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META-ETHICS AND LEGAL THEORY: THE CASE
OF GUSTAV RADBRUCH

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I. INTRODUCTION

Gustav Radbruch was one of Germany's foremost legal philosophers, but his legal-philosophical views are known to English-speaking scholars, if at all, primarily through H. L. A. Hart's brief rendition of his views on the nature of law in Hart's well-known debate with Lon Fuller.¹ In his article, Hart

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¹ H. L. A. Hart, 'Positivism and the Separation of Law and Morals', *Harvard Law Review* 71 (1958): 593–629, at 615–621. To be sure, there have been some articles in English on Radbruch's legal philosophy, especially in the past ten-fifteen years. See, e.g., Robert Alexy, 'A Defense of Radbruch's Formula' in David Dyzenhaus (ed.), *Recrafting the Rule of Law. The Limits of the Legal Order* (1999), pp. 15–39; Anton-Hermann Chroust, 'The Philosophy of Law of Gustav Radbruch', *The Philosophical Review* 53(1) (1944): 23–45; Wolfgang Friedmann, 'Gustav Radbruch', 14 *Vanderbilt Law*

explained that in convicting people who had informed on neighbors and colleagues during the Nazi period, post-war German courts had declared certain Nazi statutes to be legally invalid on moral grounds, and that in doing so they had invoked Radbruch's post-war writings on the nature of law.² Crudely put, Radbruch's post-war standpoint was that law and morality are conceptually connected, and that therefore laws that are intolerably unjust are flawed law and must yield to justice.³ The received view, however, is that Radbruch's pre-war stance was that of a legal positivist and moral relativist, who held that there is no conceptual connection between law and morality, that moral judgments can be true or valid only in relation to a given moral framework, and that no such framework is truer or more valid than any other; and that Radbruch changed his views on the nature of law as a result of his experience of the war.⁴ But, as we shall see, the received view has been challenged by distinguished legal theorist Stanley Paulson, who argues that Radbruch really wasn't a legal positivist before the war and that Radbruch's pre-war analysis is actually compatible, and indeed continuous, with the post-war analysis.

Footnote 1 continued

191 (1960/61) pp. 14; Frank Haldemann, 'Gustav Radbruch vs. Hans Kelsen: A Debate on Nazi Law', *Ratio Juris* 18:2 (2005) pp. 162–178; Heather Leawoods, 'Gustav Radbruch: An Extraordinary Legal Philosopher', *Washington University Journal of Law and Policy* 2 (2000): 489–515; Stanley L. Paulson, 'Radbruch on Unjust Laws: Competing Earlier and Later Views?', *Oxford Journal of Legal Studies* 15 (1995): 489–500; Stanley L. Paulson, 'On the Background and Significance of Gustav Radbruch's Post-War Papers', *Oxford Journal of Legal Studies* 26(1) (2006): 17–40; Max A. Pock, 'Gustav Radbruch's Legal Philosophy', *Saint Louis University Law Journal* 7 (1962/63): 57–71; Julian Rivers, 'The Interpretation and Invalidity of Unjust Laws' in Dyzenhaus (ed.), *Recrafting the Rule of Law* pp. 40–65; Barend van Niekerk, 'The Warning Voice from Heidelberg – The Life and Thought of Gustav Radbruch', *South African Law Journal* 90 (1973): 234–261; Eric Wolf, 'Revolution or Evolution in Gustav Radbruch's Legal Philosophy', *Natural Law Forum* 3 (1958): 1–23.

² Hart (1958, pp. 615–621).

³ As we shall see (in Section 5), Radbruch really asserts two distinct theses about unjust laws.

⁴ See Hart (1958, p. 616).

In this article, I discuss the compatibility of Radbruch's pre- and post-war analyses of the nature of law and the place of Radbruch's meta-ethics in these analyses. I argue, *pace* Paulson, that Radbruch's pre- and post-war analyses are indeed incompatible, because they involve incompatible claims about the existence of a conceptual connection between law and morality. I also argue that the pre-war analysis is to be preferred to the post-war analysis. For whereas the pre-war analysis presupposes meta-ethical relativism, the post-war analysis – through the Radbruch formula – presupposes moral objectivism, and meta-ethical relativism, but not moral objectivism, is a defensible meta-ethical theory.

I begin by outlining Radbruch's views on the method of legal philosophy (Section 2) and by saying a few words about meta-ethical relativism, moral objectivity, and Radbruch's use of the term 'justice' (Section 3). I then introduce Radbruch's pre- and post-war analyses of the nature of law (Sections 4–5), compare them with each other (Section 6), and argue that the pre-war analysis is to be preferred (Sections 7–9). I conclude the article with a brief consideration of Lukas Meyer's revisionist interpretation of Radbruch's relativism (Section 10) and Marc André Wiegand's interpretation of Radbruch's relativism in terms of evaluations rather than values (Section 11).

II. RADBRUCH ON THE METHOD OF LEGAL PHILOSOPHY

Radbruch maintains that in our ordinary experience *reality* and *value* are commingled.⁵ He distinguishes a value-blind, a value-relating, a value-conquering, and an evaluating attitude, and he explains that whereas the *value-blind* attitude is the

⁵ Gustav Radbruch, 'Legal Philosophy' in Edwin W. Patterson (ed.), *The Legal Philosophies of Lask, Radbruch, and Dabin* (Cambridge, Massachusetts: Harvard University Press, 1950), pp. 43–224, at 49. This is a translation into English of Gustav Radbruch, *Rechtsphilosophie*, 3rd edn. (Leipzig: Quelle & Meyer, 1932).

attitude of natural science, which focuses on physical reality without evaluating it, the *evaluating* attitude focuses precisely on values and their relation to one another.⁶ He goes on to point out that, corresponding to these four types of attitude, we may divide the given into four distinct categories: existence, value, meaning, and essence.⁷ On this analysis, the value-blind attitude corresponds to *existence*, the evaluating attitude corresponds to *value*, the value-relating attitude corresponds to *meaning*, and the value-conquering attitude corresponds to *essence*. On the basis of this fourfold division of the given, he distinguishes three different ways of viewing the law: (i) the evaluating view, (ii) the value-relating view, and (iii) the value-conquering view.⁸

Radbruch proceeds to explain that legal philosophy is the evaluating view of law and that this view of law can be understood in terms of a combination of methodical dualism and relativism.⁹ On Radbruch's analysis, *methodical dualism* has it that existence and value belong in separate spheres and that there is no way to derive an Ought from an Is,¹⁰ whereas *relativism* is the view that a value judgment can be right only in light of a particular "outlook on values and the world" and that no such outlook on values and the world is right in and of itself:

⁶ *Ibid.* at 49–51. The *value-relating* attitude is the "methodical attitude of the cultural sciences," (*Ibid.* at 50) which *aims* at values, such as truth, beauty, moral right, etc.; and the *value-conquering* attitude is a religious attitude that "conquers values" (*Ibid.* at 50), in the sense that it affirms whatever exists, and in doing so cancels the contrast between value and worthlessness and therefore the contrast between value and reality.

⁷ *Ibid.* at 51.

⁸ Radbruch clearly feels that there is no plausible way of viewing law that corresponds to the value-blind attitude.

⁹ Radbruch (1950, p. 53).

¹⁰ *Ibid.* at 53 (Footnote omitted). Methodical dualism thus conceived appears to be identical with the well-known logical thesis that has been called Hume's law. See David Hume, *A Treatise of Human Nature* (London: Penguin Books 1984 [1739]), p. 521.

The method which is here presented is called relativism, because its task is to determine only whether any value judgment is right in relation to a particular supreme value judgment, within the framework of a particular outlook on values and the world, but not whether that value judgment and that outlook on values and the world are right in and of themselves.¹¹

Radbruch points out that relativism does not mean that the individual can escape the choice between competing legal views that have been developed on the basis of competing starting points. The relativistic legal philosophy, he explains, "...is limited to presenting to him exhaustively the ultimate presuppositions, but it leaves his decision itself to the resolution he draws from the depth of his personality – by no means, then, to his pleasure, but rather to his conscience."¹² He concludes that the task of a legal philosophy based on relativism is to develop a system of systems without deciding between them.¹³

As one might expect, Radbruch rejects, in keeping with his belief in relativism, the view held by classical natural law theorists, viz. that there are universally valid substantive moral values and standards.¹⁴

III. META-ETHICAL RELATIVISM, MORAL OBJECTIVITY, AND THE MEANING OF 'JUSTICE'

As should be clear, the type of relativism endorsed by Radbruch is what contemporary moral philosophers refer to as *meta-ethical relativism*.¹⁵ For meta-ethical relativism has it that moral

¹¹ Radbruch (1950, p. 57). Radbruch also explains the import of relativism in terms of *provability*. As he puts it, "...the ultimate statements concerning the Ought are incapable of proof, axiomatic." *Ibid.* at 55. I choose to focus on his analysis in terms of *rightness*, however, because this is in keeping with contemporary discussions of moral relativism. See Section 3 below.

¹² *Ibid.* at 57.

¹³ *Ibid.* at 69.

¹⁴ *Ibid.* at 60.

¹⁵ This has been noted by Lukas Meyer. See Lukas H. Meyer, 'Gesetzen ihrer Ungerechtigkeit wegen die Geltung absprechen: Gustav Radbruch und der Relativismus', in Robert Alexy, Lukas H. Meyer, Stanley L. Paulson, Gerhard Sprenger (eds.), *Neukantianismus und Rechtsphilosophie* (Baden-Baden: Nomos Verlagsgesellschaft, 2002), pp. 319–361, at 326.

truth or validity is always relative to a moral framework, and that no such framework is truer or more valid than any other.¹⁶ As Gilbert Harman puts it, “moral right and wrong (good and bad, justice and injustice, virtue and vice, etc.) are always relative to a choice of moral framework. What is morally right in relation to one moral framework can be morally wrong in relation to a different moral framework. And no moral framework is objectively privileged as the one true morality.”¹⁷

But, as I shall suggest, with some hesitation, Radbruch’s meta-ethical stance in the post-war period can be characterized as *objectivist*, though not necessarily as realist. Let me therefore briefly explain what I mean by ‘moral objectivism.’

Moral philosophers make a distinction between *moral realism*, which has it that moral facts are mind-independent in the sense that they are conceptually independent of our beliefs and desires, and *moral anti-realism*, which has it that moral facts do not exist at all (non-cognitivism) or that their existence depends on the beliefs and desires of human beings (idealism or constructivism).¹⁸ Hence while meta-ethical relativism is compatible with anti-realism, it is incompatible with moral realism – if there were mind-independent moral facts, it could not be the

¹⁶ When I say that no moral framework is *truer* than any other, I mean that no moral framework contains more true norms or values than any other. The idea, then, is that a moral framework may be truer than another if and to the extent that it contains more true norms or values than the other moral framework. I would like to thank Lars Lindahl for suggesting this way of understanding the term ‘truer’ in this context. Most contemporary meta-ethical relativists take the truth of something like Radbruch’s methodological dualism for granted – if they had thought it possible to justify moral judgments by reference solely to empirical statements, they wouldn’t have been meta-ethical relativists. See, e.g., Geoffrey Harrison, ‘Relativism and Tolerance’, in Michael Krausz & Jack W. Meiland (eds.), *Relativism: Cognitive and Moral* (Notre Dame & London: University of Notre Dame Press, 1982), pp. 229–243, at 229–230.

¹⁷ Gilbert Harman, ‘Moral Relativism’, in Gilbert Harman & Judith Jarvis Thomson, *Moral Relativism and Moral Objectivity* (Cambridge, Massachusetts & London, UK: Blackwell Publishers, 1996), pp. 3–64, at 3.

¹⁸ For more about moral realism and anti-realism, including mind-independence, see David O. Brink, *Moral Realism and the Foundation of Ethics* (Cambridge: Cambridge University Press, 1989), Chapter 2.

case that no moral framework is truer or more valid than any other.

As I see it, moral realism is a sufficient condition for *moral objectivity*, that is, for some moral claims to be universally true or valid. But it *may* be the case that some moral claims are universally true or valid even if moral realism is a false theory, which means that moral realism *may* not be a necessary condition for moral objectivity. For example, Richard Hare, even though he prefers to speak of ‘rationality’ instead of ‘objectivity,’ maintains that his type of prescriptivism yields universally valid moral claims.¹⁹

Let us note, finally, that Radbruch’s thoughts on *justice* appear to have varied with the context in which the issue is discussed.²⁰ As we shall see (in Sections 4 and 5), Radbruch was at times clearly concerned with formal justice, whereas at other times he appears to have been concerned rather with substantive justice. My impression is that he always (both before and after the war) held that *formal* justice is an absolute (non-relative) value, though I am inclined to think that he changed his mind about *substantive* justice, in the sense that having embraced meta-ethical relativism before the war, he came to embrace some form of moral objectivism after the war. But, as we shall see (in Section 10), scholars disagree about the precise nature of Radbruch’s post-war view on meta-ethics.

IV. RADBRUCH’S PRE-WAR ANALYSIS: LEGAL POSITIVISM AND META-ETHICAL RELATIVISM

The concept of law, Radbruch explains, is a necessary general concept that is oriented toward the *idea of law*, which is *justice*. On Radbruch’s analysis, then, law is “the reality the meaning of which is to serve the legal value, the idea of law [that is,

¹⁹ See R. M. Hare, *Moral Thinking* (Oxford: Oxford University Press, 1981), Chapter 12.

²⁰ I would like to thank an anonymous reviewer for *Law and Philosophy* for drawing my attention to this circumstance.

justice].”²¹ Following Stanley Paulson, I shall refer to this claim as Radbruch’s *basal criterion*.²² Radbruch is, however, careful to point out that justice does not exhaust the idea of law – it determines only the *form*, not the content of law. The reason is that justice, which on Radbruch’s analysis requires that equals be treated equally, leaves it an open question whom to consider equal and how they should be treated.²³ To get the *content* of law, Radbruch says, we must add *expediency* to justice.²⁴ But, on Radbruch’s analysis, what is legally expedient depends on what the purpose of law is, and the purpose of law may be found (i) in individual values, (ii) in collective values, or (iii) in work values (*Werkwerte*),²⁵ none of which is more right than the others. Since this is so, the value of expediency can only be relative to a choice of a value that itself can only be relatively valid.²⁶ Radbruch also reckons with a third element of the idea of law, in addition to justice and expediency, namely *legal certainty* (*Rechtssicherheit*). We need legal certainty, he explains, because there is no non-relativistic answer to the question “justice or expediency?”²⁷

Radbruch emphasizes that (formal) justice and legal certainty are *absolute* values, whereas expediency is only a *relative* value, adding that the ranking of these three elements is a relative matter, too. He writes:

Of the three elements of the idea of law, it is the second, expediency, to which relativistic resignation applies. But the other two, justice and legal

²¹ Radbruch (1950, p. 73) (Footnotes omitted).

²² See Paulson (2006, p. 19). See also Stanley L. Paulson, (Review of) Gustav Radbruch, *Rechtsphilosophische Tagesfragen* (Hideo Adachi & Nils Teifke eds 2004), *Archiv für Rechts- und Sozialphilosophie* 90(4) (2004): 578–583, at 582.

²³ Radbruch (1950, pp. 90–91). Radbruch thus appears to be concerned here with *formal*, not substantive, justice.

²⁴ *Ibid.* at 91.

²⁵ Radbruch means by ‘work values’ the value(s) of human works, such as the value of works of art or scientific theories. *Ibid.* at 91–92.

²⁶ *Ibid.* at 90–107, 108. Radbruch explains that the individualistic and the transindividualistic views of the state are embodied in the political ideologies – liberalism, socialism, and conservatism – that he considers in his theory of parties (*Parteienlehre*).

²⁷ *Ibid.* at 108.

certainty, are above the conflicts between views of law and the state, above the struggle of the parties. 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, which constitute the second great task of law, while the first, equally approved by all, is legal certainty, that is, order, or peace. So, too, all equally submit to the postulate of justice. /.../ The idea of justice is absolute; it is *formal*, indeed, but universally valid withal. Like legal certainty, it is a nonpartisan postulate; but upon the view of the state and the law, the party attitude, it depends how far these postulates are to precede or rank below other postulates concerning the law, to what extent expediency or justice of the law is to be sacrificed to legal certainty or conversely legal certainty to them. Universally valid elements of the idea of the law are justice and legal certainty; a relativistic element, however, is not only expediency itself but also the rank of the three elements relative to each other.²⁸

Radbruch thus acknowledges that the three elements of the idea of law may sometimes conflict with one another, and he argues that in a conflict between legal certainty and justice, the judge ought to give priority to *legal certainty*:

It is the professional duty of the judge to validate the law's claim to validity, to sacrifice his own sense of the right to the authoritative command of the law, to ask only what is legal and not if it is also just. To be sure, the question may be raised whether this very duty of the judge, this *sacrificium intellectus*, this devotion in blank of one's own personality to a legal order the future changes of which one cannot even anticipate, is morally possible. But however unjust the law in its content may be, by its very existence, it has been seen, it fulfills 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.²⁹

Radbruch's claim that the judge ought to choose legal certainty over justice indicates that Radbruch was a legal positivist in the sense that he accepted the so-called *separation thesis*, which has it that there is no conceptual connection between law

²⁸ *Ibid.* at 108–109 (Emphasis added on line 7 of the quotation).

²⁹ *Ibid.* at 119.

and morality.³⁰ This is so because at least in this context choosing legal certainty over justice means applying the law as it stands, despite its injustice, and this presupposes that there is no conceptual connection between law and morality – if there had been such a conceptual connection, an unjust law would not have been a law at all, and this means that there would have been no law for the judge to apply in his efforts to promote legal certainty.

I believe the main reason why Radbruch accepted what I shall refer to, following Stanley Paulson, as the *doctrine of judicial bindingness* – the idea that the judge has a moral duty to choose legal certainty over justice (see the quotation above) – and, therefore, the separation thesis, was that – given his commitment to meta-ethical relativism – he believed that this would help bring about stability and predictability. He reasoned that since according to relativism there is no correct answer to the question, “What is right or just?”, the task of the law is to determine what should be done:

Ordering their living together cannot be left to the legal notions of the individuals who live together, since these different human beings will possibly issue contradictory directions. Rather, it must be uniformly governed by a transindividual authority. Since, however, in the relativistic view reason and science are unable to fulfill that task, will and power must undertake it. If no one is able to determine what is just, somebody must lay down what is to be legal; and if the enacted law is to fulfill the task of terminating the conflict of opposing legal views by authoritative fiat, law must be enacted by a will which is able also to carry it through against any contrary legal view.³¹

We should note, however, that Radbruch’s relativism would seem to be applicable to the claim that we need stability and predictability, too. For this is a claim about moral values, at

³⁰ For more on the separation thesis, see Hart (1958). See also Torben Spaak, ‘Legal Positivism, Law’s Normativity, and the Normative Force of Legal Justification’, *Ratio Juris* 16(4) (2003): 469–485, at 473–474.

³¹ Radbruch (1950, pp. 116–117). Having read this passage, one wonders whether it is really possible to square the claim that “no one is able to determine what is just” (this quotation) with the claim that “the idea of justice is absolute” (the first quotation in Section 4). Does Radbruch believe that there are objective moral values, including justice, that we are unable to access, or is he rather concerned with *substantive* justice in this and *formal* justice in the first quotation? I am inclined to favor the latter interpretation.

least morally relevant values. Hence on Radbruch's analysis, this claim – that we need stability and predictability – can be no more valid than the counter-claim that we do *not* need stability and predictability. This indicates not that Radbruch wasn't a legal positivist, but that his commitment to legal positivism rests on rather shaky ground.

Stanley Paulson rejects the notion that Radbruch was a legal positivist before the war, however, pointing out that the doctrine of judicial bindingness neither implies nor is implied by statutory positivism, that is, the theory that law equals statutory law.³² But while Paulson is clearly right that the doctrine of judicial bindingness neither implies nor is implied by *statutory* positivism, it does *not* follow from this that it doesn't presuppose (or imply) legal positivism in the sense of the *separation thesis* – and that is what is important in this context.

Interestingly, an anonymous reviewer for *Law and Philosophy* objects that since Radbruch accepted the doctrine of judicial bindingness for *moral* reasons, he cannot reasonably have presupposed the separation thesis. The reviewer does not, however, offer any argument in support of this claim, and I see no reason to accept it. My own argument, as we have seen, is that if there had been a conceptual connection between law and morality, an unjust law would not have been a law at all, and this means that there would have been no law for the judge to apply in his efforts to promote legal certainty. This argument is in keeping with the claim advanced by prominent legal positivists like Hans Kelsen and Neil MacCormick that there are moral reasons for accepting legal positivism, including the separation thesis³³; and even if these thinkers are wrong about this, I cannot see that they are guilty of contradicting themselves in so arguing.

It is, however, worth noting in this context that John Finnis maintains that the natural law thinkers who embraced the formula “*Lex injusta non est lex*” – which is essentially the formula under consideration here – only meant to say that an

³² Paulson (2006, p. 36).

³³ Hans Kelsen, *Reine Rechtslehre* (Wien: Österreichische Staatsdruckerei, 1960), p. 71; Neil MacCormick, ‘A Moralistic Case for A-Moralistic Law?’, *Valparaiso University Law Review* 20 (1985): 3–41.

unjust law is not a law in the *focal* sense of the term ‘law,’ while admitting that it may well be a law in the sense that it meets the criteria of validity laid down in the legal system (for example, in the rule of recognition), or in the “intra-systemic” sense that, legally speaking, it ought to be applied.³⁴ But while Finnis may be right about what the natural law thinkers in question really meant, this does not change the circumstance that anyone who asserts a conceptual connection between (the content of) law and morality must admit that, at some point, an unjust law does not qualify as law, just as he must admit that a married man does not qualify as a bachelor.

V. RADBRUCH’S POST-WAR ANALYSIS: THE RADBRUCH FORMULA

After World War II, Radbruch put forward a modified analysis of the nature of law based on his pre-war idea that the concept of law is oriented toward the idea of law and that the idea of law comprises three distinct elements, namely (formal) justice, legal certainty, and expediency. He now maintains that justice is more important than legal certainty (and that legal certainty is more important than expediency). More specifically, he maintains that the conflict between justice and legal certainty is to be solved by giving priority to legal certainty, except in cases (i) where the injustice is intolerable, or (ii) where there is not even an *attempt* at justice on the part of the lawmaker:

The conflict between justice and legal certainty may well be resolved in this way: The positive law, secured by legislation and power, takes precedence even when its content is unjust and fails to benefit the people, unless its conflict with justice reaches such an intolerable degree that the statute, as ‘flawed law’, must yield to justice. It is impossible to draw a sharper line between cases of statutory lawlessness and statutes that are valid despite their flaws. One line of distinction, however, can be drawn with utmost clarity: Where there is not even an attempt at justice, where equality, the core of justice, is deliberately betrayed in the issuance of positive law, then the statute is not merely ‘flawed law’, it lacks completely the very nature of

³⁴ John Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980), pp. 354, 363–366.

law. For law, including positive law, cannot be otherwise defined than as a system and an institution whose very meaning is to serve justice.³⁵

We see that Radbruch asserts two distinct theses about unjust laws: (i) that an intolerably unjust law is *flawed* law and must yield to the demands of justice; and (ii) that a law that does not even aim at justice *lacks completely the very nature of law*.³⁶ Legal writers usually refer to Radbruch's theses as the *Radbruch formula*,³⁷ though (ii) is really a (slightly modified) version of the natural law thesis *lex injusta non est lex*, discussed in Section 4.³⁸ We see that on Radbruch's analysis, version (i) concerns the *validity* of law, whereas version (ii) concerns the *concept* of law.³⁹

As we shall see (in Section 8), Radbruch's endorsement of the Radbruch formula, including the belief in the existence of supra-statutory law, is difficult to reconcile with a commitment to (meta-ethical) relativism. One is therefore not surprised to find that Radbruch now (after the war) appears to accept some version of *moral objectivism* instead. For he now asserts that there are fundamental principles of law in light of which legal norms can be judged to be devoid of legal validity:

There are principles of law, therefore, that are weightier than any legal enactment, so that a law in conflict with them is devoid of validity. These principles are known as natural law or the law of reason. To be sure, their details remain open to question, but the work of centuries has in fact established a solid core of them, and they have come to enjoy such a far-reaching consensus in the so-called declarations of human and civil rights

³⁵ Gustav Radbruch, 'Statutory Lawlessness and Supra-Statutory Law', *Oxford Journal of Legal Studies* 26(1) (2006): 1–11, at 7. Translated into English by Bonnie Litschewski Paulson and Stanley L. Paulson. This article was first published in 1 *Süddeutsche Juristen-Zeitung* 105–108 (1946) under the title 'Gesetzliches Unrecht und Übergesetzliches Recht'.

³⁶ That Radbruch really endorses two distinct Radbruch formulas has been pointed out by both Robert Alexy and by Stanley Paulson. See Alexy (1999, p. 16); Paulson (1995, p. 491).

³⁷ See, e.g., Alexy (1999); Rivers (1999, p. 41); Haldemann (2005, p. 165).

³⁸ This has been pointed out by Julian Rivers, though Rivers does not distinguish between formula (i) and formula (ii). See Rivers (1999, pp. 41–42).

³⁹ This has been pointed out by Stanley Paulson. See Paulson (2006, p. 26).

that only the dogmatic skeptic could still entertain doubts about some of them.⁴⁰

However, we also find that Radbruch is explicit about his commitment to (meta-ethical) relativism in another post-war essay, namely *Der Relativismus in der Rechtsphilosophie*. Although this essay was first published before the war (in 1934), it was later included in a post-war collection of essays edited by the author himself.⁴¹ Hence I believe I am justified in thinking of it as a post-war essay.

Thus we have reason to see whether we can adjust Radbruch's post-war position in one way or another. Stanley Paulson suggests that Radbruch's view was that the application of concepts like 'statutory non-law' and 'supra-statutory law' concerned only the unique situation during the Nazi period, and he also points out that Radbruch explicitly denied that he had principles of natural law in the classical sense in mind when he spoke of 'supra-statutory law' and was instead thinking of (what Rudolf Stammeler had called) a natural law with changing content.⁴² But I believe that any attempt to restrict the claim about the existence of supra-statutory law to the unique situation during the Nazi

⁴⁰ Gustav Radbruch, 'Five Minutes of Legal Philosophy', *Oxford Journal of Legal Studies* 26(1) (2006): 13–15, at 14–15. Translated into English by Bonnie Litschewski Paulson and Stanley L. Paulson. This article was first published in the *Rhein-Neckar-Zeitung* (Heidelberg) 12 September 1945 under the title 'Fünf Minuten Rechtsphilosophie'. See also Gustav Radbruch, *Vorschule der Rechtsphilosophie*, 3rd edn. (Göttingen: Vandenhoeck & Ruprecht, 1965), p. 114.

⁴¹ Gustav Radbruch, 'Der Relativismus in der Rechtsphilosophie', Gustav Radbruch, *Der Mensch im Recht*, 2nd edn. (Göttingen: Vandenhoeck & Ruprecht, 1957), p. 80. See also Gustav Radbruch, 'Entwurf eines Nachworts zu "Rechtsphilosophie"', in Ralf Dreier & Stanley L. Paulson (eds.), Gustav Radbruch, *Rechtsphilosophie. Studienausgabe*, 2nd edn. (Heidelberg: C. F. Müller Verlag, 2003), pp. 193–208, at 208.

⁴² Paulson (1995, pp. 497–498). See also Rivers (1999, pp. 41–43). One could perhaps also argue, as an anonymous reviewer for *Law and Philosophy* has suggested, that Radbruch had the post-war development of international human rights law in mind when he spoke of 'supra-statutory law,' though this leaves it an open question whether he thought of the relevant legal norms as being dependent on or independent of enactment.

period would be arbitrary (see Section 10). Moreover, I do not believe that Radbruch's own claims about how to understand his legal philosophy should be decisive. Radbruch might have misunderstood his own position,⁴³ or he might simply have wished to portray his legal philosophy as more coherent than it really was.

Although the evidence is by no means unequivocal, I myself am inclined to think that Radbruch now (after the war) accepts some form of moral objectivism.

VI. THE INCOMPATIBILITY OF THE PRE- AND POST-WAR ANALYSES

We have seen that before the war Radbruch accepted the separation thesis and that after the war he endorsed the Radbruch formula, which formula presupposes that there is a conceptual connection between law and morality. But one cannot without contradiction both assert and deny the existence of a conceptual connection between law and morality, and this means that Radbruch's pre- and post-war analyses of the nature of law are incompatible.

Since I have already explained why I believe that Radbruch accepted the separation thesis (Section 4), I shall not go over this topic again. Instead, I shall consider here Stanley Paulson's claim that there is continuity in Radbruch's thoughts about the nature of law after all, that Radbruch's later position is "of a piece" with the earlier position.⁴⁴ Paulson maintains in a review of Radbruch's recently published lecture notes (*Rechtsphilosophische Tagesfragen*) that Radbruch *anticipates* the Radbruch formula in his pre-war writings.⁴⁵ He points out that before the war Radbruch maintained (i) that "law is the reality the meaning of which is to serve the legal value, the idea of law", (ii) that the idea of law is justice (or formal justice,

⁴³ Radbruch's claim that relativism is the conceptual presupposition of democracy indicates that this is a real possibility. See Radbruch (1950, p. 48) (Author's Preface).

⁴⁴ Paulson (1995, p. 490); Paulson (2006, pp. 18–20).

⁴⁵ Paulson (2004, p. 583).

expediency, and legal certainty),⁴⁶ and (iii) that there are legal provisions that depend solely on considerations of justice. He adds (iv) that on Radbruch's analysis, legal provisions that depend solely on considerations of justice fall *outside* Radbruch's relativistic schema and must therefore be evaluated immediately on the basis of Radbruch's basal criterion. He concludes that on Radbruch's pre-war analysis, unjust provisions lack the nature of law, and that this means that Radbruch anticipates (the consequence of a violation of) the second version of the Radbruch formula:

The legal rules that are based on justice alone – Radbruch speaks, for example, of the prohibition of ad hoc tribunals – are *outside* his relativistic order, within which the rules are dependent on the chosen position within the spectrum of the theory of political parties. Thus such legal rules would have to have been evaluated by direct referral to the “basic formula” [the basal criterion]. If the “basic formula” is to be considered the explanation of the nature of law, then a fact of the case that arises from the violation of a rule directly grounded in justice constitutes no law. In my opinion this constitutes an unmistakable anticipation of the famous Radbruch formula, introduced first in 1946, or more precisely: the “basic formula” anticipates the consequence of a violation of the so-called denial formula, which refers to the concept of law and the violation of which in general leads to the loss of the legal character of the norm in question.⁴⁷

⁴⁶ As should be clear, the combination of premises (i) and (ii) amounts to Radbruch's basal criterion.

⁴⁷ *Ibid.* at 582–583 (Footnotes omitted). Translated into English by Robert Carroll. The German original reads as follows: “Die allein auf der Gerechtigkeit beruhenden Rechtsvorschriften – Radbruch spricht zum Beispiel vom Verbot der Ausnahmegerichte – finden sich *außerhalb* seines relativistischen Schemas, innerhalb dessen die Vorschriften von der gewählten Position im Spektrum der Parteienlehre abhängen. Also müßten solche Rechtsvorschriften unter unmittelbarer Berufung auf die „Grundformel“ bewertet werden. Wenn die „Grundformel“ als Darlegung der Natur des Rechts zu betrachten ist, dann stellt ein Sachverhalt, der sich aus der Verletzung einer unmittelbar auf der Gerechtigkeit beruhenden Vorschrift ergibt, kein Recht dar. Dies stellt meines Erachtens eine unverkennbare Vorwegnahme der erst im Jahre 1946 eingeführten, berühmt gewordenen Formel Radbruchs dar, genauer gesagt: Die „Grundformel“ nimmt die Folge einer Verletzung der sog. Verleugnungsformel vorweg, die auf den Begriff des Rechts bezogen ist und deren Verletzung überhaupt zum Verlust des Rechtscharakters der in Betracht kommenden Norm führt.”

I cannot accept Paulson's line of reasoning, however. To begin with, it seems to me that the combination of premises (i) and (ii) – Radbruch's basal criterion – would be enough to yield the desired conclusion, given Paulson's (unstated) additional premise (v) that Radbruch rejected the separation thesis (see Section 4): If law is the reality whose meaning is to serve justice, then a piece of reality (that is, a provision) whose meaning isn't to serve justice cannot be law. Why, then, does Paulson add premises (iii) and (iv)? As I understand him, he is saying that premises (iii) and (iv) make it clear that Radbruch made certain *exceptions* to his relativism by allowing that in some cases the requirements of justice apply independently of any relativization by appeal to purposiveness.⁴⁸ Actually, premise (iv) seems to do no more than spell out the implications of premise (iii), by emphasizing that a legal provision that depends *solely* on considerations of justice falls outside Radbruch's relativistic schema and must be evaluated immediately on the basis of the basal criterion.

But this is not persuasive. For on Radbruch's analysis, *all* legal provisions rest on considerations of justice, in the sense that their passing a "justice test" is a necessary, but not a sufficient, condition for their having legal quality. In addition, there are a few legal provisions that rest *solely* on considerations of justice, in the sense that they owe not only their legal quality in the sense explained, but also their *content*, to such considerations. When Radbruch asserts that there are legal provisions that are "dictated solely by justice or legal certainty," or that the prohibition of ad hoc tribunals "rest[s] on requirements not of expediency but solely of justice" (see below), he has in mind the *latter* type of provision. But this means that premises (iii) and (iv) are *irrelevant* to the conclusion Paulson wishes to establish. For the fact that, on Radbruch's analysis, some legal provisions owe not only their legal quality, but also their content, to considerations of justice, does nothing to show that Radbruch anticipated (the consequence of a violation of) the second version of the Radbruch formula. Since *all* legal provisions owe their legal quality to considerations of

⁴⁸ See Paulson (2006, p. 32).

justice in this way, the fact that *some* of these provisions also owe their *content* to consideration of justice is neither here nor there when we are concerned with the question of legal quality. Here is Radbruch:

One might be tempted to settle the conflict between justice, expedience, and legal certainty by proposing a straightforward division of labor between the three principles according to their fields of operation. By *justice* we would test whether a precept is cast in the form of law at all, whether it may at all be brought within the concept of law; by *expediency* we would determine whether its contents are right; finally, by the degree of *legal certainty* it affords we would judge whether to ascribe to it validity. As a matter of fact, we determine by the standard of purported justice alone whether a precept is at all legal in nature, whether it accords with the *concept* of law. But the *contents* of the law are governed by all three principles. To be sure, the bulk of legal contents is governed by the principle of expediency; but even these legal contents are modified by justice, as, for instance, when a doctrine derived from expediency demands application even beyond the range of its expediency on grounds of legal equality. Moreover, there are a number of legal provisions which are dictated by no expediency at all but solely by justice or legal certainty. Equal protection of the laws or the prohibition of *ad hoc* tribunals, for instance, rest on requirements not of expediency but solely of justice.⁴⁹

But, as I indicated above, even if I were wrong about this, Paulson's argument would not go through unless we also granted Paulson's unstated premise (v), viz. that Radbruch rejected the separation thesis. The reason, of course, is that the separation thesis flatly contradicts the basal criterion: whereas the separation thesis denies that there is a conceptual connection between law and morality, the basal criterion asserts that there is such a conceptual connection by asserting that law is the reality the meaning of which is to serve justice.

To be sure, Radbruch was explicit about the basal criterion, but not about the separation thesis, which means that one might be tempted to ensure consistency in Radbruch's theory by saying that he endorsed the former while rejecting the latter. I have, however, argued that the doctrine of judicial bindingness *presupposes* the separation thesis, and my guess is that Radbruch simply didn't see that his endorsement of the doctrine presupposed acceptance of the separation thesis.

⁴⁹ Radbruch (1950, pp. 110–111) (Emphasis added).

In a later article, Paulson explains that Radbruch's pre-war endorsement of the doctrine of judicial bindingness stood in the way of any application of the basal criterion, and that therefore it may be difficult to see that Radbruch actually anticipated the Radbruch formula in his pre-war writings.⁵⁰ He does not explain in so many words just how the doctrine "stood in the way" of an application of the basal criterion, but I assume he means that Radbruch simply could not have maintained that a purported, though unjust, legal provision lacked the quality of law, while insisting that the judge nevertheless apply the provision in question. If Radbruch had done that, he would have countenanced a contradiction at the heart of his theory. But having given up the doctrine in his post-war writings, Radbruch was free to put the basal criterion into effect; and this comes through in the Radbruch formula. Paulson adds that Radbruch's giving up the doctrine does *not* count as a revision of his views on the nature of law, because Radbruch endorsed the doctrine for policy reasons only.⁵¹

But this argument doesn't work. The reason, as I have said, is that Radbruch's endorsement of the doctrine of judicial bindingness presupposes acceptance of the separation thesis, and Paulson in effect admits as much when he explains that the doctrine "stood in the way" of an application of the basal criterion; and this holds whether or not Radbruch endorsed the doctrine for policy reasons only. This means that Radbruch's giving up the doctrine must indeed count as a revision of his views of the nature of law.⁵²

Let us, however, despite my objections, suppose that Paulson's argument is valid. We must now ask whether it is also *sound*, that is, whether the premises are true. Whereas premises (i) and (ii) are clearly true, premises (iii) and (iv) are problematic. I am, however, inclined to grant the truth of premise (iii);

⁵⁰ Paulson (2006, pp. 18–20, 32–38).

⁵¹ *Ibid.* at 36.

⁵² One may also wonder whether it could really have made sense for Radbruch to allow the doctrine, which was a matter of *policy*, to override the basal criterion, which concerned the *nature of law*. I find such a stance puzzling. I would like to thank Åke Frändberg for drawing my attention to this difficulty in Paulson's analysis.

and if premise (iii) is true, then premise (iv) should also be true, if and insofar as it does nothing more than spell out the implications of premise (iii). Nevertheless, it is worth noting, in regard to premise (iv), that Paulson explains neither (a) why a provision that rests solely on considerations of justice would fall outside Radbruch's relativistic schema, nor (b) why it couldn't be evaluated immediately in light of the basal criterion if it didn't. Perhaps Paulson simply believes that the claim that there are provisions that rest solely on considerations of justice wouldn't make sense, unless it were premised on the assumption that considerations of justice fall outside the relativistic schema – if they didn't, they would be true or valid only in light of a given moral framework, but perhaps not in light of another; and this would lead to serious complications (see Section 8). However, this line of reasoning presupposes that Radbruch accepted the troublesome theory of restricted (meta-ethical) relativism – a relativistic theory that simply doesn't apply to all moral considerations – and any legal-philosophical position that depends on such a troublesome theory will itself be equally troublesome (see Section 10).

I conclude that Paulson has not shown that Radbruch anticipated the Radbruch formula in his pre-war writings after all, and that therefore I am justified in claiming that Radbruch's pre- and post-war analyses are indeed incompatible.

VII. WHICH IS TO BE PREFERRED – THE PRE-WAR OR THE POST-WAR ANALYSIS?

I have argued that Radbruch's pre- and post-war analyses of the nature of law are incompatible. The natural question, then, is: Which analysis is to be preferred? Any attempt to answer this question will have to take into account the lack of clarity in Radbruch's post-war position. Was Radbruch a meta-ethical relativist, or wasn't he? Was he a natural law thinker, or wasn't he? I have argued that he was a legal positivist and a meta-ethical relativist before the war, and that he gave up legal positivism and appears to have accepted some version of moral objectivism after the war. But the only thing that is absolutely

clear about Radbruch's post-war position is that he endorsed the Radbruch formula, and I shall therefore take this circumstance as my starting point.

In my view, the pre-war analysis is to be preferred to the post-war analysis. The reason is that the pre-war analysis presupposes meta-ethical relativism, whereas the post-war analysis – through the Radbruch formula – presupposes moral objectivism, and that meta-ethical relativism is, whereas moral objectivism is not, a defensible meta-ethical theory.

I shall now explain (i) why and in what sense the Radbruch formula presupposes moral objectivism, and why meta-ethical relativism and the Radbruch formula are incompatible, and (ii) why I consider meta-ethical relativism, but not moral objectivism, to be a defensible meta-ethical theory. I discuss (i) in Section 8 and (ii) in Section 9.

VIII. THE RADBRUCH FORMULA, MORAL OBJECTIVISM, AND META-ETHICAL RELATIVISM

A meta-ethical relativist who accepts the Radbruch formula might argue that a statute or a statutory provision, S , is a law or is legally valid in light of a certain moral framework, M_1 , and is a non-law or is legally invalid in light of another moral framework M_2 , while admitting that M_1 is no truer or more valid than M_2 , and vice versa.

The problem is that on this analysis, the *legal force* and, in extreme cases (when the Radbruch formula is applicable), the *existence* and *content* of law would vary with the choice of moral framework, and such variation would likely undermine the *predictability* of court decisions. Thus we have reason to expect that those who maintain that law and morality are conceptually connected will also maintain that morality is objective, at least in so far as we are concerned with extreme injustice. And this appears indeed to be the case. Robert Alexy, for example, accepts the Radbruch formula and maintains that “judgments about extreme injustice are genuine judgments, capable of a rational justification and in so far possessing of a cognitive and objective character”; and he offers as an example

of extreme injustice the atrocities committed by the Nazis in the Third Reich.⁵³

The problem of predictability does not arise for meta-ethical relativists who accept the separation thesis. Although they will have to accept that the *moral* force of law will vary with the choice of moral framework, they do not have to accept that the same goes for the *legal* force of law or for the existence and content of law. In fact, they must maintain that the legal force of law is independent of the moral force of law and so remains the same irrespective of the choice of moral framework.⁵⁴

We should note, however, that this argument – that the value of predictability supports the claim that the Radbruch formula presupposes moral objectivism – itself appears to presuppose moral objectivism. The reason is that under the theory of meta-ethical relativism, the value of predictability – like any other moral or morally relevant value – is going to vary with the choice of moral framework, and this means that a meta-ethical relativist will have to accept that predictability is not going to be an important moral or morally relevant value in light of some moral frameworks.

IX. META-ETHICAL RELATIVISM: A DEFENSIBLE THEORY⁵⁵

I believe that meta-ethical relativism is, whereas moral objectivism is not, a defensible meta-ethical theory. I do not, of course, propose to determine once and for all whether meta-ethical relativism is a true and moral objectivism a false theory, but I can at least point to a couple of considerations that lend plausibility to these claims.

I begin by arguing that moral *anti-realism* is a defensible theory. First, the existence of *widespread moral disagreement*

⁵³ Alexy (1999, pp. 33–34). See also Finnis (1981, Chapters 3–5); Michael S. Moore, *Educating Oneself in Public* (Oxford: Oxford University Press, 2000), Chapter 9.

⁵⁴ For more on this topic, see Spaak (2003, pp. 478–483).

⁵⁵ The text in this section can be found, more or less verbatim, in Torben Spaak, 'Moral Relativism and Human Rights,' *Buffalo Human Rights Law Review* 13 (2007): 73–85, at 77–79.

supports the claim that there are no mind-independent moral facts.⁵⁶ Although there has been disagreement in sciences such as history and biology and cosmology as well, it seems that disagreement in the field of morals differs importantly from disagreement in those other fields. For, as John Mackie points out, moral disagreement cannot plausibly be thought of as resulting from speculative inferences or explanatory hypotheses based on inadequate evidence. Instead, as Mackie suggests, “[d]isagreement about moral codes seems to reflect people’s adherence to and participation in different ways of life.”⁵⁷

Second, it seems that if there were mind-independent moral facts, we should be able to agree on some sort of *method* for solving moral disagreements.⁵⁸ But so far we have not been able to reach such agreement. For example, consequentialists and deontologists cannot agree about the relevance of consequences in moral thinking. To be sure, there may be features of our moral thinking – such as the point of moral inquiry and, perhaps, the form and content of moral claims – that are best explained by the assumption that there are mind-independent moral facts,⁵⁹ but we have to acknowledge that we cannot agree on a method for solving moral disagreements. And that is a reason to doubt the existence of mind-independent moral facts.

⁵⁶ This has been observed by a number of authors. See, e.g., Harman (1986, pp. 8–11); John Mackie, *Ethics* (London: Penguin Books, 1976), pp. 36–38. But not everyone agrees that there is widespread moral disagreement. See, e.g., Michele Moody-Adams, ‘The Empirical Under-Determination of Descriptive Cultural Relativism’, in Paul K. Moser & Thomas L. Carson (eds.), *Moral Relativism: A Reader* (Oxford: Oxford University Press, 2003), pp. 93–106.

⁵⁷ Mackie (1976, p. 36). See also Harman (1986, pp. 8–11).

⁵⁸ See Jeremy Waldron, ‘The Irrelevance of Moral Objectivity’, in Robert P. George (ed.), *Natural Law Theory* (Oxford: Oxford University Press, 1992), pp. 158–187, at 171–176. Of course, Waldron’s aim is to show not that there are no moral facts, but that the existence of moral facts does not matter when we are concerned with judicial decision-making.

⁵⁹ For more on this topic, see Brink (1989, pp. 23–25); Michael Smith, *The Moral Problem* (Oxford, UK & Cambridge, Massachusetts: Blackwell Publishers, 1994) pp. 5–6.

Third, it seems that moral realists cannot account for the fact that moral claims are closely bound up with moral *motivation*.⁶⁰ The idea is that *beliefs* – as distinguished from desires – are motivationally inert, and that therefore moral realists – who hold that moral claims express beliefs about mind-independent moral facts – cannot account for the motivational aspect of moral claims. The idea that moral judgments are closely bound up with moral motivation is usually referred to as *internalism* and can be spelled out in different ways. It is, however, controversial.⁶¹ The critics maintain, *inter alia*, that it cannot explain the existence of *amoralists*, that is, people who remain unmoved by what they recognize as moral considerations.⁶² But internalists have responded that amoralists are not really making moral judgments.⁶³

There is a problem here, however. The internalist objection to moral realism seems to be equally applicable to the type of moral anti-realism called *constructivism*, since constructivists agree with moral realists that moral claims express beliefs about moral *facts* – they differ only in their views of the nature of those facts. Hence constructivists seem to be as unable as moral realists to account for the motivational aspect of moral claims.

While these considerations support moral *anti-realism*, with the qualification just mentioned, it would seem that they offer only indirect support for *meta-ethical relativism*. The reason is

⁶⁰ For a discussion of this type of critique of moral realism, see Brink (1989, Chapter 3).

⁶¹ While a number of prominent moral philosophers have accepted internalism, other equally prominent moral philosophers have rejected it. Those who accept some form of internalism include Simon Blackburn, *Spreading the Word* (Oxford: Oxford University Press, 1984), p. 188; R. M. Hare, *The Language of Morals* (Oxford: Oxford University Press, 1952), pp. 20, 31; Thomas Nagel, *The Possibility of Altruism* (Princeton, New Jersey: Princeton University Press, 1970), p. 7; Smith (1994, Chapter 3); Charles Leslie Stevenson, 'The Emotive Meaning of Ethical Terms', *Mind* 46 (1937): 14–31, at 16. Those who reject internalism include Brink (1989, Chapter 3); William Frankena, 'Obligation and Motivation in Recent Moral Philosophy', in A. I. Melden (ed.), *Essays on Moral Philosophy* (Seattle: University of Washington Press, 1958), pp. 40–81.

⁶² Brink (1989, pp. 46–49).

⁶³ See Smith (1994, pp. 66–71).

that both main types of moral anti-realism – noncognitivism and constructivism – come in a relativist and a non-relativist form.⁶⁴ I believe, however, that both types of moral anti-realism lead naturally to meta-ethical relativism. For, as we have seen, moral anti-realists hold either that there are no moral facts (non-cognitivism), or that moral facts depend in one way or another on the attitudes and preferences of the people whose values and standards they are (constructivism). And this seems to mean that moral right and obligation will depend on the preferences or attitudes of the people in question, which are likely to differ quite a bit. The standard way for moral anti-realists to avoid meta-ethical relativism is to argue that moral right and obligation depends in some way on what a rational agent would do or choose,⁶⁵ but it is hard to say which is the correct theory of rationality.⁶⁶

X. A REVISIONIST INTERPRETATION OF RADBRUCH'S RELATIVISM

We have seen that Radbruch endorsed the Radbruch formula and believed in the existence of supra-statutory law after the war, and I have suggested, with some hesitation, that this brings with it a belief in moral objectivism. However, as we have seen, there is also evidence that he remained a meta-ethical relativist

⁶⁴ For a brief discussion of the possibility of non-cognitivist relativism, see T. M. Scanlon, 'Fear of Relativism', in Moser & Carson (2003), pp. 142–162, at 143–144. See also Mark van Roojen, 'Moral Cognitivism vs. Non-Cognitivism', *The Stanford Encyclopedia of Philosophy* (Winter 2005 Edition), Edward N. Zalta (ed.), URL: <http://plato.stanford.edu/archives/win2005/entries/moral-cognitivism/>.

⁶⁵ See, e.g., David Gauthier, *Morals by Agreement* (Oxford: Oxford University Press, 1986), Chapter 1; John Rawls, *A Theory of Justice* (Oxford: Oxford University Press, 1971), Chapter 3.

⁶⁶ The difficulties involved are nicely illustrated by John Harsanyi's critique of John Rawls's use of the maximin principle for rational choice in the so-called original position. See John C. Harsanyi, 'Can the Maximin Principle Serve as a Basis for Morality? A Critique of John Rawls' Theory', *The American Political Science Review* 69(2) (1975): 594–606. Rawls' original discussion of the maximin principle can be found in Rawls (1971), pp. 152–157. See also John Rawls, 'Some Reasons for the Maximin Criterion', *The American Economic Review* 64(2) (1974): 141–146.

after the war. But if this is so, his position appears to have been incoherent, since, as we have seen, endorsement of the Radbruch formula presupposes a belief in moral objectivism. Interestingly, Lukas Meyer, too, has observed that Radbruch's fundamental assumptions – relativism, methodological dualism, and the idea that legal science (*Rechtswissenschaft*) is a cultural science – cannot be squared with the claim that there are fundamental, non-relative moral principles in light of which the legal validity of legal norms can be determined.⁶⁷ Meyer therefore proposes (what he calls) a revisionist interpretation of Radbruch's relativism, which is designed to make it possible to square Radbruch's above-mentioned assumptions with the claim that there are such fundamental moral principles (and with Radbruch's position on various substantive moral issues).⁶⁸ He proposes, more specifically, that we should take Radbruch to have espoused (what Meyer refers to as) a *moderate* meta-ethical relativism, according to which a *few* fundamental moral judgments are non-relatively true or valid, whereas all others are true or valid relative to a choice of moral framework, rather than (what Meyer refers to as) the *extreme* meta-ethical relativism that Radbruch seems to have espoused in fact, according to which *all* moral judgments are true or valid relative to a choice of moral framework (and *no* moral judgments are non-relatively true or valid).⁶⁹

Meyer's revisionist interpretation of Radbruch's meta-ethical relativism is attractive, because it allows us to reconcile Radbruch's endorsement of the Radbruch formula, including belief in the existence of supra-statutory law, with a commitment to meta-ethical relativism. The problem is that the very idea of a moderate meta-ethical relativism seems to be arbitrary. The reason why meta-ethical relativism is, at least *prima facie*, attractive is that it answers to the common sense notion that moral values and standards appear to depend in one way or another on the attitudes and preferences of the people whose

⁶⁷ Meyer (2002, p. 335).

⁶⁸ *Ibid.* at 340.

⁶⁹ *Ibid.* at 339–346. What Meyer calls *extreme* meta-ethical relativism is, of course, the standard type of meta-ethical relativism. See, e.g., Harman (1996).

values and standards they are. But this common sense notion does not distinguish between more and less important moral values and standards in regard to the issue of *objectivity*. Why, then, should we accept the claim that some moral values and standards are objectively true or valid, whereas others are only true or valid relative to a choice of moral framework? Meyer does not answer this question, except to refer the reader to Richard Brandt's thoughts on (what Brandt refers to as) non-methodological relativism.⁷⁰ Brandt explains that some moral values are *necessary to human existence* (such as mating, rearing and education of offspring, and security against violent attack), and that there is considerable *agreement* about other moral values (such as the value of life and truth-telling).⁷¹ And he reasons that these types of moral value can therefore be said to be objectively valid.

But it is obvious that even widespread agreement about some values and standards does not mean that these values are objective – intersubjectivity, as John Mackie points out, is not objectivity.⁷² And while moral values that are necessary to human existence would appear to be good candidates for moral objectivity, there remain important questions about the precise shape and form of such values. Just think about the various conceptions of the good life and of various ways of rearing and educating our children (more discipline, less discipline, etc.) The problem, in other words, is that the moral values in question may be necessary to human existence only at a very abstract level of discourse. I therefore conclude that these considerations are not sufficient to support the claim that some moral values and standards are objectively valid.

XI. RADBRUCH ON VALUES AND EVALUATIONS

In a recent study of Radbruch's legal philosophy, Marc André Wiegand argues in effect that the import of Section 2 of Radbruch's *Legal Philosophy* – in which Radbruch develops his

⁷⁰ Richard B. Brandt, *Ethical Theory* (Englewood Cliffs: Prentice-Hall, 1959), pp. 271–294.

⁷¹ *Ibid.* at 288.

⁷² Mackie (1976, p. 22).

understanding of legal philosophy as the evaluating view, defined in terms of methodical dualism and (meta-ethical) relativism – ought to be discounted.⁷³ If Wiegand is right, a competent interpretation of Radbruch's legal philosophy ought to play down the importance of Radbruch's relativism quite a bit.

Wiegand points out that Radbruch is explicit that value judgments (*Werturteile*) cannot be rationally grounded, but can only be the object of a non-rational choice (*Bekennntnis*). But, he points out, if this were so, Radbruch could hardly base his own thinking on value judgments, and his references to neo-Kantianism would be incomprehensible.⁷⁴ Wiegand therefore suggests a way to make sense of Radbruch's analysis without doing violence to the text. We might, he explains, make a distinction between values (*Werte*) and evaluations (*Wertungen*), and say that Radbruch did not have values, but evaluations, in mind when he said that value judgments (*Werturteile*) cannot be rationally grounded:

These assertions of Radbruch's may be understood as both reconcilable and meaningful if one reflects upon a distinction drawn by Rickert that seems to correspond to Radbruch's meaning, namely that there is a distinction between value and evaluation. "A philosophy of evaluations is not the same as a philosophy of values", Rickert maintains. What this sentence means has been established above: While value is identical with the object of knowledge (and, thus, accessible to knowledge), an evaluation made by an individual does not guarantee truth and is, therefore, unable to supply a criterion for knowledge.⁷⁵

Although Wiegand does not put it this way, the upshot of his analysis is that Radbruch's relativism concerns *evaluations*, not values, and – contrary to what I have been arguing in this article – that therefore Radbruch is *not* a meta-ethical relativist in the usual sense of that term.

⁷³ Marc André Wiegand, *Unrichtiges Recht* (Tübingen: Mohr Siebeck, 2004), pp. 116–118. This has been noted by Stanley Paulson. See Paulson (2006, pp. 30–31, n. 95).

⁷⁴ Wiegand (2004, p. 116).

⁷⁵ *Ibid.* at 116–117 (Footnotes omitted). Translated into English by Torben Spaak and Uta Bindreiter.

I am not persuaded by Wiegand's analysis, however. First, if Wiegand has in mind Radbruch's claim that the idea of law is justice (or, more specifically, formal justice, legal certainty, and expediency) when he maintains that if Radbruch believed that value judgments cannot be rationally grounded, he could hardly base his own thinking on values, then Wiegand's claim is simply that Radbruch's meta-ethical relativism undermines his analysis of the idea of law. But this would be too quick a conclusion to draw. For, generally speaking, there is nothing stopping a meta-ethical relativist from erecting a philosophical theory on the basis of (relative) moral values. Moreover, even if Radbruch forgets his relativism at times, as he seems to do,⁷⁶ this just means that he is (at times) a confused relativist. Since this is so, we do not have to make sense of Radbruch's analysis, as Wiegand suggests – for it makes sense as it stands.

Second, assuming that Radbruch really is a neo-Kantian,⁷⁷ we must ask whether neo-Kantianism is inconsistent with meta-ethical relativism. I am not sure about this, though it seems to me that Wiegand's reference to Radbruch's neo-Kantianism in this context does not add much to the simple claim that Radbruch contradicts himself by asserting the non-relative (absolute) value of justice, while endorsing meta-ethical relativism. But one way out of this dilemma would be to argue that Radbruch's belief in the non-relative value of justice concerns *formal*, not substantive, justice, whereas his meta-ethical

⁷⁶ See, e.g., Radbruch's argument in support of the separation thesis above in Section 4.

⁷⁷ Stanley Paulson points to various circumstances that support the claim that Radbruch was really a neo-Kantian: (i) that Radbruch's three-fold scheme – (a) existence, (b) cultural fields, and (c) absolute values – resembles the three-fold scheme of the Southwest neo-Kantians; (ii) that Radbruch refers to the 'underlying philosophical assumptions' of his legal philosophy and then mentions the leading neo-Kantians of the Southwest school in a footnote; (iii) that Radbruch himself explains in his autobiography that his friend Henry Levy, a neo-Kantian of the Southwest school played an important part in his philosophical development; and (iv) that textually a good bit in Radbruch's neo-Kantianism can be traced back to Emil Lask's book *Legal Philosophy*. See Paulson (2006, pp. 29–30). I accept that Paulson has made a *prima facie* case for his claim that Radbruch is a neo-Kantian of the Southwest School.

relativism concerns *substantive* values. If we could accept a restricted relativism of this type, then the contradiction would be dissolved, and we could conclude that this consideration, too, fails to show that we need to make sense of Radbruch's analysis.

But even if we assume that we do need to make sense of Radbruch's analysis, I have doubts about Wiegand's attempt to do that. The reason is that I have doubts about Wiegand's use of the distinction between values and evaluations. It seems to me that if a person had knowledge of *values*, he could also assess the truth or validity of any given *evaluation* in light of the relevant value or values. If this is so, then conceiving of Radbruch's relativism as relativism concerning evaluations – as distinguished from relativism concerning values – serves no purpose and actually contradicts Radbruch's belief in the non-relativity of values as much (or as little) as conceiving of it as a relativism concerning values does.

I conclude that one may believe that Radbruch embraced a version of meta-ethical relativism and also held that there were certain non-relative (absolute) values, such as (formal) justice. This means that a competent interpretation of Radbruch's pre-war philosophy ought to pay close attention to this feature in his legal philosophy, even if it means playing down the importance of Radbruch's neo-Kantianism quite a bit.

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