# 8

# The Ontology of Liberties

## *Reconciling Reinach and Hohfeld*

*Olivier Massin*

The year 1913 saw the publication of two foundational works of legal theory: Hohfeld's 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning'[1] and Reinach's A *Priori Foundations of Civil Law*.[2] Hohfeld's paper, introducing his famous taxonomy of rights, proved to be more influential than Reinach's.[3] While Reinach's text has been praised for his pioneering elucidation of social acts (promising, commanding, granting, transferring, allowing, enacting), his thorough accounts of moral and nonmoral rights and obligations, of ownership and of legal representation have all been largely overlooked. This is unfortunate: Reinach's *Foundations* contains a myriad of insights, some of which reveal and permit correction of deficiencies in Hohfeld's taxonomy of rights. In this chapter, I focus on what is arguably the most basic disagreement between Hohfeld's and Reinach's ontologies of rights. The disagreement concerns the kind of rights that Hohfeld calls 'liberties' and Reinach calls 'absolute rights'. Reinach and Hohfeld both argue that the category of right should be divided between claim rights (for instance, claims that ensue from promises) and liberty rights (for instance, freedom of trade). Both characterize claim rights in a very similar manner, emphasizing that claims are necessarily correlated with an obligation of a counterparty. But they disagree on the topic of liberties. Hohfeld assumes from the outset that all rights are relations and maintains consequently that all liberties have correlatives. He calls these correlatives 'no-rights', for lack of a better term. Reinach, for his part,

[1] Wesley Newcomb Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) 23 Yale Law Journal 16.

[2] Adolf Reinach, 'The Apriori Foundations of the Civil Law' (John F Crosby tr, 1983) 3 Aletheia 1, reprinted in Adolf Reinach, *The Apriori Foundations of the Civil Law Along with the Lecture 'Concerning Phenomenology'* (John F Crosby ed, Ontos Verlag 2012), originally published as Adolf Reinach, Die apriorischen Grundlagen des bürgerlichen Rechtes, 1(2) *Jahrbuch für Philosophie und phänomenologische Forschung* (Max Niemeyer 1913), 685–847.

[3] That text was followed in 1917 by a second text with nearly the same title: Wesley Newcomb Hohfeld, 'Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1917) 26 Yale Law Journal 710.

maintains that in contrast to claims, liberties essentially lack correlatives and counterparties, which is why he calls them 'absolute rights'.

Who is right? Do liberties have or lack correlatives? I argue that both Reinach and Hohfeld overgeneralized an initially correct insight: Reinach is right, *pace* Hohfeld, that some liberties are absolute, but wrong that all are. Hohfeld is right, *pace* Reinach, that some liberties have no-rights as correlatives, but wrong that all liberties have such correlatives. The argument will be developed as follows. After having stressed some striking similarities between Reinach's and Hohfeld's ontologies of rights in Section 8.1, I characterize in Section 8.2 the notion of legal correlatives in terms of converse relations. Section 8.3 explains why duties of noninterference cannot be the legal correlative of liberties, a point on which Reinach and Hohfeld agree. I next present in Section 8.4 Hohfeld's proposal according to which the correlative of liberties are no-rights, and defend it against three objections. Section 8.5 argues, this time against Hohfeld, that some liberties, in particular property rights, lack counterparties. Reinach's proposal according to which liberties have no correlatives is presented in Section 8.6 and criticized in Section 8.7. Finally, in Section 8.8, I propose an encompassing ontology of rights which welcomes both relative and absolute liberties.

## 8.1 REINACH AND HOHFELD: SIMILARITIES

Before delving into the main disagreement between Hohfeld and Reinach, it is worth emphasizing some striking commonalities between their two projects. Both consider the legal practices and scholarship of their time to be riddled with confusion. As a result, they both set out to clarify key legal concepts by drawing overlooked distinctions. In doing so, they engage in research from an a priori perspective: both are optimistic that a priori legal reasoning can help disentangle important conflations and discover fundamental distinctions between legal entities. Admittedly, Reinach is more of a committed a priori essentialist than Hohfeld is. Reinach thinks that legal phenomena have essences that can be grasped a priori. Reinach's famous claim that 'Positive law finds the legal concepts which enter into it; *in absolutely no way does it produce them*'[4] finds no counterpart in Hohfeld, who has little patience for metaphysical inquiries.[5] The idea of prelegal rights is not just absent from Hohfeld's approach, but appears to be excluded by his assumption that all jural relations 'take their significance' from positive law.[6]

Yet, Hohfeld also uses essentialist expressions. Hohfeld's repeated claims that legal discussions of his times 'are not founded on a sufficiently comprehensive and discriminating analysis of jural relations in general', and that we should strive for 'clear understanding' of these, presuppose that the relevant understanding is provided

[4] Reinach (n 2) 4.
[5] Hohfeld (n 1) 20, 44.
[6] Hohfeld (n 3) 721.

not by positive law alone, but that some other source of legal knowledge lies beyond positive law. Remarkably, both Reinach and Hohfeld are skeptical of reductive analyses or definitions. They thus both adopt a primitivist approach. In this approach, basic legal entities cannot be reduced to nonlegal entities. This does not mean, however, that nothing can be said about them. Both believe that instead of analyzing into components, one can explain them by bringing out their various relationships with other legal and nonlegal entities. Thus, Hohfeld maintains that rights cannot be strictly speaking defined: they are *sui generis* legal relations. The elucidation of these phenomena is not a matter of defining them, but rather of showing the various relationships that they have with other phenomena:

> The strictly fundamental legal relations are, after all, *sui generis*; and thus it is that attempts at formal definition are always unsatisfactory, if not altogether useless. Accordingly, the most promising line of procedure seems to consist in exhibiting all of the various relations in a scheme of "opposites" and "correlatives", and then proceeding to exemplify their individual scope and application in concrete cases.[7]

Reinach, likewise, maintains that rights cannot be defined and are instead best understood in terms of essential connections between them:

> It is a sign of a philosophically misshapen mind to demand definitions where none are possible or have any value. [. . .] With regard to owning, [. . .] it is not possible to penetrate into it by listing certain immanent elements of it, for we have to do here with something ultimate, with something which is not composed out of other things. It is, as Descartes rightly remarks, "perhaps one of the main errors which one can commit in the sciences to try to define what can only be seen through itself". [. . .] And so we decline to attempt a definition of rights and of obligations.[8]

In this respect, Reinach and Hohfeld both adopt a descriptive approach to the ontology of rights, as contrasted with a reductive one (such as the will theory or interest theory of rights).[9]

The affinities between Reinach and Hohfeld are both substantive and methodological. In their typologies of law, Hohfeld and Reinach often independently arrive at exactly the same distinctions. For example, each emphasizes a distinction between legal phenomena and the nonlegal phenomena that determine legal phenomena. Reinach emphasizes that promises and other social acts are not themselves legal but natural phenomena which nevertheless, by their very nature, ground or generate different kinds of rights.[10] Likewise, Hohfeld insists on the

[7] Hohfeld (n 1) 30.
[8] Reinach (n 2) 65.
[9] Kathrin Koslicki and Olivier Massin, 'A Plea for Descriptive Social Ontology' (2023) 202 Synthese 59.
[10] Reinach (n 2) 13, 81 even uses the fact that some rights can arise from free acts – promises, transfer, orders . . . – to distinguish nonmoral rights from moral ones; the former only can be modified by free acts.

existence of operative facts which 'under the general legal rules that are applicable, suffice to change legal relations, that is, either to create a new relation, or to extinguish an old one, or to perform both of these functions simultaneously'.[11] Relatedly, both insist on the distinction between possession and ownership.[12] However, they disagree on the nature of ownership. For Hohfeld, ownership is a legal phenomenon, a bundle of rights. For Reinach, by contrast, ownership is not a bundle of rights itself, but rather the basis of property rights.[13] Additionally, both Reinach and Hohfeld elaborate the distinction between physical and legal power.[14] Both define legal power as the power to modify the realm or rights:

REINACH: A [legal] power reveals itself in the fact that the action to which it refers, produces an immediate effect in the world of right *(rechtliche Wirkung)*, for example, produces, modifies, or eliminates claims and obligations.[15]

HOHFELD: A change in a given legal relation may result (1) from some superadded fact or group of facts not under the volitional control of a human being (or human beings); or (2) from some superadded fact or group of facts which are under the volitional control of one or more human beings. As regards the second class of cases, the person (or persons) whose volitional control is paramount may be said to have the (legal) power to effect the particular change of legal relations that is involved in the problem.[16]

Reinach and Hohfeld also both distinguish between legal powers and what Hohfeld calls liabilities and Reinach calls (admittedly less systematically) legal abilities (*Fähigkeiten*),[17] that is, the capacities of having one's rights impacted by the social acts of other persons. Finally, and crucially for this chapter, both stress the distinction between claim rights and liberty rights. Moreover, both characterize the correlative of claim rights in the very same way, as we shall see. But liberty rights are also the chief locus of divergence between their ontologies of rights.

## 8.2 THE NOTION OF LEGAL CORRELATIVES

Both Reinach and Hohfeld propose to divide rights into claims and liberties (which Reinach calls 'absolute rights'). Thus, Hohfeld argues that *liberties* (which he also calls *privileges*) should be distinguished from *claims* or *rights* in the strict sense. Reinach draws the very same distinction between claims and absolute rights.

[11] Hohfeld (n 1) 25.
[12] Hohfeld (n 1) 721.
[13] Reinach's position on this matter is presented and defended by Olivier Massin, 'The Metaphysics of Ownership: A Reinachian Account' (2017) 27 Axiomathes 577.
[14] Reinach (n 2) 53. Hohfeld (n 1) 52.
[15] Reinach (n 2) 66.
[16] Hohfeld (n 1) 44.
[17] Reinach (n 2) 92.

A common example of a claim, for each of them, is a promissory or contractual claim. For instance, if Eve promises Bob to come to dinner, Bob has the right to have Eve come to dinner. A typical example of a liberty, for each of them, is a property right. For example, because Eve owns her bike, she has the liberty to use it as she wishes. Other liberties include freedom of speech, trade, movement, and religion. Firstly, let us focus on claims. Reinach and Hohfeld agree that claims have correlatives, which are relative duties or obligations. For example, if Paul is entitled to Julie buying him a beer, then Julie has a correlative obligation to buy him a beer. Similarly, if Margaret has a claim against Bob that he washes her car, then Bob has a correlative obligation to wash her car. Reinach offers a description of the various elements of claims and relative duties that helps us capture their relation:

(i) All claims and correlative duties have a *holder*: they are claims and duties of someone.
(ii) All claims and correlative duties have a *counterparty*, *addressee*, or *destinee*: they are held against/relative to/towards/versus/vis-à-vis somebody distinct from their holder.
(iii) All claims and correlative duties have a *deontic force:* namely, they are either claims or duties.
(iv) All claims and correlative duties have *contents* (Hohfeld also speaks of 'tenor'): they are claims or duties to do something or to get something done.

On the whole, claims and correlative duties are of the form:

1. X has a claim against Y to the effect that Y Fs.
2. Y has a duty towards X to the effect that Y Fs.

Where 'X' and 'Y' stand for the parties, and 'Fs' stands for Y's action (e.g., 'X sings'). The relation between claims and obligations provides a paradigmatic and uncontroversial example of 'correlativity'. But how exactly should we understand the relation of legal correlativity in general? That question is crucial for our present purposes. To determine whether liberties have correlatives or not, one needs to be clear about the nature of correlativity.

Reinach stresses that correlative claims and obligations have the very same content (here: that Y Fs).[18] Accordingly, a first proposal here is that legal correlatives must have the same content (a point which Kramer rightly rehearses in a recent paper).[19] Second, both Reinach and Hohfeld stress that sentences 1. and 2. are related as a matter of necessity. Reinach maintains that it is *essentially* impossible to have the one without having the other (they start and cease to exist at exactly the

[18] Reinach (n 2) 12.
[19] Matthew Kramer, 'On No-Rights and No Rights' (2019) 64 The American Journal of Jurisprudence 213.

same time); Hohfeld makes an even stronger claim as he maintains that 1. and 2. are *logically* equivalent.[20] Strictly speaking, however, 1. does not logically entail 2., nor the reverse. My proposal is that correlativity should be understood in terms of converse relations. Every relation has a converse. The converse of X *is over* Y is Y *is under* X. Likewise, the converse of X *has a claim against* Y *(to the effect that* Y *Fs)* is Y *has a duty towards* X *(to the effect that* Y *Fs)*.[21] On top of clarifying the otherwise elusive notion of correlativity, understanding legal correlatives in terms of converse relations presents three advantages.

First, it helps us make sense of Hohfeld's idea that legal correlatives logically imply each other. Though strictly speaking, legal correlatives are not logically equivalent (*Y has a duty towards* X does not logically follow from X *has a claim against* Y), one can understand the temptation of describing them as logically connected once one thinks about them in terms of converse relations. As plausibly argued by Williamson,[22] converse relations are identical. That is, if 'R' stands for a relation and '$R^C$' stands for its converse, *xRy* (e.g., Bob is shorter than Eve) and *y* $R^C$ *x* (e.g., Eve is taller than Bob) express one and the same fact in two different ways.

Second, the proposal that legal correlatives are converse relations helps us understand why rights without counterparties also lack correlatives: rights without counterparties are monadic, and monadic predicates lack converses.

Third, an understanding of legal correlatives in terms of converse relations explains why some correlatives may lack proper denominations in ordinary language. While English and other languages provide lexical (e.g., taller/smaller) and syntactic (passive voice) ways of expressing converse relations, not all relational predicates have converses. Thus, dyadic predicates such as 'being biased against', 'being infatuated with', 'being conscious of', 'being at the disposal of', 'having a reservation against' lack converses. The only way to express their converses is to use periphrases, such as 'being the object of the infatuation of' or to introduce new terms (e.g., 'Let us now say that when x is infatuated with y, y "fatuates" x'). 'Having a liberty right relative to' is arguably a predicate of this sort, which is why Hohfeld has to introduce the neologism 'no-right' to express its converse.

## 8.3 CORRELATIVES OF LIBERTIES ARE NOT DUTIES OF NONINTERFERENCE

We are now able to address the question raised by Hohfeld: what are the logical correlatives of liberties? One natural proposal is that the correlative of Bob's freedom

[20] Hohfeld (n 1) 36.

[21] Substantially the same point is pressed by Davis Lyons, 'The Correlativity of Rights and Duties' (1970) 4 Noûs 45. Consequently, it is possible to build a logic of claims and relative obligations, by retaining only one of these as our primitive, and by introducing the other thanks to a definition from the first, as proposed by Stig Kanger and Helle Kanger, 'Rights and Parliamentarism' (1966) 32 Theoria 85.

[22] Timothy Williamson, 'Converse Relations' (1985) 94 The Philosophical Review 249.

to F is everyone else's duty not to interfere with Bob's F-ing. This proposal is rightly rejected by Hohfeld, albeit for two reasons that are not quite convincing. After presenting them, I shall advance two more straightforward reasons to reject the view that duties of noninterference are correlatives of liberties.

Hohfeld's first argument is that there could be liberties without duties of noninterference, for positive law may not recognize such obligations.[23] For example, it is conceivable that Eve has the freedom to use her bicycle, while Bob has no duty not to interfere with Eve's use of her bicycle. Hence, Hohfeld concludes, duties of noninterference cannot be correlatives of liberties. But this argument is wanting. Admittedly, in such cases there are no correlative duties recognized by positive law. Nevertheless, it could be argued that there is a prelegal duty of noninterference. In order for this argument to be convincing, it must be assumed that there are no prelegal or natural rights. This is a debated assumption, and it would be best to avoid relying on it.

Hohfeld's second argument does not rely on such an assumption. Suppose Eve allows Bob to use her bicycle, saying to him: 'You can use it if you like, but I'm not obliged to let you use it: if I'm the first on it, too bad for you.' In such a case, Hohfeld argues, Bob is free to use Eve's bike, but Eve is under no obligation to let Bob use her bike. Thus, Bob's freedom is not correlated with any duty of noninterference, legal or prelegal. However, proponents of the view that duties of noninterference are correlative with liberties are unlikely to be convinced. They might reply that sentences like 'You can use it if you like, but I don't commit to letting you use it' (or Hohfeld's 'Eat the salad if you can; you have our license to do so, but we don't commit to not interfering with you.') are problematic: if you let someone use something, you thereby commit, or so they claim, not to interfere with his use of the thing.

Can we find more compelling reasons to reject the view that duties of noninterference are correlatives of liberties? Why is A's liberty to F not equivalent to other people's duties not to interfere with A's F-ing? There is one reason to reject the left-to-right entailment, and two reasons to reject the right-to-left entailment.

The reason to reject the left-to-right entailment is that the content of duties of noninterference includes a notion of interference absent from the content of the corresponding liberty. This is problematic because, as we saw, legal correlatives must have the same content (otherwise, they cannot be converses of each other).

On the other hand, there are at least two reasons for rejecting the implication from duties of noninterference to liberties. First, the correlative of duties of noninterference (assuming such duties are relative) are not duties but claims. Consider Mary's duty not to interfere with Bob's singing. The correlative of this duty is not Bob's freedom to sing, but Bob's claim not to be prevented from singing by Mary (by the correlativity of claims and relative duties). Second, Mary's duty not to prevent

[23] Hohfeld (n 1) 36–7.

Bob from singing does not entail Bob's freedom to sing, because we may be prohibited (morally, legally, positively) from interfering with someone's action even if that person has no freedom to act in that way. Suppose I walk on the grass when it is forbidden to do so. The fact that you see me breaking this rule does not give you the license to prevent me from walking on the grass. So, the duty not to interfere with someone's action does not automatically entail that the person has the right (liberty) to act as he does.

To sum up, duties of noninterference are not logical correlatives of liberties because (i) the notion of interference is absent from the content of liberties; (ii) the correlatives of duties of noninterference are claims, not liberties; and (iii) everyone's duty not to interfere with my action does not entail my liberty to take that action. One might turn to a looser notion of correlativity to claim that duties of noninterference are correlatives of liberties in a broader sense. Thus, Thomson argues that genuine liberties (which she distinguishes from mere privileges) must have duties of noninterference as correlatives.[24] But if we stick to Hohfeld's original program of mapping 'logical' correlatives, such a proposal must be rejected.

What, then, is the relation between liberties and duties of noninterference, if they are not correlatives? One possibility, touched upon by Hohfeld and made explicit by Reinach is this: Bob's liberty to sing partly *explains* or *grounds* Bob's claim not to be prevented from singing. It is partly because Bob has the liberty to sing that Mary has the duty not to prevent Bob from singing. Reinach develops the proposal as follows:

> one could also say – although we are not ready to venture such an assertion – that the subject of absolute rights [i.e. liberties] has a claim on all persons to respect his rights and not to violate them. Even if this were so, it would not mean that absolute rights *are* nothing but universal rights against all persons, but only that they have such rights *as a consequence*.[25]

According to this proposal, the relation between Bob's liberty to sing and Mary's duty not to prevent Bob from singing is explanatory, and therefore asymmetrical, as opposed to the symmetrical relation between logical correlatives.

## 8.4 HOHFELD: CORRELATIVES OF LIBERTIES ARE NO-CLAIMS

So far, Hohfeld and Reinach agree: duties of noninterference are not correlatives of liberties (in the strict, logical sense of legal correlatives). Hohfeld however, maintains that logical correlatives of Bob's liberty to sing are the 'no-rights' of third parties that Bob does not sing (a proposal that Reinach would reject). The term 'right' is meant here in the sense of a claim: a 'no-right' is indeed a 'no-claim'. So, if Bob has the liberty to sing, relative to Mary, Mary does not have the claim that Bob does not

[24] Judith Jarvis Thomson, The Realm of Rights (Harvard University Press 1990) 53.
[25] Reinach (n 2) 52.

sing, relative to Bob. Generalizing Hohfeld's proposal, we get the following pairs of correlatives:

3. X has a liberty relative to Y to the effect that X Fs.
4. Y has a no-claim relative to X to the effect that X does not F.

Three objections to Hohfeld's notion of 'no-rights' can be raised. Since I shall argue that *some* liberties have no-rights as correlatives, I need to answer them.

(Bad) *Objection 1: ad hocery*. Faced with the problem of finding correlatives for liberties, Hohfeld forges a neologism. This seems *ad hoc*. But note that Hohfeld readily concedes that 'no-right' is a term of art. The reason why Hohfeld is justifiably nonplussed becomes clear once correlatives are understood in terms of converse relations: as noted above we should not expect all converse relations to be readily expressible in ordinary language. Every relation has a converse, but not every converse has a morpheme in ordinary language. 'Having a liberty relative to' is one relation of this sort.

(Bad) *Objection 2: reifying a negation*. 'No-right' is a negation, indicating merely the absence of a right.[26] Contrast correlative claims and duties: one party has a claim, and the counterparty a duty, such that there is clearly something – some normative position – that each party has relative to the other. But in the present case, one party has a liberty while the other, instead, lacks a claim. If some person lacks something (here, the normative position of holding a right), ascribing to her possession of a negative entity ('no-right') seems awkward. Lacking a hat is not having a no-hat; by parity, lacking a claim should not be equated with having a no-claim. The answer to this objection is quite straightforward once legal correlatives are conceived in terms of converse relations. Indeed, if, as proposed above, converse relations represent no addition of being, the sentences 'Bob has the liberty to sing relative to Eve' and 'Eve has a no-claim that Bob does not sing' express one and the same relational fact in two different ways. Despite the 'no-claim' nominalization it contains, the second sentence does not quantify over an absence of claim, but over the presence of a liberty. It just describes that liberty from the point of view of its counterparty, while the first sentence describes it from the point of view of its holder.

(Bad) *Objection 3: violation of the requirement of same content*. Recall that one central feature of legal correlatives is that they have identical contents. The correlative of Mary's claim (that Bob sings) is Bob's duty (that Bob sings). This same content requirement is crucial to understanding the logical equivalence between legal correlatives. The violation of this requirement was one of the reasons for rejecting the view that duties of noninterference are correlatives of liberties. However, so the third (bad) objection goes, the view that no-rights are correlatives

[26] See Heidi Hurd and Michael Moore, 'The Hohfeldian Analysis of Rights' (2018) 63 American Journal of Jurisprudence 307.

of liberties also violates the same content requirement: the correlative of Bob's liberty (that Bob sings) is Mary's no-right (that Bob does *not* sing). One content is the negation of the other. To answer that important worry, I suggest a slight modification of Hohfeld's original proposal. Instead of saying that no-claims are the correlatives of liberties, we should say that the correlative liberties are *no-claim that not* (or better: *no-claim-that-not*). That is, the correlative of Bob's liberty (that Bob sings), would be Mary's no-claim that is it not the case (that Bob sings). To satisfy the same content requirement, we have moved the negation outside the content of the correlative, so as to make it a constituent of the correlative itself. Thus, instead of having the two following correlatives, as per Hohfeld's original proposal:

5. X has a liberty relative to Y to the effect that (X Fs).
6. Y has a no-claim relative to X to the effect that (X does not F).

We now have two pairs with the same content:

7. X has a liberty relative to Y to the effect that (X Fs).
8. Y has, relative to X, a no-claim-that-not (X Fs).

This satisfies the same content requirement while preserving Hohfeld's original insight. One might object that putting the negation on the side of the deontic connective rather than in its content is spurious. But such a move is far from unprecedented. It is endorsed, for instance, by those who think, following Reinach, that *disbelieving that p* and *believing that not p*, though logically equivalent, are distinct.[27] Likewise, closer to our topic, it is endorsed by those who think that *being obligatory that not p* and it *being impermissible that p* are equivalent, but nonetheless distinct.

Kramer has recently argued along similar lines that legal correlatives must have the same content.[28] How does the present proposal relate to his? According to Kramer, the correlative of *X's liberty to enter the land* is '*Y's no-right concerning X's entering the land*'. But how exactly should this formulation be understood? Kramer insists that it should not be understood to mean that Y has no right that X does not enter the land. How is it to be read, then? In particular, what has happened to the negation in the rejected formulation? Has it been dropped altogether? Or has it been moved within the 'no-right' connective?[29] In the first case, it is hard to see how there

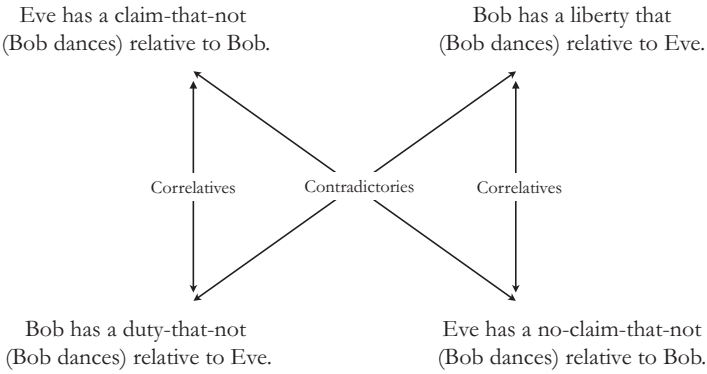
[27] Adolf Reinach, 'On the Theory of Negative Judgment' in Barry Smith (ed and tr) *Parts and Moments. Studies in Logic and Formal Ontology* (Philosophia Verlag 1982) 333; originally published as Zur Theorie des negativen Urteils, *Munchener Philosophische Abhandlungen*, Festschrift for T Lipps, A Pfander (ed) (Barth, 1911) 196–254.

[28] Kramer (n 19).

[29] A similar concern is expressed by Andrew Halpin, 'No-Right and Its Correlative' (2020) 65 The American Journal of Jurisprudence 147.

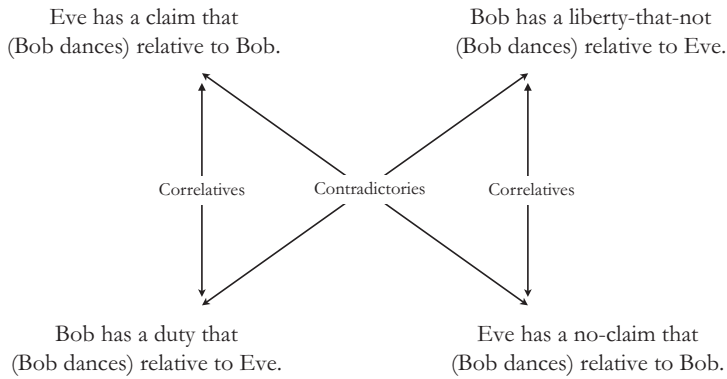
can be a necessary equivalence between no-rights and liberties: Bob's liberty to dance, relative to Eve is not equivalent to Eve's no-right that Bob dances, relative to Bob. In the second case, Kramer's proposal and the present one are indeed one and the same. Let us assume that it is so.

Even so, there remains one point of divergence between Kramer's picture and the present one. Kramer maintains that liberties and duties are not contradictories but 'duals' because they do not have the same content. Bob's liberty to dance is opposed to Bob's duty not to dance: the content of the one is the negation of the content of the other. I would like to suggest, following an early suggestion by Mullock,[30] that once the idea of moving the negation from the content to the connective is taken on board, it is easy to apply the same content requirement to the whole Hohfeldian table (which Kramer rejects), in order to get a clearer picture of the logical relations between legal connectives:




By neutralizing variations in content, such a picture, I submit, better captures the logical relations between the legal concepts themselves. Admittedly, we then get unusual expressions for legal concepts: 'duty-that-not', 'claim-that-not', and 'no-claim-that-not'. But note that *Bob's having a duty-that-not (Bob dances)* amounts to *Bob's having a prohibition that (Bob dances)*. In other words, we usually allow a distinction between positive duties and negative duties (i.e., prohibitions). This is not a content-based distinction: the same content can be obligatory or impermissible. The proposal is to extend this distinction to claims (so that positive claims must be distinguished from negative claims, or claims-that-not), but also to no-claims and liberties. Thus, with liberties-that-not, we get the following square:

[30] Philip Mullock, 'The Hohfeldian No-Right: A Logical Analysis' (1970) 56 Archives for Philosophy of Law and Social Philosophy 265.




To be clear, none of this is meant to preclude the view that negative legal connectives can be reduced to positive connectives with negative contents, for example, that the *liberty-to-not pay*, can be reduced to the *liberty not to pay*; or that the *prohibition to sing* (i.e., the *duty-to-not sing*) can be reduced to the *duty not to sing*, just as, according to some, *disbelieving that p* amounts to *believing that not p*. But the point is that these are *reductions*, and that, insofar as we are interested in *describing* the logical connections between legal connectives, we should eschew any reductionist commitments.

In conclusion, Hohfeld's view that 'no-claims' are correlatives of relative liberties, once interpreted in the light of the proposal that liberties and no-claims are converse relations, turns out to be neither ad hoc, nor committed to reifying absences, nor incompatible with the idea that legal correlatives must have the same content. I conclude that Hohfeld's proposal is coherent.

## 8.5 OBJECTIONS TO HOHFELD: PROPERTY RIGHTS

Why, then, should we not accept Hohfeld's amended proposal that every liberty is correlated with a no-claim-that-not? The (Reinachian) view I will defend in this section is that property rights have no counterparties (and hence no correlatives). Such a possibility has been largely overlooked. Even those legal scholars who rightly emphasize the qualitative distinction between rights *in personam* and rights *in rem* (which include, first and foremost, property rights) take it for granted that both kinds of rights have counterparties.[31] Here are three objections to the view that all freedoms have counterparties.

[31] See in particular James E Penner, *The Idea of Property in Law* (Oxford University Press 1997); Thomas W Merrill and Henry E Smith, 'What Happened to Property in Law and Economics?' (2001) 111 Yale Law Journal 357; Thomas W Merrill and Henry E Smith 'The Property/Contract Interface' (2001) 101 Columbia Law Review 773.

*Objection 1: from number of property rights*. The liberty rights that attend owning something (whether such rights are grounded in ownership, as per Reinach, or constitutive of ownership, as per Hohfeld) are, under Hohfeld's proposal, liberties that are relative to every other person, *ceteris paribus*. If Bob owns a car, he has, *ceteris paribus*, the liberty to use it as he sees fit, and that liberty is relative to Eve, Max, you, me, and every other person. (The *ceteris paribus* clause is needed, for Bob may have, for instance, promised to Eve not to use his car.) As a result, we all have a no-claim that Bob does not use his car as he wants. Let us now ask what happens to Bob's liberty to use his car when other persons come into being or pass away. There are two equally unappealing options.

The first option, arguably endorsed by Hohfeld, is to claim that Bob has as many liberties as there are other persons: one liberty to use his car for each counterparty.[32] This implies that when Eve dies, Bob loses one such liberty. To make the situation more vivid, suppose Bob knows nothing at all about Eve, who lives in another region. How could Eve's dying be relevant to Bob's right(s) to use his car? Suppose, likewise, that a new person is born, whom Bob will never meet. This would mean that Bob gains a new right to use his car. Again, this seems odd: it does not seem appropriate to suggest that Bob gains or loses liberties to use his car with every variation in human population.

According to the second option, Bob has just a single liberty to use his car, but that this liberty is relative to all other persons in the world (or in the legal system at stake), independently of any variation in the number of those other persons. This need not be read as entailing the liberty relation has as many places as they are counterparties (i.e., that liberty is sometimes dyadic, sometimes triadic, sometimes n-adic, according to the number of counterparties); more plausibly, the liberty could be seen as a constantly dyadic relation between its holder, on the one hand, and the plurality of its counterparties, on the other hand. That proposal, contrary to the previous one, does not imply that when the population increases, Bob's liberties to use his car increase proportionately. But it does imply that when a population increases, Bob's single liberty to use his car in a way becomes greater. But this is implausible. On this view, Robinson on his island would not be free at all to use a tool he built until the arrival of Friday. When Friday arrives, Robinson would gain the liberty to use that tool, although that liberty would be of the lowest possible level – Friday being but one person. Robinson would have a greater degree of liberty to use the tool when returning to a populous England. This all sounds rather counterintuitive: Robinson, Reinach would have it, has always been free to use his

[32] Hohfeld (n 3) 740 endorses this option when it comes to claims directed at several persons. Such claims, he maintains, should be understood as several claims, rather than as one single claim held against many persons. So, he would arguably endorse this same option when it comes to liberties.

tools; changes in his social environment have never altered his freedom (although they have certainly affected the likelihood of his freedom being interfered with).

*Objection 2: from the transfer of property rights.* To introduce the second objection let us briefly return to claim rights. Eve promises Bob that she will eat. As a result, Bob has a claim right against Eve that she eats. Now, Bob cannot unilaterally transfer that claim to Ralf: to transfer the claim, he needs Eve's consent. This is because Bob's claim is relative to Eve: both must consent to change it. Now consider Bob's liberty right to use his car. That right, on Hohfeld's proposal, is relative to all other persons who, correspondingly, have no-claims that Bob refrain from the use of his car. Suppose now that Bob decides to transfer his right to use his car to Eve, by lending his car to her for one week. As a result, Eve has the liberty right to use Bob's car for one week. Eve's newly gained liberty right is, according to Hohfeld's proposal, correlated to all other persons' no-claims that Eve does not use Bob's car. Hence the no-claims of all the other persons have been changed from no-claims that Bob refrains from the use of his car, to no-claims that Eve refrains from the use of Bob's car. Shouldn't all these people have a say on Bob's transfer? After all, this transfer affects their deontic status. If the addressees of claim rights have to give their consent to the holder's transfer of these rights, why mustn't the addressees of liberty rights consent to the holder's transfer of such rights as well? That consequence of the view that all liberty rights are relative rights, and therefore have correlatives, is very odd: surely, we are not violating any obligation when we lend our bike to a friend without asking for the authorization of everyone. One possible answer is that claims require the consent of third parties, but liberties do not. But such an answer seems ad hoc: why should it be the case that claims relative to Bob should require Bob's consent to be transferred, but not liberties relative to Bob? It is hard to think of any relevant difference between the two cases that would justify such an asymmetry. Such a difference would perhaps appeal to the fact that Bob tends to be more prejudiced in the first case than in the second, but it is far from obvious that this has to be the case in general.

*Objection 3: from absolute obligations.* The third objection does not appeal to property rights but challenges the idea that the absence of counterparties' claims implies the party's liberty (which should be the case, since correlatives are equivalent). Consider for simplicity a world with only two people, Bob and Ida. Can we conclude from the fact that Ida does not have a claim to the effect that Bob does not sing, that Bob has the liberty to sing? Not necessarily. For this to hold, one must assume that absolute obligations – obligations lacking any counterparty, that is, obligations which are not obligations *to* someone – are impossible. But that assumption is quite controversial.[33] Bob may be under some absolute duty not to sing. For

[33] Absolute obligations are defended, among others, by Reinach (n 2); Joel Feinberg, 'Duties, Rights, and Claims' (1966) 3 American Philosophical Quarterly 137; Margaret Gilbert, Rights and Demands: A Foundational Inquiry (Oxford University Press 2018); David Lyons, 'Rights,

this objection to work, it is enough to show that absolute obligations are possible, since no-claims are meant to entail liberties in all possible cases. Hohfeld, therefore, must deny the possibility of absolute obligations. But doing so undermines the appeal of his proposal.

Consider general duties not to kill, not to damage works of art or not to destroy landscapes in the absence of strong countervailing reasons. To many, such duties are not only possible, but also actual. One answer would be that we owe it to the person not to kill him or her; that we owe it to the landscape not to destroy it. But, as Reinach 'emphatically stresses', we should not confuse the addressee of the content of a duty with the addressee of that duty (if there is one).[34] Hence his assertion that such duties are not directed to persons. The proponent of the view that all duties are relative certainly has several maneuvers at his disposal to counter this claim. He can argue, for example, that we owe it to actual or potential beneficiaries of the landscape (which may include future humans) not to destroy it; that we owe it to the artist (who may be dead) not to destroy his work; that we owe it to any other human or to God not to kill any human, etc. The present argument, however, is not premised on the idea that there are absolute duties; it only makes the weaker claim that, since absolute duties make sense, they should not be made impossible by our taxonomy of rights. Yet they are made impossible by Hohfeld's view that liberties and no-claims are equivalent.

These problems disappear if one agrees that some liberties, such as property rights, are absolute instead of relative, as Reinach argues. So, let us now turn to his account.

## 8.6 REINACH: LIBERTIES HAVE NO CORRELATIVES

So far, we have argued that duties of noninterference cannot be the correlative of liberties, and that in some cases at least, no-rights are not correlatives of liberties either. What then are the correlatives of liberties? Reinach maintains that there are none: liberties are absolute rights, by which he means that liberties lack any correlative. Hohfeld assumes from the outset that all rights are relations between two parties: the holder of the right and a counterparty. Such an assumption is rejected by Reinach, who stresses that both rights and obligations come in two types, relative and absolute:

> Claim and obligation necessarily involve a bearer and a content. The direction against another person, by contrast, is not necessarily connected with them.

Claimants, and Beneficiaries' (1969) 6 American Philosophical Quarterly 173; Gopal Sreenivasan, 'Duties and Their Direction' (2010) 120 Ethics 465; Thomson (n 24) 61–4; Siegfried Van Duffel, 'The Nature of Rights Debate Rests On a Mistake' (2012) 93 Pacific Philosophical Quarterly 104.

[34] Reinach (n 2) 76. An analogous claim is made by Hohfeld (n 3) 721–22 about rights, when he urges not to conflate rights *in rem* with right against things.

> There is indeed the a priori law that every obligation which exists over against another implies a corresponding claim of this other, and every relative claim implies a relative obligation. But this relativity of claim and obligation is nothing necessary; there are absolute obligations and absolute claims, or better, absolute rights.[35]

Reinach's absolute rights correspond to Hohfeld's liberties. An *absolute* right (or obligation), Reinach stresses, is not a *universal* right (or obligation), in the sense of a right (or obligation) relative to every other person. To have the absolute right to F does not mean to have the right to F relative to everybody. Quite the contrary, absolute rights (and obligations) are absolute in the sense of having one bearer but lacking any opposite party (*Gegnerschaft*):

> The absoluteness of rights and obligations means the *absence* of every relation to a partner, and not its *universality*, that is, not the fact that the so-called absolute rights and obligations exist over against *all* persons in contrast to the obligatory rights and obligations, which are tied to a *single* person.[36]

Because absolute rights lack counterparties, they lack correlatives: the claim that Eve has against Bob is equivalent to a duty of Bob towards Eve; but Eve's absolute right to F, because it is not a relation to another person, cannot be equivalent to a deontic property of someone else. The core essential feature of absolute rights, Reinach maintains,[37] is their reference to one's own action. Relative rights, by contrast, always refer to another's action. One can have the freedom to express one's opinion, but one cannot have the freedom that somebody else express his opinion. By contrast, relative rights never bear on one's own action (that would be 'contradictory' according to Reinach):[38]

> absolute rights, which also presuppose only one person, their bearer, but do not need any second person over against whom they would exist. But obligations and rights do differ in an essential point: whereas obligations by their very nature refer only to one's own action, and this whether they are relative or absolute, we have to distinguish two different cases with regard to rights. Relative rights can only refer to the action of another, absolute rights, by contrast, always refer to one's own action. Rights which, though they are over one's own action, exist only over against some person seem to us just as impossible as rights to (claims on) the action of another which do not exist over against this other.[39]

[35] Reinach (n 2) 12.
[36] ibid 52.
[37] ibid 12, 51, 58, 66.
[38] ibid 120.
[39] ibid 13.

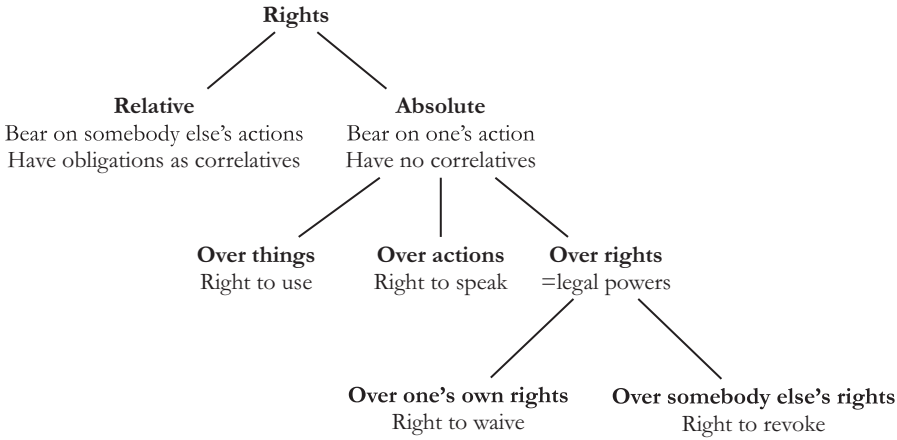
That absolute rights always refer to the actions of their holders allows Reinach to distinguish between at least three kinds of absolute rights. The first are the rights over things or property rights, which are the rights to use things. All rights over things arise ultimately, Reinach contends, from ownership.[40] The second kind of absolute rights are the rights to perform certain actions which do not consist in using things: these are actions such as moving, expressing one's opinion, or the moral right 'of the free development of one's personality'.[41] These absolute rights are not grounded in a relation of ownership, but in the person as such. The third kind of absolute rights mentioned by Reinach are rights over rights, that is, the right to perform actions which modify rights. These come in two sub-kinds:[42] the rights over one's own rights, such as the right to waive one's claims, and the right over somebody else's right, such as the right to revoke another's right.

> Just as we have learned that rights over things are absolute rights to some action of mine directed to the things, so we have to see that rights over rights are rights to some action of mine directed to rights.[43]

Note that the way Reinach describes rights over rights is strikingly close from the way he characterizes legal powers a few pages later.[44] One question is whether he intends to draw a distinction, and another is whether he could draw it in a convincing way. There is reason for doubt on both questions. What would distinguish them is unclear: both have content directed to the action of their holder which produces an immediate effect in the world of rights, both are absolute.[45] Reinach writes, besides 'This *power or right* to transfer is a *power or right* over one's own right' (italics mine).[46] If Reinach indeed equates powers with (absolute) rights over rights, then a further divergence between Reinach's and Hohfeld's typologies of rights appears. While Hohfeld sees legal powers as a new kind of legal phenomenon on top of claims and liberties, Reinach equates legal powers with a sub-kind of liberties.[47] I shall not explore this important difference further here.

[40] ibid 56.
[41] ibid 81.
[42] ibid 63.
[43] ibid 64.
[44] ibid 66. See Section 8.1.
[45] ibid 55.
[46] ibid 67.
[47] Albert Kocourek ('The Hohfeld System of Fundamental Legal Concepts' (1920) 15 Illinois Law Review 24) notes that Hohfeld sometimes confuses liberties with powers and suggests that the two might in fact overlap.

Reinach's typology of rights can be represented thus:[48]




We have mentioned so far three essential differences, according to Reinach, between relative rights (that is, claims) and absolute rights (that is, liberties):

(1) Relative rights are directed towards another person, whereas absolute rights are not.
(2) Relative rights have correlatives, whereas absolute rights have no correlatives.
(3) Relative rights concern the action of another person, whereas absolute rights concern one's own action.

Reinach advances six other, related, essential differences between claims and absolute rights:

(1) While a claim can be *fulfilled* an absolute right can only be *exercised*. It is impossible to exercise a claim, or to fulfill an absolute right.
(2) Relatedly, a claim is awaiting or 'aiming at' its fulfillment, while an absolute right 'is something definite, something resting in itself'.[49] This may be compared to active and passive dispositions: active dispositions, such as the force exerted by a magnet, tend to bring about their effect unless prevented from doing so; passive dispositions, such as the fragility of a piece of glass, remain latent unless triggered.
(3) While a claim, in virtue of its nature, ceases to exist when fulfilled,[50] an absolute right typically survives its exercise.

[48] I here ignore the distinction between moral and nonmoral rights; Reinach's more complete ontology of rights is presented in Massin (n 13).
[49] Reinach (n 2) 58.
[50] ibid 14, 32.

(4) While any claim may be waived,[51] absolute rights can only be waived in special cases. The owner of a thing, for instance, cannot waive his right to use it. He may at best transfer or grant that right to another person or transfer his ownership altogether. One may, however, waive one's absolute right to use the things owned by another person (when that person lends them to us for instance).
(5) Relatedly, while claims cease to exist when they are waived, waiving one's right to use a thing owned by another person does not destroy that absolute right, but returns it to the owner.[52]
(6) While absolute rights can sometimes be transferred by their holder without further condition (the owner of a thing may lend it, that is, transfer or grant the right to use to another person),[53] claims can only be transferred with the agreement of a counterparty.[54] If Eve has as a claim against Bob to the effect that Bob sing, Eve cannot transfer that claim to Dan without Bob's consent.

These nine essential differences between absolute and relative rights, according to Reinach, are recapped in the following table:

| | **Relative rights (claims)** | **Absolute rights (liberties)** |
|---|---|---|
| *Content* | Bear on the action of another | Bear on one's action |
| *Parties* | Have opposing parties | Lack opposing parties |
| *Correlatives* | Have relative obligations as correlatives | Lack correlatives |
| *Satisfaction* | Are fulfilled | Are exercised |
| *Dynamics* | Tend towards their fulfillment | Rest until they are exercised |
| *Duration* | Cease to exist when fulfilled | Continue to exist while being exercised |
| *Waiving (1)* | Essentially can be waived | Sometimes cannot be waived |
| *Waiving (2)* | Cease to exist when waived | Do not cease to exist when waived |
| *Transferring* | Can only be transferred with the consent of the counterparty | Can be transferred without any consent of the counterparty |

[51] ibid 33.
[52] ibid 56, 70, 75.
[53] ibid 66–7.
[54] ibid 75–80.

Reinach does not just provide an alternative to Hohfeld's account of liberties. He also explains why we are tempted to mistakenly believe that liberties are directed towards others.

First, absolute rights may have their source in another person.[55] Thus the owner of a thing may grant to another person the absolute right to use that thing.[56] Bob may grant to Mary the right to use his bike. In such a case, the right (liberty) which Mary gets is not relative to Bob.[57] Likewise, the social act of allowing somebody to do something results, Reinach contends, in that person having the absolute right to do it.[58] The destinee of the act gets that right thanks to the author of the act, but his right is not directed to the author.

Second, as pointed out above, the fact that absolute rights may refer to another person in their content does not mean that they are directed towards that person. The right to make promises to other people (by contrast to rights generated by promises themselves) is not directed towards anybody.

Third, absolute rights and relative rights may be related in different ways (by essential or positive laws) which may lead to confusion. Thus, if an absolute right is related to a relative right, it is easy to confuse the third party of the relative right with a supposed third party of the absolute right. A first example stems from cases in which the positive law provides for a claim of compensation when an absolute right is violated.[59] In such cases, it is the compensatory claim that is directed, not the underlying absolute right. A second example is the right of lien. A lien is an absolute right on a thing that is used to secure a claim.[60] If Eve does not fulfill Bob's claim by not giving his money back, Bob becomes entitled to use Eve's car (an absolute right). Bob's claim is directed, but the absolute right it secures is not directed. In the first example, a violation of an absolute right gives rise to a claim; in the second example, an absolute right secures a claim. In none of these examples is the absolute right a directed right, although it is easy to mistake the direction of the claim for a direction of the connected absolute right.

## 8.7 OBJECTIONS TO REINACH: ALLOWING

For all its acuity, Reinach's account of absolute rights overlooks the distinction between absolute and relative liberties. By maintaining that all liberties are relative,

[55] ibid 52.
[56] ibid 119.
[57] Couldn't we answer that in such a case, Mary is granted a claim to use Bob's bike? No, answers Reinach (n 2) 120 for claims are essentially related to the action of another; claims to one's own action are contradictory; at best, Mary may have the claim *not to be prevented by others* from using Bob's bike.
[58] ibid 120.
[59] ibid 52.
[60] ibid 59.

Hohfeld, we saw, cannot properly accommodate absolute liberties that arise from ownership. Analogously, I shall now argue, by maintaining that all liberties are absolute, Reinach encounters difficulties when it comes to social acts such as allowing, which arguably give rise to relative liberties.

Let us first get clear on the social act of allowing. Reinach maintains that allowing is a distinct kind of social act that not only needs to be heard by another person, but that is also addressed to another person, in virtue of which that other person gains the absolute liberty to perform a certain kind of action.[61] This characterization, I believe, is nearly correct: its only flaw is to assume that the liberty given to the addressee is absolute. Here are two objections that show that the liberties generated by that act of allowing are relative.

*First objection: allowing and transferring.* Max is the owner of a piece of land and hence has, *ceteris paribus*, the liberty right to use that land. The right to use what is ours, Reinach correctly argues (*pace* Hohfeld), is absolute. Suppose that Max allows Eve to use his land. As a result, Eve also has the liberty right to use the land. Max's and Eve's liberties are numerically distinct, because though they have the same content, they have different holders. But these liberties also appear to be distinct in kind: while Max is entitled, tout court, to use the land, Eve is entitled to use the land only relative to Max.

One way to bring out this distinction is to consider the conditions under which liberties can be transferred. As Reinach points out, Max, the owner of the land, can transfer the right to use that land without third-party consent, while Eve, who has been granted that right by Max, cannot do the same: she needs Max's green light to do so. Why? On Reinach's view, the nature of these liberties is *ex hypothesi* the same and hence cannot explain the difference. We must refer instead to the origin of the liberties: while Max's liberty to use his land stems from his ownership of the land, Eve's liberty to use Max's land stems from Max having allowed her to do so. But it is unclear why a right's history should make any difference to how it now 'behaves'. Under the present proposal, by contrast, there is no need to investigate the genesis of liberties to understand why some are transferable and others not. This difference in transferability is due to an essential difference between these liberties: absolute

[61] ibid 120. Reinach is not quite explicit about this, but there are strong Reinachian reasons for considering allowing someone to do something as a kind of granting of an absolute right to someone. Indeed, Reinach (n 2) 68 distinguishes between the transfer of rights, where the transferred right is lost by the transferor, and the granting of rights, where the granted right is not lost by the granter, either because he never had the right in the first place, or because he retains the right. This, I think, helps to clarify the distinction between lending something to someone and allowing someone to use something. If Max lends his land to Eve for a while, Max transfers the right to use his land to Eve for that time, and thereby loses that right for a while. On the other hand, if Max allows Eve to use his land for a while, then Max can keep his right to use it for that time as well, so two people can use Max's land at the same time.

liberties can be transferred without the consent of third parties (because they have none), whereas relative liberties require the consent of their third parties in order to be transferred.

*Second objection: allowing and forbidding.* Ann's father has allowed her to go to the party, but Ann's mother has forbidden her to do so. The straightforward thing to say, in such cases, is that Ann has the liberty, *relative to her father*, to go to the party, while she has the interdiction, *relative to her mother*, to do so. This answer is, of course, not open to Reinach. How else could he treat cases like this? He seems to have two equally unappealing options.

First, Reinach could maintain that Ann at once has an absolute liberty to go to the party and an absolute obligation not to go to the party. Contradictory rights and obligation are not a problem *per se* for Reinach: he allows for incompatible *pro tanto* rights and duties. However, this case is special because the liberty and interdiction are directly and completely contradictory: they have contradictory contents, and the same holder. But they also have the same counterparty if they are absolute (none, *ex hypothesi*), and are of the same kind: nonmoral obligations and rights stemming from similar social acts (allowing and forbidding). It is one thing to maintain that contradictory rights are possible so long as they are of different kinds or have different counterparties. It is quite another to maintain that one can be at once entitled and forbidden, absolutely and in the very same sense, to perform the same action at the same time. Under the standard hypothesis, having the permission to F is logically equivalent to not having the obligation to non-F.[62] If so, the present proposal leads to a contradiction.

The second option is to maintain that Ann has the absolute liberty to go to the party, but the obligation *relative to her mother*, not to go to the party. This is likely the strategy Reinach would adopt. The reasons for this are twofold. First, he maintains that allowing generates absolute obligation.[63] Second, while he never explicitly considers the act of forbidding, he considers in detail the close act of commanding (*forbidding to F*, one may think, is equivalent and perhaps identical to *commanding not to F*). Reinach maintains that like promising, commanding essentially generates relative claims and obligations.[64] Third, this strategy presents the advantage of putting the former worry of contradiction to rest, for Ann now has an

[62] Like the equivalence between relations and their converses, that relation is not quite logical, but still is arguably analytic. It belongs to what McNamara and Van de Putte call the 'traditional definitional scheme' (Paul McNamara and Frederik Van De Putte, 'Deontic Logic', *The Stanford Encyclopedia of Philosophy*, Edward N Zalta and Uri Nodelman (eds) available at https://plato.stanford.edu/archives/fall2022/entries/logic-deontic/).

[63] Reinach (n 2) 120.

[64] ibid 24. The obvious difference between commanding and ordering being that promising generates a relative obligation in the promisor, while commanding generates a relative obligation in the commandee.

absolute liberty conflicting with a relative obligation, this being a noncontradictory form of deontic conflict.

However, this strategy comes at a high cost. It assumes that the social act of allowing generates absolute liberties, while the social act of forbidding generates relative obligations. This seems *ad hoc*: if forbidding generates relative obligations, then allowing should generate relative liberties. Indeed, forbidding and allowing belong to a common kind (together with obliging/commanding): both are other-directed, both bring about deontic status in their addressees (respectively, interdiction and permission); both require that the persons performing them have some legal power over their addressees. Finally, the logical relations between allowing and forbidding closely map the logical relations between permission and obligation. In the same way as *not being permitted to F* is equivalent to *being obligated to not-F*; *not allowing S to F* seems to have the same correctness conditions as *forbidding S to F*. Also, in the same way that *being permitted and forbidden to F* is contradictory, *allowing and forbidding S to F* is contradictory. One way to bring out that worry is to compare the deontic status of Ann in the present example with her deontic status had her father instead commanded her to go to the party. In such a case, Reinach would say (correctly) that Ann is under two incompatible relative obligations: the obligation, relative to her father, to go to the party; and the obligation, relative to her mother, not to go to the party. Why, when her father simply allows her to go to the party, should we treat the deontic conflict she finds herself in differently? Why shouldn't we see it as a conflict between two relative deontic states?

## 8.8 A RECONCILED ONTOLOGY OF RIGHTS

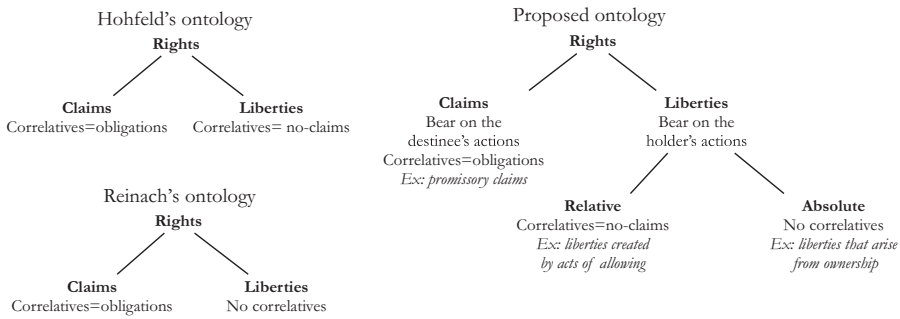
Let us take stock. Hohfeld maintains that all liberties are relative and have no-rights as correlatives. He faces objection stemming from cases such as property rights, in which liberties appear to be absolute. Reinach, for his part, maintains that all liberties are absolute and therefore lack correlatives. He faces objection from cases in which liberties appear to be relative, such as the liberties that arise from allowing. At this juncture, the way out seems obvious: a complete ontology of liberties should include both absolute and relative liberties.

However, this proposal raises an immediate worry: how should we distinguish liberties from claims? Hohfeld holds that they are distinct in virtue of having distinct correlatives (respectively, no-rights and relative obligations); Reinach holds that they are distinct in virtue of being respectively relative and absolute. If we welcome both absolute and relative liberties, we cannot distinguish them from claims based on either of these two criteria. Reinach, fortunately, provides us with another criterion: the key difference between claims and liberties is not to be found in their correlatives, but in their content. Liberties bear on the action of their holder, claims bear on the action of their addressees. We can thus

retain most of Reinach's detailed account of the contrast between claims and liberties:

| | **Claims** | **Liberties** |
|---|---|---|
| *Content* | Bear on the action of another | Bear on one's action |
| *Parties* | Have opposing parties | ~~Lack opposing parties~~ |
| *Correlatives* | Have relative obligations as correlatives | ~~Lack correlatives~~ |
| *Satisfaction* | Are fulfilled | Are exercised |
| *Dynamics* | Tend towards their fulfillment | Rest until they are exercised |
| *Duration* | Cease to exist when fulfilled | Continue to exist while being exercised |
| *Waiving (1)* | Essentially can be waived | Sometimes cannot be waived |
| *Waiving (2)* | Cease to exist when waived | Do not cease to exist when waived |
| *Transferring* | Can only be transferred with consent of the counterparty | ~~Can be transferred without any consent of the counterparty~~ |

On top of avoiding all the worries raised above, this proposal reveals why absolute claims are impossible: since claims bear not on one's own action, but on the action of another, they necessarily must have a counterparty. The following figures contrast the proposed ontology of rights with that of Hohfeld and Reinach:




Based on this ontology, two Reinachian 'essential laws' can be formulated. To introduce the first, recall the distinction made by Reinach between social acts

that are other-directed, and those that are not.[65] All speech acts need to be heard, and hence have an addressee, yet not all of them are other-directed. The acts of promising, commanding, or granting a right are other-directed, by contrast to the acts of enacting or waiving.[66] Based on this distinction, the first essential law states:

(1) Other-directed social acts cannot generate absolute rights and obligations.

Promising, commanding, and granting only generate relative rights and obligations. (Likewise, submitting, another other-directed act, generates in its addressee the *relative* legal power to bring about legal effect in the person who submitted.[67]) Absolute rights and obligations, on the other hand, arise from the nature of ownership, of persons, or from social acts like that of enacting, which is not other-directed. It is indeed possible to transfer an absolute right, and transferring a right is other-directed, according to Reinach, but this is no exception to the present law since transferring does not generate any right.

The second essential law concerns the condition of transfer. The owner of a thing, we saw, can transfer his liberty to use that thing without any further ado, while the person that has been granted the right to use a thing cannot transfer that liberty without the consent of the owner. This suggests the following essential law:

(2) All relative rights (be they relative claims or relative liberties) require the consent of their counterparty in order to be transferred by their holder, in contrast to absolute rights.

In the absence of countervailing factors, absolute liberties can be transferred without the consent of anybody. The transfer of relative liberties, by contrast, always requires the consent of the counterparty.

## 8.9 CONCLUSION

I have compared Reinach's and Hohfeld's contemporaneous ontologies of rights and argued that their main disagreement lies in their understanding of liberties. While Hohfeld sees liberties as relative, correlated with no-rights, Reinach claims that liberties are absolute, lacking any counterparties. I then argued that both start from a correct insight, but that they each then overgeneralize this insight to all liberties. This led me to propose an ontology of rights that makes room for both relative and absolute liberties.

Among the other points of disagreement between Hohfeld and Reinach that deserve further investigation, the nature of legal power is perhaps the most

[65] Reinach (n 2) 32.
[66] ibid 32, 105.
[67] ibid at 111.

interesting. While Hohfeld argues that legal powers constitute a *sui generis* kind of legal relation, on top of duties, claims, and liberties, Reinach sees legal powers as a subspecies of liberties, namely liberties to perform actions that modify rights. A strong reason to follow Reinach here is that powers bear on their holder's action, which is the mark of liberties. A strong reason to follow Hohfeld, though, is that the view that powers and liabilities are correlatives is highly plausible (and must be rejected by Reinach since powers, qua liberties, must lack correlatives). Here again, I surmise, the Reinachian framework could accommodate Hohfeldian liabilities, disabilities, and immunities, provided that it abandons the problematic assumption that liberties are always absolute. More precisely, the hypothesis would be that legal powers come in two kinds, absolute and relative, that relative powers have liabilities as correlatives, and, that liabilities are a kind of no-claims.[68]

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