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Niklas Luhmann's Theory of Autopoietic Legal Systems

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Luhmann, autopoiesis, social systems, self-reference

Abstract

Between 1984 and his death in 1998, German sociologist Niklas Luhmann developed a comprehensive theory of what he called autopoietic or self-referential systems. He worked out this approach both at the level of a social system as a whole and at the level of various social subsystems, such as state, economy, science, religion, education, art, family, and—the concern of the present article—law. My particular topics in this critical introduction to Luhmann's theory are (a) its relation to more standard legal theory, (b) foundational or self-referential problems in law, and (c) the problem of law's relation to other social spheres, especially politics and the economy.

INTRODUCTION

This article presents a largely sympathetic overview of a sociological approach to law that is influential on the Continent but still mostly unknown to Americans, whether academic lawyers or sociologists of law. The approach is through a particular variant of sociological systems theory first developed by German sociologist Niklas Luhmann. For his work of the 1960s and 1970s, Luhmann earned recognition as a theorist of society's differentiation into functional subsystems (such as the economy, politics, science, education, religion, and also law) (see Luhmann 1982). First trained as a lawyer, Luhmann was known in particular for his work in the sociology of law [see Luhmann 1985 (1972)].

Beginning with work published in 1984, however, Luhmann retooled his theory to incorporate ideas of autopoietic systems—to be explained below—that were developed originally in biological research of the early 1970s. He first published a book setting out general principles for a theory of autopoietic social systems [see Luhmann 1995 (1982)]. He then set out writing book-length studies of the various societal subsystems he had earlier distinguished. Most relevant for our purposes, in 1993 he published *Das Recht der Gesellschaft*, translated eleven years later as *Law as a Social System* [Luhmann 2004 (1993)]. In 1997, the last year of his life, Luhmann published a two-volume restatement of the general principles of autopoietic social theory (oddly titled *Die Gesellschaft der Gesellschaft*). In December 2012, an English translation of the first volume appeared, entitled *The Theory of Society, Volume 1* [Luhmann 2012 (1997)].

My strategy is to rely here almost entirely on *Law as a Social System* and *Theory of Society*. I have two reasons: First, *Law as a Social System* is Luhmann's most definitive statement of autopoietic law and makes it unnecessary to address the various warm-up essays he published on the subject during the 1980s and early 1990s. Similarly, his 1997 capstone two-volume study, available so far only as *Theory*

of Society, Volume 1, is a definitive and final statement of Luhmann's general theoretical principles. My second reason for referring almost exclusively to these two works is to make it easier for interested readers to follow up on this essay. It will be sufficient for almost all of them to read only those two books (as well as Volume 2 of *Theory of Society*, once it appears).

In what follows, I first address Luhmann's immensely challenging general principles and then take up his examination of the legal system in particular.

BASIC PRINCIPLES OF LUHMANN'S LATER WORK

Luhmann sometimes described his later work as focusing not on objects but on distinctions [Luhmann 2004 (1993), p. 67; 2012 (1997), p. 28]. The basic distinction of Luhmann's work is between system and environment. This distinction is of a sort that Luhmann dubs a form, by which he means a distinction in which one side is intrinsically bound up with the other. The notion of a system, he observes, implies a distinction between it and what lies beyond its boundary, that is, its environment. Viewed from the other side of the system/environment form, an environment is an environment only with respect to a system.

Luhmann distinguishes among living, psychic, and social systems. By living systems, he means (for our purposes) living bodies, and by psychic systems, he understands individual consciousnesses. Luhmann identifies different levels of social systems, including face-to-face interactions and organizations. At the most encompassing end of the spectrum, Luhmann refers to society, or the societal system, and he is emphatic that these (equivalent) terms mean world society, not a territorial state or any other smaller-scale collectivity.

(World) society is primarily differentiated into various subsystems that perform some unique function. Among these functional subsystems, Luhmann identifies the economy, politics, law, science, education, religion, art,

mass media, and the family.¹ Most of these subsystems, too, “operate independently of spatial boundaries” [Luhmann 2012 (1997), p. 96].² Luhmann describes the political system, however, as partly regionally and not simply functionally differentiated—that is, organized in part by territory [Luhmann 2004 (1993), p. 484]. The legal system, too, is for him territorially differentiated into different legal orders. Nonetheless, he writes, we still can speak of a global legal system—albeit one largely without centralized legislation or decision-making capacity (pp. 468, 481–82). Luhmann goes beyond many theories of globalization in rejecting the idea of world society as a global system of nation-states [Luhmann 2012 (1997), p. 10]. Territorial states, he says, are simply not social systems in his sense of the term [Luhmann 2004 (1993), p. 480].

A focus on systems has been prominent in social theory for decades. The version of social systems theory probably best known to legal theorists—and Luhmann’s usual foil—is the open systems approach developed during the 1960s under the influence of advances in cybernetics and information theory. This generation of social systems theorists emphasized the permeability of the boundary between system and environment. Inputs to and outputs from the system regularly cross the system boundary in a relation of exchange or interchange between system and environment (see, e.g., Easton 1965, pp. 25–26; Buckley 1967, p. 50.) Through this process, the system receives inputs from its environment, processes them, and converts them into outputs fed back to the environment. In turn, information about the outputs’ effects on the environment and the system flows back into

the system, completing the feedback loop (see Easton 1965, pp. 29–32).

In contrast to virtually all sociological systems theory developed before his autopoietic turn in 1982, Luhmann refers to systems not primarily as open but as operatively closed or normatively closed—though, to complicate matters, also as cognitively open. Consider first what Luhmann means by operative or normative closure. He sees the societal system and its subsystems not as associations among individual persons—the traditional conception of society—but as a network of operations. These operations are communications. Through communication, society carries itself forth and reproduces itself as a system. Given Luhmann’s definition of society as a network of communications, the idea that it is closed by those operations called communications is a tautology. The boundary between societal system and nonsocial environment is the boundary between communications and noncommunications. According to Luhmann, information does not enter from the environment into the system; instead, information always is produced internally, within the system, according to procedures and standards and criteria proper to that system itself [Luhmann 2004 (1993), pp. 37, 116]. Yet, Luhmann says repeatedly, this idea of operative closure—the idea that communications within a system link directly only to other communications within that same system—is consistent with the idea of causal relations between system and environment [Luhmann 2004 (1993), pp. 34, 74; 2012 (1997), pp. 70, 80, 105, 381, 477]. Luhmann’s theory, however, does not focus on system/environment relations as causal relations.

A system’s operative closure is the basis for its autonomy or autopoiesis.³ The term autopoiesis means literally self-production [Luhmann 2012 (1997), p. 52]. Autopoietic systems produce themselves—their operations and their structures—through their own

¹For a fine account of the relation between Luhmann’s idea of differentiation and Weber’s conception of cultural and social rationalization, see Michailakis (1995).

²Luhmann [2012 (1997), p. 96] writes that “only the political system along with the legal system of modern society can be regionally differentiated in the form of states.” Otherwise, Luhmann understands regional differences as just “differences in the involvement in and reaction to the dominant structures of the world system of society” (p. 96).

³Luhmann seems often, though not always, to use the terms interchangeably.

operations. So much is a tautological consequence of operative closure [Luhmann 2004 (1993), p. 78]. Luhmann rejects emphatically the idea of relative autonomy or relative autopoiesis (see pp. 95–98). Either a system is autonomous and autopoietic, or it is not. He rejects the idea of relative autonomy as essentially useless because it is a purely negative formulation that excludes nothing (pp. 96 n.47, 390 n.29, 467 n.19). As long as we conceive of autonomy as freedom from external causal influence, then it would seem clearly meaningful to speak of relative autonomy, that is, of autonomy, so conceived, as a matter of degree. And Luhmann admits that his own notion of autopoiesis is not by itself rich in explanatory power [Luhmann 2012 (1997), p. 32]. But Luhmann’s theory, recall, is not a causal theory. Though not denying a system’s dependence on its environment, Luhmann’s basic theoretical decision is to investigate societal systems from within and define them in terms of their own operations (the communications that are each system’s elements). And so for Luhmann’s objectives, the causality-based notions of relative autonomy or relative autopoiesis are useless.⁴

The idea of autopoiesis was introduced in 1972 by biologists Humberto Maturana and Francisco Varela. Beginning from laboratory work on visual cognition in frogs and pigeons, they sought to develop a general theory of living systems [see Maturana & Varela 1980 (1972), pp. xiv–xvi]. An obvious question for Luhmann is whether the theory can be extended to social systems. Does Luhmann’s work rest on a giant but unsustainable biological metaphor? Why would we think that the same principles will be illuminating both for cell biology and for a theory of world society?

Luhmann insists that the idea of autopoiesis is neither analogy nor biological metaphor

[Luhmann 2012 (1997), p. 42; see also Luhmann 2004 (1993), p. 83]. Instead, it is in the nature of a hypothesis. “All that matters,” he says, is whether it can generate further hypotheses that will lead to “fruitful science” [Luhmann 2012 (1997), p. 83 n.11]. I will follow that approach here, leaving it to the reader to determine whether Luhmann’s work can produce fruitful insights.

In further specifying his basic idea of autopoiesis as operative closure, Luhmann describes societal subsystems as closed with respect to a code. By code, Luhmann means a distinction between two opposed values, such as true/false for the scientific system and legal/illegal for the legal system. The code defines the societal subsystem’s unity and is unique to that system (at least as a code) [Luhmann 2004 (1993), pp. 118–19]. All subsystem communication is organized with respect to this code. For some subsystems, Luhmann identifies media—his full term is symbolically generalized communications media—that implement the subsystem’s code. The function of such media is to motivate communicative acceptance (p. 193). Money, for the economic system, and power, for the political system, are the clearest examples of such media. For some subsystems, Luhmann identifies primary and secondary media and codes. The economic system, for example, has a primary medium of property (with a binary code of owning/not owning) and a secondary medium of money (whose code is pay/not pay) [Luhmann 2012 (1997), pp. 207, 220; see also Luhmann 2004 (1993), pp. 391, 393]. The political system’s primary medium of power is secondarily coded through the medium of law [Luhmann 2012 (1997), p. 220]. These secondary media and codes have developed only in some subsystems and only in the most recent stages of social evolution. Luhmann describes them as “indispensable for the modern rationality and distinctness of the corresponding media codes” (p. 220).

Luhmann gives two reasons why subsystems’ codes must be binary. First, he suggests that a code arises from and reflects the binary

⁴He does allow that one can use an input/output schema “as a crudely simplified model in order to sort out facts” [Luhmann 2012 (1997), p. 382 n.5]. But “for the sociological perspective and especially for systems-theoretical analysis, causal explanations are so difficult that they are inadvisable at the level of general theoretical propositions” (p. 344).

yes/no, acceptance/rejection structure of all communication (pp. 62, 135, 190, 276). Second, he maintains that a code with more than two values would be too complex for decision [Luhmann 2004 (1993), pp. 185, 427]. With a binary code, by contrast, the negation of one code value (e.g., true) allows crossing to the other code value (false) [Luhmann 2012 (1997), p. 216]. This crossing from one code value to the other is a special case of a more general notion: crossing as a transition from a marked or indicated side of a distinction (generally a positive value) to the unmarked or nonindicated side (generally a negative value). System media, such as money and power, facilitate the crossing that is essential to systems' operation—or at least some systems' operation (p. 24).⁵

The counterconcept to the idea of code is the idea of program. This notion is the basis for Luhmann's idea of systems' cognitive openness. As a rule for allocating code values [Luhmann 2004 (1993), p. 118; 2012 (1997), p. 217], a program is a way of combining closure (the code) with openness (conditions that are predicates for allocating code values). In an alternative formulation, Luhmann [2004 (1993), p. 196] describes programs as combining self-reference with external reference. The clearest example of a legal program is a statute, particularly when put in the classical, conditional form that Luhmann prefers: If such-and-such facts obtain, then the legal consequence is legal or illegal (p. 111). Other examples of legal programs are court decisions and contracts [Luhmann 2012 (1997), p. 226]. Programming allows all the various system-relevant values excluded from the code to be part of the system's communication [Luhmann 2004 (1993), p. 186]. The system's code is invariant; its programs are variable [Luhmann 2004 (1993), p. 217; 2012 (1997), p. 195]. Luhmann, ever the lover of paradox, maintains that a

system's (operative) closure is the basis for its (cognitive) openness [Luhmann 2004 (1993), p. 34; 2012 (1997), p. 110].

But if Luhmann does not want to investigate causal relations between societal subsystems, such as those between economy and law, then how are these systems related to one another? Luhmann approaches this question with three basic concepts: irritation, structural coupling, and coevolution.

By irritation, Luhmann [2004 (1993), pp. 258–59, 383; 2012 (1997), p. 66] means a system-internal event, though one occasioned by the environment. Events in a system's environment may present anomalies, surprises, or disappointments, relative to the expectations that have arisen “from the history of the system” [Luhmann 2004 (1993), p. 383]. Thus although it is the environment that irritates the system, the system's structures determine which environmental events will count as irritations. The system's capacity for irritability is its resonance, described in other theories as responsiveness to the environment [Luhmann 2012 (1997), p. 219].

A system's degree of resonance is determined by what Luhmann calls its structural couplings. Luhmann defines structural coupling as a link between system and environment through which the system “presupposes certain features of its environment and relies on them structurally.” Luhmann's [2004 (1993), p. 381] example is the reliance in economic communication on the fact that money will be generally accepted. Structural couplings not only channel irritations; they trigger them (p. 383). The sort of structural couplings that most interests Luhmann is the coupling between societal subsystems. As will be discussed below, Luhmann sees the economic and legal systems as coupled through property and contract; the political and legal systems are coupled through constitutions. In each instance, the coupling mechanism has different meaning in the two systems (pp. 392, 400). The coupled operations unfold in each system according to that system's procedures, standards, and criteria. Structural coupling thus means that

⁵Love and art—and those are systems on Luhmann's analysis—have codes that do not facilitate crossing in this way [Luhmann 2012 (1997), p. 220]. For a thorough and insightful account of Luhmann's idea of crossing, see Philippopoulos-Mihalopoulos (2010), pp. 11–58.

the autopoietic systems can be related in a way other than boundary-crossing input and output (pp. 381–82).

An important element of Luhmann’s theory, and a point of connection for the notion of structural coupling, is Luhmann’s conception of systems as evolving entities. He rejects the premise of earlier social-evolutionary thought—social Darwinism, in particular—that evolution implies progress [Luhmann 2012 (1997), p. 260]. He rejects also the idea of evolution as adaptation to the environment (pp. 69–70, 253). Nor does he believe that evolutionary advances are the solutions to preexisting problems. Instead, Luhmann argues, the problems that are solved through advances “arise with the advances” (p. 307).

All of that tells us only what evolution is not. The central positive idea Luhmann [2004 (1993), pp. 230–31] retains from other evolutionary approaches is that evolution involves mechanisms of variation, selection, and restabilization. Variation, he says, occurs at the level of system elements or operations [Luhmann 2012 (1997), p. 273]—communication, in the case of the comprehensive societal system, and system-coded communication, in the case of functional societal subsystems (such as the legal system). An indeterminacy in legal doctrine, for example, may produce different ways of understanding and carrying forward past court decisions (variation). The process of decision (selection) carries forward and transforms system structures. Restabilization, in the evolution of living beings rather than societies, is “performed by the formation of populations” (p. 292). With societal systems, the term restabilization refers to “sequences of building structural changes into a system”—that is, making the selected structures a more durable feature of the evolving system (p. 294). It is concerned “primarily . . . with the system itself in relation to its environment” (p. 274). Functional subsystems—such as law, economy, politics, and science—he maintains, have more and more assumed the function of restabilization for the societal system as a whole. Luhmann distinguishes the idea of restabilization from the older idea of equilibrium

between system and environment. Evolution is not necessarily a harmonistic process.

For Luhmann, evolution is the transformation and renewal of a system’s relation to its environment. His revised social evolutionary theory sees modern society’s evolution as occurring largely through structural couplings among functional subsystems. As Luhmann puts it, “The onus of explanation is now on the concept of ‘structural coupling’” (p. 269). In this way, evolution becomes coevolution—coordination, though not intentionally directed or purposive [Luhmann 2004 (1993), pp. 231, 252; 2012 (1997), p. 307], in the evolutionary development of, for example, law and politics. Luhmann describes certain long-term patterns of coevolution as structural drifts—for example, “towards the welfare state, positive law, and a decentralized economic development controlled by budgets and balances” [Luhmann 2004 (1993), p. 421].

One final noteworthy aspect of Luhmann’s general theory is its emphasis on paradox. His conception of paradox is expansive, going well beyond narrowly logical paradoxes. He refers, for example, to the paradox of court decision: “Courts have to decide even when they cannot decide, or at least not within reasonable standards of rationality” (p. 289). To most, that claim would seem only to diagnose a difficulty of judicial decision under conditions of high complexity, not to state a paradox. The term *decide* appears to be used in two senses: (*a*) issue some ruling or another, however ill founded and uncertain, versus (*b*) issue a ruling that meets high standards of judicial rationality. And so, few would speak here of a paradox. Similarly, Luhmann refers to strict liability as a paradox, because it “provides liability in the case of legally produced harm” (p. 417). A more natural explanation of (American) strict liability would note, more simply, that it is a second principle of liability in a legal system that more commonly grounds liability on fault. Conduct subject to strict tort liability may not be unlawful or illegal in the sense that the actor is at fault or has committed a crime, but it is unlawful in the sense that it is subject to

liability. Strict criminal liability is of course more in tension with usual ideas of criminal liability, but it seems amenable to the same kind of explanation—that it is a secondary principle of liability, invoked either for good policy reasons or perhaps sometimes simply as a matter of history and inertia [cf. Hart 1994 (1961), p. 173, suggesting that strict liability in morality, but not in law, “at least approaches a contradiction in terms”]. These broad uses of paradox seem to me unproductive.⁶

Much more interesting and productive is Luhmann’s use of paradoxes of self-reference. Here the ordinary meaning of paradox is not strained, and Luhmann is able to generate novel insights and perspectives. The most basic example of a self-referential paradox concerns the application of a binary subsystem code—such as legal/illegal or true/false—to itself [see, e.g., Luhmann 2004 (1993), pp. 102, 182, 187, 191.] Is the distinction between legal and illegal, basic to communication within the legal system, itself legal or illegal? If (as it appears) it cannot be said to be either, then there would appear to be a foundational problem, or problem of origins, for the legal system (p. 227)—and, by extension, for every subsystem with coded communication. In the legal system, as will be discussed below, the problem appears if one asks what makes the legal system’s basic law, the constitution, valid. Of course H.L.A. Hart worked this same ground in arguing that the ultimate basis of legal validity, the so-called rule of recognition, is neither legally valid nor legally invalid. The issue in the discussion below will be

whether Luhmann’s systems theory offers new insights into this recognized problem.

Luhmann connects the idea of paradox to the idea of observation. By that term, he “means simply distinguishing and indicating” [Luhmann 2012 (1997), pp. 34, 69]. That means drawing a distinction and marking—a synonym for indicating (see Borch 2011, p. 52)—one side or the other. Consider an example. A system’s code, of course, is a distinction, and a legal decision will use the distinction between legal and illegal and indicate or mark some conduct as legal and some as illegal. An observation is a communication and thus an operation of the system [Luhmann 2012 (1997), p. 325]. It marks or indicates one side of the distinction by using the system’s own standards and criteria—for example, the legal system’s criteria for legality or illegality. Luhmann [2004 (1993), p. 460] thus speaks of a schema of observation generated within a system. Within every such schema, Luhmann maintains, there is a blind spot. The observational schema cannot be observed from within itself. All attempts to do so lead to paradox [King & Thornhill 2003, pp. 19–20; Luhmann 2004 (1993), p. 460; 2012 (1997), pp. 45, 104, 326]. A special case of this problem is the necessarily paradoxical result of applying a system’s code to itself—asking, for example, whether the distinction between legal and illegal is legally valid (or invalid).

Paradox is not, in Luhmann’s view, fatal to a system’s operations. A significant strand of Luhmann’s thought develops the idea of paradox management. The foundational idea here is the distinction between first- and second-order observation [Luhmann 2012 (1997), p. 224]. First-order observation is a system’s ordinary communication—its observation of the world in terms of the subsystem’s code (e.g., legal/illegal). Second-order observation, by contrast, is a system’s observation of its own first-order observation—or, one might say, a system’s reflexive understanding of the way in which it operates. From this second-order position, one may observe the way in which first-order observers assign code values (e.g., legal and illegal). But because second-order

⁶Other alleged paradoxes that would seem to fit in this category are (a) the sovereignty of the people, when (says Luhmann) the people collectively are “the one who cannot decide at all” [Luhmann 2004 (1993), p. 365]; (b) the paradox of the objective validity of subjective rights (p. 415); and (c) law’s positivity, that is, the circumstance that “law is valid for the very reason that it can be changed” (p. 452). More promising, in my opinion, and distinct from the paradoxes of self-reference mentioned below in text, are (a) the paradoxes of total freedom and total equality (p. 226) and (b) the paradox of modern sovereignty, that is, “the binding of necessarily unbound authority” (p. 408). For investigations into Luhmannian legal paradoxes, see, for example, the essays collected in Perez & Teubner (2006).

observation is not itself the assigning of code values, it can avoid the question of whether the first-order observational schema should be assigned the positive (legal) or negative (illegal) code value. Put differently, the blind spot of first-order observation can become apparent. As Luhmann would phrase it, one can see (in second-order observation) what one cannot see (in first-order observation). Of course, second-order observation has its own blind spot—it cannot observe its own observational schema in the course of employing that very schema [Luhmann 2004 (1993), p. 460; 2012 (1997), p. 45]. For that, one would need third-order observation. Although in principle one could thus speak of n -order observation, with no limit on n 's magnitude, in practice Luhmann speaks primarily of first- and second-order observation, occasionally of third-order observation, and never in any systematic way of any higher-order observation (Borch 2011, p. 59).

A second term Luhmann uses in discussing paradox management is unfolding. Second-order observation, he says, is the unfolding of (first-order) paradoxes [Luhmann 2004 (1993), p. 212]. This unfolding involves, in his analysis, the reentry of the distinction between system and environment into the system's communication [Luhmann 2012 (1997), pp. 105–6]. Luhmann refers to this as a distinction, within a system's communication, between self-reference and external (or other-) reference. Through this reentry of the system's distinction from its environment, legal communication can “observe its own operations and their effects” [Luhmann 2004 (1993), p. 105].

Luhmann's explanations for how reentry can manage or unfold paradox are not well developed at the level of general theory. More clear, however, and taken up below, are his accounts of how this sort of deparadoxification takes place in the legal system in particular. At the level of general theory, Luhmann argues that the dissolution of paradoxes “has to be mediated by mechanisms of structural coupling” (p. 409). The coupling he discusses most is the link between law and politics provided by the constitution.

LUHMANN'S THEORY OF THE LEGAL SYSTEM

Luhmann's Conception of Legal Theory and Its Role

Luhmann and legal positivism. Luhmann insists that law is a separate subsystem of society, differentiated from politics as well as from morality. Only the law, and not politics or morality or any other system of communication, determines what the law is. The idea of operative closure “above all opposes the idea that morality could immediately or intrinsically be understood as valid in the legal system” [Luhmann 2004 (1993), p. 107; see also pp. 108, 115]. “Morality as such,” Luhmann maintains, “has no legal relevance” (p. 112). In these senses, Luhmann's thinking aligns with the main line of legal positivism. In further claims, Luhmann echoes particular variants of legal positivism. References to extralegal concepts and criteria are increasing, Luhmann notes, particularly in judicial (and especially constitutional) decisions. But they are juridified when incorporated, and thus they may have a different and specifically legal meaning within the legal system (pp. 113–14, 120–21, 213). Echoing Hart's idea of secondary rules, Luhmann notes that law not only restricts conduct but also facilitates it. Luhmann particularly emphasizes contract as a device for massive amounts of law creation, classifying it as a category of legal decisions alongside court rulings and legislation (pp. 104, 130). He notes further, in agreement with Hart, that the law of property and of corporation formation allows private citizens to create law [p. 163; see also p. 401 (describing law as giving private citizens a slice of political power); accord Hart 1994 (1961), p. 41 (law of contracts, trusts, wills, for example, makes a private citizen “a private legislator”)]. Finally, consonant with Hart, Luhmann suggests that his approach still leaves place for “a moral judgment of law” [Luhmann 2004 (1993), p. 225; cf. Hart 1994 (1961), pp. 207–12]. To say, as Luhmann does, that law is an autonomous system is not to say that it cannot be evaluated from other points of view.

But Luhmann has little patience for the old debate between positivism and theories of natural law. Despite the persistence of this long-running jurisprudential debate, the idea of legal positivity has lacked a genuine counterconcept since the decline of medieval ideas of divine law [Luhmann 2004 (1993), p. 77]. The substitute distinction, “between law and morals,” in Luhmann’s view, “does nothing for legal theory” beyond “providing confirmation that law is positive law and that it can also be assessed morally (without immediate legal effects)” (p. 77). If we retain the idea of legal positivism, he says, it would be only “more or less a matter of semantic tactics” (p. 454). The standard positions in the perennial debate, which Luhmann characterizes as positivity and reason, are eighteenth-century formulae that “have too little complexity, and overvalue and homogenize the points of view that guide them” (p. 448).

Luhmann’s disinterest in conventional debates over legal positivism is not just a matter of ennui. He rejects, first, the idea, common to many nonpositivist approaches as well, that a legal system is to be understood as a collection or system of rules. Hart’s idea of law as union of primary and secondary rules is in fact “precisely . . . the target of the concept of autopoiesis” (p. 130). The elements of Luhmann’s legal system are communications—operations—and not rules. Further, Luhmann rejects the idea, common in positivist theories, of a hierarchy of rules resting on an ultimate rule of recognition (Hart) or *Grundnorm* (Hans Kelsen). Luhmann defends a temporal rather than hierarchical theory of legal validity: “The only available test,” he writes, “is the success of the ongoing change of the status of the system’s validity, of the ongoing connecting of one operation to the next, of the autopoiesis of the system” (p. 131). The governing image is not hierarchy but recursive connection. In place of the old positivist idea of hierarchical sources of law, Luhmann proposes the idea of legal validity—to be discussed below—as circulating symbol. And this symbol is not static but dynamic, as it “refers to changes in the state of law” (pp. 124, 130, 443, 473).

But although he rejects the idea of law’s foundation in an ultimate rule of recognition or *Grundnorm*, Luhmann retains and develops Hart’s idea that law ultimately cannot ground itself as legally valid. He frames the problem as one of paradox in the self-application of law’s legal/illegal code (pp. 227, 284). Still, unlike Hart, Luhmann sees law’s basic paradox as generative. Paradoxical though these attempted solutions remain, from the basic paradox have been developed successively the ideas of the king as sovereign, the sovereignty of the people as a collective body, and the foundational character of a written constitution (see pp. 362, 365, 409). As is his usual pattern, and as will be discussed below, Luhmann addresses these strategies of paradox management through the idea of structural coupling—specifically, the coupling between law and politics that the constitution establishes.

Legal theory as the legal system’s self-description.

According to Luhmann, systems such as the legal system may be described either from the inside or from the outside. But even an external description, he thinks, needs to present law “as a system that describes itself and constructs theory about itself” [Luhmann 2004 (1993), pp. 422–23]. Luhmann presents a system’s self-description as a special form of observation, one that reflects “the unity of the system” (p. 424). In contrast to ordinary legal theories one finds at work in court decisions or in legal arguments, legal theory as self-description does not necessarily guide everyday legal practice (p. 425). Still, according to Luhmann, the legal system’s self-description must accept, among other things, the system’s binary legal/illegal code, the idea (most usually associated with the late Ronald Dworkin) of “only one correct decision” in each case, and the principle that decisions should rest on good legal reasons and should be respected (p. 428).

Obviously the idea that the legal system is describing itself and theorizing about itself is counterintuitive. Yet it follows from Luhmann’s initial theoretical decision to focus on systems rather than persons or groups and to

see those systems as constituted by communications rather than persons who communicate. Luhmann insists that his exile of the knowing human (or transcendental) subject from the center of his theory does not simply reinstate that unitary subject, this time as a supra-individual thinking, perceiving, self-describing system of communication. An adequate description of the activity of legal theory, however, must see the multiple conflicting theories and multiple perspectives from which those theories could be said to issue. If we can say that the legal system describes itself in legal theory, it may be simply that within the collection of communications that invoke or otherwise appropriately concern the legal/illegal code—the elements of the legal system—some of them meet the criteria for self-description that Luhmann has set forth. Luhmann’s own account of the history of legal theory follows a path that to most would seem more straightforward, referring for example not to the legal system’s generation of positivist theories, but to the positivist theories put forth by Hart and Kelsen. I find it at least questionable whether anything is gained by the locution “the system describes itself.” I continue to pursue this point below.

The Center/Periphery Model of the Legal System’s Internal Structure

Luhmann sees the system of world society as differentiated functionally into subsystems for (to name his usual examples) economy, politics, law, science, education, the mass media, medical care, religion, art, and family. Although functional differentiation is the primary form [Luhmann 2012 (1997), p. 109], the political and legal systems are in Luhmann’s view regionally differentiated as well (p. 96). This of course is Luhmann’s concession to the continued existence of the so-called nation-state. Although other systems show regional variations in development, Luhmann sees these differences as showing nonetheless congruent trends and as consistent with “the unity of the system of [world] society” (pp. 92–93, 96). With many other contemporary thinkers, Luhmann

believes that it no longer makes sense to speak of, in particular, national economies.

The internal structure of the functionally differentiated legal system reflects a distinct and apparently rather old form of differentiation, “one that predates modern forms of differentiation.” Luhmann describes this form as a distinction between center and periphery. The pre-modern arrangement Luhmann [2004 (1993), p. 302] has in mind is the old difference between town and country. In his center/periphery schema, courts occupy the center. But center does not mean most important (p. 292). Luhmann’s theory is not court centered in the way that American legal theory traditionally was court centered.⁷ Similarly, the periphery is peripheral not in the sense of being unimportant; it is peripheral in that it is the contact zone for other functional systems. Luhmann places at the periphery legislation and contract, which, we will see, establish structural couplings to the political and economic systems, respectively.

Luhmann does not explain a certain category difference here. The center of the legal system, the subsystem of courts (p. 275), is a network of institutions. The periphery, by contrast, is stocked with either two forms of legal communication (legislation, contract) or the various communications that exemplify those forms (the various statutes and contracts historically found in the legal system). With his insistence that systems have elements and that those elements are communications, one would think that Luhmann would describe the legal system’s internal differentiation as a differentiation of communications. The presence of courts, rather than judicial communications (especially opinions but also, for example, court rules), seems an unusual feature.

⁷A good example is Dworkin’s (1986) *Law’s Empire*, which in its opening and closing pages places courts in the empire’s capital city and crowns judges as the empire’s princes (see pp. vii, 407). Dworkin defends courts’ centrality in ways that Luhmann would reject. For a more extended treatment of Luhmann’s center/periphery scheme and Dworkin’s empire metaphor, see Baxter (1998), pp. 2018–21.

But the function Luhmann assigns the legal system's center seems to require an institution rather than a mere assemblage or network of communications. The function is paradox management. We have seen that for Luhmann, the central paradox of the legal system is the paradox of the legal code's self-application—the impossibility of determining whether the distinction between legal and illegal is itself legal or illegal. And if that question cannot be answered, then how can the legal/illegal distinction be applied to decide cases according to law? This is the sense in which legal decision itself is for Luhmann inherently paradoxical (see pp. 283–84, 291).

Courts, according to Luhmann, have the task of unfolding this paradox. He seems to link his assignment of this task to the idea that courts, alone among legal actors, are legally compelled to decide. Although legislators and those engaged in contract may refrain from law-changing decisions, courts must decide all cases properly before them (though of course not necessarily on the merits). Presumably for this reason, and probably also because he (like more conventional thinkers) notes courts' special obligation to issue consistent decisions (p. 297), Luhmann sees courts as charged with unfolding the central paradox of legal decision. Here Luhmann mentions also what above I called a looser sense of paradox: the need to decide without ever having full information and sometimes without being able to meet “reasonable standards of rationality” (p. 292). Unfolding a paradox means working it out temporally rather than at a single moment. Courts' task of paradox management therefore is ongoing. I find Luhmann's ideas most interesting in connection with constitutional decision making, and I take up that question in the section on the constitution as mechanism of structural coupling below.

Within this center of courts, Luhmann identifies, in addition to functional and center/periphery, a third sort of differentiation: hierarchical. Federal courts in the United States, of course, are arrayed from district court to regional court of appeals to the Supreme Court;

state court systems have similar structures. As the term regional court of appeals suggests, territorial differentiation structures the federal court system. And one sees a fourth sort of internal functional differentiation as well: The US Court of Federal Claims, US Court of Appeals for Veterans Claims, and US Court of Appeals for the Federal Circuit all are courts with specialized subject-matter jurisdiction (see pp. 294–95).

Luhmann does not address the point, but within a federal system such as the United States, national and state or provincial courts are differentiated from one another partly functionally and partly hierarchically. Federal courts, of course, are courts of limited jurisdiction. Vast areas of the legal landscape are governed by state rather than federal law. The relation among the federal courts and state courts seems to be one of functional differentiation but with hierarchy as to federal-law questions that the state courts decide (with review sometimes available in the US Supreme Court). Among the state systems of courts, the relation seems to be nonhierarchical differentiation based on territory. American courts as a whole, of course, are differentiated territorially from other nation-states' courts (and have structural couplings with territorially differentiated political systems). This is part of the sense in which Luhmann sees the legal system as still differentiated territorially as well as functionally. These different forms of differentiation determine the way in which a particular court's decisions link up with (or not) the decisions of other courts. Ideas of precedential and merely (more or less) persuasive authority are linked to these forms of differentiation. Here too, once one begins thinking matters through, it quickly becomes clear that any talk of the legal system communicating in one way or another is in an important sense misleading. The legal system of a world society is differentiated according to several principles into various subsystems, and so the parent system has no single voice and no single apparatus of perception or thought.

One metaphor Luhmann uses to address the relation between legal center and legal

periphery is parallel processing (p. 296). Legislatures and those engaged in contract also are producers of legal validity, and they of course also operate within space that is legally (among other ways) structured. Free from the pressure of compulsory legal decision, legislation and contract can be more selective in channeling irritations from the environment. Luhmann's understanding of the legal periphery is consistent with contemporary theories of legal pluralism. He identifies there the production not just of state law (through formal state legislation) but also of "new forms of privately produced law." Here Luhmann refers to "the internal law of organizations, and . . . law created as a result of provisional collective agreements between interest groups and other big organizations, market-specific interpretations of general regulations, the law of general terms and conditions of trade, and others" (p. 293). Pre-eminent among those (more or less strongly) influenced by Luhmann in this respect is Gunther Teubner (see, e.g., Teubner & Febraro 1992; Teubner 1993, 2011).

Structural Coupling of Law and Economy

Operations, considered as events, "can participate in different systems." A payment pursuant to a contract, in Luhmann's example, is both an economic communication and a legal communication. Forms of structural coupling make these links between systems more durable than momentary events [Luhmann 1992a, p. 1437; see also Luhmann 2004 (1993), p. 381]. As the example suggests, contract is a prime form of structural coupling that Luhmann sees between the legal and economic systems. Property is the other [Luhmann 2004 (1993), p. 383].

A form of structural coupling has different meaning in the two systems' networks of communication. This is so even if the same term may be used in the two systems. Consider the idea of property and the related idea of interests. These terms have a double significance, different in legal and economic communication

(p. 392). Since the legal realist movement of the 1930s, a popular legal metaphor for property has been a bundle of rights, such as the rights to use, to exclude, and to dispose of the property and to reap benefits from it. These rights correspond to economic interests. They are attempts within legal communication to perceive through external reference the legal system's economic environment. Viewed from the other side, the economic significance of property depends upon, among other things, whether and to what extent the legal system will provide enforceable protection to economic interests. Those interests are meaningful in economic communication as greater or lesser amounts of fungible economic value. Economic communication thus selectively models or perceives legal communication. Through the ideas of property and interest, the two systems are structurally coupled and mutually irritate and resonate with one another.

Elsewhere I have examined in some detail US constitutional takings law as an illustration of this coupling of law and economy (see Baxter 1998, pp. 2046–57). The legal system's conception of property protected in takings law is selective and has excluded many important economic interests (such as employment, government entitlements, tax exemptions, licenses, and money owed in taxes). And although economic communication sees economic interests as fungible, differing only quantitatively in money value, constitutional takings doctrine ranks those interests qualitatively and normatively, extending much more stringent constitutional protection to interests in land, regardless of the amount of economic value at stake. Further, among rights concerning land, the Supreme Court has identified the right to exclude as "one of the most treasured rights" and "one of the most essential sticks in the bundle" (*Loretto v. Teleprompter Manhattan CATV Corp.* 1982, p. 435). In the case from which these words are taken, the Court provided constitutional protection against an intrusion that was minimal both physically and in economic impact—the placement of cable TV equipment

amounting to one-eighth of a cubic foot in roof space for which the owner “would have had no other use” [*Loretto* 1982, p. 443 (Blackmun J, dissenting)]. In another example of the divergence between legal and economic understandings of land’s value, the Court acknowledged in *Lucas v. South Carolina Coastal Council* (1992, p. 1020 n.8) that the rule it developed might provide full compensation for a 100% deprivation of value but no compensation at all for a 95% diminution. This result seems economically senseless. But from the perspective of legal communication, the Court explained, “takings law is full of these ‘all-or-nothing’ situations.”

One similarly can analyze contract as a mechanism for structurally coupling law and economy. The legal term contract has an economic counterpart, exchange [Luhmann 2004 (1993), p. 393].⁸ In the idea of the expectation interest, contract law models its economic environment, vindicating what it takes to be the usual economic interest of a contracting party. Application of the rule, through valuation of this interest, requires a court or jury to observe at least a small slice of the economic system. Economically minded commentators have identified and endorsed other rules that require further economic observation and could be thought to incorporate norms of economically reasonable behavior into contract law. Examples include the ideas of efficient breach, the lost volume seller rule, and the (so-called) duty to mitigate damages. The Uniform Commercial Code can be understood in part as an attempt to replace legalistic constructions with increasingly economically sensitive inquiry. Its parol evidence rule, for example, refers courts and juries to “the commercial context” of contractual terms and (ironically, it would seem) “definitely rejects” the idea that written contract terms gain meaning “by rules of construc-

tion existing in the law” (see U.C.C. Sec. 2–202, comment 1). The greater project of some legal realists was to replace occasional and haphazard connections between law and economy with a more systematic observation of economy in the law—and the reflexive incorporation of this observation into the law itself. Viewed from the other side, the Uniform Commercial Code (for example) “treated businessmen,” not just “lawyers and judges,” as “principal addressees” (Twining 1973, p. 304).

Luhmann’s work provides a frame for analyzing these connections between law and economy—and for understanding their limits. Despite their structural coupling—or perhaps precisely because of their structural coupling—law and economy remain separate systems. The dream sometimes attributed to realism—that law might one day mirror the world of economic transactions—was unrealizable, for reasons Luhmann’s work can explain. Legal doctrine responds to internal pulls as well, and to pulls also from politics, the other system to which it is coupled. Luhmann notes also that legal language, despite its specialization, is still “a part of society’s language” [Luhmann 2004 (1993), p. 125]. Thus, moral conceptions also may be taken up into law.⁹ And so contract doctrine includes also morally responsive notions such as unconscionability, duress, and undue influence. Further, and perhaps even more interesting, law’s observation of other social spheres is structured, enabled, and limited by its rules (particularly its rules of evidence), standards, and procedures. Those rules and procedures are not identical to the ones found in its environment, whether we think of the economic system or (to consider the system specialized in knowledge production) science. One of course can seek to improve law’s ability to perceive or model its social environment, but the two systems still will remain distinct.

⁸Unlike the case of property, according to Luhmann, there is no term common to the two systems. (This claim might be more plausible in German than in English.)

⁹With respect to constitutional law, Luhmann usually treats the reference to or incorporation of moral norms as an occasion for criticism [see, e.g., Luhmann 2004 (1993), pp. 233–343, 411–12].

Structural Coupling of Law and Politics

Law and politics as separate but coupled systems. Not all theorists, or even all systems theorists [see Luhmann 2004 (1993), p. 357], would accept Luhmann's distinction between the legal and political systems. Luhmann's longtime theoretical adversary Jürgen Habermas, for example, treats courts and legislatures alike as part of the political system's institutional complex. He writes, "Less plausible is Luhmann's . . . step of taking modern law out of politics . . . and giving it independent status as its own subsystem alongside the administration, economy, family, and the like" (Habermas 1996, p. 74). Luhmann intends his idea of structural coupling to capture the obvious connections between law and politics, most evident through legislation and political enforcement of judicial decisions. But at the same time, Luhmann is perhaps able to retheorize what mainstream legal theory has long sought to identify and defend: a distinction between law (especially judicial decision) and politics.

Writing from the context of German legal and political theory, terminology poses a barrier for Luhmann that is not so evident in English. The German term *Rechtsstaat*, sometimes translated as constitutional state, compounds the terms for law and state into a single word. This formula has tended to conceal the fact that law and politics are "different systems, both being operatively closed, having different functions, different codes, and different code-dependent programmes" [Luhmann 2004 (1993), p. 364]. Further, they have different temporality and time pressures, with the legal system sometimes operating too slowly for political needs. Legislation, a key mechanism for structurally coupling law and politics, operates to "balance" these "societal time-differences" (pp. 371–74, 382). The legal system's center, the courts, operates through argumentation and reasoned decision in ways not exactly paralleled even in democratic politics. As for the periphery, the very same event—for example, the enactment of a statute—can have different meanings in the

two systems. Within politics, successful legislation "can be counted as a political success, as it marks the end to lengthy efforts to achieve a consensus." A statute's political story is distinctive, "a history of 'talk,' of strategic positioning, of operations under the schema of government and opposition, of negotiations, of public declarations of intention and the secondary intention of testing public opinion, etc." Within the legal system, by contrast, a statute's enactment "changes the state of validity of the law and serves as an instruction to courts and, beyond that, to everyone who wants to know what is legal and what is illegal" (p. 377).

Luhmann, however, sometimes obscures the point he himself is trying to make. Here are two examples. First, he posits two codes for the political system: one, the distinction between government and opposition, and the other, the distinction between governing and governed (see pp. 420–21, 436). On its face, having two system-defining codes for a single system would seem to be a mistake. True, he posits two codes for the economic system as well—one related to property and the other to money. But he handles the tension there by treating one as evolutionarily primary and the other as evolutionarily secondary (pp. 214, 220, 233). No such move seems available for the above two political-system codes. Still, Luhmann's problem seems avoidable. He could present the political system's code more simply as the distinction between having and not having power. This single code then could be specified differently depending on whether one analyzed the vertical dimension of power's application or the horizontal dimension of competition for power.

A second way in which Luhmann seems to undermine his own idea of a political system, distinct in coding from the legal system, is his introduction of yet another complication in the political system's coding. Here, as he did with the economic system, he develops the idea of an evolutionarily secondary coding: the "legal coding of power" established with the *Rechtsstaat* or constitutional state (p. 213; see also p. 220). This idea of an evolutionarily secondary coding seems consistent with the political

system's unity in a way that the analytical relation between government/opposition and governing/governed at first did not. But to describe the political system's medium, power, as coded through the legal system's medium, law, is to undermine the idea of separate political and legal systems. The idea of system-specific codes and media, after all, is Luhmann's fundamental basis for distinguishing between systems.

Luhmann suggests a way out of this difficulty with an alternative formulation. Law does not code political power, he indicates at one point; instead, the political system's administrative apparatus is "programmed in the form of law" (p. 366). This formulation seems more promising. The two systems' communications comprehend law in very different ways. From the side of the legal system, law has an internal culture, based in a specific form of argumentation. For a question to count as a legal question, Luhmann notes, it must take on a particular form. Such is the function of ideas such as justiciability: "Problems must be turned into justiciable form to have access to law. This means that they can be defined recursively in relation to the historical condition of the legal system and the validity of law."¹⁰ Further, legal claims typically must be articulated specifically as rights claims (p. 366). From the perspective of law, there is no law-free space (p. 368). But from the side of the political system, by contrast, law appears simply as an instrument for realizing political goals (p. 370).

The Constitution as mechanism of structural coupling. Luhmann proposes an additional coding for the legal system: the distinction between constitutional and non-constitutional law that developed, of course, with the rise of the constitutional state (p. 120). Constitutional law exempts itself from the usual rule that new law trumps old (p. 405). Further,

¹⁰Obviously, such doctrines can be more or less restrictive. But some version of a justiciability requirement seems unavoidable. To take Luhmann's [2004 (1993), p. 366] example, it seems unimaginable that a court could have decided the question of whether to reunify Germany.

as the foundational document of a legal system and source of that system's legal validity, the constitution's own validity cannot be established through ordinary legal means (p. 126).

This last point is, of course, a version of law's foundational paradox—the impossibility of establishing legally the validity of the legal/illegal code—and a version of Hart's problem of foundation for the rule of recognition. Hart's strategy is to ground the rule of recognition in the fact of its acceptance, especially official acceptance (see Hart 1994, pp. 100–17). It makes no sense, he argues, to say that the ultimate standard of legal validity is either legally valid or legally invalid (pp. 107–8). Luhmann describes the strategy adopted in the American Constitution: "The constitution itself contains the proclamation of the constitution and externalizes this symbolically by a reference to the . . . will of the people" [Luhmann 2004 (1993), p. 406]. The legal system, in Luhmann's term, thus externalizes the paradox by referring it to politics—in this case, however, extraordinary politics.

None of this of course changes the fact that the Constitution's framers ignored the conditions for amendment stated in the Constitution's predecessor document, the Articles of Confederation, choosing to write an entirely new document rather than amend the old. If law is law only by reference to prior law, then the Constitution is not law. The solution to law's fundamental paradox is not a legal solution, says Luhmann, but instead a political solution (p. 410).

Recall that, according to Luhmann, the dissolution of systems' paradoxes "has to be mediated by mechanisms of structural coupling" (p. 409). Unsurprisingly, then, he characterizes the constitution as a mechanism of structural coupling. As such a mechanism, it has a double significance, with different meaning in each of the coupled systems. "For the legal system it is a supreme statute, a basic law. For the political system it is an instrument of politics" (p. 410). This mechanism of structural coupling offers an unfolding or dissolution for the political system's own foundational paradox: the

paradox of sovereignty, that is, “the paradox of the binding of necessarily unbound authority” (p. 408). The constitution operates as an instrument of politics in prescribing conditions for the legal exercise of power. In Luhmann’s (perhaps misleading) term, the constitution legally codes political power. And so the mechanism of structural coupling, the constitution, “provides political solutions for the problem of the self-reference of the legal system and legal solutions for the problem of the self-reference of the political system” (p. 410).

Unlike Hart’s solution to law’s basic paradox, Luhmann’s unfolding of the paradox does not depend simply upon a hierarchy of norms. In one of the more difficult arguments in Luhmann’s theory of the legal system, he introduces, in addition to the legal/illegal code, the idea of legal validity as a circulating symbol. Of law’s foundational paradox, Luhmann first mentions Hart’s and Kelsen’s proposed solution through normative hierarchy and then writes:

The most convincing solution of the problem posed in this way is by reference to the language that is in practice used by lawyers. The starting point for this line of thought is the following: all law is valid law. Law which is not valid is not law. It follows that the rule that makes validity recognizable cannot be one of the valid rules. There cannot be any rule in the system that regulates the applicability/nonapplicability of all the rules of the system. (p. 125)

It would at first seem odd, of course, to address a paradox with a tautology (“all law is valid law”). Luhmann’s point is that legal validity, in his specific sense here, “is not a norm, and it is neither a basic norm nor a meta-norm. . . . What is valid in the legal system is not what ought to be valid—it is valid or not” (p. 126). Validity is “not a norm but a form”—that is, in Luhmann’s general theory, a distinction with an internal side and an external side (valid and not valid, respectively). Luhmann describes the idea of validity as “a symbol for the unity of

law” and “a symbol for the dynamic stability of the system” (i.e., its persistence through legal change). The idea of validity does not ground the legal system; instead, it is a product of the very legal operations that it qualifies. In Luhmann’s systems-theoretical vocabulary, “validity is an eigenvalue of the legal system; namely a value that is constituted by the recursive performance of the system’s own operations and one that *cannot be used anywhere else*” (pp. 124–25, emphasis in original). In another formulation, Luhmann describes validity as a circulating symbol (p. 130).

All of this is, at the very least, an innovative approach to an age-old problem: the basic paradox of law.

CONCLUSION

In closing, rather than recap the theory, I want to suggest two significant remaining difficulties and indicate what might be the broadest appeal of the theory. The first difficulty concerns drawing the bounds of the legal and political systems in particular.¹¹ Luhmann’s theory of society is a theory of world society. With respect to some of the subsystems he identifies, this makes considerable sense—especially with respect to the economy and science (there are no national scientific systems!), but also religion, art, and probably the mass media. But as Luhmann allows, territorial differentiation still persists with political systems and, he would say because the systems are structurally coupled, with legal systems as well. There is an international political order and principles of international and transnational law with some entities that make and enforce such law. But the idea of a world political system, or a world legal system, has hardly been realized. Whether Luhmann’s work has the means necessary to analyze the maze of political and legal orders, some (as in federal systems) operating within

¹¹The education system probably should be included here as well, given that at least for primary and secondary education, it is so closely linked to governments and thus suffers from the same fate as the political system on this score.

the same territorial bounds, I leave to others. His successors, most notably Teubner, have set out on this general task (see Teubner 2011, 2012). Exploration of this work would require another article; perhaps the present one will make Teubner's work more accessible.

A second difficulty is that many theorists will reject Luhmann's work because it is constructed so as to unask, one might say, questions of differential social, economic, and political power. Luhmann, often polemical, is perhaps at his most polemical when he addresses those who want a social or legal theory to have a (leftist) critical edge. For theorists of this persuasion, Luhmann's work unalloyed would be insufficient. But many inspired by Luhmann's work occupy the left-hand side of the political spectrum. Teubner is one such thinker; Marx-inspired sociologist Bob Jessop is another (see Jessop 1990).

Still, many legal theorists, and even many sociologists of law, will find Luhmann's work unattractive for a variety of reasons, not all of them political. I want to suggest, however, that Luhmann's formulation of boundary problems is a source of his work's strength as well as

its difficulty. The idea of social subsystems as distinct but structurally coupled poses a problem for differentiated modern society (or if one prefers, societies): How do the various subsystems (or if one prefers, discourses) fit together? The problem is particularly acute for law and politics, both of which systems have ambitions to regulate and direct the other social spheres. Luhmann's theory suggests that regulation must both link up with and respect the autonomous logic of the regulated sphere and also maintain the autonomous logic of the regulating sphere (whether law or politics). In thinking about regulation and such boundary problems, Luhmann's work, even if unpalatable as a full-scale substantive theory, can be understood as a methodological recommendation: Think from the inside out, and attend to the differences across systems that even the same term (e.g., constitution, property, negligence, insanity) might have.

The same sort of caution seems appropriate for those engaged in interdisciplinary scholarship. It seems appropriate, also, for those—legal theorists or otherwise—who have ambitions for their work to affect the wider social world.

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