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Autopoiesis and Positivism

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AUTOPOIESIS AND POSITIVISM

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Autopoiesis has been criticized from various perspectives as insufficiently distinguished from positivism.[1] Even where critics recognize that the Luhmann-ian notion of closure[2] differs from positivism—in that the system produces and reproduces all of its functions, including its norms, unreliant (except as structurally coupled) on the sovereign or the political system—the similarities to positivism remain disturbing. Critics from a traditionalist[3] (shall we say "humanistic"?) perspective may feel ill at ease because the systemic, organic, metaphor of autopoiesis heightens the sense of nonconstraint that we associate with powerful, vitalistic forces, either in nature or our own deepest nightmares. Recent history, too, conjures the extreme risks of autonomous legal systems, which left to their own devices, not only furthered but initiated unacceptable agendas of legalistic violence. I will return to that history, at some risk of *coupling* legal analysis to the very environment that Luhmann rigorously—and I think often convincingly—excludes (particularly over a temporal period) from the legal system.

The notion that (whether originated or not by the will of the sovereign) the closed legal system contains a threat both to itself and to other social systems also informs the critique of the newly ethical-minded deconstructionists, especially in America. As one of Paul de Man's recently benighted and divided group of graduate students (in my case, in the salad days of Cornell and Zurich), I must always suppress a smile when *deconstructionism* and *justice* find their way into the same sentence. But some post-moderns have disliked in autopoiesis a self-referentiality that with too much seeming smugness, looks only to the system to maintain itself and flourish.[4] It would be one thing, this group might say, if the system could think about (as well as talk to) itself, for such self-consciousness, though fraught with

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1 *See, e.g.*, Arthur Jacobson, *Autopoietic Law: The New Science Of Niklas Luhmann*, 87 MICH. L. REV. 1647, 1668-77 (1989); Drucilla Cornell, *Time, Deconstruction, and the Challenge to Legal Positivism: The Call for Judicial Responsibility*, 2 YALE J.L. & HUMAN. 267, 270 (1990).

2 *See* Niklas Luhmann, *Closure and Openness: On Reality in the World of Law*,*in* AUTOPOIETIC LAW: A NEW APPROACH TO LAW AND SOCIETY 335 (Gunther Teubner ed., 1987); Jacobson, *supra* note 1, at 1660-61 & n.42.

3 Jacobson, *supra* note 1, at 1677-83.

4 *See, e.g.*, Cornell, *supra* note 1, at 270-73.

ambiguity, would make not only possible, but necessary, the justice-seeker's distanciation from the ceaseless surgings of the autopoietic machine. Through this distancing, which is partly a function of the individuation of the law that Luhmann certainly wishes to avoid, the system's potential excesses might be checked.

But Luhmann, in his paper for this conference,[5] has if anything merely toughened his analysis. Communication, for autopoiesis, is *not* the complex consciousness imbued by humanists with the power to transform the system from within. Although, in Luhmann's words, the "basal operation"[6] of law, communication, "never becomes thought"[7] within the system; rather it is the constant *irritation* of communication that brings the individual fully into the system. But while the individual thus becomes a player, he or she does not through language alone become a self-conscious entity, engaged in thinking and speaking *about* the system.

Nor, on the autopoietic view, would extrinsic influences or disciplines assist the system to grow or develop significantly. As Professor Gumbrecht remarks, the system instead exhibits a "radical blindness towards [its] environment."[8] It says no (Luhmann's phrase, somewhat after the Nietzsche of *Ecce Homo*) to outside forces far more than it (selectively) permits them in. "[T]he ultimate problem always consists of combining external and internal references, and the real operations which produce and reproduce such combinations are always internal operations. *Nothing else is meant by closure.*"[9]

I would like to suggest that autopoiesis, if developed in the direction of one of its own *basal* premises, might nonetheless sufficiently answer those critics who would challenge it to avoid the positivistic or unselfreflective fallacies of other traditional or contemporary theories of law. I will do so by linking (I deliberately avoid the word *coupling*, because this linkage takes place entirely *within* the legal subsystem) the critique of autopoiesis's positivistic remnants with the recent discussion of positivism that has arisen in France as part of the late-breaking reaction there to the "Vichy experience."[10]

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[5] Niklas Luhmann, *Operational Closure and Structural Coupling: The Differentiation of the Legal System*, 13 CARDOZO L. REV. 1419 (1992).

[6] *Id.* at 1424.

[7] *Id.* at 1433.

[8] Hans Ulrich Gumbrecht, *Interpretation vs. Understanding Systems*, 13 CARDOZO L. REV. 1505 (1992).

[9] Luhmann, *supra* note 5, at 1431.

[10] When I began researching Vichy, little French scholarship existed in the field. For the past five years, work has increased dramatically. *See, e.g.*, JEAN BARTHÉLEMY, MINISTRE DE LA JUSTICE: MEMOIRES (1989); DORIS BENSIMON, LES GRANDES RAFLES: JUIFS EN FRANCE 1940/1944 (1987); MAURICE RAJSFUS, JEUDI NOIR (1988); *see also* works cited *infra*, note 11.

Various scholars (including myself) have recently been exploring what one could call the autopoiesis of French law under the Vichy regime and the Nazi occupation, 1940-44.[11] Vichy provides a challenging example for autopoietic reasoning. Picture a system otherwise founded on egalitarian norms by then some 150 years old; then political events suddenly place these norms under stress. But the system is permitted to adhere to those norms if it wishes; the system retains, even under occupation and surely under the autonomous Vichy government, almost all its autopoietic options. For our findings reveal that French law of this period retained its particular qualities: French lawyers and bureaucrats wrote new laws while most of those on the books remained in place; French magistrates and administrative courts adjudicated under those laws; the French bar and the country's private lawyers worked on a daily basis, integrating new laws into old, reasoning with the alacrity and Cartesian thoroughness found in French legal rhetoric down through the generations. The Germans were bemused and delighted to let the French system develop on its own. There are more instances on the record attesting to the Germans' fear that the French might be going too far than to the victors' need to coerce the French to adopt racial or other *new* laws.[12]

There was surely, in Vichy law, some structural *coupling* with political exigency, although before the German regime had established its bureaucratic presence, the French on their own were establishing concentration camps on French soil (laws of September and October, 1940).[13] But in the fullness of time, the Vichy legal system produced and reproduced the "external and internal references"[14] that brought autopoietic closure to the system for four long years.

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[11] LE STATUT DES JUIFS DE VICHY: 3 OCTOBRE, 1940 ET 2 JUIN, 1941 (Serge Klarsfeld ed., 1990); Danièle Lochak, *La Doctrine Sous Vichy ou les Mesaventures du Positivisme*, *in* LES USAGES SOCIAUX DU DROIT 252 (1989); Richard Weisberg, *Legal Rhetoric Under Stress: The Example of Vichy*, 12 CARDOZO L. REV. 1371 (1991).

[12] Weisberg, *supra* note 11, at 1380-92 (discussion of French law exceeding German law on the burden of proof and evidentiary standards and stating that, "[t]he Germans themselves, on several occasions, had to slap the wrists of French lawyers and bureaucrats whose legalistic zeal carried them beyond the strictness of German legal precedents.") The French law, for example, placed the burden on the individual to prove his non-Jewishness, while German law placed the burden of proving an individual's Jewishness on the State. German law was similarly more liberal in its acceptance of evidence. For example, the production of a baptismal certificate was less convincing to French courts as proof than to German courts as proof of an individuals non-Jewishness.

[13] *Id.* at 1396 & nn.51-52 & 62-63 (discussing the Vichy detention laws of 3 September 1940 and 4 October 1940 which stated that: "Foreigners of the Jewish race can, as of the promulgation of this law, be interned in special camps by the decision of the prefecture of the Department in which they live." *Id.* at 1396).

[14] Luhmann, *supra* note 5, at 1431.

Where, as Professor Schlink has emphasized here in a different context, was the "openness of justice"[15] of this closed system? During those years, in a fully lawful manner, 75,000 or more Jews—having been so defined by a French law more expansive in its text and interpretation than the German models—were rounded up and deported from French soil.[16] The law set itself the task, upon which it flourished, of seeing the French-authored racial laws to their logically—even aesthetically—structured conclusion. Nothing stopped the legalistic onslaught; not German concerns that, even for their tastes in such techniques, the French machine was almost too well oiled.[17]

Recently French Professor Danièle Lochak, in an article called *La Doctrine Sous Vichy ou les Mesaventures du Positivisme*,[18] has attacked what she sees as the positivist basis for Vichy law. Her claim, based on empirically accurate and important documentary findings, is that the objective, value-neutral description of the racial laws by contemporary legal academics and writers helped or in fact guaranteed the acceptance within the system of those laws. Defending legal positivism from Lochak's specific charge, Professor Michel Troper claims that Vichy legal analysis drifted from its *purely descriptive* function to a value-oriented role basically in sympathy with the racial model it was analyzing.[19] As he puts it,

> That approach to law agrees to reckon with values, as opposed to a purely positivist legal science, and furthermore, it departs from positivism not only in observing the values of the legislator, but even those coming from the political, religious, social, or psychological environment that might influence the legal system.[20]

Troper thus answers Lochak by divorcing from true positivism the Vichy legal aberration. I substantially agree. The whole thrust of Vichy law, including the sustenance it received from many academicians, is value laden. It surely involved, for example, the deepest patterns of Catholic hermeneutical reasoning, and also of cultural and

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15 Bernard Schlink, *Open Justice in a Closed Legal System?*, 13 CARDOZO L. REV. 1713, 1713 (1992).

16 Weisberg, *supra* note 11, at 1373 n.1 (listing various research estimates of the number of Jews deported from France between 1940 and 1944).

17 *Id.* at 1383 n.28. Thus, as just one example, the Nazis publicly expressed amazement that the French had not adopted their legal view that the evidence of a priest on the conversion to Catholicism of a challenged individual with only two Jewish grandparents mandated a finding of "Non-Jewishness." French courts distrusted and often dismissed such evidence, thus making it harder for challenged individuals of that type to escape the sometimes fatal and always life-disrupting strictures of the law.

18 Lochak, *supra* note 11.

19 Michel Troper, *La Doctrine et le Positivisme*, *in* LES USAGES SOCIAUX DU DROIT 286 (1989).

20 *Id.* at 292 (my translation).

religious prejudice. But while this view saves positivism from any Vichy infection, it cannot bring solace to autopoietic thinkers willing (as they must be) to face the challenges to their theory of that integral internal piece of the law's machinery: legal history.

I believe—and have put it this way in my own writings on Vichy[21]—that French law worked within its own rhetorical flexibility, its basal operation of communication, to further (fairly gradually and with little dependence on any external factors) a racial program. In thinking about Professor Luhmann's approach, I find that it is fully descriptive of the closed system of Vichy and immensely helpful in understanding how hitherto stable norms (say of equality before the law) were internally transformed through acts of communication subtly shifting notions of right and wrong *(recht und unrecht)*.[22] Indeed, to go one step further, the phenomenology of Vichy law seems perfectly described by the distinction Luhmann makes between those binarities and what he calls the construction of normative rules or programmes to serve the purely internal needs of the system.[23]

What happened in Vichy was not the triumph of positivism. Rather the system, working with its own rhetoric (Professor Gumbrecht's "utterance"),[24] adopted a program of racial bias and, for its own purely internal purposes, rejected or deflected the equally operative program of egalitarian and process-protective constitutional norms. (This phenomenon, this unpredictable eventuality, exemplifies what Professor Charles M. Yablon has called the indeterminacy of even normatively closed systems.[25]) Indicative of the autopoietic nature of Vichy law is the public pronouncement, by a strong and articulate minority of French lawyers, throughout the period, that the entire system was unlawful, particularly the *ex post facto* and evidentiary aspects of the new racial laws.[26] Their voice was tolerated. But it was drowned out by the subtle communication, largely unselfconscious—and not usually based upon such extrinsic models as anti-

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21 *See* RICHARD WEISBERG, THE FAILURE OF THE WORD: THE PROTAGONIST AS LAWYER IN MODERN FICTION (1984); Richard Weisberg, *Avoiding Central Realities: Narrative Terror Under Vichy and the Occupation*, 5 HUM. RTS. Q. 151 (1983); Weisberg, *supra* note 11; Richard Weisberg, *France: From Vichy to Carpentras*, WALL ST. J. (int'l ed.), Oct. 12-13, 1990, op. ed. page, col. 3.

22 Luhmann, *supra* note 5, at 1429.

23 *Id.* at 1428.

24 Gumbrecht, *supra* note 8, at 1510

25 Charles M. Yablon, *Timeless Rules: Can Normative Closure and Legal Indeterminacy Be Reconciled?*, 13 CARDOZO L. REV. 1605 (1992).

26 *See* Weisberg, *supra* note 11, at 1378 & n.17, 1391 & n.41 (citing the "Riom Trial" where defense counsel invoked constitutional guarantees, criticized the Vichy government, and protested the use of *ex post facto* laws).

Semitism or fear of German reprisals—of the vast majority of lawyers, who could find a privileged place for the other, retrospectively bizarre and "unFrench" program within the organism.

Unchecked by any extrinsic constraint, closed only upon itself, the organism went berserk. Surpassing positivism, it went beyond the models of the German (and sometimes even the French) dictatorial legislator; hence the French were able to find, just because they decided to talk and write about the problem until it was logically exhausted, that Georgians of Mosaic belief were Jewish (although the Nazis refused to persecute Georgians) and that baptized children with two Jewish grandparents might also be Jewish because their baptism as infants did not bespeak (as the Germans held it did) a sufficient will to be non-Jewish.[27]

Vichy demonstrates the salient differences between positivism and autopoiesis. It also exemplifies the descriptive power of that theoretical construct. But where autopoiesis stands most in continuing relation to positivism; where, in Professor Troper's terms, a theory rigorously rejects the infusion of value analysis or of the critique of the individual legal actor,[28] I believe the theory needs further self-justification. As I suggested earlier, the latter might already be implicit in the autopoietic theory. Perhaps full acceptance, and further study, of *communication* itself, as the sole system so connected with law as to surpass mere structural coupling, would inspire an openness to justice even within the closed autopoietic legal system.

Some answers lie, for example, in the unity between language and justice to be found in the decisions of Benjamin N. Cardozo.[29] To this end, and to other tasks which we mean to demonstrate are integral to

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[27] *Id.* at 1385. A French tribunal held that two children, aged two and three, who were baptized and had two Jewish and two non-Jewish grandparents were Jewish, because to "truly belong to another religion required a considered and clearly expressed will that no child of 2 or 3 can possess." *Id. See also id.* at 1383 & n.28 (citing a further example of French law exceeding German law. In this instance, the French, unlike the Nazi's, held that Georgians of Mosaic belief should be considered Jews under Vichy law, and that therefore "in every case, these Georgians must be made the object of aryanisation measures." *Id.* (quoting letter from "Directeur du Statut des Personnes (citation omitted))). According to French law, a baptismal certificate was not sufficient to demonstrate an individuals non-Jewishness. Rather, the individual was required to prove his nonadherence to the Jewish religion by an actual membership in one of the other religions.

[28] Troper, *supra* note 19, at 291.

[29] Hynes v. New York Cent. R.R., 131 N.E. 898 (N.Y. 1921); Richard Weisberg, *Law, Literature, and Cardozo's Judicial Poetics*, 1 CARDOZO L. REV. 283 (1979). *See also* RICHARD A. POSNER, CARDOZO: A STUDY IN REPUTATION 48-55 (1990) (discussion of Cardozo's artistry with the *Hynes* opinion). For the lengthy pre-Posnerian discussion of *Hynes* that is cited by Posner to dubious effect, *id.* at 48 n.24, see RICHARD WEISBERG, WHEN LAWYERS WRITE 10-12 (1987). *Hynes* demonstrates that communication and justice-doing are so linked within the autopoietic legal system as to be indistinguishable. *See also, infra*, note 30.

autopoietic law, Law and Literature in the United States and abroad has set its sights.[30]

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[30] *See* RICHARD WEISBERG, POETHICS: AND OTHER STRATEGIES OF LAW AND LITERATURE (1992). Language does more than simply *buttress* or *ornament* the doing of justice. Language *is* justice-doing, and language (whatever the political "outcome" of a judicial decision) can be justice's *undoing*, as in the baleful case of Roe v. Wade, 410 U.S. 113 (1973).