MORAL RIGHTS AND SOCIAL CONVENTIONS

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[T]here are, of course, a great many things whose existence does depend on human linguistic practice. The dependence is in many cases an unproblematic and trivial fact. But in others it is not trivial—it touches the nerve of great philosophical problems. The cases I have in mind are three: namely rules, rights and promises.

Elizabeth Anscombe, On the Question of Linguistic Idealism

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Did we invent or discover moral rights? What would either answer entail for the duties that rights purport to create? And what would it entail for political and legal rights?

The following three papers revolve around these questions. My answers exploit a property of rights that makes them very special: There is a constitutive connection between their justification and their existence. I have a right iff I am indeed justified in making certain demands, iff it is indeed true that others owe me certain duties. A theory of right therefore requires us to connect metaphysical with moral issues.

"Anscombe on the Sources of Normativity" is the first systematic reconstruction of a very important discovery of hers. Rights (and also rules and promises) are self-referential: They purport to themselves be the justification of the duty that they impose; and they indeed are the justification if the purported duty exists indeed. For Anscombe, a social constructivist view of right-based duties is the only way explain this property: Rights can justify themselves, just as rules in a board game can, because they exist as part and parcel of a larger social practice.

"Do Rights Exist by Convention or by Nature?" uses Anscombe's discovery of the self-referentiality of rights to shed new light on an old debate: that between natural rights theorists and

social constructivists about rights. I attempt a proof of Anscombe's contention that rights can only exist with social practices. I also spell out what kind of universal rights are still possible within such a social constructivist framework.

"Authority and Interest in the Theory of Right" applies Anscombe's discovery to a current standoff in legal philosophy. I argue that "Will Theory," according to which I have a right iff I have a justified claim against someone, gives the correct justification of rights, provided we modify certain details. "Interest Theory," however, according to which I have a right iff I have a legitimate interest, seems to give the correct justification of the practices, within which rights are assigned (as opposed to any individual person's right, as Interest Theorists claim).

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1.0 CHAPTER OVERVIEW

1.1.1   Anscombe on the Sources of Normativity

Anscombe is mostly known as a critic of "Modern Moral Philosophy" and its language. My paper reconstructs her positive view. Its aim is not merely exegetical: I hope that Anscombe's theory will emerge as an attractive new paradigm for metaethics.

Anscombe's metaethical theory is a hybrid of social constructivism and (non-reductivist) naturalist realism. Her three main claims are the following: (1) We cannot trace all duties back to one moral principle; there is more than one source of normativity. (2) Whether I have a certain duty will often be determined by the social practices of my community. Duties that arise from other people's rights, for instance, are socially constructed. (3) Whether something is a good, however, will often be determined by human nature—which is not socially constructed.

Key Words: deontic modals ● practices ● Hume's Circle ● G.E.M. Anscombe ● rights ● promises.

1.1.2 Do Rights Exist by Convention or by Nature?

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.

Key words: natural rights ● convention ● practice ● Hume's Circle ● G.E.M. Anscombe ● W.N. Hohfeld

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1.1.3 Authority and Interest in the Theory of Right

I outline a new theory of right: Rights can be explicated as sets of permissions, commands and prohibitions, justified by interests.

I argue as follows: (1) The two dominant theories of right, Will Theory and Interest Theory, have certain standard problems. (2) These problems are much larger than hitherto discussed, and they

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are systematic: The root of Will Theory's main problem is that its conception of the right-holder as 'a small-scale sovereign' (Hart) falsely depicts the right-holder as the only one on whom the right bestows authority, while the root of Interest Theory's main problem is that its conception of the right-holder as bearer of a duty-grounding interest includes in the definition of a right what actually belongs to the justification of the practice within which that right is assigned. (3) I recast the connection between authority, interests and rights in a way that solves both theories' problems. (4) The resulting theory also has two further advantages: It mirrors the understanding of rights in actual public discourse, and it is compatible with a wide selection of ethical theories. Since its core exploits a specific use of modal auxiliary verbs, I call this new theory the Modal Theory of Right.

Key Words: duties ● deontic modals ● G.E.M. Anscombe ● W.N. Hohfeld ● Will Theory ● Interest Theory

2.0 ANSCOMBE ON THE SOURCES OF NORMATIVITY

2.1 INTRODUCTION

Currently, Elizabeth Anscombe's account of first-personal knowledge and her theory of action attract much attention. Other aspects of her extensive work remain mostly unknown. One such hidden treasure is her metaethics. The main reason why this has gone unnoticed, I believe, is that Anscombe never sets it out in a systematic fashion. I reconstruct Anscombe's theory from her various writings, and I put it in a contemporary context. I also hope to make a strong case for her theory. Even readers who will find that they do not agree, however, might still be interested in the puzzles that Anscombe discusses and that her metaethical account is supposed to solve.

Section 2.2 will set out these puzzles. Section 2.3 then presents Anscombe's solution and discusses the advantages over seemingly similar proposals (for example by Rawls or Gauthier). Section 2.4 then argues that Anscombe's theory allows us to combine attractive features of realism and anti-realism.

2.2 MANY MORAL JUSTIFICATIONS ARE CIRCULAR

Anscombe's metaethics develop from the following observation: Rules, rights and promises are self-referential, and they are so in two ways: (1) Their *content* "is given in a formula for acting whose meaning it is that one must act in accordance with it" (1981a, p. 120); and (2) in those cases where there truly is a justification to act in accordance with such a formula, that *justification* indeed is the formula itself. Rules, rights and promises prescribe actions; they purport to themselves be the justification of these prescriptions, and they indeed are the justification if there is one. (For presumably not all rules, rights and promises are binding.)

2.2.1   *The Self-Referentiality of Promises*

This self-referentiality is most obvious for promises. To give a promise is to give a sign *by which* one creates a duty for oneself. That sign can be an explicit utterance, such as "I promise to φ;" but it might just as well consists in, for instance, a nod at the right moment or in writing one's signature in a certain place. The meaning of the sign is that through the sign itself being given, a duty is created. Juliet nods at the right moment (for instance after Romeo has asked whether she'll pick up the kids tomorrow); the meaning of this nod is 'I hereby—by nodding—create a duty for myself to pick up the kids tomorrow'; and under usual circumstances the nod indeed creates that duty.

Anscombe illustrates the peculiar self-referentiality of the promise-sign as follows: Imagine, your nervous system were connected to a paralyzing device. That device makes it impossible for you to φ after you have said "Let there hereby be a constraint upon me [not to φ]" (1981b, p. 98). Such a sign—the "Let there…" utterance—would be much easier to understand than our actual promises are. The utterance activates the device, and then the device brings about the constraint. The utterance does not create the constraint simply by being uttered. Just as the sentence "I *hereby* open you," said while staring hard at a door, does not, simply by being uttered, open the door (1981b, p. 99). In the case of "I *hereby* promise you to φ," on the other hand, it really is *hereby*—by the utterance—that an obligation to φ is created (if it is). The last "hereby" indicates that through which promises go beyond "predictions and expressions of intention" (1981b, p. 99). The "significance of a promise is that it not only of itself (that is without a mechanism) but *by its significance* purports to *make it the case* that there is a new obligation" (1981b, p. 99, emphases in original).

Anscombe's observation, to which I shall frequently return below, is this: (1) The "hereby" that one might use in the explicit formulation of a promise *refers* to the promise itself. (2) If the duty that the promise purports to create is indeed created, then it is *created* through that to which the "hereby" refers, viz. the promise itself.

2.2.2   Hume's Circle

Anscombe claims that David Hume already discovered this self-referentiality of promises. The respective passages (T 3.2.1 and 3.2.5) became famous as "Hume's Circle." Most readers find them

"cryptic" (Cohon 2010, 10.1); but for Anscombe, Hume hit on a profound problem in metaethics here. She formulates Hume's Circle as follows:

> [A][…] promise contains (perhaps on the face of it just *is*) a future-tense description which the giver then makes come true—or he breaks the promise. The obligation is a kind of necessity to make the description come true. But what sort of necessity is that?
>
> We may say: the necessity is one of making the description come true—*or* being guilty of something. Of what? Of breaking a promise. […] Not just to go on running round in the circle let's try again and say: of an injustice, a wrong against the one whom the sign, the description, was given. But what *wrong* was that? The wrong of breaking a promise … We are back in the circle after all. […]. Let's have a sign for […][something being a promise], say "I promise," put in front of the prediction. Or, because we know that too well, let's invent one: "I blip." It's not the *prediction* by itself that it's an offence not to make come true, it's the 'blipping' of it, or its being a blip. And what is the meaning of its being a blip? That it's an offence not to make the attached description come true. But *what* offence? The offence of going contrary to a blip. It seems clear that we just haven't explained what blipping is at all. (1981b, pp. 99-100, original emphases)

That is Hume's Circle "translated into philosophically neutral terms" (1981b, p. 100), that is, in a formulation that does not require us to subscribe to Hume's moral philosophy and philosophy of mind. A promise is a sign that purports to oblige us to act in a certain way and that (at least usually) does oblige us. (1) It *purports* to oblige us by being what it is: a promise; (2) and if we ask for the mechanism by which it *could* possibly oblige us, then the answer again is: by being what it is, a promise.

Thus, promises are self-referential in two ways: Any *definition* of the concept 'promise' will have to mention promises again, as will any *justification* for why promises (can) bind us.

> One might fail to notice that there are two problems, because a promise *signifies* the creation or willing of an obligation. It might be thought that if you could show how there can be a sign with that signification, you would be home and dry: the obligation is generated by the giving of a sign which has that signification! Hume's clarity of mind perceived that this is not so. […] I might say "Let there be a constraint upon me to do such-and-such." *This* is a sign signifying a will to be constrained. It is clear that we could understand this, and still go on to ask: "*Will* there be any such constraint?" (1981b, p. 98, emphases original)

The first problem concerns the meaning of utterances such as "Let there be a constraint upon me…," the second concerns their mechanism. If we were to define Anscombe's concept 'blip', we'd have to say that a blip is a thing that claims of itself to oblige us. And if we were then pressed to say why blips (at least usually) oblige us, then the answer would again be that they are blips: Blips can give us reason to comply with them.[1]

Notice that we cannot escape Hume's Circle by filling the terms "injustice," "wrong" or "offence" with more content.[2] Suppose, we think that what's wrong with a wrong action is that it

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[1] Some of Anscombe's descriptions of Hume's first problem are rather misleading. Passages like the one just cited, where she asks "how there can be a sign with that signification," might suggest that (1) the problem concerns the signal by which we promise, not the very concept 'promise' itself, or that (2) the problem does not concern the concept, but how such a concept can have evolved.

[2] Anscombe does not discuss this suggestion.

does not aim to maximize the greatest good of the greatest number. So we also think that breaches of promise are actions that do not aim to maximize the greatest good of the greatest number. Even so, we would have to specify *how* a breach of promise is a way of doing this. You must, because you blipped it.—And what does that mean, "I blipped it"?—That it's an offence not to make the attached description come true.—But what offence? *How* do I fail to aim at the greatest good of the greatest number in going contrary to my blip? Had I just expressed an intention to carry out the action in question or predicted that I would, then I would *not* act against the greatest good of the greatest number simply by going contrary to my announcement. (Unless, of course, we imagine other special circumstances.) That is, had I just announced instead of promised the action, then there would be no moral issue. Our problem is that we are unable to specify how we wrong others if we combine our announcement with a special sign and then don't do as announced. That problem cannot be solved through a more detailed explanation of what a wrong in general is. We need to know what makes this type of action wrong.

2.2.3   The Self-Referentiality of Rules

For Anscombe, Hume's discovery has a much broader application than he realized. It applies to rules and rights as well, and hence has huge implications for metaethics. This is how she applies his discovery to rules:

> The parallel between rule and promises is obscured by the fact that a promise is a sign
> […]. […] The requirement of acting *so* because of a rule is not generated by the rule's
> being uttered. Nevertheless the problem is parallel; for *the necessity is supposed to be generated*

by the existence of the rule, and in explaining what a rule is beyond a mere regularity, one

will say, for example, that *it is given in a formula for acting, whose meaning is that one must act in*

accordance with it. (1981a, p. 120, emphasis added)

The parallel to promises is more obvious if you imagine the rule to be stated on a sign (1981b, p. 102).

Traffic signs, for instance, state rules—even if they only show a picture.

Figure 1: Traffic sign

The content of this sign is not "a mere regularity," such as 'People prefer not to turn left here'. The

sign says: "Follow me—and don't turn left." In general terms, the content of a rule according to

which you must φ is that *it itself* obliges you to φ. In fact, all rules are like the following sign:[3]

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[3] A very wide notion of a rule could include entities for which that claim is not true. It could, for

instance, include instrumental 'rules', such as "In order for eggs to become soft, you must cook them

for three minutes." Those 'rules', however, are not the kind that interest moral philosophers; they just

formulate causal relations.

Figure 2: Self-referential sign

If we were to formulate the traffic rule depicted above, then we would probably say: "You must not turn left here." That formulation appears not to contain a reference to the rule itself and thus covers up the parallel with promises. The justification for why you must not turn left, however, is that this rule itself says that you must not. The correct way to understand "must not" in this phrase is as "you must not because I, this rule, say so."

2.2.4   The Self-Referentiality of Rights

Apart from a few, very condensed remarks (1981c, p. 140), Anscombe does not explain how Hume's discovery applies to rights. I suggest that we extrapolate as follows: Rights are similar to rules, in that we generally do not create a right through formulating it. (A lawgiver might be able to do that, of course.) In explaining what a right is, however, beyond a mere prompt or tradition, one can again say "that it is given in a formula for acting, whose meaning is that one must act in accordance with it." According to this formula, the right-holder *may* do or *does not have* to do something; certain others *must*

or *may not* do something else; and that is because of the right itself. If Juliet has a right to her wage, for instance, then this right is something that goes beyond her prompting her employer to give her money and it goes beyond her employer traditionally giving her money. It means that her employer must give her money and must do so because of this, Juliet's right, itself.

The parallel between rights and promises is even harder to discern than that between rights and rules. Many formulations that we give of rights do not mention any action at all—just take "Juliet has a right to her wage" or "This money is Juliet's." Moreover, the actions that a right regulates are often not actions of the right-holder but actions of others concerning the right-holder. (In our example, they are actions of Juliet's employer.) Thereby, formulations of rights often cover up the fact (1) that rights prescribe actions and (2) that they claim of themselves to be the justifications for these actions.

2.2.5   A Special Class of Deontic Modals

Anscombe believes that formulae which express rules, rights or promises belong to (or perhaps form) a special class of deontic modal claims: Their justification does not *ground* the supposed obligation; it *classifies* it as being an obligation of the rule-type, the right-type or the promise-type.

In expressing rules, rights and promises, we use claims that mark an action as either necessary or possible. For each affirmative claim, such as "You must …," "You can …" or "You may …," there is a negative correlative, such as "You don't have to …," "You cannot …" or "You must not …" We often combine these modals with what appears to be a justification. The prohibition "You can't sit there," for instance, might be combined with: "This is N's place" (1981b, p. 101). The resulting claim "You can't sit there; this is N's place" appears to have the same logical structure as, for instance:

"You can't move that; the shelf will fall down" (1981b, p. 101). The meaning of "The shelf will fall down," however, can be explained without reference to "You can't move that;" whereas Hume's Circle shows us that this is not possible for the meaning of "This is N's place." If this place is N's, then that *means* (together with further things and under usual circumstances) that others are not allowed to sit there. N's right is not an independently describable fact that could serve to ground the prohibition. The prohibition partly constitutes N's right.

Anscombe introduces a special terminology for deontic modal claims that only allow for combinations with such a dependent reason, that is, with a circular justification. She calls such a claim "forcing modal" in case it is affirmative and "stopping modal" in case it is prohibitive.[4] Forcing and stopping modals express a necessity that is neither a logical nor physical necessity—which is why Hume called the forcing and stopping modals associated with a promise "not intelligible naturally" (T 3.2.5, § 2). Quae deontic necessity claims, forcing and stopping modals are compatible with the falsity of the claim embedded under them (1981b, p. 100); that is, they do not obey the "Axiom T." Anscombe illustrates the idea of a stopping modal as follows: "If I say 'You can't wear that!' and it's not, for example, that you are too fat to get it on, that's what I call a stopping modal" (1981b, p. 100). The necessity that such modals express is of its own kind; it is the necessity to act in accordance with the prescription because of the prescription.

Anscombe also introduces a term for the dependent reason that can accompany a stopping or forcing modal; she calls that its "logos."

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[4] Roger Teichmann (2008, p. 97) introduces a third term, "permitting modal," for the negation of a stopping modal. ('May', for instances, could be defined as the negation of 'can't.')

[For] it *is* a 'reason' in the sense of a *logos*, a thought. But if we ask what the thought is, and for what it is a reason, we'll find that we can't explain them separately. We can't explain the "You can't" on its own; in any independent sense it is simply not true that he can't (unless 'they' physically stop him). But neither does "it's N's …" have its peculiar sense independent of the relation to "you can't". Of course, *once these linguistic* practices exist, we can detach the two parts from one another and "it's N's" can appear as an independent reason, for example a reason why one will not do something (1981b, p. 101, emphases original).

Instead of "logos," Anscombe says, "I might also use 'theme' […] for the second half of 'you can't… because…,' where the two halves are not independent" (1981b, p. 102). For what the second half effectively does is to classify the preceding modal as being of a particular type. Rules, rights and promises are three such "general logos-type[s]." Each of them "is an abstraction from many particular cases; a label which tells you the formal character of the stopping modal" (1981b, p. 102). About the logos-type 'right', for instance, Anscombe says:

I have located the generation of the concept right in a certain kind of use of a stopping modal with what appears to be a reason attached: the reason says that something is N's, or is 'of N,' or 'for N'. […] We have here a very special use of the name of a person, or a very special way of relating something to a person, which explains (not is explained by) the general term "right." […] The general term "right" is constructed because, as it were, our language feels the need for it. As, for example, the general term "relation" was invented. (1981c, p. 142)

2.3 PRACTICES AS A SOLUTION TO HUME'S CIRCLE

We said that rules, rights and promises pose two problems: Neither can we define what they are, without bringing them in again; nor can we justify the duties they potentially impose through anything but themselves. Hume's own solution to this two-fold circle is that "promises have no force antecedent to human conventions" (T 3.2.5, § 6). Anscombe aspires to formulate a more generalized version of this, "which fully justifies Hume in his own solution" (1981b, p. 100). She calls a "practice" what Hume has called a "convention," and she argues that practices are what gives (1) rules, rights and promises their special content as well as (2) their power to bind us. The resulting moral theory is a hybrid of social constructivism and Aristotelian naturalism. It distinguishes two fairly independent spheres of justification: Practice-internal necessity is socially produced. The practice itself is necessitated by human nature.

Moral theories that regard (some) duties as practice-internal rightfully incurred much criticism (see, e.g., Melden 1977, ch. 2; or Scanlon 1990). Examples of such rightfully criticized views are rule-consequentialism and contractarianism. Although Anscombe's view, too, is such a "practice conception" (as I shall call it), it is not vulnerable to the main objection against previous practice views (see Section 2.3.4).

2.3.1 *Practice-Internal or "Conventional" Necessity*

We were unable to define what that is, a rule, a right or a promise, but "definition is not the only mode of explanation" (1981c, p. 138). We can say more about them and about how they bind us, even though this explanation cannot take the form of "Rules, rights and promises make it necessary for you to do something by _____ [insert independent fact here]." Unfortunately, Anscombe herself is not very explicit on how the concept of a practice sheds light on that of a rule, of a right and of a promise. What I shall say in the current section will hence go far in terms of interpretation. I read her argument (and Hume's) as an argument by exclusion.

I shall start with the necessity created by rules in a game. For game rules, no one doubts that the necessity they impose requires the game. Take that rule of chess which obliges Juliet to move her king, who is in check. The content of this rule is 'Players must move their king if he's in check because of me, this rule'; that is, we are in Hume's Circle. At the same time, the situation is not very mysterious: The rule is part of a larger set of rules that together form the game of chess. The necessity that the rule generates exists within that game. Were Juliet not playing chess, then it would not be necessary for her to move this particular piece of wood.[5] In fact, that piece of wood would not even be a king, nor would there be the situation of 'being in check'.[6]

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[5] Unless, of course, some non-chess-related fact made that necessary. (Perhaps Juliet needs to stick this piece of wood under the table, to keep the table from wobbling.)

[6] John Rawls (1955, p. 25) already points out that one cannot "steal a base" outside of baseball. John Searle (1969, sect. 2.5) later calls rules like the check-rule "constitutive rules."

How, then, does a game generate a necessity for its players? Some would suggest that this necessity rests on a kind of contract: Through agreeing to play chess, Juliet implicitly agreed to follow the rules of chess. Hence her duty to follow any of these rules ultimately is the duty to keep this implicit agreement. That suggestion, though, is unhelpful: It already presupposes the concept of a promise which is among those that Anscombe set out to investigate and definitions of which got caught in Hume's Circle. Others will suggest that Juliet's chess-duties stems from her opponent Romeo's expectations, which she may not violate. (That would be to suggest a "Principle of Fidelity" for games, as Scanlon 1990, p. 208, suggests for promises.) Juliet's duty, however, is independent of Romeo's expectations: If Romeo is not well-informed about the rules of chess, he might expect Juliet to move a different piece. Nevertheless, Juliet would still have the duty to move her king. It is the game itself that requires her to move the king, not the other player's expectations.

Both these suggestions attempt to break Hume's Circle. They are akin to the paralyzing device imagined in Section 2.2.1: The external fact that there is a contract or an expectation, grounds the duty. Contrary to that, Anscombe does not understand the relation between a game and a rule-based duty as a grounding-relation. The rule is not something external to the game, which the game endows with force. Instead, the concepts 'rule' and 'game' are interdependent. (A definition of what chess is, for instance, could consist in a complete list of the rules of chess.) We pick up these concepts 'as a package', so to speak, early on in our lives, when we actually learn to participate in games.

> Consider the learner in chess or some other game. Of course: "You have to move your king, he's in check" is equivalent to "The rules of the game require that, in this position, you move your king." But a learner may not yet have this idea: *the rules of the game require…* Accepting it when told "You have to move your king, he's in check," is part of learning that very concept: 'the rules of the game require'. *Requiring* is putting some

sort of necessity on you, and what can that be? All these things hang together at some early stage: learning a game, learning the very idea of such a game, acquiring the concept of 'you have to' which appears in the others' speech, grasping the idea of a rule. Nor is there a distinct meaning for "being a rule of the game" (unless the general idea has been learned from other games) which can be used to *explain* the "you have to" that comes into that learning. (1981b, p. 102, emphases original)

Thus we cannot ground the necessity created by the rule in its game. Nevertheless, the notion of a game can shed some light on this necessity. A game is one of these social patterns, in which we learned to participate, when we were "trained in the practices of reason" (1981b, p. 103). The notion of a game does not help us to a "definition" (1981c, p. 138) or a "translation or analysis" (1981e, p. 116) of 'rule'. The situation, however, is very familiar to us: In a certain social setting, others do things that function as prompts for us to do things and *vice versa*. Those who don't show the trained reaction are 'wrong'. Anscombe thinks that this dependence between a rule and a game is also the correct way to think of promises and to think of rights. Those, too, exist in the context of a bigger social "practice."

It may be asked: "But what is this necessity [created by the promise]?" The answer is given only by describing the procedure, the language-game, which as far as concerns the 'necessity' *expressed in it* does not differ from this one: "I say 'ping' and you have to say 'pong'." (Anscombe 1981f, p. 18, emphasis original)

As intimated, I understand Anscombe's argument as an argument by exclusion. (1) It is logically possible for us to act against rules, rights or promises, and (2) it is physically possible for us to do so. In all cases where "you are told that you 'can't' do something" because of a rule, a right or a promise,

"you plainly *can*, as comes out in the fact you sometimes *do*" (1981b, emphases original). In what sense, then, is it impossible for us to act against them? (3) In Section 2.2.2, we tried to argue that it is *normatively* impossible for us to act against rules, rights or promises, that we wrong others if we do. We were, however, unable to specify what is wrong with doing this. How then do rules, rights and promises generate a necessity? What option is left? (4) The answer that Anscombe offers is: We are familiar with the necessity created by rules, from these games in which we were trained early on. We cannot give a definition of "rule," but our training has given us a practical understanding of rules: We can move in these social patterns. Now, the wrong that you commit when you disrespect a right or a promise is the same type of wrong that you commit when you don't react as trained to prompts within one of these patterns. Anscombe does not coin a name for this type of necessity; so let me introduce the name "conventional necessity" for it. Anscombe seems to think that a description of the social context is the only explanation that is left and the furthest we can go. Her notion of a practice is central to a description of the wider contexts of rules, rights and promises; and such a description is the closest we can come to an explanation.

This result may appear disappointingly quietist. As we shall see in Section 2.3.3, however, it is quite powerful: It will enable us to formulate a criterion for what one actually ought to do—faced with other people's real or supposed rights.

Qua argument by exclusion, what has been said does not prove that rules, rights and promises can only exist and can only have force as part of practices.[7] Anscombe, however, makes a very

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[7] Michael Thompson (2012, slides 23-48) suggests that such a proof might be constructed from an epistemological observation of Anscombe's in "On Promising…" (1981f, p. 10): I promise only if I understand myself to be promising. Hence, any complete definition of 'promise' would have to

convincing case: (i) She shows the semantic similarity of all three entities: All three are self-referential deontic modals. (ii) Most philosophers would agree that the understanding she suggests is the correct understanding of rules. (iii) Her account sheds some light on all three entities, despite the fact that Hume's Circle makes it impossible to define them.

2.3.2 Practice-External or "Aristotelian" necessity

We saw that Anscombe regards the necessity that rules, rights and promises create as socially created. So far, her moral philosophy sounds rather relativistic: We must follow certain prescriptions because our community agreed on these. How could that ever give us a theory that justifies substantial moral duties?

Contrary to individual right-based, rule-based or promise-based duties, practices can be justified through something other than conventions on Anscombe's account. In several of her discussions (e.g. in 1981b, p. 100), she quotes Aristotle's 'dictionary', according to which "one sense of 'necessary'

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mention this self-understanding. That, however, makes it impossible to define 'promise', as well as to specify what a person who promises thinks she is doing. Anscombe, after bringing up this paradox, proceeds to give a description of the practice of promising (pp. 14-16), and she indeed claims that this description resolves the paradox (p. 17). How exactly a practice is supposed to enable us to think thoughts with such a self-referential content, however, remains unclear. ("On Promising…" is Anscombe's earliest treatment of Hume's Circle, and her later papers do not mention the epistemological paradox anymore.)

is: 'that without which some good will not be attained or some evil avoided'" (Meta. V, 1015a22-23).

Philippa Foot later named this type of necessity "Aristotelian necessity" (2003, p. 15). Aristotelian

necessity is a metaphysical necessity: In all possible worlds in which the good in question is

attained/the evil avoided in an adequate way, such-and-such is the case. For Anscombe, practices are

among the things that can be necessary in this Aristotelian sense. We could summarize her account

thus: The justification of a rule-based, a right-based or a promise-based duty appeals to what is *right*,

in the sense of a correct move within the practice. The justification of a practice appeals to what is

good—in the sense of good for human beings.

First, it can be necessary for a community to adopt a new or to keep an existing practice.

Anscombe claims, for example, that it is necessary for human beings to have the practice of promising;

because it is often necessary for us to get each other to do something and because that practice is

often the only means of doing so.

> What ways are there of getting human beings to do things? […] [F]ew people have
>
> authority over everyone they need to get to do things, and few people either have power
>
> to hurt or help others without damage to themselves or command affection from others
>
> to such an extent as to be able to get them to do the things they need others to do. […]
>
> [In default of these means, promising] is at least *a* means of getting people to do things.
>
> Now getting one another to do things […] is a necessity for human life, and that far
>
> beyond what could be secured by those other means. (1981f, p. 18, emphasis original)

Second, it can be necessary for a practice to have a particular shape. A practice serves some function,

and sometimes it will be unable to do so unless it contains this-or-that rule or assigns this-or-that right.

In that case, the rule or the right, too, and not just the practice is necessary in Aristotle's sense.

Anscombe gives the following example:

> [T]hose who have and carry out the task of bringing up children quite generally perform
>
> a necessary task. It cannot be done without children's obedience. So those people have
>
> a right to such obedience. (1981c, p. 145)

Anscombe might or might not be correct about this and the previous examples, but we only need to evaluate the structure of her arguments here. The following detail is very important: In deciding whether a certain rule or a certain right must be part of a practice, we are considering the rule or the right as a type, as opposed to the rule that a given individual must follow in a given situation or the right of a given individual in a given situation. Thus, the reason why adults with children have a right to tell these children what to do (if they have such a right) is that raising children would otherwise be impossible. But the reason why mother M has a right to tell *this* child C what to do is that C is her child. Or, to pick up our earlier example of occupying N's seat: The reason why people in such-and-such a situation have an exclusive right to use such-and-such objects (if they indeed have such a right) could be that refusal of that right would make it impossible for our practice of private property to serve its function. The reason why *N* has a right to *that* seat, however, is that N bought a ticket. In other words, a general right can be necessary in the Aristotelian sense; the duty to respect an instantiation of a right always is a practice-internal or "conventional" necessity.

Naturally, it need not be a rule or a right, which is necessary in Aristotle's sense, but it can also be the modification of a rule or a right or its complete abolishment.

> [Arguments for such a change][…] might be about the ill consequences of including
>
> such-and-such types of people in the general rule, or about the inner meaning of the
>
> rule (like the 'intent' of a statue) understanding of which will make us 'see' that these
>
> people don't fall under it. Or […][they] may attack the whole rule root and branch as
>
> doing nothing but harm or as 'senseless'. "Why should mere … mean that one can …;

that equally or more valuable people should have to yield place in …?" Thus the qualification referred to in the *logos* may be rhetorically belittled; the disadvantages to those not so qualified rhetorically enlarged upon. (1981c, p. 144)

In discussing Aristotelian necessity, Anscombe only considers two cases: the justification of individual practices and the fit of a right or a rule with its practice. It seems, though, that there are a number of other cases to which similar considerations should apply: the fit between different practices, between the rules of different practices, and between the rule of one practice and the function of another practice. All of these are potential sources of conflict. The most plausible interpretation, I suggest, is a holistic picture of Aristotelian necessities: Some practices (and their rules) are necessary only if you hold all other practices fixed; others are necessary even if you allow the other practices to vary—and between these two extremes there are degrees of robustness of necessity.

Aristotelian necessity derives from goods. Anscombe has a naturalist view of the latter:[8] She thinks that for human beings, as for all living beings, there is a species-wide standard of flourishing.[9] Certain things are necessary to reach that standard; hence these things constitute goods for human beings. Some human goods can only or best be realized with the help of certain practices, and this is the justification for having the respective practices and for why these practices must contain certain rules or assign certain rights. Given that human goods are determined by human nature, it is irrelevant whether a given community recognizes them as goods or not.

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[8] Anscombe's view hence clearly differs from the "Aristotelian constructivism" recently proposed by Mark LeBar (2013, sect. 5).

[9] Foot (2003) develops a more detailed theory of this standard. (See furthermore Geach 1979; Hursthouse 2001.)

[Aristotelian necessity] gives us a way of arguing for a right without appeal to custom, law or contract; and similarly of arguing that some customary right is no right but is, rather, a customary wrong. If something is necessary, if it is for example a necessary task in human life, then a right arises in those whose task it is, to have what belongs to the performance of the task. […] Justification by necessity (of a goal, and of the means to it) is one of the most common—and most commonly abused—forms of justification offered. […] The 'necessity' of the goal is very likely the suspicious term of the argument. But in *form* it is sound enough […]. (1981c, p. 145, emphasis original)

Notice that Anscombe's naturalist stance on goods is logically independent of her distinction between two kinds of necessity. In principle, one could combine a non-Aristotelian theory of goods with her metaethical theory of rules, rights and promises.

2.3.3   *How to Connect the Right with the Good?*

In Sections 2.3.1 and 2.3.2, I extracted the two central components of Anscombe's metaethics from her various papers. The current section will put these together and draw out some implications. In the remainder of the paper, I shall then place the reconstructed theory among current alternatives.

We saw that Anscombe distinguishes two sorts of necessity. First, there is practice-internal or "conventional" necessity. The necessity imposed by a rule, a right or a promise is of this kind.

(CN)   It is *conventionally* necessary for N to do A *if:* a certain practice P exists in N's community *and* P allows someone to use "N must do A" as a forcing modal.

Second, there is practice-external or "Aristotelian" necessity:

(AN)   It is *Aristotelianally* necessary for a community C to have a practice P and for P to contain

rule R *if* an important good G will otherwise not be realized (*or* a grave evil E not be

prevented) in an adequate way.

This definition of Aristotelian necessity is simplified. As mentioned in Section 2.3.2, a holistic view

of practices seems most plausible: Whether we should actually adopt a practice P will also depend on

its interaction with various other factors, such as already existing practices.

Anscombe stays mostly silent about the relation between these two types of necessity. We would

need to know how the right and the good connect, however, in order to decide what anyone actually

ought to do. The following three inferences regarding Anscombe's view seem warranted.

First, Anscombe must allow some influence of Aristotelian necessity on our conventional duties.

For if she does not, then we end up with the implausible position of the radical cultural relativist,

according to whom practice-internal necessities must always be respected—which she explicitly rejects

(1981c, pp. 142, 145).

Second, her view excludes an influence in the other direction. There can be no rule-based, right-

based or promised-based duty to adopt a new or to modify an existing practice (unless that duty is

part of another, already existing practice). To give an example: The members of a certain government

cannot be under a duty to introduce the practice of democratic elections because those whom they

rule have a *right* to democratically elect their government (unless those ruled have such a right as part

of another, already existing practice—as when their government is under the jurisdiction of a court,

for example, that rules that they must hold elections). It could be, however, that there is an Aristotelian

necessity to have the practice of democratic elections. Claiming that would require us to show that an important good cannot be adequately realized without that particular form of governance.

Third, Anscombe has to reject the idea that the influence of Aristotelian necessity on our conventional duties is such that Aristotelian necessity 'backs up' these duties (that is, that practice-external necessity backs-up practice-internal necessity). She thus has to reject rule-consequentialism (such as defined by Hooker 2000, pp. 32-33; or by Rawls 1955) as well as theories that ground rules, rights and promises in a social contract (e.g. Gauthier 1986) or that debunk them as successful evolutionary devices (e.g. Binmore 2005, ch. 6). All these theories would justify our above-mentioned, individual duty not to take a certain seat by arguing that the practice of private property results in better long-term consequences than a lack of it.[10] In other words, they use the justification for the overall practice as a justification for any individual move within it, too.[11] Various objections have been raised against rule-consequentialist and contractarian justifications of individual duties, and I shall discuss the most important of these in the next section. For the moment, I only want to stress that Anscombe must reject this whole family of justifications: They give an *ex*ternal justification for our duty to respect rules, rights or promises—viz. the maximization of good consequences and the

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[10] Some of these theories favor egoism, some favor altruism. The consequences that count as relevant vary accordingly: Either they are the consequences that the agent suffers or they are the consequences that the group suffers. If the latter, then the relevant measure is either the aggregate of the consequences for all members of the group or it is the distribution of these consequences.

[11] Rawls (1955, p. 3) sets out to show that these two justifications may not be identified. Nevertheless, his justification for our individual duties is practice-*ex*ternal: "The obligation to keep a promise is a consequence of the principle of fairness" (Rawls 1999, p. 304).

rationality of acting as if bound by an agreement, respectively. They thus claim that it is possible to leave Hume's Circle, which Anscombe rejects.[12] Hence a back-up relation between Aristotelian and conventional necessity cannot be the kind of connection that she has in mind.

Anscombe does not tell us how to solve this conundrum. I shall advance a suggestion here that uses ideas from "On Brute Facts" (1981d), one of her papers on social ontology. In that paper, Anscombe argues that certain institutions form the necessary background of certain facts, in the sense that some facts could not exist if the respective institution did not exist. As she points out, however, such a metaphysical dependence of a fact on its background does not entail that a *description* of this fact must (or even may) mention the background.[13] Similarly, I should argue that the existence of certain duties—viz. those imposed by rules, rights and promises—requires the good purpose of the practice as a background. That, however, does not entail that a justification of these facts must (or even may) mention the practice. My suggestion is to regard the necessity of the practice as a *precondition* of any practice-internal duty. N can only have a right that we vacate that particular seat if the whole

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[12] Hume's own conclusions from his discovery seem hard to reconcile. On the one hand, he justifies the individual's duty to comply with the rules of a practice by the point of that practice, just as rule-consequentialists and contractarians do (T 3.2.2). On the other hand, he realizes that there is no way to convince a "sensible knave," who "observes the general rule and takes advantage of all the exceptions" (EHU 9.2, § 9-10).

[13] One of Anscombe's examples is: "[T]he statement that I owe the grocer does not contain a description of our institutions, any more than the statement that I gave someone a shilling contains a description of the institution of money and of the currency of this country. On the other hand, it requires these or very similar institutions as a background […]." (1981d, p. 22)

practice of private property indeed serves some good or prevents some evil. Saying that, however, does not entail that a justification of our duty toward N may be justified by drawing on the necessity of the practice of private property. If we regard the necessity of the practice as a background, then we arrive at the following *prima facie* necessity claim:

(PFN)   It is *prima facie* necessary for N to do A *if:* a certain practice P exists in N's community C *and* P allows someone to use "N must do A" as a forcing modal *and* P is Aristotelianally necessary for C.

In other words, it is necessary to respect a conventional necessity if the practice within which that conventional necessity exists is necessary in Aristotle's sense. Suppose, for example, that the marriage practice of a given community is such that it systematically harms one party to the marriage by expropriating them. *Prima facie*, there would be no necessity for any given member to obey the rules of that practice.

Some might wonder why I am speaking of a "*prima facie* necessity" as opposed to an "all things considered necessity" here. This is because PFN does actually not prescribe a duty *all* things considered. It prescribes a duty certain-conventional-and-certain-Aristotelian-necessities considered. There are, however, many other circumstances that influence what any real person in a given situation ought to do. I already mentioned that a plausible Anscombean theory would be holistic, that is, N would have to consider other practices and their rules, in order to form an all-out judgment. There is more, though: One further thing that any all-out judgment about an action must take into account, for instance, are certain empirical facts. Perhaps Juliet's employer has a right against her that she operate a certain machine—but not if that machine happens to be broken. A third thing to consider for an all-out judgment are emergencies and other special situations. Thus, it is necessary for Plato to

restore his friend's weapon if the practice of private property exists in Athens *and* allows the friend to use "You must give me that weapon" as a forcing modal against Plato, but not if the friend is in a state of madness and hence likely to bring about evil (Republic 331c). There would be different ways to include such circumstances in Anscombe's conception: Perhaps the practice of private property is trumped by something more important in the last example. Perhaps it contains an emergency clause. Such open details, however, do not need to worry us at this point, where the aim is to set out the main features of Anscombe's view. I suggest that the described background-foreground construction is a plausible way to connect her ideas.

2.3.4   Anscombe Bypasses the Main Objections to Practice Views

The suggested background view does not identify the justification of the practice with the justification of an individual duty. This feature allows it to avoid the most pressing objection against other practice views, such as rule-consequentialism and contractarianism.

(R.-Consequ. & Contract.)   If there is a conventional necessity for N to do A and honoring this conventional necessity will have the best long-term consequences, then it is *prima facie* necessary for N to do A *because* doing A will have the best long-term consequences.

(Background view)   If there is a conventional necessity for N to do A and there is an Aristotelian necessity for N's community to have the associated

practice, then it is *prima facie* necessary for N to do A *because* of the conventional necessity for N to do A.

According to the first type of view, the source of the individual duty are the consequences of the practice. According to the second view, the source is my promise, your right or the rule. The lesson that Anscombe draws from Hume's Circle is that we cannot specify an independent justification for the duties generated by a rule, a right or a promise. We can only classify them as *that* type of duties, and the best way to understand duties of that type is as existing as part of a practice. This practice must be justified, in order for us to be under a normative (as opposed to a mere social) necessity to honor the respective duties, but it does not appear in the justification of these duties.

The first type of view has met with a variety of objections, which led many to regard practice views as a failed project.[14] The most important of these objections is that views of the first type give the wrong justification for individual duties. It simply seems false, for instance, that Juliet must do what she promised Romeo to do *because* sticking to her announcement will bring about better consequences for Venetia in the long run. For a start, that justification implies the odd conclusion that it would really be all citizens of Venetia and not Romeo in particular who would be wronged if Juliet broke her promise.

Anscombe fully agrees with this criticism. For her, Hume's Circle demonstrates that it is the fact that Juliet has promised which creates Juliet's duty—not the goods to be realized through the

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[14] William Vitek (1993, pp. 118-143 , 215-133) provides an overview of these criticisms. The contemporary heirs of practice views are theories that regard compliance with certain moral principles as constitutive of agency (such as Korsgaard 2009; Velleman 2000). Criticisms of this type of "constructivism" (e.g. Enoch 2006) echo the earlier objection of Hume's sensible knave.

practice of promising, nor any other external reason. Within the practice of promising, Juliet must do such-and-such (viz. carry out an action that she announced in a special way), and the reason is that she promised (that is, that she announced the action in this special way). From Anscombe's perspective, we could say that critics like Abraham Melden or Thomas Scanlon point out an implication of Hume's Circle: The only correct justification for the promise can be the promise itself. Those who draw on the usefulness of the practice in order to justify moves within the practice try to give a justification that Hume has demonstrated does not exist.

2.4 COMPARISON WITH ALTERNATIVES IN METAETHICS

In this last section, I shall first summarize Anscombe's account as I understand it. Second, I shall place it on the map of current positions.

2.4.1 Summary of Anscombe's Metaethics

The account reconstructed here from Anscombe's various papers combines social constructivism and naturalist realism: (1) Duties imposed by a rule, a right or a promise are conventional duties. This means that they exist as part of a practice and that their justification must appeal to features internal to that practice. Practice-internal justifications are circular. (2) A justification of the practices, on the

other hand, must appeal to practice-external considerations—Anscombe suggests that practices must be justified through human needs. These practice-external justifications are non-circular. (3) A conventional duty is ultimately justified only if it is part of a justified practice. In other words, the goodness of a practice is a precondition for an individual agent's duty to comply with a conventional duty assigned within that practice. Anscombe thus opposes rule-consequentialism and contractarianism, according to which the goodness of a practice ultimately justifies the individual agent's duty. (As specified under point 1, conventional duties must be justified by practice-*in*ternal considerations on Anscombe's account.)

The following two implications of this account seem to be the most important: First, what is right cannot be directly inferred from what is good. If Anscombe is correct, then the good only forms the background of the right. Second, we should reject moral theories that derive all individual duties from a single source—such as a general duty to further the greatest good of the greatest number or to treat everyone as an end in themselves. Any duty that can be described as the duty to respect a certain rule, a right or a promise must be justified within a practice. Juliet's duty to respect N's right to seat S therefore has a different source then her duty to do what she promised to Romeo. On Anscombe's account, there are at least as many sources of individual duties as there are necessary practices.

2.4.2 Advantages of Anscombe's Metaethics

I mostly argued for Anscombe's account from its own merits. As a last step, let me point out some advantages that it has over alternative accounts. We already saw that it avoids the usual problems of

practice views (see Sect. 2.3.4). I believe that it furthermore combines elements of realism and anti-realism in such a way as to offer us the best of both worlds.

A long-standing objection against non-naturalist *moral realism* says that the latter entirely disconnects moral entities from the empirical world: Neither can these entities be part of causal chains, which poses metaphysical problems; nor can they be scientifically investigated, which poses epistemological problems.[15] Naturalist realism avoids these problems (see Brink 1989, ch. 7; or Railton 1986, for suggestions). It is unattractive to those, however, who refuse to regard physics as the measure of all things. The latter seems to be true of most philosophers who work in the disciplines of which metaethics is the meta-theory: normative ethics, applied ethics and certain areas of political theory. (This sociological fact might partly account for the strange disconnect between these disciplines and contemporary metaethics). Aristotelian naturalism is non-reductivist, but neither are the objects denoted by its key terms disconnected from the empirical world: Some aspects of human nature can be investigated by the natural sciences; others are legitimate topics of the humanities and social sciences. Unfortunately, previous Aristotelian accounts offer little guidance as to how human goods connect with what any individual actually ought to do. Through adding the level of practices, Anscombe supplies us with a (partial) account of this. And just like human nature, social practices can hardly be regarded as 'queer', in J. L. Mackie's sense of 'supernatural'.

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[15] The critics here rely on what came to be called the "Open Question Argument" (Moore 1993, pp. 62-69). For a solution to this problem within the non-naturalist realist paradigm, see Shafer-Landau (2005, part 2).

Most varieties of *social constructivism* and *expressivism* are varieties of moral relativism.[16] While their proponents welcome this feature, most other people (in- and outside of philosophy) tend to start worrying, when elementary rights and duties are declared to be social constructs or a matter of personal attitudes. While Anscombe's hybrid theory regards rights as socially constructed, rights are constructed within the boundaries of non-constructed goods. Anscombe indeed has to reject 'natural' rights à la Locke (T II, ch. 1-5). For her, the idea of rights that exist before any practice exists is akin to the idea that the check-rule could exist before chess exists. She does, however, allow for universal rights in the following sense: If a certain human good can only be achieved through a practice that contains right R, then it is necessary for any community to assign right R—whether they recognize that or not. With this conception, she might, in fact, have given us a much more powerful tool than Locke did. Locke supplies us with a list of rights, but he leaves it unclear what qualifies any right to be on that list (with the exception of property rights) and also how far the list could be extended.[17] Anscombe supplies us with a basis on which to argue about what qualifies as a universal right.[18]

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[16] Some expressivists, however, oppose relativism and argue that their theory avoids it, for example Blackburn (2005); or Horgan and Timmons (2006).

[17] Many contemporary theories attempt to bridge this Lockean gap with a transcendental argument. James Griffin (2008, ch. 2), for instance, regards a right as human right if it is a prerequisite for the possibility of agency.

[18] One might worry that this only transfers Locke's problem to the next level: Whereas we before lacked a justification of human rights, we now lack a justification of human goods. As mentioned in the above discussion of realism, however, we possess methods to investigate human goods. In addition, it seems that arguing from human goods is what we, in fact, do when pressed to justify

Proponents of the above views believe, of course, that they can answer these well-known objections (see footnotes 15 and 16); or they reject the objection itself. I hence do not expect to convince anyone who is already firmly based within an existing paradigm. For all those dissatisfied with the current selection, however, Anscombe might offer an alternative.

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human rights. Here is an example: The UNESCO's justification for a universal right to a basic education is that "[e]ducation is a powerful tool by which economically and socially marginalized adults and children can lift themselves out of poverty and participate fully as citizens" (UNESCO 2015). In other words, without education certain goods (such as participation) cannot be achieved and certain evils (viz. poverty) not be prevented, the possession/prevention of which is a human need.

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3.0 DO RIGHTS EXIST BY CONVENTION OR BY NATURE?

3.1 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).[19]

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[19] 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

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?[20]

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).

[20] 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.

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 3.8): It is often claimed that conventionalism entails cultural relativism about rights. I suggest a conventionalist view, though, on which 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 3.2-3.3); I then present the actual argument (Sections 3.4-3.7), and then I discuss where my result leaves us with respect to cultural relativism (Section 3.8).

3.2 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, …, 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, …, Y_m" and "Y_1, …, Y_m each owe one or more of duties D_1, …, D_n to X" are interchangeable (if D_1, …, D_n is a complete set of duties corresponding to R).[21]

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

The placeholder "suitable" cannot be further specified if Explication R is to capture all rights, since what is a suitable distribution 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

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[21] 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.

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, …, 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, …, 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.

3.3 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).[22] 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.)

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[22] 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).

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*.[23] 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.

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

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[23] As I shall show in Section 3.5, a circular justification counts as a correct justification for a right.

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*.

3.4 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.[24] I argue as follows:

Section 3.5:   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."

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[24] 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 3.6:   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.

Section 3.7:   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.

3.5 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.[25]

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[25] 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.

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:
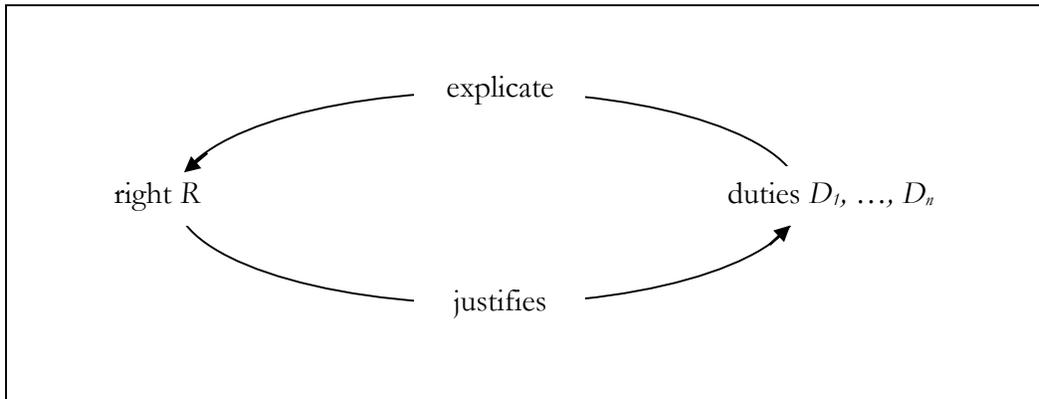
Figure 3: Hume's Circle for rights

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 3.7, 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.

3.6 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 3.7, 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.[26] 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 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.

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

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.

3.7 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 3.7.1*)	(see *Section 3.7.2*)		(see *Section 3.7.3*)

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.[27]

3.7.1   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

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[27] 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 3.8.3* 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.

own attempt to break the circle.[28] 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 to find actual examples of altruistic justifications of rights through consequences.[29] 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).

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[28] 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.

[29] 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).

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 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.[30] In cases like our inheritance case, however, where the right-holder is ignorant of their right, there is no risk of detection

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

and thus of erosion of the practice. Therefore, the distinction between the practice and the individual action falling under it cannot solve the problem.[31]

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 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.

3.7.2   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-

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[31] 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.

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.

3.7.3   *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 voluntaristic 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.[32] 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

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[32] 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.

regarded as implausible.[33] I, too, will claim here that non-supervenience is implausible, and I use this claim as a premise—which rules out the first option.[34]

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.

3.7.4   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

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[33] 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.

[34] 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.

violate autonomy or divine commands in a way that 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.

3.8 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.

3.8.1   *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 3.7 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 3.7.1, 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.

3.8.2 *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.[35]

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[35] 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 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-

3.8.3 *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

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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."

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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. 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.

3.9 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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4.0 AUTHORITY AND INTEREST IN THE THEORY OF RIGHT

4.1 A TALE OF TWO INCOMPATIBLE THEORIES AND A COUNTERPROPOSAL

According to current orthodoxy, there are two theories of right—"Will Theory" and "Interest Theory"—, each of which has well-known problems and each of which is incompatible with the other (Cruft 2013, pp. 196-198).[36] According to the *Will Theory*, to possess a right is to be able to enforce or waive some duty on the part of another person (see, e.g., Preda 2012, p. 230; Simmonds 1998, pp. 214-215; Steiner 1998, p. 238; Steiner 2013, p. 231).[37] Thus, Will Theory's main claim says:

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[36] Strictly speaking, the names "Will Theory" and "Interest Theory" denote families of theories. Given that I am only interested in the central idea uniting each family, I shall use the singular.

[37] The locus classicus is H. L. A. Hart (1982, pp. 182-183).

(W)   *X* possesses a right *R* iff *X* is able to enforce (or waive) a duty of another person, where this duty is correlative to *R*.

Section 4.3.1 discusses what it would mean to "be able to enforce (or waive) a duty of another person," but at the current stage our formulation of *W* must be vague enough as to include all possible interpretations of the Will Theory. A well-known problem with *W* is its implication that those who are unable to enforce any duties (say, comatose patients or babies) are unable to possess any rights. According to the competing *Interest Theory*, to possess a right is to possess an interest that puts another person under some duty (see, e.g., Căbulea May 2012, pp. 116, 125; Kramer 2010, p. 32; Kramer 2013, p. 246; Raz 1986, p. 166; 2007, pp. 235-236).[38] Thus, Interest Theory's main claim says:

(I)   *X* possesses a right *R* iff *X* has an interest that grounds a duty of another person.

Section 4.4.1 discusses what it would mean for someone's interest to "ground a duty of another person," but at the current stage *I*, too, must remain sufficiently vague. A well-known problem with *I* is its implication that we are unable to possess rights which exclusively or mainly protect the interests of others (like the right to governmental child support, which is a right of parents, but intended to protect the interest of their children).[39] Most Will and most Interest Theorists see their position as irreconcilable with the other; "the debates between them are often intense […][and] seemingly interminable" (Wenar 2011, sect. 2.2.2).

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[38] The first to revive this Benthamite idea again was David Lyons (1969, p. 173).

[39] This counterexample is by Raz (1992, p. 50) himself, who tries to solve it through the idea of doubly-harmonious interests.

Against this orthodoxy, I shall advance the following position: (i) Will and Interest Theory are falsely seen as complete (and hence incompatible) theories of right. But in fact we need Will Theory's key concept of *authority*, in order to *specify what it is* to possess a right, while we must appeal to *interests*, in order to *justify* rights. (ii) Will Theory's misconception of the role of authority and Interest Theory's misconception of the role of interest both result from a failure to distinguish three questions: What prohibitions, commands and permissions does a given right authorize?, Whose interests does this right protect? and: Who possesses this right? In other words, both Will and Interest Theory fail to distinguish between the *constitution* of rights, their *justification* and their *possession*. (iii) Once we make those distinctions, we can redefine the roles of authority and interest in a way that avoids Will and Interest Theory's standard problems. I shall call the resulting theory the "Modal Theory of Right," since the proper understanding of authority and interest will turn out to be through understanding a specific use of modal auxiliary verbs.

I proceed as follows: Section 4.2 shows that current orthodoxy has given us no reason to think that Will and Interest Theory actually are incompatible. Section 4.3 then discusses Will Theory. I show that Will Theory's standard problem is much larger than we generally assume (Sections 4.3.1 and 4.3.2), and that it stems from a false understanding of how rights authorize. I suggest an alternative understanding (Section 4.3.3), which I summarize as the first claim of the Modal Theory of Right. Then I demonstrate that this alternative understanding avoids Will Theory's standard problem (Section 4.3.4). Section 4.4 turns to Interest Theory. I suggest an alternative understanding of the relation between rights and interests, which I summarize as the second claim of Modal Theory (Section 4.4.1). Then I use two recent examples of public debates about rights to show at what point in such debates one can appeal to interest and that Modal Theory captures this actual role of interest, while Interest Theory misconstrues it (Section 4.4.2). I then demonstrate that this alternative

understanding also avoids Interest Theory's standard problem (Section 4.4.3). Section 4.5 summarizes the results.

The sole purpose of this paper is to diagnose the root of the orthodoxy's problems and to demonstrate how the new Modal Theory solves those problems. Nothing superfluous to this demonstration will be discussed, and I should stress in advance that this includes the following two points: First, questions concerning the possession of rights (say, how to determine the bearer of a given right or what entities are eligible as bearers) can be set aside. Only those claims of Modal Theory that are concerned with the constitution and justification of rights are required for my attempted demonstration, and only those claims will therefore be presented. Second, I shall spend no time arguing that authority and interest are key elements of any correct theory of right. Each of the two dominant theories says of one of those two entities that it is central to the theory of right, and this is what I accept as my premise. Thus, my argument is conditional: If authority and interest are to play an important role in the theory of right, it will be the one described below.

4.2 DOUBTS ABOUT THE ALLEGED INCOMPATIBILITY

Innocent bystanders might be surprised to hear that Will and Interest Theory are commonly regarded as incompatible: Don't they stress different aspects of rights, rather than contradict each other? Couldn't we hold, for example, that to possess a property right in one's savings is (among other things) to be able to enforce a bank clerk's duty to pay out the respective amount *and* at the same time hold

that the bank clerk's duty is grounded in one's interest? In other words, is it not plausible to assume that rights are characterized by both, the authority they confer over other people's behavior *and* the fact that this authority protects an interest?

Indeed, such a "hybrid theory" of right has recently been suggested (Sreenivasan 2005). This particular hybrid theory incurred much criticism, which I shall not discuss here (Kramer & Steiner 2007, pp. 308-310). This criticism, however, has not established that Will and Interest Theory's key ideas are indeed incompatible. Take Matthew Kramer's standard argument for this supposed incompatibility: Kramer believes that their incompatibility is readily apparent from the following formulation of the two theories: A Will Theorist considers it "necessary and sufficient" that a right-holder, *X*, be "competent and authorized to demand / waive the enforcement of the duty that is correlative to the right." By contrast, an Interest Theorist considers this "neither necessary nor sufficient," while fulfillment of a second criterion is "necessary," viz. that the duty correlative to the right "normatively protects some aspect of *X*'s situation that on balance is typically beneficial for a being like *X*" (2013, pp. 246-247). In short, Kramer assumes that Will Theory's claim that a certain condition is "necessary and sufficient" is incompatible with the claim that there is a further necessary condition—specified by Interest Theory.[40] But this inference is invalid: If a first criterion, C_W, is

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[40] Kramer repeats this argument in various places (see, e.g., 2008, pp. 417-418). There (see propositions *I-1* and *W-1*), as well as in the above-quoted article (see propositions *I-2* and *W*), he actually states Interest Theory in such a way that the negation of Will Theory is an independent und unconnected part of Interest Theory. Given that *any* theory, regardless of its content, could be made incompatible with Interest Theory through adding the negation of Interest Theory to it, this part of Kramer's discussion shall be ignored here.

sufficient for X to have a right, this does not logically exclude that a second criterion, C_I, is necessary for X to have a right, since C_W and C_I might not be independent of each other. For the two criteria in question such a dependency is indeed not just possible, but highly plausible: One of the main claims of my new theory below is that the relevant type of authority (demanded by C_W) only exists where the relevant type of interest does (demanded by C_I). (See section 4.4.1 for this.)

In addition to this, nothing about the two criteria themselves suggests that either of them is sufficient. In the case of our property example, we could consider it necessary for the customer to be "competent and authorized" to demand payment *and* consider it necessary for this payment to be in her interest, in order for the customer to have a right to the payment. *Prima facie*, there is no problem with the assumption that the two criteria are compatible, while none of them alone suffices.

Thus, the most recent and developed argument for "the untenability of a sophisticated hybrid theory of rights" (2013, p. 245) depends on two implausible assumptions: first, that the relevant kind of authority, demanded by the will-theoretic criterion, does not derive from facts about the right-holder's interests; second, that this criterion must be understood as a sufficient condition. It therefore seems that nothing speaks against the very idea of a hybrid theory.

4.3 PROBLEMS AND INSIGHTS OF WILL THEORY

Will Theory, construed as stating a necessary condition, claims that if someone has a right R, she is "able to enforce (or waive) a duty of another person, where this duty is correlative to R" (see claim W

above) or, as Kramer puts it, she is "competent and authorized" to do so (2013, p. 247). The current Section begins with a demonstration that this claim either faces a much larger class of counterexamples than is usually recognized or becomes empty (Section 4.3.1). I then argue that this and other problems with this claim result from a misconception of how rights authorize (Section 4.3.2), and I present an alternative claim (Section 4.3.3) that avoids these problems (Section 4.3.4): *M1*, the first claim of the Modal Theory of Right.

4.3.1   *Problem 1 for Will Theory: Even Healthy Adults Are Denied Many Rights*

As intimated in the introduction, Will Theory's most-discussed problem is that it denies rights to those who cannot enforce any duties—like people in a coma or children. But in fact those cases are just a tiny selection of all the counterexamples that Will Theory actually faces: As I shall show, Will Theory must also deny healthy adults most of the rights that we commonly take them to have.

The root of these problems lies in Will Theory's development. Will Theory started as a descriptive account of the role of rights within Anglo-Saxon law (Edmundson 2004, pp. 122-125). In other words, its original aim was to analyze the form and function of *legal* rights (within one particular legal system). Hart famously characterized *Legal Rights* as demands against others which the right-holder is free to *enforce* or not, and it is the holder of such a legal right "who is a small scale sovereign"

for Hart (1982, p. 182). In this legal context, *to enforce* simply meant *to sue*, should the other party not willfully heed to one's demand.[41]

Contemporary Will Theory has extended its domain of application: Will Theory now is a theory of rights in general: moral rights, legal rights and more—some current discussions of rights even include the "rights" of players in games (see, e.g., Wenar 2013, p. 202). Moreover, Will Theory now is a normative theory. But it has kept Hart's characterization of the right-holder as sovereign and of rights as demands against others which the right-holder is able to enforce. What is commonly overlooked, however, is that, by using Hart's criterion outside of its original legal context, it becomes unclear what it means *to be able to enforce* such a demand (or to be *authorized and competent* to do so, as Kramer puts it). Initially, to be able to enforce was to be able to sue. But what is the equivalent of this ability outside of a system of positive law? What does it now mean that *X* is able to enforce against *Y* the demands which right *R* entails? As far as I can see, it can mean either of three things: (1) *X* is *justified* (morally? legally? by the rules of the game?) in demanding that *Y* respect the demands which *R* entails *and* she is *able to force Y* to respect the demands which *R* entails. (2) *X* is *justified* in

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[41] "The idea is that of one individual being given by the law exclusive control, more or less extensive, over another person's duty so that in the area of conduct covered by that duty the individual who has the right is a *small scale sovereign* to whom the duty is owed. The fullest measure of control comprises three // distinguishable elements: (i) the right holder may waive or extinguish the duty or leave it in existence; (ii) after breach or threatened breach of a duty *he may leave it 'unenforced' or may 'enforce' it by suing* for compensation or, in certain cases, for injunction or mandatory order to restrain the continued or further breach of duty; and (iii) he may waive or extinguish the obligation to pay compensation to which the breach gives rise." (Hart 1982, pp. 182-183, emphasis added)

demanding that *Y* respect the demands which *R* entails *and* she is *able to demand* that *Y* respect the demands which *R* entails. (3) *X* is *justified* in demanding that *Y* respect the demands which *R* entails.

None of these three interpretations, though, yields a result that is both plausible *and* interesting: The third interpretation is empty, while the other two also expropriate healthy adults of most of their (apparent) rights. To demonstrate this, let me spell out the result of each interpretation for two exemplary cases: Case one are the much discussed comatose and babies. For the second case, imagine the following scenario: *X* leaves the room in the public library and another person, *Y*, takes her unattended laptop computer. In other words, imagine a scenario where *X* supposedly possesses a right, but is unable to defend this right because she is not present to do so. *Table 2* lists the results for the two scenarios under each of our three interpretations.

Table 2: Outcome (right/no right) for two scenarios on three interpretations of Will Theory

		interpretation 1	*interpretation 2*	*interpretation 3*
		X is "able to enforce" her right *R* against *Y* if …		
		… *X* is *justified* in demanding that *Y* respect the demands which *R* entails and *X* is *able to force Y* to respect the demands which *R* entails.	… *X* is *justified* in demanding this and *X* is *able to demand* this.	… *X* is *justified* in demanding this.
case 1	*X* is comatose or a baby.	—	—	√
case 2	*X* is a healthy, absent adult.	—	—	√

Let's look at each of the three columns of *Table* 2 in turn.

Column 1 says that any demand of yours can only count as a right if you are in a position to force others to respect it. This assigns no rights to those in *row 1*, since they are unable to force anyone to do anything. But equally unable is the healthy adult from *row 2*, who, given her absence, cannot force *Y* to respect her (supposed) right in the computer. She, too, has no right on this interpretation. But

few would assume that our property rights cease as soon as we leave the room; so this first interpretation seems implausible.

Notice two things about the first interpretation before we proceed: (i) The problem that absent healthy adults lose their property rights cannot be solved by interposing a proxy—say, the police or "the state." For this proxy incurs the same problem as *X* herself; that is, it will not always be able to force *Y* to respect the demands which *X*'s right entails. (The police, for instance, might never catch *Y*.) (ii) Notice also that *X* would not have a right either if she were present but less powerful than the thief. The first interpretation, in fact, turns all rights into "rights of the strongest."

Column 2, like the previous column, awards no rights to comatose and babies, as both are unable to demand anything. What about the absent adult from *row 2*? Given her absence, she, too, is unable to demand that the other respect those demands which her property right in the computer entails (such as: not to take this item without her permission). Hence, she, too, has no right on the second interpretation, and hence this second interpretation is as implausible as the first. (Notice that a proxy-solution would fail for the same reason as before: The proxy will not always be able to demand of *Y* that *Y* respect the demands which *X*'s right entails.)

At his point, Will Theorists might object by saying that I misunderstand what "being able to" means in our context. A Will Theorist might say: "Healthy adult *X* is *currently* not in a position to demand that *Y* leave her computer alone, because of certain accidental circumstances—*X* happens to have left the room. But if *X* returned the next moment, she would be able to demand this. The inabilities of those in *row 2* are accidental, while the inabilities of those in *row 1* are inabilities in principle; hence it seems unfair to assign the same negative outcome to both. For while Will Theory admittedly has a problem with comatose and babies, the suggested problem with the absent adult could easily be solved if we added 'in principle' to the interpretation listed in *column 2*." Following this

reply, *column 2* would be modified so as to read: "*X* is justified in demanding this and *X* is, in principle, able to demand this." Presupposing that our Will Theorist can spell out a suitable notion of "in principle," this modification would indeed allow absent adults to keep their property rights. Nevertheless, this modification is not an option as it would make the well-known problem from *row 1* unsolvable: Prior to our modification, the claim that babies and comatose adults cannot have any rights was just an unwelcome consequence of Will Theory, which its proponents could still hope to circumvent in the future. But once we define right-holders as those who are *in principle* able to demand what their right entails, we rule out rights for babies and comatose adults by definition. Thus, the suggested modification only worsens Will Theory's situation. Our Will Theorist might react to this by altering her proposal as follows: "Let's keep the supplement 'in principle,' but give it a different reading. Instead of saying that the comatose and the baby's inability constitute inabilities in principle and that this is what distinguishes their inability from that of the healthy adult, let's treat both groups alike, as originally suggested, and say that they all are 'in principle able, though currently unable' to demand what *R* entails: the healthy adult could demand this if she were to step into the room, the comatose if she were to awake from her coma, the baby, had she already grown up." This second modification would indeed give us the desired result; that is, those in both rows could now possess rights. Effectively, however, this modification collapses *column 2* into *column 3*. For what could the resulting claim that *X* has a right if "*X* is justified in demanding this and *X* is in principle able to demand this" mean, on our new understanding of "in principle," except that the respective person would be justified in demanding what *R* entails, were she ever factually able to demand this? In other words, what would it say more than that she would be *justified in demanding this*? The latter, however, is precisely the interpretation given in *column 3*—and as the following considerations will show, it is not a tenable interpretation of Will Theory either.

Column 3, in giving a less fastidious criterion, avoids all previous difficulties. Here, someone has a right if she would be justified in making a particular sort of demand. Whether she is able to make this demand (as *column 2* required) or whether she is able to force others to obey her demand (as *column 1* required), any such empirical fact is irrelevant for the question of whether or not she would be justified in making it. In other words, on the third interpretation, someone's abilities are irrelevant for whether or not she has a right. What result does this claim yield for our two rows? Since inability does not matter, the fact that those in *row 1* are in principle unable to make demands does not matter; that is, the third interpretation finally allows us to assign rights to comatose and babies. And since inability does not matter, the fact that the absent adult of *row 2* is currently unable to make a demand does not matter; that is, the third interpretation finally allows us to assign her a property right in the laptop. Thus, the third interpretation gives the desired result for both test cases and hence seems highly plausible.

The third interpretation, however, deprives Will Theory of all characteristic content. For if we think that "to be *justified* in demanding" has nothing to do with an *ability* to demand (neither with a cognitive ability, nor with a suitable occasion, nor with actual power), then to say: "X has a right R against Y if X *is justified in demanding* that Y respect the demands which R entails" simply is to say: "X has a right R against Y if Y *is under a duty to respect the demands* to which R entitles X." X has a right against Y if X is justified in demanding of Y, and for X to be justified in demanding of Y is for Y to be under a duty to do as demanded by X. On the third interpretation, X thus has a right R against Y if Y is under a correlative duty toward X. This means, however, that the third interpretation collapses Will Theory into the thin conceptual analysis of the primary meaning of *right* that Wesley Newcombe

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Hohfeld already provided a century ago.[42] Hohfeld's analysis is almost universally accepted. Most importantly, it is accepted by Will and Interest Theorists alike. Therefore, if Will Theory does not go beyond Hohfeld's analysis on any point, it ceases to be an independent theory of right at all. Everything that was characteristic of Will Theory—that the right-holder is comparable to a "sovereign," who rules over others (albeit in a very limited domain)—has been removed. The third interpretation reduces Will Theory to a definition that its main competitor as well as other, lesser-known alternatives willingly accept—that they, in fact, already contain.

Our result regarding Will Theory's criterion therefore is that, on any non-trivial reading (*columns 1* and *2* of *Table 2*), Will Theory denies most people many of the rights that we take them to have. The commonly discussed cases are just a tiny selection of all the counterexamples which Will Theory actually incurs, and new counterexamples can be generated systematically by imagining situations in which people are currently unable to defend their rights.

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[42] "Recognizing, as we must, the very broad and indiscriminate use of the term, 'right,' what clue do we find, in ordinary legal discourse, toward limiting the word in question to a definite and appropriate meaning? That clue lies in the correlative 'duty,' for it is certain that even those who use the word and the conception 'right' in the broadest possible way are accustomed to thinking of 'duty' as the invariable correlative. […] In other words, *if X has a right against Y* that he shall stay off the former's land, *the correlative (and equivalent) is that Y is under a duty* toward X to stay off the place." (Hohfeld 1913, p. 9, emphases added)

4.3.2 *Problem 2 for Will Theory: Most Rights Authorize More People than Just Their Holder*

There also is a second and rarely discussed group of counterexamples that speaks against Will Theory's criterion of the *ability to enforce*: the numerous examples where others may enforce *our* rights. For most rights do not only bestow authority on the right-holder, but on a large number of other people, too. If *X* has a right to something, this will indeed usually entail that *X* herself is justified in making certain demands, but often it also entails that others are justified to do so on her behalf. Just think of the laptop-scenario again: Should someone try to take any of my possessions, it would indeed often be I who would demand of this person to respect my property right. But if I am not in the room and a friend watches how somebody else takes my laptop, she might, on my behalf, make the demands which *my* right entails. And her claim "Oh, you can't take that; it's …'s!" would neither be false, nor would she be unauthorized to make it.

Within Will Theory, this fact appears mysterious: How can *another* have any authority to enforce *my right*? After all, I am the sovereign here—to stay within the picture—, and although this status might include the authority to transfer my authority (for instance, we sometimes transfer the defense of our property rights to a lawyer), I have not done any such thing in the given case. I have not, upon leaving the room, instructed those around me that "I hereby give everyone permission to enforce my property rights on my behalf until I'm back," nor did I ever generally authorize my friends to enforce my property rights whenever I am not around. Will Theorists might deal with this in two ways. Either they could assume that I have *implicitly* transferred my authority. But this route does not seem attractive, given the usual difficulties with the idea of implicit consent. Or they might argue that, in contrast to saying "This is mine!", saying "This is …'s!" does not mean to enforce a right, but is instead a purely factual statement (or that both statements are). Anyone who thinks this, however, must

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specify what counts as "enforcing a right"—if uttering such phrases does not. And it seems that for any other speech act or action the same problem would emerge: There are many situations where another can perform an analog of it on my behalf without prior authorization by me. Will Theory (in its current form) thus is problematic for two reasons:

1. On any non-trivial reading, it denies many of their assumed rights to most people (see previous section).

2. It fails to acknowledge that many rights also bestow authority on people other than the right-holder.

Both these problems result from a misconception of how rights authorize. More precisely, they result from the identification of the right-holder with the one who is authorized by the right. This identification forces Will Theory to deny that our rights can authorize others, and is thus immediately responsible for the second above problem. It also causes the first above problem, though through a less direct route: On Will Theory's account, to possess a right is to be able to enforce certain demands. In the previous section, we've seen that this definition can be interpreted in three ways. The third of these interpretations collapses Will Theory into a thin conceptual truth shared by its rivals; the first and second interpretation implausibly deny property rights to absent people. A modification of the second interpretation was suggested on behalf of Will Theory, viz. to add "in principle." This modification turned out to be unacceptable, though, since to define the right-holder as the one who is in principle able to enforce the respective demands means to strip those who are in principle unable to enforce such demands off any rights by definition (at least on the understanding of "in principle" that does not collapse the interpretation from *column 2* into the trivial interpretation from *column 3*). Notice, however, that this problem would not occur if it were not the right-holder herself, who had

to be able in principle to enforce the respective demands. If our theory of right simply said that certain demands, for example regarding comatose or babies, could *in principle be made*, no such problem would arise. In other words, *column 2* above, extended by the amendment "in principle," would cease to be problematic if it did not demand that the right-holder herself was the one who had to in principle be able to enforce the respective demands.

4.3.3   An Alternative Role for Authority: Claim 1 of the "Modal Theory of Right"

This idea seems worth considering. For despite the discussed problems, there is something to be said for the claim that what characterizes rights is that they bestow a special kind of authority—that rights authorize certain prohibitions and commands. Thus, one true description of what it is for *X* to possess a right is that *X* enjoys certain permissions, while others are under certain demands—demands that can be expressed as prohibitions and commands like the following: "You can't take that—it's *X*'s" (*X* has a property right); "He must do so—he assured *X* that he would" (*X* has a right as promisee); "You can't use that—you'll hurt somebody" (people in general, including *X*, have a right not to be harmed); "You will do such-and-such—and that's an order!", said by *X* herself (*X*, as superior officer, has a right to be obeyed); and so forth.

Elizabeth Anscombe regarded such prohibitions and commands as the key to an analysis of what rights consist in. She called them "stopping and forcing modals," after the modal auxiliary verbs that such expressions contain (see particularly 1981a; but also 1981b, pp. 136-146; 1981c, pp. 118-121). Anscombe did not coin a name for those phrases by which we express the permissions for the

holder of the right, but by analogy we could name those expressions "allowing modals."[43] The first part of my solution builds on Anscombe's idea that an analysis of rights must proceed through an analysis of the use of such modal expressions. Let me pick up on the example of possessing a laptop again to illustrate this idea: For *X* to have a property right in a certain laptop means: (i) No one *may* take it without her permission (*prohibition* or "*stopping modal*"); (ii) if someone destroys it, this person *must* compensate *X* (*command / forcing modal*), while (iii) *X* herself *can* destroy the laptop, if she feels like it (*permission / allowing modal*); (iv) she *may* sell it to others (*permission / allowing modal*); and so forth. If *X* has a *right*, then certain prohibitions and commands apply for others, while certain permissions apply for her. Imagine we were to explain the very idea of property rights to a traveler, in whose culture private property did not exist. We could do so by giving her a list of prohibitions, commands and permissions—or: *stopping*, *forcing* and *allowing modals*—, just like the ones mentioned: "See, if this is my 'property,' it means that (i) no one *can* take it unless they've asked me, that (ii) others *must* compensate me, if they break it, that (iii) I *may* make changes to it as I like, while they …" A complete such list would be a complete specification of what my right consists in; in other words, it would be an explication (of this particular type) of property right.[44] Now, the first part of the "Modal Theory of Right," which I want to suggest here, says that the content of any right *R* can be specified as a set

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[43] Anscombe (1981c, p. 118) use the adjective "permissive" to describe those modals.

[44] It would not be an explication of *property right* in general, because this category comprises a wide variety of rights. There are different types of property rights, and the way to differentiate them is precisely by differentiating the sets of modal claims as which they can be explicated. Thus, the property right I have in my computer entails that I *may* set it on fire, which my property right in my house or my horse does not. (For a discussion of types of property, see Waldron 1988, pp. 26-61.)

of such stopping, forcing and allowing modals and that someone possesses *R* if use of the correlative set of modals would be justified with respect to her. We can state this first part as follows:

(M1)   *X* possesses a right *R* iff the set of modal expressions that explicate *R* may be used with respect to *X*.

Notice that *M1* is a claim about the constitution of rights. It does not tell us, say, how the bearer of a right is determined or who can be a bearer of rights at all. (As mentioned in the introduction, such questions will be set aside in this paper, whose purpose is to show how Modal Theory avoids the problems of its alternatives.) Hence the phrase "with respect to" is to be understood as a placeholder that can only be filled once we presuppose an account of the *possession* of rights. In particular, *M1* does not say that only the right-holder is entitled to utter the relevant stopping and forcing modals. In the next section, this feature of Modal Theory will allow us to solve Will Theory's above-discussed problems.[45]

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[45] There recently is much debate about "bipolar judgments" and whether those are reducible to "monadic judgments"—see, e.g., Michael (Thompson 2004, p. 335). Given that my above modal claims (such as "You can't take that!") address only one person, some readers might wonder whether the Modal Theory entails such a reduction. The answer is that it does not. If you regard moral bipolar judgments as irreducible to monadic ones, you will think that all monadic formulations, like *X has a right to* …, have a logical counterpart (in this case *Y has a duty to* …), and that although the individual judgment is monadic, its truth presupposes the truth of this counterpart-judgment, and you will hold that this does "the work of importing bipolarity into the equation" (p. 349). In other words, it is a

Before we proceed to do so, however, let me block one possible objection. One might think that this first part of Modal Theory does not go much beyond Hohfeld's analysis either, which basically says that *X* has a (claim-)right iff certain others have certain duties (see p. 90 above). This objection is unwarranted, for the following three reasons: (i) Hohfeld's (1913, p. 9) analysis explicates the concept *right* through its "invariable correlative," *duty*, whereas *M1* explicates *right* through the special usage of an independent class of expressions, modal auxiliary verbs. Hence in *M1* explicans and explicandum are independent of each other, whereas Hohfeld elucidates the relation *X has a right against Y* through the converse relation *Y has a duty against X.* (ii) The explicans in *M1* elucidates through something that is much more basic than the explicandum. After all, modal auxiliary verbs are among the vocabulary that we learn when we first acquire language: We are told as toddlers that we "must" do certain things, "can't" do others, "may" or "may not" do this-and-that; that is, we learn such concepts long before we can be introduced to such demanding concepts as *a right* or *a duty.* To define rights through modal auxiliary verbs hence is to define rights through something very simple and fundamental in comparison. (iii) The explicans elucidates through something that is not specific to the explicandum, something with which we are familiar from many other contexts (and on which we hence have a much firmer grip). For the normative use of modal auxiliary verbs is in no way limited to rights-contexts: People *cannot* take what belongs to another (property right), and they *need* to feed their offspring (right to life). But philosophers *cannot* infer that such-and-such, if doing so would be to affirm the consequent (requirement of theoretical rationality), and chess players *need* to move the king when he's in check (rule of a game); an applicant *cannot* be late for her interview if she intends to

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meta-level question whether the set of modals as which we explicate the content of a given right presupposes the truth of certain bipolar judgments.

make a good impression (requirement of practical rationality), and in some countries one *needs* to reject

two times before accepting an invitation (rule of etiquette).

Contrary to Hohfeld's definition (and to the third interpretation of the Will Theory), *M1* thus

explicates through concepts that are independent of the concept *right*, more basic than it and familiar

from other and diverse contexts. Therefore the triviality accusation against *M1* seems unwarranted.[46]

4.3.4   *M1 Solves Will Theory's Standard Problem*

If we adopt *M1*, we save Will Theory's insight that rights authorize prohibitions and commands,

without incurring the two above-discussed problems (see Sections 4.3.1 and 4.3.2).

According to *M1*, those unable to demand what a certain right grants can still have this right.

For what it now means for *X* to have a right is not that *X* is justified in making certain demands, i.e.,

that *she is justified in using* certain prohibitions and commands (or Anscombian modals), but that *it would*

be justified to use this set of prohibitions and commands with respect to her. It is not necessary that *X*

herself be the one who could legitimately give or actually does give those commands—Will Theory

has only picked the paradigm case here. For instance, if it should be true that children have a right

against society to receive an education, then, according to *M1*, this means that (i) society *must* organize

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[46] There is a fourth reason why *M1* does not collapse into Hohfeld's analysis, viz. that it entails a strong

metaphysical commitment about rights. It can be shown that if *M1* is true, then rights only exist where

usage of the relevant class of modal expressions does, in other words, where there is a corresponding

social practice. But such a demonstration requires a self-standing treatment.

children's instruction—for example through the state providing a system of schools—, that (ii) the hired teachers *cannot* refuse to teach particular children, that (iii) specially trained teachers *need* to be hired for children with disabilities, given that they, qua child, have this right to an education, too, and so forth. According to the first claim of Modal Theory, it is true that children have the right in question if it is true that all the modals mentioned (and further ones) can be used with respect to them. And what it means for the individual child *X* to have this right is to be among those with respect to whom all these modals may be used. *Who* then has the authority to use these modals or to implement what these modals demand is a further matter.

M1 also solves Will Theory's second, above-described problem (see Section 4.3.2), which derived from the same source as the first. Given that *M1* allows that non-holders of a right hold authority to enforce it, *M1* can accommodate the many cases where third parties are authorized to enforce our rights. It thus yields the correct result for cases like the laptop scenario, where not only I, as owner, but also my friend possesses some authority to command others—an authority that derives from *my* property right.

4.4 PROBLEMS AND INSIGHTS OF INTEREST THEORY

This Section presents and defends the second claim of Modal Theory, *M2*, which preserves what I take to be the genuine insight behind the Interest Theory: Rights are ultimately grounded in interests. I begin by suggesting an alternative understanding of the connection between rights and interests; that

is, I begin by presenting *M2* (Section 4.4.1). Then I demonstrate that this alternative captures how we actually argue for or against rights, while Interest Theory misrepresents such debates (Section 4.4.2). Finally, I argue that *M2* solves Interest Theory's standard problem (Section 4.4.3).

4.4.1   An Alternative Role for Interest: Claim 2 of the Modal Theory of Right

Let us assume that the theory outlined so far is correct: To give a complete description of an individual right is to give a list of the stopping, forcing and allowing modals that may be used with respect to those who possess the right. And if someone possesses a right this means that a specific set of such modals may be used with respect to her. What place can this new Modal Theory allocate to Interest Theory's claim that rights protect interests? After all, this claim seems to capture an important aspect of how we commonly think about rights: If, say, women in Saudi-Arabia demand the right to drive or if homosexuals demand the right to marry, then they certainly take the thing demanded to protect a justified interest.

Interest Theory refers to interests in order to describe what rights *consist in*, but on our new account this conception must be false. Within Modal Theory, we do not need to refer to *X*'s interests if asked to specify what rights *X* has or what it is for *X* to have a right. In other words, interests are no indispensable element of an explication of what a right consists in—neither "a right" in general, nor any particular right, say, the right to drive. What it means for *X* to *have* right *R*, according to our new theory, is that modals $m_1, \ldots, m_n$ can be used with respect to *X*, full stop. According to this result, traditional Will Theory was on the right track; it just had too narrow a conception of the role of the

involved stopping and forcing modals (understanding them not as demands that *can be made with respect to X*, but as demands *that can be made by X herself*).

But that we do not need to refer to interests, in order to describe what rights are, does not mean that a theory of right can dispense with interest entirely. For now that we have explicated rights as sets of modals, a second question poses itself, viz.: What *justifies* the usage of those modals? If, to return to our old example, I have a property right in a certain laptop, then others must ask my permission to use it, can't use it without this permission, and so forth—but why? After all, somebody else might need my laptop more urgently then I do, or perhaps I even do harmful things with it. I shall argue that if there is a place for interest in a theory of right, then interest will be what justifies the usage of the set of modals in which a given right consists and that it does so on the level of social institutions, not of the right of a given individual.

This claim constitutes the second part of Modal Theory, and the idea for it I again take from Anscombe (1981a, p. 100). Obviously, a proper account of what justifies rights would require a self-standing paper. But the role which interest would have to play in such an account can be outlined very briefly, and such an outline is all we shall need here.

If we accept the modal framework, then we must distinguish two kinds of rights-justifications: First, there is the question of why a certain set of modals applies with respect to a certain individual. Second, there is the question of why this set of modals ever applies with respect to anyone. Take the example of *X*'s private property right in a certain laptop again: There first is the question of why we should use—with respect to *X* and for the case of this laptop—the set of modals whose application would mean to grant *X* a property right in this item. And then there is the question why we should ever use this set of modals with respect to anyone for any item, that is, why we should ever grant people property rights. An answer to the first question will appeal to other things than an answer to

the second. One way to conceive of this difference is as the difference between justification *within* and *of* the "private property game," or justification within and of a certain social institution. I claim that interest is that to which we must appeal in order to answer the second question. More precisely, any rights-granting institution must ultimately be justified by appeal to interest. If there is a justification for why we should respect private property, for example, it will be that doing so protects an interest that merits such protection. But just as Will Theory seems to err in that it must not necessarily be the right-holder on whom the right bestows authority, Interest Theory seems to err in that it must not necessarily be the right-holder whose interest the right protects, and hence it must not necessarily be the interests of all the holders of a type of right, which justify that we assign this type of right. We can state this second part of Modal Theory as follows:

(M2)   The claim that the set of modal expressions that explicate right *R* may be used with respect to anyone at all must be justified by appeal to an interest that this usage generally protects.

Notice three things about *M2*: (i) *M2* does not imply that a right automatically arises as soon as there is an interest to be protected. All it says is that it is interest by which rights are justified. (ii) *M2* is compatible with a wide variety of ethical views because it is compatible with a wide variety of theories about the interest to be protected. In fact, any ethical theory which conceives of rights-assigning social institutions as having to be justified by some further aim can be combined with *M2*. (iii) According to *M2*, it is not the individual right R_i which is justified by appeal to interest, but the general institution within which the general right *R* is assigned. In the laptop scenario, it would not be my individual right in one particular item, but the institutions of private property, as part of which said set of modal

claims may be used with respect to people like me in situations such as the described one, and as an element of which this use is justified (if it is).

The following Sections will defend *M2*. In Section 4.4.2, I show that *M2* captures the understanding of the connection between rights and interest in actual political discussions, whereas Interest Theory misrepresents it. In Section 4.4.3, I show that *M2* also solves what is commonly seen as Interest Theory's main problem, viz. how we can have rights that exclusively or mostly benefit others (see introduction)—for, notice that *M2* does not specify to *whose* interests we must appeal in order to justify a given type of right.

4.4.2   Unlike Interest Theory, M2 Captures the Role of Interest in Rights-discourse

Let me demonstrate on an example that *M2* captures the role which interest plays in actual discussions about rights, whereas Interest Theory does not. In recent years, young people world-wide protested for the right to study without fees (in Chile, Germany and Hungary, for instance)[47] or at an affordable fee (for example in the UK, USA, Canada, Liberia, Nigeria and Taiwan).[48] The right they demand is

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[47] For news coverage, see, e.g., Gideon Long, "Chile Student Protests Point to Deep Discontent," *BBC News*, Aug. 11th 2011; [unnamed], „Das Ende Der Studiengebühren," *Frankfurter Rundschau* 2013; or: Krisztina Than, Marton Dunai and Michael Roddy, "Thousands of Hungarian Students Rally against Government," *Reuters, US*, Dec. 12th 2012.

[48] For news coverage, see, e.g., Sean Coughlan, "Thousands March in Student Protest over University Fees," *BBC News*, Nov. 9th 2011; Jeff Tylor, "Students on Hunger Strike to Protest Fee Hikes,"

free or affordable access to higher education. Their main justification for this demanded right can be rendered as follows: It is in the interest of all members of society that access to higher education be determined by talent, not money (and hence family background). For, first, to regulate access in this way furthers good research and national productivity, and those are aims in which all members of society have an instrumental interest. Second, to regulate access in this way today is an important aspect of promoting social justice—given that today access to education determines access to all kinds of other resources—, and it is in the interest of all members of society to live in a just society. Be that as it may, the example illustrates two things:

1. Interest is usually brought in at the justificatory stage. It is not part of the specification of the right itself. "We (students) demand the *right* to *φ* (study without or at affordable fees). The reason we give for this is that granting us this right would further this-or-that *interest* (national productivity, social justice)." In this, as in most other cases, the right itself can be specified without reference to interest, here as: "the right to study without / at affordable fees." Interests are mentioned in the attempt to justify the specified right: It is *because of* all those benefits that granting the right would be rational.

Marketplace, May 2nd 2012; Peter Hallward, "Quebec's Student Protesters Give Uk Activists a Lesson," *The Guardian, US*, June 1st 2012; Ishmael Tongai, "University Head Defends Fee Hike That Sparked Protests," *University World News*, Jan. 31st 2013; Abubakar Abdullahi Nasiru, "Ebonyi University Students Protest Increase in Fees," *Premium Times*, Feb. 5th 2013; or: Lok-sin Loa, "Students Protest Change in University Fee Regulations," *Taipei Times*, Feb. 22nd 2013.

2.   Often, it is not the right-holder's interest which serves to justify a right. True, in the above example it is *also* in the interest of all those to whom the right would be granted that they should have this right. (That is, all students and aspiring students profit from no or low fees.) But the given justification does not even mention these potential right-holders. It says that *all* members of society, most of whom have no intention to attend university and will hence never possess the right, will benefit. It is this general interest that "grounds" the right (if it does). This pattern of justification seems to be typical for many of the discussions about rights that we actually have: Very often, (claims for) rights for subgroups of the population are defended by appeal to the general interest. And Interest Theory has given us no reason to believe that this form of argument is generally invalid.

Notice that the first point, about specification, also holds where rights are denied. (The second point, about justification, does, too, of course—that is, it is not necessarily the right-holder's interest which serves to justify denial of the right to her—, but this is trivial.) Consider the example of the recent large-scale protest in France against the right of homosexuals to adopt children (see, e.g., Laurent 2013). Protesters claimed that granting the discussed right to group *A* (adult homosexuals) would negatively affect the mental health of another group *B* (the children they adopt). Again, be that as it may (and many found this claim outrageous), the right under discussion can be specified without reference to anybody's interests—as "the right to adopt children"—, and the point to bring in interest is where one is pressed for a justification: This right must not be granted, *because* it would violate an important and legitimate interest.

Interest Theory, which takes interest to be part of the specification of a right and which takes the relevant interest to be that of the right-holder, therefore misconstrues how we actually conceive of and argue about rights. *M2*, which says that the connection between rights and interests is that the

latter justify the former and which does not equate the relevant interest with that of the right-holder, seems to capture public understanding of rights more accurately.

4.4.3   *M2 Solves Interest Theory's Standard Problem*

A further advantage of *M2* is that it avoids Interest Theory's standard problem. As mentioned in the introduction, Interest Theory cannot allow that we possess rights which exclusively or mainly serve the interest of others. Apart from the rights of legal guardians, the rights of office-holders usually are of this kind. (Thus, a policeman's right to arrest someone does not serve this policeman's personal interest, but the interest of the state that employs him.) And the examples from Section 4.4.2 indicate that Interest Theory, too, faces a much wider array of counterexamples than is commonly recognized—namely all those cases, where public interest grounds rights for subgroups.

The counterexamples to both Will and Interest Theory seem to stem from a similar source. In Section 4.3.4, we saw that Will Theory construes rights as commands which the *right-holder* may issue; hence it must deny rights to all those who are unable to command. In Sections 4.4.1 and 4.4.2, we now saw that Interest Theory construes rights as having to serve the *right-holder's* interest and must hence deny the existence of rights that mostly or exclusively serve others. While Will Theory does not separate the question "Whom does a given right authorize to command?" from the question "Who possesses this right?", Interest Theory does not separate the latter question from the question "Whose interests are protected by the duty correlative to this right?" *M2* allows us to distinguish the bearer of a right from the one whose interests it protects; thereby we avoid Interest Theory's standard problem.

4.5 CONCLUSION

I have outlined a new role for authority and interest in the theory of right—the key concepts of the two currently dominant theories, Will and Interest Theory. The resulting Modal Theory of Right comprises two central claims (among others suppressed here):

(M1)   *X* possesses a right *R* iff the set of modal expressions that explicate *R* may be used with respect to *X*.

(M2)   The claim that the set of modal expressions that explicate right *R* may be used with respect to anyone at all must be justified by appeal to an interest that this usage generally protects.

(i) I have argued that if we conceive of rights in this way, we can avoid the problems of Will and Interest Theory. (ii) I hope to have shown that Will Theory's problems derive from a misconception of the connection between authority and rights, those of Interest Theory from a misconception of the connection between interests and rights. And instead of ad hoc patches for those problems, I have tried to provide a systematic cure. (iii) And although I have not demonstrated that authority and interest need to be part of a correct theory of right, I tried to endow the new alternative with some independent credibility: Modal Theory, I argued, analyzes rights through very basic and familiar concepts (see p. 97 above); it accurately reflects actual public discourse about rights (sect. 4.4.2), and it is compatible with a wide variety of ethical views (see p. 102 above). Given that it puts very few

constraints on the relevant kind of *interest*, it can be combined with any ethical theory that can accommodate rights and that allows for rights to be grounded in interests. This would include virtue ethics, for instance, certain forms of utilitarianism and also many of the contemporary Kantian accounts, which stress the role of *Glückseligkeit*—to name just a few examples.

Modal Theory becomes available once we distinguish three questions: First, in what does a right consist? Second, what justifies rights? And, third, who can possess a certain right? On our alternative understanding, Will Theory answers the first question, while Interest Theory answers the second. I have not said anything about the third question. To answer it would be to spell out the content of the expression "with respect to" in *M1*, which currently serves as a placeholder. But for our current purposes it suffices to recognize that there is a third, distinct question to be asked.

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