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Wilhelm Schapp and the Standard Theory of Exchanges.

Abstract

The paper mines, contextualizes, and assesses Wilhelm Schapp's neglected account of contracts of sale. This account is evaluated against the background of what Emma Tieffenbach and Olivier Massin label as the "Standard Theory of Exchanges [STE]" and the "Action Theory of Exchanges [ATE]" in their recent paper "The Metaphysics of Economic Exchanges" (*Journal of Social Ontology*, 2017). The first section of the present article introduces STE, its shortcomings, and ATE as a theory of exchanges, which is superior to STE. The second section systematically reconstructs Schapp's own position. It does so by highlighting the credit Schapp's position especially owes to Adolf Reinach's phenomenology. Finally, the third section claims that Schapp's theory remains largely untouched by the shortcomings that affect STE and that it can be considered as a precursor of ATE, since it shares important insights with that account.

Keywords Wilhelm Schapp, Adolf Reinach, Exchanges, Promises, Preferences

0. Introduction

Contracts—and especially, contracts of sale—are ubiquitous in our social life. For instance, they help us achieve our needs and desires. If you need or desire something that somebody else owns and if you own something the other needs or desires, a contract offers each party the possibility for fulfilling those needs or desires. That is also why we usually take contracts very seriously by often engaging in careful deliberation before entering into them: typically, the parties evaluate the good they intend to transfer to the other against the good they aim at receiving from the other. Depending on the values of the goods at stake, on the parties' preferences, and on many other factors, this deliberation may protract itself for a long period of time. Furthermore, contracts not only are sustained by deliberation, they also sustain deliberation: if you know that you will receive a given amount of money because you entered a contract with somebody, this can help you make decisions about your spending in the future. If you know that you have to meet a certain deadline for transferring money to somebody (because you have entered a contract with her), you will factor that deadline in when planning your future spending.

Because of their fundamental role in our social reality, it should come as no surprise that humans have devoted an entire branch of jurisprudence to contracts: large parts of civil law norm, regulate, and catalogue various forms of contracts and, in particular, contracts of sale. However, *despite* their fundamental role for our social reality, philosophy has invested comparably limited resources to understand the nature of contracts and, especially, contracts of sale.

A notable exception to this general observation is represented by the important contribution recently published by Emma Tieffenbach and Olivier Massin (2017)[1]. Their *The Metaphysics of Economic Exchange* is a significant paper for at least two orders of reasons. First, the authors excavate, reconstruct, and present what they dub as "the Standard Theory of Exchanges" (hereafter: STE). Albeit this theory has been "virtually never explicitly spelled out in the economics literature" (Tieffenbach and Massin, *Metaphysics of Economic Exchange,* 173), it is convincingly claimed to capture the "economists' implicit, pre-theoretical conception of exchanges" (Tieffenbach and Massin, *Metaphysics of Economic Exchange*, 178). Second, the authors systematically evaluate this theory: after identifying some important limitations of the STE, they develop their own alternative view about exchanges, which they call the "Action Theory of Exchanges" (hereafter: ATE).[2] ATE is claimed by the authors to fill STE's explanatory gaps and to solve the main problems that plague that theory. Interestingly, the

[1] Massin, O., Tieffenbach, E., 2017, The Metaphysics of Economic Exchange, *Journal of Social Ontology* 3(2), 167-205.

[2] In their paper, Tieffenbach and Massin focus on the concept of economic exchange rather than on that of contract of sale, but it should become evident in the first and, especially, in the second section that these two concepts, although different, have a certain degree of overlap: some economic exchanges are contracts of sale. It should also be noted that "contract" is used here to indicate the legal notion of a contract (the class of necessary and sufficient conditions that qualify a given event in the world as a contract), not the conventional or institutional notion of a contract (i.e., what a given society considers or accepts to be a contract). On this difference, see Smith, B., 1990, *Towards a History of Speech Act Theory*, in A. Burkhardt (ed), *Speech Acts, Meaning and Intentions. Critical Approaches to the Philosophy of John R. Searle* (Berlin: de Gruyter), 29-61.

authors develop ATE by tapping into some conceptual resources that have been secured by Adolf Reinach in the theory of promises he laid out in his masterwork, *The Apriori Foundations of Civil Law* of 1913.[3]

Although closely related, the argumentative trajectory of the present paper diverges from the one pursued by Tieffenbach and Massin. While section 1 summarizes the virtues and vices of the STE by closely following the exposition made by the authors, sections 2 and 3 go their own route. In section 2, I introduce a theory of contracts of sale, which has been inspired by Reinach in an equally profound way, although it has thus far remained at the periphery of scholarly research (including research on early phenomenology): this is Wilhelm Schapp's neglected account of contracts of sale.[4]

Schapp was a member of that glorious tradition of phenomenology, which goes under the various labels of "early phenomenology," "Münich and Göttingen circles of phenomenology," or "realist phenomenology".[5] Even though he received a PhD degree in philosophy under the

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[3] Reinach, A., 2012 [1913], *The A priori Foundations of the Civil Law. Along with the lecture "Concerning Phenomenology"* trans. by J. Crosby, with an introduction by A. McIntyre, (Berlin: De Gruyter).

[4] For a recent contribution on Schapp's phenomenology, see De Vecchi, F., 2016, A priori of the Law and Values in the Social Ontology of Wilhelm Schapp and Adolf Reinach, In: A. Salice, H. B. Schmid (eds) *The Phenomenological Approach to Social Reality. History, Concepts, Problems* (Dordrecht: Springer), 279-316..

[5] See Salice, A., 2020, The Phenomenology of the Munich and Göttingen Circles. In: Ed Zalta (ed) *The Stanford Encyclopedia of Philosophy* (Winter 2020 Edition),

supervision of Edmund Husserl by defending a remarkable dissertation on the philosophy of perception[6], Schapp did not pursue a career as an academic philosopher. He rather opted to become a notary and jurist. However, his interest in philosophy accompanied him for his entire life and materialised in a series of publications, which includes the two volumes on *The New Science of Law* (*Die neue Wissenschaft vom Recht*) published in the early 30s (1930, 1932).[7] The first volume of this book lies at the very core of the present paper: there, Schapp also advances some of Reinach's insights (and especially, those related to the nature of deliberation, values, and promises), which he employs for (among other purposes) developing a theory of contracts of sale.[8]

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http://plato.stanford.edu/archives/win2015/entries/phenomenology-mg/, and Schapp, W., 1976, *Erinnerungen an Edmund Husserl: Ein Beitrag zur Geschichte der Phänomenologie* **(**Wiesbaden: Heymann).

[6] Schapp, W., 2013, *Beiträge zur Phänomenologie der Wahrnehmung* (Frankfurt am Main: Klostermann).

[7] Schapp, W., 1930, *Die neue Wissenschaft vom Recht. Band 1: Der Vertrag als Vorgegebenheit* (Berlin: Rothschild) and Schapp, W., 1932, *Die neue Wissenschaft vom Recht. Band 2: Wert, Werk und Eigentum* (Berlin: Rothschild). After the Second World War, Schapp will address topics new to his previous philosophical oeuvre by articulating an important theory of narrativity (including a narrative account of personal identity, see Schapp, W., 2012, *In Geschichten verstrickt. Zum Sein von Ding und Mensch* **(**Frankfurt am Main: Klostermann)). In many ways, Schapp's theory resonates with contemporary approaches (for instance, see Goldie, P., 2012, *The Mess Inside: Narrative, Emotion, and the Mind* (Oxford: OUP)).

[8] Schapp is not the only phenomenologist who, in the first decades of the past century, promoted a phenomenological approach to law inspired by Reinach: Czeslaw Znamierowski

After introducing Schapp's theory in section 2, section 3 evaluates the account in the light of the STE and ATE. On the one hand, I show that, although Schapp's account of contracts can be considered as a variant of the STE, it is free of the shortcomings that affect that theory. On the other, I claim that Schapp's account can be considered as a precursor of Tieffenbach and Massin's ATE: in fact, the arguments that make Schapp's theory invulnerable to the STE's shortcomings are in line with ATE. They either systematically resonates with the ATE or have in Reinach their common inspirator (while retaining ideas from the STE).

Against this background, it can be claimed that Schapp's theory has not only relevance to those interested in advancing historical scholarship in phenomenology. It is also philosophically relevant insofar as it entails insights that are of profound significance for the ontology of social and institutional entities.

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and Cesare Goretti should be mentioned, among others (on Znamierowski, see his 1924, *Podstawowe pojęcia teorji prawa. Część pierwsza: Układ prawny i norma prawna.* Poznań: Fiszer i Majewski; on Znamierowski and Reinach, see Lorini, G., Żełaniec, W., 2016, *Czesław Znamierowski's Social Ontology and Its Phenomenological Roots*, in A. Salice, H. B. Schmid (eds.) *The Phenomenological Approach to Social Reality: History, Concepts, Problems* (Cham: Springer International Publishing), 75–89; on Goretti, see his 1930, *I fondamenti del diritto* (Milano: Libreria Editrice Lombarda); and on Goretti and Reinach, see Lorini, G., 2012, *Due A priori del Diritto: L'a priori del giuridico in Cesare Goretti vs. l'a priori giuridico in Adolf Reinach*, in F. De Vecchi (ed.) *Eidetica del Diritto e Ontologia Sociale. Il Realismo di Adolf Reinach* (Milano: Mimesis), 151-170.)

1. The Standard Theory of Exchanges and its Shortcomings.

Let us start with an example (see Schapp, *neue Wissenschaft*, 2-3). Imagine a scenario in which person A collects Swiss clocks and owns two clocks (*a*, *b*) of the same kind. In addition, person O runs a clock shop, which currently sells a clock (*c*) that is missing in A's collection. A and O ponder the possibility of exchanging *a* and *c*. If they decide to act, then the exchange comes to completion when A has transferred *a* to O and O has transferred *c* to A. This particular event qualifies as a case of barter ("direct exchange"), but clearly not all exchanges are of this direct form: the vast majority of our economic transactions are not direct because they involve money (and, therefore, are "indirect exchanges"). Since one could conceive of money as a factor whose introduction would complicate the exchange without fundamentally altering its nature, this paper will focus exclusively on direct exchanges.

Suppose now that a transaction between A and O does indeed occur; how could one describe this event more precisely? By reviewing a large body of literature in (the philosophy of) economics, Tieffenbach and Massin reconstruct what they call the "Standard Theory of Exchange." This theory, which they indicate has never been spelled out in explicit terms, seems to be the default position on which economists and social scientists alike rely. The bulk of the theory is this: for A and O to exchange their goods *a* and *c*, they should perform actions of a specific kind that are motivated by mental attitudes of a specific kind. More precisely, A should prefer *c* to *a* and O should prefer *a* to *c*. In addition, A's preference should motivate A to voluntarily transfer *a* to O and O's preference should motivate O to voluntarily transfer *c* to A.

In sum, the STE holds that, if A and O exchange their goods *a* and *c*, then the following takes place:

1. “Inverse preferences:
    - (1.1.) A prefers *c* to *a*
    - (1.2.) O prefers *a* to *c*
2. Mutual transfers:
    - (2.1.) A voluntarily transfers *a* to O
    - (2.2.) O voluntarily transfers *c* to A
3. (2.1.) partly because of (1.1); (2.2) partly because of (1.2).” (Tieffenbach and Massin, *Metaphysics of Economic Exchange*, 170, adapted)

The authors formulate three comments on the STE (*Metaphysics of Economic Exchange*, 170-172). The *first* is that the notion of a good (or “commodity”), which the STE operates with, encompasses tangible goods (clocks, e.g.), but also intangible goods (including services, i.e., actions). So, for instance, A can sell piano lessons to O, where piano lessons do not belong to the kind of entities that can be touched (and, thus, are not “tangible”). Despite this metaphysical difference, goods and services, on the STE, belong to the same ontological category, which is that of objects (in contrast to, say, that of states of affairs). This immediately leads to the *second* comment: the fact that goods are considered to be objects has consequences for the understanding of the preferences that motivate the exchange. Since these attitudes are about (or range over) goods by comparing them against each other, these attitudes are objectual (not propositional). So, in

- Prefer (*x*, *y*)

the semantic values of *x* and *y* are objects. Finally, the *third* comment is this: because *x* and *y* are compared by the two parties against each other, this comparison, if it is to motivate an exchange, must give rise to inverse preferences. To put this differently, A and O exchange their goods *because* A prefers $c > a$, while O prefers $a > c$. Interestingly, the 'because' at stake here is the "subjective" because[9]: the subjective because indicates subjective reasons (the mental state that motivates another state or an action). It does not indicate the objective reasons that render, say, subjects' preferences correct: for instance, on this second understanding of "because," O prefers *a* over *c because a* is more valuable than *c*.[10]

After formulating these three comments, the authors move on to identify the limitations of the STE. On the one hand, they pinpoint three issues that are left unexplained by the theory (*Metaphysics of Economic Exchange*, 178-179). On the other, they advance two important critiques of the STE.

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[9] See Mulligan, K., forthcoming, *Logic, Logical Norms and (normative) Grounding*. In: O. S. Schnieder, (ed.) *Bolzano on Grounding* (Oxford: Oxford University Press)

[10] According to this view, preference is an internal mental state of the agent which has motivational force insofar as it can inform the actions of this agent. Yet, this view about preferences is highly controversial within the discipline of economics (for a discussion, see Guala, F., 2019, Preferences: neither behavioural nor mental. *Economics & Philosophy* 35-3, 383-401; this also raises the question of how standard the Standard Theory of Exchange actually is). However, this is not the place to critically assess this general understanding of preference, because Tieffenbach and Massin (and, importantly, Schapp too) endorse that general view about preferences, even though they amend it in some specific aspects, as we will also see.

The first shortcoming of the theory relates to the question as to why preferences are supposed to be conducive to exchanges to begin with. If A prefers *c* to *a*, why is this supposed to motivate A to transfer *c* to O? As the authors put it: "[S]ystematically transferring what we own […] to those who own what we prefer is in general a very ineffective method to get us what we want" (*Metaphysics of Economic Exchange*, 178). Secondly, the STE does not accommodate an important feature of economic exchanges, which is their *quid pro quo* aspect: A transfers *a* to O *against c*. To express this in their words: "What is missing in the STE is an understanding of the explanatory connection between the two transfers […]" (*Metaphysics of Economic Exchange*, 179). Thirdly, the STE is blind to the normative structure that regulates the exchange. Suppose A transfers *a* to O, but then O free-rides without transferring *c* to A. Something has obviously gone wrong in this scenario. For one, A is now in a position to legitimately rebuke O. A's protest is legitimate, it appears, because O disrespected the claim A had towards O (to receive *c*) and, thereby, also disrespected O's own obligation towards A to transfer *c*. Such claims and obligations seem to be part and parcel of the transaction, but they remain unexplained by the STE[11]: "The STE per se does not explain the arising and vanishing of such transitory claims and obligations" (*Metaphysics of Economic Exchange*,179).

[11] If claims and obligations are part and parcel of any economic exchange (as Tieffenbach and Massin in their own theory of exchange claim, see *Metaphysics of Economic Exchange*, 191), then this notion can be considered to be cognate (although not coextensive) with the notion of a contract of sale, according to ATE. I will come back to this issue in the next section, where the claim of an equivalence between the two notions is further qualified.

Having pinpointed the explanatory gaps of the STE, it is now time to turn the attention to the two critiques advanced against this account. The first critique is that not all exchanges include *transfers* of goods. For instance, services cannot be transferred, although they obviously can be exchanged (*Metaphysics of Economic Exchange*, 181). Why can services not be transferred? The authors offer an argument that relies on the metaphysics of goods and services. The argument has two premises. The first premise is that the only entities that can be transferred are endurants. Endurants are entities that persist over time without having temporal parts: clocks, houses, cars, etc. The second premise is that services, being actions, do not persist over time or, if they persist over time, have temporal parts. Services, therefore, are not endurants. It follows from these two premises that services cannot be transferred, although they can be exchanged (*Metaphysics of Economic Exchange*, 181).

The second objection raised by Tieffenbach and Massin is that not all exchanges involve *inverse* preferences. Importantly, exchanges of services do not, according to the authors (I ignore here the possibility that the very action of exchanging goods is pleasurable to both parties, *Metaphysics of Economic Exchange*, 184-185). Here is one example, which illustrates their point: "Suppose Julie explains modal logic to Paul in exchange for Paul's playing the violin to her. Should we say, as entailed by the STE, that Julie values Paul's playing the violin to her more than she values explaining modal logic to him? And that, on the other hand, Paul prefers Julie's explaining modal logic to him to playing the violin to Julie? That sounds very weird." (*Metaphysics of Economic Exchange*, 185). The authors propose that, when it comes to exchange of services, the preferences of the parties are *convergent*, not inverse.

Because of the STE's shortcomings, the authors articulate an alternative theory of exchanges, the Action Theory of Exchanges ("ATE"). This theory contains a number of valuable insights,

which this paper cannot do justice to, but its main gist is this (see *Metaphysics of Economic Exchange*, 186-187): (i) for all exchanges, what one exchanges are services (that is: actions, *incl. the actions of transferring a good*), but not goods (objects); (ii) exchanges of services presuppose that the preferences of the two parties *converge* and that preferences about services are *propositional* (not objectual); (iii) when the exchange of services concerns a transfer of goods, then the preferences of the two parties about the goods to be transferred are inverse (while the preferences about the very actions of transferring those goods remain convergent); *and* (iv) exchanges are normatively structured. This normative structure is cashed out in Reinachian terms by means of promissory commitments and claims that are generated by the two parties' reciprocal promises (one party's offer and the other party's acceptance).

It exceeds the purposes of this paper to scrutinize the ATE. Rather, the attention will turn to Schapp's theory of contracts of sale. The next two sections argue that this theory (a) fills the explanatory gaps of STE identified above, (b) is not affected by the shortcomings highlighted by Massin and Tieffenbach, and (c) anticipates some of the insights further elaborated by the ATE (while retaining some ideas from STE).

2. Reinach's Legacy: Schapp's Theory of Contracts

As mentioned in the introduction, Schapp's account of contracts has been developed against the background of early phenomenology and is indebted, especially, to Reinach. Reinach was well aware of the significance of his ideas especially about social acts and promises for a general theory of contracts,[12] but he never developed such a general theory. In the following, I

[12] See Reinach, *A priori Foundations*, 50

will introduce Schapp's account by emphasizing the elements that, most saliently, relate to Reinach's philosophy. This is relevant not only for an historical assessment of Schapp's theory, but also to unveil how Schapp's theory relates especially to the ATE.

Schapp starts his analysis by distinguishing what he calls the substructure (*Unterbau*) and the super-structure (*Oberbau*) of a *contract of sale* (*Kaufvertrag*). In the first subsection, I will start by discussing the substructure of contracts and then move on to their super-structure. Now, what is the substructure of a contract of sale? The substructure, Schapp maintains, consists in the reflection (*Überlegung,* also: "consideration" or "deliberation") that the two parties undergo before entering the contract. These considerations motivate the parties to act in such a way as to enter into a contract, where the actions of entering into the contract is the super-structure of the contract (which is the topic of the second subsection). The presence of a substructure, i.e., of a deliberating activity, is what makes a contract *rational*—in contrast to irrational. Note that the contract does retain its rationality even when it is *foolish* (*töricht*, see Schapp *neue Wissenschaft*, 2), that is, even when the deliberative activity carried out by the subject is faulty or mistaken.

i. The substructure of the contract of sale.

Schapp's analysis of the substructure can be argued to heavily draw on Reinach and especially on his investigation into what he calls "volitional reflection"[13]. Whereas intellectual reflection is the epistemic activity a subject engages in, when she is interested in finding out the solution

[13] Reinach, A, 2017 [1912-13], *Reflection: Its Ethical and Legal Significance*. In: J. Smith, M. Lebech (eds.) *Three Texts on Ethics* (Munich: Philosophia Verlag), 45-164.

of a theoretical problem or the truth-value of a given proposition (and, therefore, the existence of a given fact), volitional reflection is the deliberative process that is supposed to lead the subject to a decision or intention (*Vorsatz*) on whether to perform (or to omit) a certain action.[14]

Let us go back to the example: A collects Swiss clocks and owns two clocks (*a*, *b*) of the same kind, while O's clock shop currently sells a clock (*c*) that A's collection misses. What does the substructure of the exchange between A and O look like? According to Schapp, A will begin by estimating (*werten*) the value of *a* and the value of *c* (Schapp, *neue Wissenschaft*, 3), where

[14] See Salice, A., 2018, *Practical Intentionality. From Brentano to the Phenomenology of the Munich and Göttingen Circles*. In: D. Zahavi (ed) *The Oxford Handbook of the History of Phenomenology* (Oxford: Oxford University Press), 604-622. Interestingly, Reinach claims that one essential element of volitional reflection is the subject "feeling" the values that characterise the goals or projects she is pondering (Reinach, *Reflection*, 109-110). So, for instance, when pondering whether bringing about goal G or goal G1, the subject will aim at feeling the values of G resp. G1 (for early phenomenologists' notion of "feeling," see Mulligan, K., 2010, *Husserls Herz*. In M. Frank, N. Weidtmann (eds.), *Husserl und die Philosophie des Geistes* (Frankfurt a.M.: Suhrkamp), 209–238). Schapp endorses Reinach's axiological realism, but he adopts a different terminology to denote the experiences that make one acquainted with values: values can be either "enjoyed [*genossen*]" or "tasted" [*kostet*] (Schapp, *neue Wissenschaft*, 7-8). Whereas the first experience is affectively colored, the second is not. For instance, I can enjoy my cup of coffee, but the professional coffee taster aims at "tasting" (not enjoying) his or her cup of coffee. As De Vecchi in her *A Priori of the Law* remarks, Schapp (at least terminologically) does not seem to distinguish value-properties from the objects that instantiate those properties ("goods").

"estimating" can be presumed to be an attitude closely related to the enjoyment or taste of values mentioned in footnote 14 (Schapp remains silent on this point). In a subsequent step, A will make two interrelated comparisons (*Wertgleichungen*):

A's comparisons

- *c*'s value > *a*'s value
- the value of owning *c* > the value of owning *a*

These considerations give rise to two interrelated preferences,[15] which—as a first approximation—can be formulated as follows (these formulations will be revised below):

A's preferences

- A prefers the state of affairs {*c*, value} to the state of affairs {*a*, value}
- A prefers the state of affairs {owning *c*, value} to the state of affairs {owning *a*, value}

On their end, O will proceed analogously by first making the following comparisons:

[15] Schapp only hints at the presence of preferences, which mediate between the comparison of values, on the one hand, and the decision to make an offer to the other party, on the other. He speaks of the subject "choosing" the most valuable item over the other without further elaboration (*wählen*, see Schapp, *neue Wissenschaft*, 5). The reconstruction of preferences and of their correlates offered in this paper is, therefore, almost entirely systematic, although consistent with Schapp's (and Reinach's) pertinent claims.

O's comparisons

- *a*'s value > *c*'s value
- the value of owning *a* > the value of owning *c*

Because of these two comparisons, O shall form these two preferences:

O's preferences

- O prefers the state of affairs {*a*, value} to the state of affairs {*c*, value}
- O prefers the state of affairs {owning *a*, value} to the state of affairs {owning *c*, value}

Four comments are in order. The first comment is that Schapp, as so many of his fellow phenomenologists, endorses axiological realism. Therefore, the expressions "*a*'s value" or "the value of owning *a*" refer to a proper or intrinsic value-property (*Eigenwert*) of *a* or of owning *a*. Values are understood by Schapp as a particular kind of properties instantiated by objects: "The value is something which is inherent […] in the object […]. The value is as objective—and in the same sense objective—as the object" (Schapp, *neue Wissenschaft*, 8-9). Interestingly, Schapp (as, among others, Reinach and von Hildebrand[16]) maintains that not all values of an object are intrinsic. In addition to intrinsic values, objects can also have extrinsic or instrumental values (*Zusammenhang*- or *Mittelwert*, Schapp, *neue Wissenschaft*, 3, 26).

[16] See Reinach, *Reflection*, and von Hildebrand, D., 1916, Die Idee der sittlichen Handlung, *Jahrbuch für Philosophie und Phänomenologische Forschung*, 3, 126–252.

These are values that an object acquires because of its relations with a subject or with other objects, in respect of their intrinsic values. For instance, clock *a* has instrumental value (*Mittelwert*) for O because it can be sold at a higher price than *c* (*a* would not have had that value if O were not interested in the profit, which O is planning to use for, say, extending his business, saving for his retirement, etc.).[17] For the sake of simplicity, I will exclusively focus on intrinsic values in comparisons and preferences.

The second comment concerns the fact that the value of owning *x* differs from the value of *x* and that these values can diverge.[18] To illustrate this point, Schapp takes the following example (Schapp, *neue Wissenschaft*, 19-20): the value of a Rembrandt painting is very high. However, the value of owning a Rembrandt might not be equally high. In fact, it may be much lower than

[17] Two observations are relevant in this context. First, since extrinsic values presuppose intrinsic value, the idea of a world which contains only extrinsic values is absurd (Schapp, *neue Wissenschaft*, 22). Second, just as one can be mistaken about the proper value of an object, so one can also be mistaken about its instrumental or extrinsic value (Reinach, *Reflection*, 119).

[18] Reinach distinguishes between ownership (*Eigentum*, sometimes also translated as "property") and possession (*Besitz*): ownership grounds property rights about an object, whereas possession is the power to use that object (see Reinach, *A priori Foundations*, 53ff, Massin, O., 2015, Qu'est-ce que la propriété? Une approche reinachienne. *Philosophie* 1, 74–91). For instance, renting a flat is possessing the flat, but not owning it. In his account, Schapp exclusively focuses on the possibility for ownership to be transferred. Often, transferring ownerships includes transferring possession, but this should not prevent us from thinking that, sometimes, possession alone can be made the object of a contract of sale. (I am thankful to Emma Tieffenbach for pushing me on this point.)

the value of the painting—for instance, it can be assumed that owning a Rembrandt goes together with important collateral costs that not every owner can afford. Or maybe the owner doesn't have a place where he can put his Rembrandt. So, the subject, to be motivated to enter a contract of sale, must not only have a preference for the good, but also a preference for owning that good.

Note that this marks an important distinction between the notion of exchange and that of a contract of sale: sales require inverse preferences about the ownership of the exchanged good. By contrast, the parties only need to have inverse preferences about the goods—regardless of their preferences about owning those goods—for an exchange to happen (children, e.g., gain pleasure from merely exchanging marbles regardless of the question about ownership).[19] Accordingly, exchanges and contracts of sale are cognate notions, but not identical or coextensive.

The third comment is that the preferences of A and O do not range over objects, but over states of affairs, in contrast to what STE holds. So, the idea is that preferences are propositional (not objectual) attitudes and that their form is

- Prefer (p, q)

where p and q range over states of affairs (not objects). To be sure, Schapp is not explicit about this point, but his premises—combined with some ideas of Reinach's about formal ontology—systematically support this view about preferences, or so I will now argue. To sustain this view,

[19] I am thankful to Emma Tieffenbach for raising this point.

I first distinguish between coarse-grained and fine-grained preferences and I then elaborate on the intentional correlate of fine-grained preferences.

Let us start with the first point. When one claims to prefer *a* over *c*, then one usually reports a preference of *a* over *c*—*all things considered*. One prefers one entity over the other in relation to all the values or disvalues exemplified by that entity (the very same idea applies to the ownership of *a* and *c*, but I will discuss ownership later). This suggests that coarse-grained preferences directed towards objects rely on fine-grained preferences which consider *a* and *c* in relation to a single value-property *v*. It is because *a* is preferred to *c* in relation to the value-properties *v*, *v'*, *v''* (even though perhaps not in relation to the value-property *y*) that one forms the coarse-grained preference for *a* over *c*.

Fine-grained preferences are not directed towards *a* and *c*, *sic et simpliciter*. Their intentional correlate is more complex. *On the one hand*, they are directed towards *a* and *c* insofar as they are (or have) *v*—let's express this point by saying that the preference is directed towards "*a*^*v*" and "*c*^*v*," where "^*v*" points to the "moment"[20] or "trope"[21]—that is, to the individualized value-property had by *a*. Let us call the entity referred to by "*a*^*v*" (i.e., the object including one of its moments) a "factual material" (*sachlicher Tatbestand*), to follow Reinach's terminology.[22] *On the other hand*, these preferences are directed towards the *existence* of *a*^*v*

[20] See Husserl, E., 2001, *Logical Investigations*, 2 vols. (London: Routledge)

[21] See Williams, D. C., 1953, On the Elements of Being: I, *Review of Metaphysics* 7(1), 3–18

[22] Reinach, A, 1982 [1911], On the Theory of the Negative Judgment. In: B. Smith (ed.) *Parts and Moments. Studies in Logic and Formal Ontology* (Munich: Philosophia Verlag), 340f, Smith, B., 1987, On the Cognition of States of Affairs, in K. Mulligan (ed.) *Speech Act and*

over the *existence* of *c^v*. That is, the *existence* of one factual material is preferred over the *existence* of the other, where the existence of a factual material is a state of affairs—not an object.[23] For instance, if I form the preference for a just world over a free world (or of an elegant clock over a functional clock), what I actually prefer is the *existence* of a just world over the existence of a free world (or the existence for an elegant clock over the existence a functional clock). To put this differently, preferences are conative attitudes which have a world-to-mind direction of fit: the point of entertaining these attitudes is a concern for how the world should or should not be, and more precisely, for what should or should not exist—where, to reinforce this, the existence of an object is a state of affairs, not an object.

The point about preferences being propositional is slightly more complex in the case of preferences about ownership, although the very same considerations apply. The point is more complex because ownership is a relation which the owner enters into with an object[24]—since relations are states of affairs[25] and since ownership is a relation, so does ownership qualify as a state of affairs. Here, again, the preference could be coarse-grained or fine-grained: one could prefer owning *a* over owning *c*, *all things considered*, which again presupposes the fine-grained preference of owning *a* over owning *c* with respect to a specific value *v*. It can be therefore argued that the intentional correlate of fine-grained preferences partly consists in, on the one

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Sachverhalt. Reinach and the Foundations of Realist Phenomenology (Dordrecht: Martinus Nijhoff),189–225.

[23] Reinach, *Theory of the Negative Judgment*, 338.

[24] Ownership "is itself no right over a thing, but rather a relation (*Verhältnis*) to the thing, a relation in which all rights over it are grounded." (Reinach, *A priori Foundations*, 56)

[25] Reinach, *Theory of the Negative Judgment*, 345-346.

hand, the state of affairs (say, owning *a*) together with the individualized value-property *w*. On the other, its full intentional content is about the *subsistence* of that very state of affairs (which is a state of affairs of a higher order[26]). So, the preference of owning *a* over owning *c* is the preference of the state of affairs that the (with respect to value *w*) valuable ownership of *a* subsists over the state of affairs that the (with respect to the same value *w*) valuable ownership of *c* subsists (where the attribute "valuable" counts as a placeholder for any property *w* in respect to which one relation of ownership is preferred over the other).

The fourth comment is that, as in the STE, Schapp maintains that the evaluative comparisons of A and O are inverse. Why do these evaluations have to be inverse for the contract to be a contract of sale (*Kaufvertrag*)? Schapp develops the following consideration: if the evaluations were convergent, the contract would qualify as a contract of gift (*Schenkungsvertrag*, *neue Wissenschaft*, 5, 50-51). To put this differently, if A and O share the following evaluations:

A's and O's preferences:

- the state of affairs that {*a*^*v* exists} < the state of affairs that {*c*^*v* exists}
- the state of affairs that {the (with respect to *w*) valuable ownership of *a* subsists} < the state of affairs that {the (with respect to *w*) valuable ownerships of *c* subsists}

and if, therefore, O—based on those preferences—transfers *c* to A, then O is presenting A with *c* and, thus, O is *not* selling *c* to A.

[26] Reinach, *Theory of the Negative Judgment*, 338.

Let us take stock. We have seen that the substructure of a contract of sale includes several components: 1) it has experiences that make a subject acquainted with the value of an object (and its ownership); 2) there is comparison of two objects (and of ownerships thereof) in relation to a certain value *v*; 3) this comparison gives raise to inverse fine-grained preferences about the two objects (and of ownerships thereof), which are propositional; 4) importantly, the fine-grained preferences about the two objects (and of the related ownerships) must be inverse for these preferences to lead to a contract of sale. This list, however, does not yet enumerate all the elements of the substructure.

To see why, consider this thought: individual preferences, as we suggested, are conative attitudes. For conative attitudes to lead to intentional action, they must be combined with doxastic attitudes.[27] For an agent to act intentionally, this agent not only must be driven by some conation, but also must have information about the world. What is the doxastic element that, combined with A's preference, leads him or her to act? This is the idea Schapp offers (Schapp, *neue Wissenschaft*, 31):

If A prefers

- the state of affairs that {*c*^*v* exists} over the state of affairs that {*a*^*v* exists}
- the state of affairs that {the (with respect to *w*) valuable ownership of *c* subsists} over the state of affairs that {the (with respect to *w*) valuable ownership of *a* subsists}

and if A *expects* O to have inverse preferences, that is, if A *expects* O to prefer

[27] See Salice, *Practical Intentionality*.

- the state of affairs that {*a*^*v* exists} over the state of affairs that {*c*^*v* exists}
- the state of affairs that {the (with respect to *w*) valuable ownership of *a* subsists} over the state of affairs that {the (with respect to *w*) valuable ownership of *c* subsists}

then A will *decide* to act in the way described in the next subsection. This expectation-desire pair supports the "super-structure" of the contract by motivating the subject to form the decision (*Entschluß*) to act—more precisely, the subject will form the decision to formulate an offer (Schapp, *neue Wissenschaft*, 62). Before moving to the super-structure of the contract, it is important to highlight that the subject's expectation must be *confirmed* by the other party for the contract of sale to acquire a super-structure (for, recall, if the other party has convergent preferences, then the contract has the form of a gift). As we will see, the search for this confirmation is visible in the way in which the first party formulates the offer, which is one element of the contract's superstructure.

ii. The super-structure of a contract of sale.

The super-structure of a contract of sale consists in a combination of two elements: the offer (*Angebot*) and the acceptance (*Annahme*). Crucially, offer and acceptance are promises and, as such, they are social acts. Schapp here is operating with Reinach's notion of promises (as he clearly acknowledges, see Schapp, *neue Wissenschaft*, 56), whereby promises are acts that are in need of being heard and, therefore, are happy or successful if their addressees hear or

understand the act (in various senses of the terms 'hearing' and 'understanding'[28]). In addition, Reinach claims that successful promises, by necessity, generate:

- *pro tanto* commitments on the promisor;
- *pro tanto* claims on the promisee.[29]

These commitments and claims are triadic relations,[30] which bind together the promisor, the promisee, and a content. The content of a promissory commitment is identical with the content of the corresponding claim: this is the action of the promisor (or the result of an action performed by the promisor), which is precisely what the promisor has promised (the content of

[28] See Salice, A., 2015, Love and Other Social Stances in Early Phenomenology. In: D. Moran, T. Szanto (eds) *The Phenomenology of Sociality: Discovering the We* (London: Routledge), 234-247.

[29] These commitments (and claims) are *pro tanto* in the sense that their deontic force can be superseded by the force of other commitments (or claims). An immoral promise (that is, a promise with an immoral content) is the classical example of a promise where the promisor is subject to the *pro tanto* promissory commitment of realising the promise's content (and the *pro tanto* moral obligation of honouring the promise), but where the *pro toto* commitment may be *not* to act upon it (depending on how severe the immorality of the promissory content is), see Reinach, *A priori Foundations*, 14.

[30] Note that these entities are deontic, but they are not moral. It is one of Reinach's greatest achievements to have sharply distinguished between promissory commitments and promissory claims, on the one hand, and moral obligations and moral rights, on the other (see Reinach, *A priori Foundations*, 8-10).

the promise). To illustrate all this by means of an example, if I promise to invite you to dinner, then my promise is happy if you have understood my promise. If the promise is happy, then I have now a commitment towards you and you have a claim towards me. My commitment and your claim have the same content: me inviting you for dinner, which is the action of mine I have promised to you.

Not only does Schapp adopt this conceptual framework for thinking about promises. He also makes use of Reinach's idea that social acts can undergo some typical modifications. Reinach describes four modifications,[31] but one in particular is relevant in this context. This is the idea that a social act like a promise can be conditional or unconditional and/or can have a conditional or unconditional content. Consider the following example: I promise you that, if I win the lottery, I will invite you for dinner. This is a case of an unconditional promise with conditional content:

- Promise (I win the lottery → I invite you for dinner)

This promise generates a commitment and a corresponding claim in the moment in which it has been uttered and understood. Now contrast this promise with the following conditional promise with unconditional content: if I win the lottery, I promise you that I will invite you for dinner.

- I win the lottery → promise (I invite you for dinner).

[31] On these modifications, see Reinach, *A priori Foundations,* 22-24.

This promise is conditional in the sense that the promise is performed (and its deontic consequences are brought about) only if a certain condition is fulfilled. The promisor, that is, is not committed unless (and until) the condition has occurred. To see how all this is relevant to contracts of sale, let us now turn to Schapp's theory.

Schapp argues that, when one party of the contract makes an offer (because of all the conditions we have discussed in the previous subsection), this offer qualifies as a promise. Interestingly, the offer can be formulated in various forms and Schapp identifies three such formulations (Schapp, *neue Wissenschaft*, 30, note that we are not told whether there are other forms in which an offer can be formulated):

- I commit myself to transfer *a* to you under the condition that you, the buyer, commit yourself to provide me with the property of *c*;
- I promise to transfer *a* to you. However, this promise generates a commitment for me only if you, the buyer, promise to transfer *c* to me.
- I promise to transfer *a* to you, but I retain the right to revoke my promise if you, the buyer, do not immediately declare to transfer *c* to me.

Interestingly, the first and the second promises are different formulations of an *unconditional* promise with a *conditional* content: the promise immediately puts the promisor under commitment to realise the content of the promise, if a certain condition is met (and, in the case at stake, the condition is that the promisee promises something to the promisor). As soon as the promisee performs the relevant promise to the promisor, the promisor is committed to realise the content of his or her initial promise.

By contrast, the third promise is an unconditional promise with an unconditional content, which—however—is coupled with the promisor's unilateral right of revoking the promise, should a condition not be met: if the promisee does *not* perform the required promise, the original promise is void. The combination of an unconditional promise and the unilateral right to revoke that promise is not a trivial matter: in cases other than the contract of sale, the promisor does *not* have the unilateral right of revoking the promise. This right can be bestowed on the promisor only by the promisee.[32] Invoking this right when performing the promise is therefore peculiar and is what qualifies the promise in this particular context as an "offer." Let us now turn the attention to the acceptance. Two points are in order.

First, just like the offer, so too can the acceptance be formulated in different ways, such as "yes" or "I accept." However, it should be noted that, even though the second party might frame his or her act as an act of "acceptance," thereby avoiding explicit use of the verb "I promise," the underlying act does qualify as a promise. On the one hand, it is a *promise*, which is required of the buyer in order to fulfil the condition which makes the realisation of the other party's promise obligatory. On the other, the deontic consequences that are generated by the alleged act of acceptance coincide with the consequences of a promise (in accepting the offer, the party is committed to transfer the good to the other and the other is entitled to that). Therefore, even though the acceptance may not disclose itself linguistically as an act of promising, the act performed nevertheless does qualify as a promise.[33]

[32] Reinach, *A priori Foundations*, 33.

[33] On promises and, in particular, conditional promises that disguise themselves as forms of acceptance, see Reinach, *A priori Foundations*, 28-29.

Second, the subject, by making using of the term "to buy" and its cognate ("buyer," etc.) in the formulation of the offer, is seeking confirmation that the other party has the inverse preferences required for the contract of sale to take place. When the other party accepts the offer, common knowledge is thereby established that the kind of activity the two subjects are engaged in is one of sale. When common knowledge is established, the seller now knows (and does not merely expect) that the buyer has inverse preferences, and so does the other party: everybody now is informed of the kind of activity they are engaging in (see Schapp, *neue Wissenschaft*, 29).

To recap, the upshot of this second subsection is this: whenever an offer has been accepted in the sense at stake, the contract of sale has been sealed and the two parties are now bound by reciprocal claims and obligations.

3. Schapp: Amending the Limitations of the Standard Theory of Exchanges

In this section, I come back to the STE's limitations, as these have been flagged by Tieffenbach and Massin, to see how Schapp's theory scores in their respect. In doing so, I will also flag how Schapp's account relates to the ATE. Let us start with the three explanatory gaps identified in STE.

First, the STE leaves unexplained why preferences are conducive to exchanges. To put this differently, why, if A prefers *c* to *a*, is this supposed to motivate A to transfer *c* to O? Schapp's theory can explain this by invoking practical rationality. According to standard theory on practical rationality, if a subject entertains a relevant belief-desire pair, she will be motivated

to form an intention to act.[34] For instance, if I desire to have a beer and I believe there is beer in the fridge, I will form the decision to open the fridge and look for the beer, which then will trigger my action. Similar principles apply to exchanges: if A prefers *c*'s value to *a*'s value (etc.) and if A expects that O prefers *a*'s value to *c*'s value (etc.), A will decide to make an *offer* to O and will eventually make the offer. This idea neatly aligns with Tieffenbach and Massin's idea (see their *Metaphysics of Economic Exchange*, 188.)

Second, the STE leaves unexplained the *quid pro quo* aspect of exchanges. More precisely, STE leaves unexplained the fact that A transfers *a* to O *against c*: "what is missing in the STE is an understanding of the explanatory connection between the two transfers…" (*Metaphysics of Economic Exchange*, 179). Schapp's theory has the conceptual resources to explain that fact. The dynamics of offers and acceptance explains precisely that: A conditionally promises to transfer *a in order to* get *c*, and O likewise promises to transfer *c in order to* get *a*. This, too, is an insight that is endorsed by the ATE (see *Metaphysics of Economic Exchange*, 191).

Third, the STE is argued to leave unexplained the fact that claims and obligations are part and parcel of the transaction. Something has gone wrong if A transferred *a* to O, but O had no motive for not free riding without transferring *c* to A. These motives are accommodated in Schapp's account thanks to the anchorage of this theory in Reinach's phenomenology of promises (which is a trait Schapp's account has in common with the ATE, as we have seen in section 1): precisely because O promised to transfer *c* to A, O is under the *commitment* to

[34] See Bratman, M., 1999, *Intention, Plans, and Practical Reason* (Stanford: CLSI Publications) and Salice, *Practical Intentionality*, for practical rationality in early phenomenology

transfer *c* to A (and A has a claim concerning *c* to be transferred to him). The commitment is a sufficient reason for O to act accordingly (and for A to rebuke O, had O not acted on the commitment).

Further, Tieffenbach and Massin identify two limitations of the theories. The *first* limitation has to do with the fact that not all exchanges include *transfer* of goods—services cannot be transferred because they are actions, not objects. *Second*, not all exchanges involve inverse preferences: according to the ATE, exchanges of services presuppose converging, not inverse preferences.

To assess Schapp's theory in the light of these two points, one should bear in mind that he is not offering a theory of what it is to transfer goods, but a theory of contracts of sale. That is why his theory has the explanatory power for modelling the exchange of services—given that services, too, can be sold and, thus, can become the subject matter of contracts of sale (Schapp, *neue Wissenschaft*, 28). The question that then remains is the following: how does this theory accommodate exchange of services?

Remember that, at least based on the systematic reconstruction offered in the previous section, preferences are propositional attitudes that are directed at states of affairs. In the example discussed about the preference for one clock over another one, the state of affairs at stake is the existence of an object together with an individualised value-property (over the existence of the other object considered in relation to the same property). Now, obviously, value-properties can be exemplified by actions, too. Certain actions are more (or less) valuable than others: e.g., some are more costly in terms of efforts (and, therefore, less desirable) than others, some are morally more valuable than others, some are more enjoyable than others, etc. This suggests

that preferences can be directed at actions and not only at objects. For instance, with respect to the epistemic value *v*, I prefer reading a paper on realist phenomenology to reading a paper on Derrida. Or, what we can consider as its equivalent: I prefer the fact that my valuable (with respect to epistemic value *v*) reading of a paper on realist phenomenology subsists over the fact that my valuable (with respect to *v*) reading of a paper on Derrida subsists.

If that is the case, then different actions can (i) be compared against each other with respect to some value *v*, (ii) be preferred over other actions, (iii) be made the matter of a contract of sale. Imagine the following scenario:

1. A prefers the state of affairs that {the (with respect to value *v*) valuable O's playing violin to him subsists} *over* the state of affairs that {the (with respect to value *v*) valuable A's explaining modal logic to O subsists}
2. O prefers the state of affairs {that the (with respect to value *v*) valuable A's explaining modal logic to O subsists} *over* the state of affairs that {the (with respect to value *v*) valuable O's playing violin to him subsists}
3. A expects (2)
4. O expects (1)
5. Given (1) and (3), A makes an offer: "I promise to teach modal logic to you, if you promise to play violin for me"
6. Given (2) and (4), O accepts the offer: "I accept"

This appears to depict an exchange of services. A compares two state of affairs against each other: O's playing violin to A (φ) and A explaining modal logic to O (ψ). A concludes that, all things considered, he prefers (φ) over (ψ). A makes an offer to O because A expects that O has

the inverse preference: A expects O to prefer the state of affairs ψ over φ. Since O does indeed have the inverse preference, O accepts the offer.[35] Since preferring φ over ψ (and vice versa) is preferring the subsistence of φ over the subsistence of ψ (and vice versa) and since an agential state of affairs subsists when the corresponding action has been performed, once A and O have exchanged promises, A will perform ψ in order to benefit from φ and O will perform φ in order to benefit from ψ.

While Schapp's theory aligns with the ATE insofar as it accommodates the exchange of services by being true to their metaphysical status, it diverges from the ATE (and sides with the STE) insofar as it holds that exchanges of services can be explained by the parties' inverse preferences. Yet, if the systematic reconstruction of Schapp's theory of preferences offered in the previous section is correct, then this flags another convergence between the two theories: for Schapp as for the ATE, preferences are propositional and range over states of affairs.

4. Conclusion

Schapp's *The New Science of Law* is a neglected chapter in the history of metaphysics of exchanges, but also in the story of early phenomenology. Schapp develops a novel and original theory of contracts of sale by activating philosophical insights that had been originally secured by Reinach. More specifically, Schapp operates with Reinach's ideas about deliberations,

[35] One implicit presupposition of this account is that, metaphysically, actions qualify as states of affairs. Since it exceeds the scope of this paper to support this claim, the considerations that rely on this claim are conditional (but see Goldman, A., 1970, *A Theory of Human Action* (Princeton: Princeton University Press), for a defense of this view).

values, social acts (esp. promises) to argue that contracts are legal formations (*Gebilde*) of a specific kind: they are supported by a specific process of deliberation (which includes the estimation of the values of goods or services) and they consist in the exchange of reciprocal promises.

However, Schapp's contribution is not merely relevant from a historical point of view. Schapp's theory bears systematic significance in that it offers conceptual instruments, which are able to meet some of the main problems affecting the STE. Specifically, this theory closes three explanatory gaps by clarifying (i) the motives that lead to an exchange (ii) the *quid pro quo* aspect of exchanges and (iii) the social normativity that accompanies exchanges. Furthermore, his theory can explain the economic exchange of services by preserving the idea that all exchanges are motivated by the two parties' inverse preferences. Importantly, some of these results either anticipate ideas presented by Tieffenbach and Massin in their ATE or share Reinach as common denominator with the ATE. This is why Schapp's theory can be considered as a precursor of the ATE.[36]

5. Acknowledgments

[36] As one reviewer pointed out, this conclusion leaves the task open of assessing ATE against Schapp's (or the Schapp-inspired) theory of exchange reconstructed in this paper. However, this can only be the project for another article as embarking in that systematic treatment would require developing arguments the scope of which would exceed the purposes of the present paper.

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