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Abstract

One of HLA Hart's main contributions to jurisprudence is his theory of social rules. Hart claimed that a social rule has an external, behavioural aspect, and an internal, attitudinal aspect. However, Hart's description of the internal aspect of social rules left much to be desired. Drawing on recent work in the philosophy of action, I argue that the internal aspect of social rules is best thought of as the widespread 'acceptance' that an action should be performed. The technical notion of acceptance I rely on is related to Hart's own understanding of acceptance, but the two differ in several important respects.

Keywords

Jurisprudence, HLA Hart, social rules, internal aspect, acceptance.

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1. Introduction

One of HLA Hart's main contributions to jurisprudence is his theory of social rules. The theory promises to account for the existence of a number of important rules, including most famously the ultimate rule of recognition of a legal system. The essence of Hart's theory is that a social rule has an external, behavioural aspect as well as an internal, attitudinal aspect. I argue that Hart's account of the internal aspect of a social rule is inadequate and that the external aspect is redundant. There is room – indeed, there is need – for a new theory of social rules. Drawing on recent work in the philosophy of action, I argue that the existence of a social rule turns on a kind of societal 'acceptance' that an action should be performed. The technical notion of acceptance I rely on is related to Hart's own understanding of acceptance, but the two differ in several important respects.

2. Types of Rules

Rules exist in virtue of facts, and some rules exist in virtue of *social facts*, ie, facts about people's actions or attitudes. One of the main tenets of legal positivism is that a law – and thus a legal rule – exists solely in virtue of social facts. According to Ronald Dworkin: 'Legal positivism has many different forms, but they all have in common the idea that law exists only in virtue of some human act or decision'.¹ Similarly, Joseph Raz says: 'In the most general terms the positivist social thesis is that what is law and what is not is a matter of social fact'.²

One kind of social fact that can bring a rule into existence is the fact it was properly laid down (set out, enacted, prescribed, etc). Nothing more is needed. For example, in the nineteenth century a law was enacted in Britain that prohibited anyone from flying a kite. Nowadays people in Britain regularly fly kites, and they are not discouraged from doing so. That legal rule is ignored, and indeed most people do not even know the rule exists. Yet it *does* exist, and it will continue to exist unless and until it is repealed.³

Other rules exist in virtue of social facts but were not laid down. When these rules are public in character, they are called *social rules*. Kurt Baier explains:

Rules of this sort have not been laid down by any one in particular nor are they modified or abrogated by specially authorized persons. Nevertheless they 'hold' in certain groups and usually vary from one group to another.⁴

Common examples of social rules are the rules of etiquette, grammar, manners, and 'social mores' generally. For instance, no one laid down the rule that 'Black is worn at funerals' yet that rule plainly exists, and exists in virtue of what people think and do. Social rules of more interest to legal scholars include the rules of precedent⁵ and most constitutional conventions⁶. The best known type of social rule, however, is what Hart termed a 'rule of recognition' – a rule that determines the kind of actions or events that create, modify, and abrogate law in a society with a legal system.⁷ Without going into

¹ Ronald Dworkin, *A Matter of Principle* (Harvard University Press 1985) 131.

² Joseph Raz, *The Authority of Law* (OUP 1979) 37.

³ S 28, Town Police Clauses Act 1847. Sometimes a prescribed rule can cease to exist by desuetude. Whether this is true of this rule is not important for my discussion.

⁴ Kurt Baier, *The Moral Point of View: A Rational Basis for Ethics* (Cornell University Press 1958) 124.

⁵ See, for example, AD Woosley, 'The Existence of Rules' (1967) 1 *Nous* 63, 74-75.

⁶ Joseph Jaconelli, 'The Nature of Constitutional Conventions' (1999) 19 *Legal Studies* 24. See also: Dennis Lloyd, *The Idea of Law* (Penguin Books 1964) 247-248.

⁷ Hart's account of rules of recognition is scattered throughout *The Concept of Law* (2nd edn, OUP 1994). The most important passages for my purposes are 94-95 and 100-110.

detail, Hart described a rule of recognition as a ‘judicial customary rule’, clearly distinguishing it from statutory and other enacted rules.⁸

My broad concern is what brings a social rule into existence, but to simplify things I will restrict my discussion in several ways. First, I will only discuss rules that can be said to ‘require’, ‘mandate’, or ‘prohibit’ conduct. These are *mandatory rules*. Any mandatory rule – including a mandatory social rule – can be expressed in a statement of the form ‘As should ϕ ’, where As are members of a class of person A and ϕ is a generic action.⁹ Second, I will only discuss *non-overridable rules*. I am therefore sidestepping the debate about whether some rules are overridable or whether this is a point of distinction between rules and principles.¹⁰ Finally, I will only discuss what are sometimes called *genuine rules*, which unlike rules of thumb apply no matter how clear it is that departing from the rule is preferable to complying with it.¹¹ The reason for focusing on genuine rules is that they are by far the more common type in law.

In summary, my interest is rules that exist in virtue of social facts and that are public, unmade, mandatory, non-overridable, and genuine. From now on when I refer to a ‘social rule’ I mean a rule of this type. Going ahead, the question is, in virtue of what kind of fact or facts does a social rule exist?

3. The Practice Theory

The existence of social rules was one of Hart’s main concerns in *The Concept of Law*. He claimed that for a social rule to exist the members of a society must generally do as the (putative) rule requires.¹² For example, it is a social rule that ‘Knives are to be placed on the right of the dinner plate’ and in fact that is where knives are usually to be found. The converse is not true, however. Just because the members of a society generally do something does *not* mean there is a social rule that requires it. In Hart’s words: ‘Mere convergence in behaviour between members of a social group may exist (all may regularly drink tea at breakfast or go weekly to the cinema) and yet there may be no rule *requiring* it’.¹³ That we generally do something does not mean there is a social rule requiring it, but we generally do what social rules require of us.

Convergence in behaviour is thus necessary for the existence of a social rule, but insufficient. What else is needed? According to Hart, for a social rule to exist the members of a society must also have a certain attitude. Hart called this the ‘internal’ aspect of rules, to go with the ‘external’, behavioural aspect.

[I]f a social rule is to exist some at least must look upon the behaviour in question as a general standard to be followed by the group as a whole. A social rule has an ‘internal’ aspect, in addition

⁸ Hart, *The Concept of Law* (n 7) 256.

⁹ Joseph Raz, *Practical Reason and Norms* (2nd edn, Princeton University Press 1990) 50. See also: Max Black, *Models and Metaphors* (Cornell University Press 1962) 106-108; Georg Henrik von Wright, *Norm and Action* (Routledge & Kegan Paul 1963) 100-102; Gideon Gottlieb, *The Logic of Choice* (George Allen & Unwin 1968) 40; William Twining and David Miers, *How to do Things with Rules* (5th edn, Cambridge University Press 2010) 141-142.

¹⁰ Ronald Dworkin famously claimed that principles have a ‘dimension of weight’, whereas rules apply in an ‘all-or-nothing’ fashion: *Taking Rights Seriously* (Harvard University Press 1978) 24ff; see also 71-80. For a skeptical response see: Joseph Raz, ‘Legal Principles and the Limits of Law’ (1972) 81 *Yale Law Journal* 823.

¹¹ There is a great deal of terminological disagreement about ‘rule of thumb’. Raz uses the term idiosyncratically to describe a type of (what I am calling) genuine rule, which is distinguished by its justification as a time- or labour-saving device: *Practical Reason and Norms* (n 9) 59-62. Others use the term to mean something like a reminder of a reason. See, for example: Alan Goldman, *Practical Rules: When We Need Them and When We Don’t* (Cambridge University Press, 2002) 14-19; Scott Shapiro and Edward McClennen, ‘Rule-Guided Behaviour’ in Peter Newman (ed), *The New Palgrave Dictionary of Economics and the Law* (Palgrave Macmillan 1998) 363-364. My usage is consistent with Frederick Schauer’s: *Playing by the Rules* (OUP 1991) 105 n 36.

¹² Hart, *The Concept of Law* (n 7) 55, 255.

¹³ Hart, *The Concept of Law* (n 7) 9. Italics in original.

to the external aspect which it shares with a social habit and which consists in the regular uniform behaviour which an observer could record.¹⁴

There is a rule in a society if and only if its members regularly act in some way and they generally¹⁵ have a 'critical reflective attitude to [that] pattern of behaviour as a common standard'.¹⁶ To have this critical reflective attitude is to take the *internal point of view* towards the pattern of conduct.¹⁷

What does it mean to take the internal point of view towards a pattern of conduct? The standard form of explanation is to say how the attitude leads its possessor to act. (Sometimes Hart describes the internal point of view in terms of 'acceptance', a point I return to in Section 8.) Taking the internal point of view towards a pattern of conduct leads one to demand conformity with that pattern of conduct and to criticize non-conformity, to use normative language to express those demands and criticisms, and to refrain from criticizing others for having similar reactions.¹⁸ These ways of acting and speaking serve to distinguish mere habits or customs from rules. We do not criticize someone for failing to drink coffee at breakfast, for instance, because it is just a habit many people have. On the other hand we do tend to criticize people if they do not wear black at funerals, use normative language to make our criticisms (eg, 'she should have worn black'), and are rarely criticized in turn. That would suggest there is a rule in our society that black should be worn at funerals, and in fact there is such a rule.

Since I am about to mention some problems with Hart's theory, it will be useful to have a more formal statement of it. The theory is known as the 'Practice Theory'.¹⁹ We can state it like this:

Practice Theory There is a social rule in a society *S* that *As* should ϕ if and only if:

- (1) the *As* in *S* generally ϕ ;
- (2) the members of *S* generally have an attitude that leads them to:
 - (a) demand that *As* ϕ and criticize *As* when they do not ϕ ;
 - (b) make their demands and criticisms using expressions such as 'As should ϕ ';
 - (c) refrain from criticizing other members of *S* for making the demands and criticisms in (a).²⁰

The first condition requires a pattern of conduct. The second condition is meant to ensure that there really is a social rule as opposed to just a pattern of conduct. Condition (2)(b) plays another role as well. As Raz explains, the other conditions could be satisfied even if there is no rule that requires *As* to ϕ , so long as there are other rules that together cover all instances of *As* ϕ -ing.²¹ However, in that case people would not use expressions like 'As should ϕ ' when making demands and criticisms. Condition (2)(b) requires that they do use such expressions, and so ensures there is a single rule.

¹⁴ Hart, *Concept of Law* (n 7) 56.

¹⁵ Hart declines to specify exactly what proportion of a society's members must have the attitude in question, but he claims that the behaviour that manifests it must 'generally' occur: Hart, *Concept of Law* (n 7) 56-57.

¹⁶ Hart, *Concept of Law* (n 7) 57.

¹⁷ For discussion of the internal point of view, see: Neil MacCormick, *Legal Reasoning and Legal Theory* (OUP 1978) 177ff; Dennis Patterson, 'Explicating the Internal Point of View' (1999) *SMU Law Review* 67; Scott Shapiro, 'What is the Internal Point of View?' (2006) 75 *Fordham Law Review* 1157; Stephen Perry, 'Hart on Social Rules and the Foundations of Law: Liberating the Internal Point of View' (2006) 75 *Fordham Law Review* 1171.

¹⁸ Hart, *Concept of Law* (n 7) 56.

¹⁹ Hart later recognized his theory was too broad, and confined it to rules that are 'conventional' in that 'general conformity of a group to them is part of the reasons which its individual members have for acceptance': Hart, *Concept of Law* (n 7) 255-256.

²⁰ Raz, *Practical Reason and Norms* (n 9) 52-53 and Shapiro 'What is the Internal Point of View?' (n 17) 1162 offer similar summaries.

²¹ Raz, *Practical Reason and Norms* (n 9) 53.

In what follows I first identify two problems with the Practice Theory and then offer an alternative theory in its place. The first problem is that the Practice Theory is overinclusive: it sometimes says there is a social rule when there is not. The source of the problem is Hart's description of the internal aspect of a social rule; it is not specific enough. The second problem is that the Practice Theory is underinclusive: it sometimes says there is not a social rule when actually there is such a rule. That is because the external aspect of a social rule is simply unnecessary. The alternative theory I propose corrects for these problems.

4. Belief and the Internal Aspect

According to Hart, what we know about the internal aspect of rules is that it manifests itself in demands and criticisms that are expressed in normative terms. As many scholars have pointed out, a belief that an action should be performed manifests itself in the same ways.²² Indeed, in Hart's description, the two attitudes are outwardly virtually identical.²³ This leaves Hart without a way to distinguish between cases in which there is a social rule that requires an action and cases in which the members of a society merely believe an action should be performed. That turns out to be a serious problem, as examples like this one from Raz show:

Consider a community in which almost everybody believes that babies should be breast-fed or that children should be encouraged to learn to read when they are three years of age. This is generally done and people tend to reproach mothers who do not breast-feed or parents who do not teach their three-year-old children to read. Yet people in the community do not regard these as rules. They merely think that they are good things to do.²⁴

The members of the community generally believe certain things should be done, but they do not always have rules requiring them. In contrast, people in the community do regard it as a rule that they should do certain other things, such as go to church on Sunday. 'Somehow they think differently of this, though the difference is not reflected in their practice'.²⁵

Examples like Raz's demonstrate two points. First, there is a social rule in *S* that *As* should ϕ only if the members of *S* generally have a certain attitude, one that leads them to act *as if* they believe *As* should ϕ . Second, whatever the attitude in question is, it is not merely a belief that *As* should ϕ , nor is it entailed by such a belief. Both points are well recognized in the literature, and I will not labour them. Instead I want to consider a related question: Does the existence of a social rule entail the widespread belief that the rule should be complied with? In other words, if *S* has a rule that *As* should ϕ , does it follow that the members of *S* generally believe that *As* should ϕ ?

The question is not as straightforward as it may seem, largely because of the complexities surrounding 'should'. (I discuss some of those complexities in Section 6.) It is clear, however, that the existence of a social rule does not entail a widespread belief that the *balance of reasons* favours compliance with the rule on any particular occasion. Indeed, it does not even entail the absence of a widespread belief that the balance of reasons favours breaking the rule on some occasion. As Raz says, everyone who has a rule may think he should do as the rule says but may have the 'characteristic mixed reaction to the effect that doing so is not all right, ie, that there is a different calculation according to which he ought not to perform the action'.²⁶ (The 'different calculation' Raz refers to is a calculation of the balance of reasons, as the context makes clear.)

²² See, for example: Raz, *Practical Reason and Norms* (n 9) 55-56; Geoffrey Warnock, *The Object of Morality* (Methuen & Co Ltd 1971) 45-46; Scott Shapiro 'How Rules Affect Practical Reasoning' in Bruno Verbeek (ed), *Reasons and Intentions* (Ashgate 2008) 133-135.

²³ The exception is that the internal aspect of rules leads people to make statements like 'there is a rule that ...' but a mere belief that an action should be performed does not.

²⁴ Raz, *Practical Reason and Norms* (n 9) 56.

²⁵ Raz, *Practical Reason and Norms* (n 9) 56.

²⁶ Raz, *Practical Reason and Norms* (n 9) 75. For similar statements see, eg, Schauer (n 11) 4; Joseph Raz, 'Promises and Obligations' in Peter Hacker and Joseph Raz (eds), *Law, Morality and Society: Essays in Honour of HLA Hart* (OUP

Hart's discussion of the rule of recognition brings out the point. When a judge takes office, Hart says, he finds there is a practice 'according to which any judge of the system is required to apply in the decision of cases the laws identified by specific criteria or sources'.²⁷

The judges not only follow this practice as each case arises but are committed in advance in the sense that they have a settled disposition to do so without considering the merits of so doing in each case and indeed would regard it not open to them to act on their view of the merits. ... *His view of the merits may be favourable or unfavourable, or simply absent*²⁸

There is a social rule among judges (and other officials) that they are to apply the law, but judges may not believe that the balance of reasons – the 'merits' of the case – favours applying a particular law. Indeed, they may even believe the balance of reasons favours *not* applying a particular law. As Geoffrey Warnock says, 'the question is removed from the sphere of judgment on the particular merits of each case'.²⁹

In summary, the internal aspect of a social rule is the widespread possession of a certain attitude, and what we know about the attitude is that it leads a person to act as if he believes the (putative) rule should be complied with, whatever he believes the balance of reasons favours doing. To determine what the internal aspect of a social rule is, we must determine what attitude leads a person to act in this way. Before I attempt to do so, I need to address the other aspect of a social rule – its external aspect.

5. Membership and the External Aspect

According to Hart, there is a social rule in a society only if the people in the society generally do as the (putative) rule says. Schematically, there is a social rule in *S* that *As* should ϕ only if the *As* in *S* generally ϕ . There are two ways to interpret this condition, depending on what 'generally' is taken to mean. On one interpretation, the condition reads:

- (1) There is a social rule in *S* that *As* should ϕ only if the majority of *As* in *S* ϕ .

There is an obvious objection to (1), namely, a society can have a rule even if most of the members of the society to whom the rule applies break it. Rolf Sartorius gives this example:

I take it that contemporary American sexual morality contains a prohibition on adultery. I also think that it might be true that the majority of married individuals commit adultery at least once in their lifetimes. The point is that it could be true without changing the fact of the matter concerning the existence of a moral prohibition on such behaviour.³⁰

Even though a majority of American couples break the prohibition on adultery, that social rule still exists. Other examples include grammatical rules such as 'Do not end a sentence with a preposition' and 'Never start a sentence with a conjunction'. These rules exist even though most people break them from time to time.

According to another interpretation, what matters is whether the rule is complied with on most of the occasions to which it applies:

(Contd.) _____

1977) 223-224; Ronald Heiner, *Imperfect Decisions and the Law: On the Evolution of Legal Precedent and Rules* (1986) 15 *Journal of Legal Studies* 227, 236; Robert Nozick, *The Nature of Rationality* (Princeton University Press 1993) 10, 27; Shapiro and McClennen (n 11) 366

²⁷ HLA Hart, *Essays on Bentham* (OUP 1982) 158.

²⁸ Hart, *Essays on Bentham* (n 27) 158-159. Emphasis added.

²⁹ Warnock (n 22) 65; see also 36: 'A person is acting in compliance with a rule ... if he supposes that he (or one) is to act in that way, whether or not in every case there is, there and then, good reason to do so'.

³⁰ Rolf Sartorius, 'Positivism and the Foundations of Legal Authority' in Ruth Gavison (ed), *Issues in Contemporary Legal Philosophy: The Influence of HLA Hart* (OUP 1989) 51. See also: Warnock (n 22) 47-48.

(2) There is a social rule in S that As should ϕ only if the As in S ϕ on a majority of occasions.

This second interpretation is not vulnerable to Sartorius' counterexample, because most people who are married are not unfaithful most of the time. However, there is another problem with (2). If there are no As in S , then it is not true that As in S ϕ on a majority of occasions, which according to (2) means there is no social rule in S that As should ϕ . More generally, (2) claims that a society has a social rule only if the rule applies to its own members. And that claim seems false.

Consider the rule that non-Catholics must refrain from receiving communion. The rule applies only to non-Catholics, so it is impossible for a Catholic to conform to it. Even so, it is plainly a social rule among Catholics. Catholics would tell a non-Catholic that he or she is not allowed to take communion, for example. It is easy to think of similar examples: admission rules, initiation rites, hazing rituals, requirements of guests and visitors, etc. In all these cases, a society has a rule that applies only to non-members. Consequently, it is impossible for the members of the society to generally conform to (or break) the rule.³¹

To accommodate this counterexample, we could change (2) to read:

(2*) There is a social rule in S that As should ϕ only if As ϕ on a majority of occasions.

Whereas (2) requires that As in S ϕ on most occasions, (2*) just requires that As ϕ on most occasions. The revision is an improvement, insofar as it is safe from counterexamples like the one in the last paragraph. Non-Catholics generally do not take communion, for instance. However, (2*) is unacceptable for another reason. According to (2*), a society cannot have a rule that applies primarily to non-members unless the non-members comply with the rule on most occasions, which is clearly incorrect. Catholics, for example, have many rules that are universally applicable but which non-Catholics generally do not observe.³²

According to either interpretation, a pattern of conformity is unnecessary for the existence of a social rule.

6. Two Approaches

Let me summarize where we are: Hart claimed that a social rule has an external and an internal aspect. I argued that the external aspect is unnecessary, which if correct means that all there is to social rules is the internal aspect. The internal aspect of a social rule is simply a certain attitude widely held by the members of the society that has the rule. To determine when social rules exist we need to determine what this attitude is. The main thing we know about the attitude is that it leads those who possess it to act as if they believe the rule should be complied with, whatever they believe the balance of reasons favours doing.

What we know about the attitude in question is puzzling, especially when taken together with two natural thoughts. The first thought is that, if people who have a rule act as if they believe the rule should be complied with, it is because they actually believe it should be complied with. The temptation is then to say: *If there is a social rule in S that As should ϕ , then the members of S generally believe As should ϕ .* The second thought is that what should be done is the same as what the balance of reasons favours. Since sometimes there is a social rule but the members of the society do *not* generally believe the balance of reasons favours compliance with the rule, the temptation is to say: *Sometimes, there is a social rule in S that As should ϕ but the members of S do not generally believe As should ϕ .* These claims are inconsistent, so we need to reject one of the thoughts that led to them.

³¹ Is it possible that rules of admission, initiation, etc do not apply to non-members, instead governing how members should act towards non-members, or governing the applicability of other rules? That would distort what these rules require. Catholics, for example, would say that a *non-Catholic* should not take communion, not (merely) that a *priest* should not give communion to a non-Catholic.

³² See also: Sanford Levinson, 'Who is a Jew(ish) Justice?' (1989) 10 *Cardozo Law Review* 2359, 2369: 'According to classical Judaism, *all* persons, and not only Jews, are under a Noachite commandment not to worship idols; such behaviour is ultimately punishable by death'. Quoted by Schauer (n 11) 119 n 9.

That is, we must grant that a society can have a rule even though its members do not believe it should be complied with, or we must grant that what should be done may diverge from what the balance of reasons favours.

Both approaches are viable. The key to the second approach is to give a plausible account of why what should be done may diverge from what the balance of reasons favours. There are philosophers who think the two diverge, with Raz as the most prominent example. According to Raz, a 'protected reason' prevails over at least some conflicting reasons without necessarily tipping the balance of reasons in its favour.³³ If Raz is right about how protected reasons work, then perhaps the internal aspect of a social rule is simply a widespread belief in a protected reason to comply with the rule.

I will not discuss protected reasons here. That is partly because Raz never gives a full account of the existence conditions of social rules. He may not think that the existence of a social rule is explained by a belief in a protected reason and, as far as I know, no one else argues that it is. Why not try to propose such an account myself? Raz's claims about the nature and operation of protected reasons have come under sustained and largely persuasive attack for many years.³⁴ Until Raz or someone else answers those criticisms, protected reasons appear to be a shaky foundation on which to construct an account of social rules.

I will instead pursue the second approach and argue that people who have a social rule need not believe the rule should be complied with. Some other attitude explains the existence of a social rule. It simulates a belief that the rule should be complied with, but it neither entails nor is entailed by such a belief. I start in the next section by drawing a distinction between acceptance and belief. With that distinction in place, I argue in Section 8 for an acceptance-based theory of social rules. For simplicity's sake, I will assume in what follows that what should be done is the same as what the balance of reasons favours.

7. Acceptance and Belief

Recently a number of philosophers, including Michael Bratman, Jonathan Cohen, and Robert Stalnaker, have contrasted belief with another propositional attitude, usually termed 'acceptance'.³⁵ The details of their accounts vary, but there is a core of agreement, and that is enough for my purposes. In Stalnaker's formulation: 'To accept a proposition is to treat it as true for some reason. One ignores, at least temporarily, and perhaps in a limited context, the possibility that it is false'.³⁶ Above all it is the notion of *treating as true* that is central to acceptance. The usual reason to treat a proposition as true is that one believes it *is* true. As a result, what one believes one normally accepts. However, one can also accept a proposition one does not believe. That brings one to treat the

³³ Protected reasons are an ordinary reason and an 'exclusionary reason' not to act for at least some conflicting reasons: Raz, *The Authority of Law* (n 2) 18. According to Raz, conflicts between exclusionary and excluded reasons 'are resolved not by the strength of the competing reasons but by a general principle of practical reasoning which determines that exclusionary reasons always prevail, when in conflict with first-order reasons': *Practical Reason and Norms* (n 9) 40.

³⁴ See, for example: David Clarke, 'Exclusionary Reasons' (1977) 86 *Mind* 252; Chaim Gans, 'Mandatory Rules and Exclusionary Reasons' (1986) 15 *Philosophia* 373; Michael Moore, 'Authority, Law, and Razian Reasons' (1989) 62 *Southern California Law Review* 827; Larry Alexander, 'Law and Exclusionary Reasons' (1990) 18 *Philosophical Topics* 5. For a useful overview of the debate, see: William Edmundson, 'Rethinking Exclusionary Reasons' (1993) 12 *Law and Philosophy* 329.

³⁵ The main works are by Robert Stalnaker: *Inquiry* (MIT Press 1987) 79-81; 'Common Ground' (2002) 25 *Linguistics and Philosophy* 701, 715-716; Jonathan Cohen: 'Belief and Acceptance', (1989) 98 *Mind* 367; *An Essay on Belief and Acceptance* (OUP 1995); and Michael Bratman, 'Practical Reasoning and Acceptance in a Context' (1992) 101 *Mind* 1. See also: Bas van Fraassen, *The Scientific Image* (OUP 1980); John Perry, 'Belief and Acceptance' (1980) 5 *Midwest Studies in Philosophy* 533; Edna Ullmann-Margalit and Avishai Margalit, 'Holding True and Holding as True' (1992) 92 *Synthese* 167; Keith Frankish, *Mind and Supermind* (Cambridge University Press 2004); Mark Sainsbury, 'Fiction, and Acceptance-Relative Truth, Belief, and Assertion' in Franck Lihoreau (ed), *Truth in Fiction* (Transaction Books 2011). The introduction in Pascal Engel (ed), *Believing and Accepting* (Springer 2000) provides a helpful overview.

³⁶ Stalnaker, 'Common Ground' (n 35) 716.

proposition as true, and to act as if one believes it, even though one does not actually believe it.³⁷ In what follows, I state some of the features of belief, then give some examples of acceptance that show it lacks these features, and conclude by saying how belief and acceptance are related.

A. Features of Belief

Three features of belief are important for my purposes:

- (1) Reasonable belief is shaped by evidence and a concern for the truth. Belief is said to ‘aim at truth’. Of course some beliefs are shaped not by a concern for the truth but by what one wishes were true. But in that case one is open to criticism for wishful thinking or self-deceiving.
- (2) Reasonable belief is context-independent. At any one time a reasonable person either believes a proposition or he does not. He does not believe the proposition relative to one context but not relative to another.³⁸ More precisely, non-indexical belief is context-independent. One can believe the proposition *the book is here* in one context but not another, since the context goes to the content of the belief. Also, it is possible to have different attitudes towards a proposition depending on how it is presented.³⁹ These cases mark the exception, however, not the rule.
- (3) Beliefs are not under one’s direct, voluntary control. A person cannot decide to believe a proposition and, just like that, come to believe it. It is the world as it is, as well as demands of reasonableness, which shape a person’s beliefs. Philosophers debate why beliefs are out of one’s direct control, but there is no serious disagreement that it is.⁴⁰

This list is not meant as exhaustive. No doubt belief has other features, too. These features matter because they are the ones that acceptance lacks.

B. Examples of Acceptance

Sales assistants are required to treat it as true that the customer is always right. Of course they do not believe that. No one does. Some customers are dishonest; others are mistaken. What matters is simply that the sales assistants take the truth of the proposition as a basis for deliberation and decision. In doing so, they come to act as if they believe the customer is always right. Mark Sainsbury explains what that involves:

[T]o do their job properly, in certain circumstances, sales assistants have to act as if they believed [that the customer is always right]. That means: listening carefully to what the customer says, not challenging it, making remedial proposals that take for granted the customer’s story, and so on.⁴¹

The sales assistants need not treat it as true that the customer is always right *all* the time. Rather, they must do so during store hours and when interacting with customers. ‘After hours, it’s quite alright for

³⁷ See, for example: Stalnaker, *Inquiry* (n 35) 79-80: ‘To accept a proposition is to act, in certain respects, as if one believed it.’

³⁸ Bratman (n 35) 3. See also: Cohen, *Belief and Acceptance* (n 35) 13; Stalnaker, *Inquiry* (n 35) 80-81.

³⁹ Frankish, *Mind and Supermind* (n 35) 129; Bratman (n 35) 3 n 4.

⁴⁰ Bernard Williams argued against direct doxastic voluntarism in ‘Deciding to Believe’ in *Problems of the Self* (Cambridge University Press 1976); see also Bratman (n 35) 3. The argument has its critics. However, the conclusion – that direct doxastic voluntarism is false – has wide support, and that is what matters for my purposes.

⁴¹ Sainsbury, ‘Fiction and Acceptance-Relative Truth’ (n 35) 149. For a similar discussion of the same example, see Ullmann-Margalit and Margalit, ‘Holding True and Holding as True’ (n 35) 170-171.

sales assistants to tell one another how wrong the customers are', and indeed we would not be surprised if they made this kind of complaint.⁴²

The attitude the sales assistants have toward the proposition that the customer is always right is what I am referring to as 'acceptance'. Acceptance of a proposition p in a particular context leads a person to treat p as true in that context, just as belief that p normally does. Acceptance differs from belief in that it lacks the three features listed above. First, it is reasonable to accept something for a practical reason (eg, because it is a requirement of a job). Second, it is reasonable to accept something in one context (eg, during store hours) but not another (eg, after store hours). Finally, acceptance is under one's direct, voluntary control. The sales assistants, for example, need only decide to accept that the customer is always right to acquire the attitude.

Acceptance in the absence of belief is common when people are playing a role. Here is an example of Sainsbury's in which a therapist accepts what he believes is false to better treat a patient:

A disturbed patient is recounting his (entirely fictitious) early history to his therapist:
When I was young, I played the violin. I performed Beethoven's sonata in E flat at the Wigmore Hall.
The therapist knows this is false, but decides it's best to roll with her patient's delusions and says:
Did you play an encore?⁴³

In asking the question, 'Did you play an encore?', the therapist is treating it as true that her patient was a concert violinist.⁴⁴ She does so to better bring out the patient's fantasies and provide him with more effective treatment. The therapist's acceptance is context-dependent, because after the session, when arriving at a diagnosis, she will rely on what he knows to be the case and treat the patient as delusional. Finally, the acceptance is under her direct, voluntary control. She does not take any means to accept that her patient is a concert violinist; she decides to accept it, then asks her question.

The final example is by Stalnaker. He imagines a scientist who accepts certain propositions to simplify his inquiries:

Particles or planets may be treated as mass points, the atmosphere may be assumed to be a vacuum, consumers or governments may be thought of as rational. Of course in other inquiries these same assumptions might greatly distort the results, but the scientist might be in a position to know that in his inquiry they would not. The scientist does not, of course, *believe* the propositions he accepts, but he acts, in a limited context, as if he believed them in order to further his inquiry.⁴⁵

The scientist accepts what he does not believe (indeed, what he likely believes to be false) because it will help him with his inquiries. In this respect, he is guided by his goals, not by the evidence. In another context – say, when the composition of the atmosphere is under consideration – his goals may be different, and what he treats as true will change accordingly.

In short, acceptance that p in a context leads a person to treat p as true in that context. Acceptance shares none of the features of belief, above. Specifically, what one accepts in a context is (1) shaped by practical reasons; (2) context-dependent; and (3) under one's direct, voluntary control.

C. Belief and Acceptance Related

I have said how belief and acceptance are different. How are they related? It is uncontroversial in the literature on belief and acceptance that one can accept a proposition without believing it. It is also uncontroversial that one can believe a proposition without accepting it in a particular context. That is, acceptance that p does not entail belief that p , nor does belief that p entail acceptance that p in a particular context. (Whether belief entails acceptance in *some* context is unclear. It is also unimportant

⁴² Sainsbury, 'Fiction and Acceptance-Relative Truth' (n 35) 149.

⁴³ Sainsbury, 'Fiction and Acceptance-Relative Truth' (n 35) 153-154.

⁴⁴ Sainsbury, 'Fiction and Acceptance-Relative Truth' (n 35) 154.

⁴⁵ Stalnaker, *Inquiry* (n 35) 93.

for my purposes.) Although acceptance and belief can diverge, normally they do not. Normally, what one accepts relative to a context is what one believes, because the simplest reason to treat a proposition as true is that one believes it is true.⁴⁶ So, normally, if a person accepts a proposition relative to some context, he will act in that context as if he believes it.

Some further terminology would be helpful at this point. Suppose one accepts *p*. The acceptance might be based on one's continued belief that *p* or not. Call the acceptance *belief-dependent* in the first instance and *belief-independent* in the second. Note that it is possible to both believe *p* and to independently accept *p*. What is the significance of the independence of the acceptance? For one thing, it makes it more certain that one will treat *p* as true. Even if one were confronted with persuasive evidence that not-*p*, which would lead one to abandon the belief that *p*, one would not for that reason cease to accept *p*, or cease to treat *p* as true.

D. Summary

To accept a proposition in a context is to treat the proposition as true in that context. By default, one accepts in a given context all and only what one believes. Beliefs do not reasonably vary from context to context. They are shaped by evidence and are beyond one's direct, voluntary control. Ultimately, though, it is up to a person what to accept in a given context and, if he is reasonable, his choices will be guided by practical reasons. When it is held independent of belief, acceptance in a context normally leads a person to act as if he believes what he accepts, whether or not he actually believes it.

8. The Acceptance Theory

I claimed that a social rule exists simply by virtue of the widespread possession of a certain attitude by a society's members. I asked, what attitude is it? I spent the last section gathering the resources needed to answer that question. Now, in this section, I am prepared to set out an account of the existence of social rules. My claim is essentially that there is a social rule that requires some action just if the members of a society generally accept that the action should be performed, independent of their beliefs on the matter.

The argument is straightforward. First I show that the attitude that brings a social rule into existence, and a kind of belief-independent acceptance, lead people to act in the same ways. Then I show that the attitude we are looking for is, like belief-independent acceptance, practical, voluntary, and context-dependent. Having shown that the two attitudes share all their features, I claim that the attitude in question just *is* a kind of belief-independent acceptance.

A. Acceptance, Belief, and Acting 'As If'

Consider the constitutional convention in Britain that the Queen should act on the advice of her ministers. The convention exists partly in virtue of the attitudes of constitutional actors, which are displayed in speech and action. Constitutional actors regularly say things like 'The Queen should do what her ministers advise'. They would react critically to any suggestion that the Queen should act contrary to her ministers' advice, and they demand her compliance if they feel the need. In short, constitutional actors behave as if they believe the Queen should act on the advice of her ministers.

Do constitutional actors *actually* believe that the Queen should always do as her ministers say? Do they believe, for instance, that when the Queen and her ministers disagree about the merits of a bill, the Queen is always wrong and her ministers are always right? It seems unlikely. Ministers are not infallible. Sometimes, surely, the Queen gets it right. Constitutional actors know this as well as anyone else; it just does not make any difference to what they say or do. They act as if they believe the Queen should follow her ministers' advice, but they are indifferent to the truth of that proposition.

The explanation, I suggest, is that constitutional actors are generally in a state of belief-independent acceptance towards the proposition that the Queen should act on the advice of her ministers. They do not believe the proposition. Indeed they may even disbelieve it. Nonetheless they accept the proposition, which leads them to speak and act as if they believed it. That includes making

⁴⁶ Stalnaker, 'Common Ground' (n 35) 716.

the appropriate utterances and reacting critically to threatened departures from the convention. Belief-independent acceptance is, in short, an attitude that exactly fits the facts.

This example is meant to illustrate a more general argument, which runs as follows: from sections 4 to 6, we know that there is a social rule in *S* that *As* should ϕ just if the members of *S* generally have a certain attitude, one which leads them to act as if they believe *As* should ϕ , whether or not they actually believe that. From the last section, we know that being in a state of belief-independent acceptance towards a proposition leads a person to act as if he believes the proposition, whether or not he actually believes it. Thus, the main thing we know about the existence of social rules suggests they arise from a generally held state of belief-independent acceptance towards a normative proposition.

B. Additional Features of Acceptance

Acceptance is defined by more than just how it leads people to act and under what conditions. It also has the three features I listed in the last section: it is practical, context-dependent, and voluntary. The attitude that underlies the existence of a social rule is a kind of acceptance only if it too has these features. Does it?

To see why the answer is yes, consider a rule of recognition. A rule of recognition is a social rule, one that requires officials of the system of which it is a part to apply the rule it identifies as valid. The rule of recognition exists by virtue of the attitudes of those officials. As Hart makes clear, the officials can possess the necessary attitude – the ‘internal point of view’ – for a variety of reasons, including practical reasons.⁴⁷ Raz’s example is of an anarchist judge who reasons that ‘if he follows the law most of the time he will be able to disobey it on the few but important occasions when to do so will tend most to undermine it’.⁴⁸

Raz does not discuss the anarchist judge in detail, but we can guess the rest of the story. Most of the time, the judge will act as if he believes he should apply the laws of the legal system of which he is part. He will act that way in court, say, or when he makes a public appearance. He will do so to further his long-term goal of bringing down the legal system. In other contexts, though, the judge’s true character will shine through. When he attends meetings of an anarchist society, or plots strategy with other anarchist judges, he will express his belief that no one – himself included – should apply the law. The judge will lead a double life. In public he will treat as true what he believes is false; only in private will the two coincide.

The anarchist judge is like an actor in a play. Just as an actor may adopt the point of view of his character for greater verisimilitude, the judge chooses to take the internal point of view to advance his anarchist ends. When the play is over, the actor will shrug off his persona, simply by deciding to do so. Likewise, when the time is right, and he determines that disobeying the law will maximally damage the legal system, the judge will cast off the internal point of view and act from conviction. It is up to the actor to choose when to play his part, and it is up to the judge to decide whether to take the internal point of view and for how long.

The anarchist judge takes the internal point of view voluntarily, for a practical reason, and relative to some contexts but not others. His attitude shares the three features of acceptance I mentioned earlier. This suggests, more generally, that the attitude by virtue of which a social rule exists is voluntarily, responsive to practical reasons, and context-dependent.

Consider a different sort of example next: suppose you join a ship as its most junior mate. One of the first things you notice is that there is a strict rule against killing the albatrosses that occasionally follow the ship. Wanting to fit in as much as possible, you decide to treat it as a rule that albatrosses should not be killed. That leads you to criticize attempts to kill albatrosses by the other mates and to say things like ‘We should not kill albatrosses’. When you go ashore, though, you confide to your non-sailor friends that really you hate albatrosses and would like to shoot the odd one as an example to the others. Eventually, as old shipmates leave and new ones join, you end up as the most senior mate. As it happens, all the mates junior to you did as you did: to fit in better they chose to treat it as a rule that

⁴⁷ Hart, *The Concept of Law* (n 7) 203.

⁴⁸ Raz, *Practical Reason and Norms* (n 9) 148. See also: Raz, *The Authority of Law* (n 2) 138-143, 156.

albatrosses should not be killed, meanwhile harbouring a deep animosity towards albatrosses. The whole ship is crewed by people who think shooting an albatross would be an excellent idea, yet they are all prepared to criticize anyone who actually did so. Everyone aboard the ship despises albatrosses, but nowhere is an albatross safer.

It seems plausible that during your whole time on the ship there is a social rule against killing albatrosses. That rule exists when you are senior mate as much as it does when you are junior mate. Here, then, is the point: the existence of the rule at all times rests on a widespread attitude among the mates, one which by the time you are senior mate is in each case held voluntarily, for a practical reason, and relative only to certain contexts. Thus the social rule exists by virtue of an attitude that shares all the features of acceptance.

C. The Acceptance Theory

I have said there is a social rule that requires some action just if the members of a society generally possess a certain attitude. What Hart and his critics revealed about the attitude suggests it is belief-independent acceptance that the action should be performed. What else we know about belief-independent acceptance suggests the same. Can we then say that there is a social rule that requires an action just if the members of a society generally accept that the action should be performed, independent of their beliefs on the matter?

Not quite. One may accept a proposition relative to different types of contexts. Some of those contexts are practical; others are theoretical. The difference matters because we would not say that there is a social rule if the members of a society accept that some action should be performed, but their acceptance is held purely for theoretical purposes. In a lecture on Roman law, for example, students may be asked to accept that slaves may not vote.⁴⁹ Even if they accepted that, we would not say the students have a rule that prohibits slaves from voting, because their acceptances are used to draw theoretical conclusions, not to guide action.

Having made this clarification, I propose what I term the ‘Acceptance Theory’ of social rules:

Acceptance Theory There is a social rule in *S* that *As* should ϕ if and only if the members of *S* are generally in a state of belief-independent acceptance towards the proposition that *As* should ϕ , and their acceptances are held relative to a practical context.

According to this theory, constitutional actors are understood to accept that the Queen should act on the advice of her ministers, whatever they believe she should do. Officials are understood to accept that they should apply the laws the rule of recognition identifies as valid, even if (like the anarchist judge) they believe otherwise. Other social rules can be understood similarly.

C. Hart and Acceptance

How does the Acceptance Theory differ from Hart’s Practice Theory? Most obviously my theory does not make a pattern of conformity a necessary condition for the existence of a social rule. It also clearly distinguishes the attitude that brings a social rule into existence from an ordinary belief that an action should be performed. That protects the theory from objections of the sort Warnock, Raz, and others leveled against the Practice Theory. Finally, my theory draws attention to some unrecognized features of the attitude that underlies a social rule, in particular, its context-dependence.

In other respects, the two theories are compatible. Indeed, Hart often described the attitude he was looking for as a kind of acceptance, or as related in some way to acceptance. He never said what he meant by ‘acceptance’ and he was frustratingly inconsistent about what the object of acceptance is, but he clearly saw a connection between the attitude and social rules.⁵⁰ Perhaps the best way to think

⁴⁹ Cf Hart, *The Concept of Law* (n 7) 105: ‘One vivid way of teaching Roman Law is to speak *as if* the system were efficacious still and to discuss the validity of particular rules and solve problems in their terms ...’.

⁵⁰ In various places, Hart describes the internal aspect as the ‘acceptance of a rule’, ‘acceptance of a rule as a guide to conduct’, ‘acceptance of a pattern of conduct as a standard’, ‘acceptance of a pattern of conduct as a reason’, and so on.

of the Acceptance Theory is as an attempt to finish what Hart started. With the benefit of recent work in the philosophy of action, we can now give a sharper account of what acceptance is and why it helps to bring social rules into being, sharper than Hart could when he wrote *The Concept of Law*.

9. Conclusion

Even though it suffers from well-recognized problems, the Practice Theory has dominated jurisprudential thinking about social rules for fifty years. What we have lacked is a good alternative. I have added to the criticisms of the Practice Theory. More importantly I have proposed a theory to take its place. The Acceptance Theory draws inspiration from Hart's work on social rules, but it avoids the problems faced by the Practice Theory. It avoids them by making the existence of social rules turn solely on the kind of attitude Hart himself may have been seeking: an attitude different enough from belief to be responsive to practical reasons, but one that shares its motivational force. That attitude, I claim, is acceptance that an action should be performed, where the acceptance is held independent of a corresponding belief, and relative to a practical context.

(Contd.) _____

Perhaps most confusingly, he says someone may share the 'internal point of view accepting the rules as standards for all to whom they apply'. See Hart, *The Concept of Law* (n 7) 56-57, 89-90, 115-117, 255.

