

Introduction

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Adolf Reinach (1883–1917) was a philosopher. Before his battlefield death at the age of thirty-three, his philosophical career was brief; the corpus he left slim.¹ Today, he is best known for developing a theory of social acts thought to be an independent precursor to the speech act theories of John Austin and others later in the century.² He is cited in certain branches of philosophy for his contributions on speech act theory and other contributions to metaphysics, including the mode of existence of states-of-affairs, their relationship to other features of our world, and the role of ‘phenomenology’ in epistemology.³ In short, Reinach is taken today as a rather obscure metaphysician with a limited body of work.

But Reinach was also a *legal* philosopher. He wrote and thought a great deal about the law and legal philosophy,⁴ and, uniquely in the philosophical circles in which he moved, he had trained as a lawyer.⁵ Indeed, just as Austin would later draw

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¹ Adolf Reinach, *Gesammelte Schriften* (M Niemayer 1951); Karl Schuhmann and Barry Smith, ‘Adolf Reinach: An Intellectual Biography’, in Kevin Mulligan (ed), *Speech Act and Sachverhalt: Reinach and the Foundations of Realist Phenomenology* (Nijhoff 1987) 25.

² John F Crosby, ‘Adolf Reinach’s Discovery of the Social Acts’ (1983) 3 *Aletheia* 143; Kevin Mulligan (ed), *Speech Act and Sachverhalt: Reinach and the Foundations of Realist Phenomenology* (Nijhoff 1987).

³ Jan Woleński, ‘Adolf Reinach, Negative States of Affairs and the Concept of Omission’ (2020) 90 *Folia Iuridica* 5; Barry Smith, ‘On the Cognition of States of Affairs’, in Kevin Mulligan (ed), *Speech Act and Sachverhalt: Reinach and the Foundations of Realist Phenomenology* (Nijhoff 1987) 189; Kimberly Baltzer-Jaray, ‘Bogged Down in Ontologism and Realism. Reinach’s Phenomenological Realist Response to Husserl’, in Rodney KB Parker (ed), *The Idealism-Realism Debate Among Edmund Husserl’s Early Followers and Critics* (Springer 2021); Denis Seron, ‘Adolf Reinach’s Philosophy of Logic’, in Bruno Leclercq, Sebastien Richard, and Denis Seron (eds), *Objects and Pseudo-Objects: Ontological Deserts and Jungles from Brentano to Carnap* (De Gruyter 2015).

⁴ *ibid.*

⁵ Baltzer-Jaray (Chapter 4, this volume).

on legal examples in his own discussion of speech acts,⁶ Reinach's social act theory is presented in, but takes up only a portion of, the most substantial publication of his life – the 1913 monograph *The A Priori Foundations of the Civil Law*.⁷ The *Foundations* is a substantial work of legal philosophy that theorizes about basic constituents of private law – promise, obligation, claim, right, property, representation, and more – as social acts.⁸

In the century since his death, Reinach's substantive legal philosophy – that is, the *rest* of the *Foundations* – has fallen by the wayside.⁹ Until recently, you could search in vain for citations to Reinach in the law reviews. While Reinach's contributions to philosophy have undergone a renaissance in certain branches of ontology in the past forty years, his *legal* philosophy has not been the focus.¹⁰ And even as private law theory has turned greater attention to Kant and other moral philosophers in recent decades,¹¹ if you wanted to discuss Reinach at an English-speaking conference on jurisprudence, you would at best be looked at with befuddlement.

Granted, given what Reinach argued about the law, his dismissal from the Anglophone jurisprudential canon makes some sense. As the title of his monograph suggests (the *A Priori Foundations*), Reinach argued that the basic legal concepts that structure private law are metaphysically real constituents of the universe, accessible *a priori* by something called the 'phenomenological method' – '[w]e shall show that the structures which one has generally called specifically legal have a being of their own just as much as numbers, trees, or houses, that this being is

⁶ JL Austin, *How to Do Things with Words* (JO Urmson and Marina Sbisa, eds, 2d edn Harvard University Press 1975); 57.

⁷ Hereinafter *The Foundations* or *Foundations*. Citations throughout the volume are to John F Crosby's most recent English translation, except where otherwise noted by individual authors. 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.

⁸ *ibid.*

⁹ Of course, not entirely. Neil Duxbury, 'The Legal Philosophy of Adolf Reinach' (1991) 77 *Archives for Philosophy of Law and Social Philosophy* 314; Stanley L Paulsen, 'Demystifying Reinach's Legal Theory', in Kevin Mulligan (ed), *Speech Act and Sachverhalt: Reinach and the Foundations of Realist Phenomenology* (Kluwer 1987). And indeed, while engagement with Reinach's work has become rare in English-language legal philosophy, it has been the subject of a small but consistent literature in German. Sophie Loidolt, *Einführung in die Rechtsphänomenologie* (Mohr Siebeck 2010); Christoph J Lüttenberg, 'Über das Sein des Sollens – Die rechtlichen Gebilde in der Rechtsphänomenologie Adolf Reinachs' (2020) 11 *Zeitschrift für rechtswissenschaftliche Forschung* 9; Kai Purnhagen, 'Grundlagen der Rechtsphänomenologie – Eine kritische Darstellung der Rechtsphänomenologie von Adolf Reinach und Wilhelm Schapp zu den apriorischen Grundlagen des Privatrechts' (2009) 31 *JURA – Juristische Ausbildung* 661.

¹⁰ Barry Smith, 'Adolf Reinach: An Annotated Bibliography', in Kevin Mulligan (ed), *Speech Act and Sachverhalt: Reinach and the Foundations of Realist Phenomenology* (Nijhoff 1987); Jeff Mitscherling, Tanya DiTommaso, and Aref Nayad, *The Author's Intention* (Lexington 2004) 5.

¹¹ Ernest J Weinrib, *The Idea of Private Law* (Harvard University Press 1995); Arthur Ripstein, 'Private Order and Public Justice: Kant and Rawls' (2006) 92 *Virginia L Rev* 1391.

independent of its being grasped by men, that it is in particular independent of all positive law.”¹² ‘[T]he positive law’, Reinach boldly proclaims, ‘*finds* the legal concepts which enter into it; *in absolutely no way does it produce them*.’¹³

In the century since Reinach wrote, there is perhaps no proposition of legal theory more widely taken for granted than that, whatever legal concepts are, they are not what Adolf Reinach thought.¹⁴ Most famously and enduringly associated with the contributions of American Legal Realism, various forms of nominalism about legal concepts – that, say, the legal concepts of ‘contract’ and ‘ownership’ are more or less arbitrary exercises in policymaking, often *sub silentio* – have been gospel in the legal academy for over a hundred years.¹⁵ As the slogan has it, ‘we are all legal realists now.’¹⁶ In analytical jurisprudence, neither HLA Hart nor Ronald Dworkin thought legal concepts have a determinate metaphysical existence.¹⁷ And whatever the Law and Economics and Critical Legal Studies movements disagree about, it isn’t this.¹⁸

But perhaps now is the time to start engaging with Reinach – and his provocative metaphysical realism about legal concepts, sharp analysis of those concepts, and epistemic confidence in ‘phenomenological’ discernment – once again in legal philosophy. In the past few decades, theorists, particularly of the ‘New Private Law’ school, have grown increasingly skeptical of the hegemonic picture of private law concepts as exercises in boundless policy invention and reinvention.¹⁹ Many of these scholars again take seriously private law’s internal point of view, sometimes including that perspective’s notorious solicitude for conceptual reasoning, while acknowledging a variety of interdisciplinary, external perspectives.²⁰ And indeed, in the past few years, legal theorists have begun to engage with Reinach’s work in private law theory and adjacent areas of philosophy.²¹

¹² Reinach (n 7) 4.

¹³ *ibid.*

¹⁴ Frederick Schauer, ‘The Limited Domain of the Law’ (2004) 90 Virginia L Rev 1909.

¹⁵ Karl N Llewellyn, *The Common Law Tradition: Deciding Appeals* (Little, Brown & Co. 1960) 180–81; Felix S Cohen, ‘Transcendental Nonsense and the Functional Approach’ (1935) 35 Columbia L Rev 809; Scott Brewer, ‘On the Possibility of Necessity in Legal Argument: A Dilemma for Holmes and Dewey’ (2000) 34 John Marshall L Rev 9, 39.

¹⁶ Joseph William Singer, ‘Legal Realism Now’ (1988) 76 California Law Review 465, 467.

¹⁷ Ronald Dworkin, *Law’s Empire* (Harvard University Press 1986) 83; HLA Hart, *The Concept of Law* (3rd ed Oxford University Press 2012) 129–29; Jules L Coleman, ‘Truth and Objectivity in Law’ (1995) 1 Legal Theory 33, 47.

¹⁸ Guido Calabresi and A Douglas Melamed, ‘Property Rules, Liability Rules, and Inalienability: One View of the Cathedral’ (1972) 85 Harvard L Rev 1089; Duncan Kennedy, ‘Form and Substance in Private Law Adjudication’ (1976) 89 Harvard L Rev 168; Gary Peller, ‘The Metaphysics of American Law’ (1985) 73 California L Rev 1151.

¹⁹ Andrew S Gold, John CP Goldberg, Daniel B Kelly, Emily Sherwin, and Henry E Smith (eds), *The Oxford Handbook of the New Private Law* (Oxford University Press 2020).

²⁰ *ibid.*

²¹ James Toomey, ‘Property’s Boundaries’ (2023) 109 Virginia L Rev 131; Olivier Massin, ‘The Metaphysics of Ownership: A Reinachian Account’ (2017) 27 Axiomathes 577; Manuela Massa, ‘Property and *Nuda Potestas* as Constitutions of Reinach’s Philosophy of Law’ (2020) 90 Folia Iuridica 75.

In this context, Reinach's account of the *a priori* foundations of civil law offers valuable insights – perhaps *uniquely* valuable insights – to both proponents and detractors of a conceptualist, formalist turn in private law theory. For one thing, unlike many earlier proponents of legal formalism and natural law theory, Reinach *knew* he was defending a contrarian view against rising (and ultimately ubiquitous) positivist nominalism.²² He framed his thesis against a view 'on which there is general agreement', that 'all legal propositions are *creations* of the lawmaking factors'.²³ And by taking seriously and engaging with nominalism on its own terms, his arguments might merit more credence than earlier theorists who assumed worldviews no longer widely accepted – say what you will about Reinach, he is no easily dismissed pre-Darwinian natural law theorist building jurisprudence on partisan theology. Indeed, he is no traditional natural law theorist at all, because although he took core legal concepts like promise to be metaphysically real, he also believed them normatively inert, and the positive law free to deviate from their *a priori* entailments in the name of morality or expedience.²⁴

Moreover, Reinach's enthusiastic embrace of *metaphysical* realism in private law can help both illuminate and challenge debates around legal concepts today. For those sympathetic to a role for conceptual reasoning or analysis in legal discourse, Reinach might offer a theory of legal concepts' nature – supported by his broader 'Realist Phenomenology' theory of the universe, a general account of metaphysics and epistemology that has been revisited in philosophy in the past few decades.²⁵ Or, as several contributions in this volume suggest in different ways, it might be that his *analysis* of legal concepts is illuminating even if his particular *theory* of their existence is not – he may have done valuable work making sense of the entailments of legal concepts that exist in some other, less difficult, way.²⁶

At the same time, to skeptics of law's internal point of view, or of the determinacy of legal concepts, Reinach might be saying the quiet part of any sort of legal conceptualism out loud. Nominalists about legal concepts have long suspected their opponents of (at least) closet Platonism – of being committed to law as a 'brooding omnipresence in the sky',²⁷ consisting of a 'heaven for legal concepts',²⁸ notwithstanding the interdisciplinary efforts of New Private Law theorists to avoid these sorts

²² Reinach (n 7), 4.

²³ *ibid.*

²⁴ *ibid.* 45.

²⁵ Barry Smith, 'Realistic Phenomenology', in Lester Embree (ed), *Encyclopedia of Phenomenology* (Springer 1997) 586; Baltzer-Jaray, 'Bogged Down' (n 3) 156.

²⁶ Andrew S Gold and Henry E Smith (Chapter 5, this volume); Marietta Auer (Chapter 1, this volume); James Toomey (Chapter 2, this volume); Paul B Miller (Chapter 7, this volume); Lorenz Kaehler (Chapter 3, this volume); Sandy Steel (Chapter 6, this volume).

²⁷ *S Pac Co v Jensen* [1917] 244 U.S. 205, 222 (Holmes, J., dissenting).

²⁸ Rudolf von Jhering, 'In the Heaven for Legal Concepts: A Fantasy' (Charlotte L Levy, tr, 1985) 58 Temple L Q 799.

of commitments.²⁹ From that perspective, at least Reinach *doesn't* shy away from bold work in metaphysics, but rather embraces it wholeheartedly – perhaps raising the possibility that, at bottom, and in one of its best articulations, maybe conceptual analysis in legal reasoning *does* demand faith in something like the World of Legal Forms.³⁰

In this volume, we bring together papers by American and European legal theorists and philosophers on Reinach's work and its implications for private law. In so doing, we aspire to both resuscitate and interrogate Reinach's legal theory, to situate Reinach's theories alongside their alternatives and make sense of their relationship to debates in contemporary private law scholarship. Moreover, we hope that this volume will serve as a resource for private law scholars hoping to learn more about Reinach, philosophers and scholars of Reinach who plan to engage more with the legal aspects of his work, and students coming upon Reinach for the first time.

The contributions are arranged in three parts. In the first, Marietta Auer, James Toomey, Lorenz Kähler, and Kimberly Baltzer-Jaray write about issues related to Reinach's philosophical methodology. In Part II, Andrew Gold and Henry Smith, Sandy Steel, Paul Miller, and Olivier Massin discuss connections between Reinach's legal philosophy and contemporary private law theories. And finally, Stephan Kirste, Emma Tieffenbach, Alessandro Salice and Olivier Massin, and Crescente Molina draw on Reinach's approach in making novel arguments about *particular* legal concepts – from the concept of legal time to that of agreement.

This introduction is similarly arranged. After setting the scene with a brief biography of Adolf Reinach, we introduce each of the three parts, and summarize the chapters, in turn.

1.1 A BRIEF LIFE OF ADOLF REINACH

Adolf Bernhard Philipp Reinach was born in 1883 to a prominent and well-established Jewish family in Mainz, near Frankfurt, then of the German Empire.³¹ His interest in philosophy began in his teenage years at *Ostergymnasium* at Mainz,

²⁹ Paul B. Miller, 'The New Formalism in Private Law' (2021) 66 *American Journal of Jurisprudence* 175; Henry E. Smith, 'On the Economy of Concepts in Property' (2012) 160 *University of Pennsylvania L. Rev.* 2097; John Gardner, *From Personal Life to Private Law* (Oxford University Press 2018) 11–12; Jules L. Coleman, 'The Practice of Corrective Justice' (1995) 37 *Arizona L. Rev.* 15, 22.

³⁰ Granted, it is controversial whether Reinach's account is properly described as 'Platonist'. Kimberly Baltzer-Jaray, 'Adolf Reinach Is Not a Platonist' (2009) 13 *Symposium: Canadian J. Continental Philosophy* 100; Smith, 'Cognition of States of Affairs' (n 3) 201. As far as legal philosophers go, however, he was clearly *something like* a Platonist.

³¹ John F. Crosby, 'A Brief Biography of Adolf Reinach', in John Crosby (ed.), *The Aprior Foundations of the Civil Law: Along with the Lecture 'Concerning Phenomenology'* (Ontos Verlag 2012).

where he was introduced to Plato, who would remain one of his most significant influences throughout his life.³²

In 1901, Reinach started at the University of Munich, where he studied philosophy and psychology under Theodor Lipps, who was famous for interdisciplinary research in both fields.³³ While Reinach's heart clearly lay in philosophy and its intersection with empirical psychology, he also studied law and jurisprudence; indeed, he earned a PhD in philosophy in 1904 with a dissertation on the concept of causality in criminal law.³⁴ During his years in Munich, Reinach fell in with a broad group of other students of Lipps, who would largely form his intellectual network for the rest of his life, many of whom were or would go on to be important philosophers in their own right – Johannes Daubert, Dietrich von Hildebrand, Max Scheler, Moritz Geiger, Theodor Conrad, Alexander Pfänder, and more.³⁵

While Reinach was beginning his intellectual journey in Munich, Edmund Husserl, already established, was working in Göttingen, on, among other things, the foundations of logic, and the relationship between logic and psychology.³⁶ In his 1901 work *Logical Investigations*, Husserl argued against the view (much in vogue, and embraced by philosopher-psychologists like Lipps) that logic was reducible to psychology, and propounded a new method, which he called 'phenomenology', as an alternative.³⁷ Reinach's circle in Munich began reading Husserl in the early years of the twentieth century, and its members were particularly attracted by the emphasis in *Logical Investigations* on the metaphysical realism of logic, as contrasted with the views of their mentor, Lipps.³⁸ In 1905, Reinach and several of his friends from Munich began moving to Göttingen to work with Husserl directly – the so-called 'Munich invasion of Göttingen'.³⁹

Evidently, however, in a familiar tale, Reinach's parents found disputes about the ontological status of logic rather frivolous (or at least unemployable), and insisted he return to his legal studies.⁴⁰ He did so in 1906, taking courses in Munich and Tübingen, most influentially from the legal theorist Ernst Beling, whose account of criminal law saw it as composed of 'delict-types', through which certain sets of facts were held to constitute specified legal forms – not unlike Reinach's own later views in civil law.⁴¹ And though clearly he had little interest in practicing law, Reinach's

³² Anna Reinach, sketch of a 'Lebenslauf', in the Bavarian State Library, Ana 379 D IIi (quoted in Schuhmann and Smith (n 1) 2).

³³ Schuhmann and Smith (n 1) 2.

³⁴ Adolf Reinach, 'On the Concept of Causality in the Criminal Law' (tr. Berit Brogaard) (2009) 1 *Libertarian Papers* 1; Schuhmann and Smith (n 1) 5.

³⁵ Alessandro Salice, 'The Phenomenology of the Munich and Göttingen Circles' in Edward N Zalta (ed), *Stanford Encyclopedia of Philosophy* (online 2020).

³⁶ Stefania Centrone, *Logic and Philosophy of Mathematics in the Early Husserl* (Springer 2010).

³⁷ Edmund Husserl, *Logical Investigations*, Vol. I (JN Findlay tr, Routledge 2001).

³⁸ Salice (n 35); Schuhmann and Smith (n 1) 6.

³⁹ Salice (n 35).

⁴⁰ Crosby, 'A Brief Biography' (n 31) viii.

⁴¹ Schuhmann and Smith (n 1) 7–8; Baltzer-Jaray (Chapter 4, this volume).

legal studies were not without characteristic intellectual enthusiasm – he boasted to his friends that he had memorized large portions of the Imperial German Code of Civil Procedure⁴² and commented favourably on the insight of many of his teachers.⁴³ In 1907, he sat for and passed the state law exams, before promptly returning to philosophy.⁴⁴

In 1909, once more firmly working on philosophical issues, Reinach habilitated at Göttingen with Husserl's support, with a thesis on the nature of judgement, and began teaching as a *Privatdozent*.⁴⁵ His teaching – something he had done informally among his philosophical peers for a long time – was rather legendary;⁴⁶ 'the Göttingen students ... of this period refer to Reinach, not to Husserl, as their real teacher in phenomenology';⁴⁷ observing that he was 'brilliant in directing philosophical seminars'.⁴⁸

During these years, Reinach worked closely with Husserl as an assistant, helping to revise and prepare the second edition of *Logical Investigations*, which was to be published in 1913, and helping to edit Husserl's new journal *Yearbook for Philosophy and Phenomenology Research*, which would become the preeminent publication of the phenomenological movement in the following decades.⁴⁹ In 1912, Reinach married Anna Stettenheimer, among the first women to obtain a PhD in physics from the University of Tübingen.⁵⁰

At the same time, Reinach was hard at work on his own contributions. In 1913, in the first edition of the *Yearbook*, he published his masterwork, *The A Priori Foundations of the Civil Law*.⁵¹ Connecting his legal training with his philosophical thinking, the monograph argues that, rather than inventions of positive law, foundational legal concepts like promise and property are metaphysically real, and knowledge about them is accessible *a priori*.⁵² Specifically, these legal forms are *social acts*, which Reinach took to be an ontological kind not sufficiently recognized in philosophy.⁵³ Similar to John Austin's later theory of speech acts, this 'discovery' of social acts in the *Foundations* is what Reinach is best known for today.⁵⁴ But in the remainder of the work, Reinach seeks to illustrate the realism of legal concepts by

⁴² Quoted in Schuhmann and Smith (n 1) 8.

⁴³ *ibid.*

⁴⁴ Crosby, 'A Brief Biography' (n 31) viii.

⁴⁵ Schuhmann and Smith (n 1) 12–13.

⁴⁶ Salice (n 35); Schuhmann and Smith (n 1) 14; Crosby, 'A Brief Biography' (n 31) ix.

⁴⁷ Herbert Spiegelbert, *The Phenomenological Movement* (3rd ed, Springer 1994) 191.

⁴⁸ Edmund Husserl, *Briefe an Roman Ingarden* (Nijhoff 1968) 114.

⁴⁹ Schuhmann and Smith (n 1) 12–16.

⁵⁰ Kimberly Baltzer-Jaray, 'Happy 104th Wedding Anniversary, Adolf & Anna!', <https://reinach.ophen.org/2016/09/15/happy-104th-wedding-anniversary-adolf-anna/>.

⁵¹ Reinach, 'Foundations' (n 7).

⁵² *ibid.* 4.

⁵³ *ibid.* 18–28.

⁵⁴ Sources cited in note 2, above.

reasoning to synthetic *a priori* judgements about them – that, say, a promise need not be accepted; a claim dissolves once waived.⁵⁵

In the same edition of the *Yearbook* in which the *Foundations* appeared, Husserl also published his next great work, *Ideas*, advocating for phenomenology grounded not in metaphysical realism but transcendental idealism.⁵⁶ The contiguity of this work with Husserl's realism about logic in *Logical Investigations* has long been controversial, and Reinach and his fellow travelers in metaphysical realism took it as a substantial departure – 'the *Ideas* ... provided young phenomenologists with an opportunity to renew their commitment to a robust form of metaphysical realism, which was perceived as incompatible with Husserl's transcendental idealism.'⁵⁷ Indeed, while it may have been 'something of an exaggeration'⁵⁸ to claim that after *Ideas* 'Reinach and, following him, the others broke away from the new developments',⁵⁹ an important intellectual rift had opened among self-identified 'phenomenologists,' and Reinach and Husserl were beginning to disagree about the basic foundations of philosophy.⁶⁰

Any further intellectual divergence (or reconciliation) between Reinach and Husserl was, however, not to be. In August 1914, Europe descended into general war.⁶¹ The notorious, now-mystifying war fever that swept Europe that fateful month did not pass Reinach by – he volunteered immediately and was in France by September, alongside his younger brother Heinrich, also a lawyer, who would later be imprisoned on *Kristallnacht* and escape to Brazil.⁶² While at the front, Reinach continued thinking about philosophy – corresponding with his friends on philosophical topics and announcing lecture courses he would never give.⁶³ In 1916, Reinach converted to Christianity and, while on leave, he and Anna were baptized into the Protestant Church.⁶⁴ His final writings were sketches on the phenomenology of religion, written from the battlefield.⁶⁵ Adolf Reinach died in the service of the German Empire on 16 November 1917, at the age of thirty-three.⁶⁶

Back in Germany, Edmund Husserl eulogized Reinach in *Kant Studies* – 'German philosophy has suffered a heavy loss as a result of Adolf Reinach's early

⁵⁵ Reinach, 'Foundations' (n 7).

⁵⁶ Schuhmann and Smith (n 1) 20; Edmund Husserl, *Ideas: General Introduction to Pure Phenomenology* (originally published 1913) (Routledge 2012).

⁵⁷ Salice (n 35).

⁵⁸ Schuhmann and Smith (n 1) 21.

⁵⁹ D Cairns, *Conversations with Husserl and Fink* (Nijhoff 1976) 10.

⁶⁰ Salice (n 35); Crosby, 'A Brief Biography' (n 31) ix; Rodney KB Parker (ed), *The Idealism-Realism Debate Among Edmund Husserl's Early Followers and Critics* (Springer 2021).

⁶¹ Barbara W Tuchman, *The Guns of August: The Outbreak of World War I* (Penguin 1994).

⁶² Schuhmann and Smith (n 1) 23; 2.

⁶³ *ibid* 24.

⁶⁴ *ibid* 24; Crosby, 'A Brief Biography' (n 31) ix–x.

⁶⁵ Schuhmann and Smith (n 1) 24; Crosby, 'A Brief Biography' (n 31) ix–x.

⁶⁶ Schuhmann and Smith (n 1) 24.

death.⁶⁷ Reinach had left his unpublished papers with Anna, with instructions to destroy them in the event of his death.⁶⁸ Several previously unpublished fragments nevertheless appeared in the *Collected Writings* of Adolf Reinach, published in 1921 and edited and arranged by Edith Stein and other students, with an introduction by Hedwig Conrad-Martius;⁶⁹ other writings were finally destroyed when Anna Reinach fled Germany in 1942, in the face of Nazi persecution.⁷⁰

1.2 REINACH AND HIS METHOD

To modern philosophical eyes, Reinach is a difficult philosopher to place. On the one hand, he writes like an analytical philosopher – he is engaged in an exercise that looks a lot like conceptual analysis, tosses variables around, and routinely invokes the philosophy of mathematics. On the other, he called his method ‘phenomenology’ and was a prime assistant to ur-Continental Edmund Husserl. Was Reinach an ‘analytical’ philosopher or a ‘Continental’ one? The answer, perhaps, is both, and neither.

Indeed, Reinach’s life, and his work, sits right at the point of departure of these schools. The Husserl of *Logical Investigations* was influenced by Gottlob Frege, often taken to be the founder of analytical philosophy, and was preoccupied with the foundations of mathematics and logic, just like Russell, Carnap, and the early Wittgenstein.⁷¹ It was this Husserl that Reinach, and the other ‘Munich Realists’ were drawn to and worked with.⁷² This began to change after *Ideas*, as Husserl took a turn into transcendental idealism, and Reinach and his friends doubled down in their realist commitments.⁷³ Before the War, Reinach remained Husserl’s closest assistant.⁷⁴ After, Husserl obviously needed a new one.⁷⁵ He settled on a former seminary student named Martin Heidegger;⁷⁶ and the rest, as they say, is history.

But before you jump to the conclusion that Reinach is *just* some sort of crypto-analytic, that isn’t quite right either. It was very important to him that his method was ‘phenomenological’, and he insisted on claims such as that ‘[i]n immersing ourselves in the essence of [legal] entities, we spiritually see what holds for them’.⁷⁷

⁶⁷ Edmund Husserl, ‘Obituary notice (entire)’ in John Crosby (ed), *The Apriori Foundations of the Civil Law: Along with the Lecture ‘Concerning Phenomenology’* (Ontos Verlag 2012) xi, originally published in (1919) 13 *Kant-Studien* 147.

⁶⁸ Schuhmann and Smith (n 1) 25.

⁶⁹ Adolf Reinach, *Gesammelte Schriften* (Niemeyer 1921); Schuhmann and Smith (n 1) 25.

⁷⁰ Schuhmann and Smith (n 1) 25.

⁷¹ Salice (n 35).

⁷² *ibid.*

⁷³ *ibid.*

⁷⁴ Schuhmann and Smith (n 1) 21.

⁷⁵ Salice (n 35).

⁷⁶ Edmund Husserl, *Edmund Husserl Briefwechsel, Vol. 2 Die Münchener Phänomenologen* (Elisabeth Schuhmann and Karl Schuhmann, eds, Kluwer 1994)

⁷⁷ Reinach (n 7).

Indeed, it might be best to say that the moment of ‘Realist Phenomenology’ Reinach occupied with his friends from Munich was its own bounded moment in philosophy – then eclipsed after twenty years of turmoil by the linguistic turn in English and existentialism on the Continent. The survivors of the moment – Roman Ingarden, Max Scheler, Hedwig Conrad-Martius, Dietrich von Hildebrand, Edith Stein – carried on the legacy of Realist Phenomenology in more religious philosophy.⁷⁸

The chapters in the first part of the book address questions raised by Reinach’s philosophical method, his relationship to other philosophical schools, and the implications of his philosophical position for his jurisprudence. In ‘Promising, Owning, Enacting: Adolf Reinach’s Phenomenology of Legal Speech Acts’, Marietta Auer draws out the nature of Reinach’s phenomenological theory of private law by examining it in light of both the German civil law tradition and mid-century language philosophy. As noted earlier, Reinach was trained in the law, and the *Foundations* reflects a deep knowledge of the German Civil Code. This knowledge of German law shapes some of Reinach’s analysis but, at other times, offers a foil for his views. Those views rest on a theory of social speech acts – legal relations arise when actors engage in various social speech acts. Reinach concentrates in particular on promising and owning. Auer shows how deeply linguistic Reinach’s approach is and draws out its etymological background. Promising involves speaking (*versprechen*), and owning involves hearing and obeying (*gehören*). Even enactment is a social speech act (*bestimmen*) with etymological linguistic overtones.

This confluence of tools and goals in Reinach’s phenomenology of private law allows him to avoid some of the pitfalls of established schools of thought, Auer argues. His approach is not wholly positivist, and nor is it moralist (natural law) or nominalist (as in Legal Realism and its relatives). Reinach can, from this perspective, be interpreted as eschewing metaphysics where it is not necessary. Promisors are obligated to perform because they have promised, rather than because of positive law, promisee reliance, good consequences from promise keeping, and the like. Reinach thus solves notorious problems – such as justifying the bindingness of promises and the nature of ownership as more than a bundle of rights – by stopping philosophical analysis when it reaches the ‘*a priori*’ bedrock in the law. In this way, Reinach does not overclaim about what ought to be from what is, and thereby avoids the common pitfalls of ‘ontology’.

In ‘Darwin’s Reinach’, James Toomey argues that Reinach’s approach to basic legal concepts can be embraced on the basis of evolutionary psychology rather than Reinach’s own strong metaphysical views. Reinach thought that basic legal

⁷⁸ As discussed above, Reinach, too, converted to Christianity during the First World War. Crosby, ‘A Brief Biography’ (n 31) x. It is perhaps fair to critique Realist Phenomenology as demanding a faith in the abstract and immaterial closely compatible with religion and mysticism. On the other hand, at least in Reinach’s case, it is hard to disentangle the influence of his combat experiences from his own turn to religion. Husserl, ‘Obituary’ (n 67) xiv; Schuhmann and Smith (n 1) 24.