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# A Process Theory of Natural Law and the Rule of Law In China

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# A Process Theory of Natural Law and the Rule of Law in China\*

Mark C. Modak-Truran\*\*

## I. Introduction

Exporting the Rule of Law has been a strong focus of American, British, and European foreign policy since the end of World War II.<sup>1</sup> The post-war constitutions of Germany and Japan followed Western notions of constitutional democracy and the rule of law. The end of the Cold War resulted in many former Eastern-bloc communist countries implementing Western-style democratic constitutions and notions of the rule of law. Similarly, in 1979, Deng Xiaoping engineered China's "opening to the West,"<sup>2</sup> which began China's efforts to implement the rule of law. Recently, President George W. Bush has paradoxically employed military means in Afghanistan and Iraq to spread "democracy"

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\* Portions of this article are based on an entry I wrote entitled *Prolegomena to a Process Theory of Natural Law*, 1 HANDBOOK OF WHITEHEADIAN PROCESS THOUGHT 507-19, 533-36 (Michel Weber and Will Desmond, eds., Ontos Verlag, 2008). I would like to thank Larry Catá Backer for organizing this symposium and for generously asking me to participate in this important conversation about the rule of law in national, international, comparative, and transnational contexts.

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1. Cf. J.M. KELLY, A SHORT HISTORY OF WESTERN LEGAL THEORY 409-10 (Oxford U. Press 1992). Kelly emphasizes that:

[j]ust as the experiences of the era which, in Western Europe, closed in 1945 led to a firmer entrenchment of constitutionalism and of human rights, as well as to a revival of interest in natural law, so the ideal of legality (the rule of law, the *Rechtsstaat*) increased in value and acceptance.

*Id.*

2. Jamie P. Horsley, *The Rule of Law in China: Incremental Progress*, in THE BALANCE SHEET IN 2007 AND BEYOND 94 (C. Fred Bergsten, N. Lardy, B. Gill & D. Mitchell eds., 2007).

and the “rule of law” as a prophylactic measure against the spread of terrorism. In all these cases, the focus on the rule of law makes sense given that “the rule of law has been truly said to be the soul of the modern state.”<sup>3</sup>

The rule of law, however, faces critical challenges both in America and abroad. In America, legal indeterminacy and the ontological gap between legal theory and legal practice present two quandaries that defy resolution by contemporary normative theories of law. Although legal theorists (ranging from extreme-radical deconstructionists to contemporary legal formalists) disagree about the degree of legal indeterminacy,<sup>4</sup> they overwhelmingly agree that the law is indeterminate.<sup>5</sup> The law is indeterminate because there are hard cases where the apparently relevant statutes, common law, contracts, or constitutional law provisions at issue fail to resolve disputes. Thus, legal indeterminacy raises the specter that judicial decisions in hard cases are illegitimate because judges must rely on personal political, moral or religious beliefs.

Despite the widespread consensus that the law is indeterminate, contemporary legal theory fails to provide a normative theory of law to explain how the law can be rationally legitimated in hard cases. For example, legal positivists, like H.L.A. Hart, recognize legal indeterminacy<sup>6</sup> or an “open texture” to the law, but maintain that judges have “discretion” to decide hard cases without specifying how they should exercise that discretion.<sup>7</sup> Critical legal studies, feminist legal theory, and critical race theory disavow the possibility of an apolitical legitimation of law and focus on deconstructing hidden political bias

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3. ROBERTO M. UNGER, *LAW IN MODERN SOCIETY: TOWARD A CRITICISM OF SOCIAL THEORY* 192 (The Free Press 1976).

4. Legal theorist Ken Kress notes that:

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

Ken Kress, *Legal Indeterminacy and Legitimacy*, in *LEGAL HERMENEUTICS: HISTORY, THEORY, AND PRACTICE* 200-01 (Gregory Leyh ed., 1992).

5. The consensus ranges from extreme-radical deconstructionists such as Anthony D’Amato to contemporary legal formalists such as Ernest J. Weinrib. Compare Anthony D’Amato, *Aspects of Deconstruction: The “Easy Case” of the Under-Aged President*, 84 *Nw. U. L. REV.* 250 (1989) (arguing that the United States’ constitutional requirement that the president be thirty-five years of age is indeterminate) with Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 *YALE L.J.* 949, 1008 (1988) (claiming that “[n]othing about formalism precludes indeterminacy”).

6. H. L. A. HART, *THE CONCEPT OF LAW* 144 (Oxford U. Press 1961).

7. *Id.* at 138, 144 & 152.

relating to class, gender, and race. Finally, some legal theorists have unsuccessfully attempted to deny legal indeterminacy. For instance, Ronald Dworkin has remained committed to his Right Answer Thesis—there is a “right answer” in hard cases, except in extremely rare or exotic ones<sup>8</sup>—even though his interpretive theory of law has been shown to make the entire system of law indeterminate.<sup>9</sup>

In *Law's Quandary*, Steven D. Smith identifies the second important quandary for contemporary normative theories of law. He persuasively argues that the metaphysical or ontological presuppositions of the practice of law are inconsistent with the presuppositions of contemporary legal theory.<sup>10</sup> The practice of law presupposes a classical or religious ontology while contemporary legal theory usually presupposes a scientific ontology (i.e., scientific materialism).<sup>11</sup> Smith concludes that this “ontological gap”<sup>12</sup> between the practice of law and legal theory presents “a *metaphysical* predicament” that “will require us to ‘take metaphysics seriously.’”<sup>13</sup> Smith’s argument suggests that legal theorists can no longer ignore the issue of metaphysical or ontological presuppositions, but he confesses that he has “no idea what the answer to that question might be.”<sup>14</sup> The following will address this quandary and show that the prognosis is not as dire as Smith suggests.

Promoting the rule of law abroad raises questions about whether the Western presuppositions of the rule of law are compatible with the

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8. RONALD DWORKIN, *A MATTER OF PRINCIPLE* 143 (Harvard U. Press 1985) [hereinafter DWORKIN, *A MATTER OF PRINCIPLES*]. Despite much criticism, Dworkin continues to embrace his right answer thesis. *See, e.g.*, RONALD DWORKIN, *JUSTICE IN ROBES* 41-43 (Harvard U. Press 2006) [hereinafter DWORKIN, *JUSTICE IN ROBES*]. *See also* text accompanying notes 125-30.

9. Kenneth Kress convincingly argued that coherency theories, like Dworkin’s, require a reconstruction of the system of legal norms in each hard case that is decided, which results in a continuous reconfiguration of the system of legal norms (the “ripple effect”) and amounts to a retroactive interpretation of existing law. Although judges are not exercising discretion, they are creating new law by changing the settled law in the process of interpretation. Each hard case requiring the reconstruction of the political conception of justice thus creates a ripple in the coherent system of legal norms and makes the system indeterminate. *See* Kenneth J. Kress, *Legal Reasoning and Coherence Theories: Dworkin’s Rights Thesis, Retroactivity, and the Linear Order of Decisions*, 72 CAL. L. REV. 369, 380-82 (1984). This results in a continuous reconfiguration of the system of legal norms (the “ripple effect”) and amounts to a retroactive interpretation of existing law. Although judges are not exercising discretion, they are creating new law by changing the settled law in the process of interpretation. Each hard case requiring the reconstruction of the political conception of justice thus creates a ripple in the coherent system of legal norms and makes the system indeterminate. *See infra* Section III, A.

10. *See generally* STEVEN D. SMITH, *LAW’S QUANDARY* (Harvard U. Press 2004).

11. *Id.* at 155.

12. *Id.*

13. *Id.* at 2.

14. *Id.* at 177.

presuppositions of other cultures. Renowned cultural anthropologist Clifford Geertz argues that law “is not a bounded set of norms, rules, principles, [or] values . . . but part of a *distinctive manner of imagining the real*.”<sup>15</sup> He further cautions that “the comparative study of law cannot be a matter of reducing concrete differences to abstract commonalities.”<sup>16</sup> Rather, law is “local knowledge; local not just as to place, time, class, and variety of issue, but as to accent—vernacular characterizations of what happens connected to vernacular imaginings of what can.”<sup>17</sup> As discussed below, Larry Catá Backer, Brian Tamanaha, and Donald Clarke recognize some of these concerns in their criticisms of efforts to rigidly implement an American notion of the rule of law in China without consideration of cultural differences.

Moreover, without a normative theory of law that can make the rule of law culturally sensitive and address legal indeterminacy and the ontological gap, the rule of law is in serious peril in America and even more questionable as an export abroad. Is it meaningful to continue talking about the rule of law? Do legal indeterminacy and the ontological gap mean that law is primarily guided by local social norms and customs rather than universal rules and principles? Do different cultural circumstances in the West and the East warrant different conceptions of the rule of law? If so, can a normative theory of law legitimate these culturally sensitive conceptions without devolving into cultural relativism?

To address these issues, this Article analyzes China’s efforts to implement the rule of law and proposes a constructive, post-modern normative theory of law based on the Process Philosophy of Alfred North Whitehead and the Radical Empiricism of William James. This “process theory of natural law”<sup>18</sup> provides a novel theory of natural law

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15. CLIFFORD GEERTZ, *LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY* 173 (Basic Books, Inc., 1983) (emphasis added). Robert Cover similarly argued that we inhabit a *nomos*—a normative universe.

We constantly create and maintain a world of right and wrong, of lawful and unlawful, of valid and void. The student of law may come to identify the normative world with the professional paraphernalia of social control. The rules and principles of justice, the formal institutions of the law, and the conventions of a social order are, indeed, important to that world; they are, however, but a small part of the normative universe that ought to claim our attention. No set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning. For every constitution there is an epic, for each decalogue a scripture. Once understood in the context of the narratives that give it meaning, law becomes not merely a system of rules to be observed, but a world in which we live.

Robert M. Cover, *Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983).

16. Geertz, *supra* note 15, at 215.

17. *Id.*

18. The process theory of natural law is not related in any way to the Legal Process

that eliminates the perceived illegitimacy arising from legal indeterminacy and closes the ontological gap between legal theory and practice. Process natural law also mediates many of the cultural differences between the East and the West through the telos of beauty (unity-in-diversity), which entails maximizing both an Eastern aesthetic sense of order (emergent harmony or spontaneous order) and a Western rational sense of order (complexity arising from diverse individual orderings). In accordance with the telos of beauty, process natural law further supports a culturally sensitive conception of the rule of law because, as Whitehead emphasizes, “[e]ach society has its own type of perfection.”<sup>19</sup> This conception of the rule of law allows for important cultural differences to be reflected in the interpretation of democracy and formal legality and in the instantiation of individual rights in the law. Thus, the ideal rule of law may look quite different in the United States (“U.S.”) and China and may continue to evolve in our constantly changing, pluralistic, and multicultural world.

To support this argument, Section II will discuss Western conceptions of the rule of law, the implementation of the rule of law in China, Eastern and Western notions of social order, and the affinities between Process Philosophy and Chinese thought. Section III will identify the threat of illegitimacy to the rule of law arising from legal indeterminacy and the ontological gap between legal theory and legal practice as the two key quandaries for contemporary legal theory. Section IV will discuss Whitehead’s theistic teleology of beauty and his treatment of law, as well as the emerging process scholarship on law and human rights. Finally, Section V will demonstrate the promise of

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School of Jurisprudence and its notion of the rule of law, which gained prominence in the 1950s. See HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (William N. Eskridge, Jr. & Philip P. Frickey eds., The Foundation Press 1994). Rather than discerning metaphysical or ontological principles about the universe like process philosophy, the Legal Process conception of the rule of law focused on several factors, such as: (1) “procedural fairness in the development and application of legal norms,” (2) “an assumed connection between notions of law and reasonableness,” (3) “reasoned elaboration of the connection between recognized, pre-existing sources of legal authority and the determination of rights and responsibility in particular cases,” and (4) “judicial review as a guarantor of procedural fairness and rational deliberation by legislative, executive, and administrative decisionmakers.” *Id.* at 18. Legal Process conceded that the law was sometimes indeterminate and that judges relied on extra-legal sources. However, Legal Process held out the aspiration “to root law at least partly in a current, normative consensus perceived as adequate to validate particular decision making processes and their outcomes as lawful.” *Id.* at 19. The chief criticism of this approach seems to be the recognition that even if the 1950s included a discernable normative consensus, that normative consensus no longer exists in the twenty-first century.

19. ALFRED NORTH WHITEHEAD, *ADVENTURES OF IDEAS* 291 (The Free Press 1933) [hereinafter WHITEHEAD, *ADVENTURE OF IDEAS*].

process thought for articulating a new theory of natural law that legitimates the law even when it is indeterminate, that closes the ontological gap between legal theory and legal practice, and that provides a culturally sensitive conception of the rule of law.

## II. The Rule of Law, Eastern and Western Notions of Social Order, and Process Philosophy

Implementing the rule of law in China began in 1979 when Deng Xiaoping engineered China's "opening to the West," and has continued to receive attention at all levels of government.<sup>20</sup> In 1982, the Constitution of the People's Republic of China ("PRC Constitution") was adopted and clearly demonstrated the government's goal of fostering the rule of law.<sup>21</sup> The 1999 Amendments further acknowledged China's goal of "ruling the country in accordance with the law and building a socialist country of law."<sup>22</sup>

Although the PRC Constitution provides for developing a "socialist democracy" and improving the "socialist legal system,"<sup>23</sup> it has many provisions that are similar<sup>24</sup> to the U.S. Constitution. While the PRC Constitution acknowledges that China is "[u]nder the leadership of the Communist Party of China" ("CCP"),<sup>25</sup> it also emphasizes that the PRC Constitution, like the U.S. Constitution, "is the fundamental law of the state and has supreme legal authority," so that:

The people of all nationalities, all state organs, the armed forces, all political parties and public organizations and all enterprises and undertakings in the country must take the Constitution as the basic norm of conduct, and they have the duty to uphold the dignity of the Constitution and ensure its implementation.<sup>26</sup>

The Preamble and Article 5 make it clear that the PRC Constitution, like the U.S. Constitution,<sup>27</sup> is the supreme law of the land. The PRC

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20. See Horsley, *supra* note 2, at 94.

21. XIAN FA (1982), available at <http://english.people.cn/constitution/constitution.html> (last visited Dec. 23, 2007).

22. *Id.* at art. 5 (amended 1999).

23. *Id.* at pmbl.

24. The P.R.C. Constitution provides that all citizens are "equal before the law," that citizens who are eighteen years old or older have "the right to vote, stand for election, freedom of speech, of the press, of assembly and association" as well as the "freedom of religious belief." *Id.* at art. 33-36.

25. *Id.* at pmbl.

26. See, e.g., *id.* at art. 5 (amended 1999). Article 5 similarly provides that "[n]o law or administrative or local rules and regulations shall contravene the constitution" and that "[a]ll state organs, the armed forces, all political parties and public organizations and all enterprises and undertakings must abide by the Constitution and the law." *Id.*

27. Article VI of the U.S. Constitution provides that:

Constitution further provides that all citizens are “equal before the law,” that citizens who are eighteen years old have “the right to vote and stand for election, and that citizens have the “freedom of speech, of the press, of assembly and association,” and “freedom of religious belief.”<sup>28</sup> Also, the PRC Constitution grants the National People’s Congress (“NPC”) legislative powers, provides for a president and vice president to be elected by the NPC for a maximum of two terms, and establishes the “Supreme People’s Court” as the “highest judicial organ” along with lower-level “people’s courts.”<sup>29</sup>

#### A. *The Rule of Law*

Despite the obvious parallels between the Chinese and U.S. Constitutions, many scholars (including some Chinese scholars)<sup>30</sup> claim that China is not yet a rule of law country.<sup>31</sup> In this respect, Donald Clarke has emphasized that Americans often use an “Ideal Western Legal Order” (which the U.S. often fails to live up to) as the criterion for evaluating the actual practices of the Chinese legal system.<sup>32</sup> Clarke notes that “China’s criminal procedure as actually practiced (and as reported by various human rights organizations) is compared with an ideal picture of the American criminal process (and not the picture as reported by various human rights organizations)” and “is found wanting.”<sup>33</sup> The main problem with this approach stems from its failure

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[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the *supreme Law of the Land*; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const., Art. VI (emphasis added).

28. XIAN FA, *supra* note 21, at arts. 33-36.

29. *Id.* at art. 57-84 & 123-35 (1982).

30. While recognizing that “[t]he concept of the rule of law originated in the West,” Wang argues that implementing the rule of law in China will involve three stages including: (1) “criminal law safeguards the general social order;” (2) “civil and commercial laws provides a just, safe, and efficient business order;” and (3) “constitutional law guarantees an open and just political order.” Zhenmin Wang, *The Developing Rule of Law in China*, HARV. ASIA QUARTERLY 1, 4 (Dec. 2000), available at [http://www.asiaquarterly.com/index2.php?option=com\\_content&do\\_pdf=1&id=88](http://www.asiaquarterly.com/index2.php?option=com_content&do_pdf=1&id=88) (last visited Dec. 25, 2007).

31. Horsley, *supra* note 2, at 94. Similarly, David Kairys notes that he “found a huge range of formulations and meanings for the rule of law in legal, historical, academic, and popular usages,” but concludes that “China does not have something that we call the rule of law.” David Kairys, *Searching for the Rule of Law*, 36 SUFFOLK U. L. REV. 307, 308 (2003).

32. Donald C. Clarke, *Puzzling Observations in Chinese Law: When Is a Riddle Just a Mistake?*, in UNDERSTANDING CHINA’S LEGAL SYSTEM: ESSAYS IN HONOR OF JEROME A. COHEN 93 & 95-97 (C. Stephen Hsu ed., 2003).

33. *Id.* at 97.



to sufficiently state and justify the ideal against which the Chinese legal system is evaluated.<sup>34</sup> Instead, Clarke maintains that “the best attainable understanding of the Chinese legal system will not be simply the best-fitting model plus incompatible observations explained as errors. We must be prepared to apply multiple models and to be alert to the need always to move nimbly among them.”<sup>35</sup>

Using an Ideal Western Legal Order (i.e., the United States) as a standard of evaluation also ignores that “the Rule of Law is . . . an ‘essentially contestable concept.’”<sup>36</sup> Richard Fallon argues that there are four competing ideal types of the rule of law—historicist, formalist, Legal Process, and substantive—and many variations of each type.<sup>37</sup> Fallon demonstrates that the rule of law does not have a fixed meaning in the American context, by showing that Antonin Scalia, Associate Justice of the U.S. Supreme Court, advocates each one of these types in his opinions in different cases.<sup>38</sup>

Despite the contested nature of the rule of law, scholars seem to agree that the rule of law is essentially a Western ideal but have struggled to identify its essential aspects and have identified many different types. Fred Dallmayr argues that the rule of law can be traced back to Plato’s and Aristotle’s insistence that the “ideal regime is defined by rule-governance, namely, as a ‘government of laws and not of men.’”<sup>39</sup> He cautions that “[t]his doctrine is not simply an accidental political bias but is linked with central premises and hierarchical postulates endemic to Western civilization: particularly the rule of reason over arbitrary will, of universal principle over particular circumstances, and ultimately of idea over matter.”<sup>40</sup> Dallmayr warns that questioning this entrenched “cultural-historical background” will likely have “a deeply unsettling effect by touching the fiber of political and intellectual life.”<sup>41</sup> The effect of hermeneutics on the rule of law is to disclose “the unstable meaning of the phrase—the fact that, like the notion of reason,

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34. *Id.* at 99.

35. *Id.* at 114.

36. Richard H. Fallon, Jr., “*The Rule of Law*” as a *Concept in Constitutional Discourse*, 97 COLUM. L. REV. 1, 7 (1997). See also Michel Rosenfeld, *The Rule of Law and the Legitimacy of Constitutional Democracy*, 74 S. CAL. L. REV. 1307, 1351 & 1309 (2001) (concluding from his analysis of the different meanings of the rule of law in German, French, and Anglo-American traditions that “adherence to the rule of law in one of the three traditions considered above emerges as a necessary but insufficient means to legitimacy” for a “constitutional democracy in a contemporary pluralistic society”).

37. *Id.* at 10.

38. *Id.* at 40.

39. Fred Dallmayr, *Hermeneutics and the Rule of Law*, in LEGAL HERMENEUTICS: HISTORY, THEORY, AND PRACTICE 3, 4 (Gregory Leyh ed., 1992).

40. *Id.*

41. *Id.*

*rule* and *law* are themselves the targets of continuous interpretation and reinterpretation.”<sup>42</sup> Thus, the process of interpretation may pause for a momentary “sovereign prerogative,” but the continuously changing circumstances soon demand a new “concretely engaged interpretation.”<sup>43</sup>

Notwithstanding the continuous process of interpretation, some scholars divide the rule of law into broad categories of formal and substantive conceptions of the rule of law.<sup>44</sup> Formal theories of legality focus on the “proper sources and form of legality,”<sup>45</sup> such as rule-by-law, formal legality, and democracy plus legality.<sup>46</sup> Tamanaha argues that rule by law is the thinnest notion of formal legality as it merely requires that government actions be authorized by law without mandating the content of those laws.<sup>47</sup> He notes that “[e]very modern state has the rule of law in this narrow sense” and that “that this is the Chinese government’s preferred understanding of the rule of law.”<sup>48</sup>

Tamanaha notes that “formal legality is the dominant understanding of the rule of law among legal theorists.”<sup>49</sup> Following the work of Joseph Raz and Lon Fuller, Tamanaha maintains that formal legality adds to the rule by law requirements that “the law must be prospective, general, clear, public, and relatively stable” and that the process of applying the law must involve “an independent judiciary, open and fair hearings without bias, and review of legislative and administrative officials and limitations on the discretion of police to insure conformity to the requirements of the rule of law.”<sup>50</sup> Some theorists, like Jürgen Habermas, also add “democracy as a procedural mode of legitimation for law”<sup>51</sup> to formal legality to constitute the thickest formal theory of the rule of law.

Substantive theories of the rule of law add to the formal requirements further required content for the law such as individual rights, the right of dignity and/or justice, and, in the thickest form, social welfare requirements. Within Western societies, Tamanaha claims that “when the phrase ‘rule of law’ is uttered it is typically understood to include democracy and individual rights along with formal legality.”<sup>52</sup>

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42. *Id.*

43. *Id.* at 17.

44. See BRIAN Z. TAMANAHA, ON THE RULE OF LAW: HISTORY, POLITICS, THEORY 91-92 (Cambridge U. Press 2004).

45. *Id.* at 92.

46. *Id.* at 91.

47. *Id.* at 92.

48. *Id.*

49. TAMANAHA, *supra* note 44, at 111.

50. *Id.* at 93.

51. *Id.* at 100.

52. *Id.* at 99-101.

He notes that this “likely approximates the common sense of the rule of law within Western societies.”<sup>53</sup> However, unlike the culturally dogmatic criticisms of China disparaged by Clarke, Tamanaha argues that “[t]his understanding of the rule of law does not necessarily travel” so that “China can implement formal legality without democracy” and still be viewed as implementing the rule of law.<sup>54</sup>

Alternatively, while acknowledging that “China is not yet a rule of law state,” Larry Catá Backer argues that “no rule-of-law analysis of China is useful or complete unless it seriously considers two structural aspects of Chinese governance usually ignored in the standard analysis.”<sup>55</sup> He argues that both the role of the Chinese Communist Party in political governance and the on-going effort of the CCP “to develop a sound ideological basis for rule through law in China”<sup>56</sup> must be taken into account. He “suggests that the Chinese State Government is a combination of both the formal apparatus of government—its institutions and governing instruments—and the CCP as the party in power.”<sup>57</sup> Even though most scholars criticize the CCP’s continued role in governance as contrary to the rule of law, they do not know how to respond to the CCP’s ideological statements.

Conversely, Backer analyzes the CCP’s recent Sange Daibiao (“The Three Represents”) campaign, the “Two Musts” campaign, the “Fish-Water” connection, the *ba rong ba chi* (“Eight Honors Eight Disgraces”) campaign, and the “Three Harmonies” campaign.<sup>58</sup> From these ideological pronouncements, he concludes that “the CCP may more openly embrace its role as a critical component of the state apparatus and

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53. *Id.* at 111. Tamanaha points to Ronald Dworkin as a leading example of this substantive theory of the rule of law. With respect to the rule of law, Dworkin rejects the “rule-book conception” which “insists that, so far as is possible, the power of the state should never be exercised against individual citizens except in accordance with rules explicitly set out in a public rule book available to all” and followed by the “government as well as ordinary citizens” (i.e., formal legality). *See id.*; *see also* DWORKIN, *A MATTER OF PRINCIPLE*, *supra* note 8, at 11. By contrast, he embraces a “rights conception of the rule of law” which “assumes that citizens have moral rights and duties with respect to one another, and political rights against the state as a whole” that “may be enforced upon the demand of individual citizens through courts or other judicial institutions . . . so far as this is practicable.” *Id.* It adds to the rule-book (formal legality) rules that capture and enforce these moral and political rights (individual rights). Dworkin also argues that this rights-based notion “enriches democracy by adding an independent forum of principle.” *Id.* at 32.

54. TAMANAHA, *supra* note 44, at 112.

55. Larry Catá Backer, *The Rule of Law, The Chinese Communist Party, and Ideological Campaigns: Sange Daibiao (The Three Represents), Socialist Rule of Law, and Modern Chinese Constitutionalism*, 16 *TRANSNAT’L L. & CONTEMP. PROBS.* 29, 36 (2006).

56. *Id.* at 36.

57. *Id.*

58. *Id.* at 37.

assume both the obligations and privileges of that role in a rule-of-law context.”<sup>59</sup> He further argues that the CCP ideology helps interpret the changing role of the CCP in governance and provides clues to understanding the PRC Constitution. For instance, the Preamble to the PRC Constitution states that “the road of Chinese-style socialism” is “under the guidance of Marxism-Leninism, Mao Zedong Thought, Deng Xiaoping Theory and the important thought of ‘Three Represents.’”<sup>60</sup> Backer argues that acknowledging these ideological pronouncements in the Preamble may lead “to further incorporate [these pronouncements as] substantive rule-of-law elements into Chinese constitutionalism.”<sup>61</sup> The CCP ideology may also someday play a role analogous to the ideology of the Federalist Papers, which has been used in the American context to interpret the U.S. Constitution.<sup>62</sup> Backer concludes the CCP ideological pronouncements provide important clues to understanding Chinese conceptions of the rule of law and that “these organizing principles recognize the foundational nature of some form of collectivity as basic to Chinese society and political culture.”<sup>63</sup>

Despite the consensus that China has not yet implemented the rule of law, Backer, Tamanaha, and Clarke argue that China’s progress should not be measured simply by its comparison with the usual Western conception of the rule of law (formal legality, individual rights, and democracy) or some idealized notion of it. Clarke and Tamanaha question the efficacy of the usual Western conception for the unique cultural situation in China. Backer goes further by suggesting that China may represent a new model because of the unique role of the CCP and the role of ideological pronouncements to become “substantive rule-of-law elements into Chinese constitutionalism.”<sup>64</sup> In addition, the next section argues that more attention needs to be paid to Chinese aesthetic notions of social order to further evaluate what conception of the rule of law and normative legal theory are compatible with the unique cultural circumstances in China.

### *B. Eastern and Western Notions of Social Order*

While scholars acknowledge the Western origins of the “common sense” notion of the “rule of law” (formal legality, individual rights, and democracy), they rarely explore whether its Western presuppositions are

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59. *Id.* at 38.

60. XIAN FA, *supra* note 21, at pmbl. (amended 2004).

61. Catá Backer, *supra* note 55, at 61.

62. *Id.* at 36-37.

63. *Id.* at 37.

64. *Id.*

compatible with the presuppositions in other cultures. With special emphasis on American and Chinese notions, this Section will explore some of the relevant differences between Western and Eastern notions of social order, reason and experience, individualism and collectivism, law and custom, and capitalism and socialism. Similarities between Chinese thought and Whitehead's process philosophy will be noted in the next Section, along with areas where process philosophy can mediate between Eastern and Western notions. Stereotyping "Western" and "Eastern," or "American" and "Chinese" cultural differences can be reductionistic. However, ignoring these differences and imperialistically imposing Western notions on China would be worse. In Janet Ainsworth's words, "suppressing the significance of, on the one hand, China's Chineseness or, on the other hand, its Marxism, . . . seriously distort[s] our understanding of Chinese constitutional discursive practice."<sup>65</sup> Consequently, this Section will identify several ways in which different cultural tendencies are crucial for thinking about a normative theory of law and the "rule of law."

Drawing on the extensive work by David Hall and Roger Ames, Wang Shik Jang argues that "Whitehead's philosophy points the way" to integrating the "aesthetic way of thinking," characteristic of Eastern civilization, with the "rational way of thinking," characteristic of Western civilization.<sup>66</sup> Hall and Ames maintain that different forms of social organization flow from these different ways of thinking. Further, they hold that "rational or logical order consists in a pattern of relatedness which is, in principle, indifferent to the elements whose mutual relatedness comprise the order."<sup>67</sup> Rational ordering occurs in accordance with conforming actions to "habits, customs, rules, or laws determinate of our conduct" and moves "away from the concrete particular towards the universal" and "tends toward uniformity and pattern regularity."<sup>68</sup>

From the perspective of rational ordering, laws (both legal and scientific) are beneficial because "external determining sources of order provide the grounds for the perpetuation of a sense of rational orderedness."<sup>69</sup> Laws "are products of lawgivers" either "as divine commands, whose transcendent source provides their strongest

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65. Janet E. Ainsworth, *Interpreting Sacred Texts: Preliminary Reflections on Constitutional Discourse in China*, 43 HASTINGS L. J. 273, 298 (1992).

66. Wang Shik Jang, *A Philosophical Evaluation of Western and Eastern Civilization from a Whiteheadian Perspective*, 33.1 PROCESS STUDIES 135, 135 (2004).

67. DAVID L. HALL & ROGER T. AMES, THINKING THROUGH CONFUCIUS 135 (State U. of N.Y. Press 1987) [hereinafter HALL & AMES, THINKING THROUGH CONFUCIUS].

68. *Id.* at 134-36.

69. *Id.* at 138.

justification,” or “as rational principles articulating norms of behavior and interaction characterized by fairness and productive of the greatest social stability.”<sup>70</sup> This process of rational ordering dominates the Western tradition and lends evidence to the Western origins of the rule of law. Positing some abstract, universal standard for what counts as a legal system is incidental to the Western desire for a rationally ordered society.

Roberto Unger unpacks many of the presuppositions of the rational ordering achieved by the typical Western conception of the rule of law offered by liberal legalism. Unger argues that in legal liberalism, “[t]he main task of the theory of adjudication is to say when a decision can truly be said to stand ‘under a rule’” because “[o]nly decisions ‘under a rule’ are consistent with freedom; others constitute arbitrary exercises of judicial power.”<sup>71</sup> Unger further points out that liberal political theory adopts the principle of individualism; a concept which asserts that “[g]roups are artificial because all values are individual and subjective.”<sup>72</sup> Society must be constructed and “held together by rules.”<sup>73</sup> Legislation and constitutions must be based on the will of the people (an aggregation of subjective wills) because there are no “natural” or rational social bonds. The rule of law ideal attempts to ensure that the legislative process is done according to fair procedures and requires that the laws are “general, impersonal, or neutral.”<sup>74</sup> Once legislators have made the law, the “simplest and most familiar account of legal justice” claims that judges apply the law mechanically to reach the logical result without interpreting the purposes or policies informing the law.<sup>75</sup> Under this account, adjudication does not have recourse to any objective moral, political or religious truth to decide cases. The judge’s role is circumscribed by applying determinate legal rules and principles to resolve cases. While Unger’s characterization of liberal legalism is somewhat exaggerated, it poignantly identifies the rational or logical ordering at the root of legal liberalism’s conception of the “rule of law.”

In contrast to Western philosophy, Hall and Ames argue that “Confucius’ social and political philosophy gives priority to aesthetic over rational ordering.”<sup>76</sup> The “[a]esthetic order begins with the uniqueness of the one thing and assesses this particular as contributing to

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70. *Id.* at 170.

71. ROBERTO M. UNGER, *KNOWLEDGE AND POLITICS* 89 (The Free Press 1975).

72. *Id.* at 83.

73. *Id.*

74. *Id.* at 88.

75. *Id.* at 92.

76. HALL & AMES, *THINKING THROUGH CONFUCIUS*, *supra* note 67, at 158. Jang emphasizes that he departs from Hall and Ames’s analysis by arguing that both ways of thinking are always present in each culture but that one way of thinking tends to dominate the other. *See* Jang, *supra* note 66, at 136.

the balanced complexity of its context.”<sup>77</sup> It is “constituted by just those particularities . . . those features that distinguish one ordering perspective from another.”<sup>78</sup> Hall and Ames argue that “Confucius’ ideal is a society in which the application of laws is not necessary.”<sup>79</sup> For Confucius, both rulers and people should participate voluntarily in “an emergent harmony defined by the personal display of meaning and value in the performance of ritual action” so that the aesthetic “order is effected by a modeling process in which personal cultivation above inspires emulation below.”<sup>80</sup> In this process, the participants *become the sociopolitical order* based on the emergent harmony from their voluntary participation.<sup>81</sup> Julia Ching adds that “[t]he evolution of law in China may be described as the *devolution* of ritual (*li*) into law (*fa*) and of law into punishment (*xing*).”<sup>82</sup> This devolution resulted in the term “law” being associated mainly with penal law in Chinese society. Thus, in the Chinese context, the “rule of law” (as the negative sense of *cheng*) signals the failure of spontaneous voluntary ordering based on ritual and targets merely “a minimum standard of orderly conduct” for “the sake of general harmony.”<sup>83</sup>

Not surprisingly, Ching notes “that human rights are not historically a Chinese concept, but a Western import.”<sup>84</sup> The word “rights” does not have an exact Chinese equivalent and is usually translated as “power.”

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77. HALL & AMES, THINKING THROUGH CONFUCIUS, *supra* note 67, at 158.

78. *Id.* at 138.

79. *Id.* at 169.

80. *Id.* at 157.

81. *Id.* at 157-58. In THINKING FROM THE HAN, Hall and Ames further emphasize that:

In the *Analecets*, this sense of harmony is celebrated as the highest cultural achievement. Here, harmony is distinguished from mere agreement by again involving the central role of particularity. The family metaphor pervades this text, encouraged by the intuition that this is the institution which members typically give themselves most fully and unreservedly to the group. “Propriety” or full participation in ritualized roles and relationships (*li*) is the pursuit of a flourishing community through the personalization of overlapping familial roles and relationships.

DAVID L. HALL & ROGER T. AMES, THINKING FROM THE HAN: SELF, TRUTH, AND TRANSCENDENCE IN CHINESE AND WESTERN CULTURE 181 (State U. of N.Y. Press 1998) [hereinafter HALL & AMES, THINKING FROM THE HAN]. In exploring this notion of harmony in Confucian thought, Hall and Ames draw on a few of Whitehead’s “technical terms of aesthetic analysis.” *Id.* at 182-86. With respect to the Chinese notion of harmony, Roberto Unger argues that in the Chinese feudal period “the impulse to deify the world was so strong that a separation between nature and society was precluded” and that “[t]he notion that the basic structure of social life might be manipulated through made law was largely unknown.” UNGER, *supra* note 3, at 95.

82. Julia Ching, *Human Rights: A Valid Chinese Concept?*, in CONFUCIANISM AND HUMAN RIGHTS 67, 74 (Wm. Theodore De Bary & Tu Weiming eds., 1998).

83. HALL & AMES, THINKING THROUGH CONFUCIUS, *supra* note 67, at 157-58.

84. Ching, *supra* note 82, at 70.

To incorporate these Western notions, “the Chinese language had to coin a word for ‘freedom’ (*ziyou*, literally, self-determination). The closest classical term was *ziran* (literally, the natural), connoting more a Taoist sense of harmony with nature than of Promethean self-assertion.”<sup>85</sup> Consequently, “the concept of freedom as a *right*—such as the right to freedom of thought and religion, to freedom of speech and assembly—was never clearly articulated until modern times, and under Western influence.”<sup>86</sup>

Recently, Confucian thought has become increasingly emphasized by Chinese political leaders and by journalists and scholars attempting to understand Chinese culture, government, and China’s implementation of the “rule of law.” For example, President Hu Jintao recently published his “Theory of the Three Harmonies” as a summary of his view of Chinese statecraft and its effort to bolster the CCP’s “Mandate of Heaven.”<sup>87</sup> Hong Kong journalist Willy Lam noted that the “Theory of the Three Harmonies” was derived from the “Communist-Chinese canon as well as ancient Confucian classics” and “can be rendered as ‘seeking peace in the world, reconciliation with Taiwan, and harmony in Chinese society.’”<sup>88</sup> Lam further emphasized that, “since gaining power at the 16<sup>th</sup> CCP Congress in late 2002, both President Hu and Premier Wen Jiabao have presented themselves as ‘people-caring sage-emperors’ in the mold of Confucius’ ideal, humanistic rulers.”<sup>89</sup>

In contrast, the CCP and Chinese government have tried to deemphasize Marxist-Leninist principles. In a recent article in the New York Times, Joseph Kahn reports that the new versions of standard world history texts for high school students in China “de-emphasize dynastic change, peasant struggle, ethnic rivalry and war, some critics say, because the leadership does not want people thinking that such things matter a great deal.”<sup>90</sup> Kahn reports claims that the “changes passed high-level scrutiny” and that the textbooks “reflected the political viewpoints of China’s top leaders, including Jiang Zemin, the former president and Communist Party chief, and his successor, Hu Jintao.”<sup>91</sup> Kahn further speculates that “Mr. Jiang’s ‘Three Represents’ slogan aimed to broaden the Communist Party’s mandate and dilute its traditional emphasis on class struggle” while President Hu’s “Theory of

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85. *Id.* at 73.

86. *Id.*

87. Willy Lam, *Hu Jintao’s “Theory of the Three Harmonies,”* CHINA BRIEF, Jan. 3, 2006, at 1.

88. *Id.*

89. *Id.* at 2.

90. Joseph Kahn, *Where’s Mao? Chinese Revise History Books,* N.Y. TIMES, Sept. 1, 2006, at A1.

91. *Id.*



the Three Harmonies,” “aims to persuade people to build a stable, prosperous, unified China under one-party rule.”<sup>92</sup>

These textbook changes appear consistent with some of China’s recently stated Constitutional goals to “develop a socialist market economy, advance socialist democracy, improve the socialist legal system and work hard and self-reliantly to modernize industry, agriculture, national defense and science and technology step by step to turn China into a powerful and prosperous social country with a high level of culture and democracy.”<sup>93</sup> With respect to implementing the “rule of law,” this strategy seems crucial because of the pejorative view of law in classic Marxist thought. For example, the Manifesto of the Communist Party provides that:

So long as you apply, to our intended abolition of bourgeois property, the standard of your bourgeois notions of freedom, culture, and law. Your very ideas are but the outgrowth of the conditions of your bourgeois production and bourgeois property, a will, whose essential character and direction are determined by the economical conditions of existence of your class.<sup>94</sup>

It is hard to imagine that taking a strong Marxist position on the nature of law and private property could be seen as consistent with China’s shift towards a socialist market economy under the “rule of law.” Hall and Ames stress this point by asserting that “[i]n instance after instance in recent Chinese history, the rhetoric has been Marxist while the motivation and sentiment has, in the broadest sense, been more traditional and ‘Confucian.’”<sup>95</sup>

### C. *Process Philosophy and Chinese Thought*

One of the important affinities between Chinese and Whiteheadian thought concerns the priority of process or becoming over substance or being. This priority of process will be helpful for understanding the changing nature of most of the “natural laws” in process natural law discussed below in Section V. In their introduction to *The Analects of Confucius*, Ames and Rosemont assert that classical Chinese texts show “a more relational focus: not a concern to describe how things are in themselves, but how they stand in relations to something else at

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92. *Id.*

93. XIAN FA, *supra* note 21, at pmb1.

94. Karl Marx & Friedrich Engels, *Manifesto of the Communist Party*, in THE MARX-ENGELS READER 469, 487 (Robert C. Tucker ed., 2d ed. 1978).

95. DAVID L. HALL & ROGER T. AMES, ANTICIPATING CHINA: THINKING THROUGH THE NARRATIVES OF CHINESE AND WESTERN CULTURE xv (State U. of N.Y. Press 1995).

particular times.”<sup>96</sup> Furthermore, they note that “early Chinese thinkers never seem to have perceived any substances that remained the same through time; rather. . . . *Dao*, the totality of all things (*wanwu*), is a process that requires the language of both ‘change (*bian*)’ and ‘persistence (*tong*)’ to capture its dynamic disposition.”<sup>97</sup> In this respect, David Griffin recounts that:

Whitehead himself stimulated discussion with his oft-quoted remark that his philosophy “seems to approximate more to some strains of Indian, or Chinese, thought, than to western Asiatic, or European, thought.” . . . [I]n the fact that his philosophy, like Chinese thought, “makes process ultimate,” whereas the other type of thought “makes fact ultimate.”<sup>98</sup>

Whitehead’s observation recognizes a major difference between the classical Western metaphysics approach versus the process metaphysics approach to explaining the basic elements that make up existence. Classical metaphysics is substance metaphysics. The universe is comprised of one or more substances that form the basic building blocks of the universe. For example, the essence of Spinoza’s metaphysics can be summarized with a few key propositions about God: the eternal and infinite substance and cause (not in the sense of creator) of the universe. God is the only substance and “is the efficient cause of all things that can come within the scope of infinite intellect.”<sup>99</sup> Once we understand God’s nature, everything else flows from it as a matter of logical necessity; God or Nature is presupposed by or is the condition of conceiving of everything else.

Conversely, process metaphysics (the philosophy of organism) maintains that the final real things of the universe are actual occasions or entities, which are units of process (or processes of becoming) rather than substances (being) in the traditional sense. Process metaphysics rejects the “substance-quality concept” in the Spinoza example and replaces it with a “description of dynamic process.”<sup>100</sup> This dynamic process—the philosophy of organism—can be summarized as “[t]he

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96. Roger T. Ames & Henry Rosemont, Jr., *Introduction: Historical and Textual Background*, in *THE ANALECTS OF CONFUCIUS: A PHILOSOPHICAL TRANSLATION* 1, 23 (Roger T. Ames & Henry Rosemont, Jr. trans. & eds., 1998).

97. *Id.* at 26.

98. David Ray Griffin, *Whitehead, China, Postmodern Politics, and Global Democracy*, in *WHITEHEAD AND CHINA: RELEVANCE AND RELATIONSHIPS* 25, 36-37 (Wenyu Xie, Zhihe Wang, & George E. Derfer eds., 2005).

99. *BARUCH SPINOZA, THE ETHICS: TREATISE ON THE EMENDATION OF THE INTELLECT* 39, 43 (Seymour Feldman ed., Samuel Shirley trans., 1992).

100. *ALFRED NORTH WHITEHEAD, PROCESS AND REALITY* (David Ray Griffin & Donald W. Sherburn eds., corrected ed., Free Press 1978) (1929) [hereinafter *WHITEHEAD, PROCESS AND REALITY*].

many become one and are increased by one.”<sup>101</sup> Process metaphysics, like all other philosophical schemes, is an abstraction from concrete experience. Whitehead tries to avoid the “fallacy of misplaced concreteness”—“the accidental error of mistaking the abstract for the concrete”<sup>102</sup>—by grounding the philosophy of organism in the most concrete elements of our experience which he refers to as actual entities. The Whiteheadian world is a microcosmic multitude of actual entities (the many); it is atomistic. The becoming, the being and relatedness of actual entities (i.e., “the many become one and are increased by one”) is what the whole of *Process and Reality* is concerned with describing.

Whitehead arrived at his process metaphysics by employing what he refers to as the method of Speculative Philosophy.<sup>103</sup> Speculative Philosophy involves “the endeavour to frame a coherent, logical, necessary system of general ideas in terms of which every element of our experience can be interpreted”<sup>104</sup> and utilizes both rational and empirical approaches to this task. In this context, interpretation means that everything we are conscious of (the many) will be a particular instance (the one) of the general scheme (the many becoming one and are increased by one). More specifically, the philosophical scheme must meet four criteria: it must be coherent, logical, applicable, and adequate.<sup>105</sup> The two terms, coherent (all basic notions presuppose each other) and logical (consistency), make up the rational side of Whitehead’s philosophy.<sup>106</sup> The other two terms, applicable (some basis in concrete experience) and adequate (includes all conceivable experience), refer to the empirical side.<sup>107</sup>

Speculative Philosophy only asymptotically approaches a final formulation of the first metaphysical principles because of deficiencies of language and imaginative penetration. By utilizing the “true method of discovery,” Whitehead argues that some progress can be made. The true method of discovery integrates the rational and empirical sides of Whitehead’s philosophy. It can be best understood by analogy to the flight of plane. The true method of discovery “starts from the ground of particular observation” (applicability); “it makes a flight in the thin air of imaginative generalization; and it again lands for renewed observation” (adequacy), which is “rendered acute by rational interpretation”

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101. *Id.* at 21.

102. ALFRED NORTH WHITEHEAD, *SCIENCE AND THE MODERN WORLD* 51 (Free Press 1967) (1925) [hereinafter WHITEHEAD, *SCIENCE AND THE MODERN WORLD*].

103. WHITEHEAD, *PROCESS AND REALITY*, *supra* note 100, at 3.

104. *Id.*

105. *Id.* at 3-4.

106. *Id.*

107. *Id.* at 4.

(coherency, consistency).<sup>108</sup> This method attempts to derive a philosophical scheme which universally explains all our experience and provides those conditions that are presupposed by any self-understanding at all.

Like Whitehead's *Speculative Philosophy*, Wang Shik Jang concludes "that a civilization will turn out to be ideal when the rational and aesthetic ways of thinking are kept in balance."<sup>109</sup> To this end, *Speculative Philosophy* foreshadows the rational and empirical sides of practical reasoning utilized by the process theory of natural law discussed below. Furthermore, process natural law will help achieve this ideal civilization by providing a flexible and culturally sensitive conception of the "rule of law" and by overcoming the two most significant quandaries for contemporary legal theory—legal indeterminacy and the ontological gap.

### III. Two Quandaries for the Rule of Law and Contemporary Legal Theory

#### A. *Legal Indeterminacy*

The first important quandary for contemporary legal theory concerns the overwhelming consensus that the law is indeterminate without any consensus regarding the normative justification of judicial decision making and the rule of law under the conditions of legal indeterminacy. While legal indeterminacy is widely embraced, there is little agreement about the degree or scope of legal indeterminacy. On one hand, 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).<sup>110</sup> On the other hand, contemporary legal formalists, such as Ernest Weinrib, claim that "[n]othing about formalism precludes indeterminacy."<sup>111</sup> Weinrib asserts that "formalism does not rely on the

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108. WHITEHEAD, *PROCESS AND REALITY*, *supra* note 100, at 5.

109. Jang, *supra* note 66, at 136.

110. See D'Amato, *supra* note 5, at 250 (citing Judge Frank Easterbrook's view that the constitutional minimum age requirement of thirty-five years old for presidential eligibility is subject to varying interpretations such as "the number of revolutions of the world around the sun, as a percentage of average life expectancy (so that the Constitution now has age fifty as a minimum), or as a minimum number of years after puberty (so the minimum now is thirty or so)"). *Id.* 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. L. REV. 536 (1990).

111. Weinrib, *supra* note 5, at 1008.

antecedent determinacy for particular cases of the concepts entrenched in positive law,” but that “the organ of positive law has the function of determining an antecedently indeterminate controversy.”<sup>112</sup> Consequently, in its weaker forms, the indeterminacy thesis merely signals the almost universal rejection of strong legal formalism.

Christopher Columbus Langdell is often considered the archetype of strong legal formalism.<sup>113</sup> He considered law a science and claimed that “all the available materials of that science are contained in printed books.”<sup>114</sup> Supporters of 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.<sup>115</sup> 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.<sup>116</sup> Strong legal formalism thus provided a persuasive argument that under the “rule of law,” judges can decide cases independently of extra-legal norms from morality, politics, and religion.

In response, both legal realists and the critical legal studies movement (“CLS”) have forcefully undermined the feasibility of strong legal formalism by demonstrating the indeterminacy of the law. 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.<sup>117</sup> For example, Karl Llewellyn rejects deductive legal certainty and argues that “legal rules do not lay down any *limits within* which a judge moves.”<sup>118</sup> Rather, Llewellyn argues:

[A] legal rule functions not as a closed space within which one remains, but rather as a bough whose branches are growing; in short,

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112. *Id.*

113. See GRANT GILMORE, *THE AGES OF AMERICAN LAW* 42-43 (Yale Press 1977).

114. ARTHUR E. SUTHERLAND, *THE LAW AT HARVARD* 175 (Cambridge 1967). For further discussion of the dominance of strong legal formalism from the Civil War to World War I, see GILMORE, *supra*, note 113, at 41-67.

115. See *id.* at 43-44.

116. Cf. MICHEL ROSENFELD, *JUST INTERPRETATIONS: LAW BETWEEN ETHICS AND POLITICS* 33 (1998) (discussing the “new” versus the “old” legal formalism); see also David A. Strauss, *The Role of a Bill of Rights*, 59 U. CHI. L. REV. 539, 544 (1992) (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”).

117. GILMORE, *supra*, note 113, at 42-43.

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

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.<sup>119</sup>

For legal realists, this understanding of legal rules entails a rule skepticism that recognizes the indeterminacy of law.

CLS is also well known for its claim about the radical indeterminacy of the law. It not only rejects 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 that:

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 “easy” the case first appears). While settled *practice* is not unattainable, the CLS claim is that settled *justificatory schemes* are in fact unattainable.<sup>120</sup>

Although there is little consensus about the nature and degree of legal indeterminacy,<sup>121</sup> most legal theorists accept that the law is indeterminate to the extent that there are hard cases where the apparently relevant statutes, common law, contracts, or constitutional law provisions do not provide sufficient guidance for a resolution. For example, the indeterminacy of the U.S. Constitution results in conflicting judicial interpretations of how it should apply to issues such as abortion, physician-assisted suicide, and same-sex marriage. Ken Kress has noted that “[t]he indeterminacy thesis asserts that law does not constrain judges sufficiently, raising the specter that judicial decision making is often or always illegitimate.”<sup>122</sup> Judges must rely on extra-legal norms to resolve hard cases, which can result in inconsistent treatment of like cases and arbitrary decisions.

Does this mean that judicial decision making is merely the arbitrary exercise of political power, or is it just the product of the particular life experience of the judge?<sup>123</sup> Lawrence Solum claims that:

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119. *Id.*

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

121. Kress, *supra* note 4, at 200-01.

122. *Id.* at 203.

123. 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. *See generally* JEROME FRANK, LAW AND THE MODERN MIND (Peter Smith 1970) (1930). In *Law and the Modern Mind*, Frank comments that:

[w]hat we may hope some day to get from our judges are detailed

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.<sup>124</sup>

Moreover, in a democratic society, this means that judges are allegedly subverting democratic rule by creating the law outside of the legislative process and that judicial decision making is illegitimate. Consequently, the indeterminacy thesis puts into question the notion of the “rule of law.”

Contemporary legal theory, however, fails to indicate how law can be rationally legitimated under the conditions of legal indeterminacy. There have been three types of unsatisfactory response to legal indeterminacy. First, some legal theorists have attempted to reject the legal indeterminacy thesis. For example, Ronald Dworkin maintains that his interpretive theory of law provides an understanding of law that is quite determinate so that the law provides “right answers” (even in hard cases) based on the criteria of “fit” with prior precedent and “justification” according to the principles of political morality underlying the law.<sup>125</sup> With respect to fit, he argues that “in a modern, developed, and complex [legal] system”<sup>126</sup> a tie with respect to fit would be “so rare as to be exotic.”<sup>127</sup> The principles of political morality can further determine a right answer when the criteria of fit fails so that “[i]f 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.”<sup>128</sup> In the final analysis, Dworkin’s interpretive theory of law constitutes a weak legal formalism, which maintains that the law has

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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.

*Id.* at 123-24.

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

125. RONALD DWORKIN, *LAW’S EMPIRE* 225, 255 (1986). Despite much criticism, Dworkin continues to embrace his right answer thesis. *See, e.g.*, DWORKIN, *JUSTICE IN ROBES*, *supra* note 8, at 41-43.

126. Dworkin, *A Matter of Principle*, *supra* note 8, at 143.

127. *Id.*

128. *Id.* at 144.

adequate resources to come to determinate results in all cases.<sup>129</sup>

To the contrary, Habermas claims that Dworkin's "coherence theory of law can avoid the indeterminacy supposedly due to the contradictory structure of the legal system only at the cost of the theory itself becoming somehow indeterminate."<sup>130</sup> Habermas argues that this indeterminacy results from what has been referred to as the "ripple effect argument."<sup>131</sup> The ripple effect argument shows that coherency theories require a reconstruction of the system of legal norms in every hard case which results in a continuous reconfiguration of the system of legal norms and amounts to a retroactive interpretation of existing law. Each hard case thus creates a ripple in the coherent system of legal norms and makes the entire system of law indeterminate.

In addition, legal positivists usually recognize legal indeterminacy but fail to explain how judges provide a rational legitimation for the law in hard cases. For instance, 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."<sup>132</sup> Hart helps make clear that this open texture or indeterminacy concerns not only "particular legal rules," but also "the ultimate criteria of legal validity," which he refers to as "the rule of recognition."<sup>133</sup> 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.<sup>134</sup> Hart claims that "the law in such cases is fundamentally *incomplete*: it provides *no* answer to the questions at issue in such cases"

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129. Brian Leiter similarly describes Dworkin as a "sophisticated formalist . . . who has a rich theory of legal reasoning," but "still remains within the formalist camp because he sees the law as rationally determinate and he denies that judges have strong discretion (i.e., he denies that their decisions are not bound by authoritative legal standards)." Brian Leiter, *Positivism, Formalism, Realism*, 99 COLUM. L. REV. 1138, 1146 (1999) (reviewing ANTHONY SEBOK, *LEGAL POSITIVISM IN AMERICAN JURISPRUDENCE* (1998)). See also John P. McCormick, *Max Weber and Jürgen Habermas: The Sociology and Philosophy of Law During Crises of the State*, 9 YALE J.L. & HUMAN. 297, 324 (1997) (characterizing Dworkin as embracing a "reformed formalism").

130. JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY* 219 (William Rehg trans., 1996).

131. *Id.* (citing Kress, *supra* note 9, at 380-82).

132. HART, *supra* note 6, at 144. Hart notes that the rule of recognition can be partly, but never completely, indeterminate. *Id.* at 148. For example, 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 152.

133. *Id.* at 148.

134. *Id.* at 152.



and that courts must exercise the restricted law-making function which he refers to as discretion.<sup>135</sup> As a result, 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.”<sup>136</sup>

Finally, CLS, feminist legal theory, and critical race theory appear to give up on a rational legitimation for law altogether and reduce law to politics.<sup>137</sup> As a proponent of CLS, Roberto Unger 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. The legal order is merely the outcome of power struggles or practical compromises.<sup>138</sup> He thus advocates “the purely instrumental use of legal practice and legal doctrine to advance leftist aims.”<sup>139</sup> Similarly, Robin West claims that masculine jurisprudence proceeds from the presupposition of individuals as essentially separate from one another (“separation thesis”), while feminist jurisprudence proceeds from the presupposition that individuals

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135. *Id.* at 252.

136. *Id.* at 273. While denying that legal pragmatism is similar to Hart’s legal positivism, Richard Posner shares Hart’s rejection of legal formalism—the idea of “law as a system of rules and judicial decisions as the result of deduction, with the applicable rule supplying the major, and the facts of the particular case the minor, premise of syllogism.” RICHARD A. POSNER, *LAW, PRAGMATISM, AND DEMOCRACY* 19 (2003). Rather, “[l]egal pragmatism is forward-looking, regarding adherence to past decisions as a (qualified) necessity rather than as an ethical duty.” *Id.* at 60. Posner emphasizes that “[t]he ultimate criterion of pragmatic adjudication is reasonableness,” which tries to achieve the “right balance between rule-of-law and case-specific consequences, continuity and creativity, long-term and short-term, systemic and particular, rule and standard.” *Id.* at 59, 64. Posner’s legal pragmatism thus considers “systemic and not just case-specific consequences,” so that it takes into account “standard rule-of-law virtues of generality, predictability, and impartiality,” but pragmatic judges only rarely “give controlling weight to systemic consequences as legal formalism does.” *Id.* at 12, 59 & 61.

137. David Kairys argues that:

The 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) (emphasis added).

138. Roberto M. Unger, *The Critical Studies Movement*, 96 *HARV. L. REV.* 563, 565 (1983).

139. *Id.* at 567.

are essentially connected or related to one another.<sup>140</sup> Critical race theorists have also tried to show that “areas of law ostensibly designed for our benefit often benefit whites even more than blacks.”<sup>141</sup>

Given these responses, the challenge of legal indeterminacy to the legitimacy of the law has not been met. Legal indeterminacy thus still constitutes “the key issue in legal scholarship today”<sup>142</sup> because it potentially calls into question the “rule of law.” In other words, legal indeterminacy raises a crucial normative question that current legal theory has failed to answer: on what rational normative basis do judges determine which extra-legal norms are valid and which valid norms are controlling in deciding hard cases? In the following discussion, I will show that a process theory of law can address this issue and save the “rule of law” from illegitimacy.

### B. *The Ontological Gap*

The second quandary demonstrating the need for a new normative theory of law stems from the disconnection between legal practice and legal theory. Steven Smith argues that this disconnect stems from an ontological gap between the metaphysical presuppositions informing the practice of law and the “anti-metaphysical animus” informing contemporary legal theory, which has resulted in “a jurisprudential dead end.”<sup>143</sup> Smith emphasizes that “[t]he ways in which lawyers and judges (and even most legal scholars) actually practice and talk about law are not so different than they were a century ago—or even five centuries ago.”<sup>144</sup> The contemporary practice of law still presupposes a classical or religious ontology that maintains the reality of “the law” and that posits “a sort of working partnership between a divine author and human legislators.”<sup>145</sup> However, Smith maintains that the classical “account has been widely rejected by modern legal thinkers as mere ‘superstition.’”<sup>146</sup> As a result, the religious ontology presupposed by the practice of law is contrary to the ontology presupposed by contemporary legal theory.

More specifically, Smith identifies three ontological families which he labels everyday ontology, scientific ontology, and religious ontology.

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140. Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1 (1988). See also FEMINIST LEGAL THEORY (Katharine T. Bartlett & Rosanne Kennedy eds., 1991).

141. Richard Delgado, *Brewer's Plea: Critical Thoughts on Common Sense*, 44 VAND. L. REV. 1, 6 (1991). See also Richard Delgado & Jean Stefancic, *Critical Race Theory: An Annotated Bibliography*, 79 VA. L. REV. 461 (1993).

142. Anthony D'Amato, *Pragmatic Indeterminacy*, 85 NW. U. L. REV., 148, 148 (1990).

143. SMITH, *supra* note 10, at xii.

144. *Id.* at 1.

145. *Id.* at 155.

146. *Id.*

Smith argues that “‘the law’ . . . does not square with either the everyday ontology or the scientific ontology that people in academic settings regard as axiomatic, at least for professional purposes.”<sup>147</sup> This clarifies that the ontological gap results because the practice of law presupposes a religious ontology while contemporary legal theory presupposes a scientific ontology.

The ontological gap presents a problem because the end result of accepting a scientific ontology based on “atomic physics and Darwinian evolution,” “is that the religious worldview is inadmissible for purposes of serious thought.”<sup>148</sup> To support this claim, Smith cites John Searle’s conclusion that an unassailable scientific ontology (i.e., scientific materialism) invalidates religious ontology.<sup>149</sup> Smith’s argument means that legal practice is based on a defective or faulty religious ontology that lacks “academic” credibility. Given this analysis, the question becomes whether the ontological gap between legal practice and legal theory constitutes an unfathomable chasm that cannot be traversed or whether it can be navigated by reforming centuries of legal practice or by positing a new ontology for legal theory.

#### IV. Whitehead’s Telos for Law and Process Scholarship on Law and Human Rights

##### A. *Whitehead’s Teleology of Beauty and Treatment of Law*

Contrary to Smith’s conclusion, Whitehead’s metaphysics or speculative philosophy shows that “atomic physics and Darwinian evolution” are not inconsistent with a religious ontology. John Cobb emphasizes that Whitehead’s speculative philosophy blends together the new insights in physics (e.g., “relativity and quantum theory”) with William James’s new philosophical insights (e.g., radical empiricism) to challenge the pervasive “scientific materialism and the Cartesian Ego.”<sup>150</sup> Similarly, David Ray Griffin clarifies that Whitehead’s philosophy is part of “constructive or revisionary postmodernism” that “rejects not science as such but only that scientism in which the data of the modern natural sciences are alone allowed to contribute to the construction of our worldview.”<sup>151</sup> At the same time, Whitehead maintains that God is a

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147. *Id.*

148. SMITH, *supra* note 10, at 34.

149. *Id.*

150. John B. Cobb, Jr., *Alfred North Whitehead*, in FOUNDERS OF CONSTRUCTIVE POSTMODERN PHILOSOPHY 165, 165-66 (David Ray Griffin, John B. Cobb, Jr., Marcus P. Ford, Pete A. Y. Gunter, & Peter Ochs eds., 1993).

151. David Ray Griffin, *Introduction to SUNY Series in Constructive Postmodern Thought*, in FOUNDERS OF CONSTRUCTIVE POSTMODERN PHILOSOPHY, *supra* note 150, at

necessary part of his metaphysics because God “shares with every new creation its actual world; and the concrescent creature is objectified in God as a novel element in God’s objectification of that actual world.”<sup>152</sup> God is crucial for the creative advance of the universe because God lures the world toward the categorical imperative of maximizing beauty or the “intensity of feeling . . . in the immediate subject, and . . . in the relevant future.”<sup>153</sup> Whitehead’s metaphysics thus unifies scientific ontology and religious ontology and presents the possibility of closing the ontological gap between legal practice and legal theory.

Furthermore, Whitehead maintains that maximizing beauty is categorical or universal because “[t]he teleology of the Universe is directed to the production of Beauty.”<sup>154</sup> Beauty or unity-in-diversity entails achieving both a sense of order (harmony or an absence of mutual inhibition among various prehensions) and a raised intensity of feelings (complexity or a synthesis of contrasting feelings).<sup>155</sup> Because this transcendent (a priori) telos is universally applicable to all experience (human and nonhuman), humans as self-conscious experiencing agents should direct their actions to maximize beauty. Consequently, normative legal claims should maximize beauty (unity-in-diversity) no less than moral claims and, as I will argue below, Whitehead’s metaphysics requires a natural law theory of law based on the telos of beauty.

Although Whitehead’s metaphysics provides great potential for closing the ontological gap with a new theory of natural law, Whitehead’s discussion of law and jurisprudence offer little explicit guidance on how this can be done. In *Adventures of Ideas*, he refers to law several times but mainly as an example of how it relates to the advance of civilization. For example, Whitehead briefly mentions essential human rights, the “alliance of philosophy, law, and religion,”<sup>156</sup> “jurisprudence,”<sup>157</sup> “Anglo-American Common Law,”<sup>158</sup> and “our legal ideas”<sup>159</sup> in various passages without discussing law or legal theory in any detail.<sup>160</sup> With the exception of slavery (discussed below),

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viii. Zhihe Wang also provides a very helpful analysis of the aspects of Whitehead’s Philosophy that justify characterizing Whitehead as a constructive “postmodern thinker.” See generally Zhihe Wang, *The Postmodern Dimension of Whitehead’s Philosophy and Its Relevance*, in WHITEHEAD AND CHINA: RELEVANCE AND RELATIONSHIPS, *supra* note 98, at 173-87.

152. WHITEHEAD, PROCESS AND REALITY, *supra* note 100, at 345.

153. *Id.* at 27.

154. WHITEHEAD, ADVENTURES OF IDEAS, *supra* note 19, at 265.

155. *Id.* at 252.

156. *Id.* at 13-14.

157. *Id.* at 19.

158. *Id.* at 44.

159. WHITEHEAD, ADVENTURES OF IDEAS, *supra* note 19, at 63.

160. *Id.* at 65.

Whitehead's other references to "law" in *Adventures of Ideas* focus primarily on the "notions of Law" relevant to science and technology (i.e., physical laws of nature) and the cosmological ideas they presuppose.<sup>161</sup>

Despite his focus on theoretical or speculative reasoning, Whitehead argues that the "function of Reason" "is to promote the art of life."<sup>162</sup> Whitehead clarifies that practical reasoning "is the enlightenment of purpose; within limits, it renders purpose effective."<sup>163</sup> More specifically, he states that it has "a three-fold urge: (i) to live, (ii) to live well, (iii) to live better. In fact, the art of life is *first* to be alive, *secondly* to be alive in a satisfactory way, and *thirdly* to acquire an increase in satisfaction."<sup>164</sup> In other words, Whitehead maintains that the telos of beauty leads to a different form for practical reasoning. Unlike the Greeks who thought the final ends for humans were fixed, the end is not just to live well. There is also an imperative toward the creative advance of a higher form of perfection—"the adventure of living better."<sup>165</sup> This pragmatic function of reason presupposes a notion of final causation and seeks to make that end effective. In a process perspective, the end is never finally realized because there are always higher levels of perfection to be realized in the future.

In the *Adventures of Ideas*, Whitehead gives the example of the "growth of the idea of the essential rights of human beings, arising from their sheer humanity" or the humanitarian ideal to demonstrate how the aspiration to live better can surpass the aspiration to live well.<sup>166</sup> He points out that "Freedom and Equality constitute an inevitable presupposition for modern political thought . . . while Slavery was a corresponding presupposition for the ancients."<sup>167</sup> For example, despite the great democratic insights of the Greek and Roman civilizations, "it was universally assumed that a large slave population was required to perform services which were unworthy to engage the activities of a fully civilized man."<sup>168</sup> For the ancients, slavery was a presupposition consistent with democracy while modern political thought presupposes freedom and equality. While certain technological advances "weakened the necessity for slavery," its eradication required the "combined

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161. *Id.* at 103-39.

162. WHITEHEAD, *THE FUNCTION OF REASON* 4 (Beacon 1958) (1929) [hereinafter WHITEHEAD, *THE FUNCTION OF REASON*].

163. WHITEHEAD, *PROCESS AND REALITY*, *supra* note 100, at 37.

164. WHITEHEAD, *THE FUNCTION OF REASON*, *supra* note 162, at 8.

165. *Id.* at 19.

166. WHITEHEAD, *ADVENTURES OF IDEAS*, *supra* note 19, at 13.

167. *Id.*

168. *Id.* at 12-13.

influence of philosophy, law, and religion.”<sup>169</sup> In the West, Whitehead credits the moral energy of “the impracticable ethics of Christianity,” the philosophical generality of outlook Platonic philosophy, and the “constructive ability” of law for “the evolution from the notion of society based upon servitude to that of society based upon individual freedom.”<sup>170</sup> Social reform thus requires an “alliance of philosophy, law, and religion.”<sup>171</sup>

*B. Process Scholarship on Law and Human Rights*

Despite Whitehead’s limited treatment of law, Jay Tidmarsh has provided great insight into the implications of process thought for legal theory. In contrast to the focus in this Article on the normative implications of process thought for law, his focus has been more on descriptive jurisprudence than on normative jurisprudence.<sup>172</sup> In *A Process Theory of Torts*, Tidmarsh maintains “that torts must be understood as a system in perpetual process—forever indefinite and infinitely malleable in its precise theoretical, doctrinal, and practical manifestations—yet ultimately bounded in its possibilities.”<sup>173</sup> “Normatively, the fact that all states of perfection will perish suggests that a tort system that wishes to survive must reject all conceptualist efforts to hitch the system to a particular natural law, corrective justice, or efficiency theory.”<sup>174</sup> In *Whitehead’s Metaphysics and the Law*, Tidmarsh further provides a comprehensive introduction to Whitehead’s metaphysics and suggests some principles like perfection, order, and harmony, as “a framework that could be used to determine that which best achieves Beauty in certain instances, and that which does not.”<sup>175</sup> He also suggests that “middle principles” could be developed from Whitehead’s metaphysics which “could suggest in general terms the sorts of legal structures, theories, rules, and practices that best suit particular occasions of experience, and thus are most conducive to the achievement

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169. *Id.* at 27, 26.

170. *Id.* at 42, 26.

171. WHITEHEAD, *ADVENTURES OF IDEAS*, *supra* note 19, at 19.

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

173. Jay Tidmarsh, *A Process Theory of Torts*, 51 WASH. & LEE L. REV. 1313, 1317 (1994).

174. *Id.* at 1418.

175. Jay Tidmarsh, *Whitehead’s Metaphysics and the Law: A Dialogue*, 62 ALB. L. REV. 1, 89 (1998).

of Beauty.”<sup>176</sup>

Recent work on process thought and human rights begins to derive middle principles from Whitehead’s metaphysics that give further insight into how the telos of beauty might provide a normative theory of law. Howard Vogel has explored the importance of process thought for reinvigorating the sense of vocation among lawyers through an understanding of “law-as-process-with-a-purpose.”<sup>177</sup> Recently, he has also begun to explore the importance of process thought for international human rights<sup>178</sup> and constitutional interpretation.<sup>179</sup> With respect to the later, Vogel has argued that “[t]he legitimacy of constitutional interpretation is to be found in the *growth and nurture of participatory democracy*, as an expression of the principle of internal relations, seeking community large enough to *embrace the elements of discord in our experience*, as contrast within a ‘more perfect union.’”<sup>180</sup>

With respect to human rights, both Douglas Sturm and George Pickering have set forth relational or process perspectives on property rights.<sup>181</sup> Sturm has been particularly responsible for advancing the implications of process thought for human rights.<sup>182</sup> He attempts to preserve the “idea of human rights” because of its “normative insight about the meaning of life.” However, Sturm replaces the individualistic ontology of “classical western liberalism” with a process-based “communitarian political ontology,” which “is more relational and ecological, even organic, in character.”<sup>183</sup> Sturm further advocates a

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176. *Id.*

177. Howard J. Vogel, *The Terrible Bind of the Lawyer in the Modern World: The Problem of Hope, the Question of Identity, and the Recovery of Meaning in the Practice of Law*, 32 SETON HALL L. REV. 152, 183 (2001).

178. Howard J. Vogel, *Reframing Rights from the Ground Up: The Contribution of the U.N. Law of Self-Determination to Recovering the Principle of Sociability on the Way to a Relational Theory of International Human Rights*, 20 TEMPLE INT’L & COMP. L. J. 443 (2006).

179. Howard J. Vogel, *The Possibilities of American Constitutional Law in a Fractured World: A Relational Approach to Legal Hermeneutics*, 83 U. DET. MERCY L. REV. 789 (2006).

180. *Id.* at 824 (emphasis added).

181. George W. Pickering, *Property Rights: Another Relational Perspective*, in ECONOMIC LIFE: PROCESS INTERPRETATIONS AND CRITICAL RESPONSES 79 (W. Widick Schroeder & Franklin I. Gamwell eds., 1988); Douglas Sturm, *Property: A Relational Perspective*, in ECONOMIC LIFE: PROCESS INTERPRETATIONS AND CRITICAL RESPONSES; *id.* at 29.

182. In honor of Sturm’s contributions and his retirement from teaching at Bucknell University, “the Center for Process Studies held a conference April 17-19, 1999 called ‘Human Rights in a Process Perspective.’” Randall C. Morris, *Focus Introduction: Human Rights in a Process Perspective: Conversations with Douglas Sturm*, 33.2 PROCESS STUDIES 195 (2004). The “task of the conference” was “to take a critical look at the principle of human rights” from the perspective of process thought. *Id.* at 196.

183. DOUGLAS STURM, SOLIDARITY AND SUFFERING: TOWARD A POLITICS OF

“jurisprudence of solidarity” rather than a “jurisprudence of individuality.”<sup>184</sup> In a jurisprudence of solidarity, “the driving passion of law is not so much to protect the individual against trespass as it is to create a quality of social interaction conducive to the flourishing of a vibrant community of life across the world.”<sup>185</sup> In other words, Sturm argues that “human rights are of greatest importance as a form of empowerment, enabling people, as individuals and in their associations, to participate effectively in and through political community.”<sup>186</sup>

In addition, Franklin Gamwell’s work provides great insight and guidance in determining what particular human rights follow from the theistic telos of beauty, which he refers to as the comprehensive divine purpose or the “maximal unity-in-diversity.”<sup>187</sup> In *Democracy on Purpose*, Gamwell attempts “to articulate the [comprehensive] divine purpose in terms of the principles of justice.”<sup>188</sup> He arrives at these principles by supplementing process thought with the work Karl-Otto Apel and Jürgen Habermas. Based on Apel and Habermas, Gamwell makes a transcendental argument supporting “the principle of communicative respect,” which “is a meta-ethical presupposition of every claim to moral validity.”<sup>189</sup> The principle of communicative respect provides that “individuals are morally bound to treat each other as *potential participants in moral discourse*.”<sup>190</sup> This principle is a formative principle because it remains neutral to all substantive principles and provides that moral disagreement should be resolved by the social practice of argumentation.<sup>191</sup>

Gamwell argues that the constitution must establish formative rights to ensure a “full and free political discourse.”<sup>192</sup> Democracy requires that political association is both *full*, such that all principles or norms, whether formative or substantive, are subject to contest, and *free*, such that all individuals participating in this political association have equal rights to participation. However, the rights in the constitution must be

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RELATIONALITY 19-20 (1998) [hereinafter STURM, SOLIDARITY AND SUFFERING]; see also Douglas Sturm, *The Idea of Human Rights: A Communitarian Perspective*, 23.4 PROCESS STUDIES 238 (1994).

184. STURM, SOLIDARITY AND SUFFERING, *supra* note 183, at 10.

185. *Id.* at 11.

186. *Id.* at 18.

187. Franklin I. Gamwell, *The Purpose of Human Rights*, 29.2 PROCESS STUDIES 322, 338 (2000), reprinted in 22 MISS. C. L. REV. 239 (2003) [hereinafter Gamwell, *The Purpose of Human Rights*].

188. FRANKLIN I. GAMWELL, DEMOCRACY ON PURPOSE: JUSTICE AND THE REALITY OF GOD 149 (2000) [hereinafter GAMWELL, DEMOCRACY ON PURPOSE].

189. *Id.* at 223.

190. *Id.* at 197.

191. *Id.* at 198-99.

192. *Id.* at 212-13.



solely formative because “[a]ny constitutional provision of substantive rights would, in other words, arrest a full and free political discourse by stipulating that citizens as participants in it explicitly accept some conception of good human association.”<sup>193</sup> Rather, the full and free debate essential to democracy concerns precisely the question of which conception of the good human association should inform the substantive rights prescribed by law.

In order to institutionalize this debate, Gamwell argues that the constitution should include formative rights protecting both private and public liberties. Private liberties protect the prerequisites for discourse such as the right to personal property and the right to contract.<sup>194</sup> Public liberties “govern actual participation in discourse” and include rights such as due process, equal protection of the law, free speech, and freedom of association.<sup>195</sup> In addition, some liberties, like religious freedom, are both public and private. As a private liberty, religious freedom protects the “freedom of conscience,” and as a public liberty, it ensures that all conceptions of the comprehensive good are subject to contest.<sup>196</sup> While these private and public constitutional rights remain formative, statutory legislation must make substantive determinations concerning issues such as the extent of personal property rights, the legal constraints on the free market, and public education.<sup>197</sup> There is no guarantee that these decisions will facilitate the free and full debate, but the private and public formative constitutional rights ensure that these decisions are always subject to contestation. Individuals may challenge these substantive prescriptions as well as the conception of good human association that they endorse.

Despite the formative nature of the constitution, Gamwell maintains that “the principles of justice depend on a comprehensive [divine] purpose” and “that the [comprehensive] divine purpose for human life implies a democratic principle.”<sup>198</sup> To support this claim, he argues for “*the compound character of justice*.”<sup>199</sup> On the one hand, the substantive principle or principles of justice imply the formative principle of communicative respect, which is the meta-ethical presupposition of moral validity. On the other hand, the formative principle of communicative respect implies a comprehensive purpose. This comprehensive purpose provides the basis for the substantive principles

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193. GAMWELL, DEMOCRACY ON PURPOSE, *supra* note 188, at 221.

194. *Id.* at 206.

195. *Id.* at 217-18.

196. *Id.* at 235.

197. *Id.* at 216.

198. GAMWELL, DEMOCRACY ON PURPOSE, *supra* note 188, at 181.

199. *Id.* at 232.

of justice that are required to resolve moral and political decisions.

In addition, Gamwell summarizes his compound theory of justice as general emancipation with a principle: “*Maximize the general conditions of emancipation to which there is equal access.*”<sup>200</sup> He supports this substantive principle by demonstrating that it has a compound character and that it follows from the comprehensive divine purpose. He then summarizes this compound conception of justice by a set of democratic principles:

1. The political association should be constituted as a full and free discourse, providing equal public liberties and, therefore, equal private liberties.
2. The political order should
  - A. maximize equality of public access, providing for all conditions of basic emancipation, and
  - B. maximize the general conditions of emancipation to which there is equal access.<sup>201</sup>

Although 2B is the inclusive principle of justice as emancipation and implies the others and their priority, the formative principle in 1 and the substantive principle in 2A are democratically prior. Together these principles define the compound character of justice as general emancipation. Moreover, “this statement of principles for a conception of human rights backed by neoclassical metaphysics” is “inseparable from a comprehensive [divine] good” and articulates “a universal or natural moral law” that should determine the activities of the state.<sup>202</sup>

## V. Process Natural Law

### A. *A New Theory of Natural Law*

Michael Moore’s definition of natural law theory supports Gamwell’s characterization of his process-based compound theory of justice as a universal or natural moral law. Moore argues that a “natural law theory” contains “two essential theses: (1) there are objective moral truths” (*moral realist thesis*); “and (2) the truth of any legal proposition necessarily depends, at least in part, on the truth of some corresponding

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200. *Id.* at 295.

201. *Id.* at 311.

202. Gamwell, *The Purpose of Human Rights*, *supra* note 188, at 343-44.

moral proposition(s)” (*relational thesis*).<sup>203</sup> With respect to the *moral realist thesis*, process metaphysics clearly establishes both a rationally necessary teleology of beauty (i.e., comprehensive divine good) and the formative and substantive rights it implies as objective moral truths.

Similarly, with respect to the *relational thesis*, Sturm notes that Gamwell’s formative rights are “unqualified rights, since they compose the necessary, even if not sufficient, foundation of a democratic political process.”<sup>204</sup> In other words, the validity of any law in a democratic political system must be consistent with these formative rights. In addition, substantive rights must be “rooted in an overarching moral criterion that both authorizes the formative rights already indicated and provides a normative measure for the evaluation of contestable policy proposals.”<sup>205</sup> Even though formative rights should be constitutionally guaranteed and substantive rights should be left to the legislature, both formative and substantive rights are accountable to the telos of maximizing beauty for their legitimacy. Consequently, the telos of maximizing beauty and the formative and substantive rights it implies represent objective moral truths that determine the legitimacy of any legal proposition.

Beyond Moore’s two essential theses, process natural law theory has both similarities to and differences from classical natural law theory. As noted by Cicero, classical natural law maintains that:

True law is right reason in agreement with nature; it is of universal application, unchanging and everlasting . . . there will not be different laws at Rome and at Athens, or different laws now and in the future, but one eternal and unchangeable law will be valid for all nations and all times, and there will be one master and ruler, that is, God, over us all, for he is the author of this law, its promulgator, and its enforcing judge.<sup>206</sup>

With respect to formative rights, the classical notion of fixed, unchanging natural laws may have some relevance to process natural law theory. For example, the universal formative rights noted above (e.g., the right to personal property, the right to contract, due process, equal protection, etc.) should be protected in all constitutions.

On the other hand, the realization of the universal telos of

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203. Michael S. Moore, *Moral Reality Revised*, 90 MICH. L. REV. 2424, 2425 (1991-92).

204. Douglas Sturm, *Taking Human Rights Seriously: Relationality Relationship and Subjectivity*, 33.2 PROCESS STUDIES 237, 253 (2004) [hereinafter Sturm, *Taking Human Rights Seriously*].

205. *Id.*

206. MARCUS TULLIUS CICERO, DE REPUBLICA, III, xxii, 33 (Clinton Walker Keyes, trans., Loeb Classical Library 1928).

maximizing beauty (including the implied substantive right to general emancipation), is always relative to the particular circumstances. For example, Whitehead claims that the details of all moral codes “are relative to the social circumstances of the immediate environment” and that there is a transcendent “aim of social perfection” (i.e., beauty) for all these moral codes.<sup>207</sup> Conduct in one environment produces a measure of harmony, but in another environment, it is destructively degrading. “Each society has its own type of perfection.”<sup>208</sup> Similarly, the substantive laws in any particular country should embody legal norms which are relevant to its particular environment and which aim at promoting the evolution of that environment towards its proper perfection. Consequently, we must continually “seek for some highly general principles underlying all such codes. Such generalities should reflect the very notions of the harmonizing of harmonies, and of particular individual actualities as the sole authentic reality. These are the principles of the generality of harmony,” (i.e., order), “and of the importance of the individual” (i.e., increased intensity of feeling), which together constitute beauty.<sup>209</sup>

The telos of beauty, however, is never fully realized, which means that substantive laws and “[m]orals consist in the aim at the ideal.”<sup>210</sup> Aiming at the ideal does not mean achieving a static state of affairs, but instead striving for creative advance. While the telos of beauty is universal, the unique circumstances of each society in question determine which state of affairs will maximize beauty in that particular legal system. Except for the telos of beauty and the formative and substantive rights it implies, the ends of the law do not include any fixed and unchanging substantive rights or state of affairs as they would in classical natural law and natural rights theory. Thus, the substantive rights and regulations must be continually modified to facilitate the ideal social perfection that is relevant to the current societal circumstances.

#### *B. A Culturally Sensitive Conception of the Rule of Law*

The telos of beauty in process natural law supports a more flexible and culturally sensitive conception of the rule of law. As a theory of natural law, process natural law requires a substantive conception of rule of law similar to the usual Western conception because it also includes formal legality, individual rights, and democracy. Although form and substance are never completely separate, formal legality would require

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207. WHITEHEAD, *ADVENTURES OF IDEAS*, *supra* note 19, at 269, 290-91.

208. *Id.* at 291.

209. *Id.* at 292.

210. *Id.* at 269.

the protection of the universal formative rights noted above in all constitutions.<sup>211</sup> In addition, Gamwell's compound conception of justice entails a set of democratic principles including the tenet that "political association should be constituted as a full and free discourse, providing equal public liberties and, therefore, equal private liberties."<sup>212</sup>

With respect to individual rights, Gamwell argues that identifying which substantive rights to protect is always a matter of debate and should be accomplished through the legislature.<sup>213</sup> Recall that realizing the universal telos of maximizing beauty and the implied substantive right to general emancipation is always relative to particular circumstances. The content and interpretation of the individual rights protected in different countries depend on the perfection best suited for their historical and cultural circumstances. A process conception of the rule of law thus allows for some differences with respect to the interpretation and instantiation of individual rights in different countries like the U.S. and China.

For example, Doug Sturm offers an amendment to Gamwell's understanding of human rights by arguing for the inclusion of the "right to subsistence" in the Constitution.<sup>214</sup> Sturm argues that "the right to subsistence" (which includes economic and social rights) is inextricably interdependent with the "right to participation."<sup>215</sup> Sturm clarifies that "[w]ithout a guarantee of effective participation in the public forum, one's economic condition is likely to suffer," and "[w]ithout the economic wherewithal to provide for at least minimal sustenance, basic education, and some degree of social mobility, one's participation in public life is likely to be minimalized."<sup>216</sup> In other words, process natural law may also support an alternative conception of the rule of law that would be classified in the category of "thickest" substantive

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211. See *supra* text accompanying notes 192-97.

212. GAMWELL, *DEMOCRACY ON PURPOSE*, *supra* note 188, at 311.

213. *Id.* at 215-16.

214. Sturm notes that "[i]n important respects, Gamwell's understanding of the role and importance of human rights and mine . . . converge," but Sturm offers an amendment proposing that "the right to subsistence" (which includes economic and social rights) should be added to the "right to participation" on the list of formative rights. Sturm, *Taking Human Rights Seriously*, *supra* note 204, at 251, 254. Gamwell responds by noting that he concurs in Sturm's claim that the "right of subsistence" is important, but maintains that "substantive rights are *too important* to be constitutionally stipulated." Franklin I. Gamwell, *Response to Douglas Sturm*, 33 *PROCESS STUDIES* 258, 261 (2004). Gamwell further clarifies that putting substantive rights in the constitution would be "inconsistent with the sovereignty of the people" because "each citizen must be sovereign over her or his assessment of every politically relevant claim, in the sense that neither the constitution nor the state properly stipulates that assessment." *Id.* at 260-61.

215. *Id.* at 253-54.

216. *Id.* at 252.

conceptions because it adds social welfare provisions to individual rights.

The debate between Gamwell and Sturm highlights that process natural law may support more than one conception of the rule of law. Rather than imperialistically imposing a Western conception of the rule of law (formal legality + individual rights + democracy), process natural law supports a conception of the rule of law that takes into account the important cultural differences among countries like the U.S. and China. With China's "socialist democracy" and "socialist legal system,"<sup>217</sup> one possible development would be to emphasize the social welfare requirements mentioned by Sturm in addition to, or more strongly than, Western notions of individual rights. For example, China may impose substantial taxes on Chinese business to help alleviate the growing disparity of economic development between urban and rural parts of China. China may further utilize forms of wealth redistribution to protect the right of subsistence that may be contrary to Western notions of property rights. Moreover, China's socialist democracy may help China circumvent interpreting "the right as well as the duty to work"<sup>218</sup> under Article 42 of the Chinese Constitution as a vehicle for prohibiting health and safety regulations protecting workers like those found unconstitutional during the *Lochner Era* in the United States.<sup>219</sup> In other words, the socialist influence on China may allow China to pursue an ideal social perfection that avoids the harsher aspects of the industrial revolution suffered in the West.

On the other hand, this culturally sensitive notion of the rule of law should not be interpreted as a form of cultural relativism. For example, some women may be concerned that the renewed emphasis on the Confucian tradition will mean that the advances for women will in China succumb to the reinstatement of Confucius's (551-479 BC) feudal notion of the place of women in society. In addressing current concerns that

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217. XIAN FA, *supra* note 21, at pmb1.

218. *Id.* at art. 42.

219. In *Lochner v. New York*, 198 U.S. 45 (1905), the United States Supreme Court held that New York legislation limiting bakers' work to sixty hours a week and ten hours per day was as an unconstitutional restriction of liberty of contract protected by the Due Process Clause of the Fourteenth Amendment. Constitutional law scholar Erwin Chemerinsky notes that, during the *Lochner Era*, "[i]t is estimated that almost 200 state laws were declared unconstitutional as violating the due process clause of the Fourteenth Amendment" and additional federal laws were held unconstitutional under the Due Process Clause of the Fifth Amendment. ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 616 (3d ed. 2006). By most accounts, the *Lochner Era* ended when the United States Supreme Court gave up on vigorously protecting the liberty of contract (i.e., substantive economic due process) in cases such as *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937), where it upheld a minimum wage law for women as a reasonable restraint on liberty. See PAUL BREST ET AL., *PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS* 510-13 (Aspen, 5th ed. 2006).

“Confucianism spells authority and discipline, limiting individual freedom, and strengthening the state,” Wm. Theodore de Bary notes the feminist critique of Confucian thought in the early 1900s by Ho Shen.<sup>220</sup> Ho Shen maintained that “Confucian learning is marked by its devotion to honoring men and denigrating women” so that “women have duties but no rights.”<sup>221</sup> She further argues that Confucianism venerated “men like gods while condemning women to the hells” and that “Confucianism marks the beginning of justifications for polygamy [for men] and chastity [for women].”<sup>222</sup>

While I am not suggesting this is the only way to interpret Confucian thought on the role of women, this feminist critique raises valid concerns that tailoring the rule of law to Confucian cultural traditions may diminish the equality of women in China. The culturally sensitive aspect of a process conception of law actually would not support such retrogression in women’s equality. As emphasized by Sturm, Gamwell’s formative rights are “unqualified rights, since they compose the necessary, even if not sufficient, foundation of a democratic political process.”<sup>223</sup> In addition, Gamwell summarizes his compound theory of justice as general emancipation with a principle: “*Maximize the general conditions of emancipation to which there is equal access.*”<sup>224</sup> Gamwell makes the protection of equality clear in each of the three democratic principles that specify “equal public liberties,” “equal private liberties,” and “maximizing equality of public access.”<sup>225</sup> Equality is thus beyond cultural negotiation and would not yield to any anti-female Confucian notions.

Also, this feminist critique of Confucian thought could just as well be made against key Western thinkers, like Aristotle, who wrongly thought women had a diminished capacity.<sup>226</sup> Confucius’s blindness regarding women does not mean that other aspects of his thought are not

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220. Wm. Theodore de Bary, *Introduction*, in CONFUCIANISM AND HUMAN RIGHTS, *supra* note 82, at 1.

221. *Id.* at 3 (quoting HO CHEN, *Nuzi Fuchou lun*, in TIANYI BAO, no.3 (10), 7-13 (Peter Zarrow trans.)).

222. *Id.* at 2 (quoting CHEN, TIANYI BAO, *supra* note 221, at 7-13).

223. Sturm, *Taking Human Rights Seriously*, *supra* note 204, at 253.

224. GAMWELL, *DEMOCRACY ON PURPOSE*, *supra* note 188, at 294 (emphasis added).

225. *Id.* at 311. *See also* text accompanying note 201.

226. Jean Bethke Elshtain notes that Aristotle excluded certain categories of persons (*e.g.*, women, slaves, mechanics, and laborers) from politics because he did not think they had the rational capacity required for ruling or citizenship. JEAN BETHKE ELSHTAIN, *PUBLIC MAN, PRIVATE WOMAN: WOMEN IN SOCIAL AND POLITICAL THOUGHT* 47 (2d ed. 1993). For example, “Aristotle’s women were *idiots* in the Greek sense of the word, persons who either could not or did not participate in the *polis* or the ‘good’ of public life, individuals without a public voice, condemned to silence as their appointed sphere and condition.” *Id.*

continuing to influence Chinese society in a positive way and should be taken into account when implementing the rule of law. Jean Bethke Elshtain similarly argues that while rejecting Aristotle's erroneous view of the diminished capacity of women and other categories of persons, she argues that we can still adopt Aristotle's notion of politics as a form of action and his claims about the relationship between the individual good and the good of the state.<sup>227</sup> Moreover, while process natural law supports some flexibility and cultural sensitivity in implementing the rule of law, certain notions like equality between men and women are not subject to cultural negotiation. Thus, process natural law mitigates some of the cultural bias in exporting the rule of law abroad and allows for the law to reflect some "local knowledge," but at the same time, it considers other principles like equality to be trans-cultural in nature.

*C. Legal Indeterminacy and Closing the Ontological Gap*

Process natural law also responds to the two major threats to the rule of law at home—legal indeterminacy and the ontological gap between legal theory and practice. Contrary to contemporary legal theories, legal indeterminacy does not present an issue of illegitimacy for process natural law theory or threaten the rule of law. Rather than reducing law to an act of will (e.g., legal positivism) or an ideological gesture (e.g., critical legal studies), process natural law theory claims that the law has a rational basis. In hard cases, even though the expressed will of the majority (e.g., statutes) and the decisions of their judicial representatives (e.g., case law) are indeterminate, judges still have resources to rationally legitimate their decisions. Judges can rely on the telos of beauty and the formative and substantive rights following from it to determine how hard cases should be decided. Given that the validity of the law is already determined by the telos of beauty and these rights, judges are warranted in relying on them directly whether the indeterminacy is intentional (e.g., reasonable person standard) or unintentional (e.g., conflicting laws). Furthermore, process natural law does not mean that inflexible, antiquated natural laws will be imposed on contemporary society. Rather, judges must determine what maximizes beauty in accordance with the circumstance of the case and the social perfection possible within that society. As a result, under a process theory of natural law, legal indeterminacy does not result in illegitimacy but presents an occasion for judges to rely directly on the rational foundation of the law (i.e., the telos of beauty and the formative and substantive rights it implies) to resolve disputes.

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227. *Id.* at 53.



In addition, no ontological gap exists between process natural law theory and the practice of law. Whitehead's metaphysics unifies scientific ontology and religious ontology. There is no distinction between the religious ontology presupposed by the practice of law and the "scientific" ontology presupposed by legal theory. Whitehead's theistic teleology makes sense of the religious presuppositions of legal practice regarding "the reality of 'the law'" and "a sort of working partnership between a divine author and human legislators."<sup>228</sup> Similarly, Whitehead's metaphysics refutes the "scientific" ontology of contemporary legal theory, which presupposes that the end result of accepting a scientific ontology based on "atomic physics and Darwinian evolution," "is that the religious worldview is inadmissible for purposes of serious thought."<sup>229</sup> Consequently, process natural law theory solves the two most pressing issues of contemporary legal theory by providing for the legitimation of law despite its indeterminacy and by closing the ontological gap between legal theory and legal practice.

*D. The Empirical Side of Process Natural Law*

Given the abstract nature of the telos of beauty and the human rights implied by it, it is far from clear how a process theory of natural law provides a legitimation of judges' decisions in hard cases. These abstract principles clearly rule out some options and provide general guidelines for practical deliberation. However, the principles of process natural law do not provide a deductive mechanism for resolving hard cases and are indeterminate when it comes to resolving particular disputes. Judges must still choose from the permissible options.

Unlike classical natural law theory, process natural law involves more than top-down reasoning from the abstract principles of process natural law. Process natural law also provides justification for judges reasoning from the bottom-up. Judges are permitted to rely on their intuitions about how these abstract rational principles ought to resolve hard cases. Judicial intuitions constitute a direct application of principles of process natural law to the facts and positive law relevant to a particular case. This conclusion seems to be supported by Whitehead's similar conclusion with respect to practical reasoning in ethics. He claims that "ethical intuitions are a direct application of metaphysical doctrine for the determination of practice."<sup>230</sup> Judicial intuitions thus complement the purely rational approach to judicial decision making based on the principles of process natural law.

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228. SMITH, *supra* note 10, at 155.

229. *Id.* at 34.

230. WHITEHEAD, *ADVENTURES OF IDEAS*, *supra* note 19, at 18.

This bottom-up approach is the empirical side of process thought as it relates to practical reasoning. For Whitehead, experience is primary while rational theoretical constructions are an abstraction from the fullness of experience. He claims that the apprehension of a vague and inarticulate causation is primary while consciousness is secondary.<sup>231</sup> In other words, what we are conscious of is a reduction of that vague sense of causation. The principles of process natural law are an abstraction from more inclusive experience of the telos of beauty and its relation to the facts and positive laws relevant to particular cases. Consequently, a process theory of natural law should take into account the inclusiveness and primacy of experience as well as the principles of process natural law.

Whitehead, however, does not provide much insight on how the empirical side of process philosophy relates to practical reasoning. To supplement Whitehead's account, I will draw on William James's pragmatic empiricism. Although Whitehead rejects James's denigration of rational metaphysical speculation, Whitehead agrees with James about the primacy and inclusiveness of experience. Whitehead credits James with "the inauguration of a new stage of philosophy" because of his rejection of Cartesian dualism.<sup>232</sup> Whitehead further cites James's empiricism approvingly,<sup>233</sup> and he credits James with properly protesting "against the dismissal of experience in the interest of system."<sup>234</sup>

James's pragmatic empiricism claims that our experience includes the conjunctive and disjunctive relations between things as well as the things themselves.<sup>235</sup> The "parts of experience" are held together "by relations that are themselves part of experience."<sup>236</sup> In other words, no "trans-empirical connective support" holds the universe together.<sup>237</sup> James refers to this inclusive view of experience as the vast wholeness or fullness of experience.<sup>238</sup> Pragmatic empiricism takes both logic (or

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231. WHITEHEAD, *PROCESS AND REALITY*, *supra* note 100, at 173, 178.

232. WHITEHEAD, *SCIENCE AND THE MODERN WORLD*, *supra* note 102, at 143.

233. WHITEHEAD, *PROCESS AND REALITY*, *supra* note 100, at 68.

234. ALFRED NORTH WHITEHEAD, *MODES OF THOUGHT* 2, 3 (Free Press 1968) (1938).

235. William James, *A World of Pure Experience*, in *ESSAYS IN RADICAL EMPIRICISM* 39, 44-52 (Ralph Barton Perry, ed., U. of Neb. Press 1996) (1912) [hereinafter James, *A World of Pure Experience*]; William James, *The Meaning of Truth*, in *PRAGMATISM AND OTHER ESSAYS* 138, 138 (1963) [hereinafter James, *Meaning of Truth*]; William James, *Pragmatism's Conception of Truth*, in *ESSAYS IN PRAGMATISM* 159, 165-66 (Alburey Castell ed., 1948) [hereinafter James, *Pragmatism's Conception of Truth*]. For a more extended treatment of James's pragmatic empiricism and its implications for legal reasoning, see Mark C. Modak-Truran, *A Pragmatic Justification of the Judicial Hunch*, 35 U. RICH. L. REV. 55, 71-83 (2001).

236. James, *Meaning of Truth*, *supra* note 235, at 138.

237. *Id.*

238. As Whitehead recognized, James claimed that: "Your acquaintance with reality

theory) and the external senses as valid experiences. Rationalism limits itself to logic (theory), and empiricism limits itself to the external senses. James's pragmatic empiricism, however, includes all experience, physical and mental, which is one of the reasons James refers to it as "radical empiricism."<sup>239</sup>

With respect to practical reasoning, James identifies two factors that discipline or justify practical decisions based on the fullness of experience. First, James says that we will recognize answers to practical problems as we do everything else, "by certain subjective marks." These subject marks include "a strong feeling of ease, peace, rest" and a transition from a puzzled or perplexed state to a state of rational comprehension.<sup>240</sup> James calls these subjective marks the "Sentiment of Rationality." He argues that we experience the justification of the decision and feel a lack of need to justify or explain it.<sup>241</sup>

To fully understand James's radical proposal to practical decision making, the metaphysics of radical empiricism needs further exploration. First, it is essential to understand that James's metaphysics, like Whitehead's, radically rejects the subject/object split. Hillary Putnam has noted that since Descartes, most philosophers have argued that "in perception we receive 'impressions' that are immaterial, totally

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grows literally by buds or drops of perception. Intellectually and on reflection you can divide these into components, but as immediately given, they come totally or not at all." WHITEHEAD, *PROCESS AND REALITY*, *supra* note 100, at 68 (quoting WILLIAM JAMES, *SOME PROBLEMS OF PHILOSOPHY*, Ch. X (U. of Neb. Press 1996).

239. James, *Meaning of Truth*, *supra* note 235, at 138; James, *A World of Pure Experience*, *supra* note 235, at 41-44.

240. WILLIAM JAMES, *The Sentiment of Rationality*, in *ESSAYS IN PRAGMATISM* 3 (Alburey Castell ed., 1948) [hereinafter James, *Sentiment of Rationality*]. Aristotle also claimed that judging was not merely a deductive process of going from universals to particulars, but that it involved a kind of perception (called the "eye of the soul") whereby the practically wise judge could relate the universals to the particulars. ARISTOTLE, *Nicomachean Ethics* 1144a:29-30 (William D. Ross trans., rev. by J.L. Ackrill & J.O. Urmson), in 2 *THE COMPLETE WORKS OF ARISTOTLE* (Jonathan Barnes ed., rev. Oxford trans., 1984). See also MARTHA C. NUSSBAUM, *POETIC JUSTICE: THE LITERARY IMAGINATION AND PUBLIC LIFE* 86 (1995); Mark Modak-Truran, *Corrective Justice and the Revival of Judicial Virtue*, 12 *YALE J.L. & HUMAN.* 249 (2000) (positing Pericles as the ideal Aristotelian judge and arguing that corrective justice is a moral virtue of the judge (rather than a formal, substantive, or political conception of freedom or equality) that cannot be fully understood without specifying its relationship to the intellectual virtue of practical wisdom and the telos of the good life).

Similarly, Joseph Hutcheson proposed the Hunch Theory of judicial decisionmaking to support judges relying on their hunches or intuitions in deciding cases. See Joseph C. Hutcheson, Jr., *The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision*, 14 *CORNELL L.Q.* 274 (1929); see also Modak-Truran, *A Pragmatic Justification of the Judicial Hunch*, *supra* note 235, at 58 (arguing that William James's pragmatism provides a compelling epistemological justification for the Hutcheson's Hunch Theory of judicial decision making and saves the hunch from arbitrariness).

241. *Id.* at 4.

different—separated by a metaphysical gulf—in fact from all the material objects we normally claim to perceive; and from the character of our internal mental impressions we infer how things are in the external physical world.”<sup>242</sup> In other words, we first have consciousness of an impression of physical objects and then somehow derive or postulate the physical world we are “experiencing” from that impression.

In contrast, James and Whitehead maintain that we actually experience the objects themselves as related to us in some way. Perception is direct or unmediated. When I perceive your body, I do not perceive an impression of your body that is mysteriously related to your actual body. I perceive your actual body. Certainly, my conception of your body is an abstraction from that perception, but James maintains that I have an experience of your body prior to this conception which is an experience of your actual body. As for Whitehead, experience is prior to and more inclusive than our consciousness of it. Furthermore, Hillary Putnam has characterized James’s thought as a form of “direct realism” or natural realism. Putnam further clarifies that James is claiming that:

the properties and relations we experience are the stuff of the universe; there is no non-experiential “substratum” . . . and these experienced or experienceable properties and relations (James is unfortunately a little vague at this crucial point) make up both minds and material objects. Moreover, minds and material objects, in a sense “overlap.”<sup>243</sup>

In other words, James argues that we have access to a common world via our experience. The properties and relations that seem to make up material objects are also part of our minds. We are related to material objects and a common world not separated from them by a mysterious and unbridgeable metaphysical gulf.

James’s rejection of the subject/object distinction means that even though he is defining practical deliberation subjectively, he is not claiming that it is merely subjective. Since our minds “overlap” with a common world, subjectivity is not isolated from the world. It is primarily related to it and has a direct experience of it. In the wholeness of experience, the mind (subject) and the world (object) are one. Further, James rejects the idea that there is an objective truth, like economic analysis, that can resolve practical problems.<sup>244</sup> Our truths are subjectively defined, and he refers to pragmatism as a subjective method of determining the truth.<sup>245</sup>

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242. Hillary Putnam, *Pragmatism and Realism*, 18 CARDOZO L. REV. 153, 160 (1996).

243. *Id.* at 165.

244. James, *Pragmatism’s Conception of Truth*, *supra* note 235, at 161-64.

245. *Id.*

Applying James's radical empiricism to judging demands that the process of judging be looked at from the inside. James recognizes that "[a]bstract rules can indeed help," but he claims that "they help the less in proportion as our intuitions are more piercing."<sup>246</sup> Hence, judging involves the judge taking in all the relevant legal materials, factual information, and other factors and trying to determine the outcome. Once the judge has come to a resolution of the case, the judge should have a sentiment of rationality that her decision makes sense. This subjective sign is not an "objective justification" of the judge's conclusion.<sup>247</sup> However, it is a confirmation that the judge's decision resonates with what the judge believes is true about the law, the facts, and how they should relate. Whitehead similarly links judicial decision making to aesthetic enjoyment and pragmatism by stating that:

Habits of thought and sociological habits survive because in some broad sense they promote aesthetic enjoyment. There is an ultimate satisfaction to be derived from them. Thus when the pragmatist asks whether 'it works,' he is asking whether it issues in aesthetic satisfaction. The judge of the Supreme Court is giving his decision on the basis of the aesthetic satisfaction of the harmonization of the American Constitution with the activities of modern America.<sup>248</sup>

If a judge does not have a sentiment of rationality or an aesthetic satisfaction, this should be a sign that the judge's decision is ill-formed. In other words, the judge must do the best she can to resolve all the loose ends in the case and come to a decision that she feels confident is right. The judge knows that this has occurred when she feels a sentiment of rationality about her decision.

The process does not end once the judge has achieved the sentiment of rationality—this is not the end of the story. James argues that we must use the pragmatic method to test these decisions in accordance with their consequences. The second disciplining factor is thus the *pragmatic testing* of judges' decisions. James has confidence that we all experience

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246. William James, *The Moral Philosopher and the Moral Life*, in *ESSAYS IN PRAGMATISM* 65, 83 (Alburey Castell ed., 1948).

247. Whitehead similarly recognizes that "intuitive judgment is concerned with togetherness in experience." WHITEHEAD, *PROCESS AND REALITY*, *supra* note 100, at 190. "A judgment is a feeling in the 'process' of the judging subject, and it is correct or incorrect respecting *that* subject." *Id.* at 191. Thus, correctness and incorrectness concerns the coherence of a proposition with an objective nexus of actual entities. *Id.* at 190-91.

248. ALFRED NORTH WHITEHEAD, *ESSAYS IN SCIENCE AND PHILOSOPHY* 98 (1947) (emphasis added). In analyzing this passage, Randall Morris helpfully emphasizes the "striking connection Whitehead makes among aesthetics, pragmatism, and legal reasoning" here and in other references to practical reasoning. Randall C. Morris, *Whitehead and Legal Realism*, 35 *PROCESS STUDIES* 95, 95 (2006).

a common world and have access to a common truth, but he is not naive about the possibility of disagreement about our interpretations of that world. He recognizes that a plurality of decisions may produce the sentiment of rationality for different decision makers. Hence, James argues that we must test these judgments by their fruits; “[t]he results of the action corroborate or refute the idea from which it flowed.”<sup>249</sup> The verification of a theory or claim means “that if you proceed to act upon your theory it will be reversed by nothing that later turns up as your action’s fruit; it will harmonize so well with the entire drift of experience that the latter will, as it were, adopt it, or at most give it an ampler interpretation, without obliging you in any way to change the essence of its formulation.”<sup>250</sup> By contrast, if your decision is mistaken, James notes that:

the course of experience will throw ever new impediments in the way of my belief, and become more and more difficult to express in its language. Epicycle upon epicycle of subsidiary hypotheses will have to be invoked to give to the discrepant terms a temporary appearance of squaring with each other; but at last even this resource will fail.<sup>251</sup>

In other words, judges must follow the consequences of their decisions. They must test whether their subjective feeling of rightness has consequences that verify it.

Accordingly, judges must pay attention to the effects of their decisions. Did the parties live up to the terms of the court’s resolution of the case? Did similarly situated parties change their behavior because of the decision? In other words, the court should determine whether the opinion furnished good or bad incentives for future actors. For example, if future cases demonstrate that justifying the legal decision requires numerous “subsidiary hypothesis” that eventually undermine the original decision, James would argue that the decision has been determined to be false or misguided and ought to be corrected. Consequently, judicial intuitions should be subjected to the pragmatic method of testing. Intuitions must be verified by their consequences for the parties, future claimants, and future precedent.

In addition, process natural law requires that judges be able to reconcile their pragmatically tested decisions with the principles of process natural law. Unlike James, Whitehead would be confident that judges could provide a rational argument to support their decisions based on these principles. This would provide an additional check on parochial judicial bias masquerading as legitimate judicial intuitions.

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249. James, *Sentiment of Rationality*, *supra* note 240, at 33.

250. *Id.*

251. *Id.*

## VI. Conclusion

Once the top-down principles of process natural law are complemented by the bottom-up judicial practice of arriving at intuitive judgments, the unique blend of rational and empirical methods in Whitehead's Speculative Philosophy is further extended to judicial decision making and legal reasoning. Searching for the sentiment of rationality takes the primacy and inclusiveness of experience into account. Pragmatic testing checks those intuitions, and the principles of process natural law provide an overarching rational structure for the law and further discipline judgments in particular cases. Thus, process natural law provides a balanced and comprehensive method of legal reasoning that shows great promise for moving past the current theoretical obstacles in legal theory posed by legal indeterminacy and the ontological gap between legal theory and the practice of law.

Process philosophy and its theory of natural law also mediate many of the cultural differences between the East and the West that confront the leading Western conception of the rule of law. The telos of beauty (unity-in-diversity) entails maximizing both an Eastern aesthetic sense of order (emergent harmony or spontaneous order) and a Western rational sense of order (complexity arising from diverse individual orderings). Social order arises from diverse and harmonious individual and collective human choices that partially construct the internal relatedness of all things in the universe. This constitutes an ongoing process of "imaging the real" that will never reach a final or fixed state. The "ideal civilization" will constantly change as society and the larger universe continue changing.

Finally, process natural law provides for a flexible and culturally sensitive conception of the rule of law that avoids imperialistically imposing a Western conception of the rule of law on all nations. This conception of the rule of law allows for important cultural differences to be reflected in the interpretation of democracy and formal legality and in the instantiation of individual rights in the law. The ideal rule of law may look quite different in countries as different as the U.S. and China. Thus, the process theory of natural law provides for the creative advance of the rule of law toward the ideal civilization in a constantly changing, pluralistic, and multicultural world.