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Stephen M. Diamond

University of Miami School of Law, sdiamond@law.miami.edu

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AUTOPOIESIS IN AMERICA

*Stephen Diamond**

These are all very interesting papers written by very intelligent people. It is no criticism of them to suggest that, generally, the structure of the discussion has not significantly advanced since the Florence Symposium on Autopoiesis,¹ at which many excellent papers were also presented. The autopoiesis theorists have not convinced others, particularly Americans, that theirs is the only, or the best, model of law in society. Nor have they felt themselves obliged by criticism to alter significantly their own position and mute their claims.

Unlike a sportscaster or a war correspondent, I shall not give my estimate of the effectiveness of the challenges to autopoiesis, the points scored and surrendered, the damage done. After succumbing to the temptation to offer the unoriginal remark that an autopoietic system is evidenced by the capacity of autopoiesis theorists to ignore often and assimilate sometimes criticisms of their work—the same can also be said of the critics of autopoiesis—I shall instead very sketchily outline the pattern of criticisms of autopoiesis and then speculate briefly on some of what is or may be at stake in the debate between pro- and anti-autopoiesis forces.

Is autopoiesis presented as a theory or as a metaphor? If it is offered as a characterization of what actually is, is the proposition falsifiable? American critics are uncomfortable with the tautological aspect of formal grand theory. Professor Niklas Luhmann is frustrated by his critics' refusal to restrict their talk to high theory.²

If it be only a metaphor, what makes it useful? And why should everything be explained by one central metaphor drawn from biology? Skeptical of theory, American intellectual pluralists like to admire autopoiesis for some insights, but not for its universal structure.

* Professor of Law, University of Miami Law School. B.A., Swarthmore College, 1967; Ph.D., 1976, J.D., 1976, Harvard University. I would like to thank Chuck Yablon, Joel Rogers, and Robert Gordon for discussing this subject with me, and Robert Gordon for generously sharing a draft of his unpublished evaluation of autopoiesis.

¹ See *AUTOPOIETIC LAW: A NEW APPROACH TO LAW AND SOCIETY* (Gunther Teubner ed., 1988) (collection of essays, many of which were delivered as papers at the Florence Symposium) [hereinafter *AUTOPOIETIC LAW*].

² Niklas Luhmann, *Operational Closure and Structural Coupling: The Differentiation of the Legal System*, 13 *CARDOZO L. REV.* 1419, 1425-26 (1992).

Theory *qua* theory provides only "aesthetic pleasure,"³ which Americans admit defiantly yet perhaps guiltily.⁴

Why is autopoiesis preferable to a description of law, economics, etcetera, as various dialects of a political language? This question leads to the problem with system boundaries, much debated in Florence and still at issue.⁵ Professors Luhmann and Gunther Teubner have done much to schematize the relationship between systems, but have not satisfied the non-believers.⁶ Why is it so important that law has discrete and maintainable boundaries? German heirs to the Pandectist tradition feel some compulsion to insist on such boundaries, but American academics have much invested in legitimating their position within academe by emphasizing the ties between law and other disciplines.

Autopoiesis does not fit comfortably with the common perception, at least in the United States, that the boundaries between law, politics, and economics, for instance, are permeable, and indeed cannot be independently defined. The subjective, low-level empirical arguments which reflect such a perception frustrate Professor Luhmann, who argues that his critics are often not rigorous as to the level of generality in which they are speaking.

What American legal academic, after reading Robert Hale⁷—and I note that Hale, not Roscoe Pound is a hero for contemporary American law professors of what passes in the United States for a theoretical bent—can conceive of the market as independent of the legal rules which are constitutive of it? (I suspect that Professor Luhmann's reference to Pound⁸ may be one of the very few times his name will be uttered in an American law school this year.) Which American entirely disagrees with Mr. Dooley's observation that the Supreme Court follows the election returns⁹—that the structure of legal science cannot explain American law? Professor Luhmann would explain

³ Thomas Heller, Remarks at the *Cardozo Law Review* Symposium entitled, *Closed Systems and Open Justice: The Legal Sociology of Niklas Luhmann* (Mar. 4, 1991).

⁴ When this conference was in large part repeated at the Law and Society meetings in Amsterdam in June 1991, the audience was large—the session took place in the grand hall—and almost entirely European. Professor Luhmann and his work have a powerful, but restricted appeal.

⁵ See AUTOPOIETIC LAW, *supra* note 1.

⁶ See Peter Kennealy, *Talking About Autopoiesis—Order from Noise?*, in AUTOPOIETIC LAW, *supra* note 1, at 349 (a summary of the debate between the supporters and critics of autopoiesis).

⁷ ROBERT L. HALE, *FREEDOM THROUGH LAW: PUBLIC CONTROL OF PRIVATE GOVERNING POWER* (1952).

⁸ Luhmann, *supra* note 2, at note 39 and accompanying text.

⁹ FINLEY PETER DUNNE, *MR. DOOLEY'S OPINIONS* 26 (1901).

constitutional law as a coupling of law and politics. His system remains intact, but as a pure theory of law is nowhere instantiated on earth. Such an objection, of course, is by no means fatal to theory.

If law as a system is distinguished from the market as a system because the former is normative, focused on right and wrong, or legal and illegal, whereas the latter is concerned with costs and benefits and gives us prices, why did Oliver Wendell Holmes classify so much American law solely as a matter of price?¹⁰ And why has American law proved so susceptible to the arguments of the law and economics movement?¹¹

Do lawyers actually think differently from economists? I think that our typical answer is sometimes yes and sometimes no. There is a joke currently popular in the medical community that tells of a golf foursome composed of a priest, a doctor, an historian, and a lawyer, who were frustrated because the foursome in front of them were playing very slowly. While they were grouching about this at the nineteenth hole, a club official explained that the earlier foursome were all blind. The priest declared his delight. "What an inspiration—I'll add this to my next homily." To shorten the story, the doctor and the historian were equally enthusiastic. The lawyer, however, asked, "Why don't they play at night?" Perhaps it is a distinctive attribute of American lawyers that they, like American economists, can be associated with a crude, unfeeling, yet perhaps effective practicality.¹²

Lawyers may face dissonance when they profess to act sometimes—or simultaneously—as agents of the client and sometimes as officers of the court, but they do profess to do both. That is, auto-poiesis does not resonate with the American experience of the legal world, perhaps because the lawyer—the intermediary between the law and other systems, such as the market—and not the commentator, is seen as central to that world. To the lawyer, unlike the commentator,

¹⁰ See Robert W. Gordon, *Holmes' Common Law and Social Science*, 10 HOFSTRA L. REV. 719, 736-37 (1982); see also Letter from Oliver Wendell Holmes, Jr. to Frederick Pollock (Mar. 12, 1911), in 1 HOLMES-POLLOCK LETTERS 177, 177 (Mark D. Howe ed., 1946); Letter from Oliver Wendell Holmes, Jr. to Frederick Pollock (Mar. 25, 1883), in HOLMES-POLLOCK LETTERS, *supra*, at 19, 21.

¹¹ See MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 116-18 (1987); RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW at xix (3d ed. 1986); Clark Byse, *Fifty Years of Legal Education*, 71 IOWA L. REV. 1063, 1077-79 (1986).

¹² Professor Luhmann insists that he is describing systems and not institutions. Niklas Luhmann, Remarks at the *Cardozo Law Review* Symposium entitled, *Closed Systems and Open Justice: The Legal Sociology of Niklas Luhmann* (Mar. 4, 1991) [hereinafter Luhmann Remarks]. But his disciples who criticize regulation, see *infra* text accompanying note 14, are making institutional arguments, and in general, the abandonment of institutional claims leaves the theory intact but of questionable relevance. The appeal of auto-poiesis becomes an aesthetic rather than an instrumental one.

the law is never pure. Autopoiesis theorists do not, however, concede that this is a weakness in their theory; practice always distorts theory, they note dismissively.¹³

Finally, is the theory of autopoiesis a normative one? Sometimes its proponents offer an anti-legislative, anti-regulatory critique. Don't mess with another system's life world, as it were. And there is also, as Dean Alan Wolfe has noted,¹⁴ sometimes an assumption that an autopoiesis system should be preserved. Functionalism has presented similar difficulties, being alternately a description and an evaluation of practices.¹⁵ (Is the theory that what survives *is* functional, or that what is apparently functional *should* survive?) Legal techniques often seem insular and surprisingly durable, but do they never change decisively, and should they never? Are there never moments of perceived radical discontinuity between experiences and norms—paradigm shifts, as it were, when, for instance, the formal equality and generality of late nineteenth-century American law was understood to be class-based and unfair?¹⁶ (Generality and universality of statutory law were themselves ambitions which differentiated the mid-nineteenth century from what had come before.)

These are then some of the ambiguities and problems upon which Dean Wolfe,¹⁷ Professor Michel Rosenfeld,¹⁸ and others here and at the Florence Symposium have elaborated.¹⁹ I turn now to what may be at stake.

Autopoiesis theory resolutely denigrates the importance of the individual human agent. (Professor Luhmann tells us that he talks of individuals five billion at a time.)²⁰ Autopoiesis theory is not, of course, the only grand theory that does this. Theories of organic growth, which Hubert Rottleuthner has noted²¹ closely resemble

¹³ While autopoiesis can be contrasted with American empiricism as an example of a German penchant for abstraction and generality, it can also be understood as one of many recent particularistic challenges to Enlightenment universalism. Like Slovakian or Croatian nationalism, autopoiesis insists on the limited possibility for communication.

¹⁴ Alan Wolfe, *Sociological Theory in the Absence of People: The Limits of Luhmann's Systems Theory*, 13 CARDOZO L. REV. 1729 (1992).

¹⁵ See Ralf Dahrendorf, *Out of Utopia: Toward Reorientation of Sociological Analysis*, in SYSTEM, CHANGE, AND CONFLICT 465 (N.J. Demerath III & Richard A. Peterson eds., 1967); David Lockwood, *Some Remarks on "The Social System,"* in SYSTEM, CHANGE, AND CONFLICT, *supra*, at 281.

¹⁶ I owe this formulation to Robert Gordon.

¹⁷ See Wolfe, *supra* note 14.

¹⁸ See Michel Rosenfeld, *Autopoiesis and Justice*, 13 CARDOZO L. REV. 1681 (1992).

¹⁹ See AUTOPOIETIC LAW, *supra* note 1.

²⁰ Luhmann Remarks, *supra* note 12.

²¹ Hubert Rottleuthner, *Biological Metaphors in Legal Thought*, in AUTOPOIETIC LAW, *supra* note 1, at 97.

autopoiesis, also tend to denigrate the individual's significance, as does structuralism. Such an approach is appealing for several reasons. It conveys the reassurance of order and system not contingent upon spontaneous and capricious free will. It thus offers hope for the preservation of freedom in the Hayekian or common law sense of *freedom from*:²² the constraints one lives under are not created by identifiable human beings; one does not live under the will of another.

This observation is reassuring, but only partly so, since the theory does not just minimize another's free will, but one's own as well. John Stuart Mill faced this same dilemma. He wrote in his autobiography of his giddy delight as an over-educated youth, in utilitarianism and in the sense of personal power and potential to reshape the environment.²³ Then he had what is known as his "mental crisis," when he considered that he in turn might well be the environment being shaped by another,²⁴ a particularly poignant fear given his relation to his father. That is, human agency is usually attractive if one considers one's own freedom and power, but not if it suggests that another may have power over one. Some people are reluctant to hamstring themselves just to hamstring others—Thomas Jefferson for one.²⁵

A similar concern lies behind Bruce Ackerman's efforts,²⁶ questionable though I might ultimately find them, to see three revolutions in American history: the one going by that name, the Civil War, and the New Deal—all liminal movements which decisively transformed American constitutional law and did it through ordinarily illegitimate, or at least problematic, mechanisms. Ackerman wants routine and inbred law, but occasional radical change as well.²⁷

In American law, any decision can be, and at various times probably has been, explained as the result of the exercise of a judgment or policy, or as the consequence of a jurisdictional determination. One view exaggerates individual potency; the other denies it. You pay your money and you take your choice.

The denial of human agency, with its rejection of spontaneity and

²² See FRIEDRICH A. HAYEK, *LAW, LEGISLATION AND LIBERTY* (1973).

²³ JOHN STUART MILL, *AUTOBIOGRAPHY* 42-44 (Curran V. Shields ed., The Liberal Arts Press 1957) (1873).

²⁴ Thomas Haskell eloquently and persuasively elaborated on this subject in an unpublished speech entitled, *Persons as Uncaused Causes: John Stuart Mill, The Spirit of Capitalism, and the "Invention" of Formalism*, which he delivered in January 1991 at the Association of American Law Schools Conference.

²⁵ HANNAH ARENDT, *ON REVOLUTION* 233-42 (3d prtg. 1966).

²⁶ 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 58 (1991).

²⁷ *Id.* at 58-61.

free will—or, at least, the placing of the theoretical focus elsewhere—is appealing for intellectual as well as for political reasons. Auto-poiesis is couched on a level of abstraction and with a magisterial perspective which permits the assertion of regularity and pattern. Critics, therefore, cite a myriad of events, motives, behaviors, etcetera, which the theory of autopoiesis necessarily overlooks. Professor Luhmann then laments the theoretical ambiguity behind these recitations.²⁸ Autopoiesis theorists purport to present a theory in history, but, like Herbert Spencer,²⁹ they avoid details.

For some, grand theory is very satisfying. Oliver Wendell Holmes, who often aspired to be a philosopher in this style, periodically complained that philosophers considered themselves to be little gods who try to contain the whole world within their own minds.³⁰ Is grand theory commendable ambition or hubris? (Holmes thought that the aspiration was human but that good sense required that one always knows that one had not achieved it.)³¹ I confess that I, like most of the critics, am an American fox nipping at the heels of the German hedgehog, but my perspective is justified only by taste, which is clearly culturally shaped, and I respect Professor Luhmann's seriousness of purpose and breadth of learning. Different strokes for different folks.

Several years ago, I attended a fascinating conference of German and American legal academics in Bremen.³² The cultural differences between the two groups were striking. The Germans thought that the Americans were irresponsibly casual in their promiscuous acceptance of theoretical inconsistency. The Americans thought the Germans

²⁸ Luhmann, *supra* note 2, at 1423.

²⁹ HERBERT SPENCER, *THE STUDY OF SOCIOLOGY* (University of Michigan Press 1961) (1873).

³⁰ See Letter from Oliver Wendell Holmes, Jr. to Harold J. Laski (Feb. 26, 1918), in 1 HOLMES-LASKI LETTERS 138, 139 (Mark D. Howe ed., 1953). Holmes also commented specifically about German scholarship. He wrote, "I am more than ever impressed by the thoroughness of the Germans in systematizing, while I believe that the real contribution of the system-makers was one that was shared in by outsiders—*viz.*, a certain number of *aperçus* or insights." Letter from Oliver Wendell Holmes, Jr. to Frederick Pollock (Mar. 1, 1918), in 1 HOLMES-POLLOCK LETTERS, *supra* note 10, at 261, 261. Holmes also wrote, "[Wu's] professor Stammler is deeply occupied with the forms of thought—like a true German. I wrote the other day, though not to Mr. Wu, that infinite meditation upon a pint pot wouldn't give one a gill of beer, and that I was more concerned with the contents than the forms." Letter from Oliver Wendell Holmes, Jr. to Frederick Pollock (Aug. 2, 1923), in 2 HOLMES-POLLOCK LETTERS, *supra*, at 120, 120. The contemporary American response is little changed.

³¹ Letter from Oliver Wendell Holmes, Jr. to Frederick Pollock (Nov. 23, 1905), in 1 HOLMES-POLLOCK LETTERS, *supra* note 10, at 122, 122.

³² See *CRITICAL LEGAL THOUGHT: AN AMERICAN-GERMAN DEBATE* (Christian Joerges & David M. Trubek eds., 1989).

hopelessly obsessive in their demand for universal consistency. The consensus at the end was that there was something to each critique.

Autopoiesis has often been compared to one of the popular metaphors in the United States for the rule of law—semi-autonomy.³³ Autopoiesis is clearly preferable: its theorists attempt rigorous definitions. Semi-autonomy simply means that law cannot be completely explained by the material substructure or by wholly autonomous legal practices and that the result is complicated. Thick description, popular these days as the appropriate method through which to explore semi-autonomy, is, at least in the hands of many of those who claim to use it, the abandonment of theory masquerading as theory. Facts and stories are in; theory, at least temporarily, is Cinderella.

As Dean Wolfe notes, Professor Luhmann has on occasion repressively—but uncharacteristically—asserted that with autopoiesis, nothing further need be said.³⁴ It may or may not be some consolation that this conference suggests the contrary. Viewing academic discourse as an autopoietic system, I am not surprised.

³³ See Richard Lempert, *The Autonomy of Law: Two Visions Compared*, in *AUTOPOIETIC LAW*, *supra* note 1, at 152.

³⁴ Wolfe, *supra* note 14, at 1735.