Katharina Nieswandt

Do Rights Exist by Convention or by Nature?

Abstract

I argue that all rights exist by convention. According to my definition, a right exists by convention just in case its justification appeals to the rules of a socially shared pattern of acting. I show that (i) our usual justifications for rights are circular, that (ii) a right fulfills my criterion if all possible justifications for it are circular, and that (iii) all existing philosophical justifications for rights are circular or fail. We find three non-circular alternatives in the literature, viz. justifications of rights by consequences, by autonomy or by divine commands. I show that all three alternatives fail, and I conclude that all rights exist by convention.

This ontological result has a surprising and beneficial consequence. A common argument against conventionalism is that it implies cultural relativism. I finish by showing that the suggested conventionalism is incompatible with cultural relativism.

Keywords

Natural Rights • Convention • Practice • Hume's Circle • G.E.M. Anscombe • W.N. Hohfeld

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1 Introduction

There are two metaphysical views regarding rights:

Rights exist by convention	In assigning someone a right, social groups *produce* new duties which would not exist were it not for this assignment.
Rights exist by nature	In assigning someone a right, social groups *recognize* duties which exist independently of this assignment (or else they make a mistake).[1]

These two views are mutually incompatible, but both have a strong appeal. On the one hand, the idea of universal natural rights (and of the state as their protector) only emerged when economic power shifted from the nobility and clergy to the bourgeoisie. It thus is a rather recent idea, and it developed as a weapon of one side in a political power struggle, clearly serving the economic interests of that side (Macpherson 1962). It would furthermore seem odd, metaphysically speaking, if enlightenment philosophers had discovered a new entity, which was overlooked for more than two-thousand years, although it should actually be the central topic of moral and political theories. (Such a discovery can happen in the natural sciences, but can it happen in moral philosophy?) Both these points seem to support conventionalism about rights. On the other hand, most of us today take it to be beyond doubt that everyone has certain basic rights, whatever the social conventions, and the naturalist view of rights immediately entails this claim. Furthermore, why not think that the enlightenment era indeed brought a giant leap for moral philosophy?[2]

My result will be that the conventionalist view is the correct view: All rights exist by convention; there are no 'natural' rights. My argument has a surprising and beneficial implication (see Section 8): It is often claimed that conventionalism entails cultural relativism about rights. I suggest a conventionalist view, though, on which

[1] Theories within the same camp can differ considerably. Prominent historical proponents of the conventionalist view are Thomas Hobbes (*L* 14-18), David Hume (*T* 3.2), Jeremy Bentham (1843) and Karl Marx (*MEW*, I.347-377). Recent defenders include Raymond Geuss (2001, ch. 3), Gilbert Harman (1996, pp., sect. 1-2), as well as some legal positivists (Campbell 2004). The opposing naturalist view was most influentially defended by John Locke (*T* 2.1-5). His theory, as those of his now lesser-known contemporaries, influenced the preamble of the American declaration of independence and of the French declaration of human rights. Recent defenders include libertarians, both right-wing (Narveson 2001; Nozick 1974; Shapiro 2007) and left-wing (Cohen 1995; Otsuka 2003; Vallentyne & Steiner 2000), and Kantians (Griffin 1986, ch. 11.1-11.5; 2008, ch. 2.3-2.7; Ripstein 2009, ch. 2).

[2] A short remark here, to prevent confusion: Natural rights theorists are usually not 'naturalists'; that is, they do not think of rights as things that the natural sciences can investigate or as reducible to physical entities. What unites this family of theories is their denial that rights are a social construction in any sense.

cultural relativism about rights must be false. Inspired by Rawls, this view distinguishes between the justification of a right and the justification of the practice within which the right is assigned. I show that if we accept this distinction, then rights-assigning practices cannot exist by convention, although the rights themselves must exist by convention. My conventionalist proposal thus incorporates the main virtue of its naturalist competitor.

I start with some conceptual ground-clearing (Sections 2-3); I then present the actual argument (Sections 4-7), and then I discuss where my result leaves us with respect to cultural relativism (Section 8).

2 What is a Right?

Before proceeding to the investigation, let me specify what a right is and what it would mean for a right to exist by convention. My use of "right" will follow Wesley Newcomb Hohfeld's almost universally accepted explication. According to Hohfeld (1913, p. 32), any right *R*, held by some *X*, imposes duties on some *Y*. For instance, your property right in your bicycle imposes a duty D_1 on me not to use the bike without your permission, a duty D_2 not to damage it and so forth, as well as other duties on various other people $Y_1, \ldots, Y_m$. Thus, we can explicate what it is to have right *R* by listing the duties $D_1, \ldots, D_n$ that *R* imposes on others. Suppose I came from a culture where private property did not exist, and I asked: "What does it mean that *X* has a *property right* in this bicycle?" One answer says: "Well, to say '*X* has a property right in this bicycle' is to say that you cannot take this bicycle without *X*'s permission, that you may not damage it, … and similarly for me and for various others." According to this answer, for *X* to have a right *is* nothing but for certain others to have a duty toward *X* (not) to act in a particular manner. "*X* has right *R* against $Y_1, \ldots, Y_m$" and "$Y_1, \ldots, Y_m$ each owe one or more of duties $D_1, \ldots, D_n$ to *X*" are interchangeable (if $D_1, \ldots, D_n$ is a complete set of duties corresponding to *R*).[3]

Explication R For every right *R*, there is a set of duties $D_1, \ldots, D_n$ such that *X* has *R* just in case each member of a set of agents $Y_1, \ldots, Y_m$ owes a suitable subset of these duties to *X*.

[3] Notice that the following explication captures all of the four basic meanings of "right" that Hohfeld distinguishes. Following Hohfeld, (1) a *claim right* is a right that others φ, (2) a *privilege* is the lack of a duty not to φ, (3) a *power* is a right to alter other people's rights or duties and (4) an *immunity* is a right not to have one's own rights and duties altered (1913, pp. 30-59). Categories 3 and 4 concern second-order rights and thus already presuppose the concept of a right we investigate here. Categories 1 and 2, however, are intertranslatable, as Hohfeld himself points out (pp. 32-33): If I have a 'privilege' to φ, then others have *no* 'claim right' against me that I *don't* φ, and vice versa.

The placeholder "suitable" cannot be further specified if Explication R is to capture all rights, since what is a suitable distributions of rights might vary considerably. (Some rights, such as my right to physical integrity, involve a core set of duties owed by everyone, whereas other rights involve duties owed only by a few or even a single agent, or they involve entirely different duties on the part of different agents.) Let me add five clarifications regarding this explication of "right" before I proceed to the explication of "conventional right."

(1) Explication R allows alternative explications of 'right'. (Here is one: "X has a right just in case X has legitimate claims against some set of agents $Y_1, \ldots, Y_m$.") I contend, however, that any *informative* explication of 'right' has to mention what Hohfeld mentions: A right on one person's part entails duties on the part of others toward that person.

(2) Explication R requires that all rights entail duties, but it does not require that all duties entail rights.

(3) Duties $D_1, \ldots, D_n$ may be conditional upon certain empirical circumstances.

(4) X and Y may be natural persons, or they may be institutions (such as a government) or group agents (such as a corporation).

(5) Hohfeldian explications, such as Explication R, have been accused of building libertarian contentions into the very analysis of 'right' and to then draw libertarian conclusions, disguised as mere conceptual truths. This is because Onora O'Neill (1996, ch. 5.2) and others have used such explications to argue as follows: Rights require a corresponding duty. The duty that corresponds to a *universal* right must be a duty to *refrain* from an action; it cannot possibly be a duty to carry out an action, since an *active* universal duty would presuppose that everybody knew about and could reach everybody else. Universal economic rights would require active universal duties. For instance, a right not to live in poverty—long-discussed within the UNESCO (see McNeill & St. Clair 2009, ch. 6, e.g.)—would require an active universal duty to alleviate the poverty of others. Therefore, such a universal right cannot exist. This libertarian argument, however, presupposes three additional libertarian premises:

    (i) *The active duty corresponding to economic rights is a duty of natural persons.* Why not think, though, that such a duty is owed by a non-natural person, such as the poor individual's government (whether this duty is "institutionalized" in positive law, as O'Neill demands, or not)?

    (ii) *A universal right, say, not to live in poverty requires active duties; it is a "welfare right."* Why not think, though, that a universal right not to live in poverty only requires omissions, such as: *not* to create exploitative national and international institutions (Pogge 2005) or not to legalize privatization of the means of production (as a Marxist would claim)?

    (iii) *It is possible to draw a hard-and-fast distinction between actions and omissions* (Tasioulas 2007, sect. 4). Why believe, though, that such a distinction

can be drawn (Shue 1996, ch. 2 & afterword), given that no one succeeded in doing so, after several decades of discussion (Howard-Snyder 2011)?

In short, Explication R by itself has no libertarian implications.

3 What is a Conventional Right?

We now have an explication of 'right', but what would it mean for a right to exist by convention? The meaning of "convention" has been debated at least since Hume (*Treatise* 3.2.2).[4] More recently, people have written about conventions and language (Lewis 1969), conventions in law (Marmor 2009, ch. 7), truth by convention and conventions in science (Ben-Menahem 2006) or conventions and collective action (Gilbert 2008, sect. 6)—in fact, they have written about conventions "and almost any other topic one can imagine" (Rescorla 2011, sect. 1.2). These debates are only loosely connected with each other and with my meta-ethical question. Furthermore, I do not want to presuppose any particular author's theory of conventions. I shall instead confine myself to the following, minimal criterion:

Criterion C A right exists by convention just in case *the only* justification for its corresponding duties is that the rules of a socially shared pattern of acting impose these duties.

Criterion N A right exists by nature just in case there is a justification for its corresponding duties *other than* that the rules of a socially shared pattern of acting impose these duties. (In other words, every right that is not purely conventional shall for our purposes count as a natural right.)

According to Explication R, you have a right if certain others have certain duties. I take it to be a conceptual truth that they have these duties just in case there is a *justification* for these duties. To say that there is no justification for Y's duty to φ is to say that it is not true that Y must φ; that is, it is to say that there is no duty for Y to φ.[5] Now, Criterion C says the justification of Y's duties appeals to a convention—and X's corresponding right is a conventional right—just in case any justification of it exclusively appeals to the rules of a socially shared pattern of acting. (We can call such a pattern a "practice.") Let me illustrate this, using our previous example with the bicycle again.

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[4] Some argue that the Greek debate about *nomos* and *physis* in moral and political philosophy already introduced the idea of moral conventions and also introduced many of the questions discussed today (see, e.g., Taylor 2007).

[5] As I shall show in Section 5, a circular justification counts as a correct justification for a right.

You have a property right in a certain bicycle if I have a duty not to take said bicycle and if others have suitable other duties. Suppose, the only justification for my duty not to take the bicycle is that the members of our community engage in a socially shared pattern of acting, one of whose rules imposes this duty on people like me toward people like you. Then, if it weren't for this pattern, there would be no justification for my 'duty'. (After all, there is no other justification.) Hence I—and others—would not have this duty, and hence you would have no right. The justification used in this case justifies through mere reference to the rules of the pattern. If the only justification for my duty is of this kind, then your right in the bicycle is a *conventional right*.

Suppose instead, though, that there is an alternative justification. Perhaps the justification for my duty not to take the bicycle is that this bicycle only exists because you mixed yourself with the natural raw materials of which the bike consists (Locke, *T* 2.5). Then, even if there were no socially shared patterns of acting in the world at all, there would still be a justification for my duty; hence I would still have this duty, and hence you would still have your right. This kind of justification is justification through some external, non-conventional fact. If the justification for my duty is of this second kind, then your right in the bicycle is a *natural right*.

4 A Sketch of the Argument to Follow

In the following sections, I shall demonstrate that *all* rights fulfill Criterion C, that is, that all rights exist by convention. (If successful, my demonstration hence rules out the possibility that some rights exist by convention, whereas other rights—for example human rights—exist by nature.) I provide a novel foundation for this claim by combining Hohfeld's analysis with an entirely overlooked idea by Elizabeth Anscombe.[6] I argue as follows:

Section 5: If Explication R is correct, then the justifications we usually give for rights are circular. More precisely, they run in what is often called "Hume's Circle."

Section 6: If the justification for a right runs in Hume's Circle, then the justification for its corresponding duties exclusively appeals to the rules of a socially shared pattern of acting. Hence, the right exists by convention, unless an alternative, non-circular justification exists.

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[6] Said idea is a *leitmotif* in many of Anscombe's writings on ethics (Anscombe 1981a, sect. 2; 1981b, sect. 2; 1981c, pp. 118-122; 1981f). Despite the recent wave of interest in her work, however, only Roger Teichmann (2002; 2008, sect. 3.2.2) has discussed it explicitly and has pointed out its far-reaching implications. Paul DeHart (2007, ch. 6) and Peter Winch (1987) use it as the starting point for their own conceptions.

Section 7: No such alternative justification exists. Three non-circular alternatives have been suggested in the literature, viz. justification by consequences, autonomy or divine commands. All three fail, however, or collapse into a circular justification again. Therefore, rights exist by convention.

5 The Usual Justifications for Rights Run in 'Hume's Circle'

If any informative explication of *X*'s right must mention a corresponding set of duties on the part of some *Y*s (see Explication R), then our usual justifications for rights run in a circle. Elizabeth Anscombe first made this point explicitly, but she credits David Hume with its original discovery.[7]

If we are asked to justify ***why*** someone should respect the duties to be mentioned in an explication of somebody else's right *R*, then we usually reply that the right-holder has right *R*. Take our old example again: If *Y* asked "Why can't I take this bike?", then the answer "It's *X*'s"—in other words, "*X* has a property right in it"—usually counts as a perfectly good justification for *Y*'s duty. Indeed, it seems that any justification not conveying that the crucial normative fact is that *X* has right *R* is *eo ipso* an inadequate justification. (After all, *Y* could take the bike, other things being equal, if neither *X* nor anyone else had a property right in it.) This reply, however, draws on the very thing it is supposed to justify. Explication R says that *X* has *R* just in case some others have a set of corresponding duties $D_1, \ldots, D_n$. *R* is nothing over and above $D_1, \ldots, D_n$. Hence, if someone asks for a justification of one of these duties, say D_i, and we reply (as we usually do) by simply naming the fact that *X* has right *R*, then what we effectively do is to *name* the fact that some people each have a suitable subset of $D_1, \ldots, D_n$ (which includes D_i for *Y*) in order to *justify* the fact that *Y* has duty D_i. We say: "*Y* must (not) do something, because there is a whole set of things that *Y* and others must (not) do, and this action happens to be a member of that set." The reason why one must (not) carry out any of the actions in that set is that one must not violate *R*. *R* itself, though, is nothing over and above this set. As the following figure illustrates, we justify the duties through themselves and the right through the right itself:

[7] Anscombe (1981a, pp. 97-99) reads Hume's famous 'Circle Argument' (*T* 3.2.1; also see Cohon 2010, sect. 10.1) as already containing this point.

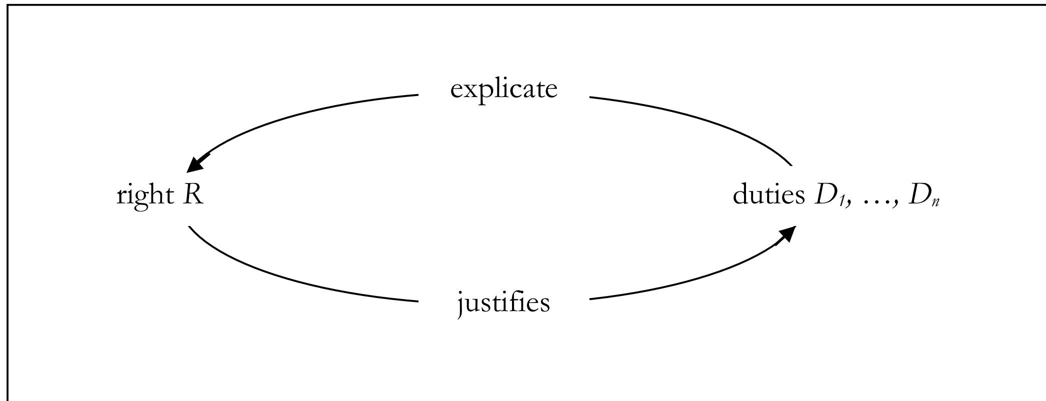

Figure 1: Hume's Circle for rights.

This does *not* mean that replies such as "This is *X*'s bike" to the question "Why can't I take this?" are inadequate justifications for the duty. They still convey information. This information, however, does not consist in the mention of an external fact that exists over and above the duty. (To find such a fact would be to find an alternative justification for rights.) Rather, the reply clarifies of what type the supposed duty is and often also to whom it is owed. The addressee supposedly has a duty not to take the bike, and this duty is the duty to honor a property right, owed to *X*. Had *Y*'s question been "Why can't I sit there?" and the answer: "This is the chief's/judge's/Queen's seat," then the duty would have been the duty to honor the rights of an office-bearer. As I shall show in Section 7, such a clarification is the only kind of justification that we can give for rights—it is, in other words, the adequate justification of a right-based duty.

6 Humean Circularity Implies Conventionality

Our usual justifications for rights run in Hume's Circle. In the current section, I aim to establish that a right exists by convention if *all* of its justifications run in Hume's Circle. In Section 7, I aim to show that that is indeed the case, by showing that all existing attempts to break Hume's Circle fail.

A right can be explicated as the duties it entails, but the right is also what justifies these duties. Anscombe (1981b, pp. 138-141) mentions in passing that the very same circle occurs for rules in a game.[8] Such a rule, too, can be explicated as the 'duties' it entails for the players. Take the offside rule in soccer. Brushing over some of its more intricate details, this rule can be explicated as: "An attacking player must not be closer to the opposing team's goal line than the two players of the opposing team that are closest to this line." Just as we *explicate* *X*'s property right as a duty for

[8] Hume's own discussion focuses on third example: promises (see *T* 3.2.5).

others not to take the item in question, not to damage it etc., we must explicate the offside rule as a duty for players not to move into a certain position, not to pass the ball to players in that position etc. And just as we *justify* *Y*'s duty not to take the item in question etc. by appealing to *X*'s property right, we justify *Y*'s duty not to move into a certain position etc. by appealing to the offside rule. The offside rule must be explicated as the duties it entails, but the offside rule also is what justifies these duties. Justifications for rule-based duties in games thus have exactly the same structure as our usual justifications for right-based duties: Both run in Hume's Circle.

Now, justifications of rule-based duties in games clearly appeal to the rules of a shared pattern of acting (here: the practice of soccer); that is, rules of a game clearly 'exist by convention' as specified by Criterion C. While a game as a whole can sometimes be justified by appeal to independent natural (in the sense of non-social) facts, the duties it imposes on the individual players cannot be thus justified (Ertz 2008, 1.1, 1.2.4 & 4.1; Rawls 1955, pp. 24-28), even though natural facts might set some boundaries here. *Given their structural similarities*, it seems highly plausible that justifications for right-based duties, too, should appeal to the rules of a shared pattern of acting (here: the practice of private property), and hence that rights, too, should exist by convention.

Someone might object to this analogy: "The reason why *Y* must not be closer to the opposing team's goal line than ... admittedly is that a rule of the practice of soccer says so. But perhaps the reason why *Y* cannot take a certain bicycle is not that a rule of the practice of private property says so, but that *Y* 'naturally' cannot take this bicycle. *Some* justifications that run in Hume's Circle clearly appeal to the rules of a socially shared pattern of acting, but why conclude that *all* of them do?"

This objection, however, collapses into the claim that an independent natural fact exists that justifies right-based duties; that is, it collapses into the claim that not all justifications for rights run in Hume's Circle. The suggestion that we 'cannot' do what the other's right forbids us to do, because we 'naturally' cannot do so is empty if left without further specification. As Anscombe (1981a, p. 101) already remarks, we are *physically* able to do what we 'cannot' do given other people's rights, and it is *logically* possible for us to violate these rights. What, then, could "natural" mean here? If the right is to have a justification at all, then "natural" must mean that we cannot do what the right forbids, because of *N*, where *N* must be some natural fact to be further specified (or a set of such facts). As we shall see in the following section, there is no such fact. All justifications for rights run in Hume's Circle.

7 Consequentialist and Deontological Attempts to Break Hume's Circle Fail

Our task is to find a non-circular justification for rights. In other words, we have to find the natural fact or set of natural facts *N* that justifies rights.

There are three suggestions for *N* in the literature: well-being, autonomy and divine commands. A justification of rights through any of these must either say that respect for rights *brings about* the respective *N* or that respect for rights *is itself* a way of realizing *N*. That is, we either postulate a contingent or a necessary relation between rights and *N*. If we think that the relation is necessary, then there are three options:

necessary a — *N* justifies rights, and *N* is part of an explication of rights.

necessary b — *N* justifies rights, and rights are part of an explication of *N*.

necessary c — *N* justifies rights, and there is no explication relation between *N* and rights.

If we combine the possible relations between *N* and rights with the three suggestions for *N*, then we get the following space of possible positions, only some of which have actually been advanced:

Table 1: The relation between rights and their alleged justification *N*.

	contingent	*necessary a*	*necessary b*	*necessary c*
	N ← cause / → justifies *R*	*N* ← explicate / → justifies *R*	*N* →explicates / → justifies *R*	*N* → justifies *R*
well-being	rational egoism & altruistic consequentialism			
autonomy		Kantianism 1	Kantianism 2	
divine commands				contemporary interpretations of scholasticism

We shall see that these positions have the following problems:

	Counterexamples	Collapse into Hume's Circle	Either vacuous justification or counterexamples	Metaphysical dilemma
	(see *Section 7.1*)	(see *Section 7.2*)		(see *Section 7.3*)

All of the empty fields represent positions that have not been advanced, and we could also add more rows to Table 1. My discussion, though, will be restricted to existing positions. But the problems I bring up for those in the first, second and forth column would also arise for positions in the same column that no one has advanced; hence, my discussion gives us good reasons to be skeptical of any view that would fall into these columns. Such a general demonstration, however, is not possible for the third column. My discussion will therefore only establish that none of the *currently available* naturalist justifications of rights is plausible, not that no plausible justification could ever be found.[9]

7.1 Problems with Consequentialist Justifications

Existing positions in the first column justify rights by the well-being that respect for rights brings about. They either address the rational egoist or the altruist. That is, they either argue that all of us maximize our personal well-being if all of us respect rights, or they argue that we thus maximize the well-being of our group. A famous egoistic justification of rights through consequences is Hume's own attempt to break the circle.[10] Another famous example is Hobbes' justification of our duty to respect the rights of fellow citizens (*L* 14-15). Most consequentialists, however, provide altruistic justifications for ethical demands. But although consequentialism is a large family of theories and although rights are a large topic in practical philosophy today, it is difficult

[9] The reader might wonder about the following three omissions: (1) Virtue ethics, the largest family of ethical theories and the one with the longest history, is not represented in this table. This is, first, because it is unclear what role rights play in virtue ethicist theories (see Miller 1995, e.g., for a discussion of rights in Aristotle). Second, contemporary virtue ethicists who have written about rights often accept Hume's Circle; that is, they do not attempt to give a naturalist justification of rights. For more on the contemporary virtue ethicist perspective, see *Section 8.3* below. (2) Locke is not represented. This is because his theory of right is merely a catalogue of rights, not a justification. Property rights are the only type of right on which he elaborates further, but these already presuppose a more basic property right, which in turn remains unexplained, viz. self-ownership. For the same reason is (3) contemporary libertarianism not represented in the table.

[10] According to Hume, human groups invented rights to overcome certain practical difficulties (*T* 3.2.2, § 7-9), and the utility of rights for every single group member justifies the members' duty to respect rights. Property rights, for example, make life easier to plan and more secure (*T* 3.2.2, § 22); they are, according to Hume, even a prerequisite for human life as a group larger than one's immediate kin and friends (*T* 3.2.2, § 4, 13). Each of us, Hume thinks, has an egoistic interest in being able to plan their life as well as in living as a group. Therefore, each of us has an egoistic interest in respecting the property rights of all others.

to find actual examples of altruistic justifications of rights through consequences.[11] Most discussions of altruistic consequentialism and rights after John Stuart Mill (1985, ch. 5) do not ask how altruistic consequentialism justifies rights; they only ask whether it can accommodate rights at all (Anscombe 1981d, pp. 33-42; Gibbard 1984; Norcross 1997; Pettit 1988; Scheffler 1994, ch. 3; Smart 1973, sect. 7).

The problem with a causal and hence contingent relation between the thing justifying and the thing justified is that there will always be counterexamples. For *act-consequentialist* justifications of rights this problem has long been recognized. Assume, for example, that people have a moral right to valuables that their deceased parents intended to pass on to them. Imagine, *X*'s parents intended to pass on valuables to well-off *X*, but *Y* would be able to secretly (a) keep these valuables or (b) donate them to an orphanage in dire need instead. In that case, *Y* would actually further her own well-being or the well-being of the greatest number if she did not surrender the valuables to *X*; hence act-consequentialism tells her not to surrender them. Notice that this is not because *X*'s right in the valuables gets trumped. Act-consequentialism entails the much stronger claim that *X* does not even have a right here. The consequentialist justification for *Y*'s duty to surrender the valuables to *X* is that this will maximize whatever our consequentialist criterion obliges us to maximize; hence if surrendering the valuables does not maximize whatever is to be maximized, then there is no duty to surrender them and hence no corresponding property right on *X*'s part whatsoever (see Explication R)—which seems false.

Could we save rights within act-consequentialism by declaring *X*'s right to be conditional? What if, instead of having a right-to-these-valuables, *X* had a right-to-these-valuables-unless-they-would-generate-more-well-being-in-other-hands? One way to argue against this proposal is to point out that it has implausible implications. The act-consequentialist would have to say the same about all kinds of property, not just inherited property. No one could then ever be sure to actually own anything, since one's property right in anything could at any point be voided by an event that caused the good to now generate more well-being in other hands. (One further implication of that would be that legitimately selling and buying goods became virtually impossible—for how could we ever ensure that the seller is indeed the owner?) Many act-consequentialists, however, are prepared to accept the fact that we would have to radically revise our way of life in order to conform with act-consequentialism (e.g., Singer

[11] Thus, Peter Singer's (1989) famous defense of animal rights only argues that animals have an equal right to protection from bodily harm as human beings because they have an equal capacity for suffering. Singer does not explain how this capacity justifies rights in the first place. William Talbott's (2010, ch. 1; 2013, ch. 6) consequentialist defense of human rights is one of the few that could be classified as an altruistic consequentialist justification of rights. His proposal, however, is not supposed to provide a general justification of rights, but only a justification for institutionalizing a certain set of universal rights (2010, p. 328).

1972, p. 236). Let me therefore add a more principled objection. If the valuables must be given to *X* just in case they will generate most well-being in *X*'s hands, but must be given to someone else in all other cases, then it becomes unclear why the scenario in which they are given to *X* should be understood as respecting a right of *X*'s. In selecting the worthy recipient, it is of no consideration to the act-consequentialist that the valuables were previously owned by *X*'s parents (unless, of course, this accidentally happens to play some role for the maximization of well-being). If *X* receives these valuables, then that is for exactly the same reason for which anybody else would receive them, viz. that these valuables will generate most good in that recipient's hands. But if the parental relation plays no role within the act-consequentialist calculus, then how can we speak of a "right" (to one's inheritance) that *X* has here—even a highly conditional right? We seem to have 'saved' rights within act-consequentialism at the cost of emptying the right in question of its distinctive content.

Hobbes (*L* 15, § 7) already recognized some of the problems of an act-consequentialist conception of rights. He and modern *rule-consequentialists* (e.g. Hooker 2011, sect. 8) try to solve these problems by arguing that disrespect for individual property rights erodes the general practice of private property and thereby has more bad than good consequences in the long run.[12] In cases like our inheritance case, however, where the right-holder is ignorant of their right, there is no risk of detection and thus of erosion of the practice. Therefore, the distinction between the practice and the individual action falling under it cannot solve the problem.[13]

It thus seems that rights cannot be justified through the goods they bring about, that is, consequentialism does not enable us to break Hume's Circle. In fact, what has been said allows us to rule out the entire first column of the Table 1: *Whatever N* is—well-being, autonomy, divine commands or something not yet mentioned—, we will be able to construct counterexamples to a relation between *N* and rights if that relation is causal and hence contingent.

[12] The first principle of Derek Parfit's "Triple Theory" (2011, p. 413) is a similar suggestion.

[13] Rawls (1955, p. 16) objects: "There are obvious utilitarian advantages in having a practice which denies to the [individual agent] […] any general appeal to the utilitarian principles in accordance with which the practice itself may be justified." Even if we grant this, though, it does not solve our problem. The problem is why we should follow the rules of a practice in a situation where this does not maximize *N*, given that it was maximization of *N* which justified our obligation to follow the rules of this practice in the first place. This problem cannot be solved by adding a further rule to the practice, according to which one must follow its previous rules even in such situations, since the same problem would arise for the new rule.

7.2 Problems with Kantian Justifications

The problem of counterexamples vanishes if we claim that one of them explicates the other, so that there is a necessary relation between rights and *N*. James Griffin (1986, ch. 11.1-11.5; 2008, ch. 2.3-2.7), Arthur Ripstein (2009, ch. 2) and other authors in the Kantian tradition propose such a necessary relation between respect for rights and the right-holder's *autonomy*.

If rights explicate autonomy (Kantianism 1), however, that is, if the relation is of type "necessary a," then we run in Hume's Circle again, as the small graph on top of column 2 already illustrates. Suppose rights explicate autonomy as that which we possess if our rights are respected. Then, if the duty to respect autonomy justifies the duty to respect these rights, we have the same circularity as we had before between rights and duties. Since this would be the case no matter what *N* is, we can rule out the entire second column of the table.

The same problem does not arise for a relation of type "necessary b." Here autonomy explicates rights, for example as that which we must respect if we are to respect autonomy. The duty to respect these rights is justified through the duty to respect autonomy.

There are two ways of fleshing out this proposal. In the first case, respect for *N* and respect for rights are identical. This justification can be ruled out immediately, since it is vacuous. In the second case, respect for rights is only one element of respect for *N*. *N* is that feature which the agent possesses if—among further conditions—all of her rights are respected. I do not think that, in principle, there is anything wrong with this type of justification; hence there is no way of ruling out the entire third column of the table. I do think, however, that the only currently existing member of this column, Kantianism 2, faces serious difficulties.

For Kant, the autonomous agent is the one whose will can be "regarded as independent of empirical conditions, as pure will, determined by the mere form of the law, a determinant thought of as the ultimate condition for all maxims." (*KpV*, V:31). Kant defines autonomy as "that feature of the will through which the latter is a law upon itself (independent of any features of the objects of the will). The principle of autonomy hence is: to never choose but so that in the same act of the will the maxims of one's choice are also comprehended as universal law" (*GMS*, IV:440, my translations). In other words, autonomous agents follow the Categorical Imperative. How, then, is autonomy connected to rights? According to Ripstein (2009, p. 34), "Kant's account identifies a right with the restriction on the conduct of others 'under universal law,' that is, consistent with everyone having the same restrictions. Each person's entitlement to be independent of the choice of others constrains the conduct of others […]." You are independent in this sense "if nobody else gets to tell you what purposes to pursue with your means" (p. 34). For instance, *Y* must respect *X*'s property right in a certain bicycle, because failure to do so would make *X* dependent on *Y* in the sense that it would make it impossible for *X* to pursue certain purposes with

this means of hers. *Y* would limit *X*'s "outer freedom" in a way that *Y* could not will everybody's outer freedom to be limited.

The problem that arises for this explication of *N* is that there seem to be counterexamples in which *X*'s right is violated, although her freedom to pursue her ends with her means is not impeded. In other words, this explication of *N* seems incorrect. Here is one such example: *X*'s neighbors violate her property rights if they secretly live in her house, while she is on vacation. If they return everything to its original condition before *X* returns, however, then they do not impede her freedom to pursue her ends with her means. There are also more realistic examples: Secret services violate *X*'s right to privacy if they keep her whole life under surveillance (at least if they do so without any credible indication of serious criminal activity on *X*'s part). If they never intervene, however, then they do not impede *X*'s freedom to pursue her ends with her means. One might object here that both her neighbors and these secret services limit *X*'s freedom in the sense that they limit *X*'s *potential* freedom: If *X* returned home early from her vacation or if she became politically active, then they would impede her; the only reason why *X* is not limited in her freedom is that her choices happen to not conflict with the choices of those who violate her rights. We can meet this objection, however, by tailoring the scenario accordingly: *X*'s neighbors, for instance, could have bugged her and would hence know in advance of an untimely return. In fact, any scenario, in which it is impossible for *X* to ever notice the violation of her rights would constitute a counterexample. Just as we could systematically construct counterexamples to consequentialism, we can systematically construct counterexamples to Kantianism 2.

Someone could object: "Even if it were impossible for *X* to ever notice the violation of her rights, her autonomy would still be limited. For autonomy also consists in having discretion over certain aspects of one's life." Then, however, we must identify these aspects of a rational being's life. If we cannot identify them by their practical relevance, then it seems we must identify them as those aspects over which *X* has a right to decide or lacks autonomy. This, however, means to explicate autonomy through rights, not rights through autonomy. In other words, this objection collapses Kantianism 2 into Kantianism 1.

7.3 Problems with 'Scholastic' Justifications

To postulate a relation of type "necessary c" is to postulate that *N* justifies rights, but that there is no explication relation between *N* and rights. This raises the question of why there should be a necessary relation between *N* and rights at all. Could we not immediately construct counterexamples to the respective positions again?

We could indeed if *N* stood for well-being or for autonomy. If *N* stands for divine commands, though, then we avoid this problem, because we introduce a vol-

untaristic element. We can simply postulate that God's commands are necessarily violated if rights are violated, because God has commanded respect for rights. Contemporary authors sometimes ascribe this view to the scholastics (e.g. Geuss 2001, p. 143). I believe that this ascription is inaccurate, at least for the dominant traditions.[14] But since this view is regularly discussed (e.g. by Parfit 2011, ch. 22), I shall include it in my discussion, too.

This view faces the following problem: Imagine we have two worlds, w_1 and w_2, in which all natural facts are the same, but for which God's commands differ: God commands only the inhabitants of w_1 to respect property rights. Then it either is the case that the inhabitants of w_2 do not have property rights or that there is no duty to respect their property rights. If the first is true (no rights), then moral facts do not supervene on natural facts. A denial of such supervenience, however, is widely regarded as implausible.[15] I, too, will claim here that non-supervenience is implausible, and I use this claim as a premise—which rules out the first option.[16]

If the second option (no duties) is correct, though, then there are rights without corresponding duties, that is, Hohfeld's analysis of rights is false—which, too, is implausible. We thus get stuck with an implausible position either way. In other words, the modern rendering of scholasticism does not seem to be an attractive strategy for breaking Hume's Circle either. Since voluntaristic accounts were the only feasible candidates in the fourth column anyway, this enables us to rule out this entire fourth column.

7.4 Conclusion: All rights Exist by Convention

All discussed attempts to justify rights in a non-circular manner either fail or have costs we should not be willing to pay. Neither does respect for rights always bring about some good nor does it necessarily violate autonomy or divine commands in a way that

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[14] Thomas Aquinas, for instance, classifies moral obligations as part of natural law, which in turn is that part of the world order into which all rational beings can gain insight—regardless of religious beliefs (*ST* I.IIae, Q 91.2 & 100.1). I would say that his view resembles Kant's: Any rational being can see that actions against natural law are unreasonable.

[15] Thus, ever since J. L. Mackie (1977) and Simon Blackburn (1971; 1984) raised the worry that moral realists cannot explain the supervenience of the moral on the natural, the dominant response strategy has been to offer such an explanation or to else argue that non-realists cannot explain this supervenience either, whereas the denial of supervenience is widely considered a non-option. For the problems that a denial of this supervenience raises, see Michael Ridge (2007; 2014, sect. 6) and the works he cites.

[16] Even those who, at this point, would rather hold on to rights naturalism than to supervenience might still find my argument interesting: It implies that they must give up supervenience.

could be formulated without falling again into Hume's Circle, giving a vacuous justification, facing counterexamples or facing a dilemma. The problems that plague the discussed examples from all but the third column turned out to be problems for the entire column; we should hence be skeptical regarding these entire columns. For the third column, only the existing candidate (Kantianism 2) could be ruled out. The conclusion to which we are entitled hence is that none of the hitherto suggested naturalist justifications for rights is satisfying or even plausible. It furthermore seems hard to imagine that any alternative could avoid all of the discussed problems. Given this lack of any plausible non-circular justification, we therefore seem warranted to conclude that rights exist by convention.

8 Conventionalism Can Exclude Relativism

Some readers will find this result more puzzling than enlightening, I expect, because the following question immediately arises: Doesn't conventionalism about rights entail a radical form of cultural relativism (or conservatism)? Doesn't it entail that one cannot criticize, for instance, the right of male citizens in Saudi Arabia to force their daughters to marry at the age of ten? The surprising answer is that if we flesh out conventionalism in a certain way, then we must reject cultural relativism. My demonstration of this will require a small detour via Rawls' distinction between justification *within* a practice and justification *of* a practice.

8.1 Rawls on Rules and Practices

According to Criterion C, rights are conventional just in case their justification exclusively appeals to the rules of a practice. Rawls (1955) has shown that justifications that appeal to the rules of a practice are justifications of an individual move within that practice. To justify a right, on my conventionalist account, hence is to justify a move within a practice. For instance, the justification for my duty not to take this particular bicycle is: You came to hold that bike in such-and-such a manner (through voluntary exchange for some other good, perhaps, or as a present), and the rules of our practice say that goods someone came to hold in said manner may not be taken by others without explicit permission (provided circumstances are not unusual). The conventionalist justification for this case can be put as follows:

(conventionalist) You came to hold the bike in such-and-such a manner, and the rules of our practice say …

In addition to this, there is a second level of justification, Rawls says, viz. the justification of the whole practice. At the level of the practice we can pose questions such as: "Should we have the practice of private property at all?" or "Should our practice of

private property have this shape?", that is, "Should we change some of the rules of our current practice of private property?" Justifications on the practice level appeal to something categorically different, viz. the point of the practice. Contrary to justifications of rights, they mention a fact over and above the thing to be justified.

In this paper, I have not said anything about the justification of practices. Rawls regards justifications on the two levels as independent of each other. This means that justifications of individual rights and justifications of the practice within which these rights are assigned cannot occur in one continuous chain of justification; the justification of the practice cannot 'back up' the justification of the individual right within it. Let us start with the resemblance of such practices to games, as Rawls does: The justification for soccer player *X*'s duty to move into a certain position could be that otherwise she would be off-side. This justification cannot be backed up by considerations about the point of the practice of soccer, such as: "otherwise she would be off-side and then the game would be less fun, and the point of this game is to have fun." The only adequate justification, Rawls' construction implies, is one that does nothing but to clarify of what type the supposed duty is. Similarly, the only adequate justification for my duty to leave said bike is one that does nothing but to clarify that my obligation is of the type that corresponds to property rights. It cannot be backed up by considerations about the point of the practice of private property. The alternative justifications discussed in Section 7 deny that there are two independent levels of justification. They justify your right in the bike as follows:

(rule-consequentialist)	You came to hold the bike in such-and-such a manner, and the rules of our practice say …, *and* we must respect the rules of this practice because in the long run this practice has the best possible consequences.
(deontologist)	You came to hold the bike in such-and-such a manner, and I would violate your autonomy/God's commands if I took things you came to hold in said manner.

Puzzlingly, Rawls himself presented his two-level distinction as an argument *in favor* of rule-consequentialism, and rule-consequentialism is generally taken to be a two-level view. As should have become clear in Section 7.1, however, rule-consequentialism in fact collapses the two levels, and this is the root of its discussed problem. Rule-consequentialism ultimately justifies my duty to respect your individual property right by appeal to the point of the practice of private property, and this is why scenarios in which (i) respect for an individual right does not serve the point of the practice but in which (ii) disrespect for this right would not endanger the practice either, constitute counterexamples to rule-consequentialist justifications for rights. I suggest that we instead follow Rawls' original idea and treat the two levels as independent. Justification on the level of rights, I have tried to show, is by convention. Justification on the level of practices remains yet to be explored.

8.2 Practices as the Background of Rights

Doesn't such a strict separation of the two levels mean that one can criticize practices but not rights? At the beginning of this section, I mentioned the example of the right of Saudi fathers to marry off their ten-year-old daughters. My view allows us to criticize Saudi marriage practice, but doesn't it preclude criticism of that right?

This worry rests on a misunderstanding. The view I advocate says that if someone does have a right *R*, then this is because the rules of some practice *P* say this. If the practice itself is not justified, however, then there is no reason to comply with its rules. Therefore, if the practice should be rejected, then none of the rights it assigns has to be respected.

Doesn't this position collapses the two levels again and leave us with a rule-consequentialist position? For don't I now say that the justification for why *X* has *R* is that the rules of some practice *P* say that *X* has *R* *and* that this practice is justified? No, because all I claim is that a practice must be justified, in order for any right assigned within it to morally oblige us (as opposed to, for instance, legally oblige us). This claim does not entail that the practice and its justification must—or even may—be part of a justification of that right. It is a precondition that the practice be just, but the practice is not part of the justification itself.

The metaphysical principle behind this is fairly uncontroversial and is often invoked in social ontology: Not everything that is necessary for something to exist is part of a description of that thing. Similarly, for normative entities, not everything that is necessary for something to be justified is part of a justification of that thing. A frequently given example is money: "The statement that I owe the grocer does not contain a description of […] the institution of money and of the currency of this country" (Anscombe 1981e, p. 22). Nor would a justification of Anscombe's right-based duty to the grocer mention these. Nevertheless, it is necessary for money and the currency and, I would add, for the practice of trade to exist, in order for the grocer's right to this-or-that sum to exist. Similarly, it is necessary for the practice of trade to be justified, in order for there to be a moral obligation to respect the grocer's right. But this does not entail that the practice of trade should—or even could—be part of a justification of the grocer's right. On the view I suggest, we can only be obliged to respect *X*'s right *R* (or: *R* is also a 'moral' and not just a mere positive right) if the practice *P* within which *R* is assigned is justified, even though no justification of *R* may invoke *P*. If a practice is not justified, then no right *R* within it obliges, but this is because *P* forms the necessary background of *R*, not because *P* justified *R*. With respect to the mentioned right of Saudi fathers, my account therefore allows us to argue that the whole practice is unjustified and that hence there is no duty to respect this right or other rights within it.[17]

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[17] Anscombe puts this thought as follows: "Someone may want to say: […][my duty to the grocer] consists in these facts in the context of our institutions. This is correct

8.3 Practices Cannot be Justified by Conventions

We can now see that the question of cultural relativism concerns the level of practices, not of rights: Formulated in Rawlsian terms, cultural relativism is the view that one cannot legitimately criticize other cultures' practices, not the view that such criticism is not possible regarding the assignment of a right to a particular individual. As I said, the justification of practices remains yet to be explored—I have only outlined the form of an argument against a given right, not its content. One might therefore suppose that my conventionalist view of rights could be combined either with a conventionalist or with a non-conventionalist view of practices. In other words, one might suppose that my view does not force us to take a relativist stance on rights, but it does allow such a stance.

Closer inspection reveals, however, that we must combine the suggested conventionalist view of rights with a non-conventionalist view of practices. According to Criterion C, rights exist by convention because their justification exclusively appeals to the rules of a practice. Suppose we accept the two Rawlsian claims that, first, there is a further level of justification (viz. that of the practice), and that, second, justifications on the level of rights and on the level of practices are independent of each other. Then we arrive at the striking conclusion that justification on this second level cannot be by convention as I defined it. For the justification of practices cannot appeal to the rules of a practice, or at least this cannot be the case for all practices, since that would launch us on a vicious regress. (Hume calls a "convention" what I have called a "practice," and to say that practices exist by convention comes indeed close to saying that conventions exist by convention.) At least the justification of some practice must appeal to something that does not exist by convention. The surprising and novel result thus is that there is a plausible conventionalist view of rights that entails a non-conventionalist view of (at least some) practices.

The shape of this non-conventionalist view remains yet to be determined. I do not intend to carry out this task here, but I want to list some possibilities. (1) One can take a purely evolutionary stance on practices and think that there is a 'competition' between practices, some of which 'survive' because they (better) serve some universal human need, or they serve the particular needs of a given culture well. Thus, most anthropologists and economists trace the cultural differences regarding the practice of marriage back to different economic and environmental conditions (Durham 1991, ch.

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in a way. But we must be careful, so to speak, to *bracket that analysis correctly*. That is, we must say, not: It consists in these-facts-holding-in-the-context-of-our institutions, but: It consists in these facts—in the context of our institutions, or: In the context of our institutions it consists in these facts" (1981e, p. 22, my emphasis). Similarly, I say: "The justification for why X has moral right R is that the rules of some practice P say that X has R—in the context of that practice being justified," whereas the rule-consequentialist says: "The justification for why X has moral right R is that the-rules-of-some-practice P-say-that-X-has-R-in-the-context-of-that-practice-being-justified."

2; Flinn & Low 1986). (2) One can also take a normative stance and think that, at this point, anthropological and ethical questions intersect. An ethical account which incorporates anthropological considerations about practices is Aristotelian naturalism—such as suggested by Philippa Foot (2003). An Aristotelian counterargument to the Saudi practice of marriage would postulate an alternative conception of the good in question that draws on basic human needs and the conditions of a happy life. (3) One can also, however, accept my conventionalist account of rights, but reject these anthropological considerations regarding practices. Conventionalism about rights could then be combined with, for example, a consequentialist justification of practices. (Parfit or Talbott seem to suggest such a second-level consequentialism.) In fact, the real separation of the two Rawlsian levels that I suggest is a solution to the above-discussed problem that rights pose for consequentialism.

All three of these combinations, of course, are optional. You can reject them and still accept my proposal of a conventionalism without relativism.

9 Summary

I have tried to demonstrate that rights exist by convention. I argued that a right exists by convention if it is exclusively justified by conventions. Then I went through the different alternative justifications proposed in the literature. I argued that none of them succeeds, and I concluded that rights exist by convention. A common worry regarding this result is that it entails that we cannot criticize existing rights-assigning practices. I outlined a form of conventionalism that does not only not entail cultural relativism about rights but that actually excludes it.

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