

Gustav Radbruch: An Extraordinary Legal Philosopher

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I. INTRODUCTION

Philosophy is not to relieve one of decisions, but to confront [one] with decisions. It is to make life not easy but, on the contrary, problematical. . . . How suspect would be a philosophy that did not consider the world a purposeful creation of reason and yet resolved it into a rational system with no contradiction! And how superfluous any existence if ultimately the world involved no contradiction and life involved no decision!¹

Herein lies what may be the basic difference between Gustav Radbruch and the traditional legal philosophers of our historical and present times. The vast majority of philosophers align themselves with one tradition of legal philosophy, either natural law or legal positivism, which have always been understood as antitheses. Until Radbruch, no major legal philosopher attempted to combine dialectically the central theses of traditional natural law theory and legal positivism. Quite simply, to do so is to confront contradictions. Radbruch asserts that it is the individual who must face these quandaries and take a decision. In addition, he positions the traditional theses into the fields of the ordinary and the extraordinary. According to Radbruch, only by allowing the individual, in truly extraordinary times, to take the moral stand that a legal system has gone too far will citizens truly protect themselves from the intolerable

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1. GUSTAV RADBRUCH, *Legal Philosophy*, in THE LEGAL PHILOSOPHIES OF LASK, RADBRUCH, AND DABIN 43,112 (Kurt Wilk trans., 1950).

perversions of their political leader. At all other times, Radbruch uses antinomies to evaluate the law according to a non-moral criterion.

Radbruch derives the two theses at the heart of his dialectic from the traditions of natural law and legal positivism. Natural law dominated legal philosophy for centuries. This tradition asserts that law is manifest in nature and is universally accessible and discernible because humans are rational beings.² Natural law reflects and can be captured in terms of a morality thesis, which holds that law and morality are necessarily connected. Laws are identified as legally valid only if they comport with morality; when morality conflicts with a law, the law is deemed to be invalid. Not until the early modern period did a separate theory, centered on the authoritative process of lawmaking by humans, develop into a competing philosophy of law. This theory, later called legal positivism, relies on a separability thesis; legal validity is identified by a purely legal criterion wholly separate from morality. A law is considered invalid only if it does not meet this purely legal criterion. An example of such a criterion would be the process a legislature must follow to enact a law: was the law passed by a majority vote, did the executive sign it, and is it within the constitutional powers conferred upon the legislature?³ By the middle eighteenth century, legal positivism was beginning to dominate legal philosophy. It was not until after World-War II that a small resurgence of natural law occurred, popularly thought to be led by Radbruch.

The two theses at the heart of Radbruch's dialectic, the morality thesis and the separability thesis, historically have been defined in

2. St. Thomas Aquinas, one of the most influential natural law theorists, states in his *Summa Theologica*:

It's moral nature is stamped on a human act by its object taken with reference to the principles of moral activity, that is according to the pattern of life as it should be lived according to the reason. If the object as such implies what is in accord with the reasonable order of conduct, then it will be a good kind of action. . . . [I]f, on the other hand, it implies what is repugnant to reason, then it will be a bad kind of action. . . .

JAMES RACHELS, *THE ELEMENTS OF MORAL PHILOSOPHY* 45-46 (1986).

3. Of course, this example is a simplistic version of what can be quite complicated. See, e.g., H.L.A. HART, *THE CONCEPT OF LAW* (1961) (outlining Hart's working rules of recognition and ultimate rule of recognition illustrate that legal positivism can be quite complicated). See also, Stanley L. Paulson, *Continental Normativism and Its British Counterpart: How Different Are They?* 6 *RATIO JURIS* 227, 236-41 (1993).

terms of antitheses. For a long time many scholars deemed the morality thesis and the separability thesis as both mutually exclusive and jointly exhaustive. “Thus understood, the two types of theory together rule out any third possibility. Pretenders—theories that purport to be distinct from both traditional theories—turn out to be disguised versions of the one or the other.”⁴ Stanley Paulson argues, however, that philosopher Hans Kelsen resolves this *jurisprudential antimony* with his Pure Theory of Law, whereby Kelsen attempts to develop a third alternative.⁵ Kelsen, by combining elements of the morality and separability theses into a new, wholly distinct theory and simultaneously rejecting the two traditions, attempts to show that the traditional theories are not exhaustive.⁶ When one analyzes natural law theory, one finds both the familiar morality thesis and a normativity thesis (law is separate from fact). Legal positivism consists of the separability thesis and a facticity thesis (law and fact are inseparable). Kelsen attempts to combine the separability thesis with the normativity thesis.⁷ Therefore, Kelsen arguably provides a third option, a “middle way” between natural law and legal positivism. Like Kelsen, perhaps, Radbruch also offers another third option.

This paper argues that Radbruch succeeds in combining the morality thesis and the separability thesis by assigning them, as it were, to distinct fields: the ordinary and extraordinary. Part II examines Radbruch’s pre-World War II theory presented in his *Rechtspilosophie*. Part III then examines Radbruch’s post-World War II writings and addresses a familiar but mistaken interpretation of these writings as different from, and a renunciation of, his earlier work. In part IV I propose the idea that Radbruch’s post-World War II work is best seen as a refinement of his earlier theory, while still maintaining that the two works are unitary and not contrary. Finally, part V sets out elements of Radbruch’s complete theory as seen within this new framework of the ordinary and extraordinary.

4. Stanley L. Paulson, *Introduction to HANS KELSEN, INTRODUCTION TO THE PROBLEMS OF LEGAL THEORY* xvii, xxi (Bonnie Litschewski Paulson and Stanley L. Paulson trans., 1992).

5. *Id.*

6. *Id.*

7. *Id.* at xxvi.

II. RADBRUCH'S PRE-WORLD WAR II WORK

Radbruch establishes the foundation for his theory in his 1932 work, *Rechtsphilosophie*. He finds that law, as a cultural concept, “is the reality the meaning of which is to serve the legal value, the idea of law.”⁸ Radbruch argues that the idea of law may only be Justice.⁹ Here he is appealing to an objective idea of distributive justice.¹⁰ This Justice appeals to an ideal social order that directs the relationships between moral beings.¹¹ The essence of Justice is equality; thus, Radbruch asserts “[Justice] is essential to the legal precept in its meaning to be directed toward equality.”¹² The objective of legal philosophy is to evaluate the law in terms of congruency with its only goal—“to realize the idea of law”.¹³ Here an analogy may be helpful. Our cultural concept of a table is that it serves human beings by providing a place to set things, particularly to facilitate work or eating. Therefore, the idea of a table is to serve humans, so it is helpful to measure the reality of tables by the idea of a table—in what ways it serves humans. However, the idea of a table does not fully describe all that encompasses the concept of tables. Tables may be made of wood or metal, but usually of a hard, stable material; tables generally are flat on the top with three or four legs that lift the flat surface a specific height above the ground. The table is thus defined as the complex of general descriptors whose ultimate idea is to serve humans in particular tasks. Radbruch finds that although the idea of

8. RADBRUCH, *supra* note 1, at 73.

9. *Id.* at 73, 74. I capitalize Justice here to assist in differentiating it from one of Radbruch's three precepts of law discussed later. See *infra* notes 108-15 and accompanying text.

10. *Id.*

11. *Id.* at 73.

12. *Id.* at 76.

13. RADBRUCH, *supra* note 1, at 52. This evaluative role is compared with the value-relating view (law as cultural fact, realm of legal science) and the value-conquering view (realm of religious philosophy of the law). Radbruch associates the latter view with both legal positivism and natural law. “Religion is ultimate affirmation of whatever exists, smiling positivism that pronounces is ‘Yea’ or ‘Amen’ over all things . . . without regard to [their] worth of worthlessness.” *Id.* at 50. “There remains the possibility of anchoring the law not only in the realm of values but in the most absolute essence of things, as in classical antiquity.” *Id.* at 52. Finally, Radbruch dismisses a value-blind view of the law as he finds it undesirable, and impossible, to define the law without some reference to the law's purpose. He uses the example, could one define (or describe) a table without reference to its purpose? *Id.* at 51-52.

law is Justice, this alone does not fully exhaust the concept of law. Justice, he says, “leaves open the two questions, whom to consider equal or different, and how to treat them.”¹⁴ To complete the concept of law Radbruch uses three general precepts: purposiveness, justice, and legal certainty.¹⁵ Therefore, Radbruch defines law as “*the complex of general precepts for the living-together of human beings*” whose ultimate idea is oriented toward justice or equality.¹⁶

Purposiveness is one of the three precepts Radbruch uses to complete the concept of law. It is the only relativistic component of the three, for it strives to “individualize as far as possible.”¹⁷ This precept attempts to help define the content of the law and results from a choice of different views of the state, of the law, indeed by embracing a particular world view.¹⁸ Radbruch’s second precept is justice. This concept of justice is separate and distinct from the idea of the law as Justice, as this justice competes with the other two precepts. This idea of justice is absolute, formal, and universal; what is fair for one is fair for all.¹⁹ Therefore, justice and purposiveness raise conflicting demands; purposiveness seeks to individualize as much as possible while justice demands generality.²⁰ Radbruch’s final precept is legal certainty. An important part of legal certainty is the justice it provides through, if nothing else, its predictability. The primary goal of legal certainty is to ensure peace and order. Certainly, the conflict between legal certainty and justice or between legal certainty and purposiveness is easy to imagine. For example, legal certainty would demand that a law be upheld even though the result would be an unjust application of the law. Therefore, in most cases the content, form, and validity of the law are understood in terms of Radbruch’s triad—three equally weighted principles that, while in tension and possibly in contradiction, are found together.

14. *Id.* at 90-91.

15. *Id.* at 107-12.

16. RADBRUCH, *supra* note 1, at 90-91 (emphasis in original).

17. *Id.* at 109.

18. *Id.* at 108.

19. *Id.* at 108-09.

20. *Id.* at 109. *See infra* notes 108-15 and accompanying text.

Many have understood Radbruch's 1932 work, *Rechtsphilosophie*, fundamentally as a statement of legal positivism.²¹ He writes that legal certainty should prevail only when what is just or what is right in the content of the law is absolutely indeterminable. "It is more important that the strife of legal views be ended than that it be determined justly and purposively."²² Notably, what is just is indeterminable only in an abnormal time. Radbruch states:

The validity of demonstrably wrong law cannot conceivably be justified. However, any answer to the question of the purpose of law other than by enumerating the manifold partisan views about it has proved impossible—and it is precisely on that impossibility of any natural law, and on that alone, that the validity of positive law may be founded. At this point relativism, so far only the method of our approach, enters our system as a structural element.

Ordering their living together cannot be left to the legal notions of the individuals who live together, since these different human beings will possibly issue contradictory directions. Rather, it must be uniformly governed by a transindividual authority. Since, however, in the relativistic view of reason and science are unable to fulfill that task, will and power must undertake it. *If no one is able to determine what is just, somebody must lay down what is to be legal. . .*²³

Radbruch uses a description of the role of a judge to demonstrate further this precept. "It 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 ask not if it is also just."²⁴ In this situation alone, the emphasis on legal certainty is greatest. Although a law may be unjust in its content, it nonetheless serves at least one purpose, legal

21. See, e.g., Stanley L. Paulson, *Radbruch on Unjust Laws: Competing Earlier and Later Views?*, 15 OXFORD J. LEGAL STUD. 489, 489-90 (1995). See also, H.L.A. Hart, *Positivism and the Separation of Law and Morals* 71 HARV. L. REV. 593, 617 (1958).

22. RADBRUCH, *supra* note 1, at 108.

23. *Id.* at 116-17 (emphasis added).

24. *Id.* at 119.

certainty.²⁵ Therefore, the judge, “while subservient to the law without regard to its justice, nevertheless does not subserve mere accidental arbitrariness.”²⁶

A strict interpretation of this section as legal positivism is not a complete understanding of Radbruch’s theory. Radbruch does more than make an argument for pure legal certainty for such an argument would call for legal certainty and positive law to prevail over all other things at all times. Instead, he reasserts the equality of the three precepts and the importance of no absolute precedence of any one precept:

Only this has been established, that legal certainty too is a value and that the legal certainty which positive law affords *may* justify even the validity of unjust and inexpedient law. Not established, though, has been any absolute precedence of the demand of legal certainty, which is fulfilled by any positive law, over the demands of justice and [purposiveness], which it may possibly have left unfulfilled. The three aspects of the idea of law are of equal value, and in the case of conflict there is no decision between them but by the individual conscience. So the absolute validity of all positive law as against every individual cannot be demonstrated.²⁷

Legal positivism requires that legal certainty alone be the sole criterion of legal validity—precisely what Radbruch is rejecting. Therefore, at the very least, it is clear that Radbruch is not embracing any known pure form of legal positivism.

III. RADBRUCH’S POST-WORLD WAR II WORK

Scholars believe that Radbruch transformed his thought after living through the twelve-year period of Nazi rule in Germany, and they classify his post-World War II writings as natural law.²⁸ Many

25. *Id.*

26. *Id.*

27. RADBRUCH, *supra* note 1, at 118 (emphasis added).

28. See Paulson, *supra* note 21, at 489. See also Hart, *supra* note 21, at 617; Lon L. Fuller, *American Legal Philosophy at Mid-Century*, 6 J. LEGAL EDUC. 457 (1954), cited in Paulson, *supra* note 21, at n.17.

scholars touted Radbruch as the leader of a natural law renaissance (after almost a century of virtual silence). In particular, Radbruch's works, *Five Minutes of Legal Philosophy*²⁹ and *Statutory Non-Law and Suprastatutory Law*,³⁰ illustrate the tendency to read his post-War work as natural law. However, such a reading is a misplaced emphasis on one part of his theory at the expense of understanding it in its entirety.

In his first post-War work, *Five Minutes of Legal Philosophy*, Radbruch appeals to elements usually associated with traditional natural law. He concludes, for instance, that there are certain principles that are more important than any statute, so much so that a statute conflicting with one of these principles would be invalid.³¹ Radbruch uses language common to natural law thought:

There are, therefore, principles of law that are stronger than any statute, so that a law conflicting with these principles is devoid of validity. One calls these principles the natural law or the law of reason. To be sure, their details remain somewhat doubtful, but the work of centuries has established a solid core of them and they have come to enjoy such a far-reaching consensus in the declarations of human and civil rights that only the deliberate skeptic can still entertain doubts about some of them.³²

Finally, Radbruch calls on the voice of God, who speaks through the individual to aid in the determination of the validity of law:

The tension between these two directives [between obeying God on the one hand and the state on the other—both found in religious language] cannot, however, be relieved by appealing to a third—say, to the maxim: Render unto Caesar the things that are Caesar's and unto God the things that are God's. For this directive too, leaves the boundary in doubt. Rather, it

29. Gustav Radbruch, *Five Minutes of Legal Philosophy*, in *PHILOSOPHY OF LAW* (Joel Fienberg & Hyman Gross eds., 1991).

30. GUSTAV RADBRUCH, *STATUTORY NON-LAW AND SUPRATATUTORY LAW* (Bonnie Litschewski Paulson & Stanley L. Paulson trans., 1993).

31. RADBRUCH, *supra* note 29, at Fifth Minute.

32. *Id.*

leaves the solution to the voice of God, which speaks to the conscience of the individual only in the exceptional case.”³³

Radbruch’s analysis seems to be directly congruent with the natural law tradition in legal philosophy.

In a later work, Radbruch appeals to a “suprastatutory law” and overwhelmingly rejects legal positivism, which led many scholars to interpret his paper entitled *Statutory Non-Law and Suprastatutory Law* as one within the tradition of natural law.³⁴ Radbruch writes: “We appeal to *human rights* that surpass all written laws, and we appeal to the inalienable, immemorial law that denies validity to the criminal dictates of inhuman tyrants.”³⁵ If one understands natural law to be that which transcends and binds against any positive law, it is not illogical to read Radbruch as embracing natural law. Moreover, Radbruch is highly critical of legal positivism in Germany, more so than in any of his earlier works. As a result, many scholars believe that Radbruch is rejecting all that legal positivism has to offer (including legal certainty). For example, Radbruch explores the difference between an order issued within a military context and a law: “An order is an order,” and “a law is a law.”³⁶ Radbruch finds the former tenet is always impliedly restricted in its scope, as soldiers have no obligation to obey orders serving criminal purposes.³⁷ The latter tenet, however, knows no such restriction; it expressed the positivistic legal thinking that dominated legal theory in Germany for many decades.³⁸ He establishes why this overwhelming embrace of legal positivism in Germany was disturbing:

Legal positivism, with its principle that ‘a law is a law,’ has in fact rendered the German legal profession defenseless against statutes that are arbitrary and criminal. Legal positivism is, moreover, in and of itself wholly incapable of justifying or explaining the validity of statutes. The positivist believes he [she] has proved the validity of a statute simply by showing

33. *Id.*

34. RADBRUCH, *supra* note 30, at 10.

35. *Id.*

36. *See id.* at 1.

37. *Id.*

38. *Id.*

that it had sufficient power behind it to prevail. But although compulsion may be based on power, obligation and validity never are. Obligation and validity must be based, rather, on a value that inheres in the statute.³⁹

Radbruch rejects his earlier assertion that legal certainty was the primary role of the judge and now asserts that the judge *must* decide first in accordance with Justice. When discussing the case of the grudge informer,⁴⁰ Radbruch considers whether the judges who condemned the accused to either literal death sentences or sent them to the front (an effective death sentence) are guilty of murder or are accomplices to murder.⁴¹ It is significant that the statutes used in these trials permitted but did not require the death penalty as a punishment; therefore, this was a discretionary decision on the part of the judge.⁴² Radbruch concludes that liability of these judges turns on whether the informer is convicted as a murderer or as an accomplice.⁴³ In the case discussed by Radbruch, the informer, Puttfarcken, was condemned as an accomplice to murder, and “[a]ccordingly, the judges who ‘condemned Gottig to death, contrary to law and statute,’ had to be guilty of murder.”⁴⁴ Finally, Radbruch calls the judges to stand by justice at all costs:

[Judges] could invoke the state of necessity contemplated in Section 54 of the Criminal Code by pointing out that they would have risked their own lives had they pronounced Nationalist Socialist law to be statutory lawlessness. I call this defense a painful one, for the judge’s ethos ought to be directed toward justice at any price, even the price of his own life.⁴⁵

39. *Id.* at 13.

40. *See id.* at 2. The grudge informer is a general term used to encompass acts of informers who turned in their friends, rivals, spouses, neighbors, and the like to the military on the basis that they spoke negatively of the government or the führer. These informants often did so because they held a grudge and were using the legal system as an instrument of murder. RADBRUCH, *supra* note 30, at 6, 20.

41. *Id.* at 7.

42. *Id.* at 8.

43. *Id.*

44. *Id.* at 8-9.

45. *Id.* at 22 (footnote omitted).

Here, we see the transformation from the concept of a judge who is “subservient to the law without regard to its justice”⁴⁶ to the judge who is called upon to risk his or her own life for the sake of justice. In all fairness to proponents of the transformation thesis, who argue that Radbruch transformed his thought from legal positivism to natural law after having lived through the twelve years of Nazi Germany, this seems plausible. Nevertheless, there is a more enlightened reading of his pre and post-War works, a reading that turns on understanding them as a unity.

The first step towards a unitary understanding of his work is to understand that his post-War work serves as a correction of his earlier 1932 work, specifically, his over-emphasis on legal certainty.⁴⁷ Radbruch’s post-War writings state, “legal certainty is not the only value that law must effectuate, nor is it the decisive value. Alongside legal certainty, there are two other values: utility (purposiveness) and justice.”⁴⁸ Whereas previously we saw legal certainty emphasized, we now see legal certainty taking “a curious middle place between the other two values . . . because it is required not only for the public benefit but also for justice.”⁴⁹ Legal certainty remains an important aspect of Radbruch’s theory, and he is critical of the Nazi government for its lack of legal certainty. Radbruch states:

I am of the opinion that after twelve years of denying legal certainty, we need more than ever to arm ourselves with considerations of ‘legal form’ in order to resist the understandable temptations that can easily confront every person who has lived through those years of menace and oppression. We must seek justice, but at the same time attend to legal certainty, for it is itself a component of justice.⁵⁰

Given this, one can begin to understand the balance and tension Radbruch intends his triad to encompass.

46. RADBRUCH, *supra* note 1, at 119.

47. *See supra* part II.

48. RADBRUCH, *supra* note 30, at 13.

49. *Id.* at 14.

50. *Id.* at 24.

Radbruch, in his post-World War II work, corrects more than just an over-emphasis on legal certainty. He is also restricting its scope of application in his theory. In his post-War work he reveals for the first time two formulae that delineate when a law is either no longer valid or when it lacks even the very nature of law. Radbruch expounds on the distinction between the ordinary (time for legal certainty) and the extraordinary (time to consider justice):

The resolution of the [possible] conflict between justice and legal certainty may well be found in a formula such as this: Preference is given to the positive law, duly enacted and secured by state power as it is, even when it is unjust and fails to benefit the people, unless its conflict with justice reaches so intolerable a level that the statute becomes, in effect, ‘false law’ and must therefore yield to justice. . . . One line of distinction, however, can be drawn with utmost clarity: 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 ‘false 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.⁵¹

Of particular importance to Radbruch is this distinction between the ordinary times and the extraordinary times because it safeguards society, returning its critical voice towards the legal system.⁵² In addition, Radbruch has created a theory that attempts to include *both* the morality thesis and the separability thesis.

51. *Id.* at 14-15.

52. The importance of this should not be understated:

We must not fail to recognize—especially in light of the events of those twelve years—what frightful dangers for legal certainty there can be in the notion of “statutory non-law,” in duly enacted statutes that are denied the very nature of law. We must hope that such non-law will remain an isolated aberration of the German people. . . . We must prepare, however, for every eventuality. We must arm ourselves against the return of an outlaw state by categorically overcoming legal positivism, which rendered impotent every possible defense against the abuses of National Socialist legislation.

Id. at 18.

IV. UNITY THESIS

Many distinguished legal philosophers contend that Radbruch transformed his theory after World War II.⁵³ However, a minority of scholars argue that a unity thesis better exemplifies Radbruch's pre and post-War work.⁵⁴ Paulson examines four common assertions by proponents of this unity thesis in his argument that Radbruch's post-War work is a correction and continuation of his pre-War work. I argue that this unitary understanding of his work is the basis for illuminating the dialectic that Radbruch builds between the morality thesis and the separability thesis.

On behalf of the unity thesis, Paulson points to the simple fact that one of the most basic aspects of Radbruch's philosophy is consistent between his pre and post-War works. This is the "meaning of law [as] understood in terms of the realization of the idea of law, which is justice."⁵⁵ Radbruch defines the concept of law as oriented toward the idea of law which can only be justice.⁵⁶ In his post-War work Radbruch refers to this same understanding. "For law, including positive law, cannot be otherwise defined than as a system and an institution whose very meaning is to serve justice."⁵⁷ Radbruch then implicitly acknowledges the primary orientation of law toward the idea of law (justice) by use of his formulae to establish when law becomes either false law or when it lacks the very nature of law. He asserts that "[o]ne line of distinction . . . can be drawn with the utmost clarity: 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 'false law,' it lacks completely the very nature of law."⁵⁸

The second proposition on behalf of the unity thesis concerns the scope of application for Radbruch's 1946 formulae.⁵⁹ If Radbruch's

53. See *supra* note 28.

54. See Paulson, *supra* note 21, at 490.

55. *Id.* at 497.

56. RADBRUCH, *supra* note 1, at 73. See *supra* notes 9-21 and accompanying text for further discussion of the concept and idea of law.

57. RADBRUCH, *supra* note 30, at 15.

58. *Id.*

59. Paulson, *supra* note 21, at 497.

post-War work were a transformation into a natural law tradition, it would not be consistent for his theory to be dramatically limited in its application, namely to particular situations. Yet, as later works by Radbruch make clear, he intends “the application of the concepts of ‘statutory non-law’ and ‘suprastatutory law’ [to be] limited to ‘the altogether unique circumstances of the twelve Nazi years.’”⁶⁰ Paulson notes:

In another paper of 1947, he made the same point, albeit in slightly less restrictive terms: ‘As a rule, the positivistic doctrine must stand, which is to say that the statute, without regard to its content, is to be considered binding law. *Rechtsstaat* and legal certainty demand this fundamental commitment to the statute, which may be relaxed only in altogether exceptional, indeed, unique cases, only in cases rivaling what we have experienced in the Nazi period—and hope never to experience again.’⁶¹

Radbruch has created a formula for determining when society should no longer recognize a law as a law, and in doing so he makes it clear that this applies only in the “unique case” of Nazi Germany or to other comparable events.⁶²

A third argument made on behalf of the unity thesis centers around Radbruch’s use of the term “suprastatutory law.” Paulson acknowledges there is little doubt that Radbruch is endorsing classical natural law in his first of the post-War papers, *Five Minutes of Legal Philosophy*.⁶³ A reader of Radbruch’s later works, however, becomes aware that this endorsement does not carry forward in any substantive way. Instead, Radbruch focuses his discussion on working through the details of adjudication.⁶⁴ He did not appeal to principles of natural law when discussing the area of international human rights and several categories of crimes set out in the Nuremberg Charter.⁶⁵ He left this to the process of adjudication.⁶⁶

60. *Id.*

61. *Id.*

62. *Id.*

63. Paulson, *supra* note 21, at 497-98.

64. *Id.*

65. *Id.* at 498.

Paulson notes that this alone is not sufficient to refute the argument that Radbruch was appealing to classical natural law theory with his identification of “suprastatutory law.”⁶⁷ However, in a posthumously published paper, Radbruch “denied outright” any appeal to classical natural law and explains that he was proposing a concept more along the lines of Stammler’s idea of “natural law with changing content.”⁶⁸

The final argument made on behalf of the unity thesis is that Radbruch was merely “shifting the accent,” thereby “replacing his earlier emphasis on legal certainty with an emphasis on justice” in his post-War papers.⁶⁹ Yet, as Paulson argues, this is not “the most illuminating reading of Radbruch’s theory.”⁷⁰ Instead, he argues, Radbruch had in mind a permanent correction of his theory. To hold otherwise would effectively mean that at some point in the future Radbruch might well “shift the accent” again—this time in the direction of legal certainty, as unduly emphasized in his early works. This, Paulson argues, would be the equivalent of a defense of “open legal positivism,” which Radbruch sharply criticized and overwhelmingly rejected.⁷¹ Open legal positivism proves the validity of a law by showing “it had sufficient power behind it to prevail.”⁷² Radbruch responds by stating that “although compulsion may be based on power, obligation and validity never are.”⁷³

V. UNDERSTANDING RADBRUCH WITHIN THE CONTEXT OF THE ORDINARY AND EXTRAORDINARY

To begin to understand fully Radbruch’s basic structure, it is useful to look at how Radbruch positions himself in relation to the other legal philosophical traditions. In Section three of his 1932 work, *Rechtsphilosophie*, Radbruch outlines several general schools

66. *Id.*

67. *Id.*

68. RADBRUCH, *supra* note 1, at 68.

69. Paulson, *supra* note 21, at 499. Paulson notes that Radbruch, himself, commented on the tension between his pre and post-War works where he wrote that he was “shifting the accent, simply bringing into the light what formerly stood in shadow.” *Id.*

70. Paulson, *supra* note 21, at 499.

71. *Id.*

72. RADBRUCH, *supra* note 30, at 13.

73. *Id.*

of thought and criticizes them. Specifically, the first part of this section will focus on natural law, Hegel, Marx-Engels, legal positivism, Stammler, and cultural philosophy. I will argue that Radbruch incorporates pieces of each of these traditions and constructs an evaluative philosophy for the legal system. Such an inherently contradictory, evaluative philosophy is possible because he positions the overarching antithetical concepts in particular instances of time: the ordinary and the extraordinary. Radbruch develops a unique formula for determining when the extraordinary is impending, such that what has been law might cease to be. The remaining elements of his philosophy continue a similar dialectic with three potentially conflicting principles that together form a basis through which we can understand law, validate law, and determine its content.

Beginning with classical natural law, Radbruch refutes the central precept that there is a recognizable, universal system of values or morality.⁷⁴ Radbruch invokes Kant's critique of reason to show that the only universally valid element of law is the question: What is the right (just) law? The answers to this question are never applicable apart from the particular circumstances in which the question arose.⁷⁵ This is significant because Kant emphasizes that what is just or right for a particular society cannot be used to determine justice in another society.⁷⁶ Radbruch argues that if one must retain the traditional classification of natural law despite this central challenge, the new form must be known as the "natural law with changing content," an allusion to Stammler's work.⁷⁷ Finally, Radbruch attacks classical natural law apart from Kant. To be consistent, a natural law philosopher must, according to Radbruch, identify completely the validity of the law with the justness or rightness of the law. Thus, "[one] is unable to concede to enacted law any independent reason for existence besides natural law; [one] arrives at a complete absorption of enacted law by the right law, of legal reality by legal

74. RADBRUCH, *supra* note 1, at 60.

75. *Id.*

76. *Id.*

77. *Id.*

value, of legal science by legal philosophy.”⁷⁸

Next, Radbruch turns to historical theories, specifically those of Hegel and Marx-Engels.⁷⁹ Radbruch appreciated the potential of the dialectical method—the positioning of antithetical statements.⁸⁰ He also shares with Hegel the idea that what ought to be is what should determine what is.⁸¹ Marx and Engels argued the reverse, that what is determines what ought to be.⁸² Radbruch is very critical of this, for it seems to “turn legal philosophy into a dependent part of social philosophy and the second turns social philosophy into an empirical social science.”⁸³ This necessary connection between law and fact⁸⁴ is precisely what Radbruch wants to reject by embracing the normativity thesis (or the separation of law from fact) and ultimately a voice of criticism.

Similarly, legal positivism is troubling for Radbruch because it does not answer the question of when a law is right or just; rather, it only reveals when a law “may be correctly discerned.”⁸⁵ Under legal positivism legal philosophy becomes subsumed by legal science.⁸⁶ “This purely empiristic general theory of law would deserve mention here only as the euthanasia of legal philosophy were it not for the ineradicable philosophical impulse that does penetrate it almost against its will.”⁸⁷ Radbruch states, “[c]oncepts such as legal subject and legal object, legal relation and legal wrong, and indeed the very concept of law itself, are not accidental possessions of several or all legal orders but are necessary prerequisites if any legal order is to be

78. *Id.* at 61.

79. One of Radbruch’s criticisms of the historical school in general is that “no matter how defiantly a historical deed may break away from all tradition in the minds of the doers, as a deed that is done it becomes irrevocably subject to that necessary form of historical scientific thought, that category of gradualness without breaks. In the subsequent historical view, even the most arbitrary Will is inevitably revealed as a Must . . .” RADBRUCH, *supra* note 1, at 62. Here, Radbruch is seeking a method to criticize the extraordinary—which breaks away from all tradition.

80. *Id.* at 63.

81. *Id.*

82. *Id.*

83. *Id.* at 64.

84. “[The] economic basis and legal ideological superstructure affect each other mutually.” RADBRUCH, *supra* note 1, at 65.

85. *Id.* at 66.

86. *Id.* at 65-66.

87. *Id.* at 66.

understood as legal.”⁸⁸ These concepts are not included in a positive theory of law. Positive law is not an evaluation of the law itself, but rather it is only an epistemological assessment of the law-making process.⁸⁹ As seen later in his work, Radbruch asserts a form of legal positivism with legal certainty by combining this method of cognition with other forms of evaluation.⁹⁰

Rudolf Von Jhering represents an important influence in Radbruch’s philosophy. Von Jhering countered the historical school by advancing the idea that “purpose is the creator of the entire law.”⁹¹ Radbruch believes that Von Jhering would “have had to perceive the dualism of the views of legal reality and legal value, and finally to conquer the utilitarianism of partial purpose statements in an ultimate absolute idea of purpose . . . thus [arriving] at the necessary conclusion of methodological dualism.”⁹² Both the idea of purpose and methodological dualism play a key role in Radbruch’s theory.

Stammler’s use of relativism with natural law also greatly influenced Radbruch. His “natural law with changing content” is key to understanding Radbruch’s use of justice in both instances of the ordinary and extraordinary. Stammler falls short of a full statement of legal philosophy; he essentially serves to reestablish “an independent view of legal value beside the investigation of legal reality, based on the methodical dualism of Kantian philosophy. . . .”⁹³ Radbruch extols Stammler’s addition to the field:

[Stammler advocated] that beside the investigation of positive law there must be developed, in full independence, the ‘theory of the right law,’ but also that this theory of the right law represents only a method and not a system of legal philosophy. The theory of the right law will not and cannot develop a single legal rule that could be proved right as of universal validity. It buys the universal validity of its concepts at the price of their purely formal character. Thus, it is less a legal

88. *Id.*

89. RADBRUCH, *supra* note 1, at 66.

90. *Id.*

91. *Id.* at 67.

92. *Id.* at 67-68.

93. *Id.* at 68.

philosophy than a logic of legal philosophy, and epistemology of the view of legal values, a critique of legal reason. It is an extremely valuable entrance wing to any legal philosophy but not the main structure itself.⁹⁴

Along with Stammler, philosophical relativists seek to remove legal philosophy from the discussion of its own method into a form capable of espousing value judgments.⁹⁵ Although unable to do anything more than renounce the universal validity of a system, philosophical relativism can develop a series of systems without deciding between them. This is the “task of legal philosophical relativism” according to Radbruch.⁹⁶

Radbruch and Stammler do disagree on the role of the idea of law. Stammler insists on distinguishing sharply between the idea of law and law itself, asserting that the concept of law should be derived without any reference to the idea of law.⁹⁷ For Radbruch this is impossible; he reasons that “it would be a miracle beyond all miracles if a concept formed by relation to values, such as that of law or that of crime, could be made to coincide with a natural concept arrived at by a value-blind approach.”⁹⁸ More precisely, the concept of law may only be defined “as the reality tending toward the idea of law.”⁹⁹

Beyond the role of the idea of law, Radbruch finds Stammler’s distinction between the “Is” and the “Ought” to be, by itself, less than sufficient.¹⁰⁰ “[B]etween the statement of reality and the appraisal of values a place must be saved for the relation to values, that is,

94. *Id.*

95. RADBRUCH, *supra* note 1, at 69.

96. *Id.*

97. *Id.*

98. *Id.* at 52. In Section 1 of his *Legal Philosophy* Radbruch constructs this argument with reference to describing a table. Is it possible, he asks, to accurately describe only a table without reference to its purpose? Obviously, he finds it not possible and thus also a value-blind view of the law is impossible. *Id.* Therefore, he concludes, “Law can be understood only within the framework of the value-relating attitude. Law is a cultural phenomenon, that is, a fact related to value. The concept of law can be determined only as something given, the meaning of which is to realize the idea of law.” *Id.* at 51-52.

99. *Id.* at 69.

100. *Id.* at 69-70.

between nature and ideal, a place for culture.”¹⁰¹ Radbruch is developing his triad with some assistance from cultural philosophy. “The idea of law is value, but the law is a reality related to value, a cultural phenomenon. This marks the transition from a dualism to a triadism of approaches (disregarding here the fourth, that is, the religious approach). That triadism turns legal philosophy into a cultural philosophy of the law.”¹⁰²

Radbruch combines all of the above influences to build a philosophy that will maintain its critical voice, *cultural rootedness*, and legal certainty. Using Kant as his guide, Radbruch is able to “stamp law and justice as moral tasks, but leave the determination of their contents to an extra-moral legislation.”¹⁰³ Desiring to minimize the unpredictability of the legal system, among other reasons, Radbruch limits the ultimate test of the *validity* of law for truly extraordinary times.¹⁰⁴ In all other ordinary times, Radbruch evaluates the law according to a triad of equally-weighted principles: justice, legal certainty, and purposiveness.

A. Ordinary Times

When describing the concept and idea of law in ordinary circumstances Radbruch uses antinomies as a means of creating a dilemma for the individual. Justice and purposiveness require contradictory priorities.¹⁰⁵ For Radbruch the heart of justice is equality, which demands generality of legal rules.¹⁰⁶ Purposiveness, though, seeks to individualize and “every inequality remains essential.”¹⁰⁷ The paradox between justice and purposiveness that is created illustrates more than incompatible courses of action. The same is true for legal certainty and justice; one easily imagines when a law must be enforced for the sake of certainty, but for a particular

101. RADBRUCH, *supra* note 1, at 69-70.

102. *Id.*

103. *Id.* at 85. Such is possible, according to Radbruch, only because “law, notwithstanding any possible variance of its contents from morals, still tends toward morals as its end.” *Id.*

104. RADBRUCH, *supra* note 30, at 18; Paulson, *supra* note 21, at 497.

105. RADBRUCH, *supra* note 1, at 109.

106. *Id.*

107. *Id.*

individual that law is unjust.¹⁰⁸ For example, Socrates, jailed by an arguably unjust application of the law, refused an opportunity to escape prison. This refusal illustrates the contradiction between justice and legal certainty; he did not leave prison because it would have been a further injustice for every individual to be able to renounce at will the authority of the law.¹⁰⁹ Radbruch asserts that “law may prove its power but never demonstrate its validity.”¹¹⁰ Ultimately, though, the validity of a law that is extraordinarily unjust cannot be upheld.¹¹¹ Radbruch intends for all three precepts—justice, legal certainty, and purposiveness—to exert equal amounts of influence on the individual’s resolution of his or her “irremovable tension.”¹¹²

Another important step towards understanding Radbruch’s philosophy is to examine the role of relativism. He combines relativism with neo-Kantian methodological dualism: statements of what the law ought to be may be established only through other statements concerning the “ought,” never through what the law “is.”¹¹³ “Ought” statements may not be “discerned but only professed.”¹¹⁴ Therefore, legal science in the field of the “ought” can achieve three things: (1) “establish the means necessary to realize the end that ought to be attained,” (2) “think a legal value judgment through down to the remotest means for its realization, [and] . . . clarify it up to its ultimate presuppositions of world outlook,” and (3) develop systematically the “conceivable ultimate presuppositions and, consequently, all starting points of legal evaluation.”¹¹⁵

108. The Supreme Court’s declaration of the Religious Freedom Restoration Act as unconstitutional is a good example. *City of Boerne v. Flores*, 521 U.S. 507 (1997). The Court instituted a new test for First Amendment claims: if the law is generally applicable and does not single out a religion for discriminatory treatment then it is not unconstitutional. *Id.* I would not argue this was a good decision of the Court, although, it is illustrative of this particular tension.

109. Further, “the statute of limitations, title by adverse possession, the protection of possessory estates in private law, and the *status quo* in international law, even the illegal situation is given the effect of destroying or creating rights in the interest of constancy. . . .” RADBRUCH, *supra* note 1, at 110.

110. *Id.* at 114-15 (quoting Socrates).

111. *Id.* at 111.

112. *Id.*

113. *Id.* at 55.

114. *Id.*

115. RADBRUCH, *supra* note 1, at 55-56.

Radbruch presents a relativistic legal philosophy that exhaustively presents the individual with all possibilities from which only he or she can decide. He describes the relativistic method as one of determining internal validity:

The method which is here presented is called relativism, because its task is to determine only whether any value judgment is right in relation to a particular supreme value judgment, within the framework of a particular outlook on values and the world, but not whether that value judgment and that outlook on values and the world are right in and of themselves.¹¹⁶

The importance of an individual's choice of the appropriate balance between justice, legal certainty, and purposiveness cannot be overstated. Goethe says "that the different ways of thought are founded upon the difference of men, and that for this very reason a general uniform conviction is impossible. Now if one knows on what side he stands, he has done enough . . ."¹¹⁷

Equally as important in understanding Radbruch's philosophy concerning relativism is to recognize when relativism is no longer applicable. The nature of legal certainty requires a uniform system of governance by a trans-individual authority to settle conflicts among individuals.¹¹⁸ Such legal positivism provides reliability, and in a sense, a form of justice.¹¹⁹ Radbruch does not intend for the individual to use relativism to determine the certainty or validity of the law. Remembering Socrates, Radbruch describes positivity:

Positivity is a fact, positive law presupposes a power that lays it down. So law and fact, law and power, while opposites enter into close relationship all the same. But legal certainty not only requires validity of legal rules laid down by power and factually carried through; it also makes demands on their

116. *Id.* at 57 (footnotes omitted).

117. *Id.* at 59.

118. *Id.* at 116-17.

119. *Id.* at 119.

contents: it demands that the law be capable of being administered with certainty that it be practicable.¹²⁰

In essence, Radbruch shows us that legal certainty is beyond the control of the individual alone; it necessarily involves the state, which is empowered by the recognition of citizens.¹²¹ The state serves a decisive role when what is just is indeterminable; the state “lays down what is to be legal” in these times because it has the will and power to do so.

One final concept will illuminate Radbruch’s theory as applied in the context of ordinary circumstances: the role of morality in the legal system. He embraces Kant’s idea that law and justice are moral tasks but that the determination of their contents is better left to an extra-moral legislation.¹²² Radbruch believes “[t]his moral sanction of law is possible only because the law, notwithstanding any possible variance of its contents from morals, still tends toward morals as its end.”¹²³ Morals, “on the one hand, constitute the end of the law and, on the other hand, for that very reason are the ground of its obligatory validity.”¹²⁴ Radbruch expressly does not intend to obliterate “the distinction established between the respective contents of law and morals,” nor does he intend to subsume one to the other.¹²⁵ Rather, he seeks to explore the “naturalization of the legal duty in the realm of morals” through what he considers an “investment of the same material with a twofold value character.”¹²⁶ One set of values belongs with the ordinary circumstances and that is the set of values, termed working values, commonly associated with science or aesthetics.¹²⁷ One uses this set of values when working with Radbruch’s triad of equally weighted precepts. Working values strive toward attaining the moral good, and consequently remain connected to morality even

120. RADBRUCH, *supra* note 1, at 109.

121. *Id.* at 116. Radbruch notes that this recognition is one that is rooted in the individual’s “true interest” in its validity rather than “fictitiously taken to be willed by him.” *Id.*

122. *Id.* at 85.

123. *Id.*

124. RADBRUCH, *supra* note 1, at 84.

125. *Id.*

126. *Id.* at 85.

127. *Id.*

though they do not always directly coincide.¹²⁸ Radbruch, once again, creates an unresolvable tension between law and morality.

Thus, the relation of morals and law represents a relation rich in tension. At first, law is just as foreign, just as differentiated from and possibly opposed to morals as the means always is in relation to the end; it is only subsequently that, as the very means for the realization of moral values, the law partakes of the worthiness of its end and is thus incorporated in morals with the reservation that it operates according to its own rules.¹²⁹

Thus far, Radbruch has taken pieces of different, popular theories like natural law and legal positivism, altered them in small measure, and placed them together in a equivalent fashion of conflicting precepts. On the one hand, he argues that law and morality are necessarily connected, as morals provide the obligatory force and end destination of the idea of law. On the other hand, morality (other than societal, “working values”) should not be a part of determining the validity of law, at least in ordinary circumstances according to Radbruch. However, he leaves the final decision up to the individual’s conscience, impliedly involving that individual’s morality, as to the appropriate balance between justice, certainty, and purposiveness. Essentially, Radbruch is creating a new basis for legal philosophy by combining the seemingly uncombinable and making them inseparable.

B. Extraordinary Times

Having survived World War II in Germany, Radbruch was able to consider his theory in the situation of the extreme, or the extraordinary. Radbruch’s post-War writings reflect this experience and are the basis for his correction of his earlier work. When describing the status of an unjust law in his pre-War work, Radbruch held that it is only when legislation is “recognized beyond a doubt as unjust” then no claim can be made for retaining its validity; the very

128. *Id.*

129. RADBRUCH, *supra* note 1, at 87.

basis of validity is on the unknowability of right or just law.¹³⁰ Radbruch's post-War writings reflect a much stronger assertion about when legislation reaches such a previously unimaginable level: "Preference is given to the positive law . . . unless its conflict with justice reaches so intolerable a level that the statute becomes, in effect, 'false law' and must therefore yield to justice."¹³¹ Radbruch then goes one step further and draws a line with utmost clarity: "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 'false law,' it lacks completely the very nature of law."¹³² This new, clear line of distinction and the stronger reassertion of the previous standard are the result of the application of Radbruch's theory to the laws of Nazi Germany, which now represents the extraordinary time.

Radbruch limited the scope of application of these formulae to only extraordinary times. As discussed above, Radbruch did not intend for individuals to reach the determination that a law is unjust by their own individual standards or morality. The justice invoked by Radbruch during the extraordinary times is a universal sense of justice—not a relativistic determination. Nevertheless, he did desire to empower the individual, the society, and the judge with a standard that helps them determine when a law goes beyond the acceptable.

Two examples will illustrate Radbruch's formulae and how the courts of Germany used his formulae to invalidate laws of Nazi Germany. The first case involved a German attorney who emigrated to Holland before the outbreak of the War.¹³³ A 1941 Reich law called into question the citizenship of the attorney.¹³⁴ In 1968 the German Federal Constitutional Court held that "legal provisions from the National Socialist period can be denied validity when they are so clearly in conflict with fundamental principles of justice that a judge who wished to apply them or to recognize their legal consequences would be handing down a judgment of non-law rather than law."¹³⁵

130. *Id.* at 61 (Paulson's translation).

131. RADBRUCH, *supra* note 30, at 14-15.

132. *Id.*

133. Paulson, *supra* note 21, at 491.

134. *Id.*

135. *Id.*

The German Court continued, expressly invoking Radbruch's formulae, "In this law, the conflict with justice has reached so intolerable a level that the law must be deemed null and void."¹³⁶ Legal certainty does not trump this injustice, as the Court found: "For, once issued, a non-law that clearly violates constitutive principles of law does not somehow become law by being applied and observed."¹³⁷ For a court to apply the argument or test from a legal philosopher is, as Paulson notes, a monumental event.

The second case involved former East German border guards who were being prosecuted for shootings at the Berlin Wall. In 1992, the German Federal Supreme Court for Civil and Criminal Matters heard this case, which revolved around the interpretation and validity of section twenty-seven of the East German Border Law.¹³⁸ This law purported to justify the act of border guards, namely firing their weapons "to prevent an act that is, in the circumstance in question, criminal."¹³⁹ The Court argued that if the prevailing practice of the East German State was to inform the interpretation of this statute, then such interpretation triggers the application of Radbruch's formulae.¹⁴⁰ The Court wrote:

The conflict between the positive law and justice must be so intolerable that the law *qua* "false law" must yield to justice. Drawing on [such] formulations [as these], an effort was made after the fall of the Nazi dictatorship to characterize the most serious violations of law. It is not easy to apply this point of view to the case at hand, for the killing of people on the intra-German border cannot be equated with the mass murder perpetrated by the Nazis. Nevertheless, the insight acquired earlier remains valid, namely, that in evaluating acts committed in the name of the state, it is necessary to ask whether or not the state has gone beyond the outermost limit set in every country as a matter of general conviction.¹⁴¹

136. *Id.*

137. Paulson, *supra* note 21, at 491 (footnote omitted).

138. *Id.* at 492.

139. *Id.*

140. Paulson, *supra* note 21, at 492.

141. *Id.*

VI. CONCLUSION

Radbruch attempts to create a legal philosophy that makes room for morality and legal positivism. He accomplishes this by positioning the ordinary and extraordinary into distinct fields. During ordinary times, Radbruch relies on a relativistic approach; individuals themselves must balance and reconcile the three antinomies of law: justice, legal certainty, and purposiveness. Radbruch draws the line when it comes to legal certainty, thus it should predominate only when what is just is indeterminable. Radbruch separates extraordinary times from the ordinary and develops two formulae to facilitate the determination of “statutory non-law,” or when a law lacks the very nature of law.

Through the many contradictions and classifications of circumstance, one must remember that Radbruch intends his entire theory to be understood as an undisturbed whole.

So it is but emphasis on one link in a closed ring, and not a break in the ring, to point sometimes to the individual personality, sometimes to the collective personality, and sometimes to the culture of work as the ultimate end of individual and collective life. These three possible views of the law and the state result from emphasizing *different elements of an indivisible whole*.¹⁴²

Thus, to focus on any one part of Radbruch’s theory is incomplete; one must consider it in its entirety. Radbruch reminds us that this unity “rests not in the works themselves but in the consciousness uniting them, and not in an individual consciousness which would be altogether unable to grasp its fullness but in the collective consciousness of the nation which embraces the individuals and joins the generations.”¹⁴³

142. RADBRUCH, *supra* note 1, at 96 (emphasis added).

143. *Id.*