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ERRATA

1. Insert between lines 8-9 from the top on p. 92:
"is divided between the representative hearing and the act of the other"
2. Insert between lines 4-5 from the bottom on p. 106:
"tions or judgments. But we have distinct kinds of propositions in"

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The preparation of this volume by John F. Crosby, who made all the translations, wrote the biographical sketch of Reinach, and the critical study of Reinach, was made possible by a grant to him from the Translation Program of the National Endowment for the Humanities.



Dedicated to the memory of
ADOLF REINACH
(1883 - 1917)
in deep veneration,
on the centennial of his birth

TABLE OF CONTENTS

John F. Crosby: A Brief Biography of Reinach	ix
Reinach as a Philosophical Personality	
Edmund Husserl	xi
Dietrich von Hildebrand	xv
Edith Stein	xxvii
Hedwig Conrad-Martius	xxx
Adolf Reinach: The Apriori Foundations of the Civil Law	1
John F. Crosby: Reinach's Discovery of the Social Acts	143
Discussion:	195
Josef Seifert: Is Reinach's "Apriorische Rechtslehre" More Important for Positive Law than Reinach Himself Thinks?	197

A Brief Biography of Reinach¹

by John F. Crosby

Adolf Reinach was born in Mainz on December 23, 1883, into an established Jewish family of the city. Already in the gymnasium of Mainz he discovered Plato, and developed a love for his philosophy which he never lost. Reinach began his university studies in the fall of 1901 in Munich, where he studied philosophy and psychology with Theodor Lipps, and also took courses in jurisprudence and history. In 1905 he completed his doctorate under Lipps with a dissertation entitled, "On the Concept of Causality in the Present Criminal Code," while minoring in criminal law and history.

It was Alexander Pfänder who at this time made Reinach and other students of Lipps aware of Husserl's *Logical Investigations*, which made a great impression on them, and which made them break completely with whatever attachment they may have had to the psychologism represented by Lipps. In the spring of 1905 some of them, including Reinach, went to Göttingen to study with Husserl. Reinach was convinced that philosophy had been put on a new basis by Husserl's breakthrough to objective being and by the exactness and stringency which he cultivated in his work. After one semester in Göttingen, however, Reinach's work with Husserl was interrupted by his legal studies, which apparently his parents had insisted on. These studies he pursued in Munich and Tübingen, and in 1907 he completed them by passing the *Juristische Staatsprüfung* in Württemberg. He immediately resumed his philosophical studies in Munich, working on problems of epistemology and logic and attending courses in mathematics and theoretical physics.

In June of 1909 he completed his Habilitation under Husserl in Göttingen with a work entitled "The Nature of the Judgment." Though this work has been lost, it seems that much, perhaps all, of its content was taken over in Reinach's monograph, "Toward the Theory of the Negative Judgment," which appeared in 1911 in Munich in a Festschrift for Theodor Lipps. After his Habilitation Reinach began teaching as Husserl's assistant in Göttingen. The unanimous testimony of his students is that he was an extraordinarily gifted teacher, who was especially admired for the clarity of his thought. Many of these students, such as A. Koyré, T. Conrad, D. von Hildebrand, and E. Stein looked more to Reinach than to Husserl as to their real master in philosophy. In his classes Reinach did far more than just mediate the thought of Husserl to his students; he understood phenomenology as a philosophical realism, and while Husserl was developing his transcendental phenomenology, Reinach was devel-

oping a very different, realist phenomenology. This is why Reinach was deeply disappointed by Husserl's *Ideen* of 1913, Husserl's first major work in transcendental phenomenology.

Reinach's monographs in philosophy were written and published during his Göttingen period. In 1911 there appeared, in addition to the study on the negative judgment, already mentioned, "Kant's Understanding of the Humean Problem," and "The Most Basic Rules of Inference in Kant." In 1913 there appeared "Deliberation in its Ethical and Legal Significance," and his major work, for which his earlier law studies turned out to be very important, "The Apriori Foundations of the Civil Law." This latter work appeared in the first issue (1913) of Husserl's *Jahrbuch für Philosophie und phänomenologische Forschung*, of which Reinach was a founding editor, along with Geiger, Scheler, and Pfänder. In January of 1914 Reinach held a lecture on phenomenology at the University of Marburg; though it was published only posthumously² it is admired as one of the clearest introductions to phenomenology.

At the outbreak of the war in 1914 Reinach volunteered for action on the front, and was assigned to the Western front. While serving in the war he underwent a profound religious conversion. Before 1915 he had had no definite religious convictions, though he had a deep respect for Christianity; but now he found his way to faith in Christ. He and his wife were baptized in 1916. He naturally tried to reflect phenomenologically on what he had experienced, and he made notes towards a philosophy of religion, some of which were later published in his *Gesammelte Schriften*. He was killed in action in Flanders on Nov. 16, 1917, and buried in Göttingen. Since Reinach had determined that all his papers be destroyed in the event of his death, we have no literary remains from him.

1 My main source for the facts in this biography is E. Avé-Lallemant, *Die Nachlässe der Münchener Phänomenologen in der Bayerischen Staatsbibliothek* (Wiesbaden: Harrassowitz, 1975), pp. 172.

2 In the appendix to his *Gesammelte Schriften* (Halle Niemeyer, 1921), which contain all the studies of Reinach which we have mentioned. A reprint of the *Gesammelte Schriften* by the Philosophia Verlag of Munich is planned for 1984.

Reinach as a Philosophical Personality

We want to celebrate the centennial of Reinach's birth (1883) by collecting what has been said about him as a philosophical personality by those who were associated with him in some way. We will hear first Husserl, and then three of Reinach's best known Göttingen students. All translations have been made by John F. Crosby.

Edmund Husserl

Obituary notice (entire), Kant-Studien 13 (1919), pp. 147-49.

German philosophy has suffered a heavy loss as a result of Adolf Reinach's early death. He was of course still very much in the process of developing when the war broke out and he left, full of enthusiasm, to enlist as a volunteer and to fulfil his duty towards his country. But even his first writings bore witness to the independence and power of his mind as well as to the seriousness of his striving for knowledge, which was able to be satisfied only by the most thorough kind of investigation. If one was closely associated with him and learned to esteem his philosophical manner in discussion, if one observed the range of his studies, the intensity and variety of his interests, one may well have wondered why he was so slow in publishing his work. How easily he grasped, whether listening or reading, complicated trains of thought, how quickly he perceived the basic difficulties and took in the most remote consequences. And what a wealth of brilliant intuitions were available in all his deliberations. But how he restrained his gifts, which seemed to impel him to quick and spectacular productions. He wanted to draw only from the deepest sources, he wanted to produce only work of enduring value. And through his wise restraint he succeeded in this. The writings after his doctoral dissertation (the last of which appeared in his thirtieth year) are not large in number and size; but each of them is rich in ideas and insights and deserves the most careful study. His first piece of work (his dissertation in Munich in 1905 "On the Concept of Causality in the Present Criminal Code") is very much under the influence of Theodor Lipps, to whom he owed his initial philosophical education. But even as a student in Munich he opened himself to the influence of the new phenomenology and he joined the group of highly gifted students of this important author in opposing his psychologism from the point of view of my *Logical Investigations*. Reinach did not undergo the same changes of opinion which Lipps

underwent after 1901 as a result of this opposition, even though he esteemed the wealth of valuable ideas in Lipps. Reinach belonged to the very first philosophers who fully understood the distinct character of the new phenomenological method and who was able to see its philosophical significance. The phenomenological mode of thinking and investigating soon became second nature to him and he never became unsettled in the conviction (in which he rejoiced) that he had reached the firm ground of real philosophy and that he was encompassed by an infinite horizon of possible discoveries which belong to philosophy as a strict science. Thus his writings in Göttingen breathe a completely new spirit, and at the same time they express his striving to take up clearly demarcated problems and to get on with the work of preparing the ground.

Only one of Reinach's treatises is historical in character: "Kant's Understanding of the Humean Problem" (*Zeitschrift für Philosophie und philosophische Kritik* 141; 1908). It deserves the most careful attention. Reinach's insights into "relations of ideas" and his discovery that Kant wrongly interpreted these as analytical judgments, were, as I studied them at the time, of decisive importance for me on the way to pure phenomenology. Reinach for his part, as an accomplished phenomenologist turning to the study of Kant, detected Kant's misunderstanding and treated of it in a rich and instructive article.

The first of Reinach's systematic-phenomenological essays, "Towards the Philosophy of the Negative Judgment" (in the *Festschrift* for his earlier teacher in philosophy, "Münchener philosophische Abhandlungen. Th. Lipps zu seinem 60. Geburtstage gewidmet von früheren Schülern," Leipzig, 1911) deals in an extraordinarily penetrating way with difficult questions belonging to the general theory of the judgment. It is original in attempting to develop a phenomenological difference between "conviction" and "assertion" and in this way to enrich the theory of the negative judgment by making various phenomenological distinctions. Very important but apparently neglected is Reinach's study, "Deliberation in Its Ethical and Legal Significance" (*Zeitschrift für Philosophie und philosophische Kritik* 148 and 149; 1912§13). The pure phenomenological analysis of the essence of theoretical ("intellectual") and practical ("voluntary") deliberation leads Reinach to fine and significant distinctions in the area of intellectual and practical-emotional acts and states of mind; he then applies his results to questions of ethics and penal law. The most significant and the longest work of Reinach's is also a mature and thoroughly finished work, "On the Apriori Foundations of Civil Law," which appeared in the first volume (1913) of my *Jahrbuch für Philosophie und phänomenologische Forschung*, of which Reinach was a co-editor.¹ This work attempts something completely new with respect to all present and past philosophies of law: on the basis of

pure phenomenology it attempts to develop the idea, long held in suspicion, of an apriori theory of right. With inimitable analytic power Reinach brings to light a whole array of "apriori" truths which underlies any real or possible legal code; and these truths, as he shows, are apriori in exactly the sense of the basic axioms of arithmetic and logic, that is, they are truths which are grasped in intellectual insight as being valid without any possible exception, and they are prior to all experience. These apriori truths in the sphere of right, such as that a claim is dissolved by its being fulfilled, or that property, through the act of transfer, passes from one person to another, have nothing to do with the "enactments" (arbitrary determinations that something ought to be) of the positive law. For all positive enactments presuppose concepts such as claim, obligation, property, transfer, etc.; these concepts are thus apriori with respect to positive law. Reinach's apriori principles are simply expressions of absolutely valid truths which are grounded in the essential meaning of these concepts. What is utterly original in this essay of Reinach's, which is in every respect masterful, is the idea that we have to distinguish this apriori, which belongs to the proper nature of any legal order, from the other apriori which is related to positive law as something normative and as a principle of evaluation: for all law can and must be subjected to the idea of "right law"—"right" from the point of view of morality or of some objective purpose. The development of this idea would lead to a completely different apriori discipline, which however does not, just as Reinach's apriori theory of right does not, go in the direction of realizing the fundamentally mistaken idea of a "natural law." For this apriori discipline (of "right law") can only bring out formal norms of right, and from these one can no more extract a positive law than one can get definite truths in the natural sciences out of formal logic.² No one who is interested in a strictly scientific philosophy of right, in a definitive clarification of the basic concepts which are constitutive for the idea of any possible positive law (a clarification which, it is clear, can be achieved only by phenomenologically penetrating into the pure essence of our consciousness of right) can afford to overlook this work of Reinach's which breaks so much new ground. It is for me beyond any doubt that it will secure for its author a permanent place in the history of the philosophy of right.

In the last years before the war Reinach was occupied with basic problems of general ontology and especially with the essence of motion, about which he felt that he had attained important phenomenological insights. There is hope that valuable fragments of his incomplete drafts will be able to be published. During the war, he never flagged in the joy with which he served his country. But his religious nature was so deeply stirred by the overwhelming experience of the war that he could not help

attempting, in times of relative quiet on the front, to develop his basic understanding of reality by turning to the philosophy of religion. I am told that he in fact made his way to clear convictions: the fatal bullet of the enemy struck a man who was at peace with himself, who was completely at one with himself and with God.

Dietrich von Hildebrand

This was written as an Introduction to Reinach's Gesammelte Schriften (1921). For some reason it was not used, and in its place there appeared an introduction by Hedwig Conrad-Martius, from which we have translated some passages which appear below. Since this piece of von Hildebrand's has never before been published, we present it first in the original German, and then in an English translation. We present it in its entirety. In the margins of the typescript we find the handwriting of another student of Reinach's, S. J. Hamburger, who was a close collaborator of von Hildebrand's. The presence of his handwriting, as well as the style of the thought in some places, suggest that Hamburger may have made some contribution to the composition of this introduction.

Mit dieser Herausgabe der gesammelten Schriften Adolf Reinachs beabsichtigt der Freundes- und Schülerkreis des Verstorbenen nicht, ihm aus der Fülle der Dankbarkeit, die in ihm lebt, ein Denkmal zu setzen, sondern er will der breiteren Öffentlichkeit diese schönen, tiefen, zum Teil grundlegenden Arbeiten zugänglich machen, die bisher in Zeitschriften und Jahrbüchern zerstreut, nur einem kleinen Kreis und da nur mit Mühe zugänglich waren. Was uns diese Ausgabe als eine Pflicht erscheinen liess, ist daher rein sachlicher Natur. Es wäre unverzeihlich, diese in ihrer Klarheit, Präzision und Tiefe geradezu einzigartigen Arbeiten, die rein inhaltlich wie methodisch von derselben Bedeutung sind, nicht in einer äusserlich festen Form der Mit- und Nachwelt zu erhalten. Die Vergänglichkeit der Zeitschrift- und selbst der Jahrbuchform entspricht so wenig der unvergänglichen Bedeutung dieser Arbeiten, die so keineswegs Gelegenheitsarbeiten sind, dass schon allein dieser rein objektive Gesichtspunkt uns zu dieser Ausgabe nötigte.

Es ist ein spezifisches Merkmal Reinachs, dass in jeder dieser Arbeiten, mögen sie auch von verhältnismässig speziellen Problemen handeln, doch stets allgemeine, grundlegende Erkenntnisse vorkommen, die hier zum ersten Mal gewonnen und festgelegt worden sind. Und diese Einsichten sind meist zugleich so scharf formuliert, dass man auf ihnen ohne weiteres weiterbauen kann. So klärt die kleine Schrift, "Die obersten Regeln der Vernunftschlüsse bei Kant," die an sich eine Kritik Kants ist, ein logisches Hauptproblem, die Frage nach dem sogenannten allgemeinen Gegenstand, durch die Trennung von Wesenheit und unbestimmtem Einzelgegenstand, der an dieser Wesenheit teil hat; so klärt die Schrift, "Kants Auffassung des Humeschen Problems," in ihrem Ziel scheinbar ganz spezialistisch, das Wesen der echten Kausalität, durch die Trennung von modaler und materialer Notwendigkeit; so klärt die Schrift, "Zur Theorie des negativen Urteils," das Wesen von Vorstel-

1 In the following I repeat what I said by way of characterizing Reinach in my obituary notice in the *Frankfurter Zeitung*, Dec. 6, 1917.

2 [In footnote 43 of my study on Reinach in this volume I discuss what seems to me misleading and also what seems to me false in these sentences of Husserl. JFC]

lung und Anschauung sowie die grundlegende Klassifikation des ganzen theoretischen Aktreiches in stellungnehmende und erfassende Akte, die sich an die Trennung von Vorstellung und Urteil als Überzeugung und als Behauptung anschliesst und in ihrer fundamentalen Bedeutung nicht nur die Sphäre des negativen Urteils, mit der die Schrift sich ja eigentlich befasst, sondern auch die des Urteils überhaupt weit überragt und grundlegend für jede weitere Ontologie der Akte ist. Am meisten tritt diese Eigentümlichkeit der Reinachschen Geistesart in seiner vollkommensten Arbeit, "Die apriorischen Grundlagen des bürgerlichen Rechts," zutage. Das Thema ist ein rechtsphilosophisches, aber allerdings nicht *ein*, sondern *das* Grundproblem der Rechtsphilosophie. Hier findet der so vieldeutige Begriff des Apriori seine eindeutige klassische Formulierung. Die Idee des sozialen sowie die des vernehmungsbedürftigen Aktes, oder der konstitutiven Bedeutung gewisser Akte, durch deren Vollzug sich reale, objektiv gültige Relationen konstituieren, die der Willkür der Person entzogen sind, geht wie vieles andere weit über den Rahmen des Themas in seiner Bedeutung hinaus. Es sind Erkenntnisse, die für die ganze Ontologie des Aktreiches sowie der Sphäre der objectiv gültigen Gebilde, die sich durch den Vollzug gewisser Akte konstituieren, grundlegend sind.

Die Gedanken sind dabei, wie schon erwähnt wurde, in ihrem wesentlichen Kern so anschaulich und plastisch herausgearbeitet, dass man sofort auf ihnen weiterbauen kann, dass sie nicht nur ihrer Grundintention nach als Anregungen, als Ideenrichtungen, sondern ihrem vollen sachlichen Gehalt nach, ja sogar in ihrer hier vorliegenden Form zu dem streng objektiven und wahren Gut der Philosophie gehören. Diese sachliche Bedeutung kommt sowohl den stets sich findenden allgemeinen Erkenntnissen, die das Spezialthema weit überragen, zu als auch den das Spezialthema selbst betreffenden Erkenntnissen. Ausser den von ihm selbst originär entdeckten Wahrheiten enthalten Reinachs Arbeiten auch oft die volle Ausgestaltung und klassische Ausprägung fremder Entdeckungen, die er mit kongenialem Blick nicht nur verstanden, sondern aus ihrem tiefsten Kern heraus mit vollzogen hat, wie z. B. die Ausführungen über den Sachverhalt, dessen eigentliche Entdeckung von Husserl stammt. Alles atmet in gleicher Weise unmittelbare anschauliche Nähe zu der Welt der objektiven Gegenstände, wie absolute Treffsicherheit und Besonnenheit.

Aber auch rein methodisch bedeuten die Arbeiten Reinachs etwas geradezu Einzigartiges. Sie sind ein Muster unerbittlicher Konsequenz und Stringenz, ein Stein fügt sich mit zwingender Notwendigkeit auf den andern, nichts lenkt ab, nichts belastet unnötig. Aber diese Stringenz ist nicht eine gewaltsame, rein logische, gleichsam ein "more geome-

trico," die nur die formale Konsequenz einschliesst, ohne den Leser in die anschauliche objektive Struktur des Problems einzuführen. Diese ist es vielmehr, der Reinach stets gerecht wird und daher gelingt es seiner Darstellung, den Leser zu einem wirklichen Verstehen des jeweiligen Inhalts aus seinen objektiven Gründen heraus zu führen, ihn zu einem anschaulichen Tieferdringen von Schritt zu Schritt zwingend.

Wenn nun die sachliche und methodische Bedeutung dieser Arbeiten so gross ist, dass diese allein uns eine solche Ausgabe zur Pflicht macht, so muss andererseits mit allem Nachdruck betont werden, dass alle diese Arbeiten nicht im Stande sind, ein adäquates Bild von der Tiefe, Kraft und Fülle des Geistes zu geben, der in Adolf Reinach lebte. Nur wer ihn persönlich gekannt hat, seine Vorlesungen und Übungen gehört hat, ist im Stande, das richtige Verhältnis dieser Arbeiten zu seiner gesamten geistigen Welt zu ermessen. Die Arbeiten beziehen sich meist, wie schon gesagt, auf relativ spezielle Themata und ihre Behandlung ist durch eine besondere Subtilität und Restlosigkeit ausgezeichnet. Nichts wäre aber irriger, als Reinach deshalb für einen philosophischen Spezialisten zu halten, der nicht primär in den zentralsten Problemen der Welt und der Philosophie lebt und mit ihnen in anschaulicher Berührung steht, sondern in erster Linie auf abseitsliegende Spezialfragen eingestellt ist, dem das Reich der eigentlichen Hauptfragen nur in blasser Leere und ohne direkten persönlichen Kontakt gegeben ist. Er war vielmehr ein typisch-klassischer Geist, dem die objektive Rangordnung der Probleme stets gegenwärtig war, und dessen Interesse, und Art und Grad der Hingabe dieser objektiven Rangordnung völlig entsprach; dass er sich vornehmlich Spezialthemata wählte, hatte seinen Grund darin, dass er aus der Fülle des in ihm Lebenden sich die grossen zentralen Probleme für später vorbehielt, in einer freudig erregten Erwartung des Momentes, in dem er sich an sie heranwagen zu dürfen glaubte. Er fühlte alle seine Arbeiten als provisorisch, an seinen eigentlichsten Intentionen gemessen, und die Tatsache, dass sie aus der gesamten lebendigen Fülle der Probleme nur wie provisorische Niederschläge sich loslösten, prägt sich auch in der oben erwähnten Eigenart dieser Spezialarbeiten aus, dass in ihnen stets weit über das Thema hinausgehende fundamentale Erkenntnisse enthalten sind. Er wählte diese Spezialthemata in seinen Arbeiten also erstens nur, weil die Arbeiten an seiner Gesamtintention gemessen, etwas provisorisches waren, und aus Ehrfurcht vor der Grösse der Hauptfragen, für deren endgültige Behandlung er, gerade weil sie ihm vor allen am Herzen lagen, die volle Ausreifung seiner Kräfte abwarten wollte. Zweitens aber auch deshalb, weil er, wie wenige Philosophen, eine Fähigkeit zu dieser restlosen Durchdringung und stringenten, durchsichtig klaren Behandlung, auf die wir schon früher hinwiesen,

besass und er sich dieser Art der Ausarbeitung nur spezielleren Fragen gegenüber vorläufig gewachsen fühlte.

Die Themen seiner publizierten Arbeiten sind aber nicht nur speziell, sondern sie hängen auch relativ wenig zusammen. Bald logische Fragen, bald rechtsphilosophische, bald ontologische Probleme bilden den Gegenstand. Aber wiederum wäre nichts verfehlter als Reinach darum für ein vorzüglich formales Talent anzusehen, das bald da bald dort seine formalen geistigen Fähigkeiten und Kräfte spielen lassen könnte - mehr willkürlich einem Gebiet sich zuwendend als aus sachlicher Nötigung. Dies wäre ein Missverständnis der Reinachschen Geistesart, wie es grösser nicht gedacht werden kann. Seine Geistesart war vielmehr, wie ich schon sagte, eine klassische, bei der *alles* von der materialen Eigenart der objektiven Inhalte bestimmt wurde, und für eine irgendwie geartete Willkür keinerlei Platz war. Die Tatsache, dass seine Arbeiten nur Niederschläge der grossen in ihm lebenden geistigen Fülle waren, dass sie wie reife Äpfel, die bei einem leichten Schütteln vom Baume fallen, von der reifenden Fülle seines Geistes sich ablösten, macht die Themen scheinbar unzusammenhängend. Er lebte in der anschaulichen Hingabe an die Zentralprobleme, aber gerade deshalb und infolge der klassischen Allseitigkeit seiner Einstellung war es ihm möglich, bald dieses, bald jenes Spezialthema zu behandeln, die nur scheinbar nicht zusammenhängen, in Wahrheit aber Ausläufer der einen grossen, reichen Geisteswelt sind, die in ihm lebendig war. Hinter diesen scheinbar losen Spezialproblemen stand das durch die materiale Eigenart der Objekte bedingte anschauliche unmittelbare Verhältnis zu der Welt der Dinge, in dem die Einheit von Liebe und Erkenntnis unzerstört lebte, das in seiner Klassizität so allseitig war, dass bald da, bald dort etwas präzise gefasst und geformt werden konnte, wie ein reicher, umfassender Geist über dieses und jenes befragt, antwortet — aber alles aus der einen material zusammenhängenden Fülle heraus. Vielleicht wird auch der tief eindringende Leser die Welt durchfühlen, die, hinter den Arbeiten stehend, diese material verbindet. Wie bald aber die Zeit der Reife anbrechen und er sich dem Tiefsten innerhalb der eigentlichen Hauptprobleme zuwenden sollte, zeigen die im Felde begonnenen und nur in Notizen vorhandenen religionsphilosophischen Untersuchungen. Es liegt nicht im Geiste Reinachs, die Skizzen zu dieser Arbeit mit unter diese Sammlung aufzunehmen, da gerade seinem Bedürfnis nach restloser Durchdringung und plastischer Ausarbeitung die Veröffentlichung unfertiger Skizzen denkbar fern gelegen hätte. Aber ein Zitat aus diesen Skizzen soll hier seine Stelle finden, damit dem Leser ein Ausblick in dies völlig Neue, das in dieser Skizze im ersten Keim sich bildete und zugleich alle vorigen Intentionen zur Erfüllung bringen sollte, gewährt wird.

So wenig die folgenden Arbeiten also auch im Stande sind, ein adäquates Bild von Reinachs geistiger Bedeutung zu geben, und der Zweck der Publikation daher ein rein sachlicher ist — vielleicht wird der tiefdringende Leser doch aus ihnen fühlen, dass Reinach nicht ein vielversprechendes Talent war, sondern eine volle philosophische Persönlichkeit, die darum sachlich wie methodisch denen, die ihn wirklich gekannt haben, ein Vorbild ist, und die die Gewissheit bot, dass ihre eigentlichen, ganz ausgereiften Werke zu den grossen klassischen Werken der Philosophie gezählt hätten.

★ ★ ★ ★ ★

Unter vielen abgerissenen Notizen und Skizzen zu einer Religionsphilosophie, die uns aus Reinachs Aufzeichnungen erhalten sind, und die für einen engeren Kreis in Schreibmaschinenschrift zugänglich sind, findet sich ein längeres zusammenhängendes Stück über "das Absolute." Dieses ist es, das wir hier als *Zitat* anführen wollen — unter den Arbeiten wurde es seiner Unabgeschlossenheit wegen nicht aufgenommen — um dem Leser doch einen Blick in die neue Epoche von Reinachs Arbeit zu ermöglichen.

(Folgt "das Absolute")

Mit den religionsphilosophischen Untersuchungen, die Reinach in letzter Zeit so beschäftigten, beabsichtigte er keineswegs einen Ersatz für positive dogmatische Offenbarungsreligion zu geben. Weit entfernt von dem Philosophendünkel, der von seiner deistisch rationalen Warte auf die positive Offenbarung herabblickt, bekannte sich Reinach zur positiven christlichen Offenbarung und er war der positiven Offenbarung gegenüber durchaus ehrfürchtig eingestellt. In seinen religionsphilosophischen Arbeiten intendierte Reinach vielmehr einen Weg für diejenigen zu schaffen, die noch ganz ausserhalb stehen — die rein natürlich erkennbaren Wege zu Gott und zum Glauben aufzudecken, etwa im Sinne von Newmans Naturreligion — und so für die positive Offenbarung und Gnade, die natürlich allein das Entscheidende zu geben vermag, den Boden bereitend, wie dies ein Brief aus dem Feld an seine Frau beweist.

Mein Plan steht mir klar von Augen - er ist natürlich ganz bescheiden. Ich möchte von dem Gotteserlebnis, dem Erlebnis des Geborgenseins in Gott, ausgehen und nichts weiter tun als zeigen, dass man von dem Standpunkt 'objektiver Wissenschaft' nichts dagegen einwenden kann, möchte darlegen, was im Sinn jener Erlebnisse eingeschlossen liegt, inwiefern es auf 'Objektivität' Anspruch machen darf, weil es sich als Erkenntnis zwar eigener Art, aber in echtem Sinne darstellt, und schliess-

lich die Folgen daraus ziehen. Eine solche Darstellung kann dem wahrhaft Frommen *gar nichts* geben. Sie kann aber den Schwankenden stützen, der sich durch die Einwände der Wissenschaft beirren lässt, und den weiterführen, dem diese Einwände den Weg zu Gott versperren. Ich meine, eine solche Arbeit in aller Demut zu leisten, ist heute das Wichtigste, viel wichtiger als in diesem Kriege mitzukämpfen. Denn wozu dieses ungeheure Geschehen, wenn es die Menschen nicht näher zu Gott heranführen wird?

So berührte Reinach mit seinen letzten Arbeiten die Sphäre des wahren Lichtes, das, wie wir hoffen, ihn voll umfließen wird, dort wohin er uns vorausgegangen.

"Et lux perpetua luceat ei!"

English translation of von Hildebrand on Reinach

With this edition of the collected writings of Adolf Reinach the friends and students of the deceased do not intend to erect a monument to him out of the deep gratitude which they feel, but rather to make available to a broader public these beautiful and profound and in part foundational studies, which have hitherto, being dispersed in journals and yearbooks, been available only to a few, and that with effort. It is, then, a purely philosophical reason which makes us feel obliged to prepare this edition. It would be unforgivable not to preserve the works of Reinach in an externally fixed form for our contemporaries and for posterity, for they are simply unique in their clarity, depth, and precision, and are no less important in their way of proceeding than in their results. The transitory character of the journal and yearbook form is so little appropriate to the enduring importance of these essays, which are in no way just written *ad hoc*, that this purely objective consideration would have sufficed to compel us to issue this volume.

It is characteristic for Reinach that in each of these studies, even if they treat of rather particular problems, Reinach achieves and formulates, often for the first time, general foundational insights. And these insights are at the same time in most instances so precisely formulated that nothing more is needed for us to build on them. Thus the short study entitled, "The Most General Principles of the Inference according to Kant," which is on one level only a critical study of Kant, clarifies one of the basic problems of logic, the problem of the so-called general object, by distinguishing between essence and the indeterminate individual object which participates in the essence. In the same way his paper, "Kant's Understanding of Hume's Problem," in its aim apparently so very special-

ized, clarifies the nature of authentic causality by distinguishing between modal and material necessity. And in the same way his paper, "Towards the Theory of the Negative Judgment," clarifies the nature of presentation (*Vorstellung*) and intuition (*Anschauung*), and makes the foundational distinction within the sphere of theoretical acts between acts in which a position or stance is taken, and acts in which something is grasped or apprehended. This distinction, made in connection with the distinction between presentation and judgment (both in the sense of conviction as well as of assertion), has a fundamental importance which not only far surpasses the sphere of the negative judgment, the subject of this paper, but also surpasses the sphere of the judgment in general and is fundamental for every ontology of acts of the person. This characteristic of Reinach's mind comes out most clearly in his most perfect work, "The Apriori Foundations of the Civil Law." His theme here is one belonging to the philosophy of law, but what he deals with is not just *any one* but rather *the* problem of legal philosophy. The so ambiguous concept of the apriori finds here its definite and classical formulation. The idea of the social acts, with their characteristic need of being heard by the addressee, or of the constitutive importance of certain acts through the performance of which are constituted real, objectively valid relations, withdrawn from our arbitrariness, all this and other ideas as well have an importance which goes far beyond the scope of Reinach's legal theme. We have here insights which are fundamental for the whole ontology of the sphere of personal acts as well as of the sphere of those objectively valid structures which are constituted by the performance of certain acts.

As we already mentioned, the ideas in these writings are in their essential core so clearly brought to evidence and so well worked out that one can right away build on them. They are not, in their fundamental intention, mere suggestions, or intellectual tendencies, but rather in their full content, indeed even in the form in which they are here expressed, they belong to the strictly objective and true results of philosophy. This importance belongs not only to the general insights which constantly come up and far surpass Reinach's particular theme, it also belongs to the insights which are proper to the given particular theme.

Besides his own original discoveries of truth Reinach's works also often contain the full working out and the classical formulation of discoveries made by others, which he not only understood from within but also thought through in their deepest core. An example of this is his discussion of states of affairs, the real discovery of which derives from Husserl. Everything breathes in the same way the most immediate intuitive closeness to the world of objective beings, as well as the greatest thoroughness, thoughtfulness, and sureness in seizing the point.

But even in a purely methodical respect the works of Reinach represent something truly unique. They are a model of relentless stringency and working out of consequences — one stone is joined with compelling necessity to the other, nothing distracts, nothing burdens the text by being superfluous. But this stringency is not a forced and merely logical stringency, it is not a proceeding *more geometrico*, as it were, which would involve only formal deductive consequence without leading the reader into the intuitively given objective structure of the problem. This objective structure is rather that which Reinach always does justice to, which is why his presentation succeeds in drawing the reader into a real understanding of the given subject in terms of its objective principles, compelling the reader to penetrate ever more deeply into the evidence of the thing.

Now if the substantive and the methodical importance of these papers is so great that this alone would oblige us to prepare such an edition of them, we have on the other hand to stress emphatically that all these studies are not capable of giving an adequate image of the depth, power, and fullness of spirit which lived in Adolf Reinach. One had to know him personally and to attend his lectures and seminars in order to be able to assess the right relation of these works to his overall spiritual world. As we were saying, these works refer for the most part to relatively specialized themes, and the treatment of them is distinguished by a special subtlety and thoroughness. But nothing would be more mistaken than to conclude that Reinach was a philosophical specialist who does not live in the most central problems of the world and of philosophy and does not have an intuitive contact with them but who is in the first place concerned with peripheral specialized questions and who does not have a direct and personal but only a weak and abstract contact with the realm of the really central questions. He was rather a typically classical mind who was constantly mindful of the objective hierarchy of problems and who completely corresponded to this objective hierarchy in the kind and degree of his interest and commitment. The reason why he was drawn to narrowly focused subjects is that, feeling the fullness of his inner life, he wanted to reserve for later the treatment of the great central problems, in eager anticipation of the moment when he would feel ready to attempt to deal with them. He felt that all of his papers, measured against his ultimate intentions, were provisional, and the fact that they are only preliminary expressions of the fullness of problems and issues which was alive in him, shows itself in the already mentioned characteristic of these papers, namely that they always contain fundamental insights which go far beyond their immediate theme. We can say, then, that he chose these specific themes in his papers, first because these papers were, in light of

his overall intention, only provisional, and because he felt reverence in face of the greatness of the central questions, for the definitive treatment of which, precisely because he was so drawn to it, he wanted to await the full maturation of his powers. Secondly, because he possessed, as few philosophers have possessed, the ability, referred to above, of penetrating issues thoroughly and completely and of dealing with them in a stringent and transparently clear way, and for the time being he felt that in this way he could work out only more specific questions.

The themes of his published papers are not only specific, but they are relatively unrelated one to another. The subject is now questions of logic, now questions of legal philosophy, now of ontology. But again, nothing would be more mistaken than to conclude that Reinach had a primarily formal talent and that he could let his intellectual abilities and powers play freely in any subject matter he happened to choose — turning to a given subject matter more arbitrarily than being drawn to it by its proper nature. One could hardly conceive of a greater misunderstanding of Reinach's mind. As has already been said, his mind was a classical one for which *everything* was determined by the particular character of the given object and in which there was no place at all for any kind of arbitrariness. It is precisely the fact that his studies are only partial expressions of the great spiritual fullness which lived in him, that they grew out of the maturing fullness of his mind like ripe apples which fall from a tree when it is only lightly shaken, it is this fact that makes his subjects seem to be unconnected among themselves. He was deeply committed to the central problems, but precisely for this reason and because of the classical universality of his mind, he was able to treat now this, now that specific theme; these themes are only apparently unrelated, in reality they all derive from one and the same rich spiritual world which lived in him. Behind these apparently unrelated specific problems was an immediate, intuitive relation to the world of beings, a relation conditioned by their distinctive character and in which the unity of love and knowledge was intact and which was so classical and universal that even in the most various areas he could grasp precisely and articulate ideas, somewhat like a vast and rich mind responds to questions about this and that — but always out of the same qualitatively unified fullness. Perhaps the penetrating reader will sense something of the world which lies behind these studies and which qualitatively unites them.

But how soon the time of his full maturity would arrive and he would turn to what is deepest in the central problems of philosophy, is shown by the reflections in the philosophy of religion which he began on the front during the war and which only exist in the form of sketches. It would not be in the spirit of Reinach to include these sketches among these collected

writings; the publication of unfinished sketches would be as foreign as could be to one who had the need to penetrate his ideas thoroughly and work them out plastically. But one passage from them should find a place in this introduction, so that the reader can get a glimpse of the utterly new material which began to develop, as an opening seed, in this sketch and which at the same time should bring to fulfillment all his previous intentions and strivings.

The following papers are, therefore, unable to convey an adequate image of Reinach's intellectual stature, and we publish them simply for the sake of their content. But perhaps the penetrating reader will be able to gather from them that Reinach was not just someone with very promising talent but rather a full philosophical personality. This is why those who really knew him saw in him a thinker exemplary both in his substantive results as well as in his way of proceeding, and why they were certain that his fully mature works would be reckoned among the great classical works of philosophy.

★ ★ ★ ★ ★

Among the many detached notes and sketches towards a philosophy of religion which were preserved for us in Reinach's notebook and which are available in typescript for his closest circle, there is a somewhat longer unified piece on "the Absolute." This is what we want to introduce here as a *quotation* — it was not included among his papers because of its incompleteness — so as to make it possible for the reader to get an idea of the new era in Reinach's work. [*The passage which was to follow here was also included by Conrad-Martius in her introduction to the Gesammelte Schriften, Niemeyer, 1921, pp. XXXI-XXXVI; it will be translated in a future issue of Aletheia dealing with the philosophy of religion. JFC*]

With these investigations in the philosophy of religion, which occupied him so intensively in his last years, Reinach in no way intended to offer a substitute for a positive revelation expressed in doctrines. He was far from the pride of the philosopher who, from the lofty point of view of his deistic rationalism, looks down on any positive revelation; he professed his belief in the positive revelation of Christianity and was deeply reverent towards this revelation. In his work in the philosophy of religion Reinach instead intended to open a way for those who still stand apart from all religion, to disclose the strictly naturally knowable ways to God and to faith, such as those which belong to what Newman calls natural religion, and in this way to prepare the ground for positive revelation and for grace, which alone can provide that which is most important. This intention of Reinach is expressed in a letter to his wife from the front:

I see my plan clearly before me — it is of course very modest. I want to start from the experience of God, the experience of being sheltered in God, and to do nothing more than to show that from the point of view of "objective science" one cannot raise any objection to this. I would like to show what is enclosed in the meaning of these experiences, and to what extent this makes a claim to "objectivity," since it presents itself as authentic knowledge, even if knowledge of a unique kind, and finally to draw the consequences from this. Such an expositor has *nothing at all* to give to the really devout believer. But it can give support to someone who has been shaken, who has been confused by the objections of science, and it may lead on someone whose way to God has been blocked by these objections. I think that to carry out such a work in all humility is the most important thing which can be done today, far more important than to fight in this war. For what meaning does this tremendous upheaval have if it does not lead men closer to God?

And so in his last work Reinach came in touch with the realm of true light, which, as we hope, fully encompasses him in the place where he has gone ahead of us.

Et lux perpetua luceat ei.

Dietrich von Hildebrand

From the passage in von Hildebrand's Selbstdarstellung (in Pongratz, ed., Philosophie in Selbstdarstellungen, II, Hamburg: Felix Meiner, 1975), where he contrasts Scheler and Reinach as philosophical personalities.

I met Reinach around Easter of 1907 [probably in Munich, JFC]. In him I encountered the philosopher who made a profound impression on me by his unconditioned love of truth, his intellectual power, his thoroughness, and his incomparable clarity. It was a great gift for me to discuss with him many philosophical questions. Later on in Göttingen, from 1910 on, he was my only teacher. . . . (*Von Hildebrand proceeds to speak of Scheler, and then he says:*) This was a completely different experience from the encounter with Reinach. Reinach's noble and upright personality won my boundless esteem and awakened an unconditional confidence in him as a person and as a philosopher. Scheler, by contrast, intoxicated me with the wealth and challenge of his ideas and the charm of his personality. . . . Scheler lived from his ideas and intuitions (*Einfälle*). He wrote down his ideas, of which he had tremendously many. He did not have a critical

attitude towards these ideas. He never pressed on to a definitive confrontation of them with what is given in experience in the slowly progressing and relentless working out of what is given. . . . With him the passion of philosophizing and of unfolding his rich genius was stronger than the unconditioned and reverent love of truth. He was in this the very opposite of Reinach, who investigated being in the most thorough way and who was motivated only by a burning love of truth. (pp. 78-80)

Edith Stein

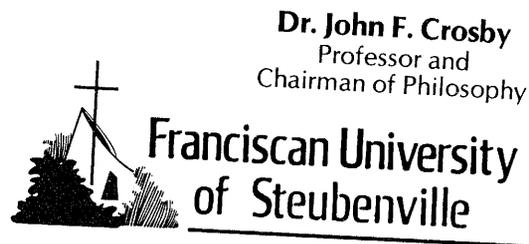
Selections from her memoirs, Aus dem Leben einer jüdischen Familie (Freiburg: Herder, 1965), especially from Chapter 7, "My Years as a Student in Göttingen."

Dear Göttingen! I think that only someone who studied there in the years between 1905 and 1914, the brief period during which the Göttingen school of phenomenology flourished, can appreciate how much this name means to us. (p. 165)

I have now said enough about the many incidental circumstances of life in Göttingen and I finally come to the main thing which had led me to Göttingen: phenomenology and the phenomenologists. In Breslau Mos had given me the instruction: "When one comes to Göttingen, one goes first of all to Reinach; he then takes care of everything else." Adolf Reinach was *Privatdozent* for philosophy. He and his friends Hans Theodor Conrad, Moritz Geiger, and several others were originally students of Theodor Lipps in Munich. After the appearance of the *Logische Untersuchungen* they had insisted that Lipps discuss this work with them in his seminar. After Husserl was offered a position in Göttingen, they went there together in 1905 to be initiated by the master himself into the mysteries of the new science. This was the beginning of the "Göttingen school." Reinach had been the first of these students to complete his *Habilitation* in Göttingen, and was now Husserl's right hand. He was above all the mediator between Husserl and the students, for he understood extremely well how to deal with other persons, whereas Husserl was pretty much helpless in this respect. He was at that time about 33 years old. (p. 172)

After this first meeting (with Reinach) I was very happy and filled with a deep gratitude. I felt as if no one had ever approached me with such a pure goodness of heart. It seemed to me obvious and only natural that one's closest relatives and friends who have known one for years would treat one lovingly. But here there was something quite different. It was like a first glimpse of a whole new world. (p. 173)

I was quite astonished when he (Franz Kaufmann) once told me that on visiting Reinach for the first time Reinach "almost threw him out" and emphatically refused to admit him into his seminars. Until now the thought had not even crossed my mind that the goodness with which I was received could be something which was shown only to me personally. When I later took part in Reinach's seminars I found the explanation. For all his goodness and friendliness he emphatically rejected any arro-



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gance when he encountered it. Kaufmann may well have presented himself to Reinach with considerable self-consciousness. (p. 180)

For me the winter semester was even more enriching than the summer semester. Husserl held his great course on Kant. But above all my course schedule allowed me to take Reinach's course (Introduction to Philosophy) and his seminars for advanced students. In the summer semester I had only attended his course occasionally as a guest, whenever I happened to be free at that time. It was a sheer joy to hear him. Though he had a manuscript before him, he seemed hardly to look at it. He spoke in a lively and cheerful tone, lightly, freely, and elegantly, and everything was transparently clear and compelling. One had the impression that it did not cost him any effort at all. When later on I was once able to look at these manuscripts I noticed to my extreme amazement that they were from beginning to end a complete text. Under the last lecture of the semester he used to write: "Finished, thank God." All these brilliant performances were the result of unspeakable labor and pain.

Reinach held his seminars at home. Since we had Husserl's class immediately before, it took a good run of twenty minutes to reach the Steingraben. The hours spent in his beautiful study were the happiest of my entire stay in Göttingen. We students probably all agreed that we were here more than anywhere else learning about philosophical method. Reinach discussed with us the questions which were occupying him in his own research, in that winter semester he was working on the problem of motion. It was not a situation where he lectured and we took notes, but rather a searching together, similar to what we had in the Philosophical Society, but at the hand of a sure leader. Everyone had a deep reverence for our young teacher, and one did not readily venture a hasty observation; I would have hardly dared to open my mouth without being asked. Once Reinach posed a question and wanted to know what I thought of it. I had been making a great effort to follow along, and I expressed my view with great shyness in a few words. He looked at me in a very friendly way and said: "That's what I thought too." I could not have imagined a higher distinction. But these evenings too were a torture for him. When the two hours were over, he did not want to hear the word "motion" any more. We students raised certain objections to him at that time, and these eventually compelled him to give up completely his original point of view. After Easter he began again from the very beginning. I was later able to discern this break too in his written drafts. (pp. 194-95)

A short time before Christmas (1915) I received a letter from Pauline Reinach: her brother was coming home for the holiday on leave; they all thought it would be very nice if I too would come to Göttingen. . . . Seeing

Reinach again had always been for me equivalent to peace. It was almost too wonderful really to come true. (p. 266)

Reinach had become broad and strong; military service did him good. I really got to know Mrs. Reinach now. Before I had come almost entirely as a student to my teacher, but now I belonged to the innermost circle, to "the grievors of the first order," as Reinach once said in jest as he imagined how it would be if he were killed in the war. (p. 268)

Hedwig Conrad-Martius

From her introduction to Reinach's *Gesammelte Schriften* (Halle: Niemeyer, 1921), pp. V-XXXVII.

Adolf Reinach's work, as it is now available in his collected writings, possesses the convincing power of absolute objectivity. One has only to be endowed with a little feeling for philosophical spirit in this pure sense, in order to experience it intensely here in each writing and in each word. The clarity which is a distinguishing mark of his style of research and expression, dispenses us from the task of offering any interpretation of his meaning. (p. v)

With the concept of law in general (and not just in its loftiest realization as essential law of being) we touch upon what is perhaps the most central category for the overall spiritual makeup of Adolf Reinach. There must have been nothing which was more repulsive to his soul than that bad arbitrariness which, as a result of an empty and therefore unfruitful passion to assert oneself as 'subject' everywhere, cannot bear or recognize any objective bonds. Both in his practical action as well as in his theoretical work he lived out of an attitude of always simply and loyally bowing before objective (valid) law. This did not come from a pedantic feeling of duty but rather from realizing that the passionate forces of the soul and of the spirit can grow and bear fruit only when they are held in control and put in the service of something higher. Here we have the reason why the essence of the state was for him always a powerful experience and at the same time one of the most basic problems, and also why jurisprudence had such an attraction for him that he was led to complete a degree in law: jurisprudence considered as the theoretical discipline of the bonds . . . which validly regulate the social life of man. (pp. xix-xx)

When we see how Reinach . . . took such delight in giving himself to and living in everything which, detached from the conditions of space and time and unburdened by factual existence, possesses a pure, inviolable, and absolute being, then and only then does his special love for Plato appear in the right light. In his lectures he mentioned no other philosopher more often and with greater love and reverence than Plato. He called him the greatest of the ancient philosophers, and perhaps the greatest of all time. Reinach, who developed his gift for subtle analysis as a student of Theodor Lipps (who was his first philosophical teacher) and who then in the works of Edmund Husserl and as his personal student was overwhelmed by the experience of the great breakthrough to objective being, was in his own central philosophical position and in his

disposition as a philosopher a kindred spirit of Plato. This of course not in the sense of any particular Platonic doctrine (he was not a "Platonist"!), but rather only in the particular philosophical eros which animated him. And in this connection we venture to touch upon something which throws the right light on everything which we have said about Reinach's philosophical personality. A person may, in his naivete, be puzzled at the characteristic union in Plato of, on the one hand, an extremely artistic disposition, and, on the other, a preference for those abstract analyses and trains of thought which make up the strictly philosophical Plato. . . . In Adolf Reinach one saw the same mixture of the most intensive capacity to experience and to receive impressions through the senses, with the strictest sobriety in the investigation of objective reality. His spiritual life emerged from a dark origin (*aus einem dunklen Grund*), and this gave his being that characteristic depth and heaviness which one always sensed in him. He was in his empirical makeup an unsheltered man. In giving himself to that which is objective and withdrawn from all arbitrariness and is in every sense unconditioned, he may well have experienced the same satisfaction and purification of soul which has been portrayed so forcefully by Plato. Let us also mention this characteristic fact: though in his search for knowledge he stopped at that which cannot be rationally resolved, he was an extremely good judge of character in the sense of being able to grasp another person in the most central and ineffable core of his personal being. He was a *knowing* person, to whom naivete was foreign. (pp. xxvi-xxvii)

While serving in the war, the knowledge of God came over him. It goes without saying that up until this time he regarded with unconditional reverence and reserve realms of being which he thought must somewhere or other have their proper place but which were not accessible to him personally. But now this new reality, which is absolute in quite another sense, overwhelmed him with such fullness and power that his mind was at first exclusively rivetted on it. As we see, the central religious experience for him was the feeling and the knowledge of absolute shelteredness. That this had nothing to do with a vague pantheistic feeling, that the metaphysically objective and real source of such experience was really the source of his experience, can be seen from the clear and definite relation which he from now on had to Christ. For only in the experience of Christ can the infinite distance and majesty of the divinity — here the overwhelmed human being cannot pass beyond the silence of adoration — be transformed into the infinite closeness through which the Christian in prayer knows that he is personally heard and drawn up to God. (p. xxvii)

THE
APRIORI FOUNDATIONS
OF THE CIVIL LAW

by Adolf Reinach

Translated by
John F. Crosby

TRANSLATOR'S FOREWORD

I wish to thank Prof. Josef Seifert of the International Academy of Philosophy, and Prof. Wolfgang Waldstein, chairman of the Department of Roman Law in the Law Faculty of the University of Salzburg, for the help they gave me in making this translation.

I also wish to thank the Translation Program of the National Endowment for the Humanities for a generous grant which enabled me to make the translation and to write the critical study which is here published for the first time, "Reinach's Discovery of the Social Acts."

As for Reinach's footnotes, I have kept them just as they appear in his text, with the exception of the one originally English work from which he quotes below, Hume's *Treatise on Human Nature*, which will of course be quoted according to the English original. I have added some notes of my own which have the purpose of explaining my translation of some important concepts, or of offering a remark on what Reinach means, or of making a cross-reference. More properly critical remarks I have reserved for my study of Reinach which immediately follows the translation. The notes which I have added are printed in italics and enclosed in brackets.

Reinach's monograph was first published in the first issue (1913) of Husserl's *Jahrbuch für Philosophie und phänomenologische Forschung*, pp. 685-847; reprinted in Reinach's *Gesammelte Schriften* (Halle: Niemeyer, 1921), pp. 166-350; reprinted again under the title *Zur Phänomenologie des Rechts* (Munich: Kösel, 1953), 215 pp. What follows is the first English translation of Reinach's monograph, and in fact, as far as I can tell, the first translation of it into another language, except for the Spanish translation of José Luis Alvarez, *Los Fundamentos Apriorísticos del Derecho Civil* (Barcelona: Librería Bosch, 1934), with a foreword by José M.a Alvarez M. Taladriz. By the way, this translation includes a valuable bibliography of most, if not all, of the German works in philosophy and jurisprudence as of 1934 which deal with Reinach's monograph.

John F. Crosby

CONTENTS

INTRODUCTION

§1 The idea of the apriori theory of right (*Rechtslehre*)

CHAPTER ONE

Claim, Obligation, and Promise

§2 Claim and obligation

§3 The social acts

§4 The act of promising as the origin of claim and obligation

CHAPTER TWO

Basic Themes of the Apriori Theory of Right

§5 Rights and obligations. Property

§6 The apriori laws determining the origin of relations of right

§7 Representation

CHAPTER THREE

The Apriori Theory of Right and the Positive Law

§8 Enactments and the propositions which express enactments

§9 The positive law

§10 The apriori theory of right and the natural law

INTRODUCTION

§1 The idea of the apriori theory of right (Rechtslehre)

The positive law is caught up in constant flux and constant development. Legal systems arise and pass away and change. There is hardly any enactment of a positive code which is not absent in another code, and there is none at all which could not be conceived as absent in another code. What is decisive for the development of law are the given moral convictions and even more the constantly changing economic conditions and needs.

And so the propositions found in the positive law are quite essentially different from the propositions proper to science (*Wissenschaft*). That $2 \times 2 = 4$ is a fact which is perhaps not understood by some persons but which exists independently of being understood, independently of being posited by men, and independently of the lapse of time. By contrast, the fact that a creditor can transfer his claims without the consent of the debtor belongs to our present-day law, but it had no validity in other legal periods. There is clearly no sense in speaking of truth and falsity as proper to this proposition as such. Certain economic exigencies have moved the makers of law to posit it. One can call it useful and in this sense "right." But at other times the opposite proposition may have been "right."

In light of considerations such as these we can understand the view of the positive law which we can surely take as the view which is generally accepted today. One thinks that there is simply no such thing as legal principles which stand in themselves and are timelessly valid, such as we find for instance in mathematics. Of course it is possible to gather the basic ideas of a positive code from its particular enactments by a kind of induction. But even these basic ideas can yield to others in the future. Of course it is possible to propose new guidelines for the development of the law. But these are based on the politics of law and are valid only as long as the circumstances of the time remain the same. Finally, it may be possible — though here one will of course raise serious objections — to determine certain principles to which every system of law as law is subject, independently of the given economic conditions. But these principles can always only be formal. The law necessarily derives its constantly changing content from the content of the times.

Just as the legal propositions so also their elements, the legal concepts, are according to this view created by the makers of law; there is no

sense in speaking of these concepts as having any being which is independent of the given system of positive law to which they belong. Of course it happens that objects of nature, whether physical or psychic nature, are mentioned in the legal language. In our law one speaks of weapons and dangerous instruments, of state of mind, premeditation, error, etc. Here we have to do with extra-legal concepts which the law has to take over. But as to specifically legal concepts such as property, claim, obligation, representation by a proxy, etc., these have not been found and taken over by the law but have been produced and created by it.¹ There were periods in the history of law during which the concept of representation was unknown. Economic conditions have forced us to devise it.

If we prescind from all positive law, there remains from the legal point of view, according to this conception, nothing but nature out there and man with his needs, his desiring, willing, and acting. Certain things may be subject to his power. Perhaps his strength and energy have helped him to attain this superiority. But the strength of the individual can never reach so far as to secure him against all the dangers and attacks with which he is threatened by his greedy and aggressive fellow men. At this point there arises a new task, the task of the collectivity, namely to mark off and to protect each individual's sphere of dominion over things: the positive law appears on the scene. When the dominion of a man over a thing is protected by the law, it is called property. So both the property itself as well as the norms which regulate the conditions of its coming to be and the manner of its exercise, are products of the positive law.²

Where two persons each have an object in their possession and each of the persons wants what the other has and is willing to give up his own thing for the sake of getting it, the immediate exchange of the things is the indicated way of satisfying the desire of both. Something similar holds for the exchange of services, or of things for services, etc. But what about the case in which the one party can do his part right away but the other can do his only later? Do we have to give up here any and every kind of exchange? That would mean an unbearable restriction on economic activity. But on the other hand the position of the party who has already performed his part and is waiting for something in return, would be greatly endangered. In most cases the other party, who has what he wants, would probably take little interest in the wants of the first party. Here too, we can look for help only from a positing of the positive law. The individual men are forced to carry out what they have led others to expect. The positive law produces by its all-encompassing power a claim in the one party and an obligation in the other. Only because the positive law compels fulfillment do contracts have binding force. The further

problem which the old philosophy of natural law saw in the binding force of promises and contracts, is on this view in reality an empty pseudo-problem.³

This is one way in which one has tried to explain the emergence of legal concepts and legal norms. One has also tried it in other ways. The essential point, however, on which there is general agreement, is this: all legal propositions and concepts are *creations* of the lawmaking factors, and it makes no sense to talk about any being of theirs which would be independent of all positive law.

Winning as this view is at first glance, we are convinced that we have to oppose it with a fundamentally different one. We shall show that the structures (*Gebilde*) which one has generally called specifically legal (*speziell rechtlich*)⁴ have a being of their own just as much as numbers, trees, or houses, that this being is independent of its being grasped by men, that it is in particular independent of all positive law. It is not only false but ultimately meaningless to call legal entities and structures creations of the positive law, just as meaningless as it would be to call the founding of the German empire or some other historical event a creation of historical science. We really do find what one has so emphatically denied: the positive law *finds* the legal concepts which enter into it; *in absolutely no way does it produce them.*

We will on this basis have to go farther. As we just said, legal entities such as claims and obligations have their independent being, just as houses and trees do. To these latter we can ascribe all kinds of things which we can find in the world outside of us through acts of sense perception and observation: a tree is grasped as blooming, a house is painted white. These predications are not grounded in the character of tree and house as such. Trees do not have to bloom, houses can have other colors — what we grasp in those perceptions are not necessary states of affairs, nor even general states of affairs, insofar as the predicates are referred only to this individual tree or this individual house. We do not have the right to extend them to everything which is tree or house. It is quite different with the propositions which hold for those legal entities. Here we do not just stand before a world in which we can observe all kinds of states of affairs; here a different and deeper possibility is available to us. In immersing ourselves in the essence of these entities, we spiritually see what holds for them as a matter of strict law; we grasp connections in a manner analogous to the way in which we know when we immerse ourselves in the nature of numbers and of geometrical forms: that a thing is so, is grounded here in the essence of the thing which is so. It is therefore no longer a matter, as it was above, of individual and accidental states of affairs. Even when I predicate some-

thing of a particular legal entity (*rechtliches Gebilde*) which exists as real at some time, the predication does not refer to the entity as individual but rather as an entity of this kind. But this means that the predication is valid for *absolutely everything* which is of this kind, and that it *necessarily* belongs to every such thing, and that it could not fail, not even once, to hold for any particular case. That certain objects lie next to each other in the world, is an individual and accidental state of affairs. That a claim lapses through being waived, is grounded in the essence of a claim as such and holds therefore necessarily and universally. *Apriori statements are valid for legal entities and structures.* This apriori character does not mean anything dark or mystical, it is based on the simple facts which we just mentioned: every state of affairs which is in the sense explained general and necessary is in our terminology apriori.⁵ We shall see that there is a vast realm of such apriori statements, which can be strictly formulated and which have an evidence enabling them to be known by insight, and which are independent from the consciousness which grasps them and above all independent from every code of positive law, just as are the legal entities and structures to which they refer.

We are well aware of the widespread prejudices which, especially among jurists, are opposed to this point of view. And we understand quite well how it came to these prejudices. But we ask that the reader try to put off the accustomed attitude and to approach the things themselves unburdened with preconceptions. Above all we have to defend ourselves from the very beginning from the misunderstanding which will surely plague us more than any other: from the misunderstanding that we mean to defend the apriori character of the contents of positive legal codes. This is far from our intention; it is a point of view which would be for us even more absurd than for many jurists and philosophers. For we deny emphatically that positive legal norms can be taken as judgments in any sense. The difference between apriori and empirical has no application to them.

We of course fully recognize that the positive law makes its enactments in absolute freedom, exclusively with a view to economic necessities and to the given moral convictions and unbounded by the sphere of apriori laws which we have in mind. The positive law can deviate as it likes from the essential necessities which hold for legal entities and structures — though it is of course a problem for itself to make understandable how such deviations are possible. We only assert one thing, though on this we lay great stress: the basic concepts of right have a being which is independent of the positive law, just as numbers have a being independent of mathematical science. The positive law can develop and transform them as it will: they are themselves found by it and not

produced by it. And further: there are eternal laws governing these legal entities and structures, laws which are independent of our grasp of them, just as are the laws of mathematics. The positive law can incorporate them into its sphere, it can also deviate from them. But even when it enacts the very opposite of them, it cannot touch their own proper being.⁶

If there are legal entities and structures which in this way exist in themselves, then a new realm opens up here for philosophy. Insofar as philosophy is ontology or the apriori theory of objects, it has to do with the analysis of all possible kinds of object as such. We shall see that philosophy here comes across objects of quite a new kind, objects which do not belong to nature in the proper sense, which are neither physical nor psychical and which are at the same time different from all ideal objects in virtue of their temporality. The laws, too, which hold for these objects are of the greatest philosophical interest. They are apriori laws, and in fact, as we can add, synthetic apriori laws. If there could hitherto be no doubt as to the fact that Kant limited much too narrowly the sphere of these laws, there can be even less doubt after the discovery of the apriori theory of right. Together with pure mathematics and pure natural science there is also a pure science of right (*reine Rechtswissenschaft*), which also consists in strictly apriori and synthetic propositions and which serves as the foundation for disciplines which are not apriori, indeed even for such as stand outside the antithesis of apriori and empirical. Its propositions are of course not simply taken over without change, as are the statements of pure mathematics and pure natural science. Though they make our positive law and our positive legal theory possible at all, they enter into them only as transformed and modified.

Just as we sharply stress the independence of the positive law with respect to the apriori theory of right, so we have to stress the independence of the latter with respect to the positive law. There are after all vast areas of social life which are untouched by any positive legal norms. Here too we find those specifically legal (as they are usually called) entities and structures, whose independence from the positive law we assert, and here too of course those apriori laws also hold. Just as the general mode of being of these entities is of interest for ontology and epistemology, so their content is important for sociology. Together with certain other laws they form the apriori of social intercourse, even for areas of it which fall outside the scope of any positive law.

Legal entities and structures exist independently of the positive law, though they are presupposed and used by it. Thus the analysis of them, the purely immanent, intuitive clarification of their essence, can be of importance for the positive-legal disciplines. The laws, too, which are

grounded in their essence, play a much greater role within the positive law than one might suspect. One knows how often in jurisprudence principles (*Sätze*) are spoken of which, without being written law, are "self-evident," or "follow from the nature of things," to mention only a few of these expressions. In most cases it is not a matter, as one thought, of principles whose practical usefulness or whose justice is fully evident, but rather of essential structures investigated by the apriori theory of right. They are really principles which follow from the "nature" or the "essence" of the concepts in question.

We have already stressed that the positive law is fully free to emancipate itself from the apriori of the general theory of right; the possibility of this too we will make understandable on the basis of apriori laws. But in the factual development of legal codes we often find the tendency to cling to this apriori; the freedom proper to the positive law is not exercised with full force from the beginning. Only this, as it seems to us, makes understandable why certain legal institutions have developed so slowly and with such difficulty. And so we may hope that the apriori theory of right can here and there make a clarifying contribution even to the history of law. But it seems to us quite indispensable for understanding the positive law as such. As long as one thinks that the positive law produces all concepts of right by itself, one can only encounter a perplexity here. The structure of the positive law can only become intelligible through the structure of the non-positive sphere of law.

In the following we will above all treat of the apriori theory of right as such and will put aside its application to specific questions of jurisprudence. We are entitled to expect, on the basis of what has been said, that one will not try to stop us with objections which have all too often been raised against a philosophical treatment of problems of right and which stress — what is obvious enough — the constant development of and the unbounded possibilities of change in the positive law. We precisely have the intention to make understandable on the basis of the apriori sphere certain lines of legal development. But then one should not throw up to us this very development as an objection. For too long one has rigidly insisted on this one point and thereby obscured the sight of a beautiful and rich world.

CHAPTER ONE

Claim, Obligation, and Promise

§2 Claim and obligation

Let us begin by treating a particular problem in the vast realm of the apriori theory of right. We want to try thereby to find a first access to this realm, and only then will we try to survey it in its entirety.

One man makes a promise to another. A curious effect proceeds from this event, an effect quite different from the effect of one man informing another of something, or making a request of him. The promising produces a unique bond between the two persons in virtue of which the one person — to express it for the time being very roughly — can claim something and the other is obliged to perform it or to grant it. This bond presents itself as a result, as a *product* (so to speak) of the promising. It can, according to its essence, last ever so long, but on the other hand it seems to have an inherent tendency towards meeting an end and a dissolution. We can conceive of different ways which can lead to such a dissolution. The thing promised is *performed*; in this way the bond seems to find its natural end. The promisee *waives*; the promisor *revokes*. Even in this way, though it seems to us less natural, a dissolving of the promise can sometimes occur.

All of this can strike us as obvious, or as curious, according to the attitude in which we approach it. It is "obvious" in that it is something which everyone knows, which everyone has passed by a thousand times, and which one can now pass by for the thousand and first time. But just as in other cases it happens that our eyes suddenly open to something which we have long been familiar with, and that we really see for the first time in all its proper character and in its distinctive beauty what we have already seen many times, so it can happen here too. Here is something which we know as promising, or at least think we know. Through the act

of promising something new enters the world. A claim arises in the one party and an obligation in the other. What are these curious entities (*Gebilde*)? They are surely not *nothing*. How could one eliminate a nothing by waiving or by retracting or by fulfilling? But they cannot be brought under any of the categories with which we are otherwise familiar. They are nothing physical (*Physisches oder gar Physicalisches*); that is certain. One might rather be tempted to designate them as something psychical or mental, that is, as the experiences (*Erlebnisse*) of the one who has the claim or the obligation. But cannot a claim or an obligation last for years without any change? Are there any such experiences? And further: are not claims and obligations really there even when the subject does not have or need not have any experiences, as in sleep or in the loss of consciousness. Recently one has begun to recognize again, in addition to the physical and the psychical, the distinct character of ideal objects. But the essential mark of these objects, such as numbers, concepts, propositions, is their timelessness. Claims and obligations, by contrast, arise, last a definite length of time, and then disappear again. Thus they seem to be temporal objects of a special kind of which one has not yet taken notice.

We understand that certain immediately intelligible laws hold for them: for example, a claim to have something done dissolves as soon as the thing is done. This is not a statement which we could have gathered from many or from all instances experienced by observation, it is rather a law which is universally and necessarily grounded in the essence of the claim as such. It is an apriori statement in the sense of Kant and at the same time a synthetic one. In the "concept" of claim nothing is "contained" in any possible sense about the fact that the claim dissolves under certain circumstances. The contradictory of this statement would indeed certainly be false, but it would not imply a logical contradiction. There are still many other synthetic apriori statements about claim and obligation. They are found, then, in a sphere in which one would have hardly suspected them. But I think that this preliminary survey suffices to strip our starting point [*that is, promising*] of every appearance of obviousness. One is after all accustomed to granting readily that philosophy begins in marvelling at what seems to be obvious. And there is no reason at all to limit this marvelling to what the history of philosophy recommends as marvelous.

Important as the attitude is in which one sees familiar things for the first time in their distinctive character, this is by no means the end of the matter. We have to make clear this distinctive character, to distinguish it from other things, and to determine its essential traits. In our case we have to attain clarity regarding the nature of promising — let us openly admit that we are still far from knowing this nature — and also regarding

the ways in which this promising generates claim and obligation, what claim and obligation on closer examination really are, and what fortunes they can undergo. Our reflection will then have to go further. Promising is not the only possible source of claim and obligation. They can under certain conditions also proceed from certain actions. If someone takes something away from the one to whom it belongs, there arises, by an essential necessity, an obligation for him to return it, and a claim in the other for its return. One sees how the consideration of this case right away leads to new problems. We speak of a thing which "belongs" to the other; we can also say instead: which is the property of the other. We have here too a unique kind of relation, of course not a relation of person to person but of person to thing. This relation too must have its source, here too apriori laws govern. Thus it is apriori excluded that belonging can have its origin, as claim and obligation have, in an act of promising.⁷ Other sources are presupposed here, such as the acts which we will later consider more closely under the title of transfer (*Übertragung*). For the time being we simply want to investigate claim and obligation, and only insofar as they proceed from promises.

We still know nothing of any positive law. We deliberately choose our examples from a sphere which is not subject to it; it is all-important to grasp our realm in its full purity. Let A promise B to take a walk with him and B accept the promise. There arises a corresponding obligation in A and a claim in B. One may question that at this point. But then such a questioning presupposes that one understands by claim and obligation something definite, and that can suffice for now. We only want to approach what these words refer to. We have already seen that we are dealing here with temporal objects which have a character all their own and which are neither physical nor psychical. It is especially important to separate them from the experiences (*Erlebnisse*) in which they are present to us and with which they can be confused. There is a consciousness of numbers or propositions. We can speak of a simple knowledge (*Wissen*) about them; this knowledge, taken purely as a way of being conscious (*Bewusstseinsweise*), is in no way changed according as it refers to one's own claims and obligations or to those of another. It is further completely indifferent to whether its objective correlates exist or not, just as the reverse also holds, namely that claims and obligations can exist without being the object of such a knowledge.

Sharply to be distinguished from this cold knowing is another related form of being conscious: *feeling* oneself to be entitled or to be bound, which is, in contrast to the knowing, possible only with regard to one's own claims and obligations. The distinctive character of this way of being conscious should be noticed. One can also speak of feeling in the

case of those experiences in which *values* are given.⁸ But whereas there is in this case a sharp distinction between the value to which this feeling is directed and this feeling itself which apprehends the value, we do not find such a sharp distinction in the case of feeling oneself entitled. The title or claim is not here the object of a more or less clear and perhaps even evident intentional feeling; we rather have here a phenomenally quite unified experience which without itself being a clear grasping of the claim, presupposes for its validity such a grasp.

The nature of these experiences is yet to be investigated. What above all interests us here is their absolute independence from the claims and obligations which make themselves felt in these experiences in a certain way. Nothing is more certain than that I can very well feel myself to be obliged without there really being any obligation, and that on the other hand I can very well have a claim without feeling myself to be entitled at the moment in which I have it. It now becomes completely clear how untenable every theory is which tries to take claim and obligation as something psychical or mental. Since we almost always have claims or obligations of some kind, we would have almost always to have corresponding experiences. But such experiences cannot be found. It can also be established from the very outset that there cannot be such. For to make the point one more time: claim and obligation can last for years without change, but there are no experiences which last like this.

Claim and obligation presuppose universally and necessarily some bearer (*Träger*), some person to whom the claims and obligations belong. And just as essential to them is a definite content (*Inhalt*) to which they refer. Differences in content determine the different kinds of claims and obligations. Both are immediately intelligible, but need a closer examination. Being grounded in a supporting subject is something which our legal entities have in common with *experiences* (*Erlebnisse*) of all kinds, for these too always presuppose a subject whose experiences they are. But the class of possible bearers is here much broader; animals too can be the bearers of experience, but never of claims or obligations. Here it is persons who by an essential law are presupposed as bearer; it goes without saying that not every subject or ego is a person.

The content of claim and obligation also admits of being specified more exactly. Every obligation refers to a future action (*Verhalten*) of its bearer, and this whether the action consists in a doing, an omitting, or a tolerating. Of course I can have an obligation that something take place in the world; but this obligation has meaning only if it admits of the further qualification that this something is to take place through me and my action. Of course I can be obliged that something take place through another. But here too it must be my action which is supposed to lead to the

action of the other. In every case, therefore, it is our action which makes up the immediate content of our obligations. But it is not always their only and final content. We distinguish between the obligations which tend only towards some action and find their definitive fulfillment in it, and such as aim through an action at the realization of an end result. Only in the first case are the ways of acting necessarily determined; in the second case it is usually only the end result which is determined and the way of realizing it is left up to the obliged person.

The action which forms the content of the obligation can be directed towards the bearer of the corresponding claim, but this is in no way necessary. I can be obliged to pay \$100 to B, who has the corresponding claim. But the payment to which I am obliged can also be to some third party; B need not thereby cease to be the bearer of the claim. The obligation to do something for someone is different from the obligation to someone to do something. So we distinguish between the addressee of the content of the obligation, and the addressee of the obligation itself. Every obligation of the kind which we are now considering has as such a partner (*Gegner*), that is, has someone over against whom it exists. The partner of an obligation is at the same time the bearer of a claim with identical content; this claim too necessarily has its partner, who is at the same time the bearer of the obligation. There thus exists a peculiar kind of correlativity between claim and obligation: each has identically the same content, and the relations of bearer and partner are mutually interwoven according to strict apriori law. But the content can be directed to any addressee, indeed can lack altogether an addressee.

Claim and obligation necessarily involve a bearer and a content. The direction against another person, by contrast, is not necessarily connected with them. There is indeed the apriori law that every obligation which exists over against another implies a corresponding claim of this other, and every relative claim implies a relative obligation. But this relativity of claim and obligation is nothing necessary; there are absolute obligations and absolute claims, or better, absolute rights. Just as A can promise B to do something and in this way create an obligation in his person and a claim in the person of the other, so B can impose an obligation on A and A can accept it, and all this in such a way that the obligation does not exist over against B nor anyone else, or in other words, that neither B nor any one else has a claim against A. It is not so easy to find realizations of such absolute obligations in our practical lives. For the time being we will just refer to certain obligations found in public law. The state is (obliged) to certain ways of acting, but this obligation does not exist over against any persons. One can debate whether we really have absolute obligations in a given case, but it is beyond any doubt that

they are apriori possible. Parallel to the absolute obligations are the absolute rights, which also presuppose only one person, their bearer, but do not need any second person over against whom they would exist. But obligations and rights do differ in an essential point: whereas obligations by their very nature refer only to one's own action, and this whether they are relative or absolute, we have to distinguish two different cases with regard to rights. Relative rights can only refer to the action of another, absolute rights, by contrast, always refer to one's own action. Rights which, though they are over one's own action, exist only over against some person seem to us just as impossible⁹ as rights to (claims on) the action of another which do not exist over against this other.¹⁰

It is of the greatest importance to distinguish the absolute and relative obligations as well as the absolute and relative rights (we will always refer to the relative rights as claims) from moral duties (*Verpflichtungen*) and moral entitlements (*Berechtigungen*). Though these too have necessarily bearer and content and admit of the division into relative and absolute, they are for the rest thoroughly different, not only with respect to the specifically moral character which they have, but also with regard to the essential laws which hold for them. Whereas the legal entities can spring from free acts of persons — for example, relative obligations and claims from given or received promises, or absolute rights from an act of transfer, or absolute obligations from an act of assuming (*Übernahme*) — this is impossible in the case of the corresponding moral entities. An absolute moral entitlement, such as the right to develop one's own personality, can have its ground in the person as such; a relative moral entitlement such as the claim to receive help from a friend, can spring from the relation of the entitled person to the other person. But they can never be grounded in arbitrary acts as such. Furthermore, whereas the absolute rights and the claims discussed above can very well, according to their nature, be transferred to others, it is impossible for a person to transfer to another his moral entitlement to free personal development or his moral claim based on a bond of friendship. Finally, the holder of absolute rights and relative claims can effectively waive his rights by a definite act. The holder of moral entitlements, by contrast, though he can omit the exercise of them, cannot abolish by an arbitrary act what is grounded in the nature of a person or in the relation of one person to others. Only that which springs from free acts can also be abolished by free acts.

We find something similar in the case of moral duties. They too can never spring directly from acts as such. Every moral obligation has as its necessary, even if not sufficient, condition, the moral rightness (*Rechttheit*) of states of affairs; in particular it presupposes that the existence of a

person's *action*, which forms the content of his duty, is either in itself morally right or right in virtue of the rightness of other related states of affairs.¹¹ This holds both for the absolute *moral* obligations, which one usually simply calls duties,¹² as well as for the *relative* moral duties, which correspond to the relative moral entitlements (these latter duties seem to have hitherto gone unnoticed in ethics). The obligations of right, by contrast, spring from free acts of the person and without any respect to their content, for instance from acts of assuming or of promising. Just as moral entitlements cannot be transferred, so moral duties cannot be assumed by other persons. This is only possible with the extra-moral obligations discussed above. And finally, whereas every relative obligation can dissolve through the waiving of the partner, the partner of a moral duty, though he may decline to insist on his moral right, could never annul a moral duty by a free act. He could possibly perform an action which would make an action which was once binding, no longer binding, so that no moral duty remains. But one always has to test the whole state of affairs (*Tatbestand*) with respect to moral significance. Just as free acts as such cannot generate moral duties, so they can also not abolish them. One will object that in the case of a promise or the assuming of an obligation there is a moral duty to realize the given content. That is surely correct and at the same time especially well suited to bring to light the difference which we are here stressing. Because obligations spring from those acts, there is a moral duty to carry out their content. It is an *a priori* law that the fulfillment of absolute and relative obligations is a moral duty. One sees how obligation and moral duty stand next to each other, with the former making the latter possible. In other cases the moral duty is independent of every act and of every obligation grounded in it. But the two things should never be confused with each other.¹³

We are already forced by these last considerations to take a look at the *origin* of rights and obligations. We must now undertake a closer analysis, limiting ourselves for the time being, according to our plan, to claim and relative obligation. We begin by putting forward as a general and self-evident *a priori* law: no claim and no obligation begins to exist or is extinguished without some "reason." It is quite clear: if a claim is to emerge (be extinguished), then at the moment when it emerges (is extinguished) there must have come about something out of which or through which it emerges (is extinguished). And we can add right away: whenever exactly the same thing occurs again, the corresponding claim must also emerge (be extinguished) again. It is necessarily and sufficiently determined by the event.

We are surely familiar with this principle of the definite determination of temporal existents. The only remarkable thing is that we have

found here a new and peculiar sphere of its validity. Naturally we must be careful not to carry over blindly to our sphere of right everything which we know or think we know about necessary determination in other areas, such as in events in nature. If we were to develop fully a comparison, we would have to go too much into a consideration of causal relations in nature, and so we shall limit ourselves to calling attention to a few essential points.

We can surely take it as generally granted that there are no *self-evident and necessary* relations of essence in the *casual* relations of external events. However it is, to speak with Hume, that we come to know that fire produces smoke, this is surely not intelligibly grounded in the essence of fire, as it lies in the essence of the number 3 to be larger than the number 2. There is no doubt that the causal relation is no *necessary "relation of ideas."*¹⁴ But it would be a mistake to extend this principle to every relationship obtaining between temporally existing things. The case which is now before us is the best proof of this. A "cause" which can generate claim and obligation is the act of promising. From this act, as we shall show more exactly, proceed claim and obligation; we can bring this to evidence when we consider clearly what a promise is, and achieve the intuition (*erschauen*) that it lies in the *essence* of such an act to generate claim and obligation under certain conditions. And so it is by no means experience in the sense of observation (*Erfahrung*) which instructs us, not even indirectly, about the existential connection of these legal entities; we have rather to do here with a self-evident and necessary relation of essence.

The coming into being of a claim or obligation needs a *sufficient* reason, just as the occurrence of a change in nature does. We have just seen that only in the first case is there a self-evident and necessary relation of essence between "ground" (*Grund*) and "consequent" (*Folge*). Our attention is now called to another difference, which may seem to be a more curious one. If in the case of external nature the consequent is there, it can at any time — we speak here of an ideal possibility — be given by itself and through itself. The movement of a ball which comes from being hit by a stick can be perceived by itself, without me having to go back either in perception or in thought to the blow. If we consider that for every object there is a certain kind of act in which it can be immediately given, then we can say: the act in which the effect is given does not need to be grounded in an act apprehending the cause. By contrast, a claim or an obligation cannot be grasped through itself. If I want to convince myself of the existence of the movement, I have only to open my eyes. But with claims and obligations there is no way to avoid always going back to their "ground." Only by once again establishing the existence of

an act of promising can I establish the existence of that which follows from it. There is here no act which, comparable to an act of inner or outer perception, can by itself establish this existence. That is surely a very curious fact, but it is a fact all the same. We can find an analogy to this in an area which is otherwise quite unrelated. The state of affairs (*Sachverhalt*) expressed by a mathematical theorem exists (*besteht*), and this existence has its ground in a number of other states of affairs from which it follows. Here too we find definite determination, though of course that which is determined is not objects which exist but states of affairs which subsist or obtain (*bestehen*) and the groundedness of these states of affairs is quite different from the generating of claim and obligation through the promising.¹⁵ But we are concerned with the analogy which is present here in spite of all the differences. A state of affairs grounded in other states of affairs exists through these others, even as the claim deriving from an act of promising exists through this act. If I want to grasp the state of affairs anew, there is no act of grasping it through itself which is available to me. I have no alternative but to go back to the grounding states of affairs and to derive it from them again, just as I have to go back to the underlying act of promising in order to establish again the existence of the claim.

One has often — we leave open the question whether rightly or not — put forth the principle that just as the same causes have the same effects, so also the same effects always have the same causes. The principle has been called into question. In any case, for the sphere of states of affairs and the relations of dependency among them the invalidity of an analogous principle is generally recognized. A given state of affairs can follow from and be derived from very different kinds of states of affairs. In this point, too, the sphere which here especially interests us shows a greater affinity with the sphere of states of affairs. The same claim and the same obligation can derive from very different sources. Thus my claim that a thing which is mine be returned to me, can be derived from a promise to return it which the present possessor of the thing makes to me, or it can be derived from the particular relation which I have to the thing, namely from the fact that it belongs to me.

We have decided to speak here only of a single source of claim and obligation: of promising. If we investigate this source and its relation to that which results from it, then we encounter difficulties which one little suspects as long as one, living in the attitude of everyday life in which one fails really to notice things, “takes it for granted” that promising produces claim and obligation. *What is a promise really?* The usual answer is that promising is a declaration of will, or more exactly, an expressing or making known the intention of doing or omitting something in the

interest of another to whom the utterance is made. Why this utterance should oblige and entitle is of course far from being understandable. It is after all certain that the mere intention to do something does not have any such effect. Of course there usually results from a decision which I make a certain psychological bond, an inner tendency to act according to my resolution. But this inner psychic tendency is certainly no objective obligation, and even less does it have anything to do with a claim of the other. But if this is so, how can this situation be changed by me making known my decision, by me telling another that I want to do this or that for him? It is after all otherwise not the case that the expression of a resolution of will engenders an obligation in me. Why should this happen precisely in the case where the content of my willing involves an advantage for another?

One has made numerous attempts to “explain” this problematic binding through promises. One has denied that there is any such binding in a natural way, and has reduced it to an artificial convention which the state or society has come up with out of considerations of practicality. Or one has based oneself on the psychological experience of being bound which follows on every decision, and has tried to show how this experience undergoes a modification and objectivation on being apprehended by the other. Or one has argued from the consequences. Since the one who finds out about the decision will undertake all kinds of things in reliance on it, and since he could then suffer harm if the decision were not carried out, everyone who makes his intention known to others is bound to his decision.¹⁶

We shall later have the opportunity to show how untenable all these theories are. For now let us just remark that the very foundation on which these and other theories rest is mistaken. Promising is by no means reducible to merely making known a decision of will. Let us stay precisely with the case where I make the resolution to do something for another and where I also inform him that I have made this resolution: I have thereby surely given no promise. Informing about a resolution and making a promise are fundamentally different things. One should not let oneself be deceived about this difference by the fact that both acts will sometimes make use of the same linguistic expression. If one overlooks this, then one of course has to lose oneself in hopeless constructions in order to derive claim and obligation from the expression of a resolution. Our first task, accordingly, is to make clear what promising really is. To do this we have to back up and lay a foundation for ourselves. We have to introduce a fundamental new concept.

§3 The social acts

Out of the infinite sphere of possible kinds of experiences let us select out a certain kind: the experiences which not only belong to a self but in which the self shows itself as active (*tätig*). We turn our attention to a thing, or we make a resolution: these are experiences which are not only opposed to the ones in which something like a sound or a pain imposes itself on us, but also to the ones where we cannot speak of a real passivity of the self, as when we are happy or sad, enthusiastic or indignant, or when we have some wish or resolution. We want to call the experiences in question spontaneous acts; this spontaneity refers to the inner acting (*das innere Tun*) of the subject. It would be quite a mistake to want to find the distinguishing mark of these experiences in their intentionality. The regret which rises up in me, or the hatred which asserts itself in me, are also intentional in that both refer to some object. Spontaneous acts have in addition to their intentionality also their spontaneity, which lies in this, that in them the self shows itself to be the phenomenal originator of the act. Spontaneity also has to be definitely distinguished from activity in its many possible meanings. Thus I can call indignation active since it issues from me and forms a contrast to the sadness which comes over me, perhaps suddenly. Or I call the having of a resolution active in that I am the one who has the resolution. But we distinguish the having of a resolution, whether actually or inactually, from the making of the resolution, we distinguish what exists in us as a state (*zuständlich*) from the punctual experience, which precedes or at least can precede it; and only here in the making of a resolution do we have an example of what we mean: a doing (*Tun*) of the self and thereby a spontaneous act. We right away think of all kinds of examples of such acts: deciding, preferring, forgiving, praising, blaming, asserting, questioning, commanding, etc. In looking more closely at these cases we right away notice an essential difference, and this is the difference which is important for us here.

impracticable
same w/ sadness

The act of deciding is an internal act. It can be performed without being announced (*verlautbart*) or needing to be announced. Of course the decision can express itself in facial expressions and gestures; I can express it, communicate it to others if I want. But this is not necessary for the act as such. It can unfold entirely within, it can rest in itself and not receive an expression in any sense. One sees right away that it is otherwise with certain other spontaneous acts. Commanding or requesting, for instance, clearly cannot be performed entirely within. *? for imp. case.*

exap. in our actions

Let us look more closely at one of these remarkable acts. Commanding is undoubtedly a spontaneous act in that it presents itself as the doing

actions don't have a location.

of a subject. But in distinction to other spontaneous acts such as turning one's attention or making a resolution it presupposes in addition to the performing subject a second subject to whom the act of the first subject is related in a very definite way.

There are experiences in which the performing subject and the subject to whom the act is related can be identical, there is a self-esteem, a self-hatred, a self-love, etc. But for other experiences it is essential that the subject to whom they are directed be another person; we will call them other-directed (*fremdpersonal*) experiences. I can for instance not envy myself, cannot forgive myself. It is clear that the act of commanding is to be characterized as other-directed.¹⁷ But this does not exhaust its distinctive character. We immediately notice that it differs in a crucial point from such other-directed acts as forgiving. It is not only related to another subject, it also addresses the other (*wendet sich an es*).

The act of turning forgivingly to another, like the making of a resolution, can unfold entirely within and can lack any announcement to others. Commanding by contrast announces itself in the act of turning to the other, it penetrates the other (*dringt in den anderen ein*), and has by its very nature a tendency to be heard (*vernommen*) by the other. We never give a command if we know for sure that the subject to whom we turn with the command is incapable of becoming aware of it. The command is according to its essence in need of being heard (*vernehmungsbedürftig*).¹⁸ It can of course happen that commands are given without being heard. Then they fail to fulfil their purpose. They are like thrown spears which fall to the ground without hitting their target.

is intended & expected
com!

We designate the spontaneous acts which are in need of being heard, social acts. We have already seen in the example of forgiving that not all other-directed acts are in need of being heard. We will later see that not all acts in need of being heard are other-directed. Our concept of social acts centers only on the need of being heard. *like? prayer? cry?*

like cursing

We have to be careful not to distort this state of affairs (*Sachlage*) by dragging in ideas to which we are accustomed. A command is neither a purely external action nor is it a purely inner experience, nor is it the announcing to others of such an experience. This last possibility seems to be the most plausible. But it is easy to see that commanding does not involve an experience which could be expressed but also not expressed, and also that there is nothing about commanding which could rightly be taken as the pure announcing of an internal experience. Commanding is rather an experience all its own, a doing of the subject which according to its nature has in addition to its spontaneity, its intentionality, and its other-directedness, also the need of being heard. What has been shown for commanding also holds for requesting, warning, questioning, informing,

answering and for still many other acts. They are all social acts, which, by the one who performs them and *in the performance itself*, are as it were cast towards another person in order to fasten themselves in his soul.

The function of the social acts whereby they make themselves known could not fulfil itself among us men if the acts were not in some way expressed externally. The social acts, like any acts of other persons, can only be grasped through some physical medium; they need an external side if they are to be heard. Experiences which need not turn without, can unfold without being in any way externally expressed. But the social acts have an inner and an outer side, as it were a soul and a body. The body of social acts can widely vary while the soul remains the same. A command can be expressed in mien, gestures, words. One should not confuse the utterance (*Äusserung*) of social acts with the involuntary way in which all kinds of inner experiences such as shame, anger, or love can be externally reflected. This utterance is rather completely subject to our voluntariness and can be chosen with the greatest deliberation and circumspection, according to the ability of the addressee to understand it. On the other hand, it should not be confused with statements about experiences which are now taking place or have just taken place. If I say, "I am afraid," or "I do not want to do that," this is an utterance about experiences which would have occurred without any such utterance. But a social act, as it is performed between human beings, is not divided into an independent act and a statement about it which might or might not be made; it rather forms an inner unity of voluntary act and voluntary utterance. For the inner experience here is not possible without the utterance. And the utterance for its part is not some optional thing which is added from without, but is in the service of the social act, and is necessary if the act is to address the other. Of course there can be statements about social acts which are accidental to them: "I have just given a command." But these statements refer to the whole social act including its outer side, which should therefore in no case be confused with a statement about itself.

There is an important point which should not be overlooked in these considerations. The turning to another subject and the need of being heard is absolutely essential for every social act. That the act be expressed externally is only required where the subjects among whom the social acts are performed can grasp the psychic experiences of others only on some physical basis. If we imagine a community of beings who can directly and immediately perceive each other's experiences, we will have to recognize that in such a community social acts could perfectly well be performed which have only a soul and no body. We men in fact do not take the trouble to express our social acts as soon as we assume that the

being to whom we direct them can directly grasp them. Let us think of silent prayer, which turns to God and tends to address itself to Him, and which therefore has to be considered as a purely interior social act.

We now turn to a closer analysis of particular social acts. And first, the act of informing. I can be convinced of some states of affairs and can keep this conviction to myself. I can also express this conviction in an assertion. Here too we still have no informing. I can verbally express the assertion for myself, without having any partner to whom it is addressed. But this addressing is intrinsic to informing. It belongs to its essence to address another and to announce to him its content. If it is directed to a human being, it has to be externally expressed in order to enable the addressee to become aware of its content. With this becoming aware the goal of the informing is reached. The circuit which is opened with the sending out of the social act is here closed.

With other social acts things are somewhat more complicated. We begin by selecting out requesting and commanding for closer inspection. They are fairly closely related acts, a fact which is reflected in the considerable similarity of their external expression. The same words can be the expression of a command or of a request: the difference manifests itself only in the way of speaking, in the emphasis, sharpness and in other factors which are difficult to capture precisely. Commanding and requesting have a content, just as much as informing does. But whereas with informing it is only the content which is supposed to be presented to the addressee and not the act of informing as such, with commanding and requesting it is these acts as such which are supposed to be grasped. And even with this becoming aware, the circuit is only tentatively closed. We have here social acts which, by contrast to informing, aim by their nature at corresponding, or better, at responding activities, whether these activities really come to pass or not. Every command and every request aim at an action on the part of the addressee which is prescribed by the act. Only the performance of this action definitively closes the circuit opened by these social acts.

Questioning too is a social act; it calls for some doing by way of response, but not an external action but rather another social act, the "response" in the strict sense. We have in responding a social act which does not call for any doing but rather presupposes some such — and always in the form of a social act. So we distinguish simple social acts, social acts which presuppose other social acts, and finally social acts which aim at social acts or other activities as following upon them.

We have distinguished the social acts as sharply as possible from all those experiences which do not necessarily express themselves to others. We now have to take note of the remarkable fact that all social acts

presuppose such internal experiences. As a matter of apriori necessity every social act presupposes as its foundation some internally complete experience whose intentional object coincides with the intentional object of the social act or is at least somehow related to it. Informing presupposes being convinced about what I inform someone of. Asking a question essentially excludes such a conviction and requires instead uncertainty regarding that about which I ask. In the case of requesting, what is presupposed is the wish that what I request come to be; more exactly, that what I request be realized by the one to whom the request is directed. Commanding presupposes as its foundation not only the wish but the will that the one who is commanded carry out my command; etc.¹⁹

One will perhaps contest these relationships. One will point for instance to conventional questions, which are perfectly compatible with knowing about the content of the question, or to hypocritical requests, which are made contrary to one's real wish; etc. We do not doubt that there are all these things. But one should notice that we do not have here genuine, fully experienced acts of questioning and requesting. There is a certain definite modification of social acts; besides their full performance there is a pseudo-performance, a pale, bloodless performing — the shadow, as it were, next to the bodily thing.²⁰ One should not think that in such cases there is only the speaking of the words which usually accompany the performance of the acts. There is more than that at stake. The acts are performed, but it is a pseudo-performance (*Schein-vollzug*); the performing subject tries to present it as genuine. Social acts which occur with this modification do not presuppose the inner experiences just discussed; in fact, the very nature of a pseudo-act excludes them. A genuine conviction cannot underlie a pseudo-act of informing, genuine uncertainty cannot underlie a pseudo-question, a genuine wish and a genuine will cannot underlie a pseudo-request and a pseudo-command. Only in the first of these cases does one speak of a lie. By extending this concept (lying) one can designate the whole group of these cases as the sphere of social dishonesty or hypocrisy, inasmuch as the person falsely presents himself in them as "really" commanding, requesting, etc.

There are quite a few other kinds of modifications which the social acts present. We distinguish first of all between a social act being conditional (*bedingt*) and being unconditional. There is a simple commanding and requesting, and there is a commanding and requesting "in the event that." Of course not all social acts are subject to this modification; an act of informing "in the event that" is not in the same sense possible. This becomes understandable only when we consider that an efficacy proceeds from certain of the social acts. If a command is given or a request is made, something is thereby changed in the world. A certain action now

stands there as commanded or requested, and under certain conditions which by their nature can be clearly identified, as when the addressee of a command has performed the social act of submitting to the person who gives the command, there arise obligations of a definite kind. Since informing does not have any such efficacy, it is not susceptible of being conditioned. But with the conditional commands and requests, the efficacy is made dependent on a future event.

Conditional social acts are indeed performed, but in their performance their efficacy is tied to something which may occur later. One should of course not confuse this conditional performing with the announcing of a possible later performing. In our cases there can be no question of any such later performance. With the occurring of the event the efficacy of the act is — without any further contribution of the bearer of the conditional act — just what it would be if an unconditional act were now performed. And from the moment it is clear that the event will not occur, it is as if no act at all had ever been performed.

It is essentially required that the event on which the efficacy of the act is made to depend, can possibly occur, but it is impossible that it must occur.²¹ Only in the first case does conditionality make sense. In the second case all that would be possible would be an unconditional social act with a reference to time in its content: I command you (unconditionally) to do this or that at the moment when an event occurs. Here we have no modification of the act but only one of its content. Besides being time-bound (*befristet*) the content can also be conditional. We distinguish as sharply as possible between the conditionality of the content and the conditionality of the act. The unconditional command with conditional content immediately makes binding the realization of a certain action when a possible future event occurs. It immediately produces — under certain presuppositions — the obligation to do or to omit something when an event occurs; the occurring of the event simply makes the obligation actual. By contrast, the conditional command with unconditional content makes an action binding only when the event occurs, and only at this moment does it produce an obligation prescribing an immediate doing or omitting.

Furthermore, with regard to the unconditional acts with conditional content we can distinguish between future conditions which put an end to an obligation, and those which let the obligation come into being. The command to do something until a certain event occurs, immediately produces an obligation, which then dissolves when the event occurs. But with conditional commands the distinction between these two kinds of conditions obviously makes no sense.

All of these distinctions are grounded purely in the essences of the acts and have

but not time-bound content is conditional

highly-rebutted

??

?

good

OK ✓

like in civil law code

good

good

nothing at all to do with empirical observations. They are of the greatest importance for the sphere of social relationships.

Social acts can be performed by a number of persons, and can be addressed to a number of persons. This second peculiarity is found only among social acts, whereas the first is found also in the sphere of merely external actions and merely internal experiences. I can direct a command to two or more persons "together." A single social act then has several addressees. The effects of such an act are necessarily different from the case where there are just as many social acts as addressees. Whereas in this case there are as many obligations as there are addressees — even if the social acts have the same content — there is only *one* obligation in the case of a social act with several addressees, and this obligation is shared by them. I command A and B together to get something for me. Then there arises only one obligation, the content of which is getting the thing, and which bind A and B together.

More difficult and more interesting is the case where several persons together perform one social act. Each of the persons performs the act, for instance, commands, and each expresses the performing. But each performs the act "together with the other." We have here a very distinctive kind of "togetherness." It should not be reduced to identity of content or of addressee, and even less to the deliberate simultaneous performance of the act; in these cases we would always have several distinct acts. We have rather to do here with the case where each of the persons performs the act "in union" with the others, where each knows of the participation of the others, lets the others participate, and participates himself: we have *one single* act which is performed by two or more persons together, one act with several subjects. The effects of the act are modified accordingly. Let us again assume that the addressee (or addressees) have submitted to the commands of the commanding persons. Then the commands produce corresponding claims and obligations. To the command of *one* person there corresponds *one* claim. To the commands of several persons there correspond several claims. To the *one* command given by *several* persons together there corresponds one *single claim* in which these persons share together. So we see how the idea of social acts performed together by several persons and directed to several persons together, gives rise to the idea of claims and obligations which have several persons as subjects or partners.

With external actions, too, it is possible to speak of several performing subjects of one and the same action. There is a way of acting "in union." The criminal law's concept of "complicity," as it seems to us, has to base itself on this, and such collective actions are also important for

public law, administrative law, and international law. But we cannot elaborate on this here.

As a fourth modification in our sphere we point to the difference between those social acts which are performed by their subject (*Eigenakte*), and those which are performed by a proxy (*vertretende Akte*). There is such a thing as commanding, informing, requesting "in the name of another." Once again a very curious state of affairs presents itself to us, and we should by no means explain it away; we want first of all to try to characterize it briefly. A command in the name of another is one's own command and yet not really one's own command. More exactly: the proxy performs the act quite personally, but in such a way that the act is presented as ultimately proceeding from another person. Absolutely different from this is the case where someone commands "in the interest" of another, or in carrying out his assignment. Here the command proceeds from the one who performs the act; nothing is changed by the fact that he performs the act with the knowledge of the other, or in his interest, or in carrying out his assignments. Even a command given on the basis of another command is one's own command. Only the command "for" the other, or, more expressively, "in the name of" the other, takes its ultimate origin in this person.

We shall later speak extensively about acts performed by proxy in the sphere of right. Here we will just add that the character of the act naturally determines the character of the effect. A command which A in the name of B gives to C, obliges C not to A but to B, and gives B and not A the claim. This efficacy depends, of course, on a *double* presupposition: the command as such must be able to bind C, and A must be able to be the proxy for B. We shall speak later about this second presupposition. As to the first, let us just remark that the act of submitting, which here too can make the command binding, must in this case be performed not towards the proxy who commands, but towards the one whom the proxy represents.

Let us return to our starting point, the act of promising. It does not take a long explanation to show why we find promising to be an other-directed social act. It inaugurates a train of events, like commanding and unlike informing. It too aims at an action, though of course not at one of the recipient of the act, but at one of the promisor himself. This action need not be a social act, as in the case of questioning.

Like all social acts, promising presupposes an inner experience which has the content of the promise as its intentional object. As with commanding, this inner experience is that of intending that something occur, not of course through the addressee but through the promisor himself.

Every promising to do this or that, presupposes that one's will is directed to this action.

We now see clearly how thoroughly mistaken and untenable is the usual conception of promising as an expressing of intention or of will. An expression of will runs like this: I intend. If it is directed to someone, then it is an informing, which is indeed a social act but no act of promising. And of course it does not become a promise by being directed to the one who will profit from the intended action. Promising is neither intending nor the expression of intending; it is rather an independent spontaneous act which in turning without, expresses itself. The making audible of the promise could be called a declaration of the promise. It is only indirectly a declaration of intention, in that an act of intending necessarily underlies the spontaneous act of promising. If one calls promising a "declaration of intention," then one has to call the act of questioning a declaration of doubt, and the act of requesting a declaration of wish. The misleading character of these designations is clear. It is not — as one had thought — through impotent declarations of intention that relations of right are constituted but rather through the strictly apriori efficacy of the social acts.

Only by failing to go beyond the external side of promising and to study this act more closely was it possible to confuse it with the informative expression of a resolution of will. The same words, "I want to do this for you," can after all function both as the expression of a promise and as the informative expression of an intention. We find in other cases, too, that different social acts can make use of the same way of expressing themselves, especially when the surrounding circumstances leave no doubt in the mind of the addressee as to the nature of the expressed social act. One will generally be certain as to whether there is an act of promising or of informing behind the words. And even if misunderstandings are possible, as disputes and law-suits show, this of course in no way abolishes but rather confirms anew the fundamental difference between declaring an intention and promising.

We are now in a position to clear up the difficulties which one found in the "bond" resulting from promises. It is of course incomprehensible that the informative expression of a resolution of will should produce an obligation. But we have found in promising an act *all its own*, and we claim that it lies in the essence of this act to bring forth claims and obligations.

As a social act, promising admits of all the modifications which we discussed above. There are promises which are directed to several persons together, or performed by several together. From these acts proceed claims which several persons share together, and obligations which bind several together. Further, there is a conditional promising, which we will

have to distinguish sharply from unconditional promising with conditional content. From the former, claim and obligation come into being only on the fulfillment of the condition, for only then does the promise unfold its proper efficacy.²² From the latter, claim and obligation come into being immediately. The promisee here can immediately claim from the promisor that he (the promisor) do something when the condition is fulfilled, but in the first case it is only after the fulfillment of the condition that the promisee can claim from the promisor that he (the promisor) do something immediately. In the second it is possible to waive the claim before the condition is fulfilled, but in the first case there is at the outset nothing which could be waived.²³ Only a conditional waiving would be possible here: a waiving conditional on the claim coming into being (as a result of the fulfillment of the condition). In the second case waiving is immediately efficacious and the fulfillment of the condition has no significance. In the first case the fulfillment of the condition brings into being the claim and thereby fulfills the condition of the waiving. This makes the waiving efficacious and immediately dissolves the claim. The coming into being of the claim is in this case the immediate cause of its death. A mechanism of social interaction which is subject to strict apriori laws shows itself here; we have to do with immediately evident laws of essence and with nothing less than with the "positings" or "inventions" of some positive law.

In addition to one's own promising (*Eigenversprechen*), there is a promising in the name of another, a representative promising (*vertretendes Versprechen*). A person performs an act of promising, but he is not the one who promises; he rather lets another promise, or more exactly, he promises for another. When someone promises "instead" of another in the sense of promising in his interest or in carrying out his assignments, there is no promising by proxy, and the obligation arises in the one who promises. We have also to exclude the case where someone promises on the basis of a promise. A can promise B to promise C to hand over a thing to C. Then B has the claim that A promise C, and through the fulfillment of this claim there arises in A an obligation toward C to hand the thing over to him. Or B promises A to provide him with some thing, and gets C to promise to provide the thing for him (for B). Then there are in the person of B at the same time both a claim against C for providing the thing, and an obligation towards A to provide him with the thing. In neither of these cases is there any question of B making a promise to C in the name of A. But only that would be representation and would at the same time involve the characteristic effect of representation. By promising in representation there arises a claim of C, just as in promising for oneself; but this claim is against A and not B; and at the same time there

right of hand - like ontological arg. for God,

arises correlatively an obligation in the person of A. This efficacy is naturally subject to definite conditions. We shall devote a whole section to discussing them. It is not just the content of these statements, which is so familiar to the jurist, but their strict apriori form which commands the great interest of the philosopher.

Promising through a representative is different from promising for oneself in that it does not presuppose any intention to do the thing promised. At the most it is possible that the represented party has this intention or at least would have it if he knew the circumstances as the representative does. With the representative himself the only intention which is needed is the intention that the represented party acquire from his promising an obligation with the same content. Even this restriction is missing in the case of the last modification of promising which we will consider: pseudo-promising (*Scheinversprechen*).

Like all the social acts promising is susceptible of that shadowy and inauthentic mode of being behind which there is no sincere intention of doing the thing promised. The pseudo-promise also turns to another person, as does the authentic promise; and it is intrinsic to it to express itself just like the authentic promise does. Whoever makes a pseudo-promise, pretends to be promising authentically.²⁴ One can wonder whether claim and obligation proceed from this pseudo-promise just as from an authentic one.²⁵ Without being able to decide this question with certainty, we now proceed to make clear how claim and obligation proceed from authentic promising.

§4 The act of promising as the origin of claim and obligation

If we put ourselves in the position of the promisor, we see that a genuine promise can be performed and expressed, yet without reaching the subject to whom it is directed. As long as this does not happen, there can be no question of claim and obligation. It is also not enough that the promisee perceive the external signs, for instance hear the words, without understanding them. He must grasp through them that which is expressed in them, he must take cognizance of the act of promising itself, he must, as we would put it somewhat more exactly, consciously take in the promising (*des Verprechens innwerden*). Now the addressee can respond differently to that which he takes in. He can inwardly reject it, he can also inwardly accept it. The inner rejection can express itself in an act of declining (*Zurückweisen*), the inner accepting in an act of acceptance. If the promise is simply heard (*vernommen*) there arises a claim in the one who hears and an obligation in the promisor. The act of acceptance can at most

serve to confirm; it makes a contribution to the efficacy of the promise only when the promise is made "in the event of" an acceptance. On the other hand, an act of declining prevents both claim and obligation from coming into being.

The question is put — especially by those who are accustomed to think in terms of our positive law — whether merely becoming aware of the promise is not insufficient, whether an acceptance is not in every case needed for its efficacy. By way of response, we must above all bring out the unclarity and ambiguity of the concept of acceptance. We can take note of five different meanings. Acceptance can first of all be taken as the positive response to a proposition, to an "offer" of some kind or other. In this very formal sense the most various kinds of social acts can function as acceptances, for instance a promise just as well as its being accepted. If A responds with "yes" to the request of B to promise him something, we have in this "yes" just as much an acceptance in the formal sense, as when A responds to the promise of B with "good." But materialiter the "yes" contains a *promise* and the "good" the *acceptance* of a promise in a quite new sense. This material acceptance refers only to promises. With regard to it we still have various things to distinguish. There is first of all acceptance as a purely inner experience, an inner "saying yes," an inner assent to the promise which is heard. From this we distinguish acceptance in the sense of the *expression* of the acceptance, as it can occur in actions but also in words. Something new is added when the expression of acceptance takes on an informing function, when it is directed to a person. Finally, as the fifth and most important concept we point to acceptance as a social act in its own right which is not reducible to an informing.

One encounters exceptional difficulties if one tries to carry out this last distinction. In other cases it is much easier to distinguish the social act from an informative statement about the inner experience which it necessarily presupposes, for the social act is fundamentally different from this experience; only as a result of the absence of any phenomenological analysis was it possible to confuse promising with an informative expression of intention. But in the present case there is a fundamental likeness between the inner experience and the social act. There is a purely inward "accepting," and corresponding to this there is naturally the informative expression of this experience. To the "I will" there corresponds an "I accept." Here it is much more difficult to decide whether to recognize a distinct social act of accepting which, though it can hide itself behind the same words which are used in an expression of the inner experience, is nevertheless different from this expression. And yet we cannot avoid making this distinction. The *expression* of acceptance [*that is, the statement about the acceptance*] can be directed to anyone, it is an act of

informing which can be made towards everyone. The social act of accepting a promise, by contrast, has a strictly prescribed reference point, it can only be directed to the person or persons by whom the promise has been made. Further: the informative expression of the experience of accepting can be repeated ever so many times and towards ever so many persons. The social act of accepting can meaningfully be performed only once. Its effect is completely achieved with a single performance — assuming that the other party takes it in consciously. A repetition would have no further effect and would therefore have no point. Thirdly, the informative expression can refer to a present, past, or future experience of accepting. It can therefore be made in the present, past, or future tense. The social act of accepting, by contrast, admits only of the present tense. To the “I have inwardly assented” and “I shall inwardly assent,” there is on the other side only the “I hereby accept.” One should not overlook the distinctive function of the “hereby.” It refers to an event which is happening along with the performance of the act, that is, to the “accepting,” which here as it were designates itself. By contrast, there is no least sense in saying, “I hereby experience an inner assent.” Here it is precisely not the case that the experience is performed in and with the expression. The distinction on which we are insisting seems to us, therefore, to be thoroughly established.

It is now clear how ambiguous is the question whether a promise needs to be accepted in order to be efficacious. In raising this question one is mainly thinking about the principle of the positive law that one-sided acts of intention usually do not produce claim and obligation, and that some “meeting of the minds” (*Willenseinigung*) is usually required, that is, to put it in our language, an agreement which is constituted through mutual social acts.²⁶ From this point of view these acts are considered as “offer” and “acceptance.” Here we have acceptance in our first and formal sense. We must now exclude this point of view. We have deliberately narrowed our problem. We are only asking whether *promising* needs a (material) acceptance in order to be efficacious.

But even the concept of material acceptance is, as we have seen, ambiguous enough. One can first of all think of the experience of inwardly assenting. It is not understandable why such an experience should have influence on the emerging of claim and obligation. Social relations of right, as we shall increasingly see, are constituted through social acts. The joy or sadness of an individual, his satisfaction or regret, his inner assent or negation, have no influence on these relations. But if this is so, then it should neither make any difference whether the inner experience is expressed or not, nor even whether this expression functions as an act of informing to someone or not. Only the fifth concept of

acceptance, therefore, can come into question here: acceptance as a social act of its own.

One could try to argue for the necessity of such an act of accepting by considering other social acts which are closely related to promising. We are in a position, within our sphere of right, to consider even acts which do not come into question for the civil law.²⁷ One could point out that a request needs to be accepted if there is to be an obligation to do the thing requested, and that a command, too, grounds an obligation only if accepted — assuming that the addressee has neither made an act of submission to the commanding person nor stands in a relation of subordination to him. And one could draw the analogous conclusion that with promising too such an accepting should be necessary. But we should not play around with the word acceptance. The accepting of a request and of a command amounts materialiter to a “declaring oneself ready,” a vowing or a promising to accede to the request or the command. The accepting of a promise, however, cannot itself be a vowing or a promising. For then we would fall into a fallacious *regressus in infinitum*, inasmuch as this new promise would also need acceptance, etc. This also shows clearly how thoroughly different [*from promising*] the supposed analogates [*requesting and commanding*] are. With them it is a question of imposing an obligation on the addressee of the social act, and this of course really does need some acceptance. But in the case of promising the performer of the act assumes the obligation himself; on the side of the addressee there arise only claims, and we do not see why any social act on his part should be necessary. And so we are entitled to say: claim and obligation are grounded in promising as such. The presupposition for the coming into being of each is that the addressee consciously take the promise in. There seems to be no need for an acceptance in any sense.

We put forward the apriori law that the claim can only arise in the person of the addressee. It is apriori impossible that a person to whom the promise is not directed should acquire a claim from it. Of course the positive law deals with contracts with third-party beneficiaries and thereby with promises from which not only the addressee but a third person in addition to him or even to the exclusion of him gets the claim to the promised action. But it would be a very superficial and thoughtless objection if one were to question the validity of self-evident essential relations on the basis of such positive enactments. We shall later have to examine carefully the relation of both. For now let us just remark that it is surely no accident that contracts with third-party beneficiaries were in some legal codes established so late, if at all.

With the apprehending of the promise there arise — strictly simultaneously — claim and obligation. The parties who have the claim and the

obligation over against each other stand in the relationship which we already characterized earlier. We want to call the whole bond which unfolds on the basis of promising an obligatory relationship.

We already saw earlier that the obligatory relationship does not rest in itself, as does for instance the relation of owning. Like the act of promising itself, it tends towards the realization of its content by the promisor. It is destined to be dissolved. To every claim and to every obligation there "belongs" the realization of their content, not in the sense that the realizing action necessarily exists as soon as they exist, as claim and obligation exist as soon as the heard act of promising exists, but rather in something like the sense in which admiration "belongs" to a beautiful work of art, or indignation to a bad action. If the realizing action does not occur at the time at which it should, the obligatory relationship undergoes a change: the claim is "violated." It is further conceivable that the fulfillment of the claim becomes impossible, whether because the promisor is unable to carry out the promised action, or because — as with obligations which ultimately aim at realizing some end result — something has come up which makes it impossible to achieve the result through any action. One cannot say that claim and obligation thereby dissolve.²⁸ But there does arise a curious antimony between the tendency of the obligatory relationship to be fulfilled, and the factual impossibility of fulfillment. The obligatory relationship thereby takes on a distinct kind of meaninglessness. Claim and obligation have become incurably sick.

The normal thing is for claim and obligation and thereby the whole obligatory relationship to dissolve by the carrying out of the content of the promise — which does not have to be phenomenally characterized as a fulfilling action (*Erfüllungshandlung*). There is in addition also a second way of dissolving, by *waiving*. As it is grounded apriori in the nature of the claim to end by being fulfilled, so also by the waiving of the promisee. This waiving is a social act whose addressee is the promisor. Here for the first time we encounter a social act which lacks the moment of other-directedness. Waiving refers merely to that which is waived, in this case to the claim; it is not directed to a person. But it has to be revealed to a person — in this case the promisor — in order to be effective; the need of being heard is intrinsic to it. As soon as it is apprehended, claim and obligation dissolve. We have to reckon with objections at this point. Can every claim really be waived, that is, can a person to whom some service has been assured, arbitrarily decline to receive the service? One might think of cases in which someone at first wanted to decline a promise and then accepted it only after being repeatedly requested to do so. May he later on waive and thus withdraw himself from receiving the service of

the other? Precisely this case shows clearly the confusion which is being committed here. One is assuming that there is an obligation to accept that which has been promised. But it is self-evident that an obligation, though it can spring from a promise, can never spring from the simple acceptance of a promise or even less from merely consciously taking it in. But we have seen that with requesting and commanding a promise can very well lie hidden behind the obscure expression, "acceptance." This is the kind of case which one is thinking of here. If a promise is accepted in response to urgent requests, a distinct promise to accept the service lies in the acceptance, which is at the same time a response to the request. It is false to say that the claim can then not be waived, for the ability to waive is grounded immutably in the essence of a claim. But even if the claim is waived there still very much remains, on the basis of the second promise, an obligation in the holder of the original claim. For obligation excludes by its very essence and meaning that an act of waiving could be directed to it. Many things may be difficult to make out in these acts as they are performed in real life, certain experiences may be vague and blurred in themselves, passing over indistinguishably into each other. But the acts themselves are distinguished as sharply as may be; in their pure ideas are grounded certain and immutable laws.

The very meaning of obligations makes it impossible for them to be waived, but they do admit of a way of being eliminated. The question arises as to the nature of this elimination (*Aufhebung*) and of the conditions under which it is effective. There is a revoking (*Widerruf*) of a promise. If it is validly revoked, then claim and obligation are thereby eliminated. Revoking is a social act, but one which, like waiving, lacks the moment of other-directedness. Its intentional correlate is the promise, its addressee is the promisee. Revoking and waiving are different from each other in all the essential points. Whereas the ability to waive lies in the essence of the claim, the ability to revoke in no way lies in the essence of promising. As such the promise is irrevocable, just as irrevocable as for instance the revoking itself and the waiving are. Of course it is at any time possible to perform acts of revoking, just as acts of waiving. But whereas the latter need nothing else to be efficacious, the former are in themselves inefficacious. If we consider this matter from the point of view of the revoking and the waiving person, we can say: both acts can be performed at any time. But only the holder of a claim who waives can eliminate the obligatory relationship by his act, the holder of the obligation who revokes cannot simply do this without fulfilling any other conditions. To the natural capacity or power (*Können*) which is present in both cases there corresponds only in the one case an efficacious power over the social

relation of right, or, as we would put it more briefly, a legal capacity or power (*rechtliches Können*).²⁹

No less certain than all this is the fact that revoking can be effective under certain circumstances, that therefore a legal power can be present on the side of the revoking person. The question is, what provides him with this power? This too can be determined apriori; a reference to any positive code is thoroughly superfluous and would in no way contribute towards the solving of our problem. It is clear from the outset that only the holder of the claim can provide the revoking party with a legal power, for what is at stake is the elimination of his claim. It is further clear that the social acts which we have hitherto considered do not suffice here. It is for example excluded apriori that the holder of the claim could produce the legal power by a *promise*. He could promise to waive his claim in the event of a retraction. Then the revoking would result in a claim to the waiving, but not in the direct dissolving of the (original) claim. Quite different acts are at stake here. The legal power or the right to revoke has to be "granted to," "conferred on" the promisor. And this granting of right or of legal power — an other-directed social act which we will get better acquainted with later on — is directed by the promisee to the promisor. As soon as the promisor consciously takes it in, he acquires the legal power to revoke. Whether the empowered person performs the act or not, is his business. In any case the basis is created for an effective revoking, that is, one which dissolves the obligatory relationship. We shall later have the occasion to put this discussion in a larger context.

It was already mentioned that philosophers and jurists have for a long time seen a problem in the "binding of the promise." It is not so very difficult to dispose of the numerous constructions in which they have often gotten lost. There are three types of theories which we want to discuss here, for they have special importance. We are mainly concerned with filling out and clarifying the investigations which we have carried out.

The nominalistic theory of David Hume

We find in Hume two theses which are opposed as sharply as possible to the ones which we have put forward. He thinks that promising makes no sense before human convention has given it sense. And: even if promising did make sense apart from all convention, it would not involve any moral duty. Hume seizes with great acuity on the point on which everything depends. "If promises be natural and intelligible, there must be some act of the mind attending these words, *I promise*; and on this act of the mind must the obligation depend."³⁰ But which act is that supposed to be? It cannot be

a resolution to perform anything. For that alone never imposes any obligation. Nor is it a *desire* of such a performance: For we may bind ourselves without such a desire, or even with an aversion, declar'd and avow'd. Neither is it the *willing* of that action, which we promise to perform: For a promise always regards some future time, and the will has an influence only on the present actions.

There remains only one thing: the act of the mind which Hume is looking for must lie in "the *willing* of the *obligation*, which arises from the promise." Hume shows that this last possibility contains an absurdity. An obligation to do something is given, according to him, when its omission displeases us in some way. The creation of a new obligation presupposes, therefore, the arising of a new feeling. But it is just as little in our power to change our feelings as to change the motions of the heavens. The will to create the obligation itself, in other words, the will to change one's feelings, is accordingly absurd; "nor is it possible, that men cou'd naturally fall into so gross an absurdity." But even supposing that such a will existed,

it could not *naturally* produce any obligation . . . A promise creates a new obligation. A new obligation supposes new sentiments to arise. The will never creates new sentiments. There could not naturally, therefore, arise any obligation from a promise, even supposing the mind could fall into the absurdity of willing that obligation.

This whole argumentation is quite independent of Hume's own theory of obligation. Assuming that obligations are grounded merely in the objective structure of the world, completely apart from all feelings and consciousness of men, the will to produce such an obligation through one's own act would remain just as absurd as before. How should it be possible for the mere event of willing, a purely inner experience, to bring forth a change in the objective structure of the world? There cannot be such an absurd act of willing, and even if it existed, it would never bring about an obligation.

And so Hume comes to the conclusion that promising is no natural act of the mind and that the obligation of the promise is not a natural consequence, but that "promises are human inventions, founded on the necessities and the interests of society." It is not difficult to see that there are such necessities and interests. Selfishness does not let men perform an action for the advantage of others when they have no prospect of thereby achieving their own advantage. The normal thing is an immediate exchange of goods. But that is not always possible, since it often happens that the one service can be provided right away and the other

only later. Then the one party has to be satisfied with remaining in uncertainty and relying on the gratitude of the other in order to have his favor returned. Such an expectation is often disappointed because of the corruption of men in general. There is nothing to be done about this corruption, this selfishness and ingratitude of men. The only possible course for "moralists and politicians" is "to give a new direction to those natural passions, and teach us that we can better satisfy our appetites in an oblique and artificial manner, than by their headlong and impetuous motion." Calculating self-interest leads to the performing of services in the expectation of the repetition of similar services, and this repetition is secured through the rightly understood interest of the other. In addition to these self-interested transactions, there is of course the disinterested and more noble exchange of services performed without any prospect of advantage.

In order, therefore, to distinguish those two different sorts of commerce, the interested and the disinterested, there is a *certain form of words* invented for the former, by which we bind ourselves to the performance of any action. This form of words constitutes what we call a *promise*, which is the sanction of the interested commerce of mankind. When a man says *he promises any thing*, he in effect expresses a *resolution* of performing it; and along with that, by making use of this *form of words*, subjects himself to the penalty of never being trusted again in case of a failure.

Critique

We are pleased with the certainty with which Hume seizes on the essential point: the search for the "act of the mind" which accompanies promising. But the attitude in which Hume looks for this act is flawed from the very outset. He wants to find the experience which "is expressed by a promise," which could therefore also be present *without* having any such expression. Of course he cannot succeed in bringing to light any such inner experience. He is right to reject the experiences of resolving, desiring, willing; but he does not see that in addition to these inner experiences there are also "acts of the mind" which do not have in words and the like their accidental, additional expression, but which are performed in the very act of speaking and for which it is characteristic that they announce themselves to another through words or some similar forms of expression. Just as the general fact of the social acts as such remains hidden to him, so also does the occurrence in particular of acts of promising with their distinctive character.

The act of promising is naturally not the same thing as the will to oblige oneself. But all the same, an obligation towards the other does come about through promising, the promisor can be aware of this at the moment of promising, and in this case the will to this self-binding can very well accompany the act of promising. Hume wants to present this will as intrinsically absurd; this is however by no means the case. It would surely be so if there were nothing except this will. One can show this even apart from the ethical principles of Hume, which are in part subject to serious criticism. Every obligation necessarily has some source from which it springs. An obligation can therefore never arise without some change in the overall make-up of the world, or put more exactly, without something coming about which produces the obligation. In light of this we see that an empty, naked will to oblige oneself is indeed an impossibility. To oblige myself, or more exactly, to produce an obligation on my side, is something which I can only do by producing something from which the obligation springs; only *through something* can I want to put myself under an obligation. This factor which obliges is of course in our case the act of promising. Once it enters the world of being, it produces obligations which before had not been present. And so, though it would really be absurd to conceive of promising as merely willing an obligation, it is clearly understandable how this willing can accompany the act of promising. Thus promising has meaning "before human conventions had establish'd it"; and once we have clearly grasped what the act of promising is, we can also understand as a matter of self-evidence that an obligation does indeed come into being through the performing of it and on being heard by the addressee.

Since Hume fails to understand all of this, he has to resort to the conception of the promise as an artificial formula, as a symbol which we are led to observe because of our rightly understood interest. We need not lose much time in rejecting this theory. It is clearly a construction to which Hume is forced, and it is not in the least able to do justice to the clearly given essential relations. Above all there can be no doubt but that the binding force of contracts and promises was not created "by moralists and politicians," and that it is in any case completely independent of any *promisor* — we will later see that another philosopher derives it from the interest of the *promisee*. The one theory is as mistaken as the other. We understand that an obligation proceeds from promising even when there is no least interest in the service of the other; and even when there is some interest, the obligation is self-evidently not grounded in the interest but in the promise. Hume's contrast between interested and disinterested services shows best of all the weakness of his position. The disinterested promise given out of friendship of course obliges in exactly

the same sense as the most self-regarding promise. This cannot be understood on Hume's terms.

There is only one thing which Hume could perhaps make understandable through his analysis: that self-interest originally made men *keep and fulfill* their promises and their obligations. What would be explained here would be the influence of self-interest on the tendency to do the thing promised; but this is by no means the phenomenologically quite distinct experience of feeling oneself bound by the promise. What is the leap whereby one wants to get from the one experience to the other? But furthermore and above all, it is not a matter of the *experience* of feeling bound, which considered in itself can be founded or unfounded, but rather of the *obligation itself* and of the *claim* — Hume completely fails to take account of this latter — proceeding from the act of promising. Both of these are utterly unlike experiences. That this is so cannot be "explained" at all. One can only come to see it and to understand it by bringing to clarity the distinct act of promising and the essential relations grounded in it.

The psychological theory of Theodor Lipps

Lipps follows the other thinkers in holding that promising is nothing more than the expression of the intention to do something in the interest of another. How can an obligation issue from the fact that I make a resolution and a second person knows of this resolution? This is for him the real problem. Lipps is psychologically much deeper than his predecessors. He offers a penetrating analysis of what one simply calls knowing of the resolution of another.³¹

There is a cold knowing, for instance of past events. I know that Caesar was struck down by the hand of Brutus. One cannot simply assume that our consciousness of the experiences of others is like this knowing. Of course they too are at first simply presented as tied to another; but this is not the end of it. A general law reaching far beyond our particular sphere is here confirmed: every presented (*vorge stellt*) or contemplated object tends towards being fully experienced (*vollerlebt*). This tendency is realized when the presentation (*Vorstellung*) is left up to itself, especially when there is nothing to contradict the consciousness of the reality of the presented thing. This means in our particular case that the person who knows of the experiences of others, himself has the tendency to experience the experiences which were at first only presented in the other.

But there is something to pay close attention to here. When I sympathetically experience the experiencing which was at first only presented in the other, this sympathetic experience is in no way the same as an

experience of my own which flows out of my self. For it is the experience of the *other* which I experience, and this gives to my sympathizing "a special felt character of objectivity, that is, a character of ought (*des Sollens und Dürfens*)."³² This is the way it is in the case of "simple sympathizing." I know for instance of the judgment of another; I now have the tendency to perform the same judging, but at the same time this tendency takes on in me the character of an *ought*. Or I know of the inner attitude of another towards me; I know, for instance, that he esteems me. On the basis of this knowing there arises in me the tendency to esteem myself; and because this tendency of my experiencing has its basis in another individual, it again takes on a distinct felt character of objectivity: I am entitled (*ich darf*) to esteem myself in such a way.

This simple situation can now become more complicated. Let us assume that I have a certain consciously experienced attitude, and that another knows of this, and that I know in turn that he knows it. A tendency then arises in the other to experience sympathetically my attitude: this is the fact of simple sympathy. And then there is the fact that I *know* of this tendency in the other, so that thereby the tendency towards the attitude again arises in me. "My attitude therefore returns to me." Lipps speaks here of reflexive sympathy. But my attitude does not return to me *unchanged*, it has all the modifications which it has for whatever reason received in the other, and it has in addition — according to what we just explained — received the felt character of objectivity, of ought.

This set of facts implies for Lipps the consciousness of the natural social entitlements and obligations.

I express in words for instance the intention to perform a service in which the other has an interest; that is, I promise something. In knowing or assuming that the other gathers this intention from my words, I take this very act of intending back into myself, but heightened by the interest of the other, and as an ought or an obligation (that is, to fulfil the promise).

We see that Lipps deviates greatly from Hume's theory. Social relationships arise *naturally*, as he explicitly stresses, that is, "prior to every artificial institution which intends them."

Critique

We cannot here adequately evaluate these psychological ideas, which for Lipps fall under the comprehensive concept of sympathy (*Einfühlung*) and which get applied to very wide and various areas. We are only

concerned with their application to the fact of promising and to the claims and obligations resulting from it. And here we do not think that they do justice to the very distinctive facts of the case. Let us bring out only the most important points. Lipps conceives of promising somewhat as follows. The will to do something for another is present. This will has the tendency not to relent but to remain committed, as indeed every inner attitude has in principle the tendency to "continue on in the same way."³² This does not yet establish the consciousness of obligation. But the other knows of the decision. He has the tendency to experience it sympathetically. But this is no spontaneous experiencing of his own, but an experiencing which has been objectified as a result of coming from the other; it becomes a feeling of being entitled to will. The one who originally willed knows of this tendency. It returns back to him, but not as a tendency of his own, but as again objectified. He begins to feel obliged to will and to stay with his decision. In this way Lipps explains how claim and obligation arise from promising.

But does he really explain this? We think not, not even if we go farther in basing ourselves on Lipps' psychology than we would find justified. Let it be granted that in knowing of the experience of another we have the tendency to experience it sympathetically. Let it be further granted that this tendency undergoes an objectivation in the sense of Lipps. Of course even here one is up against considerable difficulties. It is especially hard to see why the judgment of another makes me feel *compelled* to make the same judgment, whereas the willing of another makes me feel *entitled* to will. We want, finally, to take a third step with Lipps: the sympathizing tendency returns objectified back to the one who knows of it. Of course here too it is hard to see why the feeling entitled of the other, of which I know, should objectify itself in me as a feeling obliged. But as we said, we want to grant all of this. The distinctive thing about promising is obviously still not captured. It is above all unintelligible why the promisor is required to express his intention in words or otherwise. After all, it suffices for Lipps that the other know of my intention and that I know of his knowing. Suppose that the other indirectly found out about my intention, that he for instance deduced it from some accidental activity of mine, and that I know that he has drawn this conclusion. According to Lipps a claim would then have to arise on his side and an obligation on mine. But nothing is more certain than that they do not arise in this way. The theory of Lipps, then, proves too much.

And further: Lipps would have to say that everyone who finds out about my will to do something for someone, thereby acquires a right that I really do it. If I express to Peter that I want to do something in the interest of Paul, there arises in Peter the objectified tendency also to want

it, and in me then the once more objectified tendency. In other words: Lipps would have to say that Peter gets a claim that I do something for Paul and that the corresponding obligation arises in me towards Peter. And yet neither thing happens. Lipps of course stresses that the tendency is stronger in the one who has some interest in the action. But that would only make for a quantitative difference. It would mean that I feel myself less strongly obliged to Peter than I would to Paul if I had directly expressed to him my intention. But in reality there is no obligation at all towards Peter. And even if Peter had a strong interest in the service being performed to Paul, he would clearly still get no claim. And the reverse holds: even if the service is not at all in the interest of Paul, he is still the one who has the claim, if only the "declaration of intention" has been addressed to him. Thus I can promise Paul to do something for Peter. Then Paul and only Paul has the claim; Peter has no such claim, even if he have ever so much interest in receiving the service.

Lipps's theory cannot do justice to any of these facts. And this is quite understandable. If one makes claim and obligation dependent on the psychological effects of the decision of the will and of the knowledge about it, one can then not explain the exclusivity of the obligatory relationship, its being strictly limited to the person who makes the "declaration" and to the one to whom it is addressed. In reality it is of course not the intention at all but the "act of declaring" which binds and entitles, and this act is not something like simply expressing one's intention, as Lipps thinks just as much as Hume does; it is rather a distinctive psychic acting which is grounded in the will and which must be externally expressed for the sake of announcing itself to another. In this act and only in it are claim and obligation grounded.

Note well: *claim* and *obligation* are grounded in it and not *experiences* or *feelings* of being entitled. These too may certainly arise in many cases, but that is quite irrelevant to our question. And here we come to the most fundamental of our objections to Lipps' point of view. Let us forget all of our previous objections and assume that through the expression of intention there arises in the expressing person the feeling of being obliged and in the addressee the feeling of being entitled — what has really been gained? What we want to know is whether claim and obligation arise. Those experiences can never substitute for this. Or should we perhaps take them as a sign indicating to us that the objective claims and obligations really exist? That would be an all too uncertain sign. We know after all that claims and obligations quite often exist without making themselves felt in corresponding experiences; and that there are, on the other hand, deceptions in which one feels obliged or entitled without really being so. These experiences are just as little a substitute or a

guarantee for the objective relations of essence which obtain between promising on the one side and claim and obligation on the other, as for instance the experience of a "necessity of thinking" is a guarantee for the objective logical laws. One calls it psychologistic when one tries to "explain" logical laws and structures in terms of experiences instead of clarifying them and making them evident by analyzing the laws themselves. We shall, then, have to speak of psychologism in the present case, too, where one tries to explain the objectivity of apriori social relations and formations by recurring to experiences which are absolutely irrelevant to the existing of these relations and formations.

The utilitarian theory (Erfolgstheorie) of Wilhelm Schuppe

Whereas obligation, which for us derives from the act of promising as such, is explained psychologically by Lipps in terms of the effects of the decision of will and is thereby seen as originating in a factor which is prior to the act of promising, Schuppe tries to derive it from posterior factors.³³

From the mere concept of will and declaration, there follows nothing which would keep the will from changing. . . For the will naturally follows opinions and feelings, and just as these can change, so can the will. The concept of obligation is inapplicable to them. And if no one can oblige himself to have continuously a certain opinion and a certain feeling, it seems that he cannot oblige himself for the future to the corresponding will.

But it happens that others rely on my expression of intention, and that in relying on it they undertake certain actions, so that through a change of my decision they would suffer some "property damage." In such a case the legal order (*der objektive Rechtswille*) will have to give its decision on this basis, and under certain circumstances forbid such a change of intention. This is the basis of contract.

So it is only for the sake of the security of property (or the sameness of the conditions for acquiring it) that one can demand the irrevocability of an expressed intention. The so-called binding force of a contract consists in nothing other than the importance of the legal order which insists on irrevocability. Since this binding force belongs to the concept of a contract, one can say: contracts can in principle only be made with regard to things which have to do with property relations.

Obligation, then, does not flow from "the magical power of a solemn formula," but from the basic principle of right that damage to property, or in general harm to another, even if only indirect, cannot be permitted.

Critique

The first thing which we notice is that the creation of the obligation is confused with the irrevocability of a declaration of intention. Promises are in themselves both binding and irrevocable. But these two concepts are emphatically to be distinguished, since there are obligations which derive from revocable promises and also, on the other hand, irrevocable promises which do not immediately produce an obligation. The first case is realized whenever the promisee grants the promisor the right of revoking. The second case is realized by the conditional promises. For claim and obligation arise here only when the condition is fulfilled. But this conditional promise is irrevocable from the very outset; the conditional promisor does not have the power to avoid by revocation the future occurrence of an obligation. So we see how unclear the very posing of the question as to the "binding force" of promises is. For this expression comprises indiscriminately both the irrevocability of the promise and the power of promising to generate obligation.

But let us put this aside, and test the theory with which Schuppe tries to make sense of the obligations resulting from declarations of intention. We shall bring out here only the most essential points. Schuppe is like the authors whom we have already discussed in seeing nothing more to promising than the expression of an intention of the will. He too is unprejudiced enough to admit that such an expression cannot explain an obligation. So we need some explanatory factor from without. The obligation is justified only by the fact that a change in a decision which has been declared can bring about harm to the property of another. We raise the objection: whence this restriction to the damaging of property? Does the legal order not recognize agreements regarding things which in no way touch property relations? One need only think of the contracts regarding the religious education of children. And why the reference to legal order? Does not for instance the promise to repay a loan produce an obligation in the promisor which is completely independent from the legal enactments which indeed uphold the obligation but in no way artificially create it? And does obligation not also arise in a sphere which is in no way touched by legal norms, not even if these are considered in their ideal perfection, for example in the case of a promise to visit someone or to take a walk with someone? This is precisely the place where the apriori effects of promising show themselves in a pure and unclouded way.

With regard to promises made apart from any positive law, the position of Schuppe would be that promises oblige if the one who relies on the declaration of intention would necessarily suffer thereby some harm. We object as follows: 1) one can think away the possibility of any such harm, but that would not restrain the arising of the obligation; 2) one can imagine ever so much harm, though no obligation results from the promise. We have only to recall that the promise which I perform towards another obliges me only to *this* person, but never to a third person who accidentally hears of my expression of will and relies on it in his acting. One will respond to us: not just anyone will rely on it but only the addressee of the expression of intention. But here we come to the most vulnerable point in Schuppe's theory. How to explain that only the addressee of the utterance relies on it? Not because he could be harmed by a change of intention — by the hypothesis so could any third person — but because the declaration of intention is performed to him and only to him, or to put it more correctly, because to him and only to him is the promise made. Relying on the utterance does not explain the obligation, rather the obligation produced by promising explains the relying. In taking his stand on the fact that precisely the promisee relies on the promise, Schuppe presupposes what he wants to explain: the obligation of the promisee.

What may give Schuppe's discussion at first glance an appearance of plausibility is that a moral duty really does sometimes arise in the cases considered by him. It is wrong deliberately to inflict harm on another, and there is accordingly a duty to act in such a way that this harm does not occur. And so, assuming that other duties and entitlements do not interfere, one can acquire the duty to stand fast by an intention which has been expressed, if otherwise someone who has acted in reliance on what he has heard, would be unavoidably harmed. But this moral duty has according to its whole structure, nothing at all to do with the extra-moral obligation which results from a promise. After all, both of these things are completely different even as to their origin. The moral duty presupposes that its content is morally right, in the present case that it is right to avoid harming one's fellow man. That an expression of intention has occurred is indeed the occasion for there being the threat of harm at all, but it is in no way the ground of the duty. The obligation, by contrast, does not presuppose any morally right state of affairs; it is rather grounded exclusively in the declaration of intention, or rather in the act of promising. With a view to this we can formulate the mistake of Schuppe's theory in this way: it replaces the obligation grounded in the essence of the social act, with a moral duty derived from states of affairs

which in no way coincide with the act of promising and which can obtain completely apart from it.

If promising is going to be brought into relation to moral duty, we should rather think of a different duty which really is inseparable from it, even if it has to be distinguished as sharply as possible from the obligation. Where a promise has been given, there is a moral duty to fulfil it. The *obligation* to fulfil which exists over against the promisee is in addition to the duty, or better, it forms the basis and presupposition of that duty. It is morally right to fulfil obligations — this is the principle which determines the moral duty of fulfilling and which clearly presupposes that an obligation exists. Where, then, an obligation exists, there also exists, resting on it as on a foundation, the duty whose content is the fulfillment of the obligation. This principle, like all essential laws in general, holds with absolutely no exception. The objection which will be raised here and which was perhaps already raised to our earlier analyses is an obvious one: do then immoral promises bind and even entail a moral duty? Does one really want to say that whoever mindlessly promises to murder a fellow man takes on an obligation towards the promisee and that he even acquires a moral duty to carry out the murder? We do not answer these questions in the affirmative. The obligation is grounded in the nature of promising as an act and not in its content; the immorality of the content can, therefore, in no way touch this essential law. And further, the moral rightness of fulfilling and also the moral duty of fulfilling is grounded in the essence of obligation and not in its content. Here too the immorality of the content is irrelevant. Of course it is not irrelevant in *every* respect — we just mean that it is here of the greatest importance to keep distinct the various levels. If the content of the obligation is not morally right, then the duty not to realize it, is grounded in this wrongness — and not in *the obligation as such*. So here we see juxtaposed and at odds with each other the duty to do and the duty to omit, each deriving from very different factors. In the case of such a conflict it is one's moral duty to fulfil the demand of the higher duty. There is no doubt but that in our example one's moral duty would be not to commit the murder. But the essential thing for us in the present and in other ethical contexts is that here too an obligation arises from the promise and remains intact, and that even a moral duty arises, even if it is outweighed by other higher duties. We can know whether an obligation should be fulfilled only by going beyond it to the moral duty grounded in it. For only in this sphere is a comparison with other duties possible. The extra-moral obligation remains untouched by all this.

It is quite understandable when § 138 of the *Bürgerliches Gesetzbuch*

[Civil Code] prescribes: a legal transaction which offends against good morals is void. This of course does not mean that from such a transaction, say from a promise, no obligation in our sense arises — not even the BGB can negate essential apriori relations; it rather means that the positive law neither recognizes nor supports with coercion such promissory claims and obligations as conflict with moral precepts. On this basis we can dispose of the objections which have been raised to a “natural binding power” of promises. It has been said that since immoral promises do not bind, the act of promising by itself is not able to bind. Our response is clear enough. If in saying this one is thinking of the genuine relative obligations, we can say that even the immoral promise as promise produces them. If in thinking of these obligations one has in mind what is usually confused with them, namely the moral duties of fulfilling which are grounded in the obligation, then we grant only that these duties, which arise even from the immoral promise, can be outweighed in such a way by higher moral duties that the final result is a duty not to do the thing promised. But the principle that from promising as such there results an obligation and thereby a moral duty of fulfilling, is just as little called into question by this, as the laws of gravity are called into question by a body whose falling is prevented by another body which supports it.

And so we stand by our thesis that claim and obligation are grounded with essential necessity in the act of promising as such. One reason why this has been misunderstood not only by the theories discussed but in general, is that most authors focus only on one small problem in a vast sphere. There are after all still many other social acts besides promising. There are essential apriori laws grounded in commanding and requesting, in revoking and waiving, in transferring and granting (*Einräumung*), etc. A glance into the vast world of legal occurrences should suffice to convince one of this. Then one would have surely abandoned such constructions as have been undertaken. Or would one have tried to “explain” in the same way that for instance a claim necessarily dissolves on being waived?

Strictly speaking we are not proposing any *theory* of promising. For we are only putting forth the simple thesis that promising as such produces claim and obligation. One can try, and we have in fact tried, to bring out the intelligibility of this thesis by analysis and clarification. To try to explain it would be just like trying to explain the proposition, $1 \times 1 = 1$. It is a fear of what is directly given (*Angst vor der Gegebenheit*), a strange reluctance or incapacity to look the ultimate data in the face and to recognize them as such which has driven unphenomenological philosophies, in this as in so many other more fundamental problems, to untenable and ultimately to extravagant constructions.

Apriori relations, though they are given to us directly and plainly, have a dignity all their own. The slightest misinterpretation can lead to the worst philosophical consequences. There is *one* error which is committed especially often: the object in whose essence a predication is grounded is confused with an object in which the predication is realized at some time or other and in some way. In the essence of promising is grounded claim and obligation. But as far as our experience reaches, we find only human beings who make promises. What is more plausible than the thesis that claim and obligation are grounded in the promises of *men*? One will assert this as if it were obvious. After all we only know of men and their promises — are we supposed to be able to say something about the promises of certain persons who are unknown to us? We can indeed do this. In whatever person a promise is realized, whether it is angels, or devils, or gods who promise to each other, claims and obligations arise in the angels, devils, and gods — as long as they can really promise and can hear promises. For what we have shown regarding claim and obligation is grounded in promising as promising, and not in the fact that promising is performed by subjects who walk upright on two legs and are called men. The nature of the performing subject is evidently irrelevant for the essential relation; but this means that *all possible* subjects, however bold we are in imagining their nature, bind themselves by their promises, as long as they are capable of promising. And so we are not the ones who here assert something extravagant, it is rather our opponents who, restricting themselves in apparent modesty to the human sphere, make the apriori relation depend on presuppositions which cannot be verified by direct insight. To want to limit essential necessity by arbitrarily linking it to the accidental bearers in which it is realized, this is to spread a veil with one's own hand over the world of ideas, into which it is granted us to look.

The slaves in ancient Rome were, according to their general legal incapacity, incapable of taking on obligations through their own promises or of acquiring claims in their own persons through the promises of others. Roman jurists have said that this legal incapacity was invalid according to the “natural” principles of right. From our point of view this thesis receives a good foundation. We can of course not agree with the explanation of it given in terms of natural law. It is not because the slaves were human beings just as much as freemen were and because “nature has created men equal,” that they can acquire claims through promises, it is rather because they can promise and be promised to, that they thereby acquire, by essential necessity, claims and obligations. What we have here shown for promising also holds in general for all social acts and for all acquisition of right through them, as we are about to see.

Notes

- 1 Cf. above all Zitelmann, *Irrtum und Rechtsgeschäft*, p. 17.
- 2 That property amounts to a power relation which is sanctioned by the positive law, that it is in any case something which is possible only on the basis of the positive law, can be said to be the generally held opinion. Cf. among philosophers for instance Hume, *Treatise on Human Nature*, Book III, section 2, or Schuppe, *Grundzüge der Ethik und Rechtsphilosophie*, p. 235 and ff.
- 3 Cf. for instance von Ihering, *Der Zweck im Recht*, I, p. 264 and ff.
- 4 ["Legal" is of course a problematic translation for "rechtlich," because "legal" derives from "law" understood primarily in the sense of positive law, whereas "rechtlich" in the present context and elsewhere means, or at least includes in its meaning, law in some prepositive sense (though not necessarily in the sense of the natural moral law). But it is impossible to find a really adequate English rendering of rechtlich. Whenever I translate with "legal" but do not explicitly elaborate with an expression like "legal in the sense of the positive law," the reader should take "legal" as equivalent to rechtlich and as open in its meaning to prepositive law. The task of translation is somewhat easier with the German "Recht" (as in Rechtsphilosophie), which I usually translate not with "law" but with "right" (as when I translated "apriorische Rechtslehre" with "apriori theory of right"). This use of "right" is understandable, even if not completely natural, and seems justified on the grounds that it is more readily expressive of pre-positive law, with which Reinach is especially concerned. JFC]
- 5 It is not necessary in this work to look more closely into the problem-laden theory of the apriori. Just one thing should be especially stressed: what is primarily apriori is neither sentences nor the judgment nor the act of knowledge, but rather the "posited," judged, or known state of affairs (*Sachverhalt*). It follows that in the apriori relations which are alone in question here, it is not the judgment or the knowing which is necessary, but rather the judged or known such-being (*Sosein*). And "universality" has no further meaning than that this such-being, which is grounded in the essence of that to which the subject refers, holds for absolutely everything which shares in this essence.
- 6 In the following we limit ourselves to bringing out some of the apriori foundations of the civil law. But we are convinced that other legal disciplines, especially penal law, public law, and administrative law, are capable of and in need of such a foundation.
- 7 What should be the content of this promise? A can promise to B to transfer to him a thing which belongs to A. Nothing comes thereby to belong to B, he only has a claim to have the thing transferred to him. Or A promises B to let him act as an owner. Here too there is set up only a claim of B against A, but in no way at all a relation of belonging between B and the thing. One sees here clearly that we have to do with the essential laws and not with the enactments of a changeable positive code. The statements which the jurist takes for granted acquire thereby a quite new philosophical significance.
- 8 [Reinach has in mind here Max Scheler's account of value perception, which Reinach's student, Dietrich von Hildebrand, developed both in his dissertation, "Die Idee der sittlichen Handlung," and in his Habilitationsschrift, "Sittlichkeit und ethische Werterkenntnis." They both originally appeared in Husserl's Jahrbuch, the first in 1916, the second in 1922, and were reprinted in 1969 by the Wissenschaftliche Buchgesellschaft, Darmstadt. JFC]
- 9 To be clearly distinguished from this is the fact that absolute rights can be derived from another person, for instance by transfer.
- 10 [Reinach's extremely concentrated train of thought here becomes fully clear if we give an example of an absolute right. The rights which the owner of a thing has over the thing are, as Reinach explains in his detailed discussion of property (§5), typically absolute rights. The entitlement of an owner to dispose over his property is not a claim against anyone; it simply "covers" his own action in disposing over his property. By contrast, the right of the promisee, his claim against the promisor, refers not to an action of his own but to an action of the

other, the promisor. Reinach finds that this contrast has no place in the sphere of obligation; obligation refers always only to some action on the part of the subject who is ^{obliged} (All obligation seems to be, in respect of the action covered by the obligation, like the absolute rights; obligation does not admit of a parallel to the relative rights in this respect. JFC)

11 We have to distinguish in the sharpest possible way between the moral value of person, actions, acts, etc., and the moral rightness which belongs to states of affairs and only to them. In this way two basic spheres of ethics are marked off, though they are related to each other by self-evident essential relations. Thus it is morally right that a morally valuable thing exists, and the contradictory state of affairs (*Sachverhalt*) is morally not right (*unrecht*), etc. Furthermore, the realization of an ethically right state of affairs is morally valuable, its omission has moral disvalue, etc.

12 [We shall translate Reinach's "Verpflichtung" with "duty." Actually "obligation" would in many cases be a better translation, but we do not know how to avoid reserving this term for Reinach's "Verbindlichkeit," which he means to contrast with "Verpflichtung." A Verbindlichkeit (whether absolute or relative) for him is an obligation which is not itself specifically moral, whereas a Verpflichtung (whether absolute or relative) is a specifically moral bond. As he goes on to explain, this is only a distinction and not a separation, and every Verbindlichkeit has the tendency to bind morally. JFC]

13 [It must be admitted that the objection which Reinach just posed to himself is not satisfactorily dealt with here. He returns, however, to this whole subject below, pp. 45-46, and says more about it. Cf. our critical discussion below of Reinach's distinction between Verbindlichkeit and Verpflichtung. JFC]

14 We leave open the question to what extent other kinds of essential relations can play a role here.

15 Cf. my essay, "Zur Theorie des negativen Urteils," in *Münchener philosophische Abhandlungen*, p. 220 ff. [This essay of Reinach's was reprinted in his *Gesammelte Schriften*, where the passage in question occurs at pp. 82-83. An English translation of this essay has recently been published in *Aletheia II* (1981); here the passage occurs at pp. 34-35. JFC]

16 On other theories of contract cf. Stammler in *Handwörterbuch der Staatswissenschaft*, 3d ed., vol. VIII, p. 334 f.

17 I can only command myself by artificially putting myself over against myself as something other and somehow foreign. Self-love, by contrast, does not have this artificiality.

18 [We use the term "hear" in a broad sense which enables us to speak of the commanded person hearing the command even when his ears are in no way involved, as when he apprehends the command by reading something. We are drawn to the term, hear, because it, more than alternative terms for *vernehmen*, like *apprehend*, or *recognize*, is often used to express the conscious taking in of a word addressed to the hearer. But it is clear that neither German nor English has any natural and unambiguous word for expressing the highly meaningful concept of a receptive act which refers precisely to an act of another person addressed to the recipient. Perhaps "receive" could be made to work, and serve as a translation for *vernehmen*, but I have decided on "hear." JFC]

19 When we in this way contrast wishing and willing, we are of course presupposing a definite meaning of these so ambiguous terms. ^{right}

20 Cf. my "Zur Theorie des negativen Urteils," *op. cit.*, p. 202 f. [In Reinach's *Gesammelte Schriften*, p. 62-63; in the English translation in *Aletheia* (1981) vol. II, p. 20. JFC]

21 As seen from the time at which the act is performed, of course. ^{jo}

22 Conditional promising is not exactly without any immediate efficacy at all. It creates in the promisor a state of being bound which shows itself in the fact that he can no longer avoid acquiring an obligation when the condition is fulfilled.

23 Above all the state of being bound is not something which could be waived, since it is not a right of the promisee. One can only speak of a releasing of the promisor by the promisee.

recht ist auch nicht.

24 This is what distinguishes the pseudo-promise from the promise which does not expect to be taken seriously, such as a jocose promise, a polite form of speech, advertisement, or promising on the stage, which is a case for itself.

25 We do not dare to answer this question with certainty. It may be that the positive law treats a pseudo-promise, which pretends to be serious but which is not seen through by the addressee in its lack of seriousness, as a genuine promise; but from this no argument can be made which applies in our extra-positive sphere of right. Let us just observe that in these and other cases of what jurists call the disagreement of "intention" and "declaration of intention," we find first of all a disagreement of the social act and its mode of expression, only secondarily one between mode of expression and intention, and never one between intention and social act. This distinction seems to us to be important for the analysis of the so-called "defects of will." Thus we have to distinguish sharply the following things each of which varies in its legal significance: a deception as a result of which I *intend* something which I would otherwise not intend, a deception as a result of which I *promise* something which I indeed intend but would not promise unless deceived, and a deception as a result of which I give my promise *an expression* different from what I would give without being deceived.

26 We cannot here go into the interesting and difficult phenomenology of the contract. It should by now be evident that a contract cannot be understood without the concept of the social acts, that it is especially not composed of "expressions of intention," and that it is in particular the *conditional* social acts which are important for its structure.

27 This is not to say that these acts do not come up at all in the positive law. Thus it seems to us that a phenomenological analysis of permitting or of commanding and of the apriori laws grounded in them is quite necessary for giving a philosophical foundation to public law and to administrative law.

28 How the positive law treats this case is of course a matter of indifference for our sphere of right.

29 It probably does not even need to be mentioned any more that we do not have to do here with a *positive-legal* ability.

30 Hume, *Treatise of Human Nature* (Oxford, 1888; rpt. of original ed. of 1738), Book III, Part II, Section V, p. 516. All the following quotes from Hume are taken from Section V, pp. 516-525.

31 Cf. especially *Leitfaden der Psychologie*, 2 ed., p. 208 ff; also *Die ethischen Grundfragen*, 2 ed., p. 152 ff.

32 Cf. *Ethische Grundfragen*, p. 155.

33 *Grundzüge der Ethik und Rechtsphilosophie*, p. 304 ff.

CHAPTER TWO

Basic Themes of the Apriori Theory of Right

§5 Rights and obligations. Property

Though we now want to rise to a more comprehensive view of the sphere of the apriori theory of right, we in no way contemplate an exhaustive presentation, which would have to include vastly more than one might at first think. We can intend nothing more than to bring out a few basic themes (*Grundlinien*).

We have already distinguished the absolute rights and obligations from the relative claims and obligations. The absoluteness of these things entails that their content refers to one's own action. We distinguish as sharply as possible between these extra-moral phenomena of right and the specifically moral duties and entitlements, whether absolute or relative. We have seen in detail how the former arise and pass away purely through free social acts of persons; we can call them the rights and obligations of *social transactions* (*Verkehrs-Rechte und -Verbindlichkeiten*). But the specifically moral is in every case in need of a different foundation. We have seen that this foundation is very different with moral duties and with moral entitlements. Even if they have the same content, they can never have the same origin. This of course does not exclude the possibility of a moral entitlement existing together in the same person with a moral duty of the same content. But then the foundation of each is necessarily different — just as, though it is conceivable that both the absolute right and the relative obligation of a person refer to the same action of the person, nevertheless the origin of each is apriori different, for instance, the origin of the absolute right might be an act of granting (*Einräumung*), of the obligation an act of promising.

Moral entitlements and moral duties are not correlated to each other as positive and negative, rather both are positivities which completely differ in kind from each other. An action in accordance with duty neces-

sarily has as such a moral value; its existence is thus morally right. But an action which is covered by a moral right need be neither morally good, nor morally right in its existence. Action in accordance with duty is as such required, action covered by a right is as such allowed. Inasmuch as one and the same action can be equally a matter of duty and right, the statement, "This is not only my right but even my duty," expresses apriori possibility. The "even" should not be taken as asserting a hierarchical relation of right and duty, which would in itself be quite impossible, but merely as expressing the necessity which a required action has and which an action which is merely allowed does not have.

In these investigations we are primarily interested in the rights and obligations of social *transactions*. But a complete exposition would also have to take account of the corresponding *moral* phenomena, for these too are to a great extent recognized by the positive law. One should just recall the entitlements and duties which result from certain relationships of consanguinity or affinity.

The absoluteness of rights and obligations means the *absence* of every relation to a partner (*jeglicher Gegnerschaft*), and not its *universality*, that is, not the fact that the so-called absolute rights and obligations exist over against *all* persons in contrast to the obligatory rights and obligations, which are tied to a *single* person. We have to be very exact here, and in particular to leave aside all considerations derived from the positive law. It may be that absolute rights and obligations usually presuppose a person from whom they are derived; but that does not mean that they are *directed* towards this person. It may also be that when someone violates an absolute right, there arises a claim against him for compensation; but this relative right is not identical with the absolute right, which much rather functions here as its presupposition. Finally one could also say — although we are not ready to venture such an assertion — that the subject of absolute rights has a claim on all persons to respect his rights and not to violate them. Even if this were so, it would not mean that absolute rights *are* nothing but universal rights against all persons, but only that they have such rights *as a consequence*. The very relationship which is here in question presupposes that there are absolute rights, that is, rights without any partner at all.

We find very significant differences among the absolute rights, which always refer to one's own action. There are rights to actions with an immediate efficacy in the world of right — we already encountered some of them: the right to waive, to revoke, and the like. These are social acts the exercise of which produces an immediate effect in relations of right, such as ending them or modifying them. We want to call these rights, following a well-known juristic terminology, *Gestaltungsrechte*.¹

From these rights we distinguish the rights to an action to which no such immediate effects of right are intrinsic. We want to focus especially on those ways of acting which refer to *things* (*Sachen*) and present themselves as a *dealing* (*Verfahren*) with things. In virtue of their content these rights themselves have a relation to things: we can call them *rights over things* (*Sachenrechte*). Rights of this kind are for instance the rights to use a thing, to enjoy its fruits, to cultivate it, to make something of it, and the like. The concept of a thing in no way coincides with that of a bodily object, even if positive enactments would restrict it to this. Everything which one can "deal" with, everything "usable" in the broadest sense of the word, is a thing (*Sache*): apples, houses, oxygen, but also a unit of electricity or warmth, but never ideas, feelings or other experiences, numbers, concepts, etc.

Among the rights over things the jurist usually selects out one as the most important and in a certain way as the foundational one: property. The phenomenology of property will have to play an especially important role in the apriori theory of right. In our present context we can only bring out some of the most important points.

Among the many possible relations of a person to a thing, let us consider first of all the relation of *physical power* (*Gewalt*). The person who has power over a thing can do with it as he will, can use it, transform it, destroy it. This power (*Können*) is a *physical* power which we encountered earlier. When for instance we spoke of the power to waive, we were not thinking of a natural ability to perform an act but of the ability, grounded in the nature of the claim, to eliminate an obligatory relationship through the act. A natural power (*Gewalt*) over things is reflected in the ability to manipulate them; a legal power (*Macht*) is reflected in the ability to waive, to revoke, etc. But these two kinds of power are to be distinguished as sharply as possible.

There is a certain indefiniteness intrinsic to the concept of a natural power. It is hard to draw the line exactly between the things which are within the power of a person and those which fall outside of it. But this indefiniteness belongs to the very nature of such concepts. And we have to be careful not to misinterpret it. That a person's sphere of power is enlarged to an extraordinary extent as culture develops, does not modify the concept of power but only the range of things which falls under it.

Without here going into a closer analysis of the relation of power in which a person can stand to a thing, we designate it as *possession* (*Besitz*). This possession is clearly no right but rather a factual relation, if one will, a fact. One can be entitled to this relation or not entitled to it, according as a given person has a right to stand in the relation of possession or not. The right to the possession (*Recht auf den Besitz*) should of course not be

confused with the *possession itself*, just as little as the right to *take possession* (*Recht zum Besitz*) should be confused with it, that is, the right of a person to enter into a relation of power to a thing. This right can be an absolute one granted by another person, or a relative one arising against another person through the promise of this other. One is entitled to establish a relation of possession if one does so as the exercise of a right, but this establishing as well as the relation itself can be such that one is not entitled to them. A person is always entitled to a relation of possession which derives from a taking possession to which the person is entitled. All these simple principles are valid apart from any positive code, apart from the recognition and protection which it can extend to the relations of possession to which one is entitled and possibly even to those to which one is not entitled, and to the different kinds of rights to possession and to taking possession. But we want to point out that a relation of possessing obviously does not change from a fact to a right in virtue of being recognized and protected by the positive law, just as little as for instance the exercise of a right itself changes by this protection from a factual event to a right.²

A thing can be in my power without belonging to me. It can belong to me without being in my power. This difference is self-evident without referring to any positive code, even for those who do not know the least thing about the positive law. To talk here of an "unconscious" influence of positive norms, is nothing but a superficial and untenable construction. Even supposing that the norms of the positive law have become almost a part of us as a result of long acquaintance with them, this "being accustomed" to them could only produce certain inner tendencies and compulsions, but never the clear and indubitable evidence with which we distinguish, without any dependency on a positive code, between property relations and power relations. That a thing belongs to me is a thoroughly "natural" relation which is no more artificially produced than is the relation of similarity or of spatial proximity. This is shown in the fact that the terms of relation of belonging are strictly prescribed by the essence of the relation. In distinction to the relations just mentioned, these terms are not both on the same level. There is a bearer of the relation and a "borne" object. The first can necessarily be only a person, the second only a thing. How should such necessary and immediately intelligible relations be grounded in some artificial creation? It is also impossible to derive in any way the relation of belonging from the completely different relation of power. A person can be entitled to have a thing in his power, though the thing does not belong to the person. And on the other hand, the thing can belong to the person, though he is not entitled to have the thing in his power. Just as untenable, as it seems to

us, is the attempt of some philosophers and jurists to remove belonging from the sphere of things which stand in themselves and are structured by apriori laws, and to place it in the sphere of the positive law. One wants to recognize nothing except factual power relations as being independent of the positive law, and so one takes property as the legally sanctioned and protected power or dominion over a thing. In this very important question we have to set ourselves as emphatically as possible against the usual opinion. One need surely not make a point of the fact that possession in the positive law is a protected power relation. Does it perhaps thereby become property? Or is property supposed to be distinguished from possession by merely a *more* in the way of protection, as if the first degree of owning were already contained in possessing? The absurdity of such an opinion is clear. Let the positive law extend its protection to power relations (which one may or may not have a right to) as broadly as it will: they can never be thereby transformed into relations of owning. It is not the case, as one generally claims, that something is property because the positive law protects it; rather the positive law protects it because it is property.³

The relation between person and thing which is called owning or property is an ultimate, irreducible relation which cannot be further resolved into elements. It can come into being even where there is no positive law. When Robinson Crusoe produces for himself all kinds of things on his island, these things belong to him. Just as there are claims and obligations which arise from social and similar promises completely apart from any positive law, so it is easily conceivable that property relations could come into being in a realm devoid of positive norms. The reason why one fails to see this is that our positive law comprehends and structures not some (as with promises) but *all* relations of owning. But there is no least logical contradiction in assuming that a certain class of things is not subject to the property law of a given legal code.⁴ It goes without saying that there would be relations of owning even with regard to these things, which relations would arise and be dissolved according to strictly apriori principles, which we are about to discuss.

The bond between a person and the thing which he owns is a particularly close and powerful one. It lies in the essence of owning that the owner has the absolute right to deal in any way he likes with the thing which belongs to him. Whatever ways of acting one can think up, whatever combinations of them one may devise — the owner always has the right to perform them. Of course these rights can be limited by obligations of right and by moral duties deriving from other facts. The owner naturally can also enter into obligations which restrain him from making use of his rights, or he can grant to others the rights inhering in his

property. But all this in no way changes the fact that all those absolute rights derive from owning as such. We of course reject the usual formulation that property is the *sum* or the *unity* of all rights over the thing. If something is grounded with essential necessity in another, this other can never consist in the thing. We are not simply idly playing with concepts here; it is a matter of a serious distinction with immediate consequences. If property were a sum or unity of rights, it would be reduced by the alienation of one of these rights, and it would be eliminated by the alienation of the totality of all rights, for a sum necessarily disappears with the disappearance of all of its parts. But we see that a thing continues to belong to a person in exactly the same sense, however many rights he may want to alienate; it makes no sense at all to speak of a *more* or *less* with respect to belonging. The *nuda proprietas* in no way means that the owning "springs back to life" once the rights transferred to other persons have been extinguished; the thing rather *belongs* to the owner in the interval in exactly the same sense as before and after.

We have definitely to hold fast to the thesis that property is itself no right over a thing but rather a *relation* (*Verhältnis*) to the thing, a relation in which all rights over it are grounded. This relation *remains completely intact even if all those rights have been granted to other persons*.

Very curious is one of the effects of this *nuda proprietas*, and it can be grasped apriori, as all these relations can be. Let us assume that A has some right which he transfers to B. Then B can later transfer it back to A. Or B waives his right; then it disappears from the world for good. This is all quite different in the case of an absolute right over a thing which belongs to A. It lies in the essence of owning that all rights belong to the owner except insofar as they belong to another person as a result of some acts performed by the owner. If this other person waives his rights, the factor restraining the free unfolding of the owning disappears: the rights in question belong again to the owner. This is the essential necessity which underlies the so-called "elasticity" or "residuality" of property and which can hardly be reasonably considered as an "invention" of the positive law.

One sometimes speaks of divided property. Now nothing is clearer than that *property* itself, the relation of belonging, cannot be divided, just as little as the relation of identity or of similarity. Only if one lets property *consist* in the rights over the thing — in reality these rights are *grounded in* property — can one want to divide it up by dividing up the rights. The rights grounded in owning can of course be divided among ever so many persons; it is also possible to resolve them into ever so many rights by breaking up their content. But it is evident that a division of the *owning itself* is impossible. The dividing, then, insofar as it is really present,

can only lie on the side of the owned thing. It is clear that a thing, say a physical object, comprises parts which make possible separate relations of owning for a number of persons, so that the parts of the thing become relatively independent partial things. But we have to distinguish this direct division of the thing, from an *indirect division of the thing based on a division of its value*.

If we compare things with their economic or other value, we find that each can vary in very considerable independence from the other. There are modifications which affect both thing and its value at the same time, but in different ways; modifications which affect the thing and leave the value untouched; and finally modifications which are only of the value. The destruction of half of a thing may eliminate three fourths or even all of its value; the division of a thing can leave the value completely intact; a reduction or augmentation of the value can be brought about by events which do not change the thing itself in the least. On this basis it becomes understandable why events which happen to a thing can be specified more exactly both by referring directly to the thing, or indirectly to its value. The destruction of half a thing can at the same time be called the destruction of for example three-fourths of the thing's value. And it can further be the case that the damage to a thing cannot at all be calculated in terms of a division of itself but only in terms of a division of its value. Then not the least part of the thing is destroyed, but it is damaged at half of its value (as when its colors fade).

Property too admits not only of a direct relation to the thing or its parts, but also to the thing *insofar* as it has certain economic value-parts. A can own a thing at half its value, B at a third of the value, and C at a sixth. It is not a question of real parts of the thing, but of *partes pro indiviso*, an excellent expression of Roman law. Just as a thing can be destroyed at half of its value without itself undergoing a corresponding destruction, so a person can own a thing at half its value without this half coinciding with a real half of the thing itself. That which is owned in this case is not a fraction, whether real or "merely thought," of the thing itself, nor is it a fraction of the relation of owning — which is as such impossible — nor is it a fraction of the thing's value; that which is owned here is *the thing itself at fractions of its value*. The thing belongs to several persons "together" in the sense — and only in the sense — that each of the persons owns the thing at a certain part of its value, and the sum of these value-parts is equal to the value-whole.

Turning now to the owning person, we have above all to stress that the same thing at its whole value can never at the same time be owned by two different persons in two different relations of owning. The one owning necessarily excludes the other.⁵ From the case of several rela-

tions of owning we have to distinguish the one relation of owning in which several persons participate, just as we spoke above of claims and obligations in which several persons participate. A thing can belong to ever so many persons together (*zur gesamten Hand*, as the positive law puts it). They are then all together owners of one and the same thing; however many they are, there is only one relation of owning. In the case considered above it is also possible for there to be ever so many owners. But there the thing was divided according to its value, and there were as many relations of owning as there were value-parts; the close bond connecting with one another the many bearers of the *one* relation of owning was missing. Finally, in the case of a direct division of a thing into real parts (which we would, by the way, distinguish from *breaking the thing up into parts*), one cannot even speak of unlimitedly many possible owners, since the direct division of things has its limit, and there can only be as many owners as there are parts of the thing. If a thing belongs to a number of persons together, they share all together in the rights which derive from owning the thing. If someone owns a thing only at a fraction of its value, his right to enjoy the economic purpose of the thing is proportioned to this fraction. It is the task of the positive law to structure things more exactly. Here we have just wanted to make evident several essentially necessary relations which underlie the various notions of property in the different positive codes and which can be elaborated by them with the greatest freedom.

As we saw, relative claims can last ever so long; it is evident without further explanation that absolute rights over one's own action can exist for a very short time. But an essential difference between them is that the claim is by its nature something preliminary, something aiming at fulfillment, whereas the absolute right is something definitive, something resting in itself. The claim is in need of fulfillment; the absolute right over one's own action is not even capable of fulfillment at all. It can indeed be *exercised* by the holder of the right himself, but it does not call for such exercise in the sense in which a claim calls for fulfillment. And on the other hand, a claim is not capable of being *exercised*. The claim after all has to do not with one's own action but with that of another. If the action of the other fails to take place, the claim is violated; but there is no action of one's own which could replace the action of the other. Bringing suit and other such things — which are irrelevant for our sphere — could indeed be considered, from the point of view of the positive law, as the exercise of a claim, though even here one would have to ask whether we do not rather have to do with the exercise of certain particular rights.

The exercise of absolute rights, which are always directed to one's own action, is left up to the person who has the rights. The fulfillment of

the relative claims is left up to the partner over against whom they exist. If we assume that every right ultimately aims at some interest of the person who has the right, then we can say that with every absolute right the person can realize this interest by himself, whereas with the claims he is dependent on the initiative of the other. The greater security and reliability is obviously found with the absolute rights. In the sphere which we are investigating, we have nothing to do with any coercion which might be brought to bear against the other. The problem arises how one's interest can be realized as certainly with respect to claims as with respect to absolute rights. This cannot be done on the level of the claims, for it is impossible to *transform* these into absolute rights over one's own action. It is then an ingenious idea to put the *absolute rights into the service of the relative claims*. This does not mean simply creating an absolute right, for that would only be adding a right to the claim. It should rather be done in this way: an absolute right is made dependent in such a way on the claim that the right becomes actual as soon as the claim is violated by the failure to fulfil, and the right then, in replacing the claim, secures the interest of its holder by letting him depend no longer on the initiative of the other but on his own action. These are the apriori foundations of the law of liens and mortgages (*des Pfandrechtes*), the elaboration of which can of course display the greatest variety. It is always simply a matter of realizing by one's own action the value or its equivalent which the other failed to realize by his action. The supporting right can therefore take any imaginable form, even if the positive law realizes only some of the possibilities prescribed by the idea of the law of lien.

Two things seems to us to be characteristic for this right. First of all, it is by no means on a level with the other absolute rights; it is for instance not related to usufruct as this latter is to servitude (easement), or to the hereditary right to maintain a building on the property of another (*Erbbaurecht*). Even if one limits, as is usual, the concept of a lien to rights over things, any of these rights can function as a lien insofar as it is suited to the securing of a claim. One should therefore not conceive of the lien as a new kind of absolute right over things which has a content all its own, but rather as any of the rights over things, in the role of fulfilling a particular function.

This function — the securing of a relative right — is the second characteristic point. The exercise of the absolute right over the thing is supposed to offer compensation to the lien-holder whose claim — in itself incapable of being exercised — has gone unfulfilled. This also means that this exercise is allowable only when the other fails to fulfil. Let us recall the distinction which we made earlier between unconditional rights with conditional content, and conditional rights with unconditional content,

the former deriving from unconditional, the latter from conditional social acts. Insofar as the lien, that is, an absolute right serving to secure a claim, is unconditionally granted, it is an unconditional right. Insofar as it may only be exercised in the event that the claim is not fulfilled on time, it is an unconditional right with conditional content. Only when the condition has come to pass may the right be exercised, may for instance the thing be used, or its fruits or profits enjoyed, or the thing be sold, etc. It is clear that the function of securing is here independent from the arbitrariness of the *obliged party*. It is up to him whether the condition comes to pass or not. But the absolute right, whether in its actual or inactual state, is withdrawn from his arbitrariness. Even when it is a question of a right over a thing which belongs to him, this right is independent of what he does with the thing. As we shall see, it remains untouched by the transfer of the thing into the property of another. Quite different from this is the question whether or not the thing serving as security is held by the holder of the absolute right which makes up the lien. It is the task of the positive law to decide this, and the matter has nothing at all to do with the idea of a lien itself — of an absolute right over a thing with conditional content, serving to secure a claim.

Property, too, comes into question for the securing of a claim. Of course in this case, where we have to do with a simple relation of belonging, the distinction is no longer possible in the same way between conditional content and the conditional right. It is quite conceivable that A conditionally transfers a thing to B "in the event" that a certain occurrence comes about. But an unconditional transfer with conditional content is here excluded, since the relation of owning does not have any content in the sense in which rights do. Only the absolute rights deriving from owning can have conditional content. We leave open the question whether there are acts which *apriori* bring about property unconditionally, all the unconditional rights of which have conditional content. But it is certain that there are conditional acts of transfer which result in conditional property. If the property is transferred for the purpose of securing the claim, then we do not have, as in the other cases, a lien consisting in an unconditional right with conditional content but rather a conditional lien relationship.

What one today usually calls a lien in the narrower sense, sometimes also a "genuine" lien, forms a remarkable contrast to this. Here the claimant has the right to "utilize" (*verwerten*) the thing given as security, to get "satisfaction" from it, in the event that his claim is not fulfilled. This utilization or satisfaction is achieved by selling the thing, and the right to make this sale implies the right and the legal ability (*rechtliche Fähigkeit*) to transfer the thing into the property of another. So it is not property in

the thing which the lien-holder has, neither unconditional nor, as in the case just discussed, conditional, but one of the rights which derive from owning property, and in fact one which stands in a very special and especially close relation to property: a right over *the property itself*. This lien in the narrower sense, too, is in its structure a right with conditional content.

Before proceeding let us stop and take a glance at the positive law, especially the positive law of the German Civil Code (*Bürgerliches Gesetzbuch*). One speaks of transactions which are subject to a condition or a deadline, and one understands thereby the ones whose effect depends in part or entirely on the occurrence or non-occurrence of an uncertain future event or the approach of a future deadline. In these cases we clearly have conditional or time-bound (*befristet*) rights in our sense. From the time-bound legal transactions one usually distinguishes the "deferred" (*betagt*) transactions; here "according to the agreement of the parties the right arises immediately and only its exercise (*Geltendmachung*) is postponed" (Endmann, *Lehrbuch des bürgerlichen Rechts*, I, §79). One speaks accordingly of "deferred claims" which are present from the outset but "which come due (*fällig werden*) only after the lapse of a definite or indefinite period of time" (Cosack, *Lehrbuch des Deutschen bürgerlichen Rechts*, I, §62). On this we have two things to remark. First of all, it is not evident why this "being deferred" should be restricted to *claims*. Just as the fulfillment of existing claims can be made dependent on the arrival of a certain point in time, so can the exercise of the existing absolute rights. There are absolute as well as relative rights with the time-bound content. Further, the content of a right can be not only time-bound but also conditional. In the very same way in which we contrast a right with a time-bound content, with a time-bound right, we can contrast a right with conditional content, with a conditional right. The rules which the BGB lays down for conditional rights have a meaning such that they can to some extent be applied to rights with conditional content. Thus the principle that a condition is considered to have come about/not come about when its occurrence is hindered/brought about by the bad faith (*wider Treu und Glauben*) of the party who receives some disadvantage/advantage from it, obviously applies, according to its whole meaning and purpose, both to actions which bring about in bad faith the right itself as well as to those which in the same way bring about the "actuality" (*Fälligkeit*) of the right. We leave open the question as to where and how often it happens in practical life that the content of a right and not the right itself is conditional. The essential thing for us here is that even developed codes of positive law can be understood as dealing with unconditional rights with conditional content. When the BGB § 1204 gives the holder of a lien on a moveable thing the right to get satisfaction from the thing, a right is meant which exists unconditionally on the basis of the act of granting (*Einräumung*) — assuming that the granting was not itself conditional — but which can of course not be exercised right away but only in the event of the non-fulfillment of the claim being secured. This means that everything which has been said about rights with conditional content can also be applied to the right of lien, insofar as a particular positive code does not prescribe otherwise. The particular question

comes up whether the non-fulfillment of a claim is counted as occurring when the holder of a lien who would derive greater profit from exercising his right of lien than from having his claim fulfilled, acts in bad faith to make it impossible for the other to fulfil. An exercise of the right of lien would then not be allowable, which would mean a far more effective protection for the debtor than any claim to be compensated out of the *irrevocable* sale of the thing given as security.

A lien shows itself to be an *absolute right* with conditional content. In addition the positive law deals with obligatory claims and obligations as well as with *Gestaltungsrechte*⁶ with conditional content. Let us take two examples: guaranty (*die Bürgschaft*) and the right of preemption (*das Vorkaufsrecht*). The guarantor is obliged to the creditor of some third party to see to it that the third party fulfills his obligation (BGB § 765). The obligation of the guarantor (and the correlative claim) is undoubtedly unconditional. But its actuality, its "coming due" depends on an uncertain future event. It is therefore conditional in its content. As for the right of pre-emption, the law itself draws as clearly as possible the distinction between the right itself, and its possible exercise in the event of the occurrence of a certain condition. "Whoever is entitled to pre-emption with respect to a certain object, can exercise his right as soon as the obliged party has concluded a contract of sale for it with some third party" (BGB § 504). The person having the right of option has an unconditional right to perform a social act with the immediate legal effect that he now stands in the same obligatory relation to the seller, as the seller stands to the third party with whom he has concluded the contract of sale. Since the exercise of right is conditional on the concluding of the contract, we have to speak here of a *Gestaltungsrecht* with conditional content.⁷

Positive jurisprudence (*positive Rechtswissenschaft*) thus acquires — on the basis of the simple analyses of the apriori theory of right — the task of working out a general theory of the rights with conditional content and of investigating how they are structured in the parts of the positive codes to which this concept is applicable.

Despite the possible variations of the right of lien in the wider sense, there is grounded in its idea a number of principles which are usually obvious to the jurist but which must interest the philosopher insofar as they are laws of an apriori nature. We limit ourselves to pointing to two such principles. First of all, the auxiliary nature of the right of the lien-holder is immediately evident. Insofar as the function of securing is intrinsic to this right, the right is inconceivable without a claim which it serves. If then the claim is extinguished, as by the holder of the claim waiving, it is not possible for the lien to stay in existence. Even if it is not explicitly waived by its bearer, it goes out of being together with the claim — a unique way of being extinguished. One can also show the necessity of this extinction by considering the nature of the right of the lien-holder as a right with conditional content. With the disappearance of the claim,

the occurrence of the condition — its non-fulfillment — has become impossible.

The second principle which we put forward is that a lien on one's own property is impossible. Only a right which one does not possess oneself, which can therefore be granted or transferred as something new, can provide the claimant with compensation for non-fulfillment, and can therefore perform the function of securing, which is necessarily implied in the very concept of the right of lien. But as we know, the owner as owner already has all imaginable rights over the thing. We should not let ourselves be unsettled in this point by the apparently contradictory provisions of the positive law. Our civil law has an "*Eigentümerhypothek*"⁸ (a mortgage registered in the name of the owner); it even speaks of a mortgage of this kind which lacks any claim which it secures. "If the claim is extinguished, the owner acquires the mortgage" (§ 1163, para. 1). Here in a single sentence *both* of our apriori laws seem to be contradicted. There can in reality be no question of this. It is a problem for itself — and not such a difficult one at that — which practical considerations have led the positive law to form the concept of an *Eigentümerhypothek*, and what is understood by it. There is here surely no lien in the authentic, primary sense; and respect for the positive law should not lead us to deny principles which are available to insight with the most absolute evidence.

One has put forward the thesis that a lien in every case has a *right* as its object.⁹ Untenable as this view seems to us, even when put as generally as this, still it has a certain fundamentum in re when applied to liens in the strict sense. Insofar as a lien implies the right to "transfer" the thing to another and thereby to change the relation of belonging by changing its bearer, the lien shows itself to be not indeed a right over a *right*, but rather a right over a *relation* of right (and thereby at the same time a right over the *thing* which stands in the relation of right). This right usually belongs to the bearer of the relation of right and it is then a right over one's own relation of right. But with a lien we encounter it as a right over another's relation of right.

When we really do find rights over *rights*, we also have to distinguish rights over one's own rights and rights over the rights of another. A right of the first kind would be the right to waive, for here the holder of the right is as such entitled to eliminate his own right by a social act. A right of the second kind would be the right of revoking a promise, insofar as the partner of the claim is entitled to eliminate the right of another by a social act.

One has spoken of the conceptual impossibility of rights over rights (*Rechte an Rechten*). One can ask — and one would never fail to pose this

question in every individual case — what “conceptual impossibility” really means here. It can mean that the possibility of a right over a right contradicts the definition or concept of a right which one has devised. In this case one ought to examine this definition or this concept quite carefully; but this says nothing at all against the objective possibility of rights over rights. Or else one means something completely different: that it is incompatible with a right as such to refer to rights. Here the predication would not contradict the *concept* of rights which we have formed, but would rather be incompatible with something which is completely independent of us, with the *character*, the *essence* of rights, as when obligation excludes by its very character and essence the possibility of being waived. It is a mistake which has proved to be really devastating in all discussions of juristic methodology: one has obscured by vague and ambiguous talk about conceptual impossibility the fundamental difference in principle between conceptual contradiction and essential incompatibility — a difference which of course only the apriori theory of right can make completely understandable. Even if in our particular case the relation whereby rights refer to rights contradicts the concept of a subjective right which jurists or philosophers have formed; this relation is quite certainly not incompatible with the essence of a right as such. Just as we have learned that rights over things are absolute rights to some action of mine directed to the things, so we have to see that rights over rights are rights to some action of mine directed to rights.¹⁰ If the talk of the conceptual impossibility of rights over rights is to have any objective meaning at all, it must either mean that rights as such exclude any action directed to them, or that such action is indeed thinkable but that a right over it is excluded. But one is just as false as the other. The right to waive, for instance, shows us with indubitable clarity a right to act toward a right. That it is the same person who has both rights is thoroughly irrelevant. And the possibility of a right to eliminate the right of another through say revoking, is beyond any doubt. There are ways of acting which refer exclusively to things (e.g., working), some which refer exclusively to rights (e.g., eliminating by revoking), and finally some which refer to both (e.g., the drawing of “yields” or “revenues”). There can be apriori as many rights over rights, as there are ways of acting toward rights. Further, all those rights over the rights of others which, when exercised, offer compensation for the non-fulfillment of a claim, can apriori function as rights of lien. We will not here go further into the types of rights over rights, and into the ways they can be structured by the positive law. We have only wanted to show here their “conceptual,” or better, their *essential* possibility.

§6 The apriori laws determining the origin of relations of right

It is a sign of a philosophically misshapen mind to demand definitions where none are possible or have any value. We have characterized promising as a social act and have unfolded its distinctive presuppositions and effects. But what distinguishes promising as such from other social acts such as commanding or requesting, can indeed be seen (*erschauen*) and made evident to others, but it can no more be defined than one can define that which distinguishes red from other colors. With regard to owning, too, we were able to speak of apriori presuppositions and effects; we called it a relation between a person and a thing from which are derived all conceivable rights of the person over the thing. But it is not possible to penetrate into it by listing certain immanent elements of it, for we have to do here with something ultimate, with something which is not composed out of other things. It is, as Descartes rightly remarks, “perhaps one of the main errors which one can commit in the sciences to try to define what can only be seen through itself.” As soon as the question of the essence of such ultimate elements is brought up, one shrinks from looking at them directly and flees to extrinsic factors which one is content to look at from a distance. And so one makes the hopeless attempt to clarify that which needs to be brought to evidence, by drawing in foreign elements which are themselves just as much in need of clarification.

And so we decline to attempt a definition of rights and of obligations. It is not difficult to see that the usual statements made by way of defining (*bestimmen*) a “subjective right”¹¹ have nothing to contribute to our purposes. How should we, for instance, characterize having rights as “being allowed to will” (*Wollendürfen*), when rights obviously refer not to the *willing* but the *acting* (*Verhalten*) of persons, and when the concept of being allowed (*Dürfen*) is surely not a bit clearer than the concept of a right. Or how should we accept the definition that “right is power or dominion of the will,” when the apriori theory of right teaches that it is not the will but the *person* who has power, and that this power is not realized through willing but through social acts, and that finally the power of the person which is realized in the social acts is not *identical* with having rights but is simply intrinsic to certain kinds of rights, such as the right to revoke. We should note well that most if not all of the conceptual definitions of rights are made with a view to the rights conferred by a positive legal order. It goes without saying that we have to distinguish as sharply as possible between such conferred rights and the rights — and these are the only ones which concern the apriori theory of right — which derive with strict essential necessity from acts of the person. And so the great majority of

the many deep studies on rights is unusable for the apriori theory of right. Subjective right in the juristic sense may depend on and stand in various complicated relations to "objective right" or to the "*objektiven Rechtswillen*," that is, some power or authority, with which *we* as yet still have nothing to do. We are concerned with descending down to the ultimate elements of right, which that authority cannot "create," and to the essential laws, to which it is indeed not bound but which have an eternal being which it cannot touch.

We reserve it for later studies to analyze thoroughly the structure of the rights and their possible kinds. At this point it is necessary, in order to understand the following investigations, to distinguish the concept of a right from another concept more sharply than we have hitherto done. As we know, rights can refer to one's own action (these are absolute rights) as well as to the action of another (these are the relative rights, or claims). We distinguish as sharply as possible from both of them a legal power or capacity (*Können*), which only refers to one's own action. A power reveals itself in the fact that the action to which it refers, produces an immediate effect in the world of right (*rechtliche Wirkung*), for example, produces, modifies, or eliminates claims and obligations. By contrast, it is *not* intrinsic to a right, not even to an absolute one referring to one's own action, to have immediate effects in the world of right; one has only to consider all the absolute rights over things.

It is only through the concept of a legal ability that we are able to understand the origin of absolute rights and obligations, and their passing from one person to another. This much can be said even now: absolute rights and obligations can never derive from *promises*, for a certain relativity is intrinsic to everything produced by a promise. It will be quite different kinds of acts to which they owe their coming into being. Let us assume for now that an absolute right is *already present* in a person, and let us save for later the question as to its origin. In this case the person can *transfer* or *assign* (*übertragen*) it to another person as long as certain conditions are fulfilled which we shall mention below. This transfer shows itself to be an act all its own. It is first of all an *other-directed* act, since any transfer of right is necessarily transfer to another, and then and above all it is a *social* act, since the need of being heard is intrinsic to it. Transferring forms a certain contrast with promising in that it does not look to any further action of the transferring person through which the circuit opened by the act would be completed. This act rather, purely through itself and without needing any subsequent action on the part of the acting person, attains the end for which it ultimately strives: giving rise to a transferred right in the person of the partner. Both promising

and transferring are social acts with immediate legal efficacy. But only transferring reaches its final goal with this efficacy.

There is a further important fact related to this. The willing of a later action by oneself or by another does not underlie transferring as it does promising (or commanding). As a result, whereas transferring can very well be conditional, or performed by a proxy, or by a number of persons, it is not susceptible of the modification by which a promising or commanding person pretends to want an action which he does not in reality want. But all the same, we should not overlook that transferring can be performed as a pseudo-act. If it is performed fully and honestly it presupposes the intention that the other come to hold the transferred right. This intention can be missing or be ungenue; then the act of transfer is performed in that shadowy, ungenue way of which we spoke above. Perhaps the person only wants to seem to transfer, perhaps he intends to deceive the addressee or third persons. Here, too, there arises the question whether the same effects derive from this act when it is performed in a pseudo way and is heard by the other and taken as genuine, as when it is performed genuinely and sincerely.

As for the genuine acts of transfer, the effects which they produce are not so easily explained. It is obvious that not everyone can transfer whenever he will, as everyone can promise whenever he will. The presence of a specific power (*Können*) to transfer, or a *right* to transfer which implies this ability, is required. Let us focus in particular on the cases in which absolute rights over things are granted by the owner: here the holder of these rights is by no means necessarily in a position to transfer them on to third persons. They were after all conferred on him and *only* on him. The owner would have specifically to confer the power to transfer. This ability naturally does not belong to the *content* of the conferred right over the thing. Whoever is entitled to use a thing and to transfer to others this right to use, is the holder of two rights, the second of which is a right over the first. This power or right to transfer is a power or right *over one's own right*.

It is, furthermore, apriori quite possible that someone transfers the absolute right of another to a third party. This ability must of course be expressly conferred on him by say the person who has the absolute right and also has the right to transfer the right. The transfer of someone's right which is thus made possible is to be clearly distinguished from the case in which someone acting as the representative transfers the right of the other. In the latter case we would have a transfer in the name of another; in the former, a social act of one's own. But these two categories of right do not apply everywhere. Thus in the case of a promise which is supposed to oblige only another, nothing but an act performed *by a proxy* is

possible. For there necessarily derives from every promise of one's own, even if its explicit content is the action of another, an obligation in the promisor which refers to this action or rather to the bringing about of the action.

The principle, *nemo plus iuris transferre potest quam ipse habet*, expresses of course an apriori truth. Our previous considerations put us in a position to complement it in two directions. One can no more transfer *all* the rights which one has, than one can, by oneself, transfer rights which one does not have. In addition to the right there has to be present the ability to transfer it. But once this condition is fulfilled, even the rights of others, i.e., rights which one does *not* have, can be transferred.

From the transfer of a right we distinguish the *granting* of a right (*Rechtseinräumung*), which is also an other-directed social act. It can refer to the same objects as transfer, and be performed under the same conditions; the holder of a right to use a thing can either transfer or grant this right to another. The two acts, nevertheless, should not be confused; this becomes especially clear in cases where one can indeed speak of granting but not of transferring. The ability to revoke is *granted* by the promisee, the ability to transfer a right not one's own is *granted* by the holder of the right. For in every transfer there is the passage of what had previously existed in the person of the transferring party, over to another person. But the ability to revoke was never possessed by the promisee in the first place. The ability to transfer a right is somewhat different in that it was present in the person who grants, but it does not pass from him over to the other person; there is no doubt but that the one who concedes an ability to transfer need not thereby forfeit his own ability to transfer. Of course the ability to grant is itself bound by exact limits; it too has to be grounded in a clearly determined sphere of legal power. Even though the promisee, in granting the ability to revoke, gives what he does not himself have, one should still not overlook the fact that this ability to grant is possible only because the promisee has rights over his claim; just as he can eliminate it by waiving, he can create the possibility of its elimination by granting the ability to revoke. Only in virtue of his legal power over the existence and non-existence of the claim can he confer the corresponding power on others. And in the same way one can only grant to another the power to transfer a right when one has the power to transfer oneself. So we can formulate the following new principle of right: no one can grant more legal ability than he has himself. We distinguish between the cases where the ability which was granted is realized in acts which the granting person was also able to perform (as is the case with transferring), from those other cases where the particular act by its very meaning was not possible to the granting person (as with

revoking). But what is common to both cases is that, in contrast to transfer, the personal sphere of right which makes the granting possible in the first place need not be eliminated by the granting. The promisee who grants to others the ability to revoke, is still able to waive his claim whenever he wants.

Rights can also be granted which do not involve any legal power and which do not refer to action by the holder of the rights which would have consequences in the world of right. Wherever the transfer of a right is possible, the granting of a right is apriori possible too. No one can grant to others rights which he does not have; or grant more than he has. We have to distinguish two things here: the holder of a right can by his granting enable another to *share in his right* (*Mitberechtigung schaffen*) — a case for which transferring offers no analogy; or he can create rights "in his stead." In the first case the other shares in the *one* right which previously belonged only to the holder of the right and is now held by both of them.¹² In the second case, which has a greater resemblance with the *transfer* of a right, the granting brings forth, in the other a right just like the one which the granting person had, and at the same time lets the right of the granting person disappear. With transfer, by contrast, one and the same right simply changes its bearer. Here too the distinction between granting and transferring proves to be important.

We have already objected to the dogma of "declarations of intention" through which relations of right are supposed to come about. Its untenability in every respect has become clear. It may be that promising, aiming as it does at a later action of the promisor and presupposing the intention to perform this action, could be confused with the expression of this intention. But there is no intention to perform a later action in the case of transferring and granting, of revoking and waiving. How should it be possible at all to speak here of a declaration of intention in the strict sense? Is one perhaps thinking of the intention to transfer or to waive which precedes these social acts? But surely one could not possibly confuse the declaration of intention, "I want to transfer," or "I want to waive" with the *carrying out* of this intention, with the transferring or waiving itself. Or is one thinking of the intention directed to the immediate effect of the act, that is, to the will that one's own right becomes the right of the other, or disappears. There is of course the declaration, "I want the other to have my right," or "I want my right to disappear." But what does that have to do with the waiving and the transferring — the declaration of an intention with the acts which, when performed, bring about the intended thing? The more our view of the sphere of distinctive social acts expands, the more the dogma of "declarations of intention" becomes utterly meaningless.¹³

Transferred and granted rights can in their turn derive from acts of transferring and granting. If one traces back this chain, one finally comes to other kinds of origin, the most important of which is property. Since in it all conceivable rights over the thing are grounded, the owner can — while the relation of owning itself remains absolutely unchanged — transfer or grant them to others. We understand why the waiving of a right does not restore the right to someone other than the owner who had held it before, but rather exclusively to the owner. We should, however, not speak of the right going back to him but rather of its being re-produced in him in virtue of the “elasticity” or “residuarity” of property.

Property too can be transferred. Its special position also shows itself here. A thing is conveyed “into the property of another”; that is more than a linguistic turn of phrase. It is really the case that the supporting member of the relation of owning (i.e. the owner) modifies the relation by his own act in such a way that he drops out of the relation and someone else takes his place, though for the rest the thing and the relation remain identically the same. The transferring of property also presupposes a power to transfer, but a granting of this power would make no sense. For insofar as owning essentially implies the right to deal in *any and every* way with the thing, the power to transfer the thing into the property of others is contained in this right. Just as we saw that the power to waive is a legal power which refers to one’s own right and is grounded in it, so we find here an ability which refers to one’s own relation of right and *derives from it*.¹⁴

A thing can of course be transferred to several persons together. Just as the social act then has several addressees, the property resulting from the act has several bearers: it is property “zur gesamten Hand.” If this property should then be transferred again, a social act of transferring is required which is performed by the several bearers together. Things are quite different if the owner transfers a thing to several persons in such a way that the thing is divided among them according to its economic value-parts. Here just as many acts of transfer as addressees are required, and from these acts there result just as many relations of owning. The thing then belongs to each of the addressees at a certain part of its value, and none of them needs the cooperation of the others in order to transfer the thing into the property of others at that or at a lower part of its value. We will not here pursue the question as to how the positive law has used and structured these categories and principles of right.

If property in a thing is transferred, the important question arises as to the fate of whatever absolute rights over the thing were held by third

persons. It seems that the existence of these rights is left untouched by the change in the bearer of the relation of owning. If a right deriving from owning is transferred by the owner and thus no longer present in him, then the property can only be transferred in this restricted condition. That right which even now would derive from the owning as such continues on in the person of the third party, and there is no least reason why it should lapse as a result of the change in the bearer of the property. Such a reason would rather have to be specifically created. The reason can above all lie in the fact that the owner transferred the right only for the — indefinite — duration of his owning. Then we have to do with a conditional right which dissolves with the fulfillment of the condition, that is, with the transfer of the property, and which is at the same moment restored in the person of the new owner.

One can call this trait of absolute rights over things whereby they remain intact even when the bearer of the property changes, their “reality” (*Dinglichkeit*). We must, however, observe that this concept varies a great deal in juristic usage, nor does it, as it seems to us, always have clearly demarcated meanings. Let us just point out several of them. First of all, a real right (*das dingliche Recht*) is contrasted to an obligatory right, in other words, the right over one’s own action is contrasted to the right over the action of another; it is taken as an *absolute right* in our sense. Secondly, it is restricted to those actions of ours dealing with things. Then it amounts to a right over a thing (*Sachenrecht*) in our sense. Thirdly, it gets restricted to such rights over things as survive a change in the owner of the thing, which in other words attach to the thing without any respect of the person of the owner at a given time. In this third sense, all absolute rights over things are, as such, real rights, as we have seen. Fourthly, all those rights over things are called real rights which when interfered with give rise, according to the prescriptions of the positive law, to the claim against the interfering person that he desist from interfering. Needless to say, this sense of real right is irrelevant for us since we have here as yet nothing to do with the positive law.¹⁵ Fifthly, one calls contracts real insofar as the rights which derive from them are real in any of the preceding senses. Contracts which only involve a promise would therefore never be real. Sixthly, even *claims*, that is, relative rights are called real insofar as they derive from real rights. Thus one also speaks of a real right in the case of the claim of an owner who demands that the property which has been taken away from him be returned to him. On closer inspection, of course, we find that the structure of this claim, quite apart from its origin in a real right, is quite distinctive; with a view to it there arises here a seventh meaning of a real right. The claim for the return of the thing is a claim against a second

person, but it is obviously not restricted to this particular person. The claim is rather a claim against whoever happens to "have" the thing at the moment, that is, whoever stands to the thing in that relation of power which we have called possession. What is missing here is a relation to one irreplaceable person, which is something which we found to be characteristic for the claims deriving from a promise. It is of course hardly desirable to speak here of a real claim; it would probably be better to speak of the variability of the relation to the addressee.¹⁶ These distinctions will prove to be important later on.

We have been discussing how absolute rights over things originate from the acts of transferring and granting on the part of the owner. Now we touch upon the difficult question as to the origin of property itself. From the very outset we have to insist emphatically that this is not a question about historical development nor a psychological question nor an ethical question. We do not want to know how the institution of property gradually arose in the history of mankind; equally irrelevant for us are the psychological factors in human nature which in fact underlie the recognition and elaboration of the concept of property. We are above all not concerned with question whether property or some form of it can be morally justified and *how* it can be morally justified. We are interested in the conditions under which owning can arise in the apriori way in which for instance a claim arises from a promise. The theory of property has greatly suffered from the confusion of these four questions; to distinguish them is the most elementary thing which can be required here at all. Many will perhaps find it particularly difficult to distinguish the third and fourth question. But we have to consider that by formulating the apriori laws for the origin of owning, nothing is as yet decided about the value and worthiness of owning. One has to consider the value of owning quite independently from the question of its origin. Actually owning has in itself a certain value *in addition to* the value of the owned thing and *independent* of this value. Furthermore, there are apriori laws governing the relation between the value of the owning and the value of the thing owned: the higher the value of the thing, the higher the value of the owning. It is a new question whether it is morally right for such owning, which in itself has value, to exist and be recognized within human society, or more exactly whether it is right at certain times, in certain places, under certain economic conditions. The value which owning has in itself does not of course exclude that it is morally unjustifiable, for it is in principle possible that the disvalues which would accrue to society through the recognition of property, would outweigh this value. One can also raise the question as to the *form* of property which is morally required, whether it is for instance desirable to let the whole community

rather than an individual own things which perform certain economic functions — as the means of production or land. Our inquiry into the essential laws governing the origin of property prescind completely from all these and similar problems.

We have already spoken of *one* way in which owning can originate: the earlier owner conveys the thing to another. This way always presupposes that a relation of owning already exists somewhere in the world; but how it comes into the world in the first place, that is a far more difficult question. We have seen that claim and obligation, which do not belong to physical or psychical "nature," arise through a natural event, that is, through the performance of a social act. In the case of property, too, we shall have to look for such a natural event as its ultimate origin. Here as above we can touch only on a few themes: for we do not have to give a detailed theory of property but only to show that within the vast realm of the apriori theory of right there is a place for the various categories of property and the essential laws which hold for them. The positive law speaks of "primary forms of the acquisition" of property, such as first occupation, specification, prescription, and the like. It is to be suspected that apriori laws govern here, though it is especially difficult in this subject matter to put aside all psychological tendencies, all practical considerations, and to attain to a pure intuition of essence. All the same, we can even here, if we examine things without prejudice, readily reach certain insights. It is for instance immediately clear that prescription, indispensable as it may be for the positive law, is *not* a way in which property can originate apriori. A thing which I have possessed for two or three or ten years — whether in good faith or in bad faith — cannot possibly thereby suddenly come to belong to me. Here it can only be reasons of practicality which move the positive law to let property originate in such a way. But it is clearly quite different when a thing which someone has produced enters into the property of the producer. Let us prescind from the cases in which someone changes the property of another or transforms it into something new, and let us stay with the much simpler and clearer case in which someone *produces* (*schaffen*) a thing out of materials which have never belonged to anyone. Here it seems quite obvious that the thing from its very beginning belongs to the one who produced it. Let us put this "obvious fact" to use for a deeper examination of this subject. Just as a relation of owning is *not* grounded in the nature of possessing or using, it *is* grounded in the nature of producing. We have already stressed that this producing should not be confused with working on or changing an already existing piece of property. More important is a second point. One has often put forward the principle that property should arise only on the basis of *work*. The word "should" reveals

that we have here to do with an ethical postulate which aims at regulating in a morally satisfactory way the property relations of a community and not with a simple apriori law of being (*wesensgesetzlichen Seins-Zusammenhang*). Our thesis therefore should not be confused with this one. Even if work is invested in the producing of things, property in the thing still does not derive from that — one may put just as much work into transporting a thing from one place to another — but from the producing *as such*. Now producing is neither an other-directed act nor a social act. For the first time we find a relation of right which is not constituted in an act of the subject which is in need of being heard. All the same, there are modifications of producing which are like the ones which we found earlier with the social acts, and one can grasp apriori the consequences of these modifications. There is a producing which is done by several persons *in common*; the same thing can be produced by several "together": then these several have property in the produced thing "together." We shall not venture to decide whether there is within our sphere also a producing "in the name of" another person, so that the represented person immediately acquires property from the representative producing. In any case, what we wanted to show should now be clear: an investigation of the essential laws determining the origin of property is possible.

Now that we have raised the question as to the origin of absolute rights and of property, we have to discuss briefly the origin of absolute obligations. Assuming that an absolute obligation already exists, there is such a thing as the act of a third person assuming (*Übernahme*) the obligation, and also the correlative act of the bearer conveying the obligation (*Übergabe*), an act which corresponds to the transfer of absolute rights. In conveying and assuming we encounter new social acts, which again can in no way be taken as the declaration of any will. It goes without saying that no one can assume more obligations from another or convey more obligations to another than exist in the conveying person. We have to distinguish between the assuming or conveying of already existing obligations, and the imposing of obligations or the assuming of obligations which need not exist in the person who imposes them. There is clearly an analogy between the imposing of obligations and the granting of rights. But whereas this granting presupposes that the granting person has rights of the same kind, there is no corresponding presupposition in the case of imposing obligations. No one needs to have himself the obligations which he imposes on others. In virtue of the imposing, and the accepting by the other, obligations enter the world which had not previously existed. In daily life this producing of absolute obligations is of course found only rarely. When one person wants to place another under

an obligation, he will have the other *promise* the thing in question and thereby bring it about that the obligation is over against himself and that he for his part has a corresponding claim. He will prefer this to merely producing — though this is always apriori possible — an absolute obligation in the other and going without any claim himself. Our daily life, however, does show us at least one realization of this possibility. Let us recall what our positive law designates as "*Auflage*." "The decedent can oblige his heir or legatee to perform a service without letting another acquire a right to this service" (BGB § 1940; and § 2194 does not give any claim in the sense in which we have hitherto spoken of claims).

As for the origin of *relative* claims and obligations, we have spoken of this in our first chapter. But what about their transfer from one person to another? The apriori theory of right is above all confronted with this question: can the holder of a claim simply transfer this claim to another by a social act?

We are convinced that our answer has to be an unconditional no, strange as this may at first sound to a jurist. Here too we have to free ourselves from the notions to which we are accustomed from the positive law, and to look without prejudice at the things themselves. We grant from the outset that the claimant has a far-reaching power to dispose over his claim; as we know, he can waive it whenever he will and thereby eliminate it from the world. Whereas with waiving the absolute rights over a thing which are granted by an owner (we considered these earlier), the act of waiving, though it eliminates a right in the person of the right-holder, nevertheless lets this right come back to life in the person of the owner, a *claim* is made to disappear from the world completely in virtue of being waived. With a view to this one could be tempted to hold: if the claimant has this absolute legal power over the being and non-being of his claim, should he not also have the power to transfer it into the person of another? For one thing, the fact that the claim is relative makes this impossible. As we know, every claim is over against another person, and this other person has an obligation of the same content toward the claimant. A transfer of the claim would therefore mean a simultaneous modification of the obligation: it would necessarily acquire another partner. But here the legal power of the claimant reaches its limit. No one would doubt that the obligation of a person cannot be changed in the least by just any other person, and especially that it cannot be directed toward a new partner by just any other person. Only the bearer of the obligation himself, he who alone can assume the obligation, can give it a new direction. This remains the case even if we are speaking not of just any other person but of the partner of the obligation himself. He has far-reaching power over his own claim, but not over the obligation of the

other. Thus any modification of the claim which would at the same time mean a modification of the obligation is impossible to him. And so it is excluded that a claim could be transferred to a third party merely by the claimant and without the cooperation of his partner.

Now one could consider whether such a transfer could be made possible by the cooperation of the bearer of the obligation. The following train of thought might seem to grow out of our earlier reflections: the bearer of the obligation, if he was able to create the obligation by a free social act, must also be able to cooperate in changing the direction of the obligation according to the wish of the person toward whom he is obliged. The ability to transfer the claim, which the claimant does not have since this could change the direction of the obligation, can be conferred on him by the bearer of the obligation. This conferring can occur at any time, whether at the time of the promise itself, or at the time when the claimant wants to transfer the claim. If B promises A \$100 and adds that he agrees to the transfer of the claim resulting from his promise, or if B agrees to a concrete transfer which A proposes to make to C, then the act of transfer becomes thereby effective: the claim which used to exist in A now exists in C.

This consideration overlooks the most important point, on which everything here depends. Even granting that the claim can be transferred with the consent of the bearer of the obligation, one would thereby in no way attain what one wants to attain with the transfer, namely that the new claimant has a claim that the sum be paid out *to him*. Earlier we stressed emphatically the difference between the addressee of the claim or obligation on the one hand, and the addressee of the content on the other. When the transfer of the claim is made possible by the consent of the other, there is a change in the person to whom the obligation is directed; but this transfer can never attain what one intends by transferring: namely a change in the person to whom the content is directed. A has the claim that B pay *him* (A) \$100; if he is able to transfer this claim to C, then C acquires the claim that B pay A \$100; it is in no way evident why C should get as a result of the transfer a claim with a quite new content, namely a claim that the sum be paid out to him (to C).

So we arrive at a very curious result. The question whether a transfer of a claim is possible without the cooperation of the obliged party, is to be answered under all circumstances in the negative. We can grant that a transfer is possible with the consent of the obliged person. But if we take "transfer" in the primary and exact sense, then it has to be carefully noted that with all claims whose content is addressed to anyone at all¹⁷ this addressee is untouched by a transfer of the claim. If the claimant and the addressee of the content are, as is usually the case, the

same person, then what results from the transfer is the claim in the new claimant that the service be performed for the earlier claimant, who even now functions as addressee of the content.

But what is generally understood by the transfer of a claim and what in particular the positive law understands by it, is something which goes much farther: the new claimant is supposed to become at the same time the new addressee of the content. Where the content of the claim lacks any addressee, this requirement has no application, even as it has none when some third person is the addressee of the content. If A has the claim that B do something for D and transfers this claim to C, then C acquires the claim that B do the same thing for the same D. But as soon as the content of the claim is directed to A instead of D, something quite new is required. Of course here too it would be conceivable that someone would perform the transfer in the proper sense, so that now C had the claim that something be done for A, and although such cases of authentic transfer surely sometimes occur in real life, nevertheless one usually — though probably without noticing it — understands by transfer an event which changes the addressee of the content in favor of the new claimant. Such a qualified transfer through a free act of the original claimant is clearly impossible; more exactly, it is something which cannot be called transfer in the primary sense. Transfer in this sense presupposes that the thing transferred remains strictly the same. Though the claim changes its partner (*Gegner*) in the case of authentic transfer, it is nevertheless in the strictest sense the same claim which undergoes this modification, just as something remains in the strictest sense the "same" as it for instance changes its color. But in the case which the positive law and in fact most people have in mind when they speak of transferring a claim, the claim undergoes such a fundamental change in its content that one cannot possibly speak of a change in the holder of an otherwise identical claim. One can of course still speak of a certain "sameness" of the claim, somewhat like Descartes' piece of wax which, though changed in its color, temperature, odor, taste, shape, and size, was still the "same" wax, even if qualitatively different in almost every respect. It is still the claim which derives from the promise and which has changed its bearer and its content in essential ways. But one can no longer speak of the simple transfer of something which remains qualitatively the same except for its bearer. This is also why a granting of the ability to transfer on the part of the obliged party cannot make possible — as it can with authentic transfer — this qualified transfer. It is apriori excluded that this modification of the content can come about through a simple ability to transfer.

One can raise the question whether the desired effects of a qualified transfer can be achieved in another way. A can promise C to do for him

what B is bound to do for him; then there arises a new claim of C against A, but not against B. And besides the first claim remains here. Or if we draw B into the transaction: A can promise B to waive his claim if B promises to do the same thing for C. There then arises a conditional claim of B against A. If the condition is fulfilled, then C gets the desired claim against B, and the claim of B that A waive his claim has become actual. The claim of A against B, however, remains intact as long as the claim of B against A (that A waive) is not fulfilled. One can avoid this last consequence by letting A directly waive over against B "in the event" that B promises to do the thing for C. If now B promises, one seems to have achieved what the qualified transfer is supposed to achieve: the claim of A against B is gone, and C has a claim against B that the same thing be done for himself. And yet there remains an essential difference. It is not the "same" claim which A once had against B and which now — with a new bearer and a modified direction of its content — C has against B: for the claim of C against B is much younger, it derives only from the promise which B gave C and not from the promise of B to A. If this claim has some mistake or defect,¹⁸ the flawlessness of the earlier claim of A against B is of no help. The reverse also holds: if this earlier claim was defective, the new claim in no way suffers from this.¹⁹

And so we see: in none of these ways can we succeed in bringing about the desired transfer and simultaneous modification of the content of one and the same claim. There still remains to consider whether a special structuring of the act which gives rise to this claim would not help us to this result. A can declare to B: I promise you or whomever you name, to pay out a certain sum to you. Here together with the promise to B (and only to him) the power to transfer is also given. One could also imagine the case where B can hand on *with* the claim also the power to transfer it, so that the power is joined to the claim once and for all. Here one might use these words in adequately expressing the matter: "I promise you and everyone else whom you or your descendants will name . . ." One should note, however, that it is not this *promise* from which the claim arises in the second and third person. Only in the first person does a claim arise from the promise, and at the same time, thanks to the particular form of the promise, the power to transfer the claim and also the power to transfer the power. Only this constitutes the apriori basis on which the claim can move from person to person. But what we above all have to maintain emphatically is that in all these cases the claim is always that something be done for the first claimant. We have still failed to explain how the goal of the qualified transfer can be achieved, so that the thing is done for *whoever* has the claim at a give moment.

In order to show how the required modification of the content is

possible, let us consider that a promise need not refer to only one content, it can rather propose one or the other of two different actions. The decision (and thereby the consolidation of the content to one of the two actions) can be left up to the promisor or to the promisee: I promise you to do this *or* that for you, and choice is up to me (or up to you). The distinctive structure of such "elective obligations" must of course be thoroughly analyzed in the apriori theory of right. Here we mention it only to bring out a related phenomenon of right. A promise is possible which indeed refers to a definite action but which gives the promisor or the promisee the ability or the right to alter this definite content. Here we do not have two alternatives which are on a level with each other, but rather from the outset a consolidation of the content of the claim, but in such a way that it can at any time *be replaced by another content* or at least *changed*. This change can affect either the content in the strict sense or the direction of the content. One could declare: "I promise you to provide you with 100 units of thing A (or else 150 units of thing B)," and "I promise you to provide you (or else another whom you will name) with 100 units of thing A." It is evident that we here have the possibility of what we have been looking for: the change of the addressee of the content through the free act of the claimant. At the same time we have separated out by itself that moment on which we lay such stress: we have here a modification of the content of the claim without any change in the bearer of the claim, without any real transfer. And now it is no longer difficult to grasp the whole which we have been looking for. A qualified transfer is possible when a promise is given together with the ability to transfer it (and possibly with the ability to transfer the ability) and when *at the same time* the legal power is granted to change the direction of the content in transferring, so that the new holder of the claim replaces the earlier as addressee of the content.

Perhaps there are in practical life promises with these or at least with similar intentions; one might think of the promise of the one who accepts a bill of exchange (*Wechsel*). But it is certain that a qualified transfer is apriori excluded when a simple promise to do a definite thing is made to only one person. Of course the BGB prescribes: a claim can be transferred by a creditor to another on the basis of a contract with this other (§398); and it tacitly ascribes to this transfer the effect of changing the addressee of the content. Once again we have one of the — rather numerous — cases in which the enactments of the positive law seem to contradict what we claim to be strictly apriori. We defer these — rather obvious — objections to the next chapter; but even now we would suggest that the slow acceptance of the assignment of claims (*Anspruchscession*) in Roman law is urgently in need of some explanation.

There is something else to be pointed out here. The fact that we have such a clear and indubitable insight into the absolute impossibility of performing a qualified transfer of a claim without any cooperation from the one against whom the claim exists, shows that it is not "custom" (*Gewohnheit*), as psychological dilettantism says so glibly, which guides us in putting forth supposedly apriori laws. Even apart from the fact that custom can perhaps bring us to *believe* blindly what we have often heard, but never to have a clear insight into it, the present case should teach us a lesson. If it were custom which influenced us in putting forward our essential laws, then it would lead us, on the basis of the experience which we have had with our positive law, to assert that the assignment of a claim is easily possible. So it is not custom which betrays us into putting forward apriori principles; it is rather clear insight into the apriori relations of essence which destroys that blind belief which is born of custom.

Let us turn from the transfer of claims to the transfer of relative obligations. This is also not possible without the cooperation of the one towards whom the obligation exists, insofar as a change in the holder of the obligation is also a change of the person who is subject to the claim and is thus a *modification* of the claim, which (modification) is not possible without the cooperation of the holder of the claim. If the holder of the claim grants from the outset or for a particular case the power of imposing the obligation on another, then the possibility is created of simply imposing the obligation on a third person and of being assumed by this third person. This is what the positive law understands by the "assumption of a debt" (*Schuldübernahme*) and not something qualified in the sense of the "assignment of a claim." If B imposes on C his obligation to do something for A, the addressee of the obligation's content (that is, A) is of course supposed to remain the same.²⁰ It is possible with the assumption of a debt, as it is with the simple assignment of a claim, that the obliged party has from the very beginning an unrestricted right to give the obligation to others and even the right to give this right, although this apriori possibility will, for obvious reasons, hardly ever be realized in practical life.

As for legal powers — which must always be absolute — we have already shown that they can be transferred and granted according to apriori laws which are analogous to those which hold for the transfer and granting of absolute rights. *Property* is the ultimate basis for certain kinds of legal power, as it is for absolute rights over things. As we know, the power to transfer or grant to others the rights deriving from property, itself derives from property. In a similar way, every right includes the power to waive it; etc. At this point, however, it is necessary to go back one step further. Social acts such as granting or transferring and the like

cannot possibly function as the ultimate source of legal power, for these acts, insofar as they have immediate effects in the world of right, are themselves always made possible by legal power, and this more basic power must ultimately have some other source if we are to avoid a fallacious *regressus in infinitum*. Such an ultimate source is in fact present in the person as such. A person can promise, convey obligations, assume them, and do many other such things. Of course the essential point is not that persons are capable of performing these acts; for we are not concerned here with this ability as a natural power but with the fact that effects in the world of right, such as claims and obligations, immediately arise from the performance of these acts. This gives evidence of a legal power which cannot be derived from any other legal ability but which has its ultimate origin in the person as such. We speak here of the fundamental legal capacity or power of the person (*das rechtliche Grundkönnen der Person*). This fundamental power cannot be transferred. Insofar as it is grounded in the nature of the person as such, it is inseparable from the person; it forms the ultimate foundation for the possibility of legal-social relationships.

Let us recall the moral (both the absolute and the relative) rights (*Berechtigungen*) and duties, which we distinguished as sharply as possible from the rights of social transactions (*Verkehrsrechte*) and from obligations, and which do not come about in free social acts but rather presuppose the existence of other kinds of facts and realities: these too have their origin in the person as such. One speaks of the right to the free development of one's personality; let us leave open the question how such a right could in fact be formulated: in any case we have here an example of an absolute moral right which is grounded in the person as such. There is a great number of parallel cases; they too can play a role in the positive law. Let us just recall the "basic rights" in certain constitutions, which should in part be characterized as absolute moral rights, recognized by the positive law, which are proper to the person as such. Let us also recall the *Persönlichkeitsrechte* of the civil law [*i.e., rights to be respected in the different aspects of one's being as person*]. We mentioned earlier that other moral rights and duties can derive from particular relationships among persons, such as friendship or love. These too play a role in the positive law; let us just think of the duties of spouses to each other, and their duties towards their children. None of these rights and duties can be transferred.²¹ Whatever is grounded in the person as such or in certain relationships between or among persons, cannot be separated from this ground. This is quite different from the rights and obligations of social transactions, for these, deriving as they do from free social acts, can be transmitted by free social acts. Of course even here one speaks of rights and obligations

which cannot be transferred. But we will have to distinguish two things very clearly from each other: the factual inability in a concrete case to transfer rights which *can in principle be transferred* or to transfer obligations which *can in principle be imposed on others*; and the inability to transfer and be transferred which is intrinsic to moral rights and duties. One can speak in a threefold sense of "deeply personal" (*höchst persönlich*) rights (and obligations): with regard to the moral rights which are grounded in the nature of the person as such and which accordingly are inseparable from the person; with regard to the moral rights which derive from certain objective facts and realities with which the person is involved and which are inseparable from the person as long as they last; and finally with regard to rights which arise through social acts in the person and cannot be transferred by the person simply because he happens to lack the power to transfer them. There can be no question in this third case of even a temporary inseparability from the person, since these rights of social transactions (*Verkehrsrechte*) can by their very nature be waived at any time.

§7 Representation

If we now attempt to subject to closer examination a fundamental concept of the positive law, the jurist should not expect any "theory" or representation in *his* sense. We can only be concerned with bringing to light the foundational essential laws which make something like representation possible at all. But at the same time we hope through our investigations to sort out the various themes which, as it seems to us, have hitherto not been sufficiently distinguished in the juristic theories of representation.

If one only recognizes intentions and declarations of intention in the proper and strict sense, it is not possible to understand the institution of representation in its nature. If B conveys a thing of A's to C in the name of A, there are on this assumption only two possibilities. *Either* A has the intention that the conveyance of property take place; but since A does not himself express this intention, such an intention will have to remain without effect. Besides, this concrete intention of A is not even required for an efficacious representative acting on the part of B. *Or* B has the intention; then it is incomprehensible how something which obviously does *not belong* to him can by him expressing his intention be transferred into the property of a third party. There remains no alternative but to assume here an artificial institution of the positive law which is called for by all kinds of practical considerations. If B makes a declaration to C "in

the name of A" — and if certain other legally determined presuppositions are fulfilled — then the positive law sets up the fiction, in the teeth of all the facts, that the intention and expression of the representative are the intention and expression of the represented person, and on the basis of this fiction it gives rise to all the legal effects which go with the fictional facts. Hume's conception of promising as a "formula" which is arbitrarily given a legal efficacy, though we may, on the basis of our earlier discussion, hesitate to accept it as an account of one's own promising, seems to force itself unavoidably upon us as an account of representative promising. Some will even assert this as obvious. One will point out that at certain times in legal history there was no such thing as representation in the proper sense; one will above all deny that it could ever be "naturally" understandable why the concrete expression of intention by one person should have direct consequences for another person. On this view we really do have here an institution which exists "by the grace of the positive law."

We regard this view as fundamentally wrong, even if it is a necessary consequence of a defective phenomenological analysis of that which one usually calls "declarations of intention." Intentions (*Willensvorgänge*) undoubtedly belong in every respect only to the person who has them. But social acts can be performed "for" or "in the name of" another person²²; whoever promises in this way is not promising for himself, as every one who wills is necessarily willing for himself, but rather in the performing of the act he lets it ultimately issue from some third person. This is surely not just a modification of the linguistic expression but a descriptive trait of the performance of the act. It is no "institution" of the positive law but rather a modification of social acts, which goes far beyond the world of right. For one cannot doubt that there is a requesting, an admonishing, an informing, a thanking, an advising in the name of another. To the extent that these acts when performed in one's own name have immediate effects according to an essential necessity, these effects are modified as the acts are modified when performed representatively. Only the failure in principle to recognize the social act lying between the internal experience and the physical expression made it possible and in fact necessary to misunderstand these relations of essence and thereby to fall into constructions which distort the concept of representation.

We can begin by asking which inner experiences underlie the social acts which are performed in the name of others. Here it is important to stress a negative point at the outset: it is indeed intrinsic to representative acts to be performed in the *name* of the others, but not necessarily *according to their intention*. I act according to the intention of the other if I do

what he would intend under the same circumstances. There are various ways of knowing of his intention: by being informed by the other or by third persons, or by inferring it from facts which I know, etc. And above all I can get such knowledge by feeling myself into the mind of the other and into the relevant traits of his character, and in this way feeling by sympathy (*nacherleben*) the intentions which he would have. My own intention need not coincide with the intention which I sense in the other, and may even directly contradict it. We have here a very curious situation which is urgently in need of analysis. In the present context we have to content our selves with pointing out that feeling oneself sympathetically into the mind of another (*das Nacherleben*) should be understood neither as a cold knowledge about the experiencing of the other nor as an experiencing of one's own, however pale. I can sympathetically feel myself into the joy of someone over a situation over which I am myself displeased; I can even be displeased as I feel myself into his joy, and in fact I can be more displeased the more I feel his joy; there need be no question at all of any joy of my own. We also have to distinguish experiencing in dependence on another, from sympathetically feeling oneself into the experiencing of another. The disciple who lives according to the pattern of his master is certainly not free in his experiencing; but it is still *his* experiencing which he derives from the person of the master. This dependency in his experiencing makes for an unfree experiencing of his own, but it is his own. By contrast, sympathetically feeling oneself into the experiencing of another is beyond the antithesis of freedom and unfreedom, for it involves no experiencing of one's own at all.

There is a representative acting which derives from our knowledge of the real or in a given case of the expected intentions of the represented person. But this knowledge does not underlie the representative acting in the necessary way in which for instance intending to do something underlies a promise which one makes in one's own name. Acts can be effectively performed in the name of another without being performed according to their intention. On the other hand, one can act according to the intention of another without thereby representing him. We recall the case of a manager who undertakes something without being commissioned to do it (*Geschäftsführung ohne Auftrag*), which according to the BGB has certain legal consequences only if it is performed according to the intention of the other.²³

It is not any *knowledge* about the intentions of the represented party but rather, as with the social acts performed in one's own name which we discussed above, an *intention* which forms the underlying inner experience of representation. But this intention cannot aim at producing the effects of the act in the person who performs it but rather in the represented

person, with the result that *this latter person* acquires an obligation when the representative promises, and that *his* property comes to an end when the representative conveys it to a third person, etc. Here too such an intention can be missing, as in the already discussed cases of acts performed in one's own name; then there is a pseudo-representation in contrast to authentic representation.

If one thanks or informs in the name of another, there is no effect which proceeds according to essential necessity from this act, at least no effect in the world of right. It is different with a whole host of other social acts. We shall focus here only on the legally relevant ones. Let us begin with the evident fact that the act performed in representation is not able to have the same effect as the same act when performed in one's own name. If I promise in the name of another to do something, I cannot thereby acquire an obligation; for I did not myself promise but rather promised in the name of the other. Instead there occurs under certain circumstances the extremely curious effect: the other, in whose name I have promised, is put under an obligation. And we find the same thing in other cases: I convey in the name of the other his rights, I impose obligations on him by performing in his name the act of assuming, I waive his claims, revoke his promises, etc. In every case the extraordinary thing happens: rights and obligations arise, change, and come to an end in the person of the other without him having even to suspect it himself.²⁴

Of course these effects do not occur under all circumstances. I cannot simply promise for another person out of the blue and thereby give him obligations without or even against his will. Nor is it enough if he does have this will; and after our experience with the analysis of promising we will surely avoid saying that he must have previously *expressed* his will to the representative. Above we spoke of the genuine and the pseudo representative acts; now we make the very different distinction between *efficacious* and *inefficacious* acts. Our problem is this: under what conditions does a social act which is performed in the name of another produce the same legal effects in the represented person as it produces by its essential nature when performed in one's own name? One thing is clear from the outset: the represented person cannot be left out of it; without some act of his which we have yet to search out, these effects cannot come about. But how should we conceive of this act more precisely? One could first of all think that it is a promise, and it will be useful for bringing out clearly the structure of the mechanism involved in representation if we compare the effects which are apriori possible from such a promise, with authentic representation. The promise can either be directed to the representative or to some other third person. I can promise the representative to do whatever he will promise to do in

my name. Then I acquire an obligation the content of which is identical with the content of the later promise. But this obligation does not derive from the promise given in representation but from my own promise. And above all the obligation is over against the representative and not, as with an obligation deriving from an effective representation, over against the third person. The difference stands out still more sharply in the case of social acts which dispose of (*verfügen*) something. The efficacious transfer of property in the name of another produces immediately the change of property. If there were nothing else here but the promise of the owner to do what the representative "expresses" in his name, there would at the most result an obligation toward the representative to transfer the property, but not a direct transfer of property. If we now consider the case where I promise a third person to do what a certain person promises him in my name, we see that there does indeed arise in me an obligation toward the third person the content of which comes from this latter promise. Insofar this promise seems to coincide with the case of authentic representation. But one should not overlook the fact that the obligation here results from the promise which I made to the third person; the promise of the representative can only give a concrete content to this obligation, the obligation does not result from the promise performed in representation. Something parallel is found in the case of disposing of property. I can transfer something which belongs to me into the property of a third party in the event that someone else should dispose of it in my name. Then my property does indeed pass over to the other when the representative act is performed; but this transition derives from my conditional transfer, the condition of which is the representative act, and not from this act itself.

So we see that a promise can never explain the efficacy of representative acts as such. We have to make use of another idea with which we are already familiar. As we know, every person as person has the legal power to produce, modify, etc. rights and obligations through his own social acts. But he does not have the legal power to produce them in the person of others. The problem of the efficacy of representation comes to this: how can a person acquire such a power? There is only one person who can grant it, namely the person in whom the legal effects are supposed to come about. Whoever can by his acts produce and modify rights and obligations in his own person, can perform an act which grants this power to others. This act is of course not a transferring — the one who performs this act does not forfeit his own power in the least — but rather a purely creative granting (*rein erzeugendes Einräumen*). This legal power which is grounded in the person as such can as it were be reproduced in the person of any others; this is what gives the representative

acts their characteristic efficacy. We designate this social act (it is also an other-directed act) of granting as the conferring of the power of representation or, if we follow the terminology of the jurists, the act of granting power of attorney. The content of this act can be specified very variously. The power can be granted to perform in the name of another social acts of all kinds, or only certain social acts, or only certain social acts with a certain content. The content of the act authorizing the representative limits the power of the representative in that all his acts performed in representation remain without any legal efficacy if they, whether as acts or in their content, are not comprehended by the content of the act of authorization. They produce neither effects in the person of the representative — for he does not perform the acts in his own name — nor in the person of the represented party — for with regard to these acts he has not granted any power of representing.²⁵

The transfer of this power is subject to the rules which we have already discussed. In itself the power to represent does not include any power to transfer this power; but this further power can be included by the granting person in his act. But this is in a curious way more complicated than a simple transfer of a right. In addition to simply *transferring* the power of attorney on the basis of having received the power to transfer, there is also the quite different *granting* of the power of attorney on the basis of the power to represent (that is, a granting performed in representation). For the content of the power to represent can undoubtedly go so far that even the power to represent, which the represented person can grant to as many persons as he will, can itself be granted in representation. One should not overlook the difference in principle between the two cases. In the first case there is a power to transfer or to grant which enables the representative to transfer or to grant the representative power in his own name. If that happens then the representative himself forfeits the power to represent which he has granted to the other. In the second case there is not a power which refers to the power to represent, there is rather something which belongs to the content of this power: the content includes the conferring of the power of attorney in the name of the represented person. If the representative confers this power, this does not take place in his own name, as in the first case, but in the name of the other. The third party enters into a legal relationship with the represented person and not with the representative, as in the first case. As a result, the position of the representative is not here modified in the least. The difference of these two relations and the necessary laws grounded in them is of course apriori evident without any reference to a positive law. But if we should introduce a case drawn from the positive law which illustrates the difference, it would be best to mention the

power of the procurator (*Prokurist*). He has the power of attorney in all the legal transactions which belong to the conduct of a given business. This procuration cannot be transferred²⁶, that is, the procurator does not have the legal power to hand over to others his power of representation. He is not even able to hand over individual elements of his power. But he is thoroughly empowered to grant in the name of the principal the power to represent, at least to the extent that this granting has to do with the conduct of the business. Thus the procurator cannot *transfer* to anyone by his *own act* the power of receiving loans in representation, but he can, acting as the *representative* of the principal, *grant* this same power to another. The difference which we have in mind comes out here as clearly as could be.

The conferring of representative power, of which we have been speaking, can in principle occur by itself, but it is usually closely connected with other kinds of acts. It is important to distinguish our concepts here as sharply as possible. The represented person usually does not simply give the authorization to perform certain kinds of legal actions, rather he also generally gives instructions (*Informationen*) as to how to act in certain cases. These instructions directly inform the representative about the intention of the represented person; they enable him to act according to his intention. But since such acting is not intrinsic to representation, as we know, he can deviate from them without thereby having his representative power in any way restricted, indeed in this case there need not be any legal consequences at all.

Deviating from the instructions of the principal becomes legally significant only if the representative has an obligation to conform to them; this obligation does not derive from the instructions as such. Ever since Laband's studies²⁷ jurisprudence has generally recognized the distinction between representative power and "mandate" (*Mandat*). This distinction has its complete correlate in our apriori sphere; here we can distinguish a mandate both from the mere instructions as well as from the conferring of representative power. For one thing it is intrinsic to a mandate that claims and obligations derive from it. If for instance A gives B the commission to sell a thing for him and B accepts the commission, a claim of A and an obligation of B derive from this acceptance — which *materialiter* amounts to a promise. It goes without saying that we have here far more than mere non-binding instructions of A to B. We also see clearly the difference between the conferring of representative power and the conferring of a mandate. The former gives a legal power, the latter does not, not even if it is accepted. Claim and obligation derive from an accepted mandate, but never from the conferring of representative power, not even if it is accepted. That mandate and representative power

are often found together, that it can be doubtful in practice whether we have to do with the one or the other or with both, does not change the essential difference between them in the least. And besides, they can easily occur separately. It is in no way grounded in the essence of representative power to be in fact connected with a mandate or commission and certainly not to be connected with an acceptance of the commission. And there are numerous commissions in which the commissioned person is not given any representative power.

Still more important than this difference in essence and this possibility of being separated in existence, is the following axiom of the apriori theory of right: even when commission and representative power coexist with each other they cannot in any way influence each other. The obligation, deriving from accepting a commission, to do something in the world of right, in no way produces as obligation a representative power referring to the same content. And on the other hand, the power of performing in representation certain social acts is in no way touched by the obligation, deriving from the commission, not to do what one has representative power to do. It is after all clear that if I accept a commission and acquire an obligation to buy a thing "for" someone or "in his name," this obligation *as obligation* is not necessarily connected with a corresponding representative power. This power presupposes a special act of conferring, and this not only when the commission is given to me by some third party but even when the obligation is toward the party in whose name I am supposed to make the purchase. It is just that in this latter case one can say that it belongs to the sense of giving a commission that the simultaneous conferring of representative power goes with it. It is further clear that if the power of buying a thing in the name of another has been conferred on me, and if I later, by accepting a commission, acquire the obligation not to buy it above a certain price, this obligation is not able to touch the legal power which refers to buying as such. If I buy at a higher price, I violate my obligation, but at the same time I really exercise my legal power. Here we come across two axioms which have a fundamental importance for the apriori theory of right and for the positive law which (importance) extends far beyond the sphere of representation — it does not matter whether they are written down in any legal code anywhere in the world: *the obligation to perform a social act with immediate effects in the world of right does not necessarily include any legal power directed to the same content. And: the obligation not to perform a social act with immediate effects in the world of right does not eliminate or restrict a legal power directed to the same content.* The obligation to revoke a promise does not give me any power of revoking. The obligation not to make use of my power of waiving a right, leaves this power untouched.

In the case of a representative power of a certain range, every step of the representative can be regulated by the most exact instructions; by exact commissions his every step can be made the content of an obligation. The representative remains through and through representative. The fact that his actions are very exactly prescribed does not degrade him to the status of a messenger (*Bote*), not even if the content of his representative power is extremely restricted. As long as he merely has the power to perform in the name of another a *single* social act with a definite content, say the act of revoking a certain promise, he is as holder of this power a representative. A messenger, by contrast, is as such not one who performs a legal-social act, but rather simply stands in the service of one. He has to see to it that the announcing function of the social act is fulfilled, that the addressee consciously takes the act in. He has to help the social act to appear externally, he has to produce the physical basis for the addressee hearing the act. In fulfilling this task he may himself perform social acts. But these acts — such as an act of informing — should not be confused with the principal act which they are serving. It is characteristic for the representative to perform social acts in the name of another without referring to a preceding social act; but the messenger necessarily makes such a reference, though he need not himself perform any social act. We have just seen that it is not the freedom to choose among legal-social acts which distinguishes the representative as such. But it seems to us that his distinguishing mark is also not to be sought in the fact that the representative “determines the conclusion of a transaction by his own decisions,”²⁸ whereas the messenger does not. If it is left up to a messenger whether or not to deliver a letter expressing a social act addressed to a third party, he does not thereby become a representative. Insofar as he has to see to it that a third party hears someone’s act, he functions as a messenger, even if his acting is left up to his discretion, so that he “determines the conclusion of the transaction by his own decisions.”

The effect of a legal-social act, whether it is performed by a representative in the name of another or is relayed by a messenger, comes about at one and the same moment: when the act is heard by the third party. This should not obscure for us the fact that in the second case the performance of the act and its efficacy are separated in time, whereas in the first case they directly succeed each other in time. The representative performs, the messenger transmits what has already been performed. That can prove to be significant in all those cases where the positive law makes some effect depend on the performance of an act. Let us think of BGB §149.²⁹ This enactment refers to all cases of a delayed transmission of a message and not to the delayed performance of a representative

action. If the messenger of the other party relays to me with obvious delay the acceptance of my offer, I have to notify the other party immediately of the delay; but if the representative of the other party makes an acceptance obviously much later than he was instructed to, there is no such obligation on my side.

Up until now we have spoken of representative acts and of a representative power which is expressed in the fact that legal-social acts with immediate efficacy can be performed for others. But representation is not restricted to this.

We distinguish between the performance of the acts and their being heard by the addressee, which is what alone gives rise to the effect of the act. Here too there is such a thing as representation, insofar as we can extend this concept to every action of a person, whether active or passive, which in producing its immediate legal effect according to essential laws does not produce it in the person of the one who acts but in the person of another. B can hear the promise of A; but the claim is acquired not by B but by some third C. A condition for this is that A does not promise to B as such but to B “in the place of” or “for” C; B is here related to the social act as its addressee-representative. We have to distinguish this case from the quite different one where A promises B to do something for C. Then the promise is addressed to B as to one who hears it in his own name, and it is also B who acquires from the promise the claim that something be done for C. In our case no claim of B results at all, but a claim of C does indeed result.

B does not perform social acts, as in the representation discussed above. He does not “express” himself, he does not turn to another. He does not even perform any inner act; he simply *hears*. Of course there can be activities connected with this hearing: listening, paying attention, etc. But these acts precede the hearing and are never identical with it. Besides, they by no means have to precede the hearing. One can hear without intending and even against one’s intention; something can penetrate me from the outside without the least cooperative activity on my part, and even against my inner resistance. If we earlier had to do with an essentially active representation, we can here speak of a passive representation. The difference in principle between the two kinds is extraordinarily far-reaching. As we know, active representation is realized in an act performed with a descriptively very distinctive modification, whereas any such modification is lacking in the addressee. On the other hand, the “hearing” of the passive representative is in no way distinguished from the usual apprehension of social acts, whereas here it is the act of the one who addresses the representative which displays a distinctive modification: the act which he performs — in his own name — addresses first of all

the representative but refers "ultimately" and "really" to the person who is represented by him. Just as we distinguish with representative acts between the person who performs the act and the person who is recognized in the performance of the act as the one from whom the act really proceeds, so we have here to make the distinction between the person to whom the performer of the act addresses himself and the one whom he intends as the real addressee.

Since in this way the distinctive character of passive representation which is heard, we have to look in two different places for that which in the case of active representation we were able to find in the *one* act performed in the name of another. The social act of the one who addresses the representative has as its internal experience the intention that the effect of the act, say of a promise which is given to someone "for" a third party, come about in the person of this third party — and not in the person of the one who is directly addressed. If this intention is missing, then we have to do with a pseudo-act in our usual sense. By contrast, the hearing of the passive representative does not necessarily have an underlying internal experience; for only social acts presuppose by essential necessity such an experience. The person to whom a promise "for" another is addressed, neither has to want to hear it nor to want the effect to come about in the represented person. This effect can even come about against his will, as long as the other conditions for an effective representation are fulfilled.

Here too it is a social act which is also other-directed, namely the act of granting, which grounds the efficacy of the representation. Two things are set up by this act: a legal power (*Können*) and something which we would better designate as a legal ability (*Fähigkeit*). The curious thing is that here the legal power is produced by the granting in persons other than the addressee. If A confers passive representative power on B, then any given person C has as a result the power to produce legal effects in the person of A through acts in which he addresses himself to B "for" A. But with regard to the representative, by contrast, we cannot speak of a legal power, since he does not have the possibility of undertaking any action (*Tun*) with effects in the world of right. We will rather speak of an ability which is shown in the fact that as a result of his hearing social acts, the effects of them come about in the represented person.

There is nothing particularly problematic about the possibility of granting a passive power of representation. Just as we have the ability to let legal effects come about in our own person as a result of hearing social acts, so we can confer such abilities on other persons and thereby confer at the same time on ever so many additional persons the legal power of directly producing legal effects in us by addressing their social acts to the

empowered persons. As for the transfer of the passive power of representation, it is for the most part like the transfer of the active power of representation. There are just two points which ought to be especially stressed. One possibility which we discussed in connection with active representation is here excluded. The merely passive representative of a person can never exercise his representative power in such a way as to set up others as representatives of this person. For he lacks any power of producing effects in the represented person through *acts* in the name of this person, such as he would have to perform as representative in granting the passive ability to represent. And further: whereas it is possible to transfer the passive power of representation if one has been expressly granted the power to transfer, it is not possible for a person who has the power to address the represented person through the representative, to transfer this power. For this power is purely auxiliary in nature. It is completely dependent on the passive power of representation, from which it arises as a kind of reflex in a more or less large group of people. And so a transfer of this auxiliary power, perhaps even while the passive power of representation remains constant, would be completely meaningless.³⁰

The conferring of a passive ability to represent has, like any conferring of representative power, a definite content which can vary as it will. It can for example be limited to hearing social acts of a certain kind. There is no apriori obstacle to it being limited to the social acts of certain persons. The content of the power which is auxiliary to the passive ability of representation is then correspondingly restricted, as is the range of those persons who have this power.

It belongs to the meaning of passive representation that it cannot be subject to instructions and commissions which, as with active representation, direct and regulate the representative hearing. These can only come into question if they regulate some activity which prepares for the representative hearing, but not this hearing itself. Thus the passive representative can be bound to perform certain actions toward bringing about social acts in the other party, or toward making possible the hearing of them by his own activity. But the hearing is not itself an activity; the mechanism of representation works here as it were by itself, and the representative cannot avoid it.

With passive representation, too, we have to distinguish between representing and conveying a message. Although it is not true that a representative, in contrast to a messenger, necessarily has to perform a social act, nevertheless the messenger here also stands in the service of a social act, he has the task of fulfilling its announcing function by letting it appear externally. Both the messenger and the representative can appar-

ently do the same thing: both can simply hear a social act. But precisely here the contrast becomes quite clear. Whereas the task of the messenger only begins with the hearing and ends in making it possible for the addressee of the act to hear, the task of the representative is already over as soon as he hears. The effect of the social act comes about with the hearing of the representative. But in the other case one can speak of this effect only when the messenger has enabled the real addressee to hear the social act.

According to our analysis, both active and passive representative power arise through the social act of granting (it is also an other-directed act) which is addressed to the future representative. If we compare this thesis with different juristic theories, we seem to find only a partial agreement. Of course some jurists come to the same or to a similar result — we make special mention of Laband.³¹ According to other theories the authorization can be made to anyone at all or only to the third party with whom the representative is dealing, or both to this third party and the person to be empowered.³² It seems to us that, in the interest of the purity of our apriori point of view as well as in the interest of a clear understanding of the meaning of these theories, it is of the greatest importance to show that there are no contradictions here with our own position, since the statements of the apriori theory of right have a very different theoretical meaning from the various constructions which we find among jurists. Let us look more closely at the view maintained by Lenel: that the conferring of representative power is only possible toward the third party with whom the representative is dealing.³³ This thesis, taken as an essential law, is undoubtedly false. For one thing it is not clear why A should be able to give B a legal power by a social act which is addressed to a third party, C. But even if there were such an act, even if in other words by declaring to third persons, "I hereby grant to B power of attorney in dealing with C," a representative power were to arise necessarily in B, such a declaration would have to be possible toward any third person and not just, as the theory would have it, to the person, C, with whom the representative is dealing. But above all, this declaration could never exclude the possibility of directly giving B representative power by a simple act of granting it to him. This possibility is undoubtedly established by essential law. Insofar as the theory would want to contest all of this, it would be false. But the question is whether the theory, when rightly understood, wants to contest this at all. We have never denied the freedom of the positive law in making its enactments, even if we see in this a difficult problem, which will be discussed later. Just as the positive law is in a position to give active and passive representative power to persons to whom this power has not been

granted by any social acts of the represented persons — one could think of the various forms of "legal" representation (*gesetzliche Vertretung*) — so it can also, if reasons of practicality speak in favor of this, give to future representative acts any content and any addressee it wants. It is, therefore, quite possible to conceive of a positive law which lets representative power come about only through an act directed to the party with whom the representative has to do and never through an act of granting addressed directly to the future representative — perhaps because one could thereby prevent an undue restraint of trade which would result from doubts of third parties as to who really has representative power. A juristic theory which would maintain the thesis of Lenel for the positive law would of course be quite right and would in no way come into any contradiction with the essential laws which we have brought out. But we can go still further: this thesis could be — independently of every particular positive law — in general proposed as a requirement for every future positive law. That representative power can only be granted to the party with whom the representative deals would then be a "right" principle insofar as it would take account of the needs of commerce and every practical consideration which comes up for the positive law. This is what Lenel probably means in saying that the consequences of his position "are the only ones which in doubtful cases lead to decisions which satisfy our feeling of right (*Rechtsgefühl*)."³⁴ It is of course not our task to decide whether his theory is right for our positive law or for some earlier positive law, and further, whether it recommends itself as a legal-political principle for every future positive law. But we have to insist as forcefully as possible on separating these questions from the questions of essence which belong to the apriori theory of right.

We have here an antithesis (*Gegensatz*) which runs through the whole world of right. Thus the question at what moment a social act is effective, whether when it is declared, or when its physical embodiment is sent to the other, or when it reaches the other, or only when it is heard by him, has been variously answered by the expression-, the transmission-, the reception-, and the hearing-theory. All of these theories have their basis in pure considerations of practicality, and it is such considerations which have introduced the reception-theory into the law of the German civil code. If we inquire into the relation of essence which here obtains, there can be no doubt that the effect of social acts always comes about only when they are heard. The fact that a hearing-theory is the only tenable one here does not exclude its teleological unsoundness as a theory of positive law. The strictest separation of the two realms is in the interest of each. We repeatedly find that the objection of "conceptual impossibility" in the sense of essential incompatibility is raised against theories of

positive law. And yet the objection is fundamentally misplaced in this sphere. The apriori theory of right must come to understand the essence of legal structures and bring out the strict apriori laws which are grounded in them. Every theory which does not investigate *essential being* (*wesenhaftes Sein*) but rather the content of *useful norms* is absolutely independent of these apriori laws. If we earlier stressed the irrelevance for positive jurisprudence and for the apriori theory of right, of objections which are based on "conceptual impossibility" in the sense of incompatibility with certain definitions which are made at a given time, we now get to understand the irrelevance of essential incompatibilities for positive jurisprudence. Of course on the other hand we also have to insist that one not obscure the purity of the apriori knowledge of being (*apriorische Seinerkenntnis*) by bringing in practical political points of view. There is in particular no justification at all for introducing any deviating principles which have been established in the development of the positive law, as supposed refutations of self-evident essential laws.

This has to be applied to the much-discussed question as to the construction of representation as such. If one for instance asks with regard to active representation who the contracting party is, the representative or the represented party, the apriori theory of right will be the first to give an answer. It will work out in a purely phenomenological analysis the distinctions of which we have spoken; it will contrast with the act performed in the name of another, the act performed in one's own name and it will contrast with the performer of an act in one's own name, both the representative performer and also the represented originator of the representative act; it will accordingly distinguish here between the representative contracting party and the real contracting party to whom the representative refers in his act and in whose person the effects of this act immediately and directly occur; and it will finally develop the essential laws which are grounded in these distinctive categories of right. As for the question whose will is decisive for acts performed in representation, the apriori theory of right will be the first to give an answer. It will point out the general distinction between a definite and immediate willing of something, and an indefinite and mediate willing of something; this distinction comes up when for instance someone wants a definite result and consequently approves at the same time and in this sense co-wills everything which would derive from this result (without already knowing it in detail). Thus the legal power of the representative is immediately and definitely willed by the represented party; the legal consequences which come about in his person through the exercise of the power, are co-willed in that quite different way which is indefinite and mediate. Of course these consequences are immediately and directly willed, but not

by the represented party but by the representative. It belongs to the apriori theory of right to investigate further essential relations which are possibly grounded in these categories. But we enter as it were a completely different world as soon as one raises the question as to the norms which, with a view to practicality and justice, should be set up by the positive law. Here we can reach directly contradictory results. If for example a representative, B, acts according to the instructions of the represented party, A, there is no doubt but that, considered in the light of essential laws, the effect of the representative action derives exclusively from the social act which B performs and that the instructions of A are completely irrelevant for this effect. But if A knew of certain circumstances of which B did not know but the knowledge of which would have influenced the effect of the social act performed by him, it can be said to be a requirement of justice that the ignorance of B should not be a burden to A who has the knowledge; the positive law can then make a corresponding enactment (cf. BGB §166 II). Here again the possibility arises of developing theories of the positive law of representation which are completely independent from essential laws of the apriori theory of right and from all the necessities and impossibilities which are proper to it. Of course juristic inquiry goes still further here: it does not limit itself to presenting and teleologically justifying the content of the norms in a positive code, or of the norms of "right" positive codes; it also tries through constructive theories to "make understandable" and to "explain" these norms. Enactments determining representation are "derived" from the fact that the representative is for the purposes of jurisprudence thought of as being in the place of the represented party³⁴, or from the fact that "it is not *the particular* declaration of intention of the representative but rather *a* declaration of intention *like that* of the representative which is thought of as the declaration of intention of the represented party . . . a tract of conscious experience qualitatively just like the one which the representative had in making his declaration of intention."³⁵ In part these theories come from the desire to understand the *essence* of representation; the rather strange elaboration which they sometimes have is then, as we have already shown, a result of an insufficient understanding of the essence of the social acts. The fulfillment of *this* desire is a task for the apriori theory of right. But insofar as these theories want to achieve something quite different, insofar as they intend to "deduce" from constructions and more or less intuitive images the structure of legal codes which have been developed according to teleological considerations, as if we had to do here with laws of being which could be established, one must have weighty doubts about their scientific (*wissenschaftlich*) value.³⁶ We for our part want to limit ourselves

to recognizing in this area only the two paths of investigation: putting forward and teleologically grounding general positive enactments which change with economic and other conditions, and investigating the eternal laws of being which are grounded in the most basic pure categories of right. On the basis of this distinction in principle we hope for a clarification and enlargement of the knowledge of right (*rechtliche Erkenntnis*).

Notes

1 ["By a *Gestaltungsrecht* we understand the right of a certain person, by means of a one-sided act, which is usually a declaration of intention in need of being received by the other, to bring about a relation of right between himself and another person, or to determine more exactly the content of such a relation, or to change it, or eliminate it altogether. The *Gestaltungsrecht* gives the entitled party a legal 'power' enabling him to bring about entirely by his own will legal consequences which, since they affect the sphere of right of the other, ordinarily require the other's consent in order to be brought about." Karl Larenz, *Allgemeiner Teil des Deutschen Bürgerlichen Rechts* (Munich: C. H. Beck'sche Verlagsbuchhandlung, 1980), pp. 192-93.]

2 From this we have to distinguish the fact that the positive law is able to exclude certain power relations from its concept of possession and on the other hand to subsume under its concept of possession cases in which there are no power relations (cf. *Bürgerliches Gesetzbuch* [Civil Code], §855 on the one hand, §857 on the other). The construction of the concept of possession for the purposes of a positive code is a task for itself. The apriori theory of right, by contrast, which has to do not with constructions but with intuitively evident relations of essence, remains untouched by this. We cannot warn emphatically enough against confusing these two spheres.

3 Whereas crimes like murder, infliction of bodily harm, rape, and the like undoubtedly have their moral disvalue apart from any positive norm, theft and embezzlement, as nothing more than the violation of legal enactments, should according to the dominant view be fundamentally different from them. If one thinks this view through, these crimes would be on the same level as driving on the left side of the road — a truly absurd consequence.

4 From this we have definitely to distinguish the case where a class of things is expressly excluded by a positive norm from ever becoming property.

5 The principle "*duorum in solidum dominium esse non posse*" is by no means "an inference from the definition of property in the existing law of property" (Endemann), but rather an apriori truth grounded in the essence of owning.

6 [Cf. note 1 of this chapter for a definition of a *Gestaltungsrecht*. JFC]

7 It does not seem to us correct to speak of the right of preemption as an "obligatory (i.e. relative) right" (cf. for example Cosack I, §132; Endemann I, §162). The very wording of the law, which speaks of *exercise*, tells against this. The obligatory claim of the entitled party which derives from the exercise of his right should not be confused with the right of preemption itself. We cannot in the present context develop this more fully; but we would like to point out that when an obligatory and a real (*dinglich*) right of preemption are contrasted, this ambiguous pair of opposites takes on a meaning all its own.

8 At this point we draw mortgages (*Hypotheken*) into our considerations, which have hitherto centered mainly around liens on moveable things.

9 Bremer, *Das Pfandrecht und die Pfandobjekte*, p. 119. Cf. also Pfaff, *Geld als Mittel pfandrechtlicher Sicherstellung*, p. 12.

10 It seems to us quite unacceptable to narrow the concept artificially to certain ways of acting.

11 [In German one contrasts *das subjektive Recht*, or a right held by a person, with *das objektive Recht*, or the legal order which protects and in some cases even establishes the rights held by persons. Since we do not have this contrast in English, one can convey everything meant with *subjektives Recht* by translating it as "a right," or as "rights" and this is what we shall do in the following. JFC]

12 From this we have to distinguish the granting of a right which derives from a primary right (*vom Hauptrecht*). Whoever is entitled to use a thing can grant to others the right to use it at certain times or to a certain extent. In this case the other acquires an independent

right, he does not share in the right of the granting person, who forfeits his right insofar as it cannot coexist with the right of the other.

13 There is simply no way to avoid the *designation* of legal-social acts as declarations of intention. But one should not let this word obscure for us the existence and the essence of these acts.

14 A lien on a thing represents, as already mentioned, a case in which this legal power is granted to another person.

15 It is of course a question for the apriori theory of right whether any kinds of claims against the violating person derive apriori from his violation of my rights. We shall not discuss this problem here.

16 Also variable in this sense is the "real" right of preemption with regard to land (BGB §1094 ff.) insofar as it has as its addressee whoever owns the property, whereas the "obligatory" right of preemption has a relation to a definite person. (Yet another concept of a real right arises when one thinks of BGB §1098.)

17 We have already mentioned that some claims have a content which completely lacks any addressee, such as the claim that someone take a walk.

18 In these investigations we will not take up the question as to the possible defects of rights and their apriori foundation.

19 One should ask oneself without prejudice what sense it could have to designate these principles as "arbitrary enactments of the positive law" when they are so immediately evident even to non-jurists!

20 It goes without saying that with the transfer of the obligation there is at the same time a change in the one who *performs* the content, since every obligation by its very nature has to refer to some action by the bearer of the obligation.

21 There is at the most a possibility of transfer with regard to the extra-moral claims to certain financial benefits (*Geldleistungen*) which develop in a very curious way from certain moral rights such as the right of children to support.

22 Cf. §3 in ch. i, "The social acts," p. 25.

23 BGB §683: "If the manager, in undertaking some activity, acts in the interest of and according to the real or supposed will of the proprietor, he can require reimbursement for his expenses, just as if he had been commissioned to undertake the activity."

24 Here we will have to keep in mind the distinctions made earlier. If B promises something to C in the name of A, it belongs to the meaning of this promise that A is the one who has to do the thing. But it is apriori quite possible that B promises to C in the name of A some action of B's own. Then C has a claim on A that B perform the action.

25 The way in which the positive law regulates representation which lacks the power to represent, remains irrelevant for the consideration of the essential relations which obtain here.

26 *Handelsgesetzbuch* [Commercial Code], §52 II.

27 *Zeitschrift für Handelsrecht* (X), p. 203 ff.

28 Dernburg, *Pandekten* (I), 7th ed., p. 272 ff.

29 "If a declaration of acceptance which is delayed in reaching the party who made the offer, was sent in such a way that it would have reached him on time if it had been delivered in the usual way, and if the party who made the offer knows this, then he has to notify the accepting party of this delay immediately upon receiving the declaration insofar as this has not already taken place. If he delays in sending this notification, the acceptance does not count as delayed."

30 One sees here that Ihering's concept of a legal reflex can find its definitive clarification in our apriori sphere. We have to restrict ourselves to this brief mention.

31 The fact that Laband (op. cit., p. 208) sees in the grant of representative power a contract and not a one-sided "declaration," is irrelevant for us.

32 Cf. the literary references in Lenel, "Stellvertretung und Vollmacht," *Iherings Jahrbücher* (36), p. 14.

33 *Ibid.*, p. 14 and ff.

34 Cf. for example Hellmann, *Die Stellvertretung in Rechtsgeschäften*.

35 Windscheid, *Pandekten I*, 8th ed., p. 302.

36 This is of course not to deny that there is also another — and fully justified — kind of construction in the positive law.

CHAPTER THREE

The Apriori Theory of Right and the Positive Law

§8 *Enactments and the propositions expressing enactments*
(Bestimmungen¹ und Bestimmungssätze)

We have said that only persons can be the holders of rights and obligations. A foundation is certainly not a person, and even less is an estate; and yet according to the positive law they can be the bearers of rights and obligations. We have said that whoever can perform a promise can thereby take on obligations. If a person is 20 years old he can surely perform promises of all kinds, and yet he does not necessarily acquire from these an obligation which is fully valid before the law. We said that every promise gives rise to claim and obligation; they arise as soon as the addressee, the only person who can get the claim, has heard the promise. The positive law seems to contradict this in every respect.² A promise which has been heard, for instance a promise to make a loan, usually does not establish any claim if it is not accepted in a special social act; other promises, for instance the oral promise to give someone a house, do not establish any claim even if they are accepted; if we look at the other side of the obligatory relation, we find that obligations can arise before the promise has even been heard, such as in the case of offering a public reward, at least according to some jurists³; and a promise which I make to someone can bind me toward a *third* person, as with promises with third-party beneficiaries. Furthermore, we have put forward the following as necessary laws of essence: a claim cannot simply be assigned without further ado; no one can get property in a thing which does not belong to him; a lien on one's own property is impossible. The positive law teaches us the opposite: claims can as a rule be readily assigned by their holder; someone acting in good faith acquires property in a moveable thing which a non-owner of the thing has transferred to him (assuming that it is not something which someone has lost); there is a mortgage

of the owner on his own property. We will not introduce more cases: hardly a single one of the principles which we have claimed as laws of essence could not be confronted with a deviating enactment of the positive law. And to make the point in principle: there is no law of essence from which such a deviation would not be conceivable. That a claim is extinguished by being fulfilled is surely just as evident as any logical or mathematical axiom. But if it should prove to be useful, why should not the positive law enact that certain claims are extinguished only when their fulfillment is officially notarized at the nearest courthouse? We touch here on the point from which probably most of the objections to our grounding of the apriori theory of right will be derived. These objections are also immensely plausible: how can one put forward apriori laws which claim absolute validity, when any positive law can stand in the most flagrant contradiction to them?

There are great difficulties here even for those who are able to consider these states of affairs with open eyes and who are sufficiently free from prejudice to understand that the statement, "a claim is extinguished on being waived by the entitled person," is fundamentally different from the statement, "a promise to give something as a gift needs to be notarized in order to be valid." We have come to understand relations of essence with an evidence which admits of no doubt as to their reality. How then is it possible at all that contradictory statements can be put forward? That $2 \times 2 = 4$ is an apriori statement. If someone asserts that $2 \times 2 = 4$, he asserts thereby nonsense. But should we really designate as nonsense those statements of the positive law which contradict the essential laws? That will surely not do.

But all this argumentation is quite premature. We above all raise the question whether we really have to do here with a *contradiction* in the proper sense. There are various kinds of propositions (*Sätze*),⁴ but the only propositions which involve contradiction between themselves are the ones which are contradictory in their content and of a quite particular and identical kind. No one will detect a contradiction between an asserting or judging proposition such as "A is B" and the interrogative proposition which is contradictory in its content, "Is A not B?" A contradiction clearly presupposes *two asserting propositions* (*Urteilssätze*) which are contradictory in content. The propositions of the apriori theory of right undoubtedly are, insofar as they posit being, asserting propositions, or statements. But — this is now our question — is this also true of the propositions of the positive law? One has often claimed that it is; one has more exactly designated legal propositions (*Rechtssätze*) as *hypothetical judgments*. A glance at the very first paragraph of our Civil Code shows this view to be untenable. The proposition, "The ability of man to be a subject of rights

begins with the completion of birth," has just as little a *hypothetical* character as does the proposition, "Man is mortal." And further, it cannot possibly be considered to be a *judgment*.⁵ We do not have here a positing of being which, according as this being is really there or not, could be judged as true or false; we rather have an *enactment* (*Bestimmung*), which stands beyond the alternative of true or false. The only reason why it was possible to be misled about this is that very different kinds of propositions can be given the same linguistic expression. The sentence, "The ability of man to be a subject of rights begins with the completion of birth," can also be read in any text book of civil law. We have the same words, but the content of the proposition is clearly different in kind. In the textbook it is really a judgment which is made, it is asserted that in Germany today the ability of man to be a subject of rights begins at birth, and this assertion goes back as to its ground to the first paragraph of the Civil Code. But this paragraph does not contain another assertion — how could one ground one judgment through identically the same judgment — it rather contains an enactment. *Because* the Civil Code enacts that the ability to be a subject of rights begins at birth, the jurist can *assert* that *in virtue of this enactment* it really is so in Germany at the present. The proposition of the jurist can be true or false; quite different predications are appropriate for the enactment of the Civil Code: it can — in the teleological sense — be "right" or "wrong," it can be "valid" law or "invalid" law, but never true or false in the logical sense.

We can, therefore, not speak of a real contradiction between our essential laws and the propositions of the positive law. If the positive law allows the assignment of a claim, it does not *assert* that through the act of transferring, the claim changes its bearer and at the same time the obligation changes the person whom it faces — that would of course be a contradiction of an evident essential law — it rather *enacts* that wherever the act of transferring takes place, this effect should come about. Here of course new problems come up. Even if those antinomies from which we began do not exist in the way in which we presented them, there are nevertheless undoubtedly *deviations* (*Abweichungen*) of the enactments from the intuitively given essential relations of right. How is that possible? What is an enactment at all, what can it refer to and what are its effects? An enactment that 2×2 ought to equal 5 would surely be absurd; indeed, not even the enactment that 2×2 ought to equal 4 makes good sense.

If one does not speak of legal propositions as hypothetical judgments, then of course one usually speaks of them as *norms*. But this concept has extraordinarily many meanings; it would be easy to list at least ten different meanings in which it is used. But which one of all of these does one have in mind here? We can make a fundamental demarca-

tion if we reflect on the necessary origin of every enactment. There are norms which are grounded in the moral rightness of states of affairs. Because something is morally right, it *ought to be*, and if certain further conditions are fulfilled, *I ought to do it*. This oughtness of being and of doing exists by its nature in itself and apart from the knowing or the positing of any consciousness. An *enactment*, by contrast, necessarily presupposes a person who issues it. Of course even an enactment can have its "ground" in the rightness of states of affairs. But "ground" does not mean here that from which the objective ought-to-be derives; it rather designates the motive which moves a person to make an enactment. If one wants to call an enactment a norm, we have here norms which presuppose a person as their origin and bearer. But even after we have marked off our sphere in this way, confusions are still possible. The most usual and most disastrous confusion seems to us to be the one between command and enactment. After all, it seems to be plausible at first glance: legal propositions are norms which the law-giver issues; and to say that he issues norms is to say that he gives *commands*, *prescriptions*, and *prohibitions* which are addressed to the citizens or to the executive organs of the legal order. It goes without saying that we cannot remain at such a distance from the things themselves. Enactments are in reality anything but commands; and the distinction between the two things forms the indispensable basis for understanding the issues which occupy us here.

To begin with, both are to be understood as *social acts*. There are neither commands nor enactments which unfold purely within the person; they always address themselves to others, and the need of being heard is intrinsic to them. But whereas commanding is at the same time necessarily an other-directed act, the act of enacting is not. By its very nature every command presupposes a person or group of persons who are commanded, just as with the act of promising or of granting. But enacting does not have this necessary relation to other person, just as little as do acts like waiving or revoking. Although these acts are addressed to other persons in being performed, their substance (*Gehalt*) lacks any personal moment (*personales Moment*). Whereas I *always* promise to or command a person, I simply waive a claim or simply enact that something should be in a certain way. And in the content of the acts, too, we can see the difference in principle between command and enactment. Every command refers to an action of the person or persons to whom it is given (just as a promise refers to the action of the one who promises). An enactment, by contrast, just as it does not include in its content any person at all, also does not include any action of a person. Whatever constructions one may resort to, one cannot project the action of a person into a simple and complete enactment such as that the ability of man to be

a subject of rights begins at birth. This difference is of course also reflected in the internal experiences which underlie the two social acts. Authentic commanding presupposes the intention that some action be realized by the other person. But the intention which underlies enacting refers quite generally to the fact that something ought to be. The two acts can be related in such a way that an enactment grounds a command. The leader of a group can tell the members of the group that he enacts that this or that should be so or so. He can then give the command to the individual members to realize the content of the enactment. In other cases an enactment or a command is found by itself. But an enactment can never complete a command in the way in which a command can complete an enactment as the means which realizes the enactment. We do not propose to investigate here if commands ought to be or in fact are joined with the legal enactment of a law-giver, whether as commands to the executive organs or to the citizens of the legal order. But one will no longer be able to doubt that the two acts — whether joined or not — are different. Let us now try to go more deeply into the essence of enactments.

The first distinction which comes up here — as by the way also in analogous cases — is the one between the experience of enacting, the act of enacting, the proposition expressing the enactment, the content of the enactment, and the effect of the enactment. If we begin with the individual experiences in which persons enact, we must of course distinguish the experience or the performance of the enactment from the performed enactment itself. The same act of enacting, "A ought to be b," can be performed by ever so many persons, somewhat as the same perception or the same promise can be performed by them, or the same grief felt by them. This *act* of enacting is distinct from the individual experiences of performing the enactment; it is realized in them. The act of enacting has also to be distinguished from the proposition expressing the enactment, which represents a distinct kind of objectivation of the act. It goes without saying that the proposition in this sense does not coincide with the grammatical formulation which we can give it. It is in the strictest sense the *same* proposition which we can express in German, French, or English. Not all acts go with this kind of objectivation in a proposition; we might think here of perception or imagination or grief over something. The sentences, "I perceive this," or "I am sad," are surely not "perception-propositions" or "feeling propositions," but rather asserting propositions — addition to judgments, such as interrogative propositions, imperative propositions, enacting propositions, etc. The proposition, "Do this" is undoubtedly not a judgment; it is rather related to the act of commanding as a judgment is to an assertion. And the enacting proposition, "A ought

to be b," is related to the act of enacting in exactly the same way. It stands of course in sharp contrast to the judgment, "A ought to be b," which expresses the existence of an objective ought-to-be which is grounded in the rightness of A being b. The moralist may perform such acts of judging; the law-giver performs acts of enacting. In the works of ethics we find such asserting or judging propositions; we encounter enacting propositions in the legal codes.

There is the general distinction between acts (and propositions), and the content to which they refer; between the act of judging (and the judgment), and the judged state of affairs; between the command (and the imperative proposition), and what is commanded, etc. Strict relations of essence obtain between these two spheres, and these determine which objects go with which acts. A judgment — even a false and absurd one — can as judgment refer only to states of affairs. Every command can by its very nature refer only to the action of another person. But an enactment can have both as its object: just as the judgment posits states of affairs as existing, so the enactment can posit that states of affairs ought to exist. But an enactment is also like a command in that its object can be an action; indeed, not only the action of other persons but even one's own action can function as the content of an enactment.⁶

Furthermore, we find differences in principle with respect to the way in which acts are related to their content. Judgments are *conforming acts* (*Anpassungsakte*); it belongs to their nature to "render" (*wiedergeben*) in their positing something pre-given. Even when a non-existing state of affairs is asserted, it still belongs to the sense of the assertion to regard the state of affairs as existing (*bestehen*)⁷ and thus to posit as existing something which is meant as existing. And so in addition to the positing character which is proper to states of affairs — whether existing or non-existing — *insofar* as they are posited as existing in acts of judging persons, there is the *existence in itself* of the states of affairs to which the positing tries to conform. With other acts it is quite different. A question too can refer only to states of affairs; but it does not try to render anything which exists in itself. Though one can speak of the dubitability of a state of affairs as being able to ground a question, the corresponding conforming act even here is the *assertion* that dubitability is present, and this assertion is not identical with the question which asks whether the state of affairs really exists. Though one also speaks of a state of affairs being "generally" called into question, this generality does not refer to the intrinsic inhering of a property but rather to the large and possibly all-inclusive number of persons for whom the putting into question exists. Something similar can be shown for enactments. Through them something is posited: it ought to exist; this positing character is relative

to the positing acts and there is no independently existing being which runs parallel to it and to which it has to correspond. Though it is especially easy to confuse this ought with the objective ought-to-be, it is nevertheless clear that this latter ought, grounded as it is in moral value or moral rightness, has nothing to do with the positing character which exists only as the correlate of the enacting acts of a person. Of course the moral ought can be the "reason" for a corresponding enactment. But even then the enactment does not conform to it in the earlier sense — this could be done only by the assertion, "it ought to be" — the enactment rather posits, on the basis of the objective moral ought, something quite new: the ought-to-be which is proper to an enactment, which can be arbitrarily enacted and can last for any length of time, and which at first can exist only as the correlate of the act of the enacting person, quite parallel to the case of putting into question.

At this point we begin to see clearly the distinctive way in which an enactment is different not only from the conforming acts of judging but also from other freely positing acts such as the question. A comprehensive apriori theory of acts would have to work out the many different things which can be attributed to acts; we will just mention three here: the logical correctness of acts, their groundedness, and their efficacy. Only conforming acts can be logically right or not right, according as that which they assert as existing, really exists. A *question* is grounded insofar as the state of affairs which it puts into question is objectively doubtful; an *enactment* is grounded insofar as the norm which is enacted, objectively ought to be. But besides this the enactment belongs, in contrast to the judgment and to the question, to the "efficacious" acts, that is to the acts which by being performed intend to effect a change in the world and sometimes do effect it. Whoever enacts something not only wants to bring it about that the content now exists as enacted by him, as the content of a question is one which is called into question; it rather belongs to the meaning of an enactment that it intends to "be valid" (*gelten*) for a larger or smaller group of persons. We have still to speak about the necessary presuppositions of such "validity." Here we will just show different possibilities of efficacy, and we will do this with reference to different possible contents of enactments.

Every enactment as such aims at the realization of that which it posits as something which ought to be. Thus the content of an enactment can never meaningfully be something which is apriori necessary or apriori impossible. This makes it readily understandable why an enactment that 2×2 ought to be 4 is just as meaningless as the enactment that it ought to be 5. Only that which can be and can also not be, which can have a beginning, duration, and an end in time, is the possible content of

an enactment. We should first of all think of events of external nature and of internal nature, such as actions, omissions, etc. If such an enactment, as for instance the enactment of the director of a company that a bridge should be built, is efficacious for the members of the company, then this state of affairs exists as one which ought to be. A distinct kind of objectivity of oughtness shows itself here. Far *more* is at stake here than the being posited as ought to be which is relative to the act of enacting; this character of being posited is proper to all enactments, to the inefficacious as well as to the efficacious. On the other hand, one should not overlook the difference in principle between this ought-to-be and every ought-to-be which, like the moral ought, exists in itself. This latter is independent of positing acts of any kind; the former is constituted only in acts of enacting. The latter is valid under all circumstances, the former presupposes the efficacy of the enacting acts. If the latter is valid at all, it is valid in general; the former is valid only for the persons for whom the enacting act is efficacious.⁸ If a state of affairs exists for a group of subjects as objectively required in virtue of an enactment, then action realizing the state of affairs is consequently required of these subjects. The enactment can of course directly refer to this action. But everywhere we encounter this three-fold distinction: the ought-to-be which, existing in itself, makes enactments grounded insofar as they posit it; the ought-to-be which is constituted in the enactment and is valid for a certain group of persons, and which derives from all efficacious enactments, whether grounded or not; and finally, the merely being posited as ought to be, which exists relative to *all* enactments, whether grounded or ungrounded, whether efficacious or inefficacious.

We encounter among enactments all the differences which are grounded in the essence of social acts in general. Thus they can issue from several persons, and can be addressed to several persons. In the latter case there is *one* action which confronts the collective addressees as required and is to be realized by them in common. We will not analyze these matters more closely, our interest in the present context goes in another direction.

We have in this work shown that in addition to the well-known sphere of natural objects, that is, of the physical and the mental, there is a world of its own consisting of entities and structures which are in time, though they do not belong to nature in the usual sense, and which derive from the social acts. Enactments can also refer to these entities and structures, but at the same time we encounter a very curious fact. That which belongs to nature exists, in virtue of efficacious enactments, as something which ought to be for all the persons to whom the enactment is addressed, and it awaits realization. But with legal entities and struc-

tures there is no such tension between enactment and realization. Nor does there need to be any realizing action on the part of any persons. It is rather the case that in the performing of the enactment and in positing one of these entities or structures as something which ought to be (*als seinsollend gesetzt*), the existence of what is thus posited comes about *through the enactment itself*. What is otherwise done by that action which is required of the persons by the enactment, is here done by the act of enacting itself. We have now to work this out more in detail.

We shall think in terms of an arbitrator, and it goes without saying that we think of him without any reference to the positive law which regulates courts of arbitration. Let us suppose that there is a dispute about who is in the right. Perhaps A and B dispute about which social acts they performed toward each other, perhaps also about the effects which derive from the acts which were really performed. They turn to C and ask him to make a decision, and C enacts: A has a claim against B to be paid a certain sum. But B is the owner of a certain thing. That it ought to be so, is enacted, and presently it is so, as it was enacted. It is not so because of the social acts which the two performed, not because B promised to pay A the amount and because A conveyed the thing into the property of B. One can assume that all these acts never took place, indeed, that the arbitrator does not even think that they did. He *enacts* that claim and property ought to be, and *presently something is changed in the world*. What is posited by the enactment is not merely something which ought to be and is waiting to be realized, rather it becomes real *at the moment of the positing* and *through* the positing: property and claim exist *in virtue of* the enactment.

Such an enactment is of course not efficacious without the fulfillment of certain conditions, just as in the case of an act performed in representation. What are these conditions in our particular case? The enactment has to be preceded by another social act, in particular an act which is addressed to the enacting person by those for whom the enactment is supposed to be efficacious. The power of producing through enactments legal effects in other persons has first to be conferred by these persons. Here too the act of promising proves to be insufficient. A promise made by A and B to C to let the enactment of C be decisive, would degrade the enactment to a factor which merely gives a definite content to an already existing claim. And besides, in this case no claim of A and no property of B would result, but rather merely a claim of C that A convey a thing into the property of B, and a claim that B produce or recognize an obligation toward A. If the promise to let the enactments of C be decisive is exchanged between A and B, then again the enactment does not itself produce rights but simply concretizes an already existing claim. Furthermore, A indeed gets a claim against B here, but this is a claim that B

produce or recognize an obligation toward A and thereby the claim in the person of A which C has prescribed; this claim of A is not the claim prescribed by C. A parallel analysis holds for the conveyance of property. So we see, and this is the crucial point: in both of these cases the enactment has no power of its own to generate right; it brings about only a concretization of rights and obligations which come from other sources. The promise is by its very nature incapable of generating an immediate efficacy for the enactment. If we look closely at the facts, then we can confirm the fact that we are not performing any act of promising when we submit to the enactment of a third person. We rather have to do with a "yielding" (*sich beugen*) or a "submitting" (*sich unterwerfen*) to the future enactment. We find this submitting to be an act all its own, and to be a social act which is other-directed. It of course does not have to be an *unconditional* submission; it can always be limited by the extent of the sphere of right which is supposed to be subject to the enactments. But within this limitation it belongs to the act of submitting to say in effect to the addressee, "It ought to be as you enact," and thereby to confer on him the power to bring about by enacting legal effects in the person of those who submit to him.

This is not to touch in any way the apriori relations; their validity is rather very much presupposed. It is the function of the enactment either to destroy the relations of right which arise according to apriori laws, or to generate out of its own power relations of right which are apriori excluded. The enacting person will very often have reason to exercise this fullness of legal power. If we separate that which essentially is from that which — from a moral or from a practical point of view — objectively ought to be, the second does not under all circumstances have to be joined to the first. Of course it is impossible that what exists apriori — considered purely in itself — ought at the same time rather not be than be. But the circumstances of an apriori relation which is realized can be such that it ought rather not be. Meaningless as it would be to say that the claim which derives by essential necessity from a promise ought not to derive from it, it can on the other hand be very meaningful to say that the irresponsibility and lack of experience of a young man should not be exploited by others. An ill-considered promise ought not be, and thus also the — necessarily resulting — claims and obligations ought not be. Or to introduce an example from another sphere of what ought to be: it is apriori impossible for someone to convey into the property of another what does not belong to him. On the other hand one can say that it would protect the security of transactions if the expectations of those persons are not disappointed who think in good faith that the present possessor of a moveable thing is also its owner and who received it from him. From

this point of view one can say that it ought to be that the one who acquires the thing in this and in analogous cases should be its owner. So we see how the existence of relations of right which result by essential necessity can from another point of view be such that they ought not to be, just as the existence of relations of right which do not result by essential necessity can from another point of view be such that they ought to be. It goes without saying that such an ought-to-be cannot touch apriori being. New factors which eliminate or create existence have to enter the picture, and *this is where an enactment comes in*.

Enactments are conceivable which are made with a view to realizing that which is objectively the case. It may be disputed which social acts were performed by two parties and which effects have resulted from the acts which have been performed. The arbitrator is of course here neither able to enact the existence of such acts nor to enact that this or that effect has resulted from the social acts. How should that which exists in the past or which exists according to apriori necessity be posited by him as something to be realized or even not to be realized? What he can do is, on the basis of the views which he has formed as to which social acts were performed and what is essentially grounded in these acts, to enact that those relations of right exist which would exist if his views were correct. The enactment tries here to conform to a pre-given being, even if the assumption of the arbitrator is mistaken; that which he enacts now *comes about* — not of course in virtue of the social acts and of what belongs to them, which perhaps did not exist, but in virtue of the act of enacting itself.

We have to distinguish sharply between enactments with this intention and enactments which want to realize not that which is but that which ought to be. That deviations of the latter from the former are quite possible, has already been explained. Thus the arbitrator can know for sure that certain relations of right did not result from the social acts which were performed. But because from other points of view they ought to be, they become the object of his enactment and at the same time — insofar as he is in a position to issue efficacious enactments — are realized. Or relations of right which have undoubtedly resulted according to the laws of being, are, because they ought not to be, deprived of their existence in virtue of his enactment. We speak of ought-to-be here in the broadest sense. Not only moral value in the strict sense but also the useful, the pleasant, the practical and the like, that is, everything which can take on the character of value, can also take on, in virtue of its value, the character of being such that it ought to be. This objective ought-to-be which lacks existence acquires it here through the enactment.

We have until now dealt with the case in which a certain *concrete*

relation of right is regulated in a manner which deviates from the reality of the relation. But propositions of ought (*Sollensätze*), just as well as propositions of being (*Seinssätze*), admit of a general formulation. And cases are easily conceivable in which persons let the enactments of others regulate in general the relations of right which will arise among them in the future. If such general enactments are issued, these do not subsequently produce or destroy structures of right which have already come about according to laws of being. A different kind of situation discloses itself here, one which needs to be considered more closely.

Let us first of all take the case of an apriori law according to which certain relations of right *cannot possibly* derive from certain social acts (for instance belonging from the act of promising). An enactment can of course not bring it about that such a deriving nevertheless take place. What it can bring about is that whenever a social act of that kind is performed, the relation of right immediately follows upon it. If such an enactment is efficacious, this relation does indeed come about, but never *through* the promise, rather *after* the promise and *through* the enactment.

It is otherwise if we turn from apriori impossibility to apriori necessity. If entity, A, is necessarily connected with a social act, B, and if an efficacious enactment has been issued on the basis of considerations of what ought to be, prescribing that whenever act B is performed, C rather than A should result, then A does not even come into being at all. The enactment, which has the function of generating and destroying legal structures, though it can never let something derive from the act which cannot possibly derive from it, can nevertheless suppress that which necessarily derives from the act. The general apriori law is then suspended by the enactment, not in the sense that the law no longer holds or that another holds in its place, but in the sense that the law, which exists *in itself (an und für sich)* and whose validity is even presupposed by the "deviating" enactment, is blocked out (*ausschalten*) by the enactment. We have already gotten acquainted with something similar in a quite different context. As we know, from owning there necessarily arise in the person of the owner all the absolute rights over the thing, but this effect of the relation of right can be suspended by the owner granting these rights to other persons. We would have a direct parallel to this case if the person whose enactments the owner has submitted to, enacts in general that this or that right deriving from property should go to a third person. In the first case the apriori law is suspended by an act of the owner himself, in the second case, by an enacting act of another person.

We can in general distinguish two kinds of essential laws: those which hold under all circumstances, and those which hold only if certain definite factors are absent. To the first class would belong for instance

the law that color can only exist as joined in a certain way with extension. There are simply no circumstances at all which could allow color to exist without extension. To the second class we would reckon the law that the fulfillment of desire is always accompanied by pleasure. This is certainly not gathered on the basis of repeated observations, rather just the contrary — the law which is grounded in the essence of fulfilled desire as such, underlies and guides our observations. The validity which it, considered by itself, has without exception, can however be blocked out under certain circumstances; thus it is possible that if the fruit which we want to taste turns out to taste excessively bitter, the experience of pleasure, which, considered in itself, accompanies an event phenomenally characterized as fulfillment, does not come about. In the same way the statement that from owning, considered in itself, all the rights over the thing arise in the person of the owner, holds only on the condition that no limiting acts of granting or transferring have been performed by him. And all of the necessary essential laws of right which we have investigated hold only on the condition that no limiting enactments have been performed, enactments which derive their efficacy from certain acts of the persons who would have been bound by those laws considered in themselves. If one formulates the essential laws of right in such a way that the possibility of their being suspended is taken into their content, then they hold unconditionally. Otherwise their validity depends on those possibilities not being realized. But in either case it remains true that the validity of these laws, considered *in themselves*, is free from any exception.⁹

The distinctions which we have made within the sphere of enactments have by now become clear. The act of enacting is realized in the experience of performing the enactment. One will hardly be inclined any more to confuse this act with the act of commanding. To the act and its objectivation in the proposition expressing the enactment, there corresponds, as objective correlate, that which is enacted, that for instance under the circumstances A should be a B. We speak of an enactment being "grounded" when that which it posits, objectively ought to be; we speak of its "efficacy" or "validity" when the posited content has that characteristic objective oughtness (*Sollenobjektivität*) which is restricted to the persons to whom the enactment is addressed and which is constituted exclusively among them. We call particular attention to a special case of the efficacy of enactments which is very important for our purposes: the *immediate* realization of the relations of right which are posited by the enactment. This kind of efficacy is impossible in the sphere of natural facts. The effect of these acts of enacting can here be "rendered" in an existential proposition. Because it has been efficaciously enacted that say

a certain relation of right derives from certain social acts, it is correct to assert that within the group of persons in question those relations of right *really* come into existence through those acts. As we see, the logical validity of propositions which assert is here grounded in the legal validity of enactment-propositions.

If one considers rights with regard to the apriori essential laws on the one hand, and with regard to efficacious enactments on the other, one finds very different and in a sense opposed relations. Because certain rights are necessarily grounded in certain social acts, the assertion "rendering" this state of affairs is correct. Because on the other hand an enactment is efficacious, there exist the rights posited by it. The well-known question as to the priority or posteriority of the "subjective rights" is therefore to be answered differently according as one is thinking of their relation to the essential laws of right or to enactments. When subjective rights exist under certain circumstances with apriori necessity, the corresponding assertions are true. The efficacy of the enactments which posit these rights makes them necessarily exist.

§9 The positive law

We can now respond to that objection which — apparently supported by indubitable historical facts — has been so disabling for the philosophy of right and which has made it impossible to understand the essential laws in the sphere of right and their relation to the positive law. There can be no question of a "contradiction" between the apriori theory of right and the positive law, there are only deviations of ought-enactments from the laws governing what is. These deviations, however, can never be used as an argument against the validity of the apriori laws of being, for as we have seen it is precisely such laws of being which make these deviations possible and understandable at all. The idea — posing as so scientific whereas it is ultimately quite simple-minded — that the relations which are grounded in the essence of the social acts and are available to our direct insight could be refuted by the study of historical facts, proves to be thoroughly untenable and even absurd. For it has been shown that the positings found in the history of law which supposedly refute the apriori theory of right, are, as enactments, themselves social acts which are governed by apriori laws. It is these laws which make possible the efficacy of enactments and thus of those historical facts which one tries to introduce as a general argument against the apriori laws in the sphere of right.

We can put the matter more exactly in the following way. Legal

enactments as such posit their content in such a way that it ought to be. In this respect they are all on the same level. On a level with the enactment that claims can as a rule be assigned to third persons without the cooperation of the obliged person, is the enactment of the penal code (StGB 1871 §211) that the premeditated killing of a human being is punished with death: these are neither assertions of what is the case nor commands to do something, they are rather genuine enactments of what ought to be. But whereas the penal enactment cannot immediately realize that which it requires by its positing — for we have here to do with actions and events of external and internal nature — the enactment of the civil code deals with structures in the purely legal sphere which attain to existence in and through efficacious enactments. The objection in question can base itself on the *proposition* expressing the enactment or on the *effect* of the enactment. *In the first case*, one says that it is impossible for there to be essential laws of right because historical experience shows legal propositions (*Rechtssätze*) which contradict them. This objection is disposed of by showing that legal propositions, since they are propositions expressing enactments, can in no way contradict existing states of affairs and the judgments which express these, but can only deviate from them, and that furthermore such a deviation of the enacted ought-to-be from that which exists independent of the enactment, is not only readily possible but quite often even the main motive of the enactment. *In the second case* one proceeds from the presupposition that something new is constituted in virtue of the efficacy of the enactment, and then makes the argument that the essential laws of right, such as the law that a claim is always and without exception generated by a promise, cannot be valid since this is contradicted by the factual impossibility of such a generating in various cases of the civil law. This objection is disposed of by showing that this apriori necessity indeed holds without exception, but only as long as deviating enactments which are efficacious have not prescribed something different. It is not the case that a claim can both result and not result from a promise made to someone under the same conditions — that would indeed be a contradiction — it is rather the case that the claim, which is, considered by itself, grounded in the promise, can be set aside by an efficacious enactment. Insofar as this objection presupposes in this case that a claim is absent *as a result* of an enactment and in other cases that a legal entity is present *as a result* of an enactment, it rests on those very essential laws governing social acts the validity of which it calls into question; it is therefore an absurd objection in the most proper sense of the word.

What grounds the efficacy of positive enactments — if it really exists — is a problem exclusively for the philosophy of the positive law and not

for the apriori theory of right. We have here just wanted to refute the objections which call into question the existence of the latter. But we still want to mention that certain legal theories appear in a new light when considered from our point of view. It undoubtedly belongs to the meaning of the theories — they are of course not tenable as history — which understand the emergence of the state and the legal order as deriving from an *act of submission* by the citizens of the state and of the legal order, to explain thereby the immediate efficacy of the enactments issued in this state and for these citizens. Now some reference to a person is intrinsic to submission. It can only be introduced into a discussion of legal enactments performed by one person, such as an absolute monarch. One can try to bring in still other acts to “explain” the efficacy of enactments. Just as there is a submission to persons, there is a distinct kind of act which one could call recognition (*Anerkennung*), which refers directly to the content of acts of enacting and of propositions expressing enactments. We do not want to investigate here whether a system of legal propositions acquires efficacy through being recognized by a group of persons — explicitly or through symbolic actions — in the same way as though acts of submission. Let us just point out that the theories which derive the “positivity” of the law from the recognition of the citizens, presumably do so with the intention of explaining in this way the immediate efficacy of this positive law.¹⁰

Positive enactments posit states of affairs which ought to be (*Sollenssachverhalte*) in order precisely thereby to transform them into states of affairs which objectively exist (*Seinssachverhalte*). This is the reason why the textbooks of civil law make assertions of what is the case and refer to the ought-enactments of the positive law, which are expressed in the same words. But the function of the positive law does not exhaust itself in this efficacy. It not only generates rights, obligations, and the like, it has at the same time to provide for their protection. We saw earlier that an action by the obliged person necessarily “belongs” to a claim but that this action by no means has to come into existence; we can add that an absolute right over one’s own action does not prevent this action from being hindered or disturbed from without. The positive law has the task of providing for the existence of what is in this way required, or for the possibility of what is allowed. It fulfills this task in general by granting legal protection, which in the case of claims takes the form of conferring the power of bringing suit against the other, and thus as a rule^{10a} also the possibility of coercing the other; in the case of absolute rights it takes the form — in a very curious way — of inserting claims in the person of the rightholder which have a content which can again be made the object of bringing suit and possibly of coercion. Thus the

usufructuary of a thing not only has a claim that the thing be returned to him if the possession of it is taken away or withheld from him, he also has the claim that all other interferences with and disruptions of his rights be done away with, etc. By recognizing these claims of the rightholder^{10b} and sometimes coercing the fulfillment of their content, the positive law secures the exercise of his absolute rights.

In addition to the legally protected rights the positive law has also to do with rights which are not legally protected. These are recognized by it as claims¹¹ but lack the legal protection of which we were just speaking. Thus a claim which is in itself actionable forfeits this actionability after the expiration of the statute of limitations and on the basis of someone pleading this statute. It shows itself to be clearly still present since it can be made the basis of a recognition of debt (*Anerkennung*), can be secured by a lien, used in settling a debt, etc., and above all since the realization of its content by the obliged party counts as fulfillment and not as something like giving a gift or unfair enrichment of the claimant. The positive law deals with any number of such "natural obligations" (*naturale Obligationen*), which taken one by one display very various properties but which all agree in this: they lack legal protection on the one hand, and the performance of their content counts as fulfillment on the other hand. These "natural claims" should not be confused with the claims which — apart from any positive law — are grounded in the essence of the social acts. Just as the legally protected claims belong by their nature to the positive law, so also the claims which are not legally protected, that is, they exist exclusively in virtue of a positive enactment. This in no way means that they at the same time result with essential necessity from the preceding circumstances; just think of a claim which derives from a promise with a third-party beneficiary and which then expires according to the statute of limitations. And on the other hand, the legally unprotected claims arising with essential necessity need not be recognized as natural obligations; just think of a claim which derives with essential necessity from a promise to make a certain will.

Absolute rights are also possible which, like the natural claims, lack the protection of the positive law. In the case in which the exercise of these rights is interfered with, there would arise no actionable claims against the disturbing persons that they desist from their interference; in the case of rights over things the seizure of the thing would not give rise, on the basis of the right, to a claim for the return of the thing, etc. One could speak here of natural absolute rights, more exactly of natural rights over things. Their concept is thoroughly free from contradiction, and they are just as "possible" as the natural claims which also lack legal protection.

The freedom of the positive law not only extends to deviating from the essential laws and joining to certain social acts those consequences which seem to be required by justice or by the well-being of commercial life or by some other legally relevant purpose; the positive law is also accustomed to interpreting commercial declarations with a more or less vague content as social acts of a definite kind. Whoever wants to "buy" or "sell" a thing, strives for a definite result and tries to realize it by declaring "I buy" or "I sell." One need not at all be clear as to how the desired result should be realized; one is simply agreed as to the final goal — the conveyance of property in the thing to the buyer, and the payment of a certain sum of money to the seller. But there are very various ways which lead to this goal. Let us just mention four of them: there could be — though only under certain conditions — an immediate exchange of the thing and of the money, or a payment of the money and a promise to convey the thing; or there could be an immediate conveyance of the thing with a simultaneous promise to pay, or an exchange of promises both to pay and to convey. Only in the first case would the end result be immediately reached; in the second case, the conveyance of the thing, in the third, the payment, in the fourth, both of these things would still be required as further steps. According as the positive law, guided say by practical considerations, interprets the same agreement expressed by "I buy" and "I sell" either as promises or as transfers of property, it couples the agreement with different legal effects. Thus our civil law, as is well known, gives the contract of sale merely the effects of a mutual promise¹², whereas the *code civil* gives it the effects of a conveyance on the part of the seller and of a promise to pay on the part of the buyer.¹³

This freedom of interpretation which the positive law has, comes out with particular clarity with loans and rents. If we inquire without prejudice into the intention which a person normally has in lending or renting some property of his to someone, we find that he *wants to grant him the right to use the thing*. It may be that some *promise* is also included, say of the lessee positively to provide the lessor or renter with the use of the thing, but even then the main emphasis undoubtedly falls not on this promise and the resulting claim of the renter, but on the granting and the resulting absolute right to use the thing. This is why borrower and renter feel themselves *in the first place* as holders of a right to use the thing and not as holders of a claim for a certain action of the lender or lessee. Now our civil code seems to be in full contradiction to this "natural" state of affairs when it enacts (BGB §598 and 535) that through the lending agreement or the rental contract the lender or the lessee is obliged to allow or to secure the use of the thing for the borrower or the renter. There is no mention of the rights of the borrower or renter to use the thing; on their

side there result only claims for a certain action from the other party to the contract. It does not seem to us acceptable to say with Endemann that the right to use a thing is "established as an obligatory right."¹⁴ Either we have a *right to use* a thing; then we have an absolute right, and in fact an absolute right over things, since using always refers to things. This is not changed by the fact that this right is granted by the lessee and that one can speak of it existing "over against" him insofar as it possibly modifies his position as owner. All of this could after all be said even of usufruct, which no one takes as an obligatory right. Or else we have here an *obligatory right*; then it necessarily and as such refers to the action of another. But an obligatory right to one's own use is a self-contradiction. §535 and 598 of our civil code undoubtedly confer nothing other than a purely obligatory claim to an action of the lessee or lender. Insofar we see the positive law freely structuring contracts of renting or lending; declarations which according to their meaning are social acts of granting are given claims as their legal consequences, just as if it were a matter of mere promises.

But we cannot rest satisfied with this. We would first of all observe that the action of the renter or borrower who uses the thing is surely not on the same level as the action of just any third party who arrogates to himself the use of the thing; that we rather have here an action to which one is entitled and that we can therefore speak of an absolute right to the action. From the point of view of the positive law one will of course respond that such absolute rights may arise on the basis of the declarations of intention or of the "social acts" of the lessee and the lender, but that the indubitable content of §535 and 598, which is legally the only significant content, does not recognize such rights but has replaced them with quite different ones. But this response does not seem to us to be unanswerable. For it is not *just any action* to which the borrower has a claim according to the prescription of the law, it is not an action which is unrelated to the absolute rights which arise "naturally"; it rather seems to us that the recognition of the first is not possible without at the same time implying the recognition of the second. In "allowing" (*Gestatten*) we have a distinct kind of act which is essentially other-directed and which as a rule refers to the action of another. It only makes sense where the other as yet has no right to the action and where on the other hand the allowing person is in a position to confer such an entitlement. To the performance of the act of allowing there necessarily corresponds the emergence of an entitlement (*Dürfen oder Berechtigtsein*) in the other person. Insofar as the lender allows the use of the thing, there arises an entitlement to use on the side of the borrower. Our civil code seems to recognize only a claim to be allowed to use the thing. But insofar as it thereby enacts that on the basis of the lending agreement the use of the thing should be allowed, the

necessary consequence of this allowing — the entitlement of the borrower to use the thing — is encompassed by the meaning of the enactment, just as every willing, according to its very meaning, includes in its intention the necessary consequences of what is willed. There no more has to be an actual and explicit act of enacting in the one case, than an actual willing in the other case.

In our particular case these general considerations are fully confirmed by the letter of the law. According to §603 BGB the borrower *may* make no other use of the borrowed thing than the one agreed to in the contract. So he *may* (*darf*) use the thing according to the terms of the contract, that is, he has an entitlement to use (*Gebrauchsberechtigung*) the thing insofar as this corresponds to the content of the contract.¹⁵ The paragraphs dealing with rent are not so explicit. But there can be no doubt that the legal position of the renter in this relation cannot be different and above all cannot be less favorable than that of the borrower. So in the case of renting as in that of lending (and accordingly also in the case of tenant farmer to his landlord [*Pacht*]) we can speak of a non-obligatory (*dinglich*) entitlement to use a thing, a right to the thing. This of course should not be understood in the wrong way. We are not of the opinion which Schuppe among others has maintained, namely that "the gap between a real (*dinglich*) and an obligatory right is in general nothing but a dogma," and that "the value of this distinction is limited."¹⁶ We rather maintain an abrupt *essential* difference between rights to the action of another, and rights to one's own action in dealing with a thing, a difference which shows itself with all desirable clarity in the apriori presuppositions and consequences of both types of right; indeed, it was only after establishing this distinction that we reached our conclusion. In no way do we want to reduce obligatory claims to real (*dinglich*) rights; we hold with other jurists that rents and loans are contracts which give rise in the first place to legally protected claims. But we hold that it is a logical consequence of these claims that they at the same time make the use of the thing in question a use to which one is entitled. The right to use the thing is of course itself *not* legally protected; here we see how necessary were our earlier distinctions regarding the different meanings of real and obligatory.¹⁷ There is no doubt that, according to the sense of the positive law, the right of say a borrower to use a thing lasts only as long as the owner of the thing remains constant, that this right is extinguished when the thing changes owners. It lacks the "inherence" in the property which we discussed earlier. There can also be no doubt that the borrower *as borrower* (which of course has to be distinguished from the borrower as possessor) is not legally protected against the interference of third persons, that his right to use the thing does not give him any claim for the

return of the thing in the event that someone has gotten possession of it, nor any claim against the interfering party that he stop interfering, etc. But all this does not mean that he is not the holder of an absolute right to use the thing, that is, holder of an absolute right over a thing (*Sachenrecht*), or a "real" (*dinglich*) right. Just as the absence of legal protection does not deprive a claim of its character as claim, so this absence does not deprive a right over a thing of its character as right over a thing. What we have here is a *natural right over a thing* (*naturales Sachenrecht*).¹⁸ We distinguish here as strictly as possible the following things: the rights which derive according to essential law from certain social acts but which are neither recognized nor protected by the positive law; the rights which are recognized and protected by the positive law; and finally the rights which are indeed recognized by the positive law but not protected by it. But whereas the recognition of natural claims usually has to be *deduced* from other legal enactments, we can here refer to the explicitly recognizing enactment of §603.

One should not confuse our position with the theory which some jurists have developed for the case of rent. When in particular Cosak¹⁹ adduces §571²⁰ as evidence for this "real" nature of renting land, we can in no way agree with him. In this paragraph we find nothing more than that the claims which the rental contract gives the renter after the piece of land has been handed over to him are variable in nature (in the sense explained above), that is, that they are not tied to the person of the lessee as the only person against whom they exist, but that when the property changes hands they undergo a change in the person against whom they exist. If the claim continues to exist, then so must the natural real entitlement which we recognize, though it goes without saying that this right does not acquire after the change of owner the legal protection which it had previously lacked. By contrast, it does not seem to us to be justified to conclude with Cosak from the fact that the claim of the renter that the property be handed over for his use is also directed against the new owner, to the further fact that the renter must have a real right to use the thing which is legally protected against interference by third parties. The existence of a variable (and in this sense "real") claim, and the existence of an absolute real right which is protected against third parties — these are fundamentally different things. The one can very well be present without the other.²¹

The position maintained by us is on the one hand less restricted than the one of Cosack insofar as it comprises lending and all cases of rent and the tenancy of a farmer [*Pacht*]; it is on the other hand more restricted insofar as it recognizes that in the cases which fall under §571 the variability of the claim implies that the already existing natural right over

the thing *survives* the change in the owner, but does not however see in this a reason for saying that this right is protected against the interference of third persons. As a result, the practical consequences which Cosak draws from his theory do not exist for us. Nevertheless we do not think that the presence of the natural right over the thing is completely unimportant in a practical-juristic respect. We can only make a brief mention of a possibility of recognizing it. Just as the realization of the content of a natural claim is in the positive law an *action which fulfills* the claim, we can consider the realization of the content of a natural absolute right by the holder of the right as an *action which exercises* the right. This would then imply that it would violate §226²² if a borrower exercises his use of a thing which has been lent to him for a certain time according to the terms of a contract, without having any least interest in it but only having the purpose of harming the lender by his use of it. If by contrast one assumes — in spite of the wording of §603 — only an obligatory claim of the borrower, then one cannot apply §226 BGB, since the use of the thing cannot be considered as the "exercise" of the *claim* — claims are in principle not capable of being exercised.

The concept of natural absolute rights or natural entitlements, is by no means limited in its application merely to rents and loans. According to the positive law, usufruct cannot be assigned; but its exercise can be given over (*überlassen*) to another (BGB §1059). We have to raise the question as to the legal position of this exercising person. It goes without saying that the exercise of the usufruct on the basis of this giving over of its exercise, is very different from the arrogation of this exercise by some third person. He "may" (*darf*) exercise the usufruct, that is, he is, on the basis of the handing over to him, *entitled* to use the thing and to enjoy its fruits. If someone interferes with his legal position he of course has no claims against this interfering person; this is exactly what distinguishes his position from that of the usufructuary himself. His entitlement to use the thing is not legally protected; so we have again a natural right over a thing, or a natural entitlement to it. When one then makes the assertion that "the handing over of the exercise establishes only an obligatory claim against the usufructuary,"²³ this can only be correct insofar as we have to do with legally protected rights.²⁴

It is the task of positive jurisprudence to investigate in detail how the natural entitlement to a thing is related to obligatory claims, at what point in time it arises — in particular whether it presupposes that one is given possession of the thing in question — how far its sphere of application and its practical consequences extend. Philosophy of right has only to establish the essentiality of the concept of natural absolute rights. We do not think, by the way, that the importance of this concept is restricted

to the sphere of the civil law. Let us recall those rights which come up in public law and which refer to the rightholder's own action and which, insofar as they do not enjoy any kind of legal protection, show themselves to be natural absolute rights.

Positive legal enactments can be *secundum leges*, *praeter leges*, and *contra leges*, according as that which results by essential necessity from the social acts turns out to be such that, surveying all the relations of right which have to be regulated, it ought to be, or according as enactments lying outside of the apriori sphere seem desirable, or according as that which results with essential necessity, given the whole legal situation, ought rather not to be. The apparent contradiction involved in the *leges contra leges* has given rise to relativism in the philosophy of right. This can no longer unsettle us now that we have seen that we do not have here two different laws which simply conflict with each other, that we rather have the case where one law of being which has validity considered in itself and is able to be known, can be transformed by an efficacious enactment in such a way that what now presents itself to our knowledge is indeed another relation of being but one which exists only with respect to and through the agency of the enactment and which is subject to apriori laws. The *leges secundum leges* are of course the primary thing, though we should beware of the equivocation with *lex* whereby it first means the correlate of our knowledge of being, and then the content or product of an enactment. Let us rather say: there is a *presumption* that every enactment will follow that which arises according to essential laws, insofar as such being, considered in itself, is always something which ought to exist; special reasons have to come up if it is to be deprived of its ought-character and thereby to be taken as the occasion for a deviating enactment. Now to this "logical" priority is added what one could call a psychological priority. Though we cannot doubt the freedom which an enactment has with respect to the laws of being, and though a *right* enactment often has to deviate from that which is, for the sake of that which ought to be, we nevertheless often find a certain *lack of freedom* on the part of enacting persons, a tendency to cling to that which is, even when it ought rather not to be, an *inability* or an *unwillingness* to give being, in virtue of one's own efficacious enactment, to that what ought to be, and to replace with this that which *prima facie* exists. This phenomenon belongs to the sphere of what one is used to calling "formalism" in the positive law. In order to distinguish it from various other phenomena which better deserve this name, we propose to speak of "ontologism." It shows up in the history of law whenever one clings to that which arises according to essential laws, even if it ought rather not to be.

From this point of view a new light falls on certain periods in the

history of law. If one makes law primarily with a view to that which is, then one will not be able to recognize promises in favor of third persons which immediately generate claims in the third persons. An inner emancipation from the apriori laws of being is required if the enactment is to be issued that a claim which could not possibly result from a promise between two persons but which is desirable in light of the exigencies of social transactions, should exist in virtue of the enactment. If in positive codes such as Roman law, contracts with third-party beneficiaries were not recognized as being in principle possible, and if such contracts seemed "impossible," then the question comes up whether this impossibility was not apprehended with a view to the apriori relations of being. An enactment which tends to conform to that which is, instead of acting out of its own power does indeed come across something here which it can absolutely not do. Of course our position is not that one was conscious of a law of being or even formulated it, and then deduced from this the impossibility of such contracts. The law of being need have had no other influence than the logical laws have, which after all can direct and have directed the thinking of men without becoming fully conscious or even being formulated. And one should not think that when the positive law develops in an "ontologistic" way, that is, in such a way that its enactments more or less depend on the laws of being, all these laws of being have to be completely recognized. The fact that that which is impossible is not made the object of an enactment, does not imply that all laws of being must be made the objects of enactments. Thus in Roman law there is no more a recognition in principle of genuine representation, the possibility of which is prescribed by essential laws, than there is of contracts with third-party beneficiaries, which are impossible according to essential laws. It is not the task of the apriori theory of right to decide what explains the first phenomenon, whether a deficient understanding of what could, according to essential necessity, be brought about by certain acts of the represented person, or whether reasons of quite a different kind, such as that it was intolerable for the Roman mentality "that a free man should offer himself as the mere representative of another"²⁵ that for this mentality the will of an independent person "could not degrade itself to merely transmitting the will of another."²⁶ It is in any case certain, and after all that we have said it surely needs no further explanation, that one cannot conclude from the failure to recognize the possibility of genuine representation, to the fact that representation is an "artificial" legal institution.

We are especially interested in the development of the assignment of claims in Roman law. Let us briefly relate some of the most elementary facts. If someone wanted to "transfer" a claim (*Forderung*), according to the

ius civile he had to use to so-called *delegatio nominis*. The creditor Titius instructs his debtor Seius to promise to Gaius what Seius owes Titius. Then Gaius says to Seius, "quod Titio debes id tu mihi dare spondes?" To which Seius responds, "spondeo." As a result of this stipulation Gaius can now require of Seius the same thing which Seius previously owed to Titius. It is clear that we do not have here a genuine transfer. The new claimant does not hold the claim which Titius originally had; it is rather the case that a new claim, even if one just like the old one, is generated by the stipulation. The need to exclude the cooperation of the debtor then led to new forms. Whoever wants to "transfer" his claim names the other as his *procurator*, who now in the name of the creditor asserts the right of this latter. By adding the provision that the *procurator* can keep for himself what he collects on the basis of the claim, one tries to achieve the effect of a transfer. But of course even this *procurator* has no claim of his own *in rem suam*, he merely asserts the claim of another.

We will of course not go into the historical details. It is not until the imperial period that the legal structures of Roman law provide for the immediate assignment of a claim; but even here it is debated whether the transaction of assigning really transferred the claim itself, or whether there merely arose an independent "right of bringing action" or "right of exercising" a claim which (claim) remained with the other.

The question comes up as to the reasons why the acceptance of this transfer, which was desired early on in legal development, was restrained and held up for so long. Why did one not consider it to be possible as soon as there turned out to be need for it? Why did one prefer the detour of delegation to a simple act of assigning?

One should not object that a direct transfer would have been "conceptually" impossible for the Romans on the grounds that obligation was for them a *iuris vinculum*.²⁷ This obviously just postpones the question. Definitions are usually not made with utter arbitrariness. And if the conceptual definition of obligation as a *iuris vinculum* implies, as one supposes in offering this explanation, that the separation of obligation from the person who has it, is impossible, the question of course arises as to the basis of this conceptual definition. If we ask for the reason for a phenomenon, one should not answer us with a definition which itself presupposes this reason. Now we have shown that a claim cannot possibly be transferred without the cooperation of the debtor, for the transfer changes the person to whom the debtor is obliged and thus the structure of the obligation; and that further even the simple concurrence of the debtor cannot suffice since what one is striving for is not the transfer of a claim which remains identical in its content, but rather a claim which is modified with respect to the person to whom the fulfilling action is

addressed. With a view to this it becomes extremely plausible to say: this qualified transfer which excludes the debtor seemed impossible because it is in fact impossible; for a long time one remained ontologically dependent on this impossibility, until one discovered the freedom of making an enactment which connects with an act of transfer that which could not arise through this act itself. Of course such a theory could be fully established — in this case as in the previously mentioned case of contracts with third-party beneficiaries — only by comprehensive historical investigations.²⁸ Here we have just wanted to show in principle how the apriori theory of right can offer some guiding considerations to historical research.

Even in the *theory* of ordinary law the view remained dominant that claims are untransferrable. This view interpreted the legal position of the new claimant as basically one in which he acquires a right of his own to "exercise" the obligation of the other. The main argument was that the "very concept of a claim makes the claim untransferrable"²⁹ — in saying which one can obviously only be thinking of an essential impossibility and not of a contradiction between such transfer and an arbitrary definition.³⁰ We have here a clear example of how greatly ontologism can assert itself, not just in legal development, but even in legal *theory*. Or put another way: we see what confusion results when principles of the apriori theory of right are conflated with questions of the positive theory of law. The intrinsic impossibility of a transfer which modifies the content of the claim, is of course no obstacle to the possibility of deviating enactments. Nowhere does this fundamental confusion turn out to be more disastrous than in the case where one binds legal enactments to rigid laws of being rather than letting them depend exclusively on considerations of value. We understand perfectly well that our present-day law provides for the possibility of transferring a claim without the concurrence of the debtor; for since it is as a rule a matter of indifference to the debtor whether he does something for this or for that person, it is fair, and with a view to the needs of commercial life it ought to be so, that through the agreement of the creditor and a third party the obligation of the debtor undergoes the desired modification. On the other hand, it is quite understandable that the assumption of a *debt* even under present-day law still needs as a rule the consent of the creditor (BGB §414, 415). For he is usually not indifferent to the person of his debtor and the ability of this person to do what he is bound to do.

Whereas enactments intervene in the world of legal phenomena in such a way as to generate and to abolish existence, facts of nature are sovereignly independent of them. Here too considerations of value can make desirable the being of that which is not, or the non-being of that

which is. In place of the freely creating enactment we have here the less powerful "legal fiction," which as it were closes its eyes to those facts which it cannot change. Let us suppose that a certain legal effect is connected with a fact; this effect can under certain circumstances be such that it ought not to be. Two ways are available to the law: it can by means of an enactment prevent the legal effect from coming about in the given case, or it can treat the fact "as if" it did not exist. Both ways lead to the same goal. This second way is taken by BGB §162, according to which a condition (*Bedingung*) which has been brought about in bad faith (*wider Treu und Glauben*) is considered "not to have occurred." And by means of fictions one can not only exclude existing facts but can also assume non-existing ones and can replace existing ones through the assumption of non-existing ones in order to give rise to the legal effect of the facts which are fictively assumed. But it is always the case that there is just as little sense in wanting to create natural facts through enactments, as in fictively assuming that legal entities exist or do not exist. There are two fundamentally different approaches to something like the assumption of an obligation by a third party: one either assumes the fiction that the creditor has given his consent, or one enacts that the third party acquires the debt even without the consent of the creditor. Only the final result is in both cases the same.

The result of a fiction, however, cannot always be equally well reached by efficacious enactments. This is especially not possible if the law is not just trying to produce or prevent rights and obligations in a being which is capable of them, but rather trying to make something capable at all of them. This is the point at which the distinctive nature of the problem of a "juristic person" comes out very clearly. It is an essential law that only persons can be holders of rights and obligations. That a given being is a person is a fact which can never be produced by an efficacious enactment.³¹ When therefore the law recognizes rights and duties in foundations or even in certain estates³², we can only be dealing with a fiction in virtue of which such a thing is treated "as if" it were a person. But it is quite inconceivable that an efficacious enactment could really make an utterly impersonal object like an estate or a foundation into a person in the same way in which it can give to a third-party beneficiary a claim for the performance of what has been promised. When it is a matter of conferring juristic personality we do not have to do with just any fictions but with fictions of a special kind: ones which, in contrast to the fictions discussed above, could never be replaced by efficacious enactments.³³

Of course the problem of juristic persons extends much farther; indeed, its main focus lies at another point. What in the first place comes

into question as "juristic persons" are things such as associations, commercial companies, states. The question comes up whether one can speak here of a collective person (*Gesamtperson*) apart from all norms of the positive law. This would be a person which would have rights and obligations of its own which are over and above the rights and obligations of the individual persons which belong to it. Now there are two things which are quite certain: such persons are very much more than, indeed, fundamentally different in kind from the sum of their members. It is one act in which I grasp and think about a community or an association, and quite another act in which the members of the community or association are given to my sense perception. And there are predications which hold for the collective persons but not for all its members, indeed, not even for a single one of its members. This of course does not mean that having rights and obligations is one of these predicates. As we know from our earlier reflections, a group of persons can be the holder of rights and obligations in such a way that each person *participates* in them; such relations of right can derive from acts of promising, granting, and other social acts which address the members of the group all together. But what is required in the present case is that a group of persons is for example the owner of something in such a way that no one of the individual persons is owner or co-owner of the thing. The question is whether this is in principle possible: whether we in fact have in the case of an association not only a whole which is distinct from its members and which has properties of its own³⁴, but rather one which admits of such a far-reaching distinction between the social whole and its members that one can speak of ownership or of obligations of the association, and then of course also of promises, acts of granting, and the like, which do not at all belong to the individual members. This is not the place to try to resolve this difficult problem. But this much is certain: if there is *not* such a possibility in principle, then we have to do here with a fiction, and in fact with a fiction of the positive law which cannot be replaced by efficacious enactments. For just as it is possible to confer by efficacious acts rights on persons who do not have them, so it is impossible with regard to a group of persons which lacks any personal reality distinct from the individual persons and lacks rights of its own, to bring this personal reality into being by enactment.³⁵

It is of special value for us that the problem of a juristic person presupposes as problem the apriori laws in the sphere of right. We surely do not have here merely a problem of interpretation belonging to the positive law; there can be no doubt that the positive law under certain circumstances treats associations, foundations, and the like³⁶ as persons in their own right. The only problem can be whether they really *are* persons

in their own right, that is, whether such personal wholes are of such a nature as to admit of relations of ownership, of obligation, of entitlement which the members of these wholes do not participate in. If one holds the position of legal positivism and recognizes nothing but the arbitrary positings of the law and wants to have nothing to do with relations of right which exist independently of such positing, then one cannot even understand the problem, and much less solve it.

The essential laws which we have brought out in this work can be considered purely in themselves and apart from their realization. One could conceive of a world in which these laws would not at all be realized, in which no social acts would be performed and nothing else would come about which would give rise by essential necessity³⁶ to rights, obligations, and relations of right. But when all of this exists, it is intimately interwoven with the rest of the natural world, with all the experiencing (*Gesamterleben*) of persons who perform acts, with their feelings and wishes, their desires and intentions, their expectations and fears, etc. Legally relevant events, when they occur, are found to be intimately interwoven with other, extra-legal events. It is a task all its own to separate the legally relevant out of the confusing welter of facts in which it is situated. It is well known how legal laymen are accustomed to relate their legal conflicts. Someone promised them something — promised it quite firmly. They waited for this promise for a long time and so were especially glad when it was finally given. It is true that the promisor had said that he could under certain circumstances not do what he promised, and one had agreed to this. But he himself had presented this as so improbable; and no one had given any more thought to this possibility. But then he revoked his promise after all, quite suddenly and unexpectedly. The jurist right away discerns in this flow of words the essential points, and even if he does not consider the case from the point of view of any positive law: a promise was given; a right to revoke was reserved, it was exercised; the claim deriving from the promise was thereby extinguished.

A good part of what one calls "legal talent" (*juristische Begabung*) seems to us to lie in the ability to discern unerringly in the vast fullness of events the legally relevant lines of meaning, and to express them. One often speaks of the "natural feeling for justice" which supposedly guides legally talented individuals, even if they do not know anything about the relevant positive law. One can, however, by no means say that those who have a particularly well developed sense for what is required by justice are necessarily also particularly talented jurists; experience seems to suggest the opposite. Far more important than the "sense" for justice is both the "sense" for *what is legally relevant*, that is, for events of a certain

kind which are subject to essential laws, as well as the understanding of these laws. We are already at a second level of analysis when we go on to test what we have gathered on this basis, in the light of standards of fairness and usefulness.

Now we are in a position to understand why codes of law which are different from our own and which have long since ceased to exist, can be of such great pedagogical value for jurists. This is not because the positive law of the present can be better understood on the basis of knowing the law from which it developed. What is really important is rather that the categories which underlie not just the system of positive law in question but any possible system of positive law and the essential laws which are grounded in these categories, were grasped and intuited with particular sharpness and clarity; and that further the jurists of those earlier times possessed to a very great degree the art of drawing out of the welter of social interaction that which is *legally* significant — which should not be confused with what is legally significant within a particular system of positive law.

But it would have been enough to consider the judgment of legally untrained laymen in order to have noticed the apriori sphere of right. How can one explain the fact that many who do not know the positive law or who hardly know it find so many enactments "self-evident"? How can we explain the fundamental difference between enactments about which one has to be informed, and those about which one needs no information? Whoever orally enters into a contract to rent a piece of land for three years may be surprised to find that according to our law this contract is considered "as made for an indefinite length of time." But whoever promises to make a loan, whoever waives a claim, whoever appoints a representative, cannot expect anything else except that he acquires an obligation, that his claim is extinguished, and that he becomes entitled and obliged through the acts of the representative. Will one say that all men usually somehow learn about enactments such as these latter, whereas they usually do not know about enactments such as the first-mentioned? But even if one were to venture to construct such an ungrounded theory, how does one propose to explain why the first-mentioned enactment, even if one has learned of it, can be *forgotten*, whereas in the case of the latter enactments it makes simply no sense to speak of really forgetting. The explanation can lie only in the fact that we have here to do with apriori states of affairs, which, as already Plato showed, neither are introduced into our knowledge "from without" nor are able to disappear from consciousness once and for all; the intuitive grasping of them in an immediate insight can be achieved again and again, as soon as the knowing subject directs its attention to them.

In the statements of the apriori theory of right we recognize synthetic apriori judgments in the sense of Kant, not otherwise than in the statements of pure mathematics and pure natural science. Kant tried to establish the "possibility" of these judgments by showing that only through them can experience and science be constituted. Since then it has become a firm principle of Kantian philosophy that anything apriori can only find its ultimate justification if it can be shown to "make possible at all" certain facts of objective culture such as science and also morality, art, religion. Let us prescind from the difficulties which beset such a transcendental deduction and which in our view ultimately render it impossible; a glance at the sphere of right, which Kant and his followers failed to take notice of, shows that this position is untenable in principle. The principles of the apriori theory of right are intuited by us with absolute evidence. Where is the science, where the cultural fact which they make possible, thereby establishing their validity? One may not appeal here to the positive law and to positive jurisprudence. The consideration of what is here posited in enactments would, as we have constantly seen in this study, lead to very various, indeed to contradictory results, it would lead to the possibility of representation as well as to its impossibility, to the transferability of claims as well as to their untransferability. And on the other hand, it could be the case that certain self-evident principles of right would have never been culturally "objectified" in any positive law. It is true that the deviations of the positive law from the synthetic apriori judgments can be explained through synthetic apriori judgments. But neither the one nor the other can be gathered, and even less "deduced" from the consideration of the positive law itself. Nowhere else do we see more clearly than here the untenability of that strange reversal whereby one wants to support self-evident essential laws by referring to cultural institutions which themselves can be clarified and explained only by those same essential laws.

No more than anyone else do we hold the position that synthetic apriori judgments should simply be accepted in trust. And we rely just as little on a general consent attaching as it were automatically to those judgments, or on a "necessity of thought" which is supposed to guarantee their truth to us. Let us recall the relation between promises on the one hand and claims and obligations on the other: this was bound to remain uncertain and doubtful as long as one retained the unclear concept of a declaration of intention and failed to work one's way to a clear conception of the nature of promising and of the social acts in general. Ultimate intuitions of essence, too, have to be worked out. And it is only purely phenomenological analysis which can give us that insight into essential relations which is evident and unburdened by any further doubt; this

insight cannot be replaced by appealing to that which makes these essential relations "possible at all."

§10 *The apriori theory of right and the natural law*

One should not confuse our apriori theory of right with what has been called "general legal theory" or "theory of juristic principles." Here one cannot speak of an independence from the positive law; the systems of positive law rather form the object of a generalizing and inductive approach. According to Adolf Merkel general legal theory has the task of working through what is common to the different legal disciplines, as well as establishing the laws of legal development.³⁷ According to Bierling the theory of juristic principles has the task of "finding out what is the same in all systems of positive law, or in other words, what belongs to the genus 'law' — in contrast to the particular systems of law."³⁸ The apriori theory of right, being independent in principle from every positive law, has nothing to do with all this. But it is able in a certain way to explain the possibility of a general legal theory. The fact that certain concepts and conceptual relations turn up in all legal systems is hardly comprehensible for the view according to which these legal systems are thoroughly arbitrary creations of the given law-making authorities and look to no objective order of being. And for this view it is bound to be just as puzzling that within the same legal system the same kinds of concepts and relations can be derived from various disciplines. It is well known that one has recently had great success in trying to work through public law by means of concepts drawn from civil law. Only the apriori theory of right can provide the epistemological foundation for this procedure. It cannot be a question here of *carrying over* categories proper to one domain into an other, different domain; that would not only be an unscientific undertaking, it would also be an impossible one. Categories are not "produced" and are not arbitrarily "applied," but are rather *discovered*. If the categories proper to the domain of civil law were not objectively present in the spheres which are regulated by say public law or administrative law or the law of civil process, they could no more be carried over into them than into the domain of mathematics or zoology. The same concepts can be formed and the same laws grounded in them are encountered only because there are in all of these spheres of law those legally relevant structures of which we have spoken and above all the social acts with all their modifications, promising and granting, allowing and transferring, waiving and revoking, addressing several persons and addressing one person, performing acts in one's own name and perform-

ing them in the name of another, conditional and unconditional acts, etc. As we look at the historical development of legal science, what presents itself to us as a carrying over of the concepts of civil law into the domain of public law, is in itself an identity or sameness of the objectivities and apriori laws of the domains. An apriori foundation for public law would partially coincide with the apriori foundation of private law which we have been attempting here, inasmuch as the same categories and laws come up in both. So it is in principle possible not only to develop the apriori foundations of the individual legal disciplines but also to develop the idea of a general apriori theory of right (which is not only different in principle from the legal theory based on empirical generalization, but also explains its possibility).

The apriori principles of public law cannot simply be taken over by the enactments of the positive law, any more than can the apriori principles of the civil law; an ontologism would be no less disastrous in the case of public law. Here too it is the case that that which exists according to essential laws and which prima facie ought to be, can turn out to be such that it ought not to be when considered in the whole context of its factual setting. But it is important to see that the standards relevant for public law are quite different from those relevant for civil law. Even where the same essential laws are at stake, such as those grounded in the same social acts, the stance taken toward them by the various kinds of legal enactments can be very different. In other words, the enactments of civil law cannot necessarily be applied to the legal relations subject to public law. It is important emphatically to distinguish this question as to the applicability of civil law norms to the legal relations subject to public law, from the fact that to a great extent the same categories and essential relations underlie both domains.

The attempt made by empiricist legal theory to restrict the philosophy of right to the study of the most general structures found in the positive law and in its development, usually stands in conscious opposition to all natural law thought.³⁹ One will probably also brandmark as belonging to natural law our attempt to ground an apriori theory of right apart from any positive law. And yet, merely to use this phrase is not to say very much. It is above all in two points that natural law theory is supposed to have failed: in the treatment of the positive law, and in the attempt to formulate law which is not formal but has content, and which is nevertheless unconditionally and generally valid. The apriori theory of right cannot be charged with either of these. Its distinctive character lies precisely in the fact that it is independent from all law (*Recht*), from the law which is "in force" not less than from some "valid" law, or one which is thought of as valid.

One has objected to natural law philosophers that they fill out the gaps in the positive law with the "ideal law" or "rational law" which beckons to them from a distance, and that they even want to replace explicit positive enactments by this "higher" law in the event of a contradiction between them.⁴⁰ Such an objection would of course not even apply to us. We do not speak of a higher law, but of simple laws of being. As we know, positive legal enactments can deviate from them; but precisely from our point of view it would be meaningless to want to replace the content of efficacious enactments with the essential relations from which the enactments deviate precisely because within the whole context of social interaction they appear to be such that they ought not to be. It may seem plausible to see the matter differently when there is a lack of explicit positive enactments. How many rules of law there are which are not codified and for the codification of which there is no need, since they are "self-evident" or evident "by the very nature of the case." Do we not have here clear examples of apriori essential laws filling out the gaps of the positive law? This is undoubtedly the point at which the jurist who deals with positive law comes into the closest contact with the apriori sphere of right. One could no longer doubt the existence of an apriori sphere if one clearly realized what a vast multitude there is of such self-evident legal rules, which, although they are nowhere formulated, are naturally and easily applied, and which we usually do not become fully aware of only because they make so much sense and are so immediately understandable. And yet an apriori principle is as such not yet unconditionally entitled to fill out gaps in the positive law. Wherever the general ethical or practical principles of the given positive law would lead to other results, one has to deviate from the laws which derive "from the nature of a thing." These should not contradict the law's "spirit," which is constituted in those principles. But the apriori theory of right can itself never decide whether they do or not.

Intrinsic to every natural law theory is the idea of an unconditionally valid law, a law of reason. This ideal law should under all circumstances be a standard for the *law-maker*; that it should also, as we were just discussing, give direction to the judge when the positive law is at odds with it, has by no means been the opinion of all natural law theorists. It is rather thought of as "a law which is independent of human decrees and enactments and which appears only very imperfectly in them; it has its foundation in a higher moral order, and it has the purpose of serving as a criterion for the *evaluation* and *development* of the existing positive law."⁴¹ To put it in our own terms: the states of affairs which are posited in enactments which are in force but possibly not justified (grounded), are contrasted with other states of affairs which, because they objectively

ought to be, are well-suited to be the content of valid enactments. This ought is not a purely moral ought, but rather a legal ought (*rechtliches Sollen*); it is an ought which has to do with principles according to which a community of men can be regulated in an objectively valid way. The frequently cited mistake which natural law theory made is that it believed in the possibility of setting up for all times an ideal law with immutable content and that it did not sufficiently take into account the variable conditions of life on which the validity of such principles depends.⁴² But this should not lead us to forget the real problems which come up here. Even if it is obvious that there are no general laws which can be proposed for the way in which say the sale of a house has to be conducted at all times and under all economic conditions, there remains still the question whether there are not here laws of a very different, relatively *formal* kind which do not depend on changeable conditions and are therefore in their validity independent of all historical development. But these are questions with which the apriori theory of right does not have to concern itself. Just as this theory emphatically distinguishes itself from the *positive* law and from the application of positive law, and warns against every ontologism which wants to bind the positive law to essential laws of being, so it also has to refuse to be interpreted as *right* or *valid* law. Although that which holds apriori is at the same time *prima facie* something which ought to be, the philosophy of right or valid law considers the apriori laws in the context of the concrete community in which they are realized and in which their ought-character can undergo very various modifications. Insofar as the apriori theory of right, therefore, does not even concern itself with the problems which have been brought up by natural law philosophy, it cannot be accused of the failings of this philosophy.

There is a third objection which one usually makes to natural law theories. These are supposed to be guilty of a strange reversal, namely to have derived the state and law from principles which already presuppose state and law. Against Hobbes' attempt to rationalize the event of the founding of the state — and against similar theories of Pufendorf, Rousseau, Kant, and Fichte — Jellinek objects that they are based on a mistaken conception of law. "These theories take one or more enactments of an established legal order within a state, in order to derive from it the state. This is nothing but a naive *petitio principii*, or begging the question. How long it has taken before the principle of the binding force of contracts, which seems so obvious to natural law theory, was found."⁴³ And in a similar way Georg Lasson in his Introduction to Hegel's Philosophy of Right makes the objection to Hegel that he did not completely overcome the point of view of natural law insofar as he accepted "a

sphere of an abstract law of reason which is as it were prior to and independent of the state."⁴⁴ Far from agreeing with these objections, we see precisely in the fact here mentioned a basic idea of natural law which is deeply justified. When Hobbes and other natural law philosophers posit contracts and derive from them claims, obligations, and other legal consequences, they are altogether in the right. For these consequences are grounded, as we have shown, in the essence of the performed acts; they are not, as Jellinek thinks, merely a part or even a product of an existing legal order. The natural law philosophers were quite right to assume that the binding force of contracts needs no enactment on the part of the state or any other factor. They are quite right to speak in general of legal structures which exist and can be investigated independently of the existence and of the investigation of the state and its positive enactments. Of course these legal structures do not as such amount to any "law." They need never to have entered into consciousness. There has never been a state of things in which they and only they would have had positive "validity." It may be that natural law theory has here gone astray in various ways. But it was entirely justified in its search for a sphere which, untouched by the various formations of the positive law, possesses its eternal truth. And so one of the main tendencies of natural law thought finds its fulfillment in the apriori theory of right.

Of course there is hardly any name which would designate these tendencies less appropriately than the name of natural law. For neither is there any question of a "law" here, nor does "nature" play any constitutive role. With regard to nature, one has committed a threefold error. One thought that the universality of the essential laws of right comes from the fact that "nature" is of the same kind in all the men who discover them. One further thought that these laws hold only for man or at the most for beings of the same or similar "nature." And finally one looked for those relations which are for us a matter of apriori law, exclusively in the sphere of "nature," that is, of the physical and mental.⁴⁵ But these are all untenable interpretations. Essential laws of right do not derive their objectivity from the fact that they are "implanted by nature" in all men; as essential laws they can be directly understood in themselves and they exist independently of the relation between themselves and other subjects of the same or different organization. It is quite false that all men in fact recognize them. But it is quite irrelevant for their existence whether this occurs or not. One should just as little want to ground them on the "natural feeling" of man and on the "general consent" of men, as one would want to ground any arithmetical or geometrical principle on this basis. And a deficient *consensus omnium* can as little harm them, as the fact that very few men know of the principles of higher mathematics and are

able to understand them, in any way harms these principles. What we understand with evidence is that for instance a claim is extinguished on being fulfilled. That *we* are the ones who understand it, is a second act of understanding which is not one whit more certain than the first. But that we are the ones to whom the evident truth owes its validity, that it depends in its being on us and on our understanding of it is something which, by contrast to the other two statements, is absolutely not a matter of knowledge gained by understanding; it is nothing but a badly thought-through idea which leads to absurdities as soon as it is generalized.

We can also no longer be led astray by the idea that the essential laws of right, even if they do not depend on men for their validity, nevertheless refer exclusively to men. It is true that we know only of social acts performed by men, only of rights and obligations held by men. But the essential laws which we understand with certainty are not grounded in the fact that these men or that some men or other perform the acts and hold the rights and obligations, but are rather grounded in the essence of the acts and in the essence of relations of right, no matter when and where they are realized.⁴⁶ They hold not only for our world but for any conceivable world.

That to which the essential laws of right refer are only in part to be reckoned among what are called the objects of nature. Though one can say that the social acts are something mental, that which derives from them or can be modified or eliminated by them, that is, relations of right, absolute and relative rights and obligations, are, as we have shown, neither physical nor psychical; it is the sphere of purely legal objectivities, having a kind of being all their own, which opens up here. And so the essential laws which hold for them should in no way be considered to be laws of nature. This is the point at which the interesting and valuable attempt of Burkard Wilhelm Leist to develop a theory of right based on *naturalis ratio* broke down.⁴⁷ We gladly agree with him when he says that "beyond the positing of the law there is a Something which our scientific inquiry has to go back to . . . and on the basis of which we can alone attain to a really adequate understanding of the variously structured bodies of law in the various peoples and eras."⁴⁸ But one is right away put off by the designation of the Something as the "domain of statements about nature." And the further discussion shows that our reservations are not just terminological. The investigation of Leist is supposed to extend to "the factual nature of the conditions of life," to their "physis," to the "natural organisms which proceed from *human interaction*"; this whole train of thought, which is meant as a foundation for legal study, is in this sense called a "physiological" one. Thus the right intention⁴⁹ which Leist in all probability originally had is from the very beginning derailed. In place of

purely legal structures we encounter "natural facts"; in place of apriori laws of essence we encounter statements about "well established organisms and institutions." Leist was not able to free himself from the belief which is so familiar to the natural world view and which is often taken over by philosophy as an untested dogma, namely the belief that there is no other being but the being of nature, which encompasses both physical and mental objects. And so it is readily understandable that subsequent thinkers did not take up what seemed to him to be one of the main tasks of science: "to carry out the contrast between *the nature of the relations and of the content of positive enactments*." And indeed: if one recognizes nothing but the "realm of facts" and the "realm of legal enactments," one cannot avoid holding that the specifically legal structures derive only from the subjective positing of men. And when one then looks at the various and often contradictory contents and products of these enactments, the conclusion seems unavoidable that these are nothing but arbitrary creations, or at most creations guided by considerations of practicality. We have to look in a very different direction in order to find an access to the domain of the pure essential laws of right, which are in every sense independent of nature: independent of human knowledge, independent of the organization of human nature, and above all independent of the factual development of the world.

Notes

1 [To translate "Bestimmung" with "enactment" is not without its problems, since "enactment" seems to be used almost exclusively in connection with the positive law, whereas Reinach's *Bestimmung* can also exist prepositively, and in fact in the present section (§8) he speaks primarily of pre-positive *Bestimmungen*. He holds that the social act of *bestimmen* no more needs the positive law in order to be possible than does the social act of promising. And so in the following we will have to let "enactment" take on an unusually broad meaning. JFC]

2 We draw our examples here and in the following from the civil law which is valid today in the German Empire.

3 Cf. Endemann, *op. cit.*, §177.

4 [One may wonder why I translate *Satz* with "proposition" seeing that proposition usually means statement or judgment, whereas Reinach in the following uses *Satz* in a much broader sense which encompasses questions and commands and enactments as well as statements. "Sentence" might seem to be a more promising translation, but this word expresses a linguistic formation, whereas Reinach is aiming at a purely logical unity. A *Fragesatz*, for example is not for him an interrogative sentence which belongs to some language, but rather a meaning-unity which exists as identically the same in different languages. There is no unproblematic translation of *Satz* as used in this way. The least unsatisfactory translation which I can find is proposition taken in an unusually broad sense. Let me alert the reader to the fact that Searle and other philosophers also use proposition in an unusually broad sense, which is however not the sense of Reinach's *Satz* and our proposition. According to them, the statement, "murder is forbidden," and the question, "is murder forbidden?" and the enactment, "murder is forbidden" all express the same proposition, and differ from each other in respects other than propositional content. Reinach, by contrast, would see here three different *Sätze*, or propositions. A proposition for him is not a moment common to these three meaning-unities; they rather differ as propositions. JFC]

5 Bierling is right in holding this in his *Zur Kritik der juristischen Grundbegriffe*, II, p. 280 and ff. Cf. also Maier, *Psychologie des emotionalen Denkens*, p. 677 and ff.

6 The confusion of command and enactment often underlies the claim that it is incomprehensible how for instance the state binds itself by its laws.

7 [Reinach follows here exactly the terminology which he established in his monograph, "Zur Theorie des negativen Urteils," p. 85 in the *Gesammelte Schriften*, p. 36 in the English translation in *Aletheia II* (1981). There he says, following Husserl, that one ought to speak of a state of affairs as *bestehend* rather than as *existing*. Since a strict English translation would yield something awkward like "obtaining" or "subsisting," and since the exact meaning which Reinach wants to convey by speaking of *bestehen* is not so important in the present context, we will content ourselves with noting this exact meaning and translating simply with "existing." JFC]

8 A well-known disputed question of medieval philosophy can be formulated in this way: does moral value exist in itself and is it merely the reason for the enactments of God, or is there nothing more than that which is constituted in the free acts of God and the ought (*Sollen*) which is binding on all beings merely because of these acts?

9 We see here clearly how exactly one has to distinguish between freedom from exception, and unconditional validity. It goes without saying that no essential law as such admits of exceptions. But its validity can very well be a conditional one (in the explained sense). [Notice that Reinach above in §4 makes this distinction, so important for the whole philosophy of necessary states of affairs and for the apriori knowledge of them, fruitful for a purely ethical problem. There he asks whether even promises with an immoral content create a moral duty to fulfil them, and he answers that while every promise tends to create a moral duty to fulfil it, an immoral content can overcome this tendency, and leave the promisor with a duty not to do what he has promised. Such a case does not constitute an exception to the necessary law that promises are as such morally binding, it rather reveals the conditionality of the necessity found in the law. If one objects that this is a subterfuge, an unwillingness to call an exception by its proper name, one should notice that all promises, even those with immoral contents, tend to give rise to a moral duty; this tendency is grounded with essential necessity in promising, and can be known apriori. JFC]

10 Even rules which have gradually established themselves without ever being posited in an expressed enactment or even ever formulated in a proposition can be recognized. One can try in this way to make understandable the efficacy of unwritten positive law.

10a But cf. ZPO. §888 II.

10b As we already mentioned, we do not investigate in this work whether these claims are grounded entirely or only in part in the essence of absolute rights, or whether they merely rest on legal enactment.

11 The reader should take note of the fact that "claim" is here meant in the sense in which we have been using it, which is the only sense which is decisive for the apriori theory of right.

12 BGB §433: "Through the contract of sale the seller of a thing is obliged to hand the thing over to the buyer and to give him property in the thing . . . The buyer is obliged to pay the seller the purchase price which was agreed upon and to accept the purchased thing."

13 *Code civil*, art. 1583: "The sale has been completed between the parties and the property acquired by the buyer as soon as they have agreed on the thing and the price, even if the thing has not yet been delivered and the price not yet paid."

14 *Op. cit.*, §167 (the reference here is to rent).

15 A comparison of the two sentences of §603 shows that the BGB makes no distinction between *Dürfen* (permission) and *Berechtigtsein* (entitlement). Cf. also paragraphs such as §904 and 909.

16 Schuppe, *Der Begriff des subjektiven Rechtes*, p. 194.

17 Cf. our §6, "The Apriori Laws Determining the Origin of Relations of Right."

18 Since in the context of the positive law one usually understands by "right over a thing" a legally protected right over a thing, it is advisable in such contexts to speak of natural entitlements (*naturale Berechtigungen*) to a thing. [Naturales Recht also has the disadvantage of promoting confusion with *Naturrecht*. JFC]

19 *Op. cit.*, §238.

20 §571, I: "If the piece of land which has been rented is alienated by the lessee to a third person after being handed over to the renter, the new owner replaces the lessee as the subject of the rights and obligations which have arisen from the rental relation during the time of his ownership."

21 Cf. Crome, "Die juristische Natur der Miete nach dem Deutschen Bürgerlichen Gesetzbuch," *Jherings Jahrbücher* (XXXVII), p. 1 and ff.

22 "The exercise of a right is not allowed if it can only have the purpose of inflicting harm on another."

23 Planck, *Bürgerliches Gesetzbuch*, III, ad §1059.

24 There is of course the further question whether giving over to someone the exercise of the usufruct cannot be limited to a simple allowing of the exercise, without any accompanying obligation. Such cases are obviously contemplated in BGB §956, which distinguishes between allowing with and without the obligation to allow. We would then be confronted with a natural real entitlement by itself and separate from everything having to do with obligation. Let us also think of the case where the owner of a piece of land simply allows another to pick the fruit of a tree. How does one propose to do justice to this relation of right without recognizing natural absolute entitlements?

25 W. Endemann, *Handelsrecht*, 4th ed., p. 95.

26 Laband, *op. cit.*, p. 186.

27 *Institutions of Justinian*, III, 13, principium.

28 "That through the appearance of a new creditor the content of the action to be performed by the debtor is also changed," has been rightly remarked by Windschied in *Pandekten*, II, §329, though in opposition to the view which he maintains in his work on *actio*. But he thinks that Roman law originally assumed that "the debtor does not have to accept

such a change without his concurrence," whereas in reality the qualified transfer is *impossible* and cannot even be made possible by a simple concurrence.

29 As related by Winscheid, *op. cit.* The objection which he makes against this untransferability is from our point of view quite untenable. We do not disagree with him when he says that in spite of all modification one can still speak of a "sameness" of the transferred claim, but we deny that such a modified transfer is directly possible.

30 This comes out very clearly for instance in Kuntze: "I see in the fact that Roman law kept out of the sphere of obligation the assignment of claims, not a merely accidental phenomenon in the development of Roman law, but a clear expression of what is implied in the innermost essence of obligation." *Lehre von den Inhaberpapieren*, p. 220.

31 Though it would not be advisable, one could restrict "personality" to all cases where the positive law recognizes rights and obligations. Then some foundations are persons, but not slaves. But one cannot say that personality "is always conferred by the law and never given by nature" (Jellinek, *System der subjektiven öffentlichen Rechte*, 2nd ed., p. 28). One thereby overlooks the primary and fundamental concept of personality which as such has nothing at all to do with the positive law and according to which slaves are persons but never foundations. A being which can perform acts of a certain kind, such as social acts, shows itself to be a person in this sense.

32 Cf. Hellwig, *Lehrbuch des deutschen Zivilprozessrechtes*, I, p. 293 and ff.

33 Only this can explain why one has discussed so intensely the problem of juristic persons without, as it seems, so much as suspecting that in very numerous other cases deviations from essential laws are present in the positive law.

34 We can distinguish between the properties which belong to the group itself and not to its individual members, and the dependent (*fundiert*) properties which only belong to the group as a result of belonging to its members.

35 One should note well that even if we do have to do here with a fiction, what is fictively assumed is not the presence of personal wholes — for these undoubtedly exist as objectivities of a definite kind — but rather merely the ability of certain personal wholes, which are chosen for practical reasons, to perform isolated social acts and to have rights and obligations of their own.

36 It goes without saying that if the essential laws were not realized this would only affect their *applicability* and not their *validity*.

37 "Über das Verhältnis der Rechtsphilosophie zur 'positiven' Rechtswissenschaft und dem allgemeinen Teil derselben," *Zeitschrift für das Privat- und öffentliche Recht*, I.

38 *Juristische Prinzipienlehre*, I, p. 3.

39 Merkel, *op. cit.*, p. 410 ff.

40 Cf. the discussion in Bergbohm, *Jurisprudenz und Rechtsphilosophie*, especially the summary, p. 140 f.

41 Thus Ahrens in von Holtzendorff's *Enzyklopädie*, 2nd ed., p. 3. (The emphasis is ours.)

42 Cf. for instance Stammler, *Wirtschaft und Recht*, p. 170 ff.

43 *Allgemeine Staatslehre*, 2nd ed., p. 208.

44 *Philosophische Bibliothek*, vol. 124, Introduction, p. 67.

45 A fourth, typically naturalistic, error is the position according to which general laws of nature at the same time function as principles of right law. But this lies outside of our present interest (cf. Lask, "Rechtsphilosophie," in the *Festschrift für Kuno Fischer*, vol. II, p. 9).

46 Cf. our reflections at the end of the first chapter.

47 *Zivilistische Studien*, 1854, 1855, 1859, and 1877; cf. also *Naturalis ratio und Natur der Sache* (1860).

48 Cf. especially the third number of *Zivilistische Studien*, the Introduction and §1.

49 One can of course in addition discern quite different intentions in Leist.

Adolf Reinach's Discovery of the Social Acts

by
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CONTENTS

- §1 The significance of Reinach's monograph
- §2 Reinach as phenomenologist
- §3 Reinach's discovery of the "social acts"
- §4 Reinach in dialogue with the speech act philosophers: promising as a social act
- §5 Continuation of the dialogue between Reinach and the speech act philosophers: the uninventable essence of promising
- §6 Towards developing and deepening Reinach's analysis of the social acts; Reinach and Wojtyła; Reinach and Husserl
- §7 Reinach's apriori sphere of right and the natural moral law
- §8 Legal obligation and moral duty
- §9 Some consequences of Reinach's discovery for political, legal, and moral philosophy; conclusion of the dialogue with the speech act philosophers

§1 The significance of Reinach's monograph

The monograph of Adolf Reinach, "The Apriori Foundations of the Civil Law,"¹ which is here translated into English for the first time, seems to us to be one of the purest, most perfect pieces of phenomenological analysis which has ever been carried out. It seems to us that Conrad-Martius does not exaggerate when she says of Reinach that he was "der Phänomenologe an sich und als solcher,"² that is, *the* phenomenologist *par excellence*. She is referring to Reinach's ability to respect what is given in experience, to let things "show themselves from themselves," to listen

and to see rather than to postulate and to construct, to accept things on their own terms rather than to prescribe to them terms of our own. We shall in §2 discuss this aspect of the phenomenological character of Reinach's work.

It is *realist* phenomenology which Reinach's work epitomizes. Reinach was one of those who (along with Scheler and Pfänder, and almost all of Husserl's Göttingen students) rejected Husserl's turn to transcendental phenomenology, and who understood phenomenology as involving a radical realism with regard to essential structures. From the point of view of transcendental phenomenology it would be said that Reinach's monograph loses itself in the objects which he investigates, and remains innocent of the foundation of these objects in human subjectivity, or rather in human intersubjectivity, that is, innocent of the transcendental phenomenology which displays these objects as products of human intersubjectivity.³ From Reinach's realist point of view, there is nothing in human subjectivity which is equal to the task of grounding the essential structures of these objects, for these structures have a necessity and an immutability which is quite foreign to human subjectivity, which after all could as well not exist. One does violence to these structures, and compromises their strict necessity, in trying to derive them from human subjectivity. Reinach's monograph constitutes a certain argument for his realism, for he brings out the strict necessity of very many essential structures connected with the civil law, and brings it out in the most convincing way. He also pauses in his study a number of times to offer extremely significant reflections on his philosophical method, and on the impossibility of various kinds of subjective explanations of the relations of essence which he has brought to evidence. Much might be said about Reinach's study as embodying the unjustly neglected realist phenomenology,⁴ but our introductory essay will go in a different direction.

There is another excellence of Reinach's monograph besides its phenomenological character; I refer to its analytic power. Husserl rightly speaks of the "*unnachahmlicher Scharfsinn*,"⁵ or inimitable philosophical intelligence which Reinach displays here. Indeed, we would speak of an incomparable power of analytic penetration in Reinach. Related to this is the extraordinary clarity which Reinach achieved in his writing and teaching. Reinach thus unites in his philosophical *habitus* perfections which, though they belong together, are rarely found together as they are in Reinach: I mean he unites the intuition of essential structures with the most rigorous unfolding of what is contained in them. This is one reason why Reinach's work is bound to interest Anglo-American analytic philosophers, and to make an important contribution towards developing the dialogue between the phenomenological tradition and the analytic

tradition. Though analytic philosophers do not approach with much sympathy the apriori intuition of essential structures, they will be forced to take seriously the account of, and the practice of, this apriori intuition in Reinach, who proceeds with such exactitude and analytic rigor.

The significance of Reinach's monograph does not just lie in its philosophical method; it also lies in the substantive contributions which he makes to legal and social philosophy. Thus Husserl, much as he must have regretted Reinach's rejection of transcendental phenomenology, had to admit:

No one who is interested in a strictly scientific philosophy of right, in a definitive clarification of the basic concepts which are constitutive for the idea of any possible positive law . . . can afford to overlook this work of Reinach's which breaks so much new ground. It is for me beyond any doubt that it will secure for its author a permanent place in the history of the philosophy of law. (p. xiii of present volume)

Here again Reinach's work is important for the dialogue between phenomenologists and analytic philosophers. For the most significant single contribution in Reinach's monograph, his investigation of what he calls the social acts, converges in some very interesting ways with the work of the speech act tradition deriving from J. L. Austin. This is why this introductory essay of ours will deal extensively with Reinach's social acts, especially as they are typified in the act of promising, which is the social act investigated most closely by Reinach, and will try to bring his work into relation to the speech act analysis of Austin and Searle.

This monograph of Reinach's deserves to be called his major work. Actually the analysis of his earlier study, "Towards the Theory of the Negative Judgment,"⁶ is in no respect inferior to the analysis of the present study, that is, in no respect except one. This earlier study of Reinach's is heavily indebted to Husserl's *Logische Untersuchungen*, and many of its contributions take the form of taking a step beyond Husserl, and of developing and differentiating Husserlian discoveries. Reinach's essay on the civil law, by contrast, is an absolutely original work. In it he makes as original a contribution to the philosophy of law as Husserl had made to the philosophy of logic. It is not too much to say that Reinach here opens up a new realm for philosophical investigation.

In what follows we make no attempt to survey everything of importance in this study. We shall, for example, say nothing about his discussion of the positive law and its relation to the legally relevant social acts (here too there are important points of contact between Reinach and recent legal philosophy in the analytic tradition⁷); also nothing about his

apriori analysis of property. We have decided to limit ourselves in this way: after discussing briefly Reinach as phenomenologist (§2), we shall select out what seems to us the most significant single contribution in Reinach's monograph, his discovery of the social acts, and discuss it critically from various points of view. As I say, we shall often be taking the speech act philosopher as our interlocutor.

§2 Reinach as phenomenologist⁸

I want to show in Reinach a certain objectivity which, though it is characteristic of all authentic philosophy, is deeply characteristic precisely for philosophy which wants to be phenomenological.

A philosophical question typically takes the form, "What is this thing, what is its essence?" Thus the philosopher asks, what is time? What is value? What is it to be a person?⁹ We can catch the distinctively philosophical sense of these questions only if we realize that in asking them we emerge out of a pragmatic attitude, and come to see the things about which we ask in a completely new light. In asking someone what time it is, we take time for granted, we are too close to it really to notice it in its distinctive character; but in asking what time is at all, we take a certain spiritual distance to time, we awaken to it, we marvel at it, and are perplexed by it. In the pragmatic attitude we notice just as much about the world around us as we need in order to act effectively in it; we look at it from a narrow subjective point of view. But in asking in a philosophical way about the essences of things, we try to put aside every subjective point of view and to let the things show themselves on their own terms, "to show themselves from themselves"; instead of letting our interest in things be determined by our practical needs, we try to let our interest be determined by the thing itself and by precisely what is most essential to it. Instead of looking at things from the point of view of our practical activity, we as philosophers look at them "against the background of God and the world." This striking expression of Josef Pieper does not mean that in philosophizing about a question we set the question into a thematic relation to God; it means that philosophical inquiry aims at a certain ultimate, unsurpassable objectivity, and that philosophizing has as a result a certain solemnity.

No one can study the work of Reinach without being deeply impressed by how purely and properly *philosophical* his questioning is. Of the many available examples, let us take one which, though at first it seems trivial, is in reality very revealing. In his discussion of what arithmetical addition is, and in particular of what the law of commutation means, according to which $a + b = b + a$, Reinach observes that neither

the man who uses numbers for counting nor even the purely theoretical mathematician notices any problem here. But Reinach the philosopher is puzzled as to the very meaning of this law.

What is the sense of this proposition? The mathematician can decline the question. The possibility of sign commutation suffices for him. Beyond this, the information which we get from him is unsatisfactory for the most part. The proposition certainly does not refer to the spatial arrangement of signs on paper. But it also cannot refer to the temporal order of psychical acts — not to the fact it is indifferent whether I, or some subject or other, adds b to a or a to b . For it is a proposition which says nothing at all about subjects and their acts and the temporal course of those acts. We have rather to do with the fact that it is indifferent whether a comes to b or b comes to a (*hinzutritt*). But what is to be understood by this "coming to," since it is nothing spatial or temporal — *that* is now the problem, a problem to which the mathematician can be indifferent, but with which the philosopher, who must not stop at the signs but must push on to the essence of that which the signs designate, must concern himself most intensively.¹⁰

We must not be put off by the apparent triviality of Reinach's questions, and overlook their intellectual depth. He is performing the extremely difficult act of emerging out of the pragmatic attitude and looking for what things *are*, and marvelling at them.

Now this properly philosophical spirit of Reinach's work is deeply characteristic for him as *phenomenologist*. For the phenomenological return to the things themselves is nothing other than a rehabilitation of authentic philosophical inquiry into what things are in their innermost being. This is why Reinach speaks of the pragmatic attitude, and of the great difficulty of putting it off, as one of the main obstacles to phenomenological philosophizing.¹¹ This is also why phenomenology in the sense of Reinach is utterly opposed (though Reinach of course died before he could have become aware of this opposition) to any radical philosophy of praxis such as Marxism as it is epitomized in Marx's theses on Feuerbach, and especially in the eleventh thesis: "The philosophers have only *interpreted* the world in different ways; the important thing is to *change* it." It is equally opposed to the radical pragmatism of, for instance, a Quine.¹²

The anti-philosophical pragmatic attitude is by no means confined to the world of labor and toil; it can dominate scientific and theoretical work. Reinach detects this attitude in the procedure of much of modern mathematics, and he brings out the antithesis between this procedure and the procedure of authentic phenomenology. According to Reinach

the modern mathematician does not inquire into the essence of number, or of the point, or the line. He simply *stipulates* certain things about these mathematical entities for the purposes of a given mathematical system, and then makes deductions from his stipulations. In another system he might well begin by making quite different stipulations. What especially concerns Reinach is that many modern mathematicians are perfectly content to make stipulations which are opposed to the evident nature of these mathematical entities. This is what shows more clearly than anything else that they are not striving to bring to light the essence of number and of the other mathematical entities; they are no more interested in the essence of number than is the person who thinks of number only insofar as he needs numbers for counting; they rather take number as a reference point around which they gather now these, now those mathematical properties. Reinach does not say that this procedure has no justification; but he says that it is a procedure which is antithetical to the procedure of the philosopher, who wants to bring to light the essences of things.

We might add that modern mathematical logic is often no less anti-philosophical. Consider the way in which the principle of excluded middle is taken into one logical system and left out of another; who is there who still takes seriously the question just what this principle really means, and whether or not it is really true? Or consider the mechanical way in which the concept of a tautology, or of material implication is "defined" in the theory of the truth tables. It takes only a little sense for authentic philosophizing in order to see how far, how infinitely far all this is from the raising of philosophical questions such as, What is a tautology? What belongs to the essence of a hypothetical judgment? What are its main kinds?¹³ By the way, Reinach would not object to the strictness and exactness which mathematical logic strives for; he himself had a passion for strictness and exactness, and he achieved these perfections to an extraordinary degree in his own work, as we shall see. But Reinach wants to be strict and exact in bringing to evidence the essences of the things themselves, and not in constructing systems which serve to obscure this evidence.

When we inquire into what a thing really is, it is not surprising if data come to evidence for us which escape minds which do not even inquire in this way. Thus we shall not be surprised to find Reinach, in his important remarks on mathematics,¹⁴ claiming, just as St. Augustine claims in his philosophy of number in *De libero arbitrio*, II, that there is a world of mathematical truth which can be brought to evidence, that there are mathematical essences which are prior to the stipulations of mathematicians and which will show themselves if only we will inquire into them.

After remarking on the freedom of the mathematician in setting up the basic postulates of a system, Reinach says:

The mathematician as such must contend for the equal worth of all such systems. For him, there are only the postulates and the logically complete and consistent deductive consequents built thereon. But the systems *are not* of equal worth. There in fact *are* such things as points and lines, even if they do not exist as real things in the world. And in acts of a particular kind, we can bring these items to adequate intuition. But if we do that, then we see (*sehen wir ein*) that, in fact, through a point not on a given straight line, one straight line on the same plane can be drawn which does not intersect the first-mentioned straight line, and that it is false that none such can be drawn.¹⁵

This is truly a memorable passage. It seems to us that Reinach speaks here like the little boy in Andersen's tale, "The New Clothes of the Emperor." Everyone was telling everyone else that the emperor was dressed, and among all the emperor's subjects only the little boy dared to look and see whether the emperor was really dressed. In a similar way we have all been taught in school that the fifth postulate in Euclid holds only for one geometry and that there are other equally valid geometries in which this postulate is dropped. Only Reinach dares to look and see whether they really are equal in validity. And of course he sees clearly that the fifth postulate describes the real nature of lines and planes, and is literally true; he sees that it has an inner necessity and intelligibility which shows it to be prior to all arbitrary stipulations. His achievement is not to understand this, for every child understands this before he is corrupted by mathematical instruction at school; Reinach's achievement is to have dared to look and see for himself, and to have broken an evil spell, and spoken a liberating word.

Of course Reinach does not rush to the conclusion that everything in mathematics is a matter of pre-given essences. To assume that from the outset would also be unphenomenological. The task is to look and see. And in so doing Reinach is led right away to distinguish between mathematical conventions, and genuine mathematical essences.¹⁶ He says that many of the laws regarding positive and negative numbers are conventional. He probably means that, for example, it is in no way understandable that $(+1) \times (-1) = -1$, or that $(-1) \times (-1) = +1$. What does it mean at all to multiply a number minus one times? One can only fall back on a mathematical convention in asserting such relations among positive and negative numbers. It could just as well have been stipulated that $(-1) \times (-1)$ equals some third value which might have been invented,

different from plus or minus. By contrast, there *is* such a thing as the natural numbers. This is why the laws obtaining among them, such as that $1 + 1 = 2$, are absolutely evident, and could not be otherwise. We also find in the essence of number such truths as that the interval between each number is always the same; or that there is no last or highest number but that there are rather infinitely many numbers, or that an odd number added to an odd number must always give an even number. Though the division of number into positive and negative partially rests on artificial stipulations, the division of number into even and odd has no such artificial basis but is grounded in the eternal essence of number.

It is above all in Reinach's philosophy of right that we get an idea of what it means to discern the pre-given structures of being in places where everyone assumes that there are nothing but structures of human devising. Reinach looks into things such as property, promising, lending, liens, representation by a proxy, things which at first seem to be obviously social products which have emerged in history, and in the most convincing way he brings to light pre-given essences of these things, and apriori laws grounded in them. He shows that property and promising do not just mean what we want them to mean, as if we invented them for the sake of structuring our social life and can modify them as we will. He shows that our minds encounter here a realm of being and essence which is absolutely withdrawn from our arbitrariness. In order to show this he does not have to ignore those aspects of promising and property which really are set up by men. He does full justice to the freedom of the civil law in making enactments which elaborate the structure of promising or property with elements which are not themselves grounded apriori in promising or property. But he shows that these enactments participate in and presuppose essential structures which not even divine enactments could eliminate or change. It was his radical phenomenological openness to that which is, which enabled him to see beyond the formations of convention and of the civil law, and to discern a realm of timeless essence and truth which is given prior to all human positings.

But Reinach does not just want to vindicate mathematical essences, or legally relevant essences. His remarks on mathematics are made in his essay on phenomenology, in which he wants to rehabilitate a general respect for what things are, what they are essentially and in themselves. It is just that in mathematics (and no less in mathematical logic, I would add) the anti-phenomenological, anti-intuitive, constructivist way of proceeding shows itself very clearly. But Reinach means that this attitude has corrupted all of philosophy, and formed many a mind in such a way that it "has lost all sense for ultimate and absolute being, and has become incapable of seeing"¹⁷; and that phenomenology has something

to give to all of philosophy by restoring the attitude of inquiring into what things are in their innermost being, what their essence is. This is why Reinach's monograph on the apriori foundations of the civil law, in practicing this phenomenological receptivity in an exemplary way and in showing, in a particular subject matter, the possibility of bringing to evidence essential structures where none had been suspected, makes a contribution the significance of which goes far beyond the philosophy of law and which touches our understanding of the very possibilities of philosophical investigation.

§3 Reinach's discovery of the "social acts"

Reinach does not think that philosophy ends when we emerge out of the pragmatic attitude, pose philosophical questions, and take up a radically receptive attitude toward being.

Though the attitude of seeing familiar things in their distinctive character for the first time is very important, this is by no means the end of the matter. We have then to bring out this distinctive character, to distinguish it from other things, and to establish its essential traits (p. 9).

Reinach is referring here to the work of rigorous analysis which, according to him, should never be regarded as unimportant in comparison with the receptive, intuitive side of phenomenology. As we turn now to Reinach's investigation of a social act, we shall see how, as we were saying above, he unites rigor and exactitude with the attempt to know each thing through itself and on its own terms.

Reinach begins his investigation by focussing on all those acts of the person which have a characteristic *spontaneity*, that is, which involve a certain "doing" (*Tun*) of the person: acts such as making a decision, or a resolution, or turning our attention in a certain direction, or praising or blaming, or asking a question, or making a request. Reinach distinguishes these acts not only from passive experiences, such as hearing a sound or feeling a pain, but also from acts such as love, hate, veneration. These latter acts, at least insofar as they are attitudes of the person, are not a "doing" in the same sense as resolving or asking a question. Now certain spontaneous acts, such as resolving, are complete internally; an outward expression of these acts in no way belongs essentially to them or completes them. But other spontaneous acts, such as asking a question, are obviously not complete internally. Without any "turning outward," without any outward expression, without any use of words, it is impossible to ask a question or to accuse someone of a crime.

Now the question arises, what is it about such spontaneous acts which forbids them from being complete internally and which makes a "turning outward" essential to them? The answer cannot be that these acts are essentially *fremdpersonal*, as Reinach says), though they really are so directed; for this otherdirectedness is found in acts which can be complete internally and without any turning outward. Thus I can only forgive another, never myself; but the act, in contrast to asking for forgiveness or granting forgiveness once asked, can be complete internally and without being outwardly uttered. The reason why a spontaneous act like asking a question cannot be complete internally is not just because it is directed to another person, but because it *addresses* another person, aims at reaching him, at really touching him, because it takes the other as subject rather than only as object, as "you" rather than "he" or "she," and is incomplete in a peculiar way if it is not apprehended by the other — "like a thrown spear which falls short of its target" (p. 19). But such an act can address another human being and make itself in need of being heard by him only when it includes as part of itself a "turning outward," something external which enables it to appear to another (*in Erscheinung treten*). Now by social acts Reinach means all spontaneous acts which are *vernehmungsbedürftig*, or in need of being heard¹⁸ by an addressee in order to be complete. Social acts are distinguished from the internally complete acts of the person which are directed to another, in much the same way as the glance which aims at catching the glance of another is distinguished from the glance which simply looks at another.

Reinach analyzes with great penetration the outer side of a social act, which, as we saw, the social acts needs in order to become audible to the addressee. This outer side usually involves some use of language, and when it does we must distinguish this linguistic outer side from

statements about experiences which are now taking place or have just taken place. If I say, "I am afraid," or "I do not want to do that," this is an utterance about experiences which would have occurred without any such utterance. But a social act, as it is performed between human beings, is not divided into an independent act and a statement about it which might or might not be made; it rather forms an inner unity of voluntary act and voluntary utterance. For the inner experience here is not possible without the utterance. And the utterance for its part is not some optional thing which is added from without, but is in the service of the social act, and is necessary if the act is to address the other. Of course there can be statements about social acts which are accidental to them: "I have

just given a command." But these statements refer to the whole social act *including* its outer side, which should therefore in no case be confused with a statement about itself (p. 20).

We might add that, though the linguistic body of a social act is not a statement about the inner side of the social act, it need not forfeit its character as a statement altogether, as is clearly shown by the social act of informing or notifying. Other social acts are such that they can, but need not, "turn outward" by means of a statement, as for instance the social act of blaming; I can blame another in and through stating the blameworthy things he did.

We see, then, that Reinach, long before the rise of speech act analysis, completely freed himself from an overly descriptive view of the function of language: so much so that the speech act philosophers, once they make his acquaintance, can be expected to see in him a forerunner of their teaching regarding the many non-asserting, "performative" functions of sentences.

It is very important to see with Reinach that the outer side of social acts is necessary only for the social acts which are performed among men, or among beings which resemble men in that their inner conscious lives are perceptible to others only through the mediation of bodily expression, statements by themselves, signs indicating their inner lives, etc. But if two persons had immediate access to the consciousness of each other, each could apprehend the social acts of the other without the help of any turning outward by the other. Thus religious persons, who are convinced that God has immediate access to their inner lives, can perform social acts toward God, such as acts of petition, hope, thanksgiving, without any turning outward. This shows that what is strictly essential to the idea of social acts is not turning outward but turning toward another so as to address him. Turning outward is simply the instrument by which we men are enabled to turn to another human being and be heard by him.

We might try to elaborate Reinach's position by introducing a certain parallel. There are other acts of the person besides social acts which we have to distinguish from internally complete acts. In the philosophy of willing the distinction has been made between willing something in the sense of giving a certain inner response to it, and willing in the sense of effecting something in the world. For example, in willing to feed a hungry person, we have to distinguish the free decision to feed him, from the free intervening in the world so as to enable him to eat. Now this second dimension of willing¹⁹, like the social acts, necessarily has an external side, it is a reaching into the world so as to effect something; it cannot be internally complete, as is the first dimension of willing. Just as a social act

has to be heard in order to be complete, so the second dimension of willing has to be effective in the world in order to be complete.

Reinach also brings out the following very important aspect of the social acts. He shows that, though social acts are not themselves purely internal acts, each social act necessarily presupposes some purely internal act:

As a matter of apriori necessity every social act presupposes as its foundation some internally complete experience whose intentional object coincides with the intentional object of the social act or is at least somehow related to it. *Informing* presupposes being convinced about what I inform someone of. *Asking a question* essentially excludes such a conviction and requires instead uncertainty regarding that about which I ask.²⁰ In the case of *requesting*, what is presupposed is the *wish* that what I request come to be; more exactly, that what I request be realized by the one to whom the request is directed. *Commanding* presupposes as its foundation not only the wish but the *will* that the one who is commanded carry out my command; etc. (p. 22).

If a social act is performed without the purely internal act which belongs to it, a certain insincerity enters into the social act. Thus I tell a lie if I inform someone of something of which I am not myself convinced.

One could easily misunderstand the relation between a social act and its underlying internally complete act in this way: one might think that the internally complete act is the content of the social act of informing, so that in commanding, I would inform another about what I want him to do, in asking a question, I would inform someone about my uncertainty, in thanking I would inform someone about my gratitude to him, etc. This attempt to reduce all social acts to the one social act of informing, and to differentiate social acts only according to the content about which one informs, can easily be shown to be false, for there are persons whom I can inform about an internally complete act, but to whom I cannot or would not perform the social act which builds on the internally complete act. I can inform anyone about what I want another to do for me, at least anyone who does not already know; but I can command only that other person from whom I want something. I can inform certain persons about my uncertainty, though quite aware that there would be no point in asking them a question based on my uncertainty; and though I can inform anyone of my gratitude toward someone, I can thank only that person. Only if we make this distinction, and see that informing is only one among innumerable many kinds of social acts²¹, can we do justice to the richness and variety of the social acts.

It must be admitted that in the case of certain social acts the distinction between the underlying internally complete act and the social act itself is not as sharp as in the cases hitherto considered. Reinach's student, D. von Hildebrand, showed that a social act can form a closer unity with the underlying act than in most of these cases. There is for example the act of declaring (*verlautbaren*) one's love to another person. It is a social act in the sense of Reinach, and it presupposes as its underlying act an attitude of love for the other. But the declaration is not a new act building on the love but rather just gives the love a "voice," lets it become "laut" toward the other. By contrast, asking a question and the internally complete act which it often presupposes, namely doubt regarding that about which one asks, are two distinct acts, and do not form such a close unity as in the case of *Verlautbarung*. In asking a question I do not merely declare my doubt, or merely add a social dimension to it; I rather perform a new act which is based on it. Von Hildebrand thus brings to light a whole sphere of social acts which Reinach had only glimpsed when he was discussing the social act of accepting another social act (pp. 29-30) but which he did not investigate more closely, since his purposes in the philosophy of law did not require an elaboration of the nature of *Verlautbarung*. Thus von Hildebrand made the idea of a social act more fruitful for the philosophy of interpersonal relations than Reinach himself had done.²² What especially concerns us here is that even in the case of *Verlautbarung* one can still not adequately account for the social act in terms of an internally complete act and a linguistic utterance. The social act of declaring one's love is not just a composition of the internally complete attitude of love, plus the utterance of the declaration. The moment of letting my love speak to the other, which forms the soul of the social act—character of the declaration, is only made audible by the utterance and is therefore by no means identical with it.

Now that we have clarified the relation between a social act and the internally complete act which it presupposes, we can characterize the originality of Reinach's discovery in this way: most writers before Reinach who dealt with those acts which he calls the social acts did not fail to notice the underlying internal acts. They also noticed the external side of the social acts. What escaped them were the social acts themselves as distinct from the internal acts and as only made audible by the external side. Most of the weaknesses in their discussion of acts such as commanding, requesting, and, as we are about to see, of promising, come from trying to understand these acts as a composition of the outer side of these acts plus the presupposed internal act.

We do not want to close this section without at least mentioning, though without developing and critically examining, Reinach's investi-

gation (in §3 of his study) of the different modifications which social acts are typically subject to, even if not every social act is subject to every one of these modifications. There is first of all the *authentic* performance of a social act as contrasted with the *pseudo-performance* of it which results from the absence of the internally complete act which should underlie the social act (for instance, telling someone what I am not convinced of). Then there is the *conditional* performance of certain acts (making a request in the event that something occurs), as contrasted to the *unconditional* performance of them. Further, certain social acts can be performed not just by one person but by several together (as when several persons join together in making a *single* request), or can be heard not just by one but by several together (as when a *single* request is heard by the several persons to whom it is addressed). And finally there is the extremely curious modification whereby one person can perform a social act, not for himself, but in the name of another. This modification obviously makes no sense with regard to acts such as perceiving or willing, but it makes good sense with regard to commanding or inviting. (Reinach devotes all of §7 in his study to an apriori analysis of this representation.)

§4 *Reinach in dialogue with the speech act philosophers:
promising as a social act*

There can be no doubt but that in explaining what *illocutionary* acts are, J. L. Austin and his school say certain things, especially regarding the need of being heard by the addressee, which Reinach says of his social acts. This is why we can contrast the social acts with *perlocutionary* acts in somewhat the same way as the speech act philosophers are accustomed to contrast illocutionary and perlocutionary acts. In fact, this contrast enables us to take a step beyond Reinach's text in unfolding the essence of a social act. We can distinguish his social acts from perlocutionary acts such as persuading, frightening, flattering. There is no one social act of persuading another, as there is of inviting or commanding another. Of course the activity of persuading will include social acts, such as warning the other, but there is no act of persuading which has to be heard for the persuading to be complete. One can be persuaded by another without even noticing it, but the act of promising cannot be complete without the promisee hearing the promise. Activities such as persuading are completed by bringing forth some effect in the other which could in principle exist apart from the activity (a person might become persuaded of something by his own reflection and reading), whereas a social act is completed by something which is inseparable from the social act, namely

the hearing of the act. It is a question here of a strict, essential difference, and in grasping this difference we grasp Reinach's social acts more exactly.

When speech act theorists analyze the illocutionary acts they say many things which were already seen and stated by Reinach. When for example Austin says that "the performance of an illocutionary act involves the securing of uptake,"²³ he clearly refers to the fulfillment of the act's *Vernehmungsbedürftigkeit*, or need of being heard by the addressee. When Searle speaks of the "sincerity conditions" of illocutionary acts,²⁴ he aims at those internally complete acts which according to Reinach (p. 22) are presupposed for the authentic performance of a social act. And there are many other such points of convergence, one of which we referred to above in speaking of the performative function of the words of promising according to Reinach.

The convergence, however, is not such that "social act" and "illocutionary act" mean the same thing, nor even such that Reinach and the speech act philosophers are aiming through these concepts at the same datum. Many of what Searle calls illocutionary acts are not at all social acts, e.g., asserting that something is the case, or exclaiming, "would that it were the case!" These acts clearly need not address another, and they can be quite complete without being heard by another. It is obviously one thing simply to assert something, and quite another to assert something in a social way, as by telling someone something. These two things are not only distinct but also separable; we make many assertions in our private thinking which simply objectify our thought and in no way address another. The reason why Searle calls even asserting an illocutionary act lies in his distinction between an illocutionary act and its propositional content. In saying, "S is P," and "would that S were P," we perform two different illocutionary acts with the same propositional content. Searle thinks that that which goes beyond propositional content and incorporates it into a complete speech act, is the illocutionary act. Since the act of asserting constitutes a given propositional content as an assertion, it is an illocutionary act. At this point there emerges not only the difference in meaning between Reinach's and Searle's concepts, but a criticism of Searle based on Reinach's work: if one characterizes illocutionary acts in terms of what constitutes a propositional content as a complete speech act, then it is in no way essential to an illocutionary act, as Searle thinks, to address another and to need to be heard by the other in order to be complete. Illocutionary acts defined in this way may, but they also may not, have this social dimension.

Let us try to bring Searle and Reinach more into contact with each other by looking at an illocutionary which really is also a social act.

Fortunately, the social act which Reinach discusses more elaborately than any other, is also the illocutionary act which Searle discusses more elaborately than any other: the act of promising. We propose to compare Reinach's account of promising with Searle's speech act account of it.²⁵

We begin by pointing out what is evident, namely that promising is a social act in Reinach's sense, and indeed a particularly rich and significant social act. The one who promises turns toward the promisee and addresses him, and utters what needs to be heard by him. And it is not just the content promised but also the act of promising which needs to be heard. As with all social acts, there is an internally complete act which is presupposed by promising, namely the intention to do the thing promised. If I promise without this intention, then I promise with that peculiar kind of emptiness and insincerity which we discussed above. The sentence, "I promise," spoken by the one who thereby promises, is not a statement about this inner act, but precisely the external side which the act of promising needs in order to make itself audible to the promisee. Promising can be performed, not only in my own name, but also, if certain conditions are fulfilled, in the name of another. It can be performed conditionally as well as unconditionally. It can have one or it can have several performers, even as it can have one or several addressees.

Let us now call to mind certain elements of Searle's well-known account of promising. After discussing certain conditions for promising, such as that it must not be obvious to the promisee and the promisor that the promisor would "in the normal course of events" do the thing promised, even without promising it, Searle proceeds to enumerate the interlocking intentions which, as he thinks, constitute the act of promising: 1) intending to do the thing promised, 2) intending that the uttering of the words of promising place one under an obligation, 3) intending that the promisee learn that the uttered words place the promisor under an obligation, and 4) intending that the promisee recognize this last intention by understanding the meaning of the words of promising.

The more one reflects on this system of intentions, the more one has to wonder whether it really includes or amounts to the act of promising. Is there only the *intention* to put oneself under an obligation, is there not also *the act of effectively putting oneself under an obligation*? Is promising merely an intending to do, and not rather a doing, an executing of the intention? (cf. Reinach, p. 69) Searle and Austin would point to the uttering of the words, which they call a performative uttering, and say that this is the doing. But if we consult carefully the act of promising, we surely find that the uttering just provides the outer side of an act which presents itself as a doing, as an establishing of an obligation. This means that underlying the performative utterance there is a performative act, an act which is

not an intending to do but a doing of what was intended. This act, which is the soul of promising, is what cannot be found among the intentions of Searle. We have only to contrast a case where there really are nothing but intentions which are carried out by a performative utterance. Suppose that I intend to get the guard at the city gate to let me in, and that to this end I utter the password in the hearing of the guard. The utterance here need not be the other side of a social act, or that which enables a social act to be heard; it seems to be the whole means whereby I execute my intention to enter the city. But the uttering of the words of promising to do stand in the service of a social act; it is, not the whole means for executing an intention, but only the outer side of a social act, an act which presents itself not as an intention to bind myself but as the execution of the intention, as the effective binding of myself. We can admit that all Searle's intentions *accompany* the act of promising; but they surely are not identical with this act, nor do they include it.

We can offer further evidence for our claim that Searle's analysis of promising contains everything except the act of promising itself, by showing that he fails to do justice to the social-act character of promising, to the way promising *addresses* the promisee, and takes the promisee not in the third person but in the second person. None of his four intentions addresses the promisee. Let us take the intention which is supposed to be recognized by the promisee, namely the intention that the promisee learn that the words of promising place the promisor under an obligation. Such an intention can exist without being destined to be recognized by the addressee; it need not be fatally incomplete apart from being recognized. Searle himself has to admit this. He thinks that the structure of promising should be understood according to the pattern of a game with its rules (a conception of promising which we shall subject to criticism in the next section). On this view of promising the rules could surely be changed so that the obligation arises when the addressee understands certain words; the arising of the obligation could be completely independent of the recognition of any intention in the speaker. In this case the intention of the speaker that the addressee learn that his words place him under an obligation, would not itself be displayed to the addressee, it would not have to be recognized by him, and could therefore not be mistaken for an act which addresses him. When in the case of promising (according to Searle's view of it) this intention *is* displayed to the other and does have to be recognized by him, a social dimension is indeed added to the intention, but even then the intention does not address the other. If it were a social act it would be impossible without this moment of addressing; it could not acquire its social dimension as a subsequent addition to itself.

Compare the act of informing another. Reinach argues (as against

Searle)²⁶ that this act is usually complete when the propositional content has been apprehended by the addressee, and that the act of informing need not itself be heard in order to be complete (p. 21). Here there is an intention that words be understood, but without any further intention that they reveal this first intention to the addressee. This first intention, therefore, does not address the other. If now the speaker wants the other also to recognize his intention to inform, and expresses himself so as to make this intention recognizable to the other, the intention remains just as little a social act as it was before being offered to the recognition of the other; even now this intention does not itself address the other. Here, then, is the all-important distinction which is missing in Searle (and which could be understood and accepted even if one disagreed with Reinach about what exactly has to be heard in order for informing to be complete): *it is one thing for an act to be made available to the recognition of another, and quite something else for an act to address the other.*²⁷ Searle will never do justice to the social-act character of promising as long as he persists in explaining this character in terms of recognizing intentions. Reinach is the real philosophical discoverer of the social-act character of the social acts.

I suggest that Reinach's superiority to Searle in the analysis of promising and of social acts in general, derives to no small extent from his phenomenological orientation. Reinach discerns that promising is an ultimate and irreducible datum, and thus tries to get to know it through itself. Searle reduces it to a system of intentions which neither contain in themselves nor collectively amount to the act of promising; he lets the act escape him, even while he thinks he is analyzing it with great care. Searle has still not freed himself from the Humean prejudice that promising is a composition of certain internally complete acts together with a linguistic utterance. This prejudice keeps him from capturing the unified act of promising and its distinctive social-act structure. Reinach is so radical in confronting the things themselves that he is able to break through this prejudice, and forge for the first time the crucial concept of a social act.

Reinach offers a profound observation on why the phenomenological confrontation with the things themselves is so difficult. Of course he often takes notice of the extreme difficulty of putting off the pragmatic attitude so as to inquire into the very essence of things. But Reinach also speaks of a certain deepseated *fear* of this confrontation, "a fear of the given, a strange reluctance or incapacity to confront those ultimate data which are knowable only in direct intuition" (p. 46; cf. p. 65). There is something in the human mind which dreads having to know the ultimate data of being through themselves, and which feels more secure in going around them, and deducing them from other things, or constructing them out of other things. It is perhaps the great spiritual exertion of

knowing things through themselves which makes philosophers shrink from this. However one explains this fear, as well as the difficulty of taking a distance to things so that their essence shows itself to us, we see *how difficult* the phenomenological ideal is to realize; the phenomenological stress on the intuition of essences in no way implies that phenomenological investigation is an effortless intellectual activity. *It is rather precisely this intuition which presents special difficulty to the human mind.*

§5 *Continuation of the dialogue between Reinach and the speech act philosophers: the uninventable essence of promising*

Even if the speech act philosophers were to accept the criticisms which we have been making of their position, they would still be at odds with Reinach on the nature of promising. For they hold something regarding promising and many other social acts which is directly opposed to Reinach's apriori philosophy of these acts: they hold that these acts are made possible only by man-made conventions. Reinach holds, by contrast, that there is in the nature of things such a thing as promising, that promising is a "natural" act of the person, as is indeed everything which is a social act in the full and proper sense.

In speaking of this naturalness we must not be misunderstood as ascribing to Reinach the thesis that there is a practical necessity that men promise to each other — for example, that men cannot develop their communal existence beyond a very primitive level without letting promising play a major role in their lives. Reinach would not necessarily reject this thesis, but it is thoroughly different from his own position on the naturalness of promising. He holds there is a highly intelligible essence of promising, that promising *is* something even before anyone makes a promise. For Reinach the "naturalness" of promising comes not from a relation of promising to something outside of itself but from the unity immanent to the essence of promising. For Reinach this naturalness is shown not in any practical indispensability but in the apriori necessity grounded in the essence of promising. It is important to recognize this, otherwise one will not understand why Reinach's thesis on the naturalness of promising sets him at odds with the speech act analysis of promising.

In claiming the naturalness of promising, Reinach does not want to reduce promising to a perlocutionary act, which merely aims at producing effects in the consciousness of another without relying on any rules known both to promisor and promisee. Whereas in trying to frighten another person, a typically perlocutionary act, I do not rely on rules and do not achieve the desired effect by acting according to them, there is this

relation to rules in the case of promising, as Searle quite rightly insists. But Reinach holds against Searle that these rules are prior to all human conventions, that they are strictly necessary and immutable, and can therefore not be devised by God or man.

Reinach is struck by a strictness and exactness in the working of the promise. For instance, promisor and promisee are not equal in the ability to dissolve the bond of the promise. The promisee can at any time waive his claim and in this way dissolve the bond, but the promisor cannot be free in retracting his promise. Unless the promisor in promising reserved for himself the right to retract, or was granted this right by the promisee, he cannot retract; but it does not take any particular modification of the promise in order for the promisee to be able to waive; he does not have to reserve for himself any right in receiving the promise, or receive any grant of right from the promisor. Reinach's point is not that the promisor *ought not* retract without any particular modification of the promise; he rather means that the promisor *cannot* effectively retract without some modification of the promise, he can only impotently attempt to retract. Reinach also finds an exact and intelligible structure in the act of the promisee empowering the promisor to retract. For this act can be clearly distinguished from a new promise by the promisee that he will waive his claim at the request of the promisor. In the case of such a new promise, the promisor (of the first promise) can only get a claim on the promisee to waive, whereas in the case of retracting which has been made possible by the promisee, the promisor dissolves the bond immediately on retracting. And there are many other aspects of promising which lead Reinach to see in the working of the promise "*einen streng gesetzlichen Mechanismus des sozialen Geschehens*" (p. 27). To mention just one more aspect: Reinach distinguishes sharply between the claimant and the beneficiary of the promise (pp. 12; 75-76). Of course they can be found in the same person, as when someone promises another to do some good thing for him (the promisee); but they can be separated in the sense that there can be no beneficiary, or in the sense that the promisor is the main beneficiary, or in the sense that some third person, distinct from promisor and promisee, can be the beneficiary. It is the last case which interests Reinach; he calls attention to the fact that in this case the beneficiary has, on the basis of the act of promising, no claim for the fulfillment of the promise. This claim emerges always only in the promisee, even when promisee and beneficiary are distinct persons. It may be "only fair" under certain circumstances that the beneficiary have a claim for fulfillment, and the positive law may be doing just what it should be doing in granting the beneficiary such a claim; but such a claim in the third party beneficiary does not flow out of the act of promising.²⁸

This distinction becomes important when we inquire whether a promisee who is also beneficiary can transfer his claim to someone else, so that this other person can claim, with the same claim, the same benefit for himself. With matchless analytic power, Reinach shows (pp. 75-79) that, because of the distinction between claimant and beneficiary, this kind of transfer of a claim is apriori much more complicated than one might think. He begins by arguing that the claim of a promisee can be transferred to another only if the promisor agrees to the transfer. But even if he agrees and the promisee then transfers his claim to another, the other does not acquire a claim that this benefit be given *to himself*, which is what we usually have in mind in speaking of such a transfer. For if B has promised A to do something for him, and if A, with B's permission, transfers his claim to C, then what results is not a claim in C that B do *for* C what B had originally promised to do for A; what results is simply a claim in C that B do *for* A what B had originally promised to do for A. In transferring the claim out of his person into another, A does not cease to be the beneficiary of the promise. And so what results from the transfer is simply that C rather than A has the claim that A receive the benefit from B.

I do not propose to discuss Reinach's account of how the desired transfer is apriori possible; I only want to show that, when we consider what is implied in the distinction between claimant and beneficiary, we get a glimpse into a system of meaning which surprises us not only by its existence and by its intricacy but also by its intelligibility and its self-evidence. And this confirms Reinach in his conviction that he is unfolding in an apriori way what is contained in certain uninventable essences.

Now philosophers in the speech act tradition notice the strictness in the laws of promising and yet, since they stand in the empiricist tradition of English philosophy, they would want no part of Reinach's apriori philosophy of the social acts. But they would say that they have a theory of these acts which enables them to explain in empiricist terms the non-empirical strictness found in the working of these acts. We shall first set out their position, and then see if Reinach's apriori philosophy of acts such as promising can withstand the objections which they would raise against it.

Austin holds that the first condition for any "performative" utterance, and thus for promising, is that "there must exist an accepted conventional procedure having a certain conventional effect, the procedure to include the uttering of certain words by certain persons in certain circumstances."²⁹ Again: "There cannot be an illocutionary act unless the means employed are conventional."³⁰ Searle has developed this position with his interesting distinction between two kinds of rules: those which

regulate some behavior which is possible apart from any rules, and those which make possible a type of behavior which makes no sense apart from the rules.³¹ The rules of etiquette would represent the first type of rules, which Searle calls "regulative"; for the behavior of eating at table with others and extending invitations to others is possible apart from the rules of etiquette. The rules of chess would represent the second type of rules, which Searle calls "constitutive": for the activities of moving the queen, castling, or putting in check are obviously constituted in their very possibility by the rules of chess and have no sense apart from these rules. Now it is for Searle simply self-evident that the promise (as well as most other illocutionary acts) makes sense only within a system of constitutive rules.

The failure to perceive the existence and nature of constitutive rules is of some importance in philosophy. Thus, for example, some philosophers ask, "how can making a promise create an obligation?" A similar question would be, "how can scoring a touchdown create six points?" As they stand both questions can only be answered by citing a rule of the form, "X counts as Y"³²

He calls a given system of rules an "institution," and calls "institutional facts" those things which make sense only within the institution, and these he opposes to "brute facts." Thus the obligation in the promisor and the claim in the promisee, or the power of the promisee to waive, are so many "institutional facts."

Most of my readers will be aware of the fact that almost all of the leading authors in contemporary legal theory have accepted this theory of promising. John Rawls takes it as self-evident, and does not even bother to argue for it, or to consider possible objections to it.³³ The same holds for H. L. A. Hart, who expresses the present consensus when he writes:

If we are to incur such obligations (as result from the promise) there must be some established procedure generally accepted by some specific social group whereby the utterance or writing of a certain range of expressions is sufficient to render actions specified by them obligatory for the speaker or writer. If no such procedures exist, promising is logically impossible, just as saluting would be logically impossible if there were no accepted conventions specifying the gestures of formal recognition within a military group.³⁴

Our remarks above on the main failure of the speech act theory of promising enable us to understand one reason why speech act philosophers are drawn, indeed forced to resort to constitutive rules in providing an account of promising. For if, as we claimed, the speech act theorist brings to light only intentions and linguistic utterances in the promisor, if he tries to account for promising in terms of internally complete acts (which is what intentions are) and fails to see that promising is a social act, then he has to resort to some kind of conventional support in order to account for promising. For how is it possible that mere intentions and linguistic utterances could, out of themselves generate an obligation in the promisor, or do anything else? There is clearly no proportion between such effects and the intentions in the promisor; in order to get such effects out of intentions one needs the mediation of some kind of artifice. Reinach, by contrast, is not under the same "pressure" to resort to constitutive rules in the theory of promising, for he does not think that promising, which is for him a social act, is reducible to intentions. The social act character of promising opens the possibility that promising can do what an intention could never do, namely generate out of itself effects in the social world.

But what concerns us here is another reason why the constitutive rule theory of promising is attractive to the speech act philosophers. It seems to them to explain the strictness found in the working of the promise and yet to do so without abandoning an empiricist point of view and losing themselves in the metaphysics of necessary essences and in the epistemology of their intuition. For the rules of a game like chess can be strict and exact and tolerate no exception. These rules and the moves which they make possible can seem to constitute "*einen streng gesetzlichen Mechanismus des sozialen Geschehens*" (p. 27). The speech act philosophers say of Reinach that they understand what it is about promising which makes plausible his a priori philosophy of promising, but that they can explain on empiricist terms the non-empirical aspects of promising. Let us accept this challenge to Reinach's position, and see if we can maintain his position against it.³⁵

Reinach would not deny (though he does not discuss it) that certain social acts are made possible by constitutive rules. He need not deny that, when one card player says to another, "I call you for three," he is performing what is indeed a social act, but one which makes sense only within the rules of that card game. But he would deny emphatically that this is the pattern of all social acts. He holds that very many social acts, or rather social acts properly speaking, have an uninventable and unchangeable essence (this is what underlies their "naturalness" discussed above), and that this uninventability is shown by the possibility of an a priori

analysis of the necessary states of affairs grounded in such an essence. Let us bring all this to evidence in the case of promising by showing a certain perfection of "inner unity" in the essence of promising. We shall do this in our own way and go beyond the text of Reinach, but in full harmony with his position, and by way of securing his position against the speech act objections which we have sketched out.

Each of the following five considerations gains force in light of the others, and they should be taken together.

1. Let us contrast the perlocutionary activity of persuading someone, with the act of promising. This activity does not seem really to be one determinate act at all, but rather a complex activity, which will ordinarily consist of many acts, and which will consist now of some acts, now of other acts. Promising, by contrast, shows itself to be one determinate act. Further, the activity of persuading gets its unity from the intended result (namely the other's becoming persuaded), whereas promising does not have its unity as an act from any such results outside of itself but has its unity in itself. Even those effects which are proper to promising, namely claim and obligation, do not give promising its inner unity. Promising is not just "that act — whatever it is — which produces claim and obligation." The fact that we understand the effects of promising *on the basis* of understanding the act of promising shows that there is a unity proper to the act itself and not derived from its effects.

2. Let us imagine an act with a somewhat different structure from that which we found in promising. Let us imagine an act in which A would bind himself to B, but in such a way that A would have exactly the same power of unilaterally dissolving the bond as B does. This would be an act like promising but differing from it in that retracting by the promisor would be exactly parallel to waiving by the promisee, and would no more require a permission to be possible than does waiving by the promisee. It is immediately evident that *there is no such act*, except as the creation of established procedures; and that by contrast there is an act such as promising, and prior to any established procedures.

There are many other ways of bringing to evidence the inner unity of promising by applying the "negative test"; we shall mention just one more. Reinach distinguishes sharply between the claimant and the beneficiary of a promise, as we saw. Let us now imagine an act in which I bind myself to another, but in such a way that the only possible beneficiary is the one to whom I bind myself and who has a claim on me for fulfillment. It is immediately evident that there is no act having this restriction on the possible beneficiary, and that such an act is a thoroughly arbitrary construction, and that by contrast there is such an act as promising with its distinction between promisee and beneficiary.

It is as if we were to contrast the square or the circle with a completely irregular line which encloses a space in a plane. Whereas such an irregular figure does not have an inner unity which is broken up as soon as one modifies the figure slightly, the square or circle really does have a unity which is shattered by even small deviations. And whereas we would say that there is no such thing as the irregular figure, that its whole being depends on its being drawn, we would by contrast say that there is such a thing as the square or the circle and that these entities "were" something even before they were in fact drawn.

This analogy shows us that it is not just any inner unity which we find in promising, but rather a particularly perfect kind of inner unity. For even chess considered as a game has a certain inner unity, yet it is all the same an invention; we would hardly say that "there is such a thing" as chess in the very nature of things, or that the idea of chess precedes its invention. Though it has inner unity, it is also held together from without by the intellectual activity which invented it. Since there seems to be such a thing as promising in the nature of things, and since in respect of inner unity promising seems to be analogous to the most intelligible geometric entities, promising shows itself to have a particularly potent inner unity.³⁶ This perfection of unity proper to promising will show itself still more clearly in the considerations which follow.

3. We proceed to look into the relation between the essence of promising, and the states of affairs which characterize promising. Let us contrast the idea of promising with the idea of an institutional fact. The facts about the king in chess, such as that the object of the game is the capture of the other man's king, are not *grounded in* the idea of the king, nor does the idea of the king make intelligible the characteristic features of the king. It is clearly the other way around: these facts are first set up by the constitutive rules of the game, and the king is what results. Any unity in the idea of the king derives from the way these facts are set up, and is a unity which *obtains among* these facts. And this is how it will have to be with any institutional fact: its characteristic states of affairs are first set up, and its inner unity, if it has any, follows from them.

Now if we find an essence which grounds its characteristic states of affairs, and has such an inner unity that it makes these states of affairs intelligible out of itself, then that essence cannot exist only as an institutional fact. But this is precisely what we find in promising. The inner unity of promising which showed itself in our preceding two considerations, is not a unity *obtaining among* the characteristic facts about promising. It is not as if the reference of promising to the future, the distinction between claimant and beneficiary, the possible ways of dissolving a promise, are so related *among themselves* as to form a unity. It is rather a

question of an inner unity in which these characteristic features of promising are *grounded*. That the promise can be dissolved by the waiving of the promisee, does not help to build up the idea of promising, but is rather grounded in this idea. As a result we can get to know this state of affairs by immersing ourselves in the idea of promising; in the idea of promising our minds encounter what they never encounter in an institutional fact, namely a "principle of meaning," a "center of unity" which discloses to us this and the other states of affairs grounded in promising. It is this inner unity which we want to bring to light in promising, for this is what establishes promising in the nature of things, and lets it be itself prior to any constitutive rules.³⁷ As we have seen, whatever depends for its being on constitutive rules must lack this unity.

4. It is not just any general states of affairs which are grounded in the idea of promising, but rather strictly necessary states of affairs.

As we bring to evidence the essence of promising it becomes clear that, for example, the promisor, insofar as his position is determined by the promise, cannot retract his promise. One cannot reduce this necessity to the necessity of an analytic statement, for one could never find in the meaning of the word, "promisor," any thing about the limitations of the promisor in dissolving the promise. Nor is this necessity reducible to the principles of identity and contradiction, as is the necessity of every analytic statement; it is rather a necessity grounded in the specific character of promising. This state of affairs, then, is grounded not in the word-meaning but in the essence of promising. This of course shows that these states of affairs are not rules which were devised by some ingenious game inventor, but that they are prior to any possible inventing. But what primarily interests us in the present discussion is this: the essence of promising in which they are grounded must be something strictly uninventable, must have the highest perfection of inner unity. For if it were ultimately invented, then, though it might have much inner unity, it could not be such as to ground strictly necessary states of affairs. The principle on which we base our claim that there is an uninventable essence or idea of promising has been stated by Descartes:

I find in myself an infinity of ideas of certain things which cannot be assumed to be pure nothingness, even though they may perhaps have no existence outside of my thought. These things are not figments of my imagination, even though it is within my power to think of them or not to think of them; on the contrary, they have their own true and immutable natures. Thus, for example, when I imagine a triangle, even though there may perhaps be no such figure anywhere in the world outside of my thought, nor ever have

been, nevertheless the figure cannot help having a certain determinate nature, or form, or essence, which is immutable and eternal, which does not in any way depend upon my mind. This is evidenced by the fact that we can demonstrate various properties of this triangle, namely that its three angles are equal to two right angles, that the greatest angle subtends the longest side, and the other similar properties.³⁸

5. If we turn finally to our *knowledge* of promising and of other social acts, we find that it is altogether different from what it would have to be if it were really only a matter of getting to know a set of constitutive rules. For the primary way in which we get to know the constitutive rules of an institution, once they have been set up, is by being informed about them. It may be in principle possible to gather some of the rules by observing the behavior of those who act within the institution; but this is a very indirect way of getting at the rules, and can probably, at least with regard to many rules, never lead to certainty. The direct way of learning with certainty what the constitutive rules are, is by being informed.

Now the question is, do we find out about the structure of promising by being informed? This is what Searle and Austin would have to maintain: but it is easy to show that this is not the case. For the act of the mind which we perform in receiving from another information about constitutive rules, is altogether different from the act of the mind which we perform in understanding the structure of promising. This latter act of the mind is one of *intellectual insight*, an act of understanding promising from within; the former act of the mind has nothing of the character of insight, and involves no understanding from within. I pre-eminently *understand* something when I see that the beneficiary of a promise need not be the one who has the claim for fulfillment of the promise; but there is no trace of such understanding when I learn that the pawn is the only piece in chess which can move only by going forward and never backward. In understanding the logic of promising, our minds encounter something highly intelligible; in learning about a set of constitutive rules, we encounter nothing comparably intelligible, we rather encounter something thoroughly contingent and factual, even though it does not exactly belong to the empirical order of nature. The intelligibility which we encounter in knowing the structure of promising is just what we would expect; for the more an essence has inner unity, then the more intelligible it is for a knower, and as we have seen, the essence of promising has the highest perfection of inner unity.

Now when we pre-eminently understand something, and achieve an intellectual insight into it, the object known lies bare before our mind,

and we get to know that thing *immediately* and through itself and not through being informed; and therefore promising cannot be a product of constitutive rules, which we learn about only by being informed.

Reinach anticipates the present argument, and develops it as follows:

How can we explain the fact that many who do not know the positive law or who hardly know it find so many enactments "self-evident?" How can we explain the fundamental difference between enactments about which one has to be informed, and those about which one needs no information? Whoever orally contracts to rent a piece of property for three years may be surprised to find that according to our law this contract is considered as "made for an indefinite length of time." But whoever promises to make a loan, or waives a claim . . . can expect nothing else than that he acquires an obligation, or that his claim goes out of being . . . Will one say that all men usually somehow learn about enactments such as these latter two, whereas they usually do not know about enactments such as the former? But — even if one were to venture to construct such an ungrounded theory — how does one propose to explain why the former enactment, even if one has learned of it, can be *forgotten*, whereas in the case of the latter two enactments it makes simply no sense to speak of really forgetting? The explanation can lie only in the fact that we have here to do with *apriori* states of affairs, which — as already Plato showed — neither are introduced into our knowledge "from without" nor are able to disappear from consciousness once and for all; the intuitive grasping of them in an immediate insight can be achieved again and again, as soon as the knowing subject directs its attention to them (p. 131)

Our five considerations, especially the last two, lead us to see that there is far more to the working of the promise than merely the non-empirical strictness which is found in the rules of a game. Closer investigation shows that, for all their strictness, game rules derive from an arbitrary act which established them up, whereas the states of affairs grounded in promising derive from the uninventable idea of promising. Closer investigation also shows that the freedom from empirical observation in our knowledge of game rules is only superficially like the freedom from empirical observation in our knowledge of the social acts. For in the former case we dispense with observing only because we are informed about constitutive rules, whereas in the latter case we dispense with observing because we can attain to an intellectual insight into a highly intelligible object. These closer investigations are completely

missing in the speech act philosophers; they notice only a few isolated features of the uninventable idea of promising, and as a result they think that the model of a game suffices to capture the essence of promising. They have no idea of how much they have to account for in developing an adequate theory of promising.

We might consider here a celebrated argument of Hume's which seems to undermine Reinach's claim that there is an uninventable idea of promising and which undoubtedly articulates one consideration which leads many legal philosophers to the conventionalist theory of social acts.³⁹ Hume makes this argument mainly with respect to property, but he means to extend it to promising as well. The argument is that, if man were far more generous and selfless, and also more trustworthy, than he in fact is, and if there were a much greater abundance of goods than there is, then promising would become largely superfluous. If man were better than he is, I would not have to bind others to me by having them make promises to me; they would have only to be aware of my needs and desires in order to resolve to do good things for me, and this resolve would be firm, and I could count on it. And if there were an abundance of goods, the needs which lead me to exchange promises with others would be fewer, and so there would be less promising. Now if promising becomes actual among men only in virtue of contingent, in principle changeable features of human nature and of the human condition, then promising must be, Hume argues, a kind of *ad hoc* construction devised for mitigating the bad effects of human selfishness and unreliability, and of the limited supply of goods. Just as practical needs lead to the invention of tools, so certain social needs lead to the invention of certain institutions, chief amongst which is promising.

But this is no argument against Reinach. For even supposing that most promising would cease if men were essentially more selfless and faithful, and had a greater abundance of goods, this does not reduce promising to an *ad hoc* construction which is in its very being somehow relative to contingent features of the human condition. Hume shows at most that certain uninventable ideas can be more or less relevant for the conduct of man's social life, depending on the makeup of man's being and on the bounty of nature. And we have no reason to deny this. It is also true that the theory of fallacies in logic is necessary for us men only because of the weakness of our reasoning powers; if these powers were stronger and if we never reasoned badly, it would be superfluous to study the different kinds of fallacies. But the theory of the fallacies, though it is made relevant for man by the weakness of human reasoning, is obviously not an *ad hoc* invention. That one reasons badly in assuming in the premises the thing to be proved in the conclusion, is eternally true, even

though it has a practical importance for human thinking which it lacks for angelic thinking. The contingent factors, then, which lead to the prominence of promising in human life, do not show the idea of promising to be itself contingent, and are quite compatible with this idea being ininventable and eternal, just as Reinach claims.

This is the place to mention the objection to Reinach based on the freedom of the civil law. One will point out that the civil law often prescribes conditions for promising which can in no way be discovered in the idea of promising, such as that certain promises are valid only if they are put in writing and witnessed by others. Sometimes the civil law seems even to make enactments which are opposed to the idea of promising, as when it allows a minor to retract his promises even if he has not been empowered to do so by the promisee. In order to deal with this objection we would have to follow Reinach into the philosophy of the positive law, and also to investigate with Reinach the peculiar "conditional" validity of the necessary laws which are grounded in the structures of the social acts. We cannot do all of this in the present essay, and we content ourselves with referring to Reinach's masterly discussion of the relation between social acts whose idea is uninventable, and the freedom of the civil law (pp. 102-115). His solution goes in this direction: just as a bodily object which does not fall straight down because of a wind, or does not fall at all because of a table which supports it, is nevertheless subject to a law which draws it straight down, so promising, even when it is elaborated by the civil law beyond what belongs to the essence of promising, is nevertheless always subject to its essence, and at least has a *prima facie* tendency to realize its essence.

If Reinach's treatment of promising is sound, then it is clear that there are many other social acts which have their uninventable ideas and which can therefore generate out of themselves effects in the world of right. Indeed, it would be surprising if promising were the only such act. In referring to something which belongs to me and in saying to another something like, "Take it, it's yours," or "I'd like to make you a gift of this," I perform a social act of giving something to another, a social act which out of itself effects the transfer of property, and which just as truly belongs to the nature of things as does the act of promising. There is surely also a social act of lending; surely also of transferring a claim or an obligation to someone else. We can only refer here to the masterful *apriori* analysis in Reinach of these and other social acts, and of certain modifications of the social acts, such as the conditional performance of them, or the performance of them by one person in the name of another. Of course, as already mentioned, not everything which the person does and which needs to be heard is a social act which explains out of itself its effects.

There is surely no social act of baptizing, at least not when baptism is understood as being far more than just the conferring of a name, and as having the supernatural effects in the soul of the baptized person which Christianity ascribes to baptism; no act of the human person could out of itself bring forth these effects.⁴⁰

And so we claim to have given new support to Reinach's position by overthrowing from its foundations the constitutive rule theory of those acts which we call social acts. One way of characterizing the basic error of the theory would be as follows: on the one hand, it absurdly *exaggerates* man's power of acting and doing when it assumes that man can devise the structure of the basic social acts, for not even divine power can devise them; but on the other hand it vastly *underestimates* man's power of acting and doing when it assumes (as we saw in the previous section) that man can produce out of himself only intentions and linguistic utterances and when it fails to see the power of the person to act and to do, to generate, to modify and to abolish by means of social acts.

§6 *Towards developing and deepening Reinach's analysis of the social acts; Reinach and Wojtyla, Reinach and Husserl*

It has been said that the realist phenomenology represented by Reinach has tended to investigate acts of the person rather than the basic structures which are constitutive of the being of the person and which make possible the acts of the person. Reinach's investigation of the social acts displays this limitation. For though he is led to recognize a "*rechtliches Grundkönnen der Person*" as "the ultimate ground of the possibility of forming social relations of right" (p. 81), he does not develop this idea, nor does he anywhere else attempt to show how the nature of the person makes the social acts more intelligible; his study does not really go beyond the social acts as acts. This is why it seems to me that his whole theory of the social acts would be deepened, and receive a whole new foundation, if it were situated within a philosophy of the person. And it seems to me that it is Wojtyla's work in the philosophy of the person which is especially well suited to providing this foundation.

Wojtyla introduces the concept of *self-possession* in trying to capture the basic structure of the person.⁴¹ The idea is that the person is a being who in a unique way belongs to himself, who in a unique way is himself and is not another. *Persona est sui iuris*, the Scholastics said. This self-possession is actualized on different levels. It is actualized when a person emerges from a state of distraction and recollects himself. He gathers himself into one out of a state of dispersion, he recovers the center of his being. He takes possession of his being, and achieves a certain self-

presence. He becomes more capable of determining himself in freedom, and of taking on and bearing responsibility. Now in all this he comes into his own as person, actualizes himself as person: which presupposes that the self-possession which he achieves characterizes him as person, and in some sense is proper to him as person even before he achieves it. On quite another level this self-possession is actualized when a person grows up as person. A child repeats what it hears from others, and imitates what it does not yet understand. The origin of its thought and action lies outside of itself. It comes into its own as person when it comes to think for itself, and to perform actions which are really its own, which completely originate in itself. What interests us is that this taking possession of oneself is at the same time the actualization of oneself as person. One can also approach this self-possession through certain acts of the person. It has long been recognized that the act of knowing, for example, does not simply lose itself in the object known but, as act of the person, is an act in which I am necessarily also aware of myself as knowing. Wojtyla takes special interest in the way in which the self-possession of the person forms every exercise of freedom, giving it the character of a conscious self-determination of the person who acts freely. Quite another access to this self-possession is available to us through our moral experience. When we see someone being used as a mere means, or regarded and treated as a mere part in a whole, the violence against him which we keenly feel presupposes that he as person possesses a dignity, in which dignity we discern, as its ground, the self-possession of the person.

The question is what significance this self-possession of the person has for the philosophy of right. It seems to me that there is one very important consequence for understanding at least a major part of the foundation of the most basic rights of the person: I think it can be shown that these rights are not just anyhow grounded in the person but are grounded in the person precisely as one who belongs to himself. This is why we find that to violate such a right is not just to harm another but to invade what is his own, to lay violent hands on what only he is entitled to dispose of. But our question here is more exactly whether Reinach's social acts are grounded in this structure of self-possession in the person. And it would seem so. Does the person not exercise his self-possession in a certain way when he makes a promise? Does the person not dispose over what is his own as a result of belonging to himself, when he gives another person a claim against himself? If a person does not perform the act of promising, then (we assume that he is not already obligated to the promised activity on grounds other than promising) this other person does not have any claim on him to perform the activity in question. As person he belongs to himself and is not subject to just any demand made

by another person. He has rather to modify what flows from his personhood if the other is going to get a claim against him. Reinach's student, Conrad-Martius, got a glimpse of this deepened understanding of promising on the basis of the personhood of the promisor; in reflecting on Reinach's analysis of promising, she writes:

When I promise someone to do something I *divest* myself of my personal freedom in a certain direction and in a certain sense — and not just in the sense of willing or resolving, rather with this act I *bind myself to the other person* in a real way. I *abandon myself as person* to the other in that definite direction and in that definite sense. It is no wonder that from this act results a claim in the other and an obligation of myself to him. Only a person as person can do this; for only the person has the freedom towards himself *to transcend himself!*⁴²

I shall not attempt to develop and to ground critically the "personalistic" foundation of the social acts which I am here suggesting. Nor shall I speak of Reinach's analysis of owning and property, and of how it too might be deepened through an adequate philosophy of the person — of how the person's belonging to himself establishes the possibility of a thing belonging to him in the sense of property. I only want to point in the direction in which, as it seems to me, one could most fruitfully deepen Reinach's work. If this deepening were successfully carried out, one would offer further evidence (in addition to that just offered in the previous section) for the uninventability of the essence of promising: for promising is not a product of conventional rules if its possibility and structure flow intelligibly from the structure of the person (unless one is going to maintain the absurd position that the structure of the person is itself a product of conventional rules). Indeed, such an understanding of promising in terms of the person would make the act of promising more intelligible than it has hitherto appeared in our analysis.

We want to protect our reflections here against a misunderstanding by posing the following question, and then trying to answer it. We referred above in our introduction to the objection which transcendental phenomenology makes to Reinach's pure theory of right. It objects that Reinach fails to go on to ground in transcendental subjectivity the relations of essence which he brings to evidence; that he stops with a onesidedly objectivistic consideration of the issues. One might now ask whether we, in proposing that Reinach's social acts, as well as his understanding of property, be grounded in personal subjectivity, are not implying that Reinach's apriori theory of right has, as it stands, exactly that weakness which Husserl claimed to find in it.

We in no way imply this. It is one thing to proceed from an analysis of acts of the person, to the structure of the person in whom these acts are grounded, and it is quite something else to proceed from the essences of our acts to the performing subject of them and to interpret these essences as products of the performing subject. It is obvious, then, that there are two ways of providing a subjective foundation for something, only one of which has anything to do with idealism. The essence of a thing may be objectively connected with the essence of the personal subject and one may therefore make it fully understandable only by considering it in the light of personal being. This is the case with the essence of acts of the person. To make the social acts more intelligible by considering them in the light of personal subjectivity and to provide in this sense a subjective foundation for them, is compatible with the sternest realism regarding essence. But the talk of a "subjective foundation" comes to mean something utterly different when one wants to explain the essence of a thing as the product of some activity of personal subjectivity. It does not matter whether this activity is understood as deliberate or not, or as fully conscious or not, or whether it is understood as a punctual act or as a continuous, habitual stance, or whether it is understood in a more or less "transcendental" way: however the activity is further qualified, it forms the basis of an idealist interpretation of that which is explained as a product of the activity. Wojtyła's philosophy of the person thus has nothing at all to do with Husserl's philosophy of transcendental subjectivity, and the incompleteness which we would find in Reinach's apriori philosophy of right, has nothing at all to do with the incompleteness which Husserl claimed to find in it.

§7 *The apriori sphere of right discovered by Reinach in its relation to the natural moral law*

Husserl ascribed great significance to Reinach's distinction between his apriori sphere of right, and what has been called the natural moral law (pp. xii-xiii).⁴³ Of course Reinach does not want to distinguish them by reserving apriori necessity for his sphere of right, and denying it to norms of the natural moral law. He makes the distinction in this way: the natural law has to do with norms of justice and with what *ought to be*, whereas his study of the legally relevant social acts and of owning (which is of course not a social act) has rather to do with what *necessarily is*. Reinach does not say that, for example, a third-party beneficiary *ought* not get a claim from the act of promising; he says that it simply is so, by the very nature of promising, that the third-party gets no claim. Nor does he say in his discussion of owning that whoever makes something out of

materials which did not belong to anyone *ought* to own the thing made; he says that the maker *necessarily does* own it and could not fail to own it (pp. 72-74). Of course the keeping of a promise is a matter of justice, as is the respecting of someone's property, but Reinach does not investigate this justice but rather the factors which give rise in the first place to obligation and to owning, and which determine the structure of these and other relations of right.

Perhaps we can clarify this by drawing a parallel to Husserl's well-known distinction between two spheres of logic. In the fourth of his *Logische Untersuchungen* he distinguishes the (more widely recognized) "higher" sphere of logic which deals with truth, falsity, and validity, from the "lower" sphere which deals with the laws concerning the constitution of units of meaning and especially of the judgment or statement. This lower sphere of logic (which was cultivated by the "speculative grammarians" of the Middle Ages) deals with the different kinds of concepts, and with those combinations of concepts which yield new meaning-unities (in contrast to those which do not, such as "red if from strongly"), and especially with those which constitute a judgment. Husserl shows that there are laws to be found here which are strictly apriori, and are quite distinct from the changeable rules of a given grammar. Now the judgment can be considered in both spheres of logic. In the higher sphere, one inquires into what the truth or falsity of a judgment is, or into the formal conditions for the truth of a judgment, or into the logical principles of contradiction and excluded middle. In the lower sphere one investigates, for example, what kind of copula the judgment (as distinct from the question) must have, or whether every judgment must have a predicate. Now in a parallel way, one can consider promising under two different aspects of right (*Recht*). One can consider it as a matter of justice, of respecting other persons, of "keeping one's word," or one can go to a more elementary lower level of investigation and ask questions which are prior to questions of justice, such as whether the promise has to be accepted in order to be complete, or whether the claimant and beneficiary have to be the same person. The former considerations typically belong to the natural law, whereas the latter belong to Reinach's sphere of right.

But if we stress the distinction between Reinach's apriori sphere and the natural law, we have also to see their interconnection. Natural law philosophy presupposes the apriori sphere in his sense, and presupposes it in a more "thematic" way than the higher sphere of logic presupposes the lower. In asking, for example, whether it was fair or just for a promisee to waive his claim, one of the givens which enters into our deliberations is the apriori fact that the promisee *qua* promisee has the power to waive his claim. Indeed, everything which follows from the

social acts which are at stake in a given situation enters into our deliberations regarding justice. The laws in Husserl's apriori grammar, by contrast, though they are of course at least tacitly known to everyone who uses language, are nevertheless not such that they become thematic when we ask about the truth of a judgment; that is, one does not take a step towards determining the truth of the judgment by drawing out those apriori laws which regulate the constitution of the judgment as a logical whole. But Reinach's apriori sphere becomes thematic in considerations of justice, even if one has to go beyond it in order to reach a decision as to what is just.

It must be admitted that when one looks more closely into all the statements which Reinach makes regarding his apriori sphere of right in its relation to the natural moral law, one encounters some real difficulties. One wonders, for example, whether Reinach's sphere of right really distinguishes itself, as Reinach thinks, from the natural law in that only the latter has a normative function with respect to the positive law. Is Reinach's apriori sphere of right really so lacking in normative importance for the positive law as he claims (p. 135)?^{43-a} But we do not propose to pursue these difficult questions here.

§8 Legal obligation and moral duty

There is something else which Reinach says by way of marking off his apriori sphere of right from the specifically moral sphere. In Chapter One of his study (pp. 13-14; 44-46), he distinguishes the rights and obligations which are characteristic for his sphere of right from specifically moral rights and obligations. The person who promises generates an obligation (*Verbindlichkeit*⁴⁴); his promising is the positing of the obligation; he is the sole creator of it. It is also characteristic for this obligation that it can be directly destroyed by the promisee who waives his claim, and can under certain circumstances even be destroyed by the promisor himself. It is further characteristic for this obligation that it can under certain circumstances be transferred from one person to another. By contrast a moral duty (*Verpflichtung*⁴⁴) depends on what Reinach calls "*die sittliche Rechtheit von Sachverhalten*" (p. 13), by which he seems to mean above all that a moral duty is withdrawn from our arbitrariness, that it cannot be directly produced or abolished or handed over to someone else: it is rather grounded in the essences of things other than acts of the person. Thus (Reinach would say) the moral duty to respect the truth is grounded in what truth is; the duty to treat another person as a person and not as a thing is grounded in what a person is.

Reinach attempts a parallel distinction between moral and legal (but

pre-positive) rights. The right of the promisee is directly posited by the act of promising and can be directly abolished by the promisee, and can also be transferred. Other social acts come into question here, such as lending. The act of lending either creates in the borrower rights over the thing which is loaned to him, or else it transfers such rights from the owner to the borrower (pp. 66-69). But a moral right, such as the right to act according to one's conscience, is grounded in the nature of the person, and cannot be transferred.

Since it is not completely clear to us just what we are to understand by the moral character of a right — though it is quite clear what the moral character of an obligation or a duty is — we will in the following remarks focus mainly on Reinach's distinction between obligation and duty.

The most obvious difficulty with this distinction is that the very act studied so closely by Reinach, the act of promising, seems to constitute an exception to what he is here maintaining (Reinach poses this difficulty to himself on p. 14; pp. 45-46). For there is also a moral duty to do the thing promised, as Reinach recognizes, and this moral duty seems to be posited by the act of promising. A person may want to be morally bound to do something, and to this end he may promise to do the thing. Reinach seems to want to meet this obligation by saying that what is directly posited by this act is the obligation (*Verbindlichkeit*); since the fulfillment of this obligation is also a moral duty (*Verpflichtung*), the duty is indeed also posited, but indirectly. Thus his position is, not that we cannot bring about moral duties for ourselves where none had existed, but that we cannot do this with that same directness with which obligation (*Verbindlichkeit*) can be generated. But even if this response is satisfactory, Reinach's way of distinguishing between the rights and obligations belonging to his apriori sphere and properly moral rights and duties is still not secured. For in the case of authentic authority (whether of the state, or of a father, or of God), an action is made morally binding for me simply because it was commanded by the authority. Here a moral duty seems to be directly posited by a person. Or would Reinach try to find here, too, a distinction between an obligation directly posited by someone with authority, and a moral duty to fulfil the obligation? But even if Reinach could find such a distinction, he is still open to an objection regarding the other half of his claim. For he not only holds that moral rights and duties are never directly posited by acts of the person, but also holds, at least by implication, that the legal rights and obligations of his apriori sphere are always so posited. Now in his discussion of the nature of property and ownership Reinach convincingly argues that whoever makes a thing out of materials which were not owned by anyone comes to own that thing and acquires all the rights over it which are implied in ownership (p. 73).

These property rights are not directly posited by the maker; they rather spring out of the nature of making. And yet these rights are not what Reinach calls moral rights (though they are of course morally relevant for others) and they are not grounded in a person simply because he is a person; and they have the transferability (as in the case of lending) which Reinach takes as essential for his *a priori* sphere of right. We find the same thing in the case of obligation; it, too, can be acquired apart from any act which directly posits it, as when a thief acquires an obligation to return the thing stolen to its owner. It seems, then, that the rights and obligations which Reinach means to contrast with more properly moral rights and with moral obligations or duties, can, in their origin, be completely withdrawn from our arbitrariness.

But even if more work has to be done on the distinction which Reinach is aiming at, we are convinced that there really is this distinction. This is quite clear in the case of the social act to which we have given so much attention, the act of promising. The obligation produced by promising can be distinguished in several ways from the moral duty to fulfil the promise. 1. A person could be morally blind, and not perceive any specifically moral demands upon himself at all, and therefore not perceive the moral duty to keep one's word, yet he could still know what a promise is, and what the obligation is which results from it. 2. It is possible to fulfil this obligation without fulfilling any moral duty. If a promisor fulfills simply out of fear of the harm which the promisee will inflict on him in the event of non-fulfillment, then though he really does fulfil his obligation and satisfy the claim of the promisee, he does not fulfil any moral duty. Perhaps he does not do anything morally wrong, but, to speak with Kant, he acts merely according to duty and not from duty. He would have to act out of respect for the other as person, and out of a desire to do his duty, if he were really to fulfil a moral duty. But the obligation directly posited by the promise does not need any particular respect or desire in order to be completely fulfilled, it can be perfectly fulfilled by one who acts out of the basest desires. 3. The obligation resulting directly from the promise is correlated to the claim of the promisee; obligation and claim are simply two sides of the same relation of right. But the moral duty to fulfil the promise is not in the same way correlated to the claim of the promisee. His claim on me is not that I fulfil any moral duty. If one were to express the matter religiously one would say that the addressee of the moral duty is God and not the human promisee.

We have not only to distinguish the obligation and the duty connected with promising but also to show their interrelation. It seems to us that Reinach quite rightly holds that the duty presupposes the obligation

in the sense that there is a *prima facie* moral duty to fulfil all obligations which we take on by promising.

And yet even after we have said this much on the distinction and the interrelation of obligation and duty as they arise from promising, we have still not determined exactly the extent of this distinction and interrelation. Reinach draws the distinction more sharply than we have hitherto drawn it when he holds that even when the content of a promise is immoral and there is therefore no duty to fulfil it but rather a duty not to fulfil it, the act of promising is nevertheless performed and it generates its characteristic obligation. The obligation does not ground a moral duty, but still exists as obligation (pp. 45-46). Reinach would probably admit that if an attempted promise involved an absurdity opposed to the very essence of the act — if I were to promise to do what I have already done in the past, or to promise something not for myself but for another (who had not made me his representative) — then the act is not really performed and no obligation results. But Reinach does not think that the moral considerations which overrule our *prima facie* moral duty to keep a promise, subvert the essence of promising in the same way. On this view, Reinach is able to investigate legally important social acts, like promising, while completely prescind from moral considerations, whereas certain moral considerations would inevitably enter into the same investigation if one were to think that a morally unobjectionable content in a promise is a condition for the possibility of it being a real promise and producing a real obligation.

The issue is very like the issue in the philosophy of the positive law regarding immoral laws: are such laws no laws at all, or rather real laws, but immoral ones, which may have no claim on our adherence? And it is no less difficult an issue. On the one hand, certain analogies with other social acts seem to give strong support to Reinach's position. Thus the act whereby a promisee waives a claim seems to be fully effective even when it is morally very wrong. Perhaps someone who wants to give up excessive drinking provides himself with an additional motive for not drinking by promising me that he will not drink. It may be morally very irresponsible of me to let him out of his promise — we can imagine a case where I would thereby remove the last obstacle restraining him from drinking again — and yet I can effectively release him, I can effectively waive. Even if I have *promised* not to release him, I can still effectively release him. And so one could think that promising, too, is similarly free from moral considerations. On the other hand, one could say that one can contradict the essence of promising not only in a formal way, as in promising what I have already done, but also in a more material way, as in binding myself to do what I am morally bound not to do, and one could say that this more

material contradiction of the essence of promising just as much subverts the act of promising as does the more formal contradiction. One could add that the act of waiving, since it is merely the exercising of a certain power (*rechtliches Können*) which I as promisee have, does not form the basis of a real contradiction when I waive irresponsibly, whereas promising, since it is the positing of an obligation, does give rise to a (material) contradiction when I promise something immoral. We shall not try to decide this difficult question and thus to determine just how independent obligations are from duties. Even if one did not think that they are as independent from each other as Reinach thinks, the distinction of one from the other would remain intact, as would the distinction in general between the focus of Reinach's apriori theory of right, and the focus of the ethics of interpersonal transactions.

§9 *Some consequences of Reinach's discovery for political, legal, and moral philosophy. Conclusion of the dialogue with speech act theory*

And now we shall try to display the fruitfulness of Reinach's study of the apriori sphere of social acts by drawing out five of the consequences for moral and legal philosophy which follow from it. Only the first of these consequences was explicitly drawn out by Reinach himself (p. 136-37)

1. There is a consequence for the problem of the origin of the state. It has often been held that acts like contracting cannot possibly be introduced by way of explaining the origin of the state, since they presuppose the state and its civil law as the condition for their possibility. It is said that one would argue in a circle in offering such an explanation. But it follows from Reinach's analysis that there are many social acts with effects in the world of right which are possible by the very nature of things and which in no way presuppose any civil law, and which therefore do not involve any circularity when considered as giving rise to the existence of a legal order. Reinach does not go on to assert that the state does in fact owe its existence to any acts of contracting, or to any other social acts. He only clears away one of the usual objections against philosophies which let some kind of social act play some role or other in the formation of the state.

This first consequence follows equally from the speech act analysis of promising, for this analysis grounds promising and the other illocutionary acts, not in the civil law, but in certain semantic conventions which can be prior to all positive law. None of the remaining consequences which we shall draw out, however, follow from the speech act analysis, and may therefore serve to develop our critique of this analysis.

2. There is a consequence for the question whether there exists positive international law. One of the main arguments for the existence of such law (as made, for instance, by Hart, *The Concept of Law*, ch. x) partly depends on the conventionalist theory of promising. One argues that treaties⁴⁵ between states are possible only because certain enabling rules are recognized among them; these rules are said to constitute international positive law (see Hart, pp. 219-220). But if Reinach's analysis of the social acts is sound, and if, as we think can be shown, a corporate entity like a state can, in the nature of things, perform the social act of binding itself towards another corporate entity, just as one individual can bind himself to another individual, then the possibility of treaties between states is established by essential necessity and constitutes no least evidence for the existence of international positive law. Other quite different arguments will have to be found if one is to establish the existence of such law.

3. We come now to a much weightier consequence which follows from Reinach's philosophy of right. It has often been held that all obligation, whether legal or moral in the sense of moral duty, is constituted by some kind of coercion. Many legal theorists, though they differ greatly in their account of what law is, have held that when a course of conduct is obligatory it is no longer optional, and that this lack of being optional is explained by coercion. Often they have distinguished between physical coercion as the source of *legal* obligation, and a coercion of condemnation and disapproval as the source of *moral* obligation or duty. They mean not merely that physical coercion is typically used to secure compliance with legal obligation, but rather that such coercion is that which constitutes legal obligation as obligation. But according to Reinach's investigation of promising, the act of promising generates its obligation out of itself, and therefore in no way needs to be supported by any kind of coercion in order to bind the promisor. The binding power of promising is made completely intelligible by the essence of the act itself. Even if there is no physical coercion supporting a promise, the promisor would nevertheless bind himself; and even if there is no moral coercion supporting a promise, the promisor is nevertheless morally bound to do what he promised (as long as no countervailing or overriding moral factor is at stake).⁴⁶ This shows that coercion is in no way constitutive for the binding force of obligation, whether for a legal obligation or for a moral duty.

4. Reinach's essay also has consequences for the much-agitated problem of deriving an "ought" from what "is," and these are undoubtedly its most significant consequences. Kelsen speaks for many legal theorists in holding that the derivation is impossible, that there is an absolute dualism of "ought" and "is."⁴⁷ He means that there is an

unbridgeable logical gulf between sentences expressing what ought to be and sentences asserting what is the case, so that sentences of the latter kind can never ground normative sentences. Kelsen would say, then, regarding the obligation of promising that we either have to assume or postulate that promises ought to be kept, or we have to derive this norm from other norms in a normative system whose ultimate or basic norm has to be assumed or postulated. But no norm can be grounded in being, can be grounded in the nature of things. This means that no norm can be grounded at all, as Kelsen himself ultimately admits.

Reinach's study of promising overthrows Kelsen's dualism. The act of promising, as an entity which is partially physical and partially mental, belongs to that which is, it is not itself a norm, not an ought; indeed, it is situated in the world of nature. In understanding why the act of promising, in virtue of its character, generates an obligation in the promisor, we are confronted directly by an ought proceeding from what is. There is no need to set up any arbitrary postulates in order to ground this ought: the essence of the act of promising grounds it completely. Reinach's study also enables us to see how the *moral* duty to fulfil promises is grounded in being. For this duty also depends on the act of promising, even though, as we saw, it is not posited by the act of promising in the same direct way in which the obligation is posited.

We do not deny that it often happens that one tries to derive an ought from facts which will not support it, and that it is the merit of Kelsen and many others to warn against these derivations. It seems that neutral empirical facts are never able to support an ought. If it were the case that, for instance, man has a psychological tendency to do what he has promised to do, and a psychological tendency to demand what has been promised to him, these facts would not, as Kelsen would rightly insist, ground any obligation in the promisor or any claim in the promisee. Even if one considered the act of promising itself ever so elaborately, but only as a subject of empirical psychology, or sociology, or semantics, one would never find any ground for an ought. This is why Kelsen supports his dualism of is and ought by an empiricist theory of reality and of knowledge. But if philosophy finds that there is more to reality than shows itself to purely empirical methods of investigation, if philosophy is able, with its characteristic method of intellectual insight, to get at the essences of things and necessary states of affairs, then the question comes up whether here, at this deeper level of being, a ground for an ought can be found. Of course even at the level of essence it is possible to try to ground norms on an insufficient basis. If for instance one were to hold that man has a tendency to do what he promises and that this tendency is grounded in human nature, one would indeed move from a

merely psychological to a more metaphysical claim, but would still not ground the norm prescribing the fulfillment of promises. But if we penetrate the essence or idea of the person and of the act of promising, as we have attempted it, then we find in the character of this act itself the intelligible ground of an obligation and also of a moral duty in the promisor; no postulates need be set up in order to derive this twofold ought. This grounding of obligation and duty would be greatly deepened if, according to our suggestion in §6 one were to ground the act of promising in the nature of the person, for then one would ground the *ought* of the promise in the *being* of the person and not just of a particular act of the person.

We also see here the falsity of Kelsen's teaching that, if there were an objective moral order, then it could only exist as the result of arbitrary divine or other decrees (he thinks an objective moral order could only exist as it is conceived in voluntaristic moral philosophy). For if the obligation to keep a promise is grounded in the very nature of the act of promising and ultimately in the very nature of the person, and if this can be understood without consulting any decrees but simply on the basis of this act, then the voluntaristic theory is to that extent falsified. Our main concern here, however, is with Kelsen's dualism of is and ought.

As is well known, Searle makes much of the fact that an ought can be derived from an "is" if the "is" is something like a promise.⁴⁸ But Reinach clearly goes further, incomparably further, in grounding what ought to be in what is, if only because Searle has recourse to a "being" whose essence depends entirely on human arbitrariness, whereas Reinach has recourse to a "being" whose essence is eternal and unchangeable. But there is more to the fuller "being" of Reinach's than this unchangeableness.

Let us try to understand why that which exists only as an institutional fact is in one respect less real than that whose essence is prior to any constitutive rules. Just as we bring out a certain dimension of objective reality in saying that a thing exists "in itself" and not as an appearance or an illusion, so we bring out another dimension of objective reality in saying that a thing exists outside of any system of constitutive rules, and does not exist as an institutional fact. It seems immediately evident that institutional facts like moving or losing a pawn in chess (considered as *chess* moves and not as physical motion) are not "real" events: I do not "really" do something in moving a pawn, as I do for example in harming or benefitting another, nor do I "really" undergo something in losing a pawn, as I do in for example being sick or being sad. And the reason seems to be this: that which exists only in some system of constitutive rules does not really exist "in itself"; its being lies curiously outside of itself.

This is reflected in our knowledge of an institutional fact. We cannot know what a given institutional fact is at all without referring to the constitutive rules; it has its whole sense and character only with reference to these rules. Whatever has its being prior to constitutive rules, exists in itself in such a sense that it is more real than any institutional fact. A being which is more real in this respect might be nothing more than an appearance such as a color quality, and yet, insofar as its being is not outside itself but immanent to itself, it is more real than any institutional fact.

And there is another, closely related reason for the lack of reality in any institutional fact: such a fact does not exist in *the one real world*; it exists only in some particular artificial world which is arbitrarily set up by human devising. An institution as a whole, such as the game of chess, exists indeed in the one real world, for it is not itself an institutional fact. The rook and the pawn and the other pieces (considered as *chess* pieces and not merely as physical objects), as well as the moves which are possible with these pieces (considered as *chess* moves and not merely as physical motion), do not in the same sense exist in the one real world, but rather only in the particular world of chess. I do not deny that in many respects of value or meaning an institutional fact may surpass that which exists in itself and prior to all constitutive rules; I only say that in respect of a certain objective reality, an institutional fact is as nothing compared to what exists in itself.

If, then, Searle holds that promising is an "is" which can ground an "ought," but if promising *qua* promising exists for him only as an institutional fact, then he grounds an ought only in a very weak and thin kind of being. We go much further in grounding in being the ought of the promise, for the act of promising, being a natural act of the mind, is for us essentially more real than for Searle. This is why Searle's position represents no approach to natural law philosophy, whereas Reinach's position on the being in which the norms of promising are grounded, implies an important contribution which is in deep solidarity with that philosophy.

One more point: it is not only our argument that *obligation* and *duty* are intelligibly grounded in a certain act of the person, which challenges the modern dogma of an absolute dualism of is and ought. The fact that we have also explained how this act gives rise to *claims* and *rights* in the promisee, equally challenges this dogma. For this dogma claims that the whole axiological sphere, and not merely obligations, is ultimately ungrounded.

5. We proceed now to indicate the bearing of Reinach's discovery on the related question of the mode of existence or reality which is proper to the claim and obligation which proceed from certain social acts.

It is not only the act of promising which for Searle is an institutional fact but also the obligation of the promisor. If that which exists only as an institutional fact "is" only in the weak sense just explained, then the obligation of the promisor also "is" only in this sense. On the basis of his dualism of is and ought, Kelsen, too, depreciates the mode of being of the obligation which proceeds from the promise. For though one person might postulate the validity of a normative system which includes enactments prescribing the keeping of promises, another person might decline to make this postulate and might interpret as acts of violence those acts which the first person interprets as positing valid laws: and from the very nature of such postulating and such interpreting, as Kelsen himself admits, there is no way of saying that the one postulate is true and the other false. As a result, if someone makes a promise, we can say only that an obligation exists in the "juristic thinking" of the person who postulates the basic norm, but we have to admit that it does not exist in the "juristic thinking" of the other. For Kelsen, obligation and other normative elements exist only in our thinking and not in reality. We can see how Kelsen subjectivizes the obligation of the promise if we consider that not even he would say that the order of nature and of natural causality exists for one person but not for another, and exists only in someone's "physical thinking"; nature is for him essentially realer than ought's and norms. This subjectivization of obligation of course occurs in Kelsen's framework, whether we speak of the obligation directly generated by promising, or of the moral duty to keep the promise.⁴⁹

The issue raised in these theses of Searle and Kelsen is of the greatest importance for our understanding of morality. For on their position it is surely impossible to do justice to the mysterious seriousness and impact of moral duty. We could not affirm Kant's famous words about the awe which the moral law inspires in us, if in fact moral norms existed only as institutional facts, or only in our ethical thinking. The weight of moral duty, and the unconditional demand which it makes of us, and the way it touches our innermost being as persons, our consciences, presupposes the full objective reality of moral duty. It is thus of the greatest importance for ethics to see how Reinach's discovery enables us to vindicate this objective reality.

We refer first to Kelsen. The obligation to do what we promise, since it is grounded in the being of the act of promising (and ultimately of the person), is fully real. The obligation of the promise is not just a certain way of interpreting certain acts of willing, as Kelsen holds; if we deny that the promisor is under an obligation (including a moral duty) to fulfill his promises, we are not simply declining to make an arbitrary assumption, we rather err. The obligation (including the moral duty) of a prom-

ise does not just exist for those who decide to set up certain postulates, does not exist merely in their juristic thinking; it exists *simpliciter*, it exists in itself, so that whoever would judge rightly about a given obligation has to recognize its existence. And now to Searle. Since he says that the obligation of the promisor exists only as an institutional fact, he too fails to do justice to its reality. The obligation of promising proceeds from a natural act of the person and is no more an institutional fact than is the act of promising itself: as a result, the obligation exists in itself and not outside of itself in the manner of an institutional fact. The obligation, as also the moral duty which it grounds, is situated in the one real world and not simply in some particular artificial world set up through constitutive rules of human devising.⁵⁰

Now that we have seen the loss of reality which entities like claim and obligation suffer in the speech act analysis, we naturally wonder what it is in this analysis which gives rise to this distortion of the given. There is an idea in Reinach which perhaps gives us at least one answer to our question. He mentions more than once the empiricist prejudice that all reality is either psychic or physical (p. 137). Confronted with a datum like obligation, the empiricist has three alternatives. He can press it either into the category of the physical or, what is more plausible, of the mental. This latter was the approach taken by all the many forms of psychologism which dominated philosophy at the end of the last century. Now the speech act philosophers are not drawn to a psychologistic account of illocutionary acts, yet they too show themselves to be under the influence of the empiricist preconception that everything truly real is either psychic or physical. This understandably leads them to the third alternative, namely to account for data like obligation in terms of a scheme which deprives these data of all reality. This means that this loss of reality is not an unintended side-effect of their theory but is precisely that which the theory is supposed to secure. Of course it takes only a little phenomenological orientation to see that this preconception is hopelessly inadequate to the realities given in experience, and to see that there are, among those things given as real, other alternatives to "brute facts" besides "institutional facts."

It might have been thought that, in tracing the foundations of social transactions to certain eternal essences and to certain necessary states of affairs which are knowable a priori Reinach ran the danger of dissipating the concrete reality of these transactions. We now see that just the contrary is the case, for he is led to go much further in affirming this concrete reality than do most contemporary legal theorists. And in general: it is positivism and empiricism which compromise the integrity of the world; and it is only a philosophy which knows of the eternal natures of

things which can do justice to the integrity and reality of the world, including the world of right.

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Notes

1 First published in the first issue (1913) of Husserl's *Jahrbuch für Philosophie und phänomenologische Forschung* reprinted in Reinach's *Gesammelte Schriften* (Halle: Niemeyer, 1921), pp. 166-350; reprinted again under the title, *Zur Phänomenologie des Rechts* (Munich: Kösel, 1953), 215 pp.

2 H. Conrad-Martius, in her introduction to Reinach's *Was ist Phänomenologie?* (Munich: Kösel, 1951), p. 7. (This booklet is a reprint of Reinach's famous 1914 lecture on phenomenology.)

3 Cf. Husserl, *Cartesianische Meditationen* (The Hague: Nijhoff, 1963), §59, pp. 165-66.

4 I have discussed the whole philosophy of the apriori and the realism of Reinach's phenomenology in ch. ii of my introduction to the reprint of his *Gesammelte Schriften* (Munich: Philosophia Verlag, 1984).

5 Husserl, "Adolf Reinach," *Kant-Studien* 13 (1919), p. 148. The present volume contains the first English translation of this obituary notice of Husserl.

6 "Zur Theorie des negativen Urteils," *Gesammelte Schriften*, pp. 56-120. This study of Reinach's was translated in English for the first time by Don Ferrari, and published in *Aletheia*, II (1981), pp. 9-64. It was subsequently also translated by Barry Smith and published in Barry Smith, ed., *Parts and Moments* (Munich: Philosophia Verlag, 1982), pp. 289-377.

7 For example, the reader acquainted with the work of H.L.A. Hart will recognize a striking convergence of Hart's critique of the command theory of positive law (*The Concept of Law*, ch. iii, section 1) and Reinach's discussion of the difference between enactments and commands in §8.

8 In the present section and in all the following ones except §3 most of my text is taken from my larger "Studies in the Work of Adolf Reinach," which forms the introduction of the reprint of his *Gesammelte Schriften*. The publisher of the reprint, Philosophia Verlag, Munich, has kindly given me permission to make this use of my introduction to the *Gesammelte Schriften*. As for §3, most of it is taken from my "Towards Grounding What Ought to Be in the Nature of What Is," in Seifert, Morscher, Wenisch, eds., *Vom Wahren und Guten* (Salzburg: St. Peter Verlag, 1982), pp. 187-204. Since both Prof. Barry Smith and Prof. Josef Seifert did me the favor of criticizing the first drafts of these underlying writings of mine, they should be acknowledged and thanked here.

9 He also typically asks certain existential questions, such as whether God exists, whether the human person survives the destruction of the body at death, but we here focus on certain essential questions, for these are the ones which phenomenologists have primarily asked up until now.

10 Reinach, "Concerning Phenomenology," in *The Personalist*, 50 (1969), pp. 194-221, translated by Dallas Willard. The German original, "Über Phänomenologie," is in the *Gesammelte Schriften*, pp. 379-405; the passage just quoted in the text is at p. 386. This famous lecture of Reinach's will be reprinted in *Aletheia* in the near future.

11 *Ibid.*, pp. 194-220; German: pp. 379-385.

12 Quine, "Two Dogmas of Empiricism," *From an Empirical Point of View* (New York: Harper and Row, 1961), pp. 42-46.

13 It is in my view the distinction of phenomenologists to have done some of the most authentically philosophical work on these and other questions of logic. Besides the work of Husserl there is the important *Logik* (Tübingen: Niemeyer, 1963) of Alexander Pfänder, which has unfortunately not yet been discovered by Anglo-American philosophers. And there are many authentically philosophical contributions to the philosophy of logic in the writings of Ingarden.

14 Reinach, "Concerning Phenomenology," pp. 200-209; German, pp. 385-393.

15 *Ibid.*, p. 203; German, p. 389.

16 *Ibid.*, p. 204; German, pp. 388-89.

17 *Ibid.*, pp. 203-204; German, p. 388.

18 For an explanation of why I translate *vernehmungsbedürftig* as "in need of being heard" rather than recognized or apprehended, see my note on p. 49, where the word gets translated for the first time.

19 On these two dimensions of the will, see von Hildebrand, *Ethics* (Chicago: Franciscan Herald, 1972), ch. xxi.

20 This claim of Reinach's is at the most true of a certain kind of question, but not of the question as such. The rhetorical question is an authentic question, and yet, as rhetorical, lacks the internally complete act of doubting which Reinach thinks is presupposed by every act of asking a question. Consider also the question which a teacher puts to his students; it too is a authentic question, and it too will often lack this doubt. It was Josef Seifert who pointed out to me this problem with Reinach's claim regarding the social act of asking a question.

21 On the subject of this distinction see von Hildebrand, *Metaphysik der Gemeinschaft* (Regensburg: Habel, 1955), pp. 24-28.

22 *Ibid.*, pp. 22-32.

23 Austin, *How To Do Things With Words* (New York: Oxford University Press, 1968), pp. 116-117.

24 Searle, *Speech Acts* (Cambridge: Cambridge University Press, 1969), p. 60; pp. 64-67.

25 *Ibid.*, pp. 57-61.

26 *Ibid.*, pp. 47.

27 It seems to us that P. F. Strawson is rather more alive to the force of this objection than is Searle. But he would try to deal with the objection by complicating the intention which has to be recognized by the other; he says that the one who performs the act of informing "should also intend *A* to recognise his intention to get *A* to recognise his intention to get *A* to think that *p*" ("Intention and Convention in Speech Acts," in Searle ed., *The Philosophy of Language* (Oxford: Oxford University Press, 1977), p. 29), and he admits that closer investigation might reveal an even more complex intention which has to be recognized by the addressee. Like Searle he fails to go beyond the *recognizing of intentions* and to find the *hearing of social acts*.

28 It is interesting that H.L.A. Hart distinguishes between the promisee and the beneficiary of a promise just as Reinach does:

The moral situation which arises from a promise . . . illustrates most clearly that the notion of having a right and that of benefitting by the performance of a "duty" are not identical. X promises Y in return for some favour that he will look after Y's aged mother in his absence. Rights arise out of this transaction, but it is surely Y to whom the promise has been made and not his mother who *has* or *possesses* these rights. Certainly Y's mother is a person concerning whom X has an obligation and a person who will benefit by its performance, but the person *to whom* he has an obligation to look after her is Y. This is something due to or owed to Y, not his mother, whose right X will disregard and to whom X will have done *wrong* if he fails to keep his promise, though the mother may be physically injured. And it is Y who has a moral claim upon X, is *entitled*, to have his mother looked after, and who can *waive* the claim and *release* Y from the obligation. Y is, in other words, morally in a position to determine by his choice how X shall act and in this way to limit X's freedom of choice; and it is this fact, not the fact that he stands to benefit, that makes it appropriate to say that he has a *right*. ("Are There Any Natural Rights?" *The Philosophical Review*, 64 (1955), p. 180.

29 Austin, op. cit., p. 14.

30 Ibid., pp. 119.

31 Searle, op. cit., pp. 33-37.

32 Ibid., pp. 35.

33 Rawls, *A Theory of Justice* (Cambridge, Mass.: Harvard University Press, 1971), pp. 344-45.

34 Hart, "Legal and Moral Obligation," in Melden, ed., *Essays in Moral Philosophy* (Seattle: University of Washington Press, 1958), p. 101. Cf. Hart, *The Concept of Law* (Oxford: Oxford University Press, 1961), pp. 42-43; 83; 219-220.

35 I am aware that thinkers in the speech act tradition do not agree among themselves as to the extent to which illocutionary acts are made possible by conventions and constitutive rules. Strawson, op. cit., goes farther than Searle in recognizing illocutionary acts which lack a conventional basis. But he seems to agree with Searle as to promising and its conventional basis, nor would he dream of arguing the naturalness of any illocutionary act as Reinach argues the naturalness of promising and other social acts.

36 We are well aware that many philosophers of mathematics would hold that geometric entities are only man-made constructions. It will be impossible to make the inner unity of promising clearer to them by comparing it with geometric figures such as the square. On the other hand, we are convinced that an investigation parallel to the present one concerning promising, could be carried out concerning the square, the circle, etc., and could establish that these are uninventable essences, just as the present investigation aims at establishing that promising is an uninventable essence. Cf. the passage from Descartes quoted immediately below.

37 Let us protect our argument from a misunderstanding: we do not say that the *only* alternative to being an institutional fact is to be something the essence of which is uninventable. The different plant and animal kinds, for instance, in no way depend on constitutive rules, yet there is not an uninventable essence of the horse, the bull, the oak; if there were such essences, then these kinds would be open to direct philosophical investigation and they would not rightly be studied empirically. We only mean that when the essence of something is uninventable and when this idea is the ground for the characteristic states of affairs about that being, then the being is independent of constitutive rules.

38 Descartes, *Meditations*, 5th meditation, beginning.

39 Hume, *Treatise of Human Nature*, Book III, section 1.

40 Besides, baptizing clearly lacks the inner unity which is found in promising: there are no apriori states of affairs grounded in baptizing as there are in promising; nor can its structure be understood from within; we have to be informed about it.

We might add that for the Christian believer baptizing is by no means immanent to an institution in the sense in which checkmating one's opponent is immanent to chess. For the believer holds that, on the occasion of baptizing, God intervenes and works certain radical changes in the soul of the baptized person, and that these changes do not just exist as institutional facts, not even if the institution is of divine origin (cf. our remarks toward the end of our §9 on the mode of being proper to institutional facts). These changes could in principle be worked by God apart from baptizing. So the believer need only grant that there is no natural act of the mind called baptizing, but he denies that the effects of Christian baptism exist only as institutional facts.

41 Wojtyla, *The Acting Person* (Dordrecht: Reidel, 1979), ch. iii.

42 Conrad-Martius, in her *Einleitung* to Reinach's *Gesammelte Schriften* (Halle: Niemeyer, 1921), p. xxiii; my translation.

43 Husserl, "Adolf Reinach," pp. xii, xiii of the present volume. What Husserl says here could easily give rise to the wrong impression that Reinach was antagonistic to natural law

philosophy, for Husserl says that Reinach's discovery in the philosophy of law does not go in the direction of the "fundamentally mistaken idea of a 'natural law.'" Husserl must be above all referring to what Reinach says at pp. 137-38 of the present volume. In this passage, and especially in §2 where he contrasts moral rights and obligations with legal rights and obligations, and in §8 where he contrasts the objective ought-to-be of certain states of affairs, with the ought-to-be posited by enactments, it becomes clear that he definitely recognizes the *reality* of which Cicero and Aquinas and the whole natural law tradition speak, that is, he recognizes an objective moral order, which is also relevant to the critique of the positive law. He objects only to a certain philosophical explanation of this moral order in terms of a purely factual psycho-physical "nature," on the grounds that such an explanation tends to compromise the inner necessity and universal validity of moral principles. If one speaks of rejecting natural law as a "fundamentally mistaken idea" in the sense in which a legal positivist would reject it, then we have to say that Reinach, far from rejecting it, emphatically commits himself to it, and in fact the position which he tends towards is in some respects more radically opposed to legal positivism than are many of the traditional formulations of the natural law. On the same page Husserl goes on to make a statement which seems to us not only misleading but simply false; he says that Reinach conceived of the moral order which is relevant to the critique of the positive law as something purely formal, that is, as related to the content of the positive law as formal logic is related to the substantive results of the natural sciences. In order to see how foreign to Reinach's mind this formalistic understanding of the moral law is, one has only to consider his statement that "crimes like murder, infliction of bodily harm, rape, and the like undoubtedly have their moral disvalue apart from any positive norm" (Chapter 2, note 3), to which he then adds theft and embezzlement; and then to consider how relevant such pre-positive norms, which are anything but purely formal, are to the critique of positive law. It is true that Reinach says (p. 136) that one cannot derive from any pre-positive order of right the exact way in which the contract of sale for a house is to be drawn up and that the relevant apriori norms are formal relative to the content of the applicable positive law. But there is no reason either to think that Reinach meant that this formality is like the formality of formal logic considered in relation to substantive scientific results, or to think that he held that the apriori norms of morality and right can never go so far as to prescribe the content of a good positive law.

43-a Thus Wolfgang Waldstein, professor for Roman law, who is one of the few recent legal philosophers to build on Reinach's work, finds that many of the structures investigated by Reinach were in fact "*vorpositive Ordnungselemente*" for the Roman jurists in giving their decisions, and this quite rightly and without any taint of the "ontologism" which Reinach claims to find sometimes in the Roman jurists (pp. 124-27). Though Waldstein does not write in conscious opposition to Reinach, what he says implies some criticism of Reinach's claim that his sphere of right is completely non-normative for the positive law. See Waldstein, "Vorpositive Ordnungselemente in Römischen Recht," *Österr. Zeitschrift für öffentliches Recht*, xvii (1967), pp. 11-12.

44 We shall render Reinach's *Verpflichtung* as duty, just as we did in the translation above, and we shall reserve the term, obligation, for Reinach's *Verbindlichkeit*, which he means to contrast with *Verpflichtung* in a way which we are about to explain. Cf. our note 12 in Ch. 1 of Reinach's text.

45 We realize that a treaty is not the same thing as a promise, and that Reinach's analysis does not directly apply to treaties. Reinach does discuss, however, conditional promising (pp. 22-24; 26-27), and takes notice of the importance of this idea for understanding the structure of contracts (ch. i, n. 26). Though Reinach does not develop this, one is nevertheless convinced that, if his analysis of promising in general is sound, and if we

can see in the essence of promising the possibility of conditional promising, then the making of treaties will surely have no less an apriori foundation than the making of a promise.

46 The present point seems to have a cutting edge against Hart. This may seem surprising in the light of Hart's critique of the theory that a positive law is an "order backed by threats." But Hart only criticizes this theory for lacking the idea of a rule; he does not criticize it for deriving the *vinculum* of obligation from some kind of coercion, and in fact he seems to hold that obligation presupposes coercion or at least pressure (*The Concept of Law*, pp. 83-84).

47 For a short statement of Kelsen's dualism of "is" and "ought" see his "Why Should the Law be Obeyed?" in *What is Justice?* (Berkeley and Los Angeles: University of California, 1957), pp. 257-265; for a fuller statement of it in his later work, see his *The Pure Theory of Law* (Berkeley and Los Angeles: University of California, 1970), pp. 1-15; 193-200.

48 Searle, *op. cit.*, pp. 175-187.

49 We are aware that Kelsen puts a certain limit on his subjectivization of obligation, at least of legal obligation, by holding that the efficacy of a legal system, which is a matter of objective empirical fact, is a *condition* for its validity. But it remains the case that for Kelsen this validity itself is not objectively real but exists only in our "juristic thinking."

50 We have here a further respect in which Searle's grounding of an "ought" in an "is" falls short of natural law philosophy; according to this philosophy it is not only the beings which ground oughts but also the oughts themselves which exist in the one real world and therefore not merely as institutional facts.

Discussion

The readers of *Aletheia* are cordially invited to submit articles on Reinach's *apriorische Rechtslehre* for publication in a future issue. We hope that the following first contribution to a discussion of Reinach's work will initiate a lively debate on Reinach's theory of apriori law. Such a debate will foreseeably lead to a further development of *apriorische Rechtslehre* as an alternative to the *reine Rechtslehre* of Kelsen and legal positivism and will enkindle a discussion by philosophers of different persuasions about a prepositive apriori foundation of law, thus allowing Reinach's important contribution to become an essential voice in the contemporary discussion of questions of philosophy of right.

I have to acknowledge a personal debt of gratitude to Professor Crosby who has not only done the major part of the editorial work for this issue and completed excellent translations of Reinach's masterwork and of some writings by other authors on Reinach as a person and as a philosopher, but who has also subjected my following contribution to a thorough critique. This penetrating rigorous critique from the person whom *Philosophia Verlag* in Germany regards as the outstanding Reinach scholar in the English-speaking world, having issued an invitation to him to mediate Reinach's work to the Anglo-American reader in form of an extensive English Introduction to the new edition of *Gesammelte Werke*, has benefitted and improved the following essay very much, even though I have to accept sole responsibility for its content.

Crosby continues to see Reinach's position, in some respects, differently from the way proposed in the following. He is particularly concerned with the question of whether Reinach is not more successful than my essay suggests in delimiting natural law and justice, which are normative for positive law, from apriori law, whose normative role Crosby sees as very restricted, as he expresses in his essay on Reinach. Moreover, according to Crosby it is quite logical to assume that Reinach never makes any claims in his book about the whole sphere of apriori law, not even about *all* apriori facts in civil law. According to this interpretation, Reinach only intends to refer to those limited aspects of civil law of which he himself has spoken at length. Moreover, Crosby believes that, even within this sphere of apriori within civil law, Reinach's thesis about the non-normativity of his apriori sphere for the positive law should be restricted to the "conditional" part of it. Crosby proposes an interesting distinction within apriori law on the basis of Reinach's distinction between conditional and unconditional apriori facts; he thinks that it is the unconditional apriori laws which play a much greater normative role

for positive law than do the conditional apriori laws. Crosby also rejects Husserl's interpretation of Reinach's theory of apriori right as entirely non-normative. He believes that a more differentiated account of the whole of Reinach's work will allow us to elucidate more clearly both the differences and the agreements between Reinach's theory and the position espoused in the following pages. These, and many other of Crosby's observations as well as those of other readers will, we hope, be further developed and will enliven the discussions of *apriorische Rechtslehre* which will be printed in further issues of *Aletheia*.

Josef Seifert

IS REINACH'S "APRIORISCHE RECHTSLEHRE" MORE IMPORTANT FOR POSITIVE LAW THAN REINACH HIMSELF THINKS?

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Introduction

There is perhaps no other work which could fulfill better than Reinach's *Die apriorischen Grundlagen des bürgerlichen Rechts* the role of an exemplary philosophical analysis which demonstrates to its reader the rigor of the authentic philosophical-phenomenological method and the character of philosophy as a science in the classical sense of the term *scientia*, as a rationally grounded, certain, and systematic evident knowledge of objective being and truth. The masterfully elaborated investigations which form the main content of this book seem to silence any objection and to demand respect and admiration rather than a critical commentary, especially in this issue of *Aletheia* which commemorates the hundredth anniversary of Reinach's birth.

And yet, the philosopher's task stated by the Platonic Socrates, to "love all truth and to love it in everything," which constitutes the IAP Motto, imposes upon us a duty which is still higher than reverence for one's great models and teachers, and which refers at the same time to the condition of all true reverence for persons, an obligation which the Ancients formulated thus: "amicus Plato, magis amica veritas." We must turn even to the greatest and most imposing works, written by minds whose brilliance and depth far surpass our own, and ask the question about the truth of their positions. To do this is not only a higher duty of the philosopher than reverently to open oneself to greater minds; only such a critical and simultaneously humbly listening spirit, in which the philosopher opens himself to all truth seen by other thinkers in light of all reality accessible to his own cognition, will be a true sign of reverence for others as philosophers and lovers of truth. Thus it seems fitting to honor Reinach in this volume, dedicated to his memory and inspired by an

admiration that regards his work as a supreme embodiment of genuine philosophy, not only with praise but also with a critical essay.

The following remarks are written in the firm conviction that both the specific contribution to a philosophy of law and the general philosophical achievements of Reinach's chief work, *The Apriori Foundations of Civil Law*, fully deserve the praise that work received from E. Husserl and others. Most importantly, this book is (with the less rigorous *Formalism* of Max Scheler) the first imposing masterwork which founded that form of phenomenology which, building upon Husserl's *Logical Investigations*, revitalizes "classical" philosophy: objectivist phenomenology as analysis of being in itself and of intrinsically necessary essences, phenomenological realism. (F. Wenisch calls this philosophy also "chreontic philosophy" in order to designate the objectively necessary, *tò chréon*, as its main object.) Reinach's *Die apriorischen Grundlagen des bürgerlichen Rechts* (it is from the third German edition, *Zur Phänomenologie des Rechts, Die apriorischen Grundlagen des bürgerlichen Rechts*, München: Kösel, 1953, that quotes in this essay will be taken) contains the seeds of insight which allow phenomenologists to overcome subjectivist phenomenology. Husserl's phenomenology after 1905, as embodied, most markedly, in the *Cartesian Meditations*, constitutes not a revival, but an abdication, of classical philosophy in favor of a more subjectivist version of transcendental idealism than even Kant's, i.e., one that seeks to eliminate entirely a world of "things in themselves," a world of intrinsically necessary essences, goods and beings independent from human subjectivity. Reinach's phenomenology, in contrast, elaborates the fully *objective* nature of an apriori that is grounded in timeless and intrinsically necessary essences and *Wesenheiten* of "things themselves." Beyond this general merit of the work, the first two chapters of Reinach's book masterfully unfold the sphere of apriori law and, in so doing, uncover a whole domain of legal entities which philosophers previously had hardly touched upon.

As they are inspired by the important analyses of the first two chapters of Reinach's work, the ensuing criticisms of certain theses contained mainly in Chapter iii also in no way diminish our unreserved and due admiration for Reinach's answer, expounded in that same chapter, to the chief objection to his theory of *apriori law*. Reinach is confronted with the argument leveled against his view that positive codes of law contradict most of those apriori laws which he attempts to bring to evidence as necessary and timeless essential laws. In view of the uncontested fact that positive law often deviates from apriori relations of right, Reinach seems to be faced with the alternative of either rejecting all these positive legal codes as "wrong law" (and how could this be done without absurdity?) or of admitting that the apriori essential laws concerning rights and

claims (regarding property, representation, etc.) are false. His answer to this question being the main purpose of chapter iii, one must acknowledge that this chapter fully achieves its goal.

Reinach demonstrates first that the *Bestimmungssätze* (propositions of positive law which express determining legal enactments) are not judgments at all and hence, as they do not assert or deny anything, cannot deny apriori law. Secondly, Reinach seeks to establish the thesis that the essential necessity of the apriori in civil law (at least in those domains investigated by him) is not an "unconditional" but a conditioned one. In other words, certain social acts and other factors necessarily ground legal rights and obligations by their very nature but not in such an absolute, unconditional fashion that they would forbid that other factors can suppress or modify that which arises by apriori necessity. In effect, the rights and obligations which arise apriori from the very nature of certain acts quite readily admit such modification or suppression. Reinach asserts, not unlike Ross who speaks of "prima facie" obligations which issue from promises, something like a "prima facie" character of the legal data which arise apriori from the nature of certain social acts. John Crosby expresses this thought of Reinach by speaking of a mere "apriori tendency" of certain social acts to bring about legal obligations and claims. And such an "apriori tendency" of specific rights and claims actually arising from a given legally relevant act or fact does not exclude that the creative capacity of positive law (and of *Bestimmungssätze*) may suppress or modify those legal entities which arise "naturally." This can precisely be made to happen by the maker of positive law. Specifically, there is a peculiar social act of *bestimmen* ("enacting") which is free to change or even to suppress entirely such legal entities and bonds as proceed from certain data, for example from social acts, in virtue of their apriori nature.

If this is recognized, the objection against the thesis that there is apriori law, on the grounds that positive law contradicts it, can receive a decisive answer. There is no real contradiction between apriori relations of law and positive law. This is exactly seen when the radical difference in nature between the propositions (judgments) of the apriori theory of law (which conform themselves to pre-given apriori facts) and those propositions which execute determining legal enactments is recognized, and when one acknowledges the creative sovereignty and the power of the state to suppress or to create legal bonds. This part of Reinach's analysis is superbly executed and is not called into the slightest doubt by the following remarks.

Object and constructive purpose of the following critique

Our critique shall concentrate on an entirely different point, namely on the question of whether those remarks of Reinach which seek to explain the *general relationship between positive law and apriori law* are sufficient or even correct. It seems to us that Reinach's reflections on the *general relationship between apriori and positive law* represent not only the most underdeveloped part of Reinach's work but that many statements of Reinach on this extremely important issue deviate from what the careful reader of the preceding masterful chapters is led to expect. Some of Reinach's statements in Chapter ii, iii, and in the Introduction appear to contradict the best established central results of Reinach's analyses in the first two chapters and to put into jeopardy the impact on positive law of his immensely important discovery of a legal apriori.

Even in having to criticize a number of statements of Reinach, however, we must not overlook the fact that his remarks about the general and unrestricted power of positive law to deviate from apriori law, the main object of our critique, do conceivably not intend to claim to be complete and to apply to examples beyond the sphere of those which Reinach himself cites to establish his points. Consequently, some of the ensuing remarks may point out a need for completion and correction of only single statements (though the most significant ones on the general relationship between apriori and positive law), rather than constitute criticisms of Reinach's ultimate position on the relation between positive and apriori law. Those passages which we regard as being outrightly false might possibly be interpreted, as suggested by Crosby in discussions of this point, as exaggerated expressions of general content which are only meant to support the largely convincing and limited concrete examples of deviation of positive from apriori law, whose justification Reinach seeks to establish. Thus a reading of Reinach which radically deviates from Husserl's and many other interpretations of apriori theory of right and which gives a restricted meaning to certain statements, mainly in Chapter iii, on the background of all his preceding analyses (interpreting them freely and non-literally), might wish to overlook any possible false meaning of Reinach's remarks.

Nevertheless, our intention to take Reinach seriously as philosopher, and especially to emulate his example of stunning precision of expression and thought, requires that we examine his statements about the relationship between apriori and positive law with the utmost rigor, not only seeking out his true intentions and main purpose but examining his utterances in light of the question of their own truth and justification. And in so doing, we will discover significant omissions and errors in

Reinach's work concerning the relationship of the sphere of apriori law discovered by him and positive law. While it is possible that none of these omissions and errors touch the *ultimate* intentions of Reinach, I do not think that they are found only in atomically isolated statements but in the most significant passages in which Reinach treats the relationship between positive and apriori law. I also think that it is impossible to interpret the obvious *meaning* of these statements themselves (I do not speak here of Reinach's ultimate conception) in such a manner that they do not constitute a fundamental contradiction to the consequences of the bulk of Reinach's work (and to a few explicit remarks of his).

To state clearly and to correct these errors and omissions of Reinach, however, will only throw into better relief the author's splendid achievements. Such a constructive criticism is all the more called for in anticipation of the interpretation adherents of Kelsen's legal positivism of *reine Rechtslehre* (pure theory of right) might give to the relationship of Reinach's *apriori law* to positive law as developed in Chapter iii of his work. While the rest of Reinach's book constitutes (at least implicitly, and in the Introduction, and elsewhere in Reinach's comments on the positivistic misinterpretation of certain historical facts, quite explicitly) a radical critique of a legal positivism which denies all prepositive legal entities — and this on a new and unexpected ground, distinct from natural law in the narrower sense —, the third chapter and portions of the Introduction seem almost to deny any practical implications of apriori right for positive law. For they assert an absolute sovereignty and freedom of positive law in relation to prepositive apriori law (albeit not in reference to values and ethical considerations). To uncover the untenability of this assertion, or — as also the most sympathetic reader of Reinach will admit — *semblance* of Reinach's assertion will surely not diminish the worth of the book but demonstrate, on the contrary, that its significance for positive law is far greater and more decisive than Reinach himself is aware of in the concluding chapter of his work.

It is important to stress, however, that the following investigation has primarily a purely positive philosophic task, not a critical one. It shall attempt to provide the outline of an analysis of the relationship between positive and apriori law. Even if none of the many relations of apriori law to positive law to be explored briefly in the following discussion had been overlooked or denied by Reinach (which I do not believe, while it would only delight me to know that this were the case), the analysis to follow, if it is successful, would retain its full value as a further development of the apriori theory of right and as an exploration of the positive role of apriori law for positive law. For even if Reinach's book were to agree with most of what we are going to say, it certainly does not unfold the majority of

the points that shall be developed in the following, and even *seems* to deny them in some crucial passages.

Thus, prescinding from the important critical aspect of the ensuing comments, their contribution seeks to be above all that of an analysis of legal "things themselves." If the thrust of Reinach's work contained most of the following points implicitly or in isolated explicit remarks, they would unfold what Reinach intends to say and serve to exclude what would appear then as a general misconception of Reinach's apriori theory of right, a misinterpretation to which definitely some statements made by Reinach gave rise and which no one lesser than E. Husserl himself, who knew the work exceedingly well and had discussed it orally with Reinach, expounds in his piece (parts of which are reprinted in this volume of *Aletheia*). Husserl interprets there the apriori in law as such (clearly taking *apriori theory of right* in its broad sense as referring to all apriori legal foundations of other disciplines of law) as not possessing any normative role for positive law. He goes even farther than that in making the assertion that another apriori discipline proposed by Reinach which would have the task of exploring axiological criteria for "right law" (in light of moral and other values) is unable to provide any material (i.e., content-related) norms for positive law but can expound entirely formal criteria only. Husserl even compares the role of this other apriori legal discipline for positive law with the role of formal logic for natural science, claiming that — as no content and axiom of natural science could be gained from formal logic, so also no proposition related to the *content* of positive law could be derived from this other apriori discipline. What Husserl says here about that more normative apriori discipline which Reinach only hints at in his book (and which, according to Husserl, ought to replace classical "natural law" theory), would of course a fortiori hold for Reinach's apriori theory of right in all its branches and ramifications, which — at least according to Husserl — would not even provide those merely formal criteria for "right law" of which he speaks. The following investigation, if it establishes its results, will prove that this conception of the role of a legal apriori for positive law (both in Civil Law and in other domains of law) is untenable.

Relations between positive law and apriori law according to Reinach

Let us summarize Reinach's fundamental position on the relationship between apriori right and positive law in the following points:

1. The sphere of apriori law, and the obligations and rights that originate in certain acts in virtue of apriori essential necessity, exist and

apply *before* any positive law exists and are thus at such *independent* from positive law, i.e., they are in no way produced by the will of law-makers (as Kelsen and legal positivism in his sense claim).

2. Apriori law as such exists necessarily and is necessarily (as ideal essential structure that applies to all possible worlds) as it is. Therefore it cannot possibly be *changed* by positive law. It is entirely independent from the latter's *Bestimmungen* (determining enactments). Legal rights or obligations which do not proceed from the essence of a given social act, cannot be made to proceed from that act by positive legal enactments.

3. There is, however, *no* proposition of apriori law from which positive law *could not* or *does not* in fact deviate:

... hardly a single one of the principles which we have claimed as laws of essence could not be confronted with a deviating enactment of positive law. And to make the point in principle: *there is no law of essence from which such a deviation would not be conceivable.* (Emphasis mine, J.S.).

A. Reinach, *Zur Phänomenologie des Rechts*, p. 166 (Transl. J. Crosby, p. 103).

In the Introduction we find the even more radical statement:

We of course fully recognize that the positive law makes its enactments in absolute freedom, exclusively with a view to economic necessities and to the given moral convictions and unbounded by the sphere of apriori laws which we have in mind. *The positive law can deviate as it likes from the essential necessities which hold for legal entities and structures...* (Emphasis mine, J.S.).

4. Such deviations of positive law from apriori law are, according to Reinach, *not* contradictions to the apriori rights and laws. This follows, he believes, from the following facts which were already discussed but shall be summarized again for the purpose of the present overview. The positive law, when it uses declarative sentences to express its legal enactments, *does not make judgments but passes determining enactments* which state what *shall* be or what *shall* be done; they are not "conforming acts" which would have to be adequate to what objectively is. On the other hand, the propositions of the apriori theory of right which state apriori laws say, not what should be but what in fact *is*.

Thus the "enacting" (an act which is distinct both from judging and from commanding) leads to a type of proposition (*Bestimmungssatz*) which is *neither* true nor false because it does not conform to already obtaining states of affairs but posits and creates new ones. Because it does not make

any assertion, a proposition of determining legal enactment *cannot contradict* any proposition that expresses a judgment, and hence also not propositions which belong to the *apriori Rechtslehre*.

Another fundamental reason why positive law does not contradict apriori relations of law lies, according to Reinach, in his contention (which has already been explained) that the apriori in civil law has a "conditional character" and that those legal obligations and rights which result apriori, in virtue of their *prima facie* nature, can also be destroyed or modified, or others be created, by positive law.

5. Hence the "deviation" in question (of positive law from apriori law) consists, rather, in *determining (creating)* a law (or legally relevant facts) *different* from the objectively existing one(s), i.e., different from those legal data which exist independently from the positive law, on the basis of apriori law.

6. What happens in the case in which positive laws deviate from apriori laws, is something which could be called "the victory of the positive law." The positive law, in other words, either suppresses the rights or obligations (and other legal entities) which exist or would exist on the basis of pure apriori law, or brings about certain modifications, expansions, or restrictions, which would not come about if the sphere of apriori law alone existed. In fact, it may even occur that positive law (e.g., in recognizing contracts from which directly a claim of a third party results) creates relations between acts and obligations (or rights) which could *never exist* in the sphere of apriori law as such (as long as no entirely new social acts would be performed). The legal bonds which are thus created by positive law may be the very opposite of what — in a world solely ruled by apriori law — exists or is ruled out by essential necessity.

Reinach generally does not seem to question (excepting some remarks, especially *ibid.*, p. 197, "Wir halten. . .," whose interpretation is difficult) the *validity* of the positive law which deviates from apriori law, i.e., the "victory" of positive law whenever it deviates from apriori law. Nor does Reinach discuss even the possibility that there be necessary conditions of the validity of a positive law which deviates from apriori law, or the limits within which such deviations give rise to valid law. See Reinach, *ibid.*, p. 184, especially 187 which I shall render here in Crosby's translation:

The objection [namely that there could not be apriori essential laws because they can be contradicted and dissolved by positive law: J.S.] is disposed of by showing that this apriori necessity indeed holds without exception, *but only as long as deviating enactments which are efficacious have not prescribed something different.* (Emphasis mine J.S.) See p. 116.

See also the statements from the text quoted above:

We of course fully recognize that the positive law makes its enactments in absolute freedom . . . unbounded by the sphere of apriori laws. . . . The positive law can deviate as it likes from the essential necessities which hold for legal entities and structures. . . .

7. The apriori laws are not even normative (*massgebend*) for the formation of positive law (this point is particularly emphasized in Husserl's thoughts on Reinach; see also Crosby's critical comments, above, pp. 192 f.), except perhaps in two ways:

First, the legal efficacy of social acts of passing determining enactments of positive law as well as the essence of these acts are themselves of an apriori necessity and structure.

Secondly, the apriori law is what is pre-given to positive law and determines as it were "prima facie" what ought to be or which rights and obligations exist at the outset (*ibid.*, p. 188).

8. The deviation of positive law from apriori law, however, is not only possible and leads to valid law but is often desirable for moral or other prudential reasons. In this regard, Reinach criticizes what he calls the "ontologism" of Roman Law which follows too slavishly the objectively pre-given apriori law, in his opinion.

9. The "norms" for the "desirable" deviation of the positive law from apriori law are of a great variety. Besides the already mentioned moral reasons (that, for example, innocent youths not be taken advantage of because they entered contracts which they insufficiently understood) there are other value considerations, practicalities, etc. which come into question here as such "norms" (*ibid.*, p. 200-201).

In each case in which usefulness, higher values, etc. make it desirable that legal relations exist which are different from those which are determined by apriori law it is an undesirable ontologism to abide by apriori laws. Not only should the positive law-maker not adhere to apriori law rigidly and absolutely; he should not even regard apriori laws as a "norm" from which no deviation of positive law would be permitted except for extremely grave reasons of value and justice. This *non-normative* character of the *apriori Rechtslehre*, if it can really be established, is even its pride insofar as it remains immune against the objections which are usually put forward against natural law theories (*Naturrechtslehre*). (See *ibid.*, p. 218, 219.) According to Reinach, apriori law is not any law which would function as norm for positive law (*ibid.*, p. 221).

10. Even when positive law does not regulate a certain issue, apriori law should not, as such, fill the blanks which are left open by positive law,

at least if utility, value, etc. speak against abiding by what is binding pre-positive apriori law (*ibid.*, p. 219-220). Reinach goes as far as to say that in *apriori Rechtslehre (bei uns)* there is "no question" of intending to "fill the gaps of positive law" (219). Again he asserts that the *apriori Rechtslehre* "does not at all occupy itself with those problems which natural law has raised" (221), i.e., specifically, of whether there is a prepositive law that is valid whenever positive law is wanting in precise prescriptions.

On the other hand — in undeniable contradiction to statements such as those quoted above — Reinach seems to modify the radicalism of asserting that his theory of apriori law differs from "any ontologism which would intend to bind positive theories of right to essentially necessary laws" when he seems to restrict the denial that apriori law would "fill in" the gaps of positive law to those cases only in which principles of morality or of utility intervene (220). The last part of p. 219 seems to refer to those repeated statements in which lawyers, and particularly the Roman Jurists, refer to those laws which "follow from the nature of things" or "are obvious" — precisely with the purpose of filling in gaps which remain in any positive code of law. After Wolfgang Waldstein's penetrating studies it can hardly be doubted that Roman Jurists used both references to natural law and to apriori law, as well as to other pre-positive moments, as a basis for concrete decisions and law-making enactments. (See W. Waldstein, "Entscheidungsgrundlagen der klassischen römischen Juristen," in: *Aufstieg und Niedergang der römischen Welt, Geschichte und Kultur Roms im Spiegel der neueren Forschung*, ed. Hildegard Temporini and Wolfgang Haase, II, vol. 15 [Berlin-New York: W. de Gruyter, 1976], especially pp. 29 ff., 51 ff., 61 ff., 78 ff., 85 ff.; See also of the same author, "Vorpositive Ordnungselemente im römischen Recht," *Öst. Z. öff. Recht* 17 [1967] 2 ff., especially pp. 10-11.) He sees analogies between the *naturalis ratio*, which Roman Jurists held does not exist by the power of positive law-makers, and the *apriori right* explored by Reinach. He shows convincingly that apriori relations of right concerning contracts became normative for the positive law of contract developed by Roman Jurists. Waldstein demonstrates equally convincingly that non-sensical laws would result from ignoring certain apriori legally relevant structures.

Does Reinach's view on the autonomy of positive law in relation to apriori law contain elements of legal positivism? On the manifold "normative function" of apriori Rechtslehre for positive law

It shall be argued in the following that the immense importance of Reinach's positive contributions (which I see in the position summarized

in points #1 and 2, above, and in the validly interpreted sense of points #3 to 5), with which I fully agree and concerning which I share Husserl's and the other contributors' to this issue unreserved admiration, appears far more clearly in its worth, if true insights of Reinach are separated from some errors he commits. In these errors (which I see in thesis 6, 7, and 10, in thesis 8 if it does not merely warn against the doubtlessly existing danger of a false "ontologism" of positive law but sees this danger in any form of being bound by *apriori right*, and in the manifest meaning of theses 3, 4, 5, and 9), it appears to me, Reinach is guided by too great a readiness to concede to positive law an almost unrestricted power of deviating from apriori law while still creating positive law which can neither be called "unjust(ified)" nor invalid. This calls into question whether there is any practical difference for positive law-making between the consequences of *apriorische Rechtslehre* and those of the legal positivism of *reine Rechtslehre* — as far as the unrestricted liberty of the state to determine the content of positive law is concerned. Reinach seems to have an overly great fear that the *apriorische Rechtslehre* might appear in the light of natural law theories, i.e., as wishing to give norms to positive legal creativity. Husserl, in emphasizing in his *Nachruf* (reprinted above) this point in Reinach, even expresses a sweeping (and in my opinion fundamentally unjustified) contempt for natural law, while admitting "an entirely different apriori discipline" (i.e., different from *apriorische Rechtslehre*) which explores the "right law" (right in the sense of morality and other objective criteria). Not only of "apriori theory of right," however, but also of such a normative discipline Husserl claims, as we have seen, that it can never arrive at any determinate right (*inhaltliches Recht*) but only at "formal norms of legality." He accuses natural law theories of attempting to provide contents and determinate laws as norms for positive law and suggests that this entire attempt is mistaken.

The following remarks seek to examine whether this opinion is true. They will lead to the result that the alleged incapacity of providing criteria for "*inhaltliches Recht*" does not only not hold for natural law, the axiological apriori theory of which Husserl speaks, or ethics, but it does not even hold for the immanent legal structures and apriori essences which Reinach's *apriori theory of law* uncovers.

The ensuing reflections leave largely out of consideration two significant parts of the problem of the relation between positive law and apriori law: on the one hand, those positive laws in regard to which there are not any directly applicable apriori laws, such as certain aspects of tax-law, election rights, etc.; on the other hand, those cases in which positive law has to freely interpret what remains indetermined in its character

prior to positive legal determinations and enactments (See Reinach, *ibid.*, p. 192, 193).

To which extent are deviations of positive law from apriori law possible or admissible?

The following remarks do not claim to give in any way an exhaustive analysis of all possible forms of deviation of positive law from apriori law. They merely seek to raise some questions concerning the general problem of such deviations and to establish that apriori law has a tremendous significance for positive law: a) It is the condition of its possibility. b) It provides the principles which must be followed by positive law in order to be at all meaningful rather than being absurd. c) Many material contents of apriori law constitute the norm or at least a normative delimiting framework for positive law.

Thus we decidedly reject Reinach's claim quoted above that "positive law makes its enactments in absolute freedom . . . unbounded by the sphere of apriori laws," that it "can deviate as it likes from the essential necessities which hold for legal entities and structures," that "there is no law of essence from which such a deviation (of positive law) would not be conceivable," and that "this apriori necessity [in civil law] . . . holds . . . only as long as deviating enactments which are efficacious have not prescribed something different." We shall see that *not at all every* proposition of *apriori Rechtslehre* tolerates a legally possible, meaningful, or valid deviation of positive law from it. Thus also the precedence in validity which Reinach seems to ascribe to positive law in the case of its deviation from apriori law, is not given universally. This will appear clearly in light of the following considerations.

1. *Acknowledgement of, and respect for, apriori right as condition of meaning, validity, and justice of positive law:*

It has to be assumed that Reinach himself would not deny the point to be explained presently. The radicality of his language in the quoted and other formulations, as they are found particularly in Chapter iii, must be compared with many statements made in previous sections of the work in which he speaks of absurd and impossible modifications of the act of promising, of its content, and of the obligations and claims which follow from it. A sympathetic reading of Reinach could point out that he really intends to say only: there is no deviation from apriori law which would be desirable from the point of view of *justice, utility*, etc. which would be excluded by apriori law. Yet as mentioned before, Reinach fails to state such an intention unambiguously and, above all, to develop theoretically (and at times he seems to deny) the following *central*

point concerning the relationship between positive and apriori law. (Apart from this, even the above sympathetic restatement of Reinach's position will turn out to be erroneous; see below, 3 C.)

In his important article, "Die rechtliche und sittliche Sphäre in ihrem Eigenwert und in ihrem Zusammenhang" (*Die Menschheit am Scheideweg*, Regensburg: Josef Habel, 1955, 86-106), Dietrich von Hildebrand raises the question, pp. 96-97, of whether or not *apriori law* in Reinach's sense is normative for positive law, without seeking to answer this question himself. The following reflections constitute a modest attempt to provide an outline for such an investigation.

We shall argue for the following thesis: There are numberless positive and negative apriori laws (or rules grounded in them) from which the positive law can never possibly (so as to possess any meaning at all), justly (i.e., meaningfully, taking this term in an axiological sense), or validly deviate and which constitute norms for the possibility, meaning, and legal validity of positive law. Positive law that would contradict these apriori laws would either be invalid, or unjust, or even entirely *absurd*.

Let us begin with an example. It is excluded by essential apriori necessity that a positive law which would even make any sense, let alone be valid or just, could prescribe that the promisee has the obligation to fulfill the promised content or action while the promisor would have a right against the promisee to claim fulfillment of the promise. The essentially necessary laws Reinach discovered function here as norms for both meaning and validity, as norms which exclude countless possible positive laws which would go against the apriori law in reference to the person in whom rights and the one in whom obligations are created by the promise in virtue of its very essence. Perhaps the reason why Reinach does not stress this normative function of apriori laws is that it would not occur normally to any lawmaker to consider deviating from these fundamental apriori legal facts; they are thus usually not experienced as a limit on law-making freedom. Nevertheless, apriori relations of right play in this manner a fundamental normative role that deserves to be clearly stated.

Apriori necessary essential laws about promise likewise forbid absolutely that a positive law could validly be passed that would oblige the promising person to perform an action which differs from the one he has promised or which is not at least logically or in some other forms of meaningful connection associated with it. Concomitantly, it is equally excluded that the positive law would give the promisee rights which would entirely differ from those which follow from the nature and content of the promise.

Waldstein introduces another example drawn from Roman Law of an unacceptable deviation of positive law from apriori law. Roman Jurists

gradually recognized that contracts, even if the form of the contract is fulfilled, until the contracting parties have reached an agreement must not be declared binding by positive law. Waldstein observes how remarkable this insight of Roman Jurists into apriori structures of law and their normative character for positive law is, given the great formalism of Roman Law.

The apriori law and the legal relevance of the social acts and legal bonds resulting from them constitute also norms of *justice*, as we shall see. If this is actually so, it is untenable to separate, as radically as Reinach does, the sphere of "natural law" and "justice" from that of apriori law. For evidently a positive law that would radically alter the claims and obligations which result from the apriori essence of the promise (by passing decrees that would arbitrarily create obligations and negate rights which follow with apriori necessity) would also be unjust. Consider the above mentioned examples which would not only be non-sensical and invalid but also, to the extent to which positive state-authority would enforce them, unjust.

Let us now consider examples of positive laws which would not be absurd but whose violation of apriori rights would make them in any case unjust, and, at least in some instances, also invalid. (Even if such laws could of course be legally *enforced*, they would still be deprived of authentic legal *validity*.) It would normally be invalid and at any rate, if enforced, gravely unjust, if the positive law were to ignore radically the apriori of property relations and were to decree, for example, that all state officials are given all rights over property validly owned by private persons — who have not ceded or forfeited their rights to the state or to the respective persons according to apriori determined laws. Such a decree would not only be unjust by considerations which lie *outside* the sphere of apriori law as conceived by Reinach. It would also be unjust (to the point of being deprived of authentically legal validity) *by the very fact of radically ignoring the objective apriori laws which govern property relations* and which are not neutral but possess a positive legal importance that demands respect. We shall return to this decisive point later. (See 3, C). The legal relevance of such property rights and relations which arise in accordance with apriori laws is, at least in many respects, not *absolute* in the sense that it could in no way be altered by higher reasons. But *prima facie* it commands respect and must be respected by the positive law that ought never to ignore apriori rights for less than proportionately grave reasons (such as a national catastrophe, vitally important constructions which justify expropriation if proper restitution is being made where this is possible, or other analogous circumstances). Similarly unjust and invalid were the racist property laws against Jews, or laws related to

slavery. These laws were unjust not only for reasons that lie entirely outside the sphere of apriori law. They are not only unjust, for example, because they oppress, and discriminate against, a group of people without any justification for such a lack of legal equality (one reason why present U.S. law making abortion "legal," is unjust and invalid albeit protected). They are unjust, prior to all such considerations of natural law, because they entirely ignore, and do violence to, the legally (and indirectly also morally) relevant *immanent logos of apriori law relations* and the legal bonds resulting from them whose importance calls for respect by any just positive law. While Reinach in his general statements fails to make this point, he recognizes it in reference to slavery, saying (p. 85) that the incapacity of slaves according to Roman Law to enter into obligations resulting from contracts and to gain rights from promises must be rejected. The reason for such a rejection, however, is according to Reinach not "natural law" or that slaves are like all men in nature, but "because they can promise and receive promises, they incur by essential necessity rights and obligations" (86).

Without developing here at any length our thoughts on the case of those apriori laws which *interpret* intrinsically indeterminate social acts such as those which underlie selling property, we must nonetheless note that, while different positive legal interpretations of these acts are admissible, there are still interpretations of these acts which are excluded apriori. Thus countless possible positive laws are ruled out as meaningless or invalid.

Apriori laws do not only constitute norms for meaningful, just, or valid positive laws but also for the decision of positive law to recognize while not protecting, or to protect (rather than not protecting) certain apriori existing legal claims. *Recognition* itself by positive law of certain legal rights and claims which arise according to apriori law is often called for by the essence of apriori law — also in instances in which, for valid reasons, legal protection is refused. Admittedly, many aspects relevant for the positive legal protection and perhaps even for the recognition of apriori rights fall outside the scope of the *apriorische Rechtslehre* because they are governed by purely empirical aposteriori principles such as the unverifiability of oral claims or non-enforceability. Nevertheless, there are also certain apriori essential truths rooted in the sphere of apriori laws which govern the question of the *recognition or protectability* of apriori rights by positive law. Positive law should *recognize the existence* of certain prepositive legal claims (resulting, for example, from orally expressed last wills or contracts which have not been put in writing), even when it chooses not to protect them; and it should clearly express this distinction.

Perhaps we should introduce here a further distinction between recognizing a legal right and claim *in* positive law and recognizing it as existing according to apriori laws (and not denying that it is morally binding). In many cases, only the latter kind of recognition is demanded in an apriori way. In other cases, in which recognition of legal bonds also in positive law is called for in accordance with a legal apriori, legal *protection* may still be refused for valid and often entirely *empirical* reasons (for example, for the reason that to enforce property rights on possessions below the order of one hundred Dollars would be impossible or a waste of money for the state). In still other cases, a refusal by the state to enforce certain rights (such as the fundamental property rights or important contractual rights), for less than reasons of inability or legitimate priorities, would be wrong because, to different degrees, certain apriori rights demand protection by the state. Thus the decision of the positive law-maker not to protect or not to recognize certain legal claims must not be arbitrary in any way if it is to be in keeping with the sphere of apriori necessities which follow from the apriori in law.

These apriori necessities are not themselves the necessary essences of *legal* entities or of those social acts and other factors which make them arise. Rather, they constitute a sort of "meta-apriori" of law in the sense of essentially necessary facts that refer to the *relationship* between apriori law and positive law. Yet in spite of its distinction from the *apriori in* law which is Reinach's primary concern, the apriori of these "meta-rules" is inseparable from, and largely founded in, the apriori *in* law itself. An additional foundation of these "apriori legal meta-rules" lies in the necessary essence of positive law as such and of its apriori structures, as well as in the essence of other relevant factors outside of legal entities themselves. Of course, as already stated repeatedly, besides the apriori rules that determine the (ideal) relationship between apriori law and positive law there are also purely empirical factors which influence this relationship, such as non-enforceability, financial limitations of a state, etc. Also with regard to these empirical elements, however, there are apriori necessities which legitimize some empirical facts playing a role in determining the relationship of positive law to apriori law, or failing to do so. The deviations of positive law from apriori rights ought to follow good reason in harmony with apriori facts.

Even when a positive legal code as such does not protect certain apriori rights, such as those which issue in the oral last will of a person, the positive law should normally make provisions for the judge to protect and to enforce them when they exist quite unambiguously or when ignorance of the positive law makes this desirable. Such provisions are actually made in many legal codes by giving the *bona fides* principle an

important role that sometimes justifies legal protection of rights that arise apriori, while they are not protected in positive law.

Thus an "ontologism" of positive law in the sense of it carefully respecting the logos of apriori laws and their relevance for positive laws is not to be deplored but is, within certain limits, strictly demanded by the sphere of apriori rights and claims. This does not deny, of course, that there is also the *false* kind of ontologism, against which Reinach warns. (Cf. Reinach, *ibid.*, p. 190, 197).

One should also not be misled by Reinach's analysis of the nature of *propositions of enactment* (*Bestimmungssätze*) into believing that *all* statements of the positive law are enactments, none judgments. For example, the statement with which a positive code of law may begin that all men possess the fundamentally same rights regardless of race, sex, etc. is definitely not a mere positive legal enactment like Reinach's "a promise of donation is valid only if made and confirmed by a notary public." Rather, the above sentence expresses a judgment about rights. If we found a statement opposite to the truth that race does not affect the fundamental rights of persons, such a statement would be a false judgment which differs also from prohibitions or permissions which violate natural or apriori principles of law but are not judgments such as permitting murder, not enforcing any contracts that involve minorities, or letting legal majority begin with the age of five. Thus well- or ill-grounded laws (enactments) must be distinguished from judgments about rights and their foundation. Both of these constitute a limit of positive law legitimately deviating from apriori law.

One might object to this, saying that we falsely claim that codes of positive law contain, besides enactments, also judgments because we implicitly hold that there cannot exist an enactment whose content coincides with that of a true judgment. Why should, however, a judgment and an enactment of the same content not be possible? Are enactments only possible when they are not strictly prescribed by some prepositive truth?

In response to this objection we note, first, that — as Ingarden does not offer any evidence in his *The Literary Work of Art* for his thesis that declarative sentences in literary works *never* express real judgments but *always* only either unreal judgments or quasi-judgments, so also Reinach offers no evidence for the analogous thesis (which he strongly suggests — *ibid.*, 16, 187, 189 — but never asserts explicitly) that codes of positive law express, when using declarative sentences, only enactments, never judgments. Of course, enactments differ from judgments. (So do quasi-judgments whose discovery constitutes a major achievement of Ingarden's *The Literary Work of Art*.) But why is it evident that positive law

never contains simply *judgments*? Is it not obvious that positive law expresses judgments when it speaks about the *natura rei* or about reasons for a given law? Why should it not likewise state in judgments what is *found* to be a natural right or apriori law that ought to be recognized by the positive law? Of course, we must distinguish enactments in Reinach's sense which are *grounded* in true propositions from these true propositions (judgments) themselves. Yet what reasons should forbid the maker of positive law to make judgments? The absence of any reason we would see Reinach offer for such a position — which goes against what at least appears to be true, namely that there are *many* judgments contained in codes of positive law — is the object of our first objection against the thesis that positive law *only* passes enactments, never judgments.

Moreover, (even well-founded!) enactments can never meaningfully "coincide" with a true judgment in content, at least not when its truth is known. Reinach himself recognizes this fact, which underlies our second objection against the position under consideration, most clearly when he speaks of the essence of enactments and states (p. 175) that they order that something "shall be" and thus make no sense in reference to necessarily true or necessarily false propositions, and thus in reference to apriori facts:

Jede Bestimmung zielt als solche ab auf die Realisation dessen, was sie als seinsollend setzt. Es kann also sinnvollerweise niemals etwas als Inhalt einer Bestimmung fungieren, dessen Sein apriori notwendig oder apriori unmöglich ist. Von hier aus ist es ohne weiteres verständlich, dass eine Bestimmung, 2 x 2 solle 4 sein, ebenso sinnlos wäre wie die Bestimmung, es solle 5 sein.

From this it follows that an enactment which would fix what necessarily is as it is, for example, necessary facts about apriori laws or natural rights, would be meaningless. Yet these occupy an important place in legal codes from whence it follows that legal codes can indeed contain judgments, not only enactments.

2. *Possible and advisable deviations of positive law from apriori right more limited than suggested by Reinach:*

Also where it is definitely possible and advisable that the positive law deviate from apriori law by requiring, for example, written documents or the presence and seal of a notary public for binding contracts, appearance before a court for a valid donation of property, etc., Reinach's position according to which the positive legal enactment as it were suppresses or modifies the legal realities which originate in the

apriori structures of legally relevant acts, seems to be oversimplified. At least, Reinach does not ask with sufficient clarity what exactly does and can happen when a positive law deviates from apriori law. His central thesis that positive law supersedes legal data which have arisen in an apriori way overlooks other possible relations between positive and apriori law. Positive law may exist and be valid in the sphere of publicly applied and recognized law, while side by side apriori law would retain its validity.

Thus a last will which a man uttered on his death-bed may not be valid or recognized as legally binding when the heirs go to court. There, in the sphere of public right and law, the positive law may truly be in force and constitute the guideline for a judge's or jury's verdict, and rightly so. And yet the oral last will may retain, in the *purity* of authentic prepositive law, its legally and morally binding character. Positive law is also not free to deviate in *any* arbitrarily chosen form from apriori law. It is, specifically, not free to adopt deviations from those apriori laws which constitute (in some cases *absolutely*, in others conditionally on no higher considerations intervening) *normative character* for positive law. As Reinach himself shows, certain moral duties follow from apriori legal rights and obligations; these moral duties manifest, to use a terminology introduced by D. von Hildebrand, the *moral relevance* of legal rights and obligations and are grounded, at least in part, in the *legal relevance* of data of apriori right. Our point here is that this legal and moral relevance of rights and obligations does not address itself solely to the individuals involved in legal relationships but also to the positive law-maker. Moreover, some of these rights and obligations which arise in accordance with apriori laws call at least *in principle* (leaving open the possibility of certain modifications) for recognition and protection by the state. A code of positive law, for example, which would refuse to protect legal claims which result according to apriori laws from written contracts or gifts whose authenticity is clearly established by witnesses, and without giving previous (sufficiently clear) public notice of legitimate modifications of which the parties involved could be expected to have knowledge, is unjust and goes against demands which prepositive apriori structures of law (in particular also those implications of the *bona fide* principle which demand positive legal protection of legal bonds which were clearly entered on the basis of apriori law) impose upon positive law. As we shall see, such a type of deviation of positive law from apriori right is also entirely incapable of dissolving the clear prepositive claims and obligations which arise to the parties in virtue of apriori essential laws and which continue to exist side by side, in the case of *valid* unjust laws, with the ordinances of positive law.

Certainly, Reinach distinguishes between the refusal of positive law to protect certain legal claims and the effective dissolution of rights that are not protected. In fact, he stresses the existence of non-protected but recognized rights. Yet he fails to notice, at least sufficiently, that the apriori sphere of right, together with other prepositive legal factors, prescribes to positive law (while there are certain limits within which it can justly and validly deviate from apriori law) apriori rules as to which apriori rights ought to be recognized and which ought not merely to be recognized but protected. This presupposes that apriori essential structures of social acts, and the rights and obligations following from them, are not neutral facts but endowed with an importance that demands to be respected by positive law. We shall return to this point.

A. *Apriori legal necessities in other spheres of Law demonstrate even more clearly the normative character of apriori right:*

Certainly, not only social acts and other data related to civil law but also other domains of legal reality, such as criminal law (think, for example, of the foundations of the authority of the state to punish at all, or the apriori structures of different crimes which imply the apriori rule for criminal law, that crimes of different gravity deserve different kinds and severity of punishment by the state) possess intelligible essences which ground apriori laws and legally relevant facts. Apriori law, whatever further distinctions might be made within it, cannot be restricted to civil law but encompasses also, as Reinach expressly states, "public law, administrative law, criminal (penal) law, rent law, and international law" (see translation Crosby, p. 134; compare also the list given in *Zur Phänomenologie des Rechts*, p. 17, note 1). In certain spheres of law, for example in criminal law, the normative function of apriori law and the untenability of a radical separation of a (non-normative) apriori law from a (normative) natural law is even more evident than in civil law. The apriori laws concerning penal law (for example, that someone who committed murder ought to be punished by the state, that murder of first degree is a greater crime than theft and that therefore also society should punish it more severely, that legal assistance must not be denied to a criminal, etc.), because of their more immediate relation to values and justice, are even far more directly *normative* for positive law than the apriori essential laws in the domain of civil law. This is not to deny a certain legitimate freedom of positive penal law to remove indeterminacy spots (contained in all apriori legal structures in reference to their application and concretization), and freely to interpret certain apriori legal facts.

We must point out here also a certain ambiguity of Reinach's notion

of *apriori right*. In the Introduction of his work he seems to designate with this term *all the rules and principles of right* "which are *apriori necessary and knowable*." In chapter I (p. 21) he explicitly restricts himself to *one single problem* that belongs to this broader sphere of apriori right (see *ibid.*, pp. 12-17). In the same vein, he later speaks of the apriori foundation of public law, of the apriori foundations of *all legal disciplines*, and of a *general apriori theory of right* (217).

On the other hand, Reinach contrasts *apriori right* with *natural law*, without — apart from critically distancing his *apriorische Rechtslehre* from the illegitimate *interpretations* of "natural law" — giving clear hints as to the delineation of the sphere of *apriori right* in a narrower sense from natural law. The principle of this distinction cannot be found in the apriori character itself, i.e., in the objective essential necessity of facts. For natural law is certainly also apriori right in this objectivist Reinachian sense of the term. (The fundamental human rights, for example, are grounded to a large extent in the necessary essence of the person and of certain aspects of the human nature.)

Certainly, whatever the exact position of Reinach on this question may have been, objectively there are spheres of apriori right and law (also in Reinach's narrower sense of the term), which pertain to all other spheres of right, including criminal law (*Strafrecht*). Reinach explicitly mentions penal law and asserts that it, too, has apriori foundations, obviously in his sense of *apriori law*. Even in the event, however, that Reinach would have claimed *in general* a total separation between the sphere of apriori law and that of justice and would have held that, for this reason, the apriori of penal law falls entirely outside of the sphere of apriori law in his sense, such a claim would seem arbitrary. And this not only because also the apriori in civil law was found to bear, like the apriori in criminal law, directly on questions of value and justice but also because each domain of legal reality must have its own essentially necessary structures and apriori laws, also penal law.

For this reason, the comparison not only of *apriorische Rechtslehre* but even of an apriori doctrine of legal norms with *formal Logic* proposed by Husserl, and a similar comparison by Crosby (in the context of his attempt to lend plausibility to Reinach's distinction of apriori law from natural right) between apriori right and "purely logical grammar" seems to be untenable. Not only is the apriori in Civil Law itself (see Reinach, *Phänomenologie*, pp. 12 ff., 21 ff.), as well as in other spheres of right such as criminal law, *material law* and thus not merely radically different from "purely logical grammar" but also from "formal logic." It is also impossible to restrict, as Reinach might have attempted to do according to Crosby's interpretation, the *influence* of apriori right on positive law to a

mere formally delimiting function which would provide only formal legal structures with and within which the maker of positive law could freely create. The untenability also of this conception of the relation between apriori and positive law (limits of this conception are also mentioned critically by Crosby, p. 177 f.) was already examined from various points of view and will be critically investigated further.

B. *The vast sphere of "parallel existence" of apriori and positive law:*

In many instances in which positive law creates laws which deviate quite legitimately and validly from apriori law and create new rights and claims discussed by Reinach, the legal rights and obligations which result in an apriori way from certain acts are clearly *not suppressed* by such positive laws but only not honored or recognized by them. This fact was already mentioned but poses problems of its own (see above, #1). In such cases, the rights or obligations (or absence thereof) which are determined by positive legal enactments exist, in the public sphere, side by side with apparently contradictory apriori rights and obligations. Take the case of valid contracts or donations. The state may quite legitimately and prudently enact a law which excludes unverifiable forms of contracts and gifts from legal protection. Yet this does not at all deny that an earnestly made gift or contract objectively stands under the pure dictate of apriori law and that the apriori arising obligations really *bind* the donor or promisor as also the truly arising rights entitle the promisee or recipient of gifts. Morally and apriori-legally, the apriori law applies here and *not* the positive law which exists, side by side to the apriori legal relations, in the sphere of the publicly recognized or protected law. Reinach does not explicitly deny this case and sometimes hints at his awareness of it. On p. 197, for example, he speaks of recognition or protection of apriori right by positive law, without, however, asserting clearly that the apriori law retains validity and is not suspended by deviating positive law. (If he means to make this assertion, he appears to contradict many of the statements quoted above which claim that apriori right is in force and "das Seinsollende" *only* as long as no deviating positive legal enactment exists.) Reinach in any case does not deal with such a "parallel existence" of apriori law and positive law — also in those domains which positive law regulates. This is an omission, however, which renders false some statements in Chapter iii. For each of the cases of "private legal relationships" can potentially be brought before court and then positive law will be applied to such apriori arisen legal relations or they will be dismissed as invalid. And often even when positive law addresses such legal cases, contrary to what many Reinachian statements imply, it is *not positive law* which prevails over apriori law or dissolves the claims and obligations which have arisen in accordance with apriori laws.

Let us emphasize more clearly this point which the third chapter of Reinach's important book should have stressed more. Only a very small portion of the entire sphere of right is brought before the tribunal of positive law, *even many of those legal relations which are regulated by positive legal enactments and (in the event any concrete case that belongs to this sphere is brought before court) are also subject to the verdict of public and positive law-authorities.* The legal relations between family members, friends, children, and many circles of society, although positive legal enactments have been made concerning them, continue to be governed solely by apriori law or validly passed legally binding determinations of a private nature or social acts (such as the subjection to the arbitrator friends may invoke in cases of dispute, to which Reinach refers). And yet these legal relations do not exist on an island on which no positive law has yet been established but in countries in which these same legal relations are objectively regulated by positive law.

It appears evident that this fact disproves the assertion of sovereign power of positive law to suppress or alter legal relations which arise in an apriori way, in the country subject to it. It further proves that sometimes, even when the positive law is invoked by litigating parties to rule their legal relationships, the positive legal enactments have a very subordinated limited role which can in no way suppress or modify those legal obligations and claims which did arise apriori. In such cases, positive law can at the most recognize them or fail to recognize them, protect them or fail to do so; but these claims and obligations — which came into existence on the basis of the apriori law — exist objectively nevertheless. In these cases, the positive law creates a much less real and respectable sphere of right than the apriori legal relations — except in some instances, for example, when parties expressly subject themselves to positive law as to an arbitrator. Otherwise, in these cases, it is more a question of what positive law recognizes or protects than an issue of "suppression" or modification of apriori law by positive law. The less faithful a positive legal system is to apriori law (as the legal state of Italy described by Manzoni in the *Promessi Sposi*), the more evident this fact becomes.

Even when we think of many of those domains of right which clearly and definitely *are subject to* positive law enacted by the State, and usually are approached in the consciousness of the parties that eventually the State-law will be invoked regarding them, like the law governing the binding force of the (last) will of persons, etc., the positive law possesses a far lesser power than the one Reinach appears to ascribe to it. It does not, in many of these cases, suppress or dissolve those rights and obligations which arise according to apriori essential necessities but it only fails to recognize or to protect them, or both. Or it creates, in addition to legal

entities which obey apriori laws, other legal bonds which do not follow from apriori right but are permitted by it.

Again, Reinach himself, in his discussion of the "*naturale Obligationen*" (especially p. 197) recognizes this point. Yet he fails to include it consciously in, and to reconcile it with, those passages in which he describes the relation between apriori and positive law in general terms, asserting that apriori legal bonds exist "only as long as deviating enactments that are efficacious have not prescribed something different;" (see above, no. 6). This and similar formulations of Reinach seem to be meant quite generally. In addition, Reinach clearly holds that the sphere of apriori law in his sense extends to all single legal disciplines. One could attempt to interpret the above statements as applicable only to those enactments of positive law which mean to suppress or to add legal effects "in a meaningful manner" or "for the reason of considerations of utility and justice." Even when it is interpreted in this way, we draw the truth of this thesis into doubt, however, as we shall see, quite apart from the fact that such a decisive restriction should have been noted by Reinach. One could also interpret Reinach as never excluding a sphere of apriori essential necessities regarding recognition and protection of apriori law in positive law and as simply never speaking of those different laws which prescribe formalities which provide the rules for legal protection. Then the results we reached concerning these laws would only complete Reinach's own results and not contradict them.

C. *The authentic creative freedom of positive law to deviate — in many cases validly — from positive law:*

None of the points made so far which refer to certain spheres or types of positive law and to some forms of its relation with apriori law, excludes the full validity in other cases of the determining enactments of positive law which deviate from the content of "pure apriori law."

Positive laws may not only specify many points left indetermined by apriori law as such. They can also validly bestow rights on persons. Thus they can truly give to persons 17 years of age and younger a right to back out of contracts unilaterally. (This legal determination creates a right which does not pre-exist positive laws.) Or they can fix the date for full legal possession of all personal rights (restricting these in children). Here the positive law does more than interpret what is given as apriori essentially necessary facts. There are many other examples, especially in property law, where there is often no apriori basis for the determinations which have to be made. Think of the case of *usucapio*, according to which the uncontested *possession* of a thing by a person for a specified number of years turns into *ownership* of the thing. Reinach is undoubtedly right when

he says that the mere *duration of possession* has, from an apriori point of view, absolutely no tendency to turn into ownership. Here, in property law, the positive law does not just add effects to a social act but creates whole structures for the organization of economic life. There are many other cases of positive law which regulate limits of rights to buy and to sell, taxes, etc., which are created by positive law in a more sovereign manner. To explore in detail the relationship between such ordinances of positive law and apriori principles is not our task here.

D. *In some cases positive law really dissolves or effectively modifies rights or obligations which arise in accordance with apriori law:*

In some cases (cf. Reinach, *ibid.*, p. 177, 178, 179) positive law truly has the power Reinach ascribes to it quite generally, and in those cases it actually dissolves rights which existed prior to positive legal enactments. Such cases include the following two. There is, for one, the case in which the *superior authority* of the State or of parents, or of the Church, may rule positively on promises of youngsters or also adults, civil marriage bonds, and so on, in such a way that the rights and obligations which would have arisen or did arise according to apriori law, actually *do dissolve*. The conditions under which, and the reasons why, legitimate authority can indeed suppress or dissolve rights which arise according to apriori law are not explicitly discussed by Reinach (nor are such additional conditions for the power of positive law over apriori legal relations explicitly excluded by him). They should be examined in further works on philosophy of right and in further developments of the *apriorische Rechtslehre*.

Another case in which positive legal enactments do indeed suppress any legal rights and obligations which may have arisen apriori is the one discussed by Reinach in which there is unclarity concerning the apriori arising claims and obligations, and in which the involved parties invoke the judgment of an arbitrator to whose judgment they surrender freely. In this case it is truly possible that the arbitrator's decision efficaciously *dissolves* the legal entities that had arisen in accordance with the apriori essence of social acts and other legally relevant data.

E. *In other cases both spheres of right coexist and each has a certain "priority":*

In other cases, both "spheres of right" (the apriori and the positive one) continue to exist. Yet the positive right may be superior and stronger in the sense that it *becomes objectively binding* for the party who objectively was in his rights *before* the arbitrator's decision, to *submit* to the arbiter's decision and to accept it without having recourse to the situation *quoad ante* (see Reinach, *ibid.*, p. 179). It remains, however, doubtful whether in the case of an objectively *clear evidence* to the contrary of the arbitrator's

decisions the moral obligation to fulfill the apriori existing legal commitments does not continue to exist nevertheless. These cases (as well as that of *Erbrecht* mentioned by Reinach) should be examined much more closely but this contribution intends only to make some general suggestions, not to carry them out fully.

F. *Positive Law can also create laws that are "excluded" by apriori law:*

It is also possible that the positive law-maker creates a law which is excluded by apriori law. Here we must distinguish, however, two meanings of "excluded." There is first the case where apriori law makes it *objectively impossible* that positive legal enactments remain valid if they deviate from apriori law. Examples of this were given above. Here (in contradistinction to what Reinach seems to say *ibid.*, p. 180, 182) positive law is *not* valid or is even absurd. Reinach does not explicitly deny this but it is an important point to include in a discussion of the general relationship between apriori and positive law.

There is secondly the case, explicitly affirmed by Reinach, in which positive law creates rights and obligations which *cannot* arise, in consequence of apriori laws as such, from the nature of certain acts (and are in this manner "excluded" by apriori law) but are not absolutely excluded by it. Here the positive law can as it were validly *add on* new rights or obligations to those which naturally arise, without *contradicting* the sphere of its creative legal competence. This case may be given when claims of third parties arise from promises made by others on behalf of third parties, when debts or claims of creditors are transferred without the apriori required social acts, etc. (cf. Reinach, *ibid.*, pp. 202, 210).

3. *Conditions to be fulfilled by legitimate and valid deviations of positive law from apriori relations of right:*

Even in those cases in which positive laws deviate legitimately from apriori legal relations in the sense described, many apriori conditions of the validity of such suspensions or modifications of apriori rights and claims by positive law obtain.

The absence of some of these reasons may not suspend validity but only legitimacy of deviations of positive law from apriori law.

A. *Meaningfulness:*

A first of these conditions is that of the apriori pre-given *meaningfulness* of a given positive law. Thus it is meaningful to require *written* contracts (instead of merely oral and unverifiable ones) in order for them to be recognized by positive law. It would be totally meaningless, however, to require by positive enactment that any contract must be signed in blue ink, and to pass an enactment that any contract signed in black ink is not

binding. To demand such a thing would be meaningless and unjust, in virtue of the total arbitrariness and illogical unfounded nature of such a demand; and such a law would even be deprived, I propose, of any true legal validity because of its absurd injustice. While this example probably does not resemble any actual positive law and serves only to illustrate the principle at stake, meaningless and invalid restrictions and modifications of apriori relations of law do frequently occur. For example, a positive law that would restrict the binding force of contracts to Whites and would deny such force to contracts entered into by or with Blacks would clearly be unjust — for the reason of violating the apriori essence of promises and of adding a meaningless condition for the validity of contracts: a certain color of skin; but it would also be invalid and incapable of suspending the apriori legal force of promises. This is also clearly Reinach's own position when he explicitly addresses himself to slavery (see above, page 211). One can thus infer the following position from the mentioned text in Reinach, a position which clearly contradicts his general statements about the "absolute freedom" of positive law to deviate from apriori law in his sense. (As we have seen, Reinach states expressly that the reason for the incapacity of Roman laws pertaining to slavery to actually dissolve the rights and obligations proceeding from promises made to slaves lies in the apriori essence of promising and not in a "natural law" outside the apriori nature of social acts and legal entities arising from them.) If a slave holder promised his slave to set him free after a determined period of time and then broke this promise, the positive law may have declared such a promise to be without binding force. This positive enactment, however, has absolutely no force to actually dissolve the fact that the slave-holder was legally (i.e., as a matter of apriori right which has precedence in this case over positive law) and, consequently, in this case also morally, bound to fulfill the promise and that the Black had a valid (albeit unprotected and unrecognized) legal claim to its fulfillment. In his talks to the pharisees on some of their positive legal enactments on binding versus non-binding oaths Christ chastizes such arbitrary positive enactments suggesting that they are not only foolish but that the binding force of a promise given under oath (solemn promise invoking God as witness) remains entirely untouched by the fulfillment or non-fulfillment of such arbitrary legalistic conditions. What is presupposed here, among other things, is that the binding force of validly formed legal bonds grounded in the apriori essence of promises, given under oath, remains intact although positive law (impotently) seeks to modify the conditions for these bonds arbitrarily in such a way that the naturally arising apriori rights and obligations are claimed not to arise as long as these arbitrary conditions are not fulfilled. This possibility seems to be

implicitly denied by Reinach's thesis of the victory of positive law over bonds that would arise from apriori right.

B. *Justice and its inseparability from apriori right:*

A second and very different condition for effective modification or suppression of apriori rights by positive law regards the issue of *justice*. Considerations of justice can make judgments contained in constitutions and codes of positive law or positive legal enactments (such as those passed by the *Third Reich* about the non-human status of Jews or those about the non-person status of embryos and the lawfulness of abortion) entirely invalid and impotent actually to bring about modifications of apriori rights (and of course also of natural rights in the narrower sense of this term). Of course, such positive legal enactments are not ineffective in the sense that they, or external actions in accordance with them, could not be legally enforced or that legal protection could not effectively be removed from the mentioned groups and from the apriori arising rights existing among them. But, as Cicero showed so powerfully, Senates and dictators are powerless to suspend the *validity* of natural or apriori law. Some of his examples refer definitely to the latter. See, for example, the following texts:

But the most foolish notion of all is the belief that everything is just which is found in the customs or laws of nations. Would that be true, even if these laws had been enacted by tyrants? If the well-known Thirty had desired to enact a set of laws of Athens, or if the Athenians without exception were delighted by the tyrants' laws, that would not entitle such laws to be regarded as just, would it? No more, in my opinion, should that law be considered just which a Roman interrex proposed to the effect that a dictator might put to death with impunity any citizen he wished, even without a trial. [These are examples of the violation of at least two apriori rights that belong to the apriori in penal law to which Reinach makes repeated reference in presenting the "apriorische Rechtslehre," namely to the apriori fact that punishment should not be distributed arbitrarily but only for crimes, and that a criminal must have the right of proper hearing, defense before court, etc.] For Justice is one; it binds all human society, and is based on the Law, which is right reason applied to command and prohibition. Whoever knows not this Law, whether it has been recorded in writing anywhere or not, is without Justice.

Cicero, *Laws* I, xv, 42

In the same work (I, xv, 40) Cicero also refers to robbery and theft as to such crimes that are wrong by their essence, referring thereby implicitly at least to some of those apriori facts concerning property which Reinach unfolds in his book. In the *Republic* III, xxi, 32 Cicero refers to all the elements of "eternal and unchangeable law" which bind all cities and states at all times and these include according to him many apriori rights in Reinach's sense, for example those that refer to the essence of contracts. Thus we can apply to them, too (and not only to "natural law" in the narrower sense) the words of Cicero that follow the text quoted above (*ibid.*, I, xvi, 42-43):

But if the principles of Justice were founded on the decrees of peoples, the edicts of princes, or the decisions of judges, then Justice would sanction robbery . . . and forgery of wills, in case these acts were approved by the votes or decrees of the populace. But if so great a power belongs to the decisions and decrees of fools that the laws of nature [we may add: and the apriori essential laws of right that pertain to justice and are presupposed by it] can be changed by their votes, then why do they not ordain that what is bad and baneful shall be considered good and salutary . . . [these last mentioned facts belong to the apriori not only of ethics but also of penal law]"

Cicero is certainly correct not only about natural law but about apriori law when he arrives at the conclusion: "and only a madman would conclude that these judgments are matters of opinion, and not fixed by Nature." (*ibid.*, I, xvi, 45). ("Nature" here includes the apriori essence of social acts.)

While here many elements of "natural law" enter, these cannot be divorced from Reinach's problem of the relation between positive and apriori law. Herewith we touch upon a further side of our critique which differs from the argument that Reinach fails to see the manifold normative role of apriori right for positive law. The present criticism concerns, rather, the untenability of as radical a separation of the sphere of apriori right from that of justice and of (a correctly interpreted) "natural law," as Reinach suggests.

C. *Other prepositive elements of law which must be respected by valid deviations of positive law from apriori right:*

Waldstein distinguishes in "Vorpositive Ordnungselemente im Römischen Recht" *loc. cit* the following pre-positive elements which exerted their influence on Roman Law and undertakes to show that the

positive Roman Law achieved its greatness precisely by constant reference to those moments: 1. the *rerum natura*, i.e., the characteristics of a given object; 2. the essential structures of legal entities such as the essence of a contract (Reinach's *apriori* law); 3. principles of Roman Law such as *fides* which transcend the immanent legal structures; 4. *ius naturale* (natural law); 5. justice (*ibid.*, pp. 8 ff.). Each of these moments (while they contain also some purely empirical factors) could be shown to contain elements which account for certain *apriori* conditions for valid positive law and for the justice and rightness of deviations of positive law from *apriori* law and *apriori* elements presupposed by the latter.

Apriorische Rechtslehre ought not to exclude this our third type of conditions of legitimate and valid deviations of positive law from *apriori* law (especially the *apriori* elements in Waldstein's no. 1 and 3) because they too affect directly the relationship between positive law and *apriori* law.

At this point, one understands why we had to withhold consent also from the most sympathetically interpreted position of Reinach, according to which all deviations of positive law from *apriori* right are valid and legitimate as long as reasons of utility and justice (and perhaps other values) support them. For *apriori* structures of right and the other mentioned prepositive elements of law, investigated by Waldstein, possess a *legal relevance*, i.e., demand (at least *prima facie*, sometimes absolutely) respect by the maker of positive law. There are, for example, many kinds of promises which do not refer to intrinsically criminal deeds or have grave evil consequences in virtue of which positive law would be obliged and free to dissolve their binding force. Nevertheless, to fulfill these promises would bring harm or moral damage to both parties of such promises. Perhaps they even imply unjust distribution of property, silly or morally dubious projects, etc. Certainly, if purely considerations of justice and usefulness (even in the deepest sense of this term) would suffice to legitimize deviations of positive law from *apriori* law, positive law should declare all such promises as null and void. The same applies for property rights whose exercise is often in conflict with a more just distribution of possessions and of property. Does it follow that the positive law, as radical socialism would hold, can validly and justly in all such cases deviate from *apriori* law? Certainly not. A radical violation not only of the freedom and autonomy of persons but also of the legal relevance of *apriori* law would result.

In order to understand this better, one must raise the doubt whether Reinach is right in holding (in Crosby's interpretation) that *apriori* right only refers to "what is" in contrast to "natural law" which would refer to "what ought to be." Reinach's own position does not clearly coincide with

Crosby's interpretation. For Reinach states repeatedly that *apriori* law is also what "ought to be" (*das Seinsollende*), at least "*prima facie*" ("*an und für sich*"). (See *ibid.*, 221.) He seems to speak more of a "modification of its character of oughtness (*Sollenscharakter*)" through circumstances of life, economic factors, etc. At any rate, if Reinach really thought that *apriori* law is in no way (and never "absolutely") something that is more than a neutral "fact," and that certain acts result from rights and obligations is an equally neutral fact, then he certainly would have plausibly concluded that *apriori* law as such is never a "norm" for positive law. Such a conclusion would have been quite warranted since Reinach does not seem to acknowledge clearly an "absolutely, i.e., non-conditionally, necessary" character of *apriori* rights and claims. For only in virtue of some absolute necessity or in virtue of some "importance" (non-neutrality), in Hildebrand's sense of the term, can *apriori* law be "normative" for positive law.

Now it is clear that we tried to bring to evidence the non-neutral character of *apriori* law. We spoke of the "legal relevance" which we conceive in analogy to those positive forms of "importance" (non-neutrality) which belong to beings in virtue of their own nature but which cannot be "reduced" to value. (Such forms of positive importance were investigated by D. von Hildebrand; see *Moralia* [*Gesammelte Werke* vol. 9], Regensburg, 1980, 31 ff., 153 ff.) Also because "legal relevance" cannot be reduced to value in the strict sense as "positive intrinsic preciousness" (Hildebrand, *ibid.*, pp. 31 ff.), it is understandable why conflicts exist between *apriori* right and considerations of justice.

Speaking here of "legal relevance," we wish to distinguish the datum of an importance which is not that of value, conceived as intrinsic preciousness of being, and which demands "legal" recognition, from "moral relevance" which demands respect in the moral sense of the term. (Compare also to this point D. von Hildebrand, "Die rechtliche und sittliche Sphäre.") Of course, *legal* relevance goes hand in hand or even grounds in many cases also "moral relevance." Yet it does not consist in moral relevance, in calling for a special respect of something in the sphere of positive law and in a "legal sense" of the term.

*Does Reinach see the relationship between
Apriori Law and Natural Law correctly?*

From what has been said so far, it can also be seen that Reinach's sharp distinction between *apriori* right and natural law cannot be upheld. We have already encountered the sphere of *apriori* right which Reinach actually investigates at length in his masterwork on the "Apriori in Civil Law." We have also seen that he regards this *apriori* only as a part of the

whole sphere of apriori *in* civil law. In addition, we have already quoted his repeated, explicit assertions that *other* legal disciplines (he mentions by name criminal law, administrative law, public law, penal law, and others), in fact "all other legal disciplines" possess an apriori foundation. Finally, we found that Reinach acknowledges an "apriori right as such" which would be explored by some "general theory of apriori right." Thus he definitely conceives of the sphere of the apriori in law in a very broad sense. At times, as we have already noted above, he includes in this notion even all elements of law which are knowable in an apriori way. In spite of his very broad and not unambiguous conception of the sphere of legal apriori (which is in any case not restricted to Civil Law) Reinach wishes to separate it clearly from "natural law" and thus intends with the term "apriori law" a more strictly delineated sphere of right distinct from "natural right."

What is the basis for this distinction? If it were claimed that the one is apriori, the other not, this could not be substantiated. For both contain clearly apriori facts and laws. Is it that apriori laws are based on neutral legally relevant structures of various factors and especially of social acts, while "natural law" speaks of rights that are not neutral and value-free? Yet we found that also many apriori laws possess value or at least "legal relevance" and demand a respect that is due to their specific irreducible character of "law" and "rights."

This important insight, which completes Reinach's analyses, was gained by Dietrich von Hildebrand in his "Die rechtliche und sittliche Sphäre," where he develops the distinctions between the categories of "right" and of "value" (*ibid.*, pp. 87 ff.) and shows simultaneously that rights differ from values and that they possess value.

Hildebrand, in the same article, proposes probably the most complete criteria for "distinguishing" the morality-laden "natural rights" (fundamental rights of the person) and the sphere of apriori right. First, the rights which result "apriori," he says, convey a certain legal "power," while the "natural rights" as such fail to do so. (A discussion of this criterion does not belong here.) Secondly, he suggests that "natural law" refers to rights, such as the right to liberty, etc. which have quite another "moral pathos" than "apriori law." Thirdly, and in consequence of this, they always demand respect and always constitute a norm for positive law which must *never* deviate from the fundamental human rights. Apriori law, in contrast, does not always constitute a norm for positive law as we have seen. Fourthly, and closely related, while apriori rights can be suppressed or suspended by the state, and renounced by the person who has them, "natural law" can never be (*ibid.*, p. 99 f.).

Whatever the exact nature of this difference is, and whatever the

specific kind of importance or "legal relevance" (distinct from value) which belongs to the strictly legal sphere (including "apriori law"), in any case many apriori rights demand respect from the point of view of justice. Thus the sphere of justice cannot be divorced from that of apriori law whose protection, and respect for which, is in fact one of the principal moments that *constitute* justice.

Returning to the difference, which certainly exists, between "natural rights" in the narrower sense and apriori law, we can ask: Does perhaps this difference consist in the fact that apriori law is *not founded* on values (only linked to them), while natural law would be strictly *founded* on value? (Hildebrand makes a suggestion in this direction when he writes — *ibid.*, p. 93: "Alle sittliche Bindung gründet in Werten, rechtliche Bindung und rechtliches 'Können' hingegen nicht.") This basis for a distinction between apriori and natural law, although it refers to important facts, can also not be accepted quite simply. Personal self-possession, for example, is not a *value* any more than the essence of social acts is although it *possesses*, of course, value but it is a partial source of many natural and apriori rights, as Crosby has suggested in his article in this issue of *Aletheia*. Moreover, we found with Hildebrand that apriori rights may be *bearers* of values. Perhaps it is true, however, that "natural rights" which are linked to the essence and dignity of the human person and his vocation, are *always* related to values and partly founded in them, while apriori law proceeds more from the *immanent structures* of certain acts than from values. This problem shall not be investigated here any further.

Reinach's own brief hints at the principles of his distinction (*op. cit.*, pp. 219 ff.) between apriori right and natural law are less convincing than those discussed so far. As a first distinction between the two realms Reinach claims that apriori right (in contradistinction to natural law) is no "higher right" that could fill in "gaps of positive law" or invalidate positive law when contradictions between the two arise. This proved to be incorrect, although it refers to the valid refined third criterion Hildebrand offers which we just discussed.

Secondly, Reinach ascribes to "natural law" the character of an unconditionally valid law that also represents a "judge" of positive law, while, as we have seen, apriori right does not have this character according to him. While we find the first part of this assertion, about natural law, correct, we cannot agree with the implication that apriori law is wholly lacking the character of a "judge" of positive law. Reinach seems to deny that (apart from the possible existence of "laws of a formal sort" — *ibid.*, p. 221 — which are not investigated by apriori *Rechtslehre* but whose existence Reinach suggests) legal apriori structures constitute *contents* in the sense of a "right law." Also this criterion we could not accept.

Thus the idea of *natural law* (freed from its misinterpretations which Reinach well criticizes) cannot be as radically distinguished or separated from *apriori law* as Reinach suggests. The criteria for the real distinction between the two kinds of "apriori right," *natural law* and *apriori law*, has to be drawn more carefully. In the context of such an analysis the criteria offered by Reinach himself and by Crosby have to be further elaborated and critically examined. The preceding remarks, without fulfilling this task, prove that here lies another major area for further development and partial critique of Reinach's position.

Reinach's Discovery more important than he thinks

In conclusion, we repeat that these criticisms, far from diminishing the immense philosophical contribution of Reinach's masterwork, throw its importance into better relief. For these criticisms demonstrate that Reinach underestimates the role which the *apriorische Rechtslehre* plays in relation to positive law. It far exceeds the modest function he assigns to it when he restricts the role of *apriori right* for positive law more or less to that of providing the *starting point* for the free play of modifications, formations, and deviations which the positive law can perform in regard to it. The role of *apriori law* that emerges from our considerations is not only that of constituting the necessary conditions of positive law but it is also a very rich and determinate immovable framework which forbids certain positive laws entirely, renders others unjust or invalid, prescribes still others, restricts some, and thus remains an important foundation on which all positive law has to rest and against whose timeless demands it must not be or even cannot be enacted. In other words, although positive law may — within certain limits — validly deviate from *apriori law*, the latter possesses a definite normative role, including that of the condition of the possibility of valid and just positive law. If this contention is correct, the careful study and further development of Reinach's *apriorische Rechtslehre* appears as one of the most urgent tasks of future philosophies of law.

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Table of Contents of Volume I: Metaphysics (two installments)

J. Crosby	The Idea of Value and the Reform of The Traditional Metaphysics of Bonum
S. J. Hamburger	Liebe, Schönheit and Einheit
M. Healy	Substance and Spiritual Substance: A Criticism of David Hume
D. von Hildebrand	The Essence of Love and the Need for a Phenomenological Metaphysics (translated from the German by M. Heyne-Seifert)
W. Hoeres	Critique of the Transcendental Metaphysics of Knowing: Phenomenology and Neo-Scholastic Transcendental Philosophy (translated from the German by W. Marshner)
J. Seifert	Essence and Existence: A New Foundation of Classical Metaphysics on the Basis of Phenomenological Realism, and a Critical Investigation of Existentialist Thomism
F. Wenisch	The Finiteness of the Past: A Dialogue
D. Ferrari	A Reply to the Finiteness of the Past

Table of Contents of Volume II: Epistemology

A. Reinach	A Contribution Toward the Theory of the Negative Judgment (translated from the German by Don Ferrari)
D. Ferrari	Retention — Memory, Perception and the Cognition of Enduring Objects
M. Waldstein	Expression and Knowledge of Other Persons
J. Seifert	Karol Cardinal Wojtyła (Pope John Paul II) as Philosopher and the Cracow/Lublin School of Philosophy <i>In Memoriam Max Scheler</i> (1874-1928)

- B. Fiand An Appreciation of Max Scheler's
Essay on Humility, Introduction
and Commentary
- M. Scheler Humility
- F. Dunlop Scheler's Idea of Man: Phenomenology
Versus Metaphysics in the Late Works
- W. Craig Reply to the Dialogue "The Finiteness
of the Past"

Table of Contents of Volume IV (1984)

Theme: Epistemology and Logic

Dedicated to Roman Ingarden (1893-1970)

- R. Ingarden Theory of Knowledge as Phenomenology
of the "Essence" of Cognitive
Experiences and Their Correlates.
(First English translation from the Polish
by A. Szylewicz).
- F. Wenisch Insight and Objective Necessity: A
Demonstration of the Existence of
Propositions which are Simultaneously
Informative and Necessarily True.
- A. Millan-Puelles Teoría del Objeto Puro.
- G. Kalinowski La Pensée Philosophique de Karol
Wojtyła et la Faculté de Philosophie de
L'Université de Lublin.
- T. Styczen Reply to Kalinowski: By Way of an
Addendum to the Addenda. (Translated
by D. Fedoryka).
- A. Poltawski Freedom and Dignity in the Work of
Karol Wojtyła.
- M. Garcia-Baro Sobre la Naturaleza de las Leyes
Empiricas.
- W. Strozewski Roman Ingarden's Aesthetic Program.
(Translated by D. Fedoryka).
- D. Fedoryka Subjectivity and Philosophy.

Table of Contents of Volume V (1985)

**Theme: Phenomenological Realism
as Classical Philosophy**

- A. Reinach What is Phenomenology? (Translated
by D. Willard).
- D. von Hildebrand Fundamentale Akte. Ein Beitrag zur
Erkenntnistheorie, Sprachphilosophie,
und Anthropologie logischer Akte.
- J. Seifert Evident Knowledge Concerning
"Things-in-Themselves" and
Appearances — Phenomenology as
Noumenology: A Thematic Study into
the Epistemological-Metaphysical
Foundations of Phenomenological
Realism, a Reformulation of the
"Phenomenological Method," and a
Critique of Transcendental
Philosophy and Phenomenology.