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**Autopoiesis and Justice**

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I. JUSTICE ACCORDING TO LAW, JUSTICE BEYOND LAW, AND AUTOPOIESIS

There is justice according to law and justice against or beyond law. Justice according to law is achieved when each person is treated in conformity with his or her legal entitlement. Justice against law, on the other hand, is the justice that makes it plausible to claim that a law is unjust (even if it is scrupulously applied in strict compliance with the entitlements which the law establishes). Moreover, to be able to determine whether a law is just or unjust, one must rely on a criterion of justice that lies beyond that law—a criterion pertaining for example, to ethics, religion, or a different order of law.

The notion of a clash between justice according to law and justice against law dates back as far as ancient Greece where Sophocles gave it vivid expression in his play Antigone. As will be remembered, Creon, the King of Thebes, had decreed that the traitor Polynices, who had been killed in the field, be left unburied, his body exposed to the dogs and the vultures. Convinced that leaving a human body without burial was an offense against the gods, Antigone rebelled against her uncle Creon’s decree and proceeded to bury her brother Polynices. Upon her subsequent arrest, Antigone admitted to having violated the King’s decree, but remained unshaken in her belief that her action had been just. Speaking to Creon about his decree, Antigone declared:

That order did not come from God. Justice,
That dwells with the gods below, knows no such law.
I do not think your edicts strong enough
To overrule the unwritten unalterable laws
Of God and heaven, you being only a man.\(^2\)

While the clash between divine law and human law is a major theme in Antigone, what makes Sophocles’ tragedy so poignant is more than the naked confrontation between divine right and human

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might. Indeed, notwithstanding her firm conviction that human law must yield to divine justice, Antigone is prepared to face the consequences of having violated her duties under human law, and thus accepts that she must die for her transgression against Creon’s decree.\(^3\) Furthermore, although Creon’s insistence on being obeyed and having his decree enforced at all costs may betray an undue obsession with law and order, his close family ties to Antigone—who, besides being his niece, is also the intended wife of his son—make it impossible for him to refrain from enforcing his decree without appearing to commit an injustice. For how can a king’s decree be just in the eyes of his subjects if the king’s family can violate that decree with impunity?\(^4\)

The tensions produced by the clash between human and divine law can be alleviated by means of a principled and systematic subordination of the positive law promulgated by human rulers to the natural law derived from God or reason. Moreover, the integration of positive and natural law results in the grounding of legal norms on extralegal values rooted in ethics or religion. Finally, the viability and legitimacy of a system that integrates positive and natural law depends on the widespread acceptance of a set of ethical or religious values capable of furnishing a workable criterion of justice.

Contemporary Western democracies tend to experience deep divisions concerning fundamental ethical and religious values. Consequently, those democracies do not provide fertile grounds for the successful integration of positive and natural law. This explains the ascendance of legal positivism with its emphasis on the futility of looking to morality or religion as capable of furnishing a genuine basis for the legitimacy of law. Furthermore, by negating the possibility of divine law, legal positivism appears well-suited to defuse the tension between justice according to law and justice against law. Indeed, legal positivism invites us to lower our sights and to abandon the vain hope of finding any universally valid measure of justice beyond law. Instead, legal positivism offers us the more modest relative justice of life under the rule of law.

Upon closer examination, however, legal positivism is vulnerable

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\(^3\) Id.

\(^4\) See id. at 144, where Creon says of Antigone:
So she must die. Well may she pray to Zeus,
The God of Family Love. How, if I tolerate
A traitor at home, shall I rule those abroad?
He that is a righteous master of his house
Will be a righteous statesman. To transgress
Or twist the law to one's own pleasure, presume
To order where one should obey, is sinful,
And I will have none of it.
to the charge that it can only resolve the clash between justice according to law and justice against law by making it possible for law to completely escape the grasp of justice. Operating in societies that are significantly divided regarding fundamental ethical and religious norms, legal positivism ties the legitimacy of law to its pedigree—a pedigree that seems inevitably to lead to the subjective values embodied in the will of a duly recognized sovereign. Whether the legitimate lawmaking sovereign be an absolute monarch or a democratically elected legislature, the values injected into law through the expression of the sovereign’s legislative will are bound to remain merely subjective and legitimately contestable so long as some of the monarch’s subjects or electoral or legislative minorities adhere to conflicting values. In other words, to the extent that no subjectively held value can be proven inherently superior to any other, and that legal positivism sanctions the infusion of the subjective values of the sovereign into law, legal positivism tends to reduce justice according to law to a virtually meaningless formality. If law must privilege certain subjective values over others, it is inherently unjust, and its equal application cannot compensate for its arbitrarily unequal impact. In short, insofar as it relies on the subjective preferences of the sovereign, legal positivism not only neutralizes justice against law, but also trivializes justice according to law.\(^5\)

Niklas Luhmann’s conception of law as an autopoietic system\(^6\) shares with legal positivism the belief that the validity of legal norms is not dependent on extralegal norms. In contrast to legal positivism, however, Luhmann’s conception seems successfully to avoid reliance on the injection of subjective values as an indispensable component in

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\(^5\) Although in the course of the preceding observations I have referred to a crude version of legal positivism that reduces legitimate lawmaking to the explicit expression of the will of the sovereign, the validity of these observations and of the conclusions to which they lead are in no way confined to that particular version of positivism. Thus, for instance, the more sophisticated legal positivism of H.L.A. Hart seems no more immune to the charge of having to rely on arbitrary subjective values than its more primitive counterpart. According to Hart, the primary rules, or first order rules, govern behavior but are dependent on second order rules—the “rules of recognition”—for their validity. See H.L.A. HART, THE CONCEPT OF LAW 97-98 (1961). In the absence of objective values, either the second order rules are infused with subjective values or, if they are “purely” formal, the establishment of the requisite links between first order and second order rules through judicial lawmaking necessarily introduces subjective values into the process of legal validation. Thus, in Hart’s sophisticated legal positivism the introduction of subjective values may be displaced but it is by no means eliminated.

\(^6\) Autopoietic systems “are systems that are defined as unities as network of productions of components that recursively, through their interactions, generate and realize the network that produces them and constitute, in the space in which they exist, the boundaries of the network as components that participate in the realization of the network.” HUMBERTO MATURANA, Autopoiesis, in AUTOPOIESIS: A THEORY OF LIVING ORGANIZATION 21 (Milan Zeleny ed., 1981).
the articulation of legitimate legal norms. Law conceived as an autopoietic system is self-referential and produces and structures its component elements.\(^7\) Moreover, as a subsystem of the social system, law's elements and mode of reproduction consist of communications.\(^8\) In other words, autopoietic law, for Luhmann, must be understood as a network of communications that recursively produce and reproduce communications;\(^9\) that is, as a system that marks identities and differences as a function of communications abstracted from other levels of reality, including the one that comprises the formation and projection of subjective value preferences.\(^10\) Accordingly, legal autopoiesis, as conceived by Luhmann, makes it apparently possible for the legal system to remain operationally severed both from extralegal norms and from the imprint of arbitrary subjectivity by relying on self-referential circularity as the foundation of law.\(^11\) Consistent with this theory, Luhmann's legal autopoiesis may furnish the means to safeguard the integrity of justice according to law while at the same time making it safe to abandon an ultimately doomed search for justice beyond law.

It is Luhmann's conception of legal autonomy that renders his theory of autopoietic law particularly attractive from the standpoint of establishing a firm contemporary foundation for justice according to law. Luhmann's claim concerning legal autonomy, however, is highly controversial.\(^12\) According to Luhmann, the legal system is

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7 See Niklas Luhmann, Essays on Self-Reference 3 (1990). Luhmann states that:
Autopoietic systems . . . not only produce and eventually change their own structures; their self-reference applies to the production of other components as well.
This is the decisive conceptual innovation. It adds a turbocharger to the already powerful engine of self-referential machines . . . . [E]verything that is used as a unit by the system is produced as a unit by the system itself. This applies to elements, processes, boundaries, and other structures and, last but not least, to the unity of the system itself.

8 See id.

9 Id.

10 See id. where Luhmann states that:
Autopoietic systems . . . are sovereign with respect to the constitution of identities and differences. They, of course, do not create a material world of their own.
They presuppose other levels of reality, as for example human life presupposes the small span of temperature in which water is liquid. But whatever they use as identities and differences is of their own making.


12 See AUTOPOIETIC LAW: A NEW APPROACH TO LAW AND SOCIETY 6 (Gunther Teubner ed., 1987) [hereinafter AUTOPOIETIC LAW] ("Legal autopoiesis is probably most controversial in its insistence on legal autonomy.").
one of a series of autonomous autopoietic subsystems that make up
the social system.\textsuperscript{13} Moreover, as societies become more complex, the
number of these autopoietic subsystems increases to meet developing
needs for greater functional differentiation.\textsuperscript{14} Although each of these
subsystems is considered to be autonomous, it maintains links to the
remaining social subsystems. Thus, law as an autonomous self-refer­
ential subsystem relates to the other social subsystems as a system
relates to its environment. Or, said another way, from the standpoint
of its functional operations, law is an autonomous system that has
other social subsystems, such as the political and the economic sub­
systems, as its environment.\textsuperscript{15} Consistent with this, the legal system is
not severed from contact with the realms of politics or economics.
Nonetheless—and this is crucial—political or economic factors can­
ot partake in the production and application of legal norms, because,
in Luhmann's conception, the legal system is normatively closed
while remaining cognitively open.\textsuperscript{16} Luhmann's insistence on norma­
tive closure is difficult to accept, however, given the widespread belief
that political and economic values play a significant role in shaping
legal norms. Similarly, even conceding that society's increasing com­
plexity fuels a need for greater functional differentiation, best satisfied
through the proliferation of self-referential autopoietic subsystems, it
is hard to imagine that the shaping and application of legal norms
remains closed to the normative input of individual actors engaged on
the legal scene.

While the issue of the autonomy of autopoietic law is crucial
from the standpoint of assessing the potential contribution of auto­
poiesis to justice according to law, this issue is not easily settled.
Luhmann's theory of legal autopoiesis has been the subject of numer­
ous criticisms\textsuperscript{17} but Luhmann has proven to be a very elusive target.\textsuperscript{18}
Some of the difficulty with legal autonomy stems from the fact that
the boundaries of law as a distinct practice may plausibly be drawn
along a wide spectrum ranging from the very narrow to the very
broad. Also, because of his special focus on functional differentia­

\textsuperscript{13} See Niklas Luhmann, \textit{Closure and Openness: On Reality in the World of Law, in Auto­
poietic Law, supra note 12, at 335-48.}
\textsuperscript{14} Id.
\textsuperscript{15} See \textit{LUHMANN, supra note 7, at 176-78.}
\textsuperscript{16} Id. at 229.
\textsuperscript{17} See, e.g., Hubert Rottleuthner, \textit{Biological Metaphors in Legal Thought, in Autopoietic
Law, supra note 12, at 97-127; Richard Lempert, \textit{The Autonomy of Law: Two Visions Com­
pared, in Autopoietic Law, supra note 12, at 152-90; Jacobson, supra note 11.}
\textsuperscript{18} Luhmann's excellent paper presented at this conference, \textit{Operational Closure and Struc­
tural Coupling: The Differentiation of the Legal System, 13 CARDOZO L. REV. 1419 (1992) is
typical of the great skill with which he has confronted his critics.}
Luhmann may systematically privilege law’s potential for marking differences over any capacity which it may have to mobilize and integrate wide-ranging normative concerns. Finally, Luhmann’s theory tackles law at such a high level of abstraction that it is hard to get a firm handle on the empirical implications of his claim concerning legal autonomy.\(^{19}\)

While these difficulties cannot be eliminated, they can be largely circumvented by confining the inquiry to the possible connection between the kind of autonomy generated by legal autopoiesis and the relationship between justice and law. The important question is not how narrow or broad the realm of law is as a practice, but rather whether there is any plausible sense of legal autonomy consistent with Luhmann’s legal autopoiesis which would provide genuine support for justice according to law in the absence of any normative consensus on justice beyond law. Moreover, once the inquiry is properly focused on the latter question, it should become apparent that the key to a satisfactory answer revolves around Luhmann’s notion that law’s self-referentiality allows for a circular justification of legal norms and operations. Indeed, if legal norms ultimately depend on their own circularity for their justification, then justice according to law would be completely independent from justice beyond law while remaining immune to manipulation based on the pursuit of purely subjective values by individual actors.

Based on the following analysis of the relationship between law and justice, and of the possible nexus between law, justice, and legal autopoiesis, this article will conclude that law cannot achieve the kind of full circularity required to sustain Luhmann’s conception of legal autopoiesis. The reason for this is that law as a (contemporary) practice cannot be fully emancipated from the normative grasp of justice beyond law, and, at least in part, is permeated by the extralegal norms that inform that kind of justice. As we shall see, the impossibility of reaching a consensus about any particular version of justice beyond law should not be misconstrued to signify that law can altogether do away with the kinds of extralegal norms that underlie justice beyond law in all its possible incarnations. On the other hand, Luhmann’s analysis should not be quickly discounted, for it captures a particularly important aspect of contemporary legal relationships. As I shall argue below, Luhmann perceptively and convincingly analyzes what is a fundamental tendency of modern legal systems toward autonomy and self-referentiality. Because of his reductionist vision, however, Luhmann ends up mistaking the part for the whole. Properly con-

\(^{19}\) This point is emphasized by Lempert. See Lempert, supra note 17, at 187-88.
structured, contemporary legal systems should be understood in terms of a dynamic ongoing struggle between a never achieved justice against law and a constantly disrupted justice according to law unsuccessfully vying for separation and autonomy. Accordingly, neither natural law, nor positivism, nor Luhmann's richer and more sophisticated positivistic autopoietic theory can do justice to the dynamic processes characteristic of contemporary legal relationships. The age-old struggle between justice according to law and justice against law dramatized in Antigone rages on, without end in sight. But more recently, the form of this struggle has been altered almost beyond recognition, as the unity of justice beyond law has itself given way to division and struggle, and as justice according to law has—as Luhmann's theory vividly illustrates—fought hard in the hope of gaining independence from both God and humans.

In order to buttress these conclusions, the article attempts a phenomenological retracing, first, of the breakdown of the unity of justice beyond law in relation to the realm of legal relationships, and then of law's journey towards increasing self-referentiality and autonomy. The article then focuses on the plausible scope and limitation of the role of legal autopoiesis in the context of both the reaction against the breakdown of unity of justice against law and the legal system's efforts at greater self-referentiality and circularity, viewed as two complementary aspects of the same overall process. Finally, drawing upon the conclusions suggested by the preceding analysis, the article sketches a picture of the current struggle between justice against law and justice according to law and of the possible place of the tendency toward legal autopoiesis in the context of their struggle.

II. LAW AND THE BREAKDOWN OF THE UNITY OF JUSTICE BEYOND LAW

The concept of justice can be said to revolve around two distinct unities: the unity among the subjects who may claim entitlement to justice—to which we may refer as "horizontal unity"—and the unity among the different normative levels at which justice may be prescribed, including the religious, moral, political, and legal levels—to which we may refer as "vertical unity." One may further postulate that perfect justice occurs where there is both full horizontal and vertical unity. Moreover, in a state of perfect justice, justice is not likely to be an issue on anyone's mind, as there would be no interpersonal disputes or discrepancies among different normative levels.

The question of justice and the call for justice only arise in the face of some breakdown, at least in horizontal unity. Indeed, even if
vertical unity remains intact, one person could shatter horizontal unity by infringing upon another's entitlement. So long as only horizontal unity is breached, infringements of entitlement will give rise to calls for corrective or compensatory justice. On the other hand, if vertical unity is also broken—either because conflicting criteria of justice are suggested for different normative levels or because such clashing criteria are sought to be applied to the same normative level—then questions of distributive justice as well as of compensatory justice are likely to be raised. Questions of distributive justice are most obviously implicated when a breakdown of vertical unity is reflected at a single normative level. In that case, members of society clash over which, among competing criteria of distribution, ought to be used for purposes of allocating that society's benefits and burdens. Moreover, although perhaps less obvious, questions of distributive justice can also arise when the split in vertical unity cuts across different normative levels. Thus, for instance, distributive justice is at issue when acting in accordance with moral norms would lead to a different allocation of benefits and burdens than that which would result from the application of legal norms.

Based on the contemplation of situations where no breach of vertical unity accompanies a departure from horizontal unity, it might be erroneously concluded that corrective justice can operate independently from distributive justice. Actually, any genuine measure of just compensation is parasitic on some norm of just distribution. For

20 Compensatory justice "requires the transfer of goods from one subject to another in order to restore the equilibrium that existed between these two subjects prior to their voluntary or involuntary involvement in a transaction that resulted in a gain for the violator and a loss for the victim." MICHEL ROSENFELD, AFFIRMATIVE ACTION AND JUSTICE: A PHILOSOPHICAL AND CONSTITUTIONAL INQUIRY 32 (1991).

21 Distributive justice, understood broadly, refers to the equitable allocation of the benefits and burdens produced by, or subject to the control of, a society among its members, according to some normative criterion of distribution.

22 In some cases, a break in vertical unity may be viewed either as raising questions of distribution or questions of compensation, depending on the perspective from which the relevant break in vertical unity is apprehended. Returning to Antigone for purposes of illustration, the confrontation that pits Creon against Antigone is essentially one between the dictates of religious or ethical norms and those of legal norms. From the standpoint of Antigone, the confrontation concerns the allocation of benefits and burdens—or more precisely of entitlements and obligations—regarding the disposition of Polynices' mortal remains. From Creon's standpoint, however, the confrontation centers around Antigone's violation of legitimate legal norms, thus primarily raising questions of corrective justice—in the sense of symbolically erasing Antigone's encroachment upon the body politic. See Michel Rosenfeld, Deconstruction and Legal Interpretation: Conflict, Indeterminacy and the Temptations of the New Legal Formalism, 11 CARDOZO L. REV. 1211, 1249 (1990) ("Corrective justice promotes the minimal harmony of mutual non-interference through the spread of a quantitative equality that ritualistically effaces the encroachment of a wrongdoing self upon a suffering other.").
example, it is impossible to determine whether the proper measure of damages in a breach of contract case involving the breaching party's refusal to pay for goods received pursuant to the contract should be the agreed upon contract price, the market price for the goods involved, or some other price generally deemed to be "just," without relying on some conception of distributive justice. However, as in the case of perfect justice, there may be no awareness of justice as no one experiences a need to call for justice, where corrective justice is at stake in the context of unbroken vertical unity, the uncontroverted operation of distributive norms may well remain beyond the grasp of those concentrating on the pursuit of compensatory aims.

Law, like justice, can be viewed as becoming a matter of concern upon the dissolution of some mythic perfect unity. Modern legal systems, moreover, are the product of division among social groups and of conflicts that alienate the individual from the group. As Roberto Unger points out, modern legal systems prevalent in Western democracies are characterized by, among other things, group pluralism and general rules of law that are universally applicable to all, regardless of status or group affiliation, while prescribing duties and entitlements to individuals. Furthermore, in Western democracies, the function of adjudication tends to be sharply separated from that of legislation, with a view towards shielding the judicial resolution of legal disputes from the politics that inevitably surround the legislative process.

The advent of the market, which, as Max Weber has stated, is "a relationship which transcends the boundaries of neighborhood, kinship group, or tribe," provides the turning point towards the greater differentiation characteristic of modern legal systems. As recounted by Weber, economic scarcity prompted individuals to leave their own communities in order to exchange goods with strangers at market. In dealing with such strangers, however, individuals could not rely on the kinship rules that governed relationships within their own community, and therefore had to look to universally applicable laws capable of transcending the local biases of intracommunal norms. In

23 For a more extended discussion of the necessary link between corrective and distributive criteria in the context of a breach of contract, see id. at 1255 n.134.
24 See ROBERT UNGER, LAW IN MODERN SOCIETY 66 (1976).
25 See id. at 69.
26 See id. at 83, 86.
27 See, e.g., U.S. CONST. arts. I and III, providing for separation between the legislative and judiciary powers of the United States.
28 MAX WEBER, ECONOMY AND SOCIETY 637 (Gunther Roth & Clause Wittish eds., 1968).
29 See id.; see also Richard Münch, Differentiation, Rationalization, Interpretation: The
other words, interactions in noncommunal spheres between strangers with different ethical and religious values require clearly differentiated laws that scrupulously avoid taking sides with respect to parochial issues or intruding upon intracommunal matters. This is paramount in order to alleviate the misgivings and reduce the uncertainties confronting those who must leave home and deal with strangers willing to trade on the market.

Given the twin aims of avoiding favoritism toward any particular parochial values and of fostering regularity and settled expectations regarding dealings in noncommunal spheres, procedural rules loom as especially apt vehicles for the institution of a highly differentiated set of laws designed to mediate interactions among strangers. Moreover, at least in the case of the laissez-faire economic market, reliance on process oriented-formal or procedural laws not only promotes greater certainty in noncommunal dealings without trampling on substantive communal values, but also makes it possible to directly serve the aims of the market by codifying the rules of market competition. To the extent that lawful competition insures that market transactions collectively will promote the common good, the procedural laws that carve out the nature and scope of such competition at once foster substantive values in the noncommunal spheres while leaving intact preexisting substantive values operative in particular communal spheres.30

It is important for laws designed to provide procedures for noncommunal relationships to be differentiated from, and to avoid the appearance of depending on, communal norms. Accordingly, the formal, process-oriented and heavily procedural laws designed to facilitate noncommunal exchanges must project an image of detachment from ethical and religious values—an image that can be promoted through spreading of the belief that law itself can become completely independent from religion and ethics. Moreover, accompanying and reinforcing this image and the belief that sustains it is, of course, the

Emergence of Modern Society, in DIFFERENTIATION THEORY AND SOCIAL CHANGE 441, 448-49 (Jeffrey Alexander et al eds., 1990) (The “emergence of interactions with strangers outside the community . . . leads to the differentiation of noncommunal spheres of interaction from communal interaction” and requires “new forms of interactions that are not covered by the internal regulations of the community.”).

30 Consistent with the economic views of Adam Smith, the morals of the market contrast with the morals of other spheres. In the market, individuals are obligated to act out of self-love rather than altruism, as the invisible hand of the process of competition automatically leads those who act out of self-love (but not necessarily those who act out of altruism) to contribute to the common good. See ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 477-78 (Edwin Canaan ed., 1976). For a more extended discussion of the relationship between the morals of the market and the morals of other spheres, see Michel Rosenfeld, Contract and Justice: The Relation between Classical Contract Law and Social Contract Theory, 70 IOWA L. REV. 769, 875-77 (1985).
perception—buttressed by the sharp contrast between communal and noncommunal dealings—of a breakdown of vertical unity in the realm of justice, with justice according to law bearing little or no connection to justice beyond law. Thus, as communal dealings increasingly give way to noncommunal dealings among strangers, from the standpoint of justice, both horizontal and vertical unity enter into a process of dissolution that seems headed towards a complete breakdown.

As it appears to become increasingly independent from other levels of justice, legal justice, while retaining compensatory and distributive components, tends to be concerned primarily with procedural matters. Procedural justice, like its distributive and compensatory counterparts, is a necessary but inconspicuous component of perfect justice. A call to justice, moreover, may concentrate exclusively on procedural justice even in the face of complete harmony regarding applicable criteria of compensatory and distributive justice. Thus, for instance, a dispute could arise on the subject of the best available procedure needed to implement an agreed upon criterion of compensatory justice. What is markedly different about contemporary legal justice, however, is its tendency to concentrate exclusively on procedural justice to the exclusion of the other forms of justice.

To better understand how procedural justice may acquire independence, it is useful to refer to the distinction made by John Rawls between the two different types of procedures that might lead to the achievement of justice. The first requires both an independent criterion of justice to determine what would constitute a just compensation or distribution and a procedure to lead to the desired outcome as prescribed by the independent criterion. If the procedure guarantees the desired outcome then we have, in Rawl’s terms “perfect procedural justice” if it does not, then we have “imperfect procedural justice.” On the other hand, the second type of procedure, “pure procedural justice,” does not require an independent criterion of (distributive or compensatory) justice for its validity. In this context, the outcome is supposed to be just, provided only that the relevant procedure was properly followed.

Modern law’s greater concern with questions of procedure is most probably, in part, due to the fact that strangers tend to be suspi-

32 Id. As an example of imperfect procedural justice, Rawls mentions the criminal trial under the adversary system of justice. See id.
33 Id. at 86.
34 Id. Rawls suggests that gambling provides an example of pure procedural justice. Id.
cious of one another. As noncommunal dealings occur in settings without established customs and traditions governing interactions, matters of procedure seem bound to leap to the forefront. More importantly, however, the independent law applicable to noncommunal spheres, which is cut off from the ethical and religious norms operative in communal spheres, seems left with no more desirable path to justice than that of pure procedural justice. Indeed, where the adoption of any substantive criterion of justice would smack of parochialism, the pursuit of pure procedural justice looms as the best possible alternative.

To the extent that free market competition guarantees achievement of the common good, implementation of the laws needed to sustain the free market would produce pure procedural justice. Moreover, among the most important of these laws would be laws regarding contract formation designed to maximize freedom of contract.\textsuperscript{35} Thus, assuming the existence of such laws, justice would require the enforcement of freely entered into contracts not because of the nature of the contractual terms involved, but because of the fact that the contractors had freely availed themselves of the rules of contract formation and freely agreed upon the terms of their mutual contractual obligations.\textsuperscript{36}

In sum, under optimal conditions and in the presence of a free market model of noncommunal relationships, law acquires independence from other normative spheres, and its implementation is capable of producing pure procedural justice. Under these circumstances, moreover, justice beyond law has most likely become fragmented and largely cast away to a distant horizon. Justice according to law can then claim both independence and self-sufficiency inasmuch as it generates pure procedural justice.

As the market tends to become all-encompassing and local communities recede towards the vanishing point, justice according to law tends to dwarf justice against law and pure procedural justice becomes increasingly sweeping. At the logical culmination of this process, it would appear that law would achieve complete independence and that justice according to law relying on pure procedural justice would occupy the entire domain of justice, rendering justice beyond law completely superfluous. In reality, however, this state of affairs is impossible to realize for at least two principal reasons. First, the ex-

\textsuperscript{35} Cf. Roberto Mangabeira Unger, \textit{The Critical Legal Studies Movement}, 96 \textit{Harv. L. Rev.} 561, 625 (1983) ("A regime of contract is just another legal name for a market.").

\textsuperscript{36} For a more extended discussion of the possible relation between freedom of contract and pure procedural justice, see Rosenfeld, \textit{supra} note 30, at 792-93, 804-05.
pulsion of ethical and religious values from the market is only possible so long as these values can find an outlet for expression in local communities that remain beyond the reach of the market. Thus, while economic exchanges take place among strangers, religious and ethical activities can remain largely confined to local communities among one's family and kinship groups. Relationships among strangers can be sustained to the extent that they are complemented by strong communal bonds. If local communities were to give complete way to market relationships, however, then all intersubjective relationships would be among strangers, and individuals would risk losing all sense of identity unless they could find a way to forge ethical or religious bonds with the strangers they encounter on the market. In short, either ethical and religious concerns are confined to communal spheres that remain beyond the market or they are bound to irrupt on the market for lack of any other available outlet.  

The second principal reason why justice according to law can never come to occupy the entire domain of justice is that market competition is never perfect, and, even if perfect competition could be achieved in the economic sense, the market would still automatically fail to promote a universally acceptable conception of the common good. Moreover, to the extent that unfettered economic competition must be curbed for the common good or public welfare, one must look beyond the market and justice according to law to find legal norms that will prove just and efficacious. So long as the public welfare is perceived as requiring that market relationships be curbed rather than eliminated, justice according to law and pure procedural justice are certain to retain legitimacy within a part of the domain encompassed by justice. The remainder of that domain, however, will call for justice beyond law (and laws embodying norms derived from the latter kind of justice). For example, let us assume that unlimited freedom of contract is deemed unjust insofar as it fosters exploitation of the weak by the powerful, but that the limitation of freedom of contract through the implementation of minimum wage and maximum work hours legislation would suffice to prevent exploitation in labor relations. Under these circumstances, a labor contract would be just, in part because its terms satisfied the minimum wage, maximum hours laws, and beyond that, because of the fact that the contractors freely and mutually agreed to enter into it. Furthermore, the mini-

37 Cf. GEORG HEGEL, PHILOSOPHY OF RIGHT 148 (T. Knox trans., 1967) ("[C]ivil society tears the individual from his family ties, estranges the members of the family from one another, and recognizes them as self-subsistent persons . . . . Thus the individual becomes a son of civil society which has as many claims upon him as he has rights against it.").
minimum-wage/maximum-hours laws would not be just in themselves, but only in reference to some expression of justice beyond law which would itself have to be legitimated in terms of adherence to certain extralegal norms; for example, it is unethical or contrary to religious dogma to exploit human beings. Inasmuch as the labor contract is just because of the fact of agreement, there is room left for pure procedural justice. But since the determination of how much room ought to be left for pure procedural justice requires recourse to justice beyond law, in the last analysis the legitimacy of pure procedural justice also depends on extralegal norms.

There is no fixed point at which communal concerns spill over into an expanding market sphere, nor is there a clear line dividing what ought to be left to the free market from what should be placed beyond its reach. There is also no set prescription concerning how the emerging community of strangers might find a suitable equilibrium between seeking to transform market relationships from within and attempting to circumscribe them through confrontation with nonmarket norms. All those issues are the subject of an ongoing, dynamic process which involves confrontation as well as accommodation, and which is therefore likely to produce numerous boundary shifts. One thing, however, does remain constant throughout the unfolding of this process: the presence of justice beyond law. Although it has become prey to fragmentation and to seemingly irresolvable internal clashes, justice beyond law is either present implicitly or it is present as the antagonist from whom justice according to law seeks, but ultimately fails, to wrest an independent existence.

The fragmentation of justice beyond law makes for extralegal norms that are highly contestable and that thus lend only the most precarious support to the laws which they purport to justify. One way to strengthen that support and to seemingly reverse the process of fragmentation is for justice beyond law explicitly to embrace pluralism as the paramount extralegal norm. In other words, instead of abandoning the sphere of justice beyond law to a hopeless contest among antagonistic extralegal norms, one may adopt pluralism as the best means to introduce unity in the shaping of legal norms without sacrificing the diversity generated by the coexistence of antagonistic norms.

Commitment to pluralism also leads to formalism and proceduralism, although not necessarily for the same reasons as does a devotion to market competition. From the standpoint of a pluralistic philosophy, diversity and tolerance of different normative outlooks are fundamental values. Pluralism recognizes the importance of jus-
tice beyond law, but insists on maintaining a clear divide between it and justice according to law, in an effort to avoid privileging some sets of competing extralegal norms over others. Accordingly, the formalism and proceduralism sought by pluralism are not meant to weaken or eliminate justice beyond law, but instead to infuse law with a measure of neutrality sufficient to permit a peaceful coexistence between diverse conceptions of justice beyond law. In short, pluralism seeks to maintain the differentiation of law from extralegal norms, in order to insure as much as possible that law will not stand in the way of the pursuit of different conceptions of justice beyond law and of the common good. Although pluralism may be capable of encompassing several different conceptions of justice beyond law, it ultimately fails to promote a legal system that is genuinely neutral with respect to all extralegal norms. Indeed, to avert self-contradiction and self-destruction, pluralism can only protect those sets of extralegal norms that can peacefully coexist with competing norms. Because of this, pluralism must sacrifice neutrality and resort to privileging mutually compatible norms over incompatible ones. In the end, pluralism itself must be counted as a substantive value that informs a particular conception of justice beyond law. Pluralism is unique because it requires sustaining the divide between justice according to law and justice beyond law as part of its strategy towards the realization of its own conception of justice beyond law. And thus, neither pluralism, nor formalism, nor proceduralism invoked in response to the breakdown of the unity of justice beyond law seems capable of eliminating the nexus between law and extralegal norms, or fully liberating justice according to law from its moorings in justice beyond law.

III. LEGAL AUTOPOIESIS, THE BREAKDOWN OF JUSTICE BEYOND LAW, AND THE TURN TOWARDS SELF-REFERENTIAL CLOSURE

As already briefly noted, the cornerstones of legal autopoiesis are

For example, religious diversity is only possible so long as the adherents to one religion are prepared to tolerate the expression of other religious beliefs and practices. Crusading religions that preach forced conversions and intolerance of the infidel could accordingly only be tolerated by pluralists at the risk of undermining religious diversity. At the very least, the protection of religious pluralism offers a more favorable environment for non-crusading religious than for their crusading counterparts. For a more extended discussion of the paradox produced as a consequence of toleration of the intolerant, see Michel Rosenfeld, Extremist Speech and the Paradox of Tolerance, 100 HARV. L. REV. 1457 (1987) (book review).

Cf. UNGER, supra note 24, at 129 (“[T]he conditions of liberal society require that the legal order be seen as somehow neutral or capable of accommodating antagonistic interests ... Yet every choice among different interpretations of the rules, different laws, or different procedures for lawmaking necessarily sacrifices some interests to others.”).
a conception of law, in particular, and society, in general, as networks of communication; the existence of a degree of social complexity that calls for a high level of functional differentiation; the generation of conflict as a means to the creation and application of legal norms; self-referentiality and circularity; the legal (sub)system's normative closure combined with its cognitive openness towards other spheres of social interaction construed as the legal system's environment; and the independence of the legal system as a self-referential network of (legal) communications from the intentions of the persons who engage in legal discourse.

As Gunther Teubner emphasizes, legal systems are not born autopoietic; they can evolve towards greater self-referentiality and thus become autopoietic. Moreover, the crucial moment in the evolution from an allopoietic to an autopoietic legal system is the "central shift from 'external' societal mechanisms of evolution to 'internal' legal mechanisms . . . in the sense that external mechanisms can only have a 'modulating' effect on legal developments while the evolutionary primacy passes over to internal structural determination." On the other hand, as Luhmann makes clear, the principal task of law is to stabilize expectations. Now, in the context of a fully normatively integrated community where the vertical unity of justice remains intact, the stability of expectations would seem clearly better served by an allopoietic legal system firmly anchored on well-established and largely uncontroverted extralegal norms. In the face of a breakdown of justice beyond law, however, the contest among extralegal norms is bound to have a destabilizing effect, and accordingly law may be better poised to buttress settled expectations by turning "inward" and drawing upon its own processes and elements.

The combination of the dissolution of the vertical unity of justice and the increasing need to deal with strangers in noncommunal settings creates a strong need for an autonomous legal system. On the one hand, the lack of vertical unity of justice makes it impossible convincingly or authoritatively to reconcile law with any available extralegal norms. On the other hand, because interacting strangers lack commonly shared extralegal norms, it is imperative that they adopt some means of regulation which can stand independently from existing extralegal norms. Moreover, this means of regulation must gen-

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41 Id. at 232.
42 See Niklas Luhmann, The Unity of the Legal System, in AUTOPOIETIC LAW, supra note 12, at 27.
erate, in the context of noncommunal relationships, the kind of stability of expectations that is customary in normatively integrated communities.

Even if the sphere of noncommunal interaction cannot be stabilized through recourse to ethical or religious norms, it does not logically follow that an autonomous legal system offers the only plausible avenue to the stabilization of expectations. Arguably, the sphere of noncommunal interaction could also be stabilized through a process of political accommodation that avoided reliance on contested ethical or religious norms. Both autonomous legal and political systems would bring increased stability to noncommunal spheres through the deployment of a communicative process. The political system, as understood here, would involve the accommodation of conflicting interests through series of ad hoc compromises among contending groups vying for power and influence in order to be in a better position to promote their own interests. Moreover, although political compromises would themselves be ad hoc, the political process in which they would be embedded could well unfold within a stable political structure—such as, for example, a parliamentary democracy—capable of lending firm support to important normative expectations.

For purposes of the present discussion, the principal difference between a legal and a political resolution of a conflict lies in that legal resolutions do not consist of ad hoc compromises, but rather of determinations involving the application of previously established (legal) normative rules, principles, or standards. In spite of this difference, however, the legal and political systems could be viewed as working in harmony, with law—perhaps in the form of a constitution—framing the structure of the political. At the same time, law could also be interpreted as complementing the ad hoc compromises of politics with the resolution of conflicts pursuant to previously set legal rules, standards or principles. Moreover, in view of the apparent complementarity of law and politics in this universe marked by the breakdown of the vertical unity of justice, it would seem that the fusion of law and politics rather than their uncoupling (with a view to establishing two

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43 To the extent that legal rules are indeterminate or that, as in the case of the common law, legal principles emerge piecemeal as a consequence of the judicial disposition of individual controversies, it may be argued that the legal system can also be characterized as involving many ad hoc determinations. Nevertheless, as the common law relies on legal precedent, and as even novel interpretations of indeterminate laws must necessarily refer to previously set legal norms, all legal determinations can be interpreted as being communicatively structured as necessarily relating to some previously established legal rule, standard or principle. For a further elaboration of the distinction between law and politics discussed here, see Rosenfeld, supra note 22, at 1259-63.
autonomous social spheres) would be most likely to lead to a greater stabilization of expectations.

From the standpoint of autopoietic theory, however, the stabilization of expectations in a complex society with interweaving communal and noncommunal spheres of interaction might be best achieved through a process of increasing functional differentiation that requires uncoupling the legal (sub)system from the political (sub)system. In the context of noncommunal dealings among strangers legal interaction would promote greater stabilization of expectations than would political interaction, to the extent that the former would have less of an "ad hoc" nature than the latter. In other words, if people could predict their legitimate legal expectations with a higher degree of probability than their legitimate political expectations, then the operation of the two spheres as separate and independent from one another might well lead to greater overall stabilization of expectations than if both spheres operated in a closely integrated manner.\footnote{It is conceivable, if the uncoupling of the legal system from the political system were to result in a much expanded political domain and a much shrunken legal domain, that sharp differentiation between the two domains would not lead to greater stabilization of expectations. There seems to be no reason, however, for the assumption that such an uncoupling would result in dramatic shifts in the relative sizes of the domains involved.}

Within the framework of an autopoietic conception of social systems, the autonomous legal subsystem would be distinguished from its political counterpart by its mode of functioning.\footnote{See Luhmann, supra note 13, at 340-47.} Each of these subsystems would provide a different mode of structuring communicative interaction between social actors. Moreover, although legal communication could always remain distinct and independent from political communication, the proportion of social conflicts submitted to the legal subsystem for resolution in relation to those submitted to the political subsystem would fluctuate depending on the circumstances.\footnote{This seems to follow from Luhmann's assertion that each social subsystem treats all other such subsystems as its environment and from his conception of the legal system as being normatively closed but cognitively open. See supra notes 15-16 and accompanying text.} Many different considerations may enter into the determination of whether a particular conflict should be dealt with in the political or the legal arena. As already mentioned, the legal system seems generally better suited than the political system to stabilize expectations to the extent that it lacks the ad hoc character of its political counterpart. In one important respect, however, this may not be the case. If the political forces are so skewed that one faction can dictate the terms of ad hoc conflict resolutions at will, then expectations may well be less likely to be disappointed in the political arena than in the
legal one. Moreover, even if the faction in question is powerful enough to impose laws at will, that faction would still be better off in the political arena to the extent that laws are sometimes susceptible of acquiring enough of a meaning of their own that they escape from the full grasp of their proponents.47 Consistent with these observations, submitting conflicts to an autonomous legal system rather than to the political sphere evinces a retreat from purely power-based relationships in the hope of achieving more stable expectations. In the context of a complete differentiation between the legal and political spheres, the commitment of a class of conflicts to the self-contained normatively closed realm of law presumably signifies both a deferral and an equalization of power among the parties to the relevant conflicts. Power is deferred inasmuch as the would-be winner of a present political resolution of an ongoing conflict submits to a previously established legal norm that leads to an anticipated but less favorable outcome of the conflict in question.48 On the other hand, power is relatively equalized to the extent that a rational decision to commit a certain kind of conflict for resolution within the legal sphere implies a willing loss of power by the strongest members of society coupled with some gain in power for its weakest members. Indeed, from the standpoint of society's strongest members, a change of venue from the political to the legal arena may be desirable even if it entails a loss in power, provided the loss is deemed outweighed by the increase in stability and security which recourse to the legal system would produce. Conversely, from the perspective of society's weakest members, it would make little sense to pursue greater stability unless that would increase (or at the very least not decrease) their power.49 Ultimately,

47 It may be objected that the absolute ruler can fare as well in both the legal and the political arena since he or she can simply repeal any law before any application of the law places an unwanted constraint on him or her. In reply, one can point out that the unchecked use of repeated repeals of law at will results in ad hoc resolutions of legal conflicts which would be virtually indistinguishable from the ad hoc resolutions of political conflicts. Furthermore, government by decree issuing from an absolute ruler would not satisfy the conditions of a modern legal system. See supra notes 24-26 and accompanying text.

48 Under these circumstances, power is deferred rather than simply lost to the extent that the party who has been a relative loser by having to settle in the legal rather than the political arena may have enough political clout to influence changes in legislation that are calculated to make him or her fare better in future legal conflicts.

49 Gaining security concerning further erosions of power—as modest as that may be—does represent some gain of power over one's future destiny. On the other hand, there would be no rational incentive for society's worst off simply to seek to lock in that status for the sake of living under conditions of greater certainty. Furthermore, it is important to stress that these calculations concerning probable increases or decreases in power as a consequence of turning to the legal system must take place ex ante and not ex post facto. Given the vicissitudes of political conflict, it is possible that over time some of the weakest actors on the political scene might gain considerable power. That, however, is irrelevant for present purposes. What is
the equalization of power stemming from a rational agreement to refer certain conflicts to an autonomous legal system may not be very different from the kind of equalization that would be achieved through a Hobbesian social contract.50 There is, however, one key difference between a Hobbesian agreement and submission to an autonomous autopoietic legal system. In the latter case, the very mediation provided by the autonomous legal system would insure against direct subordination to the will of any individual or group vested with the powers of the sovereign.

Based on the preceding analysis, the kind of justice according to law that could be secured through an autopoietic legal system would include not only a corrective component but also a distributive component.51 This distributive component emerges from the sharp differentiation implanted by autopoietic law and must be assessed in terms of the two distinct fundamental contrasts sustained by the unfolding of legal autopoiesis. The first of those contrasts is that between order and disorder (in Hobbesian terms, between civil society and the war of all against all characteristic of the state of nature); the second is that between the legal and the political spheres as autonomous autopoietic subsystems.

The order of autopoietic law must be contrasted to the disorder of unregulated noncommunal social interaction. By producing order—any order—autopoietic law differentiates itself from the potential chaos of unregulated noncommunal dealings, and insures a significant measure of stability in dealings between strangers. Furthermore, the presence of such stability results in a distribution of benefits and burdens that is arguably far preferable to, and more just than, that which would emanate from chaos. Accordingly, the order established through the process of differentiation set in motion by autopoietic law secures, at the very least, what may be referred to as “minimal distributive justice.”

50 According to Hobbes, in exchange for securing a right to life, the parties to the social contract would be willing to relinquish all their other rights to an absolute monarch. See Thomas Hobbes, The Citizen Philosophical Rudiments Concerning Government and Society, in MAN AND CITIZEN 190, 234 (Bernard Gert ed., 1972).

51 The normative closure of the legal system insures the availability of corrective justice as a necessary means to continued stabilization of normative expectations. In the face of inevitable disappointments of legitimate expectations through the transgression of legal norms, the continued stability of normative expectations depends on the availability of compensatory remedies. Moreover, to the extent that an autopoietic legal system internally generates the means necessary to dispense compensatory justice, it is also bound to produce some form of procedural justice.
Insofar as the process of differentiation that sustains the legal sphere's autonomy from the political sphere produces greater stability of expectations, it too contributes to the establishment of minimal distributive justice. Beyond that, moreover, as discussed above, the process that functionally differentiates an autopoietical legal system from its political counterpart tends to lead to the production of greater equalization (of power) in the legal sphere than in the political one; that is, assuming that the same conflict would be equally amenable to either legal or political resolution, then its legal resolution would most likely take place in the context of a smaller disparity of power among the parties to the conflict than would its political resolution. Consistent with this difference in disparity of power, commitment of a conflict to an autonomous legal rather than political system would result in a relatively more equitable allocation of relevant benefits and burdens.52 Hence, in addition to producing minimal distributive justice, legal autopoiesis further promotes distributive justice through an, albeit relative and modest, equalization of benefits and burdens among strangers engaged in noncommunal exchanges.

While all legal systems presumably satisfy minimal distributive justice, autopoietic legal systems are supposed to do more. Indeed, legal autopoiesis is not only poised to wrest order out of disorder but also to furnish some kind of insurance through the use of normative closure to stabilize expectations of expectations.53 To reduce complexity, social actors seek to achieve greater certainty concerning their expectations, and especially concerning their expectations of the expectations of others. The greater the certainty that a social actor has concerning the expectations of all concerned, the more insurance that actor has concerning the consequences of his or her dealings with others. Particularly when dealing with strangers in noncommunal settings, however, cognitive expectations are subject to constant revision, as they are likely to be frequently disappointed due to error or miscalculations.54 In contrast, normative expectations can be stabilized counterfactually, with the consequence that they need not be

52 It is important to stress the relative nature of the equalization attributable to legal autopoiesis. It is of course possible to have very egalitarian political norms and highly inequitable legal norms. All that is claimed here is that relative to the actual political system that launched the legislation implemented by a particular legal system and functionally constituted as part of the actual social environment of that legal system, a legal resolution of a conflict would tend to be more egalitarian than a contemporaneous political resolution of the same conflict.


54 See Luhmann, supra note 42, at 19-20.
revised even if they are disappointed.55

For example, if I happen to expect all my business appointments to be punctual, and they frequently happen to arrive late, I would be better off by revising my (cognitive) expectation in order to minimize the aggravation I experience as a result of counting on punctuality. On the other hand, if the law provides that those who buy goods must pay for them, I need not revise my (normative) expectation that my customers should pay for the goods they buy, even if many of them fail to pay. So long as the law remains in force, I am entitled to hold on to my normative expectation. Moreover, to the extent that the law provides remedies for the disappointment of legitimate normative expectations, it provides insurance to legal actors.56 Finally, although this is not logically required, the stabilization of normative expectations through law is also likely to lead to a significant decrease in the fluctuation of cognitive expectations. Indeed, it seems reasonable to expect that in the long run a vast majority of people will tend to behave in conformity with their legal obligations.57

In the context of dealings among strangers, the kind of insurance that autopoietic law can provide in a complex, functionally differentiated society amounts to a benefit that enhances the distributive justice that may be dispensed through justice according to (autopoietic) law. Furthermore, by adding this latter enhancement to the minimal distributive justice and the relative equalization discussed previously, we get a fair picture of the kind of distributive justice that is implicit in justice according to (autopoietic) law. This distributive justice is purely procedural in the sense that (in light of the presumed breakdown and fragmentation of justice beyond law) it does not matter what the substantive content of valid legal norms may be so long as these norms are regularly applied and capable of marking the distinction between what should count as legal and what should be deemed illegal. In the last analysis, the modest measure of distributive justice compatible with autopoietic law seems to rest on two principal assumptions: a normative vacuum or hopeless struggle relating to justice beyond law, and the vindication of the claim of normative closure in the realm of legal communications.

55 Id.
56 I may be uncertain that my customers will pay me, but if the law provides for damages in case of nonpayment, I will, in most cases, be assured of payment for the goods I sell.
57 If, for example, I am fairly certain that failure to honor my contractual obligations will result in liability to pay damages, I am not likely to have any reasonable incentive to break my contracts. My expectation would therefore most likely be to honor my contracts, and my actual and potential fellow contractors would have grounds to be relatively secure in their (cognitive) expectations of my expectation.
As to the first of these two assumptions, it is important to note that autopoietic law does not merely come to occupy an existing vacuum brought about by the retreat of justice beyond law, but it also constantly endeavors to actively maintain and even expand this vacuum through the proliferation of its self-enclosed and self-referential processes. Autopoietic law not only offers a means to resolve existing conflicts, but it also continuously generates conflict in order to secure a permanent medium for the recursive application of the legal norms embedded in justice according to law. But by manufacturing conflict and by channeling social interaction into conflict only to resolve such conflict according to its own self-generated, self-referential, and self-enclosed normative scheme, legal autopoiesis confines legitimate legal discourse to a very narrow domain. That domain is circumscribed by the dichotomies between order and disorder, uncertainty and insurance, and ad hoc political accommodation and the relative equalization of autonomous law. The confinement of law to such a narrow domain may well seem artificial and contrived, and therefore fairly raises the question of whether contemporary legal practice could be more faithfully captured by leaving aside the seemingly undue restrictions imposed by autopoietic law.

To be in a better position to answer this last question, it is necessary to take a closer look at the second assumption that underlies the conception of distributive justice linked to autopoietic law; namely, that the system of (autopoietic) legal communication is inescapably subject to the constraints of normative closure. The task of assessing the validity of this assumption is complicated by the highly abstract nature of Luhmann's discussion. Nevertheless, as we shall see, useful parallels can be drawn between the functioning of legal autopoiesis and Luhmann's description of the phenomenon of monetarization which he presents as driving the process of economic autopoiesis.

In a nutshell, the core function of legal communications, according to Luhmann's autopoietic theory, is to provide information concerning the meaning of events and, in particular, actions in relation to the binary code legal/illegal. This information is not simply the product of the enactment and application of legal rules, but rather emerges from the circular interplay between rules and decisions. Moreover, because the validation of legal norms hinges on a process

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58 See Luhmann, supra note 42, at 12, 27.
59 See LUHMANN, supra note 7, at 229-32.
60 Id. at 231. In other words, rules are validated by the decisions that invent or elaborate them and (to complete the circle) decisions are validated by the rules that use them as the medium through which they acquire a more definite shape.
of unfolding circularity,® neither the substantive values embodied in particular legal norms nor the intentions projected by actors engaged in the legal arena, can in any direct or significant way, inform determinations dependent on use of the binary code legal/illegal. This is merely a further elaboration of the notion of normative closure. On the other hand, the internally sealed circular interplay between legal rules and decisions by no means forecloses expanding (or for that matter shrinking) the domain of that which can be rendered legally meaningful through submission to the binary code legal/illegal. This seems to follow from the very notion of cognitive openness.

This highly abstract description of the work of an autopoietic legal system can be made perhaps easier to grasp by briefly concentrating on the analogy—drawn by Luhmann—between autopoietic economics and autopoietic law.® The autopoietic economic (sub)system, Luhmann maintains,

operates openly with respect to needs, products, services, etc., and it is closed with respect to payments, using payments only to reproduce the possibility of further payments. Linking payments to the exchange of “real” goods interconnects closure and openness, self-reference and environmental references. General purpose money provides for closure and remains the same in all hands. Specifiable needs open the system toward its environment. Therefore, the operations of the system depend upon a continuous checking of one in terms of the other. This linkage is a prerequisite for the differentiation and self-regulation of the economic system.®

In essence then, according to Luhmann’s description, self-regulation of the economic system is based on the connection between needs (that fluctuate depending on factors located in the economic system’s environment) and a closed monetarized exchange process that systematically mediates the complex interrelationship between the totality of existing needs and the network of products and services susceptible of contribution to satisfying those needs.

In the context of a free market economy, at least, the monetarization of all exchange relationships provides a self-regulating system that structures an order for meeting needs under conditions of moderate scarcity. Monetarization, moreover, promotes and sustains a sharp differentiation between use value and exchange relationships beyond the subjective will of economic actors.® Accordingly, so long as

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61 See id.
62 See id. at 230-31.
63 Id.
64 The differentiation between use and exchange value is a function of the systematization of the relationship between supply and demand through the communicative effects produced
market exchanges are considered to furnish the best possible means to satisfy needs for goods and services, maintenance of the self-regulating economic system relying on the universal language of monetarization is essential. In other words, unless the autonomy of the economic system is maintained, the avowed purposes of economic interaction will undoubtedly be frustrated. Indeed, replacement of the autonomous mechanism of competition by a subjectively crafted economic order would frustrate the economy's clearly differentiated function of maximizing the satisfaction of needs through the most efficient allocation of goods and services.

Taking at face value both claims, the need for autonomy in the economic sphere and the same need in the legal sphere, may lead to the conclusion that there is a fundamental analogy between the ways in which these spheres respectively achieve differentiation. Monetarization seems to provide for the internal regulation of economic relationships, and the binary code legal/illegal for the analogous ordering of legal relationships. Upon closer analysis, however, the analogy is merely superficial. Indeed, the closure of an economic system that relies on monetarization is plausibly meaningful, while taken alone, the closure maintained by means of the application of the binary code legal/illegal remains essentially trivial. Economic closure through monetarization conceivably fulfills a substantive function that cannot be otherwise equivalently performed. Legal closure through application of the binary code legal/illegal, in contrast, appears to play a purely formal role and (at least standing alone) does no more than sustain an empty tautology (as opposed to a circular but meaning-enhancing or information-producing one).

At least in the context of certain plausible conceptions of the role of the economy, the autonomous process of monetarization fulfills a function that is substantively (as opposed to merely definitionally) necessary and sufficient to propel the economic system towards achievement of its intended social task. Thus, for instance, economic

by monetarization as an abstract and universally applicable code of quantification. Neither those who supply goods nor those who wish to acquire them can impose an exchange value on them because they depend on one another and on all others involved in the supply and demand of such goods for the determination of that value which is neither subjective nor objective, but intersubjective. For a more extended discussion of this last point, see Rosenfeld, supra note 30, at 832-39. Rational market exchanges cannot proceed without information concerning intersubjective exchange values which can only be systematically communicated in monetary terms.

I say "plausibly" because I am not convinced that a conceptualization of the process of monetarization as autonomous and circular is preferable than other plausible conceptualizations that place greater emphasis on the connection between the economic sphere and other spheres of social interaction. This raises important issues which remain beyond the scope of this article.
efficiency may well be only achievable through the systematic coupling of the closure of monetarization with openness to all needs, products, services, etc. Take away the work performed by monetarization—namely, providing a common measure to otherwise incommensurable needs, products, services, and so on—and the possibility of achieving economic efficiency through an independent economic system disappears.

From the standpoint of a complex modern legal system, on the other hand, the binary code legal/illegal may be necessary, but it is not sufficient to account for the normative characteristics of law, except in a trivial tautological sense. Even conceding that ex post facto every legal communication may be interpreted as having designated the actions to which it refers as being either legal or illegal, legal practice can hardly nontrivially be reduced to the classification of actions as either legal or illegal. As pointed out above, autopoietic law promotes the values of order, insurance, and equalization relative to the ad hoc compromises of its political environment. These values are not, however, the only ones pursued by law as a distinct contemporary practice. For example, the contemporary movement towards the juridification of human rights and constitutional guarantees extends beyond mere order or insurance. Actually, such juridification often appears to open the legal system to contested conceptions of justice beyond law that transcend mere communalism inasmuch as they are specifically oriented towards the domain of noncommunal interaction. Moreover, to the extent that constitutional jurisprudence wrestles with fundamental values associated with justice beyond law, it is more likely to undermine than to promote the kind of predictability necessary to provide insurance.

66 Hubert Rottleuthner has argued against this last proposition. As a counterexample, he refers to instances in which adultery, while itself, strictly speaking, neither legal nor illegal, may have important consequences for the determination of legal conflicts, such as in the case of divorce. See Hubert Rottleuthner, A Purified Sociology of Law: Niklas Luhmann On the Autonomy of the Legal System, 23 LAW & SOC'Y REV. 779, 792 (1989).

67 It may always be countered that whereas it may be socially useful or meaningful, anything beyond the autonomous and self-referential process of using the interplay of rules and decisions to communicate whether actions relating to conflicts are legal or illegal is not, strictly speaking, encompassed within the legal system. While such an argument may be defensible from a strictly logical or purely semantical point of view, nevertheless, due to its extreme reductionism, it projects a distorted image that does not capture the full richness of contemporary law as a practice.

68 As examples of significantly unpredictable areas of constitutional interpretation involving fundamental values relating to justice beyond law, one can mention substantive due process and equal protection rights under the United States Constitution. Concerning substantive due process see, for example, Griswold v. Connecticut, 381 U.S. 479 (1965); Roe v. Wade, 410 U.S. 113 (1973); and Bowers v. Hardwick, 478 U.S. 186 (1986). As for equal protection, there is perhaps no greater unpredictability than in the area of affirmative action. See ROSENFELD,
The problems posed by the reductionism of the autopoietic conception of legal practice are compounded by the fact that order, insurance, and equalization are by no means the exclusive preserve of justice according to (autopoietic) law. Indeed, order and insurance can also be provided by the allopoietic law decreed by Hobbes's absolute monarch, or even through political means. Similarly, greater equalization may be equally or better pursued in the political arena than through the modest standard of justice according to law that emerges from legal autopoiesis.

In conclusion, the analogy between the economic process of monetarization and legal practice viewed as an autonomous and self-regarding autopoietic system does not hold sufficiently to justify the claim of normative closure in the case of law. As a matter of fact, in certain fields such as constitutional law at least, it seems more accurate to describe law as a practice as being normatively open to the extralegal norms that underlie justice beyond law. Moreover, to the extent that contemporary law as a practice is not restricted to the exclusive pursuit of order, insurance, and relative equalization, the autopoietic thesis seems defective as it unduly and arbitrarily narrows the domain of legitimate contemporary legal relationships.

IV. AUTOPOIESIS AND THE CONTEMPORARY STRUGGLE FOR JUSTICE

If autopoiesis fails to provide an accurate picture of contemporary legal practice as a whole, it nevertheless captures the essence of one of the two principal tendencies of modern law. Notwithstanding initial appearances to the contrary, modern law does not simply consist of the emancipation and triumph of justice according to law in the face of some final collapse of justice beyond law. Instead, the ascendance of justice according to law is accompanied by a movement towards the reconstitution of justice beyond law. More precisely,


69 The tendency towards legal autonomy is manifested in, among other things, the proliferation of process based and procedural rules. Law's tendency towards extralegal norms, on the other hand, becomes apparent in legal doctrines that rely explicitly on extralegal values. In American constitutional law, the interplay between these two tendencies is exemplified in the contrast between procedural and substantive due process rights under the fourteenth amendment's due process clause. The tendency towards extralegal values, however, is not limited to public law. Several legal scholars, for example, have sought to account for contemporary contractual relationships in terms of extra-legal norms. See, e.g., Patrick S. Atiyah, The Rise and Fall of Freedom of Contract (1979); Charles Fried, Contract as Promise (1981); Grant Gilmore, The Death of Contract (1974); Ian Macneil, The New Social Contract (1980).
contemporary law appears to be the product of an ongoing clash between two contradictory drives: the drive towards autonomy and that towards the reestablishment of the vertical unity of justice. One of the dynamic functions of contemporary legal actions and communications is to continuously produce sufficient normative differentiation in order to avert the dissolution of the legal sphere through absorption into the theologico-ethical or political sphere. On the other hand, clashing against this relentless pursuit of differentiation is contemporary law's insatiable need to work towards the recovery of the lost vertical unity of justice. Accordingly, the first of these two drives fuels contemporary law's tendency towards autopoiesis and autonomy while the second, on the contrary, pulls law away from autopoietic self-referentiality.

Contemporary law cannot genuinely resolve the tension between its conflicting tendencies without losing either its identity or its legitimacy. Paradoxically, contemporary law is more likely to fulfill its role by seeking to maintain an equilibrium between its conflicting tendencies than by striving to minimize contradiction through a disproportionate development of one of these basic tendencies at the expense of the other. Moreover, the reason why the unrelenting pursuit of such an equilibrium is essential is because—contrary to Luhmann's assertion—the function of contemporary law is not merely one of differentiation but also one of unification. Finally, the justification for contemporary law's simultaneous pursuit of both unification and differentiation is extrinsic rather than intrinsic to law. As we shall see, contemporary law's tendency towards autopoiesis may be justified as part of a larger whole, but only in terms of extralegal norms. In other words, it is legitimate for law to turn inward, but only because that tends to promote the integration of law in the larger social matrix in accordance with extralegal norms poised to permeate social life as a whole.

The constitutional jurisprudence of due process provides a clear glimpse of this clash. Indeed, the interplay between procedural due process and substantive due process illustrates, through the implementation of procedural due process, how the search for legal autonomy collides with the recurring need to appeal to extra-legal norms through substantive due process. The recognition of substantive rights has repeatedly prevented due process from becoming exclusively procedural. See, e.g., Griswold v. Connecticut, 381 U.S. 479 (1965) (due process implies a fundamental right of privacy); Lochner v. New York, 198 U.S. 45 (1905) (due process implies certain fundamental economic rights). However, the very determination of purely procedural due process rights may often be impossible without reference to substantive rights grounded on fundamental extra-legal values. See, e.g., Paul v. Davis, 424 U.S. 693 (1976) (determination of procedural due process rights depends on conceptions of liberty and property that are ultimately traceable to fundamental extra-legal norms); Board of Regents v. Roth, 408 U.S. 564 (1972).
The paradox presented by contemporary law's turn inward as part of its bid to recover the vertical unity of justice can be unraveled by reference to the social forces that shape contemporary legal relationships. The function of these relationships is not simply to produce differentiation or, on the contrary, to foment the unification of legal and extralegal norms. Instead, the function of contemporary law is to produce differentiation and promote unification simultaneously as prevailing circumstances make the possibility of reconciling legal norms with extralegal values conditional on carving out a distinct sphere of differentiation.

The meaning of the movement towards legal autonomy is prone to being misinterpreted to the extent that law's turn inward is overdetermined and that the full reason for it is likely to remain dissimilated. Contemporary legal relationships are inscribed in a normative universe animated by the necessity to eliminate communal norms from the sphere of noncommunal relationships, and to replace them with noncommunal—or more precisely, transcommunal—norms. Accordingly, on the one hand, law must turn inward to escape from both the grasp of past parochialisms and from the temptations of future parochialisms. But, on the other hand—and this is much more likely to escape notice—the law must also turn inward as a means to the reconstitution of justice beyond law consistent with the establishment of extralegal norms with transcommunal appeal. At the very least, the differentiation produced by law's inward turn should serve as a communicative vehicle designed to dispel the notion that the extralegal norms sought to be given transcommunal validity are but the old parochial norms bent on venturing beyond their legitimate territorial boundaries. However, in the case of the pursuit of pluralism—which, as noted above, involves the establishment of substantive values rather than merely procedural ones—the tendency towards legal autonomy plays a key role in, and is an integral part of, the systematic task of reconstituting the normative unity of the domain of noncom-

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71 As an example of such an inward turn, one may cite the evolution of the English and American law of contract between the eighteenth and nineteenth centuries. This evolution saw the replacement of substantive contract rules based on custom by process oriented rules relating both to contract formation and to the measure of damages. Moreover, the development and use of those process-oriented rules not only permitted abandoning locally rooted past customs but also made it possible to shield contractual relationships from future intermeddling in the name of extralegal norms. For a more extended discussion of this aspect of the evolution of contract law in the nineteenth century, see Rosenfeld, supra note 30, at 821-27.

72 In other words, preservation of the tendency towards legal autonomy protects against relapses into communal factionalisms while reaching out for transcommunal, extralegal norms.

73 See supra notes 38-39 and accompanying text.
munal interaction. Indeed, without maintenance of the movement towards legal autonomy, there would be no room for the peaceful coexistence of the different value systems that are compatible with pluralism. In view of pluralism’s normative aim to accommodate as many different value systems as are compatible with it, the tendency towards legal autonomy associated with it should be interpreted as part and parcel of the pluralist effort to reconstitute justice beyond law so as to legitimately empower it over noncommunal relationships.

Any attempt to reconstitute justice beyond law from the standpoint of pluralism, however, seems ultimately bound to fail. Viewing communal extralegal norms as first order norms, pluralism generates a second order of norms. These second order or transcommunal norms are supposed to provide a unified normative framework for the reconstitution of justice beyond law. Within this framework, first order norms are not suppressed but merely subordinated to second order norms. For some first order norms, subordination means displacement. For example, pluralism is compatible with the embrace of certain particular religious norms, provided that the latter are relegated to the private sphere.\(^4\) Furthermore, for other first order norms, subordination to second order pluralist norms means, in effect, elimination. Thus, for instance, crusading religions and rigidly antipluralistic moral and political norms can be given no room in a normative universe sought to be unified under pluralist values.\(^5\) Now, since pluralism cannot do without any first order norms (indeed, pluralism is meaningless without at least some available choice among different first order norms) and because it cannot accommodate all first order norms, any pluralist attempt at reconstituting justice beyond law is in some sense arbitrary inasmuch as it incorporates some first order norms while excluding others. In other words, pluralism cannot avoid making choices among competing first order norms in the course of its attempted reconstitution of justice beyond law. From the standpoint of the first order norms left out, however, pluralism’s attempted reconstitution of justice beyond law cannot overcome the breakdown in the vertical unity of justice as it necessarily privileges some of the contending first order norms over others.

\(^4\) Cf. Karl Marx, On the Jewish Question, in Writings of the Young Marx on Philosophy and Society 216-248 (Loyd D. Easton & Kurt H. Guddat trans. & eds., 1967) (arguing that religious emancipation can only be obtained at the cost of relegating religion to the private sphere).

\(^5\) Arguably, crusading religions and antipluralistic ethical and political creeds could be partly accommodated in the normative universe of the pluralist. To the extent that antipluralist values are an essential and inseparable component of a given value system, however, partial accommodation could well be tantamount to outright rejection.
We are now in a position to see more clearly the place of legal autonomy in pluralism's attempted reconstitution of justice beyond law in the face of the predominance of dealings among strangers. Legal autonomy plays both a negative and a positive role in such attempted reconstitution. The negative role consists in uprooting, and cutting loose from, first order extralegal norms in order to overcome the obstacles interposed by communal parochialisms. If legal autonomy were exclusively used for purposes of performing this negative role, however, it would promote nihilism instead of furthering pluralism. To serve the aims of pluralism, therefore, legal autonomy must also contribute to the positive function of reintegrating uprooted first order norms under the legitimating aegis of hierarchically superior second order norms. But, since these second order norms are ultimately extralegal in nature (in other words, pluralism is not an inherently legal norm), legal autonomy's positive contribution must be indirect in nature. Specifically, legal autonomy's indirect positive contribution to pluralism consists of furnishing the space necessary for the reintroduction of first order norms as subordinated to second order norms. Finally, through the ceaseless concurrent pursuit of its positive and negative roles, the legal system oriented towards self-reference and autonomy tends to postpone pluralism's ultimate inevitable failure to recover the vertical unity of justice. Moreover, focus on the autonomous tendencies of the legal system contributes to the postponement in question by concealing, on the one hand, the nexus between pluralism and justice beyond law and, on the other, the fundamental asymmetry between the legal system's role in uprooting first order norms and its role in reintroducing such norms as subordinate to second order norms. Indeed, for purposes of the legal system's uprooting function, all first order norms are equivalent; yet for purposes of their reintroduction as subordinate to second order norms, such first order norms are by no means all equal, as only some of them will in the end prove to be suitable.

CONCLUSION

Luhmann's legal autopoiesis represents an advance over positivism, but it ultimately fails to erect an impregnable barrier between justice according to law and justice beyond law. Self-referential autopoietic law guarantees minimal distributive justice, relative equalization, and the benefits of greater order and insurance. Contemporary legal systems, however, are not confined to the pursuit of order and insurance through the stabilization of expectations. Contrary to the thrust of Luhmann's fundamental assumptions, contemporary legal
systems must remain normatively open to the ever greater juridi-
fication of human and constitutional rights squarely grounded on ex-
tralegal norms. As we have seen, contemporary legal systems tend
towards autonomy, but that represents only part of the story. Indeed,
contemporary law's tendency towards autonomy and justice accord-
ing to law is accompanied by (the often concealed but nevertheless
ever present) contrary tendency towards extralegal norms and justice
beyond law. The dynamic interlocking of these contrary tendencies is
the product of the pluralist quest to reconstitute the vertical unity of
justice without bringing about the communal re-rooting of first order
norms. Perhaps, by abandoning the pursuit of pluralism and the legal
and extralegal values which it entails, it would become possible to
move towards a more complete legal autonomy. Be that as it may,
however, pluralism should not be lightly discarded for it may well
represent—in spite of its many contradictions and failures—the best
available hope for justice based on the acceptance of plausible trans-
communal norms.