There Ought to be a Law: Gustav Radbruch, Lon L. Fuller, and H.L.A. Hart on the Choice Between Natural Law and Legal Positivism

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There are principles of law, therefore, that are weightier than any legal enactment, so that a law in conflict with them is devoid of validity.

Gustav Radbruch, *Five Minutes of Legal Philosophy*, 1945

"Justice, not expediency, [is] the ideal of the law."

Gustav Radbruch: his own note in his copy of *Rechtsphilosophie*

Legal Philosophy

Those who engage in legal philosophy, as Lon Fuller (1902 – 1978) noted, are “attempting to give a profitable and satisfying direction to the application of human energies in the law.”¹ They are trying to determine how best both they and those in the legal profession ought to be spending their professional lives.² Lon Fuller suggested that an outlook which inheres to a natural law perspective on what constitutes law may be the best way forward because, in his words, it allows men and women to push reason as far as they can in their

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*This article was written while doing research on these matters for Professor Wes Pue of the UBC Faculty of Law. Sadly, Wes passed away earlier this year and will be dearly missed by family, friends, and the many colleagues and law students he had such a positive impact on. Wes encouraged me to have my work in this area published, and because previously he had graciously agreed to have me work with him as his research assistant, I was subsequently inspired to write this article in the course of that research. Thank you, Wes.

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¹ Lon L. Fuller, *The Law in Quest of Itself* (Chicago: The Foundation Press, 1940), 2.
² Ibid.
quest for the answer to the question, what is law. This advice relates directly to a question in legal philosophy that has troubled scholars for at least two centuries: that of how we ought to understand what the law is, in so far as it may be either something which exists on its own apart from any system of morals, legal positivism, or whether law is intrinsically connected to morality, natural law. Whether the view one takes on this question will produce either better or worse results stemming from the professional actions of lawyers, judges, and legal scholars in both domestic and international legal contexts was both passionately contended by Gustav Radbruch (1878 – 1949), as a once positivist converted to natural law, and hotly debated by Fuller and Herbert Hart (1907 – 1992) on behalf of natural law and positivism respectively. As his own words above indicate, after living through World War 2 and witnessing the horrible crimes against individuals and humanity carried out by the Nazis, Radbruch came to the conclusion that even if a legal system rested on legal certainty and laws equally applied to equals, if it was bereft of justice, the foundation of law, it was no law at all. Radbruch became convinced that how lawyers, judges, and legal scholars answer the question of ‘what is law’ is of central importance because he saw how the blind fidelity of judges and lawyers to the legal system under the Nazis resulted in gross injustices which law was supposed to protect against, not furnish.

In this paper I want to both briefly sketch out how this question came to be of such importance in the legal philosophy of Gustav Radbruch (1878 – 1949), Lon Fuller, and Herbert Hart, and I want to pose the question as to whether or not we are better off, whether better results will follow for society, if we choose to understand law either as dependent on morality or separate from it. I conclude that some via media, some middle way, between the two perspectives offers the best option, for the simple reason that both perspectives teach us essential things about the nature of law, and it would be irresponsible

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3 Ibid., 103; 109.
to merely cling to the good things one perspective offers at the expense of the important things we learn from the other.

But, the reader might ask, what do the answers to this fundamental question on the nature of law have to do with my life? As it happens, quite a bit I think. What if I were to ask you whether the legal system you live under was valid in your opinion; and if you claim it is valid, I then ask you why it is valid. If your answer includes considerations of fairness, equality, and justice, fair enough. Based on that, I would assume that you think your state’s legal system is not then immoral but morally acceptable. It is at exactly this point where the question discussed in this paper is most important for you because you live in a society with many others, and how the law affects them has to matter to you, because the stability of the state depends on it in the long run. One can see, for instance, how the question would be a real problem in contemporary times for societies that include both people who are prosperous and live in a relatively safe environment under a given legal system, and people who are poor or disadvantaged under that same legal system. Those who prosper may care little about laws which do not affect themselves but have negative consequences for certain others in their society. It is not that they certainly would believe all laws must be moral because they themselves prosper, it is the real possibility that we as people will accept that because we enjoy the benefits of a legal system that therefore all laws in that system must be morally acceptable. However, if some people in our society are subject to laws which bar them from advancing in their lives and where there are profound deficiencies and imbalances of wealth and power, those people will have no difficulty identifying the immorality of such laws and, if their lack of power prevents them from having the laws changed, perhaps choose to treat them as no laws at all. None of us wants to live in a society where people treat the law as no law at all, for obvious reasons.
If we can agree that how we answer the question of ‘what is law’ is important, then it is worth looking at this question from the perspective of people who spent their professional lives thinking about it.

**Legal Philosophers**

While a more detailed examination of how these scholars answered the central question will come in turn below, it will be helpful to note a few things about each of them to put them in some context and to give the reader unfamiliar with the material a sense of the timeline, considered further below. Gustav Radbruch was a German politician and legal scholar who rose to the seat of the Minister of Justice in Germany for brief stints in the early 1920s, and who wrote a legal philosophy treatise in 1932 which was grounded in positivist ideals. He lived through the horrors of World War 2 in Germany, and following the war, immediately in 1945/1946, he wrote two brief articles where he explicitly disavowed his positivist views and embraced a natural law perspective.

Radbruch died in 1949, but his ideas on the nature of law continued to remain important. In the United States, in 1940, Lon Fuller, a legal philosopher and professor of law at Harvard University, gave three important lectures criticizing legal positivism and implying that some of its ideals made the transition of power to the Fascist governments in Germany and Spain during that time period easier, and thus in some way responsible for

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their rise. Radbruch, in his 1945/1946 articles, stated the same thing, but specifically about the legal profession and judiciary: commitment to legal positivist values had blinded many of them from the rank injustices produced by their actions based on their supposed fidelity to law. Herbert Hart was a legal philosopher and law professor at Oxford University, and as someone who embraced positivist ideals, he was incensed at the apparent enthusiasm being aroused by both Fuller’s writings and Radbruch’s conversion to a natural law stance. He was invited to give a lecture at Harvard in 1958, and the lecture was a direct challenge to the natural law perspectives of Fuller and Radbruch and a defense of the aforementioned notion that law can be defined on its own apart from any connection to morality. So the nub of the argument was that on one side you had a noted positivist in Radbruch who had converted to a natural law outlook, explicitly, and Fuller having written in support of him and continuing to, and then Hart the positivist criticizes their claims and defends his own position that there in fact ought to be maintained a separation between law and morality. Hart’s lecture was published in 1958 in the Harvard Law Review, and Fuller wrote an article in response which was printed in the same issue. Radbruch passed away in 1949, Fuller in 1978, and Hart in 1992.

It should be acknowledged that there has been much scholarly speculation and consideration of Radbruch’s views and change of heart, and one of the main questions orbits around whether his apparent conversion to natural law following the War was really so much of a conversion at all. It is not the purpose of this essay to engage this interesting

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6 Fuller, *The Law in Quest of Itself* [Law in Quest].
question, but as Hart, Fuller, and most importantly Radbruch himself, all saw it as a change in alignment of crucial significance, I accept it as a fact that he did; and while the discussion below will support this notion in various places, it is not the focus of this article to prove this point. Radbruch’s work has also aroused interest in his views and formulae more generally, and numerous scholars have been interested in his work since the 1940s and continue to be to this day. The continuing interest in his ideas about what constitutes law, as an active German legal philosopher both before and after World War Two, is testament to the gravity with which we now approach the questions of whether or not our positivist modernist ideals truly did assist the rise of Fascism, and what might be the best way forward in framing what law is. I suggest these are questions worth answering, and it is to the latter question I will focus my attention. In attempting to determine a satisfactory answer to this, I will lay out a number of passages from all three legal philosophers in order to both help the reader understand what was truly important to them on this question, and to, as much as possible, let each of them speak for themselves on this matter.

Natural Law and Legal Positivism

Before moving on to look more closely at the disagreement between Fuller and Hart, which was partly occasioned by the conversion of Gustav Radbruch from being a noted positivist to an outspoken natural law proponent, let me just sketch out for the reader


unfamiliar with positivism and natural law their basic contours in the present context. Fuller gives us ready definitions:

By legal positivism I mean that direction of legal thought which insists on drawing a sharp distinction between the law that is and the law that ought to be. Where this distinction is taken it is, of course, for the sake of the law that is, and is intended to purify it by purging it of what Kelsen calls “wish-law.” Generally — though not invariably — the positivistic attitude is associated with a degree of ethical skepticism. Its unavowed basis will usually be found to rest in a conviction that while one may significantly describe the law that is, nothing that transcends personal predilection can be said about the law that ought to be.

Natural law, on the other hand, is the view which denies the possibility of a rigid separation of the is and ought, and which tolerates a confusion of them in legal discussion. There are, of course, many “systems” of natural law. Men have drawn their criteria of justice and of right law from many sources: from the nature of things, from the nature of man, from the nature of God. But what unites the various schools of natural law, and justifies bringing them under a common rubric, is the fact that in all of them a certain coalescence of the is and the ought will be found.

…So far as the question of ultimate motives is concerned, it is fairly obvious that if the positivist insists on separating the is and the ought for the sake of the is, the natural-law philosopher is attempting to serve the ought when he refuses to draw a sharp distinction between it and the is.¹¹

¹¹ Fuller, Law in Quest, 5 – 6.
For our purposes and to state the case again, the positivist is concerned we understand, for instance, that just because you have law or a legal system, it does not mean that those laws or the system will be moral; they may in fact be quite immoral, but still be a valid law or legal system. The natural law theorist maintains that law and morality are connected at a fundamental level, and when the degree of immorality in a legal system or law is too high, it ceases to be a law or legal system; they would point to the fact that legal systems are premised on ensuring justice, and immorality does not aim at justice.

The history of ideas in the positivist and natural law strains goes back to the Greek philosophers, and notions of natural law were predominant until the Modern Age and Enlightenment periods. Very broadly speaking, the focus of the natural law theorists for most of Western history was a result of the suggestions first made by Socrates (470 – 399 BCE) and Plato (424 – 347 BCE) concerning the so-called “good,” which was a reality supposed to exist outside of physical human experience, but yet to be sought after. The most ready example of this would be their idea of the forms, perfect instances of varieties of things, from the ideal form of a horse to the ideal form of justice, which were only accessible via the mind and yet perfect in every way and thus to act as our baseline for defining things. On the other hand, the ideas of Plato’s student Aristotle (384 – 322 BCE) were more focused on explaining what we can see right in front of us, describing things in detail, and defining them according to our observations. One can perhaps see how these two epistemological trajectories would have contributed to ideas in natural law that were focused on ideals (Plato and Socrates), what ought to be the case, and much later on the positivist notions which were grounded only in what is (Aristotle).


13 These ideas were picked up by both Roman and later Greek cultures and were then adopted by the early Christian Church and later the Roman Catholic Church. Some of the most notable figures associated with this virtually wholesale adoption of the ideas of the Greeks were Origen of Alexandria (184 – 253 CE) (Platonist) — in no sense a Catholic Christian but merely the most significant early Christian thinker since Paul of Tarsus —, Augustine of Hippo (354 – 430 CE) (Platonist), and Thomas Aquinas (1225 – 1274 CE)
In the Modern Period, many of Western society’s assumptions about the usefulness of natural law to explain things, including the law, were challenged and subsequently disposed with. For this discussion, two important movements which contributed to the fall of natural law explanations in the Western experience were the utilitarian and positivist schools of thought. Utilitarian or positivist achievements that took societal principles of what “ought” to be the standard for laws and rights, such as the founding Constitutional documents of the United States or France or the many reforming Acts of the 19th century in the United Kingdom, and embedding them in law, or taking judge made principles and precedents and codifying them in statutes to inhere to more certainty for litigants, were great steps forward for Western legal systems. But these positivist tendencies bringing more certainty and justice to the lives of citizens were not divorced from morality, quite the opposite: it is because of the immorality of the prior conditions which caused the revolutions, protests, wars, and setting up of new states, that these guarantees were brought into being to foster a morally acceptable environment, especially for those in society who had no power of their own and were usually no more than indentured slaves to those who ruled over them.

(Aristotelean). These three figures were the primary conduit through which Greek philosophical ideas were imported into Christian ergo European thought and culture. But it is to Augustine and Aquinas alone that we ascribe natural law theories which made popular such ideas as divine right of kings and just war. [Origen openly eschewed the notion that those of the Christian religion should be involved in such worldly enterprises; however, he was by far the most important and influential Christian thinker of the first three centuries and that it was he who as a Platonist merged the ideas of the Greeks into the religion meant that he was in part responsible for the basis upon which Augustine and Aquinas would make their claims on the basis of Natural Law.] These claims became the basis for many of the regrettable actions of the Church, the Holy Roman Empire, and European sovereigns of medieval Europe who ruled over people’s lives with an iron fist. One can see then, how even the mention of natural law would inhere to a negative connotation for those who can appreciate the seriousness of the ghastly consequences associated with the application of these human-made ideas which were claimed by their authors to have stemmed from natural law. Like many of the reforms and revolutions occasioned by the grotesque unfairness of such a tyrannical or oligarchical system of government as was known during Middle Ages, reform in the legal systems was gradually achieved during the late Middle Ages and Modern Periods by thinkers and politicians who based their reforms on humanist and positivist philosophies.
But legal positivism, somewhat different than the political reformers’ appeal to the positivist notion of predictable laws created by the people who were under them, was, in its early 19th century incarnation, concerned to demonstrate that law existed quite apart from morality, and was instead merely predicated on the existence of some person or persons strong enough to enforce it. As Radbruch noted on this tenet of early legal positivism:

…A law is valid because it is a law, and it is a law if, in the general run of cases, it has the power to prevail.

This view of a law and of its validity (we call it the positivistic theory) has rendered jurists and the people alike defenceless against arbitrary, cruel, or criminal laws, however extreme they might be. In the end, the positivistic theory equates law with power; there is law only where there is power.14

Just as with the house cleaning of very oppressive natural law based political arrangements which were accomplished in the Modern Age’s revolutions and the creation of guaranteed rights for citizens through constitutional instruments which inhered to legal certainty — a quality very dear to the positivist standpoint — there was now a concern to drive a more fundamental wedge between law and morality, and this eventually led to the claim that the

existence of the former did not indicate the presence of the latter. Was this simply a case of the pendulum swinging too far in one direction?

Positivism had gained traction in legal circles in the West in the early 19th century, and we find John Austin’s (1790 – 1859) work, *The Province of Jurisprudence Determined* (1832), as the seminal work in this direction. His work had been preceded by the very important work of Jeremy Bentham (1747 – 1832), founder of the school of utilitarianism. For our purposes, part of Bentham’s criticism was levelled at the judges appealing to principles of natural law or natural rights, the latter of which Jeremy Bentham referred to as “nonsense

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15 The positivists within the common law world began in earnest with Jeremy Bentham (1747-1832) and continued with the likes of John Austin (1790-1859) and Oliver Wendell Holmes, Jr. (1841-1935).
17 Jeremy Bentham, *Of Laws in General*, ed. H.L.A. Hart, *The Collected Works of Jeremy Bentham: Principles of Legislation*, ed. J.H. Burns (The Athlone Press 1970). Bentham’s critique on a stultified and largely arbitrary system of legal procedure involving loose precedents and amorphous unwritten laws was absolutely needed at the time. Nothing was more offensive than some judge or lawyer digging around in the archives to pull a case out of the hat which would support their decisions and argument. The 17th to 19th centuries were replete with examples of just such cherry picking and the litigants had little to no idea what to expect before the law. Charles Dickens’ (1812 – 1870) *Bleak House* (1852 – 1853) was a significant work of historical fiction which set out the absurdities of the English legal system at the time, wherein the beneficiaries of a large estate were forced to spend so much money on lawyers over so many years, generations even, that by the time the case was completed, there was nothing of the estate left for them.

It should be noted that during this era of English history both parties at law could muster cases for and against virtually at will, and what commonly happened was something akin to a Lord Denning (Tom Denning; Baron Denning 1899 – 1999) type decision where the judge would begin his written decision with something like “Ms. Beatrice was a poor old grey haired lady living on a meagre pension, and had her ….” There is no need to finish the sentence, already the reader knows what Denning’s decision was going to be. But judges were supposed to be guided by the law, not their predilections and moral preferences; the law itself was already supposed to reflect those of society at large, or some part of society in any event. There is no suggestion Denning stood outside of the law in his judgements, because as a judge in the common law system you are called upon to base your decision on the case law that exists, and you may either expand or contract its meaning, and thereby create new law. In common law systems, judges as a group are very much part of the lawmaking body of the state. Denning, himself, was a legal reformer and did change the common law in England in cases which were first overturned by the House of Lords, but yet adopted into the law by Parliament later on.

In Bentham’s day, though, he was highly critical of the fact that there was no organization in judge made law or in the way the cases at Queen’s or King’s bench were recorded and by who. Any person so choosing, the ostensible reporters, could publish their own version of the proceedings of a case, and there were numerous ones and they could easily misquote or miss parts, and that led to situations where someone’s victory or defeat at law could hang on one word; a word, as it happens, that may itself have never happened.
appealing to principles which the state has not promulgated in the form of laws inheres to the real possibility for improper use of those principles, even if they are, themselves, innocuous in the context of the daily lives of people who employ various principles in many areas of their lives. Helping an elderly person to carry their heavy bag is something many people see as principled behaviour, but there is no law for it. People do it because they think they ought to do it, and if they see someone not doing it, it strikes them as merely a regrettable omission. But if a judge sentences a person with punishment based on a legal principle which has not been clearly written in an existing law, or is based on a precedent they find in some dated law report from hundreds of years ago, then we, along with Bentham, agree that these are arbitrary uses of principles. In these cases, there is no legal certainty, something that was dear to Radbruch in his own positivist philosophy of law.

In one sense then, the positivist goal of legal certainty was necessary: codification of the laws was desperately needed; principles of natural law, what ought to be, had to be grounded in legislation or a clear line of recent case law, and cases needed to be recorded and taken from authorized sources only. Judges and lawyers could not be allowed to go on adventures into the past and pull up seven hundred year old cases to support their position, causing the original judges to “rise up from the dead,” as Bentham wrote.19


19 Jeremy Bentham, Of Laws in General, ed. H.L.A. Hart, The Collected Works of Jeremy Bentham: Principles of Legislation, ed. J.H. Burns (The Athlone Press 1970), at 185-188. If we think back a moment about Bentham, we find an English jurist and polymath of a sui generis nature who was intellectually revolted by the backwards, overly complicated, arbitrary, and unjust state of the English legal system of his day. To put Bentham’s purpose into a breath, he wanted to take laws out of the maze of records, reports, and treatises and have them all put into one “pure body of statutory law” (19.1, 232). For instance, Bentham ridiculed the fact that court records were stowed away in some dark cavernous place which was totally inaccessible to those whose fate depended on them. He noted that the trouble of finding these records, their scanty information and indecisiveness, meant that it was not more than once in a hundred that the judges employing the decisions could endure even

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It was in this environment that John Austin wrote his positivist treatise and taught lawyers and judges in common law countries around the globe that law is the command of the sovereign, and cannot be assumed to be based on anything as amorphous as natural law. Hart noted: “[t]wo of them, Bentham and Austin, constantly insisted on the need to distinguish, firmly and with the maximum of clarity, law as it is from law as it ought to be. This theme haunts their work, and they condemned the natural-law thinkers precisely because they had blurred this apparently simple but vital distinction.”

But, as Lon L. Fuller pointed out, what purpose or benefit does such an observation hold or offer? As it happens, apparently none:  

Of course the work of the positivist is essentially timeless; by abstracting law entirely from its environment and defining it not in terms of its content, but of its form and sanction, they run no risk either of being outdated or of ever contributing anything to the development of the law except restraints and inhibitions. Austin’s theory, which looking at them. He writes, “...if a fit of curiosity happens to take the judge, such an [sic] one as shall not take him thrice perhaps in a twelvemonth, they are handed down: if not they are let alone: one out of a thousand becomes a law: the nine hundred and ninety nine others remain waste paper (15.3, 186).” Bentham is just as scathing on another source of law which lawyers and judges are still wrestling with, Holmes’ “oracles of the law,” the reports. Bentham writes that as the records are largely useless, another smaller collection of documents is assembled, in which, as he notes, one third, tenth, twentieth, or hundredth part of various cases are shown to the public, which if equally known would be just as likely to become law. He notes that sometimes you have a running history of a court, and then at other times a lacuna of thirty years of “darkness.” He finds there is no telling whether you will get the beginning, middle, or end, of a cause; or the argument without decision or vice versa; sometimes the inferior court’s decision without the superior which refutes it. According to Bentham, the reports are published by anyone that pleases, and as many as please, and where nobody publishes, no one cares; if the lawyer uses the case manuscripts to make money or executors find them in batches of bequeathed papers, so be it; and if either of these happens into the hands of a bookseller, he becomes a legislator. He writes: “Sometimes by commission from that high authority, a judge who had been dead and forgotten for half a century or for half a dozen centuries, starts up on a sudden out of his tomb, and takes his seat on the throne of legislation, overturning the establishments of the intervening periods... (15.4, 187).” So, all this in aid of the fact that with Bentham we are dealing with someone who lived at a time when the law was in the hands of the rich and/or bourgeois and only understandable to those who dealt with it on a daily basis, although Bentham seems to have regularly doubted even that.

20 Hart, Positivism, 594.
21 Fuller, Law in Quest, 103.
suffered no contamination from the backward state of the social sciences of his day, remains today just as true, and just as lacking in significance for human affairs, as in 1832.\textsuperscript{22}

The fact remained then as it does now, laws are not mere commands, they are created by lawmakers who appeal to principles common to the people in the society in which they live, and they always lay a claim to some kind of justice. The laws are created by references to principles which are outside of the laws themselves, and in this way these principles are referents of a sort.\textsuperscript{23} True, in the past these laws were created by very select and wealthy members of the society, but even then, even if the law applied to those who had no part in its creation, the fact that the principles at play were only in the hands of the few does not rob them the status of agreed upon principles, it only robs them of any notion of fairness or justice if they do not benefit the ones who had no part in their creation. And as soon as you agree on that, that justice and fairness are something most people can determine on their own and ought to therefore be reflected in the law of the state of which they form a part, then you are taking a natural law perspective on what constitutes the law. You agree that there is a fundamental connection between law and morality.

If laws are created out of a certain morality, reflected in society at large in the best case scenarios, then there appears to be no way to separate morality out of the law; to do so would be akin to claiming that a hamburger with no patty is actually a hamburger. It may have a bun and thus the form, and some of the usual trappings, but it is missing the most important part, so we refuse to call it by its name not because it does not look like it, but because at a deeper level it is missing its fundamental core and just ceases to become what it claims to be. Borrowing from this analogy, what natural law theorists claim is that justice

\textsuperscript{22} Ibid.
or fairness is as important to a law as the patty is to the existence of a hamburger. But the reader needs to remember that Hart and the positivists before him do not claim that laws do not oftentimes reflect morality, they regularly do, but rather that what makes a law is not that it is moral, but that it is duly promulgated by the governing body with the power to enforce it. The question of whether or not a law is moral, for the positivists, comes after one has acknowledged and defined what a law is.

Following this period in English legal history, positivist ideals were also being espoused on the continent in Germany. Early in the 20th century, as noted above, Gustav Radbruch was a prominent scholar and politician, and his seminal work on the law, *Rechtsphilosophie* (1932), grounded in legal positivism, was an exemplar of the German positivist legal theory of that era. The reliance on positivist values to cleanse the legal system of natural law vestiges was first and foremost in the minds of theorists like Radbruch. His three master principles: predictability or legal certainty, law that was equally applied to equals, and justice, but in that order, were concerns that were foundational to his theory, as he himself later confirmed. It was important for him at the time he wrote *Rechtphilosophie* that legal certainty and equal treatment of equals were superior tenets to the junior justice. For the purposes of this discussion, though, it is only important to know that during the pre-Nazi era Radbruch ordered his principles concerning what law is in this way.

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24 Radbruch was a member of the Social Democratic Party of Germany and had a seat in the Reichstag from 1920 – 1924. He was minister of justice twice, once for just over a year from 1921 – 1922, and then for a brief period in the fall of 1923. As someone ostensibly responsible for the creation of laws, and serving as the head of this government body in Germany, and himself a lawyer and legal scholar, his views on the nature of law become even more interesting. More interesting, perhaps, than from those who appeal to scholarly argument and have no experience in the creation of law.

25 Vide infra.
The Question’s Context

For Radbruch specifically, and by implication Fuller and Hart later on, the impetus to their views ultimately came down to the problem faced by the international courts at Nuremburg, and specifically the German courts in their post World War Two context, as they tried people for crimes which were, at the time and under Nazi rule, determined by the then courts as lawful. Of course, the Nazis had authority over the German legal system during their time in power, and some of their laws and many of their policies were grotesquely brutal so as to fit the terrible aims of that governing entity. Radbruch was to reflect on how the judiciary enforced immoral laws and, more often, how the justice ministry would acquiesce to the Nazi’s interference in sentencing, resulting in the deaths of many people. These omissions seem to have been the result of the persuasive fear-based force of Hitler’s own policy of direct intervention in legal proceedings. Following the War, Radbruch commented on Hitler’s view of justice and its attendant consequences:

… Hitler himself, who regarded conscience as only a “Jewish invention”, who was devoid of any sense for truth or justice, and as for truth and justice would expend only what was useful for his policies and moods. He believed only in power and advantage, and regarded all imponderables including Justice as ridiculous illusions.26

As for examples of what this departure of justice meant, Hitler would regularly, we are told, overstep judicial sentences which were “too mild” in his view and enforce his own separate and unchecked punishments.

More commonly after the outbreak of the war, Hitler would, when by chance finding out about court judgements from the papers or from party comrades which displeased him, give the jails under jurisdiction of the Justice department the order to turn

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criminals who in his opinion had been punished too mildly “over to the police”. The rest was then self explanatory.  

Here the problem was direct interference with the administration of justice, but there were also cases where the statutes under National Socialism were unjust in and of themselves, and thus the judges had to make the choice between what was right and what was law. Radbruch quotes the post War Chief Public Prosecutor of Saxony’s views on judges who enforced unjust National Socialist statutes:

A judge can never administer justice by appealing to a statute that is not merely unjust but criminal. 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.

In light of these considerations, I believe that judges must be prosecuted who have handed down decisions incompatible with the precepts of humanity and have pronounced the death sentence for trifles.

Radbruch seems to agree with him:

The culpability of judges for homicide presupposes the simultaneous determination that they have perverted the law, since the independent judge’s decision can be an object of punishment only if he has violated the very principle that his independence was intended to serve, the principle of submission to the statute, that is, to the law. Objectively speaking, perversion of the law exists where we can determine, in light of the basic principles we have developed, that the statute applied was not law at all, or

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27 Ibid.
28 Tägliche Rundschau (Berlin), 14 March 1946 [emphasis in original]. In Radbruch, Statutory Lawlessness (1946), 5.
that the degree of punishment imposed—say, the death sentence pronounced at the discretion of the judge—made a mockery of any intention of doing justice.\footnote{Radbruch, \textit{Statutory Lawlessness} (1946), 9.}

Along with the judges, it was also the actions and omissions of those in charge of the Ministry of Justice which disturbed Radbruch. If we are to understand Radbruch, we must first briefly consider what he was forced to reckon with following the war, the prosecution of his peers in the Ministry of Justice at the Judges’ Trial at Nuremberg.

\textbf{Radbruch and Schlegelberger}

Although Radbruch disavows any attempt to “exonerate or encumber, judge or convict”\footnote{Radbruch, \textit{The Glory and the End} (1948).} these jurists who worked for the Ministry, it seems clear that he sees their efforts, while perhaps well meaning at times, as a distinct failure. As his main example, he points to a man who held the post that he had held many years previous, Dr. Franz Schlegelberger (FS), who was “head of the Reich’s Ministry of Justice from 29 January 1941 to 20 August 1942, a rather short, but disastrous time, both for the Ministry and for himself.”\footnote{Ibid.} While Radbruch notes that Schelgelberger’s policies were nobly aimed at preventing Himmler from essentially taking control of the criminal justice system by means of repeated concessions,\footnote{Ibid. Radbruch explains, “He [Himmler] was not in pursuit of the Ministerial position, but would like to have absorbed the Ministry itself, and was continuously conspiring to transfer ever increasing areas under the jurisdiction of the Justice Ministry into the hands of the police, especially those of the Gestapo, with the ultimate objective to assimilate all of the Public Prosecutor’s office, indeed the entire Criminal Justice system, into that of the Police.”} it was exactly these concessions to injustice in order to prevent something worse which, in the end, Radbruch deemed a failure akin to the judges’:
The Nuremberg Judgement rightfully called his a “tragic figure”. It becomes very clear, how he, with the compromises he made in his battle against the national socialist manipulations, became increasingly blind to the fact that the concessions with which he attempted to counter unfair demands, ultimately ended up being not much different from the original demands, so that what the end product was in fact almost as bad as what he had been trying to prevent, in effect putting him into a position of collusion with the evil powers he was opposing. Schlegelberger succumbed to Hitler’s villainous tactics with the same gradual emotional blunting that many parts of the German people fell victim to.\textsuperscript{33}

Since Radbruch had read the Court’s judgement and based his assessment in this 1948 article on what he learned, it is worthwhile here to briefly consider the case of FS to see if we agree with Radbruch. I will not consider all aspects of the case against FS, but merely some of the main ones which might help us understand Radbruch’s point of view. While FS himself in his final statement to the Court in 1947 proclaimed himself innocent in regard to the prosecution’s case,\textsuperscript{34} it must be noted that contrary to both this wartime Justice Minister’s statement and Radbruch’s assessment, the Nuremburg Court in the Justice Cases\textsuperscript{35} was not willing to pardon him even though they agreed he by his actions had prevented a much worse situation for as long as he could.

In terms of how FS’s guilt was determined, in part, the Court first pointed out that Hitler had given FS what amounted to a severance package for what they saw as a gift for faithful service in 1942, following his resignation, and allowed him to use this large sum to buy a

\textsuperscript{33} Ibid.
\textsuperscript{35} Ibid.
farm with it in 1944, when he was not actually eligible under the law.\textsuperscript{36} On this rather circumstantial evidence, given that he had worked in various positions of authority, judge included, in the legal administration of Germany from 1904 until 1942 (38 years), and severance of some kind seems at least in the realm of reasonable possibility, the court claimed “Thus, it is shown that Hitler and Schlegelberger were not too objectionable to each other. These transactions also show that Hitler was at least attempting to reward Schlegelberger for good and faithful service rendered….”\textsuperscript{37} More convincingly, the Court pointed to a strange amendment in Section 2 of the Criminal Code which, although he was not the draftsman, FS commented on it in 1936: “…whereby a person is also (to) be punished even if his deed is not punishable according to the law, but if he deserves punishment in accordance with the basic concepts of criminal law and the sound instincts of the people.”\textsuperscript{38} One can see how this kind of statutory interpretive tool in the hands of the courts would allow for all kinds of abuse, and it certainly did, making the arbitrary decision of the judge (“sound instincts of the people”) the standard for determining what was lawful instead of a precise definition found in the statute.\textsuperscript{39} What is important for understanding FS is that he apparently agreed with it, at least as indicated by this excerpt of a speech he gave at the University of Rostock.

The Court also rested its indictment of FS on his apparent involvement in the so-called Night and Fog decree of Hitler,\textsuperscript{40} whereby “…civilians of occupied countries accused of alleged crimes in resistance activities against German occupying forces were spirited away for secret trial by special courts, of the Ministry of Justice within the Reich; ….”\textsuperscript{41} The

\textsuperscript{36} Ibid., 1082.
\textsuperscript{37} Ibid.
\textsuperscript{38} Ibid.
\textsuperscript{39} Ibid., 1083. The Court wrote: This new conception of criminal law was a definite encroachment upon the rights of the individual citizen because it subjected him to the arbitrary opinion of the judge as to what constituted an offense.
\textsuperscript{40} Ibid., 1031 – 1062.
\textsuperscript{41} Ibid., 1031.
Court’s main point of connection between Hitler’s decree and FS was that the latter had signed it as Acting Minister of Justice, which FS admits he did.\textsuperscript{42} The question arises whether he would have any other choice but to sign it in his role as Minister of Justice. The Court boldly concluded: “He [FS] thereby brought about the enforcement by the Ministry of Justice, the courts, and the prosecutors of a systematic rule of violence, brutality, outrage, and terror against the civilian population of territories overrun by the Nazi armed forces resulting in the ill-treatment, death, or imprisonment of thousands of civilians of occupied territories.”\textsuperscript{43}Could a mere signature bring about this enforcement? It looks rather as if his signature was merely procedural in the issuance of a decree of Hitler, and the enforcement was a result of Hitler’s police. IF FS had nothing to do with the decree’s creation, a certainty, or ultimately the state force to back it up, another certainty, it seems difficult to see how he is “primarily responsible” for the “prosecution, trial, and disposal” of the victims of Hitler’s decree,\textsuperscript{44} other than by perhaps choosing the safe path of agreeing to sign it rather than challenge Hitler openly and lose any future opportunity for reigning in what he knew were the pregnant nightmares of Himmler’s designs for the Ministry, a fact which the Court does acknowledge,\textsuperscript{45} and one Radbruch noted.

The Court also presents a difficult line of thinking when they write: “He was guilty of instituting and supporting procedures for the wholesale persecution of Jews and Poles.”\textsuperscript{46} For evidence, they first cite his intervening on behalf of those who were half-Jewish that they should not be sent out of Germany with the rest of the Jews as was then being carried out under Hitler’s orders. It is possible that in order to save as many people as he could with this program he obviously did not agree with, he made the suggestion that any half

\textsuperscript{42} Ibid., 1038.\textsuperscript{43} Ibid.\textsuperscript{44} Ibid., 1083.\textsuperscript{45} Ibid., 1086.\textsuperscript{46} Ibid., 1083.
Jewish people not capable of propagation should not be moved out in any event, and those who were could voluntarily receive sterilization instead of face the horrors which Hitler planned. This looks like evidence that he was trying to save lives, not engage in wholesale persecution. If he could not save all Jewish people from these horrors, it seems he was in the right by trying to save some. FS seems to have thought so.

But the next evidence the Court looked at did seem to show just how deeply ensconced FS was in creating the “procedures” for the discrimination of Jewish and Polish people. It seems that on 20 November 1940, Hitler’s deputy issued a statement indicating that Polish and Jewish people ought not to be tried under German law in the occupied territories, but that a different [harsher] procedure should be applied to them in cases where they challenged the “sovereignty of the German Reich” or “the prestige of the German people.” FS wrote a draft law in response to this which was brought in evidence by the prosecution. This draft was characterized by the then Reich Chancellery as follows: “The proposals, contained in the draft of the decree of the Minister of Justice and explained in the letter accompanying it, are far-reaching in compliance with the wishes of the Fuehrer’s deputy. The draft establishes a draconic special criminal law for Poles and Jews, giving a wide range for the interpretations of the facts of the case, with the death penalty applicable throughout.” The draft does indeed appear this way, enabling a fast and loose application of legal procedure: fast in terms of the response time to ostensible offenses and their punishments, and loose in terms of the judge’s latitude in making a determination. At the time, FS noted on the implications of this draft law: “The proceedings are conducted by court and public prosecutor on the basis of the German law for penal procedure in full accordance with their sense of duty. They may deviate from the

47 Ibid., 1084.
48 Ibid., 620.
49 Ibid., 616.
50 Ibid., 621.
regulations given in the law about the constitution of courts and in the legal principles for Reich penal proceedings, in all cases where it seems practical for the carrying through of the proceedings rapidly and energetically.”

But FS also makes a significant alteration to the wishes of Hitler’s deputy in that he does not agree that corporal punishment should be employed: FS wrote: “The introduction of corporal punishment, as discussed by the Fuehrer’s deputy, has not been included in the draft, either as a criminal sentence or a disciplinary measure. I cannot agree to this form of punishment as in my judgment it would not correspond to the level of civilization of the German people.”

The Reich Chancellery noted this as well, that the Minister of Justice declined to include corporal punishment at the suggestion of Hitler’s deputy. So here one sees evidence of Radbruch’s point, and Schlegelberger’s claim, that the Minster of Justice was, in participating with the Nazis, trying to blunt the violent arm of the state as much as possible while holding his post and ground against the encroachments of Himmler et al. Radbruch wrote:

Schlegelberger hoped that this characterization of the draft would camouflage rights warrants and sentence mitigations which he had incorporated into the design, namely conveyance to the Justiz [judiciary] instead of, as Himmler had planned, to the police, as well as the rejection of flogging, also one of Himmler’s demands. Only a detailed and by no means indisputably convincing investigation could determine how much these restrictions mitigated the given concessions. The extent to which this this damming VO was applied becomes shockingly evident in the fact that as early as 1942, 61836 individuals had already been sentenced in accord with this VO.

The draft of FS was, although based on the wish of Hitler’s deputy, properly characterized by the Reich Chancellery as “draconian.” In this instance, concerning the draft, we see that

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51 Ibid., 618.
52 Ibid., 615.
53 Ibid., 621.
FS was able to do very little in the way of restraining the violent arm of the state in the occupied territories, but he did do something, as was the case with his intervention on behalf of those who were half Jewish by ancestry. In both cases similar questions arise: Did Schlegelberger prevent the application of corporal punishment to Polish and Jewish people by German forces in occupied territories, and did he by his actions save the lives of those of half Jewish ancestry from certain death by his intervention? If the answer is that he did prevent corporal punishment and did save lives, and that by staying at his post rather than give over the reigns of the Ministry to the designs of Himmler he saved countless more lives, then Schlegelberger’s guilt becomes more difficult to substantiate. In fact, the Court agreed on these points in favour of FS, but did not feel his efforts in preventing violence and saving lives merited a pardon:

Schlegelberger presents an interesting defense, which is also claimed in some measure by most of the defendants. He asserts that the administration of justice was under persistent assault by Himmler and other advocates of the police state. This is true. He contends that if the functions of the administration of justice were usurped by the lawless forces under Hitler and Himmler, the last state of the nation would be worse than the first. He feared that if he were to resign, a worse man would take his place. As the event proved, there is much truth in this also. Under Thierack the police did usurp the functions of the administration of justice and murdered untold thousands of Jews and political prisoners. Upon analysis this plausible claim of the defense squares neither with the truth, logic, or the circumstances.\textsuperscript{55}

The Court ruled that FS had, along with the co-accused, the other judges, “took over the dirty work” demanded of them by Hitler et al., and noted: “That their program of racial extermination under the guise of law failed to attain the proportions which were reached

\textsuperscript{55} The Justice Cases, 1086.
by the pogroms, deportations, and mass murders by the police is cold comfort to the survivors of the "judicial" process and constitutes a poor excuse before this Tribunal."\textsuperscript{56} The Court acknowledged that FS had held back the coming evils of the regime, but still characterized his efforts as a failure. It is not altogether clear that it was a failure, if the saving of lives mattered in the Court’s calculation; and their mention of the cold comfort of the survivors seems to indicate that in the end it did not matter to them.

The Court’s last comment on FS is interesting: “We are under no misapprehension. Schlegelberger is a tragic character. He loved the life of an intellect, the work of the scholar. We believe that he loathed the evil that he did, but he sold that intellect and that scholarship to Hitler for a mess of political pottage and for the vain hope of personal security. He is guilty under counts two and three of the indictment.”\textsuperscript{57} The “sold for a mess of pottage,” a saying in reference to the Jewish Scripture’s character of Esau selling his birthright for a pot of stew, is an interesting choice of phrase. Esau was deceived by his brother, was FS deceived by his? The notion of selling something for a ridiculously low price does not seem to fit here. The Court implied that FS by staying at his post had held back the evil which would follow, and therefore he saved lives. It is hard to see how the saving of lives is a low price. Ultimately, it seems more likely that his occasional communications with Hitler — being the Minister of Justice under him, how could it be otherwise —, his signing of Hitler’s Night and Fog decree, and his creation of the draft for what became the Decree of 4 December 1941 on penal justice against Polish and Jewish persons in occupied territories, were actions which the Court felt did not outweigh the good he had done.

FS was suffering from Illness on the day the sentences were read out by presiding Judge Brand, and his counsel appeared on his behalf. Judge Brand read out the sentence of FS

\textsuperscript{56} Ibid.
\textsuperscript{57} Ibid., 1087.
first: “This Tribunal has adjudged the defendant FRANZ SCHLEGELBERGER guilty on counts two and three of the indictment filed in this case. For the crimes of which he has been convicted, this Tribunal sentences him to imprisonment for life.”

Counts two and three were War Crimes and Crimes Against Humanity, Count one was Common Design and Conspiracy, meaning that the prosecution charged that all defendants had from 1933 – 1945 “…acting pursuant to a common design, unlawfully, willfully, and knowingly did conspire and agree together and with each other and with divers other persons, to commit war crimes and crimes against humanity…..” That FS was not found guilty on this count is of little surprise given the evidence. As to Count two, War Crimes, the prosecution alleged that the defendants were guilty “in that they were principals in, accessories to, ordered, abetted, took a consenting part in, and were connected with plans and enterprises involving the commission of atrocities and offenses against persons and property,….” FS did take a consenting part in and was connected with plans and enterprises legal which involved the commission of offenses against persons. Count three, Crimes Against Humanity, was similar to Count two, and included the quote above in toto, and also specifically indicated that these various levels of involvement related to “deportation, illegal imprisonment, torture, persecution on political, racial and religious grounds, and ill-treatment of and other inhumane acts against German civilians and nationals of occupied countries.”

In his role as Minister of Justice, he consented to and participated in either the authorization or creation of laws which, while not his idea, resulted in some of the outcomes listed in the indictment.

In the end, as Radbruch pointed out, his defense that he had held back a greater evil by committing lesser ones was not sufficient for the Court to exonerate him. If there is any

58 Ibid., 1200.
59 Ibid. 17.
60 Ibid., 19.
61 Ibid., 23.
good to be taken from his actions, it is perhaps best appreciated by considering the lives he saved because he chose to stay at his post as long as he did and not resign. As the Court admitted, once Schlegelberger left office, things became far worse and FS’s fears were realized.

This chapter in the life of FS is important for understanding Radbruch, because the two of them both served as Minister of Justice, and it is the actions of FS while Minister of Justice which Radbruch tries to analyze in his post war article, noted above. There is clearly a sympathy for FS in the analysis of Radbruch, and the observer is left with the ever present question: what would Radbruch have done had he been in Schlegelberger’s position? Would he have resigned immediately with the knowledge that Himmler was going to expropriate the Ministry of Justice to himself and produce a situation of lawlessness and bloodshed unprecedented, or would he, as FS did, stay at his post as long as he could and attempt to dull the sword of a cruel and pitiless tyrant?

The facts about the case of FS are important for understanding Radbruch’s conversion from a stance of legal positivism to one of natural law, because it seems clear that as committed to law and legality as FS was, in the end his fidelity to law and efforts to blunt the cold injustices were not able to guarantee justice, but only the raw legal certainty of various enactments which were themselves, immoral and unjust. It is only by being able to judge the deformed laws of the Nazis as no law at all that any fidelity to law can be salvaged from this situation. In order to preserve his, Radbruch declared that Nazi law which departed so obviously from any sense of justice was, in the end, no law at all.
Fuller and Hart

Radbruch’s conversion from a legal positivist stance to one of natural law would give rise to the debate between Fuller and Hart in 1958. From the Natural law standpoint, taken by both the Nuremburg and German courts and supported by Radbruch and Fuller, immoral law under the Nazis was no law at all. People who committed immoral acts under the guise of doing what was lawful yet offensive to morality were punished following the war at both Nuremburg and before the post War German courts. From the positivist standpoint, championed by Hart, those immoral laws were still laws, even though grossly immoral. The Nazis still had a valid though offensive legal system. As to the question, what of those who did evil acts under immoral laws? Hart advised that those people did deserve punishment for their evil acts, but that the only way the Nuremberg or German courts should have done this was by having first created a retroactive/retrospective statute which would then apply to a previous date and impugn the evil behaviour.\(^{62}\) He noted:

> Odious as retrospective criminal legislation and punishment may be, to have pursued it openly in this case would at least have had the merits of candour. It would have made plain that in punishing the woman a choice had to be made between two evils, that of leaving her unpunished and that of sacrificing a very precious principle of morality endorsed by most legal systems.\(^{63}\)

Notwithstanding the fact that Schlegelberger himself was castigated by the Nuremburg court for retroactive application of law,\(^{64}\) this statement of Hart is important because it

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\(^{63}\) Ibid.

\(^{64}\) *The Justice Case* (1947), 1085: It is of interest to note that on 31 January 1942 Schlegelberger issued a decree providing that the provisions of the law against Poles and Jews “will be equally applicable with the consent of the public prosecutor to offenses committed before the decree came into force”. We doubt if the defendant would contend that the extension of this discriminatory and retroactive law into occupied territory was based on military necessity.
relates in part to the wish of most positivist legal scholars to insist that what they are seeking by drawing the line between morality and law is not ethically or politically based, but rather for the goal of “clear thinking” in the law. Yet, Fuller asked the question eighteen years previous to this in 1940: “Would clarity in legal discussion actually be advanced if positivism could attain its objective of some clear-cut distinction between law and morality?” Hart thought so, and here is part of the reason why: “The vice of this use of the principle that, at certain limiting points, what is utterly immoral cannot be law or lawful is that it will serve to cloak the true nature of the problems with which we are faced and will encourage the romantic optimism that all the values we cherish ultimately will fit into a single system, that no one of them has to be sacrificed or compromised to accommodate another.” Fuller reminds the reader that it was “[n]ot that Professor Hart believes the Nazis' laws should have been obeyed. Rather he considers that a decision to disobey them presented not a mere question of prudence or courage, but a genuine moral dilemma in which the ideal of fidelity to law had to be sacrificed in favor of more fundamental goals.”

Also of importance for Radbruch’s context, was that along with this positivist wish of some to rid society of arbitrary and unfair laws was its concomitant sister effort of ridding society of similar inequalities amongst groups of people: largely between those with money and power and those without. Radbruch’s Rechtphilosophie was published in 1932, the great

65 Fuller, Law in Quest, 84 – 85. For Hart, clarity is of significant importance to positivism in general. He wrote: “Like our own Austin, with whom Holmes shared many ideals and thoughts, Holmes was sometimes clearly wrong; but again like Austin, when this was so he was always wrong clearly. This surely is a sovereign virtue in jurisprudence. Clarity I know is said not to be enough; this may be true, but there are still questions in jurisprudence where the issues are confused because they are discussed in a style which Holmes would have spurned for its obscurity. Perhaps this is inevitable: jurisprudence trembles so uncertainly on the margin of many subjects that there will always be need for someone, in Bentham's phrase, "to pluck the mask of Mystery" from its face. This is true, to a pre-eminent degree, of the subject of this article” (Hart, Positivism, 593 – 594).

66 Fuller, Law in Quest, 85.

67 Hart, Positivism, 620.

68 Fuller, Reply, 633. In terms of the goal at issue here, at least from Hart’s comment, it seems the goal of not letting someone who commits evil go without punishment.
German banking collapse began one year previous to this, in 1931. This was followed by monetary deflation, unemployment, and a palpable sense of uncertainty for the German people. It was at this time when “…the apparent incapacity of the government to halt the depression drove many in a country with so strong an étatist tradition as Germany into supporting National Socialism, a political movement which appeared to offer a speedy solution to economic ills.” But was the rise of the National Socialist movement, which became the Nazi party, in any way connected to the embracing of positivist ideals in the legal arena? Fuller thought it may have been. He suggested that one factor supporting a positivistic attitude towards law was found in a “peculiarly modern conception of democracy” which discards human reason for regulating the relations between people and posits that the order set up must be arbitrary and based on a simple rule of the majority; this view was supported by noted positivist thinker, Hans Kelsen. Fuller writes in 1940:

Majority rule is preferred not because it is most likely to be right, but because it is most likely to be obeyed. Democracy is rested not on an affirmation, but on a denial that government and law can in the end be anything but arbitrary. In my opinion this attempt to found democracy on a negation would be dangerous in any age. It becomes positively suicidal at a time like the present, when major readjustments in the basic social and economic structure of society are taking place.

This negative conception of democracy played an important part, I am convinced, in bringing Germany and Spain to the disasters which engulfed those countries. It was only this conception which could mislead men into believing that the power relations inside a society could be radically displaced by the mere will of a numerical majority, or that a social and economic revolution could be accomplished through a democratic control

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70 Fuller, *Law in Quest*, 120.
unsustained by any common faith or program. It was this conception which lulled men into the dangerous dream that a kind of political euthanasia of vested interests would be possible. In the rude awakening which followed this dream there was demonstrated, at least in Germany, not only the futility of the dream itself, but the inability of repressive violence to fill the void left by a defaulting principle of majority rule, for the purported counter-revolution of Nazism has in many cases only increased the tempo and violence of the disintegrative forces from which it claimed to be rescuing Germany.

In my opinion, democracy must be founded not on a negation of the force of ideas, but on a faith that in the long run ideas are more important than the men who form them.71

The Legal Question

If Fuller is right, that positivist ideals relating to legal certainty and that law is merely constituted by a government powerful enough to enforce it were at play here, then how can legal positivism hope to help us today in describing what constitutes law or legal systems? I think it can, but only once law has been made on the basis of a principle of justice, and I will discuss this more below. Following Fuller’s above claim, and immediately after the war, Gustav Radbruch disavowed positivism on a similar basis to Fuller’s ongoing support of it: overreliance on the ideals of positivism by judges and the Ministry of Justice with no prima facie consideration of justice itself in some of their decisions. By the close of the 30s and during the war years, Radbruch may have seen the writing on the wall for his positivist philosophy and following the war he was able to reflect on the way judges

71 Ibid., 121 – 123.
and the Ministry officials adhered to positivist ideals regarding a misplaced fidelity to law at the expense of justice.

So, what Radbruch had initially put third in his hierarchy of principles upon which to base law, justice, he seems to have realized that it ought to come first and thus his other two principles, legal certainty and purposiveness, should be subservient to the more important principle. We find this change of heart in both his 1945 article, “Five Minutes of Legal Philosophy,” and in his 1946 article, “Statutory Lawlessness and Supra-Statutory Law,” where he writes and admits exactly that: he was wrong. He reordered his principles and said justice must come first. Law and morality were inextricably tied, and a law unmoored to justice could not be a law. Radbruch wrote on his departure from positivism and embracing of natural law theory:

> Positivism, with its principle that ‘a law is a law’, has in fact rendered the German legal profession defenceless against statutes that are arbitrary and criminal. 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

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72 Radbruch had previously cited Legal Certainty, Equal Treatment of Equals, and Justice, and in that order, as the bedrock principles of a legal system seen from a positivist vantage point in his 1932 treatise. By the end of the war, equal treatment of equals is replaced by purposiveness.


legal validity. Obligation and legal validity must be based, rather, on a value inherent in the statute.\textsuperscript{75}

Any statute is always better than no statute at all, since it at least creates legal certainty. But 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: purposiveness and justice.\textsuperscript{76}

Radbruch then sets out the reordering of his principles, purposiveness or benefit to the public last, justice first, and legal certainty second, he notes there may be situations where certainty and justice may be in conflict with one another, and he writes famously that in certain situations, law becomes so offensive to justice that is ceases to be law at all, regardless of legal certainty.

The conflict between justice and legal certainty may well be resolved in this way: 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. It is impossible to draw a sharper line between cases of statutory lawlessness and statutes that are valid despite their flaws. 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

\footnote{Radbruch, \textit{Statutory Lawlessness}, 6.}

\footnote{Ibid., 6 – 7. He goes on: In ranking these values, we assign to last place the purposiveness of the law in serving the public benefit. By no means is law anything and everything that ‘benefits the people’. Rather, what benefits the people is, in the long run, only that which law is, namely, that which creates legal certainty and strives toward justice. Legal certainty (which is characteristic of every positive-law statute simply in virtue of the statute’s having been enacted) takes a curious middle place between the other two values, purposiveness and justice, because it is required not only for the public benefit but also for justice. That the law be certain and sure, that it not be interpreted and applied one way here and now, another way elsewhere and tomorrow, is also a requirement of justice. Where there arises a conflict between legal certainty and justice, between an objectionable but duly enacted statute and a just law that has not been cast in statutory form, there is in truth a conflict of justice with itself, a conflict between apparent and real justice.}

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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. Measured by this standard, whole portions of National Socialist law never attained the dignity of valid law.\footnote{Ibid., 7.}

He wrote elsewhere:

Law is the will to justice. Justice means: To judge without regard to the person, to measure everyone by the same standard.

If one applauds the assassination of political opponents, or orders the murder of people of another race, all the while meting out the most cruel and degrading punishment for the same acts committed against those of one's own persuasion, this is neither justice nor law.

If laws deliberately betray the will to justice — by, for example, arbitrarily granting and withholding human rights — then these laws lack validity, the people owe them no obedience, and jurists, too, must find the courage to deny them legal character.\footnote{Radbruch, Statutory Lawlessness, 1945. Oxford Journal of Legal Studies, 2006, 14.}

Radbruch was adamant on this point,\footnote{Ibid., he goes on: Of course it is true that the public benefit, along with justice, is an objective of the law. And of course laws have value in and of themselves, even bad laws: the value, namely, of securing the law against uncertainty. And of course it is true that, owing to human imperfection, the three values of the law—public benefit, legal certainty, and justice—are not always united harmoniously in laws, and the only recourse, then, is to weigh whether validity is to be granted even to bad, harmful, or unjust laws for the sake of legal certainty, or whether validity is to be withheld because of their injustice or social harmfulness. One thing, however, must be indelibly impressed on the consciousness of the people as well as of jurists: There can be laws that are so unjust and so socially harmful that validity, indeed legal character itself, must be denied them.} and this is exactly where Hart disagrees with both Radbruch and Fuller, discussed herein. In Statutory Lawlessness, Radbruch also seems sympathetic to the notion that the positive law of the Nazi regime applied by judges who
accepted that system of government means that it would be impossible then to charge them with perverting the law and punishing them for enforcing the law after those laws had been declared invalid. The inference is that it would be unjust to sentence a judge to punishment for enforcing the laws that operated while they sat on the bench. Radbruch seems loathe to release his positivism, but he must: he declares all law of the Nazi regime that was not grounded by equal treatment for equals or treated humans as subhuman were examples of “statutory lawlessness.” Therefore, morality and law were connected because the immorality of unequal and degrading laws meant that they were no law at all. If, on the other hand, they had been enacted and enforced inclusive of equality for equals and respected the dignity of the individual, if they had been morally connected to the “good,” there would be a cogent basis of justice upon which to then treat them as laws. As for the judges who enforced what was not law, in a positivist way while he does not believe they ought to be punished for their adhering to the letter of the statutes in force, from a natural law perspective he opines that they should never have enforced statutes that were unjust and ought to have been willing to take the consequences for standing up for justice. It must be acknowledged that from his post-War vantage point, such a claim, while laudable, is “easier said than done”. In other words, what would he have done as a judge faced with the dilemma? This question and ones like it are the proverbial elephant in the room for all who speculate on what German officials, people with families, relatives, and friends, some of whom may have been put in harm’s way by the regime, ought to have done under such a brutal and terrorizing entity.

As to the question of whether Radbruch had really changed his point of view significantly, I think the evidence from his own hand is clear on the point. But since it is still a point debated by scholars, one more piece of contextual evidence seems relevant. Fuller pointed out: “[i]n a letter written just a week after his death Radburch’s widow stated that it was her husband’s desire that his Legal Philosophy [Rechtphilosophie] be published without revision, but "with an extensive appendix that will contain his changed point of view and
his new ideas."⁸⁰ If Radbruch had told his wife that he had changed his views, then it would seem difficult to argue the other way, although scholars now do, as indicated above.

**Fuller’s Opening Remarks**

Lon L. Fuller entered the discussion about the problems of positivism in the late 30s while the Nazi party was soaring to power. In his *The Law in Quest of Itself⁸¹* it was stated clearly that mere majority rule and redistribution of wealth were not the panacea for problems in society, but rather a Chimera. A many-faced monster whose ugly head was already beginning to rise and show a disregard not only for justice in law, but disregard for a person’s right to live and prosper. *The Law in Quest of Itself* stands as the most important jurisprudential work of the 20th century to my thinking, not for its sales or general popularity, but for the dialogue it started between himself and professor Hart which led to the now famous debate between them. In it, he laid down the gauntlet of the importance of morality’s relationship to law and justice, and he had ready examples in Germany and Spain of how the divorce of these two tenets of civil society were producing results which horrified people the world over and portended even worse to come. This writing was clearly part of Hart’s impetus for writing his 1958 lecture turned article where he responds directly to and footnotes both Fuller’s *Law in Quest of Itself* and his 1956 article *Human Purpose and Natural Law*.⁸² In reality, Hart was responding to Fuller in 1958. Perhaps it should be restyled the Fuller-Hart debate.

After the horrors, the apocalyptic extermination of people’s lives and personalities and families and homes and cities and countries, of World War Two, Radbruch admitted to the scholarly community that he had been wrong about positivism, and Fuller had written

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⁸⁰ Lon L. Fuller, "American Legal Philosophy at Mid-Century", *Journal of Legal Education* 6 (1953-54): 482..
⁸¹ Lon L. Fuller, *The Law in Quest of Itself* (Chicago: The Foundation Press, 1940).
his critique of positivism five years previous to Radbruch’s admission. Therefore, Fuller’s work and criticism can rightly be said to have been the first clarion call to scholars to admit that the cleansing power of positivism in law was a myth far worse than the ostensible myths which natural law brought with it. Natural law had at least this going for it, it allows for men and women to push reason as far as they can, as he put it, and he insisted that morality was not to be feared, but to be recognized as the basis for almost every decision a person makes in their lives for their own betterment, and so, if for the person, then of course, the society as well.

Fuller also preceded Hart’s defense of positivism with an article in 1956, and he repeats his basic thesis from *Law in Quest* in a contrast between positivist and Natural law approaches to the means-ends dilemma. He wrote:

One answer to this predicament is by now thoroughly familiar. In its most extreme form it runs somewhat as follows: The validity of human ends and "values" is not a matter for reasoned demonstration. While the selection of an apt means has the quality of an intellectual undertaking, a means without an end is a monstrosity. Until we have selected an end by some fiat of the will, any discussion of means is therefore futile. Every means-end problem is unique. If it were not, this would imply that the formation of ends was itself a lawful process, subject to rational cognition, which, it is assumed, cannot be the case.

From the same human predicament, an opposing school of thought extracts the opposite conclusion. Since in the process of decision means and ends interact, it is

83 Fuller, *Law in Quest*, 103; 109.
impossible to assign in advance precise limits to the role of reason. Let us therefore push our understanding as far as it will take us into the obscure area where means and ends interact; let us seek collectively to discover as much agreement in this area as the nature of the case permits.

This view asserts the reality of a process that may be called the collaborative articulation of shared purposes. Through the centuries it has been — in spite of all of its extravagances and dogmatisms — the school of natural law that has kept alive faith in that process. Is the faith justified?

I believe we have much evidence that it is. In the affairs of daily life, we all know from personal experience that in moments of crisis consultation with a friend will often help us to understand what we really want. It does not make much difference whether our adviser tells us, in effect, "Look carefully to your means," or "Consider carefully your end." The effect of the advice is in either case to initiate a process of reflection and consultation that may change our whole understanding of ourselves.85

The issue here being discussed by Fuller was predicated on a thought experiment of Wittgenstein, which he reproduces in this article and comments on, and which Hart took exception to in his Holmes Lecture a couple of years later and reproduced it in his own lecture. Fuller was indeed the first philosopher of the two to begin the conversation between them which continues to influence law students and scholars to this day. Fuller quotes Wittgenstein and comments:

The meaning of any given purpose is always controlled by latent purposes in interaction with it. This is beautifully illustrated in an example of Wittgenstein's:

85 Ibid., 702. Emphasis added.
Someone says to me: "Show the children a game." I teach them gaming with dice, and the other says, "I didn't mean that sort of game." Must the exclusion of the game with dice have come before his mind when he gave me the order?  

Any view which claims a large power to ascribe to words or human actions a meaning innocent of evaluation will do well to ponder this example.  

Fuller also introduces his well known concept that good law has in it an internal morality, or inner morality as he styled it in 1958, just like many other cases of things which aim at ends in society. On this subject he engages in a thought experiment by answering the criticism levelled at a proposed article title “What is Art?,” which confuses fact and value and is thought to be a cover to fraudulently pass off the author’s mere subjective opinion. He wrote:  

If the objection is more radically phrased so that it could not be removed by changing the title to read, "What I Think Art Ought to Be," then what is really being rejected is the reality of what I have called the collaborative articulation of shared purposes.  

That rejection makes itself most tragically felt today, I believe, in our failure to carry on the work of former generations in analysing and discussing what may be called the forms of social order. I use that term broadly to include rules, procedures, and institutions, — all the ways, in short, in which the relations of human beings to one another are subjected to a formal ordering, whether by consent, habit, or command. As I use the term it cuts across law, politics, economics, sociology, and ethics, and

87 Fuller, Human Purpose, 700.  
88 Fuller, “Reply to Professor Hart,” 650 ff.  
89 Fuller, Human Purpose, 704
even includes systems of play. Thus, contract, adjudication, the majority principle, and the three-strike, four-ball rule are all forms of social order.

These forms are generally viewed only in their most obvious aspect, that is, as means to the realization of human ends. But they are also themselves ends, in two closely related senses. They are ends in the sense that, although we make them, they help to make us what we are, man's dependence on society being what it is. Any particular economic system not only serves to satisfy antecedent wants, but also generates its own peculiar pattern of human wants. Secondly, any form of social order contains, as it were, its own internal morality. Thus, we may judge football by an external standard and say, "Football is a good game," but we may also judge it by standards drawn from its own internal requirements and say, "Football will become impossible if this sort of thing is allowed to go on."

Law is a social ordering, and it, according to Fuller, has its own internal morality. There are bounds beyond which law is law is no longer law if certain key ingredients are left out, such as Radbruch’s justice. Just as Fuller’s analogy of football being impossible to carry out under certain conditions, any type of social ordering which does not keep its structure and output in line with its purpose will become impossible. Radbruch suggested just that, that laws which had been so bereft of justice simply ceased to be laws because they could no longer accomplish their intrinsic purpose.

Hart’s Response

In 1958, Herbert Hart gave the Holmes Lecture at Harvard which was a defense of positivism in the wake of both Radbruch’s conversion to natural law and more specifically

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90 Ibid., 704. Emphasis added.
to Fuller’s work in support of natural law and his denial of the strength of positivism to solve the ills of humankind where it concerned the law. Hart’s Justice Holmes lecture turned article, “Positivism and the Separation of Law and Morals,” was admirably written, and the best defense of positivism ever mounted. It stands as the fundamental basis for positivists wishing to build on his basic thesis to this day. His later works would be an elaboration and refining of this first statement of faith, as Fuller would say. Fuller heard the lecture and saw a draft of the article and was both so impressed and so incensed by them, that he demanded that before the article was published in the Harvard Law Review, that he would write a response to it. To dispel any notion that Fuller wished to displace Hart’s masterpiece, Fuller actually helped Hart ensure that the article would appear just the way he wrote it, without any interference from Harvard’s editors, which was a prospect which disturbed Hart greatly. Fuller came alongside and ensured his friend would have it published just the way he wrote it. Nicola Lacey records:

Herbert had agonized long and soul-searchingly about the crystallization of his spoken lecture into final, publishable form, and had scrutinized every last word. To his horror, the editors of the Law Review—as in the case of most American law journals, they were students, and the most successful and often arrogant students at that—sent in December a set of proofs he found barely recognizable. He wrote to Fuller:

Meanwhile a spot of trouble! The L.Rev. boys had mutilated my article by making major excisions of what they think is irrelevant or fanciful. They have made a ghastly mess of it and of the references to Bentham and I have written to say they must not publish it under my name with these cuts which often destroy the precise nuance. I took great care and much time over what they have coolly cut out.

Could you induce them to be sensible? Such an interference with an author’s draft is unthinkable here and I am astonished that so gross and insensitive a thing should be possible at Harvard. I have told them if they will undertake to restore the listed cuts I will get down to the unwelcome task of patching it up all over again. But meanwhile I will not return the proof.

So sorry but it is important to me to get precisely what I said printed. Best of wishes. I will write anyhow on your reply.

Yours ever, Herbert Hart

It was an experience which confirmed all of Herbert’s prejudices about Americans’ attitude to precision. But Fuller was both sympathetic and effective in response:

Dear Herbert:

After receiving your letter I went over to the Review and found the President busily engaged in restoring your article to its original form. I am sorry for what they did, though I have to confess that this sort of thing comes close to being standard practice with articles written by American authors. Being near at hand I could save my baby from mayhem. Had I dreamed they would take such liberties with your text, I would have stood over them.93

The two remained close friends until Fuller’s passing in 1978, even though they never saw eye to eye on the issue, a vivid example of what scholarly relationships ought to look like. Previous to writing his Holmes lecture, Hart had read Fuller’s 1956 article and was intrigued by his discussion of the means-end issue and his use of the Wittgenstein’s

93 Ibid.
example. In his 1958 Harvard Law Review article, he approaches Fuller’s argument by writing:

Together with this general distinction between statements of what is and what ought to be go sharp parallel distinctions between statements about means and statements of moral ends. We can rationally discover and debate what are appropriate means to given ends, but ends are not rationally discoverable or debatable; they are "fiats of the will," expressions of "emotions," "preferences," or "attitudes."

Against all such views (which are of course far subtler than this crude survey can convey) others urge that all these sharp distinctions between is and ought, fact and value, means and ends, cognitive and noncognitive, are wrong. … [94]

Let us now suppose that we accept this rejection of "non-cognitive" theories of morality and this denial of the drastic distinction in type between statements of what is and what ought to be, and that moral judgments are as rationally defensible as any other kind of judgments. What would follow from this as to the nature of the connection between law as it is and law as it ought to be? Surely, from this alone, nothing. Laws, however morally iniquitous, would still (so far as this point is concerned) be laws. The only difference which the acceptance of this view of the nature of moral judgments would make would be that the moral iniquity of such laws would be something that could be demonstrated; it would surely follow merely from a statement of what the rule required to be done that the rule was morally wrong and so ought not to be law or conversely that it was morally desirable and ought to be law. But the demonstration of this would

[94] The quote continues: In acknowledging ultimate ends or moral values we are recognizing something as much imposed upon us by the character of the world in which we live, as little a matter of choice, attitude, feeling, emotion as the truth of factual judgments about what is the case. The characteristic moral argument is not one in which the parties are reduced to expressing or kindling feelings or emotions or issuing exhortations or commands to each other but one by which parties come to acknowledge after closer examination and reflection that an initially disputed case falls within the ambit of a vaguely apprehended principle (itself no more "subjective," no more a "fiat of our will" than any other principle of classification) and this has as much title to be called "cognitive" or "rational" as any other initially disputed classification of particulars.

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not show the rule not to be (or to be) law. Proof that the principles by which we evaluate or condemn laws are rationally discoverable, and not mere "fiats of the will," leaves untouched the fact that there are laws which may have any degree of iniquity or stupidity and still be laws. And conversely there are rules that have every moral qualification to be laws and yet are not laws.\textsuperscript{95}

Hart then specifically cites Fuller as being the most significant defender of the Natural law theory, but challenges the usefulness of his observations on how the nature of ends and means, non-rational/rational, can illuminate the question of whether it is wise to draw a sharp distinction between law as it is and law as it ought to be.

Surely something further or more specific must be said if disproof of "noncognitivism" or kindred theories in ethics is to be relevant to the distinction between law as it is and law as it ought to be, and to lead to the abandonment at some point or some softening of this distinction. No one has done more than Professor Lon Fuller of the Harvard Law School in his various writings to make clear such a line of argument and I will end by criticising what I take to be its central point. …\textsuperscript{96}

\textsuperscript{95} Ibid., 625 – 626.
\textsuperscript{96} Ibid., 627. Hart goes on: Its net effect is that in interpreting legal rules there are some cases which we find after reflection to be so natural an elaboration or articulation of the rule that to think of and refer to this as "legislation," "making law," or a "fiat" on our part would be misleading. So, the argument must be, it would be misleading to distinguish in such cases between what the rule is and what it ought to be — at least in some sense of ought. We think it ought to include the new case and come to see after reflection that it really does. But even if this way of presenting a recognizable experience as an example of a fusion between is and ought to be is admitted, two caveats must be borne in mind. The first is that "ought" in this case need have nothing to do with morals for the reasons explained already in section III: there may be just the same sense that a new case will implement and articulate the purpose of a rule in interpreting the rules of a game or some hideously immoral code of oppression whose immorality is appreciated by those called in to interpret it. They too can see what the "spirit" of the game they are playing requires in previously unenvisaged cases. More important is this: after all is said and done we must remember how rare in the law is the phenomenon held to justify this way of talking, how exceptional is this feeling that one way of deciding a case is imposed upon us as the only natural or rational elaboration of some rule. Surely it cannot be doubted that, for most cases of interpretation, the language of choice between alternatives, "judicial legislation" or even "fiat" (though not arbitrary fiat), better conveys the realities of the situation.
To make the point clear Professor Fuller uses a nonlegal example [see above at footnote 8] from the philosopher Wittgenstein, which is, I think, illuminating.

...I am sure that many philosophical discussions of the character of moral argument would benefit from attention to cases of the sort instanced by Professor Fuller. Such attention would help to provide a corrective to the view that there is a sharp separation between "ends" and "means" and that in debating "ends" we can only work on each other nonrationally, and that rational argument is reserved for discussion of "means." But I think the relevance of his point to the issue whether it is correct or wise to insist on the distinction between law as it is and law as it ought to be is very small indeed.

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Hart’s main point was that law and morality could and ought to be separated to avoid confusion about the notion that just because a law exists, it is therefore somehow moral. In a very real way, Hart was condemning the experiences of World War 2 as Radbruch and Fuller both previously had, but coming at the question from a different angle. If laws were unjust, and they were, then we ought to recognize that and fight to have the law changed. But, he said, it did no good to make ourselves believe that because some rule gets the name of law it is therefore founded on any morality, or that the presence of some morally infused laws in a system, perhaps the majority, should lead us to a “romantic optimism that all the values we cherish ultimately will fit into a single system, that no one of them has to be sacrificed or compromised to accommodate another.”98

In Hart’s section on Austin and Bentham in his article, he wrote about the importance of the separation between law and morality: “There are therefore two dangers between which insistence on this distinction will help us to steer: the danger that law and its authority may

97 Ibid., 627 – 629.
98 Hart, Positivism, 620.
be dissolved in man's conceptions of what law ought to be and the danger that the existing law may supplant morality as a final test of conduct and so escape criticism." For Hart, law could exist quite well apart from morality, and ought to. He did acknowledge that law contains a minimum content of morality, something akin the moral found in the law of not killing other human beings, not stealing, etc.: he employed a science fiction laden thought experiment on the possibility of humans evolving into crabs of a kind to get his point across, and his conclusion is that given our frail state, some minimum moral content must be connected to the existence of law. Apart from his minimum content of morality, though, there was no intrinsic connection between law and morality. His was a defense of what is known as the separability thesis, that law can and ought to be separated from morality. As to what a person faced with an oppressive and immoral regime that does not even accord its citizens with the basic protections of life and property ought to do, he suggests revolt:

This is so because a legal system that satisfied these minimum requirements might apply, with the most pedantic impartiality as between the persons affected, laws which were hideously oppressive, and might deny to a vast rightless slave population the

99 Ibid., 598.
100 Ibid., 623. Hart wrote: …suppose that men were to become invulnerable to attack by each other, were clad perhaps like giant land crabs with an impenetrable carapace, and could extract the food they needed from the air by some internal chemical process. In such circumstances (the details of which can be left to science fiction) rules forbidding the free use of violence and rules constituting the minimum form of property — with its rights and duties sufficient to enable food to grow and be retained until eaten — would not have the necessary nonarbitrary status which they have for us, constituted as we are in a world like ours. At present, and until such radical changes supervene, such rules are so fundamental that if a legal system did not have them there would be no point in having any other rules at all. Such rules overlap with basic moral principles vetoing murder, violence, and theft; and so we can add to the factual statement that all legal systems in fact coincide with morality at such vital points, the statement that this is, in this sense, necessarily so. And why not call it a "natural" necessity?

…Natural-law theory, however, in all its protean guises, attempts to push the argument much further and to assert that human beings are equally devoted to and united in their conception of aims (the pursuit of knowledge, justice to their fellow men) other than that of survival, and these dictate a further necessary content to a legal system (over and above my humble minimum) without which it would be pointless. Of course we must be careful not to exaggerate the differences among human beings, but it seems to me that above this minimum the purposes men have for living in society are too conflicting and varying to make possible much extension of the argument that some fuller overlap of legal rules and moral standards is "necessary" in this sense.
minimum benefits of protection from violence and theft. The stink of such societies is, after all, still in our nostrils and to argue that they have (or had) no legal system would only involve the repetition of the argument. Only if the rules failed to provide these essential benefits and protection for any one — even for a slave-owning group — would the minimum be unsatisfied and the system sink to the status of a set of meaningless taboos. Of course no one denied those benefits would have any reason to obey except fear and would have every moral reason to revolt.  

But this is not much of a consolation for the helpless masses of German people who were being given the benefits of some protection over their lives, some ability to hold property, all the while being legally forced to immorally extinguish the lives of other human beings and steal their property, and this under the threat of death from their own government. Was Hart implying that a nation of slave owners who abuse, murder, and commit varieties of immoral acts on their “slave” population can be said to have a legitimate legal system because they offer those in their oligarchic regime some form of protection? It seems so on its face. But in giving law a minimum moral content, his arguments for keeping the designation of law, even for immoral systems such as the one he suggests, are strained to the extreme and run counter to everything the Nuremburg trials were based upon. If positivism supports the idea that the Nazis or any other maniacally oppressive regime should be thought to have genuine legal systems with legitimate laws, it is perhaps little wonder that natural law theorists demur on the claim that good might come from the separation which Hart attempted to champion. The bottom line is that a clean separation between law and morality was impossible, as he himself admits when he acknowledges a minimum content of morality in law to protect at least some people in society. The fascist dictatorship in Germany leading up to and during World War Two ended up not even being able to guarantee to those in power a minimum

101 Ibid., 624.
of protection, and far, far less to the millions of Germans who died in purges, concentration camps, and as casualties in a war caused by the regime who offered “some protection to some of it citizens.” Calling a system such as this a valid legal system begs to be the target of Jeremy Bentham’s critique, “nonsense upon stilts.” For Radbruch and Fuller, there is a point at which regimes become so evil that what emanates from them in terms of legislation and judge made law is no law at all.

**Fuller’s Rejoinder**

Fuller responded to Hart’s essay in a fulsome and masterful way. He properly credited Hart with the best defense of the separability thesis in Western thought. But he disagreed with Hart’s views, as Fuller noted, in an almost paragraph-by-paragraph way.

Fuller’s response in the essay “Positivism and Fidelity to Law: A Reply to Professor Hart,”102 was the best defense of a hybrid natural law theory ever mounted. It was for natural law theories what Hart’s essay was for positivism. That the two articles should have such a storied and ongoing success, and that the articles had such a friendly prehistory is one of the happiest accidents of history in the field of legal theory, law schools, and open and free debate about a matter which could hardly be equalled in importance. The two articles are likely the most important law articles written in the 20th century. Not for the strength of their writers, which was considerable, but for what they expressed, as this was generalizable to all humankind. All people want to live and prosper in a free society, but how those free societies are set up, and what the bounds of governments and legal systems are, and especially on what basis we set those systems up, whether one based on a common morality or one based on naked procedure, is something which appeals, and ought to appeal, to every living person. All that has come after these writings in scholarly debate

and elaboration on the subject of positivism and natural law, as Whitehead said of Plato,\textsuperscript{103} are footnotes to these monumental, but also brief and superbly written, statements of the problems associated with taking either a positivist or natural law approach to law and legal systems.

Fuller’s response was that no defense of the separability thesis was possible: law is inextricably linked to the desires and needs of humankind, and that what was called law under the Nazi regime, brutal and bereft of justice, was no law at all. In his response, he wrote:

I would like to ask the reader whether he can actually share Professor Hart’s indignation that, in the perplexities of the postwar re-construction, the German courts saw fit to declare this thing not a law. Can it be argued seriously that it would have been more beseeming to the judicial process if the postwar courts had under-taken a study of "the interpretative principles" in force during Hitler's rule and had then solemnly applied those "principles" to ascertain the meaning of this statute? On the other hand, would the courts really have been showing respect for Nazi law if they had construed the Nazi statutes by their own, quite different, standards of interpretation?\textsuperscript{104}

Professor Hart castigates the German courts and Radbruch, not so much for what they believed had to be done, but because they failed to see that they were confronted by a moral dilemma of a sort that would have been immediately apparent to Bentham and Austin. By the simple dodge of saying, "When a statute is sufficiently evil it ceases to be law," they ran away from the problem they should have faced.


\textsuperscript{104} Ibid., 655.
This criticism is, I believe, without justification. 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."105

To me there is nothing shocking in saying that a dictatorship which clothes itself with a tinsel of legal form can so far depart from the morality of order, from the inner morality of law itself, that it ceases to be a legal system. When a system calling itself law is predicated upon a general disregard by judges of the terms of the laws they purport to enforce, when this system habitually cures its legal irregularities, even the grossest, by retroactive statutes, when it has only to resort to forays of terror in the streets, which no one dares challenge, in order to escape even those scant restraints imposed by the pretence of legality — when all these things have become true of a dictatorship, it is not hard for me, at least, to deny to it the name of law.106

Radbruch had written the same thing, and Fuller defended Radbruch’s position both in his response to Hart but also previously in his 1953 article noted above. But Fuller was not a yes man for Natural law theory, nothing of the kind. He was explicit about this in his lectures turned book in 1940.107 Fuller wrote, here above, that genuine law has an inner morality of its own, and that the absence of such a foundational connection should have been enough on its own to determine that what was promulgated as law under the Nazi regime was no law at all. He wrote:

I do not assert that the solution I have suggested for the informer cases would not have entailed its own difficulties, particularly the familiar one of knowing where to stop. But I think it demonstrable that the most serious deterioration in legal morality under Hitler took place in branches of the law like those involved in the informer cases; no

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105 Ibid.
106 Ibid., 660.
107 Fuller, Law in Quest, 101: Not only am I not proposing to re-fight the philosophic battles of the American and French Revolutions, but I am not attempting to set myself up as sponsor for any of the various systems of natural which have been advocated in the past.
comparable deterioration was to be observed in the ordinary branches of private law. It was in those areas where the ends of law were most odious by ordinary standards of decency that the morality of law itself was most flagrantly disregarded. In other words, where one would have been most tempted to say, "This is so evil it cannot be a law," one could usually have said instead, "This thing is the product of a system so oblivious to the morality of law that it is not entitled to be called a law." I think there is something more than accident here, for the overlapping suggests that legal morality cannot live when it is severed from a striving toward justice and decency. …

Here again, we find the same claim as Radbruch, that when the immorality of a law or legal system reaches a certain level, we are correct in treating it as no law at all, and Fuller seems to claim we might be able to infer from the systemic nature of the immorality of the regime, that any law promulgated by them does not therefore warrant the attribution of law. Certainly the international court at Nuremberg seems to have decided along these lines, not giving much weight to the defense that “I was only obeying orders,” or for the judges’ trial, “I was only enforcing the law.”

Legal Choices

But what of Hart’s advising revolt versus Fuller’s treating the legal system as no law at all and thus inhering no reason to be obeyed. Both seem to have their “morality” aimed in the right direction, but is one more fluid and workable than the other? The following table

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108 Fuller, *A Reply*, 660 – 661. Fuller went on: But as an actual solution for the informer cases, I, like Professors Hart and Radbruch, would have preferred a retroactive statute. My reason for this preference is not that this is the most nearly lawful way of making unlawful what was once law. Rather I would see such a statute as a way of symbolizing a sharp break with the past, as a means of isolating a kind of cleanup operation from the normal functioning of the judicial process. By this isolation it would become possible for the judiciary to return more rapidly to a condition in which the demands of legal morality could be given proper respect. In other words, it would make it possible to plan more effectively to regain for the ideal of fidelity to law its normal meaning.
gives an example of how responses to an immoral law might play out along the separate lines suggested by Fuller and Hart.

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<td><strong>Individual's response</strong></td>
<td>Ignore</td>
<td>Oppose</td>
</tr>
<tr>
<td><strong>Justification</strong></td>
<td>Does not have the sufficient justice content to be called law</td>
<td>Law was created and promulgated in correct way</td>
</tr>
<tr>
<td><strong>Resultant possible action</strong></td>
<td>Ignore; overthrow the law maker</td>
<td>Openly oppose law to have it changed</td>
</tr>
<tr>
<td><strong>Possible analog</strong></td>
<td>French Resistance in World War II</td>
<td>Citizen martyr</td>
</tr>
<tr>
<td><strong>Outcome</strong></td>
<td>Best case scenario: overthrow the system</td>
<td>Best case scenario: law is changed begrudgingly</td>
</tr>
<tr>
<td></td>
<td>Worst case: death at the hands of lawmaker</td>
<td>Worst case: death at the hands of the law-maker</td>
</tr>
</tbody>
</table>

Neither route looks favourable if it were to be concerning a person’s choice under the Nazi Regime. One of the real risks would have been death as the result of either course of action, whether attempting to secretly overthrow government and treat the laws as no laws
at all, or to openly fight to have the law changed because it is immoral. Of course, we could put the French resistance under Hart as well, but we could not put “oppose law to have it changed” with the risk of martyrdom under Fuller very easily, because that would entail the person being convinced that a legitimate law needed, and desperately, to be changed, whereas Fuller and Radbruch both avow that there is a point past which when laws become sufficiently immoral they lose the qualification of law. The important thing to keep in mind is that Fuller, Hart, and Radbruch would all agree that the Nazi laws were often odiously immoral, there is no question or debate about that, it was how those laws were handled by the German courts post-facto that mattered in the 1958 articles. The ultimate question for both of them was whether it was correct for Radbruch and the post War German courts to treat the hideous laws and rulings of the Nazi regime as no law because of their gross immorality. Hart defended the positivist view that it is better for us in both the short and long run to treat them as laws, and perhaps by so doing remind ourselves that the important thing is to keep separate the concepts of law and morality so that we do not confuse ourselves into thinking the existence of the former proves the presence of the latter. Fuller and Radbruch were convinced that because justice is so intrinsically part of what a law must be to be both functional and beneficial for an orderly and fair society, that when a law’s aims, either implicitly or explicitly, become so morally offensive as to transgress basic justice and fairness, that they become grotesque aberrations which never were law to begin with. In some sense, the two sides being argued are talking about different points on a spectrum: Fuller and Radbruch are, in this argument, both at the border between morality and immorality where laws begin to become so offensive they lose their status of laws, and also far out on the immoral side of the ledger and insisting that evils of this nature are obviously not law, something which seems fair enough and would likely be widely agreed on; but Hart is, shall we say, standing somewhere in the middle looking at both sides of the spectrum and saying: “aha, from here I see there are good and bad laws, but laws nonetheless. I will obey the good and seek to have the bad ones changed if I can.”
In the Nuremburg Trials, specifically the Judges Trial of March to December of 1947, and specifically the informers’ cases discussed in the the ‘58 articles, immoral laws and crimes against humanity under the Nazi regime were declared void by both courts on the basis that they were immoral. The inference is that if a legal system dispenses with justice as its key foundational component, it can make no law as such. Hart would argue differently. Legal systems can endure that have a minimum connection to morality, but he would warn us that we kid ourselves if we think that just because something is law, it is therefore connected to morality at some basic level. When you think of all the German people, and there were other nationalities who went along with this regime, faced with the prospect of obeying the law under the Nazis, who had grown up on nothing less than what we all had, the idea that law is an indication of morality, then perhaps a great deal can be forgiven this population who went along with what was lawful under the government that fed and protected them. Hart has an excellent point. The problem was not that the Nazi regime was not immoral, it absolutely was, but we are not helping ourselves if we continue to believe that law equals morality, because look at what had just happened in Germany where this was likely to blame for many of the acquiescences of people who were simply obeying the law. This is something we all grew up doing. Radbruch grew up with it, Fuller, Hart, go back as far as to the Greeks, people often obey laws because there is an overriding, amorphous, and mystical sense that they somehow must be attached to the good, to borrow from the language of Socrates and Plato. Hart’s argument was valid, and Fuller applauded and recognized it. But its worth did not outweigh, to Fuller’s thinking, the fact that morality in the form of justice ought to be the foundational tenet upon which legal systems are both created and then assessed with as time moves forward. Society’s notion of justice may change, Fuller acknowledged that throughout, but the law’s aim, its purpose, needs to be grounded in Radbruch’s leading principle of justice.
Fuller and Hart’s arguments are two fully acceptable points of view on the matter. Which one is more acceptable to the reader is another question. The degree to which the rise in the popularity of natural law theories was occasioned by the rise and ruin of societies under fascism is implicit in the details of the lived experience of all three scholars. Gustav Radbruch lived through it in Germany, and saw with his own eyes the empty promises of legal certainty and equal treatment to purge a legal system of injustice. Fuller wrote his all important piece on the problems occasioned by positivism and how they were connected to the rise of fascism at the beginning of the War in 1940. Hart himself served with British intelligence during the war, and did fantastic work to combat the Nazi regime. All of these scholars were convinced of the terrible nature of the regime that plunged the World into war during the 30s and 40s. What they disagreed about was whether we were any further ahead in our thinking by insisting that law and morality were connected at a fundamental level, and thus whether the post War German courts were right to declare immoral laws no laws at all.

Perhaps the perspective of a German associate of Fuller’s who lived through the war can help us understand how important it is for us today to pay attention to the lessons we learn from the life and changed views of Gustav Radbruch.

I know we Germans have an enormous burden of guilt, which all of us share, regardless of our politics. But I think we also have something to teach the world. We have gone through an experience no other civilized people has had to the same degree. We have seen disappear almost overnight all the elementary decencies of law and government that you take for granted. In the process we have learned, what you have not had a chance to learn, what is fundamental in law and government.\textsuperscript{109}

\textsuperscript{109} Fuller, \textit{American Legal Philosophy}, 485.
For Gustav Radbruch, it was justice. He wrote following the War:

Do not believe anyone claiming that objectivity and legality are the answer to the ultimate questions of justice and can master the most difficult judicial problems. Objectivity and legality are sufficient as long as the state’s leadership lies in reputable hands. If however, speaking in the manner of Augustine, the state becomes a large troop of bandits, then only faith in higher values can be of assistance, in that case the glowing flame of justice must overcome all concerns and fears. It is grievous if justice has atrophied in deference to secondary values such as legality and objectivity through the positivism which has forgotten the highest of all dictates of justice: that we should be more obedient to God than Man.\footnote{Radbruch, \textit{The Glory and End of the Imperial (Reichs) Ministry of Justice}, 1948.}

Although Radbruch appeals to God in this instance, we can see from other passages from his articles following the War and noted above that it was justice simpliciter that must prevail over the lower markers of legality and objectivity. The fact that he attaches it to the divine in this instance is only a reflection of his personal faith and not determinative of his new ordering of principles which must inhere for a law to be truly a law.

\textit{What Now?}

The question raised at the beginning of the paper was how taking either a positivist or natural law approach to law or legal systems might help those of us in law related occupations make better use of our energies, as Fuller would say. It cannot be doubted that both Fuller and Hart made reasonable points about how to understand what law is. But, I suggest they were really talking about near similar things, but their focus was on different points in the law making process. Fuller’s argument about immoral law is primarily directive and prescriptive on how laws should be made, whereas Hart appeals to the person who has to face bad laws. True, they were both dealing with the post-War
German courts’ decisions about how to deal with bad law, but Fuller’s focus was on the primary ingredient for laws which had been missing from the very start, and Hart was focusing on the question of how to deal with bad law once it had been created, post facto. We can safely assume that both would agree that when making law, the morality of the society that creates the law ought to be, or should be expected to be, reflected in those laws. It is only once the law exists where disagreement still lies between the two perspectives.

If this is correct, then a question arises: ‘do the two approaches to law help the law professor or lawyer or law student make better use of their energies?’ I think taking the best parts of both theories is warranted in this case, and like Fuller observed, both the is and ought are at work in tandem in any field touched by creative human energies, one of which is the law.\footnote{Fuller, \textit{Law in Quest}, 7 – 11.} The law professor is teaching future lawyers and law professors, and in many cases informing the courts and lawmakers on possible changes to, and the need for creation of, various laws to account for both the new contingencies arising in a technologically advancing society, and the new ideas within society about what amounts to justice, which are based on some kind of morality. As primarily on the lawmaking side of the equation, I think attention then to Fuller’s ideas about the intrinsic connection between law and morality are helpful. On the other hand, for the lawyers and the law students, future lawyers, who deal with law on a daily basis before the courts and on behalf of their clients, perhaps Hart’s warnings about clear thinking about what law is would help them to see that whether or not the law seems fair to them or their client, they are not arguing their case based on what the law ought to be but what it is, and thus to deal with the law as it is first, and to direct their energies towards doing what is possible within the law as it stands to get the person as just an outcome as possible. Afterwards, the lawyer may have realized in the process of representing their client that the law was in fact bad
law. In that case, she or he may want to seek for ways to have the law changed, or at least bring it to the attention of lawmakers that the law ought to be changed. It is a long tradition in Western society for lawyers to enter the political field where laws are made. For judges, I think a combination of both is required, because from the bench the bad law can often be struck down on the basis of another good law, usually in the form of rights instruments, and yet the judge ought to take seriously Hart’s admonition that the law is what it is, not what the particular judge thinks it ought to be. Perhaps with this in mind, respect for the law that is and fidelity to it can be shown in their restraint when faced with the possibility of changing a law based on what may appear as constitutional or common law principles, but may in fact speak more to their own political views. Of course, too far in this direction of drastically changing laws from the bench, and other courts will usually step in and correct the situation, if not immediately via appeal, then in time once the new precedent reaches them.

Perhaps the law student is in the best place, because they can afford the time to look at both sides of the equation closely and put to each other hypotheticals for which they can think about how they would act and what justifications they would bring for those actions. Perhaps consideration of the two sides of the question will also help them determine a career path that better suits their own concerns for the society they live in. Like so many things in life, the answer to ‘what is law’ is not an either / or question. It certainly is based on, and hopefully reflects, the moral sensibilities of the society in which and on which it operates, and by so being, is deeply connected to a secure notion of justice, at least as that society and their peers in the international community see it. Law is also certainly what the state enforces, and as it has to account for the wishes of millions, it will perhaps never be entirely satisfactory for every single individual in it. But if it allows them the freedom to live and prosper, to speak their mind freely, and to seek to have those laws which cause offense changed, then its level of justice will not be wanting in any event.
In the final analysis, those of us who work in the legal profession must acknowledge the value of both positivism and natural law because that is the nature of law: to be something that is, the law on the books, and to be something that ought to be, creating or changing law to better accord with our fluid notions of justice. Fuller made this point, the is and the ought work together, and it is a fitting thought to conclude.

[A story retold] is a product of the *is* and the *ought* working together. There is no way of measuring the degree to which each contributes to the final result. The two are inextricably interwoven, to the point where we can say that “the story” as an entity really embraces both of them. …

Exactly the same thing may be said of a statute or a decision. It involves two things, a set of words, and an objective sought. This objective may or may not have been happily expressed in the words chosen by the legislator or judge. This objective, like the point of the anecdote, may be perceived dimly or clearly; it may be perceived more clearly by him who reads the statute than by him who drafted it. The statute or decision is not a segment of being, but, like the anecdote, a process of becoming. By being reinterpreted it becomes, by imperceptible degrees, something that it was not originally. … By becoming more clearly what it is, the rule of the case becomes what it was previously only trying to be. In this situation to distinguish sharply between the rule as it is, and the rule as it ought to be, is to resort to an abstraction foreign to the raw data which experience offers us.\textsuperscript{112}

\textsuperscript{112} Ibid., 8 – 10.