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The Metaphysics of Ownership: A Reinachian Account

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Abstract Adolf Reinach belongs to the Brentanian lineage of Austrian Aristotelianism. His theory of social acts is well known, but his account of ownership has been mostly overlooked. This paper introduces and defends Reinach's account of ownership. Ownership, for Reinach, is not a bundle of property rights. On the contrary, he argues that ownership is a primitive and indivisible relation between a person and a thing that *grounds* property rights. Most importantly, Reinach asserts that the nature ownership is not determined by positive law but *presupposed* by it. Some have objected that such realism raises insuperable difficulties as to the origin of ownership, difficulties that could only be dealt with under a more conventionalist approach. I argue that the independence of the *nature* ownership from positive law is, in fact, compatible with the claim that its *existence* is dependent on human conventions.

Keywords Property rights · Ownership · Possession · Reinach · Social Acts

What is ownership or property? Is it a bundle of rights? Is it the control over a thing? Can we do what we like with what we own? Do we continue to hold ownership of something that was stolen? Can we own something but lack the right to use it? Is ownership created by positive law? What kind of entities may be properly owned? Can the same good have several owners? The account of ownership which Reinach develops in the second chapter of the *The Apriori Foundations of the Civil Law*—henceforth, *Foundations*—published in German in 1913 (reproduced in 1989a), presents specific answers to each of these questions. Unfortunately, this contribution to the literature on property in the *Apriori Foundations* has been overlooked. It is

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the goal of this paper to present Reinach's account of ownership and to defend it as a most formidable rival to contemporary dominant theories.

In a nutshell, Reinach's theory of ownership relies on two basic distinctions:

1. The distinction between *property or ownership,* on the one hand, and *possession,* on the other.
2. The distinction between *property* and *property rights*.

These two distinctions can be easily grasped thanks to the three following examples:

- *Property/Possession*: Paul steals Julie's bike. According to Reinach, Julie is no longer in *possession* of the bike, by which he means that she has lost *the power to use* her bike. Instead, it is Paul who can use it because he is now in possession of the bike. But Julie retains the *ownership* (or property) of the bike regardless of the fact that she is no longer in possession of the bike. If Julie were to find the bike and take it back, she would not be committing theft. Having the property or ownership of a good is thus different from possessing it—i.e. from having power of using this good.
- *On Property/Property rights*: Julie lends Martin her bike for the afternoon. In this situation, Martin is in *possession* of Julie's bike for the afternoon. Furthermore, he has also the *right* to use Julie's bike during the afternoon because Julie has transferred her right to him for this period of time. Despite this, Julie remains the *owner* of the bike. Having the ownership of something is not always equivalent to having the *right* to use it. Property rights may be transferred—temporarily or permanently, partly or wholly, conditionally or unconditionally—without transferring ownership.
- *Possession/Property/Property rights*: Paul steals the bike which Julie had lent to Martin for the afternoon. The outcome is that Martin, on the one hand, loses the possession of the bike. But he still retains the *right* (that Julie had transferred to him) to use the bike during the afternoon. Paul, on the other hand, is now in possession of the bike, although he does not have the *right* to use it. Ownership of the bike has not changed hands in this situation, for Julie retains ownership of the bike even if she has lent it, and despite the theft. In this instance, then, Paul is in possession of the bike without having neither the right to use it, nor the ownership of it. Martin, in turn, retains the right to use the bike even though he neither owns, nor possesses the bike. And Julie maintains the ownership of the bike, but she has neither the possession of the bike, nor the right to use it.

Reinach does not only present the relations among possession, property and property rights, he also adopts a strongly *realist* standpoint towards such legal formations (*Gebilde*). Just like numbers, trees and houses exist independently of our perception or understanding of them, he explains, possession, property, and property rights also exist *independently of the positive law*. Thus, the property rights to which we referred to in the previous examples—i.e., the right to use the bike—are *pre-legal* rights in Reinach's account. In other words, they come into being

independently of any formal legal formation or of the law enforcement of laws within such a structure.

These pre-legal formations have essences or natures, in virtue of which they give rise to *certain necessary laws*. The central essential law advocated by Reinach with respect to property is this: *In virtue of the nature of ownership, the owner has the absolute right to do as he pleases with the thing he owns.* This law, which connects ownership, on the one hand, with property rights on the other, is grounded in the essence of ownership, and it suffers of no exceptions. (I shall address this last point later on, including the objection that it raises.)

This realism and essentialism is no surprise given Reinach's Austrian intellectual lineage. Reinach was a pupil of Husserl's, who was, in turn, a student of Brentano's. Members of this lineage share in common what Barry Smith (1990) has called 'Austrian Aristotelianism' (1990), an approach that rests on the following three pillars:

1. The world exists *independently* of our representations of the world.
2. The world contains not only individual substances but also *essences* upon which strictly *universal* laws are founded. These essences enjoy continuous existence regardless of time and place.
3. We may *experience or intuit* these essences and, on this basis, we are able to *describe* the world and its laws.

On this basis, Reinach views the nature of property as (1) independent of both our mental representations and of our institutions, (2) grounding strong essential laws, and (3) accessible through intuitions of its essence.

Before embarking on the defense of Reinach's conception of property, I would like to address two fundamental clarifications in order to prepare the ground for my task. The first clarification is that, as an Austrian Aristotelian, Reinach gives priority to *descriptions* over *explanations*, *reductions* or even *theories*. As a result his account of property is a remarkably meticulous description of what in contemporary literature is sometimes called the 'ordinary,' 'popular,'or 'profane' understandings of property.[1] In the so-called ordinary view, property is *a relationship between a person and a thing, by virtue of which the person has the right to use the thing as he sees fit.* Nowadays the ordinary approach is largely considered untenable. It has given way to more sophisticated approaches, the most influential being the view that identifies property to a *bundle of rights*. This view was already prevalent in Reinach's time, as reflected in Hohfeld (1913). A cognate sophisticated approach identifies property as *one positive right*, typically a right over things. This right has been equated, for instance, to the exclusive right to use things (Penner 1995), or the right to alienate a thing (Haller 1998). In any case, the ordinary view of property has largely disappeared from the discussions of property in contemporary literature, with some rare exceptions (Munzer 1990; Gauss 2012).

What is most regrettable is that the ordinary conception of property has been so unanimously rejected without due notice of its best advocate: Reinach. As de Calan

[1] Waldron (1988) speaks of the "profane approach". Grey (1980) names the traditional approach "thing possession" as opposed to the property approach in terms of "bundle of rights".

(2008) remarks, the conception of social acts given by Reinach in the first chapter of the *The Apriori Foundations* has overshadowed his contribution to the literature on ownership or property that comes in the second chapter. Another reason for this oversight may have to do with what at first sight appears to be a disappointing answer to the question of the *origins* of property. More precisely, Reinach seems incapable of formulating any substantial proposal about the original appropriation of a pre-existing good. Thus, among the few philosophers, lawyers and economists who mention the Reinachian theory of property, few are in favor (Gardies 1987; Zaibert and Smith 2003; and Hülsmann 2004 are among the exceptions). Most commentators are critical of Reinach, such as Bassenge (1938), Brettler (1973), Block (2004), DuBois (2002) and de Calan (2008). I shall argue that such doubts are misguided.

The second clarification attempts to answer a common quibble: If we are after a description of our ordinary understanding of ownership or, as Reinach puts it, if we can intuit the essence of ownership so as to grasp its underlying a priori truth, then why should we need a complex philosophical investigation to formulate it? Reinach's chief response—which is as true for property as for any object philosophical investigation in his approach—is that it is precisely *because property is deeply rooted in our common sense knowledge and everyday practices that it is difficult to draw out its theoretical framework*. In his words,

> That a direct apprehension of essence is so unusual and difficult that to many it appears impossible may be once explained by the deeply rooted attitude of practical life, which more possesses and operates with objects than it contemplatively intuits them and penetrates into their peculiar being. (Reinach, 1989b "Über Phänomenologie", *SW I*, p. 535, English tr., p. 200)
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> One could no longer doubt the existence of an apriori sphere if one clearly realized what a vast multitude there is of such self-evident legal rules, which, although they are nowhere formulated, are naturally and easily applied, and which we usually do not become fully aware of only because they make so much sense and are so immediately understandable (*Apriori Foundations*, *SW I,* 273; English tr., 135).[2]

Therefore, although we constantly rely on the meaning of and distinctions for the terms possession, property and property rights in everyday life (for instance when we borrow, lend, entrust, or sell things), we do this unwittingly. Our ability to make distinctions among these social acts and act on them without requiring a conscious knowledge of formal definitions, has led some authors to adopt a skeptical position regarding ordinary view of property, and even to the very concept of property (Grey 1980). However, once the distinctions that structure our naïve understanding of property are unravelled and made explicit, they strike us as immediately obvious and many vexing problems pertaining to property vanishes altogether.

Beyond its being rooted in practical life, Reinach cites a second reason why it is not immediately evident that property grounds property rights independently of any positive law. The fact that a promise creates extra-legal rights is easily recognized,

[2] Compare Aristotle: "Metaphysics, α, 1, 993b9-11. On this approach to philosophy as an attempt to unravel primitive certainties, see Mulligan's (2006) remarkable paper.

for not all promises are ruled by positive law. But positive law, by contrast, does rule all property relationships in the sense that there is no longer any instance of the property relation that is not also governed by the positive law. As a consequence, we easily get the impression that ownership grounds property rights by mere fiat.

Now, I can proceed with my defense, which is structured as follows. Section 1 presents Reinach's *distinction between property and possession*. Section 2 focusses on the *grounding relation between property and property rights*. Section 3 investigates the *nature of property rights* by situating them within Reinach's typology of rights and by making clear in which sense it is true that any owner has the absolute right to behave as he wants with what he owns. Section 4 addresses the issue of *the origin of ownership* and argues that Reinach's conception has all the necessary resources to handle this delicate issue.

1 Property and Possession

1.1 Thing and Possession

Property and possession are both dyadic relations between a person and a thing. Let us consider possession first. A person may be able to use a thing, destroy it, modify it, which means that she holds some *natural power* over it (as distinguished from a legal power). This natural power of a person over a thing is possession, which can be described as follows:

> ***Possession (Besitz)*** is a natural relationship of power that a person holds over a thing, that is to say, his or her capacity to act on it—e.g. to use it, to destroy it, to modify it, to move it, etc.

What does or does not belong to an individual's sphere of natural power varies and depends, among others things, on technological progress.

The next consideration is that only *things* may be possessed and only *persons* can possess them. But we need to be more precise in what we mean by *things*, as follows:

> A ***thing (Sache)*** is anything that may be used, anything that is useful in the widest sense. Things include, for example, apples, houses, oxygen but also quantities of electricity or heat. A thing is thus not necessarily physical, but any entity which may be *used*.

Note that, for Reinach, representations, feelings, experiences, numbers or concepts are not things because we cannot use them. This prompts the following question: Don't we use numbers for counting, or concepts for thinking? No, says Reinach, for using a thing implies *acting on* it or, perhaps more clearly, *modifying* it. When we use numbers for counting, we do not modify them. In this sense, we do not use numbers, nor can we act on them. Accordingly, numbers are not things and, as such, they may not be possessed.

This reply is not without its problems. To move an apple certainly counts as a modification of the apple, but its movement from one place to another is an *extrinsic*

modification of the moved object. Once we admit of such extrinsic modifications, the question is then whether numbers, concepts or experiences cannot also fall in the category of things. To grasp a concept and contrast it with some other, for example, or to experience an emotion and bring it forth again when describing it, or to use a number in some calculation—couldn't these examples count in the same way as acting on and *extrinsically* modifying these objects? Here, I shall here leave this problem open.

Whatever is the right definition of a thing, it seems to follow from Reinach's claims that rights are things. Reinach indeed argues that non-moral rights may be *transferred or granted* (we shall come back to this later). To the extent that these are all uses of rights, then non-moral rights must count as things, alongside with apples and houses. In fact, Reinach occasionally speaks of rights belonging to persons, which suggests that rights count as non-natural *things* in his ontology.

1.2 Property

Let us now turn to property. Reinach uses equivalently two terms to express property: "*Eigentum*" and "*Gehören*". Likewise we do not distinguish here between *property* and *ownership*. Property (or ownerhip), like possession, is a natural relation independent of positive law, between a person and a thing. It is indefinable according to Reinach, but may still be described as follows:

Property *(Eigentum/Gehören)*: a relation between a person and a thing (or a part of a thing) which is:

1. natural
   That a thing belongs to me is a thoroughly "natural" relation which is no more artificially produced than is the relation of similarity or of spatial proximity. (*Foundations, SW I*, pp. 193–194; English tr. p. 54)
2. independent of positive law
   [Ownership] can come into being even where there is no positive law. When Robinson Crusoe produces for himself all kinds of things on his island, these things belong to him. (*Foundations*,*SW I*, p. 194, English tr. p 56.)
3. primitive
   owning or property is an ultimate, irreducible relation which cannot be further resolved into elements. (*Foundations*, *SW I*, p. 194, English tr. p 56.)
4. indivisible
   nothing is clearer than that *property* itself, the relation of belonging, cannot be divided, just as little as the relation of identity or of similarity. (*Foundations SW I*, p. 194, English tr. p. 56)
5. such that it grounds, in virtue of its nature, all rights over things
   We have definitely to hold fast to the thesis that property is itself no right over a thing but rather a relation to the thing, a relation in which all rights over it are grounded. (*Foundations*, *SW I*, p. 195, English tr. p. 57)

We shall come back in details in the next section on the grounding relation between ownership and property rights. Suffice to note at present that this constitutes the key

difference between property and possession. *Unlike property, possession does not ground any right*. Thus, it is possible to possess a thing without having any right on it (if we stole it), to possess a thing without being its owner (if we borrowed it, stole it, if it was entrusted to us…), just as it is possible to be the owner of a thing without having possession over it (if we lent it, entrusted it, if it was stolen from us …).

That property is "indivisible" means that *several persons cannot each be the owner of a same thing*. This is one of the essential laws about ownership according to Reinach: the relation of ownership essentially has only two *relata* and so ownership of the same thing cannot be shared. The opposite impression rests on a confusion between shared property and the following cases:

1. *Shared rights* When one person is the owner of one thing, the rights grounded in the relation of property may be shared between several persons if some of these have been transferred (we will come back to the matter of *transfers* of rights later). Since property is distinct from the rights it grounds, sharing property rights does not amount to sharing the property relation. Martin may have been transferred the right to use Julie's bike on Mondays, while Julie kept the right to use her bike the other days. The bike still belongs to Julie only.
2. *Property of different parts of a same thing* When one thing has several parts, each of these parts may be the property of different persons. Julie may be the owner of the bike's saddle and Paul the owner of its wheels.
3. Property of different "economic value-parts" ("*wirtschaflichen Wertteilen*") of a thing, that is, *ownership of different portions of the economic value of a same thing*. One and the same thing may belong *for a portion of its economic value to one person and for another portion of its value to another person*. Julie, for example, may be the owner of half of the bike's value and Paul the owner of the other half of its value.
4. *Collective property* Shared property means that several persons can *each* be the owner of the entire thing, which is impossible. By contrast, collective property means that several persons are *collectively* the owners of one and the same thing. The first *relata* of the property relation is then a plurality of persons (correspondingly the property rights grounded by this single relation of property are then had by these persons *together*). The property relation thus remains dyadic, but can be predicated to pluralities of persons (plural predication was largely admitted among Austrian philosophers since Brentano).

2 Property *Grounds* Property Rights

Property, we saw, is not only distinct from possession but also from the property rights that it grounds. To understand this grounding relation between property and property rights, it will prove useful to first situate Reinach's theory of property within the general project of the *Apriori Foundations of the Civil Law* (2.1). I shall then characterise the grounding relation, as Reinach understands it by contrast to both the relation of causation and the relation of constitution (2.2).

2.1 Ownership within the Apriori Foundations of the Civil Law

The *Foundations* are mainly known for their theory of social acts. To prevent any misreading, it should be readily stressed out that *the Reinachian conception of property is only marginally related to his theory of social acts*. In fact, for Reinach, *property is on the same level as social acts insofar as property constitutes, together with social acts, one of the* a priori *foundations of positive law*. The main thesis of the *Foundations* is that the central concepts of positive civil law are not created ex nihilo by the legislator but precede the positive articulation of these:

> Positive law finds the legal concepts which enter into it; *in absolutely now way does it produce them.* (*Foundations, SW* I, p. 143; English tr. p. 4, italics original)

Where does positive law find its concepts? Prior to the appearance of positive law, two distinct levels should be distinguished, Reinach claims. The most basic level contains *natural* (in the sense of non-normative) objects: natural things, psychological states, social acts, etc.[3] Among these natural objects, some are quite special in that they are essentially such that they ground rights and obligations. Such rights and obligations are not rights from the positive law but pre-legal rights and obligations. Promising is a type of social act which, although not a itself a right, creates by its own nature an obligation for the person who makes the promise and a right for the person to whom the promise is made. *The very same applies to property*: owning is a natural relationship between a person and a thing which, although itself not a right, grounds by its own nature property rights for the owner over the thing:

> The bond between a person and the thing which he owns is a particularly close and powerful one. It is grounded in the essence of owning [*Es gründet im Wesen des Gehörens*] that the owner has the absolute right to deal in any way he likes with the thing which belongs to him. […] all those absolute rights derive from owning as such. 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. (*Foundations, SW I*, p. 143. English tr. pp. 55–56, translation modified)

It is thus in the nature of property, as it is in the nature of a promise, to grounds rights, claims and obligations.

2.2 Grounding Versus Causation Versus Constitution

What exactly is this relation of grounding between promises and promisory obligations, property and property rights? When Reinach says interchangeably that property and promises *create (schaffen)* or *ground* (*grunden*) rights, claims and obligations, he is not thinking of a causal relationship, but of a non-causal relationship of foundation or grounding. In the following I shall, in agreement with

[3] *Foundations*, *SW I*, pp. 212–213; English tr. p. 73.

Reinach, use the words *create* and *ground,* interchangeably, to express that non-causal relation of grounding that relates promises to claims and obligations, and ownership to property rights. What distinguishes such a grounding relation from the relation of causation between natural events? Three things at least, Reinach proposes (*Foundations, SW* I, pp. 155–156; English tr. pp. 15–16):

1. First, the grounding relation is an essential relation, by which Reinach means that the *grounding relation between property and propery rights is itself grounded in the nature of property*. This two nested relation of grounding are expressed respectively by "grounds" and "because" in the following schema that capture Reinach's general approach to grounding:
   (*A* grounds *B*) because it is in the nature of *A* to ground *B*.
   Promising grounds claims and obligations *because it is in the nature of promising to do so*. Likewise, ownership grounds property rights *in virtue of the nature of ownership*. One key insight of Reinach, to insist, is therefore that some natural (i.e. non-normative) phenomena—promises, property—are such that it is in their very essence to create normative phenomena. By contrast, the fact that some event causes another *is not itself grounded in the nature of the causing events*. Otherwise put, one first difference between grounding and causation is that in the case of grounding, it is in the nature of the antecedent to serve as a foundation for the consequent (*Folge*). In contrast, a causal relationship is contingent: it is not in the essence of a causal antecedent to bring forth the consequent.[4]
2. The second difference between causation and grounding according to Reinach is epistemological. While we may *think* of a moving ball without considering the kick that put it in motion, we may not think of an obligation without taking account of its ground, such as the promise which created it. While we can access *causal effects* via acts of inner or outer perception without apprehending their causes, we cannot access *grounded objects* or states of affairs without being presented with their ground.[5]
3. Finally, while the principle according to which "same effects have the same causes" may perhaps be true, it is clear from the start that the principle according to which "same consequents have the same grounds" is to be rejected, for "The same claim and the same obligation can derive from very different sources." (*Foundations, SW* I, p. 156, English tr. p. 16). For instance, Paul may have an obligation to transfer a sum of money to Julie, because he has

[4] One may object that causal relationships are not—or not always— metaphysically contingent relationships. For instance, it is perhaps in the nature of a force to produce, under some conditions, an acceleration of the body on which it acts (Massin, forthcoming). As it happens, this is a possibility that Reinach does not seem willing to exclude. Indeed he specifies in a footnote that he leaves open whether essential relationships have a role to play in causal relationships (*Foundations, SW I*, p. 155; English tr. p. 49 n. 14). So he would presumably agree that if causal essentialism is true, then causal relations turn out to be grounding relations. But he would insist that the essential distinction at point here between causation understood as a contingent relation and grounding would remain untouched.

[5] This idea displays some affinity with the Moorean view that the supervenience of values on natural properties is conceptual or a priori (by contrast to, e.g. the supervenience of colours on reflectances). A similar idea is also defended by Meinong (1924, ch. 11).

> promised to do so or because he had stolen the money from her. The very same obligation then arises from two different grounds.

To sum up, just like promising grounds promissory claims for the promisee, owning grounds property rights for the owner. Such a grounding relation is *non-causal* first and foremost because it stems from the very nature of promising and owning respectively. Relatedly, just like promising and the claims they give rise to are independent from positive law, ownership, the rights it grounds, and its grounding them are also independent from positive law. These are pre-legal phenomena, which may or not then be taken up or modified by positive law.

Reinach's account of ownership thus parallels—but does not crucially rely on—his account of social acts. Property stands in the same grounding relation to property rights, than promise to promissory claims and obligations. It would therefore be an error to think that, according to Reinach, only social acts serve as foundations for pre-legal norms. Property is another source of pre-legal rights.

The grounding relation between property and property is not only distinct from the causal relation, it is also distinct from the constitution relation. That property grounds property rights entails that property rights do not constitute property:

> If something is grounded with essential necessity in another, this other can never consist in the thing. (*Foundations, SW* I, pp. 194–195, English tr. p. 56)

This allows Reinach to distinguish sharply his position, according to which property grounds property rights, from the bundle of rights theory of property, according to which property is constituted by property rights. If property rights are grounded in ownership, ownership cannot consist in some bundle of property rights. Let us now turn to the nature of these property rights themselves.

3 Property Rights

3.1 Reinach's Typology of Rights

Rights (including claims), like obligations, have a *holder*, who is a person: the person who has the right or the obligation. They also have *content.* The immediate content of an obligation or of a right is always, according to Reinach, a *future behaviour.*

Beyond the fact of having a content and a holder, Reinach adds that certain rights and obligations also have a "*Gegner*" sometimes translated by "partner", which I will here translate by "*opposing party* ". The opposing party of a right or obligation is distinct from its holder. Although such rights and obligations are the rights and obligations *of one person*, they are *directed* at another person, the opposing party, which is the person *against whom* they are had. For instance, Julie's claim to have Paul keep his promise is a claim that she has against Paul. Conversely, the obligation *of Paul* to keep his promise is an obligation he has against Julie. The holder of the obligation created by a promise is the promisor and the opposing party of this obligation is the promisee. Conversely, the holder of the claim created by a promise is the promisee and the opposing party of this claim is the promisor.

Rights and obligations which, on top of their holder, have an opposing party, are said to be *relative*. *Absolute* rights and obligations, by contrast, have a content and a holder but no opposing party.

Absolute rights and obligations: rights and obligations which have a holder and a content, but no opposing party.

Relative rights and obligations: rights and obligations which, beyond a holder and a content, have an opposing party, distinct from their holder.

Let us start with relative rights and obligations. To each relative obligation of an holder corresponds a correlative right of the opposing party, and conversely (whereas no absolute obligation corresponds to an absolute right, or vice versa). Correlative rights and obligations have *the same content* (*Foundations*, *SW I*, pp. 151–152, English tr. p. 12), and hence refer to the same behaviour. If Julie promises Paul to quit smoking, Julie then has an obligation towards Paul (that Julie quits smoking) and Paul has a claim vis-à-vis Julie (that Julie quits smoking). This entails that it is not in virtue of their content that the relative rights and obligations are different: *the opposing party of an obligation (here Paul) generally does not appear in its content; and the holder of a claim (here Paul again) generally does not appear in its content*. Of course, it *may* happen that the opposing party of an obligation also figures in its content, and that the holder of a claim also appears in its content. For instance, if Julie promises Paul to give him a Porsche, then Julie has the obligation towards Paul [that Julie will give *Paul* a Porsche], whereas Paul has a claim against Julie [that Julie will give *Paul* a Porsche]. But it is not because Paul appears in the content of the claim that he is the holder of the claim. If Julie promises to *Jack* that [Julie will give Paul a Porsche], it is Jack, not Paul who is the holder of the ensuing claim—although it is Paul, and not Jack, who is mentionned in the content of the claim.

Absolute rights, by contrast, have no opposing party, nor correlative obligation. Reinach gives as an example the right "over one's own action" ("*Rechte auf eigenes Tun*"), such as, I surmise, free speech: the right to speak freely is not held against any other party. One may object that one's right to speak freely has indeed a correlative obligation: namely the interdiction for all other persons to prevent one to speak. But this is not a correlative obligation, for it does not have the same content: Paul's right (that Paul speaks freely) and Julie's obligation (that Julie does not prevent Paul from speaking freely) have clearly distinct contents.[6] How then are absolute rights related to neighbouring obligations such as duties not to interfere?

[6] Hohfeld (1913, pp. 36–37) likewise insists—rightly—that the correlatives of liberties/privileges (which correspond to what Reinach calls "absolute rights") are *not* duties not to interfere. But since, contrary to Reinach, Hohfeld believes that all rights have counterparties (and hence have correlatives), he is led—erroneously, I believe—to the odd view that the correlatives of privileges are instead "no-rights". On Hohfeld's view, the correlative to Paul's right [that Paul says what he wants] is Julie's "no-claim" [that Paul does not say what he wants]. On top its entailing that correlatives may have different contents, the oddity of the view stems from its reifying absences of rights as "no-right" that one can *have*. This odd consequence is really avoided if one accepts absolute rights with Reinach: rather than having "no-rights" as correlatives, absolute rights simply have no correlatives.

To get clear on this relation, Reinach first distinguishes carefully *absolute* rights from *universal* rights. Universal rights are rights whose opposing parties are *all* persons. They are, therefore, a category of relative rights. It is then plausible, notes Reinach, that absolute rights may have universal rights as a *consequence*. If Paul has an absolute right to speak freely, he may also have "a claim on all persons to respect his rights and not to violate them" (*Foundations, SW* I, 151–152, English tr. p. 52.). This latter right is a universal right. The relation between absolute and universal rights is then as follows: an absolute right is not a universal claim to all persons. Rather, an absolute right lays the foundation for a universal claim that is relative to all persons.

Admitting absolute rights constitutes a major divergence between Reinach's approach and the standard approach—simultaneously developed by Hohfeld—according to which a correlative duty corresponds to every right (Hohfeld 1913, pp. 35–41). However, if one accepts Reinach's suggestion that absolute rights ground universal rights, we may hold, moving towards Hohfeld, that although absolute rights *have* no correlative obligations, they always *come with* some obligations: the obligations correlative to the *universal* rights that absolute rights ground.

The essential difference between relative rights and absolute rights (presence/absence of an opposing party and hence, of a correlative obligation) imply two corollary differences, Reinach notices (*Foundations, SW I*, pp. 197–198, English tr. pp. 58–59):

1. The relative claim of a person is *waiting to be realized*. For instance, if Joe has the right to expect Paul to fulfil his promise, his right requires a realization. His right is "in need of fulfilment". This is because of the obligation which is correlative to the right: the opposing party ought to perform the corresponding behaviour. Conversely, absolute rights do not in this way call for their realization. If Paul has the right to behave in a certain way, this right does not demand realization: nobody, not even Paul, has the obligation to realize the content of this right.
2. Relative rights require realization of their content but they cannot be *exercised*, because their realization is in the hands of the other party and not in the hands of the holder. Conversely, absolute rights are self-sufficient: the realization of their content does not essentially depend on somebody else's action. This is why absolute rights, unlike relative rights, may be *exercised* by their holders.

The differences between absolute and relative rights are recapped in the following table:

	Relative rights	Absolute rights
Have opposing party/parties	Yes	No
Have correlative obligation(s)	Yes	No
Await their fulfilment	Yes	No
Can be exercised	No	Yes

The rights and obligations considered thus far are non-moral. Nonetheless, the distinction between relative and absolute rights and obligations is valid both for

non-moral rights and obligations and for moral rights and obligations. What distinguishes moral from non-moral rights and obligations? Only non-moral rights and obligations, Reinach claims, can "spring from the free act of persons", such as social acts. For instance, the absolute right to use Julie's bike, may be *transferred* (transfer being a free social act as we shall see) and hence is not a moral right. Likewise, the correlative rights and obligations stemming from promises are non-moral, precisely because they are created y a promise, which is again a free social act. One may object that the duty to realize the content of one's promise is moral. Reinach's answer is to distinguish scrupulously the non-moral obligation that arises from a promise from the moral obligation to fulfil that non-moral obligation:

> One will object that in the case of a promise […] there is a moral duty to realize the given content. That is surely correct and at the same time especially well suited to bring to light the difference which we are here stressing. […] It is an apriori law that the fulfillment of absolute and relative obligations is a moral duty. One sees how obligation and moral duty stand next to each other, with the former making the latter possible. In other cases the moral duty is independent of every act and of every obligation grounded in it. But the two things should never be confused with each other. (*Foundations*, SW I, p. 154, English tr. p. 14).

> **Non-moral rights and obligations**: rights and obligations which can be created by free acts, which may be transferred by free acts or which one may renounce by free acts.

> **Moral rights and moral obligations** (which Reinach also calls "moral entitlements" [*Berechtigungen*] and "moral duties" [*Verplichtungen*]): rights and obligations which cannot be created, transferred or renounced by voluntary acts.

Within the category of absolute and non-moral rights, in order to accurately situate property rights, we have to distinguish finally *the rights to alter legal relationships, from the others*. The formers are absolute rights to perform social acts which modify legal relationships (which create, destroy, or transfer obligations or rights…). For instance, the right to promise, to renounce or revoke, a promise, to transfer one's ownership, etc.

> **Rights to alter legal relationships** [***Gestaltungsrechte***]: rights to behaviours which are immediately legally effective. For instance, the right to carry out social acts which modify legal relations, such as promises, transfers, grantings, enactments (see below on these acts).

The remaining absolute rights are rights to behaviours which have no immediate legal effect. The main type of these are the rights to act with regard to a thing: for instance the right to use, to modify, to cultivate, to benefit from a thing.

> **Rights over things** [***Sachenrechte***]: absolute non-moral right which is not a right to alter legal relationships and whose content is a behaviour of the right's holder in relation to some thing(s).

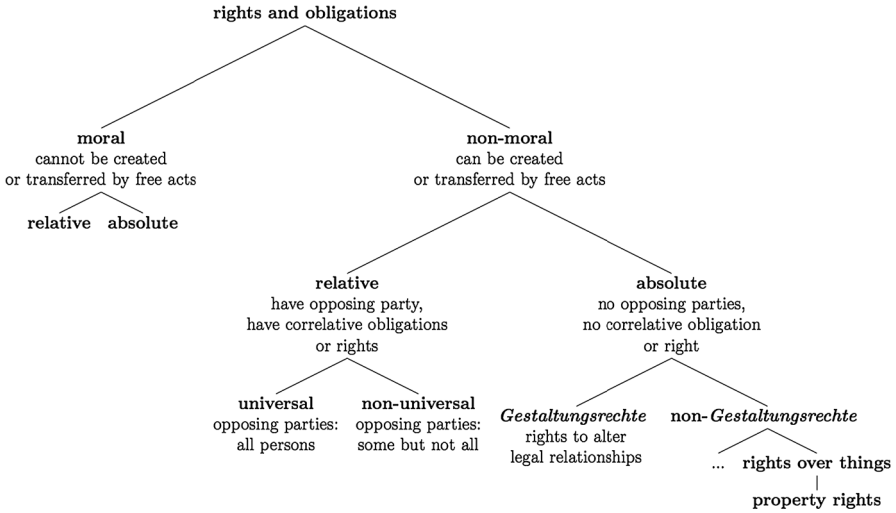

Fig. 1 Reinach's typology of rights

The Reinachian taxonomy of rights is summarized in Fig. 1.

3.2 Property Rights: Absolute Non-moral Rights Over Things

Where are property rights situated in these typology? Property rights are:

1. *Non-moral* rights (they may be transferred)
2. *Absolute* rights (they have no opposing party); the rights created by property, contrary to the rights created by promises, have no correlative obligations.
3. *Not Gestaltungrechte;* property rights are not right to alter legal relationships (contrary to e.g. the right to make promise)
4. *Rights over things;* Their content is a behaviour by the owner towards the thing he owns. Reinach stresses that property rights are the chief rights over things in that in the end, *all rights over things are grounded in property relations* (*Foundations*, *SW I*, p. 209; English tr. p. 70).

Reinach is a forerunner in upholding the irreducible character of absolute rights versus relative rights and in holding fast on this distinction so as to understand property rights. In their influential works Penner (1995) as well as Merrill and Smith (2001) rehabilitate absolute rights over things—albeit without citing Reinach, accusing Hohfeld for muddying the distinction between rights *in rem* (here, property rights) and rights *in personam* (here, relative rights). The convergence between Reinach and these authors does not end here. Although Penner as well as Merrill and Smith officially identify property as being a right, they are all led to surreptitiously reintroduce the distinction between property and property rights in order to characterize the opposition between rights over things and rights *in personam.* Thus Penner captures the distinction bewteen rights *in personam* and

rights *in rem* by saying that the former "arise by virtue contract" while the second "arise by virtue of ownership" (Penner 1995, pp. 726–728), which tightly corresponds to Reinach's distinction between relative rights stemming from promises and absolute rights stemming from property. Likewise Merrill and Smith write that "property rights attach to persons *insofar as they have a particular relationship to some thing"* (Merrill and Smith 2001, p. 360, italics mine. See also p. 364). In both cases property ceases to *be* a right over things and become instead a *ground* for rights over things: this surreptitious return of the ordinary conception of property among authors who do not officially support it pleads in its favour.

3.3 Property Rights: The Right to Do as You Please with What is Yours

Property rights are thus the absolute non-moral rights to behave in a certain way towards a thing, which arise from the ownership of that thing. But, which behaviours are we talking about? *Any* behaviour, Reinach answers: the owner of a thing has the absolute right to behave towards the owned thing *in the manner he wants:*

> It lies in the essence of owning that the owner has the absolute right to deal in any way he likes with the thing which belongs to him. (*Foundations*, *SW I*, p. 194; English tr. p. 55).

This characterization of property rights may seem too radical: an intuitive objection to Reinach is that we do not in fact have the right to do what we like with what is ours, for at least two reasons:

1. First, we do not always have the *moral* right to do as we like with what is ours. The owner of a masterpiece does not have the moral right to destroy or to modify it. The owner of a gun does not have the moral right to use it against another person unconditionally. The owner of a good which is necessary for the survival of others, and from which he only draws a small marginal utility, does not have the right to deprive others of it.
2. Second, even if we restrict ourselves to property rights, outside of other rights—such as moral rights with which they may conflict—there are still many cases where being the owner of a thing in no way implies the right to behave freely towards it. *Bare ownership* (i.e. ownership without usufruct) corresponds to the most extreme case in which the owner is deprived of *all* property rights on the thing he owns. *Rights of way* are another example, where the landowner is deprived of some of his property rights over his land.

For these two reasons, it does not seems to be true that owners can do whatever they want with what they own.

Reinach consider both problems and provide to each a clear-cut answer. In a nutshell, he answers the first worry by distinguishing *pro tanto* rights from *pro toto* rights (the terminology is not his); and he answers the second worry by introducing a clearly specified *ceteris paribus* clause in front of the essential law according to which property ground property rights. Let us consider these two answers in turn.

Reinach's answer to the first worry is that the absolute rights which stem from property may *conflict* with other obligations and rights, be they legal or moral. A right that conflict with other existing rights is not a non-existent right. Quite the contrary, it is a right *pro tanto*, as opposed to a right *pro toto*. Recall that the absoluteness of property rights *means neither that property rights cannot conflict with other rights, nor that property rights have some absolute priority over the other rights*. This absoluteness only means that property rights have no opposing party. (The manner in which various *pro tanto* rights and obligations—property rights, moral duties, obligations and claims stemming from promises, etc.—are weighted against each other to form *pro toto* rights and obligations is beyond the scope of the *Foundations*.)

Reinach's response to the second worry is that the grounding relation between property and property rights is an essential relation which is not valid in all circumstances, but only *in the absence of certain definite factors*. In the case of property, these factors consist of acts of transferring rights:

> It lies in the essence of owning that all rights belong to the owner *except insofar as they belong to another person as a result of some acts performed by the owner*. (*Foundations*, *SW I*, p. 195, English tr. p. 56, italics mine)

> As we know, from owning there necessarily arise in the person of the owner all the absolute rights over the thing, but this effect of the relation of right can be suspended by the owner granting these rights to other persons. […] the statement that from owning, considered in itself, all the rights over the thing arise in the person of the owner, holds only on the condition that no limiting acts of granting or transferring have been performed by him. (*Foundations*, *SW I*, pp. 250–251, English tr. pp. 113–114)

For instance, in the case of acquiring a piece of land with certain rights of way, the property is transferred, in an impaired state, in the sense that the owner does no get all property rights on it: he readily transfers to third parties the right to cross over his land.

Wrapping up, Reinach's claim that "In virtue of the essence of owning, the owner has the absolute right to deal in any way he likes with the thing which belongs to him" should be understood thus: "In virtue of the essence of owning, the owner has the absolute *pro tanto* right to deal in any way he likes with the thing which belongs to him, *as long as he does not transfer any of his property rights*". But what exactly is a transfer of right?

3.4 Transfer of Property Versus Transfer of Property Rights

Both ownership and property rights can be transferred. They may, but need not, be transferred together and to the same person. One may transfer the ownership of a thing to somebody else while keeping some or all of our property rights over this thing (as when we transfer the bare property of a thing but keep the usufruct). One may transfer some or all of our property rights over a thing while keeping its

ownership of it (as when we keep the bare property of a thing but transfer the usufruct). One may split the rights and transfers them to distinct persons, etc.

In all cases, transferring is a *social act*—that is, an act, usually linguistic, accomplished by a person which essentially requires to be heard and understood by its addressee—which is distinct from a promise. Like the promise, the transfer is immediately legally effective, but unlike the promise, he who transfers does not have to "keep his transfer". Hence, no promise made to a person can make her an owner. If Joe promises to transfer a thing to Paul, then Paul has a claim against Joe for the transfer of the thing, but Paul does not yet have the thing (*Foundations*, *SW I*, p. 149, n. 1, English tr. p. 48 n. 7).

One merit of distinguishing between property and property rights is precisely that this allows to straightforwardly explain the possibility of transferring property rights without transferring property (a possibility that the bundle of rights theory of property struggles to explain):

> We have definitely to hold fast to the thesis that property is itself no right over a thing but rather a relation to the thing, a relation in which all rights over it are grounded. *This relation remains completely intact even if all those rights have been granted to other persons*. (*Foundations*, *SW I*, p. 195, English tr. p. 57, italics mine)

When we transfer certain property rights to another, we do not give up ownership or become "less" of an owner (property knows no degrees). If Julie transfers to Paul the right to use her bike for an hour, Julie remains the full and only owner of the bike, although she loses the right to use it for an hour.

Because it identifies property as a bundle of rights over things, rather than with the ground of rights over things, the bundle of rights theory of property runs into several difficulties according to Reinach. First, if property were a bundle of rights, it would *disappear* as soon as one of these rights was transferred, which is obviously not the case. Second, even if the advocates of such a theory managed to establish that property could be maintained despite certain transfers of rights, property would then be maintained to a *lower* degree. But property does not come by degrees: we either own something or do not own it. Finally, the bundle of rights theory of ownership fails to account for the possibility of *bare ownership* where the owner, for a certain period of time, has no rights over the thing which nevertheless belongs to him.

3.5 Transferring Property Rights Versus Granting Property Rights

A last distinction of importance for a proper understanding of property rights is that between *transferring* (*übertragen*) a right and *granting* (*einräumen*) a right (*granting* being yet another social act). If a person transfers a right, this means that the right belonged to him in the first place, and now belongs to another person. In the case of a transfer, there therefore is a numerical identity of the right which passes from one holder to another. He who transfers a right must first hold it, and can no longer have it once it is transferred. This is not the case with granting a right.

It is possible to grant a right that one does not have, as it is possible to keep a right which one grants. This is easily seen through the following examples:

- *Granting a right which one does not have*: a promisee may grant to the promisor the right to retract (*widerrufen*) his promise. This right to retract did of course never belong to the promisee (how could he ever have had the right to retract a promise he did not made?). But the promisee can nevertheless grant this right to retract.
- *Keeping a right which one grants*: Julie may grant to Paul the right to fish in her pond, without losing her own right to do so.[7]

This distinction applies to rights in general, but applies to property rights in particular. As the second example shows, with respect to non-exclusive uses of a thing—which corresponds to what is nowadays call *non-rival goods* in economics, property rights can not only be transferred, they also can be granted.

Finally, an interesting feature of granted and transferred property rights, Reinach notices, is that if the beneficiary of these transferred rights should disappear, or renounce his rights, these rights do not disappear but automatically revert back to the owner. This is the so-called " elasticity" of property, which, Reinach points out, is another essential law and in no way an "invention" of positive law (*Foundations*, *SW I*, pp. 195, 209; English tr. pp. 56, 70).

4 The Origin of Ownership

4.1 Reinach's View on the Origins of Ownership

Property is thus a natural relation between a person and a thing which grounds, in virtue of its nature, absolute non-moral rights for this person over this thing. The last and crucial question to be tackled here is this: how can a person *become* the owner of a thing? Reinach thinks that some essential law must also govern the origin of property. In the same way that property grounds property rights in virtue of its essence, their must be something in nature, he surmises, which, in virtue of its essence, creates property relation (*SW I,* pp. 212–213, English tr. pp. 72–73). Reinach warns against the possible confusion between the search for *apriori* foundations of property—which he pursues—and three other types of inquiries, which he wants to set aside:

1. *The search for the psychological origin of the concept of property*;
2. *The search for the historical origin of the property relations recognized by positive law*. Reinach offers the example of *usucapio*, that is, the legal practice according to which under certain conditions, having *possessed* a thing during a sufficiently long period of time, entitles us to the ownership of that thing. "It is

[7] These specifities of granting first noticed by Reinach—granting rights which one does not have and keeping rights which one grants—raise important difficulties for the standard theory of economic exchanges which crucially relies on the assumption that exchangeables—which must include rights—are mutually *transferred* (Massin and Tieffenbach, to appear).

immediately clear, Reinach writes, that the *usucapio*, although indispensable for positive law, does not constitute an origin of property according to a law of essence." (*Foundations*, *SW I*, p. 213, my translation).

3. *The search for morally justified conditions of appropriation*. It is all too common, Reinach warns, to conflate such an inquiry with the search for essential laws about the origin of property. Such a conflation is often made with respect to the so-called "labour theories of ownership" prominently defended by Locke, according to which the ownership of a thing arises from mixing one's labour with that thing. Such labour theories, according to Reinach, constitute attempts to establish property relations of a *morally satisfying kind*. They provide no explanations of the essential origin of property: there is no essential relation between labour and ownership.

If usucapio and labour are excluded, what other natural events are essentially such that they engender property? Reinach sees two. We have already encountered the first one: the act of transferring property, which allows one person to become the owner of a thing. This however obviously presupposes that the thing in question already had another owner.

The second way of becoming owner of a thing implies on the opposite that there was no previous owner. It consists in creating (*schaffen*) a thing from materials, which previously belonged to nobody: it is a law of essence, Reinach claims, that created things belong to their creator (until he transferred his ownership). Reinach stresses that this is different from the thesis that property originates with labour. Even when creation requires labour, it is in the essence of creation and not in the essence of labour that the origin of property sits.

4.2 Original Appropriation: Objections to Reinach

However, beyond transfers and creation, Reinach mentions no other natural event that could be at the origin of property in the chapter on property. In particular, Reinach does not explain how a non-created thing that nobody owns for a start may become somebody's property. The only exception, albeit marginal, has to do with creation. Indeed, Reinach seems to accept that that the *matter* which constitutes what is created and which existed before becomes, with the created object, the property of the creator. The sculptor becomes at the same time the owner of the statue and of the marble that constitutes it. Apart from this important but limited case of the materials of creation, Reinach gives not hint as to the original appropriation of something which existed previously. The absence of any explanation of appropriation of land property—a plot, a source, an island…—is particularly striking. Such problems about original appropriation have given rise to to two important objections to Reinach.

The first objection is that *all* plausible candidates to the status of grounds for original appropriation have been excluded by his account, so that Reinach leaves us with an insoluble problem. He explicitly excludes usucapio, labour as well as any historic or moral consideration. Only social acts appear to remain available. But de

Calan argues that even these are offside, as for Reinach, social acts cannot ground rights over things:

> Reinach stresses that the ground of rights over things is precisely not a social act, which means that the theory of social acts has no validity in the foundation of the property relation and of the right over things that stem from it. (de Calan 2008, p. 115, my translation)

The second objection, from DuBois, argues that absent moral considerations (which Reinach, as we just saw, want to leaves aside), our intuition of the essence of property remains desperately silent about its origin:

> Is such an amoral approach to property plausible? If the essence of ownership is necessary, unchanging and highly intelligible, then *we should be able to consider this essence, and then answer very basic questions about the origination of the relationship of owning*. (Dubois 2002, p. 342, italics mine)

But we are not, DuBois argues: no matter how we scrutinize the essence property, it tells us nothing about its origin. Only moral considerations can help us answering the question of original appropriation, *pace* Reinach.

4.3 Original Appropriation: Reinachian Answers

I believe these two objections are wanting. For a start, let us consider DuBois's objection. When Reinach says that the origin of property is governed by essential relations, this does not in anyway imply that looking at the essence of property should reveal its origin, contrary to what DuBois assumes. On the contrary, it is clear that for Reinach it is *the essence of that which grounds property* that must explain its origin, and not the essence of property itself. Consider creation, one source of ownership according to Reinach. It is the essence of creation, not of ownership, that explains that creation grounds ownership: "It lies in the essence of creation that the thing created belongs to its creator" (*SW* I, p. 2013, my translation). In the same manner, it lies in the nature of promise to create obligations and correlative claims; but it does not lie in the nature of correlative claims and obligations to be the result of promises (on the contrary, as we saw in Sect. 2.2, the very same claims and obligations may result from different of natural events: a promise, a robbery…). More generally (as we saw in again in Sect. 2.2), when A grounds B, is it always, in the cases considered by Reinach, in virtue of the nature A. DuBois's error, thus, is to think that when A grounds B, the explanation should be sought on B's side, i.e. in the essence of what is grounded. This is not an absurd view *per se*. The conception of grounding assumed by DuBois has recently been made explicit and advocated by Kit Fine:

> what explains the ground-theoretic connection is something concerning the nature of the fact that [B] (or of what it is for [B] to be the case) and not of the grounding facts themselves. […]It is the fact to be grounded that "points" to its grounds and not the grounds that point to what they may ground. […]

> if the essentialist locus of ground-theoretic connections lies in the fact to be grounded and not in the grounds, then it is by investigating the nature of the items involved in the facts to be grounded rather than in the grounds that we will discover what grounds what. (Fine 2012, p. 76)

Whathever the merits of this approach to grounding, nothing could be further from Reinach's thought. When it comes to grounding legal formations, according to Reinach, it does not lie in nature of what is grounded to be so grounded; rather, it lies in the nature of the grounds (creation, promises, property …) to ground what they ground (property, claims, property rights).[8] When DuBois objects to Reinach that the origin of ownership cannot be read off from its nature, Reinach would fully agree. But he would then point out that this represents no objection to his claim that the origin of ownership must conform to an essential law, for such a law of essence must stem from *the essence of what grounds ownership*, whatever it is, and not from the nature ownership. To investigate the origin of ownership, we should not scrutinize the nature of ownership, but the nature of other natural events amenable to ground it.

But the first objection then becomes all the more pressing: what plausible candidate is still available to ground ownership, once, usucapio, labour and social acts have been excluded? Admittedly none. But contrary to what de Calan maintains, the Reinachian conception of property *does not exclude that social acts may be at this origin of ownerhsip*. De Calan is right to argue that social acts cannot found *rights* over things: only property can (see above, Sect. 3.2). But this does not imply that social acts cannot found *property itself*, which is not a right over things (but the ground of right over things).

We already know that property may be transferred by a social act. The current proposition is that *property also may be created by a social act.* What kind act would that be? I suggest that it is an act of *enactement* (*Bestimmung*). Enactments are social acts through which norms are prescribed or edicted, typically legal norms. Enactments concerning legal formations—such as rights or property, by contrast to enactements concerning natural phenomena, do not only create something that ought to be, but the very being of the formation:

> in the performing of the enactment and in positing one of these entities or structures as something which ought to be *(als seinsollend gesetzt),* the existence of what is thus posited comes about *through the enactment itself*. (*Foundations, SW I*, p. English tr. p. 110)

Reinach clearly anticipates here Austin's performatives and Searle's declarations (see Mulligan 2016). Although in the chapter on ownership Reinach does not mention the possibility of ownership being created through enactments, he explicitly consider a case of the sort in his later chapter on enactements. Independently of any reference to positive law, he writes, two parties may appeal to an arbitrator to settle a dispute. The arbitrator then "prescribes" that one party has a

[8] It is because he anchors the relation of grounding in the nature of grounds rather than in the nature of what they ground that Reinach considers as "very curious" the fact noted above (§2.2) that obligations and claims send us back to their natural foundations.

debt towards the other, but that he also gets the property of a certain thing. In such a case, writes Reinach,

> What is posited by the enactment is not merely something which ought to be and is waiting to be realized, rather it becomes real *at the moment of the positing* and *through* the positing: property and claim exist *in virtue of* the enactment. (*Foundations, SW I*, p. 247, English tr. p. 110)

The enactment in such a case then grounds by its nature the existence of a property relation. Reinach therefore mention not one but two ways in which that which is nobody's property may become owned. The first is to be the material of something created. The second is to be attributed to an owner through an act of enactment.

How may an enactment have such legal power as to give birth to property? Here again, Reinach provides a precise answer. Enactors owe their legal powers to another kind of other social acts: acts of submitting (*sich unterwerfen*). Such acts of submission are performed by the persons for whom the enactment is effective, and their addressee is the person who enacts:

> it belongs to the act of submitting to say in effect to the addressee, "It ought to be as you enact," and thereby to confer on him the power to bring about by enacting legal effects in the person of those who submit to him. (*Foundations*, *SW I*, p. 157, English tr. p. 111)

We then have the following chain of grounding relations: (1) *acts of submitting ground, in virtue of their nature, the power to enact.* (2) *some enactements, ground, in virtue of their nature, ownership relations;* (3) *ownership relations ground, in virtue of their nature, rights over things.*

Such an explanation of original appropriation will not fail to raise the following objection: if property may be created by enactment, in what way is it still a *natural* relation, on a par with, e.g., promises? How is the present proposal to be reconciled with the view introduce above (Sect. 1.2), to recall:

> That a thing belongs to me is a thoroughly "natural" relation which is no more artificially produced than is the relation of similarity or of spatial proximity. (*Foundations, SW I*, pp. 193–194; English tr. p. 54)

To complicate the matter even further, Reinach stresses that property does not come from positive law. Yet he introduces the enactment to explain the origin of positive law. This may suggest that when he says that ownership can be created by enactement, he really has in mind a surrogate for property, some positive-law counterpart of the natural ownership relation was interested into begin with. And if so, the issue of the origin of *natural* property would remain unsolved.

I believe such a reading to be erroneous. Enactments does not create watered down positive-law ownership relations, but *genuine instances of natural ownership*. How then can Reinach argue that property may not be artificially created and at the same time maintain that an act of enactment may create it? To resolve the contradiction, I propose, rather than distinguishing natural ownership form positive ownership, to distinguish the *essence* of ownership from the *existence* of its instances. When Reinach argues that property, being natural, may not be created

artificially, he anticipates Bassenge's objection that what Reinach considers an intuition of the essence of property is in fact but a representation shaped by our history and by our positive law. Against this idea that the nature of property is a construct, Reinach argues that the *essence* of property may not be artificially created or modified. That ownership is a primitive relation between a person and a thing, which grounds rights over this thing is emphatically *not* a construct from history or positive law. Now all this is compatible with the fact that the *existence* of property—the existence of its instances—may be artificially created (by enactment) or modified (by transfer).

To rephrase, an enactment may create an instance of the property relation, but no enactment can prevent property from being a relation between a person and a thing, nor prevent property from creating absolute rights for the owner. Even when instances of the property relation are created by enactments in positive law, their essence remains thus independent of positive law. One should think of the acts of enactment as bringing down to earth the legal essences that live in the platonic heaven. But they may in no case modify the heaven.

Besides avoiding to put Reinach in a contradictory position and making it possible to get out of the impasse concerning the origin of property, the idea that the instantiations of ownership—but not its essence—may find its source in enactments has two additional advantages.

First, it makes it possible to understand how labour, possession or *usucapio* may play a role in the origin of property relations. A we saw (Sect. 4.1), it is *apriori* excluded that these phenomena ground *by nature* relations of belonging. However, an enactment may prescribe that *when* labour, possession, *usucapio* etc. are satisfied by a person in relation to a good, this person then becomes the owner of this good. Under such circumstances, for instance, one may become the owner of a land, *as a result of* having mixed one's labour with a land, but *not in virtue of* having mixed one's labour with the land. Rather, it is in virtue of the *enactment* that edicts that one becomes the owner of a land if once mixed one's labour with it, that one becomes then the owner the land. (*Foundations*, *SW I* p. 249; English tr. 113).

Second, that enactements may create instances of ownership but never modify the essence of ownership makes it possible to reconcile Reinach's realism about ownership with anti-realist or conventionalist intuitions among many of his opponents: it is indeed possible to create ownership relations by using acts of enactment. But although ownership is then *existentially dependent* on such conventions, it still remains *essentially independent* from them and from positive law, in accordance with Reinachian realism.

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