

## How to Make Gifts with Words

*Emma Tieffenbach*

### 10.1 INTRODUCTION

Speech act theorists, such as John Austin, Peter Strawson, Zeno Vendler, John Searle, Michael Hancher or Mitchell Green,<sup>1</sup> take a gift to be among the range of things we can do with words. From their perspective, a gift is an illocutionary act, an act performed in uttering a meaningful sentence. In the right circumstances, saying, for example, “This bike is yours” is what it takes to gift it to you.<sup>2</sup> The consensus is that the utterance, whether implied or expressed, is a necessary component of the act.

Speech act theorists give their insights about gifts *in passing*. Once compiled, their scattered remarks reveal some remarkable disagreements and aspects left in the dark. One disagreement regards to what extent the giftee participates in the act. Most speech act theorists require gifts to be taken in by their recipients. As for any other illocutionary acts, the need to be heard and understood is taken to be among its felicity conditions. However, Peter Strawson contemplates the possibility of a gift unknown to its recipients in the form of a “will that is never read”.<sup>3</sup> Speech act theorists who insist on the need of an uptake diverge about whether the giftee is

<sup>1</sup> John L. Austin, *How to Do Things with Words* (JO Urmson and Marina Sbisa, eds, 2d edn Harvard University Press 1975); Peter Strawson, ‘Intention and Convention in Speech Acts’ (1964) 73 *The Philosophical Review* 89; Zeno Vendler, *Res Cogitans: An Essay in Rational Psychology* (Cornell University Press 1972); John R. Searle, *Speech Acts: An Essay in the Philosophy of Language* (Cambridge University Press 1969); Michael Hancher, ‘The Classification of Cooperative Illocutionary Acts’ (1979) *Language in Society*, 1; Mitchell Green, ‘Speech Acts’, in Edward N. Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Fall 2021 Edition) URL: <https://plato.stanford.edu/archives/fall2017/entries/speech-acts/>.

<sup>2</sup> Following Austin (n 1) 90, the illocutionary act of making a gift can be further distinguished from the “locutionary act” of saying “This is yours”, on the one hand, and from the contingent effects (the joy, the gratitude, or the felt burden to express the latter) brought about in the person to whom the uttering is addressed (the “perlocutionary act”). Only the illocutionary act of making a gift is under focus here.

<sup>3</sup> Strawson (n 1) 448–449.

further required to *accept* the gift for the act to be completed. Besides these points of division, speech act theorists have neglected the deontic dimensions of gifts. If I give you my bike, what I seem to be giving you is the *right* to use it forever while *ipso facto* losing mine. John Austin hints at the related deontic changes when he classifies gifts (together with ordering, prohibiting, enacting law) among “exercitives” by which “powers, rights and influence” are conferred.<sup>4</sup> Likewise, Zeno Vendler includes gifts among “operatives” (along with “arrest, sentence, condemn, fine, offer, surrender”) issued when “I say something and the social, ritual, or legal effect *ipso dicto* takes place”.<sup>5</sup> Austin and Vendler do allude to the deontic effects of gifts but leave it at one’s guess what they precisely are. These are quandaries about gifts, at best quickly addressed in the past, providing the occasion, seized in the present chapter, to expound on the topic. To further reflect on how gifts are made with words, I mobilize Adolf Reinach’s *The Apriori Foundations of the Civil Law*, first published in 1913.<sup>6</sup> Reinach has written very few and sparse remarks on gifts.<sup>7</sup> However, his theory of “social acts”, developed almost fifty years before *How to Do Things with Words* (1962), provides the notions and distinctions that are useful to elucidate the aspects of gifts which Austin and his followers have parenthetically addressed or neglected. As many commentators have stressed, what Reinach calls “social acts” are very much like Austin’s “illocutionary acts”.<sup>8</sup> Following the crowd,

<sup>4</sup> Austin, (n 1) 151.

<sup>5</sup> Vendler (n 1) 22.

<sup>6</sup> Adolf Reinach, ‘The Apriori Foundations of the Civil Law’ (John F Crosby tr, 1983) 3 *Aletheia* 1, 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.

<sup>7</sup> Reinach briefly alludes to gifts twice (n 6), and each time in order to illustrate how the positive law departs from the *a priori* laws. In certain legislations, Reinach notes, “[...] the oral promise to give someone a house [does] not establish any claim even if [it is] accepted” (ibid 102) in implicit contrast with *a priori* law being such that “a claim is always and without exception generated by a promise” (ibid 116). Reinach points to a similar deviation when he notes how, in certain legislations, “a promise to give something as a gift needs to be notarized in order to be valid” (ibid 103) in implicit contrast to *a priori* law about promises, whether uttered or written, giving rise to obligations (ibid 8–9).

<sup>8</sup> The similarity is stressed by Armin Burkhardt (“Zunächst soll jedoch die in ihren Umrissen skizzierte Geschichte der Sprechaktheorie um eine Position ergänzt werden, die wesentliche Aspekte der sprechakttheoretischen Betrachtung bereits vorwegnimmt und bisher fast völlig unbeachtet geblieben ist. Es handelt sich um die Theorie der sozialen Akte’ des Rechtsphilosophen und Husserl-Schülers Adolf Reinach, die – neben ihrer philologischen Bedeutung – geeignet ist, einige Probleme der Sprechaktheorie in neuem Lichte anzugehen”), in Armin Burkhardt, *Soziale Akte, Sprechakte und Textillokutionen. A. Reinachs Rechtsphilosophie und die moderne Linguistik* (Max Niemeyer 1986); by Kevin Mulligan (“The topics on which Reinach wrote most illuminatingly, speech acts (which he called ‘social acts’), in his *Speech Act and Sachverhalt: Reinach and the Foundations of Realist Phenomenology* (Dordrecht 1987); by Arkadiusz Chrudziński (“Many people still believe that the idea of speech acts, and particularly of their performative function, was invented by Austin. In fact it was Adolf Reinach who introduced it some forty years before under the label ‘social

I will also assume that “they are the same acts”<sup>9</sup> and, to avoid confusion, I use the slashed terms “social/illocutionary” to refer to both at once.

The discussion is structured around the previously outlined issues. Section 10.2 addresses Strawson’s example of the will that is never read. This example does not refute the giftee’s need to grasp the utterance in which gifts are made, I argue, because the act of writing a will is not yet the social/illocutionary act of making a gift to one’s heir. The question whether gifts need to be accepted is discussed in Section 10.3. In light of Reinach’s discussion of acceptance of promises, I argue that, although a gift need not be accepted, to refuse it blocks its completion. Section 10.4 critically examines Austin’s intuitive view of a gift as always involving a “gesture”, in the usual form of a handing over of something. This view, I argue, misguidedly focuses on the *things* that are gifted, whereas it is in fact the *ownership* over these things that is in all cases *transferred* to the giftee. Relying on Reinach’s insights on transfers and ownership, I put forth the “Ownership View of Gifts”, as I call it. I then consider the alternative view of charity-gift proposed by Waldron in Section 10.5. According to Waldron, a gift can be made by *waiving* property rights.<sup>10</sup>

acts”), in ‘Reinach’s Theory of Social Acts’ (2015) *Studia Phaenomenologica* 281; by James Dubois and Barry Smith (“Reinach developed his theory of *social acts* [...] a theory which bears striking similarities to the theory of speech acts later developed by Austin and Searle”, in their ‘Adolf Reinach’, in Edward N. Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Fall 2018 Edition), URL: <https://plato.stanford.edu/archives/fall2018/entries/reinach/>; by Barry Smith (“Adolf Reinach [...] is of principal note as the inventor, in 1913, of a theory of speech acts (or ‘social acts’ to use Reinach’s own terminology) which in some respects surpasses the later work of thinkers such as J.L. Austin and Searle”) in his ‘Reinach, Adolf (1883–1917)’, *The Routledge Encyclopedia of Philosophy* (Taylor and Francis 1988); by Karl Schuhmann and Barry Smith (“Historical research has recently made it clear that, prior to Austin and Searle, the phenomenologist Adolf Reinach (1884–1917) developed a full-fledged theory of speech acts under the heading of what he called ‘social acts’”) in their ‘Elements of Speech Act Theory in the Work of Thomas Reid’ (1990) 7 *History of Phenomenology Quarterly* 47; by John F. Crosby (“I tried to show that Reinach’s ‘social acts’ correspond to the ‘illocutionary acts’ of speech act theory”) in his ‘Introduction to the Reprint of Two Works of Adolf Reinach’ in Adolf Reinach and John Crosby (eds), *The Apriori Foundations of the Civil Law: Along with the Lecture ‘Concerning Phenomenology* (De Gruyter 2012) VII–VIII; and by Emmanuel Picavet (“L’une des raisons de relire attentivement Reinach aujourd’hui est la préfiguration, chez cet auteur, d’une théorie des actes de langage apparentée à celle qui devait renouveler profondément, au cours des dernières décennies, la compréhension philosophique des rapports entre validité, signification et interprétation”) in his ‘Formes sociales et actes sociaux. L’originalité du point de vue de Reinach’in J BENOIST and J Kervégan (eds), *Adolf Reinach : Entre droit et phénoménologie* (CNRS Éditions 2008); by Marietta Auer (“The parallels between the speech act theory developed by mid-twentieth century philosophers of language, on the one hand, and Reinach’s theory of linguistic social acts as the legal a priori, on the other, are striking”) in her ‘Promising, Owning, Enacting, Adolf Reinach’s Phenomenology of Legal Speech Acts’, Chapter 1, this volume.

<sup>9</sup> John F Crosby, ‘Speech Act Theory and Phenomenology’ in JF Crosby and A Reinach (eds), *The Apriori Foundations of the Civil Law. Along with the Lecture, ‘Concerning Phenomenology’* (JF Crosby ed, Ontos Verlag 2012) 167–191.

<sup>10</sup> Jeremy Waldron, ‘Welfare and the Images of Charity’ (1986) 36 *The Philosophical Quarterly* 463.

While I show that Waldron's view does not withstand scrutiny, I also show how a gift can be made by an act of waiving one's claim over someone else's property rights. It is the main result of the present Reinachian inquiry that most of the puzzles raised by gifts dissolve once attention is redirected from its physical aspects – from the gestures, the thing that is gifted, its change of location – to the metaphysical underpinning of the speech act that is performed.

## 10.2 DOES THE GIFTER NEED TO SECURE UPTAKE?

The present inquiry focuses on those gifts that are made in the performance of a locutionary act.<sup>11</sup> Relevant examples of the latter are “I hereby give you my bike”, “Here is a gift for you”, “Look what I got for you!”, “Have some wine”, or simply “My gift!” while pointing at the thing thus being gifted. The act done in each of these utterances is a gift.<sup>12</sup> Giving birthday presents, giving cash gifts, writing a will, making a bequest, distributing grants, bestowing prizes, donating money, almsgiving, etc. are commonly taken to be instances of gifts. Are they all genuine instances of the kind? The nature of gifts – what a gift fundamentally is – is a question that has been largely neglected.<sup>13</sup> It is also one that need not be resolved for the purpose of the present inquiry. Nothing should be presumed about the *genus* of gift, not even that the alleged instances of gifts listed above have any common properties in virtue of which they are gifts. It suffices that certain utterances have the social/illocutionary force of a bequest, of a birthday gift, of almsgiving, etc., and that the latter are commonly described as “gifts” in ordinary language.

As a social/illocutionary act, a gift depends on the linguistic competencies of its two parties. I focus on the illocutionary acts of *making* a gift, in contrast to *requesting* one (“Will you give me your bike?”), to *promising* to make one (“I pledge to give 10 percent of my income to the poor”), to *discouraging* (“No tipping”) or to *encouraging* one (“Give What You Can”). Verb-terms and expressions commonly spoken to express the making of a gift are “to give”,<sup>14</sup> “to bring something as a gift” or

<sup>11</sup> It is an interesting question to ask, although not addressed in the present chapter, whether the linguistic expression (the uttering) is essential to *all* cases of gifts. It suffices for the present inquiry that it is essential to *some* of them.

<sup>12</sup> Since the noun-term “a gift” designates an act, it would be less confusing to refer to it as “an act of gifting”.

<sup>13</sup> One recent exception is D Elder-Vass, ‘Defining the Gift’ (2020) 16 Journal of Institutional Economics 675.

<sup>14</sup> Many things which in ordinary talk are given require no utterance at all and, for this reason, fall outside of the present inquiry. If I say: “Will you give me more time to do it?”, I am not asking for a gift, however grateful I will be if you grant me the requested delay. Likewise, another meaning of “to give” is “to produce something”, as in “cows give milk” – utterances not being required to that effect. Also, not relevant for the present inquiry are some instances of a so-called “gift for music” which someone owes to nature, as it were, and surely not to someone else who has given it to that person.

simply “to gift”.<sup>15</sup> Some clarifications are in order. First, the utterance through which a gift is made need not contain the term “gift” nor any similar expressions. “Take it!”, “Have it!”, “I bought it for you!” are efficient alternatives.<sup>16</sup> Moreover, the same utterance can serve different illocutionary acts. In some context, someone may say “The pen is yours!” to *give* it to you, to *order* you to grab it, to *warn* you against the risk of losing it, etc. Reinach admits that a social/illocutionary act can be performed silently as long as it is “expressed in mien, *gestures*”.<sup>17</sup> In some circumstances, nodding, raising one’s eyebrows, smiling while pointing at the bike are the outward signs of the illocutionary act. Finally, let us note that the verb *give* can serve other illocutionary acts than a gift. If I say: “I am giving a party next Saturday”, “giving” means “organizing”, so it is correct to understand what I say as me *announcing* the event.

Both for Reinach and Austin, a social/illocutionary act must be heard and understood. Austin speaks of the “need to secure correct understanding”<sup>18</sup> of the audience. According to Reinach, an uptake is a necessary condition of a social/illocutionary act. “The turning to *another subject*”, he claims, “and the need of being heard [by that subject] is absolutely essential for every social act”.<sup>19</sup> Social acts need “to be announced or communicated” in contrast to “internal acts” (such as forgiving, deciding) which “can lack any announcement to others”.<sup>20</sup> However, Strawson wonders if securing uptake applies to the case of a bequest that remains undisclosed to its recipient:

[...] a man may, for example, actually have made such and such a bequest, or gift, even if no one ever reads his will or instrument of gift. . . Might not a man really have made a gift, in due form, and take some satisfaction in the thought, even if he had no expectation of the fact ever being known.<sup>21</sup>

The case of a will that is never read is not meant to refute, but merely to downplay, the need to secure uptake. The latter, as Strawson grants,

<sup>15</sup> While the term “gift” is more frequently used as a noun, “gift” as a verb does exist, according to *Merriam-Webster Dictionary* (11th edn 2023). The term means “to give something in an official or formal way”, hence excludes the informal phenomena to which the present Reinachian investigation also focuses.

<sup>16</sup> Austin’s distinction between “explicit” and “primitive” performatives is relevant here. In an *explicit* performative, the verb-term refers to the act performed through the utterance. For example, “I give you my bike” or “Let me make it a gift to you!”. In a *primitive* performative, by contrast, the utterance refers to no act, although it does serve the goal of carrying one out. For example, if I say: “This is yours” or if I just sing “Happy Birthday to you” while handing you the flowers.

<sup>17</sup> Reinach (n 6) 20 (my emphasis).

<sup>18</sup> Austin (n 1) 36.

<sup>19</sup> Reinach (n 6) 160–161.

<sup>20</sup> Reinach (n 6) 18.

<sup>21</sup> Strawson (n 1) 448.

remains “essentially *a standard, if not an invariable*”<sup>22</sup> element of all social/illocutionary acts.

Against Strawson, one may insist that making sure the utterance is understood is not a mere desideratum, but an essential aspect of illocutionary acts. As Reinach argues, the utterance “is not something that is added thereto as an incidental extra; rather, it stands in the service of the social act and is necessary in order that this should fulfill its announcing function”.<sup>23</sup> That announcing function is precisely not satisfied in Strawson’s case of the will that will never be read. However, merely restating the necessity of being read (heard, understood, having an uptake, etc.) of all social/illocutionary acts does not suffice to rule out Strawson’s case. Indeed, isn’t the point of that example to cast doubt on the necessity of uptakes that both Austin and Reinach take to be necessary to social/illocutionary acts: to suggest that unbeknownst gifts really are gifts?

There is an ambiguity in the act of making a will which may have mislead Strawson into thinking that it qualifies as an illocutionary/social act. The ambiguity is between the act of *writing* a will and the *outcome of that act* in the form of a legal document named “a will”. The suggestion here is that the need to secure uptake is true about that document, but not about the act of writing that document. Reinach’s subtle distinction between acts that are “other-directed” and acts that are “addressed” is relevant to capture Strawson’s confusion. Reinach defines “other-directed acts” as acts that are “essential[ly] directed to a subject other than the originator”.<sup>24</sup> For instance, to forgive or to envy are always to forgive and to envy *someone*. By contrast, acts that are addressed to someone require the participation of another person who “consciously takes in” the act: who hears and understands the utterance through which the act is made. While all social/illocutionary acts are thus “addressed” according to Reinach, they are not all other-directed. Indeed, “other-directedness” characterizes certain “internal acts” such as forgiving *you* and being afraid of *you*. The addressed/non-addressed distinction and the directed/non-directed distinctions are hence orthogonal. Promises are both other-directed and addressed. Declarations and enactments are addressed (therefore social/illocutionary acts) but are not other-directed.

These distinctions may have eluded Strawson and led him to mistakenly assume the other-directedness of the act of writing a will makes it a social/illocutionary act. However, once one rather focuses, as Reinach invites us to, on the need to be addressed, it becomes clear why the act of writing a will is not an instance of the social/illocutionary kind. The writing of a will, like any other act of writing, is fully completed before it is read by anyone. “A good thing done”, the testator may think once she is (indeed) done with the task. However, the mere writing of the will, while a crucial step in the making of a gift, is not (yet) a gift. It is only when the outcome of

<sup>22</sup> *ibid* 448.

<sup>23</sup> Reinach (n 6) 20.

<sup>24</sup> *ibid* 20.

the writing – the written document – is read and understood by the court and the heirs at the testator's death that the latter really are gifted what is left to them in the will. Until then, the document has not fulfilled its purpose: no gift has been effectively made. In short, the will *qua* a document must be addressed to the heirs and taken in by them. The sheer act of writing is not addressed in the related Reinachian sense of the term but also does not count as a gift, either legally or from an *a priori* point of view.<sup>25</sup>

The necessity of hearing and understanding the utterance by which gifts are made (discussed and defended in this section) is different from the necessity or the mere conceptual possibility of accepting them, which is discussed in the next section.

### 10.3 DO GIFTS REQUIRE ACCEPTANCE?

In *How to Do Things with Words*, John Austin asks: “Are you required to accept the gift if I am to give you something?”, then notes that “in formal business, acceptance is required”,<sup>26</sup> but then wonders if it also features in casual gifts. If so, what appears to be the act of one person – a “unilateral act” as Austin names it – turns out to be the act of two, namely, a “bilateral act”. In the latter case, the giftee participates in the act in a more demanding form than by simply hearing and understanding the utterance in which it is made. He would have to accept the act.<sup>27</sup> The question is not whether gifts can be refused (of course, they can). The question is whether a gift has been made in the circumstance where it is refused. If a gift is a bilateral act, refusing it prevents it from being brought into completion. Austin then ponders if the seeming bilaterality of gifts is a defining feature of all social/illocutionary acts: “The question here is how far can [illocutionary] acts be unilateral. Similarly the question arises as to when the act is at an end, what counts as its completion?”<sup>28</sup>

Is acceptance of a gift essential to its making? If the gift causes trouble to its recipient (think of a dog), it seems that the giftee must have the option to do something to prevent the act. The other intuition relates to the contrary case where the giftee, being wholly pleased with what she is gifted, would rightly consider accepting it as unneeded. The asymmetry between the cases of the unwanted gift

<sup>25</sup> Legal documents are *tangible objects* and thus differ from speech acts which are performed through *utterances*. However, as shown by Barry Smith, documents are sufficiently analogous to speech acts for approaching them as “documents acts”, that is, as “acts in which people use documents, not only to record information, but also to bring about a variety of further ends, thereby extending the scope of what human beings can achieve through the mere performance of speech acts” (Barry Smith, ‘Documents Acts’ in A Konzelmann Ziv and HB Schmid (eds), *Institutions, Emotions, and Group Agents. Studies in the Philosophy of Sociality* (Springer 2014) 19).

<sup>26</sup> Austin (n 1) 37–38.

<sup>27</sup> The content of acceptance is the act, while the content of the grasping is the propositional content of the act.

<sup>28</sup> Austin (n 1) 37.

and that of the welcome gift is not well accounted for if gifts are (merely) thought of as either unilateral or bilateral acts.

Reinach's insights on acceptance, I submit, provide a way to reconcile the two intuitions. Reinach clarifies the term by distinguishing between five different meanings of acceptance, among which is the "purely inner experience, an inner 'saying yes' an inner assent"<sup>29</sup> to some social/illocutionary act. Accepting a gift is just the experience of the internal act of *approving of* it, of finding it to one's taste. Alternatively, accepting can itself be "a social act in its own right".<sup>30</sup> To accept is, in this other sense, always to accept or express a response to another social/illocutionary act (an invitation, to take a bet, an offer, etc.). Three possibilities can be distinguished in this regard. Accepting a social/illocutionary act can either be:

- (i) a *possible* response to that act
- (ii) an *impossible* response to that act
- (iii) *necessary* to the completion of that act.<sup>31</sup>

Let us look at the related three cases more closely with the view to figuring out which one, if any, is relevant to the cases of accepting the gift. First, acceptance is a *possible* response vis-à-vis those social/illocutionary acts which do not depend on it for being done. Nominations and invitations are cases in point. While you do have the option to either decline or accept my invitation to dinner, I have invited you regardless. Not so, it seems, as far as gifts are concerned, if it is true that a gift has not been made in the case its recipient refuses it. Unlike refusing an invitation, refusing a gift does stop its completion.

Secondly, acceptance is *impossible* vis-à-vis certain social/illocutionary acts which are such that to either accept or decline does not make sense. Reinach holds commands and requests to be examples of acts that are not meant to be accepted nor declined. Reinach writes that "with [commands and requests] it is a question of imposing an obligation on the addressee of the social act, and this of course really does not need some acceptance".<sup>32</sup> For example, a teacher who commands a late student to arrive on time next time imposes an obligation on that student. The teacher should not worry about securing the student's acceptance although she might not be indifferent as to whether the student takes her command seriously or whether she internally assents to it. Obligations created by commands and requests are such that the option to accept, or, for that matter, to decline them, is just not there. To be sure, commands can be obeyed or disobeyed, and requests can be answered or left unanswered. However, to disobey is to not act as one is commanded to act, but the important point is that the command has been fully made

<sup>29</sup> Reinach (n 6) 29.

<sup>30</sup> *ibid* 29.

<sup>31</sup> I thank Kevin Mulligan for drawing my attention to these three options.

<sup>32</sup> Reinach (n 6) 31.



independently of whether it is obeyed or not. Unlike a command, however, a gift is such that the option to refuse it is there.

A third way acceptances relate to illocutionary/social acts is by being a *necessary* component of such acts. Acceptance is here required for the completion of the illocutionary/social act of which it is the necessary response. According to Austin, a bet is a relevant instance of the latter. “For a bet to have been made”, Austin notes, “it is generally necessary for the offer of the bet to have been accepted by a taker (who must have done something, such as to say ‘Done’)”.<sup>33</sup> A bet is an instance of a “bilateral act”, and the question is whether a gift is, as Austin also suggests, another *bona fide* instance of the kind. The idea is that it takes two for one to make a gift, the giftee playing his part of the act by accepting the gift, either explicitly or implicitly.

Michael Hancher concurs with this hypothesis.<sup>34</sup> The bilaterality of certain social/illocutionary acts, Hancher argues, is brought to light by the redundancy of adding “and he accepted the act” to any description of the related act. In particular, the bilaterality of appointment is underlined by noting that, in the following two sentences, “the extra clause [in (b)] goes without saying”:<sup>35</sup>

[a] Smith appointed Jones to the committee.

[b] Smith appointed Jones to the committee and John accepted it.

Applying Hancher’s argument to gift, one may note the same stylistic awkwardness in:

[c] Julie gave her bike to Paul, and Paul accepted it.

Acceptance is already featured in (what is misguidedly described as) Julie’s act. Julie’s act is a bilateral act, one may further argue, because, unlike declining an invitation, declining a gift prevents it from being made. And this is in accordance with the intuition, previously described, about how the refusal of gifts which carry obligation results in their cancellation.

However, construing gifts as bilateral acts fails to account for the asymmetry underlined previously between the cancelling effect of refusing unwelcome gifts and the superfluity of accepting wanted gifts. The related asymmetry may be explained, I shall argue, in light of Reinach’s view about how the acts of accepting and declining *respectively* relate to promises. Reinach holds acceptance to be an unnecessary component of promises. Acceptance is not required “for the efficacy of the promise” according to Reinach and “can at most serve to confirm” it.<sup>36</sup> It is “not necessary to a promise that it be accepted.” The addressee of the promise, Reinach claims, only needs to “take cognizance of the act of promising”.<sup>37</sup> Acceptance is

<sup>33</sup> Austin (n 1) 9.

<sup>34</sup> Hancher (n 1) 11.

<sup>35</sup> *ibid* 11.

<sup>36</sup> Reinach (n 6) 28–29.

<sup>37</sup> *ibid* 28–29.

therefore a *possible* response to a promise (akin to acceptance being a possible response to an invitation). However, Reinach also holds conversely that “an act of declining [a promise] prevents both claim and obligation from coming into being”.<sup>38</sup> For example, if you decline my promise to invite you to play tennis with me once a month, you prevent me from incurring the obligation to invite you to play. The option of blocking a promise toward oneself seems important to secure when the promise gives rise to an obligation to act in some unwanted way. In the contrary case, accepting a promise appears as a superfluous addendum. Reinach’s view about the distinct jural effects of accepting and of declining promises points toward the following fourth hybrid case in which:

- (iv) on the one hand, accepting a social/illocutionary act is an impossible response to that act and, on the other hand, declining the same social/illocutionary act brings its performance to a close.

The asymmetry previously outlined regarding accepting and refusing gifts, I submit, is another instance of these fourth hybrid cases. While it is not necessary for a gift to be accepted, declining a gift prevents its completion. The underlying explanation for the related asymmetry could be analogously related to the importance of not imposing on the recipient of a gift any potentially unwanted obligations. In particular, when a gift entails the transfer of certain obligation(s),<sup>39</sup> the option to prevent the gift from being made by refusing it should be at the giftee’s disposal.

The important point to retain is that whereas a gift does not require acceptance for being done, refusing a gift does block its completion. The distinct roles of accepting and refusing gifts, to which Reinach draws our attention through his analysis of acceptance of promises, seem to have been overlooked by Austin and Hancher. Having resolved the questions of the essential role of uptake (Section 10.2), and of the unessential role of acceptance (Section 10.3), I shall now emphasize the deontic dimensions of gifts.

#### 10.4 GIFTING BY TRANSFERRING OWNERSHIP

A gift is intuitively visualized as someone handing something over to someone else. Austin has done a lot to show what is wrong with that view, redirecting our attention from the physical actions – here the handing – to the utterance. The latter, as Austin claims, is “a, or even, *the* leading incident in the performance of the act”.<sup>40</sup> However, Austin also remains faithful to the intuitive view by granting a key role

<sup>38</sup> *ibid* 29.

<sup>39</sup> Think of the obligation to feed the dog received as a present or of the duty to repair the roof of the inherited house.

<sup>40</sup> Austin (n 1) 9.

to the gesture. “It is hardly a gift if I say ‘I give it you’ but never hand it over”.<sup>41</sup> The gesture associated with a gift need not be a handing. It can be a passing, a pointing, etc. In all cases, the intuitive idea seems to be that whatever is gifted to someone must be put at her disposal. To be sure, as it has certainly not escaped Austin, certain giftables (cars, houses, lands, etc.) are not liable to be handed over.<sup>42</sup> Implicit in the received view are therefore metaphysical limits as to what can be gifted. Only entities that are liable to be held and relocated are “giftables”.<sup>43</sup> These properties appropriately disqualify concepts, feelings, numbers, weddings as possible objects of gifts. However, the view also restricts “giftables” to “movables”, unduly ruling out gifts of things that are too heavy for being handed to anyone (cars) or gifts of things that by their nature (lands) remain where they are.<sup>44</sup> Be that as it may, it is tempting, following Austin, to assume that the handing, or some cognate gesture, is necessary to most other central cases of gifts<sup>45</sup>.

In this section, I show why that intuitive view is not correct, and not even an accurate account of the restricted range of cases of movable gifts (flowers, rings, etc.) it is supposed to be. The main problem of the intuitive view is that it targets the *things* (the bike, the flowers, the glass of wine) involved in gifts as *what* is given to the giftee, whereas it is in fact their *ownership* that is fundamentally targeted by the act. When I give you my bike, what I fundamentally do is to convey to you the ownership I have over it. The revision suggested here is meant to be commonplace. Still, the change of focus from the object of gift to its ownership also has important implications, as I intend to show, which speech act theorists have disregarded as the result of their focus on the things that are gifted instead of the change of ownership that these things undergo when they are brought to someone as gifts.

Let us remark, first, that the distinction between the *thing* that is owned and the *ownership* that someone has over that thing is sometimes hidden in ordinary talk. French people refer to what they own as “ma propriété” (“my ownership”) as if ownership was a generic category that comprises all the things that someone owns. Likewise, one commonly hears of “someone *having* ownership over something”. This misleadingly suggests that ownership can be *had* by someone, therefore being

<sup>41</sup> *ibid* 9. The related intuitive view is also one Hancher adopts when he stresses the “commissive aspect” of a gift which someone fails to honor when, uttering “Have some wine!”, fails to put forth any. Hancher (n 1) fn 4, 6.

<sup>42</sup> As Henry Smith told me (private communication), in many of these cases, the gift is made by the delivery of a stand in or part (a key, a deed, etc.) of the whole unmovable thing.

<sup>43</sup> In the metaphysical jargon, giftables fit in the category of “endurants” defined as entities that endure over time, yet lack temporal parts, and float free from their creators, producers or makers (cf. Barry Smith ‘Basic Concepts of Formal Ontology’ in Nicolas Garino (ed), *Formal Ontology in Information System Guarino* (IOS Press 1988).

<sup>44</sup> The constraint imposed by the intuitive view also rules out services (hair-cutting, medical advising, lecturing) from the category of giftables. Because services are acts (i.e., metaphysical “occurents”), they cannot be *handed* to anyone.

<sup>45</sup> Austin (n 1) fn I, 37. As Austin also admits, it is not clear whether the handing is essential to the completion of the act or among its felicity conditions.

itself liable to enter into another ownership relation, in a *regressus ad infinitum* inasmuch as this new ownership relation would also be liable to be owned, etc.

Reinach's theory of ownership, to which I now turn, scrupulously prevents the confusion.<sup>46</sup> This is because Reinach conceives ownership<sup>47</sup> as a dyadic *relation* between someone (the owner) and a thing.<sup>48</sup> To have the ownership of a bike is to relate to that bike in a particular way. Reinach further qualifies the ownership relation as a "thoroughly 'natural' relation which is no more artificially produced than is the relation of similarity or of spatial proximity".<sup>49</sup> Reinach also holds ownership to be a *prelegal* relation, one that "comes into being even where there is no positive law".<sup>50</sup> The island on which Crusoe is shipwrecked provides the fictitious law-free environment in support of that view. "When Robinson Crusoe produces for himself all kinds of things on his island, these things belong to him".<sup>51</sup> The ownership relation is further qualified as a *primitive* relation, that is, as one that "cannot be further resolved into elements".<sup>52</sup> Moreover, but no less crucially, it is, Reinach claims, ownership over a thing which confers to the owner "the right to deal in any and every way with the thing".<sup>53</sup> Against the proponents of the bundle of rights theory of ownership, Reinach urges us not to conflate the ownership relation with "the absolute right [of the owner] to deal in any way he likes with the thing which belongs to him".<sup>54</sup> These absolute property rights, while distinct from the ownership relation, are also "grounded" in the latter. Reinach subscribes to the view that ownership "is itself not a right over a thing, but rather a relation (*Verhältnis*) to the thing, a relation in which all rights over it are grounded".<sup>55</sup> As Olivier Massin suggests, the grounding relation between the absolute property rights and ownership is an essential relation.<sup>56</sup> It is in virtue of the essence of ownership that whoever owns a thing also has the absolute right to use that thing in whichever way she desires.

The ownership relation between an owner and what she owns stands in contrast to other kinds of relations between persons and things. In particular, the ownership relation differs from the relation of *possession* that someone has over the thing he has

<sup>46</sup> The present discussion only focuses on the aspects of Reinach's theory of ownership that cast doubt on the intuitive view of gift.

<sup>47</sup> My presentation draws on Olivier Massin's reconstruction of Reinach's theory of ownership in Olivier Massin, 'The Metaphysics of Ownership: A Reinachian Account' (2017) 27 *Axiomathes* 577.

<sup>48</sup> Reinach (n 6) 54.

<sup>49</sup> *ibid* 54.

<sup>50</sup> *ibid* 46.

<sup>51</sup> *ibid* 56.

<sup>52</sup> *ibid* 56.

<sup>53</sup> *ibid* 70.

<sup>54</sup> *ibid* 55.

<sup>55</sup> *ibid* 56.

<sup>56</sup> Massin (n 47) 582–583.

at his disposal. If the ownership/possession distinction sounds otiose, it is because *often* the owner of a thing also possesses it. However, it is among the sophistications of Reinach's theory of ownership to accommodate the cases where possession is dissociated from ownership. The dissociation occurs when someone steals something. While the thief now has possession of the bike, he has not acquired its ownership.

Once ownership, so defined, is recognized as the target<sup>57</sup> of gifts, it becomes clear why the gestures (the handing over, passing, putting forth, etc.) included in the intuitive view are not relevant to the act. Ownership occupies no space, has no weight, nor has the three-dimensions of its two *relata*. If so, while the thing that is gifted may be liable to be grasped, handed over to the giftee and be thus relocated, its ownership moves nowhere, and, in fact, is nowhere. And yet, it is really the ownership over the thing – being conveyed, as it were, from the gifter to the giftee – that undergoes the crucial ontological change *in all cases*. The complexity of gift as a “four-legged act” (involving a *gifter*, a *thing* that is gifted, the *ownership* of that thing, and the *giftee*) is revealed. We may accordingly redescribe a gift as an act by means of which someone (namely, the gifter) makes someone else (namely, the giftee) the new owner of a thing.

The alternative and presumably refined view of gift here outlined – the Ownership View of Gift (hereafter “OVG”), as I name it – differs from the intuitive view in several respects. First, the intuitive view, because it focuses on the *thing* that is gifted, is attentive to what now appear to be contingent features (the change of location, the episodic nature of the act). The OVG focuses on the *ownership* over that thing as the necessary target of gifts. From this perspective, a gift is an instantaneous act (while it takes time for a thing to be handed over to someone, the change of ownership undergone by that thing takes no time).

Secondly, whereas the intuitive view ascribes a central role to the *physical* gestures by which the gift is carried to the giftee, the OVG urges the neglect of these gestures and puts forth the (implied or explicit) utterances through which gifts are made as essential to their performance.

Thirdly, whereas, on the intuitive view, a gift is one by which the gifter gives a good to someone, the OVG offers a different view of the nature of the illocutionary of the act – one that makes someone the new owner of something<sup>58</sup> – that is performed when a gift is made.

<sup>57</sup> What is here described as the target of gift seems the same thing as what Searle and Vanderveken would term its “illocutionary point”, i.e., the characteristic aim that individuates one illocutionary act from another (John R Searle and Daniel Vanderveken, *Foundations of Illocutionary Logic* (Cambridge University Press 1985).

<sup>58</sup> While a “deed” (or a “title deed”) is the legal term for such an act, there is no casual term for designating the prelegal form of the act that is under scrutiny here. In English as in other languages, the term “appropriation” designates the act of making oneself the new owner of a thing. Interestingly, there is no term, as far as I know, for the other-directed equivalent act.

Fourthly, whereas the intuitive view of gift, focusing as it does on the thing that is being gifted, is prone to identify the “commissive” aspect of gift (i.e., the fact that the speaker is committed to bring that thing to the giftee), the OVG, emphasizing the underlying ontological change of ownership, redirects attention to the power of gifts to change reality. As Reinach insists, the ontological change taking place when “a thing is conveyed ‘into the [ownership]’<sup>59</sup> of another’ [...] is more than a linguistic turn of phrase. It is really the case that the supporting member of the relation of owning (i.e. the owner) modifies the relation by his own act in such a way that he drops out of the relation and someone else takes his place, though for the rest the thing and the relation remain identically the same”.<sup>60</sup> To understand the nature of the power of the transfer of ownership, Searle’s distinction between speech acts with a “word-to-world” and those with a “world-to-word direction of fit”<sup>61</sup> is helpful. The typical utterances (“this is yours”) through which gifts are made have both directions of fit. Their propositional content not only “represents the reality as being so changed”,<sup>62</sup> it also modifies the reality to make it match the content. The distinctive power of gifts to change reality is one the intuitive view, fixed as it is on the contingent changes of location sometimes undergone by the thing that is gifted, cannot properly register. Uttering “I hereby transfer to you the ownership of the bike”<sup>63</sup> is more truthful, even if admittedly clumsy, to the ontological changes involved in gifts than “I hereby give you my bike”.

Fifthly, the two views differ in their conception of the illocutionary force of the utterances (how that utterance should be interpreted<sup>64</sup>) through which gifts are made. Whereas the intuitive view refers to the illocutionary force of the utterance as *to give*, the OVG takes it to be *to make someone the new owner of something*. To my knowledge, there is no single English term for that illocutionary force – a noteworthy *lacuna* given the use of “appropriation” for the act of making *oneself* the new owner of a thing.

While all these differences vindicate the OVG, indeed revealing its greater accuracy, a proponent of the OVG also faces additional challenges from which advocates of the intuitive view are spared. In particular, if the illocutionary force of a gift is, as the OVG has it, the making of someone else the owner of a thing, it is

<sup>59</sup> Reinach uses two terms, namely “Eigentum” and “Gehören”, uniformly translated by John Crosby as “property”. I use the term “ownership” over a thing to enhance the contrast, stressed by Reinach, with the “property rights” over that same thing.

<sup>60</sup> Reinach (n 6) 70.

<sup>61</sup> John Searle Jr, *The Making of Social Reality* (Cambridge University Press 2010) 27–28.

<sup>62</sup> *ibid* 12.

<sup>63</sup> The stylistic short-cut is not entirely benign as it misleadingly assumes that properties are not metaphysically different from any other entities (named “continuants” in metaphysics) that can be *owned* which is nonsense. The ownership of x cannot itself be something that the owner of x owns in addition to his ownership of x.

<sup>64</sup> Austin (n 1) 70.

presumably an act that has the effect of altering the deontic status of both the gifter (who loses the ownership of the thing and property rights over that thing) and the giftee (who correlatively acquires both). Following Reinach, we may refer to “the jural power to produce, modify, etc. rights and obligations through his own social acts” and the “natural ability” to, say, hand over something to someone.<sup>65</sup> The proponent of the OVG is expected to specify *who* has the related jural power to make someone the owner of a thing, and also *which social/illocutionary act* that person has to perform to that jural effect. The OVG will readily provide the requested clarifications as follows. For X (the gifter) to have the jural power to make Y (the giftee) the new owner of *a*, it needs to be the case that:

[1] X is the *owner* of *a*.

[2] X *transfers* ownership of *a* to Y.

Both requirements are commonsensical. In his entry “Speech Act” of the *Stanford Encyclopedia of Philosophy*,<sup>66</sup> Mitchell Green gives voice to [1] when he points to the “preparatory conditions” that must be met for the speech to not misfire, illustrated by the case of a person who “cannot bequeath an object unless she already owns it”.<sup>67</sup> As far as the role of transfer in gift, it is widely recognized among legal theorists.<sup>68</sup> However, although scholars correctly point to the role of transfer in gifts, they fail to notice, let alone think through, as Reinach does, the ontological change and deontic aspects that transfers of ownership have the power to bring about.

First, the ontological change realized by a transfer of ownership is “to change the relation of belonging by changing its bearer”.<sup>69</sup> The content of the transfer – *what* is transferred – need not be an ownership relation. A transfer can, alternatively or additionally, bear on property rights, on a relative obligation, on a claim or on a jural power. In each case, however, the act of transfer is such that, as Edmund Husserl puts it, “through it” an entity “passes from one person to another”.<sup>70</sup> In other words, a transfer unfolds in such a way that at the beginning the transferor has the entity and the transferee does not have it, whereas at the end, the transferee has the entity and the transferor does not.<sup>71</sup>

<sup>65</sup> Reinach (n 6) 86; on the distinction between natural powers and jural powers cf. Reinach (n 6) 174.

<sup>66</sup> Green (n 1).

<sup>67</sup> *ibid.*

<sup>68</sup> I shall content to refer to Richard Hyland, *Gifts: A Study in Comparative Law* (Oxford University Press 2009) as evidence of the commonality of the assumption.

<sup>69</sup> Reinach (n 6) 63.

<sup>70</sup> Edmund Husserl ‘Obituary Notice’ in John Crosby (ed), *The A Priori Foundations of the Civil Law: Along with the Lecture Concerning Phenomenology* (Ontos Verlag 2012) xiii, originally published in (1919) 13 *Kant-Studien* 147.

<sup>71</sup> Olivier Massin and Emma Tieffenbach ‘The Metaphysics of Economic Exchanges’ (2017) 3 *Journal of Social Ontology* 182.

Secondly, both legal scholars and speech act theorists who reflect on gifts fail to register that “[t]he transferring of [ownership] also presupposes a power to transfer insofar as owning essentially implies the right to deal in *any and every* way with the thing, the power to transfer the thing into the ownership of others is contained in this right”.<sup>72</sup> The power (or right) to transfer ownership is just one of the “absolute rights” that the ownership relation, in virtue of its nature, confers to owners. “It is grounded in the essence of owning”, Reinach claims, “that the owner has the absolute right to deal in any way he likes with the thing which belongs to him”.<sup>73</sup> The jural powers grounded in ownership stand in contrast to the jural powers that have their source “in the person as such”.<sup>74</sup> Following Kevin Mulligan, the distinction between those jural powers that are grounded in ownership and those that have their source in personhood may be further explicated as follows. While being a person is all that is needed for having the jural power to “apologize, promise, accept promises, order, ask questions, answer questions, inform, grant, request, submit himself, thank”,<sup>75</sup> merely being a person does not suffice for being endowed with the jural powers to condemn, to declare (war), to baptize, to dissolve the government or to petition for bankruptcy. Likewise, I submit, being a (thin) person does not suffice for having the jural power to transfer to someone the ownership of a thing. Only those (thick) persons who have the ownership of that thing in the first place have the jural power to transfer its ownership to someone else. By extension, one may say that gifters do not have the power to make a gift of a thing they do not own. Speech act theorists, such as Hancher, point to the “commissive” dimension of gifts,<sup>76</sup> suggesting that utterances such as “Have some wine” commit the gifter to making what is gifted readily available. However, it may now appear that the March Hare’s misfired gift to Alice could instead be a matter of the March Hare not having the jural power of gifting the wine to Alice.

Because the OVG confines the category of gift to the transfer of *ownership*, it conceptually rules out the gifts of stolen things. Approached in consideration of Reinach’s distinction between ownership and possession, the gifts of stolen things would correspond to the case where what is transferred is the possession of a thing. Someone who has stolen a bike possesses the bike without owning it. She can transfer the possession of the bike to someone else without thus transferring the ownership of the bike. If Julie steals John’s bike, Julie possesses it while John still owns it although he has lost the power to use it. Julie can then transfer her possession of John’s bike. Paul is now the new possessor of the motorcycle, while

<sup>72</sup> Reinach (n 6) 51.

<sup>73</sup> *ibid* 55.

<sup>74</sup> *ibid* 86.

<sup>75</sup> Kevin Mulligan, ‘Persons and Acts: Collective and Social. From Ontology to Politics’ in Alessandro Salice and Hans Bernhard Schmid (eds), *The Phenomenological Approach to Social Reality* (Springer Verlag 2016).

<sup>76</sup> Hancher (n 1) 6.



John remains its owner. Now the pressing question is: Has Julie gifted John's bike? The answer to that question is not entirely clear and depends on whether a transfer of possession that is dissociated from a transfer of ownership can have the illocutionary force of a gift. I shall point to two implausible implications as decisive considerations in support of ruling out the related case. First, it would entail that the recipient of the gift possesses that which she is gifted without being further endowed with its ownership or with the property rights to use the thing. While the recipient would be able to make use of the thing, she would not have the property rights to act accordingly.

It is time to recap the sequences that, on the OVG, unfold in many central cases. For X (a gifter) to gift her *a* to Y (the giftee), it needs to be the case that:

- (i) X initially owns *a*.
- (ii) X utters, either implicitly or explicitly: "I hereby transfer the ownership of *a* to Y".
- (iii) Y hears and understands X's utterance.
- (iv) Y does not decline the transfer of ownership.
- (v) As the result of (i)–(iv), Y becomes the new owner of *a*.

The OVG, as it is outlined here, may appear to achieve generality at the cost of being at odds with the intuitive understanding of the act. One may object that it is at odds with the ordinary use of the term "gift" which does bear on things, not on their ownership, let alone a relation between someone and a thing. However, the OVG does not conflict with the widespread view that the objects of gifts are things. It really is the bike (not its ownership) that I bring to you as a gift. The rectification that the OVG urges to make regards technical aspects of gifts. In particular, the OVG presses for reconsidering the illocutionary act by which a gift is done in terms of a transfer of ownership from oneself to the recipient of that gift. The OVG also presses for reconsidering the illocutionary force of a gift as making someone the new owner of a thing.

#### 10.5 JEREMY WALDRON'S ENCOUNTER: HOW TO MAKE GIFTS BY WAIVING OWNERSHIP

Jeremy Waldron also purports to define "what charity<sup>77</sup> is and what it involves".<sup>78</sup> Waldron intends to refute both the view "that charity involves a positive act of assistance"<sup>79</sup> and the correlated claim that "withholding charity can be seen as an

<sup>77</sup> The notions of charity and gifts are not strictly identical. Only those gifts which are driven by benevolent concern are instances of charity acts. And there are other ways of performing the latter than by gifting one's resources. Still, the two categories do overlap in the case, discussed by Waldron (no), of the food that is given to the weary travelers.

<sup>78</sup> *ibid* 469.

<sup>79</sup> *ibid*.

omission – a mere failure to act”.<sup>80</sup> As he notes, “[t]his image of charity derives from the old biblical story of the Good Samaritan”, the latter being usually seen as actively doing what is needed to rescue the man. In the biblical story, “charity means putting oneself out, actively intervening for someone else’s benefits”.<sup>81</sup> As a plausible alternative, Waldron proposes “a different image of charity” as being achieved “by doing nothing”<sup>82</sup> (or almost nothing, as I will shortly explain).

Waldron tells two variants of the biblical story. In the first, two bad Samaritans actively prevent some weary travelers from helping themselves to the foods displayed on a table in their house. In the second version, one good Samaritan inactively lets weary travelers help themselves to the food. What the latter version reveals, Waldron argues, is that charity can consist in “passively allowing another to help himself to the resources”.<sup>83</sup>

As we noted earlier, charity involves giving but giving – the exercise of the power of alienation of one’s property – need not involve any active or onerous expenditure of effort. If you have physical possession of my typewriter already (you were carrying it home for me, say, as a favor), and I say, “Keep it – it’s yours”, the only action I have to perform is the purely symbolic or gestural one of saying that a gift has been made. To give you something, I do not have to put myself out for your sake or come actively to your assistance. The airiest waiver of my property rights is reasonably sufficient.<sup>84</sup>

The central claim here is that waiving property rights over something (in the present case, a typewriter) suffices for giving it to someone just in case the latter is able to help himself to, or is already in possession of, the thing. The conception of gift defended here advances two requirements. One is the “waiving of property rights”, which Waldron correctly conceives as being performed in the mere uttering “Keep it – it’s yours”. The other requirement is on the recipient of the gift, who is expected all by herself to enter into possession of that which is gifted.

According to Waldron, the originality of this conception is that it dispenses with the physical acts (such as “putting myself out for your sake”) which, on a more conventional conception, are necessary for making a gift. From this perspective, Waldron seems to endorse a version of the OVG presented in Section 10.4. However, Waldron’s view does depart from the OVG when, instead of a transfer of property rights,<sup>85</sup> it puts forth a waiving of these property rights as the act by which the change of ownership is brought about.

<sup>80</sup> *ibid.*

<sup>81</sup> *ibid.*

<sup>82</sup> *ibid.*

<sup>83</sup> *ibid.* 471.

<sup>84</sup> *ibid.* 470.

<sup>85</sup> Waldron does not dissociate, as Reinach does, ownership and property rights, assuming that owning something is just to have the property rights over it. While one may object to the related conflation, the latter does not affect Waldron’s view of gift.

Waldron is right to note that the mere waiving of property rights does not suffice for making anyone the bearer of these property rights. Waiving property rights over *a* leaves *a* un-owned. Waldron is also right to claim that entering into a relation of possession with something can in itself create an ownership relation with that thing. However, Waldron is wrong to infer that the performance of these two amalgamated acts – a waiving on one side matched by an act of appropriation on the other – amounts to the making of a gift. Reinach's insights about the social/illocutionary act of waiving can be mobilized to explain why it is so. Waiving, as Reinach notes, is "a social act which lacks the moment of other-directedness. Waiving refers merely to that which is waived, in this case to the claim; it is not directed to a person".<sup>86</sup> Waiving, like declaring, revoking and enacting, belongs to the sub-category of social acts which are not other-directed. In support of that observation, one may note that the following sentence:

[d] "I hereby waive my property right over that thing to you."

does not sound correct. The important point is that if a waiving is *not* other-directed, the act fails to display the other-directedness that is essential to gifts: the fact that the propositional content of the sentence through which a gift is made always refers to the recipients of that gift.

Although a gift cannot be done by merely waiving a property right over a thing, the social/illocutionary act of waiving can be involved in genuine cases of gift. Consider the case of Julie who promises to give Paul her bike *if* he gives her CHF100. Julie's conditional promise is a defining feature of economic exchanges.<sup>87</sup> Suppose that Paul gives to Julie the requested amount and then changes his mind: he no longer wants to buy Julie's bike and is also willing to not ask Julie to give him back the CHF100 that he transferred to her. Maybe Paul has been told that Julie put her bike on sale because she urgently needs the money. Because Paul wants to be kind to Julie, he is now disposed to gift her the CHF100 which he initially transferred in exchange for the bike. What Paul can do (and this is, in fact, the only thing he can do) so that Julie has the right to keep both his money and her bike is to waive his claim over Julie's bike.

The fictitious example described here illustrates a way of making a gift other than by transferring the ownership of the thing that is gifted. Paul has already transferred the CHF100 to Julie, but the transfer was done in the context of an economic exchange between the two. The ownership of the CHF100 was shifted to Julie when she and Paul were still engaged in buying and selling each other's goods. What makes the case tricky is that Paul makes Julie the new owner of his CHF100 not by transferring to her his ownership over the money, but by waiving his claim over

<sup>86</sup> Reinach (n 6) 32.

<sup>87</sup> Massin and Tieffenbach (n 71).

Julie's bike. The money is *what* Paul gifts to Julie. But the social/illocutionary *act* that Paul performs in order to gift the money to Julie is to waive his claim over Julie's bike. It is a case of an economic exchange that evolves into a case of gifts as the effect of a social/illocutionary act, namely a waiving of a claim, that modifies the nature of the interaction. It is a case in which a buyer (Paul) takes the role of a gifter while the seller (Julie) becomes *ipso facto* the beneficiary of a gift.

## 10.6 CONCLUSION

This chapter is a follow-up to dispersed and occasional remarks on gifts that speech act theorists have made. Far from having the ambition to be a speech act theory of gifts, the upshots of the present inquiry can nonetheless be assembled in the form of a (non-exhaustive and provisional) list of conditions for the (illocutionary-)making of gifts. It is time to recap the main findings and also to gesture at some of the issues that a full-blown speech act theory of gifts would have to tackle.

I have first shown that a gift has not been made if the giftee has not grasped the utterance through which it is made. Strawson may have been misled by the other-directedness of the writing of a will that is never read into supposing that it is a *bona fide* instance of a speech act. While the orthodox view about the utterance being essential to the illocutionary act remains unchallenged, it is not entirely clear, as Maryam Ebrahimi Dinani rightly points out, what from Reinach's perspective "the general requirement of grasp" precisely means.<sup>88</sup> In the case of gifts, it is an interesting question to ask the extent of the understanding that is implied in the grasping. While it seems reasonable to require that the addressee understands the nature of the act (as an instance of a gift) as well as the role (that of its recipient) she is ascribed in the act, it is less clear whether the addressee is also further expected to grasp the nature of the social/illocutionary act (an act of transfer) performed and also the illocutionary force of the utterance (making her a new owner) through which the act is made. What knowledge of these various hidden aspects of the gift should be expected on the part of the addressee? The level of understanding that the general requirement of grasp presupposes needs to be specified to avoid a theory of gift that is too cognitively demanding, because it is at odds with the intuitive, pre-theoretical understanding of the act that manifestly suffices for its successful performance.

A second result of the inquiry is that a gift may not be the "bilateral act" that Austin has in mind if its acceptance, in the form of a social/illocutionary act, is superfluous, as I have argued. Granted: the intended recipient of a gift has the option to prevent the act from being completed. However, if this is what is at stake, the option can be chosen simply by declining the gift in the relevant circumstance.

<sup>88</sup> Maryam Ebrahimi Dinani, unpublished Doctoral Dissertation (2023 Paris) 226.

It seems unnecessary, I have argued, that the recipient also does her part of the act, as it were, by accepting the gift in the alternative circumstance where she wants it.

There is another reason for rejecting the requirement of acceptance. It tends to confound what is fundamentally a single act with a collective one. The way the giftee is essential to the act of gifting is not by *co-performing* the act, but simply by *uptaking* it. The utterance through which the gifter makes a gift has to be heard and understood by the giftee, but the gifter is the only agent making that gift.<sup>89</sup> Thus, although a gift involves two persons, it remains the act of one person only. There is no *we-gift*, only an *I-gift* matched by a *You-uptake*.

Finally, it is a third result of the inquiry to press for a shift of focus from the thing that is the object of the gift to the ownership over that thing that is transferred to the giftee. The merits of the shift of attention are threefold: to lay bare the metaphysical underpinning of the act, to confront us with its conceptual boundaries, and to accommodate a greater range of cases. The unexpected variety of gifts is maybe the most striking result of the present inquiry. To gift my bike to you, I can either *transfer* its ownership to you, *grant* you the right to revoke your promise to pay for it or *waive* the right I have over the amount of money you owe me. One can also suppose that the actual diversity of the act is not fully laid bare by these three sub-cases, and therefore the subject matter warrants further exploration.<sup>90</sup>

#### BIBLIOGRAPHY

- Auer M, 'Promising, Owning, Enacting: Adolf Reinach's Phenomenology of Legal Speech Acts' (this volume)
- Austin JL, *How to Do Things with Words* (JO Urmson and Marina Sbisa, eds, 2d edn Harvard University Press 1975)
- Burkhardt A, *Soziale Akte, Sprechakte und Textillokutionen. A. Reinachs Rechtsphilosophie und die moderne Linguistik* (Max Niemeyer 1986)
- Chrudzinski A, 'Reinach's Theory of Social Acts' (2015) 15 *Studia Phaenomenologica* 281
- Crosby JF, 'Speech Act Theory and Phenomenology', in Crosby JF and eds, *The Apriori Foundations of the Civil Law. Along with the Lecture, 'Concerning Phenomenology'* (Ontos Verlag 2012)
- 'Introduction to the Reprint of Two Works of Adolf Reinach', in JF Crosby eds, *The Apriori Foundations of the Civil Law. Along with the Lecture, 'Concerning Phenomenology'* (Ontos Verlag 2012)

<sup>89</sup> Alessandro Salice and Olivier Massin make a similar observation about promises being the single act of the promisor, even if a promise requires being taken in by the promisee (Alessandro Salice and Olivier Massin, 'So Close and Yet So Far, Reinach and Gilbert on Promises', Chapter 11, this volume).

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- DuBois J and Smith B, 'Adolf Reinach', in Zalta EN ed, *The Stanford Encyclopedia of Philosophy* (Fall 2018 Edition), URL: <https://plato.stanford.edu/archives/fall2018/entries/reinach/>
- Ebrahimi Dinani M, Unpublished Doctoral Dissertation, prepared at Ecole Normale Supérieure, Paris
- Elder-Vass D, 'Defining the Gift' (2020) 16 *Journal of Institutional Economics* 675
- Green M, 'Speech Acts', in Zalta N ed, *The Stanford Encyclopedia of Philosophy* (Fall 2021 Edition). URL: <https://plato.stanford.edu/archives/fall2021/entries/speech-acts/>
- Hancher M, 'The Classification of Cooperative Illocutionary Acts' (1979) *Language in Society* 1
- Edmund Husserl, 'Obituary Notice', in John Crosby (ed), *The A Priori Foundations of the Civil Law: Along with the Lecture 'Concerning Phenomenology'* (Ontos Verlag 2012), originally published in (1919) 13 *Kant-Studien* 147
- Hyland R, *Gifts: A Study in Comparative Law* (2009 Oxford University Press) (Oxford University Press 2009)
- Massin O, 'The Metaphysics of Ownership: A Reinachian Account' (2017) 27 *Axiomathes* 577
- Massin O and Tieffenbach E, 'The Metaphysics of Economic Exchanges' (2017) 3 *Journal of Social Ontology* 167
- Mulligan K, *Speech Act and Sachverhalt: Reinach and the Foundations of Realist Phenomenology* (D. Reidel 1987)
- 'Persons and Acts: Collective and Social. From Ontology to Politics', in Salice A and Schmid HB eds, *The Phenomenological Approach to Social Reality* (Springer Verlag 2016)
- Picavet E, 'Formes sociales et actes sociaux. L'originalité du point de vue de Reinach', in Benoist J and Kervégan J eds, *Adolf Reinach : Entre droit et phénoménologie* (2008 Paris CNRS Éditions)
- Reinach A, 'The Apriori Foundations of the Civil Law' (John F Crosby tr, 1983) 3 *Aletheia* 1–142, 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
- Salice A and Massin O, 'So Close and Yet So Far; Reinach and Gilbert on Promises', (this volume)
- Schuhmann K and Smith B, 'Adolf Reinach: An Intellectual Biography', in K Mulligan ed, *Speech Act and Sachverhalt. Reinach and the Foundations of Realist Phenomenology* (Kluwer 1987)
- 'Elements of Speech Act Theory in the Work of Thomas Reid' (1990) 7 *History of Philosophy Quarterly* 47
- Searle JR, 'A Classification of Illocutionary Acts' (1976) 5 *Language and Society* 1
- Speech Acts. An Essay in the Philosophy of Language* (Cambridge University Press 1969)
- The Making of Social Reality* (Cambridge University Press 2010)
- Searle JR and D Vanderveken *Foundations of Illocutionary Logic* (Cambridge University Press 1985)
- Smith B, 'Basic Concepts of Formal Ontology' in Garino N ed, *Formal Ontology in Information System Guarino* (IOS Press 1988)
- 'Reinach, Adolf (1883–1917)', in *The Routledge Encyclopedia of Philosophy* (Taylor and Francis 1998)

- ‘Towards a History of Speech Act Theory’ in A Burkhardt ed, *Speech Acts, Meanings and Intentions. Critical Approaches to the Philosophy of John R. Searle* (de Gruyter 1990)
- ‘Documents Acts’, in AK Ziv and HB Schmid eds, *Institutions, Emotions, and Group Agents. Studies in the Philosophy of Sociality* (Springer 2014)
- Strawson P, ‘Intention and Convention in Speech Acts’ (1964) 73 *The Philosophical Review* 89
- Vendler Z, *Res Cogitans: An Essay in Rational Psychology* (Cornell University Press 1972)
- Waldron J, ‘Welfare and the Images of Charity’ (1986) 36 *The Philosophical Quarterly* 463