

## Adolf Reinach, Negation, and Law\*

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... but I have to pass my exams right away, so I can convey to some law students as quickly as possible that there can be nothing more pitiful on earth than a jurist who is just a jurist.<sup>1</sup>

Adolf Reinach, Letter to Theodor Conrad, 1905.

In much of the body of work devoted to Adolf Reinach, discussion is concentrated on his phenomenological realist ontology – essences, states of affairs, and judgments. Each of these is explored conceptually and with respect to how it interconnects and grounds the others. But very little attention is paid to negation, specifically negative states of affairs and their connection to both positive and negative judgments. Scholars who work on Reinach's theory of judgment tend to focus on the negative judgment of positive states of affairs, to the neglect of the positive judgment of negative states of affairs. Reinach claims that negative states of affairs ontologically subsist and do so on a par with positive states of affairs: taking a rose, for example, its *not-being-orange* subsists

\* I dedicate this article to Prof. Dr. Tomasz Bekrycht, who sadly passed away unexpectedly in 2021. In Spring 2018, Tomasz organized at the University of Łódź, Poland, a wonderful law conference titled *Reinach's Phenomenology of Law*. It was a successful event that brought together scholars from across the globe and ignited significant conversations about Reinach's relevance to modern law. Tomasz was an authentically kind and inspired soul – his love for Reinach and legal scholarship, the joy he exuded when bringing people together in conversation, and the genuine excitement he had for sharing the city of Łódź with the conference participants. He was a brilliant legal scholar, talented editor and author, a serious football fan, and a dear friend who had a smile and a laugh that was contagious. We kept in touch after the conference, and his emails were a welcome and much needed dose of sunshine in the early days of Covid-19. He is sorely missed and will never be forgotten. For more about Tomasz, please read the obituary written by his colleague and friend, Marek Zirk-Sadowski: <https://czasopisma.uni.lodz.pl/Iuridica/article/download/17266/17300?inline=1>

<sup>1</sup> "...mein Examen aber muss ich bald machen, schon damit ich möglichst schnell ein paar juristischen Studenten vortragen kann, dass es kein ärmeres Ding auf Erden geben kann, als einen Juristen, der nur Jurist ist." (Ana 379, C I 1/15) Adolf Reinach's literary estate is housed at the Bavarian State Library in Munich under the shelf mark (Signatur) Ana 379. A table of its contents can be found in Eberhard Avé-Lallemant, *Die Nachlässe der Münchener Phänomenologen in der Bayerischen Staatsbibliothek* (Harrassowitz 1975).

just as much and in the same way as its *being-red*, and the rose *being-red* entails that it is *not-being-orange*. This negation does not just occur mentally for us in a disposition (i.e., on the side of consciousness, or subjectively in a judgment) but, Reinach argues, in the world of events and human interaction (i.e., objectively, in the world). This position on negation was contrary to many of his peers and colleagues who saw negative entities as secondary to or derived from positive ones: specifically, his friend and fellow Munich phenomenologist Johannes Daubert and one of his Göttingen students, Roman Ingarden, both took issue with the idea that negative states of affairs subsisted independently and were on a par ontologically with positive states of affairs.

In this chapter, my focus will be on negative states of affairs and their corresponding judgments, and on connecting them with Reinach's jurisprudence – something that has not yet been done in the literature. Reinach was rather unique in both the Munich and Göttingen phenomenological circles because he was a law student in addition to his studies of descriptive psychology and phenomenology; this interdisciplinary education opened his mind to distinctive ways of seeing the world, in all its ways of being and not being. The position I advance here is that because the law frequently turns on what appears to be negative states of affairs, Reinach's legal training may have contributed to his insistence on their very being and their having the same ontological status as positive states of affairs. Laws have application to both action and inaction – criminality can be something done to another or an omission – and this implies a robust inclusion of negative states of affairs. Negative states of affairs have received far too little attention and serious inclusion in his work, and by engaging in this discussion, we have the potential for Reinach to be made whole again – by bridging his early law education with his phenomenological ontology.

#### 4.1 REINACH'S TERMINOLOGY: JUDGMENT AND STATE OF AFFAIRS

States of affairs, essences, and an expanded notion of the *a priori* are the core entities of Reinach's ontology. These interlace with one another, creating the fabric of reality that we come to grasp both epistemically and metaphysically. In this chapter, I will focus exclusively on states of affairs and the judgments they participate with.<sup>2</sup>

Judgment, for Reinach, can be understood as both assertion and conviction. However, for this chapter, the focus will be exclusively on the latter, as it was what he predominantly utilized for his discussion of negation. Convictions are said to

<sup>2</sup> The choice of preposition here – “participate *with*” – is a deliberate one and is intended to reflect the idea that an individual thing or being is not static, but rather is engaged in essential activity, that is in and through which its matter was being informed. This should more clearly capture the sense of Aristotle's Formal Causality and Plato's notion of Participation. My hope is to avoid the confusion or conflation of participation with imitation, which happens when phrasing like “participate *in*” is used – as if the essence preexisted the thing or entity. To subsist or obtain at all, essence must do so *through* participation.

arise from intuitive acts of presenting.<sup>3</sup> Conviction, for Reinach, possesses both a consciousness-side and an objectivity-side: that is, psychical and physical world aspects. Conviction is an act where we adopt a stance toward something, whether that means striving toward it positively or resisting it negatively.

In his essay on negative judgment, Reinach describes six essential characteristics of states of affairs.<sup>4</sup> These are essential marks meant to distinguish states of affairs from propositions and objects, and they are sufficient in the sense that every entity to which any one of them applies would be a state of affairs. For Reinach, this short list is by no means exhaustive, nor does it constitute a definition. States of affairs are:

1. that which is believed or asserted in judgments (34);
2. that which can stand in the relationship of ground and consequent (34–35);
3. that which can take on modalities, such as possibility and necessity (35);
4. that which stands in the relation of logically contradictory positivity and negativity (35–36);
5. that which obtains or does not obtain (as opposed to existing)<sup>5</sup> – and given (4) above, either a positive or a negative state of affairs obtains (36);
6. that which is apprehended or intuitively discerned, not seen or perceived through the senses (37).<sup>6</sup>

States of affairs have a special mode of being that enables them to participate with both real and ideal objects, but they themselves are not real or ideal. By employing words like “obtain,” the list of characteristics reiterates that we must not mistakenly regard states of affairs as existing; it is rather the objects to which they stand in

<sup>3</sup> Adolf Reinach, *Sämtliche Werke: Textkritische Ausgabe in 2 Bänden*, Karl Schuhmann and Barry Smith (eds) (Philosophia Verlag 1989), 108. For English translation, see ‘On the Theory of Negative Judgment’ (1981) *Aletheia* 9 [hereinafter “Ferrari”]

<sup>4</sup> Reinach (n 3) 114–118. Ferrari (n 3) 34–37.

<sup>5</sup> An important way in which Reinach differentiates objects from states of affairs is to refer differently to their modes of being: physical objects *exist*; states of affairs *obtain* or *subsist*. Reinach (n 3) 118.

<sup>6</sup> I have modified Don Ferrari’s translation of characteristic 6. The original German for characteristic 6 reads: “*Indem ich die rote Rose sehe, ‘erschaue’ ich ihr Rotsein, wird es von mir ‘erkannt’*. Gegenstände werden *gesehen* oder *geschaut*, Sachverhalte dagegen werden *erschaut* oder *erkannt*.” Reinach (1989) 118. Ferrari translates the verb *erschauen* as “observe.” I believe this choice does not capture accurately the meaning of the term. The translation of *erkannt* by “apprehended” is acceptable but should be noted that Reinach’s notion of apprehending as applied to states of affairs is not the same as that applied to concepts. For example, to apprehend the concept “man” is not the same as to apprehend the state of affairs “being-man.” The way intuition apprehends states of affairs differs from the way concepts are apprehended, because in the former what is grasped or discerned are essential connections, but in the latter, it is abstract ideas. Intuition must operate differently when apprehending states of affairs because these are not necessarily static, but rather occur in connection and participation with other entities.

relation that exist.<sup>7</sup> Reinach adds to this point: “As we immerse ourselves into the essence of these entities [*Gebilde*], we intuitively discern [*erschauen*] what holds for them as a matter of strict law; we grasp interconnections analogously to the way we do through immersion into the essence of numbers and geometric entities: the being-thus [*So-Sein*] is here grounded in the essence of that which is thus [*So-Seienden*].”<sup>8</sup> Reinach emphasizes here the type of immaterial subsistence states of affairs have, and that states of affairs and the laws to which they are subject are immutable and strictly necessary. Moreover, states of affairs are independent of any judgment or cognition on our part, and they are subject to strict laws – laws that also obtain independently of our acknowledgment.

In Reinach’s all too brief rough notes on ethics from 1906, he describes an additional characteristic of states of affairs. While objects can be valuable and persons are the bearers of moral values, it is states of affairs that are morally just: A and B can be said to be morally valuable, but *that A is B* is just.<sup>9</sup> States of affairs are independent, immaterial, and subsisting in the world and, for Reinach, justice is as well: what is just is not simply and solely in the consciousness of persons but rather at work in the universe.<sup>10</sup> These notes are early indications of where his phenomenological jurisprudence would go in subsequent writings, such as the *a priori* foundations article.<sup>11</sup> Sadly, this additional characteristic of states of affairs is incomplete; it was underdeveloped at the time of Reinach’s death and remains rather obscure to this very day, and all too frequently left out of his ontology altogether.

With the fundamental terminology covered, we now turn to negation.

#### 4.2 NEGATIVE JUDGMENT AND NEGATIVE STATES OF AFFAIRS

In “Toward the Theory of Negative Judgment,” Reinach advances two significant and controversial claims: purely in terms of their descriptive essence, positive and

<sup>7</sup> In a set of rough notes, Reinach writes that states of affairs can be either temporal or atemporal, and it is their content or “matter” that determines this. See Reinach (n 3) 351.

<sup>8</sup> *ibid* 144.

<sup>9</sup> *ibid* 336. Reinach makes use of the old distinction between justice and law, something that is rather difficult to capture precisely in English.

<sup>10</sup> For further details, see Kimberly Baltzer-Jaray, ‘Phenomenological Jurisprudence: A Reinterpretation of Reinach’s *Jahrbuch* Essay’ in J Edward Hackett and J Aaron Simmons (eds), *Phenomenology for the Twenty-First Century* (Palgrave Macmillan 2016), 117–137; and Kimberly Baltzer-Jaray, ‘Reinach and Kantorowicz: Justice, Phenomenological Realism and the Free Law Movement’ [2020] 90 *Folia Iuridica* 91.

<sup>11</sup> 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.

negative convictions stand on an equal footing with respect to each other, and likewise positive and negative states of affairs are of the same order.<sup>12</sup>

A positive conviction, Reinach posits, is an act of turning toward the object, whereas a negative conviction is an act of turning away from it (in disbelief). If a police detective tells me the body on the floor has a gun in their left hand but when I look I find the gun is actually in the right hand, then a negative conviction arises within me – “this person does not have a gun in their left hand!” – and is quickly followed by a positive conviction that “it is in their right hand!”. These judgments, while contraries, are both convictions, and refer to the same intentional correlate – that is, the same state of affairs.

Positive convictions arise straightforwardly when “reading off” states of affairs from what is given around us, but negative convictions require a different intellectual attitude and approach. Referring again to the dead body example, when I approach the body expecting to see the gun in the left hand, but sense perception attests to the gun being in their right hand, this situation results in my grasping two conflicting states of affairs (*being-left hand* vs. *being-right hand*), with only one providing direct evidence that can be apprehended. The other state of affairs (*being-left hand*) has “negative evidence,” and it is on the basis of this negative evidence that the negative conviction arises. Comparably, the judgment “nine is not less than five” arises through necessary connection with the positive state of affairs that “nine is greater than five”; the negative evidence of the former is bound by strict necessity with the positive evidence of the latter. The relationship between these judgments generates my positive conviction that nine is indeed greater than five.

Reinach distinguishes two types of negative judgments: a negative conviction of a positive state of affairs (the disbelief that A is B; *I don't believe* the gun is in his left hand) and a positive conviction of a negative state of affairs (the belief that A is not B; *I believe* this person *does not have* the gun in their left hand).<sup>13</sup> He adds that while these two convictions closely resemble one another in their logical content, they are absolutely different judgments with respect to both their consciousness- and objectivity-sides (in the one judgment, the consciousness-side is reflected by belief and the other, by disbelief; the objectivity-side of the one judgment is the gun *being-left hand* and the other is gun *not-being-left hand*). In fact, the positive conviction of a negative state of affairs has often been neglected, confused, or poorly handled by

<sup>12</sup> Reinach (n 3) 110–111. Ferrari (n 3) 30–31.

<sup>13</sup> He also mentions the negative conviction of a negative state of affairs, a double negative judgment, and it also relies on the apprehending of a positive state of affairs. “Just as in the first case [positive conviction of negative state of affairs], here too [negative conviction of a negative state of affairs] this [positive] state of affairs must conflict with the judged state of affairs, but here we have an especially distinctive relationship of conflicting: the two states of affairs are contradictory to each other.” Reinach (n 3) 125. Ferrari (n 3) 43 [Translation slightly modified].

logicians because of outdated ideas about what the correlates of affirmative and negative judgments are.<sup>14</sup>

The list of characteristics of states of affairs offered in the previous section provides the foundation for understanding both positive and negative states of affairs. When we consider the third and fourth essential marks of states of affairs – they can take on modalities (i.e., being possible, probable, impossible, improbable, contingent, necessary, etc.), and stand in the relation of logically contradictory positivity and negativity (i.e., either the positive or the negative state of affairs obtains) – we can gain a more comprehensive picture of what negative states of affairs are and encompass, and how negation operates on the objectivity-side of judgment. Given the third mark, impossible objects involve states of affairs (e.g., square circles), as do probable entities (e.g., Schrödinger’s cat’s existence) and contingent ones (e.g., the trees in my yard). All these modalities *implicitly* contain negation. Negation can obtain with modalities such as probable and contingent because the temporal nature of the states of affairs allows for it. Reinach writes,

Positive and negative states of affairs are on a par with one another. If a red rose exists somewhere, then any number of (positive and negative) states of affairs are given with the existence of that thing. ‘The red rose exists’; ‘the rose is red’; ‘the red inheres in the rose’; ‘the rose is not white,’ ‘not yellow,’ etc. . . . Just as we can separate (real or ideal) objects from their (real or ideal) existence, and easily recognize that certain objects, like golden mountains or round squares, do not, or even altogether cannot, exist, so we can separate states of affairs from their obtaining, and speak of states of affairs, like the being-gold of mountains or the being-round of squares, which do not, or cannot, obtain.<sup>15</sup>

Only some states of affairs will obtain, and by necessity a manifold of others will not. If the rose is red, then it is not at the same time purple, not yellow, not orange, etc. This implies that any states of affairs essentially connected to the rose, both positive

<sup>14</sup> Reinach (n 3) 110–111. Two such logicians, Windelband and Sigwart, held the view that positive judgments operate as a union and, when true, comprises a binding relationship between the world and mental acts. Contrariwise, they understood negative judgments as divisive or separating – that is, as not a real relationship (or any relation at all) with objects in the world, but only as a subjective mode within consciousness. Negative judgment was conceived as a mental act of rejecting or disbelieving, hence negation being situated strictly on the consciousness-side. The proper objects of judgments – Reinach would insist – are states of affairs, not relations or objects, and only they can be the intentional correlates of a judgment. To claim that the negation aspect of a negative judgment is only a subjective mode is to posit the view that the negative attitude (disbelief, separation, etc.) is a negative relation, and is as such the intentional correlate of the judgment. To maintain that relations are the intentional correlates of judgments – as logicians like Windelband and Sigwart often do – applies only some of the time to positive convictions, since there are indeed states of affairs that function as relations (such as the *being-similar* of A and B), but more often than not there are instances where the state of affairs is not at all a relation (like the *being-red* of the rose). For more on states of affairs and relations, see Reinach (n 3) 121–122 and Ferrari (n 3) 40–41.

<sup>15</sup> Reinach (n 3) 116–117. Ferrari (n 3) 36 [Translation slightly modified].

and negative, must subsist potentially outside of my mind – “lying in wait,” as it were, for the “opportunity” to obtain or not obtain.<sup>16</sup>

Briefly, combining the third and fourth essential marks of states of affairs additionally demonstrates that Reinach maintained a notion of pure possibility within his ontology, which is crucial for upholding a theory of material necessity in the world and for defeating any suggestions of necessitarianism.<sup>17</sup> In other words, for Reinach contingency has a relationship with necessity while allowing at the same time for free will and real possibility. For example, the leaves on my maple tree turned red last fall – they did not *have to be* red, they could have been orange or yellow if the weather conditions had been different, but there is no denying the *being-red* of the leaves that obtained. In his last public lecture “Concerning Phenomenology” (1914), Reinach spoke to this point,

... we have to do there not with empirically accumulated facts, but with rational [*Verstehbare*] interconnections grounded in the essence of things [*Wesen der Sache*]. To be sure, we encounter here a new sort of essential interconnections – not interconnections of necessity, but rather of possibility. We can understand that the presentation [*Vorstellung*] of an A can lead to the representation [*Vorstellung*] of a B similar to it, not that it must. Indeed, even interconnections of motivation are likewise largely of a kind that, in accordance with essence, involve a can-be-so, not a must-be-so.<sup>18</sup>

## 4.3 STATES OF AFFAIRS: INFLUENCES AND DEBATES

### 4.3.1 *Phenomenology*

Discussions featuring states of affairs surrounded Reinach, in both phenomenology and jurisprudence. Johannes Daubert exposed the Munich Circle psychology club to the writings of the Franz Brentano School very early in the twentieth

<sup>16</sup> For more discussion of Reinach’s negation in light of his ontology, see my forthcoming contribution “Reinach’s Negative States of Affairs and the Role of Essence” in Till Grohmann (ed) *The Phenomenology of Essences* (Routledge).

<sup>17</sup> In his essay “Kant’s Interpretation of Hume’s Problem” (1911), Reinach describes *material* necessity, the kind of necessity that occurs amongst and belongs to connections between material contents in the world around us. This type of necessity stands in contrast to the *modal* necessity, which is associated with the realm of mathematics and logic. In judgments of material necessity, the necessity involved not only belongs to the material content of the judgment, but also enriches the predicate term. With modal necessity it is the copula that has been unequivocally determined. Material necessity, for Reinach, was inspired by the rich discussion of causality found in the philosophy of David Hume.

<sup>18</sup> Reinach (n 3) 548–549. Here, Reinach is employing *Vorstellung* in a dual sense. His meaning becomes clear when one takes into account the context – psychological association – wherein he is speaking of a presentation of an A that has a connection via association with some mental representation of a B that is similar to A. For example, on hearing the word “red” (presentation), what may immediately come to mind (representations) is an apple.

century – that would have included not only Edmund Husserl, but also his teacher, Karl Stumpf, who was a major contributor to the philosophical literature on states of affairs. Stumpf was a student of Hermann Lotze, who also played a significant role in the conception of states of affairs when he referred to them as the special objects of judgment in his *Logic* (1874).<sup>19</sup> Husserl, a student and colleague of Stumpf and an admirer of Lotze, also wrote about states of affairs in some sections of *Logical Investigations*. Alongside these three, Alexius Meinong is another figure to consider as influencing Reinach on negation. In his *On Assumptions* (1902), Meinong investigated both the ontological understanding of negation and entities that were very similar to states of affairs. The locus of negation is first investigated by analyzing how our mind represents negative entities, and then by examining higher order objects. This kind of object, referred to as Objective [*Objektiv*], is the highlight of Meinong's novel theory of objects: (1) there are objects that do not exist and (2) every object that does not exist is constituted in such a way that it can be the subject of true predication.<sup>20</sup> The square circle is an impossible object owing to its evident self-contradiction and therefore does not exist, but that does not prevent me from judging its properties and describing it; "square circles do not exist" – that judgment too has content and can be true. The square circle has what Meinong calls *Sosein*, that is, some type of subsistence or presence that is available for predication, while at the same time being indifferent toward and independent from any relation to existence or non-existence – one can judge an object's *Sosein* apart from its *Sein* or *Nichtsein*.<sup>21</sup> I do not have the space to elucidate all the layers of Meinong's ontology, nor his overall position on negation, but suffice it to say that he winds up in a position of maintaining that negation is situated on the object-side of the objectivity/consciousness divide.<sup>22</sup> What Meinong was attempting with the status of negation is what inspired Reinach – Meinong pushed the boundaries of being/non-being and intentionality more than anyone else at the time – but, it should be noted, that Reinach was not uncritical of Meinong's ontology and footnotes reveal many disagreements.

Reinach's position that the status of negative states of affairs is on a par with that of positive states of affairs and have a footing in both the objectivity- and subjectivity-sides was a position that made him rather unique amongst the Munich and Göttingen phenomenological circles: no one else was exploring negation this way and in the context of states of affairs. It also stirred up considerable debate amongst a

<sup>19</sup> Hermann Lotze, *Logik: Drei Bücher vom Denken, vom Untersuchen und vom Erkennen* (Verlag von S Hirzel 1874).

<sup>20</sup> For further details on Objectives, see Alexius Meinong, *Über Annahmen*, (2nd edn, J. A. Barth 1910) §14 and Alexius Meinong, *On Assumptions* (James Heanue, ed and tr, University of California Press 1983) §14.

<sup>21</sup> Roderick Chisholm, *Realism and the Background of Phenomenology* (The Free Press of Glencoe 1960) 82. This point is also articulated by Ernst Mally in 1903 (published in 1904 in *Gegenstandstheorie*) with his formulation of an Independence Principle.

<sup>22</sup> Meinong (n 20) 198.



few of his closest peers and students: specifically, Daubert and Ingarden took issue with this notion of negation – the former by way of ontology and the latter by way of epistemology and subjectivity. Daubert did not support the notion of negative states of affairs having an objectivity-side; he did not believe negation to be an independently, objectively subsisting entity.<sup>23</sup> He held a view that reality is unified, that is positive and harmonious – there is no negation in the world, but only in the mind.<sup>24</sup> Contrariety, disunity, negation, antithetical phenomena in general, are only possible within the sphere of consciousness, and we come to know them through judgment and acts of meaning.<sup>25</sup> Ingarden took the epistemological differences in our access to negative states of affairs as a sign that they were dependent and could not be on equal footing: because negative states of affairs required a more complicated intellectual process, that is, they could not be directly read off what was given in perception, which indicates that they must be ontologically dependent on positive states of affairs.<sup>26</sup> He writes,

What distinguishes the negative states of affairs from the positive is that they are characterized by an existential derivativeness, potentially of a higher degree than is the case for positive states of affairs. Insofar as the positive states of affairs in an autonomous object are existentially original, the negative states of affairs that occur in it are derived from them.<sup>27</sup>

Daubert and Ingarden both failed to properly grasp Reinach's ontology of negative states of affairs and his reasons for establishing the status of these entities. Reflecting on "the how or why" these misunderstandings occur suggests that the source may well be Daubert's and Ingarden's lack of jurisprudence education – they cannot see the world as Reinach does or understand how negation is ever-present in our daily lives and in the law.

<sup>23</sup> Daubert's literary estate is housed at the Bavarian State Library in Munich under the shelf mark (Signatur) *Daubertiana*. A table of its contents can be found in Avé-Lallemant 1975.

<sup>24</sup> *Daubertiana* A I 9/180 (1911–1913). 'A ist nicht non-A'; es ist unmöglich, daß Dasselbe sei und auch nicht sei; das ist (nach Windelband und mit Recht) ein metaphysischer Grundsatz oder ein erkenntnistheoretisches Postulat mit der Meinung: Die Wirklichkeit schließt den Widerspruch von sich aus.'

<sup>25</sup> Karl Schuhmann and Barry Smith, 'Against Idealism: Johannes Daubert vs. Husserl's "Ideas" I' (1985) 38 *Review of Metaphysics* 782. The authors note that Daubert's argument that reality is positive and unified sparked a series of important investigations of the logic and ontology of the negative judgment by members of the Munich school.

<sup>26</sup> This is just one of several ways that Ingarden misunderstood and misconstrued Reinach's negative states of affairs. For more on this, see Arkadiusz Chrudzinski, 'Negative States of Affairs: Reinach Versus Ingarden' (2012) 16 *Symposium* 106.; and my forthcoming article "Reinach's Negative States of Affairs and the Role of Essence" in Till Grohmann (ed), *The Phenomenology of Essences* (Routledge).

<sup>27</sup> Roman Ingarden, *Controversy over the Existence of the World II*, (Arthur Szylewicz, tr, Peter Lang 2016) 292. [In the corrected version briefly published by Peter Lang; p. 294 in the original corrupt edition which continues to be sold despite Peter Lang's pledge not to do so.]

## 4.3.2 Jurisprudence

The most significant influence on Reinach's conception of states of affairs, I contend, came from his legal studies. When one surveys the small body of work Reinach produced over roughly a decade before he left to fight in the First World War, it becomes clear that he never truly left jurisprudence behind: he found novel ways of incorporating it into his own phenomenology<sup>28</sup> and in continuing the project Husserl had outlined in *Logical Investigations*. When one surveys Reinach's educational story, it is clear that he desired to pursue phenomenology and jurisprudence in tandem and saw great mutual benefit for both fields from such an approach.

Reinach arrived at the University of Munich for the Winter semester of 1901 at the age of seventeen; his class schedule included political economy, philosophy, psychology, and jurisprudence. During this time, he befriended Hermann Kantorowicz (a major figure in the Free Law movement), and this friendship proved so influential that in 1903 Reinach followed Kantorowicz to Berlin where all his studies focused exclusively on jurisprudence.<sup>29</sup> In the 1903/04 academic year, he returned to Munich and his studies with Theodor Lipps in psychology and philosophy, while preparing at the same time for his doctoral examinations in penal law and history. In December of 1904, he successfully earned his doctorate in philosophy under Lipps with a thesis on the concept of cause in the penal law (published in 1905). By this time, Reinach was immersed in the phenomenology of Husserl, and even took part in the famous "Munich Invasion of Göttingen": several of Lipps' students began shuttling to and from Göttingen to study with Husserl. In the summer of 1906, he returned again to Munich and immersed himself exclusively in law studies, and in the fall of that same year he travelled to Tübingen to further his legal education. During the weeks leading up to his departure for Tübingen, Reinach composed a letter to his best friend and fellow Lipps' classmate, Theodor Conrad, dated October 16, 1906, in which he asked: "Do you now know what a *Sachverhalt* is? The Imperial German Code of Civil Procedure always says *Sachverhältnis*. If you want, I will also send you the section numbers. I know it all by heart."<sup>30</sup>

In Tübingen, he attended courses offered by different theorists, but the lectures on penal law offered by Ernst Beling would have the most significant impact on Reinach's phenomenology of states of affairs and his extraordinary monograph on

<sup>28</sup> Reinach's own phenomenology is a blend of Theodor Lipps' phenomenology and descriptive psychology of the late nineteenth and early twentieth centuries, and Husserl's early realist phenomenology of *Logical Investigations*.

<sup>29</sup> For more on the relationship, see Kimberly Baltzer-Jaray, 'Reinach and Kantorowicz: Justice, Phenomenological Realism and the Free Law Movement' (2020) 90 *Folia Iuridica* 91.

<sup>30</sup> "Wissen Sie jetzt, was ein Sachverhalt ist? Die Civilprozessordnung des deutschen Reichs sagt immer: Sachverhältnis. Wenn Sie wollen, schreibe ich ihnen auch die Paragraphen. Ich kann alles auswendig." Letter to Conrad, Ana 379, C I 1/19.

the *a priori* foundations of civil law. Reinach wrote the first state examination in law in Tübingen, in the spring of 1907, and returned to Munich afterward to complete his habilitation. Lipps' poor health prevented the work on a theory of judgment from being submitted in Munich, and the Tübingen faculty made it clear they would not accept it; so Reinach turned to Husserl, who was enthusiastic about the manuscript. In spring of 1909, Reinach successfully habilitated at Göttingen<sup>31</sup> and began working closely with Husserl, as an assistant and colleague. Yet, the influence of his legal studies remained strong, with robust presence in his publications and seminar topics – especially those that focused on judgments and states of affairs: in 1911, he transformed part of his habilitation thesis into a work for the *Festschrift* for Lipps, titled “*Zur Theorie des negativen Urteils*” (*The Theory of Negative Judgment*); in 1913, he published “*Die Überlegung; ihre ethische und rechtliche Bedeutung*” (*Deliberation; Its Ethical and Legal Significance*); in 1912, he offered a seminar on the philosophy of civil law that served as preparation for his 1913 contribution to the first volume of *Jahrbuch*, titled “*Die apriorischen Grundlagen des bürgerlichen Rechtes*” (*The A Priori Foundations of Civil Law*); and in the final public lecture delivered in 1914 at the University of Marburg for a Neo-Kantian audience, “*Über Phänomenologie*” (*Concerning Phenomenology*).

As mentioned above, Beling's penal law lectures had the most profound impact on Reinach and his theorizing about states of affairs.<sup>32</sup> These lectures were likely based on Beling's *Die Lehre von Verbrechen* [*Theory of Crime*] volume from 1906, which is, by design, an ontology of criminal actions. In this work, Beling considers different types of criminal actions in relation to each other (including any modifications of these relations); to the agent(s) involved; and to the legal and punishment processes.<sup>33</sup> Schuhmann and Smith emphasize that the “importance for the penal law of the notion of typicality is clear: the punishment for a crime is a function of the *type* of behaviour that is involved. Beling's work can indeed be seen as an attempt to provide an account of the various ways in which rightful or wrongful behaviour can come to be demarcated into delict-types of different sorts.”<sup>34</sup> He demarcates primary from secondary delict-types: such as the difference between murder and attempted

<sup>31</sup> Reinach's habilitation work was titled “*Wesen und Systematik des Urteils*” (*Essence and Systematics of the Judgment*). All that remains of this document is a fragment of rough notes; Reinach's wife, Anna, was instructed by him to destroy any incomplete or rough works if he should die at war, and sadly this document was included in the list.

<sup>32</sup> My overview of Beling is sourced exclusively from Karl Schuhmann and Barry Smith, “Adolf Reinach: An Intellectual Biography” in Kevin Mulligan (ed) *Speech Act and Sachverhalt: Reinach and the Foundations of Realist Phenomenology* (Martinus Nijhoff Publishers 1987) 3–27. Beling has sadly become an obscure figure and finding detailed information about his legal theory, in particular that which pertains to his 1906 book *Die Lehre von Verbrechen* [*Theory of Crime*], is no easy or expedient task. While I am utilizing the summary to describe Beling's 1906 work and its influence on Reinach, I intend to steer Schuhmann and Smith's work in a direction they did not take it – specifically, into negative states of affairs.

<sup>33</sup> Schuhmann and Smith (n 32) 11.

<sup>34</sup> *ibid* 11.

murder, where the former are capable of existing in their own right independently and the latter are dependent formations that require certain corresponding primary delict-types for supplementation. Beling puts forward the position that there is a whole, a unity, that comes to be constituted by different elements of a certain criminal behavior, and this happens by virtue of a *unifying schema*. The example Schuhmann and Smith offer is battery. The chain of actions for battery would be organized around the schema of injuring another, wrongfully bringing oneself into contact with another, etc.<sup>35</sup> For battery to have occurred, this schema must necessarily be realized in certain actions of the offender(s) and certain consequences for the victim(s), and both the actions and consequences must be accompanied by specific mental state(s) of the individuals involved. In other words, every delict-type relies on a unifying schema that is realized in some *objective* event and reflected in some *subjective* act or mental state of the criminal.<sup>36</sup> The schema as a whole has external, objective aspects (actions, consequences, bruises) and internal, subjective aspects (premeditation, deliberation, hate). These two factors together render the delict-type a unified, independent whole. If the schema is absent or only partially fulfilled, then the delict-type may also be doomed, or is, at best, realized in some modified form.<sup>37</sup> Furthermore, the objective and subjective aspects may or may not conform to one another, and that can lead to behavior which falls within various kinds of delict-types.<sup>38</sup> For Beling, the penal law is a catalogue of delict-types with associated schemas and scales of punishment: Only with a valid schema can the legal process establish that an offender is liable and should be punished in this or that way. This constructs the sphere of law as a space constituted by a web of interdependent typical legal formations and extralegal concepts that become relevant only when they enter into relations with any of the typical legal formations.<sup>39</sup>

Schuhmann and Smith point out that Reinach's style and terminology in his civil law monograph takes many cues from Beling, and Reinach mentions penal law explicitly as being one of many legal disciplines having *a priori* foundations. They also provide a list of similarities between Beling and Reinach: (1) Beling's schema corresponds in several ways to Reinach's legal formation [*Rechtsgebilde*], but lacks some of the *a priori* connotations; (2) both men share a doctrine of contextualism in legal theory; (3) both recognize internal/subjective and external/objective dimensions in legal formations; and (4) both acknowledge the significance for legal theory of the dichotomy of standard/typical and derived/modified instances of legal types.<sup>40</sup> It is with Beling's schema, as illustrated here in the third point of similarity, that we can begin to understand why Reinach argued for both positive and negative states of

<sup>35</sup> *ibid* 11.

<sup>36</sup> *ibid* 12.

<sup>37</sup> *ibid* 11–12.

<sup>38</sup> *ibid* 12.

<sup>39</sup> *ibid* 12.

<sup>40</sup> *ibid* 13.

affairs, and that negative states of affairs necessarily have objectivity- and subjectivity-sides of judgment. In the case of an act deemed to be criminal negligence (i.e., a crime of omitting to do something that one has a legal duty to do, or of acting in disregard for the lives of others), negative states of affairs are at the heart of the crime itself and of the offender: there are objective/external aspects – not acting, no forethought of consequences; and there are subjective/internal aspects – a mental state characterized by absence of forethought, care, or sense of duty. If, for example, I were to synthesize an antihistamine medication for distribution, but then learn from lab testing and drug trials that it has a significantly high likelihood of being fatal to people with brown hair, and do not disclose this information and/or remove my dangerous drug from the market, then I am guilty of not acting to warn or protect brown-haired consumers and of failing to show regard for, or behave with a sense of duty toward, people with brown hair. More than likely, Reinach would frame this situation as “Dr. Baltzer-Jaray was clearly negligent in her decision to disregard the lab evidence and drug trials showing fatal reaction for brown-haired individuals” or even, “Dr. Baltzer-Jaray clearly failed to act, regard, or care about consequences of this drug she synthesized and distributed” – both of these judgments are examples of a positive conviction of a negative state of affairs, where the negation functions on both the objectivity- and consciousness-sides.

In Reinach’s *a priori* foundations article, the sections on social acts and, in particular, the act of promising are also relevant here. Promising is what he calls an other-directed social act that has both an inner experience – a directed willing – and an external action that results in fulfillment or failure to fulfill.<sup>41</sup> A promise brings forth claims and obligations between the parties involved. Situations where promises can be waived, revoked, or broken and where claims can be violated, all pertain to negative states of affairs. If I promise to bring Reinach some nice tobacco for his birthday and I forget to stop by the shop on my way to his party, I have broken the promise I made – I have failed to fulfill my obligation (I arrive tobacco-less). Reinach would possibly come up with a positive judgment of a negative state of affairs, “You didn’t bring me the tobacco you promised!” and I would likely be left to answer in the same mould, “Sorry, I didn’t remember to buy it!” A similar circumstance would arise if Reinach waived the promise – “You don’t have to buy me tobacco. You’re off the hook!”; where the promise has not been consummated but rather no longer holds as an obligation for me to fulfill. It is now a *non*-promise with a negated obligation, and as such involves negative states of affairs.

A version of Beling’s schema is fulfilled in these instances, in that there are both external and internal aspects: my inactions are both in the world and in my mind. A schema such as Beling’s, one that demonstrates the necessity of both objective and subjective aspects of criminal acts, supports, for Reinach, the necessity for negation to have both objective/external and subjective/internal aspects. Reinach, I suggest,

<sup>41</sup> Reinach (n 3) 165–166.

adopted what he learned from Beling and adapted it to an ontology of states of affairs, in which positive and negative states of affairs subsist on a par.

The law utilizes negative states of affairs often and broadly: negligence, the crime illustrated in the previous paragraph, is far from the only one that involves negative states of affairs. There is nonfeasance, fraud, breach of contract, and “crimes of failure” such as failing to perform, prevent, protect, comply, remain, appear, etc. In these circumstances, the negative states of affairs that obtain properly occur on both the objectivity- and subjectivity-sides: a crime of *not-acting* has consequences in reality (e.g., someone is injured physically) and also a connection to the mindset of the offender regardless of whether the *not-acting* was intentional or accidental (e.g., willing to not act as a choice, no forethought of the obvious consequences of *not-acting*). At the core of the crime of fraud – where one is deceitfully presenting themselves, an item, or a situation in order to gain something unlawfully – are negative states of affairs: the elixir sold at the carnival will *not* cure cancer, *not* regenerate an amputated limb, and it will definitely *not* provide immortality, and the salesperson knows this while pitching exactly the opposite. The elixir is *not* what the label says it is.

Another example of law relying upon negative states of affairs involves the notion of “reasonable doubt.” When reasonable doubt is created, the verdict a jury returns resembles a positive conviction of a negative state of affairs (“not guilty: person X did not with certainty murder person Y” or “guilty: person X is not innocent with certainty of the murder of person Y”). Reasonable doubt relies on negative states of affairs – creating reasonable doubt is not just stirring beliefs but is the use of evidence to tell a necessity-connected story that solidifies strong convictions that something is not the case or is not certain.

These examples are merely a selection of instances within law where negative states of affairs are engaged. A survey of the domain of jurisprudence shows that negative states of affairs are all-pervasive, and that serves as a strong indicator of both their necessity and their ontological status on a par with positive ones. Law studies opened the door, for Reinach, to a domain where negative states of affairs are acknowledged and engaged, and phenomenology provided him with a toolbox – a method for insight into, and description of, the being and essence of these entities.

#### 4.4 CONCLUDING REMARKS

Reinach was deeply influenced by his law studies. He never abandoned jurisprudence; in fact, he incorporated what he learned into his realist phenomenology. I contend that because the law frequently turns on what appears to be negative states of affairs, Reinach’s legal training may have contributed to his insistence on independent subsistence of negative states of affairs and their having the same ontological status as positive states of affairs; his law studies provide insight into why the pursuit of negative states of affairs is absolutely necessary ontologically. His

education in law at Munich, Berlin, and especially at Tübingen with Beling, underpins much of his early, persistent and profound interest in states of affairs and judgments, and in his phenomenological writings on them right up to his final lecture before enlisting in the First World War.

Reinach and the topic of negative states of affairs might seem to some as a rather obscure, philosophical niche and one that lacks relevance to larger issues; however, to consider it such would be gravely mistaken. First and foremost, Reinach's sense of justice seems to harken back to an older sense of justice (*Recht*) and is in the universe as a transcendent harmony and should undergird any written form of law (*Gesetz*). This entails all of us having a connection to and being able to participate with justice, using insight, and an ability to grasp it even if we have never read a law book. On January 1, 1900, the *Bürgerliches Gesetzbuch* (BGB) came into effect in Germany; it was a monolithic, groundbreaking positivist project that interpreted justice as achievable purely through application of the codified law. Reinach was one among many legal scholars at the turn the century who attempted to push back against this shift in the direction of jurisprudence. His *a priori* foundations article, as a whole, stands as a powerful critique of what the lawmakers of the BGB failed to grasp – justice is in the world, the laws we write should reflect this harmony at work. Laws are written and can be changed but justice is an entity we grasp using insight, not create. In this way Reinach connects with legal philosophers like Leibniz, but he leaves the notion of God or any teleology off the table (as a realist phenomenologist, he is only concerned with that which is and not how it came to be). This distinction between justice and law is currently all too relevant and extremely significant.

Reinach, like many early phenomenologists, was critical of positivistic philosophy given its bias for defining knowledge as necessarily linked to existence and sensory evidence. His ontology of states of affairs serves as a refutation of this type of positivism since they are intuitively discerned and not perceived by the senses, subsisting in the world independently, and participate with all kinds of being – real, ideal, possible, and impossible – and they can be positive or negative. He extended this critical position into his jurisprudence theorizing by incorporating ontology to ground legal concepts: positive and negative states of affairs and, most importantly, the conception of an *a priori* foundation that underpins *all* written laws, thus connecting them with a larger, transcendent justice at work in the universe.

We live in a world that remains under the influence of philosophical positivistic thinking, where there is a preference for tangible actions – for sheer deeds rather than inaction or omission. People want to *see* a crime: they want evidence showing directly that an employer discriminated against an employee, not by searching through all the structural ways that a system fails to support diversity and difference and that creates various obstacles for a marginalized individual. Reinach's robust ontology provides a foundation from which we can ground the ethical conclusions we draw. The injustices committed by failing to act or prevent something from happening are very much a part of today's dialogue about complicity in systems of



power and privilege. The witness to a violent crime on the street who says and does nothing is often perceived as an unjust person, and their perceived injustice does not stop at the failure to report or stop a crime in progress, but ripples outward in the ways their silence and inactivity supports structures of violence, inequality, inequity, misogyny, racism, colonialism, ableism, etc. Negative states of affairs bring us back to these dialogues, ontologically as well as practically, and allow us to explore negation in meaningful ways as never before and connect them as a ground for our ethical viewpoints. With so much oppression and violence against women and gender equity-seeking groups, Indigenous Peoples, racialized individuals, persons with disabilities, and 2SLGBTQIA+ persons, the issue of what so many of us are not doing or are failing to prevent has become a central issue in our thinking about how to achieve justice.

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