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REENCHANTING INTERNATIONAL LAW

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INTRODUCTION

Globalization has been the topic of much debate and disagreement. On the one hand, skeptics argue that the world is less economically interdependent than in prior eras and that globalization is a myth.[1] On the other hand, those theorists embracing globalization disagree about what it means. Some argue that it is primarily an economic issue involving the emergence of a global market and global competition.[2] Others argue that it includes an unprecedented transnational and regional interconnectedness involving economic, social, political, and legal dimensions.[3]

Despite the contested nature of globalization, international law has clearly continued to expand its scope and content in ways that even skeptics cannot deny.[4] For example, in 1998, the United Nations took the unprecedented step of establishing the International Criminal Court which has the authority to try individuals for international crimes even if they were complying with municipal or domestic laws or orders of their military or civilian superiors.[5] This step symbolizes how international law has expanded from a set of legal norms governing mainly the relations between states to include legal norms which have the authority to trump municipal or domestic law.[6] Imposing international legal norms on internal national affairs suggests that these norms are "universal" or "global," in some sense. Some commentators argue that these developments indicate a shift toward a "universal constitutional order."[7] Others, like David

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1. DAVID HELD ET AL., GLOBAL TRANSFORMATIONS: POLITICS, ECONOMICS AND CULTURE 5-7 (1998) [hereinafter GLOBAL TRANSFORMATIONS].

2. *Id.* at 3-5.

3. *Id.* at 7-10, 14-16.

4. This comment does not mean to suggest that there are not legal theorists who claim that international law should not properly be considered law. *See, e.g.*, H.L.A. HART, THE CONCEPT OF LAW 209 (2d ed. 1989) (arguing that international law fails to meet the formal definition of law because it "not only lacks the secondary rules of change and adjudication which provide for legislature and courts, but also a unifying rule of recognition specifying 'sources' of law and providing general criteria for the identification of its rules"). *But cf.* Anthony D'Amato, *Is International Law Really "Law"?*, 79 NW. U. L. REV. 1293, 1303 (1984) (arguing "that international law is really law, by showing that international law is enforceable in the same way that domestic law is enforceable"); Anthony D'Amato, *The Neo-Positivist Concept of International Law*, 59 AM. J. INT'L L. 321 (1965) (setting forth a persuasive critique of Hart's argument).

5. United Nations: Rome Statute of the International Criminal Court, July 17, 1998, arts. 5, & 33, 37 I.L.M. 999, 1003-04.

6. *See infra* text accompanying notes 56-65. The term "municipal law" is used in the international law context to refer to rules of law that "are thought to emanate from national constitutions, municipal statutes, executive regulations, and the decisions of municipal courts." MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 4 (4th ed. 2003). Note that the term does not narrowly refer to a local municipality or a city as the term is often used in the United States. It refers to all the sources of law—national, state, and local—within a particular country. I will use the term "municipal law" in most contexts but will occasionally use "domestic law" to mean the same thing.

7. *See* HELD ET AL., GLOBAL TRANSFORMATIONS, *supra* note 1, at 74.

Held, have referred to these changes in international law "as an emerging framework of cosmopolitan law . . . which circumscribes and delimits the political power of individual states."[8] In other words, there is a sense in which international law has become more global or cosmopolitan so that it provides an autonomous set of legal norms that can protect individual rights and adjudicate conflicts among countries on an objective basis.

Alternatively, David Kennedy maintains that the current ideas about public international law have evolved from a questionable account of the origins and development of international law.[9] Although challenging this account and exaggerating its claims somewhat, he comments that

> [i]nternational legal scholars are particularly insistent that their discipline began in 1648 with the Treaty of Westphalia closing the Thirty Years' War. The originality of 1648 is important to the discipline, for it situates public international law as rational philosophy, handmaiden of statehood, the cultural heir to religious principle. . . . Before 1648 were facts, politics, religion, in some tellings a "chaotic void" slowly filled by sovereign states. Thereafter, after the establishment of peace, after the "rise of states," after the collapse of "religious universalism," after the chaos of war, *came law—as philosophy, as idea, as word.*[10]

Kennedy pejoratively suggests that from its inception, the idea of international law has 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.[11] In this account, religion is "something we used to have" which "begins as a social force, is transformed into a 'philosophy' [natural law theory] and survives only as a set of 'principles,' guiding the practice of institutions."[12] By the end of the traditional period (1648-1918), these principles are no longer legitimated by natural law but by a positivist account of sovereign consent.[13] Subsequently, in the modern era, the focus has shifted to the pragmatic application of doctrinal principles and the international institutions that make this possible. Moreover, Kennedy charges that this

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8. David Held, *Regulating Globalization?, in* THE GLOBAL TRANSFORMATIONS READER: AN INTRODUCTION TO THE GLOBALIZATION DEBATE 420, 426 (David Held & Anthony McGrew eds., 2000) [hereinafter THE GLOBAL TRANSFORMATIONS READER].

9. David Kennedy, *A New Stream of International Law Scholarship,* 7 WIS. INT'L L. J. 1, 12-28 (1988).

10. *Id.* at 14 (empahsis added). Kennedy maintains that the "goal in this historical work has been to unsettle the confidence of twentieth century international law in its ability to transcend and supplant the difficulties and contradictions of philosophy through pragmatic and functional structures." *Id.* at 28.

11. *Id.* at 19.

12. *Id.* at 18, 19.

13. *Id.* at 22.

problematic account of international law maintains that international law, in a sense, takes the place of religion with an "essentially ecumenical and anti-imperial" universality.[14]

Should international law take the place of religion? Should it provide a comprehensive conviction about authentic human existence? If international law is a form of comprehensive liberalism, this would be true.[15] It would also partially explain the charge by some religious groups that international human rights treaties have a "Western bias" or are ethnocentric.[16] Alternatively, the conventional account of international law's history parallels the story that Max Weber tells about the increasing rationalization of Western culture which has "disenchanted the world."[17] Since the Enlightenment, the world can no longer be viewed as an integrated meaningful whole under a comprehensive religious or metaphysical worldview, and law can no longer be legitimized by its religious or metaphysical foundations. Law is autonomous and must have its own independent rational justification. Can international law do without religion? Does international law provide a determinate set of legal norms to resolve international disputes that are independent of religious convictions?

John Rawls has argued that the "Law of Peoples" can provide a public political conception of justice to support a determinate set of international legal norms which are independent of comprehensive doctrines. After setting forth my assumptions about legal indeterminacy, international law, and religion, I will show that Rawls's "political, not metaphysical" Law of Peoples depends on a comprehensive conviction. This means that the Law of Peoples would have to establish an official comprehensive conviction to be effective. As a result, Rawls's "political, not metaphysical" theory incoherently becomes "metaphysical, not political."

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14. *Id.* at 23. This account is not to suggest that others do not argue for an essential relationship between international law and religion. *See, e.g.*, RICHARD FALK, RELIGION AND HUMANE GLOBAL GOVERNANCE 11 (2001) (begins exploring "a form of *reconstructive postmodernism* [theory of international relations], that is, a post-Westphalian perspective that is informed by ethical values and spiritual belief"); MICHAEL J. PERRY, THE IDEA OF HUMAN RIGHTS: FOUR INQUIRIES 29 (1998) (arguing that "if-the conviction that every human being is sacred is inescapably religious, it follows that the idea of human rights is ineliminably religious, because the conviction is an essential, even foundational, constituent of the idea"). *See also* Franklin I. Gamwell, *The Moral Ground of Cosmopolitan Democracy*, 83 J. RELIGION 562 (2003) (arguing that human rights in the context of a cosmopolitan or global democracy must be justified by a comprehensive moral ground (the divine good) because consent or a social contract alone is inadequate); RELIGION AND INTERNATIONAL LAW (Mark W. Janis & Carolyn Evans eds., 1999); THE INFLUENCE OF RELIGION ON THE DEVELOPMENT OF INTERNATIONAL LAW (Mark W. Janis, ed., 1991); Richard Ashcraft, RELIGION AND LOCKEAN NATURAL RIGHTS, IN RELIGIOUS DIVERSITY AND HUMAN RIGHTS 195, 196 (Irene Bloom et al. eds., 1996) (arguing that John Locke rejected the common Western assumption (which is often attributed to him) that "in any general discussion of individual rights" that "religion is one of the least important explanatory factors to be considered").

15. John Rawls has recently noted that the idea of a well ordered society set forth in *A Theory of Justice* was unrealistic because it required citizens to adopt a "comprehensive liberalism" (which is unrealistic to expect) in order for a just society to be stable. JOHN RAWLS, POLITICAL LIBERALISM xvii (paperback ed. 1996) [hereinafter RAWLS, POLITICAL LIBERALISM]. In other words, *A Theory of Justice* proposed a "comprehensive liberalism" whereas POLITICAL LIBERALISM proposes a "political liberalism."

16. *See, e.g.*, David Little et al., *Human Rights and the World's Religions: Christianity, Islam, and Religious Liberty, in* RELIGIOUS DIVERSITY AND HUMAN RIGHTS 213, 236 (Irene Bloom et al. eds., 1996) (challenging claims that the right to freedom of conscience and religion is ethnocentric by showing that both Christianity and Islam "share a common framework within which to think about freedom of conscience and religious liberty").

17. MAX WEBER, FROM MAX WEBER 155 (H. H. Gerth & C. W. Mills eds., 1958).

To the contrary, I will argue that international law needs religion because it is indeterminate and that international law should not attempt to resolve legal indeterminancy because this would require establishing an official international religion. Given the limitations of this article, however, I will not attempt to provide a comprehensive normative and descriptive account of law and international law to support this claim.[18] My more modest expectations are to provide a normative theory of law to justify the interpretation of international law in cases in which international law is indeterminate. To support this argument, I will primarily focus on the hypothetical application of international legal norms by judges rather than by other public officials such as executives, or by private actors. Even though there are few international and regional tribunals, the context of judicial decision making helpfully brings to light the difficult issues raised by legal indeterminacy. By focusing on this hypothetical judicial decision making, I hope to make it clear that comprehensive or religious convictions are necessary for fully justifying the interpretation and application of international law when it is indeterminate. Assuming that interpreting and applying international law in hard cases for other purposes, such as foreign relations, treaty negotiations, or international business transactions, is, in principle, the same as for judicial decision making, this argument can then be extended to interpreting and applying international law in these other contexts as well. In addition, the promise of cosmopolitan law will likely depend on further developing international legislative, administrative, and judicial capacities. In order for these legal functions to be effective, demythologizing the autonomy of international law will be an important factor to take into account.

In explicating a normative theory of international law, I will assume that interpreting and applying international law involves two stages—deliberation and explanation—which do not necessarily mirror one another. Contrary to the current conception of international law, my *heretical thesis* is two-fold: (1) legal interpreters should fully justify their interpretations of international law by relying on their religious or comprehensive convictions in their deliberation about hard cases; but (2) judges and other public officials should only partially justify their decisions in their written opinions by explaining their decisions in terms of legal norms and noncomprehensive extra-legal norms. The first thesis focuses on all interpreters of international law, official or not, and argues that they should fully justify their interpretations based on their comprehensive convictions to provide international law with a "universal" justification. With respect to this second thesis, I am focusing on judges and other public officials and arguing that in their official written opinions or official actions such as treaty making, international law should remain indeterminate. International law should not adopt comprehensive convictions but only noncomprehensive legal and extra-legal norms. This leaves the official text of international law indeterminate so that a plurality of comprehensive convictions can inform international law.

18. The descriptive account helps us understand how analytically we can talk about law as something distinct from other forms of practical reasoning such as morality and politics. It also describes how the normative justification occurs in the legal system. By contrast, the normative account of law provides a justification or legitimation of the law and the legal system (including judicial decision making).

Religious convictions are thus the *silent prologue* to any full justification of hard cases. The demands of full justification in hard cases reintroduces religious convictions into the justification of international law and thereby *reenchants* international law.

I. THE NATURE OF RELIGION, INTERNATIONAL, LAW AND LEGAL INDETERMINANCY

This Section will first set forth a definition of religion. It will then specify what I mean by legal indeterminancy. Subsequently, it will articulate my descriptive assumptions about the nature of international law and indicate how the advent of legal indeterminancy raises important normative issues for international law that have not been satisfactorily resolved.

A. A Formal Definition of Religion[19]

Regarding the definition of religion, I will adopt Schubert Ogden's definition of 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."[20] According to this account, religion *explicitly* asks what is "authentic human existence" or "how we are to understand ourselves and others in relation to the whole."[21] The existential question, the question of meaning, is the question which is presupposed by all other questions. It is the comprehensive question concerning "what is the valid comprehensive self-understanding" or "comprehensive human purpose."[22] Religion *explicitly* answers the existential or comprehensive question by providing the "concepts and symbols whose express function is to mediate authentic self-understanding."[23] 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."[24]

If the existential or comprehensive question is presupposed by all other questions, does that mean that answering any question (such as which party should win a lawsuit) presupposes an answer to the existential question? Yes and no. Ogden argues that "everything that we think, say, or do, insofar, at least, as it makes or implies a claim to validity, necessarily presupposes that ultimate reality

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19. For further discussion of the issues involved in defining religion, see MARK MODAK-TRURAN, REENCHANTING THE LAW: THE RELIGIOUS DIMENSION OF JUDICIAL DECISION MAKING 19-28 (unpublished Ph.D. Dissertation, University of Chicago, 2002) (on file with author) [hereinafter MODAK-TRURAN, REENCHANTING THE LAW].

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

21. *Id.* at 6.

22. FRANKLIN I. GAMWELL, THE MEANING OF RELIGIOUS FREEDOM: MODERN POLITICS AND DEMOCRATIC RESOLUTION 22-23 (1995). 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. *Cf.* Steven D. Smith, *Legal Discourse and the De Facto Disestablishment*, 81 MARQ. L. REV. 203, 216 (1998) (claiming that "what we call 'religion' typically amounts to a comprehensive way of perceiving and understanding life and the world; it affects *everything*.") (emphasis added).

23. OGDEN, IS THERE ONLY ONE, *supra* note 20, at 8.

24. GAMWELL, *supra* note 22, at 25.

is such as to authorize some understanding of ourselves as authentic and that, conversely, some understanding of our existence is authentic because it is authorized by ultimate reality."[25] Consequently, in a sense, answering any question implies an understanding of what constitutes authentic human existence or an answer to the comprehensive or existential question. However, Franklin Gamwell notes that this does not mean that all human activity is religious but that "the character of human activity as such implies the possibility of religion, in the sense that it implies the comprehensive question and, therefore, the possibility that this question is asked and answered explicitly."[26] Human activity is thus religious only to the extent that the existential or comprehensive question has been *explicitly* asked and answered.

To differentiate between explicitly answering and implicitly "answering" the comprehensive question, Ogden refers to the former as religion and the latter as a "basic faith in the meaning of life."[27] Ogden argues that this basic faith is presupposed by all human activity. It involves "accepting the larger setting of one's life and adjusting oneself to it."[28] It implicitly answers the existential or comprehensive question because it involves a self-conscious adjustment to these conditions.[29] Unlike other animals, human animals not only "live by faith" but "seek understanding."[30] Humans are "instinct poor"; "[n]ot only the details of our lives but even their overall pattern as authentically human remain undecided by our membership in the human species and are left to our own freedom and responsibility to decide."[31] In other words, humans do not live by merely accepting their setting and adjusting to it (basic faith); they seek a reflective self-understanding of reality (the whole) and their place in it (authentic human existence). Religion provides the concepts and symbols for human reflective self-understanding; it attempts to make sense "of our basic faith in the meaning of life, given the facts of life as we actually experience it."[32] To the extent that humans act with reflective self-understanding or have an explicit comprehensive understanding of authentic human existence, they are religious. Consequently, for the purposes of this discussion, "religion" will be equated with an explicit "comprehensive claim or conviction about human authenticity." This means that religion not only includes the recognized world religions of Christianity, Judaism, Islam,

25. OGDEN, IS THERE ONLY ONE, *supra* note 20, at 7.

26. GAMWELL, *supra* note 22, at 23 n.5.

27. OGDEN, IS THERE ONLY ONE, *supra* note 20, at 18.

28. SHUBERT M. OGDEN, ON THEOLOGY 70 (1986).

29. For clarity, it should be noted that Ogden argues that both basic faith and religion involve understanding and faith. However, basic faith is not reflective while religion is reflective. In terms slightly different to those used here, he distinguishes between "the *existential* understanding or faith [basic faith] that is constitutive of human existence as such and the *reflective* understanding or faith [religion] whereby what is presented existentially can be re-presented in an express, thematic, and conceptually precise way." *Id.* at 71.

30. *Id.* at 106.

31. OGDEN, IS THERE ONLY ONE, *supra* note 20, at 6.

32. *Id.* at 18.

Hinduism, and Buddhism, but it also includes humanism, capitalism (when proposed as a normative rather than as a positive theory),[33] communism, and other so-called secular answers to the existential question. This also means that there is and always has been a plurality of religions or comprehensive self-understandings. As a result, all human activity (including legal interpretation) is either explicitly informed by a plurality of religious convictions or implicitly informed by a basic faith in the meaningfulness of existence.

Schubert Ogden also maintains that reason plays an essential role in the articulation and evaluation of religious convictions.[34] He rejects two common assumptions about theology that preclude critical reflection on religious convictions: "(1) that theology as such has to appeal to special criteria of truth for some if not all of its assertions; and (2) that the theologian as such has to be a believer already committed to the truth of the assertions that theological reflection seeks to establish."[35] To the contrary, he argues that religious convictions are subject to critical validation. Religious convictions are different in the sense that they are comprehensive but that does not mean they are beyond critical or rational validation. In fact, he maintains that "it is the very nature of a religion to make or imply the claim to formal religious truth."[36] In other words, religious convictions,

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33. *See* David R. Loy, *The Religion of the Market*, 65 J. AM. ACAD. RELIGION 275 (1997). After adopting a functionalist view of religion "as what grounds us by teaching us what the world *is*, and what our *role* 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.*

34. Despite the common assumption that religion is nonrational, many theologians and philosophers have argued that religious convictions depend, at least in part, on rational reflection for their articulation and evaluation. This does not mean that they have agreed upon the definition of reason, its role in critical reflection, or its priority with respect to revelation. Differences about these issues should not take away from the important role reason has played in formulating and critiquing religious convictions. For example, reason has been central to systematic theology and philosophical theology even though there has not been agreement on how the role of reason should be defined. At one extreme, Immanuel Kant argues that philosophical theology depends on pure reason to understand the possibility and the attributes of the concept of God. IMMANUEL KANT, LECTURES ON PHILOSOPHICAL THEOLOGY (Allen W. Wood & Gertrude M. Clark trans., 1978). At the other extreme, Paul Tillich claims that reason alone cannot give answers to the ultimate questions about life because in the existential situation, reason contradicts itself. PAUL TILLICH, 1 SYSTEMATIC THEOLOGY 18-28 (1951). Philosophy helps analyze the existential situation in which we live, but "[r]evelation is the answer to the questions implied in the existential conflicts of reason." *Id.* at 147. Somewhere in between, David Tracy maintains that "contemporary Christian theology is best understood as philosophical reflection upon the meanings present in common human experience and the meanings present in the Christian tradition." DAVID TRACY, BLESSED RAGE FOR ORDER: THE NEW PLURALISM IN THEOLOGY 34 (1975). Although these approaches incorporate philosophy (reason) into theology in different ways, they all support the necessary role of reason for theological reflection about religious convictions. Religious convictions are not exempt from critical reflection; they are the product of critical reflection. This is not to say that other theologians have not deemphasized or minimized the role of reason in theological reflection. *See, e.g.*, JOHN CALVIN, INSTITUTES OF THE CHRISTIAN RELIGION Bk. I, ch. i, sec. 1, 35-37 (Vol. XX, The Library of Christian Classics) (John T. McNeill ed., Ford Lewis Battles trans., 1960). (arguing that religious arguments based on revelation are more reliable because human reason is corrupted by sin (self-deception)). Rather, it is to emphasize that there are numerous theologians and philosophers who have embraced reason as a central part of the theological task of articulating and evaluating religious convictions. These positions thus further support the assumption that religious convictions are rational and subject to critical reflection.

35. OGDEN, ON THEOLOGY, *supra* note 28, at 103.

36. OGDEN, IS THERE ONLY ONE, *supra* note 20, at 13.

like any cognitive claim, suggest that they can be validated in a non-question begging way. Assuming that Ogden's arguments about how religious convictions can and should be critically validated succeed,[37] this means that judges and other officials should validate their religious convictions before relying on them for fully justifying their interpretation of international law.

B. Moderate Legal Indeterminancy

My essential descriptive assumption about the nature of law in general is that the law is indeterminate such that there are hard cases where the apparently relevant statutes, treaties, common law, international customs, contracts, or constitutional law provisions at issue do not clearly resolve the dispute. Many theorists now refer to this broadly as legal indeterminacy.[38] There appears to be an overwhelming consensus that the law is indeterminate but little consensus about what that means.[39] For example, extreme-radical deconstructionists such as Anthony D'Amato have argued that even the U.S. Constitutional requirement that the President be thirty-five years of age is not an easy case (*i.e.,* indeterminate).[40] However, even contemporary legal formalists, such as Ernest Weinrib, claim that "[n]othing about formalism precludes indeterminacy."[41] He argues that "formalism does not rely on the antecedent determinacy for particular cases of the concepts entrenched in positive law" but that "the organ of positive law

37. *See* MODAK-TRURAN, REENCHANTING THE LAW, *supra* note 19, at 276-93. Obviously, the nature of reason and rationality are highly contested matters. I will not attempt to redeem Ogden's understanding of these concepts here. Elsewhere, I have tried to show that assuming religion is irrational results in incoherent accounts of judicial decision making. *See id.* at 42-178. Jürgen Habermas's, John Rawls's, and Kent Greenawalt's models of judicial decision making all ironically presuppose a nonrational comprehensive conviction. Similarly, Perry's persuasive secular argument requirement depends upon his Roman Catholic religious convictions. All of these theories of judicial decision making are incoherent because they presuppose comprehensive convictions but at the same time deny the possibility of rational comprehensive reflection. Under these models of judicial decision making, the rational autonomy of judicial decision making incoherently depends on a nonrational comprehensive conviction. *Cf.* FRANKLIN I. GAMWELL, DEMOCRACY ON PURPOSE: JUSTICE AND THE REALITY OF GOD (2000). In *Democracy on Purpose*, Gamwell seeks to demonstrate that the presumed sparation of politics and theism puts democracy on an intellectually insecure foundation. He argues that the separation of justice from a comprehensive telos by Jürgen Habermas, Alan Gewirth, Brian Barry, and John Rawls results in an incoherent account of democracy because their nonteleological theories of justice include a conception of the comprehensive good. By contrast, he seeks to articulate "a theistic conception of what makes life distinctively human" and to demonstrate how this provides a coherent account of human freedom that supports our democratic commitment. *Id.* at ix. *See also* Mark C. Modak-Truran, *Book Review*, 26 J. LAW & RELIGION 823 (2001) (reviewing FRANKLIN I. GAMWELL, DEOMOCRACY ON PURPOSE: JUSTICE AND THE REALITY OF GOD (2000)).

38. *See, e.g.*, Ken Kress, *Legal Indeterminacy and Legitimacy*, *in* LEGAL HERMENEUTICS: HISTORY, THEORY, AND PRACTICE 200-15 (Gregory Leyh ed., 1992).

39. 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." *Id.* at 201.

40. Anthony D'Amato, *Aspects of Deconstruction: The "Easy Case" of the Under-Aged President*, 84 NW. U. L. REV. 250 (1989). D'Amato notes that "[d]econstructionists say that all interpretation depends on context. Radical deconstructionists add that, because contexts can change, there can be no such thing as a single interpretation of any text that is absolute and unchanging for all time." *Id.* at 252. *See also* Anthony D'Amato, *Aspects of Deconstruction: The Failure of the Word "Bird"*, 84 NW. U. L. REV. 536 (1990); Anthony D'Amato, *Pragmatic Indeterminacy*, 85 NW. U. L. REV. 148 (1990).

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

has the function of determining an antecedently indeterminate controversy."[42] Consequently, in its weaker forms, the indeterminacy thesis merely signals the almost universal rejection of strong legal formalism.

Both the Legal Realists and Critical Legal Studies Movement ("CLS") have forcefully undermined the feasibility of strong legal formalism. In fact, the origin of the consensus about the indeterminacy of the law can be traced back to the Legal Realists' critique of Langdell and other strong legal formalists.[43] For example, Karl Llewellyn rejects deductive legal certainty and argues that "legal rules do not lay down any *limits within* which a judge moves."[44] Rather,

> a legal rule functions not as a closed space within which one remains, but rather as a bough whose branches are growing; in short, as a guideline and not as a starting premise; not as inflexible iron armor which constrains or even forbids growth, but as a skeleton which supports and conditions growth, and even promotes and in some particulars liberates it.[45]

For legal realists, this understanding of legal rules entails a rule scepticism that recognizes the indeterminacy of law. CLS is also well known for its claim about the radical indeterminacy of the law. However, it rejects not only strong legal formalism but also any attempt to find a rational principle that can resolve legal indeterminacy. For instance, Mark Kelman argues that there is a CLS version of legal indeterminacy which

> is quite distinct from the Realist one. This stronger CLS claim is 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

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42. *Id.*

43. Christopher Columbus Langdell is often considered the archetype of strong legal formalism. He 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). 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). Langdell 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 decision making is essentially a deductive process whereby the application of legal rules results in determinative outcomes from the constraints imposed by the language of the law. *Cf.* MICHEL ROSENFELD, JUST INTERPRETATIONS: LAW BETWEEN ETHICS AND POLITICS 33 (1998). *See also* David A. Strauss, *The Role of a Bill of Rights*, 59 U. CHI. L. REV. 539 (1992). In discussing the conception of the Bill of Rights as a Code, Strauss defines formalism as including "three things: a heavy reliance on the precise language of the text; a pretense that the text resolves more issues than it actually does; and an effort to shift responsibility for a decision away from the actual decisionmaker and to some other party, such as the Framers." *Id.* at 544.

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

45. *Id.*

> "easy" the case first appears). While settled *practice* is not unattainable, the CLS claim is that settled *justificatory schemes* are in fact unattainable.[46]

In *The Concept of Law*, the prominent legal positivist H. L. A. Hart further provides a helpful account of legal indeterminacy with his idea of the "open texture of the law." Hart advocates a middle path between formalism and rule skepticism such that the indeterminacy of the law allows for "varied types of reasoning which courts characteristically use in exercising the creative function left to them by the open texture of law in statute or precedent."[47] Hart helps make clear that this open texture or indeterminacy concerns not only "particular legal rules" but also "the ultimate criteria of validity" which he refers to as "the rule of recognition."[48] With respect to the rule of recognition, this results in a paradoxical situation where courts are determining the ultimate criteria of legal validity in the process of deciding whether a particular law is valid.[49] Hart claims that "the law in such cases is fundamentally *incomplete*: it provides *no* answer to the questions at issue in such cases" and that courts must exercise the restricted law-making function which he refers to as discretion.[50] Consequently, in hard cases, the judge "is entitled to follow standards or reasons for decision which are not dictated by the law and may differ from those followed by other judges faced with similar hard cases."[51]

For the purposes of this article, the larger question raised by the indeterminacy thesis is whether legal interpretation can be rationally justified or legitimated under the conditions of legal indeterminacy. 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."[52] Is judicial decision making merely the arbitrary exercise of political power?[53] Or is

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46. MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 13 (1987). David Kairys similarly argues that

> [t]he lack of required, legally correct rules, methodologies, or results is in part a function of the limits of language and interpretation, which are subjective and value laden. More importantly, indeterminacy stems from the reality that the law usually embraces and legitimizes many or all of the conflicting values and interests involved in controversial issues and a wide and conflicting array of "logical" or "reasoned" arguments and strategies of argumentation, without providing any legally required hierarchy of values or arguments or any required method for determining which is most important in a particular context. Judges then make choices, and those choices are most fundamentally value based, or political.

David Kairys, *Introduction, in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 4 (David Kairys ed., 3d ed. 1998).

47. HART, *supra* note 4, at 144.

48. Hart notes that the rule of recognition can be partly, but never completely, indeterminate. For example, in the United States, the United States Constitution could be indeterminate in some sense, but the rule of recognition conferring authority (jurisdiction) on the court to exercise its creative powers to settle the ultimate criteria of validity raises no doubts even though the precise scope of that power may raise some doubts. *See id.* at 148-49.

49. *Id.* at 148.

50. *Id.* at 252.

51. *Id.* at 273.

52. Kress, *supra* note 38, at 203.

53. 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. *See, e.g.*, Roberto M. Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 563 (1983). 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." *Id.* at 567.

it just the product of the particular life experience of the judge?[54] Consequently, the indeterminacy thesis puts into question the notion of the "Rule of Law." Lawrence Solum claims that

> if the indeterminacy thesis is true, then legal justice will fall short of the ideal of the rule of law in at least three ways: (1) judges will rule by arbitrary decision, because radically indeterminate law cannot constrain judicial decision; (2) the laws will not be public, in the sense that the indeterminate law that is publicized could not be the real basis for judicial decision; and (3) there will be no basis for concluding that like cases are treated alike, because the very ideal of legal regularity is empty if law is radically indeterminate.[55]

In a democratic society, this arguably means that judges are subverting democratic rule by creating the law outside of the legislative process and that judicial decision making is illegitimate. In the public international law context, this further means that judges may override democratically created municipal laws based on their interpretation of indeterminate international legal norms. The relevant international legal norms would not provide a sufficient basis for judges' decisions. Judges have to rely on extra-legal norms to determine what international law requires. This raises the question of what provides a justification or legitimation for these extra-legal norms. Consequently, unless a normative theory of law can justify those extra-legal norms, legal indeterminancy creates a "legitimation crisis" for international law.

C. The Nature of International Law[56]

In addition to my descriptive assumption about legal indeterminacy, the following sets forth my descriptive assumptions about the nature of international

54. Jerome Frank is well known for his claim that judicial decisions can, in principle, be explained by a psychoanalysis of a judge's life experiences. He comments that "[w]hat we may hope some day to get from our judges are detailed autobiographies containing the sort of material that is recounted in the autobiographical novel; or opinions annotated, by the judge who writes them, with elaborate explorations of the background factors in his personal experience which swayed him in reaching his conclusions. For in the last push, a judge's decisions are the outcome of his entire life-history." JEROME FRANK, LAW AND THE MODERN MIND 123-24 (1930).

55. Lawrence B. Solum, *Indeterminacy, in* A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 488, 489 (Dennis Patterson ed., 1996).

56. Sometimes international law is divided into public and private international law. Public international law primarily concerns the interaction of states and focuses on questions arising from the application of international legal norms such as treaties. By contrast, "[p]rivate international law or international business transactions concerns domestic and international regulation of foreign investment and the movement of goods and workers across national borders." Joel R. Paul, *The Isolation of Private International Law*, 7 WIS. INT'L L.J. 149, 151 n.4 (1988). Private international law deals primarily with the transnational application of municipal or domestic law and requires determining which municipal law applies (*i.e.*, involves a question of conflicts of law or choice of law). *See* Robert Wai, *Transnational Liftoff and Juridical Touchdown: The Regulatory Function of Private International Law in an Era of Globalization*, 40 COLUM. J. TRANSNAT'L L. 209, 241 (2002) (arguing that "private international law has remained primarily the domain of national laws and national institutions, rather than international treaties and international courts"). To the extent I am focusing primarily on the conflict between international and municipal legal norms, my focus could be classified as primarily dealing with public international law. However, legal indeterminacy raises the same problem in the private international law context. What do judges rely on when the municipal law is indeterminate? How can those extra-legal norms be justified? Consequently, I will usually refer to international law more generally rather than to public international law.

law. International law has traditionally been conceived as the law governing the relations between sovereign states. The core principles include "[t]erritorial sovereignty, equality of states, non-intervention in domestic affairs and state consent as the basis of international legal obligation."[57] Some refer to this as the Westphalian model of international law because they date its origin from the treaties signed to achieve the Peace of Westphalia in 1648.[58] Under this model, domestic affairs, including human rights, are governed by municipal law. Independent states may hold each other to the terms of their treaties, but they do not have the right to meddle in one another's internal affairs.

Many theorists have argued, however, that since World War II, a new model of international law has emerged.[59] This model provides that international law can take precedence over municipal law with respect to transnational and domestic matters. Sovereignty over domestic affairs is no longer absolute. For example, in 1945, the Nuremberg Charter established that individuals could be punished for "Crimes Against Peace," "War Crimes," and "Crimes Against Humanity" even if the individuals committing those crimes were acting in accordance with municipal law or orders of a superior.[60] In 1950, the *European Convention for the Protection of Human Rights and Fundamental Freedoms*[61] further established a radical innovation in international law by allowing citizens to initiate claims against their own governments for failing to protect the human rights recognized by the European Convention.[62] This innovation meant that individuals, rather than states, had standing to bring charges for violations of human rights. More recently, the United Nations established the International Criminal Court in 1998 to provide a permanent institution for prosecuting "the most serious crimes of concern to the international community" including "The crime of genocide," "Crimes against humanity," "War crimes," and "The crime of aggression."[63]

This change in international law implies that international law is "universal" in some sense. For example, the United Nations Universal Declaration of Human Rights advocates broad protection for the "right to life, liberty and security of person," the "right to marry and to found a family," the "right to own property," "freedom of thought, conscience and religion," "freedom of opinion and expression," and "freedom of peaceful assembly and association."[64] The Preamble of the Universal Declaration further emphasizes that "*a common*

57. James Crawford & Susan Marks, *The Global Democracy Deficit: An Essay in International Law and Its Limits, in* RE-IMAGING POLITICAL COMMUNITY: STUDIES IN COSMOPOLITAN DEMOCRACY 72 (Daniele Archibugi et al. eds., 1998).

58. HELD ET AL., GLOBAL TRANSFORMATIONS, *supra* note 1, at 37. *See also* Stephen D. Krasner, *Compromising Westphalia, in* THE GLOBAL TRANSFORMATIONS READER, *supra* note 8, at 124-35.

59. KRASNER, *supra* note 58, at 124-35.

60. Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis Powers and Charter of the International Military Tribunal, Aug. 8, 1945, Arts. 6, 8, 59 Stat. 1544, 82 U.N.T.S. 279.

61. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 25, 213 U.N.T.S. 221 (providing that the European Commission can receive petitions "from any person, non-governmental organization or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in this Convention") [hereinafter European Connection].

62. *See* HELD ET AL., GLOBAL TRANSFORMATIONS, *supra* note 1, at 68.

63. United Nations: Rome Statute of the International Criminal Court, July 17, 1998, art. 5, 37 I.L.M. 999, 1003-04.

64. Universal Declaration of Human Rights, Dec. 10, 1948, Arts. 3, 16-20, U.N. Doc. A/810, at 71.

understanding of these rights and freedoms is of the greatest importance" and "[p]roclaims this Universal Declaration of Human Rights is a *common standard* of achievement for all peoples and all nations."[65] The "Universal Declaration" thus suggests that the human rights recognized in its text are "universal," at least in the sense that they are superior to any contrary rights protected by municipal law.

To the extent that international legal norms are derived from one of the recognized sources of positive international law, I will assume that they are legitimate and binding on the adjudication of international law disputes. I will further assume that these recognized international legal norms are "universal" because they are recognized by positive international law. For example, Article 38 of the Statute of the International Court of Justice provides that the International Court of Justice should apply the following sources of international law: "international conventions," "international custom," "general principles of law recognized in civilized nations," and "judicial decisions and the teachings of the most highly qualified publicists of the various nations."[66] These sources indicate that positive international law can be considered "universal" in the sense that it is the subject of an international consensus either by international conventions, by international customs, by corresponding municipal principles of law, by corresponding judicial decisions, or by legal experts. This really amounts to validating international law as a higher level convention that takes precedence over the lower level convention supporting municipal law. For the purposes of this article, this positivistic account of universal law will not be challenged. Given the legitimacy of these international legal norms, there will be easy cases where these legal norms will resolve disputes independently of religious or comprehensive convictions. In easy cases, judges can interpret and apply international law without relying on extra-legal norms including comprehensive or religious convictions. Consequently, I will not be challenging the autonomy of international law in this sense.

However, these recognized international legal norms are frequently inadequate to resolve disputes. International legal norms often conflict with one another or are ambiguous so that international law is indeterminate. For example, the case of Amina Lawal, who faced stoning for "adultery" in Nigeria until her sentence was overturned on appeal, clearly demonstrates the indeterminancy of international law.[67] Mrs. Lawal was convicted under Islamic Shari'a law of adultery for having a child out of wedlock and sentenced to death by stoning.[68] This death sentence is both supported by and contradicted by international legal norms. Nigeria is a signatory to the *International Convenant on Civil and*

65. *Id.* at Preamble (emphasis added).

66. Statute of the International Court of Justice, Oct. 24, 1945, art. 38, 59 Stat. 1031, T.S. No. 993 [hereinafter Stat. of ICJ].

67. *Nigeria Court Overturns Stoning Sentence,* CHRISTIAN CENTURY, Oct. 18, 2003, at 18 (reporting that March 2002 sentence of death by stoning for adultery overturned by a 4-1 vote by a five-judge Islamic court of appeals on September 23, 2004). *See also* Madhavi Sunder, *Beauty Marred: The "Miss World" Riots, a Stoning Sentence, and the Conflict Between Religious and Secular Law in Nigeria,* FindLaw's Legal Commentary 3 (last visited Dec. 5, 2002) http://writ.news.findlaw.com/commentary/ 20021205/sunder.html.

68. Nelly Van Doorn-Harder, *On Not Throwing Stones: Christian and Muslim Conflict in Nigeria,* CHRISTIAN CENTURY, Feb. 8, 2003, at 8.

Political Rights which protects the "freedom of religion," the "right of self-determination," the "inherent right to life" and prohibits "cruel, inhuman or degrading treatment or punishment."[69] On the one hand, the practice of stoning would appear to violate both the prohibition against "cruel, inhuman or degrading treatment or punishment," and the "inherent right to life" which includes limiting the "sentence of death" to only "the most serious crimes."[70] On the other hand, the application of Islamic Shari'a law seems supported by the "freedom of religion" and the "right of self-determination."[71] With respect to the right to self-determination, twelve of the northern states of Nigeria adopted expanded versions of Shari'a Islamic law by the end of 2000.[72] This expanded the jurisdiction of Islamic Shari'a courts from primarily family or personal cases to include criminal cases.[73] Assuming that these twelve northern states made this decision through democratic processes, this political decision is arguably justified by the right to self-determination protected by the *International Covenant.* Moreover, this conflict among rights protected by the *International Covenant* cannot be resolved from the provisions of the *Covenant* itself. No priority among these rights is specified in the text of the treaty.

Even if this conflict did not exist, the scope of the individual rights is ambiguous or indeterminate. For instance, Article 18 of the *International Covenant* provides that the "[f]reedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others."[74] Is stoning someone to death for adultery necessary to protect public morals? With respect to the Lawal case, a Muslim speaker commented "that just thinking about the ravages caused by the AIDS epidemic was enough to justify stoning as a way of discouraging sexual license."[75] Is that right? Or does stoning someone to death based on a religious law interfere with the fundamental right to life of the person sentenced under that law? Consequently, despite the recognized sources of international law, there are many hard cases, such as the Lawal case, where the relevant international legal norms are indeterminate both because they conflict and because they are ambiguous.

Given these hard cases, the fundamental question becomes: *what legitimates the application of international legal norms if they are indeterminate?* There is no "universal" consensus to rely on in the interpretation and application of international legal norms because the sources of international consensus (the sources of international law) are indeterminate. Despite this indeterminacy, the international legal norms have prima facie priority over municipal legal norms. This priority suggests that the international legal norms are "universal," in some sense, while the municipal legal norms are nonuniversal or conventional. In the interpretative process, legal interpreters must determine whether or not their

69. International Covenant on Civil and Political Rights, Dec. 16, 1966, arts. 1, 6, 7 & 18, 6 I.L.M. 368 (1967) [hereinafter International Covenant].

70. *Id.* at arts. 6 & 7.

71. *Id.* at arts. 1 & 18.

72. Sunder, *supra* note 67, at 2.

73. *Id.*

74. International Covenant, *supra* note 69, at arts. 18.

75. Van Doorn-Harder, *supra* note 68, at 9.

understanding of those norms support this priority. To make this determination, legal interpreters must rely on extra-legal norms because the relevant law is indeterminate. Furthermore, since international legal norms are prima facie universal, legal interpreters must determine for themselves what "universal" extra-legal norms justify the application of the international legal norms.

The international context also highlights the issue of hard cases more dramatically than the domestic context. For example, judges often posit societal consensus in domestic cases as a sufficient "justification" for their decisions even though relying on this consensus as normative must still be justified. In the international context, however, it is harder to posit some "international" consensus about extra-legal norms as universal. The positive sources of international law completely, or nearly completely, identify the possible sources of international consensus. Since these possible sources of international consensus are indeterminate, interpreters of international law are forced to rely on their own "universal" extra-legal normative beliefs. To the extent that their decision making is fully justified, these "universal" normative beliefs must be derived from their religious or comprehensive convictions. Religious or comprehensive convictions are the most comprehensive or universal beliefs that humans hold. They define what the interpreter takes to be authentic human existence as such, which is a universal normative claim. In other words, religious convictions purport "to identify the necessary and sufficient moral condition or comprehensive condition of all valid moral claims."[76] The argument below thus attempts to demonstrate how fully justifying any extra-legal norm and the choice among them in hard cases requires relying on religious convictions about authentic human existence.

Furthermore, the magnitude of the problems raised by legal indeterminancy in international law appears to be greater than in the domestic context. Although they are increasing, there are relatively few international and regional tribunals that could produce authoritative interpretations of international law to decrease the indeterminancy of international legal norms. Even if there were more of these tribunals, some of the empirical work that has been done on "the problem of legal (un)certainty in the global arena" suggests that most domestic courts "do not take notice of court opinions in other countries" and "refuse to apply the *lex mercatoria* and even refuse to enforce arbitration awards based on these autonomous rules."[77] In addition, international treaty making cannot feasibly act as an international form of legislation to respond to legal indeterminacy by amending and modifying existing international legal norms. Therefore, there is no legislative process that can be relied on to decrease legal indeterminacy by refining and filling in gaps in international law.

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76. GAMWELL, *supra* note 22, at 71.

77. *See, e.g.*, Volkmar Gessner, *Globalization and Legal Certainty, in* THE GLOBAL TRANSFORMATIONS READER, *supra* note 8 at 172, 173. Gessner concludes that "[i]n spite of interesting global developments in favour of securing economic exchanges, legal certainty is accomplished successfully and in a stable way neither by state legal devices nor by *lex mercatoria*, nor by norms and behavioural patterns created autonomously within third cultures. Some specific roles [international arbitrators, diamond dealers, and international bankers] create legal certainty for some specific groups, but most global actors . . . gain no access to these groups and cannot make use of qualified support structures." *Id.* at 178-79.

Recognizing the heightened problem of legal indeterminancy in international law, however, does not undermine the legality of international law. First, identifying the indeterminacy of international law is not to accept the conclusion of some political realists that "international law is little more than a sham."[78] Rather, it means that a normative theory of law must be developed to justify the application of international law when it is indeterminate. Second, domestic law raises similar problems which also require reenchanting the law for fully justifying judicial decisions in hard cases.[79] Finally, even if international law is considered to be aspirational *(i.e.*, a set of moral rather than "legal norms"),[80] the same problems of full justification arise. In both cases, interpreting and applying indeterminate norms requires a normative theory that can provide for the justification of practical legal or moral decisions when the relevant norms are indeterminate. My argument is that religious or comprehensive convictions are required for fully justifying indeterminate legal or moral norms. The following, however, will assume that international law is "law" in some sense and argue that judges must rely on religious or comprehensive convictions for fully justifying the application of international law in hard cases.

II. RESPONDING TO LEGAL INDETERMINANCY

Why are religious convictions needed? Don't other legal theories provide an adequate normative theory for justifying international law in hard cases without relying on religious convictions? Although a comprehensive response to this question is not possible here, two groups of theories will be considered briefly.

A. Legal Positivism and Critical Legal Studies

In general, legal theories embracing legal indeterminacy tend to recognize legal indeterminancy but do not try to provide a normative theory to justify legal interpretation in hard cases. For example, Hart's legal positivism noted above recognizes legal indeterminacy or the open texture of the law. Hart does not explain what justifies judges' decisions in hard cases but merely says that deci-

78. Terry Nardin, *Realism, Cosmopolitanism and the Rule of Law*, 81 PROCEEDINGS OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW 415 (1987) (*reprinted in* INTERNATIONAL LAW ANTHOLOGY 351 (Anthony D'Amato ed., 1994)). Nardin further states that political realism

> postulates the inevitable division of mankind into separate states and proposes a strategy for national survival in the international order created by this division. Its principal thesis is that international relations take place in a state of nature. Lacking collective enforcement, international law is little more than a sham. Since no state can be sure that other states will observe the law, each state must rely on self-help to protect its interests and security. Foreign policy must be guided by prudence, not morality or law.

Id.

79. *See* MODAK-TRURAN, REENCHANTING THE LAW, *supra* note 19, at 179-296 (arguing that the indeterminacy of U.S. 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).

80. John Austin famously argued that "the law obtaining between nations is not positive law . . . . The duties which it imposes are enforced by moral sanctions [i.e., not by force like law]: by fear on the part of nations, or by fear on the part of sovereigns, of provoking general hostility, and incurring its probable evils, in case they shall violate maxims generally received and respect." JANIS, *supra* note 6, at 3 (quoting JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 208 (1st ed. 1832)).

sions in these cases are a matter of judicial discretion rather than dictated by law.[81] In hard cases, the judge "is entitled to follow standards or reasons for decision which are not dictated by the law and may differ from those followed by other judges faced with similar hard cases."[82] No normative bases or restrictions are given. Judges can decide in whatever manner they please. The problem here is that if the amount of discretion is substantial, it is hard to hold on to the idea of the "Rule of Law." Legal indeterminacy swallows up the rule of law.

The Critical Legal Studies Movement also embraces legal indeterminancy. However, it takes legal indeterminacy a step further and concludes that legal decision making is merely political rather than rational. Law and morality cannot be based on an apolitical method or procedure of justification, and the legal system cannot be objectively defended as embodying an intelligible moral order.[83] Like all law, international law does not provide a consistent set of norms to resolve disputes. Judges merely impose their political sense of justice on the parties, and the legal order is merely the outcome of power struggles or practical compromises.[84] Consequently, legal indeterminacy is not overcome but radicalized to undermine the possibility of all objective or universal claims. Thus, neither legal positivism nor critical legal studies attempt to provide an extra-legal basis for justifying the application of international law when it is indeterminate.

B. John Rawls's Legal Liberalism

Contrary to these approaches, other legal theories cannot accept this response to legal indeterminacy. For example, legal liberalism advocates a rational basis for legal interpretation despite legal indeterminacy. To further support my argument that religious convictions are required for fully justifying legal interpretation in hard cases, I will briefly demonstrate that legal liberalism requires the establishment of a comprehensive conviction and is finally incoherent. John Rawls's theory in *The Law of Peoples* will be taken as a representative form of legal liberalism and legal liberalism's failure to solve the legitimation crisis of international law.

1. The Law of Peoples

In *The Law of Peoples*, Rawls attempts to specify a "Law of Peoples" which provides "a particular political conception of right and justice that applies to the principles and norms of international law and practice."[85] Following Kant's lead,[86] he attempts to extend "a liberal conception of justice," based on a social

81. HART, *supra* note 4, at 252. *See* text accompanying notes 28-31.

82. *Id.* at 273.

83. *See, e.g.*, Unger, *supra* note 53; KELMAN, *supra* note 46.

84. *See* Unger, *supra* note 53, at 567 (advocating "the purely instrumental use of legal practice and legal doctrine to advance leftist aims").

85. JOHN RAWLS, THE LAW OF PEOPLES WITH "THE IDEA OF PUBLIC REASON REVISITED" 3 (1999) [hereinafter RAWLS, THE LAW OF PEOPLES].

86. *Cf.* Immanuel Kant, *Idea for a Universal History with a Cosmopolitan Intent (1784), in* PERPETUAL PEACE AND OTHER ESSAYS 33, 38 (Ted Humphrey trans., 1983) (arguing that "[t]he greatest problem for the human species, whose solution nature compels it to seek, is to achieve a universal civil society administered in accord with the right" and makes a "philosophical attempt to work out a universal history of the world in accord with a plan of nature that aims at a perfect civic union of the human").

contract theory, from "a domestic regime to a Society of Peoples."[87] A "Society of Peoples" means "all those peoples who follow the ideals and principles of the Law of Peoples in their mutual relations."[88] He argues for a Law of Peoples rather than a Law of Nations because of the changes in international law since World War II. Similar to the account in Section I, he argues that "international law has become stricter" because "[i]t tends to limit a state's right to wage war to instances of self-defense (also in the interests of collective security), and it also tends to restrict a state's right to internal sovereignty."[89] Rawls attempts to take these new limits into account by shifting from a focus on the sovereignty of states (the Law of Nations) to a focus on the rights of people (the Law of Peoples).

To generate the Law of Peoples, Rawls relies on his earlier idea of the original position and extends it to a second original position with some slight modifications.[90] He argues that both liberal peoples (peoples representing liberal constitutional democracies) and decent peoples (nonliberal peoples representing societies whose "basic institutions meet certain specified conditions of political right and justice")[91] "will affirm the same Law of Peoples that would hold among just liberal societies" so that this law can be considered "universal in its reach."[92] Rawls argues that the "basic charter of the Law of Peoples" would include eight principles:

1. Peoples are free and independent, and their freedom and independence are to be respected by other peoples.
2. Peoples are to observe treaties and undertakings.
3. Peoples are equal and are parties to the agreements that bind them.
4. Peoples are to observe a duty of non-intervention.
5. Peoples have the right of self-defense but no right to instigate war for reasons other than self-defense.
6. Peoples are to honor human rights.
7. Peoples are to observe certain specified restrictions in the conduct of war.
8. Peoples have a duty to assist other peoples living under unfavorable conditions that prevent their having a just or decent political and social regime.[93]

Furthermore, note that like his political conception of justice regarding social cooperation between citizens in a constitutional democratic regime, the Law of Peoples is "not expressed in terms of comprehensive doctrines of truth or of

87. RAWLS, THE LAW OF PEOPLES, *supra* note 85, at 9.

88. *Id.* at 3.

89. *Id.* at 27.

90. *Id.* at 32-35, 39-42. For further discussion of the "original position," see JOHN RAWLS, A THEORY OF JUSTICE 118-92 (1971) and RAWLS, POLITICAL LIBERALISM, *supra* note 15, at 304-10.

91. RAWLS, THE LAW OF PEOPLES, *supra* note 85, at 59. Rawls argues that "the Law of Peoples uses an original position argument only three times: twice for liberal societies (once at the domestic level and once at the Law of Peoples), but only once, at the second level, for decent hierarchical societies." *Id.* at 70.

92. *Id.* at 121.

93. *Id.* at 37.

right, which may hold sway in this or that society, but in terms that can be shared by different peoples."[94] He assumes "that there is an even greater diversity in the comprehensive doctrines affirmed among the members of the Society of Peoples with its many different cultures and traditions."[95] The nonrational comprehensive religious, philosophical, and moral doctrines are not relevant to the content of the Law of Peoples. As in *Political Liberalism*, Rawls proposes a political conception of justice which is "political not metaphysical."[96] Thus, the Law of Peoples provides "a public political conception of justice" "which settles fundamental political questions as they arise for the Society of Peoples" without relying on comprehensive doctrines.[97]

2. The Idea of Public Reason[98]

For the purposes of this article, however, the generation of these principles is not the chief concern. The application of these principles under the conditions of legal indeterminancy is what is important. Rawls does not say much about applying the Law of Peoples. He argues that the Law of Peoples can be rationally justified and applied based on public reason, which is independent of comprehensive religious, philosophical, and moral doctrines. "[T]he ideal of the public reason of free and equal peoples is realized, or satisfied, whenever chief executives and legislators, and other government officials, as well as candidates for public office, act from and follow the principles of the Law of Peoples and explain to other peoples their reasons for pursing or revising a peoples' foreign policy and affairs of state that involve other societies."[99] Rawls maintains that although public reason of liberal peoples and the public reason of the Society of Peoples "do not have the same content, the role of public reason among free and equal peoples is analogous to its role in a constitutional democratic regime among free and equal citizens."[100] In the domestic context, the "content of public reason" is formulated by a political conception of justice ("political values of public reason") which includes two parts and two values: (1) "substantive principles of justice" for the basic structure of society ("the values of political justice"), and (2) "guidelines of inquiry" including "principles of reasoning and rules of evidence in the light of which citizens are to decide whether substantive principles properly apply and to identify laws and policies that best satisfy them" ("the values of public reason").[101] In the international context, the first part of public reason would be the substantive principles of the Law of Peoples specified above, and the second part would be the same as in the domestic context.

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94. *Id.* at 55.
95. *Id.* at 40.
96. RAWLS, POLITICAL LIBERALISM, *supra* note 15, at 10.
97. RAWLS, THE LAW OF PEOPLES, *supra* note 85, at 123.
98. For a more complete summary and critique of Rawls's notion of public reason, see MODAK-TRURAN, REENCHANTING THE LAW, *supra* note 19, at 89-135. *See also* Mark Modak-Truran, *The Religious Dimension of Judicial Decision Making and the De Facto Disestablishment*, 81 MARQ. L. REV. 255, 266-71 (1998).
99. RAWLS, THE LAW OF PEOPLES, *supra* note 85, at 56.
100. *Id.* at 55.
101. RAWLS, POLITICAL LIBERALISM, *supra* note 15, at 223-24.

Except for this difference, public reason functions almost identically in both contexts. In both contexts, public reason requires that "fundamental political questions" "be based on a public political conception of justice,"[102] but the content of that conception of justice changes depending on the domestic or international context. Consequently, to understand how public reason functions with respect to the application of the Law of Peoples, I will rely on Rawls's more complete analysis of public reason in its relation to constitutional democratic regimes.

With respect to public reason, Rawls holds out judicial decision making as the ideal type. Rawls maintains that "public reason is the sole reason the court exercises. It is the only branch of government that is visibly on its face the creature of that reason and of that reason alone."[103] Judges have "no other reason and no other values than the political."[104] Judges must use public reason to justify all their decisions and demonstrate how their decisions are consistent and fit with a coherent constitutional interpretation of the law. Rawls holds out the United States Supreme Court as the "exemplar of public reason" and emphasizes that

> [t]he justices cannot, of course, invoke their own personal morality, nor the ideals and virtues of morality generally. Those they must view as irrelevant. Equally, they cannot invoke their or other people's religious or philosophical views. Nor can they cite political values without restriction. Rather, they must appeal to the *political values they think belong to the most reasonable understanding of the public conception and its political values of justice and public reason.* These are values that they believe in good faith, as the duty of civility requires, that all citizens as reasonable and rational might reasonably be expected to endorse.[105]

In other words, in both the deliberative process and the process of explanation, judges should rely solely on the political values of public reason which are independent of any particular comprehensive religious, philosophical, or moral doctrines.[106] Even in cases where there appear to be legal arguments evenly balanced on both sides, Rawls insists that judges cannot resolve cases based on their personal views including their personal political views.[107] In hard cases, judges should seek the best interpretation of the law. The best interpretation is the one that "best fits" the relevant treaties, customs, principles of municipal law, judicial decisions, and the teachings of publicists, and the one that can be justified on the basis of the political values of public reason. Rawls maintains that "the political values of public reason provide the Court's basis for interpretation."[108] The political values of public reason function like a higher law which provides answers in hard cases and which informs judges' constructive interpretations of prior precedent. When the relevant legal materials are indeterminate, Rawls

102. RAWLS, THE LAW OF PEOPLES, *supra* note 85, at 123.
103. RAWLS, POLITICAL LIBERALISM, *supra* note 15, at 235.
104. *Id.* at 235.
105. *Id.* at 236 (emphasis added).
106. *Id.* at 139.
107. *Id.* at *lv.*
108. *Id.* at 234.

maintains that judges must rely on the political values of public reason alone. Thus, this means the substantive principles of the Law of Peoples constitute a higher law which judges should rely on exclusively to resolve hard international law cases.

C. A Hidden Comprehensive Doctrine

Contrary to his aspirations for the Law of Peoples, Rawls legal liberalism fails because it depends on a hidden comprehensive doctrine that religious judges cannot accept and that leads to self-contradiction.[109] With respect to political liberalism in general, several critics have argued against Rawls on the similar grounds that religious adherents could not consistently accept his political liberalism. For example, Patrick Neal maintains that

> citizen of faith cannot accept the strong reading of the idea that her commitment to political liberalism must be wholehearted and firm. This reading would insist that the principles of justice characteristic of political liberalism should take priority over provisions of one's comprehensive moral or religious view in cases of conflict. The citizen of faith could not grant this much authority to political liberalism without denying the ultimate authority of God.[110]

A similar problem faces judges who hold comprehensive doctrines and are told to adjudicate hard cases solely on the basis of public reason. Rawls's public reason requires religious judges to order the political values of public reason in hard cases on grounds they cannot accept as valid. When the relevant legal materials are indeterminate, Rawls maintains that the court must rely on the political values of public reason to resolve a dispute about constitutional essentials or matters of basic justice. Further, Rawls argues that in order for the political values alone to "give a reasonable answer to all, or nearly all, questions involving constitutional essentials and matters of basic justice," the ordering of values must be made

> in light of their structure and features within the political conception itself, and not primarily from how they occur within citizens' comprehensive doctrines. Political values are not to be ordered by viewing them separately and detached from one another or from any definite context. They are not puppets manipulated from behind the scenes by comprehensive doctrines.[111]

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109. In addition to this criticism, Rawls's notion of public reason, even with the help of Ronald Dworkin's interpretative legal theory, fails to solve the problem of legal indeterminancy. *See* MODAK-TRURAN, REENCHANTING THE LAW, *supra* note 19, at 115-30.

110. Patrick Neal, *Political Liberalism, Public Reason, and the Citizen of Faith, in* NATURAL LAW AND PUBLIC REASON 171, 183 (Robert P. George & Christopher Wolfe eds., 2000).

111. John Rawls, *The Idea of Public Reason Revisited*, 64 U. CHI. L. REV. 765, 777 (1997).

No religious judge, however, could accept this "political not metaphysical" ordering of political values in hard cases. A comprehensive or religious conviction "purports to identify the necessary and sufficient moral condition or comprehensive condition of all valid moral claims."[112] Thus, for the religious judge, an ordering of political values is valid only if it coincides with the ordering dictated by her comprehensive or religious convictions. Yet, Rawls's political liberalism maintains that the political values of public reason must be ordered exclusively by a "political not metaphysical" conception of justice (freestanding) even in hard cases. In other words, this requires that every religious adherent reject the claim that his or her comprehensive conviction is valid or reject that it is the "comprehensive condition of all valid moral claims." Only those judges who deny all comprehensive convictions (*i.e.*, believe that political values are independent of any particular answer to the comprehensive question) could accept Rawls's "political not metaphysical" ordering of political values in hard cases.[113] As a result, it is not clear how the Law of Peoples could be the subject of an overlapping consensus of reasonable comprehensive doctrines that Rawls claims is required for a stable society.[114] Either the acceptance of the exclusive political ordering of the political values is a mere *modus vivendi*[115] and inherently unstable, or no consensus is possible and there are a plurality of orderings of the political values informing the law as proposed by the reenchantment of international law.

Moreover, Rawls's position may finally be incoherent. Recall that he claims that an objective legitimation of law must be independent of comprehensive doctrines (*i.e.*, based on the political values of public reason) because comprehensive doctrines are nonpublic (*i.e.*, not rational). This claim entails a comprehensive denial of all comprehensive doctrines (moral relativism), which according to Rawls is not possible, and thus results in an incoherent account of judicial decision making. In this respect, Franklin Gamwell argues that "[b]ecause a denial of all religious or comprehensive convictions is itself a (negative) comprehensive

112. GAMWELL, *supra* note 22, at 70-71.

113. Franklin Gamwell argues that "[a]t best, in other words, the consensus that Rawls's political liberalism requires is joined only by those who deny all comprehensive convictions, citizens who believe that principles of justice are independent of any particular answer to the comprehensive question because no comprehensive conviction is valid." *Id.* at 73. *See also* Abner S. Greene, *Uncommon Ground—A Review of Political Liberalism and Life's Dominion*, 62 GEO. WASH. L. REV. 646, 670 (1994) (book review) ("the effect of Rawls's theory is to favor certain comprehensive doctrines over others without compensation").

114. Both in *Political Liberalism* and in *The Law of Peoples*, Rawls makes it clear that he thinks the political conceptions of justice must be supported by an overlapping consensus of reasonable comprehensive doctrines. RAWLS, POLITICAL LIBERALISM, *supra* note 15, at 147-48; RAWLS, THE LAW OF PEOPLES, *supra* note 85, at 16, 31-32. In other words, after the principles of justice are generated by the original position, they must then be affirmed from within the comprehensive doctrines he refers to as reasonable. With respect to the Law of Peoples, however, Rawls is not clear as to whether this political conception of justice must be the subject of an overlapping consensus of reasonable comprehensive doctrines. Rawls comments that "[t]he unity of a reasonable Society of Peoples does not require religious unity. The Law of Peoples provides a content of public reason for the Society of Peoples parallel to the principles of justice in a democratic society." RAWLS, THE LAW OF PEOPLES, *supra* note 85, at 18. Consequently, the Law of Peoples would not produce a stable Society of Peoples if it was not the subject of an overlapping consensus by peoples holding reasonable comprehensive doctrines.

115. *Cf.* Neal, *supra* note 110, at 198 ("citizens of faith will at best be able to establish something of a *modus vivendi* agreement with comprehensive liberals to abide by the Rawlsian account of political liberalism").

claim, it prevents the validation or justification of *any* positive beliefs about human authenticity, comprehensive or otherwise."[116] Rawls's claim then that the political values of public reason must be independent of comprehensive doctrines implies a comprehensive denial of comprehensive doctrines and is self-refuting. Therefore, Rawls's legal liberalism is incoherent. Its basis for prohibiting judicial reliance on comprehensive doctrines in hard cases is itself based on a comprehensive doctrine.

In addition, the failure of Rawls's theory to generate an overlapping consensus means that Rawls's comprehensive denial of comprehensive doctrines must be established as the official comprehensive doctrine. This is required to ensure that in hard cases the political values of public reason are ordered exclusively by a "political not metaphysical" conception of justice (freestanding). Establishing this comprehensive doctrine, however, would mean that it would become the official religion of international law. This would obviously face severe resistence by those with other religious convictions and make the adoption of such a comprehensive doctrine practically infeasible. Also, as argued below, the normative requirements of pluralistic inclusivism proscribe the establishment of a religion by the international community. Hence, Rawls's legal liberalism should be rejected because it is incoherent and because it would require establishing an official comprehensive conviction in the international law.

III. FULL JUSTIFICATION, PLURALISITIC INCLUSIVISM AND JUSTIFYING LEGAL INDETERMINANCY

Given the failure of legal liberalism and the indeterminancy of international law, how are extra-legal norms given a "universal" justification to support a rational interpretation of international law? In answering this question, I will assume that interpreting and applying international law involves two stages—deliberation and explanation. The process of deliberation is the more complete stage because it includes all the reasons for a judge's decision whether or not those reasons are articulated in the explanation of the judge's decision in a written opinion. The processes of deliberation and explanation thus do not completely mirror one another. My argument is that international law needs religion to provide a full justification of indeterminate international law in the deliberation stage but that international law should remain indeterminate (not replace religion) so that the official explanation or treaty provisions resulting from that deliberation are based on noncomprehensive legal and extra-legal norms. The first requirement applies to all interpreters of international law including judges, legislators, foreign relations specialists, etc. The second requirement only

116. GAMWELL, *supra* note 22, at 139. Gamwell further clarifies that "[i]f there is no character or positive principle of human authenticity that is valid under all historical conditions, then all valid understandings of human authenticity must be relative to some or other specific circumstances. But, then, no moral claim could be justified without validating moral relativism, and moral relativism is a *positive* claim about human authenticity, the validity of which cannot be relative to specific circumstances. To assert that the moral norms of every actual and possible human activity are in all respects relative is to make a positive claim about human activity that is comprehensive. In other words, moral relativism is self-refuting because it implies the comprehensive condition that it denies, and, therefore, the denial of all comprehensive convictions prevents the validation of any moral claim at all." *Id.* at 139-40.

applies to public officials who are part of the process of creating international law either by judicial opinions, treaties, or other official expressions of international legal norms. The first part of this Section will briefly address the first part of this thesis. The second part will address the second requirement, and the third part will indicate how pluralistic inclusivism provides a normative justification for legal indeterminacy.

A. FULLY JUSTIFYING THE INTERPRETATION OF INDETERMINATE INTERNATIONAL LAW[117]

1. Full Justification

Since all human activity implicitly or explicitly depends on a comprehensive conviction, legal interpretation is no exception. In easy cases, the relevant positive international legal norms provide a determinate outcome without regard to the comprehensive convictions that implicitly justify those norms. In hard cases, however, legal interpreters must rely on extra-legal norms because hard cases are, by definition, those cases in which the relevant sources of positive international law do not provide a determinate outcome to the issue in question. For example, the *International Convention on Civil and Political Rights*[118] protects the "right to self-determination" and the "inherent right to life." Does the "inherent right to life" include a right to die? A majority of states in the United States prohibit physician-assisted suicide.[119] The U.S. Supreme Court has also held that there is not a fundamental right or liberty interest to assistance in suicide protected by the Due Process Clause of the Fourteenth Amendment.[120] If the "inherent right to life" protected by the *International Convention* is held to include a right to die, do these U.S. state statutory provisions violate international law? Alternatively, does the right to self-determination justify these statutory provisions? As with the Lawal case noted in Section I,[121] this conflict among rights is not resolved by the text of the *International Convention* or other likely sources of international law. The international legal norms are indeterminate.

To resolve this indeterminancy, legal interpreters must rely on extra-legal norms such as political, historical, societal, and moral norms and determine which extra-legal norms are appropriate. Why is one political norm decisive and not another? Why is a historical norm, rather than a societal norm, decisive? Why are any of these norms appropriate? In other words, a full justification would also justify these extra-legal norms and provide reasons why one norm is the most appropriate for justifying a particular interpretation.

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117. For a much more thorough discussion of the role of religious convictions in fully justifying judges decisions in hard cases, see MODAK-TRURAN, REENCHANTING THE LAW, *supra* note 19, at 179-239. This analysis also demonstrates the necessity of relying on religious convictions for fully justifying decisions in two actual hard cases—*Washington v. Glucksberg*, 521 U.S. 702 (1997) and *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439 (1988).

118. International Covenant, *supra* note 69 (providing that "[a]ll peoples have the right of self-determination," that "[e]very human being has the inherent right to life," and that "[n]o one shall be arbitrarily deprived of his life").

119. Washington v. Glucksberg, 521 U.S. 702 (1997).

120. *Id.* at 735.

121. *See supra* text accompanying notes 67-75.

If the political, historical, societal, and moral norms in question are noncomprehensive extra-legal norms, they will not fully justify a decision. A full justification in hard cases requires legal interpreters to rely on a particular type of extra-legal norm—religious convictions about authentic human existence. Religious convictions are explicit comprehensive convictions which provide the comprehensive condition of validity for all normative thinking. Religious convictions should thus inform legal deliberations in hard cases in several ways. First, any noncomprehensive extra-legal norm relied on must be justified by a religious conviction. Justifying extra-legal norms requires determining that the norms in question would positively contribute to authentic human existence in the context of the case at issue. Second, the choice among extra-legal norms should also be justified by determining which norm or norms best contributes to authentic human existence. In addition, only religious convictions that have been critically validated should be relied on. Consequently, in deliberating about hard cases, legal interpreters should fully justify their decisions by relying on their religious convictions (which they have self-critically determined to be true) to justify all noncomprehensive extra-legal norms and the choice among them.

Although he has a much different conception of what fully justifying judicial decisions in hard cases entails, Dworkin makes a similar point when he argues that

> [a]ny practical legal argument, no matter how detailed and limited, assumes the kind of abstract foundation jurisprudence offers, and when rival foundations compete, a legal argument assumes one and rejects others. So any judge's opinion is itself a piece of legal philosophy, even when the philosophy is hidden and the visible argument is dominated by citation and lists of facts. Jurisprudence is the general part of adjudication, silent prologue to any decision at law.[122]

In my terms, any practical legal argument in a hard case presupposes a comprehensive conviction about authentic human existence. A choice among extra-legal norms is either fully justified based on an explicit comprehensive conviction (*i.e.*, a religious conviction about authentic human existence) or blindly based on an implicit comprehensive conviction. Comprehensive convictions are the "hidden" and "silent prologue" to any judicial decision in a hard case.

2. Caveat: The Role of Fully Justified Noncomprehensive Norms

My argument that a full justification of an interpretation of hard cases requires relying on comprehensive or religious convictions, however, needs a *caveat* because this claim is not as demanding as it may initially seem. I am not arguing that in deliberating about every hard case, legal interpreters must specify a full justification of their decisions. My claim is more modest than this. What

122. RONALD DWORKIN, LAW'S EMPIRE 90 (1986).

responsible legal interpretation requires is that interpreters have, at some point, fully justified all the extra-legal norms they rely on to decide hard cases. For example, in a hard case dealing with conflicting precedent, the judge must choose which line of precedent to follow. The law does not tell the judge which direction to go or which path to take. The judge must rely on extra-legal norms to determine which precedent to follow. If the extra-legal norms are noncomprehensive such as political, historical, social, or moral norms, then the judge will have to justify these noncomprehensive extra-legal norms in accordance with her comprehensive conviction. The judge can do this either *during, prior to, or alongside of* the process of deliberating about this hard case. In other words, even if the judge does not fully justify these noncomprehensive extra-legal norms *during* her deliberation about the case, she can rely on these norms if they have been fully justified *prior to or alongside of* her deliberation in that case.

This raises the question of where these noncomprehensive norms come from and how legal interpreters fully justify them prior to and alongside of their interpretation. Specifying noncomprehensive norms is part of determining the nature of authentic human existence. Religious or comprehensive convictions attempt to order and organize all of life around a comprehensive purpose. This includes the moral, political, social, economic, and legal dimensions of life, and it requires relating that comprehensive purpose to the particular circumstances of each individual's life. Noncomprehensive norms such as "obey your parents," "do not lie," "promote democratic government," and "pursue justice" are part of the specification of authentic human existence which depend upon a religious or comprehensive conviction. These noncomprehensive norms are essential for organizing and leading a self-reflective life because they allow us to make decisions without ascending to the comprehensive level of reflection in every decision we make. They also allow us to focus on the particular circumstances of a normative issue. Most practical normative deliberation focuses on getting the facts straight and deciding what to do based on the most appropriate noncomprehensive norm. Most of our normative thinking occurs at this level and ascends to the comprehensive order of reflection only in hard cases where the noncomprehensive norms are indeterminate.

One of the major functions that religious traditions have performed for their followers is to specify the noncomprehensive norms that promote living life authentically and to provide the comprehensive or religious justification for these noncomprehensive norms. In the Christian tradition, one of the main tasks of practical and moral theology has to do with specifying for believers what noncomprehensive norms are essential for living the Christian Life in a historically appropriate manner.[123] For example, the Papal Encyclicals have addressed mat-

123. In discussing the nature of theology in general and Christian theology as a particular example of theological reflection, Schubert Ogden argues that "*[a]lthough theology is a single moment of reflection, it has three distinct moments which allow for its differentiation into the interrelated disciplines of historical, systematic, and practical theology.*" OGDEN, ON THEOLOGY, *supra* note 28, at 7. Practical theology, in its Christian form, can be broadly understood "as reflective understanding of the responsibilities of Christian witness as such in the present situation." *Id.* at 13-14. He further claims that practical theology can also be more narrowly understood as focusing on the "explicit witness of faith" in the specific religious forms and practices of the representative Christian church. *Id* at 98-101. By contrast, moral theology focuses on the "*implicit* witness of faith" constituted by the actions of each individual Christian and formulates general principles to inform all Christian praxis. *Id. See also* DON S. BROWNING, A FUNDAMENTAL PRACTICAL THEOLOGY: DESCRIPTIVE AND STRATEGIC PROPOSALS (1991); TRACY, *supra* note 34, at 237-250.

ters of moral theology such as abortion, artificial conception, economic exploitation, and euthanasia.[124] The World Council of Churches has likewise addressed issues such as racism, sexism, and defining a just, participatory, and sustainable society.[125] In the Jewish tradition, the classic example of the specification of noncomprehensive norms is the Jewish Talmud. The Talmud is a great compendium of Jewish law and includes commentary on the Jewish law by esteemed Babylonian and Palestinian rabbis.[126] These laws address very particular aspects of daily life such as, "LOVE WORK, HATE LORDSHIP, AND SEEK NO INTIMACY WITH THE RULING POWERS."[127] Furthermore, given that all explicit comprehensive convictions are religious convictions, any tradition of comprehensive reflection, such as comprehensive liberalism, could serve the function of a religious tradition by specifying and fully justifying noncomprehensive norms.[128] Religious traditions thus provide valuable assistance to their followers in specifying and fully justifying noncomprehensive norms to help them deal with important moral, political, social, and legal issues.

With respect to legal interpretation, two things need to be emphasized. First, a full justification of noncomprehensive extra-legal norms can be done *prior to, alongside of, and during* the interpretation of the law in hard cases. The noncomprehensive extra-legal norms relied on do not just magically appear during the interpretive process. We all inherit a plethora of noncomprehensive norms from our culture, including the religious traditions which are part of that culture.[129] In the process of maturation, self-reflective individuals reflect on these inherited noncomprehensive norms and come to terms with them. Religious traditions provide assistance in this process both by specifying noncomprehensive norms which aid adherents in living life authentically and by fully justifying these noncomprehensive norms. However, individuals must finally determine for themselves which religious or comprehensive conviction about authentic human existence is valid and which noncomprehensive norms can be fully justi-

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124. *See, e.g.*, Pope John Paul II, *Veritatis Splendor* (1993), *in* READINGS IN CHRISTIAN ETHICS: A HISTORICAL SOURCEBOOK 307-311 (J. Philip Wogaman & Douglas M. Strong eds., 1996). This collection of readings includes a wide array of works in Christian ethics from early Christianity up to very recent works.

125. World Council of Churches, Reports from Periodic Assemblies (1948, 1954, 1961, 1983, 1991), *in* READINGS IN CHRISTIAN ETHICS: A HISTORICAL SOURCEBOOK 315-340 (J. Philip Wogaman & Douglas M. Strong eds., 1996).

126. *See, e.g.*, THE LIVING TALMUD: THE WISDOM OF THE FATHERS (Judah Goldin ed. & trans. 1957).

127. *Id.* at 62.

128. *See* RAWLS, POLITICAL LIBERALISM, *supra* note 15.

129. The work on "social norms" in law and society and law and economics has been helpful in identifying that the obligations generated by social norms determine behavior in addition to or instead of the law. *See* Richard H. McAdams, *Comment: Accounting for Norms*, 1997 WIS. L. REV. 625, 632; Robert C. Ellickson, *Law and Economics Discovers Social Norms*, 27 J. LEGAL STUD. 537 (1998) (Symposium on *Social Norms, Social Meaning, and the Economic Analysis of Law*). However, the discussion of "social norms" in legal theory and especially in the economic analysis of law has tended to focus on a descriptive analysis of the role of social norms in regulating behavior along with law, the market, and "architecture." *See, e.g.*, Lawrence Lessig, *The New Chicago School*, 27 J. LEGAL STUD. 661 (1998) (Symposium on *Social Norms, Social Meaning, and The Economic Analysis of Law*). Social norms are taken as a given (like preferences) and used to explain behavior in addition to legal norms, as an alternative to an explanation based on legal norms, and as a response to legal norms. By contrast, I am focusing on the normative question of how extra-legal norms, whatever their source, should be justified. The inquiry is not an empirical or descriptive account of how extra-legal norms influence judicial decision making in hard cases but a normative account of how extra-legal norms that are inherited from our culture should be justified or legitimatized. The question is what validates or justifies the extra-legal norms that are required for judges to decide hard cases.

fied by their comprehensive conviction. In addition, this is a life-long task. Self-reflective individuals continually reexamine both whether their noncomprehensive norms can be fully justified by their comprehensive or religious convictions about authentic human existence and whether their comprehensive convictions about authentic human existence are authentic or valid. To the extent individuals have been self-reflective, they come to the process of legal interpretation bench with a body of noncomprehensive extra-legal norms that have been fully justified ahead of time, and they continue to reflect on these noncomprehensive convictions alongside of or outside of the interpretive process. Certain hard cases may cause or prompt further reflection about the noncomprehensive extra-legal norms they thought were fully justified, but in most cases, the full justification of these noncomprehensive extra-legal norms has occurred prior to, and continues to occur alongside of, the interpretative process.

Second, once an interpreter has determined that certain noncomprehensive, extra-legal norms are fully justified by her comprehensive conviction, she can rely on these noncomprehensive extra-legal norms in subsequent hard cases for fully justifying her decisions without explicitly ascending to her comprehensive conviction. Future ascent may be unusual or rare. Unless something about a subsequent case calls their validity into question, these previously justified noncomprehensive extra-legal norms will suffice for deciding subsequent hard cases. The occasional nature of the ascent to comprehensive convictions may be one of the reasons that this ascent is absent from most accounts of legal interpretation. Once noncomprehensive extra-legal norms about politics, morality, economics, etc. have been fully justified, this prior process of justification may not be consciously linked with the process of legal interpretation in hard cases. In addition, individuals continue to justify extra-legal norms alongside of and during interpretation in hard cases. If legal interpreters do so *during* their deliberation, they are self-aware that they are relying on noncomprehensive extra-legal norms that must be fully justified during their deliberations. If full justification is done *along side of* the interpretive process, legal interpreters may be fully justifying noncomprehensive extra-legal norms without connecting this process to the full justification of their decisions during legal interpretation. Ideally, individuals would recognize that both of these processes are essential to a full justification of their decisions in hard cases. Nevertheless, their decisions would still be fully justified even if these processes were performed separately and were not recognized as being connected. As a result, although requiring legal interpreters to justify their decisions fully, this model of legal interpretation does not require that the full justification of the relevant noncomprehensive extra-legal norms *during* the deliberations about each hard case.

B. Why Shouldn't International Law Adopt a Comprehensive Conviction?

Given that international law does not include an establishment clause like the First Amendment of the United States Constitution, why shouldn't international law attempt to adopt a comprehensive conviction, like comprehensive liberalism, to decrease legal indeterminancy? Or, why shouldn't international law replace religion? The following will explore three possible arguments.

1. Freedom of Religion and Lack of Consensus

Both the international recognition of religious freedom and the lack of consensus about comprehensive convictions pose possible obstacles to establishing an official international religion or international conception of authentic human existence. The "freedom of religion" has been recognized by most treaties on international human rights and would arguably be infringed by the establishment of an official international religion.[130] By denying some people the right to rely on their own religious convictions in hard cases, the law would be interfering with their religious freedom. However, many of these treaties further provide that the "[f]reedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others."[131] In the United States, the same concept has supported severely limiting the religious actions or practices by generally applicable laws that are rationally related to a legitimate governmental purpose. The rationale for these restrictions on religious freedom have been justified by the claim that people still have the right to hold their religious beliefs, even though acting on those beliefs is severely restricted by these generally applicable laws.[132] If the comprehensive conviction is considered a generally applicable law that is rationally related to a legitimate governmental purpose (*i.e.*, reducing legal indeterminancy), then this argument will fail to provide a basis for prohibiting the establishment of an official international religion. Those with contrary religious convictions can still believe in those convictions, but they cannot act in a manner contrary to this generally applicable law (*i.e.*, they cannot rely on them for fully justifying decisions in hard cases). The application of U.S. law to this situation may be weakened by the fact that the First Amendment to the U.S. Constitution has both a Free Exercise Clause and an Establishment Clause, while international treaties only mention the freedom of religion. This difference may result in interpreting the freedom of religion to include the prohibition against establishing an official international religion because establishment would interfere with the free exercise of those holding religious convictions contrary to the established religion. Given the substantial indeterminacy of the meaning of the freedom of religion, however, the freedom of religion does not seem to be a firm basis for prohibiting the establishment of an international religion.

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130. *See, e.g.*, International Covenant, *supra* note 69, at art. 18(1) (recognizing "the right to freedom of thought, conscience and religion").

131. *Id.* at 18(3).

132. In *Reynolds v. United States*, 98 U.S. 145 (1878), the Supreme Court held that the free exercise clause did not protect Mormon religious practice of polygamy. The Court made the now famous distinction that "[l]aws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices." *Id.* at 166. The key question thus becomes whether the religious practice in question is one that is protected by the free exercise clause. Relying on this distinction, the Court recently refused to protect the Native American religious practice of smoking peyote under the free exercise clause because the criminal sanctions against the use of illegal drugs while working for the State of Oregon was a generally applicable law that was rationally related to a legitimate government purpose (controlling illegal drug use). Employment Division, Oregon Department of Human Resources v. Smith, 494 U.S. 872 (1990). *See also* Goldman v. Weinberger, 475 U.S. 503 (1986) (refusing to protect wearing yarmulke while on active military duty).

Nevertheless, from a practical point of view, it is unlikely that there would be sufficient consensus to support a treaty or convention adopting comprehensive liberalism. Why would those with different religious convictions, which are the comprehensive condition for all normative validity, agree to replace their religious convictions with an official international religion? Since this seems unlikely, this question may be more of an academic concern than a real issue.

2. Pluralistic Inclusivism

The strongest argument against establishing an international religion has to do with religious pluralism. Given that religious convictions can be critically validated, Ogden could be read to suggest that there is only one true religion which can be arrived at by critical reflection. If this were the case, the international community could establish this religion so that the law would include a comprehensive justification. This reading, however, would be seriously misguided. To the contrary, Ogden maintains that the debate about religious pluralism has been mistaken because it has proceeded from the assumption that there is either one true religion (monism) or that there are many equally true religions (pluralism). He argues that religious monism comes in two varieties: exclusivism and inclusivism. For example, in its Christian form, exclusivists claim that there is "no salvation outside of the Church" or "no salvation outside of Christianity."[133] By contrast, Christian inclusivists argue that "the possibility of salvation uniquely constituted by the event of Jesus Christ is somehow made available to each and every human being without exception [usually through the fragmentary explication of the true religion (Christianity) by other religions] and, therefore, is exclusive of no one unless she or he excludes herself or himself from its effect by a free and responsible decision to reject it."[134] The alternative usually proposed to these two forms of monism is pluralism. Pluralists maintain "not only that there *can be* many true religions but there actually *are*."[135] On this account, all religions are equally true, and one religion cannot be shown to be true and another false.

Conversely, Ogden contends that religious convictions are capable of critical validation. Some religious convictions are capable of critical validation by theology and philosophy and others are not. This seems to suggest religious monism, but Ogden argues for another option which he calls pluralistic inclusivism. He maintains that the logical contradictory to religious monism "is not that there actually *are* many true religions, but only that there *can be*."[136] In other words, more than one religion may be capable of critical validation. More than one religion may be the true reflective understanding of our basic existential faith. Also, religious convictions can be modified and corrected based on further reflection and based on what is learned from dialogue with other religions. The pursuit of religious truth is never complete. Through ongoing reflection and

133. OGDEN, *supra* note 20, at 28-29.
134. *Id.* at 31.
135. *Id.* at 27.
136. *Id.* at 83.

encounters with other religions, the possibility for improvement is ever present. Consequently, even if a religion could be shown to be more true than others, Ogden would oppose the establishment of an official religion by the international community. Establishing an official religion would cut off the opportunity for further improvement and refinement of religious truth. It would stifle the pursuit of religious truth and jeopardize further progress from subsequent rational reflection and dialogue among those holding a plurality of religious convictions.

3. Consequences for International Law

Assuming Ogden's arguments for his account of justifying religious convictions and pluralistic inclusivism succeed, there are two significant implications for legal interpretation in hard cases. First, all comprehensive or religious convictions cannot be presumed to be equally true. Legal interpreters must validate their religious convictions before relying on them in hard cases. At the very least, they must determine that these religious convictions are fully reflective—credible to common human existence and reason.[137] Once this has been done, they are warranted in relying on those religious convictions for fully justifying their interpretations of international law in hard cases.

However, this does not mean that legal interpreters must become theologians. They are not expected to produce a systematic theological defense of their religious convictions. Rather, they may meet this burden in several other ways. They may rely on the theological justifications of a theologian or on the official doctrine of a religious tradition as long as they examine this theological justification and conclude that this account is fully reflective. Also, many individuals have likely been reflecting on their religious convictions, to some extent, their entire lives. Once they have satisfied themselves that their religious convictions are fully reflective, this validation will suffice unless something calls this conclusion into question. In either case, legal interpreters will not usually be validating their religious convictions during their deliberations about hard cases. This validation will likely occur prior to their deliberations. If so, their focus in hard cases will not be on validating their religious convictions but on justifying non-comprehensive norms and the choice among them. If not, legal interpreters must critically validate their religious convictions *during* their deliberations and *before* relying on these religious convictions for fully justifying their decisions. As a result, if they follow this process of critically validating their religious convictions, their religious convictions will provide a rational justification of the international law even in hard cases.

Second, pluralistic inclusivism provides an additional justification for the prohibition against writing religious convictions into official legal opinions or treaties. Judges and other public officials should not write their religious convictions into the law not because religious convictions are nonrational and incapable of critical validation but because religious convictions are always open to further

137. For further discussion of Ogden's account of the critical validation of religious convictions, see MODAK-TRURAN, REENCHANTING THE LAW, *supra* note 19, at 280-88.

refinement and validation. If an official religious justification for the law is adopted as part of international law, this would establish that religious justification as presumptively true. This would stifle the pursuit of religious truth in several ways. The first problem is that legal interpreters are not theologians or philosophers. Most of them are not trained to provide a systematic account of their religious convictions even if the religious convictions they hold are true. Any religious convictions written in official opinions would likely be inaccurately or inartfully expressed. In addition, any official recognition of a religious conviction by the international community would be problematic. The act of establishing an official religious justification of the law would tend to isolate that justification from critique and to make the practical decision based on that religious justification difficult to modify. That religious justification would function like precedent; it would have presumptive validity. Those challenging it would not only have the burden of showing that an alternative religious justification was true and that the state religious justification was false, but they would also have to persuade those in power to change this religious justification.

For example, in a recent child custody case in Alabama, Chief Justice Moore wrote a concurring opinion which stated that "[h]omosexual conduct is, and has been, considered abhorrent, immoral, detestable, a crime against nature, and a violation of the laws of nature and of nature's God upon which this Nation and our laws are predicated."[138] He further cited *Genesis, Leviticus*, and St. Thomas Aquinas to support his claim that homosexuality is "inherently evil."[139] He argues that "[n]atural law forms the basis of the common law" and that "[n]atural law is the law of nature and of nature's God as understood by men through reason, but aided by direct revelation found in the Holy Scriptures."[140] Based on William Blackstone's *Commentaries on the Laws of England*, he claims that "because our reason is full of error, the most certain way to ascertain the law of nature is through direct revelation."[141] He argues that "[h]omosexuality is strongly condemned in the common law because it violates both natural and revealed law."[142] He then held that there should be "a strong presumption of unfitness" against homosexual parents for custody of their children.[143]

In the international context, a judge with conservative Christian beliefs similar to Chief Justice Moore's could interpret treaty provisions like those found in the *International Covenant* to support this same strong presumption of unfitness. For instance, the *International Covenant* protects "[t]he right of men and women of marriageable age to marry and to found a family."[144] A conservative Christian judge could infer from this provision that families ought not to be constituted by same-sex couples. In fulfilling the *Covenant's* requirement that "[i]n the case of dissolution, provisions shall be made for the necessary protection of any children,"[145] this judge could conclude that the *International Covenant* presumes that

138. *Ex Parte* H.H., 830 So. 2d 21, 26 (Ala. 2002).
139. *Id.* at 33.
140. *Id.* at 32.
141. *Id.* (citing 1William Blackstone's *Commentaries on the Laws of England* 42).
142. *Id.* at 33.
143. *Id.* at 38.
144. International Covenant, *supra* note 69, at art. 23(2).
145. *Id.* at art. 23(4).

a child would be better off with a heterosexual parent rather than a homosexual parent. If this presumption was given a Christian justification in a written judicial opinion, challengers of this presumption would then have to persuade subsequent judges both that the presumption was wrong and that the religious justification was wrong. Further, the challenger would not only have to show that the Christian argument against homosexuality was flawed but also that Christianity itself was flawed. If Buddhism could be shown to be true and Christianity false, the challenger would then have to persuade some judges who were Christian that their Christian religious convictions were not true. Even if the Buddhist was right, the practical difficulty of convincing the Christian judge to recognize his error would be immense.

To the contrary, pluralist inclusivism requires that the law should only be implicitly informed by religious convictions that judges or other public officials have critically validated. This requirement prevents the state or the international community from ruling out religious convictions ahead of time. By not allowing an establishment of religion, the debate about which religious convictions provide the fully reflective account of authentic human existence can continue. Also, this requirement shifts to individuals the responsibility for critically validating their religious convictions before relying on them for fully justifying their decisions in hard cases. At the same time, this requirement allows for the full justification of the law even though the state does not establish an official religion. Full justification of the law by individual legal interpreters would likely result in a plurality of comprehensive convictions implicitly informing the law.[146] Consequently, by following the requirements of pluralistic inclusivism, legal interpreters would *reenchant the law* by giving the law a rational religious justification in their deliberations without establishing that religious justification as part of the law in their written opinions.

C. Justifying Legal Indeterminacy

Given this argument, international law should always include only noncomprehensive legal and extra-legal norms. In the case of judges, judicial opinions should only partially justify judges' decisions. Legal justifications in written opinions should be composed entirely of noncomprehensive norms because pluralistic inclusivism and the freedom of religion prohibit judges or other public officials from providing a full justification of legal norms. Noncomprehensive legal norms can only imply a comprehensive conviction, or more likely, a plurality of comprehensive convictions. In other words, the law should be indeterminate in the sense that legal norms should not be fully justified. International law should not establish an official religion.

Mandating legal indeterminacy, however, means that judges and other public officials will not be constrained by the law, which raises "the specter that judicial decision making is often or always illegitimate."[147] Ronald Dworkin has argued

146. Similarly, Jean Bethke Elshtain has argued that "a variety of norms and rules are constitutive of plural communities and that a democratic polity has an enormous stake in keeping such plurality alive. For this is the only way to keep democratic politics alive." Jean Elshtain, *The Question Concerning Authority, in* RELIGION AND CONTEMPORARY LIBERALISM 253, 254 (Paul J. Weithman ed., 1997).

147. *See, e.g.*, Kress, *supra* note 38, at 200, 203.

that "indeterminacy is a substantive view to be ranked alongside the other substantive views."[148] He maintains that "claims of indeterminacy are not true by default: they need if not argument, which may not be available at any impressive length, at least a basis in more abstract instincts or convictions."[149]

To respond to this argument, this Section argues that pluralistic inclusivism provides a normative justification for legal indeterminacy in two senses. First, pluralistic inclusivism requires that the law is always indeterminate in the sense that the law cannot include a full justification of legal norms because that would require writing religious convictions into the law. I will refer to this as comprehensive legal indeterminancy. Pluralistic inclusivism mandates that official written opinions in both easy and hard cases are indeterminate in this sense. Judges and other public officials are prohibited from fully justifying their decisions. For example, in an easy case involving evidence beyond a reasonable doubt that someone intentionally killed another person, the statutory prohibition of murder is determinate (in the narrow sense described below) and would warrant a conviction. The judge can apply that statutory prohibition without fully justifying the prohibition of murder either in her deliberation or in her written opinion. Although the murder statute has not been fully justified, the judge (and the legislature) are prohibited from referencing the Christian Bible, the Torah, the Koran, or any other religious convictions to provide a full justification of that statute. The possible comprehensive justifications must remain implicit. In hard cases, judges must rely on their comprehensive convictions for fully justifying their deliberations, but likewise, those comprehensive convictions should not be part of their written opinions. Pluralistic inclusivism prohibits explicit full justification in both easy and hard cases. Therefore, international law must only provide a partial justification for legal prohibitions and must exhibit comprehensive legal indeterminacy.

Pluralistic inclusivism's justification of comprehensive legal indeterminacy also indirectly justifies legal indeterminacy in the narrow sense assumed at the beginning of this inquiry. In this sense, the law is indeterminate such that there are hard cases where the relevant international legal norms do not provide determinate answers to legal issues. I will refer to this as noncomprehensive legal indeterminacy. Pluralistic inclusivism indirectly justifies noncomprehensive legal indeterminacy because noncomprehensive legal indeterminacy is a function of comprehensive legal indeterminacy. Comprehensive legal indeterminacy ensures that noncomprehensive legal indeterminancy will persist in the legal system because the law cannot include a comprehensive justification for the law which legal interpreters could rely on to resolve hard cases. This produces noncomprehensive legal indeterminacy in two ways. The first way that comprehensive legal indeterminacy produces noncomprehensive legal indeterminacy has to do with the absence of a comprehensive justification within the law to resolve hard cases. To understand how this occurs, the sources of noncomprehensive legal indeterminacy need to be identified. Noncomprehensive legal indeterminacy arises for many reasons but can be classified into two broad types—intention-

148. Ronald Dworkin, *Indeterminacy and Law, in* POSITIVISM TODAY 1, 5 (Stephen Guest ed., 1996).
149. *Id.*

al and unintentional. Sometimes the law intentionally includes indeterminate standards, such as the reasonable person standard, that provide for judicial discretion. These standards allow legal interpreters the flexibility to determine what is required under the particular circumstances of the case because the law cannot ahead of time anticipate with sufficient precision what would be reasonable under the circumstances of every case.[150] Noncomprehensive legal indeterminacy also arises from unintentional sources such as ambiguous and conflicting legal norms. Despite judges' and other public officials' best efforts, these unintentional sources of noncomprehensive legal indeterminacy will persist. However, both intentional and unintentional noncomprehensive legal indeterminacy could be resolved from within the law if the law included a comprehensive justification (*i.e.*, a comprehensive condition of normative validity).[151] With an established comprehensive justification, the law would provide a comprehensive norm that could be used to resolve conflicts between norms, eliminate ambiguity, and aid judges in discerning how intentionally indeterminate standards should be applied in the context of a particular case. Despite these benefits, pluralistic inclusivism prohibits establishing this comprehensive justification or conviction and mandates comprehensive legal indeterminacy. As a result, noncomprehensive legal indeterminacy cannot be resolved from within the law because that requires establishing a comprehensive conviction which is contrary to the requirements of pluralistic inclusivism.

In addition, comprehensive legal indeterminacy produces noncomprehensive legal indeterminacy because judges and other public officials are permitted to justify their decisions in hard cases based on their own comprehensive convictions. In other words, comprehensive legal indeterminacy enhances noncompre-

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150. The practical necessity of intentional legal indeterminacy has been long recognized by philosophers. For example, Aristotle claims that some matters do not lend themselves to "a general principle embracing all the particulars" and must be decided by judicial decree. ARISTOTLE, NICOMACHEAN ETHICS 1282b:5 (William. D. Ross trans. & rev. by J. L. Ackrill and J. O. Urmson) *in* 2 THE COMPLETE WORKS OF ARISTOTLE (Jonathan Barnes ed., rev. Oxford trans., 1984). Aristotle notes that "it is impossible that all things should be precisely set down in writing; for enactments must be universal, but actions are concerned with particulars." *Id.* at 1269a:10-11. His most extensive discussion of this idea is in the Nicomachean Ethics with respect to equity which he calls "a corrective of legal justice." For further discussion of Aristotle's understanding of equity, see Mark C. Modak-Truran, *Corrective Justice and the Revival of Judicial Virtue*, 12 YALE J.L. & HUMAN. 249, 270-76 (2000).

151. Ronald Dworkin's interpretative theory suggests something like this solution. Dworkin claims 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." DWORKIN, LAW'S EMPIRE, *supra* note 122, at 255. The best construction thus includes "convictions about both fit and justification" and is the "right answer" in that case. *Id.* 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.*" RONALD DWORKIN, A MATTER OF PRINCIPLE 143 (1985) (emphasis added). He further maintains 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, this must be in virtue of some more problematic type of indeterminacy or incommensurability in moral theory." *Id.* at 144. Dworkin's interpretative method posits that there is some determinative notion of "political morality" (justification or purpose) that along with precedent (fit) could produce this legal determinacy. *See* DWORKIN, LAW'S EMPIRE, *supra* note 122, at 225-58. For this "political morality" to provide a full justification in all cases, however, it must be a comprehensive conviction. Otherwise, there would be cases where this political morality was indeterminate or where there was a conflict among the principles of political morality that could not be resolved without a comprehensive conviction. Thus, although I am not able to specify the full argument here, this would mean that Dworkin's interpretative theory would require establishing a comprehensive justification for the law in violation of the pluralistic inclusivism.

hensive legal indeterminacy because judges and other public officials can draw on a large number of comprehensive convictions for fully justifying their interpretation of hard cases. These comprehensive justifications are competing with one another to shape the law in often conflicting ways. This occurs because disagreement about comprehensive convictions translates into disagreements about which noncomprehensive norms, including different noncomprehensive legal norms, are fully justified. Consequently, judges and other public officials will resolve similar hard cases differently and articulate different interpretations of the law. The law will thus embody conflicting legal norms and be indeterminate.

For example, different religious and comprehensive convictions about authentic human existence support different conceptions of the right to marry. The Netherlands has recently enacted a statute providing that "[a] marriage can be contracted by two persons of different sex or of the same sex."[152] This expansion of the traditional definition of marriage implies a comprehensive conviction or convictions that accept homosexual marriage as part of authentic human existence. This new definition, however, conflicts with the definition of marriage in the *European Convention for the Protection of Human Rights and Fundamental Freedoms,* which only recognizes that "[m]en and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right."[153] The *European Convention* implies different comprehensive convictions that include only marriage between a man and a woman as coincident with authentic human existence. One issue for the Netherlands is whether other European Community members will recognize same-sex marriages and accord them the same rights, such as adoption, that they have in the Netherlands. Since international law has not officially adopted one of these comprehensive convictions, there are different comprehensive convictions implicitly informing the law and supporting conflicting definitions of marriage.

Without an established religion, there is no comprehensive justification within the law that can be evoked to settle this disagreement and eliminate the noncomprehensive legal indeterminacy. The law does not include a comprehensive condition for legal validity.[154] Even if a judge's opinion or a new treaty makes the law more determinate, they cannot provide a comprehensive condition for legal validity within the law. As future hard cases arise, the law will still not include a full justification which would eliminate the need for legal interpreters to rely on their own comprehensive convictions. Without establishing a comprehensive condition of legal validity, the law will continue to include intentional hard cases involving indeterminate standards and unintentional hard cases where

152. Nancy G. Maxwell, *Opening Civil Marriage to Same-Gender Couples: A Netherlands-United States Comparison*, 18 ARIZ. J. INT'L & COMP. L. 141, 155 (2001) (quoting Book 1, art. 30 of the Netherlands Civil Code).

153. European Convention, *supra* note 61, at art. 12. *Cf.* International Covenant, *supra* note 69, at art. 23 (providing for the "right of men and women of marriageable age to marry").

154. Critical legal scholars have argued similarly that the law is incoherent because it does not include a metaprinciple to resolve legal indeterminacy. Ken Kress, *Legal Indeterminacy*, 77 CAL. L. REV. 283, 331-34 (1989). However, Ken Kress points out that they further argue that "we cannot provide, in advance, fully explicit metaprinciples to resolve all conflicts accurately describes a limitation of all rules of behavior, not just legal theory." *Id.* at 334.

ambiguous or conflicting legal norms will be inadequate to resolve legal disputes. Consequently, pluralistic inclusivism would not support establishing an official comprehensive justification for the law and provides a normative justification for comprehensive legal indeterminacy and the noncomprehensive legal indeterminacy resulting from it.

Furthermore, my second thesis—that judges and other public officials should only partially justify their decisions in their written opinions by explaining their decisions in terms of legal norms and noncomprehensive extra-legal norms—attempts to take the normative implications of pluralistic inclusivism into account. Judges and other public officials should not attempt to eliminate comprehensive indeterminancy by establishing a comprehensive doctrine like comprehensive liberalism. Further, legal interpreters should react to intentional and unintentional noncomprehensive indeterminancy by relying on the comprehensive conviction they hold to be true to provide a full justification for the extra-legal norms they rely on and the choice among them. On this account, the full justification of international law in hard cases is shifted from the law to legal interpreters, and a plurality of comprehensive convictions implicitly justifies the law fully without inappropriately establishing a religion.

IV. CONSEQUENCES OF REENCHANTING INTERNATIONAL LAW

What are the consequences of religious convictions informing the interpretation of international law? This Section will focus on two important consequences of *reenchanting* the law. First, one of the central consequences of reenchanting international law is to see that much of the disagreement about the interpretation of hard cases in international law does not occur at the level of the law. It is not that some interpreters "correctly" interpret the legal norm, and others are mistaken. In hard cases, the law itself does not provide a dispositive answer to the dispute. Even if legal interpreters are completely clear about the parameters of the law they are interpreting and deal effectively with the treaties, international custom, precedent, or other international legal norms in dispute, they may disagree about what extra-legal norms are controlling. Adjudicating these competing extra-legal norms cannot be done without justifying those norms and the choice among them. If interpreters hold different religious convictions, they may fully justify contrary extra-legal norms based on those religious convictions. This is not to say that one or both of the legal interpreters could not be mistaken about the validity of his or her religious convictions. That may very well be the case. Also, some interpreters may choose without explicitly relying on religious convictions so that their choices only imply comprehensive convictions. The disagreement among these legal interpreters, however, is not about the "law" but about which comprehensive conviction about authentic human existence is true. This disagreement is at a higher level of reflection and cannot be resolved by focusing on legal norms and noncomprehensive extra-legal norms. To resolve this disagreement, the debate should turn to the comprehensive convictions that justify these different decisions. Reflection on this level of justification may disclose mistakes in the process of fully justifying different

interpretations or that some interpreters were relying on an unwarranted comprehensive conviction.

In addition, contrary to popular belief, reliance on explicit comprehensive or religious convictions in interpreting hard cases increases rather than decreases rational legal interpretation and has a disciplining effect on legal interpretation. Rather than blindly assuming that their decisions are justified,[155] legal interpreters fully justify the noncomprehensive extra-legal norms they rely on when interpreting indeterminate international legal norms. This entails justifying all the noncomprehensive extra-legal norms they rely on and the choice among them. They don't merely assume that these extra-legal norms are justified and that the choice among them is self-evident. Further, results-oriented or instrumental interpretation is prohibited. Contrary to political realism, outcomes cannot be embraced merely because they are politically desirable and/or expedient. Legal interpreters cannot conveniently rationalize their decisions in hard cases by arbitrarily choosing extra-legal norms to support desired outcomes. They cannot rely on noncomprehensive extra-legal norms that are inconsistent with their religious convictions. In their deliberations about hard cases, legal interpreters must determine how the desired outcome connects to noncomprehensive extra-legal norms. In turn, those noncomprehensive extra-legal norms and the choice among them must be fully justified by a religious conviction that has been critcally validated. This process of full justification in judicial deliberation should deter, rather than permit, legal interpreters from embracing outcomes that cannot be fully justified by their religious convictions. Consequently, religious convictions will then have a disciplining effect on judicial decision making and require legal interpretation to become more rational.

CONCLUSION

International law's history should be rewritten.[156] The conception of international law should no longer include the myth that international law was born and continues to function to overcome the "inadequacies of religion." International law cannot do without religion because it is indeterminate. By focusing on the hypothetical judicial application of international legal norms, I have attempted to show that religious convictions are required for fully justifying the interpretation of international law when it is indeterminate. This thesis holds true even if international law is conceived as a set of indeterminate moral, rather than legal, norms because religious or comprehensive convictions are the comprehensive

155. There may be circumstances where a more intuitive process of judicial decision making constitutes a second-best alternative. *See* 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 (inaccordance with William James's radical empiricism) may justify judges relying on their hunches about what the outcome of a case ought to be). Here, however, I am concerned with an ideal normative account of how judges should proceed in justifying their decisions in hard cases.

156. For a start at rewriting this history, see Mark Weston Janis, *A Sampler of Religious Experiences in International Law*, MISS. C.L. REV. (2003) (arguing that "[r]eligious principles, religious problems, and religious enthusiasts have all played profound, if sometimes little appreciated, roles in the development of international law").

condition of all normative validity. Consequently, after critically validating their religious convictions, interpreters of international law in hard cases should rely on their religious convictions to justify the extra-legal norms they rely on and the choice among them.

In addition, international law should not attempt to replace religion. This further means that international law should also not pursue a "cosmopolitan" or global notion of law if this means that international law has to include a comprehensive conviction. Rawls's Law of Peoples attempts to avoid this problem by specifying a notion of international law that is "political not metaphysical." Contrary to his wishes, his legal liberalism requires the establishment of a comprehensive conviction in order to succeed. Only those people who accept his comprehensive evaluation that all conceptions of the good are nonrational will go along with this, and it makes his theory "metaphysical not political," which is incoherent.

Finally, the requirements of pluralistic inclusivism demand that international law not adopt a comprehensive conviction about authentic human existence as required by legal liberalism. This would prematurely stifle the pursuit of religious truth and pose undesirable practical difficulties for legal adjudication. International law needs to know its limits. It cannot replace religion. This means that international law will continue to be indeterminate in both the comprehensive and noncomprehensive senses. Indeterminancy will be a permanent characteristic of international law. Religious convictions will thus continue to be needed for fully justifying the interpretation of international law in hard cases. Religious convictions will continue to be the silent prologue to any full justification of indeterminate international law, and they will thereby continue to *reenchant international law.*