal legal competence is the second crucial ingredient of legal autonomy. Formalism guarantees that the law will be applied by reference to legal norms and procedures. But without equal legal competence formal adjudication will yield outcomes that disproportionately favor the more powerful and better off and to this extent reinforce social disparities that the law does not recognize. The better off are advantaged both because they are better able to bring or avoid litigation and because once in court they are better able to muster the facts and legal arguments that aid courts in determining how the law should be applied. To the extent that the ideal of equal competence breaks down, the legal system will be less autonomous, for although the court may be blind to extra-legal power and status differences, its output will reflect such disparities.

Success at law is clearly linked to success in social life (Galanter, 1974; 1976). Those who are legally competent have usually succeeded in other areas as well. Yet even in an unequal society partial autonomy may endure. Law as it is applied in the United States, for example, tends to ameliorate rather than simply reproduce power discrepancies. Institutions like the contingent fee and legal rules like the right to appointed counsel in criminal
cases together with legal formality tend to equalize the situation of parties who go to law. Nor are these efforts empty. Judges at and before trial routinely make rulings that disadvantage the more powerful litigant. Juries regularly acquit defendants who have been prosecuted with all the financial and symbolic power the state can muster. Appointed counsel often work diligently for their clients, and some of the most important victories that poor people have won as a class have been engineered by lawyers on the state's payroll.  

2. Normative Neutrality and Status Neutral Law

At the plane of the ideal, we have identified two of the conditions that must be met if the legal system is to be autonomous and thereby resist the penetration of the social, political and ethical systems that surround it. First, the law must be applied in a formal, self-regarding way, which means that legal disputes are decided by reference to legal norms and categories in accordance with pre-existing legal procedures. Second, actors must be equally competent in their use of law. Without such equality the socially better off will disproportionately benefit from a formal law application process.

Both formality and equal competence are at best only partially achieved in modern Western societies. Could they be fully achieved, the law would be autonomously applied. But even if they were fully achieved, the law as applied would not necessarily be autonomous of distributional patterns rooted in other social systems. For built into the very texture of the law are norms that redistribute values from one political or social group to another. Such laws not only reflect and attract influence attempts by extra-legal interests, but they also mean that the applied law will have substantively different implications for differently situated groups. The quality of applied law, although not necessarily the law application process, will be shaped by extra-legal rather than legally-defined statuses. Thus there

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14 Whether partial autonomy as it exists in the U. S. is a glass that is half full or half empty depends on one's attitude and where one looks. The death penalty for rape in the South, for example, was a practical matter largely reserved for black men who raped white women (Wolfgang and Reidel, 1973). The lack of effective legal counsel no doubt contributed to this.

15 Here I may appear to be expanding my conception of what legal autonomy requires in the pure case. It is not just that the process of interpreting and applying law must be uninfluenced by extra-legal circumstances, but also that the law must not in the abstract or as applied make people differentially eligible for its rewards and punishments based on some prior (that is, having nothing to do with the behavior being evaluated) social status. Unless this condition is met, the law in its application will be inescapably bound up with the fate of extra-legal status groups and will tend in its application to be a tool in service of extralegal status interests.
is a final ingredient to pure legal autonomy. The law both as written and applied must not make distinctions on the basis of differences in social status. We may call this normative neutrality in that legal norms do not systematically favor one status group or another in the contests for welfare and power that people engage in in other spheres.

Focusing first on legal language we see that some law, including much of the common law, fits this description. It gives actors rights apart from their social or political status. Thus, anyone may own property and those who own property are generally free to use it or transfer it as they see fit. Anyone injured through the fault of another may recover in tort. And within broad limits anyone may enter into a contract with another that will be enforced in court. We may think of such law as status neutral law.

Status neutral law, that is, law that on its face attaches no special benefits to social, political or ethical status, is essential if normative neutrality is to be achieved. Thus, one way normative neutrality can fail is that law may be overtly oriented to external political, ethical, or social considerations. But status neutral law, although lacking in such overt substantive orientations, will not yield a normatively neutral legal order if it is applied in a world where considerable inequality exists.

Because status neutral law eschews the task of setting social directions and recognizes only the values of individualism, if a court applies such norms formalistically, the resulting outcomes will have an appearance of neutrality. Extra-legal distinctions will not have been imported into the law and will have no place in the legal analysis. Yet in an unequal society the formal analysis will tend to enforce power relationships that exist outside the law. Those who have substantial social power will be able to use the law to reaffirm the advantages they have over others in their day to day affairs.

If all laws were “status neutral” in the sense I use the term; if people were equally well situated to take advantage of status neutral rules and entitlements; and if the other requisites of legal autonomy were met, the ideal of pure legal autonomy would be achieved. The legal system would proceed in a purely self-regarding way. The law application process would in accordance with its own procedures manipulate distinctively legal concepts in the light of legal norms. A party’s extra-legal status would have no implications for either his rights — since these would be equally accessible to all — or his treatment in court. Similar social action would everywhere have the same legal implications. Thus, in the ideal case legal autonomy and personal autonomy coincide. Freedom is at a maximum.

I mean this phrase descriptively and do not mean to imply that in these circumstances one would have the best of all possible worlds. Thus when I speak of the “ideal of pure legal autonomy” I am referring to an ideal type and mean to make no suggestion
The Empirical Failure of Autonomy

To sum up briefly, I have argued that the autonomous application of law depends on three factors: judicial formalism; equal legal competence, and normative neutrality. Only if they are simultaneously realized in an already equal society will the ideal of pure autonomy exist. If this is so, three conclusions follow. First, a purely autonomous system of law application in the strict sense I have used the term “autonomous” is in theory possible. Nothing about the nature of adjudicative institutions or the societies in which they exist suggest that in principle these conditions cannot be achieved. Second, these conditions are not achieved in any society. Hence, as an empirical matter, law as applied is at best partially autonomous. Third, again as an empirical matter, in some societies these conditions are to some extent achieved. The judiciary in many states does distance itself from pressures to respond to non-legal interests by its special concern for procedure, rules and legal categories; concerns that taken together make up formalism. Equal legal competence does not exist, but institutions like the right to appointed counsel, public interest law firms, and the contingent fee mean that for some individuals and groups removing contests to the legal sphere generally provides a more equal arena for struggle than that which may be found in other sectors of society. Finally, some legislation is status neutral in its implications and many societies are not so unequal as to ensure that status neutral law will in each instance advantage the socially more powerful party. Putting these factors together I conclude that the application of law in Western democracies is best characterized as a partially autonomous process. But the implications of autonomy in application for the autonomy of the legal system as a whole cannot be determined until we consider the source of the norms that the system applies and how these relate to non-legal political, ethical and social interests. This draws our attention to the legislative process and the possibility of autonomy in law-making.

The Possibility of Legislative Autonomy

The legislature sits at the intersection between the political and legal spheres where it is open to the influence of wealth as well as to other sources of social and political power and to the vociferous entreaties of those who support private ethical systems. At the same time the legislature is a crucial legal actor, for it pours norms into the judicial and regulatory systems. It
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is fair to ask whether a legislature can ever share the partial autonomy we have thus far identified with law. If not, the autonomy of law is likely to be of little moment, for the stock of legal forms and concepts that regulate and sanction behavior will soon reflect the interests of powerful extra-legal status groups. My view is that as a conceptual matter a legal system that is open to legislation can never be fully autonomous because at its heart is an institution designed to translate extra-legal interests into law. It does not, however, follow that openness to legislation means that autonomy of application is of little moment. Legislatures I shall argue may be sufficiently distanced from specific extra-legal interests that their output need not directly translate some identifiable extralegal standard of behavior into law. Thus, as an empirical matter I believe that the partial autonomy we see in the legal systems of the capitalist democracies reflects meaningful independence from extralegal sources of authority.

There are several reasons why some degree of legislative autonomy is possible. First, the structure of the legislature contributes to its ability to act autonomously. Interests groups can capture legislators, but it is difficult to generate a coalition to capture the legislature. Thus, the ready translation of the interests of social, political, or ethical groups in ways that substantially threaten, rather than simply fail to promote, the interests of others is difficult to achieve. In some countries, like the United States, this difficulty is enhanced by constitutional requirements for super majorities when fundamental liberty interests or the independence of the courts is directly threatened, and by the veto power given to an executive.

Second, there are distinctively legal norms about the form, content and procedure of legislation which legislatures routinely honor. Some norms such as the prohibition in the United States of ex post facto laws and bills of attainder are written into constitutions. Others such as the need to respect the separate jurisdictions of the judiciary and executive are implied by one. Still others such as the preference for legislation that fits in as far as possible with the body of existing law and the idea that legislation should be open to public comment are part of the legislative culture. Adherence to such cultural rules not only promotes autonomy in legislation, but is itself an important expression of it.

Third, in the United States by long-standing practice and in other countries to differing degrees, the judiciary, the branch of government best insulated from the pressures that threaten autonomy, has authority to void specific legislative enactments.

Finally, law as a body may be autonomous of specific external interests in a way that individual laws are not. While particular laws may reflect the influence of identifiable status groups, the body of laws may mix such a variety of concerns that the legal system can be identified with no particular external interests, except possibly at the highest level of generality, such as whites in a segregated society or the propertied in a class-stratified society.
Moreover, not all instances of externally oriented legislative behavior reflect the influence of some special interest group. Some norms — like much of the criminal law — are so generally accepted in society that the legislative reinstitutionalization of these norms is not problematic. While in one sense those laws are the antithesis of autonomy in that the ethical and legal are collapsed, when the collapsing is complete the law may be applied without reference to any specific external norms or interests. In a society where all laws and ethical propositions were of this type, we would have neither a legal system nor an ethical system but a legio-ethical system which could act autonomously of other interests in society.

These features of the legislative process, and others that I have no doubt missed, mean that legislation is insulated to some extent from the pressures of particular extra-legal interests and is shaped to some extent by distinctively legal concerns. They do not mean that legislatures are autonomous in the way courts are. As I have previously noted, even at the level of the ideal, there are fundamental differences. The formalist court, as I argued earlier, takes legal norms as given and in this sense can be entirely self-regarding in disposing of cases. But a legislature must ordinarily look beyond existing sources of law in deciding what new legal norms will be. In doing so, it is almost always acting with a substantive end — as valued in some extralegal social, political or ethical order — in sight. This is so even if that end is, for example, a regime of contract law that takes no account of values other than the desirability of enforcing private agreements. The creation of a status neutral legal order can itself be a substantive goal. Thus, legal autonomy is, as an empirical matter, partial in two senses. It is partial in that legal norms to some extent, but not completely, reinstitutionalize in the law norms and interests rooted in non-legal political, ethical and social spheres. It is also partial in that the application of legal norms reflects, to some extent, the social and political situation of the parties to a dispute and the influence of extralegal norms and interests on legal decision making. I shall now contrast this view of legal autonomy with the theory of autopoiesis. My goal in doing so is to shed light on the latter.

**Visions Compared**

At first blush, it may appear that my version of the Anglo-American view of autonomy and Luhmann’s Continental view are completely incompatible.

\[17\] By “self-regarding” I mean that only the requirements of the law are attended to in deciding how a dispute should be resolved. The implications of extra-legal power and normative orders are not considered.
Autopoietic systems are contrasted by Luhmann and others to earlier visions of open systems in a way that suggests a complete and radical autonomy. All meaning — that is anything meaningful — within an autopoietic system is a product of the system and not borrowed from the environment (Luhmann, 1985a; 1985b). Nevertheless, there are interesting points of congruence between the two approaches.¹⁸

**Points in Common**

For Luhmann the autonomy of the legal system only exists in the context of its autopoiesis (Luhmann, 1987), which requires that the reproduction of the elements of the system be guaranteed in a recursively closed fashion by the elements of the system. It is the system which through self-reference distinguishes itself from the environment and defines itself (Luhmann, 1987). Since the elements of social systems and subsystems are found in patterns of communication ( supra: 17) this perspective on autonomy implies as a core proposition that it is for the legal system to say what is legal (Luhmann, 1985d: 7; 1985c: 113; supra: 15; 1985a: 5).

While this perspective which makes legal autonomy an implication of the legal system’s autopoiesis¹⁹ has a different focus than a conception of...
which sees an autonomous legal system as “one which in the ideal case is independent of other sources of power and authority in social life,” there are in fact substantial similarities between the two. This is because self-referential closure with respect to communications is in the Anglo-American view as I present it an important feature, and perhaps the most important feature, in distancing the legal system from other systems that might influence it. Thus, the factor that is most important in establishing or maintaining legal autonomy is judicial formalism which entails (1) a concern for procedure; (2) a concern for rules; and (3) a concern for legal categories. These three concerns all require that a legal system decides cases by reference to its own norms and values, thus requiring the kind of self-referential closure that is at the heart of Luhmann’s conception of autopoiesis and autonomy. Both models require that the legal system, if it is autonomous, determine for itself (i.e., by reference to legal norms) the relevance and implications of information presented to it (Luhmann, 1985 d: 7; 1985 c: 113–14; 1985 a: 5; supra: 17; 1987). The two views part company, however, with respect to the other ingredients that the Anglo-American view sees as important to the autonomy of applied law, equal legal competence and status neutral law, as well as in their characterizations of legislation. I shall probe the various points of divergence for what they imply for the theoretical adequacy of the autopoietic view of legal systems and for the theoretical utility of the different concepts of legal autonomy.

The Views Diverge

When legal autonomy is defined, as I define it, in terms of the (material) independence of applied law from other sources of power and authority in social life, attention is naturally drawn to the question of whether the language of the law is itself a repository of extra-legal values and to the question of whether a law which is purportedly blind to the extralegal characteristics of parties is in fact applied without regard to and unconditioned by such characteristics. For Luhmann, these questions regarding language and application are uninteresting and apparently — as a matter of definition — have nothing to do with the autonomy of the legal system. The importation of extralegal values into the legal system is not recognized in Luhmann’s theory as a potential threat to autonomy, because neither of the two ways in which importation can occur creates problems in Luhmann’s scheme.

On the one hand extralegal values may be translated into legal language through ordinary legal processes, as when a court, responding to an extralegal vision of efficiency or justice decides that strict liability should replace the negligence liability standard in cases involving defective prod-
ucts. Since the legal system is determining for itself and putting in legal language a new rule, even if the rule is rooted in values that may be observed in environmental institutions, we have, in Luhmann's scheme, autopoiesis in action and the preservation of autonomy rather than a breakdown of boundaries due to the infiltration of extralegal values into law. So long as communications on the issue remain distinctively legal, close correlations between action in the legal sphere and actions in other spheres do not disturb autonomy. Indeed, such correlations are to be expected in a social world of autopoietic systems, for without such correlations social life would not cohere. Thus, Luhmann writes:

There may be political control of legislation, but only the law can change the law. Only within the legal system can the change of legal norms be perceived as change of the law (1985 c: 113).

Not only does this imply that legislation need not be law, a topic I shall treat later, but it also suggests that if the legal system changes in response to legislation so that its norms reflect the same extralegal values that motivated the legislature, the law does not thereby become less autonomous. In Luhmann’s scheme a response by the legal system to its environment does not disturb its autopoiesis so long as it is the legal system's own principles and observations that determine the response (Luhmann, 1985 c: 114). The Anglo-American approach, as I describe it, sees the incorporation of extralegal values into law as a threat to autonomy even if the legal system's own rules call for such incorporation.

On the other hand, political, economic or ethical values might be imposed on the law as when certain disputes are taken from courts and channelled to institutions that are expected to respond not to the implications of legal language but on the basis of widely shared political or ethical values or when courts are pressured to reach politically expedient or morally correct decisions rather than decisions justified by the close consideration of legal language. In these instances the inattention to or disregard of legal values means that case decisions do not reflect the outcome of those self-referential communicative processes that are the hallmark of autopoiesis and autopoietic autonomy. Yet this situation which limits or destroys legal autonomy in the Anglo-American view also does not threaten the autonomy that Luhmann posits. Rather it shrinks the domain in which legal action occurs while expanding the domain in which the political, religious, economic or other system operates (Luhmann, 1985 c: 121, supra: 31). Thus in Luhmann’s scheme efforts to make law more politically instrumental do not aim at the transformation of law but rather seek to replace it by other systems (Luhmann, 1985 c: 123). Indeed, law as a system could be virtually eliminated in Luhmann’s scheme without, until the point of elimination, losing its autopoietic organization or autonomy. Moreover, the institutional forms of law, e.g., courts, could persist in such a shrunken system even if
much of their activity did not count as legal action, for it is not institutional arrangements that are crucial to Luhmann’s conception of autonomy, but the self-referential quality of the communications that occurs within institutions.

For similar reasons Luhmann’s conception of autonomy is not threatened by a situation in which differences in party competence mean that the law as applied systematically favors some social groups at the expense of others. The fact that the wealthy do better than the poor when they invoke the law has no implications for autonomy as autopoiesis so long as the legal process treats the inputs that wealth allows parties to provide solely in terms of their systemically defined legal implications. The Anglo-American view recognizes that the ability to structure transactions in legal terms or to effectively present legally relevant information varies with social class and has the potential to transform neutral, self-referentially defined language into language that has systematic implications for the relative success of competing extralegally defined interests.

**Definitional Desiderata**

The divergence between the two conceptions of legal autonomy on these issues highlights two issues that must be confronted in deciding whether a conception of legal autonomy is sociologically useful. The first is at the level of definition: what do we want legal autonomy to mean? For Luhmann it appears to be simply another way of characterizing the self-contained closure of systems that maintain themselves through autopoiesis. He tells us that all operations within the legal system “are recursively conditioned and precisely this constitutes the unity and autonomy of the system” (Luhmann, 1987). This conception emphasizes the possibility of self-contained communicative systems that are capable of understanding the world from a consistent system-defined perspective. Whether fully recursive social systems in fact exist is an empirical question, but clearly systems like the law impose distinctive (in the case of law, distinctively legal) meanings which can be made sense of and manipulated only by reference to other system-defined meanings (Luhmann, 1985 a: 5; see generally 1985 b).

The Anglo-American perspective, on the other hand, treats legal autonomy as a phenomenon that involves more than simply establishing, in a recursive fashion, the terms for legal discussion. Its use of the concept of autonomy is motivated by its answer to the question of why the ability to set the terms for legal discussion matters. This ability matters because it means, at least potentially, that various extralegal values will not penetrate the law and make it a tool for the reproduction and extension of extralegal social, political and ethical arrangements. If legal language, at its core, systematically distinguishes between the interests and values of extralegally-
defined classes of actors or if procedures for triggering legal action result in such distinctions whatever the formal qualities of legal language, such reproduction will occur. The Anglo-American concept of legal autonomy allows us to distinguish such situations, from situations where law is less reflective of and less systematically affects the political and moral struggles that occur in the law's environment. Luhmann's conception of autonomy as autopoiesis does not. We must ask of each concept whether it promises to be useful in social scientific characterizations of and attempts to order the empirical world, and we should also be concerned with how each version accords with the ordinary meaning of the term "autonomy".

My view is that the utility of the concept of autonomy is limited if as a matter of definition it is equated with autopoiesis or treated as a necessary correlate thereof. While the theoretical writing on autopoiesis, including some of Luhmann's, suggests this equation or at least the correlation, it is important to note that Luhmann's perspective does not require that autopoiesis and autonomy be conceptually linked. Autonomy can be meaningful only to an external observer, who can simultaneously appreciate the integrity of self-contained communications systems and the ways in which communications within such systems are conditioned by environmental factors. Accepting Luhmann's perspective, we can say that the less conditioned the meanings in one system by differences in another, the more autonomous the first system. This separates autopoiesis and autonomy and provides a definition of autonomy that takes account of the relations between systems and not just communicative closure.

Theoretical Utility

A more serious problem with equating autopoiesis and autonomy stems from another kind of implication which this equation has for the theoretical utility of the concept. Autopoiesis is, for Luhmann, an all or nothing condition. A system either maintains its autopoiesis and continues to exist as a distinct entity or it ceases to reproduce itself autopoietically and system boundaries disappear (Luhmann, 1985a: 25-6). Legal autonomy in the Anglo-American tradition is a "more or less" thing. Not only does it make

20 Luhmann acknowledges that in a system which is simultaneously open and closed like the legal system self-reference cannot amount to total self-determination or even total self-observation (Luhmann, supra: 21). A legal system's forms must take cognizance of the external world (Luhmann, supra: 23).

21 Since autopoietic social subsystems are cognitively open to their environments, it is possible for meanings in such systems to be entirely self-defined yet reflective of and in this sense conditioned on how the system views itself in relation to its environment (cf. Teubner, 1984).
sense to speak of partial autonomy, but it makes sense to describe some legal systems as more autonomous than others (compare Iran and Great Britain) and some kinds of law as more autonomous than others (compare contract law and welfare law).

Social science advances through the investigation of variance. The social scientist seeks to explain perceived differences in social life, by looking at factors that concomitantly vary. Some factors, like gender, naturally have only two states, but others exhibit a range of variation. To constrain the latter to only two states is to ignore interesting complexities of social life, to impoverish both descriptive and explanatory theory and to pose special problems for the statistical analysis of quantitative data. Even if Luhmann is correct and autopoiesis is a natural dichotomy, it does not follow that legal autonomy should be so conceived. The cost of doing so is to suggest that legal systems are either autonomous or not autonomous and to define away a number of interesting questions about the mutual dependence and interpenetration of systems. This, of course, is precisely what autopoiesis is about; it suggests a radical integrity to systems which makes language like "mutual dependence" and "the interpenetration of systems" and the modes of thought they represent obsolete. But the radical integrity of autopoietic systems should not be seen as a species of autonomy in the Anglo-American sense of the term.

If the theory of autopoiesis requires this equation, the costs of imposing the binary structure of autopoiesis on autonomy become a reason to doubt the theoretical utility of autopoiesis as a tool for understanding legal systems. Ultimately too many interesting questions are either ignored or reduced to matters of definition. For example, from the Anglo-American perspective the observation that law hews to system values (i.e., distinctively legal values) because it is autonomous gives rise to a host of questions that might be sociologically explored. These questions, such as the question of how law maintains its distance from those environmental interests which would capture it, suggest yet more focused inquiries, such as an investigation into the structure of the legal profession and how this structure may serve to insulate legal action from extralegal political pressures. Luhmann, on the other hand, suggests that whatever values the law

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22 Luhmann argues that there can be no communication of a society with its environment and that this implies that if a social system communicates with its environment, it is in effect reconstituting itself into a more encompassing system (Luhmann, supra: 18—19). Thus, if Luhmann's scheme is consistent with any vision of partial autonomy, and I shall argue later that it is, it is not consistent with a scheme in which forces within and without the legal system speak the same language. An apparent implication of this is that institutions like the jury system, which allow judgments that reflect popular morality to be pronounced as legal judgments, would render decisions non-legal in Luhmann's scheme whereas they only diminish the autonomy of the legal system in the Anglo-American view.
Normative Closure and Cognitive Openness

The theory of autopoiesis does, however, hold open a link between conditions in the legal and other systems even though it does not suggest how the link is forged. Law as an autopoietic system, Luhmann tells us, is closed and open at the same time (Luhmann, 1985 d: 6—7; 1985 c: 113—14; supra: 19—21). It is cognitively open to its environment in the sense that it can learn if reality turns out to be not as expected and it is normatively closed in the sense that legal norms will persist even if the expectations they entail are not met (Luhmann, supra: 19—20).

This suggests that there may be substantially less distance than our use of language would imply between Luhmann’s vision of a legal system characterized by that apparently radical version of autonomy called autopoiesis and my vision, in the Anglo-American tradition, of a legal system which both conceptually and empirically is at most partially autonomous. In one sense this supposition is correct. Luhmann’s portrayal of the autopoietic legal system describes a system that is from an Anglo-American perspective only partially autonomous since it is open to the influence of external forces (Luhmann, 1985 c: 114; supra: 20—21). Far from being radically autonomous, autopoietic systems are open to the world in that their actions — even if carried on as self-reflective communications — vary with environmental activity. In another sense, however, substantial distance remains, for what is crucial to the Anglo-American view that legal autonomy is at best partial is the idea that law is open to normative influences from extralegal sources of power and authority. Luhmann’s vision postulates a legal system that is closed in a normative sense. Without normative closure...

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23 One might see many of the questions that I think a sociological theory of law should allow us to address as rearising when one turns to the question of how the legal system can maintain its autopoiesis/autonomy given that law is part of a more encompassing social system. This might be the case, but the start that Luhmann makes in responding to this question which has to do with a postulated unique function of law and the closed communication system this engenders, like the theory of autopoiesis itself, tends to answer questions by definition rather than to pose them in the form of refutable hypotheses open to empirical investigation.
the autopoiesis of law and its ability to fill what Luhmann sees as its distinctive function would cease.

While it is true that a legal norm (i.e. a law) does not change simply because not everyone complies with it, if the idea of normative closure is to amount to anything important it must mean more than this. At a minimum one would think that the claim of normative closure means that law follows distinctly legal principles and does not embody the normative agenda of any particular political or social groups. One would also expect it to mean that law as applied restates its normative implications without regard to the social or political characteristics of those before it. Both propositions are, as an empirical matter, palpably false and are major reasons why: (1) actual legal systems are only partially autonomous; (2) it is instructive to view the degree of legal autonomy as a variable; and (3) the degree of legal autonomy is important for other qualities we value in social life.

But how can Luhmann be so wrong about such a fundamental and easy to spot matter as the fact that legal systems are not normatively closed? He cannot, I am sure. I must misunderstand him, or — to say much the same thing — be using language in a very different way.

But in what particular do I misunderstand Luhmann? Perhaps I misunderstand the entire enterprise. Perhaps Luhmann simply means to be dealing with law in the abstract as a closed communication system. On this view, so long as the legal system responds to pressures on it by translating non-legal language into legal language, autopoiesis is maintained (Luhmann, supra: 18—19). This would suggest that if the political system sends a message to a court that X, a leading dissenter, must be gotten rid of, and the legal system labels X guilty, the system maintains its autopoiesis.

It appears that Luhmann has a proposition like this in mind when he suggests that no legally relevant event can derive its normativity from the environment of the system (Luhmann, supra: 20). Perhaps Luhmann means something special by “derive its normativity” which makes the proposition true by definition. If not, the proposition appears to be contradicted by the use of legal standards such as “good faith,” the relation between legal and cultural values embodied in malum in se crimes and the place given to juries or lay assessors in many systems of law. While it is true that the norms thereby derived are legal because the legal system treats them as such, it is also the case that they represent the penetration of extralegal values directly into the legal system, and it may also be the case that the legal system had no real choice about accepting the values in question.

The suggestion that I must misunderstand Luhmann is neither a pretense nor intended as a rhetorical device. I am driven toward it by my reading of Luhmann’s argument, my view of the place of law in society and my respect for Luhmann as a social theorist. No doubt the suggestions that follow are not the only ways in which I may have misread Luhmann, and I welcome suggestions which do not limit the utility or scope of his theory in the ways that the readings I sketch below, which are the most plausible readings in my view, do.
This is a far cry from the Anglo-American view of autonomy, but it also seems distant from what Luhmann means by autopoiesis because the system in this example is not self-regarding except in the most limited definitional sense. Rather it is looking for guidance to another system. Indeed, Luhmann would probably go further than I and argue that not only was the legal system not autonomous, but also that what I have described is a political rather than a legal action (Luhmann, 1985 c: 122).  

Alternatively Luhmann may be treating autopoiesis as I treat perfect autonomy, that is as an ideal type, which is not and cannot be achieved, but which aids our understanding of the law because it clarifies our thinking about an important, partially achieved aspect of actual legal systems. If so, it is unfair to confront Luhmann’s portrait of normative closure with examples of how law appears normatively open and to suggest that this invalidates his view about the central distinguishing feature of law. Luhmann, however, does not present his view of law as one would present an ideal type. Indeed at various points in his writing, he suggests that if a legal system is to exist at all it can only exist as an ongoing process of autopoiesis (Luhmann, supra: 17—18).

Finally, I may be wrong in suggesting that Luhmann cannot mean to confine the idea of normative closure simply to the proposition that when normative expectations are disappointed (i.e., laws are broken) they are not changed. But if this is what Luhmann means, what appeared to be a radical perspective on the autonomy of law and the concomitant closure of the legal system instead makes only the relatively trivial point that norms are not defined by instances of individual action but are the standards by which society both tries to influence action and later judges it. This, of course, is characteristic of any normative system, closed or open. Norms, as Luhmann recognizes, can only develop by reference to deviant behavior (Luhmann, supra: 25). If norms changed so as to accord with whatever behavior occurred, they would not be norms.

If Luhmann seeks to make the broader statement that the legal system is normatively closed in the sense that its norms are not only maintained despite individual deviation but are also maintained despite aggregate deviation, then I think he is, as an empirical matter, mistaken. The claim that “everybody does it” may constitute an effective defense in law, and

26 But see the preceding footnote. Perhaps if pressures on the legal system were more subtle so that the legal system was translating popular morality as observed in the system’s environment into a set of expectations rather than simply a pronouncement in an individual case, Luhmann would see the new rule as law and see the need to translate the environmental norm into a legal system as the essence of normative closure. If Luhmann’s view allows the legal system to be so permeable to extralegal norms and interests, he and I mean very different things by an autonomous legal system, and his vision disguises a potentially overwhelming impact of other systems on the substantive normative content of the law.
some legal standards, like the standard of the reasonable person in Anglo-American tort law, are explicitly open to specification by reference to aggregate behavior. Moreover, what everybody does is often directly introduced into the law's structure as when the British common law grew to incorporate much of the law merchant or the drafters of the American Uniform Commercial Code looked to business practice to resolve difficult questions of legal policy.

If Luhmann's conception of normative closure is more restrictive than its centrality in the autopoietic process would lead us to believe, its complement, the cognitive openness of law, must entail more than what one might otherwise have thought. Luhmann is, unfortunately, not very clear about what the cognitive openness of law entails. At some points, he suggests that this means that the legal system is capable of understanding the facts of cases and reaching decisions (i.e., normative judgments) given the facts it hears (Luhmann, 1985d: 9; 1987). This suggestion is clearly correct. At a minimum law must be open in this way.

What is less clear in Luhmann's scheme is whether cognitive openness extends to an appreciation of the political and social forces in the legal system's environment that may be manifested in the generation of legal norms that reflect external distributions of power. When, for example, Mr. Dooley said, "Th' supreme coort follows the iliction returns," (Dunne, 1963: 52) was he describing the capstone of a system which was not autopoietic in Luhmann's sense of the term, or was he describing the capstone of an autopoietic system that was cognitively open in a way Luhmann's theory allows? If the narrow reading of "normative closure" that I suggest above is accurate, then the idea of cognitive openness has this latter expansive scope. The judicial consideration of election returns becomes part of the ongoing autopoietic process so long as the court specifies in legal language the legal implications of the political world it observes.

If this is the proper reading of Luhmann, it means that there are few important differences between the Anglo-American theory of legal autonomy that I espouse and the role that autopoietic theory, in fact, allows environmental influences. Both approaches see "partial autonomy" in the sense I use this term as the most that is possible and both approaches posit a system that is continually vulnerable to the influence of external social and political forces. Finally, and most importantly, both approaches see in the language of the law and the system's ability to maintain the integrity

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27 Luhmann might call this an example of cognitive openness which his theory allows, and not an example of normative openness which is not permitted if the system is to maintain its autopoiesis. If so, and the claim is plausible in Luhmann's scheme, the example illustrates the limited scope of Luhmann's concept of normative closure and the fuzzy boundary between the normative and the cognitive.
of that language the key to the degree of autonomy that is in fact achieved. The "radical integrity" of autopoietic systems is, however, not very radical. It allows for considerable encroachment by other systems. Indeed, it allows for the possibility that behavior in one system, including normative definitions,\textsuperscript{28} will change almost in lockstep with behavior in another.

\section*{A Further Comparison}

If, however, there is this kind of rapprochement between these two views, there are, in my opinion, substantial reasons to prefer the Anglo-American perspective on autonomy to one which sees it as a feature of the autopoietic unity of systems.\textsuperscript{29} First, there are definitional advantages. Luhmann's

\textsuperscript{28} Normative definitions would still have to be maintained when they are violated to satisfy Luhmann's condition, but if this is all the condition means, norms — legal norms for example — could be changed rapidly and routinely when environmental forces demand it.

\textsuperscript{29} I have already suggested a number of theoretical and empirical difficulties with Luhmann's approach, on other interpretations of what he means. Luhmann in responding to this paper when it was presented implied an advantage to autopoietic theory when he asked whether my version of autonomy allows for increasing independence and dependence at the same time. I am not one who sees theoretical virtue in apparent paradoxes, so unless one could show empirically that actual legal systems had over time become simultaneously both more (or less) independent and dependent I would not be troubled if this condition were not met. However, for those who would be troubled if this apparently paradoxical condition could not be met, I should point out that the Anglo-American idea of autonomy allows it. To see how this is possible, first consider an example distant from law. Suppose a farmer devotes 50\% of his land to his own subsistence and 50\% to growing crops for a patron who is his only access to a market. From one perspective the farmer enjoys considerable independence. He can devote half his land to growing whatever he desires, and even if the patron were to buy nothing, he could probably — albeit barely — survive. But at the same time, he is quite dependent because a substantial portion of his well-being depends on his patron. Thus he will probably plant whatever crops the patron desires; he will use the seeds the patron provides; he will harvest according to the patron's schedule rather than his own, and if there were a drought he would probably irrigate the patron's land more generously than his own to preserve the patron's future custom.

Now assume the farmer develops more outlets to market, and with the prospect of hundreds of buyers for his crops, he decides to devote 90\% of his land to farming for others and only 10\% to his own subsistence. Clearly, he is more dependent. Should no one purchase his crops, he will starve, for he does not grow enough to meet his needs. At the same time, he is far freer. With many potential buyers, he may choose what he will grow and how he will grow it, and he need not fear alienating specific buyers should he take better care of his subsistence acreage than that on which he is growing crops for others.

The Anglo-American perspective on legal autonomy allows for a similar phenomenon in the legal sphere. The legal system may have a large sphere in which it is largely
autonomy (as autopoiesis) is under this last view of what cognitive openness allows, equivalent to “partial autonomy” in the scheme I advance. Thus, there is no place for “full autonomy” or autonomy as an ideal type in Luhmann’s scheme, and theoretical discourse on this topic is concomitantly limited.

Second, if the two modes of speaking amount to the same thing, Luhmann’s approach introduces unnecessary theoretical baggage and so fails the test of Ockham’s razor. We do not need to talk of autopoiesis and all that that entails nor do we need to worry about the correspondence of legal and social systems in order to understand and speak meaningfully of legal autonomy. Moreover, the Anglo-American view offers a better understanding of how forces in the legal system’s environment affect and are restrained by communication within the legal system than that which one acquires from Luhmann’s somewhat opaque injunction that legal systems are normatively closed and cognitively open.

Finally, the Anglo-American view I advance deals more adequately with the place of legislation in the legal system. Legislation is, unabashedly, an institution that channels political judgments and the external forces they reflect into the legal system. This characteristic feature of legislation remains even though these external forces may be restrained and shaped both by norms that define the proper behavior of legislatures as legal institutions and by legal norms that affect the way courts interpret and apply legislative enactments.

In Luhmann’s scheme legislation has no clear role. It even appears at times that legislation — a central reality of modern legal systems — is self-regarding and unaffected by external interests, but vulnerability to direction from certain extralegal interests may make it highly responsive to them. Thus, in a dictatorship, substantial areas of private law may be left purely to the self-regarding principles of the law, but the system as a whole may be vulnerable to the dictator’s (polity’s) influence whenever it suits him. Or 40% of a legislature may be controlled by mining interests, yielding a body of law that is especially solicitous of mining although in areas unrelated to mining largely independent of extralegal social pressure.

In another society, numerous influences may impinge on a legal system so that judges and legislatures respond to a large variety of extra-legal interests. Yet the very variety of interests and the countervailing power they bring to bear may mean that the legal system reflects distinctively legal values more than it does any identifiable external value set. Thus total but conflicting dependence may free legal decision makers to hew on the average more closely to distinctively legal values than they would, on the average, if the legal system had to be highly responsive to extra-legal pressures in certain areas but not at all responsive in others.

30 Unless, of course, Luhmann’s theory fits into a larger, coherent theoretical whole in a way the version I am arguing for does not. Note, however, that even if one accepts Luhmann’s more general theory of the autopoiesis of social systems (1985 a; see also 1985 b) as such a whole, the Anglo-American perspective on legal autonomy may be consistent with it. See note 18, supra, and the discussion that accompanies it.
inconsistent with the autopoiesis which is the distinguishing feature of law as a subsystem of society (Luhmann, 1985 c: 122—25). For example, at one point Luhmann suggests that regulatory law, which is typically legislative or quasi-legislative rule making, exploits the law in a manner alien to its function and threatens to undermine its ability to regenerate itself (Luhmann, supra: 28). Indeed, when we contrast the role of legislation and judicial decisions in Luhmann’s scheme there is an irony in characterizing Luhmann’s vision as “Continental.” His vision of autopoiesis appears quite close to the ordinary Anglo-American perspective on how common law courts produce and reproduce the law (Luhmann, 1985 c: 117; supra: 29; 1987).

We see this in Luhmann’s view of the function of law. For Luhmann, a precise definition of the function of law is: “using the possibility of conflict for a generalization of expectations in temporal, social and substantive aspects” (Luhmann, 1985 c: 121 at note 24; see also Luhmann, infra: 17).\textsuperscript{31} This view of law’s function fits the judicial process better than the legislative one. Courts focus on actual conflict (realized possibilities). In the process of resolving conflicts presented to them, courts can and do reaffirm existing norms, overtly change norms, or contribute to bodies of precedent that carry with them the germs of new normative standards and so contribute to the ongoing self-referential reconstitution of the law that Luhmann calls autopoiesis.

Legislation, on the other hand, need not focus on realized conflicts but deals only with possibilities. This becomes particularly problematic when possible conflicts would not exist but for the legislation. Thus some legislation can be fit into Luhmann’s scheme only by suggesting that legislation may create a possibility of conflict for the apparent purpose of using the created conflict as the occasion for the generation of legal expectations. But since it is the generation of legal norms that creates the

\textsuperscript{31} Luhmann (1985 c: 121 at note 24) also argues that a more general definition like “contributing” to the order of society would confer on anything the status of being a functional equivalent to law. This suggests to me that Luhmann’s more restrictive functional definition results from reflecting not on how law serves society, but by searching for one unique way in which law serves society. This in turn appears mandated by Luhmann’s view that autopoietic subsystems must by definition be fully distinguished from each other and can as a matter of logic be so distinguished only if each fills a unique function. One reason why I have difficulty with Luhmann’s portrayal of law as an autopoietic system is that I don’t subscribe to his underlying functionalist theory of society, especially insofar as it uniquely allocates social subsystems to functions. Indeed, it does not seem to me that the function Luhmann uniquely assigns to law — using the possibility of conflict to generate norms — is at all necessary to the ongoing functioning of a society. So long as conflicts are resolved, or can be forestalled, I do not see how it matters whether it was the possibility of conflict or some other feature of social life that led to the legal norm.
possibility of conflict (Luhmann, 1985a: 28), the functional perspective makes little sense. Indeed, the matter may be more convoluted still, for at one point Luhmann suggests that what legislation does is not to create legal norms, but to conjure up conflict out of nothingness in the expectation that law will be formed out of the orientation that law takes to the conjured up conflict (Luhmann, supra: 27). I find this circularity unhelpful, and its functional basis somewhat mysterious. Any theory that forces us into such circles should be avoided if a plausible alternative is available.

Moreover, even this view does not fully resolve the ambiguity of the place that legislation occupies in Luhmann's scheme. Luhmann tells us that it is difficult to see how legal doctrine can develop amid the turbulence of frequent legislative enactments, thus implying that much legislation is not law but something that threatens it (Luhmann, 1985c: 125). Perhaps it threatens the ongoing autopoiesis of law as Luhmann sees it, but if the price of hewing to the autopoietic theory of law is that much legislation must be seen as something other than law or as external to the legal system, I think it is the theory of autopoiesis and not the notion that legislatures make law that should be discarded. Recognizing, as in the Anglo-American scheme, that the legislative process is not autonomous from non-legal sources of power and influence and that substantively oriented legislatures are a major force limiting legal autonomy is one way of making the link between legislative action and the legal system without thereby denying that law may still have a life of its own or that self-referential processes may continue to play an essential role in the application and generation of legal norms.

Summary

Lest I be misunderstood let me summarize what I see as the goals of this article and the conclusions that may be drawn from it.

32 Luhmann also speaks of legislation as "predeciding" conflicts (Luhmann, supra: 28). This perspective I find more helpful, for it is easy to see the functional value of a system that appreciates the likelihood of conflicts it does not create and establishes rules for resolving them. It is difficult to make sense of an argument that suggests that conflicts — perhaps by granting rights that create a clash of interests that did not theretofore exist — are created so that they may be the occasion for generating norms that predecide them. It also appears that legislation cannot be distinguished from adjudication on the predeciding dimension. Modern theories of precedent recognize that in deciding legal issues appellate courts look forward as well as back and attempt to establish rules to govern future conflicts. Indeed, courts also conjure up conflicts as when in overturning legal restrictions on abortion the possibility of hitherto non-existent conflicts — like the conflict between parents and minor daughter over whether the daughter can get an abortion — arise to be resolved by the court at a later date. Generally speaking, conflicts like this are inescapable by products of changing law in the context of cases and are not conjured up to provide further occasion for making new law.
1. My goal has been to elucidate, question and point up gaps in Luhmann's theory of the autopoietic social system as applied specifically to law. I have posed my version of the Anglo-American theory of legal autonomy not to convince readers that it is correct, but as a way of highlighting problematic aspects of Luhmann's theory.33

2. My focus has been on the issue of legal autonomy. I have suggested that the theory of the autopoietic legal system is not satisfactory as a theory of legal autonomy. My argument for this conclusion should not be taken as a total criticism of Luhmann's theory of autopoietic social systems, either generally or as applied to the legal system. However, in the course of exploring the adequacy of Luhmann's theory as a theory of legal autonomy, more general and fundamental problems have been revealed. For example:

a) There is considerable ambiguity and some inconsistency in the way the theory of autopoiesis and its application to the legal system is expounded by Luhmann and others. In particular the sense in which the legal system is "normatively closed and cognitively open" must be more fully and clearly specified.

b) The theory of the autopoietic legal system best fits a system of common law legal reproduction in which courts draw on legal sources to make new law. If the theory is to encompass adequately the role of legislation and administrative regulations in modern legal systems considerable work must be done. A theory which does not treat legislation and administrative regulation as law cannot serve as a general theory of legal reproduction in modern society.

c) The theory of the autopoietic legal system may appear to encompass more than it does. There is the possibility that the theory is to a large extent either true trivially or by definition and the concomitant possibility that while Luhmann is correct and the legal system does reproduce itself autopoietically this insight adds little to our understanding of the growth and implications of law. For example, if the legal system's sphere of normative closure is tiny and its sphere of cognitive openness is large, understanding legal change may require considerably more attention to conditions in the law's environment than it does to the mechanisms of reproduction. Similarly if a system cannot by definition encroach on another but can, in effect, colonize an activity that was once in the other's domain (Luhmann, 1985:c: 122), the sphere of autopoietic legal reproduction — as opposed, for example, to something which looks legal but has a major political component — may be a relatively small and insignificant compo-

33 I will not, however, object if anyone is so convinced. For a more detailed treatment, which also includes a discussion of what I call "pseudo formalism" see chapters 12 and 13 of Lempert and Sanders (1986).
nent of social life. Those who argue for the autopoiesis of law and for the theoretical utility of this perspective must define specifically the boundaries of the autopoietic reproduction of law in modern society and illustrate the range of problems the theory illuminates.

I do not regard these three criticisms of the theory of law as an autopoietic system or other criticisms of the general theory that this paper makes or implies as necessarily unanswerable, and for this reason, I do not reject the theory out of hand. I do, however, think that answers are sorely needed and that the potential of the theory cannot be realized unless its proponents respond clearly and specifically to these and similar challenges.

3. An autopoietic legal system in Luhmann's sense of the term is neither the same thing as nor does it imply a fully autonomous legal system, in my sense of the term. If Luhmann or others read the theory to require this equation or implication, their theory is, in this particular, wrong. I have shown by example that legal norms and legal behavior are influenced by actions in the economic, social and ethical spheres. Moreover, to equate autopoiesis and autonomy entails serious theoretical costs. Imposing the binary structure of autopoiesis on legal autonomy diminishes the value of the latter as an explanatory variable and its tractability as a state to be explained.

4. I do not believe the preceding point is a telling criticism of Luhmann's use of the concept "autopoiesis" for I do not think he uses it to mean or entail what I call "legal autonomy". But if autopoiesis is not linked to autonomy by equation or implication, a theory which sees law as an autopoietically organized system is, if not mistaken, markedly incomplete. A concept like the Anglo-American concept of legal autonomy must be embedded in it, to allow discussion of a range of issues concerning relations between systems that are integral to understanding both the dynamics of legal change and the role of law in society. In particular, if the theory of autopoiesis is not disconfirmed by examples of legal norms that change in accord with extra-legal behavior, it must be able to accommodate the examples and should, ideally, offer us a mechanism which explains how extralegal norms and values come to influence legal norms and behavior and so in this sense render the legal system less than fully autonomous. This is particularly important for a general theory of legal systems since many of the most interesting questions in the contemporary sociology of law, including most questions about the role law can and does play in the modern regulatory state, depend on understanding the mechanisms which render law partially autonomous — that is both independent to some degree and open to extra-legal influences. The lead that Luhmann offers — the argument that law is normatively closed and cognitively open — is both of questionable validity and too general to be of much help. Its
generality is obvious. Its validity is questionable because what often must be explained are normative changes in the law associated with extra-legal pressures. It appears that the only way that this fact may be accommodated within the theory is by reducing the concept of normative closure to the rather trivial observation that norms do not change simply because they are violated. With this interpretation the theory of autopoiesis allows legal norms to change in response to extra-legal social, economic, or ethical forces. This may be a correct portrait of what autopoiesis entails, but it is hardly the picture of system independence that the tenor of the argument for autopoiesis implies.

**Conclusion**

These observations are what I see as the heart of what we have learned from confronting Luhmann's idea of autopoiesis with an Anglo-American theory of legal autonomy. Treating the idea of autopoiesis not as a metaphor but as a theory, it appears to be either an erroneous, an inadequate or an unnecessarily complicated approach to understanding what we mean by legal autonomy. But the viability of autopoiesis as a theory of legal autonomy should not be taken as the measure of the theory, for it appears that Luhmann's theory is not intended to serve the theoretical functions that the Anglo-American concept of autonomy can fill. The confrontation of the two perspectives has, however, also suggested important gaps in the theory of autopoiesis and areas of considerable conceptual confusion. To state my reservations in their strongest form: I question the wisdom of elaborating an extensive, complex theory from a base which looks not to the empirical reality of legal or social systems, but to an arguable reality of biological systems; a reality that in its own terms is unlike that of social systems because crucial aspects of both the biological object and its observer do not and cannot characterize social systems (Luhmann, 1985c: 122 at note 26; 1985a: 2; cf. Rottleuthner, infra).

At the same time, this comparison and critique necessarily slights much that is interesting in Luhmann. Whatever its theoretical adequacy, autopoiesis may nonetheless have substantial metaphorical value in that researchers may draw important, testable, theoretical insights from pondering the idea of the autopoietically organized legal system and its possible implications. The best example of the possible fruitfulness of autopoiesis as metaphor is Luhmann, for if he has not yet developed the idea of autopoiesis to the point where it offers us a satisfactory, empirically testable theory of law, he has offered us observations that are insightful, sometimes dazzlingly so. Luhmann's simple observation that the institution of property is "the only great delegeralizer with a minimum of rules and maximum of effects" (Luhmann, 1985c: 121) is I think correct and fruitful in its implications.
His discussion of legislation and the threats of complexity (Luhmann, 1985 c: 123—25; supra: 31—33), his explanation of why legislation breeds more legislation (Luhmann, 1985 c: 124); his observation that, "[I]ntact social systems are more reluctant to juridify their conflicts than fragmented systems" (Luhmann, 1987); and his discussion of conflict as a way of resolving difficulties of communications within systems (Luhmann, 1985 a: 27) are similarly helpful and important. If I thought it was necessary to accept the theory of the autopoiesis of law or the equation of autopoiesis with autonomy in order to derive or ground such insights, I would feel compelled to rethink my critique. But I do not see Luhmann’s most insightful conclusions as dependent on the reality of autopoiesis, and I believe we should be able to discover less complex, better grounded theory that is consistent with Luhmann’s insights and more. Absent such theory, however, the best we may be able to do is to ask the Luhmann’s among us to ponder the legal system and its problems from whatever perspective they find the most stimulating. In this lies the value of autopoiesis.

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34 In reading Luhmann’s work in connection with this essay I was particularly impressed by his discussion of meaning (Luhmann, 1985 b). While this discussion provides a background for the papers on law (and much more), it does not address legal system issues directly and I have not focused on it in this paper.