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# HOW HUME AND KANT RECONSTRUCT NATURAL LAW

Justifying Strict  
Objectivity *without*  
Debating Moral  
Realism

KENNETH R. WESTPHAL

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*For Onora O'Neill*  
*—in admiration and gratitude*



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Chapter 8 appeared originally as 'A Kantian Justification of Possession', in M. Timmons, ed., *Kant's Metaphysics of Ethics: Interpretive Essays*. New York: Oxford University Press (2002), 89–109.

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*İstanbul*

*4 July 2015*

# Primary Sources and Citation Methods

Individual works by Hume are cited by each work's divisions into books, parts, sections (§), or paragraphs and, following a slash, by the page number of the Selby-Bigge–Nidditch editions. Essays lacking subdivisions are cited by title and paragraph number, designated ¶; an 'Appendix' is designated 'App.'. Occasionally, non-sequential paragraphs in one § are cited thus: *T* 3.2.2 ¶¶3, 7, 9.

Similar methods are used for citing other collected works, as indicated in the bibliography under their respective entries.

Kant's works are cited by volume:page.line numbers of *Kants Gesammelte Schriften*; this pagination is provided in all recent translations of Kant's works. Translations of Kant's writings are my own, unless otherwise indicated. Minor revisions to others' translations are not noted.

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# 1

## Reconstructing Moral Constructivism

### 1 Introduction

After rather a fallow period, both Hume's and Kant's theories of justice have recently commanded well-deserved scholarly attention. These developments are welcome, yet a philosophically decisive relation between Hume's and Kant's moral philosophies has been neglected: Hume initiated a powerful and distinctive form of moral constructivism, which Kant adopted (*via* Rousseau) and further developed. Their form of moral constructivism identifies and justifies strictly objective basic moral principles and the practices they structure (social institutions), whilst maintaining neutrality about moral realism and its alternatives.<sup>1</sup> Their form of moral constructivism justifies cognitivism about moral principles through its account of justification, rather than by appeal to alleged, ever-controversial moral 'truths', 'facts', or 'values'. In a word, their distinctive form of moral constructivism shows that issues about moral realism and its alternatives are subsidiary, not central, to normative moral philosophy.

The basic character and strategy of this form of moral constructivism are initiated by Hume in his theory of justice in Book 3 of the *Treatise*. Though unfashionable, I do not hesitate to include justice within the scope of moral philosophy. Both Hume and Kant, and indeed all moral philosophers through the early twentieth century, addressed moral

<sup>1</sup> The designation 'moral realism' has become used so broadly that any view according to which there is a definite answer whether one is or is not morally obligated in some definite way is now called 'moral realism'. This laxity is obfuscating. I use the phrase 'moral realism' to designate views according to which there are human mind-independent moral truth-makers, of whatever kind.

philosophy as a genus with two proper, coordinate species: ethics and justice (*ius*). There is much to recommend this taxonomy, not least because one of our most basic ethical duties is: Comply with the dictates of justice! As a fundamental practical matter, central ethical issues about individual action, virtue, and life-plans can be no more than theory, if even that, without a significant degree of public peace, security, and stability, which require principles and institutions basic to justice. Examining the form of moral constructivism Hume and Kant develop provides, *en passant*, some good reasons for adhering to this traditional taxonomy (fortunately still common in Europe), also because their moral constructivism forges direct and important links with philosophy of law and with economics—links which today require emphatic restatement.<sup>2</sup>

A central conviction underlying this study is that the genre ‘business ethics’ is poorly conceived and can offer little more than ineffective moralizing unless and until it is clearly recognized that the central issues in this domain are issues of justice, including the justice involved in proper accountancy. It is no secret that steady erosion of accountancy procedures and oversight in the USA in recent decades unleashed the current financial crisis.<sup>3</sup> To get our respective houses in order requires clarity of purpose; it is hoped that this study may contribute to regaining some of the clarity about morals, justice, law, finance, accounting, and auditing we so dearly need. (I must, however, beg forbearance of those interested in the justice of accounting and auditing, which cannot be addressed directly until the final chapter.)

In Anglophone jurisprudence there is growing consensus, more evident in North America than in the UK, that legal positivism and legal realism have run their course, though no consensus has emerged about a better successor. In the UK, jurisprudes are beginning to reconsider

<sup>2</sup> An important issue I cannot address in this study is the scope and grounds of obligation to non-ideal jurisdictions. Kant’s unqualified obligation to obey political authority holds only within his strictly metaphysical principles of justice and so holds only of ideal, fully just states (Westphal 1992). Parallel to this analysis Kant argues that we have very strong, though not unqualified, obligations toward actual, non-ideal states, insofar as obedience to them is necessary in the long run to provide and improve compliance with fundamental principles of justice. For discussion, see Horn (2014). (The ‘metaphysics’ relevant to Kant’s theory of justice concerns *a priori* principles, not Transcendental Idealism.)

<sup>3</sup> See, e.g., Greenspan (2002), Morris (2008), Waxman *et al* (2008). Like Greenspan (2002), Morris (2008) appeared before the crisis broke—but see below, §46.

prospects for natural law, which has enjoyed greater attention in North America and on the European Continent.<sup>4</sup> On the Continent natural law theory has remained on the agenda, both in philosophy and in jurisprudence, especially in the acute formulation of its key issues by Hobbes (see §8), though Continental legal theorists have neglected Hume's theory of justice. In Anglophone circles, Hume is widely regarded as the destroyer of natural law theory. Certainly he contributed mightily to discrediting traditional natural law theory and its central appeals to moral realism and to moral teleology. His having done so, however, is compatible with his fragment of a theory of justice (in Book 3 of the *Treatise*) having inaugurated the approach I here call Natural Law Constructivism.

Accordingly, this monograph aims at concision and clarity, so that it may be read profitably by scholars and students of philosophy, law, politics, economics, business, or accountancy alike. Where needed, specialists are referred for further details to other works. In addition to setting aside interminable debates about moral realism and its alternatives, Hume's and Kant's Natural Law Constructivism sets aside debates about 'consequentialism' *versus* 'deontology'; their moral constructivism exposes this contrast as simply unhelpful.<sup>5</sup> Their moral constructivism further shows that Kant's moral philosophy need not appeal, as a basic value or premiss, to the purported intrinsic, incommensurable value or 'dignity' (in contrast to price) of rational agency as such.<sup>6</sup> Finally, their moral constructivism is independent of issues about human motivation, and so sets aside debates about 'internal' and 'external' links between reasons and motives. Let me be very clear: Hume's and Kant's moral constructivism is simply neutral about moral realism, about the contrast between 'consequentialism' and 'deontology', about the putative incommensurable value of human agency, and about intrinsic or extrinsic links

<sup>4</sup> On the USA, see, e.g., Haines (1965); on Canada, see, e.g., The Canadian Charter of Rights and Freedoms (1982), and judgments of the Supreme Court of Canada in the cases *Roncarelle v. Duplessis* (1952), *Perka v. The Queen* (1984), and *Hofer v. Hofer* (1992). On the German and French contexts, see, e.g., *Archives de philosophie du droit* 6 (1961): *La réforme des études de droit. Le droit naturel*, Maihofer (1962), and Schmölz (1963). An interesting contrast is provided by Chakraverti (1967), who, working within the English tradition transported to India, considers 'natural justice' only as 'fundamental principles of judicial procedure'. (My thanks to Arthur Ripstein for references to Canadian law.)

<sup>5</sup> In this I agree with Herman (1993), 208–40.

<sup>6</sup> On Kant's account of dignity, see Sensen (2009, 2011) and Waldron (2012).

between reasons and motives. These views may, in some form, be true or justified; they simply are not required by Hume's and Kant's Natural Law Constructivism. These are cardinal virtues of their method and its results, which show that persisting theoretical squabbles between Humeans and Kantians over those issues are tangential to the central issues examined here. This is also to say: I shall be forthright, even at risk of perturbing various professional sensibilities, persuasions, or habits of thought. However, fault finding has become such a professional preoccupation that a reminder is in order, that critical assessment requires reflective reading to determine whether or how the reader's doubt, query, or challenge may be answered by, or on the basis of, an author's published analysis; this alone distinguishes criticism from cavil.

## 2 Conspectus

### 2.1 *Contra contemporary moral constructivisms*

Famously, Hume's ethical theory is rooted in his account of human sentiments, and of how some sentiments become specifically moral sentiments. Reading Hume's theory of justice through the lens of his ethical theory, however, fails to do justice to his theory of justice because it occludes his radical recasting of natural law theory on a constructivist, though objective, basis.<sup>7</sup> In chapter 3, I argue that Hume's construction of the basic principles of justice is independent of his sentiment theory. In chapter 4, I argue further that Hume's theory of justice exposes some substantial flaws in his sentiment-based ethical theory. Remarkably, these flaws directly anticipate Kant's reasons for rejecting moral empiricism (discussed in §19).

Various contemporary neo-Humean ethical theories, such as Blackburn's projectivism, appeal, not to Hume's sentiments, but rather to various forms of subjective human responses, motives, emotions, manifest preferences, values, moral commitments, moral intuitions, 'validity claims' (Habermas's *Geltungsansprüche*), and so forth. These contemporary forms of moral constructivism share the weaknesses of Hume's

<sup>7</sup> I am not the first to take seriously Hume's natural law theory; I gratefully follow the lead of Forbes (1977), Buckle (1991, 234–5, 298), and Haakonssen (1996), though I develop Hume's constructivist approach to natural law in greater detail.

sentiment-based ethical theory, as revealed by Hume's theory of justice and by Kant's reasons for rejecting moral empiricism. These contemporary views have much to offer; this I do not deny. I contend, however—with Hume and Kant—that they cannot identify or justify the most basic, strictly objective moral principles. This concise study cannot examine the range of contemporary forms of constructivism in detail. I shall, however, explain why the inadequacies of Hume's sentiment-based ethical theory generalize to these contemporary forms of moral constructivism, and shall examine two paradigm cases: one is Hume's ethical theory (chapter 4), the other is Gauthier's refined, radical contractarianism (chapter 7). These two examples flesh out the general problem confronting contemporary forms of moral constructivism posed in chapter 2 (§§6, 9), and indicate, sufficiently for present purposes, how these difficulties generalize to other contemporary versions of moral constructivism.

## 2.2 *Natural law constructivism*

Chapter 7 examines Kant's construction of the basic principles of rightful—that is, just—acquisition, possession, and use, which proves to be a subtle and sophisticated development of the distinctive and powerful form of moral constructivism inaugurated by Hume's theory of justice (chapter 3), and developed and ascribed to Kant—rightly, I shall argue (yet again)—by Onora O'Neill. The key point of their shared form of constructivism is that the most basic principles of justice may well be literally artificial: *we* construct them, they are our artefacts—although they are *not* arbitrary: they are indispensable, non-optional, and non-negotiable because only by establishing and abiding by them is individual human action possible, under broadly met conditions of moderate population density.

Hume's and Kant's moral constructivism appeals to some basic anthropological facts about the character and conditions of human agency. This is their key to avoiding problems about *homo sapiens* who happen not to share—or not to admit to sharing—various common, morally relevant sentiments, motives, attitudes, values, or commitments (etc.). What best to make of, or how to address, such persons is an important problem, though not one lying at the core of normative moral theory. It belongs, rather, to moral education, social and psychological pathology, and to social policy, including the administration of

justice.<sup>8</sup> The centrality of egoism in moral philosophy is not due to the overwhelming predominance of egoists in the human population. My surmise is that its centrality is due to two kinds of consideration. One concerns the extent to which individual prudential self-interest does, or can be brought to, coincide with the requirements of justice, or of right action more broadly. This is an important desideratum for any moral theory, though the agenda for its examination is not hostage to the restrictions of egoism or of egoists.

The other consideration which lends centrality to issues about egoism is a specific, often implicit model of, or approach to, justifying moral theory. The basic idea of this approach is that, to justify a theory, principle, claim, or conclusion rationally consists in justifying it to relevant individuals, which (it is supposed) requires justifying it solely by appeal to an individual's antecedent commitments. This is the demand of justificatory internalism. Yet egoists are to moral theory what radical sceptics are to epistemology: they demand that we theorists justify our views to them, whilst they reject all (or nearly all) relevant considerations, whether evidence, principles, or their specific use within any piece of justificatory reasoning. Within epistemology, justificatory internalism was discredited in the aftermath of Gettier's (1963) classic article, 'Is Justified True Belief Knowledge?', after which a healthy variety of externalist and mixed internalist-externalist theories of cognitive justification bloomed. Put generally, externalist theories of cognitive justification hold that at least some important factors pertaining to the justificatory status of someone's beliefs, claims, principles, or knowledge may not, or not easily, be available to that person's awareness or reflection. Such factors may include, for example, physiological conditions, such as the proper functioning of one's perceptual systems, or environmental conditions, such as the absence of *faux* objects such as movie sets or mock styrofoam garden 'rocks' from that person's environs.<sup>9</sup>

<sup>8</sup> On those who pathologically precipitate interpersonal conflict, see Vallacher, et al (2013); on the chronically obstreperous, see Prost (2009).

<sup>9</sup> I shall comment only briefly on coherence theories of justification, which are less plausible in moral philosophy than in epistemology, and are untenable even in this latter domain. The main reason for this is that, to distinguish themselves from foundationalist theories of justification, coherence theories must emphasize justificatory internalism, but they then are subject to the 'French novel' objection, that coherence alone cannot

Natural law approaches to moral theory have been widely unpopular amongst contemporary Anglophone moral philosophers for several reasons. One concerns the difficulty of establishing the kind of sufficiently comprehensive, yet sufficiently general account of the substance of a good or pious life from which to infer basic moral principles. Historically, this theoretical issue exploded in practice into the Thirty Years War in Europe, with rather too many subsequent recurrences. A second problem concerns the comparable difficulty of establishing sufficient and sufficiently uncontroversial claims to moral realism. A third, however, concerns the broad, if implicit commitment amongst Anglophone moral philosophers to justificatory internalism, a commitment which has occluded the very prospect of justificatory externalism in matters moral—to the extent, *e.g.*, that it is often no longer recognized that the Social Contract tradition is a branch of the Natural Law tradition.<sup>10</sup>

These are among my reasons to present here, clearly and concisely, the core features of Hume's and Kant's radical reconstruction of Natural Law through their distinctive, powerful reconstruction of moral constructivism. I do not assert that justificatory internalism, even when addressed to egoists, is hopeless.<sup>11</sup> I contend that it is not necessary, because Hume and Kant show how the most basic, strictly objective moral principles can be identified and justified without invoking justificatory internalism, and without invoking either moral realism or its alternatives.<sup>12</sup>

If these issues about justice may seem remote from the concerns of ethical theory, recall again that the first answer to the question, 'What ought I do?', is: 'Act justly, at least by acting in accord with the

distinguish between truth and any elaborately detailed, coherent fiction (Westphal 1989, 56–7; Bonjour 1997, 13–15).

<sup>10</sup> *E.g.*, Rawls (1971) sought to argue for his neo-Kantian conclusions on the basis of his opponents' empiricist, belief-desire model of (merely) instrumentally rational individual (ist) agency; Gauthier (1986) sought to argue for his contractarian conclusions on the same narrow basis.

<sup>11</sup> The most successful constructivist response to egoism I have found is Beyleveld's (1991) subtle, systematic reconstruction of Gewirth's Principle of Generic Consistency.

<sup>12</sup> Wood (2014, 41–2, cf. 65–7) assumes that, 'In general... *justification* is always justification *to* someone.' That assumption neglects Kant's justificatory externalism. Although it is important to Kant's view that rationally judging that an action (or an omission) is obligatory can also be motivating, Kant's interest in justifying reasons is not confined to what Wood calls 'motivating reasons'; see chapters 5 and 6.



requirements of justice.’ This duty recalls two of Ulpian’s maxims, *honeste vive* and *neminem laede*: live honourably, and do no one wrong. Both are cited by Kant (*MdS* 6:236) in just this connection; the first is approximated by Hume’s quotation from Ariosto (Canto 5).<sup>13</sup> As Hume’s and Kant’s moral constructivism shows, so acting is required for undertaking any further, rationally justifiable actions. Conversely, acting in unjustifiable ways entitles others to constrain, sanction, or counter-act such actions so as to maintain compliance with the requirements of justice or to rectify or redress any violations.

Allow me one last caveat. My thesis is that Hume and Kant both develop the same kind of moral theory; I do not claim that Kant knowingly followed Hume in so doing. Clearly and expressly Kant had followed Rousseau, but there is no evidence that Rousseau had knowingly followed Hume in this regard, although he, too, adopts Natural Law Constructivism, and indeed developed it much further than Hume (Westphal 2013d). The central issues of this study are systematic, not historical, though historical accuracy about Hume’s and Kant’s views is systematically important to this study.

### 3 Chapter Overview

Chapter 2 details the central issues about objectivity and conventionalism by reconsidering Socrates’ justly famous question to Euthyphro about the status of piety and the gods’ love of piety, and indicates why contemporary forms of moral constructivism are ill-suited to address those issues. Their common weakness serves to highlight some central merits of Hume’s and Kant’s Natural Law Constructivism.

Chapter 3 reconstructs Hume’s account of the basic rules of justice, and how they count, on his view, as natural laws. I develop significantly further Baier’s (1991, 243–8) insightful suggestions about the character of Hume’s analysis to show that it is a powerful fragment of, and basis for Natural Law Constructivism.

Chapter 4 argues that Hume’s theory of justice reveals basic deficiencies in his own sentiment-based ethical theory. Because Hume’s ethics has been widely used as a model or inspiration for many contemporary

<sup>13</sup> ‘Of the Rise and Progress of the Arts and Sciences’, ¶39; note added to the third and subsequent editions.

forms of moral constructivism, Hume's demonstration that moral sentiments are an insufficient basis for normative moral theory likewise calls deeply into question these successor forms of moral constructivism, though beyond some specific remarks I shall leave it to the reader to recognize these further implications. The findings of this chapter provide the context for characterizing and then dismissing the debate between Humeans and Kantians about whether there are intrinsic, or only extrinsic links between justifying reasons and motives for action (§17). Discounting issues about motivation also demotes game theory to secondary status—which is not to say it is insignificant, only that it is not fundamental.

Chapter 5 considers the centrality of principles in Kant's moral philosophy, their distinctively 'Kantian' character, why Kant presents—in a special, 'Critical' sense—a 'metaphysical' system of moral principles and how these 'formal' principles are to be used in practice. These points are central to how Kant thinks pure reason can be practical. These features have often puzzled Anglophone readers, in part due to focusing on Kant's *Groundwork* to the neglect of his later works in moral philosophy, in which the theoretical preliminaries of that first essay are properly articulated. In part, however, these puzzles stem, directly or indirectly, from Kant's opposition to moral empiricism, which puzzles readers whose default orientation is empiricist.<sup>14</sup> Accordingly, particular attention is paid to Kant's reasons for rejecting moral empiricism (§19). These reasons accord with Hume's own showing of the deficiencies of moral sentiments as a basis for normative theory (chapter 4), and also with the core problems facing contemporary forms of moral constructivism identified in chapter 2 (§§6, 9).

The broadly empiricist orientation of much contemporary Anglophone philosophy is evident in not infrequent wholesale rejections of 'the' synthetic *a priori*, 'the' noumenal, 'the' transcendental, and so forth. Kant himself fostered such reactions by contending that these features of his view all require Transcendental Idealism, which empiricists reject—as do I. The technical issues involved here merit careful consideration, though not here.<sup>15</sup> The most important points for present purposes are

<sup>14</sup> In this connection Watson (1881) and Caird (1889) remain instructive.

<sup>15</sup> See Westphal (2004, 2006, 2007a–c, 2010b, 2012a, 2016a). Very briefly, although coherent, Kant's central arguments by elimination for Transcendental Idealism are shown

three. First, Kant is mistaken that Transcendental Idealism is required to defend the possibility of moral freedom and responsibility. Kant's transcendental analyses of various principles necessarily presupposed in human thought, knowledge, and action stand independently of his Transcendental Idealism (see below, §27). Second, all normative matters as such are 'noumenal' because they cannot be exhaustively specified or justified empirically; in this Hume and Kant agree, namely, that normative conclusions do not follow from merely factual premises! (Kant's use of the term 'noumenal' to characterize normative relations is especially plain in his analysis of rightful possession.) Third, more vital than ever in today's philosophical context is Kant's critique of Cartesianism (Westphal 2007a–c), insofar as empiricism is an offspring of Cartesianism, as Hume all but acknowledged,<sup>16</sup> and as is evident even in Quine's purportedly 'naturalized' epistemology.<sup>17</sup>

Chapter 5 examines Kant's constructive approach to normative moral theory. I examine how Kant's universalization test serves as a criterion of morally obligatory, permissible, or prohibited actions, and what is morally wrong with actions which violate those criteria. Examining these points provides a compelling synopsis of Kant's system of moral principles, centring on the key terms 'practical reason', 'law', 'maxim', and 'Categorical Imperative'. The surprise—I hope, a welcome one—is that Kant's moral constructivism is a sophisticated, cogent development of the kind of moral constructivism initiated by Hume's theory of justice.

Chapter 6 characterizes concisely a key issue about rational justification which highlights an important achievement of Natural Law Constructivism: uniquely, it can resolve the Pyrrhonian Dilemma of the Criterion. Hume's and Kant's constructivist method is both sound and significant because it is based upon a core principle of rational justification as such within non-formal domains. Explicating this basis of Natural Law Constructivism affords an illuminating and defensible explication of four key aspects of the autonomy of rational judgment,

to be fallacious by a sound version of the 'neglected alternative' objection based squarely upon Kant's own central analyses in the *Transcendental Analytic*. However, Kant's semantics of cognitive judgment, including causal judgment, suffice to rebut the apparent threat of causal determinism regarding human action and to justify freedom of decision and action (Westphal 2012b).

<sup>16</sup> See Hume's letter of 26 August 1737 to M. Ramsey, in Mossner (1980), 627.

<sup>17</sup> Westphal (2015b).