

The Coherence of the Doctrine of Legitimate Expectations

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I. Introduction

When you have a 'legitimate expectation' that a public body will exercise its discretion in some way, you may be entitled to the law's protection if that 'expectation' is disappointed. This is the heart of what is known in administrative law as the doctrine of legitimate expectations. The doctrine is still developing, and many questions about it remain unanswered. One of the most important is: what generates a legitimate expectation? The standard answer is that a legitimate expectation is generated by a public body promising to exercise its discretion in some way, or it having a policy or engaging in a practice of doing so. This answer is inadequate because it is not clear what it is about promises, practices, and policies such that they, and only they, generate legitimate expectations.

If there is no principled reason why these are the only ways of generating a legitimate expectation, there is no principled reason why a legitimate expectation arises in some cases but not others. The doctrine of legitimate expectations would then lack coherence and distinctiveness. This is a concern of many commentators. Mark Elliott thinks the doctrine is at risk of becoming 'an unnecessary envelope capable of being placed around intervention on any ground'¹. Christopher Forsyth thinks that '[t]here is a real danger that the concept of legitimate expectation will collapse into an inchoate justification for judicial intervention'². Were this concern justified, there would be a strong case for 'doctrinal disaggregation', a possibility favoured by Elliott³, as well as by Richard Clayton⁴. Clayton, for instance, suggests that parts of the current doctrine of legitimate expectations should be explained instead as an application of the principle of consistency.⁵

We believe that this concern is exaggerated. In this paper, we show that the various ways of generating a legitimate expectation *do* share an underlying feature, one which gives the doctrine coherence and distinctiveness, and which makes disaggregation of the doctrine unnecessary. Our argument proceeds in two stages. First, we argue that promises, practices, and policies each comprise or make applicable a certain type of non-legal rule. Second, we argue that a legitimate expectation is generated from such a rule

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¹ Mark Elliott, "Legitimate Expectations, Consistency, and Abuse of Power: the *Rashid* Case" (2005) 10 JR 281, 283.

² Christopher Forsyth, "Legitimate Expectations Revisited" (ALBA Summer Conference, 29 May 2011) available at: <http://www.adminlaw.org.uk/library/publications.php>.

³ Mark Elliott, "Legitimate Expectations: Procedure, Substance, Policy and Proportionality" (2006) CLJ 254, 255.

⁴ Richard Clayton, "Legitimate Expectations, Policy, and the Principle of Consistency" (2003) 62 CLJ 93.

⁵ *Ibid.* at p. 104.

binding a public body to exercise its discretion in some way. Our argument draws primarily on case law, and also on work in legal philosophy.

II. Content, Origin, Protection

Suppose that a public body promises that you will be granted unemployment benefits if you lose your job. When you do lose your job, the public body denies you the promised benefits. If you sought the law's protection under the doctrine of legitimate expectations, what issues would arise? Commentators and courts divide the relevant issues differently, so we will begin by clarifying how we understand them.

There are four main issues in the doctrine of legitimate expectations:

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| <i>Content</i> | What may you have a legitimate expectation to? |
| <i>Origin</i> | What generates a legitimate expectation? |
| <i>Conditions of Protection</i> | Under what conditions will the law protect your legitimate expectation? |
| <i>Manner of Protection</i> | In what manner will the law protect your legitimate expectation? |

In our example, a court would first decide whether the provision of unemployment benefits by the public body in question is the kind of thing to which you could have a legitimate expectation. If it were, the court would consider what could generate a legitimate expectation – what we will sometimes refer to as the origin or ‘grounds’ of legitimate expectations – so as to determine the relevance of the public body’s promise. Assuming these first two hurdles were cleared, you would have a legitimate expectation to the promised benefits, and the court would then need to decide whether your expectation warranted protection, and if so, the manner in which it ought to be protected.

This paper is about what generates legitimate expectations, but let us first say something more about the content and protection of legitimate expectations. With respect to content, a legitimate expectation is always an expectation that a public body will exercise its discretionary powers in some way, either by following a certain procedure (‘procedural expectation’) or by making a certain substantive decision (‘substantive expectation’). The expectation must be one the public body could lawfully fulfill⁶ (it must be *intra vires*) and one that a court would be in a position to protect⁷. In our example, so long as it was within the public body’s lawful discretion whether to provide you with unemployment benefits, you could have a legitimate expectation to those benefits.

With respect to protection, we agree with Paul Craig that a legitimate expectation usually, though not necessarily, entitles you to the law’s protection if that

⁶ See, e.g., *R (Bibi) v London Borough of Newham* [2001] EWCA Civ 607 and *R v Secretary of State for Education, ex p Begbie* [2000] 1 WLR 1115.

⁷ *R v Environment Secretary, ex p Hammersmith and Fulham LBC* [1991] 1 AC 521; *Wheeler v Office of the Prime Minister* [2008] EWHC 1409. See also: Timothy Endicott, *Administrative Law*, 2nd ed., (Oxford 2011), pp. 285-286: ‘There is no legitimate expectation, unless a court is in a position to decide that it would be an abuse of power to disappoint the expectation’.

expectation is disappointed.⁸ Whether a legitimate expectation warrants protection is a highly context-sensitive determination: it depends on factors such as the importance of discretionary freedom for a public body, whether an issue is ‘macro-political’⁹, the size and finiteness of the class of individuals affected by a public body’s decision¹⁰, an applicant’s degree of reliance¹¹, security concerns¹², and other matters of public policy. Of the expectations that warrant protection, procedural expectations warrant procedural protections (e.g., a hearing), and substantive expectations warrant either procedural or substantive protections. Recently, there has been a great deal of interest among commentators in the substantive protection of substantive expectations.¹³ That is not our present topic, however.

With these clarifications in place, we turn now to the specific ways a legitimate expectation may be generated.

III. Promises, Practices, Policies

The term ‘legitimate expectation’ can be misleading, in two ways.¹⁴ First, to have a legitimate expectation, in an administrative law-sense, is not to have an expectation that is reasonable or justified or even legitimate, as these terms are ordinarily used. So we will not undertake an analysis of the conditions under which we would normally say that an expectation is, say, reasonable. That could be worthwhile for other reasons¹⁵, but it would not tell us about what generates a legitimate expectation.

The second way in which the term ‘legitimate expectation’ can be misleading is that to have a legitimate expectation to an exercise of discretion, in an administrative law-sense, you need not actually *expect* that exercise of discretion.¹⁶ Even those who think

⁸ Paul Craig, “Substantive Legitimate Expectations in Domestic and Community Law” (1996) 55 CLJ 289. We follow Craig’s approach because it seems conceptually clear and consistent with the recent case law. An alternative perspective is that you have a legitimate expectation only if the law will offer you its protection. See, e.g., *R v. Ministry of Agriculture, Fisheries and Food, ex p Hamble (Offshore) Fisheries Ltd* [1995] 2 All ER 714, 732 (Sedley J) and Philip Sales and Karen Steyn, “Legitimate Expectations in English Public Law: An Analysis” (2004) PL 564. Someone who prefers this alternative should treat our project as an attempt to determine the other conditions for having a legitimate expectation.

⁹ *R (Abdi & Nadarajah) v Secretary of State for the Home Department* [2005] EWCA Civ 1363 [69].

¹⁰ Rebecca Williams and Christopher Forsyth, “Closing Chapter in the Immigrant Children Saga: Substantive Legitimate Expectations and Administrative Justice in Hong Kong” (2002) 10 Asia Pacific Law Review 43; *R (Abdi & Nadarajah) v Secretary of State for the Home Department* [2005] EWCA Civ 1363 [69]; *R v Secretary of State for Education, ex p Begbie* [2000] 1 WLR 1131

¹¹ *R (Abdi & Nadarajah) v Secretary of State for the Home Department* [2005] EWCA Civ 1363 [69]; *R v Secretary of State for Education, ex p Begbie* [2000] 1 WLR 1124.

¹² *Council of Civil Service Unions v. Minister for the Civil Service* [1985] AC 374, 401: ‘The next question, therefore, is whether it has been shown that consideration of national security supersedes the expectation’.

¹³ See, e.g., Paul Craig and Soren Schönberg, “Substantive Legitimate Expectations after Coughlan” (2000) PL 684 and Craig, “Substantive Legitimate Expectations in Domestic and Community Law”, *op cit*.

¹⁴ Endicott *op. cit.*, pp. 283, 285.

¹⁵ For example, the reasonableness of an expectation (in an ordinary sense) could count as evidence of the existence of one of the grounds of a legitimate expectation, such as a promise. We thank [omitted for peer review] for mentioning this possibility to us.

¹⁶ Endicott, *op. cit.*, pp. 296-297; *R (Abdi & Nadarajah) v Secretary of State for the Home Department* [2005] EWCA Civ 1363, [38]; Richard Clayton, “Legitimate Expectations, Policy, and the Principle of Consistency” (2003) 62 CLJ 93. This was not always the case. It was only recently, in *R (Rashid) v Home Secretary* [2005] EWCA Civ 744 that the Court of Appeal held that the doctrine had developed to the point that a public body could be obligated to treat a claimant in a way he or she had no prior expectation of being treated. In that case, an Iraqi Kurd’s asylum application was rejected because he could safely relocate to the Kurdish

that an actual expectation is necessary for a 'legitimate expectation'¹⁷ recognize that an expectation is not sufficient for one. In order to understand the doctrine we still need to know what conditions an expectation must meet to become a 'legitimate expectation'.

So whether there is a legitimate expectation, in the law's eyes, is not ultimately a matter of what is legitimate or justified or even necessarily of what is expected. What, then, is it a matter of? In *Council of Civil Service Unions v Minister for the Civil Service*¹⁸ ('the *GCHQ* case'), Fraser LJ identified two sources of a legitimate expectation: an 'express promise given on behalf of a public authority' and 'a regular practice which the claimant can reasonably expect to continue'.¹⁹ The *GCHQ* case serves as an example of a practice generating a legitimate expectation. By unilaterally prohibiting a group of civil servants from belonging to trade unions, the government broke with the 'invariable rule'²⁰ of first conducting consultations when conditions of service were to be significantly altered. Had it not been for overriding national security considerations, arising from the nature of the civil servants' work, the government's action would have been unlawful.

The classic case of a promise generating a legitimate expectation is *Attorney-General of Hong Kong v Ng Yuen Shiu*²¹. The Hong Kong government had promised to decide whether to deport illegal immigrants by considering the merits of each case. The promise gave the claimant in this case a legitimate expectation that he would be able to put his case forward. When he was not given this opportunity, the deportation order issued against him was quashed. In the recent case *R v North and East Devon Health Authority, ex p Coughlan*²², a health authority promised Miss Coughlan that she would have a home for life in a new nursing facility if she agreed to move there from the hospital where she had been living for the previous 20 years. The promise gave Miss Coughlan the legitimate expectation that she could remain in the facility and made the decision to move her again five years later unlawful.

Along with promises and practices, *policies* are an established way of generating legitimate expectations.²³ A policy can create a legitimate expectation that a change in policy will not apply to certain people, or that an existing policy will be followed in a particular case. *R v Home Secretary, ex p Khan*²⁴ is an example of the latter type. In that case, the Court of Appeal quashed the Home Office's refusal to admit the nephew of a

autonomous zone. Unbeknownst to the applicant, the Home Office had a policy against basing asylum decisions on this ground. The decision to reject the application violated the applicant's legitimate expectations, notwithstanding he had no actual expectation that the policy would be applied to him. See also *Minister of State for Immigration and Ethnic Affairs v. Teoh* [1995] HCA 20; *R v Secretary of State for Wales, ex p Emery* [1996] 4 All ER 1, 16-17; *R v Secretary of State for the Home Department, ex p Ahmed and Patel* [1998] INLR 570, 591.

¹⁷ For criticism of the lack of a knowledge requirement, see Mark Elliott, "Legitimate Expectations and the Search for Principle: Reflections on *Abdi & Nadarajali*" (2006) 11 JR 281; Mark Elliott, "Legitimate Expectations, Consistency, and Abuse of Power: the *Rashid* Case" (2005) 10 JR 281; William Wade and Christopher Forsyth, *Administrative Law* (10th edn, OUP 2009) 452; *Re Minister for Immigration and Multicultural Affairs ex p Lam* (2003) 214 CLR 1, [43].

¹⁸ *Council of Civil Service Unions v. Minister for the Civil Service* [1985] AC 374.

¹⁹ *Ibid.*, at p. 401B (emphasis added); also 408-409 (Lord Diplock). For a similar statement, see *Re Westminster City Council* [1986] AC 668, 692.

²⁰ *Council of Civil Service Unions v. Minister for the Civil Service* [1985] AC 374, 401B.

²¹ *Attorney-General of Hong Kong v Ng Yuen Shiu* [1983] 2 AC 629 (PC).

²² *R v North and East Devon Health Authority, ex p Coughlan* [2001] QB 213 (CA).

²³ See, generally, Robert Baldwin and John Houghton, "Circular Arguments: The Status and Legitimacy of Administrative Rules" (1986) PL 239; Richard Clayton, "Legitimate Expectations, Policy, and the Principle of Consistency" (2003) 62 CLJ; Yoav Dotan, "Why Administrators Should be Bound by Their Own Policies" (1997) 17 OJLS 23.

²⁴ *R v Home Secretary, ex p Khan* [1984] 1 WLR 1337 (CA).

Pakistani already settled in Britain. The Home Office had issued a circular setting out the conditions that had to be met for admission, but then refused admission on other grounds. According to Dunn LJ, the Home Secretary ‘in effect made his own rules, and stated those matters which he regarded as relevant and would consider in reaching his decision’, but then ‘misdirected himself according to his own criteria’.²⁵

Courts and commentators sometimes suggest that a policy is a type of promise, and thus that policies and promises are not in fact distinct ways of generating legitimate expectations.²⁶ We think this distorts the nature of policies and promises. For one thing, ordinary usage suggests there is a difference. A policy of going to the gym every morning is not, for instance, naturally described as a promise to go to the gym every morning. Further, promises are generally bilateral, unlike policies. We typically make promises to others, whereas there is nothing unusual about having a policy purely for yourself. Finally, a promise always creates a duty or obligation to act in accordance with the promise, but adopting a policy does not.²⁷ It may be that, in virtue of your policy, you ought to go to the gym every morning; but it will not be your duty to go. There are other differences between policies and promises, some of which we address below.²⁸

IV. The Question

So we conclude there are three ways of generating legitimate expectations: promises, practices, and policies. But why these things, and only them? What unites promises, practices, and policies, on the one hand, and distinguishes them from other ways of gaining the law’s protection, on the other? If the answer is ‘nothing at all’, then there is nothing that explains why legitimate expectations arise in some cases but not others. There are simply several ways of arguing for the law’s protection, which, for no principled reason, fall under the same heading. This is the pessimistic conclusion some commentators tend towards.²⁹ It has a stark implication: we should, in the interests of simplicity, abandon talk of ‘legitimate expectations’ and treat a public body’s promises, practices, and policies separately.

We will argue this is altogether too gloomy. There is a good answer to the question posed. Before we put forward our own views, we will consider two tempting, but inadequate, accounts that might be thought to place the doctrine of legitimate expectations on a coherent foundation.

V. Representations

There is what might be regarded as a ‘commonsense’ account of the doctrine. It goes like this. The doctrine of legitimate expectations is essentially about getting public bodies to do what they said they would do. That is why promises, practices, and policies matter so much. By making a promise or policy, or by engaging in a practice, a public body

²⁵ Ibid., at p. 1352.

²⁶ Sometimes they are both treated as representations: *R v North and East Devon Health Authority, ex p Coughlan* [2001] QB 213 (CA) [57]; *R v Devon County Council, ex p Baker and another*, [1995] 1 All ER 73, 88. The three grounds – promises, policies, practices – are mentioned separately in other cases, e.g., *R v. Ministry of Agriculture, Fisheries and Food, ex p Hamble (Offshore) Fisheries Ltd* [1995] 1 C.M.L.R. 533 at [42].

²⁷ See text at note **Error! Bookmark not defined.** below.

²⁸ For example, policies are themselves rules, whereas a promise is a means of making applicable a rule. See text at note 41-**Error! Bookmark not defined.** below.

²⁹ See notes 1-3 above.

represents an intention to act in some way. There is then a *prima facie* case for requiring the public body to act in the way it represented it would. In other words, legitimate expectations are generated by a public body's representations as to its future intentions, and promises, practices, and policies are the specific ways a public body represents its intentions. Call this the *representation account*.³⁰ The representation account has its strengths. That public bodies should do what they represented they would do is certainly plausible. The weakness of the account is that, although promises are representations, practices and some policies are not.

Take policies first. A *publicized* policy may amount to a representation³¹, but an *unpublicized* policy surely does not. An unpublicized policy lacks the element of presentation or promulgation essential to a representation. Yet, according to *R (Rashid) v Home Secretary*³², unpublicized policies *are* capable of generating a legitimate expectation.³³ So the representation account says that legitimate expectations cannot arise where, in fact, they do. There are two likely responses. The first is to reject *Rashid* as wrongly decided and to argue that only publicized policies (and hence only policies that are representations) generate legitimate expectations. The second response is more ambitious. Policies are a recent addition to the doctrine of legitimate expectations. There have always been questions about whether they really belong. Perhaps a defender of the representation account would seek to excise policies from the doctrine entirely.³⁴ Better late than never, this response goes. We do not find either response compelling: there are conflicting opinions about *Rashid*, and excising policies is premature if the coherence of the doctrine can be established in a way that accommodates policy cases, as we will argue it can. In any case, there is another problem with the representation account, arising from the nature of practices.

The representation account says that a public body's consistent practice of exercising its discretion in some way may amount to a representation of an intention to continue acting in the same way. The trouble here is that this reads far more into a pattern of behaviour than is normally justified. Suppose you always mount your bicycle from the left, or always pick up the knife before the fork when you start a meal. Because your behaviour is consistent, it is *predictable*. It would be a good bet that you will pick up your knife first at your next meal, say. But what is predictable is not necessarily what is *represented as intended*. You have not represented an intention to continue picking up your knife first. (If you had we would think you irrationally failed to follow through on a plan of yours if one day you picked up the fork first – which clearly we would not.) And there is no reason to think public bodies are any different: the past exercise of discretion is an indication of its future exercise, not of what is intended. The representation account seems to be built on a confusion.

So the representation account is under-inclusive, in two ways. It does not extend to practices cases, and (if *Rashid* was correctly decided) it does not extend to all policy

³⁰ *R (Abdi & Nadarajah) v Secretary of State for the Home Department* [2005] EWCA Civ 1363 [68]: '[W]here a public authority has issued a promise or adopted a practice which *represents how it proposes to act* in a given area, the law will require the promise or practice to be honoured unless there is a good reason not to.' See also: *R v. Ministry of Agriculture, Fisheries and Food, ex p Hamble (Offshore) Fisheries Ltd* [1995] 2 All ER 714 at [42]-[43].

³¹ *R v North and East Devon Health Authority, ex p Coughlan* [2001] QB 213 (CA), [57]; *R v Devon County Council, ex p Baker and another* [1995] 1 All ER 73, 88. See also: Jack Watson, 'Clarity and Ambiguity: A New Approach to the Test of Legitimacy in the Law of Legitimate Expectations' 30 *Legal Studies* 633, 634, 637.

³² *Home Secretary v Rashid* [2005] EWCA Civ 744.

³³ Regarding the unpublicized nature of the policy, see: *ibid.*, at para [2]: 'There was in existence – it is too much to say that there had been promulgated – a policy of the Secretary of State which ... should have been applied to the claimant'.

³⁴ Richard Clayton, 'Legitimate Expectations, Policy, and the Principle of Consistency' (2003) 62 *CLJ* 93

cases. Saving the representation account would mean excising not only some policy cases but also practice cases, and at that point the representation account becomes a disguised proposal to disaggregate the doctrine.

VI. Fairness

An alternative to the representation account of the doctrine could start with normative considerations. It might be that there is a distinctive reason or justification for requiring a public body to do what it promised to do, or what it had a policy or practice of doing. If there was such a justification, it might unite the various ways of generating a legitimate expectation and distinguish them from other ways of gaining the law's protection. It might establish the coherence and distinctiveness of the doctrine of legitimate expectations. What could this justification be? Fairness is the normative concept most closely associated with the doctrine of legitimate expectations. According to Lord Bingham, the doctrine is 'rooted in fairness'³⁵. Lord Roskill said that the *GCHQ* case was 'vitally concerned with ... the duty to act fairly'³⁶. Call the *fairness account* the idea that promises, practices, and policies generate legitimate expectation because of their relationship to fairness.

The trouble with the fairness account is fairness itself: it is too widely relevant. Lord Steyn went so far as to say that fairness 'is the guiding principle of our public law'³⁷. Fairness is relevant in legitimate expectation cases, but it is relevant in other kinds of cases, too. Fairness favours keeping a promise and, at least sometimes, following through on a policy or practice. But it also favours other things – impartial decision-making, say – which play no part in the doctrine. Its promiscuity makes fairness incapable of explaining why legitimate expectations arise in some cases but not others.³⁸ Essentially the same objection could be made against accounts based on the other main justifications for protecting legitimate expectations, discussed in Section VII(F), below. Legitimate expectations are often protected in the name of preventing abuses of power, for example, but as the 'root concept which governs and conditions our general principles of public law'³⁹, abuse of power is not a narrow enough concept to pick out what is special about legitimate expectation cases.

In summary, whereas the representation account is under-inclusive, accounts based on fairness or abuse of power are over-inclusive. In the next section, we propose an account designed to correct for these shortcomings, one that identifies a feature that legitimate expectation cases share with each other and what other cases do not share with them. We find this feature in the way that promises, practices, and policies each relate to a special kind of rule.

³⁵ *R. v IRC ex parte MFK Underwriting* [1990] 1 All ER 91, 111.

³⁶ *Council of Civil Service Unions v. Minister for the Civil Service* [1985] AC 374, 415.

³⁷ *R (Anufrijeva) v Home Secretary* [2004] 1 A.C. 604, [30].

³⁸ A point well made by Paul Reynolds, "Legitimate Expectations and the Protection of Trust in Officials" (2011) PL 330.

³⁹ *R v Secretary of State for Education, ex p Begbie* [2000] 1 WLR 1129 (Laws LJ).

VII. Rules and Legitimate Expectations

A. Moral and Prescribed Rules

That legitimate expectations are associated with rules is easiest to show in the case of promises. There is a moral rule that requires promises to be kept.⁴⁰ If you promise to meet a friend for lunch, you thereby come under a rule-based requirement to do as you promised and meet your friend. Likewise, if a public body promises to follow a procedure or make a decision, it triggers the application of the promise-keeping rule, and thereby becomes required to fulfill that promise.⁴¹ In *Ng Yuen Shin*, for example, the Hong Kong government's promise to consider the cases of illegal immigrants on their merits triggered the application of the promise-keeping rule, generating a requirement that it consider the immigrants' cases on their merits.

Whereas promises trigger the application of a rule, policies are *themselves* rules. It is true that policies are not bilateral, as promises are; and they do not generate obligations to others, as promises do. But these are not essential features of a rule. The essential feature of a rule is that it is supposed to guide conduct and serve as the basis for evaluation or criticism (including self-evaluation and self-criticism).⁴² This is the function of a policy, too. If you have a personal policy not to mark late papers, you will not typically stop to consider whether to mark *this* late paper; you will take the policy as your guide and set the paper aside. If a government agency has a policy to make decisions on a certain basis, its officials will generally treat it as appropriate to make decisions on that basis, rather than on the full range of factors.⁴³ This way of thinking of policies is in line with academic commentary.⁴⁴ It is also consistent with the case law. For example, the policy in *Khan*, which specified criteria for allowing entry for adoption, was characterized by the Court of Appeal as a 'rule'.⁴⁵ Its effect was to 'bind the decision-makers as to the matters that could relevantly be taken into account'⁴⁶.

To be clear, administrative policies are not legal rules, any more than the promise-keeping rule is a legal rule. These are non-legal rules capable of having legal consequences, including consequences for the legal rights of individuals in situations in which public bodies break their promises, or seek to depart from their policies.

⁴⁰ See, e.g., Joseph Raz, "Promises and Obligations" in Peter Hacker and Joseph Raz (eds.), *Law, Morality and Society: Essays in Honour of H.L.A. Hart* (Oxford 1977), pp. 219 ff. and John Rawls, "Two Concepts of Rules" (1955) 64 *Philosophical Review* 3, 13.

⁴¹ As we discuss later, this rule-based requirement is not absolute: see text at note 78 below.

⁴² Scott Shapiro, *Legality* (Harvard University Press 2011) 41. See also: Robert Baldwin, *Rules and Government* (2nd edn, OUP 1995) 6-7; Frederick Schauer, *Playing by the Rules* (OUP 1991) 2.

⁴³ The constraining effect of policies is, in part, what explains the tension between the doctrine of legitimate expectations and the rule against fettering discretion. See text at note 90-93 below.

⁴⁴ See, e.g., Yoav Dotan, "Why Administrators Should be Bound by Their Own Policies" (1997) 17 *OJLS* 23, 26 ('policies are rules which are developed by authorities in areas in which discretionary powers are exercised'); Joseph Raz, *Practical Reason and Norms* (rev. edn., OUP 1990) 71-72; Scott Shapiro, *Legality* (Harvard University Press 2011) 127-128.

⁴⁵ *R v Home Secretary, ex p Khan* [1984] 1 WLR 1337 (CA), 1352.

⁴⁶ Robert Baldwin and John Houghton, "Circular Arguments: The Status and Legitimacy of Administrative Rules" (1986) PL 253, 254.

B. Social Rules

The connection between promises and policies and rules is clear. Practices offer a more interesting case. Here is how Sedley LJ contrasts the grounds of legitimate expectations in *R v Ministry of Agriculture, Fisheries and Food, ex p Hamble (Offshore) Fisheries Ltd*:

[W]here the expectation is based upon practice, the issue is more elusive [than when the government has made a promise]. A promise is, precisely, a representation about future conduct, making it relatively straightforward to decide whether the promisor should be held to it. Practices may, but do not necessarily, have the same character.⁴⁷

Sedley LJ claims that practices do not always give rise to legitimate expectations, as promises (and policies) do. We agree, and we think the explanation is that the practices that give rise to legitimate are of a special type. They are practices that are also *social rules*. Social rules are rules that emerge from patterns of actions and attitudes in a society or group. This distinguishes them from both enacted rules, which are deliberately created, and moral rules, which exist regardless of what people do or think. Social rules include everyday rules such as the rules of etiquette, as well as rules of more interest to legal scholars, such as constitutional conventions⁴⁸ and the ultimate ‘rule of recognition’ in a legal system.

The best-known theory of social rules is HLA Hart’s *practice theory*.⁴⁹ The practice theory says that a social rule consists of a social practice with two aspects. The first is an external, behavioural aspect. For there to be a social rule, there must be a pattern of conduct. There must be more besides, though, otherwise social rules would be mere ‘habits’ or ‘customs’.⁵⁰ The second aspect is internal and attitudinal. The group’s members must take the pattern of conduct as a ‘guide’ to behaviour and as a ‘standard’ of conduct.⁵¹ This means they must be committed to maintaining this pattern, both by contributing to it themselves and by encouraging others to do so.

The practice theory is able to account for at least most social rules. Consider that in over 300 years royal assent has never been withheld from a bill duly passed by Parliament. This is not a mere habit. Constitutional actors treat the pattern of royal assent being granted as a standard for future conduct. They urge its continuation and discourage deviations from it. The external aspect is present; the internal aspect is present; hence, according to the practice theory, there is a rule that royal assent must be granted. And that is exactly right: there is a constitutional convention (and thus a type of social rule) that requires royal assent to be granted.

There are two preliminary points to make about the practice theory. First, the theory places no restriction on the size of the group in which a social rule may exist. There are social rules that exist in small communities, like the rules that exist among teammates or officemates. There are even rules that exist between two people, such as next-door neighbours. These ‘micro-social rules’ are the social rules that concern us here. Second, although the practice theory is open to criticism on some grounds, it remains

⁴⁷ *R v. Ministry of Agriculture, Fisheries and Food, ex p Hamble (Offshore) Fisheries Ltd* [1995] 1 C.M.L.R. 533, 550.

⁴⁸ Joseph Jaconelli, “The Nature of Constitutional Conventions” (1999) 19 *Legal Studies* 24. See also Dennis Lloyd, *The Idea of Law*, (London 1964), pp. 247-248 and AD Woosley, “The Existence of Rules” (1967) 1 *Nous* 63.

⁴⁹ HLA Hart, *The Concept of Law*, 2nd ed., (Oxford 1994), pp. 8-10, 55-57, 255-256.

⁵⁰ *Ibid.*, pp. 9, 55.

⁵¹ *Ibid.*, pp. 56-57, 256.

the dominant theory of social rules in jurisprudence.⁵² Certainly there is a consensus that something like it captures the essence of social rules. Nothing crucial in our discussion hinges on the details of the practice theory beyond this consensus, so we will assume its correctness in what follows.

What, then, does the practice theory tell us about legitimate expectations? Are the practices that give rise to legitimate expectations mere habits, or are they social rules? In *R v Brent LBC, ex p Gunning*⁵³, a local education authority was held to have acted unlawfully by proceeding with the reorganization of educational arrangements without first consulting parents in the area, contrary to established practice. The first condition of the practice theory was clearly met: parents were regularly consulted before major changes were made to the educational arrangements in their area. Just as clearly, this was no mere habit. All parties looked upon the practice of conducting consultations as both appropriate and important. Parents had a recognized interest in the educational arrangements made for their children and they advocated for consultation rights. Meanwhile, according to Hodgson J, '[l]ocal education authorities [were] exhorted by the Secretary of State to consult, and the results of the consultations [were] something which he [took] into account'⁵⁴. Thus, there was a pattern of consultation that the parties were committed to maintaining.⁵⁵ Together, this pattern and the parties' attitudes comprised the kind of social practice that Hart calls a social rule.

*R v Inland Revenue Commissioners, ex p Unilever plc*⁵⁶ provides a more detailed example. The Inland Revenue had the discretion to accept claims for tax relief made outside the statutory two-year time limit. On at least 30 occasions, the Inland Revenue exercised that discretion in favour of Unilever. Unilever would submit an estimate of its taxable profits within the deadline, and after a delay it would submit its final calculation, which the Inland Revenue would accept. This arrangement went on harmoniously for 25 years. Then, without warning, the Inland Revenue enforced the time limit in a year in which Unilever had, once again, submitted a late claim for tax relief in accordance with the previous practice. The Inland Revenue's decision would have deprived Unilever, 'an honest and compliant tax payer'⁵⁷, of £17 million of tax relief, while providing the Inland Revenue with an 'adventitious windfall'⁵⁸. Unilever successfully challenged the lawfulness of the Inland Revenue's decision.

When we apply the practice theory to the facts in *Unilever*, it is easy to see that there was a pattern of behaviour between Unilever and the Inland Revenue. Unilever would submit a late return and the Inland Revenue would (almost invariably) accept it. This was not a mere coincidence of habits either. Instead, the pattern grew on itself over time. Past interactions formed the basis for future interactions, solidifying the understanding between Unilever and the Inland Revenue. There arose, in the words of Simon Brown LJ, a 'scheme of close cooperation'⁵⁹, which was 'faithfully followed'⁶⁰ by

⁵² Some of the best-known criticisms were made by Ronald Dworkin in his 'Model of Rules I' and 'Model of Rules II', both in *Taking Rights Seriously*, (Harvard 1978), and by Joseph Raz in *Practical Reason and Norms*, 2nd ed., (Princeton 1990) 49-58.

⁵³ *R v Brent LBC, ex p Gunning* [1985] 84 LGR 168 (QB).

⁵⁴ *Ibid.*, at p. 179.

⁵⁵ Does the fact that the rule was not followed in *Gunning* indicate a lack of commitment to continue the pattern of consultation? Not necessarily, because social rules can be broken, even by those who contribute to the rule's internal aspect.

⁵⁶ *R v Inland Revenue Commissioners, ex p Unilever plc* [1996] STC 681 (CA).

⁵⁷ *Ibid.*, at p. 691.

⁵⁸ *Ibid.*, at p. 691.

⁵⁹ *Ibid.*, at p. 696.

both parties, year after year. What the parties were faithfully following, we think, was a norm, a 'micro-social rule', that had arisen between them. In the same way that long practice forms a guide to future conduct in the constitutional context, the long interaction between Unilever and the Internal formed the basis of a standard against which the two parties' conduct could be measured.

*R v British Coal Cpn, ex p Vardy*⁶¹, provides another 'classic example of legitimate expectation'⁶². In 1985, the National Coal Board created a procedure by which it could consult mining unions regarding the closure of collieries. In 1992, the Board ordered the closure of 10 collieries and made clear that it would not follow the consultation procedure, which would have required it to order an independent review. The unions successfully argued that the decision frustrated their legitimate expectation. In the unions' favour was 'the fact that the [consultation] mechanism had been constantly used'⁶³. Also, the Board had previously accepted that it was 'clearly appropriate'⁶⁴ to follow the consultation procedure, and that consultation was 'in accordance with the understandings reached'⁶⁵ with the unions. Hidden J concluded that by such statements the Board was 'indicating to the [mining] unions its commitment to the continuation of the ... procedure'⁶⁶, which 'entitled [them] to continue with the belief that the [Board's] attitude to the review procedure had not changed'⁶⁷.

There are good reasons for thinking that *Gunning*, *Unilever*, and *Vardy* are typical cases and that in general the practices that generate legitimate expectations are also social rules that exist between public bodies and private parties. For one thing, courts and commentators often say that the practices that generate legitimate expectations are ones that amount to a 'commitment'⁶⁸ to continue to act in some way. Habits do not involve such a commitment, but the practices that constitute social rules do. A commitment to the maintenance of a pattern of conduct is part of what defines the 'internal aspect' of a social rule. Another consideration is the normativity of the practices that generate legitimate expectations. If a public body disappoints your legitimate expectation, you have been treated in a way that is *prima facie* unfitting or improper. You may not be entitled to the law's protection, but not everything is as it should be. This is like a deviation from a social rule, but unlike a deviation from a habit. Deviating from a habit or custom may be peculiar, but it is not objectionable. Deviating from a social rule is by nature inappropriate behaviour for those to whom the rule applies. It was inappropriate for the Internal Revenue to refuse Unilever's late claim without notice, for example, and it was inappropriate for the educational authority in *Gunning* to suddenly stop consulting parents on arrangements for their children.

That social rules are capable of generating legitimate expectations is consistent with the dynamic nature of such expectations. Conduct that was once highly predictable may become irregular, and patterns that were once treated as standards of conduct may come to be seen as mere habits. The gradual emergence and decay of social rules is

⁶⁰ Ibid., at p. 696.

⁶¹ *R v British Coal Cpn, ex p Vardy* [1993] ICR 720 (QB).

⁶² Ibid., at p. 758 (Glidewell LJ).

⁶³ Ibid., at p. 758 (Glidewell LJ).

⁶⁴ Ibid., at p. 763 (Hidden J).

⁶⁵ Ibid., at p. 763 (Hidden J).

⁶⁶ Ibid., at p. 764 (Hidden J).

⁶⁷ Ibid., at p. 764 (Hidden J).

⁶⁸ *R (Bibi) v London Borough of Newham* [2001] EWCA Civ 607 [19]; *R (Davies and Gaines-Cooper) v HM Revenue and Customs* [2011] UKSC 47 [2011] 1, [49]

noticeable in other contexts, including the constitutional context.⁶⁹ In the administrative context, the decay of a social rule would have the result of ending any corresponding legitimate expectation.⁷⁰

In this section and the last, we argued that there is a legitimate expectation that a public body will provide some benefit or procedure only if it is required to provide it by a rule. The rule may exist independently of what people do or think, as in the case of the promise-keeping rule. It may be deliberately created, as in the case of a policy. Or it may grow out of patterns of interactions and inclinations, as in the case of a social rule. The mode of origin differs, therefore, but in all cases the rule is non-legal and its existence or its application depends on the actions of the relevant public body. We now want to discuss another feature these rules share, namely, their dependence on the goals of public bodies.

C. Goal-Dependence

Some rules depend for their validity or justification on how well they serve their subjects' goals, whereas other rules are justified on other bases. The rules that generate legitimate expectations are of the first sort; they are *goal-dependent*. Take the promise-keeping rule. This rule is goal-dependent because 'the justification for individuals having the power to create ... duties is something that can be plausibly explained by reference to the way having such power serves their goals'.⁷¹ People's goals, including the goal of forming special relationships with others, are furthered if they have the capacity to bind themselves to a course of conduct under certain conditions. The promise-keeping rule helps them to do so.

Policies are likewise goal-dependent rules. You might have a policy never to drive after drinking, designed as a way of avoiding alcohol-affected case-by-case determinations of the appropriateness of driving. This would be a rule 'designed to remedy a [deficiency] which every rational person wants to remedy'⁷², making it a goal-dependent rule. Similarly, whether a public body is justified in adopting a certain policy depends on how well that policy helps the public body to discharge its statutory duties fairly and efficiently, and therefore to achieve a goal that all public bodies have or should have.

Turning to the practices that generate legitimate expectations, the Internal Revenue's practice of accepting Unilever's late claims 'fully met the needs of each and achieved for the Revenue not merely as much but in truth substantially more than they would have achieved had Unilever formally complied with the time limit'⁷³. The practice in fact served the Internal Revenue's goals. Moreover, that fact was the justification for the development of the practice in the first place. Similarly, in *Vardy*, the National Coal Board's practice of consulting the mining unions on colliery closures was held to be justified as a matter of mutual interest to the board and its employees⁷⁴.

⁶⁹ See, e.g., Geoffrey Marshall's discussion of the evolution of the constitutional conventions regarding individual ministerial responsibility and the entitlement to request a dissolution of parliament: *Constitutional Conventions*, (Oxford 1984), ch. 3-4.

⁷⁰ We thank [omitted for peer review] for alerting us to this implication of our argument

⁷¹ Leslie Green, "Law, Legitimacy, and Consent" (1989) 62 S Cal L Rev 795.

⁷² Joseph Raz, "Promises and Obligations" in Peter Hacker and Joseph Raz (eds.), *Law, Morality and Society: Essays in Honour of H.L.A. Hart* (Oxford 1977), pp. 224.

⁷³ *R v Inland Revenue Commissioners, ex p Unilever plc* [1996] STC 696 (CA).

⁷⁴ *R v British Coal Cpn, ex p Vardy* [1993] ICR 729 (Glidewell LJ).

Some rules are goal-independent and others are goal-dependent. In the same way, some rules impose obligations and others do not. With one exception, these distinctions correspond to one another. That is to say, in general, goal-independent rules impose obligations whereas goal-dependent ones do not.⁷⁵ Joseph Raz explains:

[O]bligatory acts are required by mandatory rules Not all mandatory rules, though, impose obligations. Many of them apply only to persons who pursue certain goals and are binding on them because they help to promote those goals. ... Obligations [in contrast] derive from consideration of values independent of the person's own goals⁷⁶

The promise-keeping rule is the sole exception. It is both goal-dependent and obligation-imposing.⁷⁷ When you promise to do something, you incur an obligation. When a public body makes a promise, it is obligated to fulfill that promise. Things are different when the public body creates a policy or engages in a social rule-generating practice. The policy or practice is a reason for an action, but it does not create an obligation. Thus, the rules that generate legitimate expectations vary in that some give rise to obligations and others do not. They have in common that they are the means by which public bodies bind themselves.

To be clear, what we claim is that a public body's policies and practices do not *themselves* impose obligations. It is part of the doctrine of legitimate expectations that, under certain circumstances, a public body is under a legal obligation to follow certain of its policies or to continue in certain of its practices. In that case there is a *legal* obligation imposed by a *legal* rule.

D. The Rule-Based Account

We have said that whenever a legitimate expectation has been generated, a public body has acted in such a way that it is required by a non-legal and goal-dependent rule to exercise its discretion in some way. What about the converse case? That is to say, if a public body is required to exercise its discretion in some way by a non-legal, goal-dependent rule, do you have a legitimate expectation to that exercise of discretion? We think so. The reason is that it is difficult to imagine a rule that could serve as a counterexample. We have accounted for social rules and for rules that a public body deliberately creates. We have accounted for the rules that structure voluntary obligations. What other kind of rules could have something to say about how a public body should exercise its discretion? This is not the typical province of religious or moral rules or the rules of games or anything similar; and legal rules are clearly not relevant.

So we conclude that you have a legitimate expectation if and only if a public body is, in virtue of its actions, bound by a non-legal and goal-dependent rule to exercise its discretion in some way. What we really want to know, though, is whether this is mere coincidence. Is a public body coming under this kind of requirement ultimately what generates a legitimate expectation? Is it what explains why there is a legitimate expectation in some cases but not others? What we call the *rule-based account* answers 'yes'.

⁷⁵ Raz, op. cit., pp. 223; Green, op. cit., pp. 798-799.

⁷⁶ Raz, op. cit., pp. 224.

⁷⁷ Raz, op. cit., pp. 224 ('[v]oluntary obligations are the one exception to the rule that rules facilitating realization of the agent's goals do not impose obligations').

It says that promises, practices, and policies generate legitimate expectations because they are all ways a public body binds itself with a non-legal and goal-dependent rule.

The adequacy of the rule-based account should be measured by its consistency with the law, simplicity, explanatory power, and so on. As we have shown, the rule-based account is consistent with the law, which is an advantage it has over both the representation and fairness accounts. It is highly economical, because it explains a variety of cases in terms of a single factor. It is internally coherent. It is the account we are attracted to, and in subsections VII (F) and (G), below, we demonstrate its explanatory power.

First, though, let us reiterate our earlier distinction between the question ‘what generates a legitimate expectation?’ and the question ‘when will the law protect a legitimate expectation?’ We are proposing an answer to the first question. That is a different matter than when legitimate expectations will, or ought to be, protected. However, we allow that a legitimate expectation may be more or less deserving of protection depending on how it was generated. This, as we see it, is the significance of Laws LJ’s remark in *R (Nadarajah) v Secretary of State for the Home Department* to the effect that promises made to individuals are more likely to be enforced than ‘wide-ranging or “macro-political” issues of policy’⁷⁸. It may also be easier for a court to identify a policy or promise than a practice, which could in turn affect the likelihood that an expectation will be protected. Similarly, although reliance is not essential to the generation of a legitimate expectation, it may favour the protection of that expectation, particularly if the reliance is detrimental.⁷⁹

E. Conventions: An Analogy

Earlier we explained that constitutional conventions and the practices that generate legitimate expectations are both varieties of social rules. There is another, broader connection between conventions and legitimate expectations, one that should make the rule-based account seem more familiar.

As is well-known, the conventional rules of the British constitution are non-legal rules. The British constitution also includes legal rules, some of which confer discretionary powers on constitutional actors. The Queen is entitled, legally speaking, to withhold her assent to legislation, to disregard the advice of her ministers, and to appoint a private citizen as Prime Minister. It is within the Queen’s lawful discretion to do these things – but it would be unconstitutional for her to do any of them. That is because the conventional rules of the constitution constrain the exercise of the Queen’s legal powers. The legal rules of the constitution grant the Queen powers; the non-legal rules require her to exercise those powers in certain ways.⁸⁰

⁷⁸ *R (Abdi & Nadarajah) v Secretary of State for the Home Department* [2005] EWCA Civ 1363 [69]; see also Laws LJ’s statements at 69 that under some circumstances the ‘denial of the expectation is likely to be harder to justify’ and ‘the expectation’s enforcement in the courts will encounter a steeper climb’ (emphasis ours).

⁷⁹ *Ibid.*, at para. [69]; Peter Gibson LJ in *R v Secretary of State for Education, ex p Begbie* [2000] 1 WLR 1124: ‘it would be wrong to understate the significance of reliance in this area of the law. It is very much the exception, rather than the rule, that detrimental reliance will not be present when the court finds unfairness in the defeating of a legitimate expectation’ (emphasis ours).

⁸⁰ Dicey was of the view that all conventions were ‘rules for determining the mode in which the discretionary powers of the Crown ... ought to be exercised’. AV Dicey, *An Introduction to the Study of the Law of the Constitution* (Macmillan London 1959) 423. That this ignores the diversity of conventions is well-known. See Marshall, *op cit.*, 4-5.

According to the rule-based account, the doctrine of legitimate expectations involves a similar combination of legal and non-legal rules. Public bodies are granted discretionary powers by legal, often statutory rules, but they are not free to exercise those powers in whatever way they like. Among other constraints, there are non-legal rules that require public bodies to exercise their legal discretion in certain ways. So there are non-legal, rule-imposed constraints on legal, rule-conferred powers in both the constitutional and administrative contexts. There is no special term in constitutional discourse for this kind of constraint, but in administrative law we say there is a legitimate expectation to the required exercise of the discretionary power.

There are, of course, differences between the constitutional and administrative contexts. The most important is that the law usually protects legitimate expectations, but there is no law requiring constitutional actors to comply with constitutional conventions. It is a serious matter to break a constitutional convention, but it is not illegal.⁸¹ Our point is that it is a familiar idea to attach significance to the constraint of legal discretionary powers by non-legal rules. Our account thus highlights an important parallel between two features of public law: constitutional conventions and the doctrine of legitimate expectations.

F. Justifications

We have described how the rule-based account makes sense of the various ways of generating legitimate expectations. As we will briefly indicate in this section, further support for this account is found in its consistency with various commonly-proposed justifications for fulfilling legitimate expectations.

As we said earlier, fairness is probably the main justification for protecting legitimate expectations.⁸² This makes sense on a rule-based account: it seems fair to ask that commitments be kept, including by public bodies. Promises are obviously commitments, as are the rules public bodies create for themselves in the form of policies. Taking the ‘internal attitude’ to a social rule is likewise a way of making a commitment to maintaining the pattern of conduct on which the rule is based.

We also think there is an important element of ‘fair play’ in legitimate expectation cases. Your interaction with a public body is always governed by rules, legal and otherwise. There are rules about what you must do – to gain asylum, avoid deportation, submit a tax form, etc. – and there are rules about what the public body must do and how it must exercise its discretion. It is unfair for the public body to act as if it alone is entitled to ignore the rules governing your interaction. It is unfair in the same way that it is unfair to break the rules of a game while letting others abide by them. In each case there is a double standard, and a lack of reciprocity. In each case the result is unfairness.

There are also instrumental reasons for public bodies to follow their rules, and some of these same reasons favour fulfilling legitimate expectations. For example, like the rule of law, the ‘rule of rules’ facilitates private planning, promotes personal

⁸¹ By which we mean there is no law that requires constitutional actors to do just what constitutional conventions require. The two kinds of requirement may, of course, coincide in particular cases. Indeed, if Dicey is to be believed, the breach of a convention always leads one to violate some legal requirement. AV Dicey, *An Introduction to the Study of the Law of the Constitution* (Macmillan London 1959) 296ff.

⁸² Richard Clayton, “Legitimate Expectations, Policy, and the Principle of Consistency” (2003) 62 CLJ 94; *R v North and East Devon Health Authority, ex p Coughlan* [2001] QB 213 [56], [57].

autonomy, and shows respect for citizens as agents.⁸³ In addition, the rule of rules creates the impression that public bodies will treat individuals ‘straightforwardly and consistently’⁸⁴, which may help to improve public co-operation and administrative efficacy⁸⁵. By binding itself with rules in advance, a public body can make it less likely it will be swayed by political considerations and other irrelevant factors, which makes it less likely the public body will commit an abuse of power.⁸⁶

So the rule-based account can help explain the relevance of several traditional justifications for fulfilling legitimate expectations: fairness, respect, the promotion of good government, and the avoidance of abuses of power.

G. Discretion and Exclusionary Reasons

The rule-based account is capable of explaining another aspect of the doctrine: the tension that exists between it and the rule against fettering discretion.⁸⁷ To show how that is, we first need to introduce Raz’s well-known account of the relationship between rules and reasons.⁸⁸ According to Raz, a rule that requires an action is a reason to perform that action as well as an ‘exclusionary reason’ not to act for at least some competing reasons.⁸⁹ By being excluded, the competing reasons lose their status as a permissible basis for action. The effect of a rule is therefore to limit the grounds on which a subject of the rule may act contrary to it.

Suppose you promise to meet a friend for lunch one day next week. The promise-keeping rule, in conjunction with your promise, excludes certain reasons not to meet your friend (for example, personal convenience). When the day of the lunch arrives, you should not act based on all the reasons for and against meeting your friend; that would not be treating the promise as a promise. Rather, you should make sure that what you do is not influenced by the excluded reasons. In this way, the promise restricts the permissible grounds for failing to meet your friend.

Now consider *Unilever*. Unilever had a legitimate expectation that the Internal Revenue would accept its late claims for loss relief. According to the rule-based account, that means there was a rule requiring the Internal Revenue to accept Unilever’s claims. So, according to Raz’s account of rules, there was a reason that excludes at least some reasons *not* to accept Unilever’s late claims. The Internal Revenue should not have

⁸³ Joseph Raz, *The Authority of Law* (Oxford, 2009) 216. This is also described as the principle of legal certainty: Paul Craig, “Substantive Legitimate Expectations in Domestic and Community Law” (1996) 55 CLJ 304.

⁸⁴ R (*Abdi & Nadarajah*) v *Secretary of State for the Home Department* [2005] EWCA Civ 1363 [68].

⁸⁵ Paul Craig and Soren Schönborg, “Substantive Legitimate Expectations after Coughlan” (2000) PL 697.

⁸⁶ Timothy Endicott, *Administrative Law*, 2nd ed., (Oxford 2011), pp. 294-296. When the public body follows its self-prescribed rules at least certain types of misbehavior incompatible with its public role are not open to it. (While we use this definition of ‘abuse of power’, there is reason to doubt that it is a justification rather than a doctrine and to doubt whether it gives enough guidance to be useful as either: R (*Abdi & Nadarajah*) v *Secretary of State for the Home Department* [2005] EWCA Civ 1363 [67]; R (*Bibi*) v *London Borough of Newham* [2001] EWCA Civ 607

⁸⁷ Mark Elliott, “Legitimate Expectations: Procedure, Substance, Policy and Proportionality” (2006) CLJ 254 on the importance of the non-fettering rule in this context.

⁸⁸ Raz’s account is set out in the first two chapters of his *Practical Reason and Norms*, 2nd ed., (Princeton 1990). In drawing on Raz account of rules and reasons, we do not mean to endorse it in its entirety. We assume only that rules affect reasoning in something like the way Raz claims. Whether this effect is best explained through the notion of exclusionary reasons we leave for another occasion.

⁸⁹ *Ibid.*, pp. 58 ff.

decided whether to accept Unilever's late claim by considering the full range of relevant factors. It should have made its decision based on a subset of the relevant considerations, including the fact that a practice that had grown up between it and Unilever, and excluding at least some considerations that favoured rejecting Unilever's late claim. More generally, according to the rule-based account, a legitimate expectation that a public body will exercise its discretion in some way implies a non-legal limit on the factors it may legitimately include in its decision-making process.

The rule against fettering discretion requires a public body to exercise its discretionary powers based on a consideration of all the relevant factors in each case.⁹⁰ According to our rule-based account, by creating a legitimate expectation, a public body gives itself a reason *not* to do exactly that, i.e., an exclusionary reason *not* to base its decision on a consideration of all the relevant factors. The rule against fettering discretion favours the free exercise of discretion; the exclusionary reason favours its constraint. Thus our rule-based account identifies a source of the tension between the rule against fettering discretion and the doctrine of legitimate expectations.

Some exclusionary reasons have a limited scope. A rule may therefore exclude some, but not all, competing reasons. In such cases, it may be permissible to break the rule for certain reasons, but not for others. The promise-keeping rule, for example, probably allows you to break the promise to meet your friend for lunch in order to prevent, say, a murder. We do not wish to speculate about exactly what reasons might be left unexcluded when a public body makes a non-legal rule applicable to itself, but reasons that concern the public interest (as opposed to the public body's own convenience) are plausible candidates.

H. Changes in Policy: An Objection?

So far we have been describing the advantages of the rule-based account. Here is a possible worry about it. Our account says that there is a legitimate expectation that a public body will adhere to the rules that bind it. It is implicit that the rules that generate legitimate expectations must *currently* be in place or in force; otherwise they would not bind. This aspect of our account is consistent with one line of policy cases, in which there is a legitimate expectation that a public body will comply with the policies it *currently* has in place. But it seems to be inconsistent with a possible second line of policy cases, in which there is a legitimate expectation that a public body will comply with a *former* policy, or that it will follow certain procedures before applying a new policy. In short, our account can explain "departure from policy" cases, but it is not clear it can explain so-called "change in policy" cases. We have two responses.

First, there is reason to doubt that former policies, as opposed to current ones, can generate legitimate expectations. The claim that they can do so has been described as 'problematic'⁹¹, 'contentious'⁹², and unprincipled.⁹³ Wade and Forsyth state that generally

⁹⁰ This is, of course, a very rough approximation of the complex position on fettering discretion. M Elliott, J Beatson and M Matthews, *Administrative Law* (Oxford, 2011), pp. 167-175.

⁹¹ Paul Craig, *Administrative Law* (5th edn, Sweet & Maxwell 2003) pp. 650, 667.

⁹² Clayton, "Legitimate Expectations, Policy, and the Principle of Consistency" 96

⁹³ Yoav Dotan, "Why Administrators Should be Bound by Their Own Policies" (1997) 17 OJLS 23, 38: "[courts] *refrained from developing a general principle* under which in any case of a change of administrative policy some procedural measures (such as publication or consultation prior to the change) are compulsory. But they used the concept of legitimate expectations as *vehicle* to impose such measures on specific occasions, in particular where the situation involved some factual elements additional to the change of policy" (emphasis added)

‘all that can be legitimately expected is that the policy *as it exists at the time* will be applied to the case at hand’.⁹⁴ Lord Diplock, discussing a change in policy relating to the retirement age of civil servants in *Hughes v. Department of Health and Social Security*⁹⁵, makes the same point:

Administrative policies may change with changing circumstances... When a change in administrative policy takes place and is communicated in a departmental circular to [those affected]... any reasonable expectations that may have been aroused in them by any previous circular *are destroyed and are replaced* by such other reasonable expectations [based on] the administrative policy announced in the new circular....⁹⁶

Similarly Lord Scarman remarked in *In Re Findlay*:

... the most that a convicted prisoner can legitimately expect is that his case will be examined individually in the light of whatever policy the Secretary of State sees fit to adopt provided always that the adopted policy is a lawful exercise of the discretion conferred upon him by the statute. Any other view would entail the conclusion that the unfettered discretion conferred by the statute upon the minister can in some cases be restricted so as to hamper, or even to prevent, changes of policy.⁹⁷

These passages were cited with approval in *Hargreaves*.⁹⁸ The discomfort that courts and commentators have with finding that former policies, as opposed to current ones, can generate legitimate expectations suggests that it is not a weakness, and possibly a strength, of our account that does not allow a former policy to generate a legitimate expectation.

The second response is that our account can explain the finding of a legitimate expectation in the cases involving a change in policy. As some commentators have suggested, legitimate expectations that are said to be generated by former policies can be traced back to promises or practices instead.⁹⁹ Consider *Ng Yuen Shiu*.¹⁰⁰ This case is sometimes cited to show that a policy may generate a legitimate expectation that it will not be changed without consultation.¹⁰¹ But in *Ng Yuen Shiu* the claimant had received a *promise* that his case would be heard before he was deported, and indeed this case is more often cited to show that a promise may generate a legitimate expectation.¹⁰² In the *GCHQ* case,¹⁰³ the public body was found to have a duty to consult before changing its

⁹⁴ (ibid., pp. 457) emphasis added

⁹⁵ [1985] A.C. 776..

⁹⁶ [1985] A.C. 776, 788.

⁹⁷ [1985] A.C. 318, 338 (emphasis added).

⁹⁸ *R v Secretary of State for the Home Department, ex parte Hargreaves* [1997] 1 WLR 906, 918 (Hirst LJ).

⁹⁹ Dotan, op. cit, 38-39. See also Laws LJ in *Niazji v The Secretary of State* [2008] EWCA Civ 755, [29], [41]-[43]. Craig also suggests that a “representation[s] flowing from things said or done under the old policy”, is required for a claim based on a change in policy to be successful (*Administrative Law*, op cit., pp. 667).

¹⁰⁰ *Attorney-General of Hong Kong v Ng Yuen Shiu* [1983] 2 AC 629 (PC).

¹⁰¹ Dotan, op. cit, 37.

¹⁰² Dotan, op. cit, 23, 37.

¹⁰³ *Council of Civil Service Unions v. Minister for the Civil Service* [1985] AC 374.

policy regarding membership in trade unions. As we have discussed, however, there was a *practice* of conducting consultations in similar situations, and this practice can be thought of as the source of the legitimate expectation in that case. To take another example, *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs*¹⁰⁴ is sometimes presented as a case in which the administrator was not allowed to change its policy regarding the return of Chagossians to the Chagos islands.¹⁰⁵ But in that case as well, the administrator had made a public promise that the Chagossians would be able to return.¹⁰⁶ The rule-based account is able to explain the result in all these cases, because the public body in each case had bound itself with a rule, originating in a promise or practice, to follow an earlier policy. In fact, all the cases we found where a legitimate expectation was (supposedly) generated by a former policy are likewise consistent with the rule-based account.

Even if there were a case where an administrator is held to a former policy in the absence of a practice or promise that explains this, we would not regard it as a fatal challenge to the rule-based account. Some cases are no doubt mislabeled,¹⁰⁷ and even the best account of a doctrine will class some cases as outliers. It is also worth clarifying that our account should not cause concern to those who think that fairness sometimes requires courts to prevent administrators from changing their policies without following certain procedures, or from applying new policies to particular individuals.¹⁰⁸ Courts can inhibit such changes in policy on other grounds of review including *Wednesbury* unreasonableness,¹⁰⁹ a failure to take relevant considerations into account or a lack of procedural fairness.¹¹⁰

VIII. Conclusion

The doctrine of legitimate expectations is thought to verge on incoherence because the various ways of generating legitimate expectations seem to have little in common beyond providing a convenient cover for judicial intervention. This has led to calls for the doctrine to be disaggregated. We sought to show there is more unity to the doctrine than it at first appears. According to our rule-based account, a legitimate expectation arises when a public body binds itself with a non-legal and goal-dependent rule. This account is consistent with all the legitimate expectation cases. It is economical: legitimate

¹⁰⁴ [2008] UKHL 61 [2009] 1 AC 453.

¹⁰⁵ Craig, *Administrative Law* op. cit., pp. 667-668.

¹⁰⁶ A point that Craig acknowledges in *Administrative Law*, op. cit., p. 668.

¹⁰⁷ *R v Rochdale Metropolitan BC, ex p Schemet*, (1992) 1 FCR 306 is an example. In *Schemet* a public body was required to follow a former policy (and so provide a hearing) even in the absence of a promise or practice. The case was presented as falling under the doctrine of legitimate expectations. But it is better classed under the doctrine of procedural fairness. As Simon Brown LJ said in *R v Devon County Council, ex p Baker and another*, [1995] 1 All ER 73 ‘... the concept of legitimate expectation when used ... in [this] sense seems to me no more than a recognition and embodiment of the unsurprising principle that the demands of fairness are likely to be somewhat higher when an authority contemplates depriving someone of an existing benefit or advantage....’ (91). The decision in *Schemet* could also be explained on ‘relevant considerations’ grounds (see *Schemet* 324D – E). Further, the outcome in the case is attributable to the fact that the policy in question was found to be in breach of the council’s statutory duties. Other potential counterexamples can probably be explained in a similar manner.

¹⁰⁸ *R v. Ministry of Agriculture, Fisheries and Food, ex p Hamble (Offshore) Fisheries Ltd* [1995] 2 All ER 714 [47].

¹⁰⁹ *Niazji v The Secretary of State* [2008] EWCA Civ 755 [35]: “The establishment of any policy, new or substitute, by a public body is in principle subject to *Wednesbury* review.”.

¹¹⁰ See *R v Rochdale Metropolitan BC, ex p Schemet*, (1992) 1 FCR 306, see note 107.

expectation cases are all explained in terms of a single factor. The account is also able to explain why there are strong reasons for fulfilling legitimate expectations and why the doctrine is in tension with the rule against fettering discretion. These and other advantages make the rule-based account a plausible account of what unites the various ways of generating legitimate expectations and what distinguishes them from other bases of legal protection.