

Legal Concepts as a Deep Structure of the Law

Reinach's A Priori in Action

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5.1 INTRODUCTION

Private law theory increasingly gravitates toward extremes. In area after area and across methodologies, private law is pushed in opposite directions. This polarization takes place along many dimensions. Familiar are the opposition of internal and external perspectives on law, holistic and reductionist methodologies, conceptualism and nominalism, deontology and consequentialism. Often what is left out in this picture are the details of law and its workings, which relate individual behavior and morality to larger questions of justice and societal organization. As a result of privileging the micro or the macro, private law theory has trouble relating these two levels, with a lot of hand waving substituting for a well-grounded account of any kind.

All of which makes an encounter with the legal phenomenology of Adolf Reinach more than a little startling. According to Reinach, a close consideration of our intuitions will provide access to a realm of law made up of real, timeless entities, which he identifies as being synthetic a priori.¹ That is, it is not logical, but neither is it conventional or contingent. Broader than the Kantian a priori, what the a priori was for Reinach is intertwined with the kind of close analysis called for in his

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¹ 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.

phenomenology. An entry point to the *a priori* is by way of our considered intuitions about law. The intuition can be direct, or it can be indirectly ferreted out through telltale signs like the naturalness of enactments that accord with the *a priori*.² We will argue that these signposts of the *a priori* are important for private law theory regardless of the ultimate status of what Reinach sees as a *priori*.

For Reinach, the *a priori* or essential in law is not conventional, but it can be superseded by positive enactment when it comes to actual law and legal concepts. Although such enactments can deviate from the *a priori*, the latter is always there. It not only leaves hints at its presence in terms of ease of enactment, patterns of legal thinking in new contexts, and the like. Reinach also suggests that the *a priori* has a gravitational pull such that deviations from it would be more common if they only responded to external considerations and did not work against the pull of the *a priori*.³

Most importantly, the *a priori* is a legal ontology that is presupposed when we deal with law, even when law deviates from this underlying reality. By studying closely the presuppositions of law we can get a sense of its architecture – its deep structure – even if we don't have infallible access to the *a priori* – or, we will argue, even if it does not have that status. That is, looking for the *a priori* can put on the table what about law is so robust as to be more than conventional and perhaps so taken for granted that it is not immediately apparent. Sometimes it will be difficult to tell this deep structure apart from certain widespread and psychologically, socially, or economically motivated aspects of law. In the end, one can question whether there is that much difference: one can accept that Reinach's phenomenological procedure gets at something deep about law while entertaining a range of sources for it, ranging from natural law to psychology to overwhelming practical considerations.

This is strong stuff. It grows out of a phenomenological tradition that is quite optimistic about the project of direct analysis of experience. We will not enter into the debates over phenomenology itself, nor will we argue that Reinach's extension of this methodology into law is the solution to the ills of current private law theory. Instead, we will employ the lens of Reinach's *a priori* and its surprising successes in providing insights into aspects of private law to argue that his philosophy can be the starting point for thinking about how to fill the law-shaped gap in current theorizing.⁴ We will show that Reinach's *a priori* is a good entry point to aspects of law that are deep and robust, whatever their source – natural, psychological, or practical. These aspects of law relate to the social acts between individuals and their 'micro' interactions, and at the same time they organize behavior in a way that allows society to function better or worse. In Reinach's *a priori* we can be attentive to detail and

² *ibid* 131.

³ *ibid* 5–7.

⁴ We do not mean to imply that Reinach's framework would not be useful in thinking about public law. Reinach's book was concerned with the civil law, and we are scholars of private law. Many of the social acts involved in public law will be different from those considered here.

venture abstract generalizations, without thereby becoming overly reductionist. By ferreting out the Reinachian *a priori* in law, we can in the spirit of the New Private Law bring the poles of thinking we began with – the internal and external, holistic and reductionist, conceptualist and nominalist – closer together and ultimately relate the micro in law to the macro of the legal system and society writ large.

This chapter will examine current private law theory through a Reinachian lens. In Section 5.2, we set the stage by pointing out what is missing from a wide variety of approaches to private law across legal systems: how the details of law as a working system relate to the micro and the macro. In Section 5.3, we show how Reinach tackles the law on its own terms and brings out some striking insights about law, especially in the areas of property, the transfer of rights, and representation. Finally, we draw some lessons from Reinach for addressing the micro–macro problem in private law theory and examine the full range of foundational theories that could benefit from an infusion of Reinachian deep structure, whatever its ultimate status.

5.2 PRIVATE LAW THEORY AND ITS DISCONTENTS

Private law is less unified than ever. Along quite a few dimensions, theorists push in wholly opposite directions and wind up standing at odds with one another. First, internal and external perspectives style themselves as opposites.⁵ Internal theories seek to understand law from the perspective of a participant, to get at the law's 'self-understanding', during which one is to take what courts say seriously rather than as deception or false consciousness. By contrast, external perspectives analyze the law in light of some extralegal criterion, be it efficiency, distributive fairness, or even deontology. With the rise of Legal Realism in the United States, external perspectives, especially functionalist ones, have become the mainstream there.

Related to but distinct from the internal–external divide are various approaches to reductionism. Functionalist theories of law often seek to explain or justify law in terms of one variable, such as efficiency, welfare, or fairness, and in some versions, like much of law and economics, employ simple models of individual behavior. Internal perspectives run the opposite risk, of replicating the phenomenon they seek to explain or justify. However, reductionism does not track the internal–external divide exactly. Functional theories can be pluralist, responding to multiple values, and internal theories can see in (or read into) law one overriding value. An interesting contrast are old and new institutional approaches to law and economics: the style of the original institutionalists was holistic, with the invocation of society-level variables like culture and power.⁶ New institutionalists react to but still

⁵ AS Gold, 'Internal and External Perspectives: On the New Private Law Methodology' in AS Gold et al (eds), *The Oxford Handbook of the New Private Law* (Oxford University Press 2020) 3.

⁶ See, e.g., JR Commons, *Institutional Economics: Its Place in Political Economy* (Macmillan 1934). For a discussion, see HE Smith, 'The Complex Architecture of Property Rights' in Lee

take as a starting point modern microeconomics with its methodological individualism and (unless modified) rational actor models.⁷

One major arena in which the question of reductionism looms large is the nature of concepts in law. In natural law, legal concepts are taken as robust and not the result of convention. Doctrinalism sees concepts as more or less given and not easily manipulated, and crucially as performing an important role in the law. The caricature of ‘deductive’ formalism would be an extreme example.⁸ At the opposite extreme is a kind of nominalism. Notably, the Legal Realists preferred narrow and shallow concepts that stuck close to ‘the facts’ and could be altered easily in response to social needs and policy.⁹ (Realists wrote casebooks that were organized around industries and social situations – employment contracts, medical contracts, construction contracts – rather than offer and acceptance, consideration, conditions, and the like.¹⁰)

Finally, and again in a somewhat crosscutting fashion, deontologists and consequentialists face off, with the former evaluating law in terms of its inherent rightness or wrongness with the latter more focused on law’s consequences. Sometimes this dichotomy closely tracks external and internal, with external theories explaining law in terms of (external) consequences and internal perspectives positing an immanent morality of the law. However, one can be an external deontologist.¹¹ And consequentialist reasoning has always been a part of judges’ reasoning. Nevertheless, in modern theory, deontology and consequentialism stand largely in opposition to each other.

How related these polarizations are presents a large and difficult question and one open to dispute. We can offer no more than some informed speculations on how we got here. Our main focus is the future: what can be done about the systematic – and yawning – lacuna in private law theory? There is an unaddressed yet vitally important gap between the law’s micro and macro levels, and, not unrelatedly we think, there is a series of divides between internalists and externalists, holists and reductionists, conceptualists and realists, deontologists and consequentialists. Later we will

Alston, Eric Alston, and Bernardo Mueller (eds), *Handbook on Institutions and Complexity* (Elgar, forthcoming).

⁷ See, e.g., C Ménard and MM Shirley, *Advanced Introduction to New Institutional Economics* (Elgar 2022).

⁸ PB Miller, ‘The New Formalism in Private Law’ (2021) 66 *American Journal of Jurisprudence* 175.

⁹ HE Smith, ‘On the Economy of Concepts in Property’ (2012) *University of Pennsylvania Law Review* 2097, 2100–06.

¹⁰ See HC Havighurst, *A Selection of Contract Cases and Related Quasi-Contract Cases* (Lawyers Co-operative Publishing Company 1934) iii (‘Cases are grouped according to subject matter and not according to the doctrines employed’); see generally HE Smith, ‘Modularity in Contracts: Boilerplate and Information Flow’ (2006) 104 *Michigan Law Review* 1175, 1217–19.

¹¹ See EJ Weinrib, *The Idea of Private Law* (Harvard University Press 1995) 50–53 (arguing that Charles Fried’s *Contract as Promise* uses Kantian morality as an external criterion and fails to capture the intrinsic bipolar structure of law).

argue that legal phenomenology is a good place to start in diagnosing the problem and in evaluating various solutions.

What is the source of this polarization? We can start by recognizing that it was not always so. In earlier times natural law could be used directly to make arguments of obvious relevance at the level of the law itself.¹² Natural law connected private law to larger questions of justice on the one hand and to morality at the individual level on the other. Once very widely accepted, natural law as an underpinning for law receded in the later nineteenth century.¹³ The loss of faith in natural law left a vacuum that rendered late nineteenth-century formalism vulnerable: even if it was not as mechanically formal as its detractors claimed, post-natural law mainstream legal thought was rather hollow. It purported to be about the level of law but was not grounded or even tethered to much of anything.

Intellectual histories of law capture this polarization in various ways. Famously, Duncan Kennedy contrasted classical and modern legal thought in terms of individualism and altruism.¹⁴ These broad movements were said to be reflected in individual decisions. However, these decisions were taken more as results than as internally justified, and tellingly, many of Kennedy's examples of altruism in law were equity cases. The more legal-level view of law and equity is suppressed. Nevertheless, it cannot be gainsaid that at the level of legal thought broad tendencies have contended and sometimes contradicted each other. In the civil law too, individualism and community have been a theme among legal commentators.¹⁵ And Marietta Auer has located the necessity of these high-level oppositions – between the social and the individual, and between community and autonomy – in an irreducible conflict within modernism itself.¹⁶

Private law theorists might seem to be suffering from irreconcilable differences. But before going their separate ways, theorists should take a closer look at Reinach's account of law. If one does so, one discovers connective tissue in law that was hiding in plain sight.

5.3 REINACH'S EXCAVATION OF LAW'S FOUNDATIONS

Reinach's book is entitled 'The Apriori Foundations of the Civil Law', and it is the insights that he provides into the civil law itself that provide a starting point for a new kind of theorizing in private law. Reinach posits an ontology of 'essential' law that is

¹² RH Helmholtz, *Natural Law in Court* (Harvard University Press 2015).

¹³ See, e.g., S Banner, *The Decline of Natural Law: How American Lawyers Once Used Natural Law and Why They Stopped* (Oxford University Press 2021).

¹⁴ D Kennedy, 'Form and Substance in Private Law Adjudication' (1976) 89 *Harvard Law Review* 1685, 1695–96.

¹⁵ See, e.g., A di Robilant, *The Making of Modern Property: Reinventing Roman Law in Nineteenth Century Europe and Its Periphery* (Cambridge University Press 2023).

¹⁶ M Auer, *Der privatrechtliche Diskurs der Moderne* (Mohr Siebeck 2014).

universal and foundational in the sense of being presupposed in actual legal systems, even when actual law deviates from the *a priori*. Before we turn to how this deep structure can inform current private law theory, we take a close look at some examples of Reinach's theory in action. After all, if Reinach's *a priori* helps bridge the various gaps in private law theory discussed in the previous section, there must be something specific there to play this role.

5.3.1 Reinach on Property and Transfer

Property is notoriously contested terrain in the debate over legal concepts. Reinach's treatment of property attempts to sift out the *a priori* while forthrightly facing some of the difficulties in doing so. In the process, he captures quite a few features of the legal system that have resisted analysis. Most strikingly, his analysis is flexible and intuitive and yet highly integrated.

Reinach posits ownership as *a priori* and something that is independent of and presupposed by actual property rights. As Olivier Massin argues, this account is not vulnerable to a range of conventionalist objections because it is about the *nature* of ownership, whereas the *existence* of ownership depends on human conventions.¹⁷ As we will see, Reinach's account affords something in between formalism and contextualism, and is well suited to capturing the generative and loosely systematic quality of property.

A good testing ground is the nature of ownership and 'property' itself. From the traditional notion of a right to a thing to the bundle of rights, we can see almost all the dichotomies on display in the various pictures of the structure (or not) of property entitlements.

The bundle of rights itself can be seen in the light of the *a priori* and positive enactments. For Reinach the relation of owning is between a person and a thing and is 'an ultimate, irreducible relation which cannot be further resolved into elements'.¹⁸ He contrasts this view with what sounds very much like the Realist bundle of sticks: 'We of course reject the usual formulation that property is the *sum* or the *unity* of all rights over the thing. If something is grounded with essential necessity in another, this other can never consist in the thing'.¹⁹

Reinach points out that if property were a bundle of rights, then transferring one right would diminish the 'belonging' and that if all the rights were alienated there would be no belonging. However, Reinach takes *nuda proprietas* – or bare or abstract ownership without a right of use – very seriously. Reinach notices that his

¹⁷ O Massin, 'The Metaphysics of Ownership: A Reinachian Account' (2017) 27 *Axiomathes* 577.

See also J Toomey, 'Property's Boundaries' (2023) 109 *Virginia Law Review* 131.

¹⁸ Reinach (n 1) 55. For a recent economic and psychological treatment of property in this spirit, see BJ Wilson, *The Property Species: Mine, Yours, and the Human Mind* (Oxford University Press 2020).

¹⁹ Reinach (n 1) 56.

more indefinite approach to ownership captures the ‘residual’ character of property. Ownership is bounded but not from within: the actual limits on ownership of a thing are grounded in positive law. Thus, when external bounds are removed, ownership fills the void. If an easement is destroyed or a claim against property is waived, ownership becomes visible in this ‘gap’. It might seem that ownership ‘springs back to life’ when such a restriction on what would otherwise be ownership is removed, but for Reinach ownership was there all along.²⁰ For Reinach, ‘[t]his is the essential necessity which underlies the so-called “elasticity” or “residuarity” of property and which can hardly be reasonably considered as an “invention” of the positive law’.²¹ Indeed, as we will see with transfer, some of the ‘indefiniteness’ of property seems to be more of a by-product of our presuppositions about property rather than a conscious choice.

Despite how attenuated they may become in practice, the rights associated with ownership are absolute, not in the sense of being unqualified and not in the sense of being universal. Indeed, exceptionlessness and universality are commonly mistaken for ‘absoluteness’ and ‘in rem’ status both in Reinach’s day and our own. Instead, an absolute right is one that is not directed at anyone. In this Reinach anticipates the analysis of Albert Kocourek of in rem rights as ‘unpolarized’.²² Kocourek objected to Wesley Hohfeld’s analysis of in rem rights as collections of in personam rights (‘multital’ rights would be a collection of ‘unital’ or ‘paucital’ rights).²³ Instead, for Kocourek an in rem right is ‘one of which the essential investitive facts do not serve directly to identify the person who owns the incident duty’.²⁴ A contract right when it is created is directed to a specific person, but a property right avails against people generally; more precisely no duty holder is specifically identified (in an intensional way).²⁵

Reinach contrasts ownership with possession, which is much closer to the ‘surface’ in many ways. As with the bundle of rights, he argues that ownership cannot be simply possession-plus. As for possession itself, Reinach provides a sophisticated account that captures how it straddles the social and legal world. Reinach notes

²⁰ *ibid.*

²¹ *ibid.*

²² A Kocourek, *Jural Relations* (2nd ed., Bobbs-Merrill 1928) 201; see also A Kocourek, ‘Polarized and Unpolarized Legal Relations’ (1921) 9 *Kentucky Law Journal* 131, 131.

²³ WN Hohfeld, ‘Fundamental Legal Conceptions as Applied in Judicial Reasoning’ (1917) 26 *Yale Law Journal* 710, reprinted in WW Cook (ed), WN Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning and Other Legal Essays* (Yale University Press 1923) 65–114.

²⁴ Kocourek, *Jural Relations* (n 22) 201.

²⁵ Legal Realists and other nominalists tend to define legal concepts as being equivalent if they have the same extension. (Hence the attempt to replace ownership with a collection of use rights and related entitlements.) However, from a functional point of view, different intensions can have very different implications in terms of information costs. See HE Smith, ‘Emergent Property’ in J Penner and HE Smith (eds), *Philosophical Foundations of Property Law* (Oxford University Press 2013) 320.

that a natural power over things is totally distinct from a legal power.²⁶ The latter has to do with waiver, revocation, and the like, and as we will see it features centrally in Reinach's account of transfer. In contrast to a legal power, a natural power involves physical control of a thing and forms the basis for notions of possession. Possession is related to social fact (control) but must be distinguished from a right to the possession and a right to take possession.²⁷ (Here too he anticipates Kocourek's strong distinction between possession and the right to possess.²⁸)

Reinach develops his framework of property by examining the domain of transfer. He starts out by noting the *nemo dat* principle (*nemo plus iuris transferre potest quam ipse habet*, 'one cannot transfer better rights than one has oneself'),²⁹ which Reinach says 'expresses of course an a priori truth'.³⁰ Why 'of course'? Reinach does not elaborate but extends this idea in two directions: Reinach points out that one cannot transfer rights unless one has the power to transfer and that if one has the power to transfer a right one can transfer that right even if one does not have it oneself. We interpret Reinach as laying out here an essential architecture of transfer that captures the presuppositions and tendencies one can see in the law.

Although Reinach passes quickly over his reasons for taking *nemo dat* as a priori, a closer look reveals how much grist for his mill it offers. To begin with, *nemo dat* has an immediate appeal to the intuition. If A transfers a thing – or more accurately A's rights to a thing – to B and then performs similar acts directed to C, then B has the rights A had and C does not. A had rights to transfer at the time of the transfer to B and had no such rights to give to C. And if one never had the rights, one can likewise not transfer them. This is why the idea of an offer to sell the Brooklyn Bridge is the paradigm of an obvious scam and potential gullibility on the part of the offeree.³¹

The law sometimes deviates from the *nemo dat* principle by positive enactment. If in our example, C does not know that A does not have rights, then C presents a sympathetic claimant. If, further, B could have warned C but did not, then there is a case for allowing C to have better rights than B, *nemo dat* notwithstanding.

²⁶ Reinach (n 1) 53.

²⁷ *ibid* 53–64.

²⁸ Kocourek, *Jural Relations* (n 22) 361–71. Yun-chien Chang argues that keeping possession close to physical control and distinct from the right to possess captures possession in the civil law. Y Chang, 'The Economy of Concept and Possession' in Y Chang (ed), *Law and Economics of Possession* (Cambridge University Press 2015) 103.

²⁹ An alternate, perhaps better-known formulation in common law jurisdictions is *nemo dat quod non habet* ('one cannot give what one does not have'), *nemo dat* for short. We will refer to the principle as '*nemo dat*'.

³⁰ Reinach (n 1) 68.

³¹ JL Schroeder, 'Is Article 8 Finally Ready This Time? The Radical Reform of Secured Lending on Wall Street' (1994) *Columbia Business Law Review* 291, 296 n 6. ('[T]he reason we New Yorkers consider the rube who thinks he bought the Brooklyn Bridge as the archetype of gullibility is precisely because the derivation rule is considered to be common knowledge in our society').

Similarly, with entrustment to a merchant: if A entrusts watch seller B with a watch, this creates an appearance of ownership in the merchant. If B wrongfully ‘sells’ the watch to C, then as between A and C, again C looks like a good candidate for an exception to *nemo dat*. And entrustment is indeed a common exception to *nemo dat* across legal systems in favor of good faith purchasers.³² Some systems, including the German Civil Code, feature a very wide good faith purchase exception.³³

Good faith purchase is so compelling in some cases and so useful in many situations, that some see it as having superseded *nemo dat*.³⁴ Reinach’s analysis helps us see why this is wrong. Reinach takes good faith purchaser rules as responsive to considerations that cause a deviation (*Abweichung*) from the *a priori*.³⁵ As already mentioned, the mechanism of good faith purchase means that when it does not apply, *nemo dat* applies. This is true of recording acts in real property and the Uniform Commercial Code (where it is captured by the concepts of void and voidable title). If a new situation arose outside these laws (a new resource that is neither real property nor covered by the UCC), it would fall under *nemo dat*. Moreover, it is easier to state the system with *nemo dat* as the base case and the good faith purchase rule as the exception even if good faith purchase applies much of the time. The pattern of exceptions is directed to good faith purchasers, not to anything about *nemo dat*. For *nemo dat*, the law shows what system designers call default hierarchies and linguists call an ‘elsewhere’ pattern; good faith purchase is specific and *nemo dat* is the encompassing default (a relationship to which we return in Section 5.4).³⁶ Stating the law as good faith purchasers winning and then having

³² Unif. Comm. Code § 2-403(2). See generally Y Chang, *Property Law: Comparative, Empirical, and Economic Analyses* (Cambridge University Press 2023) 261–69; S Levmore, ‘Variety and Uniformity in the Treatment of the Good-Faith Purchaser’ (1987) 16 *Journal of Legal Studies* 43; A Schwartz and RE Scott, ‘Rethinking the Laws of Good Faith Purchase’ (2011) 111 *Columbia Law Review* 1332.

³³ See, e.g., BGB § 932 (good faith purchase in property transfers); *ibid* § 935 (good faith purchaser wins if good purchased at public auction). See also *Kunstsammlungen zu Weimar v. Elicofon*, 536 F. Supp. 829, 839 (E.D.N.Y. 1981), *aff’d*, 678 F.2d 1150 (2d Cir. 1982) (applying *nemo dat* after canvassing many potentially applicable but inapplicable laws including the German law of good faith purchase). England had the market overt rule until recently. *Sale of Goods (Amendment) Act 1994*, ch. 32; M Smith, ‘Valediction to Market Overt’ (1997) 41 *American Journal of Legal History* 225.

³⁴ Cf B Arruñada, G Zanarone, and NM Garoupa, ‘Property Rights in Sequential Exchange’ (2019) 35 *Journal of Law, Economics and Organization* 127, 142–43.

³⁵ Reinach (n 1) 74, 111.

³⁶ On default hierarchies, see JH Holland et al, *Induction: Processes of Inference, Learning, and Discovery* (MIT Press 1989) 18–19. The similar notion in linguistics, sometimes called the ‘elsewhere condition’ or nested defaults, can be traced back to the ancient Indian grammarian Pāṇini. See, e.g., SR Anderson, *A-Morphous Morphology* (Cambridge University Press 1992) 45, 132; P Kiparsky, ‘“Elsewhere” in Phonology’ in SR Anderson and P Kiparsky (eds), *A Festschrift for Morris Halle* (Holt, Rinehart, and Winston 1973) 93; see also S Pinker, *Words and Rules: The Ingredients of Language* (Basic Books 1999) 13–19. In a fashion parallel to *nemo dat*, a controversy arose in the nineteenth century among Western Indologists about whether the accusative case should be treated as the default case in Vedic Sanskrit, with one of the

an exception for *nemo dat*, or positing two freestanding nonhierarchically arranged rules for *nemo dat* and good faith purchase, would be cumbersome.³⁷ Very strikingly, virtually all the statutes around the world canvassed in a recent survey by proponents of an expansive approach to good faith purchase show *nemo dat* as the base case.³⁸

This foray into good faith purchase illustrates some of the benefits of paying attention to the *a priori* in Reinach's sense. In the first place, inquiring into the *a priori* elucidates the relationship of an oft-displaced principle, *nemo dat*, to its exceptions, which makes understanding the system much easier than if one jumped straight into the good faith purchaser issue. Relatedly, some good faith purchase situations at least at their edges are close to equipoise, as where original owners and good faith purchasers are equally innocent and neither is better positioned to prevent the conflict from arising (by, for example, guarding against theft or fraud, or inquiring into the provenance of a good offered for sale).³⁹

Interestingly, the history of good faith purchase also reflects a robust underlying status for *nemo dat*. Originally good faith purchase was introduced in equity by use of the 'mere equity' (a mini-interest that is a toehold for an equitable remedy). When B defrauds A into transferring a thing and then transfers to C, A would retain an 'equity' that would travel with the rights to the thing. The equity was a placeholder for an equitable remedy and was in a sense a right to a right: when A sues, A could get a court to compel C to use the power of transfer in A's favor. However, if C were a good faith purchaser for value, the equity would be overcome because C's conscience was not affected by holding the rights. (The good faith purchaser was termed 'equity's darling'.⁴⁰) Here we see equity taking a first attempt at overcoming practical problems with the *a priori* system being directly reflected in law, as Reinach allows for.

In the common law systems, equity played a role in modulating the effect of what Reinach would call the *a priori* essential underlying legal stratum.⁴¹ Reinach notes that assignment of rights is much less obvious than one might think from studying current law.⁴² Reinach mentions the possibility of A effecting something like a

arguments in favor of such an analysis being that it unified a wide and disparate set of functions of the Vedic accusative. See H Smith, *Restrictiveness in Case Theory* (Cambridge University Press 1996) 39–40; see also Smith (n 9) 2010 and n. 46.

³⁷ Smith (n 9) 2120–24.

³⁸ Schwartz and Scott (n 32) 1378–83. It is not clear that the few countries that they list as not having *nemo dat* as the base case actually do not have *nemo dat* as an unstated base case.

³⁹ Levmore (n 32).

⁴⁰ See, e.g., A Nair and I Samet, 'What Can "Equity's Darling" Tell Us about Equity?' in D Klimchuk, I Samet, and HE Smith (eds), *Philosophical Foundations of the Law of Equity* (Oxford University Press 2020) 264, 278; HE Smith, 'Equity as Meta-Law' (2021) 130 Yale Law Journal 1050, 1065–66, 1095.

⁴¹ As it did with privity, another candidate for Reinach's *a priori*. Smith (n 40) 1065–66, 1109.

⁴² Reinach (n 1) 127.

transfer by promising someone that A will exercise the rights at the other's behest.⁴³ This is exactly what happens with an equitable assignment, which is an earlier version of modern assignment and which can be still found as an alternative to a legal assignment in English law.⁴⁴

Strikingly, Reinach uses his method to open up possibilities that conventional legal theory (if not the law itself) of his time had labelled 'conceptually impossible'. Chiefly, he argues for the possibility, from the point of view of the essential, for rights in rights.⁴⁵ He sees this as possible from the a priori point of view because in principle an action can be directed toward rights and an action can be the subject of a right. And he points to waiver as being an action directed to rights, and so the power to waive is in a sense the right to a right. Although the possibility of a right in a right had been aired in civil law scholarship before and was a natural interpretation of various provisions in the Civil Code about liens, it was apparently contested as a matter of theory and according to Reinach often dismissed as a conceptual impossibility.⁴⁶ Reinach takes this opportunity to distinguish talk of 'conceptual impossibility of rights over rights' (*begriffliche Unmöglichkeit der Rechte an Rechten*) in the positive law discourse from essential impossibility. He argues that rights in rights are possible a priori and found in certain respects, as in the law of liens. It is notable that in the common law, a leading theory of equitable rights in trust is a right in a right: the beneficiary has a right to the trustee's right and has the ability to require actions by the trustee's use of the powers of title, coming under the heading of fiduciary duties.⁴⁷ Indeed, Reinach's analysis suggests the possibility of an 'obligational' theory of trust that is compatible with the civil law, where conventional wisdom holds that civil law notions of ownership as dominium are an insuperable obstacle to recognizing the trust.⁴⁸

⁴³ *ibid* 126.

⁴⁴ See B McFarlane and R Stevens, 'What's Special about Equity? Rights about Rights' in D Klimchuk, I Samet, and HE Smith (eds), *Philosophical Foundations of the Law of Equity* (Oxford University Press 2020) 191, 206–08.

⁴⁵ Reinach (n 1) 63–64.

⁴⁶ *ibid*; Reinach, 'Die apriorischen Grundlagen des bürgerlichen Rechtes' (n 1) 758. Presumably the objection to rights in rights is that this sounds like a right in a thing, but things are supposed to be tangible (in keeping with the strict separation of in rem and in personam as implemented in German property law). See GL Gretton, 'Ownership and Its Objects' (2007) 71(4) *Rebels Zeitschrift für ausländisches und internationales Privatrecht* 802. For an early discussion of rights in rights, see W Schuppe, *Der Begriff des subjektiven Rechts* (Wilhelm Koebner 1887) 204–10.

⁴⁷ B McFarlane and R Stevens, 'The Nature of Equitable Property' (2010) 4 *Journal of Equity* 1; see also JB Ames, 'Purchase for Value without Notice' (1887) 1 *Harvard Law Review* 1, 9–10.

⁴⁸ See, e.g., P Matthews, 'The Compatibility of the Trust with the Civil Law Notion of Property' in L Smith (ed), *The Worlds of the Trust* (Cambridge University Press 2013); L Smith (ed), *Re-imagining the Trust: Trusts in Civil Law* (Cambridge University Press 2012); L Ho and R Lee (eds), *Trust Law in Asian Civil Law Jurisdictions: A Comparative Analysis* (Cambridge University Press 2013); see also R Helmholz and R Zimmermann (eds), *Itinera Fiducia: Trust and Treuhand in Historical Perspective* (Duncker & Humblot 1998).

Further, Reinach's analysis of transfer is as the exercise of a power. It is not a simple subtraction of primary rights. For one thing, as noted earlier, Reinach does not analyze ownership as a mere collection of rights. Moreover, for Reinach, 'insofar as owning essentially implies the right to deal in *any and every* way with the thing, the power to transfer the thing into the property of others is contained in this right'.⁴⁹ What is the nature of this implication? It is not deduction, because we could imagine prizing apart the right and the power to transfer it, as we saw with good faith purchase and we will see in the next section on representation.⁵⁰ Instead, the relation seems to correspond to what Ted Sichelman calls 'tight' bundles in his extension of the Hohfeldian framework.⁵¹ Sichelman gives the example of what he calls a 'common right' which is made up of a privilege and a claim right that protects that privilege. For example, the privilege to use a thing is often coupled with a claim right to prevent access, which protects the privilege. Such a complex relation often travels as a unit, and the connection between its constituents stands on a different footing than a portfolio of use rights, for example.⁵²

Perhaps what is most striking about Reinach's excavation of the essential in the domain of rights and transfer is that his propositions hang together. They simultaneously meet criteria of simplicity, generalizability, and coherence. For one thing, the 'residual' character of property along a number of dimensions 'falls out' of the theory rather than needing to be stated. For another, the entire scheme generates subtle and complex results from a loose and yet compact set of natural elements. We return to the significance of the integrity of the *a priori* in Section 5.4.

5.3.2 Representation

Reinach's account of representation is significant both for its extralegal sources and for its nuanced analysis of the relationship itself. It is also significant for what it shows

⁴⁹ Reinach (n 1) 70.

⁵⁰ Perhaps inspired by the bundle of rights theory, many assume that transfer is a parceling out of 'sticks' from the bundle. Even though Hohfeld did regard ownership as a collection of rights, Hohfeld did distinguish rights from powers. A transfer effects a change in legal rights. What is problematic about the Hohfeldian picture is that because a right is defined by who holds it, a transfer is the extinguishment of one right and its replacement by another. For an argument that a transferee receives the right the transferor had, see J Penner, 'On the Very Idea of Transmissible Rights' in J Penner and HE Smith (eds), *Philosophical Foundations of Property Law* (Oxford University Press 2013) 244.

⁵¹ T Sichelman, 'Very Tight "Bundles of Sticks": Hohfeld's Complex Jural Relations' in S Balganes, T Sichelman, and HE Smith (eds), *Wesley Hohfeld a Century Later: Edited Work, Select Personal Papers, and Original Commentaries* (Cambridge University Press 2022) 345.

⁵² Sichelman draws an analogy to atomic and subatomic physics. *ibid* 364. See also T Sichelman, 'Quantifying Legal Entropy' (2021) 9 *Frontiers in Physics* 665054, 4–6. As we will discuss in Section 5.4, these kinds of connections that reconcile a kind of reductionism with practical holism could be one way to think about the phenomena that Reinach takes as *a priori*.

about how a priori rules may be interconnected, with insights from one a priori rule (e.g., *nemo dat*) offering insights into other a priori rules. Understanding how transfers work helps us to understand how representation works, at least indirectly.

Reinach's starting point is to rule out some of the leading approaches to this topic. Thus, he begins by rejecting the idea that intentions and declarations of intention can adequately explain representation. For example, he notes that in the case of a conveyance effectuated by a representative, the represented party's intention that a conveyance occur is not required. Nor does the representative's intention prove decisive: 'it is incomprehensible how something which obviously does not belong to [the representative] can by him expressing his intention be transferred into the property of a third party'.⁵³ In this, we see an example of the *nemo dat* principle in action. As a result of these conclusions, Reinach suggests that for the intention-focused theorist, '[t]here remains no alternative but to assume here an artificial institution of the positive law which is called for by all kinds of practical considerations'.⁵⁴ And yet, for Reinach, the need for an artificial legal institution is 'fundamentally wrong'.⁵⁵

This is another reminder of Reinach's view that the essential rules of the civil law exist independently of positive law (and, indeed, that they may exist independently of law). One does not need law to find examples of representation worthy of study. On Reinach's view, what is needed 'is no "institution" of the positive law but rather a modification of social acts, which goes far beyond the world of right. For one cannot doubt that there is a requesting, an admonishing, an informing, a thanking, an advising in the name of another'.⁵⁶ The law, in other words, discovers the rules involved in representation, rather than coming up with them on its own. In this respect, as in others, Reinach sees the law finding essential rules rather than creating them.

Reinach next rejects the idea that a promise can explain the efficacy of representative actions.⁵⁷ A promise could be directed to either the representative or to a third person, he notes, but in neither case would it be sufficient to explain the power the representative has to effectuate, say, a transfer of property. Thus, Jack might promise to Jill that he will do whatever it is that Jill promises to a third party that he will do. Even if a third party then gets a right as a consequence of Jill's making such a

⁵³ See Reinach (n 1) 82.

⁵⁴ See *ibid* 82.

⁵⁵ See *ibid* 83.

⁵⁶ *ibid*. The existence of such extralegal cases may help explain why fiduciary law is in a position to make use of nonlegal conceptions of loyalty in the context of legal fiduciary relationships. On this concern, see AS Gold, 'The Reasonably Loyal Person' in H Psarras and S Steel (eds), *Private Law and Practical Reason: Essays on John Gardner's Private Law Theory* (Oxford University Press 2023) 330, 341. But cf J Gardner, *Torts and Other Wrongs* (Oxford University Press 2020) 299 (suggesting that the role of trustee may have 'no law-independent existence').

⁵⁷ See Reinach (n 1) 86.

promise to that third party, this results not because Jill had the *power* to promise on Jack's behalf. Likewise, if Jack instead made a promise to the third party to do whatever it is that Jill promises he will do, this could mean that Jack is bound to do whatever Jill promised to the third party. But again, such a promise to a third party cannot produce the representative power itself; the effect of a representative power is merely replicated in that case.⁵⁸

Instead, Reinach suggests that the power to modify our own obligations is something that we can grant to others. But what kind of a grant is this? Reinach begins with the premise that the only way that a representative power can be granted is by the represented party. Here, we might again hear echoes of the *nemo dat* principle. Recall the idea that one cannot transfer what one does not already own. We might think that the reason why a representative power can only be transferred by the represented party is that only the represented party has this power to start with. Interestingly, Reinach does not take that path.⁵⁹ This granting is not a transfer, he concludes, for the grantor does not give up his or her own powers in granting the representative power. It is, rather, a creative granting that produces a new power in the representative.⁶⁰ As he puts it: 'This legal power which is grounded in the person as such can as it were be reproduced in the person of others; this is what gives representative acts their characteristic efficacy'.⁶¹

The idea that representative power can only be granted by the represented party is apparently based on intuition, although the argument may also be tracking social practices. And, Reinach says little about why, morally speaking, such a creative granting should succeed in producing a representative power in its recipient. Note, however, that Reinach's project is not to show why the synthetic *a priori* makes moral sense, but rather to successfully capture the features of the *a priori*. Here, he identifies a social phenomenon of represented parties providing representative powers to third parties, one that exists not only in the law, but also in mundane events like one person offering thanks on behalf of another. Reinach then makes a strong argument that this representative power is not achieved by promises or transfers. The idea that this is a creative granting is then recognized through a process of elimination.

If accepted, this account has important implications for how we theorize fields like agency law. Consider the agency law question posed by Henry Hansmann and Reinier Kraakman:

⁵⁸ For Reinach's discussion, see *ibid* 85–86.

⁵⁹ It bears noting, however, that Reinach adopts a *nemo dat*-like principle for grants and not just for transfers. See *ibid* 68 ('So we can formulate the following new principle of right: no one can grant more legal ability than he has himself').

⁶⁰ See *ibid* 86. The representative can, however, transfer this power once it is granted. See *ibid* 87. That, in Reinach's view, comes down to what was included by the granting person in his or her act. See *ibid*.

⁶¹ See *ibid* 86–87.

The concept of agency, in which a principal can authorize an agent to bind the principal to contracts with third parties, is crucial to the construction of a nexus of contracts with any appreciable scope, whether the juridical person that is the central node of that nexus is an individual human being, a group of individuals, or an organization. It is interesting to ask whether the legal doctrine of agency is primitive, or whether it would be feasible to construct the functional equivalent of agency using other, more basic elements of contract doctrine.⁶²

That question is indeed interesting, and if we take contracts to be promissory at base, then Reinach's view may suggest an answer: agency is primitive.

Reinach's close analysis also highlights less appreciated features of legal representation, some of which are striking. For example, it is very common to think through legal representation in terms of one person acting on behalf of another. Yet, in trying to find the essence of representation, Reinach locates cases that do not involve any social acts by the representative.⁶³ As he indicates, it is possible to be a passive representative, merely by hearing what a third party says: '[o]ne can hear without intending and even against one's own intention; something can penetrate me from the outside without the least cooperative activity on my part'.⁶⁴ In such cases, the mere hearing of social acts may change the legal rights and obligations of the represented party.⁶⁵

The concepts involved in this account are Hohfeldian only in part. There is a legal power that plays a role in the creation of this relation, for, as Reinach elaborates:

If A confers passive representative power on B, then any given person C has as a result the power to produce legal effects in the person of A through acts in which he addresses himself to B 'for' A. But with regard to the representative, by contrast, we cannot speak of a legal power, since he does not have the possibility of undertaking any action (*Tun*) with effects in the world of right. We will rather speak of an ability which is shown in the fact that as a result of his hearing social acts, the effects of them come about in the represented person.⁶⁶

⁶² See H Hansmann and R Kraakman, 'The Essential Role of Organization Law' (2000) 110 Yale Law Journal 387, 406 n 27.

⁶³ J Penner, 'Understanding the Rules of Attribution in Private Law' in S Bray et al (eds), *Interstitial Private Law* (Oxford University Press 2024).

⁶⁴ See Reinach (n 1) 91. For a potential policy-based justification of such rules, see RRW Brooks, 'Knowledge in Fiduciary Relations' in AS Gold and PB Miller (eds), *Philosophical Foundations of Fiduciary Law* (Oxford University Press 2014) 225, 237 (discussing how 'the agency law rule presuming that the principal knows what the agent knows' can 'protect[] third parties from negligent or scheming principals').

⁶⁵ Query whether this passive representation has existing nonlegal analogues in the way that active representation does. Granted, for Reinach it is not a problem if there are no such nonlegal analogues. He would allow for a priori rules that are not instantiated in any existing human relation or system. See Reinach (n 1) 139 (noting that on his view, pure essential laws of right are 'independent of human knowledge, independent of the organization of human nature, and above all independent of the factual development of the world').

⁶⁶ See *ibid* 92.

The ‘ability’ Reinach describes is not a Hohfeldian incident, and its presence gives us a distinctive picture of what it means to represent someone.

The resulting picture of representation is both broader in coverage than the law provides for (covering extralegal cases like invitations and giving thanks), and potentially narrower in important respects. Reinach’s recognition of both active and passive representation also suggests types of representation that may differ noticeably from the way representation is commonly formulated by legal theorists. In addition, we see a broader pattern whereby Reinach builds on insights regarding the *a priori* in one area as a means to figure out the *a priori* in another area. Understanding what is, and is not, a transfer helps us to understand how representative powers are conferred on representatives.

5.4 REINACH AS A CHALLENGE AND CATALYST

As we saw in the previous section, Reinach’s method offers many surprising insights about law. Many of these insights stand whether or not one regards them, as did Reinach, as being essential and timeless – *a priori*. There is a deeper contribution that Reinach’s work offers: it points to the need for a level of law or, rather, some kind of structure supporting the law that has some robustness. This ‘deep structure’ is needed to bridge the micro and the macro and the various dichotomies that are characteristic of current theorizing about private law.⁶⁷ Again, this level is important even if it can be grounded in various ways, some very different from Reinach’s *a priori*.

We adopt the term ‘deep structure’ with caution. ‘Deep’ is evocative, and the notion of deep structure in linguistics has led to much confusion. However, what deep structure was in early generative grammar bears some resemblance to the ‘essential’ or *a priori* layer that Reinach exposes. Deep structure is a level that is presupposed by all the rules that get us to the surface structure of what we see.⁶⁸ Deep structure is distinct from the more readily apparent surface structure, and one of its selling points is how it allows linguistic structures to hang together in a uniquely compelling fashion. Deep structure was also offered as being psychologically real, and in its outlines hardwired. Deep structure has its own architecture that is accessible through analysis of patterns in language. As in the study of law, there is a debate as to how much crosslinguistic variation we need to examine in order to be able to make universal statements, including about the contours of deep structure. In both the legal *a priori* and deep structure in 1960s linguistics, there are

⁶⁷ For clarity, we wish to distinguish a theory, like ours, that focuses on mid-level law from a mid-level theory. Cf JL Coleman, *Risks and Wrongs* (OUP 1992) 8 (‘In middle-level theory, the theorist immerses herself in the practice itself and asks if it can be usefully organized in ways that reflect one or more plausible principles’). Law that bridges the micro and macro-levels of a legal system can be theorized in various ways.

⁶⁸ The classic statement is N Chomsky, *Aspects of the Theory of Syntax* (MIT Press 1965).

challenging questions about its status and how it relates to other aspects like meaning.⁶⁹ Finally and quite strikingly, Chomsky introduced a level of deep structure in defiance of the then reigning strictures of behaviorism that eschewed ‘mental’ entities in theorizing. An analogous preference for the concrete is also characteristic of post-Realist theories of law, which are highly skeptical of ‘abstract’ legal concepts altogether.

We can range the possibilities for the sources of deep structure from the more given to the more constructed.⁷⁰

At the most robust end are various ways of taking deep structure as metaphysically real. Reinach sees it as having a nonphysical but timeless existence. He distinguishes this view from natural law.⁷¹ As Reinach sees it, natural law tries to account for actual law, and as law that is unconditionally valid. Reinach’s a priori stands outside the law and is not contradicted by deviations from it in the actual law. At any rate, one source for a robust deep structure of law would be something exogenous and irreducible – metaphysically real.

Moving away from the metaphysical, one could take Reinach’s a priori as not really a priori but built into human psychology. There could be various accounts of how it got there, running from the contingent to a robust neo-Kantian view about how we are made up to encounter the world. Interestingly, the kind of evidence for psychological versions of Reinach’s a priori might include the kinds of arguments Reinach made. Perhaps at some point we might be able to appeal to neurological evidence as well.

The Reinachian layer might also be a result of social practice, even though it is in some sense abstract. This could be for functional reasons. More abstract concepts might emerge from complex interactions at a more basic level.⁷²

Perhaps any Reinachian deep structure might have multiple sources. Another way to think about it is in terms of information and complexity. As we saw with *nemo dat*, stating *nemo dat* with exceptions like good faith purchase is simpler than the other way around. The idea would be that *nemo dat* is formulated in such a way that the

⁶⁹ The conflict between adherents of generative semantics and interpretive semantics was one of the fiercest academic battles of all time. RA Harris, *The Linguistics Wars: Chomsky, Lakoff, and the Battle over Deep Structure* (2nd ed, Oxford University Press 2021). This controversy may have some relevance to interpreting Reinach’s a priori. Some passages of Reinach’s book, including those on liens, may be susceptible of a more ‘functionalist’ or a more ‘autonomous’ reading, corresponding respectively to generative versus interpretive semantics. We would argue that the more autonomous reading is more in keeping with Reinach’s general approach to the synthetic a priori.

⁷⁰ In his discussion of Reinach’s theory of ownership, James Toomey notes that one can endorse Reinachian insights on ownership while taking ownership to be metaphysically real, a human cognitive category, or an extralegal social practice. Toomey (n 17) 154–58.

⁷¹ Reinach (n 1) 134–35.

⁷² See, e.g., AS Gold and HE Smith, ‘Sizing Up Private Law’ (2020) 70 University of Toronto Law Journal 489; T Sichelman and HE Smith, ‘A Network Model of Legal Relations’ (2024) 382 Philosophical Transactions of The Royal Society A 20230153; Smith (n 6).

situations it potentially applies to are a superset of those for good faith purchase. This can be true even if good faith purchase actually applies more often. If *nemo dat* is taken as a more general rule encompassing the domain of good faith purchase in a pattern of general case and exceptions, this formulation may correspond to the shortest description in an agreed-upon metalanguage, making it less complex in an important sense.⁷³ Perhaps the Reinachian layer generally allows for more compact formulation. Or, corresponding to the ‘naturalness’ of law that tracks the a priori, we might say that such law contains less information (is less ‘surprising’, or shows lower ‘entropy’); perhaps we might find that law that respects Reinachian presuppositions minimizes legal entropy in a quantifiable way.⁷⁴

Reinach’s a priori might relate to complex systems in a variety of ways. If we think of the elements of the a priori, the various concepts and social acts, as standing in relationships to each other, we can see that some are more interconnected than others. One interpretation of Reinach’s a priori would deny that it is on some categorically different metaphysical footing. However, the dense interconnection of some elements, ownership and promise for example, suggests that it would be very difficult to alter them.⁷⁵ The more systemic the notion, the more robust and the more apparently a priori it will be.⁷⁶

Relatedly, in the vein of the social and practical, one heuristic for deep structure is the impossibility of replicating it by contract. Henry Hansmann and Reinier Kraakman argue that asset partitioning (especially the protection of entity assets from the claims of owner’s creditors) cannot be accomplished by contract.⁷⁷ They term this the ‘essential’ role of organization law, and it makes organizational law a kind of property law. Gabriel Rauterberg likewise offers an account of the essential role of agency law in terms of asset partitioning that could not be replicated by

⁷³ Kolmogorov complexity is a measure of complexity based on the shortest description in an agreed upon language. M Li and P Vitanyi, *An Introduction to Kolmogorov Complexity and Its Applications* (4th edn, Springer 2019).

⁷⁴ See Sichelman (n 52). Sichelman discusses the connection between entropy in physics and Claude Shannon’s theory of information (in which entropy is a measure of the quantity of information). CE Shannon, ‘A Mathematical Theory of Communication (pts. 1 & 2)’ (1948) 27 Bell System Technical Journal 379; (1948) 27 Bell System Technical Journal 623, reprinted as CE Shannon and W Weaver, *The Mathematical Theory of Communication* (University of Illinois Press 1949).

⁷⁵ For a discussion of how interconnectedness relates to unchangeability in legal systems across the world, see Y Chang and HE Smith, ‘Convergence and Divergence in Systems of Property Law: Theoretical and Empirical Analyses’ (2019) 92 Southern California Law Review 785.

⁷⁶ We can draw an analogy to WVO Quine’s denial of a sharp analytic-synthetic distinction, with everything in principle revisable but the more interior and interconnected statements being harder to revise. WVO Quine, ‘Two Dogmas of Empiricism’ (1951) 60 Philosophical Review 20, reprinted in WVO Quine, *From a Logical Point of View* (Harvard University Press 1953). The analogous idea would be that Reinachian legal concepts and presuppositions could in principle be revised but the more interconnected ones (as in Quine’s web) will be practically impossible to revise.

⁷⁷ Hansmann and Kraakman (n 62).

contract.⁷⁸ What form asset partitioning may take varies, but it may be the case that the concept of asset partitioning and its basic vocabulary are more invariant.

Reinach's *a priori* also relates to complexity: the *a priori* responds to the problem of complexity as a method of managing it. Reinachian deep structure points us toward the role of architecture in private law and its practical consequences. For example, consider Carliss Baldwin and Kim Clark's account of how to modularize a complex system:

For human beings, the only way to manage a complex system or solve a complex problem is to break it up. In the breaking apart, it is best to look for points of natural division, carving 'the Idea . . . at the joints, as nature directs, not breaking any limb in half as a bad carver might'.⁷⁹

It is an interesting and much-debated question whether nature has 'joints', and it is not obvious that our language can or should carve at those joints if they exist.⁸⁰ We take no position on such questions here. Yet the natural breaking point idea is suggestive for present purposes.

One of the most prominent reasons for modularizing a complex system is that it will make complexity more manageable. Such modularity can be achieved by breaking a system apart in a wide range of places, even arbitrary ones. We might nonetheless think that there is value in breaking apart a complex system at those places where users of the system will perceive natural breaking points (whether or not such points exist in nature). If we use a car for an example, we might treat the brake system as a unit rather than the brake plus adjustable seating system. And this idea of what is a 'natural' breaking point may be true for legal systems as well. Why should that be? It is not because modularizing at an apparently 'natural' point of division will necessarily lead to optimal substantive outcomes in the law; nor can we rely on such breaking points to increase simplicity in comparison to other locations. Rather, it is because doing so may lead to greater accessibility. And here we can see an additional way that Reinach's work is useful.

If Reinach is right about the synthetic *a priori*, the essential rules that apply to legal structures are not merely essential: we also have ready intuitive access to them. Their details may need to be worked out through painstaking thought and research,

⁷⁸ G Rauterberg, 'The Essential Roles of Agency Law' (2020) 118 Michigan Law Review 609.

⁷⁹ CY Baldwin and KB Clark, *Design Rules: The Power of Modularity* (MIT Press 2000) 64 (citing Plato, *Phaedrus*, 265D).

⁸⁰ Compare E Hirsch, *Dividing Reality* (Oxford University Press 1993) 52 ('A belief in reality's joints does not, at least obviously and in itself, entail a belief in any division principle. The latter makes a normative claim about language, which cannot follow, at least obviously, from a metaphysical claim about objective sameness and difference in nature') with T Sider, 'Ontological Realism' in DJ Chalmers, D Manley, and R Wasserman (eds), *Metametaphysics: New Essays on the Foundations of Ontology* (Oxford University Press 2009) 384, 401 ('An ideal inquirer must think of the world in terms of its distinguished structure; she must carve the world at its joints in her thinking and language. Employers of worse languages are worse inquirers').

but their basic implications are easily recognized.⁸¹ And some are basic indeed. Thus, Reinach notes: ‘What we understand with evidence is that for instance a claim is extinguished on being fulfilled’.⁸² That does not take much legal training or research to figure out. We know it almost immediately, and maybe without being able to say why. Indeed, the legal features that Reinach uncovers are often matters of tacit knowledge,⁸³ known by lawyers and laypersons alike.⁸⁴

This accessibility shows up repeatedly in Reinach’s work. For example, Reinach concludes that the essential rules are not only there to be found by law, but also that they are capable of being ‘grasped and intuited’ by ‘untrained laymen’.⁸⁵ In saying this, he doesn’t just mean that they are simple; they are also experienced as ‘self-evident’.⁸⁶ He likewise emphasizes that the legally talented jurist will have a knack for understanding these essential laws. The jurist will have “the sense” for *what is legally relevant*, that is for events of a certain kind which are subject to essential laws, as well as the understanding of these laws’.⁸⁷ Furthermore, in application, he thinks people use these essential laws without being fully aware of them.⁸⁸ The idea that certain aspects of law come so naturally to trained and untrained alike suggests something valuable that is distinct from what you get with modularity in the abstract. These features are accessible, in addition to being modular.⁸⁹

We have just emphasized the micro level (e.g., how claims are extinguished), but such accessibility may also bear on the relation of the micro to the macro.⁹⁰ There is

⁸¹ It might seem strange or even self-contradictory to claim, as Reinach does, that the a priori is at once accessible and that it requires close and careful study to bring out in the open. The difference stems from different modes of accessing the a priori. In employing the a priori in our thinking and in reacting to legal situations, it is supposed to come to us as intuition. But to isolate the a priori and describe it is another matter, requiring, in Reinach’s view, the attention of a phenomenologist and the skills of a jurist.

⁸² See Reinach (n 1) 138.

⁸³ For a leading discussion of tacit knowledge, see M Polanyi, *The Tacit Dimension* (University of Chicago Press 2009). For a connection between tacit knowledge and the synthetic a priori as recognized by various Austrian theorists (Reinach included), see B Smith, ‘On the Austrianness of Austrian Economics’ (1990) 4 *Critical Review* 212, 224–25.

⁸⁴ This is not to deny that some of the purportedly a priori features of private law that Reinach identifies are contestable; in some cases, his idea of what is an essential rule feels more like a statement of the German civil law in a certain time period. Likewise, in some cases the implications of Reinach’s a priori rules are only figured out through complex thought processes that the lay person might not find accessible. The point about accessibility nonetheless holds for many of the most basic propositions Reinach endorses, such as the way in which claims are extinguished, or the *nemo dat* principle.

⁸⁵ See Reinach (n 1) 131.

⁸⁶ *ibid.*

⁸⁷ *ibid* 130–31.

⁸⁸ *ibid* 135.

⁸⁹ How accessibility and modularity relate to each other is an important question. Modular structure can be detected by well-studied algorithms, such that modularity need not be taken as exogenously given. See Sichelman and Smith (n 72).

⁹⁰ Note, in this regard, that the Austrian thinkers were also characteristically interested in how the micro and macro interrelate, and in a non-reductive way. See B Smith (n 83) 215. For our thoughts on that problem, see Gold and Smith (n 72).

a suggestion of system effects in Reinach's discussion of how investigating civil law concepts can illuminate concepts within public law. As Reinach argues:

The same concepts can be formed and the same laws grounded in them are encountered only because there are in all of these spheres of law those legally relevant structures of which we have spoken and above all those social acts with all their modifications, promising and granting, allowing and transferring, waiving and revoking, addressing several persons and addressing one person, performing acts in one's own name and performing them in the name of another, conditional and unconditional acts, etc.⁹¹

Whether or not these concepts are genuinely *a priori*, Reinach's idea of accessible rules – rules that are often experienced as self-evident – is illuminating if we want to understand how concepts will operate when we move from one part of the legal system to another.⁹² And, notwithstanding the ways that Reinach distances his approach from a psychological one, there is a psychological point to be made here. If the features Reinach describes are accessible in the ways he describes, then we have a reason in favor of using them to help modularize the law. We need not decide if they actually carve at nature's joints in that case; it may be enough if they seem to do so. In all these ways, Reinach's interest in essential law is, despite initial appearances, anything but distant from legal policy debates.

Reinach's *a priori* has much to offer private law theory. Let us return to the dichotomies with which we opened this chapter. The *a priori*, whatever its ultimate status, transcends the internal–external divide among theorists. Like the internal perspective it is something – something deep – about law's own self-understanding. And yet it stands outside enacted law and connects to something beyond the law. This may be psychological, or it may be the complex process of navigating the world and solving the problems to which social acts are directed. Or it may be both. In any case, the *a priori* points to ways of thinking about how the internal and external perspectives are connected.

Likewise for holism and reductionism. Reinach's method is far from reductionist. Indeed, the point is to look closely at what is actually there. And yet what he finds is a rather compact set of interlocking notions presupposed by the law. Here Reinach's project suggests the right kind of reductionism, seeking simple local structures that produce complex and nuanced results at a more systemic level.

Reinach's *a priori* manages to produce complex results with relatively simple materials, because his *a priori* also transcends the debates over conceptualism. As we have seen, Reinach is no apologist for existing legal concepts and is unafraid to go against the grain of positive law, even in the face of claims about what is

⁹¹ See Reinach (n 1) 133–34.

⁹² On the importance of being able to track what legal concepts will mean across different areas of the law, see J Waldron, “‘Transcendental Nonsense’ and System in the Law” (2000) 100 Columbia Law Review 16.

conceptually impossible. On the other hand, his philosophy is anything but nominalist. If he is right, his a priori is highly robust. And to the extent that actual legal concepts track the a priori – and there is a gravitational pull in terms of workability and understanding for them to do so – legal concepts partake of this robustness as well.⁹³

Finally, Reinach's a priori accommodates a measure of both deontology and consequentialism. We say 'accommodates', because Reinach insists that the a priori is not inherently moral and he distinguishes his approach from natural law in not being a theory directly about actual law. Nevertheless, many of the social acts that interest Reinach have a moral dimension – think promise, release, and the like – and deontologists thus gain a foothold for their own program. Furthermore, as we have seen, part of the appeal, and perhaps the very accessibility, of Reinach's a priori is how it is built into a practical system of social acts and presuppositions that permit us to navigate the world. This is why his a priori is a good candidate for psychology, for functional practicality, and emergence from a complex social system.

By asking questions about law's 'deep structure', one is engaging in the New Private Law. The essence of this movement is to take law seriously but to be open to perspectives that bring out its nature and importance. Especially in bringing internal and external perspectives together and relating the micro to the macro, Reinachian themes will doubtless feature prominently in the New Private law in the future.⁹⁴

5.5 CONCLUSION

Reinach's synthetic a priori offers an approach to private law that cuts through the seemingly intractable debates between those who favor internal and external perspectives, between reductionists and doctrinalists, between deontologists and consequentialists. Much of what he describes looks like a deep structure to the law, presupposed by widely divergent legal theories. To say this is not to say that his approach dissolves all debates, nor is it to endorse phenomenology or Reinach's idea of timeless, essential rules. Rather, his work merits our attention for what it picks out: whether it is a matter of metaphysics, psychology, conventional practices, or functional benefits, the rules he describes are often deep-seated components of legal

⁹³ In addition to workability and understanding, we might also consider questions of acceptability to legal actors. As Stephen Smith has noted, judges tend to justify their reasoning on the basis of intermediate justifications, rather than comprehensive moral theories. See SA Smith, 'Intermediate and Comprehensive Justifications for Legal Rules' in S Degeling, MJR Crawford, and N Tiverios (eds), *Justifying Private Rights* (Hart 2020) 63; see also PB Miller, 'Juridical Justification of Private Rights' in *ibid* at 105. Much of what Reinach sees as a priori appears to play a role in these intermediate justifications. If, as Smith argues, courts need to use intermediate justifications in order to render their reasoning more broadly acceptable in a pluralist society, they may also have reason to adopt rules that track Reinach's a priori.

⁹⁴ Gold and Smith (n 72).

reasoning. They are robust, accessible, and, in many cases, possessed of considerable gravitational pull.

Thinking through Reinach's applications also offers repeated insights into law and the surrounding social practices that law interacts with. With his analyses of property, transfers, and representation, Reinach explains the structures within private law – and within social practices – in a way that illuminates both. His work is thus a valuable starting point if we want to discern and understand that architecture. Perhaps surprisingly, his work is also a valuable starting point if we want to adjust the law's architecture.⁹⁵ Reinach offers provocative and yet very productive new ways to take the law seriously.

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⁹⁵ It is a separate question how one might adjust this architecture while retaining its main features (if so desired). On ways to revise legal concepts and their operation, see AS Gold and HE Smith, 'Managing Legal Concepts: Maintenance, Modulation, Modification' (ms on file with authors).

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