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Law, Liberty, and the Rule of Law

Chapter 5
Radbruch's Formula, Conceptual Analysis, and the Rule of Law

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5.1 Introduction

Gustav Radbruch (1878–1949) was a prominent German legal theorist, who, in the aftermath of World War II, presented a "Formula" in which he famously argued that a sufficiently unjust rule loses its status as a valid legal norm. This paper will consider the connection between the "Radbruch Formula" and the rule of law, and, in the process, also inquire whether the Formula is best understood as a conceptual claim about law, or rather as ("merely") a prescription for judicial decision-making.

Section 5.2 outlines Radbruch's "Formula," and places it in the context of his overall approach to legal theory, and the way that approach changed over time. Section 5.3 considers the connection between Radbruch's "Formula" and the rule of law. Section 5.4 considers Radbruch's formula critically as a conceptual claim about law, before concluding.

5.2 Radbruch's Formula(s)

In works written right after World War II, Radbruch offered influential ideas about the connection between the moral merits of a purported legal rule and its legal validity.[1] (2006a, b) Radbruch wrote (2006a, 6):

[1] Most commentators consider these post-War writings to be radical changes of view, in relation to Radbruch's pre-War writings (*v.gr.* Hart 1958, 616), but this claim of discontinuity has been contested. (*v.gr.* Paulson 1995, 2006; Leawoods 2000, 501–3) Resolving this dispute about continuity is not important for present purposes.

In focusing on Radbruch's "Formula", and associated post-War writings, I do not mean to slight the significance of his extensive earlier writings, on which, *vid. v.gr.* Pfordten (2008) and Leawoods (2000).

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

He then goes on to offer two different elaborations of his "Formula" (2006a, 7):

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

In the article, the second formula is offered as a clear application of the first formula, but subsequent commentators have, reasonably, treated the two characterizations as separate formulas. And judges have tended to use the first formulation, given the likely problems in trying to apply the second formula, with its focus on legislators' subjective intentions, in actual cases (*v.gr.* Haldemann 2005, 166).

It helps to understand the significance of the "Radbruch Formula", and its place both within European jurisprudential thought and within Radbruch's own work, to compare it with assertions made in Radbruch's pre-War writings. In his early writings, Radbruch argued that there were three elements in "the idea of law": "justice", "expediency or suitability for a purpose", and "legal certainty" (1950, 107–8). In those writings, Radbruch seemed to assert that it was the third element, legal certainty, which was the most important, at least within the idea of law: "It is more important *that* the strife of legal views be ended than that it be determined *justly* and *expediently*. The existence of a legal order is more important than its justice and expediency…." (1950, 108, emphasis in original).[2]

This view then leads Radbruch, in that early work, to say the following about the role and duties of judges in relation to unjust laws (1950, 119):

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

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

There seems to be a sharp contrast between Radbruch's recommendation in this earlier work, and what he will prescribe in his later "Formula". One can certainly see a kind of continuity: that Radbruch arguably is still seeing the same factors in the nature of law; he is simply weighing them slightly differently, arguing that certainty, even when combined with "expediency and suitability", is not always predominant, but must give way in those cases where the claims of (in)justice are strong enough.

5.3 The Formula and the Rule of Law

In his pre-War writings, Radbruch spoke of the tension between "the demands of legal certainty", on one hand, and "the demands of justice and expediency", on the other. (1950, 118) While he adds that "[t]he three aspects of the idea of law are of equal value, and in case of conflict there is no decision between them but by the individual conscience", he later offers that "[i]t is the professional duty of the judge to validate the law's claim to validity, to sacrifice his own sense of the right to the authoritative command of the law, to ask only what is legal and not if it is also just." (1950, 118 and 119) As will be discussed at greater length later, this strong – perhaps too-strong – equation of the analysis of the law and prescriptions for judicial behaviour is characteristic of both Radbruch's earlier work and his later writings.

The prescription for judges changed in Radbruch's later works, as can be seen in his "Formula". In another one of his later works, Radbruch writes: "Measured by… higher law, lawlessness remains lawlessness when accomplished through legal forms…" (quoted in Fuller 1954, 484).[3] In such references to "lawlessness" in official actions (see also the title of Radbruch 2006a), we can see a connections being offered between Radbruch's analytical claims and the rule of law.

In Lon Fuller's terms (and, to some extent, reflecting Fuller's particular perspective), Radbruch's "Formula" was a response to (Fuller 1954, 482):

> [T]he dilemma faced by Western Germany and the occupying powers in having, on one hand, to restore lawful procedures and a respect for law, and being forced, on the other, to declare retroactively void some of the more outrageous "laws" of the Nazi regime.

Or, in Fuller's later phrasing: "Germany had to restore both respect for law and respect for justice. Though neither of these could be restored without the other, painful antinomies were encountered in attempting to restore both at once…" (1958, 657).

[3] Fuller cites Gustav Radbruch, "Die Erneuerung des Rechts", in 2 *Die Wandlung* 9 (Fuller 1954, 484fn).

Radbruch's "Formula" had been a focal point in the famous 1958 debate between H.L.A. Hart (1958, 615–21) and Lon Fuller (1958, 648–57). Part of the dispute between Hart and Fuller regarding Radbruch and his "Formula", was about the proper response to evil laws and evil regimes. Hart reads Radbruch as encouraging the courts to treat the evil laws of the Nazi regime as "not law", and therefore no shield for a woman who tried to get her husband killed under the rubric of one such law.[4] Hart, with some hesitation, would support punishing the woman, but would prefer that it be done under frankly "retrospective criminal legislation" (1958, 620). Hart argued for the independent virtue of responding to a moral dilemma with "candour" and "plain speech" (1958, 620 and 621).

Fuller viewed Radbruch's position both as a pragmatic compromise in responding to a change from an evil regime,[5] and as a deep insight into the moral foundations of the nature of law. In particular, Fuller focused on the procedural injustices (the focus of his own "procedural natural law theory) (1958, 1969), like secret and retroactive laws, which, he argued, were contrary to "the very nature of law itself" (1958, 650).

As for the German court cases, and whether the courts made a mistake by treating the unjust Nazi laws as "not law" (and Hart's argument that courts and theorists should separate whether some norm is law from whether it should be applied), Fuller wrote (1958, 655):

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

How all of this fits into debates regarding the rule of law is not self-evident. In part, this is because there are many different notions of the rule of law (Tamanaha 2004; Raz 1994, 354–62; 2009, 210–29).[6] Generally, the arguments about the rule of law focus on certain formal or procedural requirements: that the government is limited by law, that certain forms are followed in the efforts to guide citizen behaviour, and that official discretion in the application of rules is limited ("the rule of law, not men") (Tamanaha 2004, 137–41). A small number of theorists advocate more substantive conceptions of the rule of law; such substantive versions tend to

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[4] Apparently, both Hart and Fuller misunderstood the holding of a post-War West German case they were discussing, as it had been misreported in an earlier issue of the *Harvard Law Review* (Pappe 1960, 261–3).

[5] "Intolerable dislocations would have resulted from any… wholesale outlawing of all that had occurred [under the Nazis]. On the other hand, it was equally impossible to carry forward into the new government the effects of every Nazi perversity that had been committed in the name of law…." (Fuller 1958, 648).

[6] One should note that The World Justice Project has created a "Rule of Law Index", which ranks countries based on dozens of factors, based on a view of the rule of law which is primarily procedural. The ranking and information about it can be found at http://worldjusticeproject.org/rule-of-law-index/.

include requirements of democracy and the protection of certain basic human rights (Tamanaha 2004, 102–13).

Whether one sees the "Radbruch Formula" as sharply inconsistent with the rule of law, required by the rule of law, or neither, depends on which conception of the rule of law one accepts. If one's idea of the rule of law is minimal and formal/procedural, then one might even see Radbruch's "Formula" as *contrary to* the rule of law, as the formula seems to require courts to refuse to enforce, on occasion, norms which have been created according to all the procedural requirements of the particular legal system. Julian Rivers (1999) picks up on a detail of the Radbruch Formula, one also emphasized in the Hart-Fuller debate (Hart 1958; Fuller 1958), in his argument that a too-great judicial willingness to override or rewrite unjust laws is contrary to both democracy and the rule of law.[7] Rivers understands that under Radbruch's original formulation, norms only lose their legal status when their injustice reaches "an intolerable level", but he is concerned that courts that apply the "Formula" are likely to be tempted to withhold legal status even from norms that are only moderate in their injustice.

Radbruch's "Formula", and his conception of law, is based on the notion that people may not expect their legal system to be uniformly just and fair, but there *is* an expectation of minimal justice that comes with the notion of "legality". This view could be translated into Robert Alexy's well-known assertion: "Every legal system lays claim to correctness" (2002, 34). And it seems to assert something more than Joseph Raz's conclusion that law necessarily *claims* that it possesses legitimate authority (though, as Raz points out, this claiming need not be well-grounded, and Raz in fact claims that it rarely is) (1994, 199).[8] Though Raz's and Alexy's theoretical positions appear to be similar, there seem to be important differences, reflected in the fact that Raz sees law's claim to authority as consistent with a legal positivist view of law, while Alexy views his "correctness thesis" as central to his critique of legal positivism.

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

In practice, the Radbruch "Formula" is most likely to be applied where there has been some form of transition in the relevant regime, such that a judge from one system or tradition is asked to apply (or not apply) the law of another system or tradition: post-War Germany dealing with its Nazi past; unified German dealing with the East German past; and so on. I am unaware of courts using the Radbruch

[7] Rivers' preference, like that of both Hart and Fuller, is for retroactive legislation (Rivers 1999).

[8] On Raz's view about the obligation to obey the law (*vid*. Raz 1994, 325–38).

"Formula" to refuse enforcement of otherwise valid legal norms enacted by their own regime's legislature[9]; and one assumes that even if there are such instances, they are very rare.

The problem of legal transitions is not often discussed in debates about the rule of law, where the assumption is that we should be focusing on whether officials are sufficiently bound by their own system's rules (not whether the system's rules will continue to bind – and to authorize – even after the society is taken over by a different sovereign). However, as Fuller pointed out long ago, it is during just such transitions where "fidelity to law" and "fidelity to justice" can conflict in ways difficult to respond to well.

In Robert Alexy's defense of the "Radbruch Formula", he characterizes the debate from the beginning as one connected with the rule of law, but the connection is not as evident as he implies. Alexy writes (1999, 15):

> In both cases [the post-World War II cases dealing with Nazi law, and the post-reunification cases dealing with East German law] the following question had to be answered. Should one regard as continuing to be legally valid something which offended against fundamental principles of justice and the rule of law when it was legally valid in terms of the positive law of the legal system which had perished.

Given the focus of this article and this collection, I want to focus on the phrase in Alexy's summary, that the question is about norms which "offend […] against fundamental principles of justice *and the rule of law*" (emphasis added). As Alexy recognizes, the "Radbruch Formula" is about extreme injustice, with an emphasis on the content of the purportedly legal norm, not its procedural history.[10]

Alexy never makes clear in what way he believes that the norms subject to the Radbruch formula "offend […] the rule of law", nor, in fact, does he explain what he means by the rule of law. If one takes a conventional view of the rule of law as equivalent with the kind of procedural justice requirements outlined by Lon Fuller's "internal morality of law" (1958, 1969), then extremely unjust laws often are also laws that violated minimal procedural requirements. Fuller himself noted a number of instances among the Nazi rules: secret laws, retroactive laws, and interpretations and applications of law that seemed to differ sharply from the text being applied (1958, 651–5) However, it would be quite another thing to assume (as Alexy's offhand language appears to assume) that *all* extremely unjust rules, because extremely unjust, violate the rule of law, understood as a requirement of procedure and form

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[9] Refusing enforcement on Radbruchian grounds is to be distinguished from more conventional forms of judicial invalidation of otherwise valid norms – *v.gr.* holding the norm invalid because it conflicted with a provision of the regime's own constitution or supra-national constitution or treaty to which the country is a signatory, like the European Convention on Human Rights.

[10] At least in the first formulation of the "Formula". As discussed above, the second formulation refers to the intentions with which legislation was enacted, but that still does not go to the sort of procedural inquiries usually associated with the rule of law.

(Haldemann 2005, 176).[11] There seem to be too many recent counter-examples (from countries like East Germany and pre-Apartheid South Africa)[12] to make that equation.

5.4 The Formula and Conceptual Analysis

Within the Hart-Fuller debate and in Robert Alexy's discussion and adaptation of the work, Radbruch's formula is presented as a central part of an anti-legal positivist theory about the nature of law (Radbruch 2006a; Alexy 1999, 2002; Hart 1958; Fuller 1958; *vid*. also, Sartor 2009). Radbruch himself portrays his "Formula", and his post-World War II writings in general as a turn away from his earlier espousal of legal positivism.[13]

However, it is important to clarify what it might mean to say that the Radbruch Formula is a criticism about legal positivism, as opposed to being a theory in an entirely different debate. Legal positivism is a theory about the nature of law (Bix 2005). The question is to what extent the Radbruch formula should be considered as not directed, or not *primarily* directed, towards debates about the nature of law, but rather directed (primarily) towards questions about how judges should decide cases (a debate at least as controversial, and certainly as important, if not more important, than the debate about the nature of law).

At a surface level, there is no doubt that, whatever else it is, the "Radbruch Formula" does work as instructions to judges as to how to decide cases. Judicial decision-making (by West German courts responding to actions purportedly done under the authorization of Nazi laws) is the context for Radbruch's introduction of his "Formula" in his post-War articles (2006a, 1–6).[14]

Additionally, if Radbruch's "Formula" is a conceptual claim about the nature of law, then it is (by definition) a claim about all existing and all possible legal systems.

[11] If one adopts a substantive version of the rule of law, that includes requirements for protecting certain human rights, then laws unjust because they violate those rights will also be (by definition) contrary to the rule of law. However, as discussed above, this is a distinctly minority understanding of the rule of law. Additionally, there are likely to be laws that are unjust without necessarily violating whatever shortlist of human rights a substantive rule of law might include.

[12] Some would argue that there are also plenty of examples of extremely unjust laws (enacted with proper procedures) in the United States and Western Europe, but that is a controversy far beyond the scope of this article.

[13] Though, as earlier noted, *vid. supra* note 1, there are also those who claim a greater continuity and unity in Radbruch's work.

Regarding legal positivism, Radbruch, along with Lon Fuller, asserted that legal positivism played a role in the Nazi's rise to power in Germany (*vid*. Paulson 1994).

[14] And comparable decisions made by the courts in a unified Germany, evaluating actions done purportedly under the authorization of East German law, is the context for some of Alexy's discussion of his version of the Radbruch formula (Alexy 1999, 2002).

That may not be a good description of the "Formula". As regards Radbruch's argument that significantly unjust norms are not valid legal norms, one could certainly understand such a claim made internally to a particular legal system, about the criteria of validity of that legal system. It is far less clear what is meant by a theorist, like Radbruch, making this claim about all (and all possible) legal systems.[15]

The assumption in Radbruch's last works seems to have been: (a) that if a norm is valid in a legal system, then it must be applied to a legal dispute before a court; and (b) if a norm is not a valid norm of a legal system, it should not (or cannot) be applied to a legal dispute before the court. As propositions describing current legal practices,[16] both claims seem to be false.

As to the first claim, that valid legal norms are always applied, it is a common principle in many legal systems that judges have the power to modify or create exceptions in rules (particularly judge-created rules, but also, in some jurisdictions and on some occasions, statutes) when their application would otherwise lead to an absurd or unjust result.[17]

As for the second, that norms that are not valid in the legal system are never applied, there are a number of significant exceptions. There are minor, technical exceptions: as when resolving a dispute requires a court to apply norms from another legal system (*v.gr.* in resolving a contract dispute, when the contract was entered in another country), or norms of a non-public organization (as when the dispute centres on the application of a corporate or club charter), or even the norms of logic or mathematics. There are also well-known general exceptions, when courts are authorized, or perhaps even obligated, to apply extralegal moral or policy norms in the process of elaborating, clarifying, or improving the law. In common-law countries, like the United States and England, judicial development of the law is accepted and frequent, even if not quite as central as it had been in past centuries. When courts change the law, the normative reasons justifying the change (*v.gr.* "justice requires that those who cause harm must compensate for the harm" or "norms should be made as efficient as possible") are almost always norms that are not already valid within the legal system.[18] However, judges see themselves as legally bound, or at

[15] I elaborate this point in the context of a critique of both Alexy and the later Radbruch (*vid.* Bix 2006).

[16] At least of the legal systems with which the author is familiar.

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

[18] I am putting aside, for the moment, the claim occasionally still heard that most common law reasoning is merely a process of the law "work[ing] itself pure", *Omychund v. Barker* (Ch. 1744), 1 Atk. 21 at 33, 26 ER 15 at 22–3, *i.e.* that such decisions are merely discovering norms that were, in some sense, already part of the law. Few commentators would accept this as universally true of common law decision-making, and there is little evidence of which I am aware that Radbruch supported such a view.

least legally free (and morally bound), to change the law in this way. Given that "valid norm" cannot be equated with "norm that must be applied", the direction to judges "not to apply a norm in particular circumstances" is not helpfully translated into the claim "that norm is not valid".

One can come at the problem from another direction, which clarifies that Radbruch's primary purpose (and the purpose of most of those who support application of his "Formula") is the direction of judicial behaviour, not any analytical claim about the nature of law. Consider this example: How would a believer in Radbruch's "Formula" respond to a judge who applied an extremely unjust norm (without first using Radbruch's test)? One possibility would be for the Radbruch follower to say that what the judge applies, because it is an extremely unjust norm, is simply not a legally valid norm. However, as discussed above, judges apply norms *all the time* that are not valid norms of their legal system (*v.gr.* extralegal moral norms). But that is clearly not what Radbruch was getting at: he wanted judges *not* to apply these unjust norms. To see the debate as strongly analogous to legal realist or Dworkinian debates about whether certain norms or factors are "legal" or "extralegal" and whether judges are obligated to apply them, or can do so at their discretion (*v.gr.* Dworkin 1977, 1–130), would clearly be a misreading. Radbruch's clear point (understood by all interpreters) is that judges should not apply these norms. Thus, the conclusion here offered is that Radbruch is basically offering a prescription for judicial decision-making, not a conceptual (or other theoretical) claim applicable to all (possible) legal systems.

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

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

However, this is a tangent. To return to the basic inquiry: if Radbruch's intention was to direct judges, why did he choose this somewhat indirect route of a theory about the nature of legal validity? Part of the answer may be in the legal and political culture, and indeed the general social expectations, of the time(s) and place(s) in which Radbruch lived. In continental Europe, the strong expectation was that the law was fully present in the civil codes, and the judge's only task was to apply the law.

This was not a universal belief, but the fact that the Free Law Movement (*v.gr.* Gray 1999, 1, 314–8) was considered highly radical for even *suggesting* that judges had and should have discretion, indirectly shows the rigid view of judging in the conventional thought of that day. Against this backdrop, one can see why a theorist would not merely suggest that judges should modify or refuse to enforce otherwise valid law. Such a prescription is easier to make in a common law country (where it is understood that judges develop the law, even if they might claim that they were merely "discovering" it), and to modern legal theorists, who unapologetically discuss judicial discretion and judicial lawmaking. For Radbruch, perhaps the only way to make prescriptions for judicial decision-making palatable to his audience was to coat them in claims about the validity of individual norms.

5.5 Conclusion

Gustav Radbruch's "Formula", indicating that significantly unjust laws should not be enforced, is generally understood (including by its author) as a claim about the nature of law and legal validity. Its connection with rule of law values is uncertain, depending in large parts on whether one accepts a largely formal or procedural conception of the rule of law, or a more substantive one.

There are also questions about whether the "Radbruch Formula" is best or most charitably understood on its own terms, as a claim about the nature of law, rather than more narrowly as a prescription about how judges should decide cases. In most legal systems, courts frequently apply (and see themselves as bound to apply) norms that *are not* valid within their legal system, and the courts also on occasion do not apply (and see themselves as bound not to apply) otherwise applicable norms that *are* valid norms within their legal system. This is part of the complex role of judges, particularly (but not exclusively) within common law legal systems, which includes resolving disputes where the ruling norms come from outside the home legal system (or, from any legal system), and the courts may also have responsibilities to develop the law and to avoid unjust or absurd applications of otherwise valid norms.

It would seem more charitable to read the Radbruch formula as a prescription for judicial decision-making rather than as a descriptive, conceptual or analytical claim about the nature of law. Or, to put the same point a different way, reconstructing Radbruch's "Formula" in this way makes it more sensible and defensible.

The suggested change will not affect the place of the "Radbruch Formula" within debates about the rule of law or the role of courts. The issue remains the same: whether it is consistent with the rule of law not to apply norms otherwise legally valid because they are extremely unjust. Radbruch argued that this is consistent with the general understanding of law and the expectations for law. Other commentators have been concerned that Radbruch's approach undermines the rule of law by giving significant and unpredictable discretion to judges to refuse to apply otherwise valid norms.

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