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Timeless Rules: Can Normative Closure and Legal Indeterminacy be Reconciled?

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TIMELESS RULES: CAN NORMATIVE CLOSURE AND LEGAL INDETERMINACY BE RECONCILED?

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What do we know when we know the law? Does legal knowledge consist of a body of information to be interpreted and understood, much in the way we might know the history of France or the principles of quantum mechanics? Or is knowing the law primarily the knowledge of how to *do* something, like knowing how to swim or play the saxophone?[1] This is a question, I think, which underlies much contemporary academic legal discussion, and I hope I may be forgiven for suggesting, in this interdisciplinary and international symposium, that one's answer to the question may, to some extent, be culturally determined.

In European universities, the status of law as a serious academic discipline is rarely questioned. Faculties of law are organized like other faculties in the social sciences and humanities, and undergraduates can study law in much the same way they study chemistry or economics.[2] Moreover, in civil law countries, the law itself tends to be associated with the rules inscribed in the positive language of codes and statutes. European legal scholars, through their detailed study and understanding of the intricacies of such rules, have authority to speak definitively on matters of pure law. The adjudication of actual disputes by lawyers and judges, in contrast, is considered a derivative practice, an application of law, and is not as central to a true understanding of the law as the efforts of the scholars.[3] Finally, in Europe, and perhaps especially in Germany, there is an appreciation and a tendency to value theory and abstraction for its own sake, and to assume that knowledge, at least at the university level, is precisely that which can be conveyed in a lecture hall.

In the United States, law is a hybrid discipline, and law faculties are structured quite differently from graduate departments in the so-

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1 *See* GILBERT RYLE, THE CONCEPT OF MIND 28 (1949).

2 Robert A. Stein, *The Future of Legal Education*, 75 MINN. L. REV. 945, 949 (1991).

3 JOHN HENRY MERRYMAN, THE CIVIL LAW TRADITION 59-60 (1969).

cial sciences or humanities. Law schools are trade schools, and students come to them after their undergraduate training is finished. Shortly after arriving in law school, students are told that the purpose of their education is not to learn the substantive legal rules, but to learn a process called "thinking like a lawyer."[4] Moreover, in a common law country like the United States, the paradigmatic legal action is generally thought of as adjudication. The primary object of study is not the statute, but the judicial opinion. Judicial opinions are the most authoritative and definitive statements of the law. In contrast, legal scholarship, to the extent it consists of analyses or interpretations of such opinions, tends to be commentaries on commentaries and of only secondary significance. Finally, there exists in the United States a certain mistrust of theory and abstraction, a preference for practical know-how, and an attempt to justify scholarly endeavors primarily as means to accomplishing other worthy goals.

These are, of course, stereotypical generalizations, and I readily acknowledge that the differences in approach and assumptions of American and continental legal academics are not nearly as stark as I have just portrayed them. But that these differences exist, I think, is undeniable. Such differences may go a long way in explaining a tendency in continental legal thought to envision law as a set of authoritative norms which structure and determine many areas of social interaction, as well as the concomitant tendency of American legal thought to envision law as a process, an endless argument among lawyers, judges, and litigants concerning the appropriate forms of social and economic interaction. Under this American view, while the legal system may achieve substantial consensus for a time, it is always viewed, in principle and practice, as open to challenge and change.[5]

Having set up this dichotomy between American and continental European legal thought, I would note that, from this perspective, Professor Luhmann's work seems less European than most. Indeed, in certain respects, it looks positively American. It is, first of all, a sociological theory of law, and Luhmann is cognizant of the legal system as a process of social interaction in a way that more positivist legal theorists are not. While H.L.A. Hart understood that the difference between legal rules and the commands of a gunman was the attitude of the decision maker toward the legal rules, that is, the "internal per-

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[4] R. RANDALL KELSO & CHARLES D. KELSO, STUDYING LAW: AN INTRODUCTION 13 (1984).

[5] *See generally* Arthur J. Jacobson, *Modern American Jurisprudence and the Problem of Power*, 6 CARDOZO L. REV. 713 (1985).

spective" that made her feel "obliged" to follow these rules,[6] Luhmann seeks to give a full sociological account of that internal perspective. In so doing, Luhmann recognizes that the perspective is not a simple interaction between decision maker and rule, but a complex set of expectations among the various actors in the legal system. These actors have a responsibility not merely to follow a rule, but to respond in appropriate ways to the actions of others, actions which are themselves interpreted and understood with the aid of the normative expectations they have as participants in the legal system.[7] Luhmann's work, then, shares with much American theory the tendency to see law as process, and legal knowledge as embodied in the way lawyers and decision makers act and respond to the actions of others in the legal system.

Moreover, and again in contrast to more positivist conceptions of law, autopoiesis is a dynamic theory of law, a way of describing and understanding legal change. Rather than an imposing edifice whose foundations (or grundnorms) are fixed and unchanging, and where only the furniture on the upper floors is occasionally moved around or refurbished to meet current fashions,[8] the metaphor of law for autopoiesis is the biological organism; this organism is open to change, constantly absorbing and responding to stimuli from outside its own system, and continuously changing yet also remaining recognizably the same.[9]

Yet the law, for Professor Luhmann, is still embodied in a system. This system, with a determinate shape and structure, can be described at a rather high level of generalization and has certain essential and defining characteristics. Such assertions are likely to raise antisystematic hackles on the part of many American legal academics, whose inclinations, both from their native orientation towards pragmatism, and the teachings of various forms of contemporary European philosophy, are to distrust any theory which purports to explain and justify legal decision making at a high level of generality.[10]

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6 H.L.A. HART, THE CONCEPT OF LAW 20-25 (1961).

7 NIKLAS LUHMANN, A SOCIOLOGICAL THEORY OF LAW 24-40 (Martin Albrow ed. & Martin Albrow & Elizabeth King trans., 1985).

8 For a definition of "grundnorms," see HANS KELSEN, PURE THEORY OF LAW 8-9 (Max Knight trans., 1970).

9 For discussions on autopoiesis, see generally AUTOPOIETIC LAW: A NEW APPROACH TO LAW AND SOCIETY (Gunther Teuber ed., 1988); Arthur J. Jacobson, *Autopoietic Law: The New Science of Niklas Luhmann*, 87 MICH. L. REV. 1647 (1989).

10 For discussions about aspects of "essentialism" and "anti-essentialism," see James Boyle, *The Politics of Reason: Critical Legal Theory and Local Social Thought*, 133 U. PA. L. REV. 685 (1985); Ruth Colker, *An Equal Protection Analysis of United States Reproductive Health Policy: Gender, Race, Age, and Class*, 2 DUKE L.J. 324 (1990); Stanley Fish, *Anti-*

The aspect of Professor Luhmann's account of the legal system which Americans will likely find most troubling, I believe, is his assertion that the legal system is normatively closed.[11] Such an assertion seems to be in tension, if not outright conflict, with a view of law as constantly open to challenge and change. This view of law contends that the norms that constitute the legal system are so diverse, and so contradictory in scope, purpose, and level of generality that a skilled lawyer or judge can invariably invoke an authoritative legal rule to justify any outcome they wish in a particular case. This view of law, shared by many in varying degrees in American legal academia, is often referred to as "legal indeterminacy."[12]

The purpose of this paper, as the title states, is to ask whether the Luhmannian claim of normative closure can be reconciled with the claim, found in much contemporary American academic writing (including my own), that the law is indeterminate.[13] The preceding discussion of the differing perspectives of European and American legal scholars immediately calls to mind one potential reconciliation—possibly only the German legal system is normatively closed, or, alternatively, maybe only the American legal system is indeterminate?[14]

On the merits, however, it seems to me that there are good grounds for rejecting, at least as an initial matter, the notion that normative closure, as Professor Luhmann uses it, is something that relates only to German or continental legal systems, or that legal indeterminacy, as that term is used by many contemporary American

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Professionalism, 7 CARDOZO L. REV. 645 (1986); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990); Joan G. Williams, *Dissolving the Sameness/Difference Debate: A Post-Modern Path Beyond Essentialism in Feminist and Critical Race Theory*, 2 DUKE L.J. 296 (1990).

11 Niklas Luhmann, *Operational Closure and Structural Coupling: The Differentiation of the Legal System*, 13 CARDOZO L. REV. 1419, 1424-25 (1992).

12 *See e.g.*, and authorities cited within, Kenneth J. Kress, *Legal Reasoning and Coherence Theories: Dworkin's Rights Thesis, Retroactivity, and the Linear Order of Decisions*, 72 CAL. L. REV. 369 (1984); Charles Yablon, *Justifying the Judge's Hunch: An Essay on Discretion*, 41 HASTINGS L.J. 231, 235-252 (1990) [hereinafter *Justifying*]; Charles Yablon, *The Indeterminacy of the Law: Critical Legal Studies and the Problem of Legal Explanation*, 6 CARDOZO L. REV. 917 (1985) [hereinafter *Indeterminacy*]; Charles Yablon, *Law and Metaphysics*, 96 YALE L.J. 613, 623-36 (1987) (book review) [hereinafter *Law*].

13 *Supra* note 12.

14 There are, of course, strong grounds for rejecting this hypothesis which have nothing to do with its merits. First, it would be highly damaging to the self esteem of legal academics if they were limited to talking only about the legal system they actually know. Second, if legal systems were truly too different to support generalizations of the sort we are discussing here, the possibility of future international gatherings of the sort giving rise to this symposium would be sharply curtailed, with deleterious effects on both the free exchange of knowledge and on the travel industries of our respective countries.

theorists, is a feature that characterizes only American law.[15]

I

If normative closure and legal indeterminacy cannot be reconciled as merely the differing national characteristics of their respective legal systems, can they be reconciled in some more theoretically satisfying and interesting way? My answer is that, in a limited and tentative way, they can. Legal indeterminacy, at least in the aspects involved here, is a claim relating to the extent to which the existence of authoritative legal norms determine and justify specific legal actions. Normative closure, at least as I have come to understand it, is a claim about the ability of those acting within the legal system to recognize certain actions and communications as distinctively legal.

Put another way, legal indeterminacy claims that even though there may be a limited and finite set of norms available to decision makers within a legal system, this does not mean that the system cannot generate disparate, even contradictory responses (i.e., either plaintiff or defendant may win) in most cases. Normative closure does not necessarily contradict such a claim, but would look at it from another angle. It would emphasize, not the disparity of response, but the manner in which the legal system justifies and understands all such responses as not merely good or bad, but as recognizably legal responses.

The difference between claims of normative closure and claims of legal indeterminacy then, is not so much in their assertions about the legal system, but in the perspective they adopt, and in what they choose to emphasize and deemphasize. Legal indeterminacy views the legal world from the perspective of the client or advocate seeking a particular result (a particular set of actions to be generated by the

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[15] First, theorists of both schools would reject any such geographical limitations on the applicability of their work. Professor Luhmann quite clearly offers his theory as one applicable to all developed legal systems, Luhmann, *supra* note 11, at 1425-26, and the American indeterminists, while more tentative on the issue, often describe indeterminacy as a feature deeply embedded in the nature of legal reasoning. Indeed, for some contemporary American scholars, the debate is one about the determinacy of meaning itself. *See e.g.*, Fish, *Anti-Professionalism*, 7 Cardozo L. Rev. 645 (1986), Cornell, *"Convention" and Critique*, 7 Cardozo L. Rev. 679 (1986). Accordingly, indeterminacy in this sense is unlikely to vary greatly from country to country. Moreover, legal reasoning itself, as contained in the writing of judges, lawyers, and theorists in the various systems, simply does not seem that different. That is, the forms and styles of argument and reasoning that German lawyers and judges use seem perfectly comprehensible (at least in translation) to an American lawyer, and one finds, in many areas, common legal approaches to similar legal problems. It is possible that all this masks a deep and fundamental legal difference in which German law is normatively closed and determinate, and American law is normatively open and indeterminate, but I doubt it.

legal system), and emphasizes that such results are never necessarily generated by the norms of the legal system—that is, you might always lose.[16] Legal indeterminacy deemphasizes, however, the existence of a highly formalized and recognizably "legal" structure of authoritative decision-makers, rules, and arguments about rules, which form the backdrop against which legal indeterminacy occurs.

Normative closure views the legal world as a system of reciprocal relationships among actors self-consciously acting under the influence of recognizably legal norms and expectations, and emphasizes the way in which the system creates new norms as part of its internal functioning.[17] It deemphasizes the content of those norms,[18] and the extent to which they may operate at different levels of generality, involve competing or even contradictory goals, and create dispositions to act rather than mandatory actions.

In short, legal indeterminacy and normative closure may both be correct, but each achieves some of its power as a theoretical tool by failing to consider certain other aspects of legal reality. Yet, as I intend to show, a consideration of each in relation to the other may lead to a fuller understanding of the legal system as a whole.

Consider that quintessentially legal moment—a legal argument before a judge in a court of law. We all know, from television, if not from personal experience, what such a scene looks like. The judge is seated in the front of the courtroom, elevated higher than the other participants. The lawyers are seated at counsel tables, each equidistant from the judge, and each authorized to speak in turn for a limited period of time. Those familiar with the details of this particular legal system, however, will know far more. They will know whether the parties have submitted written briefs containing their arguments, whether the judge is likely to rule from the bench or reserve decision, whether her decision, once made, can be appealed, and many other aspects of legal and courtroom procedure.

I expect that Professor Luhmann, surveying such a scene, would find it normatively closed in a very satisfactory way. First, he would point out, everyone in the room is able to distinguish the "legal" from the "illegal."[19] We can all identify the judge, and know that she is the only one in the room who may legally decide the case. We also know,

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16 *Indeterminacy*, *supra* note 12.

17 LUHMANN, *supra* note 7; Luhmann, *supra* note 11, at 1426-27.

18 Thomas McCarthy, *Interaction, Indeterminacy, Normativity: Comments on Gumbrect, Yablon, and Cornell*, 13 CARDOZO L. REV. 1625 (1992); Bernhard Schlink, *Open Justice in A Closed Legal System*, 13 CARDOZO L. REV. 1713 (1992).

19 This is the English term as it appears in the translation of Professor Luhmann's paper, Luhmann, *supra* note 11, at 1427-28. It appears to encompass what might appropriately be

however, that only some of her actions and attributes are legal. We have no trouble, for example, distinguishing her wearing a robe (legal) from her wearing a watch (nonlegal). We know that her statement to counsel for plaintiff, "Sit down, your time is up," is part of the legal proceeding, but her whispered statement to her law clerk, "Bring me a glass of water," is not. We know that the statements of the lawyers while they are standing up and being recorded by the court stenographer are legal, while a shout from the spectator in the back of the room is not. Thus, the same place, the same people, the same actions, may be part of the legal system in certain respects, and totally nonlegal in others; anyone with a modicum of familiarity with the system has little trouble telling the difference.

Professor Luhmann associates these distinctions with Hart's secondary rules of recognition, that is, the rules which structure the legal system itself, the rules which are about authoritative rule making.[20] Hart would say that secondary rules are the rules that enable us to recognize when authoritative legal obligations are created.[21] They include rules about wills and contract formation, and more directly related to the issues just discussed, jurisdiction and trial procedure. Hart would say that we are able to recognize the judge and the actions she takes which are legal actions because we know the secondary rules relating to judges and courtroom procedure.[22]

It is worth noting, however, that Hart's discussion of secondary rules was meant to be more than merely a description of how we know certain actions create legal obligations. It was also intended as a refutation of the legal realist claim that "law" or "legal rules" are simply predictions of what judges will do. Hart attempted to show that this claim, which is closely related to claims of legal indeterminacy, is logically incoherent because the argument itself assumes the existence of at least secondary rules. Hart points out that the legal realist argument, at the very least, assumes that one is able to identify the judges whose actions the legal rule is seeking to predict. If so, Hart argues, one must at least recognize the existence of secondary rules that empower certain individuals (i.e., judges) to render authoritative legal opinions.[23]

Hart is correct in noting that the realist claim, as well as most statements of legal indeterminacy that permit judges to decide cases in

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called the "nonlegal," and may not encompass that which Professor Luhmann describes as "legally wrong" (i.e., illegal).

20 HART, *supra* note 6, at 97-106.

21 *Id.* at 97-98.

22 *Id.* at 99.

23 *Id.* at 138-44.

contradictory ways, does indeed presuppose that it is possible to identify judges and other authoritative legal actors, as well as their authoritative legal actions. But is Hart also correct when he says that such recognition presupposes that preexisting legal rules determine who may act with legal authority? This, it seems to me, is a far more questionable move. After all, we are able to identify many things without resorting to rules.[24] In fact, I imagine that the way most of us identify judges is by looking for the person in the black robes sitting in the front of the courtroom, yet I doubt that is what Hart contemplates when he speaks of the rule for determining who may render authoritative legal decisions.

Rather, Hart (and probably many others) would say that a person is empowered to act authoritatively as a judge when she is sworn in pursuant to certain formal procedures. This has little to do, however, with the way lawyers or lay people actually identify who is a judge. Wearing black robes, having your name appear at the front of judicial opinions, and having an office at the courthouse, are all far more useful indicia of who is actually a judge. Even the judge's "empowerment," to the extent this refers to the obedience she receives from court personnel and litigants, is more likely to be the direct result of her black robes, office in the courthouse, and the other social indicia of her "judgeness," rather than any oath she took many years ago.

This argument might trouble Hart, but I do not think it would trouble Professor Luhmann at all. Luhmann recognizes that Hart's rule of recognition cannot provide an explanation of how normative closure comes into being.[25] I am suggesting that it does not even provide an explanation of how normative closure is recognized. For Hart, it is important that there be certain rules which are logically prior to the actions of judges, and which determine who is or is not a judge. I am suggesting, however, that the rules most participants in the legal system use for picking out judges are things like: "Judges usually wear black robes and sit at the front of the courtroom"; "Judges have their names in the court directory and offices in the courthouse"; and "Judges can tell lawyers to shut up without having the lawyer talk back." If these are "rules of recognition" for judges used by the actual legal system, note that they look suspiciously like

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[24] LUDWIG WITTGENSTEIN, ON CERTAINTY (G.E.M. Anscombe & G.H. von Wright eds. & Denis Paul & G.E.M. Anscombe trans., 1969); *Justifying*, *supra* note 12, at 261-62; *Law*, *supra* note 12, at 633-34.

[25] Luhmann, *supra* note 11, at 1427.

"predictions of what judges will do."[26]

None of this, as I noted, would trouble Professor Luhmann in the least. Our ability to recognize judges may not involve "rules" in a strict Hartian sense, but they certainly involve reciprocal expectations in a Luhmannian sense. The point then is twofold. First, that normative closure, as used by Professor Luhmann, does not necessarily, or even primarily, involve clear and crisply stated legal rules. The normative expectations which structure the legal system may involve norms never stated in the law books (e.g., judges have offices in the courthouse), or they may be quite vague and general (e.g., judges speak and act with a certain air of authority and command).[27] The normative expectations which enclose the legal system may involve not just rules, or even just rules and standards, but institutionally transmitted predilections, behavioral attitudes, and predispositions.

Second, this expanded understanding of the norms which structure the legal system in no way implies a determinacy of result. That is, the fact that I can recognize a finite set of norms as those which constitute the legal system in no way commits me to the view that those norms will be applied to achieve consistent results. Rather, the claim that a legal system is normatively closed only commits me to the view that I can differentiate or distinguish those actions and communications which are distinctively legal from those which are not. Moreover, as the previous argument has suggested, such differentiation need not be made by use of rules, but may involve a "practice," in a Wittgensteinian sense, that is not reducible to any rule or algorithm.[28]

It is easy to envision legal systems that are normatively closed, in this sense of normative closure, yet quite indeterminate. An absolute monarchy in which the queen may reach whatever result she desires, but must sign and affix the royal seal to her rulings, would be such a system. Another is a system like the one which existed until recently in American Samoa. It consisted of two judges, who were assigned cases on a random basis. After each case was decided, there was a right of appeal—to the other judge.[29] This is a system in which the

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26 O. W. HOLMES, *The Path of the Law*, *in* COLLECTED LEGAL PAPERS 167-69 (1920).

27 *See generally* JEROME FRANK, LAW AND THE MODERN MIND (1936); KARL LLEWELLYN, JURISPRUDENCE: REALISM IN THEORY AND PRACTICE 111-15 (1962).

28 WITTGENSTEIN, *supra* note 24, at 8e.

29 This was the law in American Samoa until 1979. S. REP. NO. 1107, 95th Cong., 2d Sess. (1978). There was allowed "discretionary review of both final and interlocutory decisions of the High Court of American Samoa by the U.S. Court of Appeals for the Ninth Circuit." *Id.* at 1. This report by the Senate Committee on the Judiciary, was to accompany a bill, S. 2793, 95th Cong., 2d Sess. 2 (1978), however this bill was never enacted into law. The present

legal actions were quite clearly recognizable, yet seems structured to almost maximize indeterminacy of result.

Consider the indeterminacy of yet a third legal system—our own. In our hypothetical courtroom, the most striking evidence of legal indeterminacy is that assumed by the structure of the process itself. The adversarial nature of the process, with the reciprocal requests for arguments and responses from both sides, inherently assumes, and it invariably turns out to be the case, that directly contrary results (i.e., judgment for either the plaintiff or the defendant) can be justified and explained within the authoritative normative structure of the legal system. The empirical support for that claim is clear and overwhelming.[30] In every brief filed and oral argument presented in connection with every litigated case, there can be found arguments by the plaintiff which demonstrate that a judgment for the plaintiff can be explained and justified under the prevailing legal normative structure, and arguments by the defendant which demonstrate that a directly contrary result can also be explained and justified under prevailing legal norms.

This ability to justify contrary results within the prevailing legal normative structure is the central fact of legal indeterminacy. It seems to me that the ability to recognize distinctively legal actions and responses is as indisputable as the central fact of normative closure. Yet, just as the recognition of legal indeterminacy can lead to an alteration and expansion of our understanding of normative closure, a recognition of normative closure can lead to an alteration and expansion of our understanding of legal indeterminacy.

Consider once again that hypothetical legal argument. We have emphasized the fact that the briefs and arguments justify directly contrary results. A consideration and appreciation of normative closure, however, still requires us to acknowledge that those same arguments may evidence a great deal of agreement about both the type and content of the norms applicable to the particular legal dispute. For example, there is little doubt that, in an antitrust case, both sides will agree, and state with great assurance in their arguments, that an agreement "in restraint of trade . . . is . . . illegal."[31] If the agreement is, for example, one which provides distributors with exclusive territories for selling the manufacturer's product, there is little doubt that both sides will agree that the normative standard for the court to apply is

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system of appellate review in American Samoa is described in AM. SAMOA CODE ANN. §§ 3.0220-.0021 (1988).

[30] *Indeterminacy*, *supra* note 12, at 217-18.

[31] Sherman Anti-trust Act, ch. 647, 26 Stat. 209 (1890) (current version at 15 U.S.C.A. § 1 (1991)).

whether the agreement is reasonable.[32] Yet while operating under that authoritative norm of reasonableness, both sides can marshall perfectly acceptable and coherent legal arguments attacking or defending the disputed practice.

Consider also the following case. Plaintiff brings an action for medical malpractice 3 years after the allegedly bungled operation occurred. Defendant invokes the authoritative norm of the statute of limitations, which requires that such claims must be brought within 2½ years of the occurrence of the claim. Plaintiff counters with the equally authoritative norm of equitable tolling, arguing that settlement negotiations with the hospital's insurer led him to delay filing his lawsuit.[33] In this case, unlike the antitrust example, there is no agreement as to the applicable legal standard, yet both sides will recognize that the statute of limitations and the equitable tolling doctrine are both part of the normative structure of their legal system and either can be invoked to legally resolve the dispute. Accordingly, the argument will revolve around which norm is more appropriately applied in this case.

The interesting thing about these examples is that they illustrate the openness and indeterminacy of the legal decision-making process at the same time that they demonstrate the recognizability and finite number of legal norms. In these examples, and in perhaps most concrete cases, it is quite possible to predict the structure, even the content, of the legal arguments that can and will be made, even as the results remain indeterminate.

The point is that legal norms may be quite finite in number, and even rather determinate in their application, and yet still generate a system which is quite indeterminate in the manner I have previously described. In the antitrust example, there is only one potentially relevant rule, and there is unanimity as to its appropriate formulation. In this sense, the system is quite determinate, and most certainly seems normatively closed. Yet, the relevant norm is stated at a level of generality that is sufficiently high, and the considerations involved in the application of that norm are sufficiently complex and potentially contradictory, that its application can easily justify directly contradictory results.

In the statute of limitations example, there are two rather more determinate rules in operation, in that the application of either one

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[32] The normative standard requires the court to measure the agreement against the rule of reason. Jayco Systems v. Savin Business Machines Corp., 777 F.2d 306, 318 (5th Cir. 1985); Graphic Products Distributors v. Itek Corp., 717 F.2d 1560, 1573 (11th Cir. 1983).

[33] *See* Dupuis v. Van Natten, 402 N.Y.S.2d 242 (App. Div. 3d Dep't 1978).

would seem to dispose of the case. Yet, the fact that both rules coexist in the legal system and are part of that normatively closed system, generates the same sort of legal indeterminacy. The analogy, which again is formulated by Hart, is that of a chess game.[34] To understand chess is to understand the rules of chess, which are clear, and finite, and create a limited and determinate set of expectations concerning the participants in the system. Yet the rules of chess never determine, and rarely enable one to predict, the result of any particular game.

In the same way, theorists of legal indeterminacy are right to stress that the authoritative legal norms do not determine, and can rarely be used to predict, the results of concrete legal cases. But they must also recognize that such concrete legal disputes are nonetheless structured and informed by substantial agreement about the relevance and content of particular legal norms, and takes place within the context of a recognizable system of legal decision making.

These considerations lead to the conclusion that normative closure and legal indeterminacy can be reconciled, but only by understanding normative closure in a rather weak sense, as a purely formal description of the character of a legal system. The result is that the assertion of normative closure has almost no normative implications. It is compatible not only with a wide variety of normative rules, but with a wide variety of possible levels of legal indeterminacy as well.

Some may find this view of Professor Luhmann's theory of law as describing a formal and normatively empty system to be rather disappointing and unsatisfactory. Others may see that emptiness as a necessary concomitant of a theory which attempts to operate at such high levels of generality. Indeed, the weak notion of normative closure elucidated here may well be a necessary condition for the assertion of legal indeterminacy. Consider what it can mean to claim that in virtually every case, legal decision makers can justify and explain directly contrary results in accordance with authoritative legal norms. It does not mean that the law is always or even often unpredictable, for reasons I have explained elsewhere at length.[35] Rather, the claim is that the result could have been otherwise, that the judge, as judge, was free to choose a contrary result, and that if she had done so, her decision would still have been a recognizable and justifiable legal act. Note that such a claim depends on the assumption that we can make fairly confident statements about the legality of counterfactual states. When we say the judge "could have ruled the other way," we are stating that our knowledge of the norms constituting the legal system

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[34] HART, *supra* note 6, at 30-31.

[35] *Indeterminacy*, *supra* note 12.

is sufficiently great and sufficiently stable to enable us to recognize and evaluate the legality (in the Luhmannian sense, that is, as being within the legal system) of actions that have not been, and may never be, taken. In this sense, normative closure, the ability to differentiate legal from nonlegal action and communication, is a necessary condition for the assertion of legal indeterminacy.

Normative closure, on this view, does not mean that there can be no "new norms" entering the legal system from other sources. Rather, it simply means that when such new norms appear they will be immediately recognizable as legal. Consider a final example, the recently decided case of *Bowers v. Hardwick*,[36] in which the United States Supreme Court refused to hold that there was any constitutional grounds for invalidating criminal laws which prohibited private consensual homosexual acts. I believe that the result in *Bowers v. Hardwick* was indeterminate in that the case could have been decided the other way, although given what I know about the Supreme Court, I could have predicted the result. I also believe that, at some time in the future, a constitutional right against state interference in private sexual relationships between consenting adults will be established. When that occurs, will a new norm have entered the legal system? Surely it will be a change in the law, but in a sense the legal norm being appealed to already exists. It exists because one can already formulate a perfectly respectable legal argument, based on a recognized and authoritative constitutional norm (i.e., the right to privacy) to support such a right.[37] At this point the question of whether such a norm is legal or nonlegal, in the legal system or outside the legal system, introduces a metaphysical element into the concept of normative closure that I think is neither useful nor required. I would simply point out (in my antitheoretical, process oriented, American way) that the norm is part of the legal system in that I, and any other legal actor, can use it to make recognizably legal arguments. It is not a part of the legal system in that it is not now being used by the system to generate legal outcomes.

A technological analogy, which Professor Luhmann might accept, is that a legal system must be somewhat like a word-processing program. All such programs, in order to function as word processing programs, must have certain essential and determinate characteristics. One of those characteristics, however, is that one should be able to use them to write whatever you want to write. Another is that the

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[36] 478 U.S. 186 (1986).

[37] *See, e.g.*, Mark J. Kappelhoff, *Bowers v. Hardwick: Is There a Right to Privacy?*, 37 AM. U. L. REV. 487 (1988).

program must enable you to preserve what you have already written but also change and revise it.

By the same token, recognizing that normative closure may, in some formal sense, be an essential characteristic of a legal system does not imply that the choice between stasis and change, in any particular legal system and with respect to any particular legal issue, is ever foreclosed.