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## RADBRUCH'S FORMULA AND CONCEPTUAL ANALYSIS

BRIAN H. BIX\*

Gustav Radbruch (1878-1949) was a prominent German legal theorist, who, in the aftermath of World War II, famously argued that a sufficiently unjust rule loses its status as a valid legal norm. This article will consider whether Radbruch's post-war views, as encapsulated in his now-famous "Formula," are best understood as a conceptual claim about law, or rather as ("merely") a prescription for judicial decision-making.

Part I outlines Radbruch's Formula, while also giving some context regarding Radbruch's general approach to legal theory, and how it changed over time. Part II considers whether the Formula is more charitably understood as a prescriptive theory of judicial decision-making rather than as a conceptual claim about law.

### I. RADBRUCH'S FORMULA(S)

Gustav Radbruch's most influential publications included *Grundzüge der Rechtsphilosophie* [Main Features of Legal Philosophy] (1914) and *Rechtsphilosophie* [Legal Philosophy] (1932).<sup>1</sup> Those works "reflect[] the methodological dualism of the Heidelberg neo-Kantians, and contain[] elements of relativism and legal positivism."<sup>2</sup>

The Second World War and the evil done during that period in his native Germany, often under the rubric of law, deeply affected Radbruch. In works written right after the war, Radbruch offered ideas about the

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1. Both are currently available (in German) in Gustav Radbruch, *Gesamtausgabe Band 2: Rechtsphilosophie II*, ed. Arthur Kaufmann (Heidelberg: C.F. Müller, 1993), the second volume of Radbruch's collected works; *Rechtsphilosophie* is also available in an English translation. "Legal Philosophy," in *The Legal Philosophies of Lask, Radbruch, and Dabin*, ed. E. W. Patterson, trans. H. Wilk, (Cambridge, Mass.: Harvard University Press, 1950), 47-224 (orig. German pub. 1932).

2. Stanley L. Paulson, "Radbruch on Unjust Laws: Competing Earlier and Later Views?," *Oxford Journal of Legal Studies* 15 (1995): 489.

connection between the moral merits of a purported legal rule and its legal validity, that would become highly influential.<sup>3</sup> Radbruch wrote:

Positivism is, moreover, in and of itself wholly incapable of establishing the validity of statutes. It claims to have proved the validity of a statute simply by showing that the statute had sufficient power behind it to prevail. But while power may indeed serve as a basis for the “must” of compulsion, it never serves as a basis for the “ought” of obligation or for legal validity.<sup>4</sup>

He then went on to offer two different elaborations of his Formula:

- (1) The positive law, secured by legislation and power, takes precedence even when its content is unjust and fails to benefit the people, unless the conflict between statute and justice reaches such an intolerable degree that the statute, as “flawed law,” must yield to justice.<sup>5</sup>
- (2) Where there is not even an attempt at justice, where equality, the core of justice, is deliberately betrayed in the issuance of positive law, then the statute is not merely “flawed law,” it lacks completely the very nature of law. For law, including positive law, cannot be otherwise defined than as a system and an institution whose very meaning is to serve justice.<sup>6</sup>

In Radbruch’s article, the second formula is offered as a clear application of the first formula, but subsequent commentators have, reasonably, treated the two characterizations as separate formulas. And judges have tended to use the first formulation, given the likely problems in trying to apply the second

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3. Radbruch, “Statutory Lawlessness and Supra-Statutory Law” (orig. pub. 1946) and “Five Minutes of Legal Philosophy” (orig. pub. 1945), both trans. Bonnie Litschewski Paulson and Stanley L. Paulson, *Oxford Journal of Legal Studies* 26 (2006): 1-11, 13-15. Most commentators consider these post-War writings to be radical changes of view, in relation to Radbruch’s pre-war writings (e.g., H.L.A. Hart, “Positivism and the Separation of Law and Morality,” *Harvard Law Review* 71 [1958]: 616), but this claim of discontinuity has been contested. (e.g., Stanley L. Paulson, “Radbruch on Unjust Laws,” 489-500; “On the Background and Significance of Gustav Radbruch’s Post-War Papers,” *Oxford Journal of Legal Studies* 26 [2006]: 17-40). Resolving this dispute about continuity is not important for present purposes. In focusing on Radbruch’s Formula, and associated post-War writings, I do not mean to slight the significance of his extensive earlier writings, on which, see, e.g., Dietmar van der Pfordten, “Radbruch as an Affirmative Holist: What Ought to be Preserved in His Philosophy,” *Ratio Juris* 21 (2008): 287-403.

4. “Statutory Lawlessness and Supra-Statutory Law,” 6.

5. *Ibid.*, 7. Radbruch’s Formula is thus a version of what Murphy calls “strong natural law theory.” Mark C. Murphy, *Natural Law in Jurisprudence and Politics* (Cambridge: Cambridge University Press, 2006), 10.

6. “Statutory Lawlessness and Supra-Statutory Law,” 7.

formula, with its focus on legislators' subjective intentions, in actual cases.<sup>7</sup> And this article will follow the usual practice of focusing primarily on the first formulation of the Formula.

In understanding the significance of the Radbruch Formula(s), and their place both within European jurisprudential thought and within Radbruch's own work, it helps to compare the Formula(s) with assertions made in Radbruch's pre-war writings. In his early writings, Radbruch argued that there were three elements in "the idea of law": justice, "expediency or suitability for a purpose," and legal certainty.<sup>8</sup> In those writings, Radbruch seemed to assert that it was the third element, legal certainty, which was the most important, at least within the idea of law: "It is more important *that* the strife of legal views be ended than that it be determined *justly* and *expediently*. The existence of a legal order is more important than its justice and expediency . . . ."<sup>9</sup>

This view then leads Radbruch, in that early work, to say the following about the role and duties of judges in relation to unjust laws:

[H]owever unjust the law in its content may be, by its very existence . . . it fulfills one purpose, viz., that of legal certainty. Hence the judge, while subservient to the law without regard to its justice, nevertheless does not subserve mere accidental purposes of arbitrariness. Even when he ceases to be the servant of justice because that is the will of the law, he still remains the servant of legal certainty. We despise the parson who preaches in a sense contrary to his conviction, but we respect the judge who does not permit himself to be diverted from his loyalty to the law by his conflicting sense of the right.<sup>10</sup>

There seems to be a sharp contrast between Radbruch's recommendation in this earlier work, and what he will prescribe in his later Formula(s). At the same time, one can certainly see a kind of continuity: Radbruch arguably is still seeing the same factors in the nature of law; he is simply weighing them slightly differently, arguing that certainty, even when combined with

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7. See, e.g., Frank Haldemann, "Gustav Radbruch v. Hans Kelsen: A Debate on Nazi Law," *Ratio Juris* 18 (2005): 166.

8. Radbruch, "Legal Philosophy," 107-8.

9. *Ibid.*, 108 (emphasis in the original). The same year, by coincidence, United States Supreme Court Justice Louis Brandeis made a similar observation in relation to precedent: "Stare decisis is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right." *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting). Of course, the Brandeis quotation, with its careful limitation of "in most matters," leaves open the argument that the treatment of truly unjust laws should be different.

10. Radbruch, "Legal Philosophy," 119.

“expediency and suitability,” is not always predominant, but must give way in those cases where the claims of (in)justice are strong enough.

In his pre-war writings, Radbruch spoke of the tension between “the demands of legal certainty,” on one hand, and “the demands of justice and expediency,” on the other.<sup>11</sup> While he adds that “[t]he three aspects of the idea of law are of equal value, and in case of conflict there is no decision between them but by the individual conscience,” he also claims that “[i]t is the professional duty of the judge to validate the law’s claim to validity, to sacrifice his own sense of the right to the authoritative command of the law, to ask only what is legal and not if it is also just.”<sup>12</sup> As will be discussed at greater length later, this strong—perhaps too-strong—equation of the analysis of law and prescriptions for judicial behavior is characteristic of both Radbruch’s earlier work and his later writings.

Radbruch’s Formula(s) would become a focal point in the famous 1958 debate between H. L. A. Hart and Lon Fuller.<sup>13</sup> Part of the dispute between Hart and Fuller regarding Radbruch and his Formula(s), was about the proper response to evil laws and evil regimes. Hart reads Radbruch as encouraging the courts to treat the evil laws of the Nazi regime as “not law,” and therefore no shield for a woman who tried to have her husband killed under the rubric of one such law.<sup>14</sup> Hart, with some hesitation, would support punishing the woman, but would prefer that it be done under frankly “retrospective criminal legislation.”<sup>15</sup> Hart argued for the independent virtue of responding to a moral dilemma with “candour” and “plain speech.”<sup>16</sup>

By contrast, Fuller viewed Radbruch’s position both as a pragmatic compromise in responding to a change from an evil regime,<sup>17</sup> and as a deep insight into the moral foundations of the nature of law. In particular, Fuller

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11. *Ibid.*, 118.

12. *Ibid.*, 118-9.

13. Hart, “Positivism and the Separation of Law and Morality,” 615-21; and Lon L. Fuller, “Positivism and Fidelity to Law—A Reply to Professor Hart,” *Harvard Law Review* 71 (1958): 648-57.

14. Apparently, both Hart and Fuller misunderstood the holding of a post-war West German case they were discussing, as it had been misreported in an earlier issue of the *Harvard Law Review*. See H.O. Pappé, “On the Validity of Judicial Decisions in the Nazi Era,” *Modern Law Review* 23 (1960): 261-3.

15. Hart, “Positivism and the Separation of Law and Morality,” 620.

16. *Ibid.*, 620, 621.

17. “Intolerable dislocations would have resulted from any . . . wholesale outlawing of all that [had] occurred [under the Nazis]. On the other hand, it was equally impossible to carry forward into the new government the effects of every Nazi perversity that had been committed in the name of law . . . .” (Fuller, “Positivism and Fidelity to Law,” 648).

focused on the procedural injustices (the focus of his own “procedural natural law theory”<sup>18</sup>), like secret and retroactive laws, which, he argued, were contrary to “the very nature of law itself.”<sup>19</sup>

As for the German court cases, and whether the courts made a mistake by treating the unjust Nazi laws as “not law” (and Hart’s argument that courts and theorists should separate whether some norm is law from whether it should be applied), Fuller wrote:

So far as the courts are concerned, matters certainly would not have been helped if, instead of saying, “This is not law,” they had said, “This is law but it is so evil we will refuse to apply it.” Surely moral confusion reached its height when a court refuses to apply something it admits to be law.<sup>20</sup>

The next Part of the article will revisit this aspect of the Hart-Fuller debate, and question whether it is the “height” of “moral confusion” to speak of a judge refusing to apply “something [the judge] admits to be law.”

Both Radbruch and later proponents of his Formula(s) have focused on particular court decisions. In the article introducing the Formula(s), Radbruch made reference to a number of judicial decisions:<sup>21</sup>

- (1) A decision by a Wiesbaden Municipal Court declaring to be null and void a statute declaring the property of the Jews to be forfeited to the government.<sup>22</sup>
- (2) The conviction by a Thuringian Criminal Court of a defendant for being an accomplice to murder, where the crime was based on his having informed on a colleague who had written comments against a prominent Nazi official on a bathroom wall; that anti-Nazi graffiti subsequently had been part of the grounds for convicting and executing that colleague.<sup>23</sup>
- (3) The conviction and condemnation to death of two persons who had worked as executioner’s assistants under the Nazi regime.<sup>24</sup>

In a later article, Robert Alexy gives three more recent examples:<sup>25</sup>

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18. Fuller, “Positivism and Fidelity to Law,” and *The Morality of Law*, rev. ed. (New Haven, CT: Yale University Press, 1969).

19. Fuller, “Positivism and Fidelity to Law,” 650.

20. *Ibid.*, 655.

21. Radbruch also noted the intention of the Chief Public Prosecutor of Saxony to seek criminal prosecutions of those responsible for “inhuman judicial decisions,” even when those decisions were grounded on Nazi statutes, and the decision of another Chief Prosecutor not to prosecute a deserter from the Nazi army who killed an army official in the process of resisting arrest. Radbruch, “Statutory Lawlessness and Supra-Statutory Law,” 5-6.

22. *Ibid.*, 1-2.

23. *Ibid.*, 2-4.

24. *Ibid.*, 5.

- (4) The German Federal Constitutional Court's refusal to apply a Nazi law holding that Jews lost their German nationality when they emigrated (in a case in which the application of a will provision turned on the nationality of a Jewish lawyer who had emigrated just before World War II).<sup>26</sup>
- (5) The German Federal Court's upholding a Jewish woman's demand of return of securities from a German bank over the bank's objection that she had lost her property claim under the Nazi statute mentioned in the first case, above.<sup>27</sup>
- (6) The conviction by German courts of East German border guards and their superiors, for the shooting deaths of fugitives trying to cross the border, despite an East German statute that seemed to authorize the use of firearms to prevent a "felony" of this sort.<sup>28</sup>

These are all cases in which the West German or (post-unification) German courts treated a Nazi or East German statute that had either authorized an action or changed legal status or legal rights, as being without legal force because of the injustice of the law.

Radbruch's Formula(s), and his conception of law, are based on the notion that people may not expect their legal system to be uniformly just and fair, but there *is* an expectation of minimal justice that comes with the notion of "legality." This view—especially as it appears in the less well known second version of Radbruch's Formula (that to be legal the rules must at least "make an attempt at justice"<sup>29</sup>)—could be translated into Robert Alexy's well-known assertion: "Every legal system lays claim to correctness."<sup>30</sup> And it seems to assert something more than Joseph Raz's conclusion that law necessarily *claims* that it possesses legitimate authority (as Raz points out, this claiming need not be well-grounded, and he in fact claims that it rarely is<sup>31</sup>). Though Raz's and Alexy's theoretical positions appear to be similar, there are important differences, reflected, not least in the fact that Raz sees law's claim to authority as consistent with a legal

25. With at least one of the examples, Radbruch's Formula was expressly quoted, and another depended on precedent in which Radbruch's work was cited. Robert Alexy "A Defense of Radbruch's Formula," in *Recrafting the Rule of Law: The Limits of Legal Order*, ed. David Dyzenhaus (Oxford: Hart Publishing, 1999), 18, 22.

26. *Ibid.*, 18.

27. *Ibid.*, 18-19.

28. *Ibid.*, 19-22.

29. Radbruch, "Statutory Lawlessness and Supra-Statutory Law," 7.

30. Robert Alexy, *The Argument from Injustice: A Reply to Legal Positivism*, trans. Stanley L. Paulson and Bonnie Litschewski Paulson (Oxford: Oxford University Press, 2002), 34 (footnote omitted).

31. Joseph Raz, *Ethics in the Public Domain* (Oxford: Clarendon Press, 1994), 199. On Raz's view about the obligation to obey the law, see *ibid.*, 325-38.

positivist view of law, while Alexy views his “correctness thesis” as central to his critique of legal positivism.

And before being too quick to connect either of those theories to Radbruch’s post-war theory, one should observe that though some version of the Alexy and Raz theories *could* be applied to individual norms, they are most apt when discussing normative systems as a whole (that is, the question of what it is that makes a normative system as a whole “law”/“legal” or “not law”), while Radbruch’s Formula(s) are more clearly focused on individual norms (whether individual norms are so unjust that they are not, or no longer, “law”).

In practice, the Radbruch Formula is most likely to be applied where there has been some form of transition in the relevant regime, such that a judge from one system or tradition is asked to apply (or not apply) the law of another system or tradition: post-war Germany dealing with its Nazi past; unified Germany dealing with the East German past; and so on. I am unaware of any court using the Radbruch Formula to refuse enforcement of otherwise valid legal norms enacted by its own legislature.<sup>32</sup> As a matter of practical politics, one assumes that even if there are such instances, they are very rare.

## II. THE FORMULA(S) AND CONCEPTUAL ANALYSIS

Within the Hart-Fuller debate and in Robert Alexy’s discussion and adaptation of the work, Radbruch’s Formula(s) are generally presented as a central part of an anti-legal positivist theory about the nature of law.<sup>33</sup> Radbruch himself portrays his Formula(s), and his post-World War II writings in general, as a turn away from his earlier espousal of legal positivism.<sup>34</sup>

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32. Refusing enforcement on Radbruch-Formula grounds is to be distinguished from more conventional forms of judicial invalidation of otherwise valid norms—e.g., holding the norm invalid because it conflicted with a provision of the regime’s own constitution or a supra-national constitution or treaty to which the country is a signatory, like the European Convention on Human Rights.

33. Radbruch, “Statutory Lawlessness and Supra-Statutory Law”; Alexy, “A Defense of Radbruch’s Formula” and *The Argument from Injustice*; Hart, “Positivism and the Separation of Law and Morality”; Fuller, “Positivism and Fidelity to Law”; see also Giovanni Sartor, “Legality Policies and Theories of Legality: from *Bananas* to Radbruch’s Formula,” *Ratio Juris* 22 (2009): 218-43.

34. Though, as earlier noted, see above note 3, there are also those who claim a greater continuity and unity in Radbruch’s work.



However, it is important to clarify what it might mean to say that the Formula(s) constitute a criticism of legal positivism,<sup>35</sup> as opposed to being part of a theory within an entirely different debate. Legal positivism is a theory about the nature of law,<sup>36</sup> even if it is too often confused with entirely different kinds of claims (e.g., about when and whether laws should be obeyed, or about how statutes and constitutional provisions should be interpreted). The question is to what extent the Radbruch Formula(s) should be considered as not directed, or not *primarily* directed, towards debates about the nature of law, but rather directed (primarily) towards questions about how judges should decide cases.

At a surface level, there is no doubt that, whatever else it is, the Radbruch Formula(s) *do* work as instructions to judges on how to decide cases. As mentioned earlier, judicial decision-making (by West German courts responding to actions purportedly done under the authorization of Nazi laws) is the context for Radbruch's introduction of his Formula(s) in his post-war articles,<sup>37</sup> and comparable decisions made by the courts in a unified Germany, evaluating actions done purportedly under the authorization of East German law, is the context for some of Alexy's discussion of his version of the Radbruch Formula.<sup>38</sup>

Additionally, if the Formula(s) *are* to be understood as a conceptual claim about the nature of law, then they are (by definition) claims about all existing and all possible legal systems. That may just not be a good description of the Formula(s). Consider Radbruch's argument that significantly unjust norms are not valid legal norms: one could certainly understand such a claim made internally within a particular legal system, about the criteria of validity of that legal system. It is far less clear what is meant by a theorist, like Radbruch, making this claim about all (and all possible) legal systems.<sup>39</sup>

One can come at the problem from another direction, which clarifies that Radbruch's primary purpose (and the purpose of most of those who support

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35. Radbruch, along with Lon Fuller, asserted that legal positivism played a role in the Nazis' rise to power in Germany. Stanley L. Paulson, "Lon L. Fuller, Gustav Radbruch, and the 'Positivist' Theses," *Law and Philosophy* 13 (1994): 313-59.

36. Brian H. Bix, "Legal Positivism," in *The Blackwell Guide to the Philosophy of Law and Legal Theory*, ed. Martin P. Golding and William A. Edmundson (Oxford: Blackwell, 2005), 29-49.

37. Radbruch, "Statutory Lawlessness and Supra-Statutory Legality," 1-6.

38. Alexy, "A Defense of Radbruch's Formula"; and *The Argument from Injustice*.

39. I elaborate this point in the context of a critique of both Alexy and the later Radbruch in Brian H. Bix, "Robert Alexy, Radbruch's Formula, and the Nature of Legal Theory," *Rechtstheorie* 37 (2006): 139-49.

application of his Formula(s)) is likely the direction of judicial behavior, not any analytical claim about the nature of law. To clarify through an example: How would a proponent of Radbruch's Formula(s) respond to a judge who applied an extremely unjust norm (without first using Radbruch's test)? One possibility would be for the Radbruch follower to say that what the judge applies, because it is an extremely unjust norm, is simply not a legally valid norm. However, as will be discussed further below, judges frequently apply norms that are not valid norms of their legal system (e.g., extralegal moral norms). But that is clearly not what Radbruch was getting at: he wanted judges *not* to apply these unjust norms. To see the debate as strongly analogous to legal realist or Dworkinian debates about whether certain norms or factors are "legal" or "extralegal" and whether judges are obligated to apply them, or can do so at their discretion,<sup>40</sup> would clearly be a misreading. Radbruch's clear point (understood by all interpreters) is that judges *should not apply these norms*. Thus, the conclusion that what Radbruch is basically offering is a prescription for judicial decision-making, not a conceptual (or other theoretical) claim applicable to all (possible) legal systems.

The Formula(s) seem to entail, or depend upon, the view (a) that if a norm is valid in a legal system, then it must be applied to a legal dispute whenever it is relevant to the dispute; and (b) if a norm is not a valid norm of a legal system, it should not (or cannot) be applied to a legal dispute before the court.<sup>41</sup> As propositions describing current legal practices, both claims seem to be false. As to the first claim, that valid legal norms are always applied whenever they are relevant, it is a common principle in many legal systems that judges have the power to modify or create exceptions in rules (particularly judge-created rules, but also, in some jurisdictions and on some occasions, statutes) when their application would otherwise lead to an absurd or unjust result.<sup>42</sup>

As for the second claim, that norms that are not valid in the legal system are never applied, there are a number of significant exceptions. There are

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40. E.g., Ronald Dworkin, *Taking Rights Seriously* (Cambridge, MA: Harvard University Press, 1977), 1-130.

41. I do not claim that either of the above claims is expressly made by Radbruch, but they do appear to be assumptions of the Formula(s) he presents.

42. Of course, in most jurisdictions courts also have the authority, and frequently the duty, to refuse to apply a statute when its application would be contrary to the country's constitution or basic law, or contrary to the country's treaty obligations. However, this example is less useful for the purpose of the present discussion, as many commentators would characterize the conflict with the constitution or the treaty as making the statute invalid.

minor, technical exceptions: as when resolving a dispute requires a court to apply norms from another legal system (e.g., in resolving a contract dispute, when the contract was entered in another country), or norms of a non-public organization (as when the dispute centers on the application of a corporate or club charter), or even the norms of logic or mathematics.<sup>43</sup> There are also well-known general exceptions, when courts are authorized, or perhaps even obligated, to apply extralegal moral or policy norms in the process of elaborating, clarifying, or improving the law. In common-law countries, like the United States and England, judicial development of the law is accepted and frequent, even if not quite as central as it had been hundreds of years ago. When courts change the law, the normative reasons justifying the change (e.g., “justice requires that those who cause harm must compensate for the harm” or “norms should be made as efficient as possible”) are almost always norms that are not already valid within the legal system.<sup>44</sup> However, judges see themselves as legally bound, or at least legally free (and perhaps morally bound), to change the law in this way. Given that “valid norm” cannot be equated with “norm that must be applied,” the direction to judges “not to apply a norm in particular circumstances” is not helpfully translated into the claim that “that norm is not valid” (or vice versa).

It must be noted that though (as I hope I have shown) one can clearly see the theoretical difference between legally valid and invalid norms on one hand, and whether or not to apply a norm to a legal dispute on the other hand, the difference may be less evident for the kind of norms on which Radbruch (and his followers) were focusing. Arguably, one would have no trouble finding examples of judges applying norms that are extremely unjust; one can even find numerous examples where the judge is applying the unjust norm even though the judge considers herself to be doing this as a matter of discretion rather than a matter of duty. However, these are often cases where *we* might see the norms as unjust, but the judge does not. What are likely rare are examples of judges applying norms *they* consider to be extremely unjust in circumstances where *they* consider themselves to have

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43. On the issue of the legal status of mathematics used in legal decisions, see Matthew H. Kramer, “Why the Axioms and Theorems of Arithmetic are Not Legal Norms,” *Oxford Journal of Legal Studies* 27 (2007): 555-62.

44. I am putting aside, for the moment, the claim occasionally still heard that most common law reasoning is merely a process of the law “work[ing] itself pure,” *Omychund v. Barker* (Ch. 1744), 1 Atk. 21 at 33, 26 ER 15 at 22-23, that is, that such decisions are merely discovering norms that were, in some sense, already part of the law. Few commentators would accept this as universally true of common law decision-making, and there is little evidence of which I am aware that Radbruch supported such a view.

discretion whether to apply the norms or not. While justice may (by most accounts) be an objective matter, it is a matter over which there is pervasive disagreement. When we observe what *we* believe to be the court's application of an extremely unjust law, the judge's perspective will almost always be different. The judge will generally either not perceive the norm as (extremely) unjust, or will believe that the unjust norm is one that she is obligated to apply, despite its injustice.

Other natural law theorists have written on the problem of unjust laws, some offering views comparable to Radbruch's. Alexy's position was mentioned earlier. John Finnis writes the following on the topic of seriously unjust laws:

In such a case, does the law as settled by social-fact sources, in losing its directiveness for judges and citizens, lose also its legal validity? The answer depends upon the discursive context in which the question arises. If a course of reflection or discourse makes it appropriate to acknowledge the rule's "settled" or "posited" character as cognizable by reference to social-fact sources, one can say that it is legally valid though too unjust to be obeyed or applied. Or if the discursive context makes it appropriate instead to point up its lack of directiveness for judges and subjects alike, one can say that the rule, despite its links to social-fact sources, is not only not morally directive but is also legally invalid. Each way of speaking tells an important part of the truth, or rather, tells the truth with an emphasis that differs from the other's.<sup>45</sup>

Finnis's analysis can be seen as largely consistent with the argument presented here. He notes that there is an important sense in which unjust laws are still valid laws. Overall, his analysis is tied to his view that law has a "double life": as a history of official action, and as a normative system that plays a role in the practical reasoning of both citizens and judges.<sup>46</sup> For Finnis, the key conceptual point about unjust laws is not that they are not laws, but that they are not laws "in the fullest sense," including in the sense of creating reasons for judges to apply them (without modification) to legal disputes.<sup>47</sup> Finnis does cautiously approve the characterization of unjust laws as "invalid," but only when that is understood as relative to direction to judges, and also understood as only part of the proper understanding of law and legal validity, where another part of the analysis would note the law's validity.

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45. John Finnis, "Natural Law Theories," *Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta (2011), <http://plato.stanford.edu/entries/natural-law-theories/>, sec. 4.

46. See, e.g., Finnis, "The Fairy Tale's Moral," *Law Quarterly Review* 115 (1999): 170; "On the Incoherence of Legal Positivism," *Notre Dame Law Review* 75 (2000): 1602-6.

47. See John Finnis, *Natural Law and Natural Rights* (2nd ed., Oxford: Oxford University Press, 2011), 351-66.

To return to the original topic: if Radbruch's intention was to direct judges (or if that is the most charitable reading of his Formula(s)), why did he choose this somewhat indirect route of a theory about the nature of legal validity? This question would require more space (and more historical expertise) than I can offer here, but I can propose a conjecture, for whatever it might be worth. Part of the reason Radbruch may have cloaked his prescription for decision-making in a conceptual theory about law may be found in the legal and political culture, and indeed the general social expectations, of the time(s) and place(s) in which Radbruch lived. In continental Europe, the strong expectation was that the law was fully present in the civil codes, and the judge's only task was to apply the law. This may not have been a universal belief, but the fact that the Free Law Movement of that time<sup>48</sup> was considered highly radical for even *suggesting* that judges had and should have discretion, indirectly shows the rigid view of judging in the conventional thought of that day. Against this backdrop, one can see why a theorist might not merely suggest that judges should modify or refuse to enforce otherwise valid law. Such a prescription is easier to make in a common law country (where it is understood that judges develop the law, even if they might sometimes claim that they were merely "discovering" it), and among modern legal theorists, who unapologetically discuss judicial discretion and judicial lawmaking. For Radbruch, perhaps the only way to make prescriptions for judicial decision-making palatable to his audience was to coat them in claims about the validity of individual norms.

### III. CONCLUSION

This paper has raised questions about whether Gustav Radbruch's Formula(s) are best or most charitably understood on their own terms, as a claim about the nature of law, rather than differently and more narrowly, as a prescription about how judges should decide cases. In most legal systems, courts frequently apply (and see themselves as bound to apply) norms that *are not* valid within their legal system, and the courts also on occasion do *not* apply (and see themselves as bound not to apply) otherwise applicable norms that *are* valid norms within their legal system. This is part of the complex role of judges, particularly (but not exclusively) within common

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48. See, e.g., Christopher Berry Gray, *The Philosophy of Law: An Encyclopedia*, (New York: Garland Publishing, 1999), 1: 314-18; and James E. Herget and Stephen Wallace, "The German Free Law Movement as the Source of American Legal Realism," *Virginia Law Review* 73 (1987): 399-455.

law legal systems. Judges' roles include the resolution of disputes where the ruling norms come from outside the home legal system (or, from outside any legal system), and the courts may also have responsibilities to develop the law and to avoid unjust or absurd applications of otherwise valid norms.<sup>49</sup>

This paper has argued that it would thus be more charitable to read the Radbruch Formula(s) as prescriptions for judicial decision-making rather than as descriptive, conceptual or analytical claims about the nature of law. Or, to put the same point a different way, reconstructing the Formula(s) in this manner makes them more sensible and defensible.

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49. Andrew Gold, "Absurd Results, Scrivener's Errors, and Statutory Interpretation," *University of Cincinnati Law Review* 75 (2006): 25-85, argues that some applications of the absurdity doctrine of statutory interpretation may be a following of the objective meaning of the statutory text rather than an overriding of the text. Even if that is granted, there still remain numerous examples of judicial modification or overriding of legal rules in the name of morality, reason, policy, or simply coherence.

