

# The Internal Aspect of Social Rules

ADAM PERRY\*

## 1. Introduction

The existence of a legal system depends on the existence of social rules among its officials; but under what conditions do social rules exist? Two points are widely accepted. For there to be a rule in a society, its members must generally do as that rule says. This pattern of conduct is the social rule's 'external aspect'.<sup>1</sup> Also, enough of that society's members must have the right attitude. Their possession of this attitude is the social rule's 'internal aspect'. It has proven difficult, however, to explain which attitude is the right attitude, or in other words, which attitude is held by participants in the internal aspect of a social rule.

HLA Hart understood the participants' attitude in terms of its manifestations.<sup>2</sup> It leads participants in the internal aspect of a social rule to criticize deviations from the rule, to acknowledge the legitimacy of like criticisms by others, and to express these reactions using normative language. The problem, as Geoffrey Warnock and others pointed out, is that a belief that an action ought to be performed displays itself in the ways Hart described, yet a society does not have a rule requiring its members to act in some way merely because they generally act in that way and believe they ought to do so.<sup>3</sup> In cricket, for instance, players tend not only to draw near the batsman when a slow bowler is bowling, but also

---

\* I am especially grateful to John Broome and Les Green for their help. I also thank Farrah Ahmed, Patrick Emerton, Chris Essert, John Gardner, Timothy Macklem, Giovanni Sartor, Scott Shapiro, Adam Tucker, Jan van Zyl Smyt, and Lael Weis.

<sup>1</sup> The terms 'external aspect' and 'internal aspect' are from HLA Hart, *The Concept of Law* (3<sup>rd</sup> edn, OUP 2012) 56 (hereafter abbreviated as 'CL').

<sup>2</sup> Hart, *CL* (n 1) 57, 255. For this reading of Hart, see: J Raz, *Practical Reason and Norms* (2<sup>nd</sup> edn, Princeton University Press 1990) 50 (hereafter abbreviated as 'PRN'); S Shapiro, 'How Rules Affect Practical Reasoning' in B Verbeek (ed), *Reasons and Intentions* (Ashgate 2008) 134.

<sup>3</sup> G Warnock, *The Object of Morality* (Methuen & Co Ltd 1971) 45-46. See also: S Shapiro, 'How Rules Affect Practical Reasoning' (n 2) 133-135; S Shapiro, *Legality* (Harvard University Press 2011) 103-104; Raz, *PRN* (n 2) 56.

to criticize their teammates for failing to do so, to acknowledge the legitimacy of such criticisms by others, and to express these reactions using terms like 'ought', 'right', and 'wrong'. Hart is committed to saying that there is a rule requiring cricket players to draw near the batsman when a slow bowler is bowling, but in fact this is simply something cricket players believe they ought to do.

Warnock's objection shows the need to supplement Hart's account of the attitude held by participants in the internal aspect of a social rule. So far, though, no one has done so. As a result, we do not fully understand the conditions under which social rules exist. That means, in particular, that we do not fully understand the conditions under which an ultimate rule of recognition of a legal system exists, and thus the conditions under which an act or event creates or abrogates law in a community.<sup>4</sup>

In this article I shall propose a new account of the participants' attitude, one which I believe addresses Warnock's concern. Here is how I shall proceed. In the next section I shall identify several features of the participants' attitude. These features are shared by an attitude known in the philosophy of action as 'acceptance', which I shall introduce in section 3. Their shared features raise the possibility that the participants' attitude *is* a kind of acceptance. I shall argue that this is in fact the case in section 4. Once we understand the participants' attitude as a kind of acceptance, we can distinguish it from a belief about what ought to be done, which is enough to deflect Warnock's objection. In section 5 I shall compare the notion of acceptance that I use with Hart's notion of the acceptance of a rule. One of the implications of my proposal is that the internal aspect of a social rule is in important respects analogous to a shared 'presumption' or 'fiction' as these terms are understood in the law of evidence, and I shall explore this connection in section 6.

Before I go on, I should make clear that I am following Hart in focusing on mandatory social rules, that is to say, social rules that require conduct. Mandatory rules can always be stated in the form '*As* ought to *F*', where *As* are members of a class of person *A* and *F* is a generic action.<sup>5</sup> The normative proposition thus stated is the 'content' of the rule or the 'rule-proposition'.

---

<sup>4</sup> For Hart's key remarks on the ultimate rule of recognition, including its nature as a social rule, see: Hart, *CL* (n 1) 94-95, 100-110, 116-117.

<sup>5</sup> M Black, *Models and Metaphors* (Cornell University Press 1962) 106-108; N MacCormick, *Legal Reasoning and Legal Theory* (OUP 1978) 43, 45; Raz, *PRN* (n 2)

## 2. Belief and the Internal Aspect

Warnock's objection reveals two features of the participants' attitude, both of which relate to a certain kind of belief. The first feature concerns the motivational force of the participants' attitude. Participants in a rule's internal aspect have an attitude that leads them to act as they would act were they to believe the normative proposition that is the rule's content. In other words, the attitude of participants in the internal aspect of a rule that *As* ought to *F* leads them to act as if they believe that *As* ought to *F*. This is why the conduct of cricket players is consistent with them either believing that they ought to draw near the batsman when a slow bowler is bowling, or with them participating in the internal aspect of a rule that they ought to do so. In either case, the players' attitude would lead them to act in the same ways: to draw near the batsman when there is a slow bowler, to praise those who do likewise, to criticize those who do otherwise, and so on.

So, the attitude of a participant in a rule's internal aspect has the motivational force of a belief in the rule-proposition. But – and this is the attitude's second feature – it is not 'entailed' by that belief. That is to say, it is possible to believe that *As* ought to *F* without possessing the attitude of a participant in the internal aspect of a rule that *As* ought to *F*. This is why the cricket players can believe that they ought to draw near the batsman when a slow bowler is bowling without participating in the internal aspect of a rule that they ought to draw near.

Such are the implications of Warnock's objection. Now consider a related issue. You can believe that *As* ought to *F* without participating in the internal aspect of a rule that *As* ought to *F*, but what about the converse case? Can you participate in the internal aspect of a rule that *As* ought to *F* without believing that *As* ought to *F*? It is plausible that the answer is yes, though it requires some explanation.

It is generally acknowledged that participating in a rule's internal aspect does not entail believing that the 'balance of reasons' – the merits and demerits – always favours doing as that rule says.<sup>6</sup> Hart

---

50; F Schauer *Playing by the Rules* (OUP 1991) 23; Georg Henrik von Wright, *Norm and Action* (Routledge & Kegan Paul 1963) 100-102.

<sup>6</sup> See, generally: Raz, *PRN* (n 2) 75; J Raz, 'Promises and Obligations' in P Hacker and J Raz (eds), *Law, Morality and Society: Essays in Honour of HLA Hart* (OUP 1977) 223-224; Schauer, (n 5) 4; R Nozick, *The Nature of Rationality* (Princeton University Press 1993) 10, 27; S Shapiro and E McClennen, 'Rule-

gives ultimate rules of recognition as an example. He describes how, on taking office, a judge will discover the practice that constitutes the ultimate rule of recognition, i.e., the 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’.<sup>7</sup> A judge will be disposed to comply with that rule whenever possible, even though his or her ‘view of the merits [of doing so] may be favourable or unfavourable, or simply absent’<sup>8</sup>. So, a judge can participate in the internal aspect of a rule notwithstanding his or her lack of a belief that the balance of reasons always favours doing as it says.

Warnock uses an example from cricket to make the same point:

Consider ... [the rule] that six balls, and no more, are to be delivered from each end in turn. ... [U]mpires do not, on each occasion when bowlers have bowled six balls, bring the over to an end because they see, on each occasion, good reason to do so. There are in fact plenty of cases in which, from the batsman’s or bowler’s or even the spectator’s point of view, it would be an excellent thing to have more than six balls; but the fact is that the merits of such cases do not come into it.<sup>9</sup>

Umpires are participants in the internal aspects of the rules of cricket. Nonetheless, they do not always believe the balance of reasons favours doing as the rules say. They may not, for instance, believe that the balance of reasons favours bringing the over to an end after six balls have been bowled.

Now, most moral philosophers think that it is true that *A* ought to *F* if and only if the balance of reasons favours *A* *F*ing.<sup>10</sup> Not all philosophers think this. Joseph Raz is the best-known exception. Raz thinks that what ought to be done may differ from what the balance of reasons favours in the presence of an ‘exclusionary

---

Guided Behaviour’ in Peter Newman (ed), *The New Palgrave Dictionary of Economics and the Law* (Palgrave Macmillan 1998) 366.

<sup>7</sup> HLA Hart, *Essays on Bentham* (OUP 1982) 158 (hereafter abbreviated as ‘EB’).

<sup>8</sup> Hart, *EB* (n 7) 159.

<sup>9</sup> Warnock (n 3) 64-65.

<sup>10</sup> See, e.g., JJ Thomson, *Goodness and Advice* (A Gutman ed, Princeton University Press 2001) 74-76; B Streumer, ‘Can Consequentialism Cover Everything?’ (2003) 15 *Utilitas* 237, 243; I Persson, ‘A Consequentialist Distinction between What we Ought to Do and Ought to Try’ (2008) 20 *Utilitas* 348, 354; S Finlay, ‘What *Ought* Probably Means, and Why You Can’t Detach It’ (2010) 177 *Synthese* 67; and B Kiesewetter, ‘“Ought” and the Perspective of the Agent’ (2011) 5 *Journal of Ethics & Social Philosophy* 1.

reason'.<sup>11</sup> For present purposes I will assume that there are no exclusionary reasons, so that what ought to be done is what the balance of reasons favours.<sup>12</sup> (I explain the significance of dropping this assumption in section 5.) Given this assumption, and examples like Hart's and Warnock's, I can add a third point to the two above: you can participate in the internal aspect of a rule without believing the rule-proposition; you can, in other words, participate in the internal aspect of a rule that *As* ought to *F* without believing that *As* ought to *F*.

The three points I have mentioned in this section give us a partial picture of the participants' attitude. Essentially, we are looking for an attitude that has the motivational force of belief, but that neither entails nor is entailed by belief. It simulates belief, but is independent from it. Not many attitudes in the literature have this combination of features. It makes sense, then, to focus on one that does, namely, acceptance.

### 3. Belief and Acceptance

Many philosophers of action, including Michael Bratman, Jonathan Cohen, and Robert Stalnaker, think of acceptance as a propositional attitude distinct from, but related to, belief.<sup>13</sup> These

---

<sup>11</sup> Raz, *PRN* (n 2) 40, 188-189; Raz, 'Facing Up: A Reply' (1989) 62 *Southern California Law Review* 1153, 1167-1168. Raz acknowledges the unorthodoxy of his views at *PRN* (n 2) 36.

<sup>12</sup> See, e.g., D Clarke, 'Exclusionary Reasons' (1977) 86 *Mind* 252; C Gans, 'Mandatory Rules and Exclusionary Reasons' (1986) 15 *Philosophia* 373; M Moore, 'Authority, Law, and Razian Reasons' (1989) 62 *Southern California Law Review* 827; L Alexander, 'Law and Exclusionary Reasons' (1990) 18 *Philosophical Topics* 5. For a useful overview of the debate, see: W Edmundson, 'Rethinking Exclusionary Reasons' (1993) 12 *Law and Philosophy* 329.

<sup>13</sup> The main works include: R Stalnaker, *Inquiry* (MIT Press 1987) 79-81; R Stalnaker 'Common Ground' (2002) 25 *Linguistics and Philosophy* 701, 715-716; J Cohen: 'Belief and Acceptance' (1989) 98 *Mind* 367; J Cohen, *An Essay on Belief and Acceptance* (OUP 1995); and M Bratman, 'Practical Reasoning and Acceptance in a Context' (1992) 101 *Mind* 1. See also: B van Fraassen, *The Scientific Image* (OUP 1980); J Perry, 'Belief and Acceptance' (1980) 5 *Midwest Studies in Philosophy* 533; E Ullmann-Margalit and A Margalit, 'Holding True and Holding as True' (1992) 92 *Synthese* 167; K Frankish, *Mind and Supermind* (Cambridge University Press 2004); M Sainsbury, 'Fiction, and Acceptance-Relative Truth, Belief, and Assertion' in Franck Lihoreau (ed), *Truth in Fiction* (Transaction Books 2011) (hereafter abbreviated as 'Acceptance-Relative Truth'). The introduction in P Engel (ed), *Believing and Accepting* (Springer 2000) provides a helpful overview.

philosophers do not all understand acceptance in the same way, but there is a core of agreement, and that is what matters for my purposes. In Stalnaker's formulation: '[t]o 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'.<sup>14</sup> It is this notion of *treating as true* (taking as given, proceeding on the basis, etc.) that is central to acceptance. The usual reason to treat a proposition as true is that you believe it is true. What you believe you therefore normally accept. However, you can also accept a proposition you do not believe. That brings you to treat the proposition as true, and to act as if you believe it, even though you do not actually believe it.<sup>15</sup> In what follows, I shall state several features of belief, provide examples of acceptance to show that it lacks these features, and then explain how belief and acceptance are related.

Three features of belief are important for my purposes:

- (1) Belief (insofar as it is reasonable) 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 you wish was true. But in that case you are open to criticism for wishful thinking or self-deceiving.
- (2) Belief (insofar as it is reasonable) is context-independent. At any one time you either believe a proposition or you do not. You do not believe the proposition relative to one context but not relative to another.<sup>16</sup> More precisely, non-indexical belief is context-independent. You 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

---

<sup>14</sup> Stalnaker, 'Common Ground' (n 13) 716.

<sup>15</sup> Stalnaker, *Inquiry* (n 13) 79-80.

<sup>16</sup> Bratman (n 13) 3. See also: Cohen, *Belief and Acceptance* (n 13) 13; Stalnaker, *Inquiry* (n 13) 80-81.

proposition depending on how it is presented.<sup>17</sup> These cases mark the exception, however, not the rule.

- (3) Beliefs are not under your direct, voluntary control. You 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 belief is out of one's direct control, but there is no serious disagreement that it is.<sup>18</sup>

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.

Sales assistants are sometimes required to treat it as true that the customer is always right. Of course they do not actually 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.<sup>19</sup>

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

---

<sup>17</sup> Frankish, *Mind and Supermind* (n 13) 129; Bratman (n 13) 3 n 4.

<sup>18</sup> Bernard Williams argued against direct doxastic voluntarism in 'Deciding to Believe' in *Problems of the Self* (Cambridge University Press 1976); see also Bratman (n 13) 3. Williams' argument has its critics. However, the conclusion – that direct doxastic voluntarism is false – has wide support, and that is what matters for my purposes.

<sup>19</sup> Sainsbury, 'Acceptance-Relative Truth' (n 13) 149; cf Ullmann-Margalit and Margalit, 'Holding True and Holding as True' (n 13) 170-171.

for 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.<sup>20</sup>

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 you 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 can be reasonable to accept something for a practical reason (e.g., because it is a requirement of a job) rather than for a truth-related reason. Second, it is reasonable to accept something in one context (e.g., during store hours) but not another (e.g., after store hours). Finally, acceptance is under your direct, voluntary control. The sales assistants, for example, need only decide to accept that the customer is always right to acquire the attitude. (To be clear, I am not now discussing rules. I do not claim that there is a rule requiring sales assistants to act as if the customer were always right, and it would be irrelevant if there were such a rule.)

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 she 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?<sup>21</sup>

In asking the question 'Did you play an encore?' the therapist is treating it as true that her patient was a concert violinist.<sup>22</sup> She does so for a practical reason, namely, to better bring out the patient's fantasies and provide him with more effective treatment. The therapist's acceptance is also context-dependent, because after the session, when arriving at a diagnosis, she will rely on what she knows to be the case and treat the patient as delusional. Finally, the

---

<sup>20</sup> Sainsbury, 'Acceptance-Relative Truth' (n 13) 149.

<sup>21</sup> Sainsbury, 'Acceptance-Relative Truth' (n 13) 153-154.

<sup>22</sup> Sainsbury, 'Acceptance-Relative Truth' (n 13) 154.

acceptance is under the therapist's 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.<sup>23</sup>

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 you to treat  $p$  as true in that context. Acceptance shares none of the features of belief, above. That is to say, what you accept in a context is (1) shaped by practical reasons; (2) context-dependent; and (3) under your direct, voluntary control.

I have said how belief and acceptance are different. How are they related? It is uncontroversial in the literature on belief and acceptance that you can accept a proposition without believing it. It is also uncontroversial that you can believe a proposition without accepting it in a particular context. That is to say, 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.<sup>24</sup> It is also unimportant for my purposes.) Although acceptance and belief can diverge, normally they do not. Normally, what you accept relative to a context is what you believe, because the simplest reason to treat a proposition as true is that you believe it is true.<sup>25</sup> So, normally, if you accept a proposition

---

<sup>23</sup> Stalnaker, *Inquiry* (n 13) 93.

<sup>24</sup> For discussion, see: Frankish (n 13) 132-137.

<sup>25</sup> Stalnaker, 'Common Ground' (n 13) 716.

relative to some context, you will act in that context as if you believe it.

Some further terminology would be helpful at this point. Suppose you accept  $p$ . Your acceptance might depend on your 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 you will treat  $p$  as true. Even if you were confronted with persuasive evidence that not- $p$ , which would lead you to abandon the belief that  $p$ , you would not for that reason cease to accept  $p$ , or cease to treat  $p$  as true.

In summary, to accept a proposition in a context is to treat that proposition as true in that context. By default, you accept in a given context all and only what you believe. Beliefs do not reasonably vary from context to context. They are shaped by evidence and are beyond your direct control. Ultimately, though, it is up to you what to accept in a given context and, if you are reasonable, your choices will be guided by practical reasons. When it is held independent of a corresponding belief, acceptance in a context normally leads you to act as if you believe what you accept, whether or not you actually believe it.

#### 4. Acceptance and the Internal Aspect

Let me now return to social rules. To reiterate: a social rule has an internal aspect, which is the possession of the right attitude by enough members of a society (the 'participants' in the internal aspect). Hart described the participants' attitude in terms of the attitude's manifestations, and Warnock showed the need for a fuller description. I gathered the resources to reply to Warnock in the last two sections. With those resources in hand, here is my proposal: a participant in the internal aspect of a social rule is someone who has an attitude of acceptance towards the proposition that is the rule's content, where that acceptance is held independent of any corresponding belief. The internal aspect of that social rule is then a societal or 'shared' belief-independent acceptance of that proposition. My argument for this proposal is simple: it is consistent with what we know about the participants' attitude, and it is consistent with what we know about acceptance.

I said in section 2 that we know three things about the attitude of a participant in the internal aspect of a social rule: this attitude leads participants to act as if they believe the proposition that is the rule's content; it is not entailed by a belief in that proposition; and it does not entail such a belief. In the last section, I said that acceptance of a proposition leads you to act as if you believe that proposition; that it is not entailed by a belief in that proposition; and that, if the acceptance is belief-independent, it does not entail such a belief. So, in its motivational force, and its relationship with belief, the attitude of a participant in the internal aspect of a social rule is identical to belief-independent acceptance of the proposition that is the rule's content.

Acceptance is defined, not just by its motivational force and its relationship to belief, but also by its responsiveness to practical reasons, voluntariness, and context-dependence. Let me take these points in order. People often participate in a rule's internal aspect for practical reasons. The reason may be that it helps them to 'fit in' – to be like others in a group – or to avoid criticism or to attract praise. Think, for example, of a student starting at university, or someone starting a new job. In an effort to fit in with the members of the group, the newcomer may adopt its rules regarding dress, speech, and so forth. There are other kinds of practical reasons for participation. Think of chess. Like many other games, chess is constituted (in part) by mandatory social rules. These rules exist amongst the community of chess players. Many people decide to join this community, and participate in the game, because they think it would be fun or challenging – in any case, for a practical reason.

The same examples help to show that participation in a rule's internal aspect is voluntary. The student who starts at university may come to participate in rules of speech or dress tacitly, but he or she may also *decide* to participate, as a means to his or her end of fitting in. The student makes a conscious choice to dispose him or herself to criticize others for not dressing or speaking in a certain way, to acknowledge the legitimacy of such criticism by others, and so on. Likewise, participation in a game is normally voluntary. You do not have to be a chess player if you do not wish to be one, and most people do not come to participate in the game tacitly; they *decide* to acquire the attitude that marks a participant in the game. Hart would agree. He believes that you can acquire the attitude that

underlies a social rule voluntarily, and that you may do so out of self-interest or the desire to be like others.<sup>26</sup> (I return to Hart's views in the next section.)

There is a supporting analogy. Social rules are like personal rules, except that personal rules exist in virtue of the actions and attitudes of an individual, rather than of a society's members. You can choose to have a personal rule and, so long as you generally do as it says, it is yours, without your needing to do anything more. It is up to you whether to have a rule about what you ought to eat, say, or how often you ought to go to the gym. You can acquire these rules at will and you can abandon them at will. You can do these things at will because, simply by deciding to do so, you can acquire and abandon the attitude that is the internal aspect of your personal rule. Moreover, it can be reasonable to have a personal rule for a practical reason (to lose weight, say, or to become healthier). Analogously, you can choose to acquire or abandon the attitude that defines your participation in the internal aspect of a social rule, and it can be reasonable to do so for a practical reason.

The participants' attitude is also reasonably context-dependent. The student who lives by one set of social rules during term time may live by another when he or she returns home. It is not that the rules have a limited scope of application. It is that the student is a member of more than one social group, and these groups have different rules. His or her participation in the internal aspect of a particular rule depends on the proximity of members of the relevant group. To take a new example, there is a social rule in America that requires tipping of approximately 10% in many situations. While in America, many Americans will express disapproval of a failure to tip or to tip adequately. While outside America, in countries without the same rule, many of these same people will refrain from criticizing the failure to tip, even to each other or to themselves. The social context makes a difference, not to the rule's application, but to participation in its internal aspect. For a more dramatic example, imagine a spy or undercover agent who adopts the rules of a group to better infiltrate it, but who sets aside those rules when reporting back to his or her superiors. The point in all these examples is that the practical reasons which favour participation in the internal aspect of a social rule may favour participation in certain contexts only, making context-dependent participation reasonable.

---

<sup>26</sup> See references at n 35-36.

Acceptance can be held relative to a practical context (as in Sainsbury's example of the therapist) or a theoretical context (as in Stalnaker's example of the scientist). Social rules, however, are always of practical significance. It is part of their nature to guide action. So, although the attitude of a participant in the internal aspect of a social rule may be held relative to some but not all contexts, at least some of the contexts relative to which it is held will be practical in character.

So far in this section, I have said that the attitude of a participant in a rule's internal aspect is like belief-independent acceptance of the rule-proposition in that: (1) both attitudes lead their possessors to act as if they believe the rule-proposition, (2) neither attitude is entailed by that belief, (3) neither entails that belief, (4) both attitudes are responsive to practical reasons, (5) both are reasonably context-dependent, and (6) both are under your direct and voluntary control.

Here is an example that demonstrates all six common features. As I said, the existence of an ultimate rule of recognition depends on law-applying officials participating in the internal aspect of that rule. These officials can participate in the rule's internal aspect for a variety of reasons. Raz provides an example of an anarchist judge. The anarchist judge participates in the rule of recognition's internal aspect because he 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'.<sup>27</sup>

Raz does not describe the anarchist judge in detail; so let me imagine the rest of the story. Most of the time, the judge acts as if he believes he ought to apply the laws of the legal system of which he is part. He acts that way in court, say, by applying the laws of that system. He acts that way when making speeches, sitting on committees, and so on. He does this to further his long-term goal of undermining the legal system. In other contexts, however, the judge's true character shines through. When he attends meetings of an anarchist society, or plots strategy with other anarchist judges, he expresses his true belief: that it would be best if no law were applied. In public the judge treats as true what he does not really believe; only in private do the two coincide.

---

<sup>27</sup> Raz, *PRN* (n 2) 148. Cf. J Raz, *The Authority of Law* (OUP 1979) 156 n 13; Hart, *EB* (n 7) 155-159.

The judge is like an actor in a play. Just as an actor may take the point of view of his character for greater verisimilitude, the judge chooses to participate in the internal aspect of the rule of recognition to advance his anarchist ends. When the play is over, the actor will shrug off his persona. Likewise, when the time is right, and he determines that *not* applying the law will maximally damage the legal system, the anarchist judge will act from conviction. It is up to the actor to choose when to play his part and when not to. It is up to the judge to decide whether to continue to participate in the internal aspect of the rule of recognition and for how long.

The anarchist judge has an attitude that (1) leads him to act as if he believes he ought to apply the law, but (2) he does not really believe that. In addition, (3) it is possible to believe the law ought to be applied without having the same attitude as the anarchist judge. The judge has this attitude (4) in furtherance of his practical goal of undermining the legal system, (5) relative to public contexts but not private ones, and (6) as a matter of choice. The judge has an attitude that contributes to the existence of a rule of recognition, and hence a social rule, and his attitude has all the features of belief-independent acceptance.

Everything we know about the attitude of participants in a rule's internal aspect suggests it is acceptance of the rule-proposition where that acceptance is belief-independent and held relative to a practical context. So does everything we know about acceptance. We should conclude that the two attitudes are the same. Expressed schematically, the internal aspect of a rule in a society that *As* ought to *F* is the practical and belief-independent acceptance by enough members of that society that *As* ought to *F*. Let me call this the 'revised account' of the internal aspect, to distinguish it from Hart's account.

To be absolutely clear, according to this revised account, participants in the internal aspect of a social rule can both accept and believe the rule-proposition. What matters is that their acceptances are held *independent* of that belief, not *absent* that belief. Also, the revised account is consistent with acceptance of the rule-proposition being dependent on some other belief, that is, a belief other than a belief in the rule-proposition.

The revised account is consistent with what we know about the internal aspect of a social rule. That is its main virtue. What is also

crucial is that it is safe from Warnock's objection. Hart did not spell out the difference between the participants' attitude and a normative belief, which made his account overinclusive. The core of the revised account, on the other hand, is belief-independent acceptance, which is clearly distinguished from belief. Recall Warnock's cricket players. They believe they ought to draw near the batsman when a slow bowler is bowling. They also accept that they ought to draw near; they treat that proposition as true. But – and here is the crucial point – it is plausible that their acceptances are based on their beliefs. Suppose that the evidence showed that drawing near *this* batsman was imprudent, even though a slow bowler is bowling. The players would revise their beliefs. They would come to believe that they ought to draw near the batsman every time a slow bowler is bowling, except this time. They would also refrain from drawing near this batsman, implying that they no longer treated it as true, and hence no longer accepted, that they ought *always* to draw near the batsman when a slow bowler is bowling. So, the players' acceptances are not belief-independent. That is why, according to the revised account, the players do not have a rule requiring them to draw near the batsman when a slow bowler is bowling.

I shall set out some of the other advantages of the revised account in later sections. First I need to mention two worries you might have about the revised account of the internal aspect. Earlier I assumed that what ought to be done is what the balance of reasons favours (section 2). If my assumption is wrong, then my argument that the participants' attitude is a kind of *belief-independent* acceptance must fail. However, my argument that their attitude is a kind of *acceptance* would be unaffected.

Another worry may be that I have said too little about the reasons why people hold their acceptances. According to Neil MacCormick, the attitude that underlies a social rule must be held conditional on a pattern of compliance with that rule.<sup>28</sup> Hart may have adopted a similar view in the Postscript to *The Concept of Law*, where he said that his theory only applies to social rules which are 'conventional' in that 'general conformity to them is part of the

---

<sup>28</sup> N MacCormick, *HLA Hart* (2<sup>nd</sup> edn, Stanford University Press 2008) 48.

reasons which its individual members have for acceptance'.<sup>29</sup> In contrast, my account does not require that people have an attitude of belief-independent acceptance that is conditional, or that is held for any particular reason. Is that a mistake?

It is certainly true that the acceptances underpinning *some* social rules will be held conditional on conformity with the rule. It is likely true of social rules that solve coordination problems.<sup>30</sup> For example, there is a rule in Britain that people ought to stand on the right of the escalator in London underground stations, and that is in fact where people generally stand. This rule helps to solve a coordination problem. Its existence depends on our continued acceptances that people ought to stand on the right, and it is plausible that our acceptances are conditional on people continuing to stand on the right. So, in this case, it is plausible that our acceptances are conditional in the way that MacCormick (and possibly Hart) suggest.

But what is true of social rules that solve coordination problems may not be true of *every* social rule.<sup>31</sup> Take the taboo against incest. People generally do not commit incest; that is the rule's external aspect. Most of us accept that incest is wrong, whatever we believe about particular cases; that is the rule's internal aspect. Now suppose that a majority of people begin committing incest. Does it follow, as MacCormick's view seems to suggest, that those of us who accepted that incest is wrong will now abandon our

---

<sup>29</sup> Hart, *CL* (n 1) 255-256; also 267. It is not obvious whether Hart is claiming that all social rules are 'conventional', in which case he would seem to agree with MacCormick, or whether he is restricting his theory to one kind of social rule, namely, the conventional kind. On the second reading, Hart's project (when he writes in the Postscript) is not my project, because I am trying to identify the existence conditions for a social rule, not a particular type of social rule. For a close analysis of Hart's remarks, see: J Dickson, 'Is the Rule of Recognition Really a Conventional Rule?' (2007) 27 *OJLS* 1, 10-14.

<sup>30</sup> The classic work on rules (or norms) as solutions to coordination problems is D Lewis' *Convention: A Philosophical Study* (Harvard University Press 1969). See also: E Ullmann-Margalit, *The Emergence of Norms* (OUP 1977) ch 3; E Posner, *Law and Social Norms* (Harvard University Press 2000); C Bicchieri, *The Grammar of Society* (Cambridge University Press 2006).

<sup>31</sup> Lewis identifies a number of types of rules other than conventions (as solutions to coordination problems): Lewis (n 30) 97, 100-107. Ullmann-Margalit clearly distinguishes the question 'why does a norm exist?' from the question 'under what conditions would we say a norm exists?' Her own approximate answer to the second question does not require that people who have a rule are disposed as they are because others are, too: Ullmann-Margalit (n 30) 8-13.

acceptances? It does not follow at all, it seems to me. That might happen, but it might not. Many of us might simply criticize those who commit incest. Or take the taboo against cannibalism. Do those of us who accept that cannibalism is wrong hold this attitude conditional on others generally refraining from cannibalism? Does our opposition to cannibalism really hang on so little? It seems possible, at the least, that many of us who now accept that cannibalism is wrong would continue to denounce it, even if it became widespread. A general theory of the existence conditions of social rules should reflect this possibility.<sup>32</sup>

If I am wrong the problem is relatively easy to fix. It would mean making clear that the participants' attitude is held conditionally. But it would not affect the argument for thinking of that attitude as belief-independent acceptance.

## 5. Hart and Acceptance of a Rule

When Hart first discusses social rules, he calls the attitude that contributes to their existence a 'critical reflective attitude', but elsewhere he calls this attitude 'acceptance of a rule'.<sup>33</sup> So, Hart thinks an attitude called acceptance underpins a social rule, and that is what I have proposed, too. These attitudes have a similar name; are they in fact the same?

Acceptance, for philosophers of action, is a technical term. The claims made about it are not meant to reflect ordinary usage.<sup>34</sup> Hart, in contrast, seems to use the term in its ordinary sense. So, we should not expect too much overlap. However, there are points of similarity. Hart thinks that acceptance of a rule 'may be based on many different considerations: calculations of long-term interest; disinterested interest in others; an unreflecting inherited or traditional attitude; or the mere wish to do as others do'.<sup>35</sup> Some of

---

<sup>32</sup> I provide an additional reason for rejecting MacCormick's view based on his analysis of the 'external aspect' of a social rule: [citation omitted for peer review]

<sup>33</sup> Hart's terminology is very variable. He refers to 'acceptance' *simpliciter* in *CL* (n 1) 255; to 'acceptance of a rule' in numerous places, e.g., *CL* (n 1) 55-61; and to acceptance of a rule as a standard in *CL* (n 1) 116-117. Sometimes he refers to acceptance of a standard: *CL* (n 1) 116; HLA Hart, 'Scandinavian Realism' (1959) 17 *Cambridge Law Journal* 233, 238.

<sup>34</sup> See, e.g., Stalnaker, *Inquiry* (n 13) 79: 'Acceptance is a technical term: claims I make about acceptance are not intended as part of an analysis of a term from common usage'.

<sup>35</sup> Hart, *CL* (n 1) 203, 257; see also: Hart, *EB* (n 7) 153ff. Hart's aim in these passages is to deny that acceptance of legal rules must be based on *moral* reasons,

these reasons are practical reasons. Also, Hart thinks that acceptance of a rule is under your voluntary control.<sup>36</sup> These features of the acceptance of a rule – i.e., responsiveness to practical reasons and voluntariness – are also features of acceptance, in the sense philosophers of action have in mind. Alongside these similarities are differences, or at least points where the account of acceptance in the philosophy of action goes beyond what Hart provides. For example, Bratman and Stalnaker emphasize the context-dependence of acceptance and its relationship with belief, whereas Hart does not address these issues.

Acceptance, as I have been using the term, is a propositional attitude. A rule is not a proposition. It cannot be true or false, for instance. So, when Hart writes of the acceptance of a rule, it would seem he must be thinking of a non-propositional attitude. This may be too quick, however. If you were asked what is a rule, you might respond by giving a description of the kind of thing a rule is (e.g., an abstract object of some kind), or by giving an example of a rule by stating the proposition that is its content (e.g., that forks ought to be placed to the left of the plate). In a parallel way, ‘acceptance of a rule’ might refer to an attitude held towards the object that is a rule, or an attitude held towards the proposition that is the content of a rule. If Hart means ‘acceptance of a rule’ in this second way, the attitude he has in mind would be a propositional attitude, like the attitude discussed in the philosophy of action.

To be clear, my claim is that there is a reading of Hart’s remarks according to which my understanding of the internal aspect of a social rule would be similar to, and in no way flatly inconsistent with, Hart’s thinking. In that case, my revision of his account is best thought of as an extension of Hart’s views, along lines he may have been thinking, based on philosophical work not available to him. If my understanding of the internal aspect is correct, this reading of Hart would also be the charitable one. However, I do *not* claim that mine is the most natural or faithful reading of Hart.<sup>37</sup> In

---

a claim that some scholars have doubted. See, e.g., Raz, *The Authority of Law* (n 27) 153; MacCormick, *HLA Hart* (n 28) 162; P Soper, ‘Law’s Normative Claims’ in Robert P George (ed), *The Autonomy of Law* (OUP 1996) 215-220.

<sup>36</sup> Hart describes how, for the existence of coercive power, ‘some at least must voluntarily co-operate in the system and accept its rules’, and later on the same page refers to those who ‘accept the system voluntarily’. Hart, *CL* (n 1) 203.

<sup>37</sup> For example, Kevin Toh’s careful reading of Hart seems to suggest that Hart would not agree with my revision. See, e.g., Kevin Toh, ‘Hart’s Expressivism and his Benthamite Project’ (2005) 11 *Legal Theory* 75.

any case, my aim is not exegesis; it is to work towards an adequate theory of social rules.

## 6. Presumptions and Fictions

So far I have offered a revised account of the internal aspect of a social rule, which I have argued is consistent with the known facts, safe from a well-known objection to Hart's account, and yet broadly continuous with Hart's thinking on social rules. These are all virtues of the revised account. The main implication of the revision is that the internal aspect of a social rule is a much less distinctive phenomenon than has been realized. The reason is that belief-independent acceptance is common. We tend to accept that forks ought to be placed to the left of the plate, and sales assistants accept that the customer is always right. These are both shared acceptances, distinguished only by their content and the contexts relative to which they are held. What this means is that we could likely learn about social rules by studying other situations in which belief-independent acceptance plays a role. I do not have the space here to do that in a thorough way, but I shall try to show the potential by demonstrating one unexpected connection, between social rules, on the one hand, and legal presumptions and fictions, on the other.

In a trial, the tribunal of fact (the jury, or the judge if he or she is sitting alone) is normally required to deliberate based only on the evidence. One exception is when the law requires the tribunal of fact to make a presumption, such as the presumption of innocence or sanity. What is a presumption, in the eyes of the law? Here are two classic statements:

[Presumptions] operate in advance of argument or evidence, or irrespective of it, by taking something for granted; by assuming its existence.<sup>38</sup>

[The jury] are to take for true [the presumed proposition], and are to reckon upon it accordingly in making up their verdict upon the whole issue.<sup>39</sup>

These authors identify similar elements: a presumption that  $p$  is taking  $p$  for granted or 'for true' when you reason or 'reckon',

---

<sup>38</sup> JB Thayer, *A Preliminary Treatise of Evidence at the Common Law* (Little, Brown, & Co 1898) 314.

<sup>39</sup> JH Wigmore, *A Treatise on the System of Evidence at Common Law* (vol 4, Little, Brown, & Co. 1905) 3533.

regardless of ‘argument or evidence’ or belief that it is actually true. Modern writers say much the same thing. Edna Ullmann-Margalit, for example, says that a presumption that something is the case is ‘taking it for true’ in order ‘to have a foothold (as it were) for action, and she goes on to say that a presumption ‘neither requires nor entitles one to believe’ what is presumed.<sup>40</sup> In short, presumptions allow the tribunal of fact to proceed, deliberately speaking, in a way that might be closed to them if they relied only on what they believe the evidence shows.

A presumption, as it is understood in law, has all the features of a belief-independent acceptance.<sup>41</sup> First, a presumption leads a judge or jury to ‘take’ or ‘hold’ a proposition as true, or as I would say, to treat it as true. Second, a presumption is context-dependent, in that it leads the judge or jury to treat a proposition as true in their trial deliberations but not in other contexts. Third, the law clearly supposes that a presumption is under the direct control of judges and juries. Fourth, a presumption leads judges and juries to treat a proposition as true even if they do not believe it. Indeed, when a presumption has practical relevance it is because it functions as a substitute for belief.<sup>42</sup> Fifth, judges and juries do not presume everything they believe; indeed, they will not even deliberate based on everything they believe. These are features that presumption shares with belief-independent acceptance, and thus that presumption shares with the attitude of participants in a rule’s internal aspect.

The sixth and final point is that a presumption is shaped by practical reasons. Revealingly, these reasons are similar to the traditional reasons for which we have social rules. At least since John Stuart Mill, it has been recognized that rules can be used to reduce the number or costs of errors in reasoning.<sup>43</sup> Compare that

---

<sup>40</sup> Ullmann-Margalit, ‘On Presumption’ (1983) 80 *The Journal of Philosophy* 143, 146, 148.

<sup>41</sup> For similar views, see: JF Beltrán, ‘Legal Proof and Fact Finders’ Beliefs’ (2006) 12 *Legal Theory* 293, 305; Cohen, *Belief and Acceptance* (n 26) 122; D Mendonca, ‘Presumptions’ (1998) 11 *Ratio Juris* 399, 401; J Raz, ‘Reasons: ’ in David Sobel and Stephen Wall (eds), *Reasons for Action* (Cambridge University Press 2009) 38; Ullmann-Margalit and Margalit, ‘Holding True and Holding as True’ (n 26) 177-178.

<sup>42</sup> See, for example, N Rescher, *Presumption and the Practices of Tentative Cognition* (CUP 2006) 4: ‘Presumptions by nature provide a provisional surrogate for outright claims to the actual truth.’

<sup>43</sup> JS Mill, *System of Logic, Ratiocinative and Inductive* (first published 1843, Kessinger Press 2004) 617-618.

with the justification for the presumption of innocence. We make this presumption because, in Jeremy Bentham's words, we tend to 'consider the error which acquits as more justifiable ... than the error which condemns'<sup>44</sup>. Another use of social rules is to promote efficient decision-making by bringing deliberation to a close.<sup>45</sup> This, too, is a common reason for making a presumption. For example, when two people die in circumstances in which it is impossible to determine who died first, the law mandates the presumption that the older person who died first. This presumption helps to avoid an impasse in deliberation.<sup>46</sup>

So the attitude of a participant in the internal aspect of a rule is like a presumption, and the internal aspect itself is like a shared presumption. There are a variety of ways this analogy could be developed. One way would be to distinguish types of presumptions (rebuttable and irrebuttable, conditional and unconditional, etc.) and compare them to different types of social rules.<sup>47</sup> Another would be to draw on the wealth of research about why judges and jurors are sometimes unwilling or unable to make a presumption (of innocence, say), and ask whether there is any similar resistance or difficulty in accepting the content of a social rule.

A third way to develop the analogy would be through an investigation of legal fictions.<sup>48</sup> A legal fiction is a legal presumption of a proposition that is false. It is an 'acceptance of certain facts contrary to reality'.<sup>49</sup> The tribunal of fact is told to 'accept untrue facts as true and to accept them quite literally, i.e., as if they were

---

<sup>44</sup> J Bentham, *A Treatise on Judicial Evidence* (JW Paget 1825) 197-198. For discussion, see: L Laudan, 'The Rules of Trial, Political Morality, and the Costs of Error: Or, Is Proof Beyond a Reasonable Doubt Doing More Harm than Good?' in L Green and B Leiter (eds), *Oxford Studies in the Philosophy of Law*, vol 1 (OUP 2011).

<sup>45</sup> Raz, *PRN* (n 2) 59-62; Schauer (n 5) 145-155.

<sup>46</sup> Law of Property Act 1925, s-s 184(1). For discussion see: E Morgan, 'Some Observations Concerning Presumptions' (1931) 44 *Harvard Law Review* 906, 924-925.

<sup>47</sup> [citation omitted]

<sup>48</sup> The best-known discussion of legal fictions is L Fuller's, published as a series of three articles under the title 'Legal Fictions' in the *Illinois Law Review* and then republished as a book. See: (1930-1931) 25 *Illinois Law Review* 363, 513, 877. Fuller's definition of a legal fiction has been criticized many times as both inaccurate and imprecise. See, e.g., Pierre Olivier, *Legal Fictions in Practice and Legal Science* (Rotterdam University Press 1975) 35; K Campbell, 'Fuller on Legal Fictions' (1983) 2 *Law and Philosophy* 339, 342-345.

<sup>49</sup> Olivier (n 48) 61.

the real and proven facts, and to act on these facts'.<sup>50</sup> So, if the proposition that is the content of a social rule is false, then the attitude of participants in that rule's internal aspect will be like a legal fiction: it will be an attitude of acceptance held towards a false proposition. For example, the anarchist judge believes that the law ought not to be applied, and therefore that the content of the ultimate rule of recognition is false. From his perspective, then, the internal aspect of the rule of recognition is essentially a normative fiction held among law-applying officials.

Whether or not the anarchist judge is correct about rules of recognition, it is likely that the internal aspects of some social rules are shared fictions. The reason is a point well recognized in the literature: rules are often 'second-best solutions'.<sup>51</sup> Such rules do not conform perfectly to the particularities of our normative world. Rather, they present us with a rough and ready guide to the choices we face, one which is sub-optimal but still superior to the judgments we would arrive at on our own. It seems plausible that some social rules have this character. At the least, a connection between social rules and legal fictions is a possible, and intriguing, implication of my account of the internal aspect.

## 7. Summary

Hart saw that the existence of a social rule depends on the members of a society having the right attitude. Their possession of this attitude is the rule's internal aspect. Hart's account of that attitude was flawed, however, and in this paper, I offered an improved account. I started with the features of the attitude we knew about, from Hart's description, and from Warnock's objection. I said that these are features of acceptance, as it is understood in the philosophy of action. Acceptance has other features besides, and I explained that, on reflection, we can see that the attitude that underlies a social rule shares these features. On the basis of their common features, I concluded that the attitude Hart was looking for is a kind of acceptance. Specifically, I claimed that the internal aspect of a social rule is a shared, practical, and belief-independent acceptance of the rule's content.

---

<sup>50</sup> Olivier (n 48) 61

<sup>51</sup> See, e.g., A Goldman, *Practical Rules* (CUP 2002) 32-41; Raz, *PRN* (n 2) 194; Schauer (n 5) 86ff.