6

Private Law beyond the Law

Sandy Steel

In this chapter, I consider the extent to which the concepts recognised in the positive private law are answerable to concepts that exist outside of the law and in what ways the justification of positive private law rests upon its relationship to normative facts that exist independently of it. Reinach prompts reflection on these matters in that he directs his attention to a set of abstract entities (rights, claims etc.), and propositions relating to those entities (*a priori* laws) which, he claims, do not owe their validity to the positive law, but exist in the same way as mathematical objects and truths. In this way, he goes *beyond* the positive law, and in a subtle sense to be explored, considers the positive law answerable to the *a priori* law.

I will argue, in a section on 'Concepts', that performing Reinach's kind of analysis on concepts to which the positive law refers can be illuminating, and normatively fruitful, but carries with it the risk of deflecting attention from the normative issues faced by the positive law – a risk to which Reinach himself is alert. I then consider, in a section on 'Justifications', Reinach's understanding of the normative demands placed on the positive law by *a priori* truths about law, and the normative impact of the positive law. Here I examine his view that there are non-moral obligations to which the law may give effect, and his explanation of how the positive law can alter what people are genuinely required, permitted, or empowered, etc., to do.

6.1 A BRIEF PRIMER ON REINACH

In contemporary theorising about private law, few, if any, theorists describe their enterprise, with Reinach, as a search for the 'a priori foundations' of the domain. This eyebrow-raising category does not appear, for instance, in Stephen Smith's well-known taxonomy of the field.[1] Other, more detailed, treatments of the nature of

[1] See, especially, Stephen Smith, *Contract Theory* (Clarendon 2004), ch 1, which describes historical, interpretive, and normative approaches. See also the contents of Thilo Kuntz and Paul Miller (eds), *Methodology in Private Law Theory: Between New Private Law and Rechtsdogmatik* (Oxford University Press 2024), and Tarunabh Khaitan and Sandy Steel, 'Theorising Areas of Law' (2022) 28 Legal Theory 325. For an influential modern view of

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Reinach's inquiry will be found in this book, but it will be useful to have a brief statement of his basic approach.

Reinach aims to identify *a priori* foundations (*Grundlage*) of civil law. What are 'a priori foundations'? It's not *exactly* clear what Reinach intends here.[2] It seems to range from *necessary* truths about the subject matter of the civil law, to *necessary* truths about the *essence* of civil law or the normative entities which it employs and to which it makes reference, to necessary, essential truths about civil law that can be known by intuition and justified independently of experience. Perhaps the last of these three possibilities is the predominant one.

It is in this way knowable and true, Reinach says, that a promissory duty is discharged when performance is rendered, that a promisee has a power to waive the promissory duty, that a promise creates a non-moral obligation to perform it, that a person may acquire rights in their own capacity or in a representative capacity for another, that a promise is only made when the promise is heard by the promisee, that a person who produces an object from unowned materials owns the object, that factual possession is different from a *right* over an object, and so on.[3] These are like mathematical truths (a comparison Reinach makes).[4] This seems to involve their being knowable *a priori* and their existence as abstract objects.[5]

In so far as it focuses on 'legal entities', an *a priori* account aims to understand their 'essence' and the necessary truths concerning these entities – the a priori entailment relations that hold between them.[6] In relation to some of these truths, no more foundational explanation can be given of their validity: 'To try to explain it [why a promise binds] would be just like trying to explain the proposition, 1 x 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.'[7]

philosophy as concerned with identification of *a priori* truths, see Timothy Williamson, *Philosophical Method: A Very Short Introduction* (Oxford University Press 2022).

[2] See Lorenz Kaehler's contribution to this volume.

[3] Presumably, Reinach is concerned with something like 'a priori truths about the subject matter that *constitutes* private law'. It is a necessary truth about civil law that, if it exists, it exists in a world where 2+2 = 4, but this is not what interests Reinach.

[4] Adolf Reinach, 'The Apriori Foundations of the Civil Law' (John F Crosby tr, 1983) 3 Aletheia 1, 46, reprinted in Adolf Reinach, *The Apriori Foundations of the Civil Law Along with the Lecture 'Concerning Phenomenology'* (John F Crosby ed, Ontos Verlag 2012), originally published as Adolf Reinach, Die apriorischen Grundlagen des bürgerlichen Rechtes, 1(2) *Jahrbuch für Philosophie und phänomenologische Forschung* (Max Niemeyer 1913), 685–847.

[5] Cf Reinach (n 4), 111: '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'.

[6] Reinach (n 4), 96.

[7] Reinach (n 4), 46.

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How exactly does one come to know *a priori* truths about the subject matter of civil law? Not by empirical generalisation from past or present civil law systems.[8] Even if every positive system of civil law claims that a non-promisee directly gains rights from a promise, this does not alter the truth of the proposition that promises only directly create rights in the promisee. Instead, *a priori* truths are arrived at through reflection on the subject matter of civil law. By considering whether things could be other than they are, one arrives at the necessary properties of the phenomena; these are 'self-evident'.[9] These properties may then entail further necessary truths, which it is the task of an *a priori* theory to reveal.

Reinach has a subtle account of the relationship between the *a priori* foundations of civil law and the content of any particular positive civil law. It is not the case that the positive law always ought, all things considered, to mirror the content of the *a priori* foundations:

> 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.[10]

In the next two sections, we will consider in greater depth Reinach's precise account of the relationship between the positive law and the *a priori*.

6.2 CONCEPTS

Theoretical accounts of private law and its concepts are often classified as 'internal' or 'external'.[11] The former are conventionally described as foregrounding the law's own conceptual self-understanding, the perspective adopted by legal officials in applying and developing the law and being resistant to 'functional' explanations. The latter, often associated with work in the law and economics tradition, are conventionally described as providing explanations and justifications which do not privilege the law's own conceptual self-understanding.

Reinach is not straightforwardly classifiable in either category. On the one hand, he is an 'externalist' in that he seeks to identify *a priori* foundations that may or may not be reflected in the law; even if the positive law wholly departed from such

[8] Reinach (n 4), p.133. The history of civil law is not, however, entirely irrelevant to an *a priori* theory. Robustly prevalent features of civil law systems provide some evidence that the feature belongs to the *a priori* foundations. Conversely, the absence of a feature in all positive law systems casts an explanatory burden on the proponent of the view that the feature so belongs.

[9] Reinach (n 4), p.96.

[10] Reinach (n 4), p.5.

[11] See Andrew Gold and Henry Smith, 'Sizing Up Private Law' (2020) 70 UTLJ 489 (arguing that the distinction is exaggerated). See also Khaitan and Steel above n 1.

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foundations, the *a priori* law would be unaffected. The views of legal officials are largely irrelevant to the content of the *a priori* law. On the other, he resists 'reductive' explanations of the concepts employed by the law when these overlap with or refer to the *a priori* concepts and laws.

Yet Reinach is ultimately not so different from modern arch-internalists, such as Ernest Weinrib. Weinrib's work moves out from an analysis of the essential structure of private law, which, in this view, is constituted by relational duties that correlate with rights, powers of enforcement vested in right-holders, and remedial rights and duties that aim to ensure or restore a normative equality between the parties. The foundational concepts in this theory do not owe their existence to the positive law and have an existence independent of their construal in the positive law. Whatever judges might say about the matter, for instance, what makes a duty owed to another is whether the duty's mandated conduct is required in order to maintain normative equality between the duty-bearer and another person; the positive law does not alter this. Of course, and this is a major emphasis in such views, the positive law has a normative impact, making determinate the abstract notions built in to abstract right, and rendering innate and acquired right possible and enforceable without wronging others. However, it is still the case that the foundational concepts of innate right, epistemically, causally and ontologically, are not due to the positive law. Indeed, it would seem that these concepts can be known *a priori* in much the way that Reinach claims his laws can be known, albeit that reflection on the positive civil law may guide the way.

Is there a value in pursuing an investigation into *a priori* concepts of the civil law? Here are three possible reasons for doing so. First, if one takes seriously the analogy with mathematical truths, one might say that, just as there can be a value in knowing the abstract truths of mathematics ('there is no highest prime'), there is a value in knowing abstract normative truths ('promises necessarily generate waivable claims'), and understanding the essential properties of abstract normative objects ('commands are inherently addressed to another's conduct), regardless of their recognition in the positive law.

Second, there is plausibly some kind of normative constraint that justifies criticism of legal departures from certain truths that do not owe their existence to law. When a *legal* argument involves a logical circularity, for instance, its objectionability is, fundamentally, a moral one. Consider, as an example, the role of locality in determining whether an interference is unreasonable in the tort of private nuisance. In English law, the position is that interference with another's land not amounting to physical damage will be wrongful only when it is abnormal by reference to the standards of the locality.[12] One problem that arises in the application of this principle is the role of the defendant's own conduct in determining the character of the locality: if the defendant builds a new shopping centre, can they rely

[12] See, for a new emphasis on 'abnormality', *Fearn v Tate Galleries* [2023] UKSC 4.

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upon their own conduct to say that the neighbourhood has changed? In *Lawrence v Fen Tigers*, the majority took the view that the interferer's activity (running a speedway stadium) could not be relevant to how one defines the locality *if it amounts to a private nuisance*.[13] This introduces a logical circularity into the law. The defendant's activity is relevant to the characterisation of the locality only if it is not a private nuisance, but to determine whether it is a private nuisance one already needs to have specified whether it is part of the character of the locality.

Fundamentally, what is objectionable about this departure from the demands of logical validity is not its illogic, however, but rather the fact that it makes the law impossible to determine. This is not necessarily to deny that there is a general value in correct (including, logically correct) reasoning. It seems doubtful, however, that failures of reasoning always amount to a breach of a moral obligation. If I believe that I have solved a maths puzzle but in fact my reasoning involves a failure, I breach no duty, even if things go worse (for me). The special moral significance of *judicial* or legal failures of reasoning is the triggering of other moral obligations that apply in that context, including the risk of causing wrongful harm, and the moral values implicated in the Rule of Law. Since it should be possible to have reasonable clarity about one's private rights and duties, rules which make the content of one's rights dependent on circular arguments make this impossible and are objectionable on this ground. The point is not merely that, in the absence of reasonable clarity about the content of primary rights, there is a risk that force will be employed without fair warning, but also, simply, that a person may be held to have violated another's rights in circumstances in which it was impossible to determine in advance whether the conduct amounted a right violation. Nor is the concern exhausted by the failure to provide guidance to legal subjects; circular rules effectively lead to rule by judicial fiat, the rules themselves not pointing in the direction of a particular legal conclusion.[14] Insofar as there any legal *a priori* laws, there may be a similar moral reason to adhere to them on grounds of otherwise making the law unclear or confusing, albeit not simply on the ground that the law does not live up to its *a priori* foundations.

A third reason is simply that identifying the nature of the concepts employed by the law allows for clearer normative disputes – in identifying the essential features of such concepts, one better understands what is at stake in normative disputes. It is true that some, perhaps all, normative disputes can be conducted without a complete conceptual analysis of the concepts in question. For instance, we can

[13] [2014] UKSC 13, [66]. For discussion, see Sandy Steel, 'The Locality Principle in Private Nuisance' (2017) 76 Cambridge Law Journal 145.

[14] This point is missed when the value of the 'rule of law' is reduced only to the value of guidance (in accordance with valuable rules). In *Patel v Mirza* [2016] UKSC 42, [113], introducing a test involving balancing of multiple vague criteria was considered more tolerable in relation to the defence of illegality since would-be criminals need not be able to determine reliably when they will be entitled to rely upon their private law rights in connection with planned criminal activity. More tolerable, perhaps, but there is also the cost of rights-enforcement being made subject less to rules and more to judicial idiosyncrasy.

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reasonably engage in normative disputes about outcome luck – whether the causal effects of one's conduct bear upon one's moral assessment – without a complete analysis of the concept of causation. This may be because we know that whatever the necessary and sufficient conditions, or grounding properties, of causation turn out to be, we know that they will always involve a relation between facts or events that may fail to hold due to matters of luck, and the moral puzzle of outcome luck resides in that property. However, sometimes, the concept in question may be open to several possible analyses that need disambiguation in order to make any progress. For instance, consider the question of whether tort liability ought to depend upon the breach of a moral *duty*. The answer to this question may turn on whether one understands duties as exclusionary reasons, as weighty reasons, as all-things-considered requirements, and so on. It may be that tort liability ought to depend upon a breach of a duty in some of these senses but not others.[15]

A clearer articulation of the conceptual structure of the law also sometimes leads to normative insight, or more modestly, suggests a possible normative insight. One example of this in private law is the distinction between primary duties and primary liabilities.[16] A primary duty is a legally recognised or imposed requirement to do or not to do an act, which does not arise from the breach of another requirement. A primary liability is being situated such that another person may alter one's position by the exercise of a power, absent the breach of a duty on one's part. The very fact of making this distinction reminds one of the possibility that, for instance, court-ordered duties to compensate may not always hinge upon the breach of an anterior legal duty. Not all the reasons that support the recognition of being liable to be ordered to pay compensation support primary duty norms. In so far as legal duties state all-things-considered requirements – they tell us what we must do all things considered – then they give us a very particular form of guidance. Yet it is not obvious that duties to compensate should always be made contingent upon the breach of such a primary duty. There are plausibly situations in which a person is permitted to act in a certain way, yet the costs of doing so, if these involve harm to others, are justly theirs. Now, doing the conceptual work of distinguishing between 'primary duties' and 'primary liabilities' does not itself, of course, tell us anything of normative significance, but the distinction may be useful in drawing attention to a possible kind of legal relation that persons might justly be held to be under. Admittedly, it may sometimes, perhaps always, be an inchoate, unarticulated, normative insight that drives the recognition of a conceptual distinction.

Here is another, recent, example, of how analysis of the *nature* of a legal concept – and, arguably, an implicit claim that the concept corresponds to an external abstract

[15] See Leo Boonzaier, 'Gardner on Duties' in Haris Psarras and Sandy Steel (eds), *Private Law and Practical Reason* (Oxford University Press 2022).

[16] On liabilities generally, see Wesley Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) 23 Yale LJ 16, 44–54.

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object, a la Reinach – can prompt a normative claim. Consider the claim made by Robert Stevens and Donal Nolan that a legal wrong happens at a moment in time.[17] Stevens and Nolan effectively propose this, in Reinachian spirit, as a necessary, *a priori*, truth about wrongs. From it, they draw a surprising implication: the conceptual impossibility of having a legal right not to be caused *loss*. There is no point in time, Nolan argues, at which a person is caused to be worse off. Suppose that after one is negligently injured, one meets the love of one's life in hospital, but later this leads to a terrible accident in which one suffers further injuries. It is impossible, Nolan thinks, to say that the initial injury has made one worse off at a particular time, yet if there is a right not to be negligently caused loss, then it must be possible to say at a particular time that one has been made worse off. They infer that one cannot have a right not to be caused loss because the violation of a right must be something that can be determined at a particular time. Nolan employs the conclusion of this argument to argue that (i) the right in negligence is a right not to be caused *damage* (roughly, being put in a negative state at a particular time) through unreasonable risk impositions, and (ii) limitation periods based on *when* a person suffers a *loss* are hopelessly confused. Whatever we think of the merits of this argument,[18] it makes a normative proposal based on a purported *essential* and *a priori* truth about wrongs, and thus about civil law.[19]

Clearly, one can accept that there are benefits in conceptual clarity without following Reinach in believing that some legal concepts correspond or refer to abstract objects that exist independently of the law. There is a value in conceptual clarity about the concepts employed in the positive law, independently of whether they have extra-legal existence. And even when concepts do not owe their existence to the law, such as the concept of causation, a conceptual analysis might seek to capture ordinary understandings without being committed to Reinach's metaphysical claims (even if some modern authors, in their analysis of the nature of duties, rights and wrongs do seem committed to something like this). Still, Reinach reminds of the possibility that a clarifying conceptual analysis need not be tied entirely to the positive law.

Now, two broad reasons for scepticism about Reinach's enterprise. First, while Reinach is surely correct in claiming that certain conceptual distinctions he identifies hold independently of whatever the positive law says – for instance, factual power and ownership are simply different ideas, or the distinction between acquisition on one's behalf and for another – it seems doubtful that one can move, as

[17] Robert Stevens, 'Rights and Other Things' in Donal Nolan and Andrew Robertson (eds), *Rights and Private Law* (Hart Publishing, 2012) 119 and Donal Nolan, 'Rights, Damage, and Loss' (2017) 37 OJLS 255.

[18] An obvious objection is that the argument confuses epistemic uncertainty about what would have happened but for an act, and metaphysical indeterminacy.

[19] The usual example given of a necessary truth that is not *a priori*: 'Water is H2O'. Nolan and Stevens presumably think that reflection on the nature of wrongs, independently of empirical experience, justifies their view, however. Hence it is a claim about *a priori* truths.

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Reinach does, from these conceptual claims to claims that, *ontologically*, the normative entities or relations to which they refer are actually instantiated independently of the positive law.[20] We can accept, as a matter of our deep conceptual architecture, if you like, that there is a distinction between acquisition on one's own behalf and representative acquisition of rights. However, is it the case that anyone can indeed successfully achieve acquisition on behalf of another – make it normatively the case that through their purported exercise of a power, they succeed in conferring a right on the represented – independently of the positive law? It seems to me that whether any of these normative relations or entities are *realised* (other than as a matter of social fact) depends upon – perhaps very abstract – normative argument. There is a gap, in other words, between identifying a set of deep conceptual possibilities, and the claim that those conceptual possibilities are in fact instantiated as a matter of normative reality. Compare the Hohfeldian scheme of jural relations. One can accept the conceptual possibility of claims, privileges, immunities, disabilities, etc, without also accepting that these *in fact* exist. Whether anyone has a genuine claim or immunity depends (at least partly independently of the law or a conventional practice that purports to confer on them) on a normative argument that explains why.

A second reason points to a general difficulty with moving from *a priori* philosophical analysis of a concept and then using this analysis as part of a normative argument about the concepts which the law should recognise. In short, there is a risk, in such an inquiry, in moving illicitly from the claim that such and such represents the *a priori* nature of a concept to the claim that the law ought to reflect that *a priori* nature in its conceptual scheme. Reinach himself is keenly aware of this:

> 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.[21]

Clearly, this allows for a divergence between the *a priori* laws and the justified positive law. It may even resist the idea that there is a *pro tanto* reason for the positive law to reflect the *a priori* law or concept. That seems the correct position: in the contingent circumstances of a particular legal system, recognising the *a priori* position in the positive law may have detrimental consequences that prevent there being even a *pro tanto* reason for legal recognition. Enoch, Fisher and Spectre have

[20] See also Lorenz Kaehler's chapter in this volume.
[21] Reinach (n 4) 136.

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recently made a similar point in relation to epistemology and (some) normative theories of the law of evidence. They identify as mistaken 'the attempt, roughly, to do legal epistemology just by doing epistemology, or to treat epistemological considerations (say, about the nature of knowledge or evidence) as decisive, or even just intrinsically relevant, to normative questions in evidence law theory'.[22] The background to their article is a literature in the theory of evidence law which draws extensively upon certain privileged epistemic statuses that a belief might have, as identified by epistemology – it might constitute *knowledge*, or have *warrant* or be produced by a process that is *highly likely to produce knowledge*, etc. – and then argues that the law should track that status. For instance, various objections to the use of purely statistical evidence are put in epistemological terms – one view is that statistical evidence that *p* cannot generate *knowledge* that *p*.[23] Enoch and his co-authors argue, somewhat similarly to Reinach's warning above, that, without more, insisting that factfinders' beliefs have certain epistemic status amounts to a kind of epistemological fetishism. In every case, one should ask whether one is willing to trade off the existence of that epistemic status against the other goods which evidence law must secure. For instance, if one insists that factfinders have *knowledge*, and do not act upon purely statistical evidence, one must be willing to accept an increased rate of false convictions or false acquittals. Once we see that insisting upon a certain privileged epistemic status rubs up against the pursuit of other goals, it follows that some *value* must be identified in beliefs having that status which can justify this.

A similar point could be made about another area in which the results of philosophical inquiries seem, sometimes, to be taken to bear directly upon the content of the law: causation.[24] One approach to theoretical questions about how the law should approach causation might be described as 'metaphysics first'. Essentially, one outsources the question to the metaphysicians.[25] Legal norms employing the concept CAUSE should, ideally, track whatever the best metaphysical account of causation is. This approach, unadorned, is subject to a similar objection to that framed by Reinach (and Enoch, Levi and Spectre). Suppose that the best view is that absences (omissions are an example) are not causes, or that absences, in so far as they are causes, are metaphysically importantly different,

[22] David Enoch, Talia Fisher, and Levi Spectre, 'Does Legal Epistemology Rest on a Mistake? On Fetishism, Two-tier System Design, and Conscientious Fact-finding' (2021) 31 Philosophical Issues 85, 85.

[23] See, e.g., Sarah Moss, 'Knowledge and Legal Proof' in T Gendler, J Hawthorne, and J Chung (eds), *Oxford Studies in Epistemology* (vol. 7, Oxford University Press 2022).

[24] Reinach's doctoral dissertation was on causation in the criminal law: Adolf Reinach, 'On the Concept of Causality in the Criminal Law'. Reinach makes the point here that philosophical theories are not a reliable guide to the positive law, but his point is different to that in the text. It is a point about what is relevant to legal interpretation of the positive law.

[25] For this kind of approach, see Michael Moore, *Causation and Responsibility* (Oxford University Press 2009).

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causally speaking, from positive states of affairs or events. Even if so, it seems an entirely open question whether this metaphysical fact should have any legal significance. If a person can be morally responsible for omissions and outcomes to which those omissions stand in a certain relation, and such omissions ground moral rights which the law may permissibly enforce, then it is neither here nor there whether the relation in question is properly termed 'causal' by metaphysical lights.

It might be objected that, if the best metaphysical view is that omissions are *not* causes, then the law should not misdescribe reality by purporting to hold people liable on a causal basis for their omissions. Omissions liability should be described by the law as 'non-causal' in nature, similar to a company's vicarious (non-causal) liability for the acts of its employee. After all, it matters that the law accurately describes the reasons for its decisions, independently of the outcomes reached. In response to the objection, two points may be made. First, in deciding what legal rights, duties, liabilities etc. to recognise, one can accept the objection and still deny that metaphysical truths or distinctions have a direct bearing on the ideal content of those rights, duties and liabilities. In designing the ideal laws, the question is essentially: 'What relations to an outcome should give rise to legal liability?' In answering *that question*, it is at best a secondary matter whether the relevant relations are properly described according to the best philosophical theory as 'causal' or not. Second, if there is a reason for the law accurately to describe the metaphysical basis of liability, it is surely easily defeated. Suppose that ordinary thought recognises omissions as causes, contrary to metaphysical reality, and so guidance to legal subjects is considerably better achieved by describing omissions liability in law as 'causal'. In other words, suppose the law is much more readily understandable by legal subjects if this description is used, and the only reason for departing from this description is metaphysical accuracy. In those circumstances, it does seem like a kind of fetishism to insist upon metaphysical accuracy.

Nothing I have said casts doubt on the value of normative theorists of causation in the law engaging in, or with, metaphysical analysis. Understanding the kinds of relation to an outcome that generate moral responsibility (and so, potentially, legal responsibility) in respect of an outcome will require such analysis. If we can better understand the relation that exists between an agent and an outcome when that person is not necessary for the outcome, yet still seems to play a role in its production, we will better be able to identify situations in which a person is potentially morally responsible for the outcome. The only point, with which Reinach would agree, is that one should not assume that a metaphysical distinction tracks a moral, and legally relevant, one.

6.3 JUSTIFICATIONS

It should already be clear that Reinach's project in the *Foundations* is not intended to be a normative one. It does not seek to provide a justification of a system of private

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law, nor does it contain any specific normative proposal about the content of the positive law. Still, Reinach makes some interesting general observations that bear upon questions of justification, and the relationship between law and normative standards that do not owe their existence to the positive law. These can usefully be grouped into two general themes: (i) the relationship between positive civil law and morality, and (ii) the normative effects of the positive law.

6.3.1 *Moral and Non-moral Demands on the Law*

Reinach draws distinctions between kinds of normative demand, with each having some bearing on what the positive law ought to be. First, there are moral facts that hold regardless of social facts, or empirical facts more generally. These include the fact that a promise normally generates a moral duty to perform the promise.[26]

Second, there are principles, again independent of the positive law which determine 'legal oughts'. Reinach briefly elaborates that 'This [legal] 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'.[27] Perhaps what Reinach has in mind here is something in the vicinity of the distinction between justice or *ius* and other domains of morality, or between 'right' and 'virtue'.

Reinach's remarks on the matter are relatively cursory, so it's not entirely clear what relationship he envisages between morality and *ius* or the 'legal ought'. At times, it seems as if the latter is simply a sub-set of the former (for instance, when he writes that legal oughts are not *purely* moral oughts, suggesting that they are moral, but there is some additional feature of the legal ought). In particular, it is not clear that Reinach would endorse the Kantian view that the 'juridical' (*ius*-related) concerns the set of non-positive principles that properly determine the content of enforceable positive law rights and duties. In the Kantian picture, these principles determine what *rights* persons should have in positive law, and are concerned exclusively with the protection of external, equal, freedom. For instance, Reinach mentions that intimate or consanguineous relationships generate moral 'rights' between the parties to such relationships, and that these rights may be recognised by the positive law;[28] this might be taken to suggest that the grounds of justified legal rights are not exclusively freedom based.

There is a danger of terminological disputes in carving up normative territory between 'ius' and morality, or between the juridical and the purely moral. Everyone ought to agree that there are some obligations whose existence is not grounded in

[26] Reinach (n 4) 14.
[27] Reinach (n 4) 136.
[28] Reinach (n 4) 52.

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positive law which ought not to be enforced in the positive law. It doesn't matter a great deal whether we refer to the enforceable set as 'juridical' and the non-enforceable sub-set as 'moral' or consider them to be sub-sets of the more general category of 'moral'. The substantive question is: What normatively explains when and why certain obligations should be recognised and enforced in positive law? The central, distinctive, feature of the Kantian view, for instance, is the substantive claim that positive law enforceability is connected to *freedom-grounded* non-positive rights and duties; duties with a different ground are not enforceable.[29] The interesting question is, then, whether the Kantians are right that the distinction between freedom-based rights and non-freedom-based rights provides a persuasive account of which duties are, by their nature, enforceable and unenforceable, respectively, or whether a more pragmatic account is preferable. Such an account might rest not on the justificatory basis of certain duties, but to the characteristic negative effects of public enforcement.

The third category of 'normativity', for Reinach, as we know, are the non-moral *a priori* laws: facts about legal entities that do not owe their existence to the positive law, such as the fact that a claim is waivable by the claim-holder, which '*prima facie*' ought to be, and which may justly be reflected in the positive law depending on the contingent circumstances.

Reinach explicitly distinguishes the kinds of 'obligation' generated by certain acts, according to *a priori* laws, from *moral* rights and duties. For instance, he describes promises as generating non-moral obligations of performance.[30] What distinguishes the non-moral obligations that correlate with claims from 'moral' duties is (i) their freely assumed character, and (ii) their waivability by the exercise of a power. By contrast, while actions on the part of moral right-holders can *cause* a moral duty to be discharged, such right-holders lack a power directly to make it the case that a duty is not owed by waiver.

It is tempting to read this as simply a taxonomic distinction amongst moral duties with different sources, some moral duties being sourced in a free choice to incur the duty, others not; in today's parlance, some moral duties derive from the exercise of normative powers, others do not. But Reinach is explicit that there are two separate things going on when a promise is made: a non-moral 'obligation' arises *and* there is a moral duty to perform that is grounded in that non-moral obligation. So, the distinction is not simply between different compartments of morality. Nor is the distinction being drawn between 'relational' obligations and 'non-relational' moral

[29] Still, if it is insisted that the juridical is non-moral because it concerns freedom-grounded enforceable rights and duties, this involves a non-standard restriction of the domain of morality. If the idea that duties which, by their nature (perhaps by virtue of the values they serve) are unenforceable are the only moral ones, this, again, involves an unusual restriction of the domain of the moral; duties not intentionally to kill others are then non-moral duties.

[30] Reinach (n 4) 14.

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duties: Reinach is, again, clear that there can be relational *moral* duties, though he regards these as being unnoticed in ethics.[31]

Another possibility is that promises create obligations in the sense that the rules of the social institution of promising make it the case that promising involves an obligation – on this Hartian-type view, promises create a distinctive 'ought' relative to a social institution. But, of course, this cannot exactly be Reinach's view either: promises and their direct bindingness are to be explained independently of social, conventional facts; *a priori*. It almost seems as if Reinach wants to say that promises create obligations in a similar way that positive laws create legal obligations, but without these obligations having a social source. Just as an evil law *in a sense* creates a binding obligation (in law), so too a promise to do an immoral act creates a binding obligation according to the in-built normativity of promising. If that's the character of Reinach's view, it fails, however, as a contribution to the debate on why promises are binding. The puzzle that motivates this debate is precisely how one could become *morally* bound to do what one promised to do, without more – how it could be that an agent could change their moral position in the peculiar way by a kind of voluntary commitment. Pointing out that promises create non-social, non-moral obligations by their nature, does not solve or dissolve this puzzle. For every such obligation, it seems one should ask whether it ought to guide one's conduct by reference to other valid norms – be they moral norms or norms of *ius*. Ultimately, the view which makes Reinach's contribution to this debate more interesting, and more consonant with his intention to contribute to the philosophical discussion as to why promises bind, is to construe it as the view that promises *do* create moral obligations, or at least obligations which, by their nature, have some genuine hold on an agent's practical reasoning, but there is no reductive explanation of why this is so.[32]

6.3.2 *The Relationship between the Positive Law and Non-institutional Norms*

For Reinach, the positive law may diverge from the *a priori* position in at least two ways. First, it may justifiably create normative incidents which it is impossible to create *a priori*. The positive law might confer rights on third parties to a promise – for Reinach, promises only generate entitlements in the promisee as a matter of the *a priori* laws.[33] In this case, the third party's right is grounded in the positive law; the right does not arise 'directly' from the promise, but through the mediating ground of the positive law. Another example given is prescriptive acquisition, which, for

[31] Reinach (n 4) 13.
[32] See Olivier Massin and Alessandro Salice's chapter in this volume.
[33] Reinach (n 4) 113.

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Reinach, involves a mode of acquisition that is not part of the *a priori* nature of property rights. It is adopted for 'reasons of practicality'.[34]

A similar idea about the relation between the positive law and what lies beyond it is found in Weinrib's work. Weinrib gives the example of the tort duty not to induce a breach of contract. While an agreement, in private right (roughly, the non-positive interpersonal principles that regulate enforceable rights and duties), creates only relational duties between the parties to the agreement, public right may permissibly step in to provide parties with additional assurance that their agreements will not be deliberately thwarted by others.[35] Another is market overt, which confers a limited power to pass good title although the transferor had none.[36]

Second, the positive law might cancel or 'suppress' the normative pre-positive law effect of a transaction. Here Reinach envisages not merely that the positive law does not provide legal protection to an *a priori* claim, with the *a priori* claim continuing to exist. Rather, the positive law *cancels* the usual normative effect of some pre-legal transaction. Again, there is a useful parallel in Weinrib's work. The latter gives the example here of the permission to use another's land in an emergency, when being excluded from the land would result in a much graver interference with the user's right than the interference to the owner. This is how Weinrib analyses the well-known decision in *Vincent v Lake Erie Transportation Co.*[37] In this case, a ship captain fastened *The Reynolds* to the plaintiff's dock, without permission, in order to save the cargo on board from destruction in a storm. Waves and wind thrust the vessel against the dock, damaging it. The court ordered the defendant to pay compensation, despite describing the conduct as morally justified. In Weinrib's view, this rule recognised or established by this decision is an instance of public right justifiably qualifying or 'cancelling', in Reinach's terms, the owner's right to exclude. Private right permits the owner to exclude, but public right qualifies this in order to render rights consistent with one another.[38] However, precisely because private right confers the permission to exclude, public right requires compensation; the duty to compensate reflects the fact that public right is depriving the owner of what is properly theirs as a matter of private right. The possibility of compensation for departures from *a priori* right is not discussed by Reinach, but again this seems potentially consistent with his analysis; in some cases – when the positive law

[34] Reinach (n 4) 74.

[35] Ernest Weinrib, *Reciprocal Justice* (Oxford University Press 2022), ch 4.

[36] Unlike Reinach, Weinrib's view is that public right has distinctive normative constraints – its business is only the modification of private right to ensure that rights form a consistent set and satisfy certain 'publicity' requirements. Precisely what constraints these somewhat loose notions of 'consistency' and 'publicity' involve is not very clear, however. On the face of it, public right substantially enriches the normative austerity of private right, understood as a domain of rights grounded only in considerations of equal freedom.

[37] 124 N.W. 221, 222 (Minn. 1910).

[38] Weinrib (n 35).

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requires a person to bear a burden which *a priori* right permits them not to bear, for instance – this plausibly would require compensation.

One normative contribution of the positive law which Reinach does not discuss in any detail is its bringing *determinatio* to the inherently indeterminate content of the *a priori* law. This feature of the positive law has been particularly emphasised in recent Kantian scholarship on private law. It is part of what is meant by Weinrib's claim that the value of private law is to be private law. What is truly meant is that there is a value in the positive law determinately part-constituting the underlying juridical norms. This value is, *pace* Kantians, partly instrumental: it is valuable in so far as it co-ordinates legal subjects' conduct around a determinate version of interpersonal juridical rights. There is plausibly also, *pace* instrumentalists, an intrinsic value in one's being able to enforce one's rights without being at substantial risk of wronging others.[39] Absent a public, authoritative determination of innate right, we are faced with such a risk in so far as we adopt our own interpretation of what each person's innate right requires or permits. An omnilateral determination by a legitimate public authority is needed to resolve this problem. If authoritative *determinatio* is necessary for this to be the case, in virtue of avoiding the problem of 'unilateralism', then there is an intrinsic value in *determinatio* of innate right. Nothing Reinach says seems incompatible with this kind of *determinatio* adding detail to *a priori* principles of right. Indeed, it might be considered *a fortiori* his analysis of third-party rights being conferred by the positive law: if the positive law can confer wholly new entitlements, it must be able to lend determinacy to pre-existing *a priori* entitlements.

6.4 CONCLUSION

No contemporary theorists describe their work as seeking the *a priori* foundations of private law. Yet sometimes it does. Unlike Reinach, contemporary theorists not infrequently seek to identify *normative* truths, rather than essential non-moral laws, that they ultimately seem to consider knowable *a priori*. The basic, appealing, idea underpinning neo-Kantian theories that each person is entitled to stand in an equal relation to each other is not something that is read off the content or structure of legal institutions; it is a normative truth (albeit its content is open to multiple institutional concretisations) that is grasped by reflection on the kind of beings that we are, and obtains regardless of any institutional fact. The boundaries between abstract *a priori* truths about *normative* entities such as duties, rights, powers and so on, and *a priori* moral truths are porous, however, and so the distance between Reinach and contemporary normative theories is not as great as may initially appear. I have suggested that Reinach's attention to the abstract conceptual structure of basic normative ideas referred to in private law can be normatively fruitful, albeit it carries

[39] Arthur Ripstein, *Private Wrongs* (Harvard University Press 2016).

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a risk, one Reinach recognises, of imbuing features of concepts with a normative significance that they have not been established to have.

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