Some Reflections on the Ideal Dimension of Law and on the Legal Philosophy of John Finnis

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Abstract: This article defends a non-positivist theory of law, that is, a theory that accepts the necessary connection between legal validity and moral correctness by reference to the work of John Finnis. It begins with the dual nature of law as comprising both a real or factual dimension and an ideal dimension. Important examples show that at least some kinds of moral defect can deprive law of validity from the perspective of a participant in the legal system. The nature of the connection between moral defectiveness and legal defectiveness is specified in terms of three possibilities: exclusive non-positivism, in which all cases of moral defect render law invalid; inclusive non-positivism, in which moral defect renders law invalid in some cases; and super-inclusive non-positivism, in which legal validity is not affected by moral defect at all. The paper argues for inclusive non-positivism as exemplified by the Radbruch Formula, according to which extreme injustice is not law, and which strikes the right balance between the ideal and real dimensions of law, against John Finnis’s account, which can be seen as an example of super-inclusive non-positivism, although his most recent work has tended towards the inclusive version.

Keywords: Legal Validity, John Finnis, Radbruch Formula.

I. The Necessity Thesis

In the Introduction to Volume IV of his Collected Essays, titled Philosophy of Law and published in 2011, John Finnis remarks that his “work hitherto . . . fails to convey clearly enough the sheer oddity” of conceiving the debate between natural law theories and positivistic theories as “a debate about whether there is any necessary connection between law and morality.”\(^1\) Finnis’s oddity thesis is embedded in the context of the natural law tradition. Joseph Raz presents a quite similar thesis from the standpoint of the positivist tradition. According to Raz, it makes no

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sense to attribute to natural law theory or—as I will term it in what follows—to non-positivism the necessity thesis and to positivism its negation, the contingency thesis, for positivism, too, is compatible with the necessity thesis. As his reason for this, Raz contends that there exists “an indefinite number”\(^2\) of “true statements about necessary connections between law and morality.”\(^3\)

Both Finnis and Raz maintain that the question of whether there exist necessary connections between law and morality is the wrong question where the “basic orientation”\(^4\) of positivism and non-positivism is at issue. Their respective reasons for this, however, are quite different.

Raz gives a series of examples in order to “show that the existence of necessary connections between law and morality cannot really be doubted.”\(^5\) Two shall be considered here. The first is rape. Without any doubt, Raz is right in claiming “that rape cannot be committed by the law.”\(^6\) And it is, indeed, possible to interpret this as an example for a necessary connection between law and morality. Rape is morally bad, and law necessarily cannot be morally bad in this respect. Therefore, this counts as an instance of a necessary connection between law and morality, compatible with legal positivism. For this reason, the simple phrase often used as expressing the positivistic separation thesis, “There is no necessary connection between law and morality,” does not, as such, suffice to distinguish positivism from non-positivism. The picture changes fundamentally, however, if the phrase is understood as shorthand for a more precise version of the separation thesis, “There is no necessary connection between legal validity or legal correctness on the one hand, and moral merits and demerits or moral correctness and incorrectness on the other.” This more precise version gives expression to the point of the connection thesis. It refers not to each and every necessary relation between law and morality, but only to the relation between legal validity or legal correctness on the one hand, and moral merits and demerits or moral correctness and incorrectness on the other. Raz’s rape example does not bear on this relation at all.

The same applies to Raz’s second example. It concerns the possibility of law’s moral evaluation. Raz is right in maintaining that “it is a conceptual point about the law that it can be morally evaluated as good or bad, and as just or unjust.”\(^7\) But this, again, does not concern a connection that makes legal validity or legal correctness depend on moral merits or demerits. The relation between law and the possibility of its moral evaluation is merely a condition of the possibility of such a dependence, a possibility that as such entails nothing whatever about any necessary dependence of legal validity or legal correctness.

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\(^3\) Joseph Raz, *Between Authority and Interpretation* (Oxford: Oxford University Press, 2009), 169.
\(^4\) Ibid., 167.
\(^5\) Ibid., 169.
\(^6\) Raz, *The Authority of Law*, 318.
\(^7\) Ibid.
on moral merits or demerits. Something like this applies to all the examples adduced by Raz.

Finnis’s rejection of the relevance of the necessity question is grounded on quite different reasons. According to Finnis, propositions like “An invalid argument is no argument” or “An unjust law is no law,” if read with an eye to the “idiom of classic western philosophy,” simply “presuppose and entail that arguments are not necessarily valid . . . and law is not necessarily moral.” I grant that these propositions can be understood in this way. But this says nothing about the relevance of the necessity question. On the contrary, if law, however understood, can be immoral, then the question arises of what consequences this has for legal validity and legal correctness, and this question cannot be adequately treated without taking up the necessity question. For this reason, the debate about the necessity thesis is necessary, and it is by no means odd.

In what follows, I will defend the necessity thesis in its more precise version, that is, the thesis to the effect that there exist necessary connections between legal validity and legal correctness on the one hand and moral merits and demerits or moral correctness and incorrectness on the other. This shall be done with a look at John Finnis’s legal philosophy.

II. The Dual Nature of Law

The starting point in my defense of the necessity thesis is the assumption that law has a dual nature. The dual-nature thesis sets out the claim that law necessarily comprises both a real or factual dimension and an ideal or critical one. The real dimension consists of authoritative issuance and social efficacy, the ideal refers to moral correctness. Authoritative issuance as well as persistent social efficacy presuppose institutionalization of one sort or another. For this reason, the real dimension of law can also be called the “institutional dimension.” What concerns the ideal side, moral correctness is intrinsically connected with practical reasonableness. What is morally correct is, ceteris paribus, reasonable, and what is practically reasonable, is, at least in this respect, morally correct. In this way, the dual nature thesis leads to the idea of law as the institutionalization of reason.

Non-positivism would not be non-positivism if it merely maintained that law can have an ideal dimension. It lies at the very core of non-positivism that law necessarily has an ideal dimension. Without the concept of necessity, the nature of positivism and non-positivism cannot be grasped. For this reason everything said

10 Finnis, Philosophy of Law, 7.
11 Ibid.
in the defense of non-positivism depends on the necessity of law’s ideal dimension, its content, and its impact on the real dimension. I will proceed in three steps. The first step concerns the truth of the thesis that law is necessarily connected with an ideal dimension. In a second step, I raise the question of what is to be understood by law’s “ideal dimension.” The third step consists in an analysis of the impact of the ideal dimension on the real dimension. I begin with the first step.

### III. The Necessity of the Claim to Correctness

The main reason for the thesis that law is necessarily connected with an ideal dimension is the argument from correctness. The argument from correctness says that individual legal norms and individual legal decisions as well as legal systems as a whole necessarily lay claim to correctness. The necessity of raising this claim can be shown by demonstrating that the claim to correctness is necessarily implicit in law. The best means of demonstration is the method of performative contradiction. Mark C. Murphy calls this method the “illocutionary act strategy.” Finnis speaks in this context of “self-refutation.” An example of a performative contradiction in a constitution is its fictitious first article that reads:

X is a sovereign, federal, and unjust republic.

It is scarcely possible to deny that this article is somehow absurd. The idea underlying the method of performative contradiction is to explain the absurdity as stemming from a contradiction between what is implicitly claimed in framing a constitution, namely, that it is just, and what is explicitly declared here, namely that it is unjust. Now justice counts as a special case of correctness, for justice is nothing other than the correctness of distribution and compensation. Therefore, the contradiction in our example is not only a contradiction with respect to the dichotomy of just and unjust but also a contradiction with respect to the dichotomy of correct and incorrect. What is more, in the aforementioned example of the fictitious first article of a constitution, the contradiction that arises there between what is explicit and what is implicit is necessary. It could be avoided only if one were to abandon the implicit claim. But to do this would represent a transition from a legal system to a system of naked power relations, in other words, to something that is, necessarily, no legal system. In the Postscript to the second edition of *Natural Law and Natural Rights* Finnis maintains that “it is possible

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that some legal systems abstain from claiming to be morally obligatory.”

20 If this means that a legal system can forbear from claiming to be morally correct, the point must be rejected.

The necessary connection between law and the claim to correctness is by no means confined to such fundamental acts as framing a constitution. It is present everywhere in the legal system. The absurdity of decisions such as the following renders this explicit:

The accused is hereby sentenced to life imprisonment, which is an incorrect interpretation of prevailing law. 21

IV. The Content of Law’s Claim to Correctness

It is obvious that the content of the claim to correctness in each of the two aforementioned examples is quite different. In the fictitious first article of a constitution, correctness qua justice refers to justice or correctness simpliciter. In the sentence to life imprisonment, the claim to correctness refers to the interpretation of prevailing, that is, current positive law. This is to say that the first case concerns only the ideal dimension of law, whereas the second case, while referring to the real dimension of law, leaves room for the question as to what role the ideal dimension plays in it. If the second case concerns moral correctness at all, it is moral correctness bound up with legal correctness. In both cases, however, the reference to morality is rational only if such a thing as moral correctness, truth, or objectivity does indeed exist. This is contested by proponents of radical skepticism, a view that may have its roots in forms of emotivism, decisionism, subjectivism, relativism, naturalism, or deconstructionism. If radical skepticism were right, non-positivism would fail. The claim to correctness, in so far as it refers to morality, would then be nothing more than an expression of an illusion or an error. For this reason, non-positivism bears the burden of showing that moral correctness, truth, or objectivity is at least to a certain degree possible. On this point, legal theory rests on moral theory.

It is not possible to develop a moral theory here. But the two main arguments against radical skepticism shall be indicated. The first is that rational moral discourse is possible. This argument can take its cues from discourse theory, but it need not. The conditions of discursive rationality have been a central theme in moral theory from the beginning. Discourse theory has attempted to make these conditions explicit in a system of principles, rules, and forms of general practical discourse. 22 This system comprises rules that demand non-contradiction, clarity of language, reliability of empirical premises, and sincerity, as well as rules and forms that speak to the consequences, and also to balancing, universalizability, and the genesis of normative convictions. All this is embedded in a procedural

21 Alexy, The Argument from Injustice, 38.
framework. Its core consists of rules that guarantee freedom and equality in discourse.

The second argument against radical skepticism is that it is possible, on the basis of the conditions of discursive rationality, to give a justification of human rights qua moral rights and, with this, of central elements of justice. On this basis, one can arrive at certain necessary requirements of morality. This, however, does not mean that all moral questions can be definitively resolved by moral arguments. Human rights often collide with other human rights or with collective goods. Balancing is, then, necessary, and balancing can often end with incompatible judgments, both of them backed by reasons that do not violate any rule of rational discourse. Then this disagreement is, as Rawls terms it, a “reasonable disagreement.”

One might call this the “problem of practical knowledge.”

The problem of practical knowledge is one of the main reasons for the necessity of positive law. When Finnis writes that “Aquinas thinks that positive law is needed for two reasons, [one of them being] that the natural law ‘already somehow in existence’ does not itself provide all or even most of the solutions to the co-ordination problems of communal life,” he gives exact expression to this point. The insufficiency of moral discourse qua decision procedure, which Finnis speaks of as “irresolvable disputes,” necessitates the existence of the real, that is, the positive dimension of law, defined by authoritative issuance and social efficacy. This necessity stems from the moral requirements of avoiding the costs of anarchy and civil war and achieving the advantages of social co-ordination and co-operation.

The necessity of positivity, however, by no means implies positivism. To be sure, it implies the moral correctness of positivity. But the moral correctness of positivity does not preclude morality once positive law is established. Morality, that is, the ideal dimension, remains alive in and behind the real dimension. For this reason, one has to distinguish two stages or levels of correctness: first-order correctness and second-order correctness. First-order correctness refers only to the ideal dimension. Its central concern is justice as such. Second-order correctness refers both to the ideal and to the real dimension. This means that it concerns justice as well as legal certainty. In this way, the claim to correctness, qua second-order claim, necessarily connects both the principle of justice and the principle of legal certainty, or, as one might say, the principle of legality with law. This implies that the question of how to determine the relation between the ideal and the real dimension of law boils down to the question of how to determine the relation between the principle of justice and the principle of legal certainty.

26 Finnis, Natural Law and Natural Rights, 28.
V. Two Perspectives and Two Connections

In order to answer the question of how the relation between justice and legal certainty is to be determined, one must distinguish, first, two perspectives, and, second, two kinds of connections.

The first distinction is that between the observer’s perspective and the participant’s perspective. The difference between them is this. The participant asks and adduces arguments on behalf of what the correct answer is to a legal question in the legal system in which he is finds himself, whereas the observer asks and adduces arguments on behalf of a position that reflects how legal questions are actually decided in that legal system. The participant’s point of view is defined by the question “What is the correct legal answer?,” the observer’s by the question “How are legal decisions actually made?”

According to Finnis, “the central case of the legal viewpoint” is constituted by “a viewpoint in which the establishment and maintenance of legal as distinct from discretionary or statically customary order is regarded as a moral ideal if not a compelling demand of justice.” This seems to come quite close to what is here understood by the “participant’s perspective,” and Finnis’s incorporation of the concept of “a moral ideal” in the description of the central case of the legal viewpoint might well be interpreted as a reference to something like an ideal dimension of law.

The main difference between the two perspectives is found in the kinds of arguments that are adduced from the respective standpoints. The observer is confined to fact-based arguments, whereas the participant, say, a judge, has to adduce alongside fact-based arguments normative arguments, which are not fact-based, if whenever a case, owing to the “open texture” of law, cannot be resolved solely on the basis of fact-based arguments. These normative arguments, which are not fact-based, can be classified as moral arguments about how the law ought to be. For law, first, essentially concerns questions of distribution and compensation, and questions of distribution and compensation are, second, questions of justice, and questions of justice are, third, moral questions. This necessary reference to morality does not, however, imply, as such, that positivism is wrong, for a positivist can concede the point without giving up positivism, as Raz does when he says that “judges are subject to morality anyway.”

In order to remain within the positivist camp one simply has to interpret the reference to morality in hard cases as a law-making act that transforms moral reasons into law. From this point, however, it is only a short step to non-positivism, as will be shown by means of the second distinction, namely, the distinction between two kinds of connection between law and morality.

By contrast, the observer is confined to social facts. This is not to say that his considerations cannot include considerations about what the participants whom he observes think the law ought to be. One might term such considerations about what persons think the law ought to be “indirect” or “third-person”

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29 Finnis, Natural Law and Natural Rights, 14-15 (emphasis added).
31 Raz, Between Authority and Interpretation, 195.
considerations by contrast to the direct and first-person considerations of the
participant. All this implies that from the standpoint of an observer, only the
real dimension of law is of interest. For this reason, from the standpoint of an
observer, positivism with one exception is correct. This exception concerns sys-
tems of social control in which the claim to correctness is not raised at all. These
systems are not legal systems, and an observer, for this reason, cannot ask the
question: “How are legal decisions actually made?” He can only ask: “How are
decisions actually made?”

The second distinction, necessary to my answer to the question of how to
determine the relation between justice and legal certainty, is the distinction be-
tween classifying and qualifying connections between law and morality. This
distinction concerns the effects of moral defects. The effect of a classifying con-
nection is the loss of legal validity. By contrast, the effect of a qualifying con-
nection is legal defectiveness or incorrectness that does not, however, undermine legal
validity. The decisive point here is that the effect of moral defectiveness or incor-
rectness is legal defectiveness or incorrectness. That morally defective laws are
morally defective is a trivial truth. That they are legally defective, however, is not
only not trivial but also of greatest significance for the relation between the real
and ideal dimension of law, and this not only for theoretical reasons, but also for
reasons practical in nature. If the defect were merely a moral one, it would be
difficult to explain why a higher court—independently of what the positive law
says—has the legal power to set aside the unjust decision of a lower court in a case
in which this unjust decision is every bit as compatible with positive law as would
be a just decision.

The positivistic separation thesis states, as already noted above, that there is no
necessary connection between legal validity or legal correctness on the one hand
and moral merits and demerits or moral correctness and incorrectness on the
other. This implies that positivism, whether exclusive or inclusive, must
deny the existence of both a necessary classifying and a necessary qualifying con-
nection in order to remain positivistic. Non-positivism begins by defending a
qualifying connection. On this basis, non-positivism can determine the classifying
connection, that is, the effects of moral defects on legal validity, in three different
ways. Non-positivism can say, first, that legal validity is lost in all cases of moral
defect, or, second, that legal validity is lost in some cases and not in others, or,
third, that legal validity is affected in no way whatever. In this way, three forms
of non-positivism emerge: exclusive non-positivism, inclusive non-positivism,
and super-inclusive non-positivism. I will begin with the last of these, super-
inclusive non-positivism.

32 Alexy, The Argument from Injustice, 34-35.
33 In “An Answer to Joseph Raz,” 45, I wrote that the positivistic separation thesis is correct “from
the observer’s perspective.” The exception just mentioned must be inserted here.
34 See Raz, The Authority of Law, 47.
4-7.
VI. Super-Inclusive Non-Positivism

Super-inclusive non-positivism connects the real dimension of law with the ideal dimension by means of a qualifying connection, but shrinks back from classifying consequences concerning legal validity. Rather, each and every injustice is reflected in law. Super-inclusive non-positivism is distinct from positivism with respect to legal correctness, but with respect to legal validity there exists, at least principally, no difference between positivism and super-inclusive non-positivism. Aquinas and Kant can be interpreted in this way, and it is not surprising that Jeremy Waldron attempts to make the case for leaving “Kant in the classic, but honest, predicament of the true legal positivist.” More recently, John Finnis in particular in chapter XII of his *Natural Law and Natural Rights*, has endorsed such a position.

By contrast with the correctness thesis, Finnis does not primarily and directly apply normative concepts in order to establish a necessary qualifying connection between positive law and justice or reasonableness, a connection indispensable to super-inclusive non-positivism. Rather, he attempts to achieve this by means of the distinction between the “focal meaning” of a concept in which it refers to its “central case(s)” and its “secondary meanings” in which the concept refers to its “peripheral cases.” He offers, *inter alia*, the following examples: “There are central cases of constitutional government, and there are peripheral cases (such as Hitler’s Germany, Stalin’s Russia, or even Amin’s Uganda).” This is generalized when he takes up the famous sentence “an unjust law is not a law: *lex injusta non est lex.*” According to Finnis, in the first edition of *Natural Law and Natural Rights*, this statement, because an unjust law is a law just as an invalid argument is an argument, is either “pure nonsense, flatly self-contradictory, or else is a dramatization of the point more literally made by Aquinas when he says that an unjust law is not law in the focal sense of the term ‘law’ [i.e. *simpliciter*] notwithstanding that it is law in a secondary sense of that term [i.e. *secundum quid*].” If one connects this with the following statement on the next page: “Far from ‘denying legal validity to iniquitous rules’, the tradition explicitly (by speaking of ‘unjust laws’) accords to iniquitous rules legal validity,” these two statements can be considered as expressing quite clearly the position that I classify as super-inclusive non-positivism. To be sure, in his 2011 Postscript, Finnis qualifies the statement just quoted as “loose.” But this is a concern I shall take up later, when I raise the question of whether super-inclusive non-positivism is an

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37 In the work of some super-inclusive non-positivists clauses can be found which might be interpreted as indicating a classifying connection. On what concerns Kant see Alexy, “The Dual Nature of Law,” 174n10.
40 Ibid., 11.
41 Ibid., 364.
43 Finnis, *Natural Law and Natural Rights*, 364.
44 Ibid., 365.
45 Ibid., 476.
acceptable position. For the moment, the question at issue is whether Finnis’s
distinction between central and peripheral cases allows for an adequate description
or explication of super-inclusive non-positivism. This depends on how the distinc-
tion between central and peripheral cases is to be understood.

Finnis characterizes the distinction in various different ways. He designates
the peripheral cases as “undeveloped, primitive, corrupt,” and “watered-down
versions of the central cases,” and, by contrast with this, the central cases as
“mature,” “sophisticated,” and “flourishing.” The peripheral cases are said to be
“more or less borderline cases,” “distorted,” and “perverted or otherwise mar-
ginal.” Two further characterizations of peripheral cases are of special interest.
These are the characterizations as “deviant” on the one hand and “defective,”
even “radically defective,” on the other. Mark Murphy has raised the objection
that the distinction between central and peripheral cases comprises a transition
from deviance to defectiveness that is unwarranted on the ground that “[d]eviance
is not defectiveness.” “For a thing to be defective,” Murphy argues, “is for it to
fall short of a standard,” whereas being deviant does not presuppose the viola-
tion of a standard. This implies that defectiveness is necessarily normative,
whereas deviance is not. Murphy adduces a cheetah and the turtle Franklin as
examples. In order to be a central case it is necessary that a cheetah be a fast
runner. If the cheetah, for whatever reason, is not a fast runner, it is not only
deviant, but also defective. The case is said to be different with the turtle Franklin.
In order to be a central case of a turtle, Franklin must be a slow walker. If he
should be a fast runner, he would be a deviant case of a turtle. But, and this is
Murphy’s point, this deviance would not imply defectiveness. I think that this is
ture.

One might, however, object that in the example the connection between devi-
ance and defectiveness might well collapse on the ground that a turtle is a natural
kind. This is different in the case of law, which is a non-natural kind. But with
respect to law, too, one can imagine instances in which the connection between
deviance and defectiveness might well collapse. In the conditions of human life, as
it is, a legal system that does not provide for coercion in order to secure “justice
and peace” would have to be considered as both deviant and defective. If, how-
however, there came into existence a society in which all members had such a
strong sense of justice that each and every one always abides by the law, the legal
possibility of imposing coercive measures could be abolished. If that were to

46 Ibid., 11.
47 Ibid., 10-11.
48 Ibid., 11.
49 Finnis, “Natural Law Theories,” 17.
50 Ibid.
52 Ibid., 352.
53 Murphy, “Defect and Deviance in Natural Law Jurisprudence,” 50.
54 Ibid., 52.
55 Ibid., 51.
happen, this legal system would become deviant, but it would not be defective. In a certain sense, it would even be a more perfect legal system than those legal systems found elsewhere, in which reason requires the legal possibility of exercising coercion.

Still, Finnis’s distinctions are quite close to a qualifying connection according to which the effect of moral incorrectness is legal incorrectness. Incorrectness as well as correctness are normative concepts that presuppose standards of correctness and incorrectness. Finnis’s overarching standard for defectiveness and non-defectiveness is “practical reasonableness.” If this standard refers directly to defectiveness—the latter being at least extensionally equivalent to incorrectness—and to non-defectiveness—the latter being, again, at least extensionally equivalent to correctness—then the differences of the two approaches qua reconstructions of a qualifying connection are appreciably reduced, perhaps, they even vanish. With all of this, it fits quite well that Finnis, in a context in which I would prefer to use the expression “qualifying connection,” occasionally designates his defective cases as “‘qualified sense’... instances of the subject-matter.”

VII. The Radbruch Formula as an Element of the Ideal Dimension

To identify Finnis’s natural law theory in the first edition of Natural Law and Natural Rights as an instance of super-inclusive non-positivism is not to justify it. I wish now to take up this question.

Super-inclusive non-positivism gives absolute priority to legal certainty over justice when legal validity is concerned. In order to answer the question of whether such an absolute priority of the real dimension over the ideal dimension is justified when legal validity is at stake, the alternatives in the camp of non-positivism are to be considered. A radical alternative is exclusive non-positivism. According to exclusive non-positivism, legal validity is lost in all cases of moral defect. This position interprets the classic sentence “Unjust laws are not law” as saying “[I]mmoral rules are not legally valid.” With this, in cases of conflict between legal certainty and justice, absolute priority is given to justice. Such

57 Finnis, Natural Law and Natural Rights, 15.
58 Ibid., 11.
60 Beyleveld and Brownsword are well aware of the problems of denying legal validity to each and every immoral rule, and they develop a highly complex theory of restraint in order to delimit the unlimited effects that would otherwise stem from the simple formula “Immoral rules are not legally valid” (See on this Stanley L. Paulson, “Law as a Moral Judgement. By Deryck Beyleveld and Roger Brownsword,” Ratio Juris 7 (1994): 114; Robert Alexy, “Effects of Defects—Action or Argument? Thoughts about Deryck Beyleveld and Roger Brownword’s Law as a Moral Judgment,” Ratio Juris 19 (2006): 170-73)). This theory of restraint is an elaboration of “the idea of a moral obligation to comply with legally invalid rules” (Deryck Beyleveld and Roger Brownsword, Law as a Moral Judgment, 2d ed. (Sheffield: Sheffield Academic Press, 1994), 45). This can be accepted with respect to its results but not with respect to its construction, which can be considered as a paradigmatic case of an auxiliary construction that attempts to treat the consequences of a mistake instead of curing the disease itself. The alternative construction of inclusive non-positivism that, from the beginning, gives more weight to the factual dimension of law vis-à-vis its ideal dimension is not only preferable for
absolute-priority relations, however—be it the absolute priority accorded to legal certainty in the case of super-inclusive non-positivism, be it the absolute priority accorded to justice in the case of exclusive non-positivism—are problematic. Super-inclusive non-positivism can be reproached for giving too much weight to legal certainty, that is, to the real dimension of law; exclusive non-positivism for giving too much weight to justice, that is, to its ideal dimension.\(^{61}\)

The only form of non-positivism that gives adequate weight to both dimensions, the real and the ideal, is inclusive non-positivism. Inclusive non-positivism claims neither that moral defects always undermine legal validity nor that they never do. Its most prominent expression is found in the Radbruch formula, which in its most compressed form runs as follows: Extreme injustice is not law.\(^{62}\) According to this formula, moral defects undermine legal validity if and only if the threshold of extreme injustice is transgressed. This threshold is transgressed in cases of extreme violations of human rights. Here, in order that a well-balanced relation between the real and the ideal dimension of law be established, justice must be given priority over legal certainty.

It might be objected that other possibilities are at hand for giving adequate weight to the ideal dimension of law in cases of extreme injustice, and that Finnis’s distinction between a legal and a moral sense of “legal obligation” is such a possibility. According to this distinction, “legal obligation” in the “purely legal sense”\(^{63}\) is “artificially isolated from the unrestricted flow of practical reason,”\(^{64}\) or, as Finnis prefers to put it in the Postscript, from “the flow of general (‘extra-legal’) straightforward practical reasoning.”\(^{65}\) This is different in the case of a “legal obligation” in the “moral sense.”\(^{66}\) For this reason, this obligation, in contrast to “legal obligations” in the legal sense,\(^{67}\) is “variable in force.”\(^{68}\) From this background, Finnis develops something akin to a moral Radbruch formula:

More precisely, stipulations made for partisan advantage, or (without emergency justification) in excess of legally defined authority, or imposing inequitable burdens on their subjects, or directing the doing of things that should never be done, simply fail, of themselves, to create any moral obligation whatever.\(^{69}\)

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\(^{63}\) Finnis, *Natural Law and Natural Rights*, 321.

\(^{64}\) Ibid., 320.

\(^{65}\) Ibid., 473.

\(^{66}\) Ibid., 321.

\(^{67}\) Ibid., 311.

\(^{68}\) Ibid., 318.

\(^{69}\) Ibid., 360.
In short, the effect of the moral defect is to undermine the claim to the existence of a moral obligation. This is far less than the non-existence of a “legal obligation” in the legal sense. In this respect Finnis says the following:

It is not conducive to clear thought, or to any good practical purpose, to smudge the positivity of law by denying the legal obligatoriness in the legal or intra-systemic sense of a rule recently affirmed as legally valid and obligatory by the highest institution of the ‘legal system’.70

This surely, is true from the observer’s perspective, which, however, is not the central perspective. Legal systems are possible without naked observers, but they are not possible without participants. From the point of view of a participant, however, Finnis’s separation of the legal obligation from the moral obligation must be rejected. After the collapse of a regime that ruled on the basis of extremely unjust laws, the question of whether these laws and the decisions based on them were null and void from the beginning may be of the utmost importance for the protection of the human rights of the regime’s victims.71 This suffices as a good “practical purpose.”72 The Radbruch formula is, indeed, more complex than Finnis’s “legal obligatoriness in the legal or intra-systemic sense,”73 but complex concepts can nevertheless be clear.74 There seems to be a greater danger of a lack of clarity when a concept owing to its insufficient complexity is not adequate to its subject matter. For this reason, Finnis’s distinction between a legal and a moral sense of “legal obligation” is not an adequate alternative to the Radbruch formula. It fails to give sufficient weight to the ideal dimension in cases of extreme injustice.

All this, however, concerns the first edition of Natural Law and Natural Rights from 1980. In Finnis’s more recent writings, statements are found that may well be interpreted as standing close to the Radbruch formula and, thus, close to inclusive non-positivism.

As already remarked, Finnis in his Postscript from 2011 designates his statement in the first edition, namely, that the natural law tradition “accords to iniquitous rules legal validity,”75 as “loose.”76 He stresses that there is altogether room for legal invalidity for reason of iniquity. But this shall only apply if it is established by the legal system at hand, that is, when “the system itself provides a juridical basis for treating these otherwise valid rules as legally invalid by reason (directly or indirectly) of their iniquity.”77 Now, a juridical basis provided by the system itself is a basis established by positive law. Making effects of iniquity or injustice on legal validity depend on positive law,
has, however, nothing to do with non-positivism. It is an expression of inclusive positivism. For this reason, the statement just quoted cannot be interpreted in the light of the Radbruch formula.

There are, however, recent statements in Finnis’s work that can be read as endorsements of the Radbruch formula. I shall confine my attention here to just one such statement.78 It is to be found in Finnis’s entry “Natural Law Theories” in the Stanford Encyclopedia of Philosophy, substantially revised in 2011. Here Finnis makes the loss of legal validity depend upon the “discursive context.”79 Now the discursive context is, as stated above, exactly what distinguishes the observer’s and the participant’s perspectives, and from the standpoint of the participant the Radbruch formula is correct,80 whereas it is incorrect from the standpoint of the observer.81 Finnis seems to say something like this when, in the following, he states:

If a course of reflection or discourse makes it appropriate to acknowledge the rule’s ‘settled’ or ‘posited’ character as cognizable by reference to social-fact sources, one can say that it is legally valid though too unjust to be obeyed or applied. Or if the discursive context makes it appropriate instead to point up its lack of directiveness for judges and subjects alike, one can say that the rule, despite its links to social-fact sources, is not only not morally directive but is also legally invalid.82

The arguments of an observer refer, indeed, to “social-fact sources,”83 and the observer is free to contest any moral duty to obey or to apply law that is “too unjust.”84 By contrast with this, the arguments of a participant also refer to moral reasons in order to establish what is legally correct. In cases of extreme injustice, this has the consequence that the rule “is not only not morally directive but is also legally invalid.”85 This is exactly what the Radbruch formula says. With this, John Finnis has entered the camp of inclusive non-positivism.

78 Another one is the statement that the “classic position,” for which Finnis is an advocate, says “that laws whose injustice is sufficiently grave can and should be denied to have the legal character predicable of laws that citizens and courts, precisely as courts, are morally and juridically entitled to treat as—or as if they are—not law.” Finnis, “Natural Law Theories,” 18.

79 Finnis, “Natural Law Theories,” 16.

80 Alexy, The Argument from Injustice, 62.

81 Ibid., 31.

82 Finnis, “Natural Law Theories,” 16-17.

83 Ibid., 16.

84 Ibid.

85 Ibid., 16-17.