

THE ACCEPTANCE OF RULES

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What are the necessary and sufficient conditions for an agent's or group of agents' accepting a rule or set of rules? This conceptual question is crucial to the study of the nature of law and society and to the sociology of morality. H.L.A. Hart, for example, has proposed a criterion of what it is for a legal system to exist which he believes hinges on the notion of a group of agents' accepting a particular rule (the "rule of recognition") and their consequently accepting other rules.¹ Some writers on ethics conceive of moralities in terms of systems of rules. A society's accepting this or that morality would, on this sort of account, amount to a society's accepting this or that rule-system.² Other writers on ethics who are not so sanguine about morality being identical to some system of rules still believe that the acceptance of rules constitutes *part of* what it is to be a moral person.³ Thus, philosophical inquiry into the nature of rule-acceptance is integrally related to a number of aspects of social philosophy. It may also be of metaphysical interest. If *rule*, like *proposition*, is a semantic concept (i.e., if rules are that which is expressed by, but not identical to certain sorts of sentences, as Max Black has argued⁴), then there is an important difference between something's *being a rule* and *someone's accepting something as a rule*, just as there is a difference between being a proposition and someone's believing a proposition. Thus, if there are rules which are not accepted or if

¹ H.L.A. Hart, *The Concept of Law* (Oxford: Oxford U.P., 1961), p. 92f.

² R.B. Brandt, "Some Merits of One Form of Rule Utilitarianism," *Univ. of Colorado Studies, Series in Philosophy*, No. 3 (1957).

³ John Rawls, "Two Concepts of Rules," *Philosophical Rev.*, 64 (1955), pp. 3-32. The view that part of what it is to be moral is to follow rules recurs in Rawls' *A Theory of Justice* (Cambridge: Harvard U.P., 1971), pp. 54, 355.

⁴ Max Black, "The Analysis of Rules," *Models and Metaphors* (Ithaca: Cornell U.P., 1962), pp. 95-139. Black distinguishes rules from sentences because he shows that they cannot share all and only the same properties, e.g., breakability.

Diálogos 31 (1978), pp. 103-113

rules per se are ontologically distinct from accepted-rules, then the analysis of what it is to accept a rule is of ontological interest.

In this paper I distinguish three broad and related accounts of what it is for a person to accept a rule which are often not distinguished. I argue that two of these accounts are defective but that a third is acceptable. Finally, I consider a rather different account of rule acceptance—the one David Schwayder proposes in *The Stratification of Behavior*⁵—and reject Shwayder's account in favor of the simpler one I offer.

1. *A Person Accepts a Rule.* The following constitutes three related but distinguishable ways to characterize a person's accepting a rule. (A) A person accepts a rule if and only if he has a formulation of the rule (i.e., he knows a sentence which expresses the rule), and he *follows* the rule on appropriate occasions. (B) A person accepts a rule if and only if he has a formulation of the rule, and he is *guided by* the rule on appropriate occasions. (C) A person accepts a rule if and only if he has a formulation of the rule, and he believes that the rule is *binding* on him. The operative concepts which distinguish the above characterizations are *follows* (in the case of (A)), *being guided by* (in the case of (B)), and *believed-binding* (in the case of (C)). Before treating (A)-(C) directly, I shall examine these concepts, together with the concept *acting in accordance with a rule*.

An agent acts in accordance with a rule if and only if he performs no actions which are forbidden and all those which are required. Thus, an agent acts in accordance with a rule when he does not violate that rule. Acting in accordance with a rule does not require that the agent know what the rule requires or forbids. For this reason, an agent's acting in accordance with a rule is not a sufficient condition for his following the rule. Following a rule involves an agent's knowing the rule. However, an agent's knowing a rule and acting in accordance with it are not yet sufficient for his following the rule. One could act in accordance with a rule, know the rule, but never be guided by it in his decision-making. One might not think of the rule when he makes decisions. He might never find himself in situations governed by the rule, or he might be in the relevant situations and think of the rule, but it never be his reason for decision.

Being guided by a rule implies heeding it. This does not imply that one is guided by a rule only if he never violates it, although the rule must play a prominent role in practical decision-making. An

⁵ (New York: Humanities, 1965), pp. 201-280.

agent must consider a rule which he heeds *prima facie* binding, or he must believe that it should be binding. (I shall say more about this presently.) He may break the rule but only after considering the matter. Usually, if one is guided by a rule, that rule will generally be overriding in appropriate practical reasonings, and one will generally act in accordance with the rule. This is not necessary, however. People sometimes break rules by which they are guided. A person may be guided by a rule which he does not think is binding on him. Thus, someone might be guided by the rule formulated by "All political candidates must make full financial disclosure" and at the same time believe that this rule is not binding on him. He might know that it is not a law, nor a custom, nor even a part of morality. On the other hand, he must think that the rule should bind from some legitimate point of view. Finally, whatever else is true about *being guided by*, it should be clear that an agent cannot be guided by a rule unless he knows what the rule requires or forbids. This point follows from what it is for a consideration to be capable of being part of practical reasoning. An agent cannot use a rule in an argument unless he knows what the rule says.

On the basis of these distinctions, I propose the following analysis of *following a rule*. Where P is a person and r is a rule, P follows r if and only if

- (i) P acts in accordance with r ;
- (ii) P is guided by r .

My analysis of following rules is simplified by two factors. First, I stipulated that what P is following is a rule. If there is some question whether what P is following is a rule, one may see if a sentence which formulates what P is following meets certain semantical conditions.⁶ Second, my analysis makes no explicit reference to P 's epistemic relation to r . The reason for this is that the truth of (ii) entails that P knows r . He may not, however, know that r is a rule, for P may know that the formulation of r meets the relevant semantical conditions, but he might not have put these (possible) discrete bits of knowledge together. P must have all the information necessary for him to infer that what he is guided by is a rule, even if he has not made that inference.⁷ The concept of following a rule is similar to the concepts

⁶ I think that the following is plausible: A sentence expresses a rule if and only if some class of agents is required to or prohibited from bringing about some possible (though contingent) state(s) of affairs. See my "Rules and Breakability" [forthcoming] for a defense of this claim.

⁷ See Joan Ganz, *Rules: A Systematic Study* (The Hague: Mouton, 1971), pp. 26-37 for a similar although not identical analysis.

obeying a rule and *abiding by a rule*, except that the latter concepts are most at home in official contexts.

This consideration raises a putative counterexample. If "*P* disobeys *r*" is the contradictory of "*P* obeys *r*," and "*P* obeys *r*" follows from "*P* follows *r*," then *P* could not disobey *r* unless he knows what *r* says. But a person is held convictable in law whether or not he knows the law under which he is charged. Ignorance of *that* law is no defense (or excuse). This putative counterexample is not successful, for the relevant jurisprudential principle is really that no defendant is permitted to use his ignorance of the law under which he is charged, because there is a legal presumption that everyone knows the law. The fact that this is a "fiction" is not what is important here, for the fact that the fiction was introduced reveals that legal thinkers believe that it is improper to say that a man disobeys the law if he does not know what it is.⁸

With the help of these distinctions, we can evaluate (A)-(C). (A) is obviously too strong. Clearly we must allow the conceptual possibility of a person's accepting a rule and yet breaking it. Only in this way can we account for people deliberately breaking the laws of a society they consider legitimate and for moral weakness in persons who believe that their obligations involve rules. And yet it is precisely this possibility which is ruled out if we account for rule acceptance in terms of rule following.

(B) is also too strong. Two unacceptable consequences follow: (B-1) if one is guided by a rule, then one accepts it. But someone might be guided by the rules of Emily Post in order to be accepted in "good" society, not because the person accepted its rules for living the good life, but because he wished to be in a position to cheat them in highstakes card games. Furthermore, (B-2) if a person accepts a rule, then he will be guided by it on the appropriate occasions. But it seems logically possible for someone to accept a rule, be in the right circumstances, know that he is in the right circumstances, and yet not be guided by the rule which he accepts.

Also, although (B-2) does not explicitly require that someone who accepts a rule and finds himself in the appropriate circumstances feel motivated to follow the rule, it comes close. To claim that one must feel motivated thusly if one accepts a rule (or if some consideration is to play a full-fledged role in one's practical reasoning) is to assert a generalized version of the doctrine in ethical

⁸ For elaboration and qualification see Rollin M. Perkins, *Criminal Law and Procedure* (Brooklyn: Foundation, 1966), pp. 501-03 and Justin Miller, *Criminal Law* (Minneapolis: West, 1934), pp. 153-55.

theory known as "internalism." Internalism holds that one fully appreciates one's obligations only if one is to some extent inclined to do what is believed obligatory, and "moral rule internalism" would add that one appreciates one's obligations through accepting moral rules. The contrasting view is "externalism," which holds that it is possible to appreciate one's obligations (i.e., by what moral rules one is bound) and not feel any motivation to follow those rules. One interpretation of (B) generalizes internalism to all rule acceptance. Moral rule internalism and rule internalism in general strike me as false. The issues involved are too complicated for this paper, but I can circumvent a resolution of the problem without sacrificing anything crucial to my argument.⁹

(C) is the most plausible of the three criteria for a person accepting a rule. Believing that a rule is binding involves: (i) believing that some bits of behavior meet the demands of the rule; (ii) believing that some bits of behavior contravene the rule, and (iii) believing that those bits of behavior which contravene the demands of the rule are actually, *prima facie* criticizable.¹⁰ (A) and (B) also involve (i)-(iii), but (C) alone is exhausted by (i)-(iii). It is because of (iii) that I think I can circumvent adjudicating the dispute between internalism and externalism. If a person who believes that he is criticizable automatically has some motivation to avoid the relevant behavior, then (C) entails internalism. On the other hand, if a person who believes that he is criticizable may, logically speaking, have no motivation to avoid the behavior on the grounds of which he is criticizable, then (C) does not entail the general version of internalism. What makes the general version of internalism plausible is the fact that criticism seems necessarily to be unpleasant, and human beings apparently have a natural aversion to unpleasant experiences. In either case (C) is the most plausible criterion of rule acceptance. My account of a person's accepting a rule does not require that for each rule which he accepts, the rule accepting agent must believe that he accepts the best rule of that kind which he might accept. On the other hand, something more is required for

⁹ For a general account of this problem see William Frankena, "Obligation and Motivation in Recent Moral Philosophy," in *Essays in Moral Philosophy*, ed. A.I. Melden, (Seattle: Univ. of Washington Press, 1958), pp. 40-81. See also M.B.E. Smith, "Indifference and Moral Acceptance," *American Phil. Quart.*, 9 (1973), 86-93.

¹⁰ Actual *prima facie* criticizability needs to be distinguished from potential *prima facie* criticizability. If rules exist although those rules are not accepted and if those rules are justified from some point of view, then anyone who breaks those rules is potentially (although not actually) criticizable, *prima facie*, from that point of view.

accepting a rule than merely believing that there is some cost which one will have to pay for breaking the rule. What seems to be required is that the agent must believe that the point of view from which the rule he accepts is justified is legitimate, e.g., that the purposes which the rule serves are generally worthwhile.

A problem remains. If a person accepts a rule, does he accept all the rules entailed by the rule? I should think not, since rule acceptance involves belief, and beliefs are referentially opaque contexts. Thus, a person can know what a rule is without knowing every rule which is entailed by the rule which he knows. If this is so, then there could be rules which one does not know entailed by rules which one accepts. But if one does not know what a rule is then one cannot accept it. On the other hand, if a rule which one accepts entails another rule, and one knows that the accepted rule entails the other rule, then one must accept the entailed rule. Under these circumstances, if one refuses to accept the entailed rule, he must give up his claim to accept the rule which entails the rule he does not accept.

2. *A Person Accepts Some Rules.* The preceding analysis may be extended to accepting sets of rules with one major modification. If the preceding analysis were extended without modification, then if a person accepts a set of rules, he accepts all the members of the set. Although there is some plausibility in this view, it entails counter-intuitive results and should be weakened. Surely many of us accept the provisions of the U.S. Code but few of us know the complete contents of the Code. The following is a plausible weakening of the preceding analysis: a person accepts a set of rules if he has formulations of the major components which are appropriate to his activity and is prepared to accept some source as authoritative on other elements of the code and is prepared to look to the code when appropriate occasions arise.

There is an additional complexity. A person can believe that he accepts a set of rules when he actually does not accept them. Suppose, for example, that I claim that I accept the constitution and bylaws of some club. Someone might point out to me that the relevant set of rule contains a Negro exclusion rule. I might reply that I have never accepted such a rule, although it is at the same time true that I believed that I accepted the rules of the club. If I persist in rejecting the Negro exclusion rule, I would have to withdraw my claim that I accept the club rules, but his point does not affect the issue at hand.

3. *A Group Accepts a Rule.* I am concerned with social units in which there is at least a certain level of interpersonal contact and in

which the members have reasonably reliable beliefs about each other. Ideally, perhaps, the analysis of a single person's accepting a rule could be extended; if that analysis were extended, a group would accept a rule if and only if all the members of the group accepted the rule. For practical use in law, morality, and sociology, however, such a claim is too strong. We usually admit that a group accepts a rule when less than all the members of the group accept the rule. Hence, we need a weaker concept of what it is for a group to accept a rule. One weaker criterion for group acceptance is this: a group accepts a rule if and only if a majority of the members of the group accepts the rule and a majority believes that (nearly) everyone ought to accept the rule.¹¹ This weaker condition is too weak, for some fraction of the minority which reject the rule could intensely reject it. Intense disaffection by a minority can result in the disintegration of the group, in which case it would be misleading to say that the group ever accepted the rule. This problem can be overcome by the following modification: a group accepts a rule if and only if a majority of the members of the group accept the rule and the majority believe that nearly everyone should accept the rule, and few if any members of the group intensely reject the rule. (If any members do intensely reject the rule, they must not reject it so intensely that they disassociate themselves from the group on that basis, and they must not be opinion leaders in the group on issues related to the rule in question.)

4. *Shwayder's Alternative*. Shwayder has a theory which may be interpreted as a theory of a group's accepting a rule.¹² In the process of constructing his theory he alleges that members of such a group will have certain psychological characteristics. I shall discuss both the theory of rule acceptance and its psychology.

Shwayder's analysis of what it is for a group of persons (he calls it a "community") to accept a rule involves the members of the

¹¹ It might well be that one would believe that only nearly everyone ought to accept the rules. One might believe that a small fraction of the populace ought not to accept the rules so that the possibility of change might be personified in the example of the few. For other problems about rule acceptance and rules-being-in-force see A.D. Woozley, "The Existence of Rules," *Noûs*, 1 (1967), 68, 72.

¹² His theory is a theory about the existence of rules *per se*, but I am interpreting it as if it were a theory for rule acceptance. This procedure is reasonable since on his rule ontology, rule-acceptance is a sufficient as well as necessary condition for rule existence. If one takes *rule* to be a semantic notion, then there might be rules which are not accepted. Since acceptance and existence are interrelated on Schwayder's account, it is legitimate to see if he give a reasonable account of rule acceptance.

community having certain, legitimate expectations about the behavior of other members of the community. The view appears to be the following: (a) One is a member of a community if and only if one behaves as a member of the community. (b) One behaves as a member of a community if and only if one has a certain sort of reason for a large range of one's behavior. (c) If the members of the community generally have the right sort of reason, then certain mutual expectations which they have will be legitimate. (d) If there exists a system of legitimate expectations, then the community accepts a certain rule.¹³ Two problems stand out in this reconstruction of Shwayder's analysis. First, what is it for a person to behave as a member of a community? Second, under what conditions is there a legitimate system of expectations?

Shwayder presents a five-point analysis of what it is for a person to behave as a member of a community. A person *P* behaves as a member of a community *C* if and only if (i) *P* has practical knowledge of how he is expected to behave in *C*; (ii) *P* knows that every person who is a member of *C* has practical knowledge of how he himself is expected to behave in *C*; (iii) *P* knows that every member of *C* believes that every member has practical knowledge about how he himself is to behave; (iv) *P* believes that there exists at least one person other than himself who is a member of the group and who knows what *P* is expected to do; since any arbitrarily selected person other than *P* knows that *P* believes this, any arbitrarily selected person will expect *P* to behave in the expected way; (v) *P* acts *with* and *from* the knowledge that something is expected of him.¹⁴

P may be said to have practical knowledge with respect to a matter if he has knowledge of a proposition but is not able to formulate what he knows in language. Thus, practical knowledge is distinct from both theoretical knowledge which requires the knower to be able to formulate what he knows and knowing how, which does not require any propositional knowledge.¹⁵ *P*'s acting *with* a bit of knowledge and his acting *from* it seem to be contrasted as follows: if *P* acts with a bit of knowledge, it is not implied that he is guided by that knowledge, whereas if he acts from a certain bit of knowledge, then that knowledge guides him. Thus, in (v) Shwayder is insisting that community membership requires that one be guided by

¹³ Shwayder, pp. 253-55.

¹⁴ *Ibid.*, pp. 254-55.

¹⁵ *Ibid.*, pp. 206-22.

the expectations of others. When *P* acts from reasons of this sort, his behavior is conformative.

P's conforming to a rule involves an added element. For *P*'s behavior to conform to rules, the expectations of others have to be legitimate. Expectations are legitimate if the reasons from which *P* acts are of a certain sort, namely, *P* must act *with* the belief that everyone else in the community believes that *P* will act *from* the belief that everyone believes that *P* will perform a particular action.¹⁶

But is it the case that if an agent has the specified reason, then some rule is accepted in the community? Such a claim is entailed by Shwayder's view, for *P* could not conform to a legitimate community rule unless such a rule exists, and what Shwayder means by saying that a community rule exists is the same as what I mean when I talk about a rule's being accepted by the members of a group. Could *P* have the specified belief, perform the actions which *P* believes that the members of the group believe that he will perform, and it be false that there is a rule accepted by the members of the community? Clearly such a situation can obtain if *P*'s belief is false, but suppose *P*'s belief is true. Is it still possible for there to be no rule accepted in the community? It seems that it is, for people might expect *P* to behave a certain way because he has always behaved in that way; *P* might know that people believe that he will behave in a certain way, and he might keep doing whatever it is that they believe he will do simply because they believe it and because he does not want to disappoint them. But at some point he might wish to stop; would his stopping violate a rule? It would only if the expectation were "legitimate." Might the expectations of others with respect to *P* not be legitimate? This move does not seem open for one of three reasons: (1) Shwayder's picture of legitimacy depends on how *P* takes the reason from which he acts. If so, then the expectations of others are legitimate in the above case. (2) If the concept of legitimacy is used in an epistemic sense, then if one has good reason to believe that someone will behave in a certain way, one has a legitimate expectation. (3) If Shwayder means "legitimate" in some sense other than epistemic, it is not clear from his analysis what that sense is. The one which it could not be is anything which would amount to saying that an expectation is legitimate only if it is based on an accepted rule, for legitimacy in this sense would render Shwayder's account circular, since the very concept of rule itself is explicated by him in terms of legitimate expectations. Thus, *P*'s

¹⁶ I occasionally substitute "belief" for "expectation." See pp. 11-12 for justification.

having a reason of the sort specified above is not a sufficient condition for a community's accepting a rule. Shwayder himself may have been queasy about this claim since he did not argue for it but only conjectured that it was so.¹⁷

Shwayder's contention that the entailment goes the other way is more plausible. Surely one of the primary functions of accepting rules in a community is to establish a system of mutual reciprocity by means of which the behavior of the members of the groups can be coordinated where this could not reasonably be expected to occur otherwise. Indeed, the adoption of a system of rules can be seen as the adoption of a set of instructions for achieving social harmony. Of course, these instructions need not be rules; they might be other sorts of prescriptions. But accepted rules characteristically have more severe costs than other sorts of prescription. This increases the probability of compliance. The clearer and more precise the rules (assuming they are learnable, or at least reliable upon), the clearer and more precise the expectations may be. Perhaps the desirability of having more or less automatic expectations in a community is what is behind Shwayder's claim that deliberate community rule-following entails having certain beliefs (or expectations). He claims that if a person deliberately follows a community rule, that person acts *with* the belief that other members of the community believe that others expect him to act in a certain way.

Ultimately this plausible claim is false. What is necessary for a counter-example here is a case of a community which has a rule, where the members of the community believe that the rule is binding and that infractions of the rule are criticizable, but where they do not expect each other to abide by the rule. Consider a jail. Surely a jail is a community of sorts—penologists after all consider it such. Most jails have rules prohibiting the use of unprescribed "hard" drugs. Both the authorities and the inmates may accept this rule as binding. They see the issuing authority as legitimate; they see certain behavior as violating the rule and other behavior as meeting its requirements. They also think that trafficking in such commodities and consuming them is criticizable. On the other hand, many men are addicted and other want drugs to escape the boredom and horror of prison life. Selling drugs is lucrative. Prisoners may feel guilty for breaking the rules, and guards may rate themselves as bad citizens, feel greedy, and privately acknowledge their hypocrisy when they vote for "law and order" administrations. None of these things is incompatible

¹⁷ *Ibid.*, p. 257.

with the widespread use and commerce in "hard" drugs, and yet both the prisoners and the guards meet conditions (i)-(iii) of (C), which is the correct analysis of rule acceptance. Given that there is widespread drug usage and commerce, only a fool would expect the members of this community to abide by the rules which they recognize as binding. The prisoners do not expect each other to refrain; the prisoners do not expect the jailers to refrain; the jailers do not expect the prisoners to refrain, and the jailers do not even expect each other to refrain. Knowledgeable and authoritative outsiders may not expect member of either class to refrain, and members of both classes may know this very well. In this situation, we have a rule operative in this community (any member may press charges based on this rule, and any member would recognize citations of the rule as legitimate criticism of his conduct) under conditions where members of the community do not expect each other to abide by the rule.

Shwayder may have been misled in this matter by an ambiguity which is hidden in the concept of expectation. In the central case of expectation, someone expects an event if and only if he believes that it *will* occur. Thus, if Jones expects Smith at the office, Jones believes that Smith will come to the office, and vice versa. It would be incoherent for Jones to say, "I expect Smith this afternoon, but I do not believe he will come." But there is a sense of "expect" which involves what one believes *should* happen. Thus, a supervisor might say to a new hireling, "You will be expected promptly at 9:00", where the supervisor might not believe that the person will show up at 9:00. Also, one might ask, "Why should I do such and such?" and "Well, because it is expected" might be the reply. Generally, I think Shwayder means "expect" to be taken in the former sense; indeed, he would have to if he were to concede the possibility of a community's having a rule which many or all of its members did not want. However, if he takes it only in the former sense, then my counterexamples render his alleged entailment false. On the other hand, if he turns to the normative sense of "expect," he will likely not be able to analyze rules in terms of legitimate expectations.

Thus, although there seems to be an empirical correlation between the existence of mutual expectations and the acceptance of a rule by a community, the former is not logically related to the latter. The analysis discussed in Section 3, which grows out of (C), is to be preferred to the doctrine which I have attributed to Shwayder. Further exploration of specific applications of (C) and related doctrines will have to wait for other essays.

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