7

Reinach on Personality and Representation

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7.1 INTRODUCTION

Adolf Reinach died tragically at a young age, and with his death the world was deprived of a talented philosopher who was revered by his contemporaries. Reinach left us with a significant scholarly legacy that is yet to be properly appreciated, including, prominently, his *A Priori Foundations of the Civil Law*. In *Foundations*, Reinach offers original and insightful perspectives on general jurisprudential questions (e.g., on the nature of law, and the relationship between natural law, positive law, and universal elements of legal form), interlaced with equally illuminating reflections on enduring philosophical questions about private law (e.g., about promissory obligations and the nature of property rights). The insights in *Foundations* reflect the ingenuity of Reinach's theory of social acts (a precursor of the speech act theories of Austin and Searle) as well as Reinach's conviction in his novel method of phenomenological elucidation of a priori truths about law (i.e., about *juridical* social acts).

Reinach's phenomenological method is not Kant's, yet both may be viewed as offering variants on themes common to transcendental idealist thought about law. Reinach, like Kant, believed in the possibility of reasoned discernment of a priori truths about relations of right, and both believed themselves to have identified them. Furthermore, Reinach, like Kant, held that these truths – being a priori – are true universally and independently of contingent features of human experience

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(including those that influence the development of positive law). Of course, unlike Kant, Reinach recognized that relations of right are not merely *given* as a matter of practical reason but are available to reason through experience insofar as they are *practiced* as social acts (a distinctive subset of normative speech acts). Further, and again departing from Kant, Reinach denied that a priori truths about law are grounded on metaphysical and/or moral truths about human nature and the human condition.[1]

Kant's account in the *Doctrine of Right* of three basic categories of private right (property, contract, and status) is undeniably elegant. But, notwithstanding celebrated efforts to show that it illuminates contemporary private law,[2] the gulf between Kant's transcendental rendering and what is familiar in, and important from, lawyerly experience diminishes its appeal to some. Reading Reinach, by comparison, those interested in philosophical theories that make closer contact with law are rewarded with richly nuanced analysis of a wider array of familiar legal concepts that are undeniably profoundly important to private law, all presented without any attempt to locate them within a constraining transcendental deduction of categories of private right. One finds in *Foundations* bracingly original treatments of notions of personhood, capacity, power, obligation, claim, promise, grant, waiver, revocation, transfer, assignment, command, possession, lien, authorization, representation, and more. Contemporary private law theorists should find in Reinach's analysis of these concepts several profitable points of departure and return, whatever they think about the merits of his method.

As is reflected in other chapters in this volume, Reinach has much to offer even to those working the well-tilled fields of tort, contract, and property theory. This chapter ventures in a different direction, looking for insights from Reinach on two related, under-analyzed, legal concepts found interstitially and transversally, between and across private law's basic categories of private right: concepts of personality and representation.

One cannot understand, much less evaluate, Reinach's account of representation without examining it alongside his treatment of personality and, in turn, one cannot properly evaluate either contribution without coming to terms with his method. Accordingly, my presentation of Reinach's thought will proceed sequentially as follows. Section 7.2 offers a brief summary and critical analysis of Reinach's method, focusing on his claim to offer phenomenological analysis of a priori synthetic truths about law as well as his suggestion that law is constituted by social acts (Reinachian

[1] E.g., *pace* Kant, that relations of right are premised on the moral-metaphysical truth that human beings are uniquely capable of self-determination, and that the equal freedom of human beings is the constitutive value that undergirds and shapes terms of right that govern relations of right.

[2] Ernest J Weinrib, *The Idea of Private Law* (Harvard University Press 1995); Arthur Ripstein, *Force and Freedom* (Harvard University Press 2009); Arthur Ripstein, *Private Wrongs* (Harvard University Press 2016).

speech acts). Section 7.3 examines Reinach's views on legal personality, highlighting the sense in which persons are pivotal to Reinach's method (phenomenological discernment of a priori synthetic truths) and his objects of analysis (law, manifested behaviorally in juridical social acts). Section 7.4 investigates Reinach's account of representation, noting ways in which it parallels that of Hobbes, subject to Reinach's distinctive emphasis on representation as something performative (i.e., as manifested in successful social acts of representation).[3] Section 7.2 also introduces some concerns about aspects of Reinach's method (the aims and modality of phenomenological discernment of a priori truths about law, *not* his speech act theory of law), and Sections 7.3 and 7.4 show how these concerns are borne out by certain deficiencies in Reinach's analyses of personality and representation. Section 7.5 concludes with thoughts on how contemporary private law theorists might make the most of Reinach's contributions.

7.2 METHOD

The philosophical questions that Reinach pursued, and the interest held by his answers, are attributable in part to his innovative phenomenological method. The method combines elements of phenomenological and transcendental idealist thought in ways that are, to an analytical mind, nonobvious and even awkward.[4] It is phenomenological insofar as it aims at the elucidation of truths disclosed by deliberate and self-conscious attention to experience of the human condition.[5] But it shares in aspects of transcendental idealist thought: the truths meant to be disclosed are a priori and so are believed to have truth-value prior to and independent of experience. In combination, the method appears to involve a breadth and depth of meditative deliberation on experience that permits transcendent discernment (i.e., that enables one to notice and to see through, and hence beyond, what is merely contingent in human experience).

The characteristics of Reinach's method were touched upon by Husserl in his commemoration of Reinach:

> [Reinach's work has attempted] something completely new . . . on the basis of pure phenomenology it attempts to develop the idea . . . of an apriori theory of right . . . Reinach brings to light a whole array of 'apriori' truths which underlies [sic] any real or possible legal code; and these truths, as he shows, are apriori exactly in the sense of the basic axioms of arithmetic and logic, that is, they are truths which are grasped

[3] That is, it is a mode of *acting* for another.

[4] In this, Reinach followed in the footsteps of his mentor, Edmund Husserl. On Husserl, see Dan Zahavi, *Husserl's Legacy: Phenomenology, Metaphysics, and Transcendental Philosophy* (Oxford University Press 2017).

[5] See generally Alessandro Salice and Genki Uemura, 'Social Acts and Communities: Walther between Husserl and Reinach,' in A Calcagno, (ed) *Gerda Walther's Phenomenology of Sociality, Psychology, and Religion* (Springer 2018).

> in intellectual insight as being valid without any possible exception, and they are prior to all experience.[6]

Unfortunately, the modalities of thought involved in Reinach's method are exemplified rather than described by him. Thus, his method remains opaque *as a method* (i.e., as a structured way of contemplating and of elucidating what is salient in experience). While one will look in vain for detailed exposition and defense of the phenomenological method, there are occasional suggestive comments in *Foundations*, such as this one:

> 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 geometrical forms: that a thing is so, is here grounded in the essence of the thing which is so.[7]

In this passage, Reinach nods to the phenomenologist's emphasis on insight gleaned through deliberate attention to experience as well as to the transcendentalist's aim to uncover a priori truths. Also notable is his insistence that there *are* a priori truths about law; axioms that have truth-value every bit as robust as those of mathematics and the natural sciences. This claim is certainly bold, and one might understandably be skeptical about it. But Reinach is alive to reasons for skepticism or, at least, reasons that derive from the view that law is inherently artifactual. Reinach has something to say about that view, and so one should shelve associated doubts for now.

In understanding Reinach's phenomenological method, it is important to notice that it is applicable to different objects of experience. In *Foundations*, it is said to enable elucidation of a priori truths about law. This, in turn, meant, for Reinach, disclosing the sense in which law is constituted by a distinctive set of social acts (speech acts), each of which has formal properties that can be known a priori. One could therefore treat Reinach's phenomenological approach as his *method* and social acts as being amongst its possible *objects*. But I think a better approach – apt in itself and more fitting in its recognition of Reinach's legacy – is to treat Reinach's analysis of social acts as, at once, a subsidiary but severable element of his phenomenological method and an object of inquiry. Reinach is, after all,

[6] Edmund Husserl, 'Obituary for Adolf Reinach,' reprinted in Adolf Reinach, *The Apriori Foundations of the Civil Law* (John F Crosby tr, Ontos Verlag 2012) xiii.

[7] Adolf Reinach, 'The Apriori Foundations of the Civil Law' (John F Crosby tr, 1983) 3 Aletheia 1, 4 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.

responsible for a major innovation in the philosophy of language *and* its extension to the philosophy of law: development of a speech act theory of law. The speech act theory encompasses a distinctive method of examining law as a set of sociolinguistic practices *as well as* the results of same (i.e., analyses of particular speech acts).

Reinach's speech act theory antedated those of J.L. Austin and John Searle, both usually credited as progenitors. In Reinach's terminology, speech acts are 'social acts.' Social acts are 'social' insofar as they are communicative acts directed at others (or at oneself positioned as other, as in social acts of self-evaluation). They involve 'action' insofar as they are directly performatively effective where communicatively successful (e.g., expression of consent is effective *as* consent). Social acts encompass both 'spontaneous acts' (acts initiated by the actor) and 'passive' acts (acts responsive to the spontaneous acts of others). Both kinds of social act encompass 'internal' states (e.g., intentions) and 'external' communicative behavior. Spontaneous social acts are communicatively successful, and hence performatively effective, only where the external communicative behavior is 'heard' via the passive social acts of a listener/correspondent. And, Reinach emphasizes, they are authentic or 'sincere' only where internal and external dimensions are aligned.[8]

As is true of other speech act theories, Reinach's theory is illuminating on matters of *general jurisprudence* (e.g., the sense in which lawmaking and law enforcement involve social acts, such as enacting and ordering) while also informing *conceptual analysis* aimed at elucidating, and discerning the relationship between, normative concepts and the social behavior, ritualized and spontaneous, that these concepts contemplate, denote, shape, or otherwise structure.

It should be remembered that, for Reinach, social acts constitutive of law (*juridical social acts*) are but a species of social act. That said, they were a species of special interest to Reinach; indeed, seemingly of greater interest than the genus. Reinach would not deny that other normative systems are constituted by social acts. However, he was interested in elucidating a priori truths about juridical social acts, not contingent truths about social acts that figure in positive law, in custom, in conventional morality, or in other constructed normative systems.

Given Reinach's insistence that there are a priori truths to be discovered about law, one should be unsurprised by his insistence upon maintaining analytical distance from conventional morality and positive law. Equally, though, given that law is inherently normative,[9] one might be surprised by Reinach's rendering of the a priori foundations of law as a set of value-neutral existential rather than moral truths. Nevertheless, Reinach also maintains deliberate analytical detachment from

[8] Reinach recognizes that the performance of social acts can involve mistakes and deception, these being two sources of misalignment between the internal and external dimensions of a social act.

[9] That is, the fact that the law claims moral authority, and more specifically, the authority to supply peremptory normative guidance. Joseph Raz, *The Authority of Law* (Oxford University Press 2009).

morality and from the natural law tradition and its aim to show how the law is or ought to be responsive to moral truths about human nature and the human condition. I shall comment briefly on both points of detachment in turn.

Reinach emphasizes that the a priori foundations of law and phenomenological discernment of them ought not to be confused with positive law and positivistic legal analysis, whether the latter takes the form of lawyerly doctrinal or philosophical thought. As he would have it, '[t]he positive law is caught up in constant flux and constant development … the propositions found in the positive law are quite essentially different from the propositions proper to science.'[10] The a priori foundations of law are taken by Reinach to be *illuminating* of positive law, in that discernment of them might have influenced its development. But, being a priori, they are utterly independent of the positive law and the contingent social and political forces that influence lawmaking. Hence, Reinach suggests that rich experience with positive law can disclose and validate but not disconfirm statements about the a priori foundations of law.[11] Indeed, it should be expected, Reinach says, that the positive law will often diverge from what is given a priori (e.g., positive law's concept of promising may deviate from what is essentially true of promising).[12]

Reinach's reasons for distancing phenomenological discernment of the a priori from positivistic analysis of positive law are also his reasons for rejecting the notion that conventional morality has any bearing upon the essential formal properties of juridical social acts. Whatever the relationships of mutual influence that might link positive law and conventional morality, Reinach treats them as irrelevant to his project. Both concern contingent specification of norms and points of connection between constructed normative systems. One cannot hope to elucidate a priori truths about law by dwelling upon the interaction of what is historically, socially and culturally contingent in constructed normative systems.

One might think that Reinach would be at least open to the idea that the a priori foundations of law (essential formal properties of juridical social acts) evince universal moral truths about human nature and the human condition. But Reinach flatly rejects any association between the a priori foundations of law and natural law.[13] For Reinach, truths about the nature of juridical social acts are a priori and synthetic but

[10] Reinach, *Foundations* (n 7) 2.

[11] As he explains: "the positive law *finds* the legal concepts which enter into it; *in absolutely no way does it produce them*" and, later "[t]hough they make our positive law and positive legal theory possible at all, they enter into them only as transformed and modified." Reinach, *Foundations* (n 7) 4 and 6.

[12] "We of course fully recognize that the positive law makes its enactments in absolute freedom … 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." Reinach, *Foundations* (n 7) 5.

[13] As Husserl emphasized in commenting upon the originality of Reinach's work: "What is utterly original in this essay of Reinach's … is the idea that we have to distinguish this apriori which belongs properly to the 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

not moral truths. One might think, nevertheless, that fulsome understanding of juridical social acts demands normative *as well as* formalistic analysis.[14] But Reinach shows little sensitivity on this point. Furthermore, he is clearly diffident about the general normative upshot(s) of the a priori. For example, Reinach treats it as an open question whether and how the a priori should influence the development of positive law. He is seemingly of the view that if a priori truths about law have normative force, it is epistemic and linguistic rather than practical: it governs the true or correct invocation of words (e.g., 'promising,' 'claiming,' and 'enacting') denoting juridical social acts.

If we may now examine the merits of Reinach's method, the results are mixed. It cannot be doubted that he achieved great insight. He offers compelling analyses of many legal concepts that are profoundly important to private law (and to public law as well). For example, his account of representation is arguably rivalled only by that of Hobbes in its sophistication. Any legal theorist interested in conceptual analysis should find engagement with Reinach richly rewarding.

But *how* did Reinach achieve the insights he did? And, where he disclosed important truths about legal concepts, what *kind* of truths are they?

As to the question *how*, I think that most of the fruits of Reinach's labors are attributable to his novel speech act theory of law. It was in recognition that law is constituted partly by social acts that Reinach identified and profitably analyzed the content and conditions requisite to the performative effectiveness of legal notions of *promising*, *granting*, *transferring*, *owning*, *enacting*, *representing*, and so on. He understood that these notions are better understood through a speech act rather than reference theory of meaning (e.g., to understand what promising is, one must understand how it is enacted and what it accomplishes; to understand authorization one must understand acts of authorization and how they beget authority, etc.).

It is difficult to say what additional contribution, if any, is attributable to Reinach's phenomenological method. Reinach is clearer in asserting that there are a priori truths to be discovered phenomenologically about social acts, and in delineating what he takes these truths to be, than he is in explaining how one goes about discovering them. More specifically, it is not clear what the method involves (how it is practiced) and how one could be reasonably confident that one has successfully deployed it (i.e., that one has unearthed a priori truths about law). As noted earlier, Reinach suggests that the method begins with, but entails transcendence of, what is given in human experience. But it is unclear how one could practice contemplation so as to achieve knowledge of transcendent truths about law. And there is a real risk of self-delusion in the aspiration. People are in the habit of developing highly

be subjected to the idea of 'right law' – 'right' from the point of view of morality or of some objective purpose.' Husserl, "Obituary" (n 6) viii.

[14] For instance, the "fact" that promises generate claims and obligations, or that the exercise of powers changes the normative situation of the powerholder and of persons who bear correlative liabilities.

abstract generalizations – synthetic interpretations – based on observation and experience and are prone to the vice of falsely believing them to reflect axiomatic truths. How is one to know that one has in fact achieved transcendent knowledge of truths about law, and not, rather, robust (credible, yet empirically falsifiable) generalizations still very much rooted in experience?

As for the question *what kind* of truths Reinach might have unearthed, it is most probable that they are synthetic a posteriori truths and not, as he believed, synthetic a priori truths. Because the phenomenological method is opaque, one is reluctant to follow Reinach fully through to his conclusion that the formal elements of juridical social acts are true of law a priori. Despite Reinach's insistence upon detachment from positive law and positivistic thought, his analyses of social acts are imbued with insights borne of lawyerly perspectives: the perspectives of those who, like Reinach, are deeply learned in law and versed in the formal technicality of legal semantics and of legal argument. This aperture is at once partial (e.g., not likely to be shared by laypersons) and firmly rooted in experience. Thus, my suggestion that the truths uncovered upon by Reinach are likely a posteriori. Reinach would have doubtless resisted this on the basis that inconsistency in the specification of juridical social acts in positive law is a bar to robust generalization. But these worries are overblown. It is possible to develop robust generalizations from experience of positive law that have truth value (i.e., that may be reasonably believed true, on a synthetic a posteriori basis) without treating every instance of deviation as falsifying the generalization. Rather, it is common – and, I think, perfectly valid – to engage in synthetic interpretation of positive law that aims at rational reconstruction of the formal properties of legal rules and concepts, with the rationality of the reconstruction being a function of its absolute and relative coherence (relative coherence being assessed in terms of the practical point of the rule or concept).

Finally, as intimated earlier, Reinach's insistence upon detachment from knowledge rooted in experience of morality and of positive law put him in the difficult position of claiming to elucidate truths about a normative system and associated normative social practices without being able to ground or otherwise to explain their normativity. The normativity of positive law is often thought to be grounded upon morality as well as the political authority of lawmakers and legal institutions. The normativity of natural law is, in turn, usually thought to be rooted in reasoned appreciation of the objective moral value of the good, the virtuous, and the just. By insisting upon methodological detachment from positive law and morality, Reinach's a priori looms as a phantasm of normativity. Even if one were to allow that it enjoys an epistemic rather than a practical normativity, one worries that that is not the *right sort* of normativity. Juridical social acts are, after all, prescriptive in what they imply of necessity about right conduct (e.g., about the kinds of obligations and claims that promising in fact generates), and not just right ways of thinking (e.g., of forming justified true beliefs about what promising consists in).

7.3 PERSONS

All conceptions of law as a normative system are impliedly premised on a conception of persons (a juristic conception, or set of conceptions, which we may call *legal personality* or *legal personhood*, or *personality* or *personhood*, for short). This is true whether by *law* one means to refer to a priori, natural, or positive law. In positing and in interpreting positive law, lawmakers develop conceptions of persons iteratively, explicitly, and impliedly, for every law necessarily denotes persons as author(s), addressee(s), and/or object(s).

In respect of positive law, the pertinent conception of persons is that which is found in the law as such. In respect of natural law, the conception is at once juristic and moral (and, often, also metaphysical or ontological), with emphasis on the moral status, capacities, and inherent (natural) rights and duties that obtain for human beings generally. As I shall explain, Reinach recognizes that a conception of persons is pivotal to his elucidation of the a priori foundations of law, both in respect of his method and objects of inquiry.[15] However, his treatment of persons is sporadic and unresolved and, by the end of *Foundations* Reinach seemed ambivalent, suggesting that a priori truths about law transcend human experience and the human condition.

Why might Reinach have become ambivalent? And why was his exposition of legal personhood – in marked contrast to his analysis of other legal concepts – sporadic and unresolved? I will suggest that Reinach's ambivalence might have reflected the destabilizing effect of attempting to analyze the concept through his preferred methods. Reinach's speech act theory presupposes personhood but cannot illuminate it, other than indirectly (i.e., insofar as social acts reveal aspects of human nature and the human condition). And his phenomenological method, aimed at elucidation of a priori truths, was believed by him to entail detachment from normative judgments of the sort that imbue positive and natural law alike. Reinach, like so many other jurisprudes of his time and ours, had a real facility with analysis of the legal concepts that delineate jural relations but grave difficulty devising a nonnormative concept of personhood. That is because personhood is, at once, pivotal to our concept of law and ineluctably normative.

But we should begin with the positives, for there are some. Reinach's comments on persons are suggestive. And he is, I think, to be commended for addressing the topic, especially in view of a long-dominant tendency to ignore it.

In a prefatory way, we ought to begin with this tendency of avoidance, for I suspect it has origins in common with the reasons for Reinach's ambivalence. The tendency is especially prominent for jurisprudes in the positivist tradition who are committed to a concept of law rooted in social facts and responsive to what is

[15] Neil Duxbury, 'The Apriori and the Legal,' (1990) 21 Rechtstheorie 297, 301 ("For Reinach, our entire understanding of the *a priori* domain is premised on a specific ontology of the person.").

familiar in our social landscapes (e.g., the relationship between legal and other social rules, and the links between legal and other social practices). Avoidance of talk of persons and personhood by positivists is, in one sense, unsurprising if, as I have claimed, the concept is inherently normative and so exerts pressures on one's commitments to positivism. But it is remarkable given positivists' points of emphasis (on social facts and social practices) and characteristic claims about the concept of law (e.g., that law is a system of peremptory normative guidance traceable to persons or institutions with recognized authority to govern). These points of emphasis and these claims direct attention to what is normatively salient about, and for, persons, viewed in social context. Social facts about law are, after all, facts about persons living in communities that feature legal systems; social rules are authored by persons and they figure in constructed normative systems (systems of social rules); social rules (including legal rules) are addressed to persons and are typically about and involve characterization of persons; and social practices, insofar as they might be shaped by legal and other social rules, are defined by and constituted through the interaction of persons. Positivists' relative neglect of legal personhood is thus glaring, even if it is also predictable.

Reinach is, as I have said, ambivalent about, not neglectful of, legal personhood. And in comparing his approach to that of positivists it bears repeating that Reinach rejects any association with positivists' interest in developing a concept of law that privileges experience with systems of positive law. That said, Reinach's views seem perfectly compatible with certain precepts held in common by many positivists *and* natural lawyers; namely that law is meant to supply practically authoritative normative guidance to persons; that law guides by treating *and* by characterizing persons as amongst its authors, addressees, and objects; that individuals enact generic legal personhood through normative economies of behavior in which law is one currency (alongside others, consisting in norms derived from other sources); and that individuals prove capable of authoring and of being addressed by law through linguistic expression rooted in and reflective of a common human capacity for practical reason.

I think that Reinach was willing to allow (as positivists generally have not) that personhood is pivotal to law in that he recognized, however dimly, a similar set of precepts as underlying his thesis that law is constituted by juridical social acts (enactments, declarations, orders, justifications, promises, waivers, offers, acceptances, hearings, statements, replies, rejoinders, objections, and so on). Reinachian social acts are modalities of normative speech acts through which law is discerned, articulated, and its guidance realized in the context of social practices that exemplify a legal-normative economy (i.e., practices that are intelligible as evincing a legal form of social order).

Reinach seemed to recognize that a conception of persons and, in turn, a juristic notion of personhood, is presupposed by his method and objects of philosophical interest. The phenomenological method presupposes a practitioner: a self-conscious

intelligent being possessed of capacities for practical reason and language. And, again, social acts are acts of persons – focally: individual human beings or natural persons – with the same capacities.

Where positivists sidestep, Reinach backs uneasily into the concept of legal personhood, refusing to ignore it even as he was indecisive about it. Reinach's views on persons and legal personhood must be gleaned from scattered references, each of which indicates something different about what it is to be a legal person.[16]

Reinach sometimes treats *legal persons as bearers of entitlements and burdens*, distinguishing persons from things. Whereas things (property) can be the subject matter of claims and obligations, they cannot be *bearers*. To be a legal person is, then, at least in part to be rationally fit or eligible to bear claims and obligations.[17] In turn, Reinach says, claims and obligations are unintelligible absent reference to a person: 'Claim and obligation presuppose universally and necessarily some bearer (*Träger*), some person to whom the claims and obligations belong.'[18]

Elsewhere, Reinach construes *legal persons as agents*, focusing upon a capacity for self-determination. Persons are agents who are or who become self-determining by engaging in juridical social acts, these being 'experiences which not only belong to a self but in which the self *shows itself as active (tätig)*.'[19] The capacity for self-determination and hence this facet of legal personhood is construed as inherently social, just as social acts are social. Both contemplate *interpersonal* encounter. Commenting on social acts, Reinach explains that 'in distinction to other spontaneous acts . . .[a social act] presupposes in addition to a performing subject a second subject to whom the act of the first subject is directed in a very definite way.'[20] Later, Reinach evocatively suggests that social acts are those '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.'[21] Reinach does not describe legal agency, but he evidently takes it to encompass legal capacities ('abilities' to engage in various particular juridical social acts).[22] His most extensive comments

[16] Those whom Reinach influenced had rather more to say about personhood, although many of them – including Edith Stein and Max Scheler – developed disparate views. See Kevin Mulligan, 'Persons and Acts – Collective and Social. From Ontology to Politics,' in Alessandro Salice and Hans Bernard Schmid (eds) *The Phenomenological Approach to Social Reality* (Springer 2016).

[17] "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 . . . There is a bearer of the relation and a 'borne' object. The first can necessarily only be a person and the second only a thing." Reinach, *Foundations* (n 7) 54.

[18] ibid 11. See also, ibid, at 12: "Claim and obligation necessarily involve a bearer and a content" and at 102 "only persons can be the holders of rights and obligations."

[19] ibid 18 (original emphasis).

[20] ibid 19.

[21] ibid 20.

[22] "It is only through the concept of a legal ability that we are able to understand absolute rights and obligations, and their passing from one person to another." ibid 66.

connecting agency and associated concepts (capacity and power) with legal personality are as follows:

> Social acts such as granting or transferring and the like cannot possibly function as the ultimate source of legal power, for these acts … are themselves always made possible by legal power, and this more basic power must 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* … This gives evidence of a legal power which cannot be derived from any other legal ability but which has as its ultimate origin the person as such. We speak here of the fundamental legal capacity or power of the person … *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*.[23]

At yet another juncture Reinach treats *persons as bearers of legal statuses* and of *status-mediated inalienable claims and obligations*. Persons are, viewed from this aspect of personhood, bearers of certain claims and obligations that are absolute, which Reinach suggests indicates something (it is not clear what) definitive and decisive about legal personhood and an individual's enjoyment of same. Being absolute and vested (rather than provisional and/or conditional), claims and obligations mediated by statuses cannot be assigned, granted, waived or otherwise treated as fungible. Illustrating this point, Reinach emphasizes family statuses: 'Let us also recall the *Persönlichkeitsrechte* of the civil law … let us just think of the duties of spouses to each other, and their duties toward their children. None of these rights and duties can be transferred. Whatever is grounded in the person as such or in certain relationships between or among persons, cannot be separated from this ground.'[24]

Reinach's comments on persons and legal personhood are mostly lawyerly. However, an exception is found where he links personhood with self-consciousness and, more specifically, self-aware *experiencing* of juridical social acts as normative. In distinguishing persons from other beings capable of *experience* (e.g., animals), Reinach says: '[b]eing 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 this class of possible bearers is here much broader; animals too can be the bearers of experiences but never of claims and obligations. Here it is persons who by an essential law are presupposed as bearer.'[25] Put otherwise, persons are beings who have and can reflect insightfully and productively upon an experience of normativity that belongs properly to law. Hence, Reinach's insistence that only human beings are 'persons' a priori, with the implication that artificial persons (e.g., corporations) enjoy

[23] ibid 81 (second and third emphasis supplied).
[24] ibid 81.
[25] ibid 11.

personality only by 'fiction' of positive law.[26] As he puts it: '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.* When therefore the law recognizes rights and duties in foundations or even in certain estates, we can only be dealing with a fiction in virtue of which such a thing is treated 'as if' it were a person.'[27]

Finally, in tallying Reinach's views, we come to some surprising sentences at the end of *Foundations*. There, despite having acknowledged that persons and legal personhood are pivotal to his project, Reinach seems to deny that any of part of it – the phenomenology, the elucidation of a priori truths about social acts, the extension of both to law – depends in any way on insights about persons, and so, in turn, about human nature and the human condition. A priori truths about law, Reinach now urges, transcend everything that is given in experience, including the qualities of being human and modes of experiencing normativity that are uniquely available to us in virtue of our humanity:

> We can 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 only know 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 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. They hold not only for our world but for any conceivable world.[28]

This surprise turn, being inconsistent with Reinach's other comments on persons and legal personhood, might be dismissed as aberrational. It *is* an aberration. But it deserves attention because it is telling of wider and deeper problems with Reinach's method and with the analyses he provides of personality and representation.

Let me introduce three problems with Reinach's account of personality, some of which reflect limitations of his method and, specifically, his ambition to discover a

[26] ibid 124. Reinach treats the personification of foundations and other legal institutions as an example of how lawmakers can achieve by mere "enactment" a state of affairs that diverges from what is true (here, of persons) a priori, noting that "there are … undoubtedly *deviations (Abweichungen)* of the enactments from essentially given relations of right." ibid at 104 (original emphasis). For discussion of corporate personality and representation relative to the function of the corporate form in enabling cooperation for common (corporate) purposes, see Paul B Miller, 'Corporate Personality, Purpose, and Liability,' in Elizabeth Pollman and Robert Thompson (eds) *Research Handbook on Corporate Purpose and Personhood* (Elgar 2021).

[27] Reinach, Foundations (n 7) 128 (emphasis supplied). Reinach considers but equivocates on the question whether, as a matter of social ontology independent of positive law, corporations, states and other groups might be persons or have social-ontological indicia of personhood, and hence in that sense might be "real" persons, whatever their juridical status a priori and/or as a matter of positive law. Ibid at 129.

[28] ibid 138.

priori truths about law, the truth-value of which obtains independently of considerations of morality and of positive law.

The first problem, already noted, is that Reinach does not give us a cohesive account of the a priori essentials of legal personality. Given Reinach's predominant tendency to view persons and personhood as central to his project, it is striking that his thoughts are unresolved. As Neil Duxbury has noted, this is a significant lacuna in Reinach's thought.[29] One does not find in *Foundations* a single clear paragraph or page in which he explains the essentials of personhood, what it is about persons that enable us to appreciate a priori truths about law and other things, and/or how the formal properties of legal personhood prefigure and are manifested in the social acts of actual persons. Reinach does usefully highlight important facets of legal personhood: agency, the bearing of claims and obligations, and the bearing of statuses, these being features prominent in positive law.[30] However, Reinach does not even gesture at the relationship between these facets of legal personhood, much less does he show that they are jointly constitutive of personhood viewed a priori.

The second problem is that some of Reinach's characterizations of persons and legal personhood – offered as a priori truths – defy the strictures of his phenomenological method, being best construed as either (a) a posteriori synthetic truths (or statements that are plausibly true) about received conceptions of persons in broader culture and of legal persons as characterized in positive law; (b) *sub silentio* moral judgments about features of human nature and/or of the human condition that are pertinent to law; and/or (c) both (a) and (b). Each of these alternatives is a plausible candidate for assessing Reinach's claim that persons are distinguished from non-persons (including animals and things) insofar as the former but not the latter are proper bearers of claims, obligations, and statuses. The same holds for Reinach's claim that agency and self-determination are essential to legal personhood (on which, see also his assertion that persons have an absolute 'moral entitlement' to personal development[31]). And consider Reinach's suggestion that self-conscious experience of normativity is essential to personhood. If this capacity is linked to our ability to discern what is true a priori about law, and so to understand and to

[29] Neil Duxbury, 'The Legal Philosophy of Adolf Reinach (II),' (1991) 77 Archiv für Rechts-und Sozialphilosophie 466, 466–467 ("Reinach's position [is] … that the law can only come about due to the fundamental capacities of the person … [and so it is] remarkable that Reinach attributes so little discussion to the fundamental capacity of the person.").

[30] Paul B Miller, 'The Concept of Personality in Private Law,' in Samuel L Bray, John CP Goldberg, Paul B Miller, and Henry E. Smith, (eds) *Interstitial Private Law* (Oxford University Press 2024).

[31] Reinach, *Foundations* (n 7) 13, where Reinach notes that certain absolute moral obligations and claims, such as "the right to develop one's personality … have [their] ground in the person as such … [and] can never be grounded in arbitrary acts" such as spontaneous juridical social acts through which persons can generate and transfer legal obligations with the implication that "it is impossible for a person to transfer to another his moral entitlement to free personal development." This is because one "cannot abolish by an arbitrary act what is grounded in the nature of a person or in the relation of one person to others."

participate in *its* pure normativity, self-conscious discernment of the a priori must be dissociable from self-aware participation in other normative systems (e.g., of positive law, conventional morality, or true morality). But this begs questions of comprehensibility. What is this experience of a pure, transcendent normativity like? Reinach does not say. And perhaps he does not say because knowledge of a genuine practical normativity that is utterly detached from morality is unavailable to us.

The third and final problem is the incoherence introduced by Reinach's concluding comments to the effect that the a priori foundations of law are true independently of truths about persons and are valid 'not only for our world for any conceivable world.' One way of coping with indecision is minimization of the significance of a matter for decision. So, if persons and legal personality proved a conundrum for Reinach, one can understand his caving in to impulse in suggesting that his project is unaffected by his inability to come to terms with the notions. But the dodge is glaring because Reinach had already articulated powerful reasons for thinking it to be of central importance to his work. Briefly, again: (a) the phenomenological method implies the existence of self-conscious beings – persons – who are aware of and can access and reflect productively on social experience of normativity; (b) social acts are acts of persons, and moreover, reflect distinctively human capacities (practical reason and language); and (c) juridical social acts are, ipso facto, also acts of persons.

By suggesting that 'men' (human beings) are immaterial to the a priori foundations of law, Reinach introduces a host of difficult and unanswered questions. For instance: in what sense is law intelligible absent reference to the focal exemplar of a person – a human being – and of legal personhood? And, supposing that law might be intelligible for nonhuman beings or entities, what analogues of human nature and the human condition must be true of such a being or entity for something like law to be intelligible as a mode of order? Further: why should we suppose that nonhuman beings in '*any* conceivable world' would have need of or use for law?

The destabilizing effect of these questions for Reinach's project may be best appreciated through reflection on a hypothetical. Imagine, at opposite ends of a spectrum, beings who have bodies like ours but have hive minds (i.e., collective consciousness, motivations, intentions, and other cognitions) and beings whose minds are like ours but whose bodies are protected by an impenetrable carapace, both in environments in which resources essential to meeting needs and desires are plentiful. Would these beings experience and know of what Reinach deems to be the a priori essentials of promising? What need would the hive-minded have for promising? For them, solidarity and, in turn, cooperation and coordination, are instinctive. What impulse would drive the carapace-embodied to promising, lacking need-based motivation to promise or the sense of risk latent in interpersonal dependence and vulnerability consequent upon transactions that we, soft-bodied, beings often experience? What need would either species have for private ownership, given an abundance of goods and the impulse of the hive-minded to put the needs of the

hive first, alongside the impulse of the carapace-embodied to delight in opportunistic satiation, free of the worst sort of credible threats of violent dispossession? The point is not that these beings would have *no* need for laws, nor even that their laws would be completely unlike ours (they might still benefit from laws somewhat like ours that facilitate cooperation or coordination). The point is that Reinach's concluding assertion that his account of the a priori foundations of law hold for nonhuman beings and for all possible worlds is dubious. When one strips important features of human nature and the human condition away from the concepts of 'person' and 'law,' it is not clear what, if anything, is left for common signification by these terms.

7.4 REPRESENTATION

If Reinach's analysis of persons reveals limits of his phenomenological method, his analysis of representation shows those limits, too, while also exemplifying the methodological promise held by his speech act theory of law. Where Reinach hesitatingly and sporadically expressed views on persons and legal personhood, he was comparatively (and characteristically) direct and confident on representation. Indeed, his account is rivalled only by Hobbes' in the way in which it illuminates the nature of the specifically *legal* form (as contrasted with social and political forms) of representation.

Reinach begins by critically examining a positivistic view of representation as an artificial mode of social action: one foreign to extralegal social experience,[32] being something conjured and regulated by positive law. The positivistic view does not claim, implausibly, that we have no extralegal concept(s) of representation. Rather, the thought is that the positive law leads with its artifice, shaping downstream social practices and beliefs. Through increasing familiarity with mechanisms of representation in public law (e.g., via laws creating and regulating public offices) and in private law (e.g., via laws enabling private administration of persons, property, and institutions) we have come to develop rough analogues of legal representation in extralegal spheres of social life (i.e., in informal social practices of speaking or acting for others).

Reinach recognizes the intuitive appeal of the positivistic view but rejects it as 'fundamentally wrong.'[33] Representation is, he maintains, a distinctive kind of juridical social act cognizable a priori.[34] By implication, the essential formal properties of representation have nothing to do with positive law; one can understand

[32] Reinach, *Foundations* (n 7) 81–84. "On this view we really do have here an institution which exists 'by the grace of the positive law'." ibid 82.

[33] ibid 83.

[34] ibid 25: noting first the wider genus of which representation is a species, namely, acts by proxy: "[there is a] difference between those social acts which are performed by their subject and those which are performed by a proxy. There is such a thing as commanding, informing,

them without canvassing the various mechanisms of representation found in or made available by private or public law. Indeed, Reinach suggests, experience of 'acting on behalf of another' is a commonplace in extralegal settings in which people speak up for, attend to the interests of, assert claims for, answer for, or otherwise put themselves in the position of another.

Before analyzing representation, Reinach carefully distinguishes it from other modes of conduct in which one is deliberately responsive to the ends or interests of another, all falling under a wide genus of social action undertaken 'on behalf of another.' Amongst other things, he distinguishes representation from mandate, command, commission, and advisement. Each of the latter kinds of social act involves 'action on behalf of another,' in the sense of deliberate responsiveness to the ends or interests of another, but none involves representation in the sense governed by its essential formal properties.

In comparing representation with adjacent varieties of juridical social action, Reinach insightfully suggests that they have in common the engagement of a capacity for attentiveness to others consisting in 'inner experiences' of sympathetic attunement. Attunement, Reinach emphasizes, is *not* merely a matter of deciphering and/or being motivated to act according to another's intentions. Rather, it involves 'feeling oneself sympathetically into the experiencing of another.'[35] Sympathetic attunement, so understood, encompasses sharing in the perspective of another with respect to their views, plans (including intentions), feelings, interests, prospects for flourishing, and so on. Importantly, it *does not* imply endorsement, acceptance, or personal identification otherwise with another's experience (these being distortions of sympathy: a substitution of *appraisal* for *understanding* another's experience).

On representation specifically, Reinach notes that, like all social acts, it encompasses 'internal' and 'external' dimensions. *Authentic* social acts reflect continuity between the 'internal experience' of the act by the actor and 'external experience' of it by others. *Inauthentic* social acts are those in which the internal experience is discontinuous with the external experience (e.g., reflecting mistake or deception). For example, one whose behavior bears outward indicia of representative action will be a *false* representative if their internal experience is one of self-concern (e.g., one poses as a representative in order to evade liability) rather than sympathetic attunement.[36] Here, too, Reinach breaks ground, anticipating later work distinguishing *vires* and *fides* in representative action. He suggests, plausibly, that although improperly motivated representation might be effective (lawful), it is *inauthentic as*

requesting 'in the name of another' . . . the proxy performs the act quite personally, but in such a way that the act is presented as ultimately proceeding from another person."

[35] ibid 84.

[36] For discussion of Reinach on the internal and external dimensions of representation, see James M Brown, 'Reinach on Representative Acts,' in Kevin Mulligan, (ed) *Speech Act and Sachverhalt: Reinach and the Foundations of Realist Phenomenology* (Kluwer 1987) 126–128.

representation precisely in virtue of a discontinuity between internal and external dimensions of ostensibly representative behavior.

Somewhat less innovative is Reinach's characterization of representation as such. Here, one finds plentiful echoes of Hobbes' thought. Reinach observes that representation entails the performance of the very juridical social acts that individuals usually and presumptively undertake personally. Representation modifies attribution of the legal consequences, but not the legal nature, of juridical social acts. Just as we can *directly* shape the normative landscape within which we are positioned vis-à-vis others by personally performing juridical social acts (e.g., by promising, claiming, exercising a power, or waiving a right) so too can we do so *indirectly* through representatives who bear our person. It is thus that representation is correctly understood in terms of capacities ('abilities,' in Reinachian lingo) and powers. Representatives personate others by acting upon their normative capacities and powers. Furthermore, Reinach emphasizes, representation can be effective absent the represented person having specific knowledge, much less settled intentions, in respect of particular juridical social acts performed on their behalf by a representative.[37] Representatives wield standing authority: an authority that is prior to and that transcends representative performance of discrete juridical social acts.

Further on authority: Reinach recognizes that one cannot fully comprehend representation by focusing on the position and behavior of representatives alone. Representation is premised on bilateral or multilateral relationships that bind representatives and persons represented. Legal representation implies the legal authority to act for others, which in turn means that it is premised on *constating juridical social acts*. Reinach considers and rightly dismisses the notion that the pertinent act is *transferring* or *promising*. Transferring effectuates alienation of resources and alienable entitlements, while promising effectuates personal undertakings; neither can explain the third-party effects that are essential to representation (the representative's authority to exercise entitlements and to incur burdens for represented person(s) vis-à-vis others). The pertinent constating act is, instead, *granting*.[38] Representation arises when represented persons *grant* to representatives the authority to act on their behalf, with the implication that juridical social acts subsequently performed by representatives will be attributed to represented persons as having been *authorized* by them.[39]

[37] In representation "an 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." Reinach, *Foundations* (n 7) 85.

[38] "The problem of efficacy of representation comes down 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 power in the least – but rather a purely creative granting." ibid 86.

[39] "Two things are set up by this act: a legal power (*Können*) and something which we would better designate as a legal ability (*Fähigkeit*)." ibid 92.

Reinach has rather less to say about representation 'in action,' perhaps because he (correctly) believes that juridical social acts undertaken representatively are usually formally identical to those undertaken personally. However, one finds fresh insight in Reinach's distinction between active and passive dimensions of representation, tracking a broader distinction between active and passive social acts. Certain juridical social acts (e.g., promising, claiming, waiving) are *active* in that they involve the deliberate exercise of a legal capacity in ways that are *patently* performative. Others – especially *responsive* juridical social acts (e.g., receipt, acknowledgement, acceptance, acquiescence) – tend to be passive or *less patently* performative. Reinach innovates in observing that both are important modalities of representation.[40]

With the essentials of his account of representation now in view, we may take stock. As noted, Reinach's is one the most compelling accounts ever provided of the nature of *legal* representation. His account echoes that of Hobbes in its rendition of the nature of representation,[41] but this is to his credit: Hobbes and Reinach landed at the same place from divergent glide paths, giving additional reason for confidence that we've arrived with them at something approximating the truth about what representation consists of. Furthermore, there is much that is original in Reinach's analysis. His speech act theoretical method enabled him to surface facets of representation that others miss, including (a) the 'internal experience' of representation via sympathetic attunement and the expectation of continuity between it and the more familiar 'external experience' of representation through observation of juridical social acts; (b) the distinction and relationship between *constating* juridical social acts *establishing* representation (authorizing acts) and *performative* juridical social acts *of* representation (representing acts); and (c) in respect of the latter, the distinction and relationship between active and passive social acts undertaken by representatives.

Despite being mostly convincing, Reinach's analysis does have a few flaws. I will highlight three.

The first is that Reinach's account is likely not what it purports to be. That is, it is not an elucidation of a priori truths about representation. As noted in Section 7.2, Reinach has not given us a convincing reason to think his phenomenological method results in statements about law that have *this sort* of truth-value. That is partly because the method is poorly described, and also because, unlike laws of science and of mathematics, the a priori status of truths about the formal properties of social acts does not reveal itself to us, even upon prolonged reflection. But one

[40] ibid 91: "We distinguish between the performance of [juridical social] 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."

[41] For more on Hobbes' views on representation and how they illuminate contemporary law and practice of fiduciary administration, see Paul B Miller, 'Fiduciary Representation,' in Evan J Criddle et al, (eds) *Fiduciary Government* (Cambridge University Press 2018).

ought not to despair over this. If one can be contented with apprehension of a posteriori synthetic truths about law – robust generalizations informed by experience of positive law – one will find good reason for appreciation of Reinach's analysis of representation.

The second flaw is really an entire set of problems that Reinach's account of representation inherits from his analysis of personality. As Reinach recognizes, representation involves *personation*: legal representatives bear the legal person(s) of those whom they are authorized to represent. Representation is therefore unintelligible absent reference to persons and social acts, the latter being a form of communicative behavior for which human beings are by our nature uniquely fit. Defects in one's views on persons and legal personality may be expected to have ripple effects for one's account of legal representation. And so it proves for Reinach. I will note just a few issues. First, because Reinach does not provide a coherent account of the essential formal properties of legal personhood, it is unclear whether and how the various facets of personhood that he mentions are manifested in the social acts through which representation is established (constating acts) and made effective (representing acts). Second, Reinach's evocative suggestion that the 'internal experience' of representation involves sympathetic attunement requires an account of the moral capacities of human beings such as might support the claims (a) that persons are capable of sympathetic attunement; and (b) that authentic representation entails such attunement. Reinach here runs aground, again, as a result of his deliberate refusal to comment on the distinctive moral status, anthropology, and psychology of human beings. Third, we can perhaps now better appreciate the absurdity in Reinach's concluding suggestion that persons and personhood are immaterial to a priori truths about juridical social acts. Reinach's references to sympathetic attunement imply the existence of beings with a capacity for same, much as his wider theory of social acts implies other capacities (notably, of language and practical reason) that are distinctively human. Reinach's ambivalence on persons destabilizes the entire edifice of his theory of social acts.

Fourth and finally, because Reinach was so preoccupied with phenomenological elucidation of a priori truths about *law* that transcend experience, Reinach failed adequately to consider points of similarity and difference between legal representation and adjacent modes of relating to others through sympathetic attunement. In this, his work is out of step with more recent studies – including Pitkin's celebrated work[42] – that emphasize semantic and phenomenological variation in relationships of 'representation' (relationships in which a person or group is said to represent, or to be representative of, other persons or groups). Reinach asserts that representation in the narrower sense of interest to him is familiar from extralegal experience. Everyday life, he says, supplies examples of situations in which one claims standing to speak or to act for another. But given his narrow and lofty

[42] Hanna Pitkin, *The Concept of Representation* (University of California Press 1972).

gaze – his aim, again, for *transcendent* truths about *law* – Reinach does not consider that some of these situations might involve representation in a materially different sense, or modes of care and concern for others that do not involve representation in any sense. In some, the experience of attunement and assertion of standing to speak or act for another is *spontaneous* and *unilateral*. That is, the 'representative' *presumes* to speak for, advocate on behalf of, defend, or otherwise align themselves with another. In others, there is a more innocent (less officious) identification with another that involves attunement and responsive behavior (acts of care and concern). It is, of course, fine for Reinach to focus on distinctively *legal* representation, but given that his phenomenological method compels a finer attention to experience, his exposition would have been more plausible had he contemplated different varieties of representation and forms of behavior reflecting sympathetic attunement.

7.5 CONCLUSION

My assessment of Reinach's contributions is mixed. Praise for his speech act theoretical method is leavened by criticism of his phenomenological method (especially his central claim to have disclosed a priori synthetic truths about the nature of law). Likewise, I have suggested that Reinach's largely convincing speech act theoretical rendition of representation is marred by his irresolution on persons and personhood. While most work of legal theory can be faulted for ignoring ontological, moral, and juridical questions about persons and personhood, Reinach's work surprises, excites, and disappoints, especially because puzzles about persons and personhood go to the very core of what is original and insightful in *Foundations*.

Reinach surprises in forthrightly recognizing the centrality of persons and legal personhood to his project (its methods and aims). He recognizes that law is not *merely* a construct of reason (a set of artifacts, to be equated with institutions and their workings, and especially the generation and interpretation of legal texts); it is also – and more primordially – a system of norms that implicate normative *practices* constituted in and through normative *performances* (social acts). He recognizes, too, that these practices, these performances, these acts (and, one might add, the workings of institutions and the communication of, and about, law through authoritative text) are the practices, performances, and acts of *persons* (i.e., of intelligent linguistic beings possessed of a capacity for practical reason manifested in law). With these insights foremost in mind, one might initially be struck with excitement upon reading Reinach's first comments on persons and personhood, imagining, perhaps, that promised 'truths' about the 'foundations' of law will include insights about how law is, at once, *possible* and *necessary* for persons, given other, more fundamental, truths about human nature and the human condition. These truths might disclose what law *is* partly by disclosing what it is *for* (i.e., how law is practically intelligible relative to its practical point or purpose(s)).

If one were to judge him harshly, one would say that Reinach disappoints on most of these expectations. He does not provide a cohesive account of persons and legal personhood, and is averse to questions about how legal rules and concepts are or ought to be rooted in normatively significant facts about human nature and the human condition. Reinach believed, mistakenly, but sincerely, that truths about law – including, presumably, about the law's concept of a person – are normatively neutral (i.e., that they imply nothing about the moral status of persons or about what human beings have reason to value in and beyond the reliance we place on law as a source of authoritative normative guidance). While Reinach alights upon various facets of legal personhood that are important to a sound positivistic rendering of the notion, he has nothing to say about the more profound questions noted above (e.g., about how law is possible and necessary for persons, or what law is *for*). A harsh critic might say that the return on investment in Reinach consists mainly in the interest held by speech act theoretical analyses of law *and* in productive deployment of that method in the analysis of particular legal concepts (e.g., promising, enacting, granting, representing, and so on).

But one should not judge Reinach harshly. Viewed charitably, he may be credited with marshalling phenomenological methods so as to humanize law: to put lived experience at the center of our understanding of law and appreciation of the proper aims of legal theory. In turn, Reinach may be credited with profound insights about the nature of law that were won only through recognition that law is constituted through speech acts (social acts). Further, while his thinking on persons and personhood remained indefinite, Reinach clearly realized that phenomenological insights about law and other modes of social action are the insights of persons gleaned through human experience, and, in turn, that posited law is a construct dependent upon an apt marshalling of distinctively human capacities in ways responsive to our common humanity.

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