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# Secularization, Legal Indeterminacy, and Habermas's Discourse Theory of Law

Mark C. Modak-Truran

*Mississippi College School of Law*, [mmodak@mc.edu](mailto:mmodak@mc.edu)

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*Mark C. Modak-Truran*

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# SECULARIZATION, LEGAL INDETERMINACY, AND HABERMAS'S DISCOURSE THEORY OF LAW\*

MARK C. MODAK-TRURAN\*\*

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## I. INTRODUCTION

“Our age is *not* an age of secularization,” according to the prominent sociologist Peter Berger, but “it is an age of exuberant religiosity.”<sup>1</sup> Berger’s empirical studies have verified that “[m]ost of the world today is as religious as it ever was, and in some places is more religious than ever.”<sup>2</sup> The continued vitality of religion has motivated many scholars to revisit their assumptions about how religion relates to their disciplines. In sociology and religion,<sup>3</sup> scholars are revisiting, revising, or rejecting the paradigmatic assumption that the modernization of society necessarily leads to the secularization of society.<sup>4</sup>

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\*\* J. Will Young Professor of Law, Mississippi College School of Law. B.A., Gustavus Adolphus College; J.D., Northwestern University; A.M., Ph.D., The University of Chicago. I thank Mississippi College for supporting my work on this Article, Franklin I. Gamwell, Jean Bethke Elshtain, and David A. Strauss for helpful comments on earlier drafts of this Article, and Andrew Durrett for his research assistance.

1. Peter L. Berger, *Religion and Globalization*, 4 HEDGEHOG REV. 7, 10 (2002).

2. *Id.*

3. See, e.g., JOHN MILBANK, *THEOLOGY AND SOCIAL THEORY: BEYOND SECULAR REASON* (1990); JEFFREY STOUT, *DEMOCRACY & TRADITION* 97 (2004) (arguing that a secularized modern democratic discourse does not “involve endorsement of the ‘secular state’ as a realm entirely insulated from the effects of religious convictions, let alone removed from God’s ultimate authority. It is simply a matter of what can be presupposed in a discussion with other people who happen to have different theological commitments and interpretive dispositions.”).

4. See, e.g., STEVE BRUCE, *GOD IS DEAD: SECULARIZATION IN THE WEST* (2002) (defending the secularization thesis); JOSÉ CASANOVA, *PUBLIC RELIGIONS IN THE MODERN WORLD* (1994) [hereinafter CASANOVA, *PUBLIC RELIGIONS*] (challenging the privatization of religion but revising the other main postulates of the secularization thesis); Peter L. Berger, *The Desecularization of the World: A Global Overview*, in *THE DESECULARIZATION OF THE WORLD: RESURGENT RELIGION AND WORLD POLITICS 2* (Peter L. Berger ed., 1999) (characterizing prior belief in secularization theory—“[m]odernization necessarily leads to

Scholars in anthropology,<sup>5</sup> political science,<sup>6</sup> international relations,<sup>7</sup> and philosophy<sup>8</sup> have also joined in the debate about secularization and the changing role of religion in modern society and in their disciplines. For instance, in *Philosophy and the Turn to Religion*, philosopher Hent De Vries begins his book by claiming: “That religion can no longer be regarded as a phenomenon belonging to a distant past, and that it is not a transhistorical and transcultural phenomenon either, is no longer disputed in modern scholarship.”<sup>9</sup>

Despite this robust reexamination of the role of religion in public life in other disciplines, the secularization of law arguably constitutes the most widely held but least examined assumption in contemporary legal theory. Almost without question,<sup>10</sup> the contemporary consensus assumes that the law is or should be independent of any

a decline of religion, both in society and in the minds of individuals”—as “mistaken”); José Casanova, *Rethinking Secularization: A Global Comparative Perspective*, 8 HEDGEHOG REV. 7 (2006) [hereinafter Casanova, *Rethinking Secularization*] (clarifying and revising secularization thesis).

5. See, e.g., TALAL ASAD, FORMATIONS OF THE SECULAR: CHRISTIANITY, ISLAM, MODERNITY (2003).

6. See, e.g., PIPPA NORRIS & RONALD INGLEHART, SACRED AND SECULAR: RELIGION AND POLITICS WORLDWIDE (2004) (empirically defending the secularization thesis); CHARLES TAYLOR, MODERN SOCIAL IMAGINARIES 194 (2004) (arguing that “[m]odernity is secular, not in the frequent, rather loose sense of the word, where it designates the absence of religion, but rather in the fact that religion occupies a different place, compatible with the sense that all social action takes place in profane time”); Charles Taylor, *Modes of Secularism*, in SECULARISM AND ITS CRITICS 31, 46, 51-53 (Rajeev Bhargava ed., 1998) (arguing that “secularism in some form is a necessity for democratic life of religiously diverse societies” and proposing a new kind of secularism based on a revised Rawlsian notion of overlapping consensus).

7. See, e.g., SAMUEL P. HUNTINGTON, THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER (1996); Samuel Huntington, *The Clash of Civilizations?*, in THE CLASH OF CIVILIZATIONS?: THE DEBATE 1, 4 (1996) (arguing that “[t]he clash of civilizations will dominate global politics” in part because of the fundamental differences among the seven or eight major civilizations that “are differentiated from each other by history, language, culture, tradition and, *most important, religion*” (emphasis added)).

8. See, e.g., JACQUES DERRIDA, ACTS OF RELIGION (Gil Anidjar ed., 2002); RELIGION (Jacques Derrida & Gianni Vattimo eds., 1996); RICHARD RORTY & GIANNI VATTIMO, THE FUTURE OF RELIGION (Santiago Zabala ed., 2005).

9. HENT DE VRIES, PHILOSOPHY AND THE TURN TO RELIGION 1 (1999).

10. But see MICHAEL J. PERRY, TOWARD A THEORY OF HUMAN RIGHTS: RELIGION, LAW, COURTS (2007) (arguing for a religious ground for human rights); Mark C. Modak-Truran, *Reenchanting the Law: The Religious Dimension of Judicial Decision Making*, 53 CATH. U. L. REV. 709 (2004) [hereinafter Modak-Truran, *Reenchanting the Law*] (arguing that the indeterminacy of United States law requires judges to rely on religious or comprehensive convictions to justify their deliberation about hard cases fully, even though they can only provide a partial justification of their decisions in their written opinions in terms of non-comprehensive legal norms because of the Establishment Clause of the First Amendment); Mark C. Modak-Truran, *Reenchanting the Law: The Religious Dimension of Judicial Decision Making* (2002) [hereinafter Modak-Truran, Unpublished Dissertation] (unpublished Ph.D. dissertation, University of Chicago) (on file with author) (making a more comprehensive argument in support of the claim made in *Reenchanting the Law*, *supra*, about the role of religious beliefs in judicial decisionmaking, including a critique of Habermas from which portions of Parts IV & V are derived).

religious foundation or religious values. It is blasphemy to suggest a religious foundation for the law or religious convictions as a basis for judicial decisionmaking. Paul Kahn stresses that

[t]he rule of law represents a turn to a secular conception of the state, i.e., a state severed from any dependence on a divine order. Law is, for us, a distinctly human creation; the Founders were wise, not divinely inspired. Nowhere in our conception of law is there an opening for theological argument. The popular will, not the divine will, created the legal order.<sup>11</sup>

Kahn poignantly identifies that the secularization of law has become axiomatic for contemporary conceptions of law so that the religious legitimation of law is at best only a matter of historical consideration.<sup>12</sup>

This notion of legal autonomy and its strong separation of law and religion, however, do not hold up in practice. The rancorous debate over the appointment of United States Supreme Court Justices and other judges suggests that even average citizens and legislators intuitively understand that judges' decisions about issues involving abortion, euthanasia, and homosexuality under the United States Constitution depend upon their comprehensive or religious beliefs.<sup>13</sup> This intuition makes sense because it is consistent with the overwhelming consensus among legal theorists (ranging from extreme-radical deconstructionists to contemporary legal formalists)<sup>14</sup> that the

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11. PAUL W. KAHN, *THE CULTURAL STUDY OF LAW: RECONSTRUCTING LEGAL SCHOLARSHIP* 15 (1999).

12. See, e.g., BRIAN Z. TAMANAHA, *ON THE RULE OF LAW: HISTORY, POLITICS, THEORY* 19-28 (2004) (noting the movement in the West from "a law identified with Christian justice" in the Medieval period to "a general social-cultural partitioning of sacred and temporal" where "Divine law and natural law were separated from positive law, the former two losing their authority over affairs of state" after the Reformation and Enlightenment); David Kennedy, *A New Stream of International Law Scholarship*, 7 *WIS. INT'L L.J.* 1, 19 (1988) (pejoratively suggesting that from its inception, the idea of international law has often been associated with a movement beyond "the inadequacies of religion" (i.e., religion produces war not peace) to a rational notion of law to govern the relations among the evolving nation-states).

13. See Sanford Levinson, *The Confrontation of Religious Faith and Civil Religion: Catholics Becoming Justices*, 39 *DEPAUL L. REV.* 1047, 1048 (1990) (discussing the contentious public discourse surrounding the appointment and confirmation of Catholic justices to the United States Supreme Court); Howard J. Vogel, *The Judicial Oath and the American Creed: Comments on Sanford Levinson's The Confrontation of Religious Faith and Civil Religion: Catholics Becoming Justices*, 39 *DEPAUL L. REV.* 1107, 1108-09 (1990) (exploring the hypothetical confirmation of a Quaker and a secular moralist and the problematic role of a civil religious creed that has been embodied in senators' questions in the confirmation process).

14. The consensus ranges from extreme-radical deconstructionists, such as Anthony D'Amato, who have argued that even the United States constitutional requirement that the President be thirty-five years of age is indeterminate, Anthony D'Amato, *Aspects of Deconstruction: The "Easy Case" of the Under-Aged President*, 84 *NW. U. L. REV.* 250 (1989), to contemporary legal formalists, such as Ernest J. Weinrib, who claim that "[n]othing about

law is indeterminate. The law is indeterminate because there are hard cases where the apparently relevant statutes, common law, contracts, or constitutional law provisions at issue fail to resolve disputes.

From a descriptive standpoint, judges must rely on extralegal norms to resolve hard cases, and this may result in judges relying on religious norms in contravention to the secularization of the law. For example, in a recent empirical study of judicial decisionmaking, Gregory Sisk, Michael Heise, and Andrew Morriss concluded that “religious affiliation variables . . . were the most consistently significant influences on judicial votes in the religious freedom cases included in our study.”<sup>15</sup> As suggested by this study, the advent of legal indeterminacy has called into question the secularization of the law as a descriptive assumption. Legal indeterminacy thus shifts the burden of maintaining the secularization of law to normative theories of law, which require judges to justify extralegal norms without relying on religious convictions.

Jürgen Habermas understands this predicament for contemporary legal theory better than any other legal theorist or philosopher. Habermas assumes that the modern legitimation of law starts from the dilemma of “how can disenchanting, internally differentiated and pluralized lifeworlds be socially integrated if, at the same time, the risk of dissension is growing, particularly in the spheres of communicative action that have been cut loose from the ties of sacred authorities and released from the bonds of archaic institutions?”<sup>16</sup> Unlike almost all other contemporary legal theorists and legal philosophers, Habermas explicitly identifies and discusses the importance of secularization and its role in his discourse theory of law.

Relying on Max Weber’s social theory and sociology of law, he argues that the rationalization of society (i.e., secularization) has

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formalism precludes indeterminacy,” Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 *YALE L.J.* 949, 1008 (1988).

15. Gregory C. Sisk, Michael Heise & Andrew P. Morriss, *Searching for the Soul of Judicial Decisionmaking: An Empirical Study of Religious Freedom Decisions*, 65 *OHIO ST. L.J.* 491, 501 (2004). See also RICHARD A. POSNER, *LAW, PRAGMATISM, AND DEMOCRACY* 120 (2003) (noting “startling correlations” between judicial voting on gay rights and judges’ religious affiliations and arguing that “[v]alues based on personal, including ethnic and religious, background influence judicial decisions not because judges are especially willful but because many cases cannot be decided by reasoning from shared premises of fact and value”).

16. JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY* 26 (William Rehg trans., 1996) [hereinafter HABERMAS, *BETWEEN FACTS AND NORMS*]. One commentator has remarked that “the theoretical work of Habermas can be understood as an attempt to grasp the moral nature of a law that has lost its traditional moral foundations in a religious world view or some other metaphysical order.” Klaus Eder, *Critique of Habermas’s Contribution to the Sociology of Law*, 22 *LAW & SOC’Y REV.* 931, 932 (1988).

eliminated religious and metaphysical justifications for law and has differentiated law from politics and morality. Once religious and metaphysical worldviews have been eliminated as a justification for law, law must be legitimated—in a seemingly paradoxical manner—by its legality (i.e., by positive enactment according to certain formal procedures). Habermas concludes that “[t]he democratic procedure for the production of law evidently forms the only postmetaphysical [i.e., postreligious] source of legitimacy,” but that raises the question of “what provides this procedure with its legitimating force?”<sup>17</sup> Thus, Habermas acutely recognizes that this descriptive account of modern society and law raises the normative question: Where does the legitimation of modern law come from?

Habermas claims that legality can legitimate the law based on the discourse principle in the discourse of justification and that the law can be impartially applied in the discourse of application via the principle of appropriateness.<sup>18</sup> In the discourse of justification, the discourse principle provides that voluntary, intersubjective agreement by all those affected by a legal norm provides a basis for legitimating legal norms. Rational intersubjective agreement rather than religion provides the legitimation of law. At the same time, Habermas is uniquely aware of the importance of maintaining the independence of law from religion, morality, and politics (i.e., a secularized notion of law) despite the threats posed by legal indeterminacy in the application of the law. Habermas maintains that the principle of appropriateness and the discourse of application allow for an impartial application of law that is independent of religious or metaphysical worldviews. The discourse of justification justifies legal norms that are then applied by judges in the discourse of application. Although Habermas recognizes that almost all legal norms are indeterminate,<sup>19</sup> he maintains that the discourse of application does not reopen the question of legitimation and that judges can come to “‘single right’ decisions” in every case.<sup>20</sup> Consequently, he claims that the discourse of application can produce a single right decision in all cases via the principle of appropriateness despite the indeterminacy of all legal norms and without reopening the question of legitimation.

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17. HABERMAS, BETWEEN FACTS AND NORMS, *supra* note 16, at 448.

18. In jurisprudence, legitimation or justification has to do with the question: What makes a law valid? Habermas claims that “[i]n the legal mode of validity, the facticity of the *enforcement* of law is intertwined with the legitimacy of a *genesis* of law that claims to be rational because it guarantees liberty.” *Id.* at 28. Although the following discussion will focus primarily on the normative aspect of rational legitimation, it assumes that legal validity involves both a factual identification of a rule as something enforced in a legal system and a rational normative justification or legitimation of that rule.

19. *Id.* at 217.

20. *Id.* at 220.

Legal scholars and philosophers have surprisingly ignored Habermas's important attempt to reconcile the secularization of law and legal indeterminacy in his discourse theory of law. They have primarily focused on his descriptive theory of law, his political theory, and his social theory.<sup>21</sup> Recently, some scholars have criticized Habermas's discourse of application and his treatment of legal indeterminacy but have not considered the relationship between the secularization of law and legal indeterminacy.<sup>22</sup>

Accordingly, this Article focuses on Habermas's sophisticated awareness of the tension between secularization of law and legal indeterminacy and treats his discourse theory of law as a significant test of the feasibility of reconciling these claims. In an earlier article,<sup>23</sup> I criticized Habermas's discourse of justification and his claim that it legitimated the law independently of a religious or metaphysical worldview. Even assuming I was misguided in that critique, this Article argues that Habermas's discourse of application is incoherent and fails to maintain the secularization of the law in the face of legal indeterminacy. Given Habermas's failure, contemporary legal theory needs to recognize that the widespread acceptance of legal indeterminacy calls into question the secularization of law as it is currently understood.

To understand Habermas's discourse theory of law (a normative theory of law), it will first be necessary to set forth his social theory, which builds on Weber's theory about the rationalization of society

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21. See, e.g., Hugh Baxter, *System and Lifeworld in Habermas's Theory of Law*, 23 CARDOZO L. REV. 473, 482 (2002) (discussing rationalization of society while focusing on Habermas's "communications theory of society," and in particular, the social-theoretical model of 'system' and 'lifeworld' that Habermas uses to organize that theory"); *A Discursive Foundation for Law and Legal Practice: A Seminar on Jürgen Habermas' Philosophy of Law*, 12 RATIO JURIS 329 (1999); Symposium, *Exploring Habermas on Law and Democracy*, 76 DENV. U. L. REV. 927 (1999); Symposium, *Habermas on Law and Democracy: Critical Exchanges*, 17 CARDOZO L. REV. 767 (1996). In *Between Facts and Norms*, Habermas highlights this tension between a descriptive account of law as a social fact (a mode of coercive social integration) and a normative account of law as justified by a claim of reason (an intersubjective agreement by all those affected). He attempts to develop this dual perspective to both "take the legal system seriously by internally reconstructing its normative content, and describe it externally as a component of social reality." HABERMAS, *BETWEEN FACTS AND NORMS*, *supra* note 16, at 43.

22. See Hugh Baxter, *Habermas's Discourse Theory of Law and Democracy*, 50 BUFF. L. REV. 205, 208 (2002) (emphasizing that "Habermas's theory of law and democracy depends upon an array of philosophical and sociological concepts developed in his earlier work" without recognizing that Habermas's failure to solve the problem of legal indeterminacy puts into question his social theory relating to the secularization of the law); Wesley Shih, *Reconstruction Blues: A Critique of Habermasian Adjudicatory Theory*, 36 SUFFOLK U. L. REV. 331, 332-33 (2003) (noting that "very little of the literature addresses" Habermas's theory of adjudication, which "is an essential piece of Habermas's theoretical architecture," and conducting an "internal critique" with only attenuated discussion of the postreligious nature of Habermas's legal theory).

23. Mark Modak-Truran, *Habermas's Discourse Theory of Law and the Relationship Between Law and Religion*, 26 CAP. U. L. REV. 461 (1997).

and includes his descriptive account of law. Habermas's descriptive theory is important not only because his normative theory builds on it, but also because it explains the secularization of law, which arguably constitutes the most widely shared but least examined presupposition of contemporary legal theory. Once Habermas's descriptive account of law has been set forth in Part II, his discourse theory of law will be set forth in Parts III and IV. Part III concerns the discourse theory of justification while Part IV concerns the discourse theory of application. Finally, in Part V, I will argue that the discourse of application is incoherent and fails to maintain the secularization of the law in the face of legal indeterminacy.

## II. SECULARIZATION AND THE AUTONOMY OF LAW

The theory of secularization has been part of sociology since the post-Enlightenment origins of the discipline. The work in sociology of religion by Max Weber and Émile Durkheim, two of the founders of modern sociology, provided the "foundations for the more systematic formulations of the theory of secularization."<sup>24</sup> Sociologist José Casanova identifies "the core and the central thesis of the theory of secularization" as "the conceptualization of the process of societal modernization as a process of functional differentiation and emancipation of the secular spheres—primarily the state, the economy, and science—from the religious sphere and the concomitant differentiation and specialization of religion within its own newly found religious sphere."<sup>25</sup> In addition to the general conception, secularization may also refer to the actual historical processes of secularization in a particular society or the anticipated consequences of those processes on religion.

Casanova further notes that the theory of secularization reached "a truly paradigmatic status within the modern social sciences" without really being supported empirically.<sup>26</sup> In fact, he argues that "the theory of secularization is so intrinsically interwoven with all the theories of the modern world and with the self-understanding of modernity that one cannot simply discard the theory of secularization without putting into question the entire web, including much of the self-understanding of the social sciences."<sup>27</sup> In the 1960s, the theory began to receive "more systematic and empirically grounded formulations of the theory of secularization," but by the 1980s, criticism began mounting because of the increasing public role of religion.<sup>28</sup> While Casanova still thinks the core of the theory is defensible with

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24. CASANOVA, PUBLIC RELIGIONS, *supra* note 4, at 17.

25. *Id.* at 19.

26. *Id.* at 17.

27. *Id.* at 18.

28. *Id.* at 19.

some revisions, a large group of American sociologists like Peter Berger have concluded “a whole body of literature by historians and social scientists loosely labeled ‘secularization theory’ is essentially mistaken.”<sup>29</sup>

One of the difficulties in sorting out this debate has to do with the different uses of the term secularization. Casanova has argued that the theory of secularization is better understood as having three different connotations. First, its most widespread current usage is to refer to the “*decline of religious beliefs and practices* in modern societies.”<sup>30</sup> Second, secularization is often understood as the “*privatization of religion* . . . both as a general modern historical trend and as a normative condition, indeed as a precondition for modern liberal democratic politics.”<sup>31</sup> Finally, “the core component of the classic theories of secularization” is the claim that secularization entails “the *differentiation of the secular spheres* (state, economy, science), usually understood as ‘emancipation’ from religious institutions and norms.”<sup>32</sup>

With respect to legal theory, the first two types of secularization, which have been widely criticized, are not as relevant as the third type of secularization as a differentiation of law from religion and morality.<sup>33</sup> This process of differentiation raises several important questions. Does the institutional separation of the law from religious institutions mean that religious norms and the law are autonomous or separate spheres? What provides the legitimation of law without religion and morality? Is law reduced to power or privilege? Does the secularization of law mean that the legitimation of law is independent of religion? Can law have both a secular and a religious legitimation?

I will address these questions in the discussion of secularization in this Part and in the discussion of legality as legitimation in the next Part. This Part will first set forth Max Weber’s account of secularization or rationalization and its consequences for the legitimation of law. Subsequently, I will consider Habermas’s modifications and additions to Weber’s theory of secularization.

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29. Berger, *supra* note 4, at 2.

30. Casanova, *Rethinking Secularization*, *supra* note 4, at 7.

31. *Id.*

32. *Id.*

33. The third type of secularization (differentiation of secular spheres) may overlap to some extent with the second type in the sense that the “privatization of religion” is sometimes assumed to be a “normative condition” and a “precondition for modern liberal democratic politics.” *Id.* Given that Weber and Habermas focus on the third type without noting this potential overlap, I will not distinguish these two types but take them as related theses supporting both descriptive and normative claims about the secularization of law.

### A. Weber's Social Theory and Secularization

Habermas's analysis of the modern problem of legitimizing law begins with Weber's theory about the increasing rationalization of Western culture and law.<sup>34</sup> Weber's theory of rationalization includes a very elaborate typology of the different ideal types of rationality (e.g., subjective, objective, objectified, conceptual, instrumental, substantive, and formal) that he finds in Western culture.<sup>35</sup> For the purposes of this Article, it will serve to offer a general understanding of Weber's theory (and Habermas's modifications of it) and how it raises questions about the legitimation and application of law.<sup>36</sup>

According to Weber, Western culture is characterized by a "specific and peculiar rationalism"<sup>37</sup> that has resulted in the "disenchantment of the world."<sup>38</sup> Before disenchantment, religious and metaphysical worldviews gave comprehensive explanations of the whole of life; life was not yet differentiated into spheres.<sup>39</sup> Science, the only form of objective knowledge, then showed that religious and metaphysical worldviews could not provide an "objectively" rational explanation of the world.<sup>40</sup> "Every increase of rationalism in empirical science," Weber maintains, "increasingly pushe[d] religion from the rational into the irrational realm."<sup>41</sup> For Weber, science and scientific (instrumental or means/end) rationality are normative because they comprise "the only possible form of a reasoned view of the world."<sup>42</sup> "For scientific truth is precisely what is *valid* for all who *seek* the truth."<sup>43</sup> Moreover, science discloses to us that the world process is a "meaningless infinity . . . on which *human beings* confer meaning and significance."<sup>44</sup>

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34. Habermas's attempt to build on Weber's analysis of rationality and the rationalization of society in his social theory makes sense because Habermas asserts that social theory is a theory of social action (social integration through human action) and that human action is based on reason (in the broad sense that humans act with self-understanding or consciousness).

35. MAX WEBER, FROM MAX WEBER: ESSAYS IN SOCIOLOGY 292-301 (H. H. Gerth and C. W. Mills trans. & eds., 1958) [hereinafter WEBER, FROM MAX WEBER].

36. For a more detailed treatment of Weber's social theory and legal positivism, Habermas's social theory and discourse theory of law (from which the discussions in Parts II and III are partially drawn), and a critique of the discourse of justification, see Modak-Truran, *supra* note 23, at 464-82.

37. MAX WEBER, THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM 26 (Talcott Parsons trans., 1958) [hereinafter WEBER, THE PROTESTANT ETHIC].

38. WEBER, FROM MAX WEBER, *supra* note 35, at 155, 350.

39. *Id.* at 154-55.

40. *Id.* at 350-51.

41. *Id.* at 351.

42. *Id.* at 355.

43. MAX WEBER, THE METHODOLOGY OF THE SOCIAL SCIENCES 84 (Edward A. Shils & Henry A. Finch trans. & eds., 1949) [hereinafter WEBER, METHODOLOGY].

44. *Id.* at 81.

Accordingly, Weber claims that modern individuals (who are presumed to embrace scientific rationality) are faced with the knowledge of an absolute division between objectively rational facts and subjectively rational values.<sup>45</sup> All values are subjective and are only subjectively valid.<sup>46</sup> Although objective scientific rationality can determine the *technically correct* means to a given end, it cannot determine the *correct* value-orientation.<sup>47</sup> Weber maintains that “the choice between ‘God’ and the ‘Devil’ ” and “every single important activity and ultimately life as a whole . . . is a series of ultimate decisions through which the soul—as in Plato—chooses its own fate, i.e., the meaning of its activity and existence.”<sup>48</sup> Value-orientations (traditional, affectional, value-rational, and instrumental) are based on an irrational, arbitrary, and criterionless choice.<sup>49</sup> “There is no (rational or empirical) scientific procedure of any kind whatsoever which can provide us with a decision here.”<sup>50</sup> Science can make objectively rational judgments for only a narrow range of technical problems where the end is precisely given and the only decision concerns choosing the most rational means.<sup>51</sup> Consequently, scientific rationality, the most distinctive type of rationality defining Western culture, cannot solve the most important individual and social problems concerning what ends or values to pursue.<sup>52</sup>

The “specific and peculiar rationalism of Western culture” has further resulted in the differentiation of society into numerous spheres of life or objectified forms of rationality including industrial capitalism, formalistic law, and bureaucratic administration.<sup>53</sup> These objectified forms of rationality have become embodied or institutionalized in the social order and confront individuals as something external. For example, the objectified rationality of industrial capitalism has “become an iron cage” or “an immense cosmos into which the individ-

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45. *Id.* at 18-19, 52-53.

46. *Id.* at 51-53, 83.

47. *Id.* at 18-19, 34-35.

48. *Id.* at 18.

49. *Id.* at 18-19; WEBER, FROM MAX WEBER, *supra* note 35, at 152.

50. WEBER, METHODOLOGY, *supra* note 43, at 19.

51. *Id.* at 18-19, 52-53.

52. For Habermas's and other Frankfurt School thinkers' critiques of instrumental reason, see 1 JÜRGEN HABERMAS, THE THEORY OF COMMUNICATIVE ACTION: REASON AND THE RATIONALIZATION OF SOCIETY 366-99 (Thomas McCarthy trans., 1984) [hereinafter 1 HABERMAS, THEORY OF COMMUNICATIVE ACTION].

53. WEBER, THE PROTESTANT ETHIC, *supra* note 37, at 26. Weber's use of the term objective rationality is ambiguous. It can be interpreted as meaning both objectively correct action and as supra-individual or institutionalized rationality. Thus, I have used the term “objectified” to denote “objectivity” in the institutionalized sense. In addition, please note that Habermas refers to Weber's “spheres of life” both as spheres, 1 HABERMAS, THEORY OF COMMUNICATIVE ACTION, *supra* note 52, at 244-71, and as “cultural subsystems.” *Id.* at 72. I will use the term “spheres of life” or “spheres” to promote continuity with the discussion of Weber.

ual is born, and which presents itself . . . as an unalterable order of things in which he must live.”<sup>54</sup> One of the leading principles of capitalism, the Protestant Ethic, requires “the earning of more and more money, combined with the strict avoidance of all spontaneous enjoyment of life.”<sup>55</sup> In the world of “economic survival of the fittest,” violating this principle results in being “eliminated from the economic scene.”<sup>56</sup> Likewise, modern bureaucratic organization constitutes an “‘escape-proof’ ” “inanimate machine” that “is busy fabricating the shell of bondage which men will perhaps be forced to inhabit some day.”<sup>57</sup> Moreover, in *The Protestant Ethic and the Spirit of Capitalism*, Weber observes that:

[t]here is, for example, rationalization of mystical contemplation, that is of an attitude which, viewed from other departments of life, is specifically irrational, just as much as there are rationalizations of economic life, of technique, of scientific research, of military training, of law and administration. Furthermore, each one of these fields may be rationalized in terms of very different ultimate values and ends, and what is rational from one point of view may well be irrational from another. Hence rationalizations of the most varied character have existed in various departments of life and in all areas of culture. To characterize their differences . . . it is necessary to know what departments are rationalized, and in what direction.<sup>58</sup>

Consequently, this passage emphasizes both the variety of differentiated fields (i.e., “spheres of life”) that result from the rationalization of society and the multiplicity of historical processes of rationalization (both internal and external to the spheres) that are proceeding at different rates and are furthering different ends and values.

The rationalization of Western culture has also affected the bases of legitimation within these differentiated “spheres of life” such as law. Weber recognizes four basic types of legitimation: (1) traditional; (2) affectual (emotional) faith; (3) value-rational (including ethical); and (4) legal (positive enactment).<sup>59</sup> Rationalization, however, has minimized the first three types. “Today,” Weber claims, “the most common form of legitimacy is the belief in legality, the compliance with enactments which are *formally* correct and which have been made in the accustomed manner.”<sup>60</sup> In other words, legality is that

54. WEBER, THE PROTESTANT ETHIC, *supra* note 37, at 181, 54.

55. *Id.* at 53.

56. *Id.* at 55.

57. 2 MAX WEBER, ECONOMY AND SOCIETY 1401, 1402 (Guenther Roth & Claus Wittich eds., 1978) [hereinafter 2 WEBER, ECONOMY AND SOCIETY].

58. WEBER, THE PROTESTANT ETHIC, *supra* note 37, at 26.

59. 1 MAX WEBER, ECONOMY AND SOCIETY 36 (Guenther Roth & Claus Wittich eds., 1978).

60. *Id.* at 37.

which is produced from following the recognized procedures constituting positive enactment; no substantive criteria of justice must be met.

Legality, in this sense, constitutes legitimacy either because “it derives from a voluntary agreement of the interested parties” or because “it is imposed by an authority which is held to be legitimate and therefore meets with compliance.”<sup>61</sup> The distinction between legitimacy by voluntary agreement and by the imposition of authority is relative. For example, in majoritarian democracies, the majority often imposes its agreement on the dissenting minority.<sup>62</sup> In addition, legality—whether democratically determined or not—can be reduced to compliance with the procedures believed to be legitimate in the existing regime.<sup>63</sup> In a rationalized society, many spheres of life—economic, bureaucratic, and legal—will be legitimized by legality because the other bases of legitimation, whether value-rational (moral, religious, metaphysical), traditional, or emotional, have been substantially diminished by the rationalization of society. Thus, once religious and metaphysical world views have been eliminated as a justification for law, law must have its own independent, rational justification. The law is autonomous.

### B. *Habermas’s Social Theory and Secularization*

Habermas’s social theory incorporates much of Weber’s descriptive analysis of the rationalization or secularization of Western society.<sup>64</sup> Habermas agrees that the world has been disenchanted of religious and metaphysical worldviews and that law, like other spheres, has been differentiated and requires its own rational justification or legitimation. Habermas adds to Weber’s analysis the “hypothesis that the socially integrative and expressive functions that were at first fulfilled by ritual practice pass over to communicative action; the authority of the holy is gradually replaced by the authority of an achieved consensus.”<sup>65</sup> Communicative action in effect takes the place of religious legitimation. “[B]asic normative agreement” resulting from rational arguments based on “criticizable validity claims” becomes the everyday mode of legitimation after disenchantment.<sup>66</sup> In addition, Habermas adds the concept of lifeworld, which signals “*the*

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61. *Id.* at 36.

62. *Id.* at 37.

63. Jürgen Habermas, *Law and Morality*, in 8 THE TANNER LECTURES ON HUMAN VALUES 219 (Sterling M. McMurrin ed., Kenneth Baynes trans., 1988) [hereinafter Habermas, *Law and Morality*].

64. See, e.g., 1 HABERMAS, THEORY OF COMMUNICATIVE ACTION, *supra* note 52, at 143-271.

65. 2 JÜRGEN HABERMAS, THE THEORY OF COMMUNICATIVE ACTION: LIFEWORLD AND SYSTEM 77 (Thomas McCarthy trans., 1987).

66. *Id.*

*decentration of an egocentric understanding of the world.*"<sup>67</sup> Habermas claims that in communicative action, "the members of a communication community demarcate the one objective world and their intersubjectively shared social world from the subjective worlds of individuals and (other) collectives."<sup>68</sup> Thus, both the spheres, or cultural subsystems, and the lifeworld are rationalized in modern life.

While accepting much of Weber's description analysis, Habermas rejects Weber's normative claims that instrumental (means/ends) rationality is the only "objective" rationality and that value-rationality is irrational. To the contrary, Habermas argues that morality can be rationally grounded,<sup>69</sup> and that all "practical questions can be judged impartially and decided rationally."<sup>70</sup> This is one of Habermas's biggest disagreements with Weber. He claims that

Weber goes too far when he infers from the loss of the substantial unity of reason a polytheism of gods and demons [*Glaubensmächte*] struggling with one another, with their irreconcilability rooted in a pluralism of incompatible validity claims. The unity of rationality in the multiplicity of value spheres rationalized according to their inner logics is secured precisely at the formal level of the argumentative redemption of validity claims.<sup>71</sup>

Habermas further maintains that normative validity claims are different from empirical claims because they can be redeemed by arguments. Arguments or reasons, for Habermas, gain "the force of rational motivation under the communicative conditions of a cooperative testing of hypothetical validity claims."<sup>72</sup> This cooperative testing involves "differentiated validity claims—to propositional truth, normative rightness, sincerity and authenticity, as well as the claim to well-formedness or intelligibility related to symbolic construction in accordance with rules," which "call not merely for reasoning in general, but for reasons in a form of argumentation typical of each."<sup>73</sup>

In other words, the societal process of rationalization has differentiated different spheres that function according to different validity claims, but it has not resulted in an "iron cage" or a reification of subsystems. Claims within these separate spheres and the values to which these spheres are directed (i.e., no loss of meaning) can still be validated. Communicative action coordinates action through a proc-

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67. 1 HABERMAS, THEORY OF COMMUNICATIVE ACTION, *supra* note 52, at 69.

68. *Id.* at 70.

69. *See, e.g.*, JÜRGEN HABERMAS, MORAL CONSCIOUSNESS AND COMMUNICATIVE ACTION 43-115 (Christian Lenhardt & Shierry Weber Nichol森 trans., 1990) [hereinafter HABERMAS, MORAL CONSCIOUSNESS].

70. HABERMAS, BETWEEN FACTS AND NORMS, *supra* note 16, at 109.

71. 1 HABERMAS, THEORY OF COMMUNICATIVE ACTION, *supra* note 52, at 249.

72. *Id.*

73. *Id.*

ess of reaching understanding and agreement among social actors. Coordinated action is not forced from the outside (a constriction on individual freedom) nor is it merely a de facto accord (strategic agreement to achieve individual successes). Rather, communicative action ensures the full release of human potential and maximizes individual freedom. Thus, when properly understood, the rationalization or secularization of Western society will lead to the emancipation, rather than enslavement, of individuals as the rationalization of society increases, and intersubjective rationality and communicative action will provide a rational normative grounding for law, morality, and politics.<sup>74</sup>

Moreover, Habermas disagrees with Weber's claim that law and morality are completely separate and argues that law and morality complement one another.<sup>75</sup> While law cannot be reduced to a deficient morality, it requires the impartial moral point of view as part of the self-regulating procedure that checks its own rationality.<sup>76</sup> "With the positivity of law the problem of justification did not disappear," Habermas concludes, "it only shifted to the narrower basis of a post-traditional, secular ethic, decoupled from metaphysical and religious worldviews."<sup>77</sup>

In this respect, a central aspect of Habermas's social theory aims to explain the separation of law, politics, and morality into different spheres of life and the implication of this secularization or differentiation of law for legitimating the law. Once religious and metaphysical worldviews have been eliminated as a justification for law, law must be legitimated in a seemingly paradoxical manner—by its legality.<sup>78</sup> The descriptive account of law provided by the sociology of law merely identifies legality with law's facticity (e.g., law's origination via positive enactment according to certain formal procedures). The normative account of law provided by the philosophy of justice identifies legality as further requiring that law be rationally justified so that all citizens should find it acceptable.<sup>79</sup> Habermas concludes that

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74. See HABERMAS, BETWEEN FACTS AND NORMS, *supra* note 16, at 98.

75. See *infra* Part III.B.

76. Habermas, *Law and Morality*, *supra* note 63, at 274.

77. *Id.* at 268.

78. HABERMAS, BETWEEN FACTS AND NORMS, *supra* note 16, at 26-27.

79. Habermas maintains that all philosophical "attempts at discovering ultimate foundations," either "ontological hopes for substantive theories of nature, history, society, and so forth" or "transcendental-philosophical hopes for an aprioristic reconstruction of the equipment of a nonempirical species subject, of consciousness in general. . . . have broken down." 1 HABERMAS, THEORY OF COMMUNICATIVE ACTION, *supra* note 52, at 2. Rather, philosophy now focuses on "*the formal conditions of rationality* in knowing, in reaching understanding through language, and in acting . . . . The theory of argumentation thereby takes on a special significance; to it falls *the task of reconstructing the formal-pragmatic presuppositions and conditions of an explicitly rational behavior.*" *Id.* (emphasis added). Consequently, understanding the substantive conditions of human existence (objective, social,

the secularization of law means both that “[t]he democratic procedure for the production of law evidently forms the *only postmeta-physical source of legitimacy*,” and that this democratic procedure must be rationally justified for it to bestow “legitimizing force.”<sup>80</sup>

### III. LEGALITY AS LEGITIMATION AND THE DISCOURSE OF JUSTIFICATION

While adopting most of Weber's descriptive theory of the rationalization of society, Habermas's discourse theory of law attempts to provide a substantially different and arguably noncircular interpretation of the paradoxical emergence of legitimacy from legality. Habermas maintains that no one has thus far been able to provide an

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and subjective worlds) becomes an empirical task of inductively arriving at the best social theory for explaining the current conditions of modern society. Together, the “formal explication of the conditions of rationality and empirical analysis of the embodiment and historical development of rationality structures” will give us some insight into a new form of rationality which bases “the rationality of an expression on its being susceptible of criticism and grounding.” *Id.* at 2, 9. To understand law properly requires both a formal explication of the conditions of legal validity (philosophy of justice) and an understanding of how the substantive conditions of modern society affect the distinctive character of modern legal systems (sociology of law). Thus, Habermas's philosophy of justice and sociology of law together form a critical legal theory that can be used as a standard to evaluate modern legal systems.

80. HABERMAS, BETWEEN FACTS AND NORMS, *supra* note 16, at 448 (emphasis added). Habermas's claims about the secularization of law appear to be both descriptive and normative. He is not always clear in the way he is using the term. For the purposes of my internal critique of the discourse theory of law, however, it is not necessary to sort out Habermas's precise usage of the term in all cases. My critique puts into question both his descriptive and normative accounts of secularization. Although I will not attempt to unpack Habermas's epistemological claims here, he seems to assume more than argue for his key distinction between communicative action as intersubjectively rational and religion as nonrational. Roman Catholic theologian David Tracy observes that Habermas “seems to ignore the validity claims of the religions in ways that even Kant, if not Weber, would have found puzzling.” David Tracy, *Theology, Critical Social Theory, and the Public Realm*, in HABERMAS, MODERNITY, AND PUBLIC THEOLOGY 19, 35 (Don S. Browning & Francis Shüssler Fiorenza eds., 1992) [hereinafter HABERMAS, MODERNITY AND PUBLIC THEOLOGY]. Tracy suggests that Habermas assumes rather than argues “that no religious or theological claims are argumentatively redeemable” in communicative action, which ignores that “modern theology (since Hegel and Schleiermacher) have demanded the same kind of critical reflection as other modern disciplines.” *Id.* For Habermas's treatment of religion, see JÜRGEN HABERMAS, THE FUTURE OF HUMAN NATURE 104-05 (2003) (recognizing some importance for religion but arguing that the “neutral state” must remain “equal distance . . . from any strong traditions and comprehensive worldviews” and that “the sciences . . . hold the societal monopoly of secular knowledge.”); JÜRGEN HABERMAS, RELIGION AND RATIONALITY: ESSAYS ON REASON, GOD, AND MODERNITY (Eduardo Mendieta ed., 2002) (focusing mainly on the relationship between philosophy and religion and the role of religion in a disenchanted world); Jürgen Habermas, *Religion in the Public Sphere*, 14 EUR. J. PHIL. 1, 5 (2006) (arguing that the “democratic procedure” must legitimate the state because of “the loss of legitimation caused by a secularization that deprives the state of deriving its authority from God”); Jürgen Habermas, *Transcendence from Within, Transcendence in this World*, in HABERMAS, MODERNITY AND PUBLIC THEOLOGY, *supra*, at 226 (arguing for methodological atheism in what appears to be his first and possibly last formal engagement with theologians).

adequate posttraditional or postreligious legitimation of modern law. Law cannot be reduced to morality (like some natural law theories) or political power (like Critical Legal Studies), but the legitimation of law is not, as Weber maintains, completely independent of politics and morality which complement law. In order to specify the relationship between law, politics, and morality in Habermas's discourse theory of law, this Part will briefly consider these alleged failures at posttraditional justification and compare them with the discourse of justification provided by Habermas's discourse theory of law. The next Part will then summarize the discourse of application, which is the second component of the discourse theory of law, and its important role in maintaining the independence of law from religion.

#### A. *Legal Positivism and Legal Formalism*

Given the consequences of secularization, Weber attempts to define legality merely in terms of procedural requirements. Weber proposes a positivistic theory of law<sup>81</sup> and claims that law can be legitimated by its legality. Legality, as discussed above, merely means that a formal process of positively enacting law (via certain procedures that are *believed* to be legitimate in the existing regime) was followed. No substantive criteria of justice must be met. Further, law cannot draw any legitimizing force from morality or from comprehensive religious or metaphysical worldviews.<sup>82</sup> The rationalization of society and law has eliminated these traditional or value-rational bases of legitimation. Law possesses its own independent rationality; it is not reducible to morality or political power. “[L]aw is precisely what the political legislator—whether democratic or not—enacts as law in accordance with a legally institutionalized procedure.”<sup>83</sup> Weber detaches law from moral-practical rationality and reduces law to that which was positively enacted according to the accepted procedures.<sup>84</sup>

In addition, Weber argues that the secularization or rationalization of law finally leads to a formalistic system of law. In its ideal form, law becomes a “legal science,” which maximizes the calculability of social action by maximizing the use of instrumental rational-

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81. In the legal context, positivism usually means that law is not legitimated by morality (rational normative justification) but is legitimated by following the established formal procedures for enacting a law (facticity). In other words, the primary purpose of legal theory is descriptive rather than normative. *See, e.g.,* H.L.A. HART, *THE CONCEPT OF LAW* 240 (2d ed. 1989) (claiming in the new appendix to *The Concept of Law* that his “account is *descriptive* in that it is morally neutral and has no justificatory aims: it does not seek to justify or commend on moral or other grounds the forms and structures which appear in [his] general account of law”).

82. 1 HABERMAS, *THEORY OF COMMUNICATIVE ACTION*, *supra* note 52, at 259; Habermas, *Law and Morality*, *supra* note 63, at 219.

83. Habermas, *Law and Morality*, *supra* note 63, at 219.

84. 1 HABERMAS, *THEORY OF COMMUNICATIVE ACTION*, *supra* note 52, at 262.

ity. Legal science has “the highest measure of methodological and logical rationality” that Weber summarizes in the following five postulates:<sup>85</sup>

- (1) “[E]very concrete legal decision be the ‘application’ of an abstract legal proposition to a concrete ‘fact situation;’”
- (2) “[I]t must be possible in every concrete case to derive the decision from abstract legal propositions by means of legal logic;”
- (3) “[T]he law must actually or virtually constitute a ‘gapless’ system of legal propositions, or must, at least, be treated as if it were such a gapless system;”
- (4) “[W]hatever cannot be ‘construed’ rationally in legal terms is also legally irrelevant; and”
- (5) “[E]very social action of human beings must always be visualized as either an ‘application’ or ‘execution’ of legal propositions, or as an ‘infringement’ thereof.”<sup>86</sup>

For Weber, the “ ‘gaplessness’ of the legal system” results “in a gapless ‘legal ordering’ of all social conduct” so that the law is sealed off from morality, politics, and religion.<sup>87</sup> This “[j]uridical formalism enables the legal system to operate like a technically rational machine.”<sup>88</sup> Mechanical accounts of jurisprudence like Weber’s are often referred to as strong legal formalism because they posit such a strong deductive character of judicial decisionmaking and a strong autonomy of law from politics, morality, and religion.<sup>89</sup> Without this strong legal formalism, “the juristic precision of judicial opinions will be seriously impaired if sociological, economic, or ethical argument were to take the place of legal concepts.”<sup>90</sup> Weber’s classic statement of secularization makes clear that the autonomy of law presupposes a strong legal formalism to prevent religious, moral, political, or other nonlegal arguments from compromising the autonomy of law during its application. Consequently, unlike most contemporary legal theo-

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85. 2 WEBER, *ECONOMY AND SOCIETY*, *supra* note 57, at 657.

86. *Id.* at 657-58.

87. *Id.* at 658.

88. *Id.* at 811.

89. Similar to Weber, Christopher Columbus Langdell, who is often considered the archetype of strong legal formalism in the United States, considered law a science and claimed that “all the available materials of that science are contained in printed books.” A. SUTHERLAND, *THE LAW AT HARVARD* 175 (1967). He argued that common law cases could be reduced to a formal system and that the judge, like a technician, could determine the right decision as a matter of deductive logic by pigeonholing cases into the formal system. In other words, strong legal formalism maintains that legal decisionmaking is essentially a deductive process whereby the application of legal rules results in determinative outcomes so that judicial decisionmaking is autonomous or separate from religion, morality, politics, etc. For further discussion of the dominance of strong legal formalism from the Civil War to World War I, see GRANT GILMORE, *THE AGES OF AMERICAN LAW* 41-67 (1977).

90. 2 WEBER, *ECONOMY AND SOCIETY*, *supra* note 57, at 894.

rists, Weber understands that the secularization of law can only be sustained during the application of law by strong legal formalism.

Despite his reliance on Weber, Habermas rejects positivistic theories of law and strong legal formalism. For example, Habermas shows that Weber's theory of legality as legitimacy is circular. According to Habermas, "[i]t remains unclear how the *belief in legality* is supposed to summon up the force of legitimation if legality means only conformity with an actually existing legal order, and if this order, as arbitrarily enacted law, is not in turn open to practical-moral justification."<sup>91</sup> This belief in legality merely presupposes that the legal order is legitimate. In other words, a belief that certain procedures will produce valid laws does not make it so; "the belief in legality does not *per se* legitimize."<sup>92</sup> Those procedures must themselves be legitimized. Weber's theory is fatally circular because he merely presupposes or *believes in* their validity. Moreover, Habermas's argument applies to other positivistic theories because they also define legality merely in terms of a set of existing formal procedures without legitimizing those procedures.<sup>93</sup>

Weber's strong legal formalism further contradicts Habermas's claim that almost "*all* [legal] norms are *inherently* indeterminate."<sup>94</sup>

91. 1 HABERMAS, THEORY OF COMMUNICATIVE ACTION, *supra* note 52, at 265 (emphasis added). See also JÜRGEN HABERMAS, LEGITIMATION CRISIS 97-99 (Thomas McCarthy trans., 1975) [hereinafter HABERMAS, LEGITIMATION CRISIS]; David Ingram, *The Subject of Justice in Postmodern Discourse: Aesthetic Judgement and Political Rationality*, in HABERMAS AND THE UNFINISHED PROJECT OF MODERNITY: CRITICAL ESSAYS ON THE PHILOSOPHICAL DISCOURSE OF MODERNITY 269, 275 (Maurizio Passerin d'Entrèves & Seyla Benhabib eds., 1997) (arguing that "Habermas's critical philosophy seeks to justify modernity in the face of Weber's paradoxes: the relativism of rational value spheres that ostensibly gives rise to social pathology and the identification of social rationalization with capitalism"); John P. McCormick, *Max Weber and Jürgen Habermas: The Sociology and Philosophy of Law During Crises of the State*, 9 YALE J.L. & HUMAN. 297, 311 (1997) (arguing that "the riddle of whether mere legality could entail legitimacy" left unresolved by Weber's "thin notion of legal validity" is central to Habermas's analysis of law).

92. HABERMAS, BETWEEN FACTS AND NORMS, *supra* note 16, at 202; HABERMAS, LEGITIMATION CRISIS, *supra* note 91, at 99. Alternatively, Harold Berman criticizes Weber's legal positivism for different reasons. He maintains that

Weber's . . . misunderstanding of religion . . . especially of sixteenth- and seventeenth-century Lutheran and Calvinist Protestantism in Germany and England, respectively, was coupled with a misunderstanding of the legal developments that took place in those countries during those centuries, and in both cases this was due to the fallacy of his sharp separation of fact from value and of his strict positivist view of law as fact alone and as primarily an instrument of political coercion.

HAROLD J. BERMAN, LAW AND REVOLUTION II: THE IMPACT OF THE PROTESTANT REFORMATIONS ON THE WESTERN LEGAL TRADITION 28 (2003).

93. See, e.g., HART, *supra* note 81, at 110, 101 (arguing that the rule of recognition is the criteria that determines the validity of laws in the legal system but "[i]ts existence is a matter of fact" so that "[f]or the most part the rule of recognition is not stated, but its existence is *shown* in the way in which particular rules are identified, either by courts or other officials or private persons or their advisors").

94. HABERMAS, BETWEEN FACTS AND NORMS, *supra* note 16, at 217

Both the Legal Realists and the Critical Legal Studies Movement (CLS) substantiate Habermas's claim by demonstrating the indeterminacy of the law that effectively undermines the feasibility of strong legal formalism. For example, legal realist Karl Llewellyn argues that "legal rules do not lay down any *limits within* which a judge moves."<sup>95</sup> CLS goes further by rejecting not only strong legal formalism, but also any attempt to find a rational principle that can resolve legal indeterminacy. In this respect, Mark Kelman claims that "the legal system is invariably simultaneously *philosophically committed* to mirror-image contradictory norms, each of which dictates the opposite result in any case (no matter how 'easy' the case first appears)."<sup>96</sup>

Although there is little consensus about the nature and degree of legal indeterminacy,<sup>97</sup> most legal theorists have come to accept that the law is indeterminate such that there are hard cases where the apparently relevant statutes, common law, contracts, or constitutional law provisions at issue do not clearly resolve the dispute. For example, the indeterminacy of the United States Constitution results in many hard cases where judges arrive at conflicting decisions about the Constitution's implications for abortion, physician-assisted suicide, and same-sex marriage. Ken Kress has noted that "[t]he indeterminacy thesis asserts that law does not constrain judges sufficiently, raising the specter that judicial decision making is often or always illegitimate."<sup>98</sup> Judges must rely on extralegal norms to resolve hard cases which can result in inconsistent treatment of like cases and allow judges to rely on their political, moral, and religious convictions. Consequently, the indeterminacy thesis puts into question the notion of the autonomy or independence of law.

As will become more evident in Part IV, Habermas does not see the discourse of application as mechanical, but he rejects the conclusion that recognizing legal indeterminacy puts into question the separation of law from politics, morality, and religion. To the contrary, the last Part demonstrates that Habermas's discourse theory of law fails to preserve the independence of law from religion in the

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95. KARL N. LLEWELLYN, *THE CASE LAW SYSTEM* § 56, at 80 (Paul Gewirtz ed., Michael Ansaldi trans., 1989).

96. MARK KELMAN, *A GUIDE TO CRITICAL LEGAL STUDIES* 13 (1987).

97. For example, Ken Kress notes that versions of indeterminacy differ according to whether they claim that the court has complete discretion to achieve any outcome at all (execute the plaintiff who brings suit to quiet title to his cabin and surrounding property in the Rocky Mountains) or rather has a limited choice among a few options (hold for defendant or plaintiff within a limited range of monetary damages or other remedies), or some position in between.

Ken Kress, *Legal Indeterminacy and Legitimacy*, in *LEGAL HERMENEUTICS: HISTORY, THEORY, AND PRACTICE* 200, 201 (Gregory Leyh ed., 1992).

98. *Id.* at 203.

face of legal indeterminacy. Moreover, it will show that giving up on the strong legal formalism posited by Weber requires forfeiting the secularization of the law (both descriptively and normatively) in ways not yet fathomed by contemporary legal theory.

*B. Distinguishing Law from Politics and Morality*

Habermas further criticizes theories of law that reduce law to politics or morality. Some posttraditional theories of law reject the possibility of a procedurally or substantively rational justification of law and reduce law to politics. In general, they argue that neither legality nor morality can provide a rational legitimation for law; law cannot be rationally legitimated and is an assertion of political power. For example, CLS rejects the claims that law and morality can be based on an apolitical method or procedure of justification and that the legal system can be objectively defended as embodying an intelligible moral order.<sup>99</sup> The legal order is merely the outcome of power struggles or practical compromises. Thus, they advocate “the purely instrumental use of legal practice and legal doctrine to advance leftist aims.”<sup>100</sup> Similarly, feminist legal theorists usually claim that the dominant moral and legal doctrines reflect a male bias.<sup>101</sup> In both cases, legality is not an independent form of legitimation, but an assertion of political power.<sup>102</sup> As a result, law cannot be legitimized by its legality (or moral validity); law can merely be explained as the institutionalized biases of the empowered group (especially wealthy, white males).

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99. See, e.g., Roberto Mangabeira Unger, *The Critical Studies Movement*, 96 HARV. L. REV. 563 (1983) (the social and historical analyses of Marx and Weber have been particularly influential on many critical legal theorists). For a good introduction to Critical Legal Studies, see MARK KELMAN, *A GUIDE TO CRITICAL LEGAL STUDIES* (1987), and for a helpful assessment of Critical Legal Studies, see RICHARD W. BAUMAN, *IDEOLOGY AND COMMUNITY IN THE FIRST WAVE OF CRITICAL LEGAL STUDIES* (2002) [hereinafter BAUMAN, *IDEOLOGY AND COMMUNITY*]. See also Mark C. Modak-Truran, Book Review, *Law & Politics Book Review*, Vol. 13, No. 10 (Oct. 2003), <http://www.bsos.umd.edu/gvpt/lpbr/subpages/reviews/Bauman1003.htm> (reviewing BAUMAN, *IDEOLOGY AND COMMUNITY*, *supra*).

100. Unger, *supra* note 99, at 567.

101. For an excellent introduction to feminist jurisprudence, see Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1 (1988), reprinted in *FEMINIST LEGAL THEORY* 201 (Katharine T. Bartlett & Rosanne Kennedy eds., 1991). Note that West discusses a different “separation thesis” which claims that human beings are essentially separate (typical of masculine or modern jurisprudence), rather than essentially connected (typical of feminist jurisprudence), to other human beings and not that law and morality are separate. *Id.* at 2.

102. In this context, political refers to the modern notion that politics is a matter of promoting self- or group-interest. One is presumed to know one’s interest, and politics is merely a means to attaining your goal (i.e. instrumental rationality (means/ends)). By contrast, politics in the classic sense is about determining and fostering the common good (the good life).

Conversely, Habermas rejects any attempt to reduce law to politics. He claims that the very nature of political power would be undermined; political power could no longer function as legal authority. "As soon as legitimation is presented as the exclusive achievement of politics, we have to abandon *our* concepts of law and politics."<sup>103</sup> For Habermas, the rationalization of society has eliminated religious and metaphysical worldviews as bases of legitimation, but rather than reducing law and morality to politics, it has simultaneously led to the differentiation of the spheres of law, morality, and politics. Contrary to Weber, CLS, and some feminists, he claims that politics is a matter of practical reason in the modified classic sense that we can come to a rational intersubjective agreement about the norms required for establishing a just society (i.e., communicative reason replaces practical reason).<sup>104</sup> All "practical questions can be judged impartially and decided rationally,"<sup>105</sup> including law, morality, and politics. Further, "[w]ithout the backing of religious or metaphysical worldviews that are immune to criticism, practical orientations can in the final analysis be gained only from rational discourse, that is, from the reflexive forms of communicative action itself."<sup>106</sup> In the communicative action of democratic law formation, politics is a part of law in the sense that the ethical-political reasons influence the rational agreement constituting its formulation. However, moral and pragmatic reasons also influence that agreement.<sup>107</sup> As a result, law cannot be reduced to politics,<sup>108</sup> and the validity of law cannot be derived from its positivity or from politics and religion.

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103. Habermas, *Law and Morality*, *supra* note 63, at 267.

104. Habermas has recently characterized one of the aspects of the theory of communicative action as a "[r]ecasting [of] the basic concepts of 'practical reason' in terms of a 'communicative rationality.'" HABERMAS, BETWEEN FACTS AND NORMS, *supra* note 16, at 9. He claims that the classical understanding of practical reason is based on a "philosophical foundation in the knowing [individual] subject" (subject/object model of consciousness), involves only normative validity claims (rightness), and has a moral telos (a subjective capacity to tell actors what they ought to do). *Id.* at 3, 4. By contrast, communicative reason is based on a decentration of the subject into objective, subjective, and social worlds. This means that reasoning is a communal rather than an individual process. In addition, every speech act in communicative action involves three distinct validity claims which correspond to the three world relations: a truth claim (objective world of states of affairs), a rightness claim (social world of normatively regulated interpersonal relations), and a truthfulness or sincerity claim (subjective world of individual experiences). *Id.* at 3-5. Finally, the moral telos of practical reason which aims at immediate prescriptions is replaced by a linguistic telos which aims at mutual understanding and consensus. *Id.* at 4.

105. *Id.* at 109.

106. *Id.* at 98.

107. For Habermas's distinction between ethical-political, moral, and pragmatic reasons and their role in democratic law formation, see *supra* text accompanying notes 87-90.

108. Note, however, that Habermas's argument is pragmatic rather than foundational. He claims that his social theory better explains *our* use of the terms law and politics rather than giving a foundational justification of his definition of politics as rational. Habermas, *Law and Morality*, *supra* note 63, at 267.

In addition, law cannot be reduced to morality. Habermas argues that the reduction of law to morality results “not only from certain premises rooted in the philosophy of consciousness but also from a metaphysical legacy inherited from natural law, namely, the subordination of positive law to natural or moral law.”<sup>109</sup> As discussed in Part III.C, law as subordinate to morality is a premodern idea of law that eliminates the instrumental aspects of law (ethical-political and pragmatic) and undermines the complementary relationship between law and morality. Despite this complementary relationship, law is a separate sphere which is evident from the different functions that law and morality play in society. In this respect, Habermas claims that “morality and law differ *prima facie* inasmuch as posttraditional morality represents only a form of cultural *knowledge*, whereas law has, in addition to this, a binding character at the institutional level. Law is not only a symbolic system but an action system as well.”<sup>110</sup> Moreover, law is related to, but distinct from, politics and morality, and, thus, it requires a different basis of, or reasons for, legitimation.

### C. *The Discourse Theory of Law and the Legitimation of Law*

Once the religious and metaphysical worldviews have been eliminated, “the legitimacy of law ultimately depends on a communicative arrangement: as participants in rational discourses, consociates under law must be able to examine whether a contested norm meets with, or could meet with, the agreement of all those possibly affected.”<sup>111</sup> Here we see that the consensus formerly based on tradition and settled ethical conventions is being replaced by rational intersubjective consensus. This signals a rationalization of the modern lifeworld into the subjective, objective, and intersubjective (neglected by Weber) in addition to a rationalization and differentiation of the spheres of life.<sup>112</sup> “From the vantage point of the theory of communicative action, we can say that the subsystem ‘law,’ as a legitimate order that has become reflexive, belongs to the societal component of the lifeworld.”<sup>113</sup> Under these conditions, the real basis of legitimation, rational agreement, becomes evident and heightens “the need for legitimating enacted law—a law that rests on the changeable decisions of a political legislator.”<sup>114</sup> The secularization or disenchantment of the world eliminated the possibility of an “objective” legitimation of law. Assuming rationality still has some nonsubjective

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109. HABERMAS, BETWEEN FACTS AND NORMS, *supra* note 16, at 84.

110. *Id.* at 107. Cf. Habermas, *Law and Morality*, *supra* note 63, at 220.

111. HABERMAS, BETWEEN FACTS AND NORMS, *supra* note 16, at 104. See also 1 HABERMAS, THEORY OF COMMUNICATIVE ACTION, *supra* note 52, at 261.

112. *Id.* at 340.

113. HABERMAS, BETWEEN FACTS AND NORMS, *supra* note 16, at 80.

114. *Id.* at 95.

meaning, intersubjective agreement must then become the arbiter of legitimation. Legitimation thus occurs from the procedure of coming to a rational intersubjective agreement. The substance of legitimate law is not known ahead of time. The important issue for legitimation becomes the rationality of the procedures required to produce a rational intersubjective agreement. Consequently, an answer to the question of what makes a law valid depends on a procedural, intersubjective process of validation that is internal to law.

Habermas has proposed the discourse principle as such a procedure. He has recently pointed out that in his prior writing on discourse ethics he has failed to sufficiently distinguish the moral principle from the discourse principle.<sup>115</sup> The discourse principle is the more general principle and “is only intended to explain the point of view from which norms of action can be *impartially justified*.”<sup>116</sup> It specifies the conditions under which rational agreement must occur to produce legitimate (intersubjectively rational or impartial) action norms (the practical norms of law, morality, and politics).<sup>117</sup> Habermas summarizes this new procedural criterion of validity: “Just those action norms are valid to which all possibly affected persons could agree as participants in rational discourses.”<sup>118</sup> He defines “action norms” “as temporally, socially, and substantively generalized behavior expectations.”<sup>119</sup> “Affected” persons include those whose interests could be foreseeably touched by the consequences of the action norm.<sup>120</sup> Finally, he defines “rational discourse” as any attempt at

115. *Id.* at 108.

116. *Id.* at 108-09.

117. Habermas recognizes that the discourse principle “presupposes that practical questions can be judged impartially and decided rationally.” *Id.* at 109. But he claims to pragmatically redeem this claim by showing that “[w]henever we want to convince one another of something, we always already intuitively rely on a practice in which we presume that we sufficiently approximate the ideal conditions of a speech situation specially immunized against repression and inequality.” *Id.* at 228. Thus, an attempt to deny the general pragmatic presuppositions of the ideal speech condition results in a performative contradiction because one accepts its presuppositions in one’s attempt to deny them. *See also* HABERMAS, MORAL CONSCIOUSNESS, *supra* note 69, at 197-98. In *Moral Consciousness*, Habermas argues:

the thesis that discourse ethics puts forth on this subject [the universal validity of moral norms] is that anyone who seriously undertakes to participate in argumentation implicitly accepts by that very undertaking general pragmatic presuppositions that have a normative content. The moral principle can then be derived from the content of these presuppositions of argumentation if one knows at least what it means to justify a norm of action.

*Id.*

118. HABERMAS, BETWEEN FACTS AND NORMS, *supra* note 16, at 107. *Cf.* HABERMAS, MORAL CONSCIOUSNESS, *supra* note 69, at 66 (summarizing the discourse principle in discourse ethics: “Only those norms can claim to be valid that meet (or could meet) with the approval of all affected in their capacity as participants in a practical discourse.”).

119. HABERMAS, BETWEEN FACTS AND NORMS, *supra* note 16, at 107.

120. *Id.*

understanding that occurs under conditions of communication providing for free processing of information and reasons.<sup>121</sup> Alternatively, Habermas talks about a norm lying “equally in the interest of everyone.”<sup>122</sup> That norm would be rationally acceptable to all because “all those possibly affected should be able to accept the norm on the basis of good reasons. But this can become clear only under the *pragmatic* conditions of rational discourses in which the only thing that counts is the compelling force of the better argument based on the relevant information.”<sup>123</sup>

In the case of morality and law, each of these spheres separately utilizes the discourse principle as a procedure for validating moral (via moral principle) and legal (via principle of democracy) claims. Both the moral principle and the principle of democracy are specifications of the discourse principle. The moral principle justifies moral norms by the universalization principle, which gives equal consideration to everyone’s interest.<sup>124</sup> “[H]umanity or a presupposed republic of world citizens” is the frame of reference for grounding norms, and the decisive reasons for those norms must be persuasive to everyone.<sup>125</sup>

Although the discourse theory of law is modeled after discourse ethics, “the heuristic priority of moral-practical discourses, and even the requirement that legal rules may not contradict moral norms, does not immediately imply that legal discourses should be conceived as a subset of moral argumentation.”<sup>126</sup> Rather, the principle of democracy justifies legal norms on the basis of pragmatic, ethical-political, and moral reasons—but not on the basis of moral reasons alone.<sup>127</sup> The discourse must take into account ethical-political reasons to provide the form of life of “our” political community for grounding norms. Legal norms express an authentic collective self-understanding and must be acceptable in principle to all sharing “our” traditions and strong evaluations. In addition, pragmatic reasons are those attempting to achieve “a rational balancing of compet-

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121. *Id.* at 107-08.

122. *Id.* at 103.

123. *Id.* Cf. HABERMAS, MORAL CONSCIOUSNESS, *supra* note 69, at 43-115.

124. *See also id.* at 65 (summarizing the principle of universalization with respect to his discourse ethics: “All affected can accept the consequences and the side effects its *general* observance can be anticipated to have for the satisfaction of *everyone’s* interests (and these consequences are preferred to those of known alternative possibilities for regulation).”).

125. HABERMAS, BETWEEN FACTS AND NORMS, *supra* note 16, at 108.

126. *Id.* at 230.

127. *Id.* at 108. Habermas further emphasizes that “[w]hereas the democratic principle is applied only to norms that display the formal properties of legal norms, the moral principle—according to which valid norms are in the equal interest of all persons—signifies a restriction to the kind of discourse in which *only* moral reasons are decisive.” *Id.* at 460 (footnote omitted).

ing value orientations and interest positions.”<sup>128</sup> The frame of reference here strives to take into account “the totality of social or subcultural groups that are directly involved” for negotiating compromises.<sup>129</sup> Moreover, while moral reasons provide the impartial point of view in legal decisionmaking, ethical-political reasons make those reasons relevant to the historical situation, and pragmatic reasons help facilitate a compromise between competing positions.

The discourse of justification thus has both noninstrumental (moral) aspects and instrumental (ethical-political and pragmatic) aspects that inform the intersubjectively rational justification of law. Habermas argues that this kind of validity is the only feasible manner of justifying laws given the facticity of the rationalization of society and the lifeworld. As a result, the discourse of justification is Habermas's attempt to reconcile facticity (the descriptive account of law) and validity (the normative account of law) at the level of justification given the secularization of the law.

#### IV. THE DISCOURSE OF APPLICATION

Habermas argues that the discourse of application also has to reconcile the tension between facticity and validity.<sup>130</sup> In general, he claims that there is a tension between guaranteeing certainty or predictability with respect to the enforcement of law (facticity) and the legitimacy of making and applying the law (validity).<sup>131</sup> The validity of law has two interdependent dimensions. The prior Part focused on the validity of making law via the discourse of justification and the principle of democracy, while this Part focuses on the validity of applying law via the discourse of application and the principle of appropriateness. The validity of the application of law requires that the laws to be applied have been properly validated at the level of justification. The discourse of application then determines which of the justified norms is appropriate to resolve the dispute without reopening the discourse of justification.

With respect to the application of the law, hard cases test a legal theory's ability to provide an account of validity that maintains the independence of law from morality, politics, and religion (i.e., the secularization of the law). Applying the law in hard cases raises what Habermas refers to as the “rationality problem”: “how can the application of a contingently emergent law be carried out with both internal consistency and rational external justification, so as to guarantee

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128. *Id.* at 108.

129. *Id.*

130. *Id.* at 9-17.

131. *Id.* at 25-28.

simultaneously *the certainty of law* and its *rightness*?"<sup>132</sup> In order for the discourse theory of law to succeed, Habermas must show that certainty and rightness can be redeemed at the level of judicial decisionmaking despite legal indeterminacy. This Part will focus on Habermas's attempt to solve the rationality problem with the discourse of application while the next Part will argue that the discourse of application is incoherent and fails to maintain the secularization of the law.

#### A. *Problematic Aspects of Contemporary Legal Theory*

Habermas argues that most other legal theories have failed to provide a compelling answer to the rationality problem.<sup>133</sup> Several legal theories, including natural law theory, legal positivism, legal realism, and CLS run into problems as theories of application.<sup>134</sup> This occurs, in part, because they fail to provide for the validity of law at the level of rational justification.<sup>135</sup> Recall Habermas's claim that natural law theory is not viable because it fails to differentiate law from morality, which runs contrary to the rationalization or secularization of society into separate spheres with their own rational justification.<sup>136</sup> Further, CLS and legal realism fail to separate law and politics at the level of justification, and legal positivism cannot validate its own procedural norms that supposedly validate the law. Legal positivism, legal realism, and CLS also provided accounts of the application of law that undermine the certainty and validity of law at the level of application.

Despite the differences among these theories, Habermas criticizes all of them for concluding that legal indeterminacy results in judges having the discretion or leeway to decide cases based on extralegal norms.<sup>137</sup> For example, CLS claims that "[j]udges select principles and policies and construct their own legal theories from these in order to 'rationalize' decisions, that is, to conceal the prejudices with which they compensate for the objective indeterminacy of law."<sup>138</sup> Rather than relying on legal rules and principles intersubjectively validated via the discourse of justification, judges rely on their own political policies and ideologies to decide cases. While recognizing that almost "*all* [legal] norms are *inherently* indeterminate,"<sup>139</sup> Habermas claims that relying on extralegal norms undermines legal

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132. *Id.* at 199.

133. *Id.* at 199-203.

134. *Id.* at 201-03.

135. *See supra* text accompanying notes 90-109.

136. *See supra* text accompanying notes 109-10.

137. HABERMAS, BETWEEN FACTS AND NORMS, *supra* note 16, at 213-22.

138. *Id.* at 214.

139. *Id.* at 217.

validity at the level of application. By relying on extralegal norms, judges do not rely on impartially validated legal norms to decide cases, but on personal moral, political, or religious convictions. For Habermas, judges should not cross the “‘red line’ that marks the division of powers between courts and legislation” because this threatens “democratic legitimacy.”<sup>140</sup> Rather, “the legal discourse of the judge should be confined to the set of reasons that legislators either in fact put forward or at least could have mobilized for the parliamentary justification of that norm.”<sup>141</sup> Habermas thus attempts to temper his embrace of legal indeterminacy with a weak legal formalism that provides some normative constraints on what counts as a valid reason for a judge’s decision.

Finally, although accepting the insight of legal hermeneutics that norms are not self-interpreting, Habermas also rejects its proposed solution to the rationality problem. Legal hermeneutics argues that judges have a preunderstanding that is shaped by a shared ethical tradition and that provides a way of steering “the flexible connections between norms and states of affairs in the light of received, and historically corroborated, principles.”<sup>142</sup> For Habermas, this method of application is not valid because it cannot be impartial.<sup>143</sup> Recall that the principle of democracy justifies legal norms according to moral, ethical-political, and pragmatic norms.<sup>144</sup> Even though the ethical-political norms conform the law to our form of political community, law achieves its impartiality from moral norms that are intersubjectively validated. As a result, legal hermeneutics fails because the judge’s application of the law depends on a preunderstanding that is ethical and historically relative rather than moral and impartial.

### B. *Helpful Aspects of Contemporary Legal Theory*

By contrast, Habermas argues that Dworkin’s interpretative theory of law helps solve the rationality problem and the supposed indeterminacy problem. Habermas claims that Dworkin’s theory is especially helpful for explaining how certainty and validity can be maintained even in hard cases where legal rules conflict. To provide a fuller understanding of the importance of Dworkin’s theory to the discourse theory of law, this Part will discuss Dworkin’s theory in more detail than Habermas does in *Between Facts and Norms* before it discusses Habermas’s appropriation of it.

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140. Jürgen Habermas, *A Short Reply*, 12 *RATIO JURIS* 445, 447 (1999).

141. *Id.*

142. HABERMAS, *BETWEEN FACTS AND NORMS*, *supra* note 16, at 200.

143. *See supra* text accompanying notes 103-28.

144. *Id.*

In *Taking Rights Seriously*, Dworkin differentiates rules, which “are applicable in an all-or-nothing fashion,” from principles, which are merely “reason[s] that argue[] in one direction, but do[] not necessitate a particular decision.”<sup>145</sup> If the facts of a case meet the facts a valid rule stipulates, the rule provides a determinate answer. However, if two rules provide contrary outcomes for the same dispute, then a coherent legal system must eliminate this conflict. Dworkin’s critical hermeneutics advocates relying on higher-level legal principles that are part of the history of legal interpretation rather than on the judge’s relative preunderstandings advocated by legal hermeneutics. More than one principle may compete to resolve this dispute, and the principles may pull in opposite directions. To determine which principle applies, Dworkin claims in *Law’s Empire* that judges must try “to find, in some coherent set of principles about people’s rights and duties, the best constructive interpretation of the political structure and legal doctrine of their community.”<sup>146</sup> The best construction includes “convictions about both fit and justification.”<sup>147</sup> The judge must construct the best interpretation that fits the prior legal materials and that achieves the best result in light of political moral principles specifying people’s rights and duties in the legal system. The interpretation that achieves “the best constructive interpretation of the community’s legal practice” is thus the “right answer” in that case.<sup>148</sup>

Dworkin further claims that “in a modern, developed, and complex [legal] system” a tie with respect to fit would be “*so rare as to be exotic*.”<sup>149</sup> This does not mean that lawyers will not disagree on which theory provides a better fit, but that “[i]t will be rare . . . that many lawyers will agree that neither provides a better fit than the other.”<sup>150</sup> However, with respect to the dimension of political morality, he claims that “if two justifications provide an equally good fit with the legal materials, one nevertheless provides a better justification than the other if it is superior as a matter of political or moral theory; if, that is, it comes closer to capturing the rights that people in fact have.”<sup>151</sup> He argues that the second dimension makes it less likely that there is no right answer because he does not think it is likely for there to be a tie between two different theories of equal respect. Moreover, he argues that “[t]here seems to be no room here for the ordinary idea of a tie. If there is no right answer in a hard case,

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145. RONALD DWORIN, *TAKING RIGHTS SERIOUSLY* 24-26 (rev. ed. 1978).

146. RONALD DWORIN, *LAW’S EMPIRE* 255 (1986).

147. *Id.*

148. *Id.* at 225. Despite much criticism, Dworkin continues to embrace his right answer thesis. *See, e.g.*, RONALD DWORIN, *JUSTICE IN ROBES* 41-43 (2006).

149. RONALD DWORIN, *A MATTER OF PRINCIPLE* 143 (1985) (emphasis added).

150. *Id.*

151. *Id.*

this must be in virtue of some more problematic type of indeterminacy or incommensurability in moral theory.”<sup>152</sup> In the final analysis, Dworkin’s interpretative theory of law constitutes a weak legal formalism which maintains that the law has adequate resources to come to determinate results in all cases.<sup>153</sup>

Habermas proposes a critical hermeneutical process of norm application that incorporates Dworkin’s appeal to legal principles as a solution to the rationality problem and legal indeterminacy. Except for the application-specific legal norms which Dworkin calls rules, Habermas claims that “*all* [legal] norms are *inherently* indeterminate.”<sup>154</sup> However, “[i]f one assumes that the cases typical for present-day adjudication involve not only application-specific rules but principles as well, then one can easily show why collisions are quite probable—and yet do not betray a deeper-lying incoherence in the legal system itself.”<sup>155</sup> Rather, these norms require additional specifications in individual cases. These norms are “only *prima facie* candidates for application,” and different norms may lead to different results.<sup>156</sup> The judge must determine which norm is the single appropriate norm and reconstruct a coherent system of legal norms that best accounts for this application. Following Dworkin, Habermas could be read to propose a weak legal formalism to explain how judges can determine the single appropriate norm without relying on any extralegal norms (even in hard cases).<sup>157</sup>

Protagonists of CLS, however, have claimed that the conflict among principles within the law means that “every attempt at a rational reconstruction is doomed to failure.”<sup>158</sup> Habermas draws on

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152. *Id.* at 144.

153. Brian Leiter similarly describes Dworkin as a “sophisticated formalist . . . who has a rich theory of legal reasoning,” but “still remains within the formalist camp because he sees the law as rationally determinate and he denies that judges have strong discretion (i.e., he denies that their decisions are not bound by authoritative legal standards).” Brian Leiter, *Positivism, Formalism, Realism*, 99 COLUM. L. REV. 1138, 1146 (1999) (reviewing ANTHONY SEBOK, *LEGAL POSITIVISM IN AMERICAN JURISPRUDENCE* (1998)). *See also* McCormick, *supra* note 91, at 324 (characterizing Dworkin, Raz, and Rawls as embracing a “reformed formalism”).

154. HABERMAS, *BETWEEN FACTS AND NORMS*, *supra* note 16, at 217.

155. *Id.*

156. *Id.*

157. As indicated below, Habermas’s discourse theory of law seems to presuppose a conception of law similar to Friedrich Karl von Savigny’s German historical school of jurisprudence. *See infra* note 181. Like Habermas, von Savigny embraced legal formalism. Richard Posner notes that von Savigny proposed “that the German states (he was writing long before Germany became a nation in 1871) adopt the law of ancient Rome as the law of Germany—a highly formalistic version of Roman law, moreover.” Richard A. Posner, *Reply: The Institutional Dimension of Statutory and Constitutional Interpretation*, 101 MICH. L. REV. 952, 958 (2003). Posner further argues “that Savigny’s formalism was right for his time and place, where the urgent need (as in developing societies today) was for clear, uniform rules that could be applied mechanistically.” *Id.* at 958-59.

158. HABERMAS, *BETWEEN FACTS AND NORMS*, *supra* note 16, at 216.

Klaus Günther's theory of legal argumentation to respond to this objection.<sup>159</sup> Günther adds to the normative concept of coherence the distinction between discourses of justification and application and conceives of legal application as a special case of moral discourses of application.<sup>160</sup> Although Habermas emphasizes that legal and moral norms and their discourses of justification differ, he agrees with Günther that the logic of applying moral and legal norms is the same.<sup>161</sup> Habermas further claims that the differentiation of the discourses of justification and application adds precision to Dworkin's claim that conflicts among principles do not threaten the validity of law.

As noted above, the discourse of justification or legitimation relies on the principle of democracy,<sup>162</sup> while the discourse of application utilizes the principle of appropriateness. Both discourses are required for impartial judgment. The discourse of justification justifies legal norms by an intersubjective agreement by all those possibly affected. These norms are then *prima facie* candidates for application. That a norm is a *prima facie* candidate or "*prima facie* valid means merely that it has been impartially *justified*; only its impartial *application* leads to a valid decision about a case."<sup>163</sup> The discourse of application then determines which of those *prima facie* norms is most appropriate for the particular case via the principle of appropriateness.

Separating the discourses of justification and application helps clarify that the process of deciding which of the conflicting norms is appropriate does not invalidate the norms that are not applied in the case. In other words, applying norms does not reopen the question of a norm's validity. Validity of the norm is determined in the discourse of justification, not in the discourse of application. This relieves the discourse of application from the question of justification. Consequently, if one infers from the collision of norms that the system of norms is incoherent, then "one would be confusing the norm's 'validity,' which it enjoys in general insofar as it is justified, with its 'appropriateness' for application in particular cases."<sup>164</sup>

To determine which valid legal norm is most appropriate in a particular case, Habermas contends that "one must first enter a discourse of application to test whether they apply to a given situation (whose details could not have been anticipated in the justification process) or whether, their validity notwithstanding, they must give

159. *Id.* at 217.

160. *Id.* at 232.

161. *Id.* at 233.

162. See *supra* text accompanying notes 126-28.

163. HABERMAS, BETWEEN FACTS AND NORMS, *supra* note 16, at 217.

164. *Id.* at 218.

way to another norm, namely, the 'appropriate' one."<sup>165</sup> This process simultaneously involves "weaving together a description of the circumstances and a concretization of general norms."<sup>166</sup> Applying a norm requires selecting only specific features of the particular case. Habermas clarifies that:

the application discourse must determine which descriptions of the facts are significant and exhaustive for interpreting the situation in a disputed case; it must also determine which of the prima facie valid norms is the appropriate one once all the significant features of the situation have been apprehended as fully as possible . . . .<sup>167</sup>

In addition, Habermas claims that the conflicting norms are "prima facie candidates for application" so that the choice of one norm as appropriate just means that the other norms do not apply, rather than that the other norms are invalid.<sup>168</sup> The case of a "conflict between norms" is a situation where the conflicting norms only apparently conflict, because more than one norm appears prima facie valid. Although these prima facie valid norms are candidates for application, one norm always proves to be the most appropriate one for the situation.<sup>169</sup> The judge then constructs all these norms into a coherent system of legal norms. In commenting on the analogous process of applying moral norms, Habermas claims that "[f]rom the standpoint of coherence, the relations within this order shift with each new case that leads to the selection of the 'single appropriate norm.'"<sup>170</sup> The selection of the "single appropriate norm" for a particular situation is what first confers "the determinate shape of a coherent order on the unordered mass of valid norms."<sup>171</sup> No new norms are generated to fit the context. Although the coherence among the norms shifts, the answer to the legal issue is derived for the existing norms. The judge is not an interstitial legislator creating new legal norms from extralegal norms. Rather, she searches for the appropriate norm in the system of legal norms and reconstructs that system to make it the best she can in light of her application of the appropriate norm. Thus, Habermas's discourse theory of law recognizes a

165. *Id.* at 217.

166. *Id.* at 218.

167. *Id.* at 217-18.

168. *Id.* at 218.

169. This claim appears similar to his claim about the discourses of justification that "in principle a rationally motivated agreement must always be reachable, where the phrase 'in principle' signifies the counterfactual reservation 'if argumentation were conducted openly and continued long enough.'" HABERMAS, MORAL CONSCIOUSNESS, *supra* note 69, at 105.

170. JÜRGEN HABERMAS, JUSTIFICATION AND APPLICATION: REMARKS ON DISCOURSE ETHICS 38 (Ciaran Cronin trans., 1993) [hereinafter HABERMAS, JUSTIFICATION AND APPLICATION]. *Cf.* DWORKIN, *supra* note 148, at 112-13 (clarifying that principles are interpreted in relation to one another such as equal liberties rather than as mutually exclusive).

171. HABERMAS, JUSTIFICATION AND APPLICATION, *supra* note 170, at 38.

complete independence between judicial decisionmaking and the judges' personal convictions whether they are comprehensive, political, moral, etc.

*C. Habermas's Legal Paradigms as a Solution to Legal Indeterminacy*

Despite his reliance on Dworkin and Günther, Habermas claims that "this coherence theory of law can avoid the indeterminacy supposedly due to the contradictory structure of the legal system only at the cost of the theory itself becoming somehow indeterminate."<sup>172</sup> Habermas argues that this indeterminacy results from what has been referred to as the "ripple effect argument."<sup>173</sup> The ripple effect argument notes that coherency theories require a reconstruction of the system of legal norms in every hard case. This results in a continuous reconfiguration of the system of legal norms and amounts to a retroactive interpretation of existing law. Each hard case requiring the determination of the single appropriate norm thus creates a ripple in the coherent system of legal norms and makes the system indeterminate.

In addition, the process of rational reconstruction places unreasonable demands on judges and overtaxes the process of adjudication. Habermas contends that the complexity and uncertainty "of this task [are] reduced by the *paradigmatic legal understanding* prevailing at the time."<sup>174</sup> Judges can rely on this paradigmatic legal understanding to help determine which principle is appropriate without reconstructing the whole system of legal norms. Habermas embraces Friedrich Kubler's characterization of the legal paradigm as playing a guiding role for judicial decisionmaking: "it determines how the law is understood and construed; it stipulates which places, in which direction, and to what extent statutory law . . . is to be supplemented and modified by doctrinal commentary and judge-made law . . . ; and this means: it bears part of the responsibility for the future of social existence."<sup>175</sup>

Habermas asserts that there are only three legal paradigms currently in contention to play this guiding role in judicial decisionmaking.<sup>176</sup> He identifies the formal liberal paradigm, the materialist social welfare paradigm, and the proceduralist paradigm. The liberal paradigm envisions society as "tailored for the autonomy of legal sub-

172. HABERMAS, BETWEEN FACTS AND NORMS, *supra* note 16, at 219.

173. *Id.* (citing Ken Kress, *Legal Reasoning and Coherence Theories: Dworkin's Rights Thesis, Retroactivity, and the Linear Order of Decisions*, 72 CAL. L. REV. 369 (1984)).

174. *Id.* at 220.

175. *Id.* at 394 (quoting FRIEDRICH KUBLER, ÜBER DIE PRAKTISCHEN AUFGABEN ZEITGEMÄßER PRIVATRECHTSTHEORIE 51 (Karlsruhe 1975)).

176. *Id.* at 396-409, 437-38.

jects who, primarily as market participants, would seek and find their happiness by pursuing their own particular interests as rationally as possible.”<sup>177</sup> As a reaction to the failures of this formalistic system of negative rights, the social welfare paradigm proposed a material conception of positive rights that granted individuals entitlements to promote social equality in an unequal society. This introduced “a new category of basic rights grounding claims to a more just distribution of social wealth (and a more effective protection from socially produced dangers).”<sup>178</sup>

Despite the continued presence of the liberal and social welfare paradigms, Habermas claims that the current legal paradigm should be understood as proceduralist.<sup>179</sup> This proceduralist paradigm has arisen from the contest between the liberal and social welfare paradigms and their failure to achieve a proper relationship between private and public autonomy. He further identifies the dispute over legal paradigms as “essentially a political dispute” that should not be decided by the legal elite.<sup>180</sup> Habermas claims that “[t]he paradigmatic preunderstanding of law in general can limit the indeterminacy of theoretically informed decision making and guarantee a sufficient measure of legal certainty only if it is intersubjectively shared by *all* citizens and expresses a self-understanding of the legal community as a whole.”<sup>181</sup> Although there seems to be an empirical component to identifying the legal paradigms in contention (facticity), the legal paradigm that is to be shared by all citizens should be validated according to the proceduralist paradigm. Unlike the liberal and social welfare paradigms, the proceduralist paradigm no longer favors a particular ideal of society, a particular vision of the good life,

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177. *Id.* at 401.

178. *Id.* at 402-03.

179. *Id.* at 443-46.

180. *Id.* at 395.

181. *Id.* at 223. Habermas's argument here seems very similar to the German school of historical jurisprudence, which “considered law to be an integral part of the common consciousness of the nation, organically connected with the mind and the spirit of the people [i.e., *Volksgeist*].” HAROLD J. BERMAN, FAITH AND ORDER: THE RECONCILIATION OF LAW AND RELIGION 299 (1993). Harold Berman notes that Friedrich Karl von Savigny's historical school:

emphasized the ultimate source of law in the older Germanic (*germanische*) tradition of popular participation in lawmaking and adjudication as well as the more modern German (*deutsche*) tradition of professional scholarly interpretation and systematization of the *jus commune*, the common law, which had been developed over the centuries out of the texts of the Roman law of Justinian and the canon law of the Church. . . . [T]he German *jus commune* was supposed to reflect the common consciousness of the German nation, as it has developed over time.

*Id.* at 300. More specifically, Berman links Habermas to the German school of historical jurisprudence by noting that, in October 1986, Habermas justified the abolition of capital punishment in Germany by stating that “after what Germany lived through under Nazism, it would have been impossible to restore capital punishment.” *Id.* at 301.

or even a particular political option. It is formal in the sense that it merely states the necessary conditions under which legal subjects in their role of enfranchised citizens can reach an understanding with one another about what their problems are and how they are to be solved.<sup>182</sup> The proceduralist paradigm allows not only for the revision of the conditions it prescribes for subjects to reach understanding, but also for the reexamination of the paradigm itself when any perceived change in the social context seems to warrant this.<sup>183</sup> Consequently, this allows all participants, not just legal experts, to participate in determining and continually reevaluating the validity of the legal paradigm for society.

Finally, contrary to Dworkin's monological conception of judicial decisionmaking, Habermas claims that even the discourse of application in judicial decisionmaking can be dialogical.<sup>184</sup> Although the discourse of application is not a discourse in the literal sense, Habermas argues that through a process of idealization, the ideal speech conditions can be approached in the discourse of application. First, he notes that "[p]articipants in an application discourse must work their different interpretations of the same situation into a normatively rich description of the circumstances that does not simply abstract from the existing differences in perception."<sup>185</sup> This preserves a link between the universal-perspective structure of the discourse of justification and the party-centered structure of these interpretations.

In addition, Habermas points out that

interpretations of the individual case, which are formed in the light of a coherent system of norms, depend on the communicative form of a discourse whose socio-ontological constitution allows the perspectives of the participants and the perspectives of uninvolved members of the community (represented by an impartial judge) to be transformed into one another.<sup>186</sup>

He further argues that the rules of procedure help institutionally carve out a space so that there is a free exchange of arguments. At the same time, however, he recognizes that the actual conditions of a trial "seemingly prohibit one from using standards of rational discourse to assess courtroom proceedings in any way."<sup>187</sup> For instance, the parties strategically pursue their own interests rather than cooperatively seeking the truth. Despite the adversarial nature of this discourse, Habermas claims "that each participant in a trial, what-

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182. HABERMAS, BETWEEN FACTS AND NORMS, *supra* note 16, at 445.

183. *Id.*

184. *Id.* at 222-25.

185. *Id.* at 229.

186. *Id.*

187. *Id.* at 231.

ever her motives, contributes to a discourse that *from the judge's perspective* facilitates the search for an impartial judgment."<sup>188</sup> Moreover, he concludes that the "[r]ules of court procedure institutionalize judicial decision making in such a way that the judgment and its justification can be considered the outcome of an argumentation game governed by a special program."<sup>189</sup>

## V. CRITICAL COMMENTS

The complexity and sheer volume of Habermas's work makes one question whether one has understood his project even after substantial effort. Nevertheless, his theory of communicative action and discourse theory of law leave many unanswered questions and invite many critical responses. Although I maintain that both the discourse of justification<sup>190</sup> and the discourse of application fail to support the autonomy of the law, my comments in this Part will demonstrate that Habermas's discourse of application fails to provide a coherent account of judicial decisionmaking. As a result, Habermas's discourse theory of law fails to provide a rational justification for the law that is independent of religious or comprehensive convictions.

First, despite Habermas's attempts to characterize judicial decisionmaking as a discourse of application, judicial decisionmaking appears to be the polar opposite of the type of rational intersubjective agreements he claims are necessary for the validation of universal legal norms. Recall Habermas's claim that the disenchantment of the world eliminated the possibility of the objective legitimation of law.<sup>191</sup> This included the rejection of Kantian universalization because objective norms cannot be validated through a subjective process of universalization. For Habermas, universal validity at the level of justification only occurs when participants in an *actual discourse* under

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188. *Id.*

189. *Id.* at 234.

190. Several commentators have questioned "whether Habermas's purely procedural definition of legality as legitimation is enough." Modak-Truran, *supra* note 23, at 480. *See, e.g.,* DAVID INGRAM, CRITICAL THEORY AND PHILOSOPHY 184 (1990) ("Paradoxically stated, if rationality boils down to acting in accordance with rules of free and fair speech, then with the destruction and or withering away of tradition, there would be no values and meanings worth talking about!"); Richard J. Bernstein, *The Retrieval of the Democratic Ethos*, 17 CARDOZO L. REV. 1127, 1129 (1996) (arguing that Habermas "has elaborated a discourse theory that relies on, and presupposes, substantial-ethical considerations" rather than one which is procedural or formal and "free from any taint or contamination by substantial-ethical commitments"); Michel Rosenfeld, *Can Rights, Democracy, and Justice Be Reconciled Through Discourse Theory? Reflections on Habermas's Proceduralist Paradigm of Law*, 17 CARDOZO L. REV. 791, 793 (1996) (contending that "even Habermas's more nuanced and versatile proceduralism ultimately confronts the need to embrace contestable substantive normative assumptions in order to contribute to the resolution of conflicts that divide the members of the polity").

191. *See supra* text accompanying notes 64-77.

ideal speech conditions come to an *intersubjective agreement* about a norm. In the discourse of application, however, the conditions are far from those dictated by the ideal speech condition.

In a trial, for example, the judge hears the evidence, considers the law and the adversarial arguments of the attorneys, and then decides the case in the solitude of her chambers. The outcome is not determined by an agreement of all those affected (rational intersubjective agreement), but is imposed by the judge. In fact, the very reason for the trial is that the parties could not come to an agreement about how to resolve their dispute, despite the pretrial process of clarifying their claims. The parties also act strategically, seeking their own interests rather than what is right or true and often insincerely making every argument for their positions whether or not these arguments would lead to what they consider to be the right result.

Habermas even turns what are vices in the discourse of justification into virtues in the discourse of application. For instance, he claims that the adversarial symmetry between the parties in the context of a trial “enables the court to play the role of an impartial third party.”<sup>192</sup> By contrast, in the discourse of justification, the parties are supposed to aim at coming to a mutual and noncoercive consensus about the best outcome. Similarly, Habermas argues that time limits on trials are good because they ensure a decision in a timely manner.<sup>193</sup> Conversely, the argumentation process under ideal speech conditions is open-ended; it must proceed until all the parties find the argument for a particular conclusion convincing.

Although as a matter of practical necessity the discourse of application must deviate from the ideal speech conditions, Habermas has not given any good reasons why the discourse of application in judicial decisionmaking can escape the effects of the rationalization of society that made actual discourse and intersubjective agreement necessary for justifying legal norms. He has also failed to indicate how his dialogical conception of the discourse of application is any different than a monological approach to judicial decisionmaking. In both cases, the judge alone determines the “agreement” among the parties rather than an actual agreement under ideal speech conditions by all the parties affected.

These problems pose a dilemma for Habermas. Either judicial decisionmaking is legitimate independent of an actual intersubjective agreement (the judge knows what the parties would have agreed to under the ideal speech conditions), or one must just *believe* that judicial decisionmaking will produce the agreement parties would have come to under ideal speech conditions without knowing this to be the

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192. HABERMAS, BETWEEN FACTS AND NORMS, *supra* note 16, at 235.

193. *Id.*

case. Both avenues result in serious problems for Habermas's discourse theory of law. In the first case, the judicial application of legal norms can somehow be objectively rational while the justification of legal norms can only be intersubjectively rational. In the second case, Habermas's discourse of application becomes circular. Like the procedures of Weber's legal positivism, the procedures of the discourse of application are not justified, but merely believed to be true.<sup>194</sup> In either case, Habermas's discourse of application would require substantial revision to present a coherent understanding of judicial decisionmaking.

Second, even if the discourse of application could be redeemed, it would still be empty of any content that would assist judges in deciding hard cases. Robert Alexy comments that Habermas is correct to note the hermeneutical process of going back and forth between an interpretation of the facts and an application of legal norms. Nevertheless, he concludes that the discourse of application "is empty, because it does not say which aspects are to be considered in what way."<sup>195</sup> Although Habermas recognizes the interrelationship between determining the facts and one's normative lens (these aspects mutually change each other in the process of application), he does not say how the discourse of application can untangle this relationship such that the most appropriate norm surfaces rather than the resulting facts merely being construed from this normative perspective. Habermas rejects the solution of legal hermeneutics that a preunderstanding can provide a way of steering "the flexible connections between norms and states of affairs in the light of received, and historically corroborated, principles."<sup>196</sup> Habermas claims that basing the application of law on a preunderstanding inappropriately makes legal interpretation historically relative (i.e., ethical) rather than impartial (i.e., moral).<sup>197</sup> Rather, he proposes a process of "weaving together a description of the circumstances and a concretization of general norms."<sup>198</sup> The system of norms cannot deductively determine what the single appropriate norm is in a hard case, because the system of norms is reconstructed in light of this decision. Further, Habermas emphasizes that the discourse of application determines

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194. This argument is analogous to Habermas's critique of Weber's legal positivism as circular that was discussed above. *See supra* text accompanying notes 90-92. In addition, this argument is applicable to Habermas's discourse of justification because he fails to explain how we can know that all the procedural requirements (the counterfactual ideal speech conditions) are met in an actual communicative agreement so that it is legitimate. For a more detailed critique of Habermas's discourse of justification, see Modak-Truran, *supra* note 23, at 477-81.

195. Robert Alexy, *Jürgen Habermas's Theory of Legal Discourse*, 17 *CARDOZO L. REV.* 1027, 1032 (1996) (emphasis omitted).

196. HABERMAS, BETWEEN FACTS AND NORMS, *supra* note 16, at 200.

197. *See supra* text accompanying notes 103-28.

198. *Id.* at 218.

“which of the prima facie valid norms is the appropriate one once all the significant features of the situation have been apprehended as fully as possible.”<sup>199</sup> Habermas may finally be saying that we know which norm is the single appropriate norm when we see it.<sup>200</sup> This solution, however, would be advocating more of an intuitive approach to judicial decisionmaking than a coherency approach. In that case, Habermas’s discourse of application would derail at this point because the key determination of the single appropriate norm would be based on a nonrational decision rather than on a rational justification.

Third, Habermas’s proposal that legal paradigms can solve the indeterminacy of law also fails. As noted above, Habermas claims both that almost all legal norms are indeterminate and that the discourse of application itself is indeterminate because of the continual reconstruction of legal norms into a coherent system in their application. His solution was to offer the notion of a legal paradigm.<sup>201</sup> This notion presents several problems that undermine the impartiality and validity of the discourse of application and puts into question his discourse theory of law.

The first problem concerns choosing among the contending legal paradigms. Habermas notes that there is a contest among the liberal, social welfare, and proceduralist paradigms that must be resolved.<sup>202</sup> Habermas contends that the legal paradigm can limit indeterminacy and “guarantee a sufficient measure of legal certainty only if it is intersubjectively shared by *all* citizens and expresses a self-understanding of the legal community as a whole.”<sup>203</sup> To achieve this shared legal paradigm, he claims that the proceduralist paradigm would allow this decision to be made in a democratic way, like the

199. *Id.*

200. For example, Aristotle claimed that judging was not merely a deductive process of going from universals to particulars, but that it involved a kind of perception (called the “eye of the soul”) whereby the practically wise judge could relate the universals to the particulars. ARISTOTLE, NICOMACHEAN ETHICS 1144a:29-30 (William D. Ross trans., rev. by J.L. Ackrill & J.O. Urmson), in 2 THE COMPLETE WORKS OF ARISTOTLE (Jonathan Barnes ed., rev. Oxford trans. 1984); see also MARTHA C. NUSSBAUM, POETIC JUSTICE: THE LITERARY IMAGINATION AND PUBLIC LIFE 86 (1995); Mark Modak-Truran, *Corrective Justice and the Revival of Judicial Virtue*, 12 YALE J.L. & HUMAN. 249 (2000). Similarly, Joseph Hutcheson proposed the Hunch Theory of judicial decisionmaking to support judges relying on their hunches or intuitions in deciding cases. See Joseph C. Hutcheson, Jr., *The Judgment Intuitive: The Function of the “Hunch” in Judicial Decision*, 14 CORNELL L.Q. 274 (1929); see also Mark C. Modak-Truran, *A Pragmatic Justification of the Judicial Hunch*, 35 U. RICH. L. REV. 55 (2001) (arguing that in some cases, a subjective sense of certainty and pragmatically testing the consequences of a hunched decision may justify judges relying on their hunches about what the outcome of a case ought to be).

201. See *supra* text accompanying notes 173-75.

202. HABERMAS, BETWEEN FACTS AND NORMS, *supra* note 16, at 437-38.

203. *Id.* at 223.

process of justification.<sup>204</sup> Rather than judges deciding what the legal paradigm should be, all affected could agree on a legal paradigm under ideal speech conditions, like in the discourse of justification. This would only solve the indeterminacy problem, however, if the discourse of justification can provide a coherent, rational justification of the law that supports the autonomy of the law. In a prior article, I pointed out many reasons why Habermas's discourse of justification fails to justify the procedural requirements of the ideal speech condition and the autonomy of the law.<sup>205</sup>

Even assuming that the discourse of justification succeeds in providing a coherent, rational justification of the law, legal paradigms may fail to solve the indeterminacy problem because they are indeterminate. Habermas notes that legal norms are not self-interpreting and that, except for certain application-specific legal rules, all legal norms are indeterminate.<sup>206</sup> Given that the legal paradigm is a norm, Habermas must indicate how it differs from other legal norms so that its indeterminacy does not lead to an infinite regression. The liberal, social welfare, and proceduralist legal paradigms offered by Habermas belie interpretation as application-specific rules. Alexy charac-

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204. *Id.* at 443-46.

205. For example, Habermas fails to explain how we can know that all the procedural requirements (the counterfactual ideal speech conditions) are met in an actual communicative agreement so that it is legitimate. It seems that the fact of a communicative agreement must certify both that the ideal speech conditions were met and that the law in question is legitimate. No independent evaluation of these issues is possible. Thus, there is no way to know independently of an actual intersubjective agreement resulting from actual discourse whether laws are legitimate and whether the ideal speech conditions have been met. Either one can legitimate a law independent of an actual intersubjective agreement (know that the ideal speech conditions were met and that the law in question is legitimate) or one must merely *believe* that the discourse procedural requirements will provide a rational basis for legitimation without knowing this to be the case. In the first case, intersubjective agreement becomes unnecessary, and in the second, Habermas's discourse theory of law becomes circular like Weber's.

In addition, Habermas maintains that "the universalization principle acts like a knife that makes razor-sharp cuts between evaluative statements and strictly normative ones, between the good and the just." HABERMAS, MORAL CONSCIOUSNESS, *supra* note 69, at 104. In order for a law to be impartial (i.e., not violate moral norms), Habermas's postmetaphysical, rational justification of law appears to depend upon the possibility of these razor-sharp cuts. Otherwise, the ethical-political and pragmatic reasons would result in a consensus based on strategic or prudential rationality like Hobbes. In that case, the consensus signals not a notion of intersubjective rational validity but a confluence of subjective interests. However, it is unclear how Habermas can justify his distinction between ethical-political and pragmatic reasons and moral reasons because this is itself a claim about the good. "To assert that all good human purposes are in all respects historically specific is itself a universal evaluation of human purposes . . . in other words, the assertion is self-refuting." Franklin I. Gamwell, *Metaphysics and the Rationalization of Society*, 23 PROCESS STUDIES 219, 230 (1994). As a result, Habermas's discourse theory of law fails to provide an impartial or rational justification for law that supports legal autonomy. For a more detailed critique of Habermas's discourse of justification, see Modak-Truran, *supra* note 23, at 477-81.

206. HABERMAS, BETWEEN FACTS AND NORMS, *supra* note 16, at 217.

terizes them as “highly abstract” and claims that “they are not sufficient for determining a definite decision,” but “can at most substantiate prima facie priorities between principles.”<sup>207</sup> Given this abstraction, legal paradigms cannot do the work Habermas prescribes for them, because they themselves are indeterminate.

Under these circumstances, judges would have to draw on extralegal norms to decide hard cases. Elsewhere, I have argued that this means that judges must rely on comprehensive or religious convictions to validate these extralegal norms.<sup>208</sup> Whether or not this is the case, Habermas claims that relying on extralegal norms would undermine the rational and impartial basis of judicial decisionmaking.<sup>209</sup> It would shift the justification of norms from the discourse of justification to the discourse of application. As with legal hermeneutics, this would allow judges to rely on ethical and historically relative legal norms rather than discursively justified or impartially rational ones. Thus, if legal paradigms are indeterminate, Habermas’s discourse of application fails to give a rational account of judicial decisionmaking in hard cases.

Finally, even if legal paradigms are determinate, this raises the issue concerning how to define the nature and scope of legal paradigms. Habermas claims that “[a] paradigm is discerned primarily in important court decisions and usually equated with the *judge’s* implicit image of society.”<sup>210</sup> Expressions like “social ideal,” “social model,” and “social vision” have also become accepted ways of referring to a social epoch’s legal paradigm.<sup>211</sup> He observes that “[s]uch expressions refer to those implicit ideas or images of one’s own society that provide a perspective for the practices of making and applying law.”<sup>212</sup> Following Henry J. Steiner’s account of judicial social visions, Habermas recognizes that this implicit image of society entails the judge’s understanding of all of society. It includes the judge’s images of “socioeconomic structure, patterns of social interaction, moral goals, and political ideologies.”<sup>213</sup> It also includes a judge’s beliefs about social actors such as “their character, behavior, and capacities”

207. Alexy, *supra* note 195, at 1032.

208. Modak-Truran, *Reenchanting the Law*, *supra* note 10 (arguing that the indeterminacy of the United States’ law requires judges to rely on religious or comprehensive convictions to justify their deliberation about hard cases fully, even though they can only provide a partial justification of their decisions in their written opinions in terms of noncomprehensive legal norms because of the Establishment Clause of the First Amendment).

209. *See supra* text accompanying notes 137-40.

210. HABERMAS, *BETWEEN FACTS AND NORMS*, *supra* note 16, at 392.

211. *Id.*

212. *Id.*

213. *Id.* (quoting HENRY J. STEINER, *MORAL ARGUMENT AND SOCIAL VISION IN THE COURTS* 92 (1987)).

and her beliefs about things like accidents, including "their causes, volume[,] and toll."<sup>214</sup>

The scope of this social vision is very broad and includes not only descriptive components (empirical claims about the current conditions of society) but also normative components (normative claims about how society should be organized and how citizens should conduct themselves). Habermas even claims that legal paradigms have a "world-disclosive function" in that they "open up interpretive perspectives from which the principles of the constitutional state (in a specific interpretation) can be related to the social context as a whole."<sup>215</sup> Moreover, he argues that the legal paradigm "expresses a self-understanding of the legal community as a whole."<sup>216</sup>

With this broad scope, it is hard to distinguish social visions or legal paradigms from comprehensive or religious convictions about authentic human existence.<sup>217</sup> For instance, Schubert Ogden defines religion as "the primary form of culture in terms of which we human beings *explicitly* ask and answer the existential question of the meaning of ultimate reality for us."<sup>218</sup> He clarifies that the existential question concerns the nature or meaning of "authentic human existence" (i.e., how we should "understand ourselves and others in relation to the whole").<sup>219</sup> The existential question is thus the question which is presupposed by all other questions.<sup>220</sup> It is the "comprehensive question" concerning "what is the valid comprehensive self-understanding," or "comprehensive human purpose?"<sup>221</sup> Religion *ex-*

214. *Id.*

215. *Id.* at 437.

216. *Id.* at 223.

217. This summary is taken from a longer account of the nature of religion in the context of judicial decisionmaking that is based on the work of Shubert Ogden, Franklin I. Gamwell, and other academics in the religion academy. See Modak-Truran, *Reenchanting the Law*, *supra* note 10, at 721-28, 799-806.

218. SCHUBERT M. OGDEN, IS THERE ONLY ONE TRUE RELIGION OR ARE THERE MANY? 5 (1992) (emphasis added) [hereinafter OGDEN, IS THERE ONLY ONE].

219. *Id.* at 6. In more technical terms, the existential or religious question involves a metaphysical aspect and an ethical aspect that are closely related. In its metaphysical aspect, "it asks about the ultimate reality of our own existence in relation to others and the whole." *Id.* at 17. Unlike metaphysics proper, which determines the structure of ultimate reality itself, the metaphysical aspect of religion tells us the meaning of ultimate reality for us. In addition, in its ethical aspect, religion "asks about our authentic self-understanding." *Id.* at 18. Here again, there is a difference between ethics proper, which asks how we are to act, and the ethical aspect of religion, which tells us how we are to understand ourselves. Moreover, each specific religion answers both the metaphysical and ethical aspects of the existential question.

220. FRANKLIN I. GAMWELL, THE MEANING OF RELIGIOUS FREEDOM: MODERN POLITICS AND THE DEMOCRATIC RESOLUTION 22-23 (1995) ("[E]very human activity asks and answers, at least implicitly, the comprehensive question, namely, what is the valid comprehensive self-understanding? . . . What is the comprehensive human purpose?").

221. *Id.* Gamwell further recognizes that his "definition and discussion of religion is nothing other than an attempt to appropriate [Ogden's] formulations for the purposes of the present inquiry." *Id.* at 15 n.1.

*plicitly* answers the existential or comprehensive question by providing the “concepts and symbols whose express function is to mediate authentic self-understanding.”<sup>222</sup> In other words, religion includes a comprehensive evaluation of human activity in terms of the nature of existence to determine “how human activity as such ought to make a difference to the larger reality of which it is a part.”<sup>223</sup>

Accordingly, religion not only includes the recognized world religions of Christianity, Judaism, Islam, Hinduism, and Buddhism, but it also includes humanism, capitalism (when proposed as a normative rather than as a positive theory),<sup>224</sup> communism, and other so-called secular answers to the existential question. This means that there is and always has been a plurality of religions or comprehensive self-understandings. Moreover, all human activity (including legal interpretation) is either explicitly or implicitly informed by a plurality of religious convictions.

If legal paradigms cannot be distinguished from religious or comprehensive convictions, Habermas’s discourse of application would strangely be requiring judges to rely on something like comprehensive convictions in their decisionmaking. By requiring judges to rely on an official legal paradigm or “self-understanding of the legal community,” Habermas’s discourse theory of law would in effect require establishing a comprehensive conviction in violation of the Establishment Clause of the First Amendment. In addition, this would undermine Habermas’s whole attempt to provide an intersubjectively rational justification of law and violate his normative understanding of secularization. Recall that Habermas’s normative account of secularization requires that the justification and application of law must be sealed off from comprehensive and religious convictions in order to be rational. According to Habermas, comprehensive and religious convictions are not rational, because they cannot be intersubjectively validated.

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222. OGDEN, IS THERE ONLY ONE, *supra* note 218, at 8.

223. GAMWELL, *supra* note 220, at 25.

224. See David R. Loy, *The Religion of the Market*, 65 J. AM. ACAD. RELIGION 275, 275 (1997). After adopting a functionalist view of religion “as what grounds us by teaching us what the world *is*, and what our *rôle* in the world *is*.” Loy argues that

our present economic system should also be understood as our religion, because it has come to fulfill a religious function for us. The discipline of economics is less a science than the theology of that religion, and its god, the Market, has become a vicious circle of ever-increasing production and consumption by pretending to offer a secular salvation. The collapse of communism—best understood as a capitalist “heresy”—makes it more apparent that the Market is becoming the first truly world religion, binding all corners of the globe more and more tightly into a worldview and set of values whose religious role we overlook only because we insist on seeing them as “secular.”

*Id.*

If solving the indeterminacy problem in the discourse of application requires judges to rely on comprehensive or religious convictions, Habermas would be solving the indeterminacy problem at the expense of making judicial decisionmaking, on his account, nonrational. Like legal hermeneutics, the discourse theory of law would be proposing that judges decide hard cases based on something that is ethical and historical rather than moral and impartial. Unless legal paradigms can be distinguished from comprehensive convictions, the discourse of application cannot be rationally validated, and the normative "secularization of law" would paradoxically require establishing the legal paradigm as the comprehensive or religious norm for resolving hard cases. Habermas's discourse of application would then fail to seal off judicial decisionmaking from religious or comprehensive convictions that would undermine his core descriptive and normative claims about the secularization of law.

Even if legal paradigms can be distinguished from comprehensive convictions, Habermas's discourse theory of law is incoherent and requires an establishment of a comprehensive or religious conviction. Habermas's discourse theory of justification and application rely on his claim that all comprehensive convictions are not rational and cannot be intersubjectively validated. This claim constitutes a comprehensive evaluation of all comprehensive convictions.<sup>225</sup> However, this claim is self-contradictory because it presupposes what it denies—the possibility of rational comprehensive evaluation. In addition, those with differing comprehensive convictions would reject this comprehensive evaluation and the discourse theory of law. The discourse theory of law would not be supported by an intersubjective agreement. In order for the discourse theory of law to gain acceptance, this comprehensive evaluation would have to be established as part of the law. This would result in a violation of the Establishment Clause, and the discourse theory of law would fail to provide for the justification and application of law independent of any particular comprehensive conviction.

The notion of legal paradigms thus presents a problem for Habermas's discourse theory of law, either because it is indeterminate, or because it is determinate. In the former case, the law would not be autonomous from morality, politics, and religion, and judges would not have a rational basis for deciding hard cases. In the latter case, Habermas's discourse theory of law is incoherent and requires an establishment of religion, whether or not legal paradigms can be distinguished from comprehensive convictions. Consequently, Habermas's discourse theory of law fails to provide a coherent theory for reconciling the secularization of law with legal indeterminacy,

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225. Gamwell, *Metaphysics and the Rationalization of Society*, *supra* note 205, at 230.

which suggests that the simultaneous endorsement of these two assertions in contemporary legal theory is misguided.

## VI. CONCLUSION

The failure of Habermas's discourse theory of law represents a watershed moment for contemporary legal theory regarding its most widely held, but least examined assumption—the secularization of the law. Unlike most contemporary legal theorists, Habermas fully realizes that his theory presupposes both a descriptive and normative theory of secularization. Descriptively, he appropriates Weber's theory about the rationalization of society with some modifications. Once the metaphysical and religious legitimation of law has been eliminated, he argues for a secular legitimation of law (i.e., normative theory of secularization) via communicative reason in the discourse of justification based on a voluntary, intersubjective agreement among all those affected. Communicative action takes up the normative task left open by the secularization or disenchantment of the law.

At the same time, Habermas acknowledges the widely held descriptive assumption that the law is indeterminate. Realizing that the strong legal formalism proposed by Weber is untenable, Habermas proposes a weak formalism based on Dworkin's interpretive theory of law and supplemented by other legal philosophers. Dworkin's theory argues that legal principles provide resources internal to the law for judges to construct a coherent set of legal norms to decide hard cases independently of extralegal norms, including personal moral, political, and religious convictions.

However, coherence theories like Dworkin's result in the entire system of legal norms being indeterminate because the retroactive reconfiguration of the system of legal norms in every hard case creates a ripple in the system of legal norms. Habermas tries to remedy this indeterminacy with the notion of legal paradigms. Legal paradigms attempt to prevent the discourse of application from reopening the question of validity in hard cases. Moreover, Habermas argues that the impartial application of the law via legal paradigms prohibits judges from having the discretion to rely on personal moral, political, and religious convictions.

Despite these aspirations, legal paradigms fail to maintain the secularization of the law either because they are indeterminate (allow reliance on religious or comprehensive convictions) or because they are determinate (require reliance on a nonrational comprehensive conviction, which makes the discourse theory incoherent and requires an establishment of religion). Given Habermas's failure, contemporary legal theory needs to recognize that the widespread accep-

tance of legal indeterminacy calls into question the secularization of law as it is currently understood. Weak legal formalism, whether Dworkin's or Habermas's version, falls short, and going back to strong legal formalism is no longer possible. Furthermore, it is unlikely that the current consensus about legal indeterminacy will fall out of favor. The consensus is so widespread that even contemporary legal formalists, like Ernst Weinrib, embrace it.<sup>226</sup> Consequently, legal theory must rethink its assumptions about the relationship between law and religion to embrace the desecularization of law.

Desecularization of the law does not suggest returning to an explicitly religious legitimation of law. Religionists consciously or unconsciously presuppose that a particular religion or religious tradition legitimates the law. Classical religionists explicitly adopt a theocratic model of legitimating the law. For example, Article Four of the Iranian Constitution requires that all laws "must be based on *Islamic criteria*."<sup>227</sup> Contemporary religionists in the United States often echo Justice Douglas's claim in *Zorach v. Clauson* that "[w]e are a religious people whose institutions presuppose a Supreme Being."<sup>228</sup> Religionists urge that federal and state government officials recognize this religious foundation by posting the Ten Commandments, displaying crèches on government property, keeping "under God" in the pledge of allegiance, citing scripture in judicial opinions, and allowing prayer and the teaching of intelligent design in public schools. These claims have fostered allegations of advocating a theocracy in America.<sup>229</sup> While the charge of theocracy is overstated, it is accurate in the sense that religionists attempt to impose a de facto Christian

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226. Weinrib, *supra* note 14.

227. ROBERT L. MADDEX, CONSTITUTIONS OF THE WORLD 164 (1995) (emphasis added). This theocratic model has been particularly hard on women. For instance, Amina Lawal was sentenced to death by stoning for "adultery" in Nigeria under Shari'a criminal law, which had been adopted by twelve North African states in 2000. See Madhavi Sunder, *Beauty Marred: The "Miss World" Riots, A Stoning Sentence, and the Conflict Between Religious and Secular Law in Nigeria*, FindLaw's Writ, Dec. 5, 2002, [http://writ.news.findlaw.com/commentary/20021205\\_sunder.html](http://writ.news.findlaw.com/commentary/20021205_sunder.html). Ironically, the charge of "adultery" against Amina Lawal was for having a child out-of-wedlock with the man she subsequently married. See Nelly Van Doorn-Harder, *On Not Throwing Stones—Christian and Muslim Conflict in Nigeria*, CHRISTIAN CENTURY, Feb. 8, 2003, at 8.

228. 343 U.S. 306, 313 (1952).

229. The dichotomy between religionists and secularists has been particularly evident in recent books and articles about the contemporary political landscape. See, e.g., MICHELLE GOLDBERG, KINGDOM COMING: THE RISE OF CHRISTIAN NATIONALISM (2006); DAMON LINKER, THE THEOCONS: SECULAR AMERICA UNDER SIEGE (2006); KEVIN PHILLIPS, AMERICAN THEOCRACY: THE PERIL AND POLITICS OF RADICAL RELIGION, OIL, AND BORROWED MONEY IN THE 21ST CENTURY (2006); JAMES RUDIN, THE BAPTIZING OF AMERICA: THE RELIGIOUS RIGHT'S PLANS FOR THE REST OF US (2006); Ross Douthat, *Theocracy, Theocracy, Theocracy*, FIRST THINGS, Aug./Sept. 2006, at 23 (discussing most of these books).

religious foundation on “the world’s most religiously diverse nation.”<sup>230</sup>

Alternatively, I argue elsewhere that the Establishment Clause of the First Amendment and a proper understanding of religious pluralism prohibit the law from explicitly adopting a religious legitimation.<sup>231</sup> The text of the law must remain secularized. Nevertheless, the secularized text of the law does not mean that the law has an autonomous secular foundation (i.e., secularism).<sup>232</sup> Secularism constitutes a comprehensive or religious justification that competes not only with Christianity, Judaism, Islam, Hinduism, and Buddhism, but also with humanism, capitalism, communism, and other so-called secular answers to the existential question. To remain secularized, the text of the law cannot adopt any of these as a comprehensive justification for the law.

However, the law implies religious or comprehensive convictions about authentic human existence. The legitimation of law is provided by a plurality of religious and comprehensive convictions which must always remain implicit. For example, many religious or comprehensive convictions support the legal prohibition of murder, but the text of the law does not explicitly adopt any of these religious justifications. In other words, the text of the law does not provide a religious or comprehensive justification for prohibiting murder, but only implies them. Religious pluralism and the Establishment Clause require this normative theory of secularization. Consequently, despite the secularization of the text of the law, this new paradigm results in a legitimate plurality of religious convictions implicitly legitimating the law and thereby *desecularizing the law*.

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230. See generally DIANA L. ECK, A NEW RELIGIOUS AMERICA: HOW A “CHRISTIAN COUNTRY” HAS NOW BECOME THE WORLD’S MOST RELIGIOUSLY DIVERSE NATION (2001) (chronicling the increasing diversity of American religious practice and proposing a pluralistic vision for a new America).

231. See Mark C. Modak-Truran, Beyond Theocracy and Secularism: A New Paradigm for Understanding Law and Religion (unpublished manuscript); see also Modak-Truran, *Reenchanted the Law*, *supra* note 10 (arguing that the indeterminacy of United States law requires judges to rely on religious or comprehensive convictions to fully justify their deliberation about hard cases even though they can only provide a partial justification for their decisions in their written opinions in terms of noncomprehensive legal norms because of the Establishment Clause of the First Amendment).

232. Cf. JEFFREY STOUT, DEMOCRACY & TRADITION 97 (2004). Stout argues that a secularized modern democratic discourse does not “involve endorsement of the ‘secular state’ as a realm entirely insulated from the effects of religious convictions, let alone removed from God’s ultimate authority. It is simply a matter of what can be presupposed in a discussion with other people who happen to have different theological commitments and interpretive dispositions.” *Id.*