THREE SYSTEMS THEORETIC ESSAYS
IN THE
SOCIOLOGY OF LAW

Katayoun Baghai

Department of Sociology
McGill University, Montreal

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"Explanation" is what we call it, but it is "description" that distinguishes us from older stages of knowledge and science. Our descriptions are better—we do not explain any more than our predecessors. We have uncovered a manifold of one-after-another where the naive man and inquirer of older cultures saw only two separate things. "Cause" and "effect" is what one says; but we have merely perfected the image of becoming without reaching beyond the image or behind it.

Friedrich Nietzsche, The Gay Science

To Mahin Assadian

for a speck of her courage and strength

but all her love.

CONTENTS

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ABSTRACT

Sociology has long grappled with the possibility of social order and the role of law in its constitution in an increasingly complex society. Niklas Luhmann's social systems theory has received praise for its rigor and sophistication in response to that problematic, and yet been criticized for its high level of abstraction and empirical emptiness. In three independent essays, this dissertation brings systems theoretic theses and concepts to bear on some current empirical debates in socio-legal scholarship.

The first essay uses the concept of *structural coupling* to account for the 20th century emergence of the right to privacy in the context of increasing differentiation of types and forms of communication. Reducing the degree of freedom in functionally differentiated communication systems, the right to privacy increases the possibility of communicative success in all, and becomes indispensable to routine operations of modern society. This approach provides a hitherto absent common denominator for privacy conflicts, and a non-normative framework for their resolution.

The second essay uses the thesis of *normative closure* of the legal system to provide a previously lacking sociological framework for empirical investigation of extant doctrines of constitutional interpretation. The framework is employed to investigate judicial review of legislation concerning abortion and homosexuality by the United States Supreme Court. While variation in the Court's decisions is commonly understood to be politically and/or ideologically influenced rather than legally determined, examination of the Court's opinions shows how legal doctrine allows the former without undermining the latter. Originalism and living constitutionalism emerge as complementary and normatively closed strategies for reducing complexity in the law and its environment.

The third essay establishes a link between the changing contour of the right to *equality* and *functional differentiation* through an investigation of the United States Supreme Court's post-bellum jurisprudence of race. Although variation in the Court's rulings on racial classification is often attributed to dynamics of group and institutional conflict, the essay shows how the Court's response to racial classification in jury service, suffrage, access to public transportation, accommodation and education expresses legal recognition of the functional differentiation of law, politics, commerce and education, respectively. The current divide in the Court concerning affirmative action programs is discussed against this backdrop.

Findings support the systems theoretic emphasis on the unique function of law in the reproduction of social order through stabilizing generalized normative expectations. They also confirm the potential of social systems theory to successfully inform empirical research in the sociology of law and provide some coherence to the field.

RÉSUMÉ

La sociologie s'est longtemps intéressée à la possibilité d'un ordre social et au rôle du droit dans la constitution de ce dernier dans une société de plus en plus complexe. Si la théorie des systèmes sociaux de Niklas Luhmann s'est attirée des éloges pour la rigueur et la subtilité avec laquelle elle aborde cette problématique, elle a également été critiquée pour son degré élevé d'abstraction et son vide empirique. Dans trois essais indépendants, la présente dissertation utilise les thèses et concepts de la théorie des systèmes pour aborder les débats empiriques actuels en études sociojuridiques.

Le premier essai fait appel au concept du *couplage structurel* pour expliquer l'émergence, au 20^{e} siècle, du droit à la vie privée dans un contexte de différentiation croissante des types et formes de communication. En réduisant le degré de liberté dans les systèmes de communication fonctionnellement différenciés, ce droit accroît la possibilité d'une communication efficace dans son ensemble et devient indispensable aux activités courantes d'une société moderne. Cette approche fournit un dénominateur commun pour les conflits touchant à la vie privée qui n'existait pas auparavant, ainsi qu'une approche non normative pour la résolution de ces conflits.

Le deuxième essai s'appuie sur la thèse de la *fermeture normative* du système juridique afin de fournir un cadre d'analyse sociologique, auparavant inexistant, pour l'examen empirique des doctrines d'interprétation constitutionnelle actuelles. Ce cadre d'analyse est utilisé à l'étude de la jurisprudence de la Cour suprême des États-Unis en matière de révision judiciaires de lois concernant l'avortement et l'homosexualité. Si la variabilité des décisions de la Court est souvent interprétée comme étant politiquement ou idéologiquement influencée, plutôt que juridiquement déterminée, l'examen des opinions de la Cour montre que la doctrine juridique permet l'un sans pour autant compromettre l'autre. Les

principes d'interprétation d' « *originalism* » et de « *living constitutionalism* » se révèlent être des stratégies complémentaires et fermées sur le plan normatif afin de réduire la complexité du droit et de son environnement.

Le troisième essai établit un lien entre les contours changeants du droit à l'*égalité* et la *différentiation fonctionnelle*, à la lumière d'un examen de la jurisprudence *post-bellum* de la Cour suprême des États-Unis sur les questions raciales. Bien que la variabilité des décisions de la Cour concernant la classification raciale est souvent attribuée à la dynamique de conflits entre différents groupes ou institutions, l'essai démontre que la position de la Cour sur la classification raciale concernant le service de juré, le suffrage et l'accès au transport en commun, au logement et à l'éducation reflète une reconnaissance juridique de la différentiation fonctionnelle du droit, de la politique, du commerce et de l'éducation, respectivement. La division actuelle de la Cour concernant les programmes de discrimination positive est abordée à la lumière de cette analyse.

Les résultats de ces analyses viennent appuyer l'accent mis par la théorie des systèmes sur la fonction spécifique du droit dans la reproduction d'un ordre social par la stabilisation d'attentes normatives généralisées. En outre, ils confirment le potentiel de la théorie des systèmes sociaux d'éclairer à bon escient la recherche empirique en sociologie du droit et de conférer une certaine cohérence à ce domaine.

CHAPTER I

INTRODUCTION

The possibility of social order and the role of law in its constitution have been persistent problematics of theories of society. Social systems theory is no exception. The theory emerged on the intellectual scene in Germany primarily through the publication, in 1971, of a debate between its architect, Niklas Luhmann, and Jürgen Habermas entitled "*Theorie der Gesellschaft oder Sozialtechnologie: Was leistet die Systemforschung?"* Or "*Theory of Society or Social Technology: What Is Achieved by Systems Research?*" Many believe that Luhmann had the better of that debate and remember him as one of the most prominent social theorists of the 20th century.[1] His sociology of law is recognized as "the most rigorously developed and sophisticated theory of law's discursive autonomy to have emerged from the broader sociological theory" (Cotterrell 2001: xx), and has inspired theoretic reformulation of various concerns of the field in systems theoretic terms.[2] Yet, the empirically oriented sociology of law, especially in North America, has yet to take social systems theory seriously and evaluate its merits.

[1] See, e.g., Alexander (1984); Bechmann and Stehr (2002), Rasch (2000).
[2] See, e.g., Murphy (1994); Nobles and Schiff (2006); Paterson (2003); Perez and Teubner (2006); Priban and Nelken (2001); King and Thornhill (2003, 2006); Teubner (1987, 1993, 2009).

Some blame the delay on the high level of abstraction, empirical emptiness, and apparently tautological, complex and/or rigid conceptual architecture of social systems theory,[1] while others draw attention to its radical departure from common epistemological premises of empirical social science, i.e., epistemological realism and methodological individualism.[2] The difficulty rests in employing systems theoretic concepts in empirical investigation without sacrificing their integrative function or epistemological ground.

This dissertation takes up the challenge in three independent essays.[3] The following provides a brief account of some main points of contention in the debate over social order and the role of law. Locating social systems theory in that context, it outlines the task of each essay and concludes with a note on analytic strategy.

SOCIAL ORDER: MACRO/MICRO, OBJECTIVE/SUBJECTIVE

Sociology claimed disciplinary independence in search of an irreducibly social foundation for regularities of collective conduct in modern society. This was not so much a response to the Hobbesian emphasis on the primacy of politics, as it was a dismissal of utilitarian theories of contract and primacy of self-interest. Since then, the role of law has been addressed against the backdrop of a debate variously framed as the "objective/imposed" vs. "subjective/emergent" character of social order; the link between macro and micro structures; or the relation between institutionalized practice and everyday life.

[1] See, e.g., Black (2000); Cotterrell (2006a, 2006b); Münch (1992); Rottleuthner (1989).
[2] See Paterson and Teubner (1998); Teubner (1989).
[3] A limitation of this attempt is its restriction to English translations of Luhmann's work.

"Objective" views of social order are concerned with "laws" or regularities that constrain social action regardless of individual consciousness or intention; whereas "subjective" conceptions emphasize the contingent character of social order emerging through interpretive efforts of "free agents."[1] The former are more compatible with positivist and formalist conceptions of law (as a normative structure backed by force and detached from morality), and its instrumental use in system integration; the latter are more in tune with living conceptions of law (grounded in the inner order and morality of human association), and its constitutive role in social integration. These problematic dichotomies can serve as heuristic devices for tracing the debate and locating the contributions of social systems theory to the field.

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In his critique of Hegelian idealism and utopian socialism, Marx produces one of the most influential arguments for the determining role of macro-structures, especially economic ones, in shaping the horizon of individual and collective action (Alexander et al. 1987: 5-6). Legal structures can be seen as transmission belts between modes of production and collective conduct. Therefore, the emergence and transformation of law is to be examined with reference to changes in the mode of production, more specifically property rights. As the division of labour and development of productive forces give rise to new forms of ownership and finally private property, the civil law emerges to grant and protect property rights and legitimate domination of the propertied over the propertyless.

[1] See Bourdieu (1980: 25-6); Giddens (1984: 139).

While in his historical and substantive analyses of specific legal phenomena, such as the English Factory Acts of 1802, Marx offers a more nuanced and complex account of the relation between law and other social spheres (Cain and Hunt 1979), his insistence on the absence of autonomous dynamics in the development of legal structures tends to reduce the law to an epiphenomenon, an ideological project of the ruling classes with "just as little independent history as religion" (Marx 1846: 187-8).[1]

Durkheim gives the primacy of economics in producing regularities of human conduct a new twist by elevating the division of labor to a principle of social solidarity. The objective and non-contractual foundation of contract is found neither in political imposition from without nor in convergence of individual self-interests, but in collective consciousness, "the totality of beliefs and sentiments common to the average members of a society" (1893: 38-39). Thus, social order is produced not merely through rules of law and fear of sanctions, but also, and more fundamentally by means of collective morality.

As a result of increasing size, density, social differentiation, specialization, and individuation, segmental differentiation gives way to functional differentiation. Economy, politics, and other social functions are differentiated from religion; temporal life is released from rigid codes of conduct; and collective consciousness loses its shared religious content. Yet, *Gesellshaft* remains, like *Gemeinshaft* (Tönnies 1887), essentially a moral entity. The only difference is the

[1] The emphasis on the ground of law in class relations and their reproduction thereof has informed a wide range of sociological investigation of penal practice. See, e.g., Chambliss (1994); Hay (1975); Reiman (1998); Rusche (1978); Spitzer (1975).

transformation of mechanical solidarity, based on identity and equality, to organic solidarity, based on difference and inequality.

> Society becomes more effective in moving in concert, at the same time as each of its elements has more movements that are peculiarly its own. (Durkheim 1893: 85)

To perform its integrative function, however, the division of labour must be complemented by a whole range of secondary groups, professional associations, corporate organizations, and more importantly the existence of just rules and equal conditions for competition (1893: xxxv, 338).

For Durkheim, law, rather than an instrument of domination or invention of the ruling class, is an index of types of social differentiation and social solidarity. As mechanical solidarity gives way to organic solidarity, law gradually loses its diffused and repressive character and becomes more specialized and restitutive.

As a response to Durkheim, Simmel frees the question of social order from conceptions of society as a hypostatized totality and gives it a neo-Kantian bent. Rejecting restriction of the term "society" to large or permanent social formations and institutions, e.g., the state, church, guild, or family, Simmel defines society as "the function of receiving and affecting the fate and development of one individual by the other," and inquires into the condition of possibility of turning a "mere aggregation of isolated individuals into specific forms of being with and for one another" (1950: 9, 11, 41).

This transformation is effected by a complementary relation between *cultural* forms (e.g., economy, art, law, science, religion); and *social* forms (e.g.,

exchange, conflict, sociability, domination). Akin to Kant's a priori categories of cognition, cultural forms make possible selection of certain elements from the raw material of experience and their retention as recognizably meaningful objects, structures, and events.[1] It is only by means of these templates that modern individuals are able to participate in countless interactions with total strangers. Meanwhile, without elementary and less conspicuous forms of sociation that interlaced institutions, "society would break up into a multitude of discontinuous systems" (Simmel 1950: 9). Thus, the answer to the question of social order is not to be found in a single principle of social cohesion or an integrated body of norms but in the geometry of social and cultural forms.

As a response to Marx, Weber questions both the primacy of economic relations in giving rise to political and legal structures and the purely instrumental role of the latter in securing economic gains. Noting that power, in its many forms, can be sought and exercised "for its own sake" (1946: 180), and pointing out that radical transformations of economic relations do not necessarily occasion radical changes in the legal order and vice versa, Weber draws attention to political, military, and ecclesiastical factors in shaping legal structures (1925: 334, 654-657). For Weber,

> Law exists when there is a probability that an order will be upheld by a specific staff of men who will use physical or psychical compulsion with the intention of obtaining conformity with the order, or inflicting sanctions for infringement of it. (1946: 180)

[1] While Kantian categories are a-historical and inform only cognition, Simmelian forms emerge and evolve in time and organize all dimensions of experience (Levine 1971: xv-xvi).

This definition casts the history of legal evolution in the light of forms of domination and processes of their rationalization. Evolving along two dimensions, irrational/rational and substantive/formal, law is seen to have changed from "charismatic legal revelation," to "empirical creation and finding of law by legal honoratiores," to "imposition of law by secular or theocratic powers," to "systematic elaboration of law and professionalized administration of justice" (1925: 882). In the last stage, i.e., with the emergence of positive law and organized legal decision-making systems in modern society, the link between morality and law is severed, and the shift from substantively rational law to formally rational law is completed. Law is legitimated by reference to formal rationality alone and obeyed or defied with no necessary ground in morality.

While Weber provides the most comprehensive classical treatment of law and its evolution, his main contribution to our understanding of the possibility of social order and the function of law, as Luhmann (1985) points out, is not contained in the narrow definition of his sociology of law, but in his emphasis on the inherently meaningful character of social action (Weber 1922). This insight paves the way for moving beyond a search for external factors regulating social action to those that regulate its subjective meaning. Nonetheless, it is not Weber's typology of action, but the recognition by Parsons et al. (1951) of the problem of double contingency that bears the fruit:

> There is a double contingency inherent in interaction. On the one hand, ego's gratifications are contingent on his selection among available alternatives. But in turn, alter's reaction will be contingent on ego's selection and will result from a complementary selection on alter's part. Because of this double contingency, communication … could not exist without both generalization

> from the particularity of the specific situation … and *stability* of meaning which can only be assured by 'conventions' observed by both parties. (p. 16)

Parsons (1949) takes note of the impossibility of social interaction among several actors if each chooses the meaning of his action subjectively, and if each also wants to take the other into account in his orientation of action and selection of motives: hence, the indispensability of mutual normative expectations.[1] However, instead of inquiry into the foundation of normative structures, i.e., the very distinction between "is" and "ought," Parsons (1951) provides an analytic scheme for integration of action systems.

Integration of action systems is seen as the result of interrelation of the social system, the personality system, and a shared system of cultural symbols. This achievement is in part the function of socialization, i.e., cultivation of motivational orientations towards action through learning institutionalized roles, norms and values, and in part the function of social control through law. Of the four specific functions of the social system (i.e., adaptation, goal attainment, integration, and latency, performed by the economy, the political system, the societal community, and the fiduciary system), the function of law is integration of the societal community.

> In the most general sociological sense, law may be said to be any relatively formalized and integrated body of rules which imposes obligations on persons playing particular roles in particular collectivities. Such a conception implies, I think further, that there is a machinery of authoritative

[1] The problem of inter-subjectivity, this time between the scientific observer and the actor, finds a solution in Schutz's adaptation of Husserl's phenomenology. While the uniqueness of the temporal constitution of meaning in every consciousness leads Schutz to the realm of already typified subjective meanings, his neglect of the role of communication media in the end limits him mostly to "phenomenological psychology" (Schutz 1967: 44). Social systems theory moves beyond psychology by integrating the phenomenological conception of meaning with theories of communication and social differentiation.

> interpretation, i.e., something analogous to a system of courts, and a machinery of the definition and implementation of sanctions, and a relatively clear focus of legitimation. (Parsons 1960: 264)

Law is seen as a generalized mechanism for social control, institutionalizing social rights and obligations and integrating action systems, especially in functional subsystems of the social system. While for Parsons modern law is a system of "*norms*," its efficacy and legitimacy still depend on its ultimate ground in "*values*" (Treviño 2008: 5, 15).[1]

Parsons' emphasis on the institutional foundation of social order and the integrative function of law meets its other in Blumer's (1969) symbolic interactionism. Drawing on Mead's (1934) triadic conception of the social self, Blumer offers an emergent conception of social order. Social "transaction" becomes the first and last instance of society. Rather than trying to explain regularity of conduct by reference to structural concepts such as "role requirements, status demands, strata differences, cultural prescriptions," Blumer invites investigation into the construction of social worlds through interpretive processes of reaching common understanding by interaction partners. Except for relatively infrequent instances of heavily ritualized action, Blumer suggests, the fit between role-playing in transactions and macro-structures that lie beyond them is rather loose. Even living side by side, people can inhabit different worlds (1969: 74, 116, 11). Thus, the solution to the problem of "double contingency" is sought in its specific context, rather than institutionalized norms imposed from without. In a sense, if the Parsonian social actor resembles a functionary of a fully

[1] On the implications of Parsons' work for the sociology of law see, e.g., Deflem (2008: 112-114); Treviño (2008).

integrated social order, the interpretive actor of symbolic interactionism inhabits a laissez-faire world where the sky is the limit.[1]

This "freedom," however, is short-lived. In Garfinkel and Rawls (2002), Goffman (1983) and Rawls (1987) interaction is once again claimed by order. Only this time order is locally produced rather than externally imposed.[2] Thus, one can observe the social order at every instance of interaction without Parsons' elaborate conceptual scheme. The constraints of interaction order neither emerge from the institutional order nor necessarily culminate in it.[3] Rather than "spontaneous," interaction order is "autochthonous" (Garfinkel & Rawls 2002: 45, 245). It is an order *sui generis*, in which every conversation is "a little social system with its own boundary-maintaining tendencies" (Goffman 1967: 113).

The "promissory" and "evidential" character of co-presence and the needs of the presentational social self are the sources of both constraints upon and intrinsic motives for compliance (Goffman 1983: 3).[4] Interaction partners do not follow institutionally imposed "rules." Nor do they need to agree on the definition of the situation. What is indispensable, however, is their expectation of agreement, paying homage to its myth as members try to gain mastery of

[1] Symbolic interactionism has informed an immense body of scholarship on crime and deviance, but made little contribution to the sociology of law as a differentiated social system. See, e.g., Becker (1963); Matza and Sykes (1961); Katz (1988).

[2] Parsons is not oblivious to the orderly character of interaction. In fact, he calls "minor mechanisms of social control" such as "tactful disagreement, silence or humor and tension-release" "the most fundamental mechanisms" by which actors bring back to line those who do or say things out of order (1951: 303).

[3] Ehrlich suggested the same long before: "Each association creates this order for itself quite independently. It is not bound by the order which exists in other associations for the same relations" (1936: 28).

[4] Elias (1939) and Alexander (2004) historicize Goffman's dramaturgical approach by pointing to the social condition of increased reflexivity as well as the changing conditions of successful performative rituals.

"instructably reproducible practices" (Garfinkel and Rawls 2002).[1] In other words, the question is not the absence or presence of constraint on social action but its interactional or institutional source (Rawls 1987: 147).

Failed attempts to derive macro and micro structures from one another or establish primacy of either the objective or subjective character of social order suggest the possibility of their mutual constitution. Bourdieu attempts to integrate the structuralist emphasis on the objectivity of social order with phenomenological and ethnomethodological approaches to meaning and practice in his "constructivist structuralism" or "structuralist constructivism," by employing the two concepts of social field and habitus (1989: 14).[2]

A social field is "a set of objective power relations" imposing themselves on all players regardless of their "intentions" or "direct *interactions* among" them (Bourdieu 1985: 724). Habitus, the "un-chosen principle of all 'choices'," (Bourdieu 1980: 61) is the inscription of the social field in our minds and bodies as lasting dispositions. It explains regularities in improvisations and gives social actions objective meanings without subjective intentions.

Society as a multidimensional space of relatively autonomous fields is organized based on two logics: a symbolic categorical logic dividing the space in terms of differences between status groups and life styles; and an economic logic determining the possibility and rate of movement for agents within and among the

[1] The enormous body of ethnomethodological research on social interaction in legal settings has offered more insight about dynamics of communication rather than operations of the law. For a short bibliography see Deflem (2008: 137).

[2] Giddens proposes a similar solution by emphasizing the "duality of structure" and defining human agency, as "reflexive monitoring of activity." Pre-existing social structures, i.e., rules and resources, constrain and enable social action and are shaped by them recursively. Thus, "the structural properties of social systems are both the medium and outcome of the practices they recursively organize" (1984: 5, 25-26).

fields. There is an economy of practice according to which habitus generates and regulates intelligible practices without intention or calculation in such a way that "improbable practices" are "excluded as unthinkable" (Bourdieu 1980: 50-54). Similar limits are created in the social field at the level of institutions, or, one might say, organizations and networks. They guarantee relative permanence of material and symbolic acquisition, absolve actors of the need to continuously recreate them by deliberate action, and provide mobilized resistance against change (Ibid.: 130). That is how social life, far from a "roulette game," becomes a field of inertia and accumulation, in which movement requires *time* and effort (Bourdieu 1985: 241).

For Bourdieu, law has a determinant role in production and reproduction of social order. It legitimates the State and its "monopoly of legitimized symbolic violence," and produces a degree of clarity and predictability in social relations unmatched by other fields: it "consecrates the established order" (Bourdieu 1987: 838).

> Law is the quintessential form of the symbolic power of naming that creates things named, and creates social groups in particular. It confers upon the reality which arises from its classificatory operations the maximum permanence that any social entity has the power to confer upon another, the permanence which we attribute to objects.
> The law is the quintessential form of "active" discourse, able by its own operation to produce its effects. It would not be excessive to say that it *creates* the social world, but only if we remember that it is this world which first creates the law. (Bourdieu 1987: 838-9)

Thus, the "juridical field," the social space in which actors and institutions compete to determine the law, is constituted by power relations. Both the "ethos" of legal practitioners and the "immanent logic" of legal texts are strongly

harmonious with the interests, values and world views of the dominant class. Nonetheless, the operations of the field are "neutralized" and "universalized" to the extent that judicial decisions are distinguished from naked exercises of power. This involves, as Weber suggested, increasing rationalization and proceduralization of decision-making processes (Bourdieu 1987: 831-834).

While Bourdieu recognizes that entering the juridical field involves following its particular logic (i.e., converting direct conflicts and pre-juridical interests into legal cases and juridically regulated discourse), he is primarily concerned with success or failure in the field in relation to differential amounts of juridical capital held by competing agents, rather than structural development of legal discourse. The function of law is intermeshed with politics and ideology. Law both constructs the social world and consecrates its order.

Habermas' (1984) response to the question of social order and the role of law is moral and philosophical, rather than sociological. But as the arch-adversary of social systems theory, his theory of communicative action and law deserve mention. Habermas finds Parsons' action theory not systemic enough to yield an objective analysis of the emergence and evolution of action systems; and his systems theory not interpretive enough to allow for differentiation among various functional mechanisms. Thus, Parsons' action theory fails to account for the systemic requirements of social integration, while his systems theory is unable to set apart normal and pathological mechanisms of both social and system integration.

In response to these limitations, Habermas offers a bifurcated model of modern society with two distinct principles of integration. One dimension is "the

life-world," the world of ungrounded, unproblematic assumptions and dispositions that ground our ability to know, understand, and act. It is integrated through communicative action oriented to mutual understanding. The other is "the system," the realm of strategic action oriented to success in the economy and politics. It is integrated by instrumental rationality. Contrary to Parsons, for Habermas these two spheres are not in harmony. In fact, the system can intervene in the symbolic reproduction of the life-world to the point of its colonization by monetary and bureaucratic means. Thus, modern society is seen as integrated

> not only socially through values, norms, and mutual understanding, but also systemically through markets and administrative use of power…systemic mechanisms of societal integration that do not necessarily coordinate actions via intentions of participants but objectively, 'behind the backs' of participants. … [However], in the final analysis, society must be integrated through communicative action. (Habermas 1996: 39, 26)

Here lies the role of law as a profoundly ambiguous "medium" and "institution" of system and social integration (Habermas 1988). The ambiguity rests on the fact that law is intermeshed in both the system and the life-world: it can be used both as a medium for success in strategic action and as an institution for mutual understanding.[1] Hence, Habermas' hope for the spread of "communicative-power," especially in the process of discursive will-formation, in the system; as well as his fear of disruption of the communicative rationality of the life-world by its increasing "juridification," especially in the welfare state.

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[1] While, as a steering medium, law can become detached from the normative context of reaching mutual understanding, the systemic function of law is seen as bound up with its institutional role in the life-world. For Habermas, the validity of legal norms, especially in criminal law and penal procedures, rests on substantive justifications found only in the legitimate orders of the life-world (1988: 212).

Thus, sociological investigation of social order has largely evolved based on a "part/whole" metaphor. Society is seen as a whole composed of different parts (e.g., individuals, groups, classes, social actions, institutions, organizations, networks, etc.), and attempts are made to account for the possibility of their integration. There seems to have been some movement towards theories of self-organization in explaining the operations of its parts. The initially "over-socialized conception of man" (Wrong 1961) has given way to self-reflexive theories of subjectivity. Self-organizing structures are recognized in interaction systems, and attempts at establishing primacy between micro and macro structures or among the latter have given way to investigation of dynamics of their mutual interdependence as more or less autonomous entities. How exactly self-organizing structures emerge, change, and couple with one another remains to be specified.

While the function of law, its various sources, and the grounds of its legitimacy remain contentious, few sociological perspectives see the law as either isolated from or completely reducible to other social systems. A degree of relative autonomy in the operations of the legal system is commonly accepted, albeit as a mask for legitimation of political and economic interests. Nonetheless, fundamental questions remain:

1. If legal structures have a normative character, on the one hand, and rely on some form of coercion, on the other, what specifically distinguishes the law from other social spheres, particularly morality and politics?
2. What unique role, if any, does the law play in routine structuring of social life in modern society?

LAW: ORIGIN, DIFFERENTIATION AND FUNCTION

As discussed above, the irreducibly social foundation of society is the impossibility of social interaction in the absence of generalized normative expectations. Taking the distinction between "is" and "ought" for granted, previous perspectives have sought the ground of the latter's persistence and generalization. Luhmann, however, sees this distinction, i.e., the distinction between "cognitive" and "normative" expectations,[1] as the fundamental law-making structure in society and inquires into its very possibility.[2]

According to Luhmann, this distinction has nothing to do with the content, relative moral status, or instrumental value of its two sides. Rather, it only concerns a difference with respect to the temporal stability of our expectations; it involves the possibility or impossibility of learning upon experience of dissonance between an expectation and reality. An expectation is "cognitive" if it adjusts to non-fulfillment and thus changes over time; it is "normative" if it persists over time despite failure of fulfillment. In other words, a norm is a "counterfactually stabilized expectation" (2004: 149). Thus, while one accepts the fact that some people drive through red lights, some cars are stolen, and counterfeiting is an ongoing business; one still expects to be able to drive safely through green lights, find one's car where it was last parked, and rely on money to exchange goods and services.

[1] This distinction was first made by Galtung (1959).
[2] For a comparison between Parsons and Luhmann in addressing the problem of double contingency see Vanderstraeten (2002).

The complexity and contingency of social life make this distinction existentially indispensible.[1] No sociation, even the most transitory, can emerge if all possibilities can be expected to have an equal chance of selection at every moment. By ensuring temporal, social and material stability of a subset of normative expectations, law regulates uncertainty and absorbs the risk of disappointment in social interactions.

The temporal dimension refers to stability of normative expectations during the course of social interaction; the social dimension refers to institutionalization of a subset of those expectations by reliance on the presupposed expectation of expectations by a third party; the material dimension refers to the attachment of normative expectations to a common world of things, events, and symbols. Law emerges as the result of congruence among all three dimensions. It is a congruently generalized structure of normative expectations.

> Law is in no way primarily a coercive order, but rather a facilitation of expectation. The facilitation depends on the availability of congruently generalized channels of expectations, i.e., a high degree of harmless indifference to other possibilities, which lowers the risk of counterfactual expectations significantly…Thus, the function of law lies in its selection achievement. (Luhmann 1985: 78)

With this functional definition, one cannot find any society devoid of law. Law has always already been there. Thus, the investigation shifts to the process of differentiation of legal norms from other norms, usage and custom, and finally to the functional specification and positivization of legal validity in modern society.

[1] Complexity refers to a surplus of possibilities that could be actualized. In practice it implies a "compulsion to select." Contingency refers to the possibility of unexpected consequences of selection. It implies the "danger of disappointment and the necessity to take risks" (Luhmann 1985: 25; 1990a: 26).

Put briefly, in kinship-based societies (with segmental differentiation, lower complexity, inflexible norms, and very limited range of possibilities), law, like all other social systems, finds its natural basis and legitimation in the kinship system. Abstract validity does not exist. The law of the tribe is the only law and no idea of justice confronts it. Law appears in reciprocity and retribution (the oath and reactions of disappointed parties in the forms of violent self-help and blood revenge). Nonetheless, normative expectations are sustained largely by the poverty of alternatives, rather than fear of sanctions.

The most important achievement of pre-modern high cultures (with a unified status hierarchy, political-administrative order, and some degree of functional differentiation), is the resolution of disappointment through a third party: the court. Despite limited alternatives, higher levels of abstraction in relation to norm expectations emerge together with legally ordered decision-making processes, the rise of natural law doctrines, and an idea of justice, against which the law itself can be measured.

Finally increasing functional differentiation in modern society and the growing role of legislation and instrumental use of law for planned change, gives rise to positive law: law "*made* by decision" and "*valid* by decision," and "more than ever [dependent] upon the abstract availability of physical violence." The institutional aspect of the legitimacy of positive law is not grounded in value consensus but in the "*assumption of acceptance"* (Luhmann 1985: 161, 169, 201).

POSITIVITY, ADJUDICATION, AND SOCIO-LEGAL STUDIES

Severed from their foundation in a divine or natural order and frequently changing, legal decisions are in need of justification if they are to be distinguished from sheer arbitrariness. The issue is particularly pressing when it comes to adjudication by unelected officials without a democratic mandate. Some strands of legal scholarship seek the answer in an "unmoving mover" outside the law (be it the legitimacy of the law-giver entrusted upon the courts and administrative agencies,[1] the social value of anticipated outcomes,[2] or an underlying transformative politics),[3] others propose a solution within the law (devising a hierarchy of norms and formalized procedures for consistent subjection of legal decisions to legal standards),[4] while still others seek a path in between (insisting on both legal rules and procedures and the ultimate foundation of legal principles in collective moral values).[5] Despite their differences, all such attempts address the law as a normative structure and take jurisprudence seriously, albeit to expose its inability to fulfill its promises.

The immense complexity of positive law and jurisprudence seems to have discouraged social scientific investigations of law altogether. Instead, socio-legal studies have moved away from the study of law toward the study of law-*related* phenomena (e.g., the study of legal profession, judicial behaviour, public opinion about the law, access to legal institutions in relation to various social categories

[1] E.g., Austin's (1832) Legal Positivism.
[2] E.g., Pound's (1911) Sociological Jurisprudence and Llewellyn's (1931) Legal Realism.
[3] E.g., Unger's (1983) Critical Legal Studies.
[4] E.g., Hart's (1961) and Kelsen's (1967) Legal Positivism.
[5] E.g., Dworkin's (1977) Legal Interpretivism.

such as race, class, gender, age, education, etc.); hence, the bifurcation of the study of law as a normative structure from the internal perspective of legal scholarship, and the investigation of its social context from the external perspective of social sciences.

This bifurcation has not been fruitful for the field. Today the sociology of law remains marginal not only to legal theory and practice, but also to the discipline of sociology and socio-legal studies.[1] Informed by legal theory, moral philosophy, hermeneutics, deconstruction, literary theory, sociolinguistics, and conversation analysis, interdisciplinary investigations of the law and legal discourse remain mostly unmarked by many contributions of sociological theory.[2] Meanwhile, disparate social scientific analyses of the social context of law rest on ad hoc theorizing and conflicting or common-sense conceptions of law,[3] and are hardly concerned with the implications of their findings for a general theory of society.[4] In fact, Friedman's (1986) appraisal of the field still rings true:

> To many observers, the work done so far amounts to very little: an incoherent or inconclusive jumble of case studies. There is (it seems) no foundation … nothing cumulates. The studies are at times interesting and are sporadically useful. But … [n]othing adds up. Law and economics offers

[1] The section on the sociology of law was founded in the American Sociological Association only in 1993. While its counterpart in the International Sociological Association dates back to 1962, the marginal position of the field to sociology and the sociology of law to socio-legal studies is true across the board. See Deflem (2008).

[2] See, e.g., Balkin (1987); Fish (1989); Greimas (1990); Kennedy (2008); Levi and Walker (1990); White (1985).

[3] For a critique of the prevalence of common sense and normative approaches in the sociology of law see Black (1972, 1979). For a critique of Black's own sociology of law (1976) as a mere "systematization of common sense" see Hunt (1983).

[4] This is in sharp contrast to the classical origin of sociology of law. It was not this origin, but sociologically inclined legal scholarship (e.g., Ehrlich 1936; Holmes 1897, 1899; Pound 1911, 1912) that gave rise to the sociology of law as a disciplinary subfield. On the troubled relation between sociology and law, as well as the eclipse of the sociology of law by socio-legal studies in the second half of the 20th century see, e.g., Cotterrell (1986, 2002, 2006a, 2006b); Deflem (2008); Freeman (2006); Griffiths (2006); Luhmann (1985); Teubner (1989).

> hard science; CLS [Critical Legal Studies] offers high culture and the joy of trashing…Grand theories do appear from time to time, but they have no survival power; they are nibbled to death by case studies. There is no central core. (p.779)

The core that is missing, as Luhmann (1985) points out, is the law itself. Social systems theory provides a conceptual apparatus to bridge this divide. It calls for serious investigation of the law as normative structure, but instead of the normative approach of legal scholarship it conducts its investigation from the vantage point of the discipline of sociology and its central problematics, i.e., meaning-constitution, social differentiation and the possibility of social order.

MEANING: COMMUNICATION AND AUTOPOIESIS

As mentioned above, Parsons takes note of the necessity of co-coordinating meaning-constitution by interaction partners. Yet, instead of inquiring into the process, he finds the response in a shared normative order. Doubting the necessity and possibility of moral consensus in modern society, Luhmann examines the possibility of reducing the complexity and contingency of meaning-constitution in its absence.

But what is meaning and how is it constituted? Following Husserl, Luhmann describes the phenomenon of meaning as

> a surplus of references to other possibilities of experience and action. Something stands in the focal point, at the center of intention, and all else is indicated marginally as the horizon of an "and so forth" of experience and action … The totality of the references presented by a meaningfully intended object offers more to hand than can in fact be actualized at any moment. Thus the form of meaning, through its referential structures, *forces* the next step, to *selection … this formal requirement refers meaning to the problem of complexity.* This takes us from a phenomenological description back to a problem-related functional analysis. (1995a: 60)

The challenge of meaning-constitution, therefore, is to manage the relation between a "selectively restricted order and the openness of other possibilities" (Luhmann 1990a: 25). While for individuals this challenge is recognized and addressed in consciousness and conveyed in language, in social systems this is the role of communication. In fact, social systems exist *only* in communication. They emerge "as soon as any communication whatsoever takes place among individuals" (1982: 70). This means communication, even the most fleeting, occurs *only* in social systems. In other words, social systems are communication systems. The systemic nature of sociation and communication lies in the impossibility of simultaneous actualization of all available references to an object or event. Thus, every social system requires a principle for selection and boundary-formation that differentiates communications that belong to it from those in its environment.

As a discrete sphere of communication, a social system is always simpler than its environment. The condition of relative systemic simplicity is the system's ability to control retention of selected possibilities. But control is also an act of communication and successful only to the extent that communication is linked to intended communications. The first implication is the indeterminacy of the relation between cause and effect.

> We have to wait for causes to effect their effects, and for effects to be caused by causes… Causes have to select their effects, and effects have to select their causes in a world that is characterized by both over-determination and under-determination, i.e., by there being lots of causes and lots of effects floating around with no definite relationship between them… A system is a way to communicate control if there is no other way to control but to communicate. (Baecker 2001: 60)

To explain control over the selective retention of communication in modern social systems, Luhmann proposes the concept of autopoiesis. A neologism made of two Greek components, *autos* (self) and *poiesis* (production), autopoiesis was originally formulated in biology in response to limitations of input/output models in describing living systems. The key insight is that as circularly organized units of interaction, "living systems cannot enter into interactions that are not specified by their organization" (Maturana and Varela 1980: 10). Thus, while existing in an environment, living systems are products of their own operations. It is only through these operations that living systems can become distinct from their environment and maintain their distinction. A living system is autopoietic in the sense that it is the product of its own organization: an operationally closed network of processes that produce components that reproduce those processes. A living system selects itself from its environment, or "pulls itself up by its own bootstraps," and its environment receives its character through and in relation to this system (Maturana and Varela 1987: 46).[1] Every element that an autopoietic system uses for its operations is its own construction. It does not exist as such outside the system. There is no input/output of identical elements between an autopoietic system and its environment.[2] That is the core of its autonomy.

[1] This is in tune with Mead: "The individual organism determines in some sense its own environment by its sensitivity. The only environment to which the organism can react is one that its sensitivity reveals. The sort of environment that can exist for the organism, then, is one that the organism in some sense determines" (1934: 245). This idea is also present in Parsons: "Definition of a system as boundary-maintaining is a way of saying that, *relative to its environment*, that is to fluctuations in the factors of the environment, it maintains certain constancies of pattern, whether this constancy be static or moving" (1951: 482).

[2] Varela's (1997) example of classical immunology clarifies the matter: Classical immunology tried to explain how a living body reacted to antigens by producing antibodies, how an attack received a response, a virus produced immunity. Yet, as research continued, identifying antigens proved an impossible task. Antigen was defined differently by every system. Moreover, most antibodies reacted to most antibodies. Autopoietic models avoid such problems by considering

The extension of autopoiesis (as a general form of system-building based on operational closure) to the law requires treating the law as a social system *sui generis,* made of *exclusively* social components, i.e., communications. Although law presupposes other levels of reality, such as the material world and human beings, such entities participate in the operations of the legal systems only through communication.[1] The unity of law as a communication system is produced neither by consciousness nor by the special content of legal communications, but only by the recursive character of legal communications.

Treating communication as the basic unit of a social system raises the problem of its observation. Due to its tripartite structure, i.e., information, utterance, and understanding, communication can only be observed indirectly, i.e., only by attribution as action (Luhmann 1995a: 174). This attribution of responsibility for selection of communication, i.e., "simplifying localization of decision points," is necessary for the autopoiesis of all social systems. "One has to know who said what to be able to decide about further contribution to the process" (Luhmann 1986: 178).[2]

The emphasis on the role of communication in social systems does not do away with individuals and their consciousnesses. It only assigns them to the

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living systems as operationally closed and thus able to produce their own reality and their own scheme for identifying antigens (Moeller 2006: 14-5).

[1] The idea that human beings or individual selves, rather than constitutive elements of society, are constituted through particular social interactions and various discursive practices is not new. Similar suggestions are made by symbolic interactionism, post-structuralism, and deconstruction, to name a few. In fact, both the irreducibility of society to individual consciousness and the basal character of collective representations are already present in Durkheim (1901: 34).

[2] Contrary to Habermas (1984), for Luhmann communication is oriented towards more communication rather than consensus. Not only is there no ground to hold consensus-seeking as more rational than the search for dissent, but more importantly, dissent is necessary for the self-reproduction of communication and thus social systems. Universal consensus would end both communication and the autopoiesis of social systems (2002: 155-168).

environment of social systems. Social systems and psychic systems remain autopoietic and their interdependence is only achieved through structural couplings. This has two implications: a) the foundation of meaning in individual consciousness is no longer treated as more fundamental or originary than its foundation in social systems; b) with increasing differentiation of social systems the particular system reference of meaning can no longer be assumed. Meaning becomes multi-referential at the level of macrostructures and its determination becomes a matter of investigation (Luhmann 1990a: 24).[1]

Operational closure of positive law as a recursive network of legal communications requires both functional specification and binary coding (Luhmann 2004: 93). Functional specification releases the law from producing a "morally guided way of life," being a "conscience regulator," or performing any "educational and edifying" functions (Luhmann 1985: 171-172). Binary coding, "legal/illegal" provides a scheme with a positive and negative value to select and connect communications about normative expectations.[2]

Autopoietic closure is achieved only when the legal system can distinguish its own communications from those which belong to its environment. This

[1] Like a moving body with "an indefinite number of measurements of mass in the indefinite number of systems with reference to which it can be conceived of as moving" (Mead 1959: 52), action and experience acquire multiple meanings depending on their system reference.

[2] As strict and unyielding distinctions between legal and illegal are exceptional, proper application of the code requires other distinctions, rules and conditions, i.e., programmes. While the code remains the same, the programmes can change. Luhmann identifies two basic types of programmes the combination and recombination of which increase the complexity of the legal system and its ability to deal with further complexity in its environment: conditional programmes are the hard core of the legal system, indispensable devices that ensure certain events within the system are activated if, and only if, certain other events are realized. The "if…then" form makes it possible to imagine how a legal dispute will be decided in advance. Result-oriented or purpose-specific programmes, on the other hand, operate with considerations such as utility and balancing of interests. They rely more on assumptions about the factually uncertain future consequences of judgments. But they are always nested in the conditional programmes. The unity of the legal system requires the integration of both (Luhmann 2004, 1988a, 1988b).

involves subjecting legal communications to legal standards.[1] Thus, operational closure is achieved only at the level of second-order observations; only when the legal system observes its own observations by means of legal norms, procedures and programmes. What sets the law apart from other social systems is this unique *self-description*, i.e., its unique conception of its own unity. Only the legal system distinguishes itself from all other systems in its environment by being the final arbiter of the legal/illegal distinction.

No longer requiring a foundation in higher or more stable orders, law in modern society becomes fully self-referential. It can ceaselessly produce and reproduce legal communications by reference to legal communications alone. Recursive application of the code "legal/illegal" to social communications about normative expectations produces the boundaries of autopoietic law and regulates its relation to its environment. As a result, only the events recognized by the legal system as its own can trigger operations within the system; other events remain unnoticed unless reverberated in the system and changed into internal events.

> A description of the legal system as an autopoietic system requires us to say that the states of the system are exclusively determined by its own operations. (Luhmann 1992a: 1424)

Cognitively open, positive law changes over time, transforming what is legal into illegal and vice versa. Yet, normatively closed, it cannot use a code other than legal/illegal to manage such alterations. The openness of the legal system to its environment presupposes an "*asymmetrical* relation" between them, the

[1] Unlike Luhmann, who treats autopoiesis as a categorical phenomenon, Teubner allows for degrees of autopoiesis by distinguishing between self-observation, self-constitution and self-reproduction. Law becomes totally autopoietic only when all three are met. The result is a circular relation between legal norms, legal decisions, and legal procedures and dogma (1993: 32-33).

regulation of which is determined by a "*symmetrical* relation" among internal components of the legal system itself (Luhmann 1988a: 114). The normative closure thesis "above all opposes the idea that morality could immediately or intrinsically be understood as valid in the legal system" (Luhmann 2004: 107). While law can incorporate moral concerns into the law, this can only be done by "reference to legal texts, precedents, or rulings" (Luhmann 1992a: 1429). The code of the moral, i.e., "good/bad," remains external to the operations of the legal system, which is regulated by the recursive application of the code "legal/illegal." In fact, intermingling of the two becomes highly suspect. In short, autopoiesis is a way for the legal system to maintain control over its selection of communication, an evolutionary achievement of a long process of differentiation.

MODERNITY AS FUNCTIONAL DIFFERENTIATION

The self-referential character of the legal system is neither due to the supposedly higher status of legal norms, as Legal Positivism suggests, nor a formalist ruse to hide the ground of law in extra-legal interest, as Legal Realism may contend. Rather, self-reference is a universal feature of all modern societal systems, consequent upon the distinctively modern type of social differentiation.

While influenced by Durkheim, Parsons and Weber, Luhmann's theory of differentiation, rather than division of labor, social action, or rationalization, concerns mechanisms for organizing social communications. The sociological significance of these mechanisms comes into light if one reflects on the paradoxical characterization of *society*.

> [A]s a *differentiated unity*…the totality of the differentiated relationships is (and yet is not) the unity of the system…The introduction of the unity of the system within itself is therefore a differentiation itself…But the question [is] how it happens that a part of the whole comes to represent the whole as such. (Luhmann 1990b: 409, 410, 412)

In societies with a predominantly stratified form of differentiation, the paradox of society is solved by hierarchy. The unity of society is introduced into the system as an order of rank with two implications: it allows each stratum and element thereof to participate in the unity of society by means of its position; and it permits the same order of rank to be used to represent society at its summit. While stratification requires unequal distribution of wealth and power (or communication potentials), equality within subsystems is as important as inequality among them. Stratified society is a unity as difference (Luhmann 1977).

Modern society, in contrast, cannot represent its unity in itself. It is a functionally differentiated society without a "summit" or "center" (Luhmann 1987: 105).[1] System-building at the level of interaction and society increasingly diverges. Neither one can be used as a guide to understand the other. The encompassing system is too large and too complex to be accessible through, or adequately represented in, any interaction (Luhmann 1984: 59). But that is not the whole story. System-building among societal function systems differentiates

[1] In addition to stratified and functional differentiation, Luhmann recognizes segmentation and center/periphery differentiation. This typology, however, only provides a *primary scheme* of differentiation. It does not suggest that there are only limited types of societies. Forms of differentiation, rather than excluding one another, might even presuppose one another. There are, however, limits to their compatibility, which seem to depend on the complexity of their environment. Compared to segmentation, center/periphery, and stratified types of differentiation, functional differentiation provides more complexity and more compatibility with other forms of differentiation (Luhmann 1977: 40-1).

as well. The media for societal communications are not languages but "symbolically generalized communication media,"[1] such as money for the economy, power for politics, jurisdiction for law, truth for science, and faith for religion (Luhmann 1995a: 160). No system-specific perspective can claim full grasp of the whole, regulate and integrate it, or represent it as a unity. Each system operates as a closed universe of meaning without justifying its operations by reference to standards of other systems. Politics no longer needs divine justification; nor do science, economy, and art require political pretexts. Legal immoralities and moral illegalities emerge alongside blasphemous truths and false articles of faith. What is currency in the church is worthless in the laboratory or at the bank, and vice versa. Stratification in the form of social classes does not disappear but it becomes a "byproduct" of the dynamics of each societal system (Luhmann 1997a: 612).[2] While each societal system is operationally closed and self-steering, there can be no self-steering of society at the level of the entire system.[3] The reason is not flawed policies or plans, their unintended consequences, or failure of execution. Rather, it is the autopoietic character of social systems that sets limits to steering (Luhmann 1997b).

Initial optimism about the transitory nature of this predicament has vanished. Incommensurable meanings and indeterminacy of ultimate frames of

[1] The concept is drawn from Parsons' (1963) conceptualization of money. Three other media, i.e., power, confidence, and value commitment are constructed by analogy. For Habermas there are only two symbolically generalized media: money and power. Confidence and value commitment are categories of the life-world. On the difference in the use of the concept in Parsons, Habermas, and Luhmann see Ganβmann (1988).

[2] All references to Luhmann (1997a) are based on the English translation of its excerpt in Moeller (2006).

[3] Luhmann rejects a hierarchical order among societal subsystems, but he acknowledges their "unequal growth" implying that different subsystems can be of different importance in different times (Moeller 2006: 121)

reference are here to stay, and so is the necessity of their practical determination in concrete situations. Self-reference emerges in this context not as "a desired goal but a fateful necessity" (Luhmann 1988a: 112).[1] It provides a risky solution to the problem of social order amidst increasing complexity and contingency of social communications, and in turn functions as a mechanism for building further complexity.[2]

Autopoiesis and operational closure in the legal system are the result of its own development, i.e., an unprecedented increase in the level and variety of legislation and its emergence as the "dominant source of legal evolution," in modern society (Nobles and Schiff 2006: 67-70). Counter-intuitively, it is by virtue of this self-reference that law becomes more responsive to its environment. In a poly-centered society open to the future and increasingly dependent on ever changing legislation, full positivization of legal validity reconciles the contingency and alterability of laws with their normative character.

This development has important consequences for the environment of the legal system. Even more, a self-referential legal system is a precondition for increasing functional differentiation of all other systems. A differentiated money economy and political system can exist only if law is not a commodity sold to the

[1] Providing similar descriptions of the problem of social order in modern society, i.e., "increasing societal complexity," "pluralization of forms of life accompanied by an individualization of life histories," and the shrinking of "shared background assumptions," Habermas seeks sources of integration in communicative action, money and administrative power (1996: 25, 39). Luhmann's "diabolic" self-referential systems, however, are both integrative and disintegrative. While facilitating communication, they constantly produce new conflicts and differences, e.g., money both eases economic transactions and produces a distinction between the rich and the poor. See Moeller (2006: 27).

[2] This is true of both the individual psyche and social systems. In a poly-centered society neither can find a fixed, unambiguous point of reference outside itself. Self-reflexivity shields both from relentless pressure of incommensurable meanings in their environments and allows each unprecedented levels of internal complexity.

highest bidder. Likewise science, art, and mass media can become differentiated only when law does not capitulate to political pressure or moral and religious zeal (Luhmann 2004: 391). That is the ground for the "socio-structural pre-eminence" and "philosophical hypostatization" of law in the transition to modern society (Luhmann 1982: 130). In order to constrain and stabilize generalized normative expectations along system boundaries and provide universal premises of action in all social systems, law must maintain its own boundaries.

Functional differentiation and operational closure of social systems, however, do not suggest total disjuncture between them. On the contrary, these improbable evolutionary emergents are possible only by virtue of highly selective structural couplings (i.e., stable mechanisms for mutual irritation) between them. Such structures allow one system to presuppose and rely on certain features of another for its own operations. Mechanisms for reducing complexity, they are necessary conditions for building further complexity. Examples of structural couplings are: laws of contract and property (between law and the economy); taxes and tariffs (between the economy and politics); constitutions (between law and politics); academic certifications (between education and the economy). Determined by forms of differentiation, mechanisms for new structural couplings are expected to emerge in the course of functional differentiation (Luhmann 1992a: 1434-1437; 1992b: 75-77; 1997a: 781-786; 2004: 385).

A task of social systems theory, therefore, is to investigate the role of law in the emergence of new forms of structural coupling between functionally differentiated systems. It also has to examine the operational and normative

closure of the legal system in the context of continuous overproduction of conflicting normative expectations in its environment.

FUNDAMENTAL RIGHTS

In modern society conflicting normative expectations are increasingly formulated in terms of fundamental rights.[1] The reason lies in the transformation of the basic principle of social inclusion in the course of the transition from stratified to functional differentiation.

In a primarily stratified society, the institution of human rights has no place in regulating social life. Individuals have fixed social positions in a hierarchical order which provides the basis for their inclusion and exclusion. Membership in family, tribe, corporation or estate determines the individual's access to a network of social bonds and provides protection against possible threats.

In modern society, however, what are differentiated are no longer "*groups of people…but types of communication*" (Verschraegen 2002: 266). The automatic, one-dimensional mechanism for inclusion gives way to a plurality of contingent mechanisms for partial inclusion. Whereas in stratified societies dual membership, i.e., participation in more than one stratum, is rare and often considered a "monstrosity," in modern society individuals are embedded or

[1] Despite some ancient and medieval origins (e.g., the Law Code of Hammurabi and the Magna Carta), it was the U.S. Constitution, 1787, that transformed the idea of human rights into positive law. The French Declaration of the Rights of Man and Citizen, 1789, soon followed, with the U.S Bill of Rights coming in 1791. Since the 1948 Universal Declaration of Human Rights by the United Nations, and especially in the last three decades, a bill of rights and judicial supremacy have become expected mainstays of nearly all constitutional democracies. See Bates (2010); Hirschl (2004); Sweet (2000).

caught in a heterogeneous "web of group affiliations" (Simmel 1922). The implication is multi-dimensionality and partiality of social inclusion, contingent on particular rules of access determined by each social system.

The institution of subjective, civil, and later human rights emerges as a sort of compensation for loss of the automatic inclusion characteristic of stratified societies. It provides protection for the more fragile and vulnerable modern individual, who has to create his or her personality in countless interactions and various social games. Modern individuality, Luhmann suggests, is "exclusion individuality;" first, as independent individuals, actors are excluded from society; then they are allowed re-entry, but only partially and under specific conditions (Verschraegen 2002: 269).

Legal recognition of individual freedom and equality in decisions involving property, contract, ultimate belief, expression, association, marriage, child bearing and rearing, occupation, etc., allows individual access to societal systems and at the same time further compartmentalizes and prevents de-differentiation of the latter. Thus, capital accumulation can continue without regard to religious or moral expectations about surplus distribution and fear of arbitrary political acquisition. Political power cannot be used to settle religious and ideological disputes and vice versa (Luhmann 1982: 129). All individuals expect equal access to all societal systems provided that they can exhibit the required communicative competence and fulfill relevant role expectations (Verschraegen 2002).

Since the boundaries of societal systems and requirements of access to them are in flux, concrete meanings of freedom and equality remain contentious.

Increasing conflicts over fundamental rights since the second half of the twentieth century, and growing concern with the autonomy of the legal system in settling such disputes need to be examined against this backdrop.

OVERVIEW

The following three substantive chapters of this dissertation examine three claims of social systems theory concerning the role of law and its relation to other societal systems in modern society:

- In the process of functional differentiation of communication systems new structural couplings between them emerge.
- The legal system is normatively closed and fully self-referential.
- Fundamental rights, in addition to a principle of social inclusion, function as a safe-guard against de-differentiation of social systems.

Each chapter starts with a current debate in socio-legal studies and examines the fruitfulness of its reformulation in systems theoretic terms. This involves constructing and employing empirical examples for autopoietic theory construction and provisional operationalization of relevant concepts in response to each debate.

Chapter Two uses the concept of *structural coupling* to provide a sociological theory of privacy and a hitherto absent common denominator for privacy conflicts. While threats to privacy and safe-guards for its protection are often sought in different realms (i.e., excesses of the mass media, corporations, or

the State, on the one hand, and social conditions for individual self-development and civil interaction in a free democratic society, on the other), the essay shows how both threats to privacy and safe-guards for its protection are rooted in increasing functional differentiation of societal systems and paradoxes of their self-reference. As selection and retention of information in differentiated communication systems become more complex and contingent, the essay argues, the right to privacy emerges as a structural coupling between them. Reducing the degree of freedom in each communication system, it enhances the possibility of communicative success and increases the variety and complexity of social communications. This approach provides a foundation for analyzing both privacy conflicts and solutions to them beyond moral judgements about the proper balance between individual interests and public good or the relative values of various goods and in terms of problems of social complexity and functional differentiation.

Chapter Three demonstrates the *normative closure* of the legal system through an examination of the United States Supreme Court's rulings on the two morally charged issues of abortion and homosexuality. While the Court is often treated as a political institution and variations in its decisions are commonly understood to be politically and ideologically influenced rather than legally determined, the essay shows how legal doctrine allows the latter without undermining the former. Rather than an example of American exceptionalism, the doctrinal divide in the Court between originalism and living constitutionalism appears as a complementary relation between two strategies for selection and retention of legal communications amidst increasing complexity in the law and its

environment. Attention is drawn to functional equivalents of this divide and the fruitfulness of sociological investigation of jurisprudence at the level of world society.

Chapter Four establishes a link between changing contours of *equality* and *functional differentiation* in the United States Supreme Court's post-bellum jurisprudence of race. While variation in Court rulings is often examined in relation to dynamics of group and institutional conflicts, the essay shows how the Court's response to racial classification in jury service, suffrage, access to public transportation/ accommodation and education is expressive of legal recognition of the functional differentiation of law, politics, commerce and education, respectively. The current divide in the Court concerning affirmative action programs is discussed against this backdrop.

ANALYTIC STRATEGY

The empirical object of analysis in this project is the United States Supreme Court's rulings on abortion, homosexuality, and racial discrimination; issues of social exclusion that have long evoked religious, moral, and political communications in the environment of the legal system.

In its repeated application of the code "legal/illegal" to such cases, the Court has been neither consistent nor unanimous. The goal of the project is to see whether and how an informative autopoietic account of this variation across societal systems and over time can be produced; and how such an account would contribute to current debates on the relation between law and other societal systems.

The analyses encompass all 23 cases classified under "abortion," all 69 cases classified under "racial discrimination," as well as 4 decisions involving homosexuality in the Legal Information Institute's (LII) historic collection of Supreme Court decisions.[1] These cases are either "landmarks," i.e., represent a significant turning point on the issue, or "leading," i.e., articulate well-reasoned accounts of the rules and principles of law, and thus are frequently cited in legal proceedings. Additional cases are consulted if better understanding of the precedential context of selected rulings so requires.

While the focus is on the meaning of legal communications, this is not an exercise in literary criticism or deconstruction.[2] The goal is neither to expose the contingency and inherent instability of legal distinctions in order to invert hierarchical oppositions, nor to trace the ground of legal distinctions in something supposedly more originary than themselves, e.g., power, morality, or economic interest. Taking as given that legal communications do not represent the world but render it meaningful through selective reduction of complexity,[3] the project investigates how the legal system reproduces itself through stabilization of such selections amidst the surplus of other possibilities.[4] Therefore, attention is paid

[1] Co-founded in 1992 by Peter W. Martin, a former Dean of Cornell University's Law School, the LII holds an archive of the entire texts of over 600 historic decisions by the Supreme Court. The collection is based on a survey of about 100 casebooks, in collaboration with the Center for Computer Assisted Legal Instruction, a consortium of nearly all U.S. Law Schools.

[2] On the overlap and distinction between deconstruction and social systems theory see Luhmann (1993a).

[3] "A communication does not communicate [*mitteilen*] the world, it divides [*einteilen*] it. Like any operation of living or thinking, communication produces a caesura. It says what is says; it does not say what it does not say. It differentiates. If further communications connect [anschlieβen], systemic boundaries form which stabilize the cut" (Luhmann 1994: 25).

[4] The three evolutionary concepts of variety, selection, retention can be transposed onto the tripartite structure of communication, i.e., information, utterance, understanding: One can say that from a variety of referential possibilities for producing information, a particular utterance is selected, and the difference between utterance and information is understood or retained in

not to the rhetorical aspect of legal discourse but to the application of the code by means of particular programmes.

Legal arguments from all corners of the bench are examined to identify:

1. The variety of legal meanings of the case at hand, i.e., different possibilities for legal validity, and the particular ordering of actuality and potentiality presupposed by each;
2. The legal mechanisms for selection and retention of one meaning among others;
3. The implications of such operations for legal autopoiesis and functional differentiation.

The aspiration throughout is not to provide more adequate answers to questions frequently raised by other perspectives.[1] Rather, it is to show how a systems theoretic perspective can produce new research questions in the sociology of law which are directly concerned with the central problematics of sociology.

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subsequent communication. The goal is to trace the evolution of legal communications in the context of a theory of modern society.

[1] Cf. King (1993).

CHAPTER II

PRIVACY AS STRUCTURAL COUPLING

Abstract

Legal scholarship has been reacting to adverse effects of innovation in dissemination media upon privacy since the late 19th century. Yet, taking communication for granted, it has not been able to move beyond the dichotomy of individual interest and public good to ground privacy in the very structure of modern social communications. Drawing on Durkheim, Simmel and Luhmann, this essay proposes such a theory of privacy. In the context of increasing differentiation of types and forms of communication systems, the paper argues, the right to privacy provides a principle of loose compatibility among them. Reducing the degree of freedom in each system, privacy allows for simultaneous participation of individuals in incommensurable worlds of communication and remains an indispensable safe-guard against totalitarian tendencies of the latter.

More than a century after its initial appearance in legal scholarship in the United States (see Warren and Brandeis 1890) the right to privacy eludes adequate theorization. Despite its recognition as an irreducible ground for claims-making in legislative and adjudicative fora around the world, confusion persists as to what exactly the right to privacy is and why it is worth protecting (Solove 2009: 4).[1] Some consider it a distinctive right indispensable for human dignity, self-development, social freedom, civic and political participation in democratic

[1] Privacy is recognized by the United Nations and in the European Convention on Human Rights as a fundamental human right. Some countries including South Africa, South Korea and Brazil have explicit constitutional protections for privacy. Others, including the U.S., Canada, France, Germany, Japan, and India recognize it as implicit in their constitutions. There are thousands of privacy laws around the world protecting not only the individuals but also corporations and governments (Solove 2009).

society, and the like, (e.g., Bloustein 1964; Gavison 1980; Schoeman 1992; Solove 2009), while others try to reduce it to other rights or interests, such as property, liberty, autonomy, secrecy, or security (e.g. Greene 2010; Henkin 1974; Posner 1979, 1981, 2008a; Rubenfeld 2008; Thomson 1975).

These diverse attempts at understanding privacy share at least two assumptions: the modern character of the right to privacy; and its vulnerability to incessant innovation in dissemination media. What is seldom examined in this debate is the relation between the right to privacy and the distinctive structure of modern social communication. Taking communication for granted, discussions of privacy tend to move "forward" to find proper boundaries of privacy, identify privacy problems, devise taxonomies and typologies, and/or provide normative grounds for policy making and adjudication (e.g., Bostwick 1976; Etzioni 1999; Kasper 2005; Prosser 1960; Solove 2009; Westin 1967).

Using Warren and Brandeis (1890) as a reference point and drawing on Durkheim's analysis of moral individualism, this essay moves "backward," as it were, and examines the rise and legal recognition of privacy in terms of problematics of social communication in modern times.[1] Luhmann's social systems theory will complement Simmel's formal sociology in discussing the differentiation of types and forms of communication. With increasing functional differentiation of communication systems, the paper argues, the right to privacy emerges as a principle of loose compatibility among them. Reducing the degree of freedom in each communication system, the right to privacy enhances the

[1] For a brief historical and conceptual account of the ascent of privacy in the West see Schoeman (1992: 115-135).

possibility of communicative success and increases the overall variety and complexity of social communication. While the contours of the right to privacy change over time, and despite the fact that its factual violation persists, a generalized normative expectation of privacy remains indispensible for simultaneous participation of individuals in incommensurable worlds of communication and for continued operations of the latter.

I: PRIVACY AND COMMUNICATION

"The Right to Privacy" by Warren and Brandeis is often cited as a first call in the United States for recognizing privacy as a distinct and irreducible right.[1] They provide a brief history of common law protection of the individual in his *person* and *property* and the gradual expansion of the legal meanings of both, from initial protection of the body and tangible property against battery, destruction, and theft, to one's spiritual, emotional and sensory nature, as well as reputation, goodwill, confidence, products of the mind, trade secrets, and trademarks. The increasing extension of social interactions beyond acquaintances and contractual relations, they believe, has rendered such foundations inadequate. With changes in dissemination media (especially the development of photography, and sensationalist journalism), what used to be "whispered in the closet," could now be "proclaimed from the house-tops" (1890: 195). Thus, recognized foundations in the common law (such as property, contract, and breach of confidence), could

[1] A similar principle had been invoked a decade earlier by E.L. Godkin in 1880. The earliest recognition by the legal system of the violation of the sacred "right to privacy" was made in *De May v. Roberts*, 46 Mich. 160, 9 N.W. 146 (1881), when a doctor brought an unqualified assistant into a woman's bedchamber in childbirth. See HLR (1981).

no longer protect the individual's right to determine the extent to which his "thoughts, sentiments and emotions shall be communicated to others" (Ibid.: 213). To protect the individual against excesses of the press, Warren and Brandeis argue, a new foundation is required that can extend existing protections of the individual to "personal appearance, sayings, acts and personal relations, domestic or otherwise" (Ibid.). The right to privacy is that foundation. Its existence, they argue, is already implied in many legal provisions and court judgments.

The right to privacy is a general right to the "immunity of the person," a right to one's "inviolate personality," "as against the world" (1890: 207, 205, 213). Its legal recognition has become necessary because

> the intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world … [and made] solitude and privacy ... more essential to the individual. (1890: 196)

The value of this right, Warren and Brandeis argue, does not lie in the capacity to profit from such communications but "in the peace of mind, or the relief afforded by the ability to prevent any [communication] at all" (1890: 200).

Although this conception of privacy is often understood as solitude and withdrawal, i.e., the "right to be let alone," Warren and Brandeis treat privacy as a communicative right. They discuss the right to privacy in terms of control over one's self-presentation; the ability to reveal oneself selectively; to decide how, when, where, and to whom to communicate which aspects of one's life and personality.[1] They recognize a relation between the right to one's personality and

[1] Westin (1967) is one of the best-known advocates of this conception of privacy not only for individuals but also for groups and institutions. For a critique of Westin's broad and unitary

control over the scope of one's communication. From a sociological perspective the question is: what distinctive structure of social communication renders personality construction and its inclusion in social communication problematic; and how can the right to privacy provide a solution?

II: DURKHEIM: SOCIAL SOLIDARITY AND MORAL INDIVIDUALISM

Durkheim does not explicitly address the question of privacy and its relation to social communication. Nonetheless, his analysis of "moral individualism," as a collective representation and an emergent property of modern social structures, provides one of the earliest sociological accounts of the function of respect for the right to life, liberty and honour in modern society.

For Durkheim, social life is "made up entirely of [collective] representations," i.e., collective ways of thinking and acting expressive of the ways "society conceives of itself and the world that surrounds it" (1901: 34, 40). Realities *sui generis,* collective representations are grounded in the constitution of society and follow their own laws. To understand them, in both form and substance, one must examine the nature of society and not the state of individual consciousness. Increasing respect for individual rights is one such collective representation. In modern society the idea of the human person is sacred:

> An attempt on a man's life, on a man's liberty, on a man's honor, inspires in us a feeling of horror analogous in every way to that which the believer experiences when he sees his idol profaned. (Durkheim 1898: 46)

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definition of privacy and it's supposedly negative effects on economic efficiency, crime detection and prevention, and freedom of expression see, e.g., Lusky (1972).

This development, Durkheim contends, cannot be explained in terms of moral and philosophical enlightenment, as idealists seem to believe, or as a utilitarian response to individual needs, as economists tend to suggest. Rather, moral individualism is an emergent property of structural changes in modern society itself: the result of a long process of social differentiation.

In an expanding and voluminous society with increasing division of labour, growing complexity of systems of thought and experience, and declining capacity of religion for social integration, respect for the "idea" of the human person emerges as a primary ground for social solidarity; "the only tie which binds us all to each other" (1898: 52). Moral individualism serves as a secular proxy for religion. It creates enough distance and proximity among individuals to reconcile differentiation and integration. In other words, moral individualism provides modern society with unity through difference. It serves an integrative societal function, and at the same time provides a safeguard against "equalizing" individual "personalities," a protection against the "conformism of older times" (Ibid.). Thus, the conventional assumption of a zero-sum relation between the individual and society is rejected in favour of a mutually reinforcing relation between individuation and certain kind of social solidarity.

Moral individualism, of course, is not the only way "society conceives of itself." There are many other ways of acting and thinking together. The task of sociology, Durkheim believes, is to investigate the dynamic relations between these representations, to see

> how social representations are attracted to or exclude each other, amalgamate with or are distinguishable from each other, etc. (1901: 41-42)

While Durkheim did not develop his intuition about associative patterns of collective representations, Simmel and Luhmann, each in his own way, seem to heed Durkheim's call to investigate the dynamic plays of mutual attraction and repulsion among different representations of society. Society, rather than a moral unity in need of a single principle of universal integration, becomes a differentiated structure of social communications requiring multiple principles for their loose compatibility. The right to privacy, this paper contends, is one such principle.

III: SIMMEL: GROUP-AFFILIATION AND SECRECY

For Simmel, society is not a concrete substance or entity existing prior to and outside interaction. Rather, it is "an *event*; …the function of receiving and affecting the fate and development of one individual by the other" (1950: 11). Made anew in every interaction, society involves a capacity to transform a "mere aggregation of isolated individuals into specific forms of being with and for one another" (Ibid.: 41). Thus, instead of searching for an overarching principle that can integrate society once and for all, the task of sociology is to examine the various *social forms* through which this transformation is accomplished.

Social forms have an autonomous life of their own; some predate their contents, e.g., modern nation-states; others linger after disappearance of their originating condition, e.g., a marriage gone cold.[1] Among these forms, those of elementary interaction account for "all the toughness and elasticity, all the color

[1]The same, Simmel believes, applies to cultural forms such as science and law, which initially emerge as means to ulterior ends but later become values in themselves.

and consistency of social life" (1950: 10). Without these micro-structures interlacing social institutions, "society would break up into a multitude of discontinuous systems" (Ibid.: 9). Thus, Simmel provides discrete analyses of various forms of interaction, their structural properties, and conditions of emergence, development and dissolution.

Secrecy, a universal element of structures of human reciprocity in all societies, is one example.[1]

> The secret … is one of man's greatest achievements … [It] produces an immense enlargement of life…, offers, so to speak, the possibility of a second world alongside the manifest world, and the latter is decisively influenced by the former. (Simmel 1950: 330)

In the course of historical development of society what was once manifest becomes secret and vice versa, but secrecy as a social form remains.

In some respects, modern society seems to handle more secrecy than other societies. The reason is not necessarily individuals' willful concealment from one another, but increasing differentiation of both social structures and individual personalities. The key element here is the transformation of the pattern of group-affiliation in modern society from *concentric* to *intersecting.* Not only does the modern individual participate in more social groups, but, more importantly, he does so as an *individual*. In medieval society individuals already participated in various secondary groups, the reach of which could extend beyond the boundaries of towns and cities. Yet, such affiliations

[1] Other examples include exchange, conflict, competition, sociability, domination, subordination, marriage, love, friendship, dyad, triad, lie, discretion.

> had the peculiarity of treating the individual as a member of a group rather than as an individual, and of incorporating him thereby in other groups as well. (Simmel 1922: 139)

The other side of automatic inclusion in some groups was automatic exclusion from others. The modern type of group-affiliation, however, allows for simultaneous individual participation as a person in various intersecting groups. This is both a condition of and a threat to modern individuality.

Each group encounters unique individuals as exemplars of an abstract category, "as if through a veil," that simultaneously "hides the peculiarity of the person [and] gives it a new form" (Simmel 1908: 11). Group-formation is possible only by virtue of these partial and incomplete representations, which treat the individual as the agent of a definite performance. Yet, no person can ever be reduced to such circumstantially restricted functions; no category can ever fully represent an individual. Indebted to each category, the individual eludes them all.

The modern type of group-affiliation provides individuals with considerable leeway. It allows simultaneous occupation of a low/periphery position in one group and a high/central position in another. Yet, any such affiliation, "the state, the party, the family, friendship or love," can lay "relentless," "one-tracked and monopolistic" claims on the individual (Simmel 1950: 121). Thus, the individual can never participate in a group without simultaneously confronting it (Simmel 1908: 15). The modern pattern of group-affiliation has "mutually reinforcing," conflicting and integrating tendencies. The cost of increasing individual freedom is increasing "insecurity," "psychological tension" and even "schizophrenia" (Simmel 1922: 141-142). Nonetheless, the

more numerous are the abstract categories under which an individual can be temporarily subsumed (i.e., the more complex and differentiated the forms of sociation), the greater are the opportunities for refined individuality.

If human sociation is "*conditioned* by the capacity to speak," Simmel suggests, it is also "*shaped* by the capacity to be silent" (1950: 349 fn.). Unique patterns of participation produce singular configurations of silence and communication, truth and lie, and construct unique individuals who can only survive in a play of shadow and light. That is how they can protect their distinctive personalities in the midst of this endless play of claims and counterclaims.[1] This endeavor, of course, is not a solitary achievement. One can smoothly navigate this intricate web of affiliations, acquaintances and strangers only when tact and discretion are generalized practices; only if the "ideal sphere [that] lies around every human being" (Ibid.: 321) is collectively respected. In a sense, the "civilizing process," as the changing structure of human affects, has been the expansion of requirements of courtesy, civility and discretion, initially developed for sociable communication among royal courtiers of diverse social origins, to the rest of society (Elias 1939). The distinction between "back-stage" and "front-stage" and the arts of impression management are now nearly universal conditions of sociation (Goffman 1959).

Simmel's web-like conception of social structure and his attention to *social* forms for the constitution of modern individuality has inspired valuable investigations of privacy, often through the influence of symbolic interactionism

[1] On the internal tension and instability of "role-sets" associated with particular membership positions and the function of invisibility in organizations see, e.g., Merton (1957).

(e.g., Bates 1964; Fried 1968; Murphy 1984; Post 1989; Rosen 2000; Schoeman 1992; Schwartz 1968). Yet, his emphasis on the interdependence of social forms and *cultural* forms seems to have escaped adequate attention. As the discussion of Luhmann's social systems theory will shortly reveal, functional differentiation of what Simmel calls *cultural forms* is an essential element in proliferation of conflicts of expectations over the meaning and scope of the right to privacy.

Akin to Kant's a priori categories of cognition, cultural forms function as gestalts or templates that make possible the selection of certain elements from the raw material of experience and their retention as recognizably meaningful objects, structures, and events beyond the interaction level. Without objectification of *cultural* forms and their independence from subjective states of individual consciousness, the stability of *social* forms would be impossible. It is only because of the emergence of "self-contained and irreducible worlds of experience" (Levine 1971: xvii) such as economy, art, science, and religion, that one can participate in various momentary or enduring interactions and have confidence in one's interaction partners to accomplish the task at hand with little personal knowledge about them (Simmel 1950: 319).

The autonomy of cultural forms involves a "fundamental circularity" (Levine 1971: xxxiii). Legal precepts are only valid in relation to other legal precepts; scientific propositions are valid only by reference to other scientific propositions, etc. Each social world is "equally valid as a way of organizing *all* contents of life," (emphasis added) and thus able to construct a world "fundamentally discrete and incommensurable" with others (Ibid.: xvii). Each provides a distinct way of constructing social reality, an equally plausible way of

selecting and connecting social communications. Thus, in making sense of action and experience the individual is not merely torn between one-tracked and monopolistic claims of particular groups in which she participates, but also, and perhaps more importantly, between relentless and incommensurable claims of different worlds of economy, politics, law, art, religion, etc. Modern individuality is predicated not only on unique patterns of group-affiliation but also on unique situational arrangements of these incommensurable worlds by each individual in making sense of actions and experiences deemed private.

Niklas Luhmann's social systems theory is perhaps the most ambitious attempt to date to examine the structure of such incommensurable worlds of communication and the dynamics of mutual attraction and repulsion among them. His account of the multi-functionality of the institution of rights provides a ground for understanding the right to privacy as a principle of social inclusion and a loose coupling of differentiated worlds of communication.

IV: LUHMANN: FUNCTIONAL DIFFERENTIATION AND PRIVACY

Like Simmel, Luhmann conceives social systems to exist *only* in communication. They emerge "as soon as any communication whatsoever takes place among individuals" (1982: 70). Therefore, communication, even the most fleeting, occurs *only* in social systems. In other words, social systems are communication systems. The systemic nature of sociation and communication is grounded in the fact that the social world always offers more possibilities for communication than any sociation can successfully exploit; the horizon of possible meanings is always broader than any communication can actualize. Thus, all social communications

require a principle for self-selection and boundary-formation that selects and retains *only* a subset of communications among all possibilities; a standard that can set it apart from its environment.

The process of socio-cultural evolution has involved differentiation of principles of selection and retention of communication in three *types* of social systems: *interaction systems,*[1] *societal systems,*[2] and *organizations.*[3] In archaic societies, interaction, organization and society are "structurally interwoven and mutually restricting" (Luhmann 1982: 77). A tribe consists of interactions reciprocally accessible to all individual members, who, like members of an organization, can be both expelled and recruited. In modern society, however, no single organization can assume the function of a societal system, nor can the latter be sustained merely through interactions. While societal systems and organizations cannot exist without interaction, a gulf has emerged between the

[1] Interaction systems emerge among mutually perceiving individuals. Personal presence is the principle of selection and boundary-formation in interaction systems. Greatly time-dependent, interaction systems have little capacity for internal differentiation. They constantly emerge and dissolve, e.g., a line at the box office, a dinner party, or a mass demonstration. Yet, due to the constitutive role of perception, compared to other systems, interaction systems absorb more complex information at a faster pace. The ability to perceive being perceived by the other provides interaction partners with more security about the commonality of exchanged information, albeit at the cost of less analytic precision and perhaps incommunicability (Luhmann 1995a: 412-415).

[2] Societal systems are composed of all reciprocally accessible communications. They extend the horizon of meaningful experience and action beyond particular times and spaces. Temporal persistence allows for system differentiation and emergence of symbolically generalized media of communication that facilitate connectivity of communications, e.g., money for the economy, power for politics, truth for science, and faith for religion.

[3] Organizations, irreducible to either interaction or societal systems, are based on specific criteria for membership, practices, and procedures. Organizations localize and connect decisions that are important for the operation of societal systems. Thus, firms, companies and banks localize decisions within the otherwise unstructured space of market transactions. The same can be said for the relation between governments, interest groups, and parties in relation to the political system or kindergartens, schools, and universities with respect to the education system. See Nassehi (2005: 188).

ethics of face-to-face interaction and the requirements of communication in organizations and societal systems.[1]

This rift between types of social systems allows each type to emerge and operate beyond the communicative requirements of the other two. Interactions no longer need to implement the programmes of organizations or abide by societal expectations; society continues its operations as innumerable interaction systems and organizations come into being and dissolve; and organizations stabilize highly improbable modes of organized behaviour among their members without their consensus or moral commitment. This leads to increasing variation in modes of intimacy, on the one hand, and increasing concern with alienation and reification, on the other (Luhmann 1982: 78-79).

Differentiation of system types is enormously enhanced in modern society by the *functional* differentiation of *forms* of societal systems with no semantic hierarchy among them. Independent from complementary definitions of other systems, each societal system organizes its own boundaries and determines its own mode of inclusion and exclusion.[2] The political system no longer relies on divine justification; nor does religion demand allegiance by the sword; neither can set the frame of reference for economy, art, or science. While communications of one system can induce reactions in another, there is no direct input/output or causal relation among them. Information cannot cross system boundaries and keep its meaning and selective potential intact (Nobles and Schiff 2006: 216-217).

[1] On the disjuncture between the social order and interaction order see, e.g., Blumer (1969); Goffman (1983); Rawls (1987).

[2] Bourdieu (1986) takes note of a similar relation between different forms of capital. While fungible, it takes time and effort to transform economic capital to cultural or social capital and vice versa.

Thus, unmoved by scientific discoveries, religion can continue to propagate creationism; and, deaf to religious categories, law can protect practices subject to eternal damnation. In short, each system continues to provide an equally valid account of social reality and an equally plausible "vocabulary of motives" (Mills 1963) despite contrary claims.[1]

By virtue of its self-reference, or "fundamental circularity" (Levine 1971: xxxiii), each system can cast the *entire* world in its own image. Preoccupied with this novel characteristic of modern society, classical theorists of bourgeois society, such as Hobbes, Kant, Marx, and Kelsen, tried to study society from the perspective of a single system, respectively, politics, knowledge, economy, and law (Luhmann 1982: 256). Yet, despite their monopolistic tendencies, no single system is able to steer the society as a whole. No system can assume the function of another system or organize the entire society along a chain of means and ends. The reason is not flawed plans, imperfect execution, or unintended consequences, but the self-referential character of social systems and the divergent principles of selection and retention of communication among them (Luhmann 1997b). Rather than harmony and stability, or domination and centralized control, functional differentiation is prone to "increasing improbability of institutional arrangements and eventually…a greater degree of malfunctioning, anomie, alienation, apathy, fanaticism, etc" (Luhmann 1996: 34).

[1] The incommensurability of meanings generated by different societal systems can partly explain the increasing primacy of system-specific "situated accounts" over conceptual narratives which reach beyond the practice at hand. See Rawls and David (2005). Sunstein (1995) speaks to the same phenomenon in his defense of "incompletely theorized agreements" in response to constitutional conflicts, i.e., agreement on constitutional practices rather than constitutional theories.

Variously described as the postmodern condition, late capitalism, high, reflexive, or liquid modernity (e.g., Bauman 2000; Beck et al.1994; Jameson 1991; Lyotard 1984), the availability of a plurality of descriptions of society within society dates back at least to pre-revolutionary France.[1] The response to the question: "who is specially authorized to speak on behalf of society?" has long been: "many and therefore no one" (Luhmann 1987: 103).

What makes problematic one's control over the scope of one's communication is exactly this condition: the self-referential character of communication systems and plurality of system-references for each action and event. What is "in" for interaction systems is "out" for organizations; what is "in" for the economy is "out" for politics, etc. A competent conversationalist may be an inept CEO; and a clumsy politician a shrewd investor. Divergence of selection and retention principles among communication systems requires system-specific communicative competence for participation in each.[2] Money can no longer buy salvation or political office; one has to have faith and stand for election; political expediency is currency in legislation, but corruption in adjudication and scientific inquiry.

Privacy conflicts, this paper contends, arise when communication within one system is made relevant, arguably without justification, in selection and retention of communication in another, e.g., when extra-marital affairs become thematic in evaluation of professional competence; health conditions become

[1] "In France, for example, the monarch calls himself the nation; the parliament call themselves the nation; the nobility calls itself the nation; the nation only can't say what it is, nor even if it is. Waiting for this point to be clarified, everything stays confused; everything serves as material for claims and disputes" (Linguet 1778: 13) in Luhmann (1987: 103).

[2] Collins (2000) provides a similar account of situational stratification and the limits of traditional hierarchical models of social communication.

relevant to securing a bank loan; sexual orientations become relevant to employment, housing, or education, etc. The private nature of information is not determined by its content, i.e., whether it contains secrets, embarrassing or confidential information, or merely trivial daily transactions; rather, by its relevance to a particular communication system and the scope of the social networks within which it occurs.[1] Conflicts over the concrete meaning of the right to privacy in particular situations are conflicts over the system-reference of communication.

V: SOCIETAL FUNCTIONS OF PRIVACY

Like other fundamental rights, the right to privacy emerges as a result of institutionalization of certain spheres of individual experience and action alongside and separate from the stratified order. In fact, a "radical privatization," i.e., leaving decisions regarding property, office-holding, ultimate belief, marriage etc., to each individual "was a precondition for the transition to a society differentiated primarily along functional lines" (Luhmann 1982: 129).

> Only in this way could functional sectors for religion, politics, economics, and family life become more clearly compartmentalized than before, and their mutual connections left up to private role-management. Only in this way was it possible to undercut the old stratified or feudal ascription of entire person or household to specific subsystems of society…And only in this way was it possible in a relatively short span of time (that is, with relative independence from demographic developments) to reach that degree in size in single sectors necessary for a functionally differentiated social system. (Luhmann 1982: 129)

[1] For social network analyses of privacy see, e.g., Nissenbaum (2004); Strahilevitz (2005).

The societal function of privacy, however, is not limited to the origin of functional differentiation. Quite the contrary, the right to privacy remains indispensible for the continued operation of functionally differentiated systems. If initially privacy shielded functional differentiation against stratification; today it is the excesses of functionally differentiated and self-referential systems that make privacy a prerequisite for successful social communication.

As mentioned above, functional differentiation makes seamless transmission of information across types and forms of communication systems impossible. Equally impossible, of course, is the total disjunction of all communication systems. Interactions can only take place against societal backgrounds, and society would be impossible if there were no interactions. The economic system cannot fully function without the laws of contract and property, and the political system cannot do without the mass media and opinion polls. Nonetheless, "a highly complex society must limit itself to making possible, in a very loose and general sense, the *compatibility* of the disparate functions and structures of all its subsidiary units or parts" (Luhmann 1982: 79).

The right to privacy provides a principle for such loose compatibility. It functions as a form of structural coupling between the individual psyche, on the one hand, and social systems, on the other, whereby individuals can count on a private/public distinction specific to each social system and employ that in their interactions. A generalized normative expectation of privacy facilitates communication in various social systems and allows one, for example, reasonably to expect inquiry about one's medical history to be part of the admission process in a hospital but off limits in a job interview; mandatory drug-testing to be part of

professional sports competition and off limits in applying for a passport or ordinary drivers' license.

The right to privacy also functions as a form of structural coupling between different social systems, whereby one system can take into account the meaning of a particular communication and its possibility of selection upon re-use in another system, and rely on that for its own routine operations.[1] Thus, legislation is drafted taking into account possible constitutional challenges by the legal system on privacy grounds; news and entertainment are produced taking into account possible litigation by real or legal persons; scientific research is conducted and disseminated taking into account research protocols regarding human subjects, etc. In addition to constitutional and statutory protections of privacy, innumerable privacy guidelines have emerged in organizational settings to facilitate the flow of information and minimize the risk of lawsuits for potential breach of privacy.[2]

Of course, the right to privacy cannot fix the boundaries of social systems once and for all. Nor can it guarantee compliance and social integration. The structural drift of social communication and constant innovation in dissemination media continually alter the reach of communication systems and occasion new tensions between them, hence increasing conflicts over the proper boundaries of the right to privacy. Yet, as a point of restricted mutual irritation between different communication systems, privacy can produce a degree of stability in their

[1] For a lucid account of structural coupling see Nobles and Schiff (2006: 216-221).

[2] A recent case in point is the voluntary sealing of non-criminal mental health records by the Ontario police as of August 2011. According to the new guideline, such information is no longer made available upon routine background checks for employment, i.e., without specific request by the employer and obtained consent of the applicant. See, *The Globe and Mail* (July 25, 2011).

relationships without presupposing shared meanings or causal relations. Legal protection of privacy absorbs the risk of its factual violation and facilitates communication between interaction partners despite increasing uncertainty about implications of storage and future release of information.

Privacy forms part of the common background of schematized contingency that provides entrance and exit rules for otherwise unlikely interaction partners to navigate increasingly complex networks of social communication. By reducing the degrees of freedom in each system (i.e., through limiting what can be communicated in each situation), the right to privacy facilitates intelligibility and enhances the overall variety and complexity of social communication. This protects the modern individual in constructing a personality that no longer coincides with any particular social role; it also maintains the functional differentiation of communication systems that have lost all grounds for justification save the continuation of their own operations.

As a constitutionally guaranteed right, privacy is a self-limitation of politics. It prohibits the political system from interfering in legally recognized private spheres and unburdens politics from decision-making on a wide range of issues, which could only be implemented through crude coercive measures (Verschraegen 2002: 272). Moreover, by protecting a zone of individual action and experience, the right to privacy limits the communicative reach of all social systems and prevents them from determining an ultimate frame of reference for communication in that zone.

Privacy of intimate relations, for example, relieves the political system from surveillance of populations in their homes and inquiry as to the nature of

most of their intimate relations. At the same time, it limits legally sanctioned interventions of religion into such matters and relieves it from identifying and persecuting "sinners." Likewise, the economic, educational and health systems are both prevented and relieved from conditioning their communication selections on individual decisions with respect to most intimate relations. Decisions on intimate relations are rendered irrelevant not only in receiving equal protection of the law against unwarranted search and seizure, but also in access to employment, housing, education, healthcare, etc.

Constitutional claims to privacy are often interwoven with claims to equality because, despite the heterogeneity and partiality of social inclusion in modern society, exclusion continues to have contagious and totalizing effects (Luhmann 2004: 489). While opportunities provided by inclusion in one system *may* lead to further advantages, exclusion from one societal system *will* prevent inclusion in some others. People without fixed address cannot vote; criminal conviction puts some career options forever beyond one's reach, etc. In constitutional states, individuals are expected to be free to decide the meaning of action and experience that falls within a "zone of privacy;"[1] and they expect equal protection of the law regardless of such decisions. Here, the right to equality functions as a "principle of *selective indifference.*" It ensures that in the process of inclusion only "relevant features or inequalities" are considered and not others (Verschraegen 2002: 278). Exclusion or unequal treatment in each case is

[1] *Griswold v. Connecticut*, 381 U.S. 479 (1965).

expected to be justified with reference to the function of the social system in question, not with reference to other criteria.[1]

The degree to which such expectations are met is, of course, another question, as indicated by continued privacy conflicts and the sporadic character of legal responses to them. Like other laws, those concerning privacy can structure expectations; they cannot determine behaviour. Nonetheless, continued operations of modern society require the relative temporal stability of privacy expectations, even if they are not consistently met. Constitutional and statutory protections of privacy and innumerable organizational privacy policies produce a web of structural couplings between communication systems for regulation and facilitation of communication flows. They also produce a generalized confidence that societal systems, though not necessarily all interaction partners, take the right to privacy into account in their selection and connection of communication;[2] that certain information, even if brought to light, will be treated as private, i.e., without connective value in access to societal systems. More importantly, they promise the possibility of legal redress in case of privacy violations. As long as generalized expectations of legal protection for the right to privacy persist, many blatant violations of privacy and inconsistencies in adjudication can be endured. This seems to have been the story of the expansion and contraction of the right to privacy throughout the world.

[1] Walzer's (1983) notion of complex equality speaks to the same phenomenon, i.e., the uniqueness of norms of justice in different distributive spheres and the injustice of distributing goods in one sphere according to standards of another.

[2] On the precarious balance between familiarity, confidence and trust in modern society see Luhmann (2000).

VI: PARADOXES OF PRIVACY: A BRIEF SKETCH

While privacy problems are recognizable across national boundaries, responses to them vary. The former is due to the potentially global reach of functionally differentiated societal systems that make available identical forms of selecting and connecting communications across national borders; the latter is due to local variations in legal and political systems and enforcement mechanisms. Of course, inconsistencies in privacy protection abound even within the same legal system.[1]

Recognition of privacy as a fundamental human right by the United Nations (1948) and the European Convention on Human Rights (1950), and increasing trans-border dissemination of personal information has increased attempts at harmonization of privacy protections around the world (Bignami 2007; Markesinis et al. 2004; Regan 1993; Solove, 2009; Whitman 2004). While predictions of either isomorphism or heterogeneity in responding to privacy conflicts are unwarranted, one can safely predict privacy conflicts are here to stay.

In Continental Europe, until well into the twentieth century privacy, together with other norms of "respect," "honor," and "dignity" was, in practice, the privilege of persons of high social status. Today, however, as the result of a long process of "leveling up" everyone expects legal protection for their public face, as everyone is expected to have one worth protecting. Ironically, the guillotine was among the first revolutionary symbols that expanded aristocratic

[1] Understanding privacy as dignity is said to have made continental law more restrictive of collection and dissemination of consumer data, credit reports, and criminal back-ground checks. Yet, the State can interfere with the naming of children by their parents. In Germany everyone must be formally registered with the police and phones are tapped at a much higher rate than the U.S. See Whitman (2004). Association of privacy with liberty and property in the U.S. has had both expansive and limiting implications for privacy. See Cloud (1996).

privileges of honor and respect to the rest of the population (Whitman 2004: 1173). Since then, privacy conflicts have been understood in terms of a tension between the dignity of private persons and the values of private property and free expression. In the artistic and sexually licentious scene of nineteenth century Paris, the courts repeatedly allowed privacy to trump copyright in disputes between artists and their nude models, on the ground that "one's honor, was not a market commodity" that could be sold once and for all. Rather, the right over the "reproduction of one's image" was a "sacred and inalienable right;" and one always retained the right to withdraw consent regarding its publication (Ibid.: 1176-7). Tolerance for public nudity and stronger restrictions on collection and dissemination of consumer and financial records in Continental Europe are rooted in a legal tradition that prevents fixing the system-reference for "one's public image," be it in economy, mass media, religion, morality, or art.

In the U.S., however, there is little protection against unobtrusive data-collection.[1] In contrast to the European Court of Human Rights, the U.S. courts recognize a "reasonable expectation of privacy,"[2] only if the information is secret

[1] In this respect Canada seems closer to Europe. Quebec was the first province to adopt private-sector privacy legislation, in 1994, requiring corporations to have a "serious and legitimate reason" to collect information about individuals and to keep such information confidential. In the same vein, the Personal Information Protection and Electronic Documents Act (PIPEDA) was adopted in 2000 to regulate collection, use and disclosure of personal information by federally regulated private sector, such as banks, airlines and telecommunication companies. This was later extended to the retail sector.

[2] The legal origin of the phrase is *Katz v. United States* (1967), which involved the wiretapping by the FBI of a public pay phone booth used to transmit illegal gambling wagers by Katz. Upon conviction, Katz argued the admission of those recordings as evidence violated his Fourth Amendment rights to be protected against unreasonable search and seizure. In a 7 to 1 decision, the Supreme Court agreed. Justice Harlan's two-pronged test for determining the existence of a privacy right has set the stage for further adjudication of privacy conflicts ever since. The test requires both the exhibition by the individual of an "actual (subjective) expectation of privacy," and readiness by society to recognize that expectation as "(objectively) reasonable." Four decades earlier, in *Olmstead v. United States* (1928), the Court in a 5-4 decision had denied any violation

or its collection involves intrusion into private space.[1] According to the prevalent "third-party doctrine," information already known to a third party is not protected by the Fourth Amendment prohibition of unreasonable search and seizure;[2] hence increasing concerns in the U.S. over public surveillance and commodification of personal data (see, e.g., Cohen 2000; Froomkin 2000; Litman 2000; Samuelson 2000; Schwartz 2004). No longer kept in check by the moral judgment of the majority or the balance of political power, the mass media operate only based on their own criteria for producing news and entertainment. This seems to have left public figures of our time with the least protection against insults, rumors, and intrusions of mass media into their lives (Friedman 2007).

In the 1970s and 1980s, rapid technological change in dissemination media and increasing capacity for surveillance, data collection, storage and dissemination inspired comparable privacy regulations in Europe, Canada and the United States.[3] Today, however, protection of information privacy in Europe and

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of the Fourth and Fifth Amendments by admitting evidence in criminal procedures obtained through wiretapping.

[1] In *Peck v. United Kingdom* [2003] ECHR 44 (2003), the European Court of Human Rights (ECHR) awarded a man damages for the public disclosure of surveillance camera footage of his attempted suicide on a street. See Solove (2009: 195). In contrast, in *Sipple v. Chronicle Publishing Co.*, 201 Cal. Rptr. 665 (Ct. App. 1984), where newspapers "outed" Sipple, who had saved President Ford from an assassination attempt in San Francisco in 1975, the Court declared that Sipple's homosexuality was not private because it was well-known to the gay community. Sipple, whose family knew nothing about his California life, eventually committed suicide. See Rosen (2000:48).

[2] *United States v. Miller*, 425 U.S. 435 (1976) and *Smith v. Maryland*, 442 U.S. 735 (1979) are leading cases for the third-party doctrine, whereby the Court rejected customers' expectation of privacy with respect to their financial records kept by banks or the destination of their phone calls recorded by phone companies. For recent arguments for and against the third party doctrine see Kerr (2009) and Solove (2009).

[3] The Privacy Act (1974) established guidelines for collection, use and disclosure of personal information by the U.S. federal agencies and gave the individuals the right to access personal information held by them. Similar measures were put in place in Canada by the Privacy Act (1983). In 1980, Organization for Economic Cooperation and Development (OECD) issued guidelines for protection of privacy and trans-border flow of personal information. The EU Data Protection Directive (1981) obliged member states to enact legislation regulating processing and

the U.S. is noticeably different. Since 2001, in the name of anti-terrorism, the U.S. government has engaged in numerous data-mining programs that combine extensive information about individuals from phone and digital communication records to financial, health, educational and other information in search of patterns of so-called suspicious behaviour.[1] Violating E.U. privacy protection standards, such measures have created barriers to information exchange across the Atlantic (Bignami 2007; Solove 2009).[2]

Over the last century new zones of privacy and new areas of legal intervention into previously considered private zones have emerged side by side. Today, in many western countries privacy of intimate relations is recognized alongside the actionability of marital rape, child neglect, and child abuse. On the one hand, privacy protection in certain decisions has expanded beyond white, heterosexual, sound-minded males of the propertied classes; on the other hand, the upper classes seem to have lost much of their earlier privilege regarding informational privacy. The decreasing role of the household as a primary vehicle for social inclusion,[3] and further differentiation of societal systems have given rise

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secondary use of personal information. Prior to the Human Rights Act (1998), the English common law did not recognize a right or tort of privacy. By incorporating the European Convention on Human Rights (1950), the Act, for the first time, provided explicit protection for private life and required the judiciary to respect the rights protected in the Convention in developing the common law. On the slow and uneasy development of English privacy laws see Markesinis et al. (2004).

[1] Bignami (2007) explains this divergence by different enforcement mechanisms, i.e., individual litigants in the U.S., and independent privacy agencies in Europe; the rise of executive power in the U.S. compared to increasing checks on the power of European governments by the EU; and the still fresh European memory of Nazi experience. The function of Canada Privacy Commissioner seems to bring Canada closer to Europe.

[2] In 1968 in the U.S. wiretapping was authorized for only twenty-six crimes. In 1996 the number was ninety-five (Rosen 2000: 37), and likely more today.

[3] The delay in women's enjoyment of equal rights has been considered a result of women's subordination in and through the family. In fact, until the 1970s domestic violence against women

to growing concern for the protection of individuals as psychic and biological systems against not only politics but also family, science, and religion, and increasingly the mass media.[1]

VII: SELF-REFERENCE: THREAT *AND* SAFE-GUARD

Threats to privacy and safe-guards for its protections are often understood as located in two different realms, i.e., differential access to technology by parties with conflicting interests, on the one hand, and moral evaluation of these interests, on the other. Therefore, the search for resolution of privacy conflicts tends to begin and/or end with a moral position concerning the proper balance between relative values of various goods, e.g., anonymity vs. security, security vs. civic and political participation, free self-development vs. promotion of communitarian ideals, etc. (e.g., Bloustein 1964; Etzioni 1999; Gavison 1980; Reiman 1976; Schoeman 1992; Solove 2009). While moral arguments can generate moral responses, they seem to have little bearing either on the self-referential operations of other societal systems or judicial responses to conflicts that arise as the result of their operations; hence the continuous critique, especially in the U.S., against judicial responses to privacy conflicts.

If technological changes that make personal control over private information problematic are not reduced to changes in *dissemination* media and

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was shielded by the law in the name of privacy of the family and harmony of domestic life. See Siegel (1996, 2002).

[1] This, of course, has been far from a steady and incremental process. Until the 1970s, eugenic programmes involving forced sterilization of the institutionalized mentally ill were operating in many countries (Scott 1986); German gas chambers were used to exterminate the physically and mentally handicapped before the Jews; Aboriginal children were forcibly removed from their homes in Canada and the U.S, etc.; conflict over abortion, homosexuality, recreational drug use and voluntary euthanasia continues.

processing software, but seen as indicative of increasing differentiation of *communication* media, such as money, power, truth, and faith, the terrain shifts significantly. Then one can see the ground of both threats to and protections of privacy in the same phenomenon: the self-referential character of functionally differentiated communication systems. Without functional differentiation of societal systems, and thus a generalized normative expectation of partial inclusion in them, claims-making in terms of privacy would be unthinkable (as in totalitarian regimes and to some extent in stratified societies). It is the self-referential character of communication in functionally differentiated systems that gives rise to the expectation of privacy. Yet, it is this very self-reference that seems to threaten privacy the most. In collecting information to detect "security threats" or "investment risks and opportunities" the political and economic systems see no limit, nor do the mass media in producing "news" and "entertainment." To one with only a hammer, everything looks like a nail!

The question is how such information collection and processing becomes problematic; and how such conflicts can be settled in the absence of common moral values in modern society. The answer lies in the relevance of communication to the function of the system in question; the indeterminate yet determinable system-reference of communication. For example, if one is free to rent videos of various contents, how can access to employment, housing, adoption services or the like be made dependent on such information? How can what is observed as "taste" in entertainment be translated into a measure of professional

competence, neighbourly conduct, or responsible parenting?[1] The contention here is that privacy conflicts arise when such translations fail. Proliferation of legislation and guidelines concerning collection, disclosure and secondary use of personal information around the globe does not reflect growing moral consensus on the value of certain activities for the free development of individual personality or the public good. Rather, they suggest the increasing impossibility of such agreements.[2] While convergence of such moral evaluations is unlikely, modern society has come a long way toward compartmentalization of these spheres of communication, and so has the legal system.

In addition to the State, today corporations and the mass media are perceived as serious threats to privacy in their own right. Nonetheless, the mass media may be among the most important generators of a generalized expectation of privacy around the world! Despite the infancy of privacy protection in many countries and legally sanctioned violations of privacy in authoritarian regimes, the global reach of societal communication seems enough to generate and sustain normative expectations of privacy despite their factual violation.[3]

We may have left the nineteenth century world of secrecy and prudery, the world of "closed doors and drawn blinds" for a world of "one-way mirrors" and

[1] It is interesting to note that the Video Privacy Protection Act (1988) in the U.S. was enacted after Robert Bork's video rental history became an item of debate during his Supreme Court nomination. The Act prohibits disclosure of video rental and sale records outside the ordinary course of business.

[2] Torts of public disclosure and regulations for data collection and processing are in place in many countries such as Argentina, Australia, Canada, members of the European Union, Japan, Mexico, New Zealand, South Korea, and the U.S. See Solove (2009).

[3] That is how legally persecuted homosexuals and women forced to marry or denied divorce in Iran risk the flight to seek refuge in the west.

"all-seeing eyes" (Friedman 2007: 272).[1] We may "get over" the fact that the possibility of secrecy for individuals is rapidly vanishing.[2] But equal access to functionally differentiated societal systems and "zero privacy" are irreconcilable normative expectations. In fact, as more decisions are left to individuals' discretion, and as information about those decisions is made increasingly available to others' fingertips, expectations of equal access to societal systems generate more conflicts over selective indifference towards specific communications.[3] Meanwhile, the more robust are the safe-guards for the protection of privacy in certain decisions, the less secretive the decision may become, as has been the case with political and religious beliefs, contraception, abortion, and homosexuality. That might explain the apparently widespread blasé attitude toward unforeseeable consequences of cyberspace transactions and public surveillance, on the one hand, and heightened sensitivity to individual rights to make personal decisions, on the other.

CONCLUSION

Modern society is marked by diverging principles of selection and retention between communication systems and absence of a semantic hierarchy among them. Neither the social inclusion of individuals in communication systems nor the ultimate frame of reference for all communications can be determined once

[1] Latest face-recognition technologies may soon allow anyone with a smart phone not only to identify strangers on the street but also to access much of their personal information.
[2] Allusion to the CEO of Sun Microsystems Inc., Scott McNeal, who has reportedly said: "You have zero privacy. Get over it." See Froomkin (2000: 1462).
[3] Strahilevitz (2008) celebrates increasing availability of criminal background checks as a safe-guard against "statistical discrimination" and thus an enhancement of employment opportunities for some African Americans. For a counter-argument in terms of rehabilitation opportunities for ex-offenders see Solove (2003).

and for all. Thus, communication and partial inclusion in each social system require a principle for selective indifference towards irrelevant communications. As the increasing capacity for collection, storage, and combination of information diminishes our ability to both forget the past and filter out alternative presents, carving a zone of privacy for the individual provides the temporary amnesia necessary both for individuals to navigate this complex labyrinth of competing meanings and for functionally differentiated communication systems to continue their operations amidst the noise of other systems.

Without a generalized expectation of a zone of individual action and experience beyond the dictates of any societal system, without a disjuncture between interaction systems, organizations, and societal systems, the overwhelming complexity of communication would bring routine operations of functionally differentiated communication systems to a halt. While there may be functional equivalents to privacy, as indicated by appeals to liberty, equality, and autonomy, modern society cannot do away with privacy's multiple functions and keep its own self-destructive tendencies toward de-differentiation at bay. In the midst of contemporary complexities, privacy may be a canary in the mine.

LINKING SECTION

Chapter Two offered a theory of privacy as a structural coupling between functionally differentiated social systems. It argued that privacy conflicts arise when justification for making communication within one system a premise of selection and retention of communication in another system is found wanting, and proposed to examine such conflicts as boundary tensions among social systems.

The next chapter examines the United States Supreme Court's response to two such conflicts in judicial review of legislation concerning abortion and homosexuality. In the absence of explicit constitutional guarantee and in the context of a doctrinal divide on the bench between originalism and living constitutionalism, inconsistencies and contradictions in the Court's rulings are often understood in terms of extra-legal influences on Justices' decisions. The question is whether and how the Court has responded to such morally charged disputes in its environment, without compromising the normative closure of the legal system.

Analysis of the Court's opinions demonstrates the normative closure of the legal system throughout. Legal communications from all sides of the bench are fully self-referential. The uneasy, and yet, complementary relation between originalism and living constitutionalism is discussed. Attention is drawn to the fruitfulness of investigation of their functional equivalents round the world.

CHAPTER III

NORMATIVE CLOSURE:

FROM JUDICIAL BEHAVIOUR TO JURISPRUDENCE

Abstract:

Re-formulating judicial review in systems theoretic terms, this essay demonstrates the normative closure of the legal system through examination of the U.S. Supreme Court's jurisprudence on abortion and homosexuality. Originalism and living constitutionalism appear as complementary communicative strategies for self-referential reproduction of the legal system. A case is made for further sociological analysis of jurisprudence at the level of world society.

In his appraisal of the state of scholarship in socio-legal studies, Richard Abel concluded:

> Social studies of law have reached a critical point in their development. The original paradigm is exhausted. Until new ones are constructed, scholarship will be condemned to spin its wheels, adding minor refinements to accepted truths, repeating conventional arguments in unresolvable debates. The source of this paralysis is that socio-legal studies have borrowed most of their research questions from the object of study—the legal system (whose problems are defined by legal officials)—and from those who studied it first—legal scholars (themselves lawyers). (1980: 826)

After three decades, Abel's characterization of the field, at least with respect to socio-legal investigations of judicial review, still rings true. As jurisprudential

debates over judicial review continue, socio-legal studies seem to have been mostly limited to attempts at substantiating various claims of legal scholarship.

Against this backdrop, this essay draws on social systems theory and its conception of law as a functionally differentiated and normatively closed communication system to construct these legal episodes in sociological terms and propose a previously lacking framework for their resolution in terms of reduction of complexity in law and its environment.

Part I provides a brief account of the socio-legal debate on judicial review. Part II formulates judicial review in systems theoretic terms and explains the empirical suitability of the Supreme Court's jurisprudence on abortion and homosexuality for investigating the interplay between law and morality in adjudication. Part III describes the analytic strategy. Part IV provides a brief account of the multiple functions of equality and privacy underlying such disputes. Part V examines the Court's jurisprudence in terms of social inclusion and legal validity and discusses the uneasy and complementary relation between originalism and living constitutionalism. Part VI discusses the role of the Court and judicial review at the juncture of operations of law and politics. Part VII demonstrates how the normative closure of the legal system is maintained by both doctrines, and calls for a comparative historical investigation of evolution of doctrines of constitutional interpretation at the level of world society.

I: THE SUPREME COURT AND SOCIO-LEGAL STUDIES

The Judiciary Act of 1789 established a system of independent federal courts and vested the judicial power of the United States in one Supreme Court. In 1803,[1] the Court for the first time used this power to declare an act of Congress unconstitutional and thereby established its judicial oversight over legislative and administrative action.[2] Since then American jurisprudence has grappled with the legitimate foundation, proper scope, and actual exercise of power by the Supreme Court, an unelected and unaccountable body, over representative government.[3] Socio-legal studies seem to have mostly followed suit.

In the early twentieth century, adoption of the substantive due process doctrine[4] by the Court and the rise of Legal Realism[5] in American jurisprudence

[1] *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). Marbury had been appointed Justice of Peace by John Adams before the latter's presidential electoral defeat by Thomas Jefferson. Upon withholding of his commission by James Madison, Jefferson's Secretary of State, Marbury petitioned the Court to force delivery of his commission. The Court acknowledged a violation of the law, but denied relief by holding the section of the Judiciary Act of 1789, on which the petition was based, unconstitutional. The Court thus established its power of judicial review by denying Congress the right to extend the Court's jurisdiction beyond what was initially determined by the Constitution!

[2] Judicial review has a more ancient root in the English practice of reviewing corporate bylaws to ensure they are not "repugnant" to the laws of England. This practice was extended to American colonies in as much as some colonial legislatures were merely directorates of chartered trading companies. In a sense, the Judiciary Act only shifted the reference for "repugnancy" from the laws of England to the American Constitution. For a short historiography see Bilder (2008).

[3] Often the debate is cast in terms of questions of democracy, popular sovereignty, separation of powers, and the counter-majoritarian role of the Court. See, e.g., Barkow (2002); Berger (1977); Brown (1943); Corwin (1910, 1911); Dworkin (1977; 1990); Ely (1980); Goldstein (1986, 1987); Harel (2003); Hutchinson and Wakefield (1982); Jaffe (1958a, 1958b); Rakove (1997); Rostow (1952); Shapiro (1994); Stephenson (2003); Tribe (1983); Tushnet (1999, 2008).

[4] The Fifth and Fourteenth Amendments prohibit the national government and the states from depriving any person of "life, liberty, or property without due process of law." The doctrine of 'substantive due process' extended the power of judicial review from oversight of procedures to approval of contents of legislation, mostly regarding unenumerated rights. The doctrine was used during the Lochner era (1897-1937) to strike down labour laws in the name of freedom of contract.

[5] Various strands of Legal Realism emphasize the indeterminacy of the law. Rejecting natural law and positivist assumptions about fixed and pre-existing rules, they highlight the law-making aspect of adjudication, albeit to different degrees. Judicial outcomes of disputes are seen as determined, not by logical deductions of formalist and textualist jurisprudence, but by pragmatic and

augmented emphasis on the political rather than judicial function of the Court. In tune with Legal Realism, since the 1950s political scientific investigations of judicial review have mostly disregarded the difference between *political* and *judicial* decision-making and primarily focused on identifying and measuring extra-legal determinants of judicial behaviour.[1]

Dahl (1957) is regarded as a major precursor of the political approach to the Court, with one qualification: his (1961) emphasis on the distinction between predicting individual behaviour and explaining operations of social systems was lost to the behavioural and some rational-choice theoretic approaches that became cornerstones of political scientific research on the Court. The success of such studies in predicting Justices' votes cast aside concern for more adequate analysis of adjudication as a social phenomenon. As a result, many important aspects of the judicial process were left unexplored (Clayton and Gillman 1999; Smith 1988; Whittington 2000).

In recent years, and perhaps in accord with greater emphasis in legal scholarship on the constitutive, rather than instrumental, role of law, a variety of new institutionalist approaches to adjudication have tried to "bring the law back in." Such investigations have drawn attention to the role of institutional norms, procedures and missions as endogenous variables in guiding and limiting

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instrumentalist evaluation of anticipated social outcomes. See, e.g., Cardozo (1921); Holmes (1897); Llewellyn (1931); Pound (1931).

[1] Judicial decision-making is examined in relation to variety of extra-legal factors such as Justices' party affiliations, ideological commitments, and attitudes (Lim 2000; Romero 2000; Segal and Cover1989; Segal and Spaeth 1993); strategic decision making and panel composition (Cross and Nelson 2001; Johnson et al. 2005; Lindquist et al. 2007); public opinion, congressional balance of power, and the social status and ideological positions of litigants (George and Epstein 1992; Harvey and Friedman 2006; Howard and Segal 2004; Mishler and Sheehan 1996; Songer and Sheehan1993; Wheeler et al. 1987).

possibilities of meaningful action, and highlighted the role of "jurisprudential regimes" and "argumentation frameworks" in judicial decision-making. (see Gillman 2006; Marlowe 2011; Richards and Kritzer 2002; Sweet 2002).[1]

Yet, in so far as the primary focus of such studies remains prediction of judicial behaviour, they fall short of a radical break with prevalent behavioural approaches in the field.[2] Jurisprudence is brought back in, but only as one variable among others regulating or coordinating Justices' actions or policy preferences. What is ignored is the significance of jurisprudence in regulating the relation between the law and its environment. This debate has been unmarked by contributions of social systems theory to our understanding of law as a functionally differentiated communication system; the role of the Court in maintaining its normative closure; and the importance of the latter for routine operations of other societal systems in modern society. As the following analysis will reveal, these insights allow for a sociological analysis of jurisprudence in its own right and from the perspective of a theory of modern society.

II: JUDICIAL REVIEW: LAW AT A CROSSROADS

No party to the debate over judicial review denies the law-making capacity of the Court. At issue is whether an irreducibly judicial quality sets such law-making episodes apart from policy-making by the legislature; if there is something in adjudication that differentiates judicial decisions from more or less unrestrained

[1] Jurisprudential regimes are sets of rules, doctrines and tests determining the ruling precedents in evaluating the facts of the case at hand. Argumentation frameworks are discursive structures that frame arguments of the parties to a legal dispute and the court decisions.

[2] On the degree to which behavioural approaches to judicial review, best exemplified in Spaeth and Segal's (1993, 1999) "attitudinal model," can incorporate new institutionalist perspectives see Segal (1999). For an empirical example see Lindquist and Klein (2006).

exercise of power. This essay responds in the positive, but not with reference to the established effects of legal norms on Justices' judicial behaviour.[1] Rather, by reference to the Court's jurisprudence itself. A reminder of the condition of the exercise of judicial power will set us on our way.

Like the legislature, the Court can make and unmake the law. But, unlike the legislature, the Court's exercise of this prerogative is limited to settling cases between adversarial parties. Cases find their ways to the Supreme Court not according to electoral cycles or changes in public opinion (which affect politics), but according to unpredictable conflicts in everyday life and, in case of litigation, procedural mechanisms of the legal system for their resolution. The Court cannot initiate law-making for politically expedient purposes; nor, once a hearing is granted, can it postpone law-making until favorable political conditions are met. It cannot issue advisory opinions, rule on questions the political nature of which is already established,[2] or decide issues it deems "premature" or "moot." In other words, the buffer zone between the Court and its environment is not merely unwavering legal commitments of Justices but the asynchrony between a functionally differentiated legal system and its environment.

Although the Court cannot anticipate which conflicts are litigated and which make their way to the chamber, it is *only* the Court that can determine entitlement to a hearing. Since the passage of the Judiciary Act of 1925, which substantially reduced the range and number of cases over which the Court had

[1] After a decade of quantitative studies confirming the influence of jurisprudential regimes on Justices' decisions, recently the results have been cast in doubt. See Marlowe (2011: 16).
[2] Constitutional Courts in Europe are bound by the same consideration with respect to political questions. See Sweet (2000: 90).

"obligatory appellate jurisdiction," "the Court has exercised almost complete discretion in deciding what cases to accept for review." These comprise only 1 to 2 percent of nearly 7000 petitions that come to it annually (Grossman and Epp 2002: 109-111).[1] Thus, contrary to what critics of so-called judicial activism imply, considering the universe of legislations, the power of judicial review to strike down legislation is used rather infrequently (Howard and Segal 2004).

Not obliged to provide reasons for granting or denying a hearing, in allowing itself to be influenced by one conflict and not another, the Court is sovereign. Thus, the Court can ignore many conflicting claims to legal validity in its environment and continue its operation. However, granting a hearing acknowledges that in response to a particular conflict legality can have more than one answer *within* the legal system.[2] Like "hard cases," such events draw attention to both a disruption of the ordered complexity in the law and the necessity of its reconstitution. On the one hand, "the existing, doubtlessly valid, legal norms applied with logically correct deductive methods do not lead to unequivocal decisions;" on the other, the Court is legally obliged to decide the case lawfully (Luhmann 2004: 281, 287).[3]

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[1] Today the Court's caseload has increased to 10,000 per Term.

[2] These moments are not limited to Supreme Court cases. As Hart (1958: 607) suggests: "Fact situations do not await us neatly labeled, creased, and folded, nor is their legal classification written on them to be simply read off by the judge." Legal reasoning is never reducible to logical deduction from premises to conclusions or empirical induction from evidence to proposition. That is why the domain of law is not a realm of necessity, demonstration, and proof, but one of plausibility, argumentation, and persuasion, albeit with different degrees of symbolic and juridical capital (Bourdieu 1987; Perelman 1963; White 1973, 1985). The focus on Supreme Court cases is primarily because of the Court's obligation to complement its decisional response to such indeterminacies with written opinions; i.e., to observe its own observations. It is at the level of second-order observations that the normative closure of the legal system is produced and maintained. See Introduction.

[3] Hart (1961) and Dworkin (1963, 1975, 2004) have provided two contrasting influential views of adjudication in their discussion of "hard cases." For Hart, in hard cases the law is at least partly

These momentary exposures of the foundational paradox of law, i.e., the unfounded foundation of its binary code,[1] do not necessarily suggest a lag between the law on the books and the living law or a lack of information. Quite the contrary, in many such cases there may be "too much law," an excess of simultaneously plausible, yet contradictory, grounds for decision-making. In fact, as the ultimate court of appeal, the role of the Court is to "suppress law, to choose between two or more laws to impose upon law a hierarchy" (Cover 1983: 53). [2]

However the Court imposes a temporary hierarchy upon the law, a simple decision is not enough. The Court is obliged to provide an account, i.e., legally valid arguments that present the decision as grounded in and governed by the law.[3] While decisions are able to "change the position of the law," it is by means of legal arguments that the legal system seeks to ensure its operations continue "in one direction (and not the other)" (Luhmann 1995b: 286). In other words, the primary function of the Court's jurisprudence is not to "deceive" internal or external observers of the legal system as to the "discovery" rather than "invention" of the law. Rather, it is to tailor the connective capacity of the decision to past and future legal decisions.

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indeterminate and therefore a decision involves a degree of judicial discretion to "make" the law appropriate for the case. For Dworkin, each case has only one correct answer, which is discovered according to antecedent legal principles and collective moral principles of the community, and justified by means of publically accessible reasons. While their accounts of adjudication are radically different, both agree that hard cases cannot be brought under clear rules of law already laid down by statues or precedent.

[1] See Derrida (1992); Luhmann (1988b).

[2] According to Rule 10 of the Supreme Court Rules, application of which is completely discretionary, the following characteristics make a favorable case for a hearing: "undecided and important legal issues; conflicts among the federal courts of appeal; conflicts between a lower court and a prior Supreme Court decision; and lower court decisions that seem to have departed from the accepted and usual course of judicial proceedings" (Grossman and Epp 2002: 114).

[3] The same applies to Constitutional Courts in Europe. See Sweet (2000: 46).

On its own, a *decision* is only a single selection. There is no ground for its retention in future adjudication or connection to past decisions. It is the *opinion* that makes the re-discovery of this selection in past and future cases possible. That is why "what judges say is even more important than how they vote" (Shapiro and Sweet 2002: 98).[1] Each selection from the range of various possibilities requires an account as to why it is selected and how it is to be linked to other legal decisions, i.e., how it is to be understood.[2] In other words, a legal decision, a *first-order* observation of the legal system as to the legal quality of a normative expectation, requires a *second-order* observation to establish its validity by reference to legal communications.

In this *self-observation*, the Court has to exhibit the highest degree of autonomy or normative closure.[3] While the legislature can make contradictory decisions by simply announcing new policy preferences, the Court is bound to adjudicate consistently by reference to established law and its own precedents. Any departure from precedent requires legal, rather than moral or political, justification.

In short, from a systems theoretic perspective, judicial review is an externally induced self-inspection of the law. It is triggered at the juncture of two

[1] Shapiro recognizes the importance of Court opinions, it is the "opinions which provide the constraining directions to the public and private decision makers who determine the 99 per cent of conduct that never reaches the courts." Yet, he still treats opinion writing as a "crucial form of political behaviour" (1968: 39). Notwithstanding the fact that opinion writing, like any other activity, can be analyzed from the perspective of the political system, the goal of the present essay is to recover the legal significance of this function, i.e., its significance for the legal system.

[2] Of course, as the history of the Court's jurisprudence clearly shows, such attempts are never fully successful. In every iteration past judicial decisions are cast in a new horizon; new legal justifications for them are discovered, and new possibilities for connecting them to further decisions are brought to light.

[3] That explains why some opinions are revised a dozen or more times before they are announced.

sets of conflicts: one in the environment of the legal system, between two sets of normative expectations; and another within the law itself, between different ways of identifying the ruling law and applying it to the case. The Court can respond to the former only through the latter. Yet, to date socio-legal studies have failed to analyze judicial review as the juncture of the two. Concerned with social inclusion, the social sciences tend to focus on what the Court does, i.e., its *decision*; preoccupied with normative validity, legal theory engages what the Court says, i.e., its *opinion*.

As a sociology of self-describing systems, social systems theory offers a conceptual apparatus to bridge this divide and examine judicial review as the legal system's external-reference *through* self-reference. This shifts the focus of investigation concerning normative closure, or autonomy, of the law from judicial behaviour to jurisprudence; from the study of individual Justices, their attitudes and competing policy preferences, to the study of various strategies for selection and connection of legal communications.

Undoubtedly, without individual Justices the Court cannot operate. Yet, their interests, thoughts, and commitments remain inconsequential to the judicial process unless expressed in legal communications.[1] Once so communicated, however, they take a life of their own and become evocable in diverse and unexpected contexts, possibly in support of positions and goals radically different from their original contexts and authors' intentions.

The normative closure of law as a functionally differentiated communication system is produced and maintained at the level of second-order

[1] See Nobles and Schiff (2009).

observation; when the law can observe its own observation, set it apart from observations of other social systems, and produce an account of it. Only when that which sets the law apart from other social systems, i.e., the specific forms of its communications, is recognized, can the extent, nature and proper limit of the mutual influence between the law and its environment be adequately examined.

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The Court's jurisprudence on abortion and homosexuality offers a good example for such investigation. As two highly morally charged issues of American law and politics, conflicts over abortion and homosexuality have induced repeated self-inspections in the legal system. Absent explicit protection in the Constitution and in the context of a doctrinal divide in the Court over constitutional interpretation, the Court's response to such conflicts has been inconsistent and contradictory.

Since decriminalizing abortion in 1973,[1] the Court has annulled requirements of parental and spousal consent for abortion;[2] upheld denial of Medicaid for non-therapeutic abortions;[3] upheld prohibition of using public employees, funds and facilities for counseling, referral, and performing abortion;[4] and both annulled[5] and upheld[6] prohibition of the so-called partial birth abortion without a health exception. Yet, to date it has refused to recriminalize abortion.[7]

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[1] *Roe v. Wade*, 410 U.S. 113 (1973).
[2] *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976); *Bellotti v. Baird*, 443 U.S. 622 (1979).
[3] *Harris v. McRae*, 448 U.S. 297(1980).
[4] *Webster v. Reproductive Health Services*, 452 U.S. 450 (1989); *Rust v. Sullivan*, 500 U.S. 173 (1991).
[5] *Stenberg v. Carhart*, 530 U.S. 914 (2000).
[6] *Gonzales v. Carhart*, 550 U.S. 124 (2007).
[7] *Planned Parenthood of Souteastern Pennsylvania v. Casey*, 505 U.S. 833 (1992). Court refusal to overrule *Roe* came as a surprise, as four Justices had expressed their willingness to do so and two Justices were leaning in that direction. Relying on the doctrine of *stare decisis*, the plurality called overruling "under fire," a serious subversion of its legitimacy. Since then, the anti-abortion lobby

With regard to homosexuality, the Court upheld criminal sodomy laws in 1986[1] and struck them down in 2003.[2] In between the two, it annulled a state constitutional Amendment that precluded extending equal protection to homosexuals,[3] and denied them equal protection against discrimination in membership associations.[4]

These inconsistencies and contradictions are often understood in terms of a moral and political divide on the bench between conservative and liberal Justices, in the guise of originalism and living constitutionalism respectively. The question is whether and how these variations are handled by the Court without compromising the normative closure of the legal system.

III: ANALYTIC STRATEGY

Following Nobles and Schiff (2006: 163-173), the following analysis begins where Critical Legal Studies leave off.[5] It grants that law, like other discourses, is indeterminate; that disparities of power produce differential access to the legal system; and social inequalities produced in other social systems are reproduced by

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has focused on limiting late term abortion. The term "partial birth abortion" was coined to galvanize support against abortions due to foetal abnormality, something which offends many constituencies including disability groups. After legislatures in 30 states banned partial birth abortion, the Congress passed the Partial Birth Abortion Act of 2003 in which the procedure was called "gruesome," "inhumane," and "morally wrong." Presently 38 states have foetal homicide laws that were initially intended to protect pregnant women and their foetuses against violent attacks by third parties. In recent years such laws are evoked against pregnant women themselves. On the medicalization and moralization of abortion on the road from *Casey*, through *Stenberg*, to *Gonzales*, see, e.g., Gee (2007); Heffernan (2001).

[1] *Bowers v. Hardwick*, 478 U.S. 186 (1986).

[2] *Lawrence v. Texas*, 539 U.S. 558 (2003).

[3] *Romer v. Evans*, 517 U.S. 620 (1996).

[4] *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000). The Court denied relief on the ground that the Boy Scouts of America could exclude homosexuals based on its members' right to free speech and association.

[5] For an account of the shared assumptions and internal tensions of the Critical Legal Studies movement see, e.g., Hutchinson and Monahan (1984); Tushnet (1984, 1991); Unger (1983).

the law. Yet, rather than reducing judicial decisions to political decisions or trying to reveal latent and conflicting ideals and values underlying Justices' decisions, it distinguishes between individual and social levels of meaning-constitution. Bracketing judicial behaviour and legal consciousness altogether, it remains strictly concerned with legal communications. The normative closure of the legal system is sought and demonstrated only by reference to the Court's jurisprudence. Starting from the unfounded foundation of law, it asks if and how in its repeated rulings on abortion and homosexuality the Court has been able to rely solely on legal communications.

An analytic distinction is made between Court *decisions* and Court *opinions*:

Court decisions are analyzed as responses to external conflicts over social inclusion, i.e., they constitute the law's *external-reference*.[1] Their implications are examined with respect to functional differentiation of social systems in the law's environment. Court opinions are analyzed as responses to internal conflicts over methods of constitutional interpretation, i.e., they constitute law's *self-reference*. Their implications are examined with respect to legal autopoiesis.

But first a brief discussion of the structural conditions of emergence and inherent instability of the substance of the rights to equality and privacy underlying these legal episodes is in order.

[1] It is important to note that external references of the legal system still belong to the system. They are references of the system to its environment, without exact equivalent in the latter. Since law cannot operate beyond its own boundaries, it cannot determine the boundaries of other social systems in its environment. But it can determine where they should be according to the law. The promise of legal redress in case of violation of such boundaries stabilizes generalized normative expectations and in so doing participates in the structural drift of system boundaries.

IV: EQUALITY, PRIVACY, AND SYSTEM DIFFERENTIATION

The Fourteenth Amendment to the United States Constitution (1868) provided all persons within its jurisdiction with equal protection of the laws.[1] Since then, the substance of equality and the exact nature of the State's responsibility for its protection have remained contentious.[2] What is at stake in defining the substance of equality: the relation between the individual and the State, the balance of interests between conflicting groups, or something more?

A: Equality as Selective Indifference

The right to equality, more than a mere protection of individual rights, is a precondition for functional differentiation of modern social systems. As the automatic and one-dimensional mechanism for social inclusion based on fixed social position fades away, the right to equality provides a principle for contingent and partial inclusion in all societal systems. As a "principle of *selective indifference*," the right to equal protection renders irrelevant all qualities and characteristics except those pertinent to role expectations in the system in question (Verschraegen 2002). Thus, e.g., inequalities of race, ethnicity, religion, and

[1] Section 1 of the Fourteenth Amendment reads: "… No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Until the attempt to interpret the Amendment as "incorporating" the Bill of Rights and thus making it applicable to the states finally succeeded in the 1960s, the Amendment was mostly used to shield corporations against government regulations.

[2] At issue is whether the right to equal protection has vertical or horizontal effects, i.e., whether it regulates only the relations between the State and individuals, or also those between private parties. Also in dispute is the exact scope of State responsibility for ensuring the actual enjoyment of equality, i.e., the degree to which it can and should change the background rules of property, contract, and tort. For a comparative analysis of these dilemmas and their varied handlings by the highest Courts see Tushnet (2008). A more detailed analysis of the dilemma of State responsibility in providing equal protection for all persons regardless of race is offered in the next chapter.

gender, become indifferent in access to the market and franchise; inequalities of income become indifferent in access to public education or healthcare, etc.

While the right to equal protection of the laws does not guarantee equality, it raises the expectation that in access to societal systems, *only* relevant characteristics are considered; that "different social goods ought to be distributed for different reasons, in accordance with different procedures, by different agents" (Walzer 1983: 6). This protects functionally differentiated self-referential social systems from external interference. It is due to this societal function of individual rights that "individuals cannot wave them; because individuals are not their sole focus" (Tribe 1985: 333). As both the boundaries of societal systems and the exact features of their relevant role expectations are in flux, the concrete contours of equality, and the nature of State responsibility for its protection continue to change, as clearly indicated by changes in the Court's equal protection jurisprudence.[1]

B: Privacy as Withdrawal and *Inclusion*

There is no expressed guarantee for the right to privacy in the U.S. Constitution. Conceptual ambiguity and doctrinal incoherence with respect to the exact meaning and legal ground of privacy persist. Nonetheless, the legal system has recognized the right to privacy as a ground for claims-making, legislation, and

[1] Unequal treatment based on race was declared unconstitutional long before discrimination based on sex. Neither was rendered irrelevant at once across all societal systems. The same is true of unequal treatment based on income, education, sexuality, mental health, age, etc.

adjudication.[1] However defined, i.e., as reducible to other rights such as autonomy, secrecy, security, or liberty, or as a distinct right essential to human dignity and self-development, the right to privacy carves out a certain sphere of individual experience and action beyond the legally sanctioned reach of the political system *and* all other societal systems.

As functional differentiation proceeds and societal systems become increasingly independent from requirements of sociation in interaction systems and organizations, attribution of communication to a social system and thus making sense of it as action becomes increasingly complex and contingent. The legal recognition of a "zone of privacy" leaves to the individual negotiation between incommensurable claims of multiple social systems in making sense of action and experience in that zone. This, however, is not only a right to withdrawal, but also a right to social inclusion irrespective of decisions taken in the private zone. That is why privacy claims are often interwoven with claims to equality. In fact, without a guarantee for equal protection, the right to privacy would be of little consequence.

The rights to equality and privacy are emergent properties of the distinctively modern type of social differentiation. Their contours remain controversial not merely due to changing balances of power between conflicting groups, but more fundamentally due to the shifting boundaries of functionally

[1] The earliest legal recognition of the violation of the "sacred right to privacy" was made in *DeMay v. Roberts*, 46 Mich. 160, 9 N.W. 146 (1881), when a doctor brought an unqualified assistant into a woman's bedchamber in childbirth. Since then the Court has dealt with the concrete meaning of decisional and informational privacy in various issues including inter-racial marriage, termination of medical treatment, and collection and disclosure of personal information.

differentiated societal systems.[1] In fact, it is upon this dynamic structural foundation that such conflicts and their conceptualization become possible in the first place. In the absence of a societal epistème, and with the ability of each societal system to cast the entire world in its own image, it is not clear where family, organization, the economy, politics, law, science, religion, etc., begin and end. It is when such deadlocks expose the ambiguous boundaries of these systems as understood by the law that the Supreme Court intervenes with an authoritative decision.

From this perspective, judicial review of legislation concerning abortion and homosexuality rests at the juncture of a circular relationship between functional differentiation and legal autopoiesis. Triggered by conflicting expectations in the environment of the legal system over the concrete boundaries of societal systems, a hearing exposes a conflict in the law with respect to the legal recognition of those boundaries; each decision gives rise to further boundary tensions between societal systems, and hence future cycles. The question is whether and how the normative closure of the legal system is maintained in this process.

V: ADJUDICATION: LAW AND ITS ENVIRONMENT

A: Decision: Social Inclusion and Functional Differentiation

In reviewing legislation concerning abortion and homosexuality, the Court has to decide whether or not the particular social exclusion sanctioned by the statute in

[1] On the relation between legal indeterminacies in private law and conflicts between societal systems see Teubner (1993: 100-122).

question denies the equal protection of the laws. Equal protection jurisprudence has evolved such that today to make a decision about the constitutionality of a legislative or administrative act the Court responds to some or all of the following questions:

- Is there a liberty interest involved? Yes/No
- Is the liberty fundamental?[1] Yes/No
- Is the classification suspect?[2] Yes/No
- Is the State interest non-compelling? Yes/No
- Is the law or policy overbroad? Yes/No
- Is the burden imposed on the affected individuals undue?[3] Yes/No
- Is a partial revision to the law or policy insufficient? Yes/No

To recognize a constitutional violation and strike down a statute, the Court has to consistently respond in the affirmative: It has to recognize a liberty interest in the case; declare that liberty fundamental; find the affected class suspect, i.e., a victim of past discrimination; establish the non-compelling character of State interest in limiting that liberty through appropriate tests; demonstrate the burden of the

[1] A right is fundamental when its infringement by the State requires extraordinary justification. Whether fundamental rights are strictly limited to those expressed in the Constitution and enjoyed by Americans at the time of its ratification, or whether new rights can be recognized as fundamental by the Court is the central contention in rights-based reviews.

[2] The U.S. Supreme Court holds certain bases of classification, such as race and religion, as inherently suspect for legislation, and thus subject to a "strict scrutiny" test. In such cases the government carries the burden of proof and has to show the indispensability of the statute to achieve a "compelling state interest." If the basis of classification is not "suspect," a "rational basis" test and only a reasonable ground for legislation may suffice. Classifications based on sex and sexual orientation are examined with an "intermediate" level of scrutiny.

[3] A burden is undue if it is calculated to place a substantial or absolute obstacle or severe limitation before the exercise of a right. As acknowledged by Justices themselves, none of these concepts has a coherent legal basis, nor are they applied consistently.

statute on affected individuals as undue; and find partial revisions inadequate to bring the law or policy in line with constitutional standards.

Such consistencies, however, presuppose agreements on application of further distinctions.[1] In the absence of a norm hierarchy and in the context of a doctrinal divide in the Court over constitutional interpretation, it is no surprise that the history of Court engagements with abortion and homosexuality has been one of ongoing variation from partial recognitions and retreats to full reversals of position. One negative response is enough to break the chain of attribution in one network of communication and set in motion another network in which the statute could be upheld by its positive connection to other legal provisions. Yet, focusing on the "selective indifference" in question, we can examine how each decision can blur or sharpen the legal boundaries of societal systems.

Criminal abortion laws, for example, make access to pregnancy-related medical services, i.e., inclusion in the healthcare system, dependent on a pregnant woman's choice of whether or not to carry a fetus to term. Thus, religious/ethical views on the value of life, rather than medical need, become legally relevant to reception of care. Likewise, denial of Medicaid to abortion services turns some pregnancy-related health services into commodities, access to which depends not on health condition but on economic status. Since the public healthcare system *per se* is expected to be indifferent to characteristics not concerning health and

[1] Liberty can be understood as expressed or implicit; determined by reference to individual happiness or collective goals; fundamental can mean ancient or essential; strict scrutiny can be applied to State intention or to the consequence of its action; undue burden can be imposed negatively or positively, etc., etc.

illness, the question is whether the political system can use the law to limit access to the healthcare system based on religious views and economic status.

In contrast, rejecting compelling State interest in the categorical protection of the unborn renders religious and scientific definitions of life irrelevant to the legal meaning of abortion.[1] Rejecting the requirement of parental or spousal consent renders family status irrelevant in access to abortion services.[2] Rejecting regulation of abortion services and medical procedures in violation of accepted medical practice renders non-medical considerations irrelevant to delivery of abortion services.[3] In recognizing the right to make decisions about abortion "without public scrutiny and in defiance of the contrary opinion of the sovereign or other third parties,"[4] the law treats the person as "belong[ing] to himself, and not others nor to society as a whole."[5] This protects the individual not only against the political system but also all other societal systems, including the family, and prevents the de-differentiation of the latter.

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[1] While the abortion controversy is often attributed to the rise of religious Right, the role of science should not be overlooked. According to the Court's brief history of abortion regulation, in the common law and British statutory law, before quickening or viability the fetus was part of the mother and its destruction was not considered homicide. The quickening disappeared in American law in the latter part of the 19th century mainly due to the efforts of the American Medical Association. Recognizing the aliveness of the fetus before quickening, the AMA criticized the State for failing to protect the unborn, called for revision of abortion laws, and requested the support of medical societies and the clergy for that cause. See *Roe v. Wade*, 410 U.S. 113, 141-142 (1973).

[2] "The State does not have the constitutional authority to give a third party an absolute, and possibly arbitrary, veto over the decision of the physician and his patient to terminate the patient's pregnancy…The State cannot relegate the authority it does not have" *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 74 (1976).

[3] Invalidating several Pennsylvania abortion regulations including delivery of detailed information about abortion and alternative options to it the Court held "a rigid requirement that a specific body of information be given in all cases, irrespective of the particular needs of the patient," to constitute intrusion "upon the discretion of the pregnant woman's physician" *Thornburgh v. American College of Obstetricians & Gynaecologists*, 476 U.S. 747, 762 (1986). *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 431 (1983).

[4] *Bellotti v. Baird*,443 U.S. 622, 655 (1979) (Stevens, J., Concurring).

[5] *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 777 (1986) (Stevens, J., Concurring).

Criminal sodomy laws make enjoyment of liberty in intimate relations, property and equal protection of the laws dependent on moral values concerning sexual conduct and sexual orientation. Decriminalization of homosexuality, on the other hand, relieves the political system from surveillance of the population in their homes,[1] further differentiates religion, morality, politics and intimate relations, and provides the ground for equal access to all societal systems regardless of sexual orientation. This could provide legal grounds for further right-claims concerning marriage, adoption, military service etc., and further protection of individuals as biological and psychic systems against all social systems. Against this back-drop, Court decisions can be traced to see how each selection has triggered connecting events both in the law and its environment and how these events have led to further litigation and subsequent Court decisions.[2]

B: Opinion: Legal Validity and Autopoiesis

Court opinions are self-observations of the legal system. They appear when the law observes its own observations, rather than its environment. Setting aside the often idiosyncratic "logics of discovery," opinions try to describe "logics of justification" (Sachs 2009: 7). They explain how the judgement "could have been

[1] "In our tradition the State is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence" *Lawrence v. Texas*, 539 U.S. 558 (2003).

[2] Decriminalization of abortion in 1973 inadvertently demobilized the feminist movement and contributed to the creation of the "Moral Majority," with harmful consequences for civil rights; while severe restrictions on abortion in 1989 mobilized the pro-choice movement and led to electoral changes and favorable results for civil rights. Likewise, despite the Court upholding criminal sodomy laws in 1986, the number of states in which such laws were retained had dropped from twenty-five to thirteen in 2003, when the Court struck them down. On the ironic role of the Court and unintended results of its decisions see, e.g., Balkin (2004); Rosenberg (1991); Shapiro (1994); Tribe (1990).

arrived at on the basis of logical, step-by-step reasoning" (Posner 2008b: 110). At issue is how to ground the decision in the law and tailor its connective capacity to past and future decisions. Originalism and living constitutionalism provide two different answers to this question:

Originalism describes itself as an advocate of judicial restraint and popular sovereignty. It claims to treat the original meaning of the Constitution, as understood by reasonable persons at the time of its adoption, as authoritative in constitutional interpretation. Thus, it is opposed to the use of judicial review to extend constitutional protection to rights neither enumerated in the Constitution nor widely recognized at the time of its adoption. Living constitutionalism, on the other hand, understands the broad language of the Constitution as an invitation for its dynamic interpretation with reference to both precedent and contemporary standards of right and equality.[1] They offer two strategies for reducing the information value of legal communications; two ways of selecting and retaining legal decisions; and thus two ways of constructing and reconstructing the history of constitutional law.[2] They both increase internal complexity of the legal system, but in different ways.

i: Originalism

In dealing with abortion and homosexuality originalism interprets the constitutional rights, statutes, and the case at hand at the most concrete level.

[1] On the evolution of originalism and living constitutionalism and their many strands see, e.g., Ackerman (2007); Grey (1975); McBain (1927); O'Neill (2005); Rehnquist (2005); Scalia (1989); Strauss (2010); Whittington (2004).

[2] They can also be seen as two alternative ways of producing positive feedbacks or path dependencies in the legal system. See Sweet (2002).

> Liberty includes only those practices, defined at the most specific level, that were protected against government interference by other rules of law when the Fourteenth Amendment was ratified.[1]

The literal meaning of the words in the text of the Constitution as understood at the time of its adoption is used as the relevant context of the extant legal episode. Limiting fundamental rights to those explicitly guaranteed in the Constitution, originalism denies the information value of statutory restrictions on other rights, and thus prevents connective events in the legal system as the result of such restrictions.

As no fundamental right to abortion is explicitly guaranteed by the Constitution, a reasonable State objective is sufficient to criminalize or regulate it without being repugnant to the Constitution.[2] Denial of public funding for abortion services does not disturb the Constitution either, because Medicaid was enacted when abortion was illegal,[3] and there is no

> limitation on the authority of a State to make a value judgment favouring childbirth over abortion.[4]

In fact, according to an originalist view, the State may even "choose not to operate any public hospitals at all" and not be found in violation of constitutional standards.[5] The fact that such measures deprive poor women of the exercise of their right is also inconsequential. The poor are not recognized by the law as a "suspect class," and the Constitution "imposes no obligation on the State to pay

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[1] *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (Scalia, J.).
[2] *Roe v. Wade*, 410 U.S. 113, 174 (1973) (Rehnquist, J., Dissenting).
[3] *Beal v. Doe*, 432 U.S. 438 (1977).
[4] *Maher v. Roe*, 432 U.S. 464, 474 (1977); *Poelker v. Doe*, 432 U.S. 519, 521 (1977).
[5] *Webster v. Reproductive Health Services*, 492 U.S 450, 509 (1989).

the pregnancy-related medical expenses of indigent women."[1] According to originalism,

> the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual.[2]

The same strategy is used in adjudicating criminal sodomy laws:

> There is no such thing as a fundamental right to commit homosexual sodomy … Decisions of individuals relating to homosexual conduct have been subject to state intervention throughout the history of Western civilization. Condemnation of those practices is firmly rooted in Judeo-Christian moral and ethical standards … This is essentially not a question of personal "preferences," but rather of the legislative authority of the State.[3]

Since this right is not deeply rooted in history and tradition of the United States a governing majority's belief about its immorality is said to be enough for its regulation.[4] Expansion of fundamental rights beyond what was explicitly recognized at the time of the Constitution's adoption, originalism argues, involves a value judgement and thus requires a political decision by elected representatives rather than a judicial decision by appointed and unaccountable judges.

ii: Living Constitutionalism

Living constitutionalism construes both the Constitution and the statute or policy in question at a higher level of abstraction. Thus, statutory or common-law violation of implied rights are granted information value, which can activate constitutional provisions, and potentially lead to judicial recognition of new right-

[1] *Maher v. Roe*, 432 U.S. 464, 471 (1977).
[2] *Webster v. Reproductive Health Services*, 492 U.S. 450, 507 (1989).
[3] *Bower v. Hardwick*, 478 U.S. 186, 196 (1986) (Burger, C.J., Concurring).
[4] *Lawrence v. Texas*, 539 U.S. 588 (2003) (Scalia, J., Dissenting).

claims. While the Constitution does not explicitly mention any right to privacy or homosexuality,

> the concept of personal liberty … [is understood as] broad enough to encompass a woman's decision whether or not to terminate her pregnancy[1]… [as well as one's] decisions concerning intimate relationships.[2]

Legislative prohibition of funding elective abortion is unconstitutional because it affects pregnant women's exercise of choice.

> Her choice is affected not simply by the absence of payment for the abortion, but by the availability of public funds for childbirth if she chooses not to have the abortion.[3]

Criminal sodomy laws are unconstitutional not because they prohibit a particular sexual activity but because they violate

> the most comprehensive of rights and the right most valued by civilized men…the right to be let alone.[4]

This level of abstraction requires introducing new concepts and making further distinctions for selection of legal decisions.[5] In the case of abortion, the Court introduced two distinctions to differentiate abortion from homicide and yet authorize its regulation or prohibition: viable/nonviable and person/non-person. The first left the law cognitively open to the changing state of medicine and technology and thus regulation and proscription of abortion in progressively

[1] *Roe v. Wade*, 410 U.S. 113, 154 (1973).
[2] *Bower v. Hardwick*, 478 U.S. 186, 200 (1986) (Blackmun, J., Dissenting).
[3] *Maher v. Roe*, 432 U.S. 464, 483 (1977) (Brennan, J., Dissenting). On the inherent link between inalienable "negative" rights and "affirmative" duties of the state to provide universal conditions for their exercise see Tribe (1985). For a contrary view see Hirt (1988).
[4] *Lawrence v. Texas*, 539 U.S. 588 (2003).
[5] On the creative use of paradoxes in the law and its triggering of new distinctions see Fletcher (1985).

earlier stages of pregnancy.[1] The legal definition of personhood, however, has remained normatively closed to external irritations. The Court has refused to recognize the unborn as a person entitled to legal protection.

Criminal sodomy laws were invalidated by means of a distinction between intimate relations and some of its forms, such as marriage/non-marriage, procreation/non-procreation, and heterosexual/non-heterosexual relations. Extending legal protection to intimate relations as a medium for the development of self-identity makes inconsequential the side of the form on which a relationship lies. Legal protection of certain decisions concerning marriage, procreation, and certain heterosexual relations is grounded, not in their particular virtues against their opposites, but in the central place of intimate relations to an individual's free definition of self-identity and happiness.

> We protect the decision whether to have a child because parenthood alters so dramatically an individual's self-definition, not because of demographic considerations or the Bible's command to be fruitful and multiply … We protect the family because it contributes so powerfully to the happiness of individuals, not because of a preference for stereotypical households … [for] the ability independently to define one's identity that is central to any concept of liberty.[2]

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[1] One can say that most abortion jurisprudence has been in part a response to the Court's self-created problem, i.e., *Roe's* trimester time table, according to which before the end of the first trimester the right of privacy was held supreme; in the second trimester the right to privacy was balanced against the State interest in protecting a woman's life; in the third trimester, especially after fetus viability, the State was allowed to restrict and even proscribe abortion to protect potential life. In response, state legislatures enacted more restrictive abortion regulations to provoke test cases that would eventually lead to the overruling of *Roe*. Improvements in medical technology proved paradoxical as well: late term abortions became increasingly less risky for the woman, while early abortions raised questions of fetus viability at progressively earlier stages. Thus, the trimester framework overburdened the Court and turned it into the "country's *ex officio* medical board with powers to approve or disapprove medical and operative practices and standards throughout the United States" *Planned Parenthood of Central Mo. v. Danforth*, 428 U.S. 52, 99 (1976) (White, J., Concurring in part and dissenting in part). This has become increasingly the case in dealing with the so-called "partial birth abortion" legislation.

[2] *Bower v. Hardwick*, 478 U.S. 186, 205-6 (1986) (Blackmun, J., Dissenting).

Statutes that prohibit a conduct between adult and consenting sexual partners is held "demeaning" and "controlling" of the "existence" and "destiny" of individuals and in violation of due process.[1]

iii: The Friendship of Foes

Despite their spirited attacks on one another,[2] originalism and living constitutionalism provide the legal system with complementary strategies to deal with its own increasing internal complexity and that of its environment.[3] By concrete interpretations of the Constitution and the case at hand, originalism reduces decisions to disparate events without a unifying principle.[4] In the absence of an abstract meaning no generative rule for dealing with similar situations can emerge and no constitutional ground for new right-claims can be established. This can radically reduce the sensitivity of the legal system to changes in its environment. That is what living constitutionalism tries to avoid. An excessive level of abstraction, on the other hand, can introduce into the legal system a surplus of innovations beyond its assimilative capacity, and undermine its ability

[1] *Lawrence v. Texas*, 539 U.S. 558 (2003). On the trajectory from *Bowers* to *Lawrence* and the unprecedented relational and equality-based character of the latter's interpretation of substantive liberty see Tribe (2004).

[2] The Court has been described by its own members as: "deceptive," "hypocritical," "disrespectful of law and precedent," exemplary of a "jurisprudence of brute force," and "policy judgement couched as law."

[3] While they were initially perceived as radical opposites, in recent years some patterns of combination have emerged both on the bench and in legal scholarship. Originalism's judicial restraint has turned out to be highly selective (see, e.g., Howard and Segal 2002; Post and Siegel 2006; Siegel 2008); while attempts are made to recover the originalist foundations of living constitutionalism (see, e.g., Balkin 2007). This, of course, is not the first time that conventional wisdom in legal scholarship about the internal divides in American jurisprudence has been questioned. See Duxbury (1995); Hart (1977); and Tamanaha (2009) on the realist/formalist divide. See Sarat and Kearns (1995) on the instrumental/constitutive divide.

[4] This is what Rubenfeld calls "compartmentalization of precedent," whereby one knows some rights are protected but does not know why (1989: 749).

for self-direction or normative closure. That is what originalism tries to prevent. Nonetheless, their interplay increases the internal complexity of the legal system, albeit with different implications for its capacity for dealing with further complexity. What needs to be investigated is the balance between them and forms of their combination.

By limiting constitutional protections to explicitly guaranteed rights, originalism permits more disparity among states with respect to implied rights. Thus, the evolution of the legal system at the national level is made subject to the dynamics of state politics, rather than functional differentiation of law at the federal level, let alone that of world society. Unlike the Court that has to decide the case with some semblance of consistency, legislatures can compromise coherence for political expediency.

> One of the benefits of leaving regulation of this matter to the people rather than to the courts is that the people, unlike judges, need not carry things to their logical conclusion. The people may feel that their disapprobation of homosexual conduct is strong enough to disallow homosexual marriage, but not strong enough to criminalize private homosexual acts–and may legislate accordingly.[1]

Deference to state legislatures subjects the legal recognition of new right-claims to the temporality of local politics. To the degree that statutes remain incongruent and yet constitutional, this leads to more variety in the legal system without enabling the Court to offer legal solutions to their potential conflicts.

[1] *Lawrence v. Texas*, 539 U.S. 558 (2003) (Scalia, J., Dissenting).

Living constitutionalism, however, allows for harmonization of legal decisions at the national, and at times, international level.[1] By recognizing some legal communications from other jurisdictions as its own, thus allowing them to trigger connective events in American law, it too produces variety in the legal system, albeit of a different kind. This time it is dynamics of local politics that are made subject to functional differentiation of law. By granting constitutional protection to implied rights, the Court produces irritations for local politics both inside and outside the legislature. Either way, the asynchrony between the law and social systems in its environment produces more conflict than consensus, as indicated by endless legislative efforts to supersede or circumvent judicial decisions not preferred by the governing party.

VI: JUDICIAL REVIEW BEYOND LAW VS. POLITICS

The challenge for those who see the Court as primarily a political institution has been to explain the function of a political body with such a limited enforcement power.[2] Legitimation of politics has become increasingly inadequate as an answer, as a divided and majoritarian Court constantly draws attention to the mutable character of its decisions. Moving beyond the dichotomy of the Court's claim to autonomy and the political character of its decisions, an autopoietic conception of law recognizes both the interdependence and irreducibility of law

[1] In decriminalizing homosexuality in *Lawrence*, the Court relied on European Human Rights Law. On the long history of the Court's use of "foreign" law in constitutional decisions, which is strongly rejected by originalism, see Farber (2007).
[2] See, e.g., Dahl (1957); Posner (2008b); Rosenberg (1991, 1992).

and politics in constitutional democracies and invites investigation of their relation as functionally differentiated systems.

As a form of structural coupling between the legal and political systems, a constitution makes positive law the primary instrument for political organization, and at the same time provides legal means for disciplining politics. The result is a higher degree of freedom and acceleration of the internal dynamics of both law and politics. Restricting their mutual influence to constitutionally provided channels significantly increases their mutual irritability (Luhmann 1985: 404). The legal system and the political system remain operationally closed. Yet, a constitution provides an instrument for dissolving the circularity of their self-reference. It protects the illusion that politics can be legally constituted and limited, while at the same time exposing the legal system to political influence through legislation.

Not hierarchy but center/periphery provides the proper model for understanding the relation between legislation and adjudication in modern society. As the center of the legal system, the courts are the site of the emergence and unfolding of the paradox of law, the unfounded foundation of its binary code. The organization and professionalization of juridical competence, and formally equal access to the legal system, serve to strengthen normative expectations of the independence of the judiciary and equality before the law. In the United States, supervision of the constitutionality and consistency of legal decisions belongs solely to the judiciary and the Supreme Court at its summit. It is at the Supreme Court that one expects to see the highest degree of autonomy of the legal system. All other areas of law, including legislation, lie more to the periphery of the legal

system and thus are more sensitive to disparate external irritations. The importance of this distinction between the judiciary and the legislature becomes more apparent if one remembers that political motives are considered sufficient for legislation, but not for adjudication. A judiciary open to political pressures is considered corrupt by modern standards (Luhmann 2004: 292-304).[1] That is why the thorny question of autonomy is raised with respect to the Court much more than the legislature, the openness of which to influences of constituencies, corporations, lobbyists, etc., is common knowledge.

VII: NORMATIVE CLOSURE

Notwithstanding the political implications of originalist and living constitutionalist approaches to new right-claims, neither side appeals to extra-legal grounds to justify its position. Legal communications from both sides of the bench are fully self-referential.[2] Even when morality is recognized or rejected as a legitimate ground for legislation, the support for that position is found in law and precedent not in morality. This is well illustrated by comparison of *Bowers* (1986)

[1] The indispensability of this distinction was recently emphasized to the Canadian Immigration Minister by the Chief Justice of the Supreme Court of Canada, Madam Beverley McLachlin. The Minister had apparently criticized the judiciary for being "insufficiently solicitous to government policy." The Chief Justice reminded him that an independent judiciary "bases its decisions on the law and not on government policy ... We live in a society with a strong commitment to the rule of law, and one of the elements of our commitment to the rule of law is a deep, cultural belief in and confidence in the judiciary … This goes beyond a general idea that we have good judges of integrity, it's the confidence that brings litigants to choose the courts as a forum for resolving their disputes … and it is what allows them to accept the resulting judgments … Citizens have to have the confidence that whatever their problem, whoever's on the other side … they will have a judge who will give them impartial justice and not be subject to pressures to direct their judgments in a particular way" (*The Montreal Gazette*, August 13, 2011).

[2] This is not necessarily true about legal commentaries on Court judgements. That may, in part, explain the limited influence of socio-legal scholarship and normative constitutional theory on Court decisions. See Balkin (2004: 1574-6); Posner (2008b: 204-229).

which upheld the constitutionality of criminal sodomy laws, with *Lawrence* (2003) which overruled it.

In *Bowers* the Court denied that its prior judgments on cases concerning family, marriage, and procreation construed the Constitution to "confer a right of privacy that extends to homosexual sodomy." The basis for this assertion was the Court's own criterion for identification of implied rights and liberties that may qualify for heightened judicial protection (i.e., their "deep roots" in the "history and tradition" of the United States). By claiming "ancient roots" for criminal sodomy laws, the Court refused to extend constitutional protection to homosexuality by means of "judge-made constitutional law … with no recognizable roots in the language or the design of the Constitution."[1] With the right-claim failing the test of fundamentality, criminal sodomy laws were said to require only a "rational basis" for their constitutionality. The Court recognized that rational basis without passing judgment on the morality or immorality of homosexual conduct (i.e., whether it was good or bad either for the individual or for society). Rather, the question before the Court was whether morally grounded legislation had a strong enough rational basis to be upheld as constitutional. In a 5 to 4 decision the Court responded in the positive:

> The law, however, is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed. Even respondent makes no such claim, but insists that majority sentiments about the morality of homosexuality should be declared inadequate. We do not agree, and are unpersuaded that the sodomy laws of some 25 States should be invalidated on this basis.[2]

[1] *Bowers v. Hardwick*, 478 U.S. 186, 191-193 (1986).
[2] *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986).

Criminal sodomy laws were upheld not on the ground of immorality of sodomy, but because there are many morally motivated and uncontested legislations on the books:

> Countless judicial decisions and legislative enactments have relied on the ancient proposition that a governing majority's belief that certain sexual behavior is "immoral and unacceptable" constitutes a rational basis for regulation … State laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity are likewise sustainable only in light of Bowers' validation of laws based on moral choices.[1]

In *Lawrence*, the Court overruled *Bowers* in a 6 to 3 decision and rejected both the ancient roots of criminal sodomy laws and the rational basis standard for their judicial review:

> There is no longstanding history in this country of laws directed at homosexual conduct as a distinct matter … Early American sodomy laws were not directed at homosexuals as such but instead sought to prohibit non-procreative sexual activity more generally … Laws prohibiting sodomy do not seem to have been enforced against consenting adults acting in private … It was not until the 1970's that any State singled out same-sex relations for criminal prosecution, and only nine States have done so.[2]

Whereas *Bowers* required ancient roots for homosexuality to grant it constitutional protection, *Lawrence* required ancient roots for criminal sodomy laws to exempt them from strict scrutiny. The fact that the statute under scrutiny only concerned sodomy between homosexuals and not sodomy *per se* played an important role in selective ordering of legal communications. Concurring with the

[1] *Lawrence v. Texas*, 539 U.S. 558 (2003) (Scalia, J., Dissenting).
[2] *Lawrence v. Texas*, 539 U.S. 558 (2003).

opinion of the Court in *Lawrence,* Justice O'Conner, who had previously voted for *Bowers* clarified the issue further:

> In Bowers … [w]e rejected the argument that no rational basis existed to justify the law, pointing to the government's interest in promoting morality … The only question in front of the Court in Bowers was whether the substantive component of the Due Process Clause protected a right to engage in homosexual sodomy … Bowers did not hold that moral disapproval of a group is a rational basis under the Equal Protection Clause to criminalize homosexual sodomy when heterosexual sodomy is not punished.[1]

In *Lawrence,* the Court explicitly acknowledged that many hold profound convictions about the immorality of homosexual conduct. Yet, it refused to grant the majority a right to "use the power of the State to enforce these views on the whole society through operation of the criminal law."[2]

> That certain, but by no means all, religious groups condemn the behavior at issue gives the State no license to impose their judgments on the entire citizenry. The legitimacy of secular legislation depends, instead, on whether the State can advance some justification for its law beyond its conformity to religious doctrine … The Constitution cannot control such prejudices, but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.[3]

Bowers was overruled not as a lapse in moral judgement, but as an *error* in the law.

> *Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled.[4]

The dissenting opinion in *Bowers* became the majority opinion in *Lawrence* without a single moral argument for or against homosexuality. Instead, another

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[1] *Lawrence v. Texas*, 539 U.S. 558 (2003) (O'Conner, J., Concurring).
[2] *Lawrence v. Texas*, 539 U.S. 558 (2003).
[3] *Bowers v. Hardwick*, 478 U.S. 186, 211-212 (1986) (Blackmun, J., Dissenting).
[4] *Lawrence v. Texas*, 539 U.S. 558 (2003).

selective history of constitutional and common law regulation of sexual conduct was offered and a different horizon was opened up to connect criminal sodomy laws to the body of legal norms in such a way that criminal sodomy laws lost their ground in the law and the Constitution.

There is no doubt that morally grounded legislation is on the books.[1] The question is whether it would be upheld by the Court solely on its moral quality, i.e., if morality could "immediately or intrinsically be understood as valid in the legal system" (Luhmann 2004: 107).[2] In *Lawrence*, not only did the Court respond in the negative, but it provided a way to judge the constitutionality of morally grounded legislation: it required legislatures to provide a ground for such legislation beyond the moral judgement of the majority.

As originalism and living constitutionalism are both legitimate doctrines of constitutional interpretation, opting for one or the other does not undermine the normative closure of the legal system. Excessively narrow or expansive interpretations of constitutional provisions can be treated as errors in the law without undermining its normative closure. For signs to that effect one has to search for interference of other codes and programs in the self-observations of the legal system, i.e., appeal in legal arguments to codes and programs of other systems. Neither *Bowers* nor *Lawrence* made such appeals.[3]

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[1] In fact, many legislative efforts to ban abortion are formulated in moral terms. To what extent such measures are mere lip service to attract religious votes, without connective effects in the political system, or if they are indeed signs of de-differentiation of politics and religion is another question.

[2] Cover (1983) made a similar suggestion that, contrary to conventional wisdom, in the United States some moral beliefs of minorities are entitled to constitutional protection. Thus, the law cannot simply announce the majority opinion as *the* morals of the nation.

[3] A comparative historical analysis of the Court's jurisprudence on morally grounded legislation can yield interesting research questions for the normative closure thesis and provide empirical

CONCLUSION

For most of the twentieth century, socio-legal studies reduced judicial review to more or less unrestrained policy-making and jurisprudence to little more than an ideological mask over conflicting interests and political commitments. Yet, ignoring the "mask," such investigations lost sight of the distinction between adjudication and legislation. They ignored how "the need ... and belief in [this] camouflage to some degree determine the agendas and substance of judicial choices" (Shapiro and Sweet 2002: 8). Thus, the social context of adjudication has been recognized at the cost of the legal meanings of the event. Trying to "break open the legal box of secrets," (Freidman 1994: 130), such investigations often neglected the meaning of the box and *its* secrets in the eye of the law.[1] Preoccupied with what the Court *does*, socio-legal studies neglected the significance of what the Court *says*. Thus, jurisprudence, the very site for the production and potential compromise of the normative closure of the legal system was cast to the side. While in their attention to the role of jurisprudence new institutionalist approaches to adjudication are corrective to that tradition, they remain concerned with determinants of judicial behaviour, rather than dynamics of jurisprudential evolution.

A social systems theoretic approach to judicial review changes the parameters of the debate altogether. With full positivization of legal validity, neither the measure for legal autonomy nor the signs of its erosion can be found

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evidence in support of Luhmann's categorical understanding of autopoiesis or Teubner's graduated conception.

[1] One can say Weber's *Verstehen* sociology has not yet arrived at socio-legal studies!

outside legal communications. Moreover, since law cannot operate beyond its own boundaries, the significance of judicial decisions can hardly be measured by their efficacy in steering other social systems, or psychic systems for that matter, including Justices' consciousness.[1] The primary significance of judicial review lies in the steering of the legal system. Whether and how this self-steering translates into events in the environment of the legal system is determined by structural couplings between the legal system and other systems in its environment and the internal dynamics of the latter.[2]

If originalism and living constitutionalism were seen as political practices (i.e., more or less powerful vehicles for conservative and liberal mobilizations),[3] then the interplay between them would be understood *primarily* in terms of changing balances of political forces in the Unites States; an example of American exceptionalism. However, a systems theoretic approach allows their examination as universal strategies for reduction of complexity in the law and its environment. This perspective invites research into their potential for combination and recombination in relation to different stages of functional differentiation and vis-à-vis various right-claims. It also draws attention to the global context of their emergence and their functional equivalents around the world.[4]

[1] In this sense behavioral approaches are correct to deny the determining role of law on Justices' votes. Their shortcoming lies in treating the Court as composed of its individual members; and, thus, denying the legal character of its decisions, not through examination of its communications but by referring them to Justices' attitudes, which remain in the environment of the law unless they are communicated in legal terms.

[2] See Epp (1998) on the role of extra-legal social structures in institutionalizing human rights.

[3] See Post and Siegel (2006).

[4] Hirschl points to a similar divide over the interpretation of sacred texts in what he calls "constitutional theocracies" (2010: 218-226).

This shift of focus is particularly important in the context of proliferating transnational regulations and fragmentation and incoherence of global law,[1] on the one hand, and increasing importance of judicial and constitutional review concerning fundamental rights, on the other.[2] Despite the more or less political character of judicial selection processes, even in authoritarian regimes judicial and political functions are not totally conflated.[3] It is time to examine the significance of adjudication with respect to the specific function of the legal system (i.e., temporal stability of generalized normative expectations), rather than relegating it to a substitute for the core function of other systems be they morality or politics.

[1] See Cotterrell (2009); Fischer-Lescano and Teubner (2004); Gessner (1995).
[2] See Dressel (2010); Edelman (1994); Hirschl (2004, 2006, 2008); Shapiro and Sweet (2002); Sweet (2000); Yusuf (2008).
[3] See Malleson and Russell (2006); Ginsburg and Moustafa (2008).

LINKING SECTION

Chapter Three used the judicial review by the United States Supreme Court of legislation concerning abortion and homosexuality as a critical challenge to the thesis of normative closure of the legal system. It demonstrated how in its repeated response to these morally charged conflicts, the Court has remained unmoved by moral considerations and has relied exclusively on legal communications. It showed how originalism and living constitutionalism have provided complementary strategies for dealing with increasing complexity in the legal system and its environment and pointed to the fruitfulness of tracing the evolution of rights jurisprudence in terms of functional differentiation.

The next chapter traces the U.S. Supreme Court's post-bellum jurisprudence of race as one such example. While variation in the Court's rulings is often explained in terms of dynamics of group and institutional conflict, the essay shows how the contours of racial equality are destabilized as the result of increasing functional differentiation of societal systems and the Court's recognition thereof. The role of state-action doctrine, the commerce clause and the current divide in the Court concerning affirmative action programs are discussed against this backdrop.

CHAPTER IV

EQUALITY, FUNCTIONAL DIFFERENTIATION AND JURISPRUDENCE OF RACE

Abstract

Post-realist political and legal scholarship has long considered the context of the Supreme Court's equal protection jurisprudence. This paper draws attention to a fundamental, yet neglected, factor in this debate: the functional differentiation of societal systems. Court opinions concerning racial equality in jury service, suffrage, access to public transportation/accommodation and education are examined as indices of the functional differentiation of law, politics, commerce and education respectively. It is argued that racial classification is held discriminatory to the extent that the societal scope and differentiated function of the system in question is legally recognized. The current divide in the Court over the proper standard of review in adjudicating affirmative action programs is analyzed in this light.

The Fourteenth Amendment to the United States Constitution (1868) entitled all persons living within its jurisdiction to the equal protection of the laws and gave the Congress the power to enforce the Amendment by appropriate legislation. Nonetheless, relying on the state-action doctrine, the Supreme Court upheld various forms of *de jure* and *de facto* racial exclusion well into the 20th century.[1]

[1] Until the attempt to interpret the Amendment as "incorporating" the Bill of Rights and thus making it applicable to the states finally succeeded in the 1960s, the Amendment was mostly used to shield corporations against government regulations. For a brief account of the role of the Supreme Court in rendering impotent the Reconstruction Amendments and civil rights federal legislations see Gressman (1957). On the parallel role of federal, district and circuit courts see Riegel (1984).

The state-action doctrine is often traced back to 1883 when, in striking down the public accommodations provisions of the Civil Rights Act of 1875, the Court held:

> Civil rights, such as are guaranteed by the Constitution against State aggression, cannot be impaired by the wrongful acts of individuals, unsupported by State authority in the shape of laws, customs, or judicial or executive proceedings. The wrongful act of an individual, unsupported by any such authority, is simply a private wrong, or a crime of that individual.[1]

In so doing the Court limited the regulatory scope of constitutional provisions to the relation between the State and individuals, and exempted those between private parties. Initially the only exception to this rule was slavery. Over time, however, the Court expanded the scope of State action to actions previously considered private, and found arbitrary unequal treatment that once was considered reasonable. The proper scope of State action and the measure of its reasonableness remain contentious.[2]

Statutory racial exclusions were struck down in jury service and suffrage long before they were annulled in access to public education and places of public accommodation; white primary elections administered by local parties were initially upheld as private action and later struck down as State action; *de jure* segregation of black and white persons in places of public accommodation and public education, once considered reasonable, was later found unreasonable and

[1] *Civil Rights Cases*, 109 U.S. 3, 17 (1883).

[2] On the distinction between "guaranteed" and "conferred" constitutional rights and their differential entitlement to protection against private action, as well as the State's affirmative duty to ensure their universal enjoyment, see Brandwein (2007: 367-370). On the inadequacy of anti-discrimination laws, in the absence of adjustments of background rules for property and contract to guarantee equal protection of the laws for the disadvantaged see, e.g., Fiss (1976); Freeman (1978); Peller and Tushnet (2004).

unconstitutional, as was the poll tax. In other words, the Court's application of the state-action doctrine has varied across social systems and over time.

Highlighting legal indeterminacies, post-realist political and legal scholarship has been preoccupied with identification of extra-legal factors that determine variations in judicial decision-making.[1] In recent decades, a range of new institutionalist and sociological approaches to adjudication have drawn attention to the importance of meaning-constitution in the process of decision-making. Rather than a mere smokescreen for individual justices' policy preferences, as suggested by proponents of the "attitudinal model," jurisprudence is now seen as influential in its own right. Judicial decision-making is now seen as mediated by social *structures* and social *meanings*.

New institutionalism in political scholarship draws attention to the multiplicity of institutions and the tenacious relation among their norms, procedures and missions in providing various guiding principles for legitimate meaningful action (e.g., Clayton and Gillman 1999; Epstein and Knight 1998; Feldman 2005; Lieberman 1992; Skowronek 1995; Smith 1988, 1993). The context of Court rulings is seen as a competition between two "racial institutional orders," which have constituted the polity since its inception: a "white supremacist" order and an "egalitarian transformative" order, that "seek and exercise governing power in ways that predictably shape people's statuses, resources, and opportunities by their placement in 'racial' categories" (King and

[1] In the 1920s, Legal Realists rejected formalist accounts of adjudication as an objective process of discovery and application of established legal rules. Since then, various approaches to adjudication, e.g., "political jurisprudence," "law and economics," "law and literature" and "critical legal studies," have drawn attention to various aspects of indeterminacy in the law and the extra-legal context of judicial decision-making.

Smith 2005).[1] The Court's positioning in this conflict is said to be mediated by "jurisprudential regimes" composed of sets of rules, doctrines and tests that determine which precedents are to be treated as ruling in evaluating the facts of the case at hand (Gillman 2006; Marlowe 2011; Richards and Kritzer 2002).

Correspondingly, a more sociologically informed legal scholarship describes the context of Court rulings as the "sociological predicament" of democracy, i.e., a tension between its egalitarian ideals and the reality of status hierarchy. The latter is sustained by a "system of social meanings" ascribing differential values to distinct groups of people who "compete with each other for social esteem and material resources, for privilege and prestige" (Balkin 1997: 2314-2323). Law participates in this process by creating and maintaining certain constructions of race and foreclosing others. Legal reasoning is the terrain on which the "struggle over power and meaning" unfolds and "the boundaries of the plausible and the realm of the reasonable" are negotiated (Balkin 1993: 879, 891). From this perspective, conflicts over racial equality reflect a breakdown of "status hierarchy," and destabilization of the system of social meanings associated with it. Thus, the changing hierarchy of rights and variation in the meaning of race in the Court's jurisprudence are examined in terms of their grounds in and consequences for social stratification (e.g., Gotanda 1991; Harris 1994, 2000; Siegel 1997, 2000, 2004, 2006).

Despite valuable contributions, this debate rests on an inadequate understanding of the structural dynamics that destabilize the public/private

[1] For a critique of this juxtaposition and an account of the intimate relation between racism and liberalism in American political culture see Skowronek (2006).

distinction, and unsettle the contours of the right to equality: the increasing functional differentiation of societal systems. While it is acknowledged that status conflicts arise in the context of ongoing destabilization and revalorization of stratified hierarchies, Court rulings are still examined in terms of what is in decline rather than what is on the rise. What is on the rise, however, is neither another stratified order nor an egalitarian one. Rather, it is a functionally differentiated order that, while transformative, rests on contingent and yet often contagious social exclusion.[1] Both equality conflicts and equal protection jurisprudence need to be examined in this context.

Drawing on social systems theory, this essay takes up the task. Part I reformulates equality conflicts as boundary tensions between functionally differentiated societal systems. Part II discusses the analytic strategy to be employed. Part III traces the Court's equal protection jurisprudence concerning racial discrimination in jury service, suffrage, education, and access to public accommodation/transportation. It is argued that racial classification is held discriminatory and thus unconstitutional to the extent that the societal scope and differentiated function of the system in question is legally recognized. Part IV examines the current divide in the Court concerning affirmative action programs against this backdrop.

[1] To the extent that patterns of social exclusion in modern society reproduce elements of the previous status hierarchy, the radical difference between functional and stratified forms of social exclusion has been overlooked. On the other hand, the contingent trajectory of social inclusion for each individual gives rise to exaggerated views of the egalitarian potential of functional differentiation.

I: EQUALITY: GROUPS, INSTITUTIONAL ORDERS AND SOCIETAL SYSTEMS

Conflicts over the concrete meaning of racial discrimination are often conceived as reflections of struggles over power, privilege and prestige between groups of people or institutional orders (e.g., Balkin 1997; Harris 2000; King and Smith 2005; Siegel 1997). As industrialization, urbanization, internal and international migration, two World Wars, the Cold War, the civil rights movement, etc., changed the balance of forces between groups of people or institutional orders, the systems of social meaning associated with the pervious hierarchy began to crumble and new ways of conceiving race relations became possible. Throughout, the Court is seen as a majoritarian institution usually supportive of the dominant political regime, in tune with national elites, and a defender of the rights of minorities only after they have already acquired substantial political clout (e.g., Balkin 2004; Dahl 1957; Klarman 2004; Rosenberg 1992).

This conception of conflict over racial equality overlooks the importance of two interrelated structural transformations underlying these processes: transformation of the primary form of social differentiation from stratification to functional differentiation; and the changing pattern of group formation.[1]

Primarily stratified societies are organized along a unified hierarchy. Individuals are constituted as accountable actors and included in society by virtue of their fixed social position. Group membership provides automatic access to a network of social bonds and protection against possible threats. Automatic inclusion in some groups involves automatic exclusion from others. Social

[1] While the latter is not lost to legal and political scholarship, as the following discussion illustrates, its implication for the emergence of the right to equality has been overlooked.

inclusion is homogenous, total, and ineluctable. In this type of social differentiation individuals are not "rights-bearing entities" and the right to equality has no place in regulating social life (Verschraegen 2002: 264).

Modern society, however, lacks a unitary hierarchy. Functionally differentiated societal systems each have their own respective boundaries and modes of inclusion and exclusion. Access to each system is determined by virtue of relevant role expectations rather than fixed group membership. Family background no longer guarantees political office or access to education; one has to stand for office and pass examinations. Membership in multiple groups, rather than an exception becomes a norm. In short, in modern society an automatic, one-dimensional mechanism for social inclusion gives way to a plurality of contingent mechanisms for partial inclusion.[1]

By promising equal *individual* access to politics, law, economy, education, etc., the right to equality undermines group-based social exclusion and reduces the contagious effects of social exclusion across societal systems. For example, the right to equal protection of the laws entitles everyone to equal access to the courts and at the same time prevents politics, economy, and religion from interference with the administration of justice; likewise the rights to contract and property prevent negative effects of exclusion from politics or religion upon one's ability to participate in the market and protect functional differentiation of the economic system.

[1] This is not so much a move from status, i.e., an ascribed position, to contract, i.e., a voluntary stipulation, as Maine (1861) suggested, as it is a move towards status through contract. Stratification does not disappear. Rather it becomes a by-product of functional differentiation and its contingent exclusions.

The right to equality, however, does not entail the *absence* of inequality. It only requires its *reasonableness*. It promises that in the process of inclusion, only relevant characteristics are considered and not others. For example, an entrepreneur may lose a contract for bidding too high but not for religious affiliation; an applicant may be denied access to higher education for failing an examination but not on the basis of skin-color (Verschraegen 2002: 278-9).

Racial discrimination litigations involve conflicts over the relevance of race to social exclusion. By granting a hearing the Supreme Court admits indeterminacy in the law (i.e., a variety of extant legal meanings of the racial classification in question). The state-action doctrine has provided a mechanism for selection and retention of legal communications in such legal episodes. Over the years, the Court has developed various distinctions and qualifications to determine whether or not the State is responsible for the disputed racial classification, and if that classification is reasonable: Is the scope of State responsibility limited to its actions or does it extend to its inactions? Does the Fourteenth Amendment prohibit racial classification *per se* or only discriminatory ones? Is a racially disparate result sufficient to establish an equal protection challenge or is it necessary to establish motive and intent?[1] Is the function of strict scrutiny to identify invidious motives in *prima facie* neutral public policy, or to determine its efficacy and feasibility? etc., etc. [2]

[1] For a critique of the requirement of intent in establishing the discriminatory nature of legislative and administrative action see Lawrence's (1987) discussion of unconscious motivation.

[2] On the incoherence and inconsistent application of the state-action doctrine and yet its continued significance in the Court's jurisprudence, and thus persistent evaluation and re-evaluation in legal scholarship see e.g., Black (1967); Kay (1993); Lewis (1960); Peller and Thushnet (2004); Rubenfeld (1997); Schwarzschild (1988); Seidman (1993); Silard (1966); Strauss (1993); Tussman and Tenbroek (1949).

These distinctions are mostly actor/action centered, made from the normative perspective of the legal system. They seek to attribute the meaning of racial classification to actors and their intentions or to actions and their results. Yet, from a sociological perspective the meaning of a classification cannot be fixed simply by reference to author and intention, for it varies with the definition of the situation and thus, the social system to which the classification is attributed.[1] In fact, it is the system reference of racial classification that determines both the character of the actor and their intention. Thus, to understand the history of the state-action doctrine we need to examine its role in determining the system reference of disputed racial classifications.

The contention here is that State responsibility for racial classification in access to a social system is established when the societal nature of the system in question is legally recognized; the reasonableness of racial classification is rejected when the system in question is recognized to have a differentiated function.

Functional differentiation was briefly discussed above, but societal systems require a brief description: In modern society, societal systems are differentiated from both interaction systems and organizations, based on their principle of self-selection and boundary-formation. Unlike interaction systems that form between mutually perceiving individuals, and organizations that involve specific criteria of membership, the boundaries of societal systems expand to all communications employing the system's symbolically generalized medium (see Luhmann 1982; 1995a). Thus, all with the ability to pay can participate in the

[1] See Mills (1963).

economy; faith is enough to participate in religion, etc. Consequently, to the extent that interaction at interpersonal and organizational levels can be subsumed under societal communications (i.e., to the extent that interactions carry societal functions), mutual personal satisfaction becomes irrelevant to them.

II: Analytic Strategy

The following traces the Court's equal protection jurisprudence on racial classification in five areas: jury service, suffrage, access to public transportation/accommodation, education, and affirmative action, from the adoption of the Fourteenth Amendment in 1868 to the end of the 20th century.

Bracketing judicial behaviour and legal consciousness altogether, the analysis remains strictly on the manifest level of legal communications and concerns the relation between the changing contours of racial equality in the eye of the law and functional differentiation. Three questions guide the analysis:

1. How does racial classification acquire various legal meanings across different social systems and over time?
2. How does the Court select and retain one meaning over others?
3. How are these operations related to functional differentiation?

III: Racial Discrimination in the Eye of the Law

A: Jury Service

In the adversarial legal tradition of the United States, a jury has been seen as a defendant's protection against arbitrary administration of justice and an essential element of a fair trial. While racial exclusion from jury service is also denial of

the equal right of citizens to participate in the *administration* of justice, until recently it was only the denial of the equal right of defendants to *access* justice that triggered judicial review of jury selection processes. Litigations were initiated on behalf of allegedly wrongfully convicted defendants rather than excluded jurors.

During the Reconstruction period (1865-1877), statutory exclusions of blacks from jury service were repealed in most states as newly enfranchised blacks gained political clout. In Maryland, Kentucky and West Virginia, however, where minority black voters could not elect Republican governments, such exclusions remained in place until 1879, when the Court reversed the conviction of a black man in West Virginia by an all-white jury, holding statutory exclusion of blacks from jury service a violation of the equal protection clause.[1] Since then, most variations in the Court's rulings on racial discrimination in jury service have involved changes in the evidentiary formula for the establishment of racial discrimination and determination of its reasonableness.

Until 1935, in the absence of statutory racial exclusions, it was almost impossible to establish racial discrimination in jury selection.[2] Most convictions handed down by all-white juries were upheld by the Court presuming constitutionality of administrative action and deferring to fact-findings by state

[1] *Strauder v. West Virginia*, 100 U.S. 303, 310 (1879). The Court held that while a state could exclude people from jury service based on sex, property ownership, citizenship, age, or education, it could not do so on the ground of race or color. Thus, race was recognized as irrelevant to jury service long before other characteristics.

[2] In *Williams v. Mississippi*, 170 U.S. 213 (1898), a unanimous Court upheld the death penalty of a black defendant by an all-white jury on the ground that he had not shown actual discrimination in the administration of racially neutral regulations. At the time, Mississippi restricted jury service to voters and imposed a literacy test on voting. This ensured the *de facto* exclusion of blacks from jury service without a need for *de jure* exclusion.

courts which reported the absence of discriminatory action. Even where no black person had served on a jury for decades, the Court put the burden of proof on the plaintiff to show discrimination in jury selection in his own case.

The result was enormous disparity in both access to and administration of justice depending on dynamics of local politics. For the first three decades of the twentieth century *de facto* racial exclusion in jury service remained in place in all southern states and black defendants were systematically denied equal access to justice, as lynching and mob-dominated trials in primarily rural jurisdictions of southern states were left unscathed (See Klarman 2004: 39-43). In the absence of nation-wide legal standards, jury selection remained a function of the dynamics of local politics.

A change was signaled in 1935 when a unanimous Court reversed the conviction of a black defendant by holding "systematic and arbitrary exclusion" of blacks from jury service a *prima facie* violation of the equal protection clause. To determine whether a federal right was denied, the Court held, it was not enough to examine if "it was denied in express terms, but also whether it was denied in substance and effect."[1] This marked the beginning of closer examination of evidence and stricter scrutiny of administrative action in jury selection by the Supreme Court.[2] Although determining jurors' qualifications was a *political* question and within state jurisdiction, the Court expanded the oversight of the

[1] *Norris v. Alabama*, 294 U.S. 587, 590 (1935).

[2] A few years earlier the Court took a similar position with respect to state criminal trials. In *Moore v. Dempsey*, 261 U.S. 86 (1923), and in *Powell v. Alabama*, 287 U.S. 45 (1932) the Court reversed the conviction of black defendants by holding mob-dominated trials in violation of the due process clause. In most southern states they functioned as surrogates for lynching (See Klarman 2004).

legal system over the reasonableness of jurors' qualifications and the efficacy of their application.

In subsequent years, the Court devised further distinctions to determine whether a racially disproportionate jury composition indicated deliberate and systematic exclusion or a random outcome of neutral classifications. The scope of State action was gradually expanded to all steps of the jury selection process, from statutory provisions, to administration, to peremptory challenges[1] by the prosecutor, and finally to those by the defense.

In the 1960s and 1970s, to win an equal protection challenge to an all-white jury the defendant had to prove *systematic* racial discrimination in administrative action.[2] In 1986 the Court changed this evidentiary formula and allowed *prima facie* challenges based *only* on the facts involved in the defendant's case.[3] Substantial racial under-representation in a jury would shift the burden of proof to the State to show the absence of deliberate racial exclusion. This decision made prosecutors' use of peremptory challenges subject to judicial review and thus legal standards.

At the end of the twentieth century the Court was divided over the constitutionality of racial discrimination in peremptory challenges. In 1990, the Court allowed racial discrimination in peremptory challenges by the prosecutor. It

[1] In the process of jury selection prospective jurors can be disqualified by two types of challenges: the "challenge for cause" requires the challenger (i.e., the prosecutor or the defense), to provide a reason as to why the juror is deemed impartial; the "peremptory challenge" does not require a cause. While the number of challenges for cause is unlimited, the number of peremptory challenges is determined by statutes or case law.
[2] *Swain v. Alabama*, 380 U.S. 202 (1965); *Castaneda v. Partida*, 430 U.S. 482 (1977).
[3] *Batson v. Kentucky*, 476 U.S. 79 (1986); *Ford v. Georgia*, 498 U.S. 411 (1991).

held that although the venire (i.e., the panel of prospective jurors from which a jury is selected), should represent a fair cross-section of the community, the

> initial representativeness [could be] diminished by allowing both the accused and the State to eliminate persons thought to be inclined against their interests.[1]

In 1991, however, the Court held prosecutors' peremptory challenges in violation of the equal protection right of the juror if they were used to exclude otherwise qualified persons solely because of their race. It also gave the defendant third-party standing to raise the equal protection right of a juror so excluded.[2] In 1992, that ruling was extended to the defense by treating its peremptory challenges as State action, and giving the State third-party standing to challenge a defendant's use of peremptory challenges! The paradoxical nature of this decision is not lost to its opponents:

> The Court reaches the remarkable conclusion that criminal defendants being prosecuted by the State act on behalf of their adversary when they exercise peremptory challenges during jury selection ... but our cases do not compel this perverse result. To the contrary, our decisions specifically establish that criminal defendants and their lawyers are not government actors when they perform traditional trial functions.[3]

Thus, today a prosecutor can file an equal protection challenge on the part of the excluded juror if a defendant's use of peremptory challenges is deemed racially discriminatory. Whether or not the defendant and the excluded juror are of the same race is inconsequential.

How can we make sense of this divide in the Court over the constitutionality of peremptory challenges? It is hard to establish a connection

[1] *Holland v. Illinois*, 493 U.S. 474, 480 (1990).
[2] *Powers v. Ohio*, 499 U.S. 400 (1991).
[3] *Georgia v. McCollum*, 505 U.S. 42, 62-63 (1992) (O'Conner, J., Dissenting).

between destabilization of the meaning of peremptory challenges and status stratification or competing institutional orders. In fact, the National Association for the Advancement of Colored People (NAACP) and originalist Justices who oppose affirmative action were against the decision.[1] In terms of a hierarchy of rights, expansion of the scope of State action to peremptory challenges by the defense appears to favor the "right of citizens to sit on juries over the rights of the criminal defendant" whose life and liberty might be at stake.[2] Examination of the system reference of the jury selection, however, gives the ruling another significance.

At issue seem to be two conceptions of the jury. Opponents of treating peremptory challenges as State action see the jury as a buffer between the defendant and the societal system of law. Their primary question about jury selection concerns *access* to, rather than *administration* of, justice and the requirements of the two need not be in harmony. Thus, it is argued that

> a defense lawyer best serves the public not by acting on behalf of the State or in concert with it, but rather by advancing 'the undivided interests of his client.'[3]

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[1] Justice Scalia calls the decision to classify action of a criminal defendant prosecuted by the State as State action "terminally absurd," and adds: "Today's decision gives the lie once again to the belief that an activist, 'evolutionary' constitutional jurisprudence always evolves in the direction of greater individual rights. In the interest of promoting the supposedly greater good of race relations in the society as a whole (make no mistake that that is what underlies all of this), we use the Constitution to destroy the ages-old right of criminal defendants to exercise peremptory challenges as they wish, to secure a jury that they consider fair" *Georgia v. McCollum*, 505 U.S. 42, 69-70 (1992). Justice O'Connor suggests: "The ability to use peremptory challenges to exclude majority race jurors may be crucial to empaneling a fair jury. In many cases, an African American, or other minority defendant, may be faced with a jury array in which his racial group is underrepresented to some degree, but not sufficiently to permit challenge under the fourteenth Amendment. The only possible chance the defendant may have of having any minority jurors on the jury that actually tries him will be if he uses his peremptories to strike members of the majority race" (Ibid.: 68). The detrimental implication of this decision on the right of minority defendants to a fair trial is emphasized by the NAACP as well (Ibid.).

[2] *Georgia v. McCollum*, 505 U.S. 42, 62 (1992) (Thomas, J., Concurring)

[3] *Georgia v. McCollum*, 505 U.S. 42, 65 (1992) (O'Connor, J., Dissenting).

That is why even when the prosecutor's peremptory challenges were subject to scrutiny defense action was not scrutinized.[1]

Supporters of extending constitutional provisions to the defense, however, see the jury as part of the societal system of law itself. Their primary concern about jury composition is not the outcome for the defendant, but the operation of the legal system, as an instance of a democratic constitutional order. At issue is temporal stability of a generalized normative expectation concerning non-arbitrary administration of justice.

> The jury system postulates a conscious duty of participation in the machinery of justice. . . . One of its greatest benefits is in the security it gives the people that they, as jurors actual or possible, being part of the judicial system of the country can prevent its arbitrary use or abuse.[2]

Thus, it becomes

> an affront to justice, to argue that the right to a fair trial includes the right to discriminate against a group of citizens based upon their race.[3]

The "fairness" of a trial is not secured by a jury well-disposed towards a particular defendant but by a jury selected through a non-prejudicial process from beginning to end. Thus, access to and administration of justice become subject to the same legal standards.

In sum, in 1879 only de jure racial exclusion was illegal, de facto racial exclusion did not automatically activate the Fourteenth Amendment. Equal

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[1] The suggestion of symmetry between the defense and prosecution is found problematic on various grounds. The defense has legal and professional responsibilities distinct from the prosecutor. In his service to his client, the defense is not committed to the truth; in fact his obligation may make him an obstacle to truth finding. Unlike the prosecutor he is not obliged to disclose certain evidence unfavourable to his client. See Goldwasser (1989).

[2] *Powers v. Ohio*, 499 U.S. 400, 406 (1991).

[3] *Georgia v. McCollum*, 505 U.S. 42, 58 (1992).

protection was extended to systematic racial exclusions in 1935; non-systematic racial exclusion in 1986; prosecutor's peremptory challenges in 1991; and finally to the defense's peremptory challenges in 1992. In each iterative re-entry of the code legal/illegal into what was formerly legal, another step in the process of jury selection is made subject to constitutional standards. What we have witnessed is a process of increasing functional differentiation of the legal system and further differentiation of access to and administration of justice from local politics.[1] This does not preclude variations in juror's qualifying standards and/or possible violations of constitutional provisions. As the expansion of State action to peremptory challenges by the defense suggests, not all steps of this process necessarily benefit racial minority defendants.[2]

B: Suffrage

The Fifteenth Amendment (1870) brought racial discrimination in state and national elections under federal jurisdiction, but did not make all steps of the electoral process subject to constitutional standards. As with jury service, in the absence of statutory racial exclusion, disfranchised plaintiffs were denied relief for decades. Lack of enforcement power, the supposedly moot character of post-

[1] In the context of deep-seated and widespread racial prejudices, this is hardly a guarantee of equal access to justice. In fact, a reliable determinant of a death penalty sentence remains the race of the defendant and victim. In their comparative study of 2000 murder cases in the 1970s in Georgia, Baldus et al. (1983) showed that the capital sentencing rate for cases with white victims was almost 11 times greater than the rate for cases with black victims. Black defendants with white victims were 22 times more likely to be sentenced to death than black defendants with black victims and more than 7 times the rate of white defendants with black victims. The Court held the study insufficient in establishing a violation of the Equal Protection Clause by Georgia and required the defendant to "prove that the decision-makers in *his* case acted with discriminatory purpose" (*McCleskey v. Kemp*, 481 U.S. 279, 280 (1987).

[2] The Court seems to have come full-circle in its equal protection jurisprudence: from limiting its inquiry to the formal denial of a right, to strict scrutiny of its denial in substance and effect, and again back to restricting itself to formal equality regardless of substance and effect.

election cases, and lack of jurisdiction over criminal interference with voting were among the stated reasons for denying relief.[1] In southern states blacks were easily disfranchised by various means, including qualifying literacy tests, poll taxes, administrative ruses, registration fraud, direct intimidation and violence. While blacks were entitled to vote, their actual enjoyment of that right was determined by the dynamics of *local politics* in which the Court would not intervene.

It was only in 1915 that the Court annulled an Oklahoma Constitutional Amendment for its grandfather clause.[2] In 1927 the Court struck down statutory exclusion of blacks from primary elections in Texas.[3] However, when Texas left voting qualifications to the discretion of party officials, who (acting in their "private" capacity) excluded blacks from their "voluntary association," the Court initially found no fault.[4] Nine years later, however, the Court recognized racial classification by local party officials as State action and thus unconstitutional.[5]

Remaining in effect for many years in other states,[6] white primaries were complemented by discriminatory administration of voting qualifications, gerrymandering of voting districts and imposition of poll taxes. The Court has ruled against gerrymandering intended to dilute black votes, but it has not struck down electoral schemes such as at-large elections solely due to their disparate

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[1] See *Giles v. Harris*, 189 U.S. 475 (1903); *Mills v. Green*, 159 U.S. 651 (1895); *Jones v. Montague*, 194 U.S. 147 (1904); *James v. Bowman*, 190 U.S. 127 (1903).

[2] *Guinn v. United States*, 238 U.S. 347 (1915). The Amendment imposed a literacy qualification on all voters except those who, or whose grandfathers, were entitled to vote prior to January 1, 1866, i.e., prior to enfranchisement of African Americans. At issue was not the unconstitutionality of a literacy test *per se*, but its discriminatory application.

[3] *Nixon v. Herndon*, 273 U.S. 536 (1927).

[4] *Grovey v. Townsend*, 295 U.S. 45 (1935).

[5] *Smith v. Allwright*, 321 U.S. 649 (1944).

[6] Until the Court ruled their practice unconstitutional in *Terry v. Adams*, 345 U.S. 461 (1953), the Jaybird Democratic Association in Texas continued to exclude blacks from nomination of democratic candidates with the pretext that it was not a political party but a self governing voluntary club.

racial effects.[1] Only in 1966 and after abolition of the poll tax in federal elections by the 24th Amendment in 1964 did the Court overrule its previous decision and hold unconstitutional all poll taxes in state elections.[2]

The shift in the scope of State action and determination of its reasonableness with respect to voting is best exemplified by the Court overruling the constitutionality of white primaries and poll taxes respectively, albeit the poll tax did not directly involve race.

White primaries conducted by the Democratic Party in Texas were held constitutional by considering a political party as a voluntary association, regulation of the membership of which was beyond Court jurisdiction:

> Democratic Party in that state is a voluntary political association and, by its representatives assembled in convention, has the power to determine who shall be eligible for membership and, as such, eligible to participate in the party's primaries ... The Legislature of Texas has not essayed to interfere, and indeed may not interfere, with the constitutional liberty of citizens to organize a party and to determine the qualifications of its members.[3]

Subsequently the Court distinguished membership privileges of no concern to the State from those consequential to electoral processes. Thus, the formerly private action of party officials became State action when the system reference of action changed from that of a simple organization to the societal system of politics:

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[1] *City of Mobile v. Bolden*, 446 U.S. 55, 77 (1980). The Court upheld the constitutionality of an at-large election scheme for municipal elections in Alabama which dated back to 1911, despite the fact that the scheme diluted the votes of African Americans. In the absence of an "invidious motive," the disparate effect of an electoral scheme was not enough to call it unconstitutional. Since blacks were allowed to "register and vote without hindrance" the state had committed no violation. The Equal Protection Clause, the Court held, does not require proportional representation. On the divide in the Court over pro-minority gerrymandering and the implication of colorblind redistricting see Ely (1998).

[2] *Harper v. Virginia Board of Elections*, 382 U.S. 663 (1966).

[3] *Grovey v. Townsend*, 295 U.S. 45, 55 (1935).

> The privilege of membership in a party may be ... no concern of a state. But when, as here, that privilege is also the essential qualification for voting in a primary to select nominees for a general election, the state makes the action of the party the action of the state.[1]

As long as the local party was described as a voluntary association of private individuals, it could limit its membership on the account of race. Yet, once the party was seen as an integral part of the electoral process, it could no longer use race as a criterion of access. Actions of local party officials became State action when they were recognized to constitute the premise of future actions in the electoral process.

The once reasonable poll *tax* became the unreasonable *poll* tax by shifting the reference of its rationality from taxation to election, from the economy to politics. The poll tax was initially upheld as reasonable on the ground that, although collected at the poll, the tax was not levied on the electors. Aliens were not allowed to vote but they had to pay the tax, while enfranchised women and all persons over 60 were exempt from the tax and yet allowed to vote. Thus, the Court concluded that poll tax was not to deny or abridge the privilege of voting, but was used as a method of tax collection. Moreover, the Court held that as the privilege of voting was conferred by the states, they could regulate suffrage as they deemed appropriate unless explicitly restrained by the Constitution.[2]

This restraint came in 1964 when Congress made the poll tax a matter of participation in federal electoral politics rather than revenue collection by the

[1] *Smith v. Allwright*, 321 U.S. 649, 665-6 (1944).
[2] *Breedlove v. Suttles*, 302 U.S. 277 (1937). Breedlove was a white male who brought an equal protection challenge against the poll tax for its unequal application according to age and sex.

states. All the Court needed to do was to extend this prohibition to state and local elections:

> The principle that denies the State the right to dilute a citizen's vote on account of his economic status or other such factors, by analogy, bars a system which excludes those unable to pay a fee to vote or who fail to pay ... Wealth, like race, creed, or color, is not germane to one's ability to participate intelligently in the electoral process.[1]

The poll tax was distinguished from other licensing fees by its attribution to the societal system of politics.

As Congress and the Court subjected regulation of voters' qualification to constitutional standards, dynamics of local politics were made subject to dynamics of its functional differentiation at the societal level, with varying degrees of success. The Civil Rights Acts of 1957 and 1964, and the Voting Rights Act of 1965 provided the Court with ample authority to issue injunctions against racially motivated interference with the franchise. Yet, these had little impact on local administrations, which often proved successful in evading court orders and preventing registration of black voters.

On the national level mass incarceration of African Americans in recent decades seems to have provided a functional equivalent to previously statutory disfranchisement. Today one of the primary factors in exclusion of male African Americans from the political system is legally sanctioned contagious effects of criminalization.[2] Criminal conviction acts as a proxy for race, not only by direct

[1] *Harper v. Virginia Board of Elections*, 382 U.S. 663, 668 (1966).
[2] In *Richardson v. Ramirez*, 418 U.S. 24 (1974) the U.S. Supreme Court upheld the disfranchisement of convicted felons by the states. In contrast, the Supreme Court of Canada has found such measures in violation of the Canadian Charter of Rights and Freedoms.

disfranchisement but also by limiting access to employment, and perhaps the fixed address required for voting.[1] The equal right of African Americans to participate in the electoral process is thus violated not by means of their status as blacks in a stratified order but by means of their classification in the legal system. At issue is the relevance of criminal conviction to the exercise of citizenship rights.

C: Public Transportation and Accommodation

Since 1883 the Court has both blocked and allowed State action aimed at eliminating racial discrimination in access to public transportation and accommodation. It has found racial segregation both compatible with and in violation of the equal protection of the laws. Despite these seemingly contradictory rulings, however, the Court has consistently held the commerce clause as the ruling law for the application of state-action doctrine and evaluation of its reasonableness in cases involving public transportation and accommodation.[2]

In 1878 the Court blocked an attempt by the State of Louisiana to end racial discrimination in public transportation on the ground that it unduly burdened interstate commerce and thus encroached on congressional power. [3] Five years later the Court struck down a similar measure by Congress for its

[1] On the "extra-penological" function of the prison system see Wacquant (2002). On the adverse effect of criminal conviction on employment prospects see Pager (2003). For a critique of the legal narrative of the history of race relations in the US as a progressive path towards the creation of a colorblind society see Oh (2003).
[2] Article I, Section 8, Clause 3 of the Constitution gives the Congress the power "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."
[3] *Hall v. Decuir*, 95 U.S. 485 (1878).

encroachment on state power![1] Congress made no subsequent major attempt to end racial discrimination in access to public transportation and places of public accommodation until 1957. During this time, the Court upheld the constitutionality of a statutory requirement for "separate but equal" facilities for white and black passengers,[2] and struck it down fifty years later.[3] Finally, in 1964 the Court upheld prohibition of racial discrimination in places of public accommodation.[4] This, however, did not amount to prohibition of racially discriminatory membership practices by privately owned and operated clubs.[5] How can functional differentiation help us make sense of this chequered history of the Court's jurisprudence?

The first congressional attempt to eliminate racial discrimination in public transportation and places of public accommodation was struck down on the ground that it had laid down "rules for the conduct of individuals in society towards each other,"[6] a matter under state jurisdiction, unless involving slavery. Later the Court upheld the requirement of "equal but separate" accommodations in public transportation for blacks and whites as it did not imply servitude. Imposition of such measures was held within the limits of state power, as it had been with respect to segregated schools. The object of the Fourteenth Amendment, the Court held, was

> to enforce the absolute equality of the two races before the law… [not to] abolish distinctions based upon color, or to enforce social, as distinguished

[1] *Civil Rights Cases*, 109 U.S. 3 (1883).
[2] *Plessy v. Ferguson*, 163 U.S. 537 (1896).
[3] *Morgan v. Virginia*, 328 U.S. 373 (1946).
[4] *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241(1964).
[5] *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972).
[6] *Civil Rights Cases*, 109 U.S. 3, 15 (1883).

> from political, equality, or a commingling of the two races upon terms unsatisfactory to either.[1]

As for places of public accommodation, actions of owners of such facilities were not considered State action and thus not subject to constitutional standards.

The second congressional attempt in 1957, however, was held constitutional on the ground of interstate commerce.[2] While the real goal of the Civil Rights Act 1957 was held to be protection of "human dignity" rather than "mere facilitation of commerce,"[3] it was not human dignity but the commerce clause that provided the legal ground for upholding the Act.[4] The Court chose to frame the constitutional question not as whether the equal protection clause guarantees equal treatment in places of public accommodation, but as

> whether the activity sought to be regulated is 'commerce which concerns more States than one' and has a real and substantial relation to the national interest.[5]

The Court responded positively to both questions by reference to the increasing mobility of the population and growing involvement of such facilities with interstate commerce. Discriminatory practices inhibiting interstate travel and

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[1] *Plessy v. Ferguson*, 163 U.S. 537, 544 (1896).

[2] The Civil Rights Act of 1957 offered an expansive definition of State action: "Discrimination or segregation by an establishment is supported by State action within the meaning of this title if such discrimination or segregation (1) is carried on under color of any law, statute, ordinance, or regulation; or (2) is carried on under color of any custom or usage required or *enforced by officials of the State* or political subdivision thereof; or (3) is required by action of the State or political subdivision thereof." This extended the scope of state action to regulation of places of public accommodation. But it was the commerce clause, not the equal protection clause, which grounded the constitutionality of the Act.

[3] *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 292 (1964) (Goldberg, J., Concurring).

[4] While this does not imply that the first Civil Rights Act would have passed the judicial review had it been formulated in terms of interstate commerce, such a ground would have required some serious maneuvering by the Court to strike it down, as the Court had already made interstate commerce the ruling law in deciding constitutionality of regulation of public transportation.

[5] *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 255 (1964).

burdening air transportation were found harmful to national commerce and thus unconstitutional.[1]

The Act was upheld as an attempt to eliminate all impediments to the "free flow of goods and people."[2] Unification of terms of service and principles of access to national commerce meant that proprietors of such facilities no longer had the right to choose their clients as they wished, free from congressional regulation, even if such regulations entailed some economic loss to the owner. Constitutional provisions were made applicable to public transportation and accommodation when *interactions* and *organizations* involved in such transactions were subsumed under the *societal* system of commerce. This not only made their actions State action but also brought them under federal jurisdiction. Thus, "separate but equal" regime was held arbitrary and unconstitutional when it was subject to the economic rationality of interstate commerce. That explains why establishments with no more than five rooms for rent and occupied by the proprietor as his place of residence, as well as some private clubs, are exempt from the Act: because personal interactions and organizational decisions in such facilities cannot be as readily linked to interstate commerce.[3]

Different balances of interests, hierarchies of rights, and definitions of race were made possible through changing the primary system reference of racial discrimination in public accommodation and transportation. The commerce clause, or, better said, the medium of money, performed the alchemy of turning

[1] Interestingly enough, while Justice Harlan's dissenting opinion in *Plessy* had provided a legal ground to consider the action of owners of public facilities State action, the Court chose to ground its decision on the commerce clause instead.
[2] *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 250 (1964).
[3] *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972).

the "commingling of the two races," into impersonal transactions based on societal rules of commerce. Ironically, subjecting terms of service in public transportation and places of public accommodation to societal rather than interactional standards allows owners of such facilities to operate their businesses without regard to race, and retain personal racist sentiments at the same time. A racially mixed clientele does not necessarily reflect a commitment to racial equality on the proprietor's part, but merely fulfilling a legal requirement for operation of such facilities. Access to commercial establishments can be legally denied only by failure to comply with property, contract and tort regulations, not any other criterion.

D: Public Education

Since the State has always had the power "reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils,"[1] actions of officials of public educational institutions have always been considered State action and amenable to equal protection challenges. The difficulty in adjudicating racial discrimination in the education system lay with determining its reasonableness.

Until 1954, the Court did not recognize an inherent contradiction between *de jure* racial segregation and the equal protection clause. Yet, in its gradual dismantling of the "separate but equal" regime since the 1930s it consistently cast doubt on the reasonableness of segregation in public education. On a case by case basis, African American students were admitted to previously all-white state

[1] *Pierce v. Society of Sisters*, 268 U.S. 510, 534 (1925).

universities by Court orders.[1] The Court also struck down prohibition of "commingling of [black and white] students" in those universities due to its adverse effects on students' ability to learn their profession.[2]

In 1954 a unanimous Court held separate educational institutions "inherently unequal" and concluded that "in the field of public education, the doctrine of 'separate but equal' has no place."[3] Although this time the Court ruled on the general doctrine, it followed the old principle of narrow formulation of constitutional questions and limited its ruling to the field of public education.[4] It was not segregation *per se* but segregation in public education that was held unconstitutional. How is the Court's evaluation of reasonableness of segregation in public education related to functional differentiation?

The key is the Court's recognition of the transformation of the education system.[5] When the Fourteenth Amendment (1868) was adopted:

> in the South, the movement toward free common schools, supported by general taxation, had not yet taken hold. Education of white children was largely in the hands of private groups. Education of Negroes was almost nonexistent ... Even in the North ... ungraded schools were common in rural

[1] *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938)*; Sweatt v. Painter*, 339 U.S. 629 (1950).
[2] *McLaurin v. Oklahoma State Regents*, 339 U.S. 637, 641 (1950). Attribution of conscious intention to Justices and their politics is not necessary. As usual, it was only after the fact, i.e., only as the connective potentials of such decisions to future and past decisions were realized, that their significance became apparent. As Klarman suggests: "By constitutionally requiring racially segregated facilities to provide equal treatment to individuals of different races vis-à-vis each other rather than vis-à-vis their racial group, the Justices laid the doctrinal groundwork for the demise of segregation, without appreciating what they were doing" (1991: 231).
[3] *Brown v. Board of Education of Topeka*, 347 U.S. 483, 495 (1954). A.k.a. *Brown I.* This decision dealt only with the constitutionality of segregation in public education and remained silent about proper remedies.
[4] Dealing with the general doctrine became necessary as the Court faced a class-action suit on behalf of secondary and elementary school students in four states, rather than an individual petition. The case could not be settled by injunctive relief for an individual. In fact, the Court was consistent with its previous judgements on the matter. It measured segregation against educational, rather than political, standards and found it in violation of the equal protection clause.
[5] Whether or not the Court's account of the state of public education is corroborated by the actual state of public education is another question.

> areas; the school term was but three months a year in many states, and compulsory school attendance was virtually unknown.[1]

At the time of deciding the case, however, mandatory schooling was in place and education had become a requirement in the performance of:

> most basic public responsibilities ... the very foundation of good citizenship ... a principal instrument in awakening the child to cultural values, in preparing him for later professional training ... it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.[2]

In other words, the Court recognized the transformation of public education from a private privilege to a universal duty and right. Equality of access to public education became actionable under the equal protection clause as the Court recognized the increasing dependence of access to other social systems upon educational qualifications. Segregation in public education was found arbitrary, and thus unconstitutional, when measured against *educational* standards rather than *political* expediencies. Whatever goals a state could pursue by segregation, it could not do so in the realm of public education, because of its detrimental effects on the quality of education. Legal recognition of the education system's societal function turned *political* imposition of racial classification into arbitrary action unwarranted for achieving *educational* goals. Anyone with the ability to learn was granted an equal right of access to public primary and secondary education, just as anyone who could pay would finally gain the right to receive services in public transportation and places of public accommodation. If the commerce clause finally subjected state action in public transportation and accommodation to

[1] *Brown v. Board of Education of Topeka*, 347 U.S. 483, 489-90 (1954).
[2] Ibid.: 493.

market rationality, here the societal scope of public education made the rationality of segregation subject to educational standards.

Yet, while racial discrimination in public education was held unconstitutional, in its subsequent ruling the Court decided that due to "local variations" remedies would be guided by "equity principles" allowing "practical flexibility," and reconciliation of "public and private needs."[1] We have already seen this pattern with respect to jury service and suffrage. This decision left district courts and courts of appeals with hundreds of cases in response to which they "had to improvise and experiment without detailed or specific guidelines."[2]

It was clear that racial discrimination in public education could not stand constitutional challenge, but it persisted. A decade later active resistance by states and school boards to desegregation, together with demographic changes and the "white flight" to private schools and away from residential neighbourhoods with substantial black populations had rendered *Brown I* practically immaterial. Thus, although the Court had held all "classifications based solely upon race" as "constitutionally suspect,"[3] it chose to make race the sole basis of classification in school desegregation plans. By then it had become clear that "student transfers" and "freedom-of-choice" plans were not sufficient to end segregation. The Court held that states had an "affirmative duty" to devise and implement desegregation plans.[4] To remedy past discrimination and eradicate all remnants of *de jure*

[1] *Brown v. Board of Education of Topeka,* 349 U.S. 294, 299-300 (1955). A.k.a. *Brown II.* This decision dealt with the proper measures and speed of desegregation.
[2] *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 7 (1971).
[3] *Bolling v. Sharpe*, 347 U.S. 497 (1954).
[4] *Green v. County School Board of New Kent County*, 391 U.S. 430 (1968).

segregation, the Court approved forced assignment of students based on race, and struck down laws prohibiting such measures. The Court held:

> just as the race of students must be considered in determining whether a constitutional violation has occurred, so also must race be considered in formulating a remedy.[1]

In 1973, the Court extended the scope of remedial desegregation plans to states without prior history of *de jure* segregation. It held *de facto* segregation resulting from intended actions of school authorities constituted a "*prima facie* case of unlawful segregated design on the part of school authorities," and shifted the burden of proof to them to explain the result as the outcome of application of neutral policies.[2] If a school system is found segregated, the Court held, the "respondent School Board has the affirmative duty to desegregate the entire system "root and branch."[3] Later the Court limited the scope of such remedial plans to the boundary of the offending school district.[4] It also upheld incremental or partial withdrawal of judicial supervision of desegregation plans, as continued imbalances in student assignment were attributed to demographic trends rather than racial discrimination.[5]

While *Brown I* and *II* could not achieve desegregation in public education, the threat of withholding federal funds from racially discriminatory programs by title VI of the 1964 Civil Rights Act made important strides in that direction. By

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[1] *North Carolina State Board of Education v. Swann*, *402* U.S. 43, 46 (1971). This case was the first busing program in a half urban site with about 85000 students.
[2] *Keyes v. School District No. 1, Denver, Colorado*, 413 U.S. 189, 208 (1973). This principle was used to expand constitutional provisions to de facto racial exclusion from jury service in 1935.
[3] Ibid.: 213.
[4] *Milliken v. Bradley*, 433 U.S. 267 (1977).
[5] *Freeman v. Pitts*, 503 U.S. 467 (1992).

1972 more than 91% of African-American children in the south attended non-segregated schools (Rosenberg 1999). The Court's implicit admission of the inefficacy of forced desegregation of elementary and secondary schools coincided with the great expansion of post-secondary education, the desegregation of which cannot be achieved by mandatory student assignments.[1]

IV: AFFIRMATIVE ACTION

Until the 1970s, conflicts over racial discrimination involved classifications detrimental to minorities. Since then, the Court has been divided on the constitutionality of affirmative action programs which use racial classification to minorities' advantage. At issue is whether constitutional provisions prohibit the use of racial classification *per se* or only invidiously motivated ones.[2] The controversy has heightened as it has become possible to see the United States as a "nation of minorities," and as beneficiaries of affirmative action programs are not limited to victims of past discriminations or the most disadvantaged among them. This has allowed for challenges to affirmative action programs as racial discrimination against whites, a

[1] In 1992 the Court finally heard a class-action suit filed in 1975 against the State of Mississippi for failure to end the dual university system. At the time less than 1% of students in Mississippi's historically white universities were African American. The Court held that *prima facie* neutral qualifying tests and admission policies of the university were intended to exclude African Americans and thus discriminatory.

[2] A lower standard of scrutiny for judicial review of affirmative action programs is often grounded in the "political process" theory (see, e.g., Ely 1974; Klarman 1991), which is in part inspired by the Court's ruling in *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938). In that case the Court held legislation aimed at "discrete and insular minorities," lacking normal protections of the political process, subject to a heightened standard of judicial review. This implicitly precluded affirmative action programs disadvantaging majorities from strict scrutiny. The Court rejected the political process theory as a ground for affirmative action in *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989). As a result all race-based classifications became subject to strict scrutiny, regardless of their intent and affected groups.

> "majority" itself …composed of various minority groups, most of which can lay claim to a history of prior discrimination at the hands of the State and private individuals.[1]

In 1978, while upholding the constitutionality of affirmative action, the Court held unconstitutional the use of fixed quotas for increasing university admission of minority students. Since then, the Court has ruled both for and against affirmative action programs; both for and against quotas.[2] The Court has allowed collectively bargained affirmative action plans in hiring and promotion,[3] and invalidated them in layoffs;[4] it has upheld Congressional affirmative action programs in granting broadcast licenses,[5] and public works contracts,[6] and struck the latter down at both federal[7]and state levels.[8]

Behind what is seen as "casuistry," and despite "particularistic" decisions that, while "catalyzing public debate," provide little certainty about the "law governing affirmative action" (Sunstein 1996: 1185), a fundamental divide has emerged in the Court between categorical opponents of race-conscious classification and its conditional supporters.

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[1] *Regents of the University of California v. Bakke*, 438 U.S. 265, 295 (1978).
[2] Quotas are allowed only if the organization in question has a history of discrimination and segregation. Otherwise, their implementation requires a Court order. Whether or not collectively bargained affirmative action programs using quotas are constitutional remains contentious.
[3] *United Steelworkers of America, AFL-CIO-CLC v. Weber*, 443 U.S. 193 (1979).
[4] *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986).
[5] *Metro Broadcasting, Inc. v. Federal Communications Commission*, 497 U.S. 547 (1990).
[6] *Fullilove v. Klutznick*, 448 U.S. 448 (1980). Although six justices voted to uphold the Act, their arguments were quite varied except for one point: strict scrutiny was not required to determine the constitutionality of the Act, be it on the ground of deference to the legislator or benign nature of racial classification. The Court acknowledges that the remedial purpose of the Act may not be achieved but defends its decision in the name of the value of experimentation for the nation.
[7] *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989).
[8] *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995).

The former insist on the "color-blindness" of the Constitution, the textual evidence for which is found not in the Constitution but in dissenting opinion in *Plessy:*

> In view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved.[1]

Racial classification is seen as permissible only in dismantling a system of *de jure* racial classification, i.e., as a remedy for past discriminatory State action. Even then, the remedy does not extend

> further than the scope of the constitutional violation, and does not encompass the continuing effects of a discriminatory system once the system itself has been eliminated.[2]
>
> [L]aws designed to subjugate a race and those that distribute benefits on the basis of race in order to foster some current notion of equality ... [are both] racial discrimination, plain and simple.[3]

Racial classification is seen as inherently suspect, and thus subject to heightened or strict scrutiny at all times, regardless of its intention and effect.[4]

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[1] *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., Dissenting). Making sense of Justice Harlan's voting behaviour has been a puzzle for students of judicial behaviour. The sole dissenter in *Plessy*, he was a former slave owner in Kentucky and as a politician against the Thirteenth Amendment and the Civil Rights Acts of 1866 and 1875. Three years after *Plessy*, he wrote for a unanimous Court in *Cumming*, allowing the closure of black high schools in a Georgia county in order to increase the number of black children in elementary schools, while white children enjoyed publicly funded elementary and secondary education. See Klarman (2004: 17, 1991: 230).

[2] *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 525-526 (1989) (Scalia, J., Concurring).

[3] *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 240-241 (1995) (Thomas, J., Concurring in part and concurring in the judgement).

[4] While such a standard of review was initially thought to make it almost impossible for affirmative action programs to survive judicial review (Riddick and Riddick 1996), lower federal

Sharing the "aspiration" of a "color-blind" Constitution, proponents of affirmative action programs draw attention to the reality of racial disparity and limits of formal equality in ending a long history of racial exclusion and discrimination. They distinguish between invidious and benign racial classification and subject the latter to a less strict standard of review. This approach makes judicial review of affirmative action programs more akin to public policy decisions. It is not, however, always clear how to assess the value of such policies and balance their benefits against the possible harm to members of the disadvantaged group.

As both approaches find their ground in the Court's 1978 decision, a closer examination of the opinion is in order:

In *Bakke*, the Court ordered a white male student to be admitted to the University of California Medical School at Davis, after having being denied admission twice.[1] He claimed that the University's two-tiered admission program, reserving 16 out of 100 entering positions for racial minorities, denied his equal protection rights and violated Title VI of the Civil Rights Act of 1964, which proscribed use of federal funds in segregated institutions. In a 5 to 4 decision the Court agreed. Rejecting the use of a fixed quota, the Court did not question the

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courts have not been as strict in their review of affirmative action programs. In fact, between 1990 and 2003, the district, circuit, and Supreme courts upheld 30% of such programs (see Winkler 2006). On the origin of the strict scrutiny test see, e.g., S.A. Siegel (2006); on the dissolution of strict scrutiny as a means to weed out invidious motives to a cost-benefit analysis of the disputed policy see Rubenfeld (1997).

[1] While *Bakke* was thought to put a chill on affirmative action programs it turned out to be rather inconsequential. By 1998, over 95% of law and 90% of medical schools gave extra consideration to African Americans and 93% of law schools and 69% of medical schools did the same for Hispanics (Welch and Gruhl 1998: 717). As the education system cannot determine how the Court decides on the ruling law, the Court is unable to control how universities conduct their affairs. It can only inquire into the matter if a suit is brought; even then, enforcement of its decision beyond the case at hand remains doubtful.

constitutionality of affirmative action *per se*. The judgement had two key holdings relevant to the present analysis: a) whites are entitled to equal protection against racial discrimination; b) affirmative action is allowed under certain conditions as remedy for past discrimination.

Justice Powell's disaggregation of the white majority into various minority groups attracted much attention as the ground for a change in the political register of color-blindness (e.g., Freeman 1978; Lopez 2007; Natapoff 1995). The significance of his strategy to determine reasonableness of affirmative action, however, has been missed. Let us examine the stated grounds for affirmative action in university admissions:

The U.C. Davis intended its affirmative action program to counter the "effects of societal discrimination," and create an "ethnically diverse student body." Justice Powell found only the second purpose reasonable.

> We have never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations … In such a case ... the remedial action usually remains subject to continuing oversight … [the U.C. Davis] is in no position to make such findings. Its broad mission is education, not the formulation of any legislative policy or the adjudication of particular claims of illegality.[1]

Therefore, the University could not, at its pleasure, privilege perceived victims of societal discrimination. Increasing the diversity of the student body, however, was a constitutionally permissible purpose, because a university was considered free to

[1] *Regents of the University of California v. Bakke*, 438 U.S. 265, 307-309 (1978).

> make its own judgements as to education … to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.[1]

The provision of remedy for past discriminations was held to involve *political* and *legal* decisions and was thus an illegitimate ground for racial classification by the *education* system. But the University could use racial classification in so far as that purported to an *educational* goal.[2] In other words, Justice Powell decided the reasonability and constitutionality of racial classification by reference to the differentiated function of the education system. All applicants to a public university should be able to compete for any entering position and be measured against the same qualifying standards. The university is free to rank applicants as long as it uses educationally relevant criteria for such ordering and proceeds on an individualized, case-by-case basis.[3] Race is an irrelevant qualifying criterion for access to public education. But among the qualified applicants the University is free to offer preferential treatments to those of its own choosing for the pursuit of educational goals. Implied in this approach is the possibility of uncoupling racial classification from the remedy of past discrimination and linking it to permissible future goals.

The future-orientation to adjudication of affirmative action programs has been further developed by Justice Stevens who has voted both for and against affirmative action programs. Justice Stevens agrees with proponents of

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[1] *Regents of the University of California v. Bakke*, 438 U.S. 265, 312 (1978).

[2] That was the ground for student assignment solely based on their race in post-Brown desegregation plans.

[3] It has been rightly noted that while affirmative action for minorities has been under attack, legacy admissions offering preferential treatments to alumni families are never questioned. It would be interesting to see how the Court would respond to such a challenge.

affirmative action on the constitutional permissibility of benign racial classification. Yet, he sides with its opponents when it comes to the standard of review. He sees racial classifications as "too pernicious to permit any but the most exact connection between justification and classification."[1] Thus, in each case he looks for the justification of racial classification in its relevance to the function of the system in question. His ground for objecting to affirmative action in public works contracts is the absence of an

> arguable basis for suggesting that the race of a subcontractor or general contractor should have any relevance to his or her access to the market.[2]

As there is no quota for access to the political system there should be no quota for access to the economic system.

> Neither an election nor a market can be equally accessible to all if race provides a basis for placing a special value on votes or dollars.[3]

Justice Stevens, however, allows for affirmative action in layoffs in schools not because

> the Board of Education has been guilty of racial discrimination in the past … [or because minority teachers have] some sort of special entitlement to jobs as a remedy for sins that were committed in the past … [but because] an integrated faculty will be able to provide benefits to the student body that could not be provided by an all-white, or nearly all-white, faculty … [and advance] the public interest in educating children for the future.[4]

For Justice Stevens, the layoffs in the education system are not primarily about the equal rights of teachers to access the market but about equal rights of students to an integrated education.

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[1] *Fullilove v. Klutznick*, 448 U.S. 448, 537 (1980).
[2] *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 513 (1989).
[3] *Fullilove v. Klutznick*, 448 U.S. 448, 547 (1980).
[4] *Wygant v. Jackson Board of Education*, 476 U.S. 267, 315 (1986). On the same basis he supports affirmative action in broadcast licensing, police hiring, and university admissions.

The notion of a color-blind constitution provides an automatic mechanism for activation of the equal protection clause. Conditional defense of racial classification, however, requires further distinctions for such activations. While conflicts over affirmative action are often seen to reflect demographic change and inter-minority conflict in multi-racial America, what undermines the legal ground of affirmative action is the increasing difficulty of establishing the relevance of race to the function of the involved social system. Affirmative action programs are seen as transitory measures, even by their supporters.[1]

CONCLUSION

The Supreme Court's post-bellum jurisprudence of race has been a constant preoccupation of legal and political scholarship. In search of determining factors tipping the legal balance in conflicts over racial equality, attention is often drawn to the context of adjudication. This essay has shown that this context is not reducible to group conflicts or tensions between institutional orders. The terrain on which such tensions arise and unfold is not reducible to phases in the development of capitalism, liberal democracy, or changing dynamics of stratification. Rather, it is increasing functional differentiation that opens new horizons for making legal sense of racial classification and supplies the Court with changing possibilities for its selective connection to constitutional provisions.

[1] In 1996 California passed "Proposition 209," prohibiting all discrimination and preferential treatment by governmental institutions based on race, sex, color, ethnicity, or national origin. A similar initiative passed in Washington in 1998. In the face of such organized political attempts against affirmative action, the efficacy of affirmative action programs to increase minority access to societal systems is more in doubt. See Rubenfeld (1997).

We have seen that indeterminacies in the law regarding racial classification are exposed as a result of the simultaneous plausibility of legal attribution of the disputed classification to different social systems. In reducing such complexities the post-bellum Court has *not* ruled on the proper assignment of different groups of people to different ranks in a racial order. Nor has it ruled on the normative validity of an egalitarian order vis-à-vis a stratified order. Rather, such outcomes have been the result of attribution of the disputed classification to particular social systems. To the extent that the societal scope and differentiated function of the system in question is legally recognized racial classification is found unconstitutional.

Here lies a radical difference between ante-bellum and post-bellum jurisprudence. Although the Reconstruction Amendments did not annihilate racial exclusions overnight, they did put an end to the legitimacy of race-based adjudication in the eye of the law. Racial hierarchies persisted and racial conflicts continued, but once brought before the Court their adjudication by recourse to a stratified racial order became almost impossible. The Court could no longer recognize communications based on racial hierarchy as legally valid. Comparison between the ante-bellum *Dred Scott* and the post-bellum *Plessy* is quite revealing. *Dred Scott* denied equal protection of the laws to a former slave on the ground that no

> negro whose ancestors were imported into [the United States] and sold as slaves … [could claim any] of the rights and privileges which [the Constitution] provides for and secures to citizens of the United States…they were at that time considered as a subordinate and inferior class of beings who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges

> but such as those who held the power and the Government might choose to grant them. [1]

Plessy, however, upheld the constitutionality of racial segregation by making a distinction between political/legal and social equality and claiming that like other forms of segregation, e.g., those based on age, and sex, racial segregation had

> no tendency to destroy the legal equality of the two races … the enforced separation of the two races [does not] stamp the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it. [2]

The changing significance of the state-action doctrine in determining the boundary of public and private action and shaping contours of racial equality can be understood in this context. While social exclusion based on racial categories was no longer legally justified, it persisted in the environment of the legal system. The state-action doctrine provided a solution for adjudicating partial exclusion, not based on immutable racial differences, but on the ground of the societal scope and function of the social system in question. The doctrine provided a mechanism for both upholding and overturning racially discriminatory classifications without recourse to a racial hierarchy.

While this essay only dealt with the U.S. Supreme Court's application of the state-action doctrine to racial classification, the problem of State action is by no means an American exception, nor is it limited to race. Constitutional systems around the world have dealt with this question and with regard to many other

[1] *Scott v. Sandford*, 60 U.S. 393, 400-405 (1857).
[2] *Plessy v. Ferguson*, 163 U.S. 537, 543, 551 (1896).

rights.[1] At stake is the degree to which constitutional provisions can be used by the judiciary to modify background rules of property, contract, and tort; and thus provide substance for abstract rights without legislative consent.

Legal and political scholarship has provided competing normative grounds for balancing the vertical and horizontal effects of constitutional provisions in dealing with various forms of inequality from an actor/action perspective. This essay provided a systems theoretic and non-normative explanation. Similar investigations can be conducted on racial classification in other areas (e.g., intimate relations, employment, residential segregation and criminal procedure), as well as other equality conflicts (e.g., religion, gender, and sexual orientation). The results may shed new light on the structural conditions in which such disputes arise and are resolved.[2] Comparative historical analysis of such trajectories would provide a view of the evolution of the legal boundaries of functionally differentiated social systems at the level of world society and recast the question of fundamental rights and the increasing role of the judiciary in shaping their contours in terms of co-evolution of law and its environment in an increasingly complex society.

[1] Other constitutional systems deal with the same problem in terms of "vertical" and "horizontal" effects. "A constitution operates vertically when it regulates the relations between a government (usually envisioned 'on top') and citizens, residents, and the like. It operates horizontally when it regulates the relations between private parties" (Tushnet 2008: 196).

[2] The transformation of marital status law is an excellent candidate for such an analysis. The common law recognized marriage as a hierarchical relationship. The husband had the right over the person, labour, and property of his wife and in turn was bound to support and represent her in the legal system. Tracing the judicial response to the tension between marital status laws and constitutional provisions for equality in the context of functional differentiation of intimate relations from other societal systems such as economy and politics promises interesting research questions. See Siegel (1996, 1997, 2002).

CHAPTER V

CONCLUSION

As a scientific endeavour, every sociological approach to the law has first to constitute its own object. Social systems theory does so by defining law as a communication system, then using the distinction "system/environment," the concept "operational closure," and the code "legal/illegal" to delineate its boundaries in modern society. Positive law is defined as an operationally closed communication system which differentiates itself from its environment through recursive applications of the code legal/illegal.

This conceptualization has three analytic advantages: a) it enables sociology to recognize law formation processes running through the entire society; b) it allows sociology to examine the evolutionary differentiation of law from its environment; c) it provides a conceptual apparatus to investigate the evolution of system-building structures of the legal system both in its own terms and from the disciplinary perspective of sociology. Together they promise to bring some coherence to the sociology of law by overcoming persistent bifurcations in the field between the perspective of legal scholarship with its focus on the law and jurisprudence and the perspective of the social sciences with their focus on the socio-historical context, and within each of them between examination of law as formal structure or as everyday practice.

Delimited as such, i.e., as a recursive network of legal communications, the unique function of law, that which cannot be performed by another societal system, is not moral integration as Durkheim (1893) and Parsons (1951) suggest. Given the multiplicity of system-specific rationalities, conflicts of incommensurable moralities, and full positivization of legal validity, law can no longer fulfil a moral function. It cannot regulate "the market for distribution of esteem" and the application of the code "good/bad" (Luhmann 1993b: 999). Nor can morality regulate the application of code "legal/illegal." On the contrary, when morality is only a partisan value, law has to provide protection against morality, both for the individual and for the societal systems. What is legal is no longer necessarily good or vice versa. In fact, direct interference of morality and law is now considered as corruption of both. This bifurcation may explain why even the most effective legal system cannot yield societal consensus. Changeable norms cannot support and stabilize any fixed order of value, unless this order is relegated to a differentiated sphere, and no longer treated as equivalent to society or its legal order. That is how full positivization of legal validity intensifies ideology without either being able to integrate society as a whole.

Nonetheless, *pace* Weber (1946) the function of law is not primarily political. The reliance of law on the more or less abstract availability of coercion and the increasingly instrumental use of law in modern society for planned change are undeniable. However, in constitutional democracies the code of the political system, "government/opposition," and the code of law, "legal/illegal," no longer coalesce. While both the political system and the legal system are recursive networks of communication, the former uses the medium of power, whereas the

latter uses the medium of jurisdiction. With the increasing complexity of social life their functional differentiation becomes a precondition for the stability of both. The political system makes collectively binding decisions, while the legal system ensures temporal stability of normative expectations about the legality of such decisions. That is the difference between the rule of law and arbitrary exercise of power by a sovereign.

The primary function of law in modern society is not ideological as Marx (1846) suggests. Subject to change by decision, positive law can no longer "consecrate the established order" (Bourdieu 1987: 838). It can only promise that problematic changes in the ephemeral order will be legally, rather than arbitrarily, determined. Functional differentiation casts doubt on the State monopoly over legitimate exercises of symbolic violence. To exercise their power of naming, societal systems neither require nor are bound by legal validity.[1] In fact, "increasing functional differentiation and autonomy of the legal system must entail a relative loss of control over other systems" (Luhmann 1988a: 122). In other words, the recursive network of legal communications constitutes "legal reality," not "social reality," or the "life-world." The environment of the legal system is not identical to those of other societal systems either. Each system has a unique way to stabilize its system boundaries. Only in case of boundary tensions between systems is the law called upon to settle the question of symbolic meaning, hence the increasing importance of emergent structural couplings between differentiated communication systems.

[1] Legal protection of abortion and homosexuality cannot change the views of the Church. Nor can denial of global warming by a government prevent scientific communications in that regard.

The immense complexity, incoherence, and changeability of positive law undermine its capacity to provide conceptual resources for everyday life.[1] Often social actors do not know what the law is, and as symbolic interactionism has shown, they do not need to know in order to conduct most daily affairs.[2] All they need is to expect the availability of legal solutions if ambiguities about rights and obligations arise, and the ability to access the law or the know-how to escape its reach, if taken-for-granted assumptions are shattered and conflicts arise. The loss of "socializing, educational, and edifying functions" of the law in modern times is easily discernible by perusing legal terminology or taking note of the almost complete absence of law as a general subject matter in the education system (Luhmann 1985: 173).

Unable to fulfil the core functions of other societal systems, i.e., to socialize, coerce, or educate, the unique function of a differentiated legal system is to stabilize generalized normative expectations. Fulfilment of this function depends on a functionally differentiated political system, a guarantee for fundamental rights, and professional organization of juridical competence for supervising the validity and consistency of legal decisions. Normative closure of the legal system to non-legal communications limits the available range of legal decisions and provides some dynamic stability in the law; hence the law can absorb risks of disappointment and facilitate communication in all social systems.

[1] See Abercrombie et al. (1980) for a critique of both the dominant ideology thesis and the necessity of a shared moral order in capitalism. As they point out, the "everyday discourse, epistemology, or way of life of the subordinate classes are formed outside the control of the dominant class" (p. 189).

[2] That is why appeal to the law is understood to signify interruption of the "inner order" of human association, an indication that an interpersonal exchange can no longer sustain itself on its own. As Ehrlich points out, a family is "already disintegrated" as an association if its members "insist on their legal rights" and "appeal to a judge" (1936: 56).

That is how generalized normative expectations for legal protection of guaranteed rights persist despite their blatant violation.

The rigor and sophistication of Luhmann's sociology of law is not in doubt. Criticism is often levelled against its empirical vacancy. The three substantive essays in this dissertation brought systems theoretic theses and concepts to bear on some contentious debates in socio-legal scholarship with fruitful results:

I: The concept of *structural coupling* was used to develop a sociological theory of privacy and propose a solution to privacy conflicts beyond the normative framework of current legal scholarship. As functional differentiation and structural drift of social communications change the contours of privacy over time and across social systems, various conceptualizations of privacy had failed to provide a common denominator for privacy conflicts. Despite proliferation of such conflicts as well as privacy legislation and guidelines around the world, adequate conceptualization of privacy remained elusive. Threats to privacy and safe-guards for its protection were often sought in different realms, i.e., disparity in capacity and interest of various actors to control information flows, on the one hand, and differential values of certain goods or activities for the individual or society, on the other.

The essay located the threats to and safe-guards for privacy in the increasing differentiation of types and forms of communication and showed how the right to privacy emerges as a structural coupling between them. The common denominator for privacy conflicts was shown to be unjustified reliance on personal communication in one system as a premise of selection and retention of

communication in another, i.e., inter-systemic transfer of functionally irrelevant personal information. This conceptualization of privacy shifts the debate over privacy conflicts and their resolution from conflicting interests and ultimate values toward the system-reference of communication. While societal agreement on the relative value of varied activities is unlikely, normative expectations about privacy are easily formed along system boundaries. Re-orientation of privacy debates in this direction may trigger conceptual and doctrinal innovations in the law and bring some coherence to burgeoning privacy jurisprudence around the globe along the boundaries of functionally differentiated societal systems.

II. The thesis of *normative closure*, or autonomy, of the legal system was used to show the limits of the present debate in socio-legal scholarship over the role of legal vs. extra-legal factors in judicial review of legislation by the United States Supreme Court. The two sides of the debate have tried to substantiate their positions about the role of law in resolving such legal episodes by establishing co-relations between legal or extra-legal factors, and patterns of judicial behaviour. The essay explained how such evidence leaves undisturbed the question of the normative closure of the legal system. Since the autonomy of the legal system is only produced and maintained at the level of second-order observations, investigation has to shift from study of judicial behaviour to study of jurisprudence.

A sociological framework for empirical investigation of judicial review at the juncture of functional differentiation and legal autopoiesis was provided and used to show how the normative closure of the legal system has been maintained in judicial review of abortion and homosexuality. The examination of the uneasy

complementarity between originalism and living constitutionalism as strategies for the self-steering of the legal system pointed to the fruitfulness of comparative historical examinations of the emergence and development of legal doctrine.

III. Finally, the societal function of the right to *equality* was used to demonstrate that conflicts over racial equality and their judicial resolution in post-bellum United States are not reducible to group and institutional conflicts and the Court's side-taking therein. Tracing the Court's jurisprudence on racial classification across different social systems and over time, the essay showed how the social context of Court rulings could not be adequately described as phases of capitalist development, paradoxes of liberal democracy, or dynamics of stratification. Rather, it was legal recognition of the *functional differentiation* of relevant societal systems that time and again changed the horizon of possible meanings of racial classification, destabilized the line between State action and private action, and made racial classification increasingly subject to constitutional standards. Persisting patterns of racial inequality, the transitory nature of affirmative action programs, and the current divide in the Court over their constitutionality were also examined in terms of dynamics of functional differentiation.

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While two of the essays focused on the United States Supreme Court's jurisprudence, legal communications are not limited to those of formal organizations. Nor are their boundaries determined by national borders. The conceptual apparatus of social systems theory is applicable to all communications in which the principle of system-building is the code "legal/illegal." Thus, as an

empirical irritant for further autopoietic theory construction and specification, the analytic framework provided here could be brought to bear on other legal communications. If the normative closure of the legal system is a requirement of its functional differentiation, and if this closure is achieved at the level of second-order observation, then the evolution of legal doctrine and jurisprudence could be examined in terms of functional differentiation of law and other societal systems.

Similarly, while the link between the right to equality and functional differentiation was made only in relation to racial equality in the United States, the framework could be applied to legislative and judicial expansion and contraction of other fundamental rights at the level of world society. If conflicts over fundamental rights are indicative of boundary tensions between functionally differentiated societal systems, then variations in the order of emergence, development, and scope of constitutionally guaranteed rights could be analyzed in terms of stages or sequences of functional differentiation of different societal systems.

Treating meaning-constitution through selective ordering of communications as the common system-building element in all types and forms of social systems, such investigations can bring some coherence to empirical studies of law on all levels of analysis, from everyday interactions, to formal organizations and societal systems.[1] In this vein, studies can be designed to examine how questions of legal validity of normative expectations arise in

[1] Taking note of the potential of social system theory to clarify the phenomenology of emergent social formations and their interconnection, White et al. (2007), have proposed to use meaning-constitution to explain both turn-taking at the interaction level and interlocking of communications within and across networks.

everyday interaction, i.e., when and how rights-claims emerge as a result of shattered taken-for-granted assumptions; how such episodes are lifted up from their particular contexts and linked to the operations of formal organizations (by means of official reports and documents, e.g., complaints, police reports, etc.);[1] and how in turn final resolutions of such episodes by the legal system's decision-making machine provide further irritations for the interaction systems in which such episodes arise. In this way, investigations of legal consciousness in interactional settings can be linked to studies of institutional practice in formal organizations, and evolution of legal programmes and doctrines at the societal level. Tracing applications of the code "legal/illegal," to social communications, disparate social scientific studies of law and law-related phenomena could be linked and cast in the light of structural changes of modern society. Thus, similar questions can inform participant observation, public opinion research, studies of legal professions, decision-making by small-groups, and legal doctrine. Findings of such studies could be used as mutual irritations for refinements of theories and concepts across all.

This involves a shift of emphasis from properties and interests of individuals and groups to dynamics of system-building in functionally differentiated systems and structural couplings between them. As the findings of this project illustrate, at the level of second-order observations, legal communications are selected, retained, disregarded and re-discovered through a shift in the selective potential of communication, i.e., by switching its horizon of

[1] See, e.g., Douglas (1986); Smith (1990).

meaning and exposing the contingency of previous selective reductions of complexity.[1]

These shifts of horizon and changes in legal semantics could be examined in terms of the structural development of modern society and possibilities for meaning-constitutions so provided. The increasing global importance of fundamental rights and recent expansion of judicial review around the world provide a rich laboratory for such investigations. This would be a step toward reviving the original concern of the sociology of law with the condition of possibility of social order amidst increasing complexity and contingency of modern life.

[1] Two notable examples are the dissenting opinion in *Plessy* (1896), which later became the ground of opposition to affirmative action; and footnote 4 in the Court's opinion in *Carolene Prods* (1938), which became the ground for strict scrutiny of race-based classification.

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