

Obligation and Social Practice

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1. Hart on obligation

Hart thought that a major task of legal theory was to explain the idea of obligation in law, and that this made the notion of rules indispensable. He said that obligations were fundamentally connected with social practices:

[T]he existence of [social] rules ... is the normal, though unstated, background or proper context for [the] statement [that a person has an obligation]; and ... the distinctive function of such statement is to apply such a general rule to a particular person ...²

Hart regarded this connection as built into the very idea of obligation, and said that it was important in its own right as well as a necessary preliminary to understanding the special case of obligation in the legal domain.³

His explanation is familiar. Patterns of action, recognition, and censure together constitute social rules. We arrive at the departure lounge, there are dozens of us. There is only one person working behind the check-in counter. We form a line, waiting to be served roughly in the order in which we each arrived, and we react furiously to anyone's cutting in or drifting along, ahead of others who arrived before. This is not an isolated incident. It is our practice to act in this way in actual and hypothetical circumstances such as these. Our practice includes, in other words, a current settled disposition to act in this way if and when the circumstances arise. In addition, we regard the practice as a standard to which it is our duty to conform. In other words, we

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² Hart, *The Concept of Law* (Oxford, Clarendon Press 1961; Joseph Raz and Penelope Bulloch (eds), 2nd edition with Postscript 1994) 85. All further citations to 2nd edition.

³ *ibid.*

regard it our duty, not simply to form a line in the circumstances, but to conform to the pattern of behaviour of forming a line in the circumstances, and so regard the *pattern* as a standard.⁴ It follows that we take the existence of the pattern as reason for the action (whatever other reasons we might also think we have for so doing). According to Hart, these facts about us constitute and therefore explain the existence of a rule—the very standard that we accept in our attitudes—that requires that we act as we do. So such facts are what fundamentally makes it the case that we are under an obligation so to act. For a person to be under an obligation then, is for some such rule to apply to that person, where the pressure to conform exceeds some threshold of seriousness.⁵ The obligation is specifically moral in character where pressure to conform is meant to induce shame, remorse, and guilt. Of course, the kind of morality Hart has in mind here is what he calls ‘the morality of the social group’, which he elsewhere calls ‘positive’ morality (as distinct from ‘critical’ morality). That is not because he accepts the existence of obligations of critical morality which are otherwise constituted. Hart’s account of obligation is entirely general and leaves no room for obligations ultimately grounded in facts other than social practice. As we’ve seen, Hart thinks that social practice ultimately explains obligation as a matter of conceptual necessity. He understands the distinction between positive and critical morality differently. In his view, only positive, socially practiced morality may ground obligations. Critical morality, on the other hand, consists in moral ideals and principles of personal morality. These transcend and may ground criticism of social practice or give reasons to deviate from it, but do not give rise to obligations.⁶

This explanation of obligation is obviously flawed. For one thing, it is clearly not true that an obligation to take some action in some circumstances *exists* only when a social practice of taking or endorsing the action exists. Moreover, Hart was surely wrong to say that a *statement* that one has an obligation to take some action implies the existence of a social practice that underwrites it. Such a statement is perfectly sensible in the absence of any practice or even in

⁴ *ibid* 57. A pattern of behaviour, in itself, is consistent with a different attitude: each accepts some reason other than, and not dependent on, the existence of the pattern. In that case, we coincide in our action and concur in our acceptance of a duty so to act, but do not meet Hart’s conditions of an obligation constituted by the practice.

⁵ *ibid* 86–87.

⁶ Hart discusses the distinction between positive and critical morality in chapter VIII of the book; see *ibid* 167–80; *ibid* 301, endnote to p167. That Hart would not allow for the existence of obligations of critical morality is further confirmed by the fact that Hart offers no more basic account of obligation that might allow for a distinction between positive and critical moral *obligation*.

the face of a practice to the contrary. If it were not, reformers, social critics, and original moral thinkers who argued for the existence of certain moral obligations (rather than mere ideals that could be converted to obligations only on condition that they were taken up by the relevant social group) would all be out of business. It may seem that the flaw can be fixed by restricting the scope of the explanation to conventional obligation. But this is an illusion, for the flaw is ultimately in the supposed ground of obligation rather than the scope of the explanation. Practice may play a role, albeit a very different one, in the explanation of obligation. Where some (permissible) practice exists, there is often reason to conform, and the existence of the practice, including attitudes of recognition and censure, plays a role in the explanation of how it is that the reason obtains. Yet the explanation must include the considerations that assign to the practice that reason-giving role, which are therefore fundamental to the explanation.

Familiar examples are usually drawn from our relatively trivial obligations. Conventions of politeness sharpen the distinction between respect and offence in our interaction with strangers. We have reason not to risk causing offence, which makes existing practices of polite behaviour, including the expectations they create and sustain, relevant to our action. The reason makes it the case that we have an obligation to conform to the practices, therefore to take the actions that are customary and expected. The obligation is therefore ultimately explained by the considerations that make offence (and frustration of certain expectations) worth avoiding. Queuing is a way of sharing some resource in circumstances of congestion. Where queuing is practised, jumping the line would intuitively assign to the jumper a smaller share of the cost of using the resource compared to others and at their expense. If this is right, then in these circumstances antecedent reasons of fairness obligate us to join the line and wait for our turn.

The practices, in these examples, are relevant to the content of the obligation, but do not ultimately ground it. Rather, the normative facts, which are independent of the practice and give some of its aspects normative relevance, do. The structure of these cases is reflected in other domains, where more is at stake. We have reasons not to hurt others (and ourselves) which make driving practices relevant to our action. Such reasons ground an obligation to conform to practices that make driving safer, including an obligation to drive on the left in England. It is also reflected, *mutatis mutandis*, in many other domains where there is reason to coordinate or cooperate, where what others are disposed to do is relevant to the question of what each person has reason to do.

As the examples illustrate, the fundamental facts are often obvious and hardly worth mentioning—*of course* we should not offend strangers or hurt anybody—which may make it seem that the explanation can work without them. But this is an illusion. The general point is

simple. Social facts, including patterns of action and attitudes towards such patterns, do not constitute our obligations. They may, however, be relevant to and affect the content of our obligations, when and in virtue of the fact that some non-social normative facts, which ground the obligations, give the social facts that role. So Hart's claim, even restricted to obligations whose existence depends on the existence of some practice, misrepresents their nature, crucially including the source of their force.

The background normative facts in these examples solve a problem that would be intractable if we tried to solve it using only the materials that Hart allows. For Hart is optimistic in thinking that to the extent that some practice is settled, it constitutes a determinate rule. For any practice, the facts about actual settled action and attitudes (including existing settled dispositions to act in hypothetical cases) of the agents that make it up, even together with further social facts (which are the only kinds of fact to which Hart's explanation appeals), cannot by themselves uniquely determine any standard.⁷ For any action that an agent might now propose to take, we can always cook up some 'bent' standard that is consistent with the practice so understood, under which the action is precisely what the practice now requires.⁸ Suppose that Hart's men, who in their settled practice have been removing their hats upon entering the church and have been expecting everyone else to do likewise, all wore hats of a certain style prevalent in England in the late 1950s, when Hart was writing the book. The rule that required that hats *of that style* be removed upon entering a church would be consistent *with these facts*, and would fail to require removing, say, a cattle baron hat never before seen in these parts. Worse, a variety of rules that permitted not removing hats, even those of the familiar style, if some condition was met, would *also* be consistent with these facts. For example, the rule that required removing some or all styles of hat except if the Labour Party won a general election no later than October 1964, in which case not removing any hat would be henceforth permitted. But if no contemplated action can count as a mistake by reference to the practice, there is no genuine standard that the practice constitutes.

⁷ If so, there is no determinate standard that may give content to participants' attitude of regarding the relevant pattern 'as a standard'.

⁸ See M Greenberg, 'How Facts Make Law' (2004) 10 *Legal Theory* 157. The description of the fundamental problem is in S Kripke, *Wittgenstein on Rules and Private Language: An Elementary Exposition* (Cambridge, Mass, Harvard University Press, 1982), and its elaboration in terms of the emptiness of the constraint of formal consistency and the need for substantive constraints is in Susan Hurley, *Natural Reasons* (New York, Oxford University Press, 1989). Greenberg discusses the problem in detail, and draws implications for the explanation of the nature of law, including Hart's proposed explanation.

The difficulty is familiar from Saul Kripke's discussion of Wittgenstein's writings on rule following. The fundamental problem is one of relevance. Does style of hat matter? Do the political fortunes of the Labour Party in the years following publication of the *Concept of Law* matter? If not, why not?⁹ The general lesson is as simple as it is profound. For any action and attitude or other factor to determine any standard, something other than these factors must determine the relevance of each. In the examples of conventional obligation just discussed, moral facts fill that role, by making certain aspects of some practice relevant to what one ought to do, and therefore ground and explain the content of the obligation. Their role is not to ratify some standard constituted by the practice alone—there is no standard so constituted. Rather, in determining what matters by giving reasons why it should, they thereby determine the standard and so what it is for some action to be consistent (in principle, rather than formally) with the practice.

We might consider another possible fix for Hart's account. Perhaps we can take it to be partial by design, aiming to explain what it is to accept some obligation, or how things look from the perspective of someone who accepts it. But such a partial or perspectival account presupposes a more basic account of what it is that one accepts when one accepts some obligation, which serves to give content to the partial or perspectival one. On the hypothesis that Hart's account was so limited, such a more basic account necessary to give content to the limited one would be missing. Hart is anyway quite clear that he intends his account as an explanation of what it is to *be* under some obligation, not what it is to accept one as distinct from, and derivative of, one's being under it.

The distinction between considerations that an agent regards as a reason and considerations that are in fact such reasons regardless of the agent's dispositions hardly makes sense in Hart's philosophy, and he explicitly rejects it. It is essential to his view that each distinct practice—each pattern of action and disposition to conform—independently constitutes a separate domain of obligation, just as genuine or robust as any other, possibly differing only in the character or means of pressure that backs the relevant group's expectation of conformity. Hart thought that legal practice constituted yet another domain of genuine, full-blooded obligation special to it, and he resisted to the end the suggestion that he reconceive acceptance within legal practice as the attitude, sincere or feigned, of assigning to the practice moral force.¹⁰

⁹ See Greenberg, 'How Facts Make Law' (n **Error! Bookmark not defined.**) for discussion of attempts to solve the problem of relevance by appeal to more social facts.

¹⁰ See HLA Hart, *Essays on Bentham* (Oxford, Oxford University Press, 1982) 266f, 153–61.

The idea that there exist many separate domains of genuine obligation, each constitutively explained, independently of the other, by the actions and attitudes internal to the relevant practice, makes sense within Hart's non-realist view of reasons. Hart saw that on the hypothesis that reasons existed independently of the agent's subjective motivation, it would be hard to maintain the distinctness of domains so understood, including in particular the thesis that legal and moral reasons were so distinct. Given the hypothesis, someone anxious to maintain the distinctness would face a dilemma. He might accept the suggestion that legal duty was a *form* of moral duty—moral duty from the point of view of the practice. This would dilute the distinctness of legal and moral reasons in a way that Hart's theory could not accommodate; for the explanation of legal duty would now have to be derived in part from the explanation of moral duty, even as it would still allow Hart to insist that legal duty was not moral duty *outright*. Alternatively, he might be led to accept the further hypothesis, which Hart characterized 'extravagant', that there exist two independent domains of objective reasons, one legal and the other moral. That hypothesis would allow him to preserve the constitutive independence of the two domains albeit at a high metaphysical price. Hart considered the latter alternative not viable for that reason. He also rejected the former since, in addition to his worries about dilution of the distinction between legal and moral reasons, he was not persuaded that insiders must assign (sincerely or not) moral force to a practice if the practice is to give them reasons for action. He concluded that he did not need to abandon his own practice theory, which reduced obligation to patterns of action together with settled dispositions to conform, without reference to considerations external to the relevant practice. One lesson we learn from Hart's uneasy reflections on these matters is that realist and non-realist strategies for keeping moral and legal reasons distinct (in the specified sense) do not mix.

In the alternative, moralized account of obligation sketched above, rules play a diminished role. Given the moral and social facts of the examples, and therefore the obligations they constitute, we would be justified in asserting rules that require certain forms of greeting, waiting for our turn, or keeping to the left in the relevant circumstances. Such rules would merely sum up the effect of the relevant considerations on obligations, and would be useful for presenting the normative situation and for reminding ourselves what we should normally do in certain familiar circumstances.

Rules so understood don't occupy the intermediate place that Hart assigns to them in the fundamental explanation from social practices to obligations. They are neither constituted by social practices, nor ground or explain, in the constitutive sense, the relevant obligations (so it is not true that the obligations obtain in virtue of the existence of the rules). Obligations are

instead explained by the background moral and social facts that are merely summarised and reflected in the rules.¹¹

This would remain so even if we all happened to share and endorse a particular formulation of a rule, which would not thereby become unassailable, nor would the rule that it expressed become constitutively responsible for the relevant obligations. The suggestion that it is permissible for a heavily pregnant woman to go to the front of the queue would imply that a flat ‘first come first served’ formulation was an inaccurate summary of the relevant considerations and should be qualified, not that that case was left open by the considerations that regulated the plain cases and were reflected in the rule, such that the novel case would have to be regulated afresh (which is what we would have to assume in order to reconcile a flat Hartian rule with what would appear to be a clear violation of it). Since obligations are not explained by the rules, difficulties with applying the terms of some formulation have no direct consequences for the obligations that the formulation aims to capture.

In the alternative account, rules (and other standards) are convenient devices of exposition that do not explain obligation, but instead summarise the effect of other considerations, which in fact explain it. This conception of rules and of their relation to social practice is reflected in the following passage from Dworkin’s early criticism of Hart’s theory of rules:

It is true that normative judgments often assume a social practice as an essential part of the case for that judgment; this is the hallmark, as I said, of conventional morality. But the social rule theory misconceives the connection. It believes that the social practice *constitutes* a rule which the normative judgment accepts; in fact the social practice helps to *justify* a rule which the normative judgment states. The fact that a practice of removing hats in church exists justifies asserting a normative rule to that effect—not because the practice constitutes a rule which the normative judgment describes and endorses, but because the practice creates ways of giving offense and gives rise to expectations of the sort that are good grounds for asserting a duty to take off one’s hat in church or for asserting a normative rule that one must.¹²

¹¹ One might complain that ‘rule’ stands for a consideration that plays the explanatory role that Hart assigns to it: a standard that makes it the case that certain obligations obtain. If so, the right thing to say is that the alternative account has no place for rules. But it is instructive to see why not, and why it still makes sense to talk in terms of rules. Besides, it may not be wise to build a contentious thesis in the metaphysics of obligation into the idea of a rule.

¹² R Dworkin, *Taking Rights Seriously* (Cambridge, Mass, Harvard University Press, 1978) 57.

It follows that the content of the rule and the content of the practice that justifies it needn't coincide: the rule may require more or less than is practiced. And some practices may fail to justify any rule.

The social rule theory fails because it insists that a practice must somehow have the same content as the rule that individuals assert in its name. But if we suppose simply that a practice may justify a rule, then while the rule so justified may have the same content as the practice, it may not; it may fall short of, or go beyond it. If we look at the relationship between social practice and normative claims in this way, then we can account, smoothly, for what the social rule theory labors to explain. If someone finds a social practice pointless, or silly, or insulting, he may believe that it does not even in principle justify asserting any duties or normative rules of conduct, and in that case he will say, not that it imposes a duty upon him which he rejects, but that, in spite of what others think, it imposes no duty at all.¹³

2. Moral pretensions

Hart's theory fails as an explanation of the metaphysics of duty, both in supposing that a social practice of taking some action is necessary for the existence of a duty to take it, and in supposing that it is sufficient. It fails as an analysis of the logic of claims of duty, in holding that one must imply or presuppose these connections between practice and duty when one makes claims about what duties exist. And it badly misrepresents the nature of morality and its role in the explanation of obligation, in supposing that each practice by itself generates its own sphere of duty, with morality restricted to the role of criticism from the outside, without any impact on the relation of determination that may hold between practice and duty and therefore on the capacity of a practice to ground any duty at all. We have also seen that the theory cannot be patched by restricting its scope to conventional duties, because, even so restricted, it still fails to capture the nature of the connection between convention and duty. Nor can it be patched by restricting its ambition to a partial explanation of duty from the point of view of the practice because, in Hart's scheme, to explain how things look from the perspective of those who accept a duty to conform to some practice is to explain what it is for the duty to exist outright. By Hart's lights, therefore, the perspectival explanation leaves nothing of importance to be explained at some further stage.

¹³ *ibid.*

This last failure suggests a way to preserve a more defensible version of Hart's main theses: develop the idea of normative perspective on the basis of a robust distinction between one's holding that some duty exists and it being the case that it does. This distinction is central to the alternative account sketched above, and is part of a realist view about reasons, including reasons for action. But realism about reasons is not as such exclusive to the alternative account. We can develop an approach to the problem of obligation that is based on such a distinction but otherwise holds on to Hart's approach. We can thus develop a variant of Hart's account fit for a practical realist. This kind of realist shares Hart's general approach to the metaphysics of obligation: the nature of duty is to be approached via an analysis of what one means when one makes claims of duty. In the case of social practices, the key claims are those that are made by or are implied in the attitudes of insiders: those who accept the relevant duties. It's their claims that define the point of view of the practice and are therefore privileged. But the realist holds that the normative claims that prevail within a practice do not suffice for obligation.¹⁴

The realist variant therefore splits the explanation of duty into two stages. At the first stage, we can say that a practice that meets Hart's conditions generates obligations from the point of view of the practice, which is the point of view of those who regard the practice as binding. We must understand the point of view of the practice to include a tacit claim about what we owe to each other, that is to say a moral claim. So to regard the practice as binding is to hold that conforming to it is morally mandated.¹⁵ Now, as the robust distinction suggests, it's one thing to assign moral force to some practice, and another for the practice to possess it. Whether the moral claim is true, and so whether the practice succeeds in generating obligations outright, depends on whether the perspectival obligations are morally ratified. That is to be settled at a separate, second stage that consists in substantive moral investigation. This approach yields very different results from Hart's. Hart would say that Mafia soldiers are under an obligation to kneecap those who refuse to make protection payments, which obtains in virtue of Mafia practice and attitude. Of course, that would be an obligation special to the Mafia. The rest of

¹⁴ Also the realist needn't, and plausibly wouldn't, share Hart's view that a social practice is *necessary* for obligation. In what follows, I discuss the realist variant of Hart's view for the subset of obligations that do depend on the existence of some social practice.

¹⁵ In this respect, the realist approach sharply diverges from Hart's. Hart said that those who accept a duty to conform needn't accept a moral reason to do so: they may accept the duty for a variety of motives. The realist may agree that motives may vary, but insist that the stakes are moral so that, whatever motives insiders actually have for conforming, they can't count as accepting a duty grounded in the practice unless they hold the practice, sincerely or not, to bind them morally.

us might criticize the practice by appeal to moral ideals, and even a member of the mob might decline to perform the deed on grounds of conscience. If he did, he would be breaching a genuine obligation that he owed to the organization. On the realist variant, we can reject these claims. We can say that Mafia practices include an implicit claim that members are morally required to impose that brutal punishment on non-compliant debtors, so a moral duty to do so exists from the Mafia point of view. But in this case the moral claim is patently false. No-one may do these things to people, and no practice, however well-entrenched, can change that. Therefore no such obligation truly exists.

In the realist variant, therefore, morality is not restricted to criticism but speaks to the existence of obligation. If settled practice and attitude give rise to obligations, some moral fact must make it so. But the role of morality remains diminished. For this realist, it remains the case that the duties that the practice purports to impose are those that are accepted as such by insiders. So he can agree with Hart that social practices define duties, even as the duties' existence depends on moral factors. Morality plays no role in the determination of the content of the duties that the practice purports to create. Its role is limited to the ratification, if certain conditions are met, of the duties already defined by social facts alone.

The ambition to separate cleanly the role of social facts from that of morality exposes this view to certain difficulties. By leaving the determination of the content of the putative duties to the social facts of the practice, it inherits the problem of determinacy sketched above: social facts by themselves constitute no determinate standard or obligation that morality might or might not ratify. This view must also postulate the existence of some moral fact that may give a social practice force and thereby secure the existence of obligations to which the practice purports to give rise, but have no effect on their content. This must be some unusual moral fact, for it's in the nature of morality that it is in principle relevant to the content of our duties. It must be some moral fact that mandates that, in some special circumstances, morality be kept out of the determination of the content of duty in favour of some purely non-moral factors.

This view may explain the existence of such a fact in terms of a normative power. This notion is usually developed in connection with individual action. The standard example involves promising. It may be argued that you have a normative power to place yourself under a duty to take some action by promising to take the action, where promising is understood in terms of conveying an intention thereby to come under a duty to take the action. If so, the duty would have as its source your choice, with morality restricted to the role of underwriting this mechanism of production of duty by granting you the power that you tacitly claim when you aim to create a duty just by conveying an intention to do so. It therefore assigns binding force

to your choices, within limits, regardless of content. And, on this hypothesis, morality grants you the power because it is good that agents should have it so that they should each be able, through their individual choices, to shape their own moral world.¹⁶

But the notion of normative power might be adapted to apply to groups. It could be argued that morality endows agents with a kind of distributed normative power, namely of placing themselves under an obligation to take some action by making it their practice to take the action and forming an attitude of acceptance toward their own practice. This would be a power that no agent could exercise alone, but agents might exercise together, if each acted aiming to align his action with others' and considered it appropriate to do so. For the realist variant in discussion, such a normative power would have to be limited: it couldn't be used successfully to create a duty to perform some action that is flatly impermissible—though people might and inevitably will try to do so. But within the sphere of permissibility, it would be entirely open-ended. Agents could use it to make it obligatory to drive on the left, or, just as easily, to drive on the right by making it their practice to drive on the one side or the other, and in each case each coming to consider it his or her duty to conform to the practice. And, as before, the existence of the power might be explained by supposing that there is value in agents' being able to change their normative situation by acting together in the specified manner.

On this hypothesis, once morality grants agents the postulated power to change their normative situation in the specified way, it has no further role to play. The obligation that applies to the agents who exercise the power successfully is sensitive exclusively to their action and psychology, but insensitive to the morally relevant effects of their action or attitudes on their circumstances. Once the power is exercised, morality mandates that morality be set aside.

In this respect, this view differs from the fully moralized account previously sketched, where morality retains a role at analytically later stages, making any obligation that may be grounded in some social practice sensitive to the morally significant effects of the practice. On the moralized account, once such a social practice is in existence, circumstances have changed, and if some duty obtains, it does so in virtue of the changed circumstances. It coming to be our practice to drive on the left (on the assumption that we could drive either left or right) makes that alternative uniquely appealing. Driving on the right was a reasonable option before; now, it would be insane. These facts are morally significant because we have an antecedent moral

¹⁶ J. Raz, 'Voluntary Obligations and Normative Powers', *46 Proceedings of the Aristotelian Society, Supplementary Volumes* (1972), 79-102; 'Promises and Obligations', in P.M.S. Hacker and Joseph Raz (eds.), *Law, Morality and Society: Essays in Honor of H.L.A. Hart*, Oxford: Clarendon press (1977), 210-228.

duty to coordinate our driving by choosing the same side of the road. And it's in virtue of the new developments that this antecedent duty has now become a duty to drive on the left. Equally, it coming to be our practice to observe certain forms and rituals in our interaction with strangers, non-observance is almost guaranteed to cause offence. The moral valence of actions has now changed, such that certain actions that would be neutral absent the practice are now to be avoided because they will cause offence whereas others are to be taken because they will avoid it. This is morally significant because we have an antecedent duty to avoid causing offence, and it's again in virtue of these new facts that we get to have a duty to observe the forms and rituals. So in both cases, morality remains relevant after the fact of the individual actions and attitudes that make up the relevant social practice, evaluates the agents' situation afresh, and places them under a duty, when it does, in virtue of morally relevant features of their situation so updated. In that way, the moralized alternative mirrors the general structure of moral explanation, where it's not just what you did but also the morally significant consequences of your action—that you raised expectations, encouraged reliance, put others in some vulnerable position—that place you under obligations to those affected by your action in the relevant way. And in all cases, morality determines both the content and force of duties, rather than merely giving force to putative duties otherwise defined.

So the hypothesis in discussion—the hypothesis that groups of people are endowed with powers to place themselves under duties simply by choosing to coordinate their actions and attitudes in some specified way—is committed to a controversial, non-standard mechanism through which social practices may produce obligations. In addition, it is an essential part of the hypothesis that the postulated mechanism is built into the logic of the action and presupposed or implied in the normative claims of participants. When we join the queue and wait for our turn, we mean, on this hypothesis, to submit our action to a duty that exists just in virtue of the fact that it is our practice to queue, and when we tell a novice that he should do as we do, citing our queuing practice, we mean to convey, at least implicitly, that he, too, should submit his action to a duty so constituted. In that way, we claim the normative power to create, by virtue of our action and attitude, the duty, owed by each to the rest of us, to join the queue. And, if it is true that the duty obtains, as is reasonable to suppose it does in this case, it is this moral claim that morality vindicates, by conferring on us the claimed power.

To see whether the hypothesis bears out we have therefore two tasks. First, we must establish whether morality contains the special mechanism of production of duty and the power that would make it possible (or other form of the mandate that, where some social practice exists, the content of the duty the practice may give rise to depends on the social facts of the

practice alone, to the exclusion of further moral factors). It is a substantive moral matter whether morality contains these items and there is no apparent reason, independent of the doctrine about the metaphysics of duty that depends on their existence, to suppose it does. Rather, by treating social practices as capable of generating duties by systematically changing circumstances in morally relevant ways, the ordinary moral explanation seems to get the moral phenomena right.

However, the hypothesis in discussion includes the claim that the choice between the ordinary and the special explanation is *not* to be settled on substantive moral grounds. It claims that the special mechanism is privileged, because it is built into the logic of practices with normative ambitions. So the mechanism would remain a worthy object of study, whether or not morality contained the stipulated mechanism, for it would represent the distinctive moral perspective of social practices, the way in which they are *meant* to bind. And if it turned out that morality does not contain the mechanism, what would follow is not that practices generate obligations in some other way but rather that, as such, they generate no obligations at all, except perhaps as a matter of moral accident.

So the second task is to assess the ‘conceptual’ part of the hypothesis in discussion, which concerns the ‘logic’ of social practices. This part purports to model the practical attitudes that must prevail among insiders if a social practice is to be capable of giving rise to obligations. The model is not a description of the actual attitudes of insiders. Rather, it is the attitudes that we must understand them to evince when they accept a duty and point to some social practice in explanation of how it is that they are under the duty. That part of the hypothesis therefore purports to articulate key conceptual constraints about the way in which social practices could ground obligations: only an explanation that meets the constraints may adequately explain the obligations.

That part says, first, that insiders must be understood implicitly to claim that they are under a moral obligation or standard to which their practice gives rise, a claim which morality may or may not vindicate. This implies that agents who converge in their behaviour must all be understood to endorse the same obligation or standard. If not, there wouldn’t be some unique insiders’ claim that morality could just vindicate. Rather, morality would have to come into the picture in a different role and adjudicate, now on substantive moral grounds, between competing individual claims about what moral duty or standard, exactly, the practice may give rise to. Moreover, the hypothesis implies that the putative moral duty or standard they endorse, which morality might ratify, must be such that all and only those actions that agents converge in taking in their settled practice are mandated. Otherwise, there would have to be some

standard external to the social facts of settled practice that would regulate the practice and by reference to which more or less than what agents converged in doing might come out as required by it. The standard would therefore be an ordinary, substantive moral standard, so morality would once again ultimately determine the content of the duty or standard to which the practice might give rise, rather than confirm the force of a duty or standard defined by settled practice.

In the conceptual part the hypothesis says, second, that insiders must be understood to submit their action to some moral duty or standard that they implicitly hold to obtain, not merely in consequence but just in virtue of their settled practice. For otherwise factors outside settled practice would once again come into the picture as determinants of the practical significance of those consequences. In that case, morality would play its usual role of determining the practical relevance of some non-moral factors (namely the consequences of the practice) and therefore of ultimately grounding any duty that might obtain, rather than the special role of endowing the practice with the power to define duties.

If insiders failed to be unified in those ways, disagreements would inevitably arise as to what exactly their (by hypothesis moral) duties were under the practice, with different sides citing the same social facts of settled practice in arguing their case about what it is that, given those facts, they were now bound to do. The disagreement would therefore concern the bearing of these facts on the parties' moral obligations—their moral relevance—and each side would inevitably appeal to factors outside the settled practice in making their case that a moral duty obtains because of the practice. That would be a substantive moral disagreement, which morality could settle only by operating in the usual way of determining, at once, the content and force of any duties or standards, rather than endowing some non-morally defined duty or standard with binding force.

The moralized account shows that we have no reason to accept the proposed conceptual constraints, regarding either content or ground. It is, itself, a coherent and plausible explanation of how social practices may make a difference to agents' normative situation, an explanation based on the familiar general mechanism through which morality determines the practical relevance of non-moral factors. Moreover, attitudes consistent with the account can be intelligibly imputed to agents who incur obligations that obtain because of their social practices. We don't *have* to understand agents in the way the hypothesis supposes. Consider a group of agents who explicitly accept the moralized account as the correct explanation of how a social practice can give rise to obligations. The group can develop a practice, accept that its existence has changed what they owe one another, and make moral claims in its name. A

practice so understood by its insiders can flourish and succeed, if morality vindicates their claims, albeit not by granting them the power to define duties but by agreeing with their assessment of the moral relevance of their action. The practice might solve a coordination problem by making one of many alternatives the one to take. If so, agents would now understand themselves to be placed under a duty to take the alternative, a duty that would not exist but for the practice: they would think that their antecedent moral duty to do as others do in the relevant circumstances was now perfected in virtue of the moral significance, for each person's action, of the fact that others had a settled disposition to take the alternative. They could, perfectly intelligibly, summarize this thought by saying that they incurred the duty because of their settled practice.

Members of a group that think in this way have effectively internalized the moralized account and understand that, as a general matter, if the group's action converges in certain ways, systematic and predictable effects on their antecedent moral obligations can reliably be produced. They therefore have a blueprint for changing their moral situation by developing, if they can, new practices, and a map that charts the ways their situation has changed by any practices in which they happen to find themselves.

Since these agents hold the standards or duties that obtain because of their practice to be genuine moral ones that obtain not simply in virtue but in consequence of their settled practice, they needn't all agree about the content of the standards or duties. Moreover, there needn't exist a determinate shared view on how, exactly, practice matters to the standards or obligations that apply to participants, even where it's generally agreed that it does matter in some way. They may endorse overlapping standards, under which more or less than what is practiced is required, and the divergence in the perceived standards or duties would be traced to differences in understanding of the moral relevance of various social factors and the way they combine to produce their normative effect. These agents submit their action ultimately to some moral principle that they hold their practice to serve. They queue, not just because it's their practice to do so, but because their practice of queuing is an eligible way of responding to the problem of fair allocation of some resource in circumstances of congestion such that, given the existence of the practice, queuing is the fair thing to do in the circumstances. Morality does not therefore fade out of the picture once the practice settles. It remains in play, determines what fairness now requires, and, where disagreements arise, is decisive on the question how the existence of the settled practice really affects this question.

More fundamentally, agents who submit their action to substantive moral standards implicitly hold themselves responsible, not to their own conception of the standards, nor to the

specific mechanism through which, in their view, these obtain, though they may (and we have supposed that members of our group do) have strong views on both these matters. In fact, our imagined group, composed of agents who explicitly accept the moralized account, displays a philosophical sophistication that is uncommon and wholly unnecessary. Its practical situation can be duplicated with much less specificity in agents' metaphysical and moral reflection. Agents can get by simply by supposing that practices systematically affect their obligations and that some explanation exists of the way, exactly, in which that happens. Drawing on their ordinary moral sensibility, they each construct some rough or more articulate conception of the mechanism—of the precise relation of metaphysical dependence that holds between practice and duty—that is sufficient to permit them to work out what standards or duties obtain. Such conceptions have the character of *hypotheses* about how an interesting moral phenomenon is to be explained, and agents hold themselves to the correct conception, whatever that is.¹⁷

A social practice so understood is perfectly intelligible and capable of giving rise to genuine moral standards or duties whose fundamental explanation must make ineliminable reference to the existence of the practice. It can also fail to do so in a variety of ways, consistent with substantive moral mistake or insincerity on the part of agents. But not even the Mafiosi need suppose that the duties they accept obtain just because that's how they have been doing things for a long time. They may hold sincere though badly mistaken views about the importance of loyalty or the priority of tribe, though of course they may just dissemble.

In sum, the production of standards or duties through the ordinary moral mechanism that goes through the impact of the practice on agents' circumstances is not accidental but systematic and predictable, regulated by familiar moral principles. A practice that violates the, supposedly conceptual, constraints proposed by the normative powers hypothesis makes perfect sense and the attitudes that it implies are perfectly coherent. That is enough to show that the proposed constraints are not genuinely conceptual. We do not need an empirical survey of actual practices, any more than the proposed conceptual claims of the hypothesis are based on such a survey.

The moralized account also seems to square with experience. Disagreement of the relevant kind—not about how the non-moral facts are, but how they must be if they are to add up to some obligation—is the usual tell-tale of the attitudes that the moralized account implies. The account entails that such disagreement is always on the cards in the domain of practice-

¹⁷ Cf Georges Rey 'What Implicit Conceptions Are Unlikely to Do', *Philosophical Issues*, Vol. 9, Concepts, (1998), pp. 93-104, at 98-9.

dependent obligation, so the account predicts, human nature being what it is, that disagreement will frequently arise. And it seems that it does. It's not merely that we can show the *possibility* of disagreement, even where none has ever arisen—which is all it would take to refute the putative conceptual constraints that we have been discussing. That could be achieved simply by constructing some colourable alternative to the prevailing explanation, if one exists, of how it is that some practice gives rise to a certain duty. Moreover, actual such disagreement seems ubiquitous and indeed characteristic of the domain. As Dworkin pointed out long ago, '[p]eople, at least people who live outside philosophy texts, appeal to moral standards largely in controversial circumstances.'¹⁸ Anyone who has approached the entrance to the Holland Tunnel from Manhattan knows that people hold and are prone vigorously to defend very different views about what the rule of queuing precisely mandates or permits where lanes merge.¹⁹

3. Content and force

Hart thought that the content of our duties is determined by what we do as a matter of settled practice and their force by our attitude of acceptance towards our practice. He thought that both parts of the account constitute conceptual truths to be found in the logic of claims of duty. The realist variant corrects Hart's excesses that are traced to his non-realist conception of reasons as nothing but a kind of normative attitude. It supposes that objective moral facts, ultimately independent of attitudes, must play *some* role in grounding practice-dependent duties: only such facts could give force to obligations. But the account so corrected still fails. The realist variant holds on to Hart's idea that people mean to define their own obligations however they please, though it adds that they are only guaranteed to succeed in defining duties that exist from the point of view of their practice. It remains the business of morality to see to it that the duties

¹⁸ Dworkin, op. cit. (n 12) 75.

¹⁹ Perhaps you think that drivers argue, not about what the rule of queuing requires, but about how it should be extended to cover the controversial case of merging lanes. If so, consider Fred. He explicitly holds that the rule as it stands mandates that one should merge at the very end of the lane that is about to finish, even where that means that one would end up ahead of others who arrived earlier. He is aware that his view is highly controversial, but says that it is nevertheless correct and uniquely explains all cases in a principled manner, including the uncontroversial ones, where getting in ahead of others who arrived earlier is strictly prohibited. He claims that the relevant principle is one of fair allocation of the burdens of congestion that includes a dimension of efficiency. Fred may be wrong, but his view makes perfect sense. If it makes sense for Fred, why *must* we understand New Yorkers differently?

also exist outright, if they do. Like Hart, the variant supposes that this picture articulates conceptual truths found in the logic of the moral claims of insiders.

We have seen that we don't have to understand insiders to mean to define their own duties. In fact, their claims and attitudes are much more varied and open-ended than Hart and the variant suppose. We shouldn't hope to find a full template for the fundamental explanation of the relation between practice and duty already packaged in those claims and attitudes, but would rather have to call on substantive moral theory to do so. The advantage supposedly conferred upon Hart's conception and its variant by the self-understanding of participants is illusory. No conception is so privileged: we must do the hard work in the metaphysics of duty for ourselves.