

ARTICLES : SPECIAL ISSUE
CONFRONTING MEMORIES – EPILOGUE

Law's Past and Europe's Future

By Vivian Grosswald Curran*

*"Pour Charybde éviter tu tomberas en Scylle,
Si tu ne sais nager d'une voile tout vent."¹*

A. Introduction

As Europe forges its legal order, constitution, and self-understanding, many appear to believe that identifying and enacting laws and a legal framework that correspond to shared concepts of justice and human rights will solve the problem of legalized barbarism which once plagued Europe and which has been a recurrent feature throughout time and across the globe. The historical propensity of courts, even in democratic states, to legitimate and enable policies of persecution and discrimination provides compelling evidence that the current level of faith in law is misplaced.

This article argues the limitations of law and legal theory, contesting the view that, on their own, they will have more than a minimal impact on society and even on courts. No matter how good they are in conception, how correctly they embody contemporaneous understandings of universal human rights, or how flawlessly they may be phrased to connect the signifier of legal language to the signified concepts that language purports to represent, law and legal theory can only be a small part of the elements that would fashion judiciaries into a bulwark against ideologies and practices of repression.

Socio-historical research of recent years suggests that the greatest dangers to constitutional rights and freedoms may come from structures inherent in modern nation

* Many of the ideas in this article were published in Vivian Grosswald Curran, *Racism's Past and Law's Future*, 26 Vermont L. Rev. 1 (2004). Unless otherwise noted, translations are mine. *Je dédie cet essai à la mémoire de Blanche, ma sœur bien-aimée.*

¹. JOACHIM DU BELLAY, LES REGRETS XXVI 49 (1876) (1558). I have modernized the spelling from "Pour Charybde éviter tu tomberas en Scylle, / Si tu ne sçais nager d'une voile à tout vent."

states.² It has been argued that, since the French Revolution, nation states have developed an inner structural logic which is independent of substantive political ideology, and which facilitates a society's turn to discrimination, persecution, and even mass murder, when substantive ideology becomes degraded and democracy eroded.³

This theory is consistent with my view that law and legal theory cannot represent a safeguard against the abrogation of fundamental human rights. Thus, Europe's attention should be focused on fashioning institutions that do not depend on law to perpetuate civilization. The past presents a bleak picture, but the novelty of the European Union represents a bright hope. If, as Habermas and Professor Joerges conclude, Europe already is "post-national," rather than "supra-national," it may be possible to avoid the pitfalls of the nation state that put basic rights at their greatest risk.⁴ Understanding the past and conceiving of effective future safeguards are formidable challenges. Imagination, itself, is bounded by past cognition.⁵ Traces of the past limit, but do not determine, our capacity to imagine. As Europe fashions its paths forward, this article hopes to assist in setting forth law's place in the "big picture".

Part A of this article introduces my thesis. Part B situates the problem of law and legal theory, and the dangers of the contemporary world's excessive faith in them. Part C discusses the "Chinese head tax case", current litigation in Canada involving the relationship of law to racism in a modern constitutional democracy. This case figures in the debate which arose after the Second World War as to whether courts can ensure the rule of law and undermine politics of repression by adopting a non-positivistic methodology. That methodology would include identifying as non-law, and therefore as unenforceable, legislative enactments the judiciary deems to be subversions of what law should be, or, in other words, enactments the judiciary deems to be evil.

Part D examines in greater depth what one may call the debate about evil law that Nazism and Stalinism spawned in the aftermath of the Second World War. This

² This is the principal thesis of ZYGMUNT BAUMAN, *MODERNITY AND THE HOLOCAUST* (1989).

³ See *id.*

⁴ J. Habermas, *Die postnationale Konstellation und die Zukunft der Demokratie*, in: *DIE POSTNATIONALE KONSTELLATION, POLITISCHE ESSAYS* 91 (1998), cited with approval and commentary in Christian Joerges, *Europeanization as Process: Thoughts on the Europeanization of Private Law*, 11 *EUROPEAN PUBLIC LAW* 61 (2005) (manuscript on file with author).

⁵ See 1, C. S. Pierce, *The Essential Writings of Peirce: Selected Philosophical Writings* 24, 30 (NATHAN HOUSER / CHRISTIAN KLOESEL, EDS., 1992); PAUL RICEUR, *TEMPS ET RÉCIT III: LE TEMPS RACONTÉ* 177-83 (1985).

debate resulted in a rejection of theories of legal positivism in favor of a return to older perspectives of natural law theories. The proponents of natural law methodology purported to offer a solution to the judicial propensity to enable terror that had reached new heights in the massacre of populations by Hitler.

Part E deals with the present-day import of the positivism-natural law debate, including the question of how the common-law versus civil-law legal systems of the western world figure into the debate. In particular, it argues against the view that common-law attributes provide greater potential for the judicial maintenance of the rule of law than do civilian legal attributes. It also argues that judicial methodology is largely uncorrelated with the substantive justice of judicial decisions.

Finally, Part F and the Conclusion (G) situate the post-war debate in terms of law's capacities and its future, arguing that the post-war focus on judicial methodology and theory as a significant avenue for ensuring a humane rule of law is unlikely to bear fruit because a debate which is internal to law, to identifying the best laws, the best legal theories, and the best-defined judicial mission and methodology, cannot affect more than a fragment of the life of the law and of people, given the importance of the non-legal arena's influence on the pragmatic meanings of law in society, on what Ernst Cassirer called the all-important "constitution that is written in the citizens' minds."⁶ It is the inchoate values of Europe's citizens, however transitory and vulnerable they may be to subversion from both without and within, that nevertheless will constitute the law that the courts will implement according to contemporaneous societal, institutional and individual beliefs.

B. Between Legal Theory's Scylla and Charybdis

Law's capitulation to the dominant views and ideologies of society, however much they have been at odds with what one might consider to be the legal requirements of a most basic, minimal and fundamental nature, has not been an historical aberration. It has been part of the fabric of human society. Law's performance generally has been dismal: the judiciaries of nation after nation throughout time have enabled governments to discriminate against, persecute, and even massacre portions of populations.

Judicial compliance with political ideologies of discrimination, persecution, and murder have not been limited to countries in which the judiciary may be said to have lost its independence within the governmental structure of the state. Moreover, even where the judiciary operated within an authoritarian government of

⁶ ERNST CASSIRER, *THE MYTH OF THE STATE* 91 (1946).

merciless vengeance against dissenters, such as in Hitler Germany or Vichy France, where one might suppose that the judiciaries' enablement of terror stemmed from weakness and fears of reprisal, compelling evidence suggests a very different conclusion: namely, that judicial compliance with national ideology was enthusiastic and inconsistent with fear having been a primary motivating factor.⁷

The history of law's enablement of discrimination, both through statutory enactments and judicial decision-making, casts doubt over today's widespread belief that human savagery can be eradicated by good laws, and by making good laws universally accepted and enforceable, whether in the European Union or throughout the world. It is illuminating to bear in mind how racism of one kind or another, in endlessly renewed and ever creative incarnations, has typified the history of humanity around the globe, and how law generally has been its servant, not its opponent.

Unjustified faith in law is tragically dangerous because it undermines the goal of ensuring human rights and dignity that it seeks to attain.

The internal history of law and legal theory also has had remarkably constant attributes: notably, a dogged insistence on the law's power to reform humanity, to ensure that civilization triumphs and eradicates barbarism; and an overweening hubris in suggesting that law and legal theory can contain the solution within themselves, and that the goal of ensuring respect for fundamental human rights and human dignity worldwide can be attained through law and legal theory.

Whether intentionally or unintentionally, legal theory and philosophy suggest that they contain a remedial potential which, in fact, they lack, and necessarily must lack, to the extent that they fail to incorporate the inchoate values of individuals and institutions in society, the "constitution that is written in the citizens' minds."⁸ It may be as much by omission as by commission that legal theory suggests an illusory promise of remedial capacity. Omitting to address explicitly its own limitations in the scope of its application suffices to convey a greater promise of remedial effect than legal theory can fulfil.

⁷ See, generally, INGO MÜLLER, *HITLER'S JUSTICE: THE COURTS OF THE THIRD REICH* (DEBORAH LUCAS SCHNEIDER TRANS., 1991); Vivian Grosswald Curran, *The Legalization of Racism in a Constitutional State: Democracy's Suicide in Vichy France*, 50 *HASTINGS L.J.* 1 (1998) [hereinafter *Legalization of Racism*] (noting the recent academic trend that suggests the populace and judiciary supported the regime's behaviour).

⁸ CASSIRER (note 6).

The practical potential of legal theory, methodology and philosophy's influence diminish in the measure that uncertain and often unascertainable human views and understandings are driving forces behind judicial interpretation and application of law. Consequently, the solution to law's historical participation in perpetrating evil is not to be found in legal theory or in legal systems. At the very least, the role of system and theory are minor players in the story of law's potential for evil, as in law's potential for preventing evil.

Ronald Dworkin has written that "propositions of law are true if they figure in or follow from the principles of justice, fairness, and procedural due process that provide the best constructive interpretation of the community's legal practice."⁹ This is no antidote to law's connection with evil, because it means that propositions of law which would be deemed true and valid can stray very far from anything resembling what we might like to associate with the rule of law, if the community's practice generates inhumane legal interpretations.

It is with this point of departure that the present article addresses two arguments: the debate about whether evil law should be considered to be law at all; and the suggestion others have made of recourse to common-law principles of equity as a solution for changing the historically recurring judicial practice of implementing ideologies of repression and racial discrimination when legislative organs of the state have mandated the same as law.

The position of this article is that neither a natural-law perspective nor a common-law focus on equity (or on its continental European civilian counterparts, such as *principes généraux/Generalklauseln*) can systematize a solution. They may be very helpful tools if and when the "constitution in the citizens' minds" causes them to be used for good, but whether they will be so used depends on the individual and institutional values momentarily in place when enacted law is implemented.

To the extent that they are advocated as the basis of legal argument and persuasion in particular situations, such as an avenue which, in apartheid South Africa, might have led to the judicial eradication of apartheid, had they been applied more pervasively and insightfully (and courageously), as will be discussed below, they may be most valuable suggestions in practice at given moments.¹⁰ Accordingly, the point of this article is not to deny their usefulness or value, nor to deny the importance of humane judicial rulings. The latter have meant the difference between life and

⁹ RONALD DWORKIN, *LAW'S EMPIRE* 225 (1986).

¹⁰ See discussion *infra* Part V.

death to the disempowered throughout the worst periods in history, including in apartheid South Africa, Nazi Germany, Vichy France, and Mussolini Italy.

Instead, the point is to suggest that natural law and principles of equity, like all other legal principles and perspectives, will be colored and defined so differently at individual moments in history, that it is not they, but, rather, the values of the individual and institutional legal actors that will determine whether law is a force for or against humanity at any given moment in history. Consequently, the practical effect of legal theory, methodology, and philosophy is limited to the here and now, and is of minimal usefulness for guiding the way law will be implemented in the future.

By this, I mean not just that judges, in the future, may choose to ignore a natural-law perspective or principles of equity (or their civil-law equivalents), but also that, even if we were able to set a humane theory of law in stone as obligatory for a nation's judiciary, the ways in which legal theory, philosophy, and methodology will be understood and implemented will be a function of "the constitution that is written in the citizens' minds," such that they may become a force of evil no matter how carefully one crafts concepts today as a prescription for use tomorrow.

A primary purpose in drawing attention to, and insisting on, the inherently weak correlation between justice on the one hand, and established legal theory and methodology on the other, is that recognizing the reduced role of law, legal theory, and the systematization of guiding principles of legal methodology may enhance clarity, and thereby improve the efficacy of our choice of measures in trying to achieve the goal of establishing or perpetuating a humane rule of law.

It is of interest to note the emphasis on educating children in *La Pensée et l'action*,¹¹ the book by René Cassin, the principal drafter of the Universal Declaration of Human Rights,¹² who placed great faith in the power of law to change the world.¹³ He devoted his life to the furtherance of his fervent belief in the power of legal standards, and in their potential to prevent the barbaric period he had witnessed in Europe from recurring. Nevertheless, the end of the preface to his book implies a recognition that the preservation of human life and dignity does not depend on law or legal theory, no matter how humane in intention or obligatory in nature. Instead,

¹¹ RENE CASSIN, *LA PENSÉE ET L'ACTION* (1972).

¹² But see Mary Ann Glendon, *Diaries of a Forgotten Framer*, 14 HARV. HUM. RTS. J. 277, 277 (2001) (book review) (noting that the drafter of the first draft of the Universal Declaration was John Humphrey).

¹³ For a powerful depiction of Cassin and his colleagues' faith in law's power to eradicate human barbarism, see Mary Ann Glendon, *Knowing the Universal Declaration of Human Rights*, 73 NOTRE DAME L. REV. 1153, 1153-82 (1998).

it depends on the determinative power over the future of what is in the minds of the citizens; hence, the preface ends by speaking not of law, but of education:

*"It is the educators of all of the nations who are responsible for the youth of tomorrow. Theirs is the mission to sow in the soul of the young the seed that, in blossoming, will triumph over nationalisms and prepare the harvest of tomorrow: the human patrie [nation/homeland]."*¹⁴

Excessive faith in law, legal theory, system, and methodology is extremely dangerous because it is a formula for conferring insufficient attention to factors that might enable us to heighten the probability of correlating judicial adjudication with justice. The post-war focus on judicial methodology has caused an unfortunately irrational faith in its power. This focus draws attention away from identifying domains of analysis and action that would be more influential in affecting the institutional and individual values of society, the values that are strongly correlated with whether the courts are a force for or against justice and a humane rule of law.¹⁵ It also draws attention away from such structural aspects as the vast, technocratic bureaucracies of the modern nation state which may "load the dice" towards the facilitation of human catastrophe.¹⁶

The temptation to place faith in law and legal theory's potential to ensure a humane rule of law is great because the prospect of acknowledging that the inchoate plays the dominant part in law's reality means that we acknowledge how overwhelming the odds are against progress, despite the dramatic urgency for law to do better in the future than it has done in the past, and despite the huge stakes involved: life and justice.

On the one hand, excessive faith in law's potential will heighten the chances of injustice to the extent that it lessens vigilance in other socio-cultural areas. The more legal actors adopt an illusory faith in the systemic attributes of law, the greater the likelihood that they will be lured into remaining at a superficial understanding of

¹⁴ Alfred Kastler, *Préface* to RENE CASSIN, *LA PENSÉE ET L'ACTION* 11 (1972) ("Ce sont les éducateurs de toutes les nations qui sont responsables de la jeunesse de demain. C'est eux qu'incombe la mission de semer dans l'âme des jeunes le grain qui en germant l'emportera sur les nationalismes et préparer la moisson de demain: la patrie humaine.").

¹⁵ Indeed, they also are the factors that determine how judges interpret and understand the legal theory and methodology.

¹⁶ See BAUMAN (note 2).

legal developments.¹⁷ As a society's changing values affect the reality of law, it may not be clear that anything is changing, especially if the texts of enacted law are unchanged.

On the contrary, the judicial tendency is to proclaim continuity even as judicial interpretation alters the valence of textually immobile law. To follow the sixteenth-century poet, du Bellay, when seen from the outside, a law still may look like a thing of utmost beauty, like a justice-furthering ideal that may have inspired it originally, while its meaning may have become transformed into something deadly, like the inside of a tomb:

*"Qui les voit par dehors ne peut rien voir plus beau,
Mais le dedans ressemble au dedans d'un tombeau."*¹⁸

This is the phenomenon one legal scholar so aptly has termed as "ideological drift."¹⁹ Accordingly, the Scylla is that legal theory's promise is illusory unless one maintains a perspective as to the limits of its potential. To lose sight of these limitations is to lose sight of the need for deconstructing the externals of law in order to see the living reality beneath the shell.

On the other hand is Charybdis: the inevitably dim hope of remedying law's propensity to participate in injustice because of the difficulty of influencing the inchoate factors that affect a population's ever-shifting values and views. The endless variables, lack of precision, incessant flux, and vulnerability to subversion of the "constitution that is written in the citizens' minds," nevertheless, must be the terrain of our attention because, however tenuous and elusive of definition they may be, it is they which are a *sine qua non* for maintaining a humane rule of law.

The impetus for corrective-remedial legal theory is the desire to progress into a less savagely barbaric and inhumane future, to wrest law from the forces of evil and to create, both in and from it, a bulwark against injustice, human suffering, and mass murder, all of which law historically has been implicated in enabling and legitimating only too often. If one confronts the realization that the best that legal theory can

¹⁷ See V. Grosswald Curran, *Politicizing the Crime Against Humanity: The French Example*, 78 NOTRE DAME L. REV. 677 (2003) (note 14), 708-09 (describing the effect of society's narrowing perspective on law's meaning in the context of crimes against humanity).

¹⁸ Du Bellay (note 1), XC, 113. I have modernized the French spelling. The original is "Qui les void par dehors ne peult rien voir plus beau, / Mais le dedans ressemble au dedans d'un tombeau."

¹⁹ See J.M. Balkin, *Ideological Drift and the Struggle Over Meaning*, 25 CONN. L. REV. 869, 871 (1993) (stating that ideological drift means "legal ideas and symbols will change their political valence as they are used over and over again in new contexts"); see, also, J.M. Balkin, *The Footnote*, 83 NW. U. L. REV. 275, 277 (1989).

do, even if successful in getting itself adopted by judges and lawyers, is to make a very small difference in the construction of the "constitution that is written in the citizens' minds," one would have to look beyond theory, system, and methodology, to the ever-contingent array of factors that are not amenable to prediction or to control. Until and unless legal theory can manage to do that, its role will be compromised by the failure to do so, increasing, rather than decreasing, the propensity of law to partake in repressive ideology.

C. The Chinese Head Tax Case

The Chinese head tax case, ongoing in Canada as of this writing, illustrates the continuing relationship of law to racial discrimination in a modern constitutional democracy, and provides a springboard for a discussion of law and legal theory's potentials and limitations.²⁰ The case arose from legislation discriminating against Chinese residents of Canada. Starting in 1885, Canada's legislature passed a series of laws imposing a head tax on persons of Chinese origin who entered the country.²¹ By 1903, the head tax amounted to a prohibitive financial burden, "approximately two years' wages for a Chinese-Canadian worker at the time."²² Pursuant to this statute, the Canadian government collected over 20,000,000 Canadian dollars on a tax that was imposed on no portion of Canada's population other than the Chinese.²³ The original legislation was repealed in 1923 and was replaced by still harsher legislation intended to bar Chinese people from entering Canada.²⁴ This statute, eventually repealed in 1947,²⁵ removed the tax, but disqualified the Chinese as candidates for immigration to Canada.²⁶

²⁰ Mack v. Canada (Attorney General), [2001] 55 O.R.3d 113 (Ont. Super. Ct.), *aff'd* [2002] 60 O.R.3d 765 (Ont. App. Ct.); *leave to appeal refused by* [2003] 217 D.L.R. (4th) 583.

²¹ The Chinese Immigration Act 1885, S.C. 1885, ch. 71, available at: <http://www.asian.ca/law/cia1885.htm> (last visited Apr. 7, 2004).

²² Factum of the Appellants at 3, Mack v. Canada (Attorney General), [2002] 60 O.R.3d 765 (Ont. App. Ct.) (No. C36799).

²³ *Id.*

²⁴ The Chinese Immigration Act 1923, S.C. 1923, ch. 38, available at: <http://www.asian.ca/law/cia1923.htm> (last visited Apr. 7, 2004); see, also, Factum of the Appellants (note 22), 4.

²⁵ The Immigration Act, S.C. 1947, ch. 19, available at: <http://www.asian.ca/law/ia1947.htm> (last visited Apr. 7, 2004). For a brief history of the legislative intention to bar Chinese people from Canada, see Mack v. Canada, [2002] 60 O.R.3d 765 (Ont. App. Ct.), at 1.

²⁶ Factum of the Appellants (note 22), 4.

In 2001, plaintiffs who had paid the tax or whose spouses or parents had paid it, sued the Canadian government, seeking to have it held liable for unjust enrichment, as well for "harm caused by the separation of family members and other privations."²⁷ The Ontario Court of Appeal affirmed the dismissal of the case on, *inter alia*, the ground that the head tax had been legal when enacted and applied.²⁸ Far from defending the substance of the legislation, however, the court's opinion begins with a statement of regret:

*"Canada's treatment of people of Chinese origin....represents one of the more notable stains on our minority rights tapestry."*²⁹

The Chinese head tax case, and the theoretical debate in which it figures, involve the nature and definition of law as related to what may be called the problem of evil. Professor Raz has expressed this problem as follows:

*"[T]he law can be the source of much evil, meaning that evil is brought about by human beings, but that the law often plays a causal role in bringing it about, in facilitating its occurrence."*³⁰

The issue came to the foreground in the western world following the Second World War because of the degeneration of law in Nazi and fascist states.³¹ The post-war legal community confronted the problem of fascism as a problem of law because of law's primacy in Nazi Germany and other fascist societies in the following ways: (1) Hitler repeatedly proclaimed that Nazi Germany was a *Rechtsstaat*, a nation of and under law; France's collaborationist leader, Pétain, made the same claim for France from 1940 to 1944; (2) Nazi Germany enacted thousands of laws from 1933 to 1945 that legalized the Nazi system of terror; similarly, Vichy France enacted hundreds of laws from 1940 to 1944 that legalized its reign of terror; (3) Nazi Germany and other fascist judiciaries implemented laws that undermined the most fundamental, centuries-old, western tenets of what law is and means; (4) in doing

²⁷ *Id.*, 1.

²⁸ *Mack* [2002] 60 O.R.3d at 52, 54.

²⁹ *Id.*, 1.

³⁰ Joseph Raz, *About Morality and the Nature of Law*, 48 AMJ. JURIS. 1, 1 n.1 (2003).

³¹ It earlier had become a central focal point after the First World War. See Nathaniel Berman *But the Alternative Is Despair: European Nationalism and the Modernist Renewal of International Law* 106 HARV. L. REV. 1792 (1993) (note 14); Patrick Thornberry, *Is There a Phoenix in the Ashes? – International Law and Minority Rights*, 15 TEX. INT'L. L.J. 421 (1980) (describing the European political and legal climate after World War I) (cited by *Mack* appellants in *Factum of the Appellants* (note 22), 5).

the latter, the judiciaries legitimated the subversion and abuse of traditional western notions of law, rather than upholding them; and (5) other legal actors, such as legal scholars and lawyers, similarly contributed to the collapse of traditional western notions of law.³²

The Chinese head tax case demonstrates that this issue remains current. The plaintiffs' appellate brief discusses the post-war debate, including the position which the German legal scholar Gustav Radbruch developed that evil law is not law.³³ Like some of its fascist counterparts, the discriminatory Canadian head tax statute reflected the values of a society which proclaimed equality, but only selectively.

Selective constitutionalism reassures the privileged portions of the citizenry that theirs is a civilized society. This reassurance, in turn, facilitates systemic repression by clothing it in a constitutionalism that does not apply to all, as though the quality and character of substantive legal rights were unrelated to their range of application. An instance of the use of this strategy met with brilliant success in France during the Second World War under the German Occupation. The indigenous, collaborationist Vichy government presented its initial antisemitic laws with explanatory commentary insisting that the foundational values of France's legal system remained intact, and that the laws applied only to a certain portion of the population, intrinsically alien to the national community.³⁴

Similarly, in apartheid South Africa, as Justice Richard Goldstone has described it, that country's "very strange" system proclaimed constitutional law values while simultaneously undermining them in a "mix of a democratic system for the white minority, and all that that means (regular elections, changes of government at the polls, a truly independent judiciary)...side by side with...increasingly oppressive

³² See discussion *infra* Part VI. For a comparison of the legal communities in Germany and France, arguing that many of the contrasting aspects are attributable to fascism's shorter duration of four years in France, as contrasted with twelve years in Germany, see *Legalization of Racism* (note 7). For a comprehensive account and analysis of the law in Vichy France, see RICHARD H. WEISBERG, *VICHY LAW AND THE HOLOCAUST IN FRANCE* (1996).

³³ *Factum of the Appellants* (note 22), 96–113.

³⁴ This insistence on continuity was in sharp distinction to the Nazi presentation of the Nuremberg laws, as Nazi rhetoric proudly proclaimed its role as a rupture from the past. With the initial antisemitic statutes, promulgated in October, 1940, the Vichy French government also stated that Jews would remain entitled to basic property rights. With the French population's ready agreement to the legalization of antisemitism, the government dropped this pretense and proceeded to deprive Jews of all property and, eventually, of all civil rights. For the reassuring language in which the initial statute appeared when published, see *Legalization of Racism* (note 7), 9 n.21. The point that legal rhetoric provided a false sense of legality through continuity with the past is a central theme of Professor Weisberg. See WEISBERG (note 32).

racist laws."³⁵ In the United States, a Constitution that preached equality co-existed with slavery.

Western democratic constitutionalism gradually and increasingly is adopting a mandate of inclusiveness, and the Chinese head tax case is emblematic of contemporary challenges to national pasts that are occurring in courts in many parts of the globe. A range of contrasting views has emerged concerning the proper role of courts, including whether they should judge history. Thus, one might interpret the Chinese head tax case principally as a means of seeking redress for a legally cognizable wrong, unjust enrichment; as a chance to wipe clean an historical slate sullied by racism, or at least to proclaim a rejection of former Canadian tolerance for racism.

These contrasting possibilities reflect the contemporary world's changing perspective of the nature of the judicial mission. In some countries in recent years, criminal trials have become the arena for a national re-examination of the state's ideas and ideals of justice and equity. In France, for example, the post-war generation has insisted on confronting the Vichy years in the courtroom, by trying individual defendants for crimes against humanity half a century after the crimes were committed. Judicial actors, from judges to lawyers to prosecutors to civil plaintiffs,³⁶ have understood that, despite disclaimers to the contrary, these trials are of a pedagogical and political nature, which go far beyond the issue of an individual defendant's guilt or innocence, and also have understood that the country demanded that the courts engage in historical memorialization, direction, and a rendition, if not a construction, of national identity.³⁷

Memorializing the past, taking stock of the present, and devising an ideology for the future, are not tasks for which the judicial process was structured, however. Consequently, the burdens placed on the courts have been numerous and onerous, challenging law's credibility, since the processes involved in accomplishing what law was neither devised nor equipped to do arguably have involved an undermin-

³⁵ *A Judge Under Apartheid: Conversation with Justice Richard Goldstone*, at: <http://globetrotter.berkeley.edu/people/Goldstone/gold-con2.html>. (Apr. 14, 1997).

³⁶ In France, civil plaintiffs, *parties civiles*, are permitted to bring charges in criminal trials. See Code de procédure pénal [C. Pr. Pén.] art. 85 (Fr.), translated in: THE FRENCH CODE OF CRIMINAL PROCEDURE (GERALD L. KOCK TRANS., 1973).

³⁷ See LAWRENCE DOUGLAS, THE MEMORY OF JUDGMENT: MAKING LAW AND HISTORY IN THE TRIALS OF THE HOLOCAUST (2001) (arguing in favour of the Holocaust trials as legitimate and effective). But see Vivian Grosswald Curran, *Atoms of the Law*, 53 U. TORONTO L.J. 305, 309-20 (2003) (disagreeing with Douglas' conclusions and arguing that the non-judicial purposes of the Holocaust trials ultimately undermine law's credibility).

ing of some of the foundational tenets of law. When the guilt of the accused recedes in importance, and the pre-conceived pedagogical value of the verdict gains in importance, the centrality of the individual to the law erodes, endangering constitutional law's traditionally mandatory obligation to make the criminal trial of a defendant an exclusive issue of individual guilt.³⁸

South Africa avoided some of the strains to which legal systems elsewhere were subjected in cases with historical-ideological-political profiles by choosing the extra-judicial format of the Truth and Reconciliation Hearings.³⁹ It has been noted that the nature of the forum which a nation chooses to address issues of a rejected national past has much to do with the particulars of the nation's history and, hence, of its sensibilities. Professor Teitel has pointed out in the context of states in transition that, for example, because post-Communist countries had suffered from the historical revisionism that Communist governments practiced as part of their abuse and violation of truth and justice, these countries uniformly rejected redressing past crimes and offences through the construction of a historical narrative along the model of the Truth and Reconciliation Hearings.⁴⁰

While Canada is not a transitional state in the sense of having undergone an official systemic rupture with a past form of government, the Chinese head tax case arises in the context of a dramatic transition in law's interpretation that gradually has taken place in the period between the challenged legislation's enactment and the present. Even as it rejected the plaintiffs' claims, the Court of Appeal asserted its own rejection of the discriminatory legislation.⁴¹ In denying the plaintiffs' claims, the court did not endorse the statute it was upholding, but reasoned that, despite being onerous, and regardless even of whether it would be deemed legal if enacted today, the statute had been legal when enacted, and that its initial legality precluded relief for the plaintiffs.⁴²

³⁸ For an innovative proposal favouring a kind of collective guilt that would lessen the damage to law to which I refer above, see George P. Fletcher, *Liberals and Romantics at War: The Problem of Collective Guilt*, 111 YALE L.J. 1499 (2002).

³⁹ For a discussion of the Truth and Reconciliation process in South Africa, see DAVID DYZENHAUS, *JUDGING THE JUDGES, JUDGING OURSELVES: TRUTH, RECONCILIATION AND THE APARTHEID LEGAL ORDER* (1998) [hereinafter *JUDGING THE JUDGES*].

⁴⁰ See Ruti G. Teitel, *Transitional Justice Genealogy*, 16 HARV. HUM. RTS. J. 69, 78-79 (2003) (noting that "truth commissions have been of less interest in post-Communist Europe, where the use of history by various governments was itself a destructive dimension of Communist repression").

⁴¹ See *Mack v. Canada (Attorney General)*, [2002] 60 O.R.3d 765 (Ont. App. Ct.), 52 (noting that the discriminatory head tax laws, once considered constitutional, now represent "one of the more notable stains" in Canada's treatment of minorities).

⁴² *Id.*, 11, 52.

This positivistic perspective was a core issue in the debate about law that followed the Second World War, involving, among others, the British legal philosopher H.L.A. Hart, and the German legal scholar Gustav Radbruch.⁴³ They debated whether law, enacted pursuant to the procedures contemplated by the state for the legally effective enactment of law, always merits being recognized as law, whether it merits the deference due to law even if it is evil.

Their debate was framed in terms of whether law and morality necessarily are connected. A distinction made by Joseph Raz clarifies this issue. Professor Raz points out that law may have a morality that is systemic, rather than “content-independent,”⁴⁴ and thus that law that is moral in one way may be compatible with individual enacted laws that are evil.⁴⁵ He notes, for example, that one might consider obeying the laws of a nation as a moral obligation because the system as a whole merits citizen support.⁴⁶ If so, individual legal enactments might be evil without abrogating either the moral duty to obey, or the morality of the law in the systemic sense.⁴⁷

In the Hart-Radbruch debate, the issue of whether evil law is law or non-law has been addressed in terms of law’s connection to morality without making the distinction that Professor Raz contributes. One side argues that if the content of a law is immoral, or *sufficiently* immoral, it is not law, because law and morality are connected inextricably (Radbruch).⁴⁸ The other side argues that law and morality have

⁴³ Another major figure in the debate, whom I do not discuss, was Lon Fuller.

⁴⁴ Raz (note 30), 6.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ Professor Raz’s example is the converse of Professor Alexy’s, presented by Professor Dyzenhaus, of the state that declares its goal to be the pursuit of injustice. See David Dyzenhaus, *The Juristic Force of Injustice*, in: CALLING POWER TO ACCOUNT: LAW’S RESPONSE TO PAST INJUSTICE (DAVID DYZENHAUS & MAYO MORAN EDS., FORTHCOMING) (manuscript at 14, on file with author) [hereinafter JURISTIC FORCE].

⁴⁸ See Gustav Radbruch, *Gesetzliches Unrecht und übergesetzliches Recht*, 1 SÜDDEUTSCHE ZEITUNG 105–08 (1946) (F.R.G.), translated in: Stanley L. Paulson, *Lon L. Fuller, Gustav Radbruch, and the “Positivist” Theses*, 13 L. & PHIL. 313, 317 (1994) (hereinafter *Radbruch*). The view that law and morality were inextricably related was shared by Lon Fuller, with whom Hart debated the issue of positivism and natural law. But see JURISTIC FORCE (note 47), 40 (suggesting that Fuller believed there was a similarity between the Hart and Radbruch positions as “both resort to the idea of higher law in order to deal with the problems created by past legal injustice”).

no necessary connection, so that evil law is law, leaving each individual with the option to disobey it, but not to deny its stature as law (Hart).⁴⁹

D. The Hart-Radbruch Debate's Original Import

The objectives of the initial participants are relevant, as some of what seems to be disagreement may be more a reflection of differing goals and interests. Radbruch was both a German legal scholar and a former Minister of Justice under the post-World War I Weimar Republic. At the beginning of the twentieth century, he had been a proponent of the innovative Free Law School (*Freirechtsschule*), which, among others, had underscored the importance of the individual judge in the story of what law is.⁵⁰ Radbruch remained in Germany during the Nazi period, having been dismissed from his teaching post in 1933, and silenced by Nazi terror, although physically left undisturbed.⁵¹

After the war, he wanted to do more than provide an intellectual understanding of how the courts had come to play a craven and disastrous role in Nazi Germany, even though the judges mainly had been the same as in the pre-Nazi, republican Weimar period. Radbruch's goal was instrumentalist: his study of what had gone wrong was intended for the practical purpose of salvaging law for the future, by devising ways which would ensure that a humane rule of law would perpetuate itself and heighten the chances that future judges would resist, rather than join, tyrants.

Radbruch proposed that judges evaluate, not just apply, enacted law. Where law was evil, judges should refuse to apply it. Their justification would be that, where enacted law undermines the tenets of justice central to all law, it does not qualify as being law. This proposal became so widely accepted in post-war Germany that it is known today as "Radbruch's formula."⁵²

Radbruch's proposal stemmed from his view that legal positivism had been to blame for the German judges' readiness to implement Nazi law without evaluation, and for the courts' failure to resist legal enactments that were contrary to funda-

⁴⁹ See H.L.A. Hart, *Positivism and the Separation of Law and Morals*, in: *ESSAYS IN JURISPRUDENCE AND PHILOSOPHY* 49-87 (1983).

⁵⁰ See GNAEUS FLAVIUS [pseudonym for Hermann Kantorowicz], *DER KAMPF UM DIE RECHTSWISSENSCHAFT AT VII-IX* (1907) (1906).

⁵¹ 4 *20TH CENTURY LEGAL PHILOSOPHY SERIES: LEGAL PHILOSOPHIES OF LASKI, RADBRUCH, AND DABIN* 44 (KURT WILK TRANS., 1950).

⁵² See *Radbruch* (note 48), 317-18.

mental principles of law.⁵³ Moreover, he believed that the judges' positivism, namely, their relegating their judicial mission to a mere application of enacted law, whatever it was, as long as it had been enacted in accordance with the contemplated procedures for governmental enactment of legislation, stemmed from their training in law school to do precisely that.⁵⁴ He believed the entire German legal system and legal history had converged in telling judges that their task was to apply enacted law mechanically, rather than to evaluate it.⁵⁵

H.L.A. Hart strenuously disagreed with Radbruch's idea that evil law does not constitute law. Unlike Radbruch, however, Hart's focus and objectives were not oriented principally toward a pragmatic societal goal of justice. Instead, Hart's goal was to maintain and hone intellectual, conceptual clarity and accuracy, and the thrust of his criticism of Radbruch was that Radbruch's incorrect tying of law and morality would muddy the waters for legal analysis if it were accepted.⁵⁶

Hart and Radbruch's differing objectives have much to do with their respective substantive positions in the debate. The issue of nomenclature or definition was crucial for Hart, to avoid conceptual confusion that would endanger legal philosophy. Hart asserted this explicitly:

*"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...."*⁵⁷

As I have stated elsewhere, my sense is that Radbruch's interest in nomenclature was not inherently incompatible with Hart's view as much as it was a strategic decision based on the belief that naming something law or non-law would have a beneficial effect on the behavior of judges, and lessen their propensity to be complicit in evil law.⁵⁸

⁵³ H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 617 (1958).

⁵⁴ See Radbruch (note 48).

⁵⁵ Peter Caldwell, *Legal Positivism and Weimar Democracy*, 39 AM. J. JURIS. 273-75.

⁵⁶ See Hart (note 49).

⁵⁷ *Id.*, 77.

⁵⁸ See Vivian Grosswald Curran, *Fear of Formalism: Indications from the Fascist Period in France and Germany of Judicial Methodology's Impact on Substantive Law*, 35 CORNELL INT'L L.J. 101, 135 (2002) [hereinafter *Fear of Formalism*].

Radbruch's call to define law so that evil legislation does not qualify as law generally has been seen as a return to natural law. In the debate about evil law, Radbruch's position is closer to one of modified positivism, or, as Professor Dyzenhaus puts it, Radbruch's perspective is "positivism with a minus sign."⁵⁹ Radbruch's argument may best be seen as the blend of positivism and natural law that had characterized his perspective since the early 1900s, at least, when he espoused Free Law, in that he emphasizes that the norm should remain for judges to apply legislation in deference to the will of the legislature, and that only a very high *degree* or *quantity* of departure from fundamentals of justice may permit, but also must oblige, judges to reject enacted law as non-law.⁶⁰

In addition, Radbruch's idea of "non-law" bespeaks positivism, rather than natural law, in that only by denying the name of law, only once a judge has decided that a text does not qualify as law, can a judge reject the text. This means that the duty always is to apply enacted law in as much as evil enacted law no longer is called law. In this sense, Radbruch elevates the judge to a critic and evaluator of the legislator, but relegates the judge to the servitude of the legislator for all that is *bona fide* "law."

It is important to note that Radbruch's proposal never involves a judge who disobeys enacted law, but only a judge who obeys all enacted law that can qualify as law. Since non-law is not law, the judge confronted with non-law has no obligation to give effect to such a text. This may seem no more paradoxical than the role of judges in judicial review, especially in common-law systems where the reviewing court is adjudicating cases in controversy, and is not occupied exclusively with judging the legality of enacted law, so that judges continually experience the duality of applying and deferring to legislation, but also of adjudicating the viability of legislation.

Radbruch insisted on this dual function, whose alien nature to continental European civil law systems may be reflected in the fact that when constitutional review was instituted in continental European systems after the war, it generally was in the form of special constitutional courts, so that some judges became superior to the legislature to the extent that they had the last word on the legality of enacted law, but those judges, unlike their common-law counterparts, did nothing other than adjudicate issues of constitutionality.

⁵⁹ DYZENHAUS (note 47), 15.

⁶⁰ Free law theory, sometimes blamed for making a king of the judge ("*Richterkönig*"), in fact said that the judge's task was to form rules only when "the formal law has a gap." Hermann Kantorowicz, *Some Rationalism About Realism*, 43 *YALE L. J.* 1240, 1244 (1934).

All the rest of the civil-law judges, in all but the one, exceptional constitutional court, remained subservient to the legislature, and were obliged to apply the law, rather than to determine its validity. Radbruch's idea was different: not to divide the judges between those who evaluated enacted law and the rest who applied it, but, on the contrary, to insist on the evaluative obligation of all judges in all courts, within the context of their obligation of deference until and unless enacted law reached so high a degree of departure from fundamental tenets of law as to require judges to reject and to classify it as being outside the category of law.

Radbruch's blend of natural law and positivism also lies at the core of the idea he explained as a higher law to which the judiciary remains the servant: a concept of law known in German as "*Recht*," in French as "*droit*," and in Latin as "*jus*." Their etymologies link the denoted concepts to the English-language concepts of "right" and "justice." As Hobbes explained:

*"A LAW OF NATURE, lex naturalis, is a precept or general rule, found out by reason, by which a man is forbidden to do that, which is destructive of his life, or taketh away the means of preserving the same; and to omit that, by which he thinketh it may be best preserved. For though they that speak of this subject, use to confound jus, and lex, right and law: yet they ought to be distinguished; because RIGHT, consisteth in liberty to do, or to forbear: whereas LAW, determineth, and bindeth to one of them: so that law, and right, differ as much, as obligation, and liberty; which in one and the same matter are inconsistent."*⁶¹

In Hart's eyes, the problem with Radbruch's blend of natural law with positivism was one of conceptual confusion. Radbruch had constructed a way of casting judges who rejected evil law as *not* disobeying it, by virtue of first disqualifying it. Hart had no objection to Radbruch's goal of heightening morality in society so long as, contrary to Radbruch's proposal, one *did* do it by disobeying law that one considered to be evil.⁶² According to Hart, such disobedience was the better route because it would not interfere with retaining the category of law for all texts generated by legislatures according to recognized procedure.⁶³

Often considered simply and directly to be a reaction against Nazism, Radbruch's view was something else. It was part of the theoretical outlook of the Free Law School that Radbruch had helped found, and whose date of origin is generally as-

⁶¹ THOMAS HOBBS, *LEVIATHAN* 84 (1960) (1651).

⁶² See Hart (note 49), 75.

⁶³ *Id.*, 75–78.

sociated with the 1906 publication of its manifesto: Hermann Kantorowicz's *Der Kampf um die Rechtswissenschaft*.⁶⁴ Later, simplistically and occasionally ignorantly blamed for its allegedly positivistic foreshadowing of Nazism, the Free Law theory embodied a subtle, complex, and visionary perspective that combined aspects of positivism and natural law, a theory which Arnold Brecht aptly described as "neutral relativ[ism]."⁶⁵ Indeed, Free Law theory corresponds both in depth and in perspective to Cassirer's political philosophy.

Radbruch's "formula" testifies both to a strong strain of positivism and to continuity in his own legal theory (as I have argued previously and as often is disputed by the readers of Radbruch who believe that Nazism changed him from a positivist to a natural-law theoretician).⁶⁶ The blend of natural law with positivism that was intrinsic to the Free Law School's tenets also is explicit in Radbruch's correspondence with Hermann Kantorowicz, the principal founder of the Free Law School, and a colleague from youth with whom Radbruch loyally remained in contact after Kantorowicz emigrated to England.⁶⁷

E. Why the Debate Matters Today

If the positivism debate concerns us today, it should be for a reason, and this reason may influence the nature or appeal of the arguments that we make or accept. The Hart-Radbruch debate is relevant today because of the continuation in the post-war world of evil law, and the pressing urgency that legal scholars (and others) experience to marshal law as a force of humanity. These contemporary objectives are instrumentalist, like Radbruch's.

⁶⁴ See FLAVIUS (note 50).

⁶⁵ Arnold Brecht, *The Myth of Is and Ought*, 54 HARV. L. REV. 811, 824 (1941). For the Free Law School's views on natural law, see Vivian Grosswald Curran, *Rethinking Hermann Kantorowicz: Free Law, American Legal Realism and the Legacy of Anti-Formalism*, in: RETHINKING THE MASTERS OF COMPARATIVE LAW 66, 79–80 (ANNELISE RILES, ED., 2001) [hereinafter RETHINKING HERMANN KANTOROWICZ]. See, also, Vivian Grosswald Curran, *Romantic Common Law, Enlightened Civil Law: Legal Uniformity and the Homogenization of the European Union*, 7 COLUM. J. EUR. L. 63, 110–11 (2001) [hereinafter *Romantic Common Law*].

⁶⁶ See Curran (note 65), 86.

⁶⁷ See unpublished letter from Hermann Kantorowicz to Gustav Radbruch (28 February 1906) (on file with the author) (as reprinted for author by Frank Carter, the son of Hermann Kantorowicz, and published here with his kind permission). "Im ersten Teil weist er die Existenz von nichtstaatlichem 'freien' Rechte nach und naehert sich insofern dem alten Naturrecht, trennt sich aber von diesem unter anderm dadurch, dass er die Moeglichkeit bestreitet, jeden Rechtsfall rechtlich zu entscheiden. Diesem, jeder Dogmatik abholden Standpunkt gemaess, zerpfueckt er im zweitem Teile die herrschenden juristischen Methoden, wobei er jedoch betont, sich mehr gegen die Theorie zu wenden als gegen die Praxis, die schon bisher meist instinktiv das Richtige getroffen habe."

The instrumentalist nature of today's enterprise does not imply that one necessarily would reject Hart's objections if they were justified. If Hart was right that even evil law is law, it may be that to argue otherwise may not advance an instrumentalist goal. On the other hand, if the contexts of the Hart-Radbruch positions are sufficiently disparate, it may be that each has validity within a separate contextual framework. For the reasons previously stated in this article and confirmed from the historical account presented below, it is unlikely that a rejection of positivism will do much to further the goal of making law a force for, rather than against, justice.

In the modern era, apartheid South Africa illustrates the continuation of the problem that Radbruch sought to address and solve. Some have suggested that the South African judiciary might have defeated apartheid from the bench had it adopted a Radbruchian approach adapted to common law.⁶⁸ The suggestion is that principles of equity and "ordinary common law presumptions of statutory interpretation" contain within themselves the avenue for enabling judges to navigate the perilous waters that evil legislation creates for adjudication.⁶⁹

Professor Dyzenhaus presents this equity approach as one of a higher order of law, similar to the contrast that Radbruch signalled between the lower-order enacted law ("*Gesetz*") and the higher-order natural-law system of law and justice ("*Recht*").⁷⁰ Without entering into the debate as to whether the higher-order law in common-law legal systems necessarily harks to human-wide universal principles, Professor Dyzenhaus theorizes that they are implicit in the organic components of common-law legal systems in general, and of the South African one in particular.

Also along the lines of Radbruch's division of law into *Gesetz* and *Recht*, with the latter trumping the former where otherwise the two would be in mutual contradiction, Professor Dyzenhaus suggests that South African judges could have shown deference to inalterable constitutive principles of justice, which in principle enjoyed a long and established tradition of judicial recognition. According to Professor Dyzenhaus, that would have enabled and, indeed, required the judges to interpret any legal text in such a manner that would render it compatible with the demands of the higher order of law. In particular, statutes repressive of black South Africans

⁶⁸ See DYZENHAUS (note 39), 150-51.

⁶⁹ *Id.*, 75.

⁷⁰ *Id.*, 74-75.

could and should have been denuded of discrimination in their judicial interpretation and implementation.⁷¹

Professor Dyzenhaus' idea echoes the constitutional law interpretation of the United States, where the Supreme Court, whenever possible, interprets statutes so as to find them constitutional.⁷² This doctrine has dual significance: (1) the triumph of constitutional values and guarantees over legislation that would undermine individual rights; and (2) the promotion of judicial deference to legislation inasmuch as the doctrine seeks to retain enacted law rather than to reject it.

Professor Dyzenhaus' book on the South African judiciary focuses mainly on liberal judges, and reflects his judgement that they could and should have done better.⁷³ The presence of rules of equity in South Africa's common-law system provided a mechanism by which the judiciary could have nullified racist apartheid legislation. Given the overall poor showing of South African judges during apartheid, despite their operating in a system which recognized the principles of equity, the crucial issue for assessing the pragmatic potential of legal theory and methodology is whether a judiciary more strongly trained to look beyond the letter of enacted law would have done better.

Radbruch's work reflects an intense admiration for the common law system, and the belief that built-in attributes of the common-law system have an immunizing effect against judicial enablement of evil. But South Africa's history under apartheid may be the counter-example to disprove Radbruch, in as much as Radbruch suggests that the presence of the common law characteristics suffices to fortify the judiciary against legislative disruptions of the rule of law.

Radbruch so admired the common law that he believed positivism itself to be contextual in valence, and negative only in civil-law legal systems. He wrote that only in civilian legal systems did positivism correspond to judicial subservience to enacted law.⁷⁴ He believed that, in common law legal systems, positivism was an af-

⁷¹ See *id.*, 74 (quoting judges who admitted that they deferred to legislation rather than apply equitable principles).

⁷² See DANIEL A. FARBER ET AL., CONSTITUTIONAL LAW 92 (3RD ED. 2003) ("[C]ourts are supposed to choose the interpretation that avoids rather than invites the constitutional infirmity."); see, also, *id.*, 92 n.6 (citing WILLIAM N. ESKRIDGE ET AL., CASES AND MATERIALS ON LEGISLATION 873-89 (3RD ED. 2001)) ("This canon of interpretation is based on a desire to avoid unnecessary friction between the legislative and judicial branches.").

⁷³ DYZENHAUS (note 39).

⁷⁴ GUSTAV RADBRUCH, DER GEIST DES ENGLISCHEN RECHTS (1946)

firmation of "*Recht*," the supra-enactment idea of law that includes justice.⁷⁵ He said that positivism in common-law systems was a "*Bejahung des Rechts*," an assertion or affirmation of law in the supra-statutory, law-as-justice sense.⁷⁶ Radbruch explicitly associated common law methodology with England and the United States' freedom from tyranny and the historically unbroken perpetuation of the rule of law in both those countries. In particular, his book, *Der Geist des englischen Rechts*, published in 1949, sets forth the common law for German readers with unabashed admiration, as though the defining fundamentals of the system were causally related to the perpetuation of the rule of law.⁷⁷

As the history of apartheid South Africa's courts makes clear, however, the common law attributes of equity historically have proved insufficient in correlating the judicial interpretation of enacted law with a humane rule of law. David Fraser's work on the British legal system's vulnerability to fascist enactments in the Channel Islands also offers a powerful argument to the contrary, rendering highly unlikely Radbruch's conclusion that the American and British common law system's differentiating aspects from the civil law have allowed these countries to avoid fascism. Professor Fraser's book, *The Jews of the Channel Islands and the Rule of Law, 1940–1945*, has a subtitle of manifest relevance to the present discussion: "*Quite contrary to the principles of British justice.*"⁷⁸

Professor Fraser recounts the vulnerability of law to fascist ideology and legislation in the British Channel Islands of Guernsey and Jersey under German Occupation.⁷⁹ The common law judiciaries complied and, much like the common-law judiciary of South Africa, docilely applied the enacted law without reconciling it with such principles of equity as might have precluded racial discrimination and persecution.⁸⁰ Professor Fraser writes that:

⁷⁵ See Hart (note 49), 74 (noting that Radbruch believed "that the fundamental principles of humanitarian morality were part of the very concept of *Recht* or Legality and that no positive enactment or statute, however clearly it was expressed and however clearly it conformed with the formal criteria of validity of a given legal system, could be valid if it contravened basic principles of morality").

⁷⁶ See RADBRUCH (note 74), 49 (1946); Gustav Radbruch, *Anglo-American Jurisprudence Through Continental Eyes*, 52 L. Q. REV. 530 (1936) (extolling the common law).

⁷⁷ RADBRUCH (note 74).

⁷⁸ DAVID FRASER, *THE JEWS OF THE CHANNEL ISLANDS AND THE RULE OF LAW, 1940–1945: QUITE CONTRARY TO THE PRINCIPLES OF BRITISH JUSTICE* (2000).

⁷⁹ *Id.*, 1.

⁸⁰ See *id.*, 7–8.

*"...[w]hile the scale of the phenomenon can in no way be compared to the jurisprudence in France under the two Statuts des Juifs, the juridical nature of the process of identification and exclusion [of the Jews of the Channel Islands was] similar."*⁸¹

If the principles of equity or constitutionalism that the common-law systems possess might enable resistance to evil law, but historically have not done so, the problem might be that the judiciaries have not been inculcated sufficiently to prioritize these principles in the process of adjudication. In this case, it might be that greater emphasis on the need for judges to accord primacy to equity principles might cause judges to uphold, rather than subvert, a humane rule of law where enacted law is evil.

An examination of the German and French courts during fascism casts doubt on the causal relationship between actual judicial justice and emphasizing such legal theory in adjudication. While legal theory and methodology may prove useful as a tool for a judge to reach a humane decision if the judge is so inclined, twentieth-century history suggests that dissociating law from evil does not lie in inculcating the judiciary with a theory or methodology. History indicates that neither can be formulated so as to erode reliably the judicial tendency to apply, legitimate, and enable evil legislation.

F. The Telling Story of French and German Courts During Nazism and Fascism

The common law's constitutional and equity principles have a counterpart in civil law systems. These are the general principles (*principes généraux*) of France, and the general clauses (*Generalklauseln*) of Germany. Germany and France were two countries whose judiciaries enabled a reign of terror under Hitler and Pétain. Like common law principles of equity and constitutionalism, general principles and general clauses are judicial doctrines that allow judges to adjudicate under the spirit of the nation's law while interpreting specific legislation. In the words of two French scholars, French general principles allow "the introduction into positive law of moral rules or of principles of natural law."⁸² They further explain these principles as a dimension of "fairness," using this untranslatable English word in the original.⁸³ The German equivalent, the general clauses, has been described as popular in Germany in order to further the judiciary's *Rechtsgefühl*: its sense or

⁸¹ *Id.*, 37.

⁸² JACQUES GHESTIN & GILLES GOUBEUX, *TRAITE DE DROIT CIVIL: INTRODUCTION GENERALE* 338 (1977).

⁸³ *Id.*, 339.

feeling for law in the sense of law and justice.⁸⁴ Thus, similarly to common-law judiciaries, civil-law judiciaries have, and, at all relevant times, have had, a mechanism by which judges may mould enacted law on a procrustean bed of justice.

Since the presence of such mechanisms in common law systems has not been enough to ensure that judges use them to overcome and neutralize evil legislation, it might be (as we also postulated with respect to the common law) that the effective use of these mechanisms requires a judiciary to be inculcated as to the necessity of their use. An examination of the judiciaries in Nazi Germany and Vichy France suggests the contrary, however.

Radbruch's blaming judicial positivism for the reign of terror which the Nazi courts enabled overlooked the fact that the traditional judicial positivism of Germany had ended well before Hitler came to power. Germany had, indeed, embraced judicial positivism at one time, with slogans such as "enacted law is enacted law" ("*Gesetz ist Gesetz*"), and a theory known as "enacted law/statutory positivism" ("*Gesetzespositivismus*").⁸⁵

These doctrines had given way to increasing judicial activism before 1933. As Ingeborg Maus has noted, judicial activism and *anti-positivism* became the primary way for Germany's nationalistic and conservative judges to fight the Weimar laws they held in contempt.⁸⁶ Although Germany's judges appear to have felt greater sympathy for Hitler's régime than for the Weimar Republic, they continued their anti-positivistic methodology under Hitler:

*"National Socialism did not counteract the tendency to 'deformalize' law through the use of 'general clauses' instead of specific statutes, but actually strengthened it."*⁸⁷

Thus, the German judicial rejection of positivism that predated Nazism continued throughout the Hitler period.⁸⁸ It was a *non-positivistic* judiciary that legitimated,

⁸⁴ BERND RÜTHERS, *DIE UNBEGRENZTE AUSLEGUNG: ZUM WANDEL DER PRIVATRECHTSORDNUNG IM NATIONALSOZIALISMUS* 70 (1968).

⁸⁵ See Curran (note 58), 151-66 (examining positivism in Germany before World War II).

⁸⁶ See Ingeborg Maus, "*Gesetzesbindung*" *der Justiz und die Struktur der nationalsozialistischen Rechtsnormen*, in: *RECHT UND JUSTIZ IM "DRITTEN REICH"* 87 (RALF DREIER & WOLFGANG SELLERT, EDS., 1989).

⁸⁷ Caldwell (note 55), 276.

⁸⁸ This statement should be read in light of (and as qualified by) the *Methodendualismus* of the Nazi period, in which the courts interpreted enacted law liberally or strictly, selecting the methodology most

enabled and implemented Hitler's reign of terror.⁸⁹ This alone suffices to indicate that the rejection of positivism is not a prescription for maintaining law's refusal to endorse evil.

The conclusion is further fortified by the contrast between the judicial methodologies of France and Germany under fascist law. While German judges were not positivistic, French judges were, and yet the judiciaries of both countries were similarly complicit in implementing law that Radbruch said was too evil to merit the name of law.⁹⁰ The continental European legal tradition of positivism historically had been shared by France and Germany, albeit under somewhat different forms. Most continental European legal systems were more positivistic than their common law counterparts, especially when one considers that the core of positivism is the judicial application of legislative enactment, and that all law in continental Europe was written law, while, in the common law tradition, the norm was for law to be judge-made, with statutory law being the exception.⁹¹

The German and French judicial traditions developed in starkly contrasting manners before the advent of Nazism, however. In France, the judiciary became hated before the Revolution for its abuse of power. Pre-revolutionary judges had been able to issue orders arbitrarily and without being obliged to articulate a legal basis for their decisions.⁹² They could leave their judgeships to their children by will, or sell them during their life-time.⁹³ By the eighteenth century, the judiciary also had become a powerful counterpoint to the monarchy.⁹⁴ The confluence of this dual

likely to further Nazi ideology. See ERNST FRAENKEL, *THE DUAL STATE: A CONTRIBUTION TO THE THEORY OF DICTATORSHIP* (E.A. SHILS ET AL. TRANS., 1941) (providing first-hand description of National-Socialist legal system in Germany); RÜTHERS (note 84), 177; Arthur Kaufmann, *National Socialism and German Jurisprudence from 1933-1945*, 9 *CARDOZO L. REV.* 1629 (1988) (recounting the law's transformation under Nazi rule).

⁸⁹ See Paulson's comment in RADBRUCH (note 48), 315 ("the exoneration thesis [i.e., exoneration of German judges by blaming the theory of positivism for judicial injustice] has been substantially discredited").

⁹⁰ This argument is the principal theme of my article, *Fear of Formalism* (note 58).

⁹¹ See *Romantic Common Law* (note 65), 120-26 (exploring the implications of the common- and civil-law methodologies within the context of the European Union).

⁹² See JOHN P. DAWSON, *THE ORACLES OF THE LAW* 321-22 (1968) ("None of the [judges'] decrees expressed any reasons.").

⁹³ See *id.*, 351-54 (describing the origin and evolution of the sale of judicial offices in pre-Revolution France).

⁹⁴ See DAVID A. BELL, *LAWYERS AND CITIZENS: THE MAKING OF A POLITICAL ELITE IN OLD REGIME FRANCE* 15 (1994).

tradition of judicial abuse and of judicial opposition to the government caused a binary anti-judicial reaction from France's revolutionaries, consisting of both hatred and fear.⁹⁵ The revolutionaries' loathing of judges had its antecedents in the history of corruption and abuse by the judiciary, as their fear did in the role that the judges had played in overthrowing the monarchy, causing the Jacobins to fear judges for having the potential to overthrow the new revolutionary government as well.⁹⁶

While the power that French judges actually wield has been the subject of heated debate through the years, they have been relegated officially to a position of inferiority within the scheme of governmental powers. Judges themselves have complied with this official relegation, in at least superficial agreement. Ironically, it was precisely the use of equity and liberal interpretive methodology in the pre-revolutionary judiciary that spawned a reaction in the French legal mentality against it by associating equity with injustice and positivism with justice.⁹⁷

French judges officially are limited to applying enacted law, not creating it. Their decisions reflect their self-understanding of their duty to apply legislation without evaluating it. The French Civil Code continues to this day to forbid judges from making law.⁹⁸ Not surprisingly, the French judiciary, unlike the German one, did not apply general principles openly because the judges had been trained to reject judicial freedom of interpretation.⁹⁹ The traditional French rejection of general principles and adherence to positivism has been associated with a French judicial "aversion for all that is hazy or flexible."¹⁰⁰

⁹⁵ See DAWSON (note 92) 375-79 (describing the methods the revolutionary assemblies employed to subjugate the judiciary).

⁹⁶ See *id.*, (detailing the revolutionaries' attempts to subordinate the broad powers of the judiciary to the legislature); see, also, Jacqueline Hodgson, *Hierarchy, Bureaucracy, and Ideology in French Criminal Justice: Some Empirical Observations*, 29 J.L. & SOC'Y. 227 (2002) (explaining the French Revolutionaries' motives).

⁹⁷ See ANDRE DESSANS, *ESSAI SUR LA NOTION D'EQUITE* 138-39 (1934) (describing "la réaction des hommes de la Révolution contre l'arbitraire des juges de l'ancien régime . . . le juge est [dès lors] dans l'obligation de survie de la loi à la lettre . . . il y avait dans cette attitude une réaction contre une abusive jurisprudence d'Équité, qui avait [eu] pour effet de faire vivre au milieu de la société comme si elle était sans lois").

⁹⁸ Code civil [C. civ] art. 5 (Fr.) ("Il est défendu aux juges de prononcer par voie de disposition générale et réglementaire sur les causes qui leur sont soumises.").

⁹⁹ For a more detailed discussion, see Curran (58), 141-51 (examining the doctrine of *principes généraux* and the French judiciary's reluctance to resist specific enacted law).

¹⁰⁰ Giuseppe Federico Mancini & David T. Keeling, *Language, Culture and Politics in the Life of the European Court of Justice*, 1 COLUM. J. EUR. L. 397, 400 (1995).

The German tradition included no similar *animus* against the judiciary and, by the time of its enabling of Nazi law, no similar adherence to legal positivism. On the contrary, as Professor Dawson put it, Germany's judges proudly considered themselves to be the conscience of their nation and gradually acquired increasing interpretive freedom.¹⁰¹

Indeed, the German judiciary made increasing use of "general clauses" (*Generalklauseln*). According to Franz Wieacker:

*"...it was impossible even before 1933 to infer from the text of the [German Civil] Code what the law actually was....This achievement was effected quietly, unobserved by the general public, and it is still generally underestimated...partly because the courts today seldom refer to it, although they continue in the same tradition."*¹⁰²

In 1968, Bernd Rüthers documented the anti-positivism of Germany's judiciary during the Nazi era in a groundbreaking, compellingly persuasive and comprehensive analysis.¹⁰³ More recent German scholarship by Michael Stolleis, Ingeborg Maus, and Ingo Müller has continued to document the German judiciary's anti-positivism both before and during the Nazi period.¹⁰⁴

An illustration of the contrast between German and French courts can be seen in the 1920s private law cases that arose in both countries as a result of rampant inflation. In order to effect justice, the German courts were willing to change numbers set forth in absolute terms in contracts because they felt obliged to rescue from fi-

¹⁰¹ John P. Dawson, *The General Clauses, Viewed from a Distance*, 41 *RABELS ZEITSCHRIFT* 441 (1977); see, also, Franz L. Neumann, *The Decay of German Democracy*, in: *THE RULE OF LAW UNDER SIEGE: SELECTED ESSAYS OF FRANZ L. NEUMANN AND OTTO KIRCHHEIMER* 29, 36-37 (WILLIAM E. SCHEUERMAN, ED., 1996) (describing role of judiciary in Germany before Hitler).

¹⁰² FRANZ WIEACKER, *A HISTORY OF PRIVATE LAW IN EUROPE* 409-10 (TONY WEIR TRANS., 1995); see, also, Folke Schmidt, *The Ratio Decidendi: A Comparative Study of a French, a German and an American Supreme Court Decision*, VI *ACTA INSTITUTI UPSALIENSIS IURISPRUDENTIAE COMPARATIVAE* 3, 5 (1965) (comparing specific decisions that illustrate American implementation of state case law and French and German professed implementation of enacted law); JUSTUS WILHELM HEDEMANN, *DIE FLUCHT IN DIE GENERALKLAUSELN: EINE GEFAHR FÜR RECHT UND STAAT* (1933) (analyzing the use of "Generalklauseln" in the German judiciary in the early twentieth century).

¹⁰³ See RÜTHERS (note 84), 1-12.

¹⁰⁴ See MICHAEL STOLLEIS, *THE LAW UNDER THE SWASTIKA: STUDIES ON LEGAL HISTORY IN NAZI GERMANY* (THOMAS DUNLAP TRANS., 1998) (describing the interrelation between law and justice in the Nazi system); Maus (note 86), 93 (referring to declaration by Germany's judicial association, the *Richterbund*, in 1920 that judges should not have any "keine unnötige Bindung" ("unnecessary bond") with enacted law).

nancial ruin contracting parties that otherwise would have been victimized by the changed value of the German Mark which inflation had wrought.¹⁰⁵

By contrast, when French courts were faced with similar cases, they refused such judicial *legerdemain*, and their decisions became known under the slogan of “a franc is a franc” (“*un franc est un franc*”).¹⁰⁶ These cases reflect the German court tradition of interpretive liberty and the contrasting French court tradition of mechanical application of enacted law without evaluation. The German courts applied general clauses to circumvent legally-binding text. The French courts refused to apply general principles to do the same.¹⁰⁷ Despite these different methodologies, the judiciaries of both countries applied and enabled Nazi and fascist law. Thus, the interpretive freedom of Germany’s judiciary does not bode any better than the positivistic perspective of France’s judiciary for the human valence of a system that stresses judicial evaluation and interpretation over the mechanical application of enacted law.

Moreover, in both France and Germany, the bulk of statutory law dated from prior regimes. While Hitler and Pétain enacted many new laws, they did not repeal most of the previous laws, even those that contradicted the new laws. Consequently, when judges applied discriminatory laws to the detriment of an individual, they were ignoring and refusing to apply other statutes, not merely the general, abstract principles embodied in general clauses or principles, but also concrete enacted laws that guaranteed to those individuals the very rights which the courts had participated in destroying.

Professor Rütters offers an illustration of one such situation in Nazi Germany. The first article of the German Civil Code defined the human being as acquiring basic legal capacity (“*Rechtsfähigkeit*”) by virtue of having been born.¹⁰⁸ Hitler had not repealed the Civil Code, so Nazi legal scholars showed judges a way to deprive Jews of their Article I legal capacity despite the Civil Code’s continued legal effectiveness. They did this by analogizing Jews to the dead, reasoning that all laws had

¹⁰⁵ See RÜTTERS (note 84), 213 *et seq.* (describing the definition and use of general clauses in German courts during National Socialism). See, generally, John P. Dawson, *Specific Performance in France and Germany*, 57 MICH. L. REV. 495 (1959).

¹⁰⁶ See, generally, JACQUES FLOUR & JEAN-LUC AUBERT, *LES OBLIGATIONS: 1. L’ACTE JURIDIQUE* (1998); FRANÇOIS TERRE, *INTRODUCTION GENERALE AU DROIT* (4TH ED. 1998).

¹⁰⁷ French courts began to use general principles with less hesitation after the Second World War in reaction to the Vichy judges who had applied inhumane law, but resistance to using the principles remains strong to this day and the issue is heavily debated in French legal scholarship.

¹⁰⁸ See RÜTTERS (note 84), 325–29 (describing the origin and development of “*Rechtsfähigkeit*”).

to be read in accordance with the guiding spirit of the nation's law (*Recht*), namely, the racial principles of blood and race. Accordingly, only members of the allegedly racially pure German *Volk* were deemed to be living for the purposes of qualifying for legal benefits.¹⁰⁹ As Hitler already had decreed that, by reason of race and blood, Jews were barred irremediably from belonging to the German *Volk*, the scholars reasoned that, by analogy, Jews should be deemed to be disqualified from a legal capacity conveyed by virtue of birth.¹¹⁰

The law offered German and French judges under Hitler and Pétain many choices. They decided in each case which among many, often mutually contradictory enacted laws to apply, and whether to apply that law strictly or liberally. It took considerable judicial interpretive freedom to apply Article I as the German judiciary did under Hitler, as guided by the Nazi legal scholars. This example demonstrates that departure from the plain meaning of enacted law can allow judges to legalize discrimination and persecution, just as adherence to plain meaning can achieve the same result.

G. Conclusion

We have seen that the differences distinguishing the common law from the civil law — such as the common law's long tradition of recognizing principles of equity or constitutional principles, whether in written or unwritten constitutional law — have not protected common law nations from judicial implementation of evil enacted law, such as the laws of apartheid or the Nazi laws of the Channel Islands. However, common law principles still might hold the key to judicial justice if the problems of the past lie in an insufficient emphasis on these principles in the process of adjudication.

We have seen that such an emphasis existed in the very system that caused the widespread post-Second World War disavowal of judicial positivism — Nazi Germany, where German courts continued their pre-war tradition of liberal interpretation. The mechanism they used was the general clause, a concept with many similarities, for our purposes, to the common law principles of equity and constitutional law concepts.

In interpreting law liberally, Germany's judges served Hitler's ideology all the more effectively. In fact, they interpreted enacted law liberally when liberal interpretation furthered Nazi ideology, and strictly when strict interpretation furthered

¹⁰⁹ *Id.*, 323–35.

¹¹⁰ See *id.*, 323–29.

it. In France, on the other hand, the courts continued their time-honored positivism during fascism. This included the French judicial rejection of general principles, the equivalent of Germany's general clauses.

Thus, the presence of supra-statutory legal norms of constitutional law, equity, or the guiding principles of a nation's legal spirit have been present within all legal systems, and have been effective in none in preventing judiciaries from engaging in the legalization of reigns of terror. Even the judicial emphasis on interpretive freedom from the concrete terms of enacted law not only proved ineffectual, but in Nazi Germany became the very tool that courts used to undermine principles of human dignity and justice.

As the Free Law School that Radbruch helped to found affirmed, the quality of law depends on the quality of judges. The space in which legal theory and methodology have pragmatic influence is that space in which they influence the judges' values, beliefs and views of justice and legitimacy. To the extent that law, legal theory and methodology transmit underlying values of inclusiveness and fairness, judges may choose to use the legal mechanisms that are available in all systems to refuse enacted law that deprives people of fundamental rights.

If history has made one case compellingly, it is that we depend on the right judges being in place at the right time, and on their courage and vision. Consequently, we depend on the panoply of composite elements that Cassirer called the "constitution that is written in [their] minds." Much of the rest can be subsumed under what motivated the post-war's culpabilization of positivism, and the return to natural law. The resumption of natural law theory reversed a trend away from natural law that had been taking place since the time of Kant. It is part of an age-old wish to scientize law, which, in turn, is part of the wish to believe that, in a correct formulation of law, of legal theory, and of legal methodology, if only we can reach the correct formulation, if only we can discover it and implement it, lies the salvation of humanity through judicially enforced justice and civilization. More simply put, much of the rest is illusion.