HART'S CRITICS ON DEFEASIBLE CONCEPTS AND ASCRIPTIVISM

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Abstract

Hart's "Ascription of Responsibility and Rights" is where we find perhaps the first clear pronouncement of defeasibility and the technical introduction of the term. The paper has been criticised, disavowed, and never quite fully redeemed. Its lurid history is now being used as an excuse for dismissing the importance of defeasibility.

Quite to the contrary, Hart's introduction of defeasibility has uniformly been regarded as the most agreeable part of the paper. The critics' wish that defeasibility could be better expounded has largely been fulfilled.

Even the most contentious part of the paper, Hart's claim that the ascription of acts implies responsibility, is not as mistaken as some have taken it to be.

The paper remains a paragon of clarity in the important and active scholarly area that crosses legal reasoning, language, and logic.

I. Main Contentions.

H. L. A. Hart's famous paper, "The Ascription of Responsibility and Rights," (ARR, '48) is receiving renewed attention because it is found to be the place where the term "defeasible" is introduced.[1] Defeasible reasoning has flourished in recent years; some think that its grandest form will be achieved in this community, where logic and law meet.

Hart, however, had critics who have described the work as "fraught with difficulties" (Bayles, '92, p.12), "an abandoned wreck" (Howarth, '81, p. 33), "inconclusive" and "circular" (Baker, '77, pp. 37-8), and "glaringly at fault" (Cherry, '74, p. 107).[2] Those were not even the words of the critics whom Hart himself cited when he (also

famously) declined to reprint the paper in his collection, *Punishment and Responsibility*, '68. Of the two critics Hart cited, one says of the work: "fundamentally incorrect" and "needs to be drastically reformulated" (Pitcher, '60, p. 226); the other does not even deign to name Hart: "some Oxford philosophers, whom I shall call Ascriptivists, have resorted to denying" descriptive language (Geach, '60, p. 221). "I shall ... refute Ascriptivism." Three obscure pages later, the critic announces: "With this, I dismiss Ascriptivism" (Geach, '60, p. 224).

This daubery of Hart will not stand. The basic idea behind Hart's use of defeasibility is praised by his critics who evaluate it.

> Hart's notion of defeasibility seems enormously suggestive and potentially fruitful. It fills our heads with ideas and apparent insights. It seems to have applications in many areas ... The recognition that ... concepts are defeasible, seems a great advance in clarification. (Baker, '77, p. 43)

> Clearly the full extent of defeasibility needs elaboration. The potential ... is considerable. (Howarth, '81, p. 40)

As Rescher, Pollock, Nute, and Artificial Intelligence's (AI's) non-monotonic logic minions have explicated and continue to explicate defeasibility, there is growing reason to believe that Hart's semantical view was valid, justified, and prescient.

Hart is perhaps too eager to claim that ascription of action

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1. See Toulmin, "The topic of exceptions or conditions of rebuttal ... has been discussed by Prof. H. L. A. Hart under the title of 'defeasibility' ... ." (Toulmin, '58, p. 142; compare Toulmin, '50, which cites only Ross). Also, David Gauthier's dissertation submitted in '61: "practical principles are defeasible. (I take the term from Professor H. L. A. Hart.)" (Gauthier, '63, p. 159) There is universal agreement that Hart's concept is in line with W. D. Ross's *prima facie* duty (Ross, '30, p. 18ff; Loewer and Belzer quote Nell's interpretation of Kant as precursor to Ross; Causey gives Wittgenstein; Melden, '59, p. 18 gives Ewing, '47, p. 33, and Frankena, '52, p. 196, and '55, p. 231 as references to the use of *prima facie*, to which we must add Prior, '49, p. viii and Barry, '65 (his '58 dissertation supervised by Hart), pp. 32-4). Hart's defeasibility clearly augments Ross's *prima facie* duties. By the time Chisholm uses the term in '64, "These questions concern: the 'defeasibility' of moral requirements ...," (Chisholm, '64a, p. 147) the attribution of its original use seems no longer necessary. Chisholm says that his colleague, John Ladd, "who was quite taken by Hart," had used the term (personal communication), and Ladd cites Hart, Ross, and Chisholm liberally in his early work. Ladd later adds, "... I, at one time, held a view close to that of Hart, but the study of Navaho ethics convinced me that it was untenable [Ladd cites a section of the book that was unprinted]." (Ladd, '57, p. 462) Chisholm reviews Hart that same year, "Similarly for ... those facts which would defeat the ascription of killing." (Chisholm, '64b, p. 614) Also Firth, "Their warrant is not derived from ... coherence nor defeasible ... ." (Firth, '64, p. 552) Swain, Sosa, and Lehrer-Paxson show how the term became mainstream in epistemology in the mid-'70's, especially with Pollock (although Pollock communicated to me that he came to defeasibility by expounding Wittgenstein, as did Hart), and also mainstream in the philosophy of practical reasoning (e.g., Searle, Nozick, Raz, and Audi). From there it was imported to AI work on non-monotonic reasoning (see Doyle, '80, Nute, ('85) '88, Loui, '87, Causey, '91; Causey cites Belzer, who cites Nozick). A problem with defeasibility's use in epistemology is that it is so closely connected to "fallibility" and "corrigibility". In AI, we return to Hart's original problem of *specifying* rules and *applying* them.

assigns responsibility. It depends on how strongly one takes Hart to be suggesting that action implies responsibility, and on how strongly Hart views the implication. However, even this claim can be defended among those who are willing to be moved by implicature and convention, away from simple faith in mathematical logic.

II. Hart's Revelations.

II.1. Ascription of Responsibility.

Hart's central thesis is ambitious:

> My ... purpose ... is to suggest that the philosophical analysis of the concept of a human action has been inadequate ..., at least in part because sentences of the form "He did it" have been traditionally regarded as primarily descriptive whereas their principal function is what I venture to call *ascriptive*,[3] being quite literally to ascribe responsibility for actions much as the principal function of sentences of the form "This is his" is to ascribe rights in property. (Hart, ('48) '51 henceforth *ARR*, p. 145)[4]

Ascriptivism seeks to attach claims of responsibility to claims of action in the same way that legal consequences attach to legal pronouncements. Hart is explicit about making an analogy:

> If we step outside the law courts we shall find that there are many utterances in ordinary language which are similar in important respects, ... (*ARR*, pp. 156-7)

> ... The concept of a human action is ... ascriptive and ... defeasible ... . The sentences "I did it", "you did it", ... are, I suggest, primarily utterances with which we *confess* or *admit* liability, make accusations, or *ascribe* responsibility ... . (*ARR*, p. 160)

Hart's qualification of the thesis is important: the "principal function is" ascription; and they "are primarily utterances" which ascribe. It does not suffice to refute Hart by citing examples wherein ascription of action is possible without ascription of responsibility. The principality of ascription must be refuted, not the necessity of ascription.[5]

Hart's perceived connection between ascription of action, implication of responsibility, and defeasibility is clearer if we consider two examples where Hart must be right.

> 1. At a soccer game for children, a nine-year old runs into an eight-year old on the opposing team. Neither is particularly coordinated, and the eight-year old leaps up, claiming "he hit me." There is a rule against "hitting" in this league, and one who "hits" must leave the game for five minutes. The referee says calmly, "he didn't hit you; he just bumped into you," because agreeing that there was a hitting would require penalizing the nine-year old.

> 2. In an inflexible computer system for automatically billing airfare to accounts, there is a rule of inference that says that the "purchaser" of tickets is billed for their full cost. This rule functions as a meaning postulate of the language in which knowledge is represented. To have one's name entered as the purchaser is to be charged, in the same non-ampliative way that attribution of bachelorhood is supposed to require attribution of male gender for proficient speakers of English. A customer interacting with the system correctly resists saying that he is "purchasing" a ticket, when he tickets a flight with a half-price voucher.

These artificial examples clearly bind responsibility to action. The reason is that there is an incontrovertible inference from the predication of action to the predication of some kind of responsibility.

Hart's ambition is to observe in ordinary discourse implicatures similar to those in law (or in soccer, or in computer systems), even if the implications may be less clearly binding in ordinary discourse.

II.2. Defeasibility and Semantics.

Legal sentences and ascriptions are used in ways that have a distinct logic.

> ... The logical peculiarities which distinguish these kinds of sentences from descriptive sentences, ... can be grasped by considering certain characteristics of legal concepts, as these appear in the practice and procedure of the law ... . (*ARR*, p. 145)

> ... Since the judge is literally deciding ... on the facts before him ..., what he does may be either a *right* or *wrong* decision or a *good* or *bad* judgement and can be either *affirmed* or *reversed* and may be *quashed* or *discharged*. What cannot be said of it is that it is either *true* or *false* ... . (*ARR*, p. 155)

Thus, in legal pronouncements, simple claims of possession, and ordinary ascriptions of responsibility, the uses are non-descriptive; they cannot be true or false. Hart might say that they are defeasibly warranted. Hart explains that this is due to the defeasible character of the concept and the procedural nature in which defeasibility requires burdens to be discharged.

Hart approaches defeasibility in this way:

> ... Claims ... can usually be challenged or opposed in two ways. First, by a denial of the facts upon which they are based and secondly by something quite different, namely a plea that although all the circumstances on which a claim could succeed are present, yet in the particular case, the claim ... should not succeed because other circumstances are present which brings the case under some recognized head of exception, the effect of which is either to defeat the claim ... altogether, or to "reduce" it ... . (*ARR*, pp. 147-8)

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2. Melden describes Hart's proposal as "drastic." (Melden, '56, p. 532) But Melden seems to agree with Hart: Hart's proposal is only "more drastic" than what Melden puts forth.

3. Note how Pollock uses "ascribe" even before he comes to use "defeasible": "To ascribe the concept 'bird' to an object must mean simply to ... *judge* that it is a bird." (Pollock, '67, pp. 31-2)

4. Interestingly, no one disputes the intermediate thesis, that "This is his" is ascriptive just as Hart contends.

5. This qualification, though noticed by many critics, is not respected in their attacks. For instance, in Geach, Pitcher, Feinberg, and Howarth. In order to debate primary versus secondary use, we must first adopt a speech act or illocutionary point of view; having adopted such a view, the issue really turns on how one chooses to describe the conventions of the language's community of users. Searle has it this way: "... Counterexamples can be produced of ordinary uses of the word 'promise' which do not fit the analysis. ... Their existence does not 'refute' the analysis, rather they require an explanation of why and how they depart from the paradigm cases of promise making." (Searle, '69, p.55)

Here and in the next paragraphs, one can see in Hart all of the depth and clarity of understanding of argument which made Stephen Toulmin famous in his '58 work.

Hart's most famous passage in this paper introduces the term, defeasibility:

> When the student has learnt that in English law there are positive conditions required for the existence of a valid contract, ... he has still to learn what can *defeat* a claim that there is a valid contract, even though all these conditions are satisfied. The student has still to learn what can follow on the word "unless", which should accompany the statement of these conditions. This characteristic of legal concepts is one for which no word exists in ordinary English. ... The law has a word which with some hesitation I borrow and extend: this is the word "*defeasible*", used of a legal interest in property which is subject to termination or "*defeat*" in a number of different contingencies but remains intact if no such contingencies mature. In this sense, then, contract is a defeasible concept. (*ARR*, p. 152)

III. Critics.

III.1. Geach.

The entire text of Geach's main argument is exactly this:

> Now as regards hundreds of voluntary or intentional acts, it would in fact be absurdly solemn, not to say melodramatic, to talk of imputation and exoneration and excuse, or for that matter of praise and reward. Ascribing an action to an agent just does not *in general* mean taking up a quasi-legal or quasi-moral attitude, and only a bad choice of examples could make one think otherwise. (Geach, '60, p. 221)

Geach does not actually give one of the hundreds of good examples, much less a balanced diet. I have found it difficult to supply the missing example, but perhaps times have become solemn, or at least more litigious. Geach discusses "to fall" in a different context. "To fall" seems so predominantly accidental that Geach could be right; still, I have heard dancers and athletes both praised and excoriated for falling. Likewise, "to overhear" seems normally to be accidental. Contra Geach, plenty of spies and gossips invite praise or blame for overhearing. "To listen" seems hardly worthy of exoneration, although school children are often praised for exactly this.

What most of us do most often each day is "to type *e*" and, arguably, "to choose when to exhale". The average keyclicking and exhaling has little responsibility attached; indeed, it *would be* melodramatic to dwell on the rewards of typing and exhaling. But that is because not much is implied by being responsible for the action. Not all actors responsible for actions are murderers for whom there are serious penal consequences. It may be "absurdly solemn to talk of reward" for each "typing of *e*" and each choosing to exhale, but there might still be an implied responsibility.

Geach's opinion about what ascription "does not *in general* mean" will not work here: Hart is claiming preponderance, not generality, and only among principally functioning or primary utterance.

Geach's biggest barb is intended for all who do not equate declarative locutions with assertions. It is hard to understand because Geach is really attacking Austin, not Hart.

> What is being attempted ... is to account for the use of a term "*P*" concerning a thing as being a performance of some other nature than describing the thing. But what is regularly ignored is the distinction between calling a thing "*P*" and predicating "*P*" of a thing. ... "*P*" may still be predicated of the thing even in a sentence used nonassertively as a clause within another sentence. ... Hence[6], ... calling a thing "*P*" has to be explained in terms of predicating "*P*" of a thing, not the other way round. (Geach, '60, p. 223)

Geach is misconstruing Hart. Hart's ascriptivism does not seek to explain *all* uses of a sentence in terms of non-descriptive uses. He simply believes that responsibilities are attached to the putative descriptive uses. If this is true, and if the responsibility attached is non-descriptive, then the ascription of action is non-descriptive. More accurately, it is not entirely descriptive.[7]

To a Fregean logician, there is a perfectly reasonable analysis.

$$P(a) \text{ and } (P(a) \text{ implies } R(a)),^8$$

is by convention the principal use of the utterance "*A* does *P*". Predicating *R* of *a* is defeasible since it is quasi-moral; hence, any such predication is a defeasible judgement, not a "timeless" truth. (I do not promote the truthlessness of quasi-moral judgements, but it is part of Geach's appraisal.) Hence, "*a* does *P*" is not entirely descriptive of *a*.

Geach is right that Hart has a problem explaining how a quasi-legal sentence such as *R(a)*, or "*a* is liable", can function in logical rules of inference yet resist being descriptive, i.e., true or false. It is not a simple explanation. It appears to be a main problem for Hart in later years, affecting his view of "Definition and theory in jurisprudence" as well as *ARR*:

> ... Had I commanded ... the seminal distinction between the "meaning" and the "force" of utterances, ... I should not have claimed that statements ... were not "descriptive" ... .
> (Hart, '83, p. 2; see also pp. 4-5)

Defeasible reasoning and logical assertion are compatible. The way for conventional logicians like Geach to understand what has happened is to consider the difference between

1. *P(a)*; 2. "*P(a)*"; 3. "*P(a)*" is true; 4. "*P(a)*" is probable; 5. "*P(a)*" is accepted inductively; 6. "*P(a)*" is defeasibly warranted; 7. "*P(a)*" is adjudged.

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6. Geach's "hence" is purely rhetorical, since non-assertorial predications might be explained in some other way (e.g., Hare, '70).

7. Feinberg makes this point too: "Philosophers who contrast 'ascriptive' with 'factual' ... have this distinction in mind[:] By 'ascriptive sentences' they mean sentences not *wholly* theoretical or factual, having an irreducibly discretionary aspect." (Feinberg, '65, p. 151)

8. Here, *P(a)* and *R(a)* are not to be confused with "genuine action plus its intended effects," which Hart dismisses (*ARR*, p. 164). *R* is like the penalty or reward accrued for *P*, or at least a liability for it, if it were to exist. I would further suggest that the implication of *R(a)* from *P(a)* is defeasible, which is the current practice among researchers on discourse, e.g., Lascarides and Oberlander, '92.

The first is an assertion in the object-language. The second is not an assertion; it is a term in the meta-language. The rest are assertions in the meta-language.

When we state the logical conundrum with this precision, Geach and Hart are easily reconciled. Hart is saying that for some sentences, the best we can achieve is (6). Of course, some say that (4) is the best we can achieve empirically; they deny the force of induction, (5). (4) through (7) are statements about epistemology. (3) is about the first-order predicate notation of the object language, in which "validity" and "truth" have technical meanings. (3) raises separate issues. (3) is what connects (1) and (2), connecting object-level notation and meta-level notation. *Modus ponens* is not so much a rule of reasoning epistemologically as it is a feature of the chosen object-language notation. It is one of the rules that allows logical shorthands to be expanded. The conflation of epistemology and aspects of logical notation are Geach's aim. As more logical systems ascend to the meta-language, fewer philosophers of logic adhere to such a naive epistemology.

III.2. Pitcher.

Pitcher's understanding of ascription is that it is Hart's confusion of penalty and performance:

> There is a very large class of verbs that can be used in asserting that someone has done something wrong ... .
> Some of these verbs have censurability built into them while others do not. (Pitcher, '60, p. 230)

"To murder" and "to cheat" are given as examples of condemnatory verbs, in contrast with "to kill" and "to misplay."

> The trouble ... is that, with the exception of actions designated by condemnatory verbs, there are no strong defenses of the right kind against the claim that a person performed a certain action; hence, the concepts of those actions, which constitute the vast majority of cases, cannot be defeasible. (Pitcher, '60, p. 233)

> By substituting the idea that being deserving of censure or punishment is the relevant defeasible concept ..., a theory is obtained which is capable of dealing with all human actions and not just those designated by condemnatory verbs, and in which all the extraordinary insights of Hart's analysis, ... are fully preserved. (Pitcher, '60, p. 235)

This remains a sensible evaluation of ascriptivism. But it is still not entirely fair to Hart.

A minor point is that censure and praise are both relevant to ascriptions, which even Geach recognizes. So Hart's analysis must at least extend to approbatory verbs, such as "to save." A second minor point is that Pitcher is not appreciating how context can affect implicature; in the children's soccer game described above, inadvertence is indeed a defeater for a judgement that hitting should be ascribed.

The main point is that liability[9] for an action might or might not be equivalent to a particular condemnation or commendation. It depends on the context. It depends, in criminal settings, on a separate sentencing procedure.[10]

Liability does however imply a subjunctive conditional: if there *were* an appropriate penalty or reward, then it would apply to the person to whom action is ascribed. There may be no penalty for choosing when to exhale, but if there were, then one who so chooses to exhale is subject to the penalty. This conditional is defeasible. There may be mitigating circumstances for attachment of liability, and the claim of liability is precisely the claim that Hart's listed defenses can oppose.

One must remember that as Hart wrote, at Nuremburg[11] it was the attachment of liability, the responsibility for action, that was principally debated. The question of punishment was secondary.

III.3. Cherry.

Cherry reports the issue more carefully than Pitcher. Cherry permits Hart to ascribe responsibility whenever action verbs are used, for "a wide range of legal concepts." However, according to Cherry, there is a distinction between defeating the concept: "'A X-ed' is not warranted" and modifying the concept, "'A X-ed in manner M' is true".

> ... The sorts of claim which defeat the application of legal concepts to given situations do nothing of the sort in the case of action concepts. (Cherry, '74, p. 101)

> That A did X by accident ... presupposes that A did X. (Cherry, '74, p. 106)

Hart appears to hold that "A X-ed in manner M" sometimes is incompatible with "A X-ed" simpliciter. Cherry gives a counterexample:

> ... There is nothing conceptually odd about saying "He is playing chess, although he's being forced to do so at pistol-point". (Cherry, '74, p. 103)

Let us assume M = "at pistol point" and X = "to play chess". "A X-ed in manner M" and "A X-ed" indeed seem compatible. This is a problem for the defense of Hart because Hart's text does not seem to anticipate it. Hart simply suggests that there is an analogy, in fact, wills there to be an analogy. Since analogies can be defeated by distinction, Cherry may have met his dialectical burdens.

An obvious response is to claim that playing chess is an unusual example. Remember that a single untoward example will not refute Hart. "Playing chess" is purely formal, like "adding" and perhaps unlike "understanding Chinese"; as such, it is an unusual example. Still, Cherry could find a different example that is not purely formal: "he sat at gunpoint" still would arguably seem to be an instance of "he sat." Cherry would then have to argue as well that it continues, once modified, to be a primary use of "he sat."

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9. Hart's postscript to *Punishment and Responsibility* explicitly discusses kinds of responsibility, esp. liability-responsibility. (Hart, '68, pp. 210ff.) Feinberg too: "... We might say he is properly subject -- or liable -- to blame, and then judgment could be characterized as an *ascription of liability*," (Feinberg, '70, p. 128) And in Kaufmann, "... *Q'uil s'agit ici ... de la responsibilité au sens de «liability»* .... (Kaufmann, '84, p. 10)
10. Melden sees the subtlety, too. (Melden, '56, p. 539-40)

A second response is that the conventional connection between playing chess and being liable for any punishment for doing so is tight: so tight, that one is reluctant to say one without the other. "One plays chess," on this view, so strongly suggests absence of coercion that to say there is a playing of chess at gunpoint is to be unwilling to say "one plays chess" at all. The Gricean imperative to be not misleading dampens the willingness to say that there is chess being played. This is consistent with Hart's insistence that it is the principal function of utterance that he is discussing. A Wittgenstein encomiast might say that in this way, all language games are like the children's soccer game.

Brenda Baker gives this response:

> We should be chary of making general statements of the following sort [quotes Cherry]: "... In order to perform an action for which one is adjudged non-responsible, one must perform that action." This is ... apt to mislead ... by suggesting that there is some basic form of ... action performance that is common ground to all those cases where we ... modify ... . Against this suggestion, we should remember the varieties of doing ... . (Baker, '83, p. 704)

Hart makes this point in a later paper, "Acts of will and responsibility":

> ... It might well be said that he drove the vehicle ... "in his sleep" or "in a state of automatism." Such cases can certainly occur. ... In *Hill v. Baxter*, ... "after he has fallen asleep he is no longer driving". (Hart, '68 ('60), pp. 109-10)

The best response, I think, is to claim that Hart would allow "He played chess" at the same time as "He played chess at gunpoint." The defeasibility, in this case, is not about ascribing action, the playing of chess, but ascribing responsibility for the playing. "He hit her" *normally* ascribes responsibility at the same time that it describes an act. But the two are still separable, in the presence of good counterargument. "He hit her accidentally." Hart's paper is about ascription of responsibility, after all, not about ascription of action. This requires some re-interpretation of Hart's murder example. As Cherry notes, murder is *not* the kind of action that can be inadvertent and still be murder. Hart's discussion of murder becomes a poor example, since it is unlike the ordinary language examples, or special examples, such as playing chess. Not all of the ways to defeat putative ascriptions of murder are also ways to defeat putative ascriptions of exhaling or of chess-playing. This is consistent with a careful reading of Hart's paper's third section.

Cherry raises a further problem that concerns

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11. It seems clear Hart cared deeply about such things, going so far as to consider the argument "We are Germans; they are Jews" (Hart, '55, p. 190). MacCormick details Hart's "hostility to Fascism," his "helping refugees from Nazi Germany during the '30s," his birth in '07 "of Jewish parents": "[Hart]'s political beliefs ... took no public form until after the war. ... Their importance for an appreciation of his while achievement as a jurist must not be underestimated. ... To be fully aware of this is essential as a prelude to considering ... his analytical work." (MacCormick, '81, pp. 2-12)

defeasibility. Though he seems to think defeasibility is a perfectly natural idea, he sees a regress in Hart's use of it. For Hart to claim that actions are defeasible, and action-claims are warranted defeasibly by arguments, there must be concepts used in those arguments. Are those concepts themselves defeasible? If not, couldn't they be indefeasible descriptions of action?

> ... In order for there to exist a class of defeasible concepts there must exist a broader class of concepts which are not similarly defeasible ... . (Cherry, '74, p. 106)

> ... It is impossible to present in a logically coherent form what in our conceptual set-up are defeating claims, for the conditions essential to their derivation ... are *ex hypothesi* lacking. (Cherry, '74, p. 107)

It is fair to say that Hart did not depict defeasibility, argument, and justification carefully enough here. In recent defeasible logical systems, conclusions are defeasible with respect to an indefeasible basis, just as Cherry anticipates. Today, we might say that two disputants cannot reach agreement through argument unless there is agreement on some of the claims that serve as the foundation of argument. Rescher's *Dialectics* exhibits this most clearly. Surely Hart's legal foundations gave him a mature understanding of this aspect of defeasible reasoning, even if he left it for others to expound.

III.4. Bayles.

Bayles writes:

> ... It is unclear that [Hart] rejects the analysis of defeasible concepts itself, as opposed to the claim that human action is the ascription of such a concept. (Bayles, '92, p. 12)

Hart hardly can be said to disavow defeasibility in this passage from "Legal responsibility and excuses" which he did select to appear in *Punishment and Responsibility*:

> ... Most of the mental conditions we have mentioned are recognized by the law as important not primarily as *excusing* conditions but as *invalidating* conditions. Thus a will, a gift, a marriage, and (subject to many complex exceptions) a contract may be invalid if the party concerned was insane, mistaken about the legal character of the transaction, or some "essential" term of it, or if he was subject to duress, coercion, or the undue influence of other persons. There are obvious analogues of mistake, accident, coercion, duress, insanity, which are admitted by criminal law as excusing conditions. (Hart, '68 ('58), p. 34)

Two shifts from the earlier paper are clear. Hart guards defeasibility in the context of legal systems. This is his first shift: he refrains from making claims about non-legal utterances, making instead claims about "acts in the law". The second shift is that Hart does not dwell on the precise logical form taken by "law's insistence" on mental elements. To be certain that Hart remains loyal to the idea of defeasibility (if not the term[12]), we should find Hart somewhere mentioning a shifting of burdens; such shifting is the mark of defeasibility. Consider:

> Another reason limiting the scope of the excusing conditions is difficulty of *proof*. (Hart, '68 ('58), pp. 32-33)

> Proof of mental elements ... is a difficult matter, and the

law ... has used instead certain presumptions ... . (Hart, '68 ('62), p. 175)

> The primary point of saying that someone acted intentionally is to rebut a *prima facie* suggestion that he was in some way ignorant ... or mistaken ... . (Hampshire and Hart, '58, p. 7)

Hart does indulge Pitcher in his later writings by referring more to "excuse" and "mitigation" than to "invalidation" and "defeat," thus referring to punishment as well as to (liability-)responsibility (Hart, '68 ('58), p. 13).

I do not think Hart disavows either defeasibility or ascription for general acts. He simply chooses not to make and defend the argument for general discourse. Note Hart's recalcitrance (in the final dependent clause) even as he says he is unwilling to defend his earlier point:

> Finally, what I have written concerns only *legal* responsibility and the rationale of excuses in a legal system in which there are organized, coercive sanctions. I do not think the same arguments can be used to defend *moral* responsibility from the determinist, if it is in any danger from that source. (Hart, ('58) '68, p. 53).

For two decades, Hart is consistent in his view:

> Here, however, I shall not ... press the view I have urged elsewhere, that the expression "voluntary action" is best understood as excluding the presence of various excuses. (Hart, '68 ('58), p. 30; see also Hart, '68 ('60), pp. 90-1)

> ... There are important resemblances between the execution of legal transactions and more obvious cases of human actions. ... Attention to these analogies between valid legal transactions and responsible action and the mental conditions that ... invalidate and ... excuse ... illuminates many obscure theoretical disputes. (Hart, '83 ('67), p. 95)

Hart could be taking neither of Bayles' options (rejecting defeasibility or rejecting ascriptivism). Hart could merely be disliking his exaggeration of "ascriptive" instead of "descriptive" uses, as revealed in Hart's abnegation (as quoted above) of "Definition and theory in jurisprudence."

But Hart should not consider these aspects to be errors in the reasoning of *ARR* since the earlier paper neither excludes descriptive status to action sentences nor assigns them as conclusions of law. It simply draws an analogy to law and makes a claim about primary use.

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12. Hart does return to the word, matter-of-factly: "So my argument will not show that men have any right which is 'absolute,' 'indefeasible,' or 'imprescriptible.'" (Hart, '55, p. 176) Hart chooses to speak of "invalidating" rather than "defeating" conditions. This would be to call concepts "invalidable". The latter word has even better connotations than "defeasible." *Oxford U. English Dictionary* has: "defeasible, 1586; capable of being undone, defeated, or made void, as a d. estate." Meanwhile: "invalidate; to render of no force or effect, esp. to deprive of legal efficacy. To i. an obligation, 1651, an argument, 1674, evidence, 1801. " Sadly, though, it has for "invalidable" the connotation, "ineffective." Also, from logic, "invalid" implies that a rule has a truth status, even though "invalidated" is the intended stative. Chisholm used "overridden" and "may be overridden." (Chisholm, '64a, p. 148) Sosa used "discredits." (Sosa, '91 ('64), p. 16). Klein uses the term "disqualifying" (Klein, '71, p. 475). Nozick introduces a bevy: "undercut, outweighted, neutralized, overcome, overshadowed, dissolved, canceled, consent-weakened, destroyed, nullified, undermined, upset, precluded." (Nozick, '68, p. 29ff)

Hart simply declined to "press the view."

Bayles gives defeasibility short-shrift:

> ... There are numerous objections to the concept of defeasible terms. One could get the logical form of necessary and sufficient conditions by converting the unless clause into "and not *e1* and not *e2* and not ... *en*". ... To avoid this transformation ... one must distinguish positive and negative conditions, contending that the absence of a defense is not a positive condition. Such a distinction is quite suspect ([Bayles cites] Baker '77, p. 33). Is the absence of an insanity defense ... a negative condition? ... Absence of the defense seems to be a positive condition. (Bayles, '92, ibid.).

Hart says this about the transformation:

> It could, of course, be done vacuously by specifying as the necessary and sufficient condition of contract, consent, and other positive conditions and the negation of the disjunction of the various defenses. (Hart, *ARR*, footnote, p. 152)[13]

Bayles fails to perceive the importance to two kinds of negation in constructive logical systems. Work on default reasoning, defeasible reasoning, logic programming, and argument, has shown that the difference between positive and negative conditions is crucial.

Today, Hart amazes us with his clear perception that the logic programming form (which "vacuously" appears to be necessary and sufficient) equates to the more modular form of distinct defeasible reasons, while merely hiding their common procedural nature. Hart:

> ... This is misleading because what the theorist misrepresents as evidence negativing the presence of necessary mental elements are, in fact, multiple criteria or grounds defeating the allegation of responsibility. ... The logical character of words like "voluntary" is anomalous and ill-understood. (*ARR*, p. 153)

Bayles:

> Hart also seems to have thought that it was impossible to formulate all the exceptions in advance. (Bayles, '92, p. 12; see Hart, '61, p. 123, and '83 ('70), pp. 269-71, 274-5)

In the language of the writers on nonmonotonic reasoning, one might say that Hart understood the qualification problem: formulating rules that mention all possible exceptions is difficult, and defeasibility makes formulation easier.

> ... Indeterminacy springs from the fact that it is impossible in framing general rules to anticipate and provide for every possible combination of circumstances which the future may bring. (Hart '83 ('67), p. 103)

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13. Hart almost certainly was inspired by Bentham's distinction between "positive" and "negative acts." Bentham: "... The nature of an act, whether positive or negative, is not to be determined immediately by the form of the discourse used to express it. An act which is positive in its nature may be characterized by a negative expression. Thus, not to be at rest, is as much as to say to move. So also an act, which is negative in its nature, may be characterized by a positive expression: thus, to forbear or omit to bring food to a person is signified by the single and positive term to *starve*." (Bentham, '48a (Lafleur edition), pp. 72-3; the bibliography also gives a '48 Oxford edition) If we consider this passage of Bentham, Hart's linguistic philosophy and practical experience as Barrister, and precursors such as Stevenson ('38) in analytic ethics, we can understand Hart's arrival at *ARR*.

Bayles says what he thinks has happened to the idea of defeasibility in Hart's thought:

> ... This point seems to develop into his view of the open texture of language; but since all terms have open texture, it cannot be a basis for a special class of defeasible terms. (Bayles, '92, pp. 12-13) [14]

IV. Reformers.

IV.1. Mackie.

Mackie, like Geach, wants his attack on Hart to show what is wrong with a whole school of thought. For Geach, Hart's use of speech acts is the failure; for Mackie, linguistic philosophy taken as a whole is the discredit.

Mackie's main argument is that intention is what mainly attaches responsibility to an actor, and intention is not a piecemeal concept. Intention is a coherent concept, not inherently defeasible. If a lawyer or philosopher formulates defeasible rules as criteria for intention, this formulation is not conclusive evidence that the concept is defeasible.

Mackie:

> ... Hart greatly exaggerates the heterogeneity of the defences against the claim that there is a contract. ... In ordinary practice, lawyers may treat "consent" as the mere absence of the various defences; but on the rare occasions when a higher court has to make a new decision, surely the judges do ... consider, as a real question, whether the new defence is or is not evidence of the absence of consent. ... *Sometimes* the "etcetera" in the list of criteria for a defeasible concept *is* like that in "2, 4, 8, 16, *etcetera*". (Mackie, '55, p. 152)

> Surely, despite what Hart says, intending, like consent, is an introspectively recognizable state of mind. (Mackie, '55, p. 153)

Mackie has no trouble with the idea that there are such things as *prima facie* warrants:

> ... It is not that the absence of intention is a defence; it is rather that the presence of intention establishes a *prima facie* case for the prosecution. (Mackie, '55, p. 154)

This passage from Mackie nearly concedes Hart his point. However, Mackie implores us not to conclude too much:

> ... The linguistic philosopher need not get stuck in ... "vicious linguisticism"; ... he must observe how things really are. ... Hart is failing to do this; ... he is using the evidence of linguistic[s] as if it showed conclusively ... the facts ... . Because we use the word "intention" defeasibly, intention must be a purely defeasible concept, there cannot be a positive psychological state ... called intending. But this argument is ... no more valid than the argument ..., ... since there is a word "intention" there must be a thing to which it refers. (Mackie, '56, p. 157; the liberal punctuation is Mackie's)

If we ask what *would* be evidence that a concept is

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14. Baker thinks this too: "If it is plausible to attribute to Hart the thesis that legal concepts are themselves open-textured," which seems certain, "this is the lineal descendant of his early claim that they are irreducibly defeasible." (Baker, '77, p. 48) "Although this slogan [defeasibility] then disappeared, the underlying principles soldiered on unchanged." (Baker, '77, p. 57)

irreducibly defeasible, we can see where Hart and Mackie disagree. Hart is concerned with epistemology, hence, with criteria, and with rules that express criteria in language. Mackie is concerned with ontological questions, with whether concepts are coherent, e.g., in a theory of human psychology. Mackie is willing to suppose that concepts have a life separate from the rules that govern their use and the criteria for their application. So Mackie is free to call concepts defeasible or indefeasible at will. If a concept's defeasibility does not depend on its linguistic behavior, then it is hard to see the point of calling a concept defeasible.

Glanville Williams gave just this resolution in a terse footnote:

> The question may be largely verbal, ... (Williams, '53, footnote p. 29)

when he raised the same objection as Mackie:

> ... my preference is for the converse position [from Hart], that the meaning of the so-called defenses of mistake and accident can only be understood by considering a general theory of *mens rea*. In reality, mistake and accident are not defences but modes of denying the case for the Crown. (Williams, '53, footnote p. 29)

IV.2. Feinberg.

Feinberg understands defeasibility better than any of his predecessors. He notes the close association with a *prima facie* case and characterizes defeasibility as the source of shifting burdens.

> The notion of defeasibility ... is inextricably tied up with an adversary system of litigation and its complex and diverse rules ... . Of course there are no rules of comparable complexity and precision governing our everyday nontechnical use of 'faulty-action sentences'. At most, ... there are revealing analogies ... . Outside of the law the notion ... will be necessarily vague, though not necessarily obscure. (Feinberg, '65, p. 136)

Oddly, Feinberg finds some use for the "vague though not necessarily obscure" concept of defeasibility: He can be found distinguishing defeasible from non-defeasible charges (Feinberg, '65, p. 139), qualifying his new concept of "registrability" as defeasible (Feinberg, '65, p. 141), and counting many imputations of fault as defeasible (Feinberg, '65, p. 147). In fact, his abstract describes his agreement with Hart over the part of the original analysis that "has the greatest *prima facie* plausibility" (Feinberg, '65, p. 134). We could consider it a playful use of words if Feinberg did not have to rely on the concept so sincerely and repeatedly throughout his own analysis.

Baker later reiterates Feinberg's point:

> Given the procedural rules for English law, we can determine ... the burden of proof ... . Outside courtrooms there are no similar rules to settle questions of onus of proof. This obstructs the extension of the concept of defeasibility to any non-legal concepts; in particular to the concept of human action. (Baker, '77, p. 33)

> [Hart] requires ... the elaboration of a non-legal notion of onus of proof ... . (Baker, '77, p. 34)

Today's development of defeasible reasoning is precisely

for normal, everyday epistemological and commonsense situations, not just for courtroom procedure. It is not hard to invent procedures as simple or as complex as desired, as precise or as vague as appropriate, for the shifting of burdens in the use of defeasible rules.

One might paraphrase Feinberg today: the notion of defeasibility is inextricably tied up with an adversarial system of reasoning. That was the point that Perelman, Toulmin, and Rescher were making on the subject of argumentation and dialectic. Properly characterized, all kinds of reasoning are inherently adversarial, including reasoning in epistemology, science, and decision-making. These dialecticians did not focus on the defeasibility of the rules because they do not *formulate* the rules that may participate in the dialectic. That is why philosophers of law and researchers on artificial intelligence have converged on the issue: they need to consider both the representation of the rules and their processing.

IV.3. Baker.

The problem for defeasibility, Baker correctly sees, is the concept of meaning based on truth-conditions:

> It is impossible to marry the concept of defeasibility with our conception of meaning based on truth-conditions ... . (Baker, '77, p. 43)

Baker then describes a possible framework for defeasible reasoning:

> We might expect to find the defeasibility ... to have implications for the structure of ... arguments. A decision should be reached solely on the basis of evidence actually submitted by at least one of the parties or implicitly conceded by both.[15] The logical description of a trial ... could be presented in the form of a tree-diagram [which] represents states of information. A person with a complete grasp of the sense of [a proposition] *q* should be able to fill in the symbols ... on any such tree ... . (Baker, '77, pp. 45-6)

Formalists in defeasible and non-monotonic reasoning would say that Baker has discovered the constructive, game-theoretic, operational semantics of defeasible reasoning. A similar disputation tree can be found in the contemporaneous work by Rescher on dialectic (Rescher, '77, p. 5).

Baker even notices that the tree must somewhere descend infinitely if the defeasible conditions are to be incapable of transformation into necessary and sufficient conditions. Baker does not, however, perceive that finitudes of search can create the appearance of infinite depth; limited search is often due to limited knowledge, limited computation or limited presentation of argument. He also does not clearly perceive that *q*'s tree could be limitless because it necessarily incorporates as a sub-tree, the limitless tree of some subordinate proposition occurring in *q*. Surely the

open-texture of one term opening the texture of another is a strong theme in Hart.

But no matter how the reduction is prevented, Baker makes the right connection:

> ... There is no possibility of spelling out explicitly the content of [a *ceteris paribus* rider]. (Baker, '77, p. 48)

Then,

> This is a formidable catalogue of constraints on a semantic theory. Can any theory meet them? ... *Mirabile dictu*, the answer is "Yes". There is a theory of meaning ... from Wittgenstein's *Philosophical Investigations*. It is a little-known form of a little-recognized kind of semantics, a form of constructivism. (Baker, '77, p. 50)

> Constructivism ... explains the sense of a sentence by specifying the conditions under which we correctly judge it to be true ... (Baker, '77, p. 51)

> ... Defeasibility can be harvested only as the fruit of a new species of semantics. (Baker, '77, p. 57)

I have no objection to Baker's final understanding of defeasibility and constructive semantics. In fact, the AI communities of Knowledge Representation, and AI and Law, are doing exactly the work that Baker sees undone, where:

> ... The suggested constructivist ... discussion of the complexity of legal judgments, the policy constraints on legal decisions, the complexity of rules ... will have to be examined carefully ... . (Baker, '77, p. 56)

Amazingly, Baker does not attribute a constructive view to Hart. Baker thinks that Hart maintained a truth-conditions conception of meaning.

> Hart did not succeed in articulating a cogent defence of this insight. Certainly he did not pass on an understanding ... .

> This is hardly surprising. There is no way to graft the notion of defeasibility onto the ... truth-conditions conception of meaning. Hence, there is no way to develop Hart's insights except in ... semantics radically different from any that he explicitly contemplated.

> I have tried to plant the seed of this Tree of Knowledge (Baker, '77, p. 57)

> Even Hart ... can know without understanding. (Baker, '77, p. 56)

Here is a travesty. Hart passed his understanding to whomever was prepared to receive it, notably Toulmin, Gauthier, and Chisholm. Hart's articulated defense is cogent, and even more complete than the critics have thought. He was not, as Baker suggests[16] mired in the classical semantics.

Hart even understands constructivism better than Baker, noting that total evidence is *not* a requirement for making defeasible conclusions. To say that Hart failed to appreciate a Wittgensteinian semantics is to be wanting to explain Waismann's influence on Hart,[17] since Waismann was a follower of Wittgenstein. Baker seems to be just arriving at an understanding that Hart takes for granted.

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15. This constructivism, which I believe is an essential distinguishing feature of defeasibility, militates against Baker's repeated claims that "total evidence is necessary in justifying applications of defeasible concepts." (Baker, '77, p. 45) If Baker means "total submitted evidence," he should say so.

16. Baker, '77, p. 56.
17. Waismann's *"porosität der Begriffe"* is of course linked to Hart's "open-textured concepts." E.g., Bix.

What is really amazing is that Hart was able to cover so much novel logical ground in such a short essay. Even considering Hart's intellectual magnitude, this requires explanation. As Toulmin[18] and I have noted, those working "in the borderland between jurisprudence and philosophy" have advantages over philosophical logicians.

IV.4. Howarth.

If defeasibility is a good idea, how has it survived in the law of contract? Does it remain the organizing principle of the law of contract? Howarth thinks yes.

> The main texts which we encounter [citing Cheshire and Fifoot, Guest, and Treitel] ... seem implicitly to have seized upon something very like defeasibility as an organising principle, without seeing the need to make it explicit. (Howarth, '81, p. 40)

But for Howarth,

> ... The make-or-break of defeasibility must be recognized as a misleadingly crude characterization of the concept ... .

Defeasible reasoning is perfectly compatible with claims that admit of degrees of strength. Pollock, in his main use of defeasible reasoning, is concerned with establishing probability claims, and these may be of different degrees.

The real point is that Hart's desire for "greater refinement" is what led to the ascriptive view in the first place. To distinguish between different remedies and different obligations, simply create distinctions among the kinds of contracting. To distinguish between censurable killing and non-censurable killing, distinguish the action of murder from the action of manslaughter.[19]

VI. A Logician's Fairy Tale.

Did Hart renounce "Ascription of responsibility and rights?" I believe that Hart believed every bit of it in '68 and in '83.

Hart felt he made errors, but those same errors did not prevent him from including "Definition and theory in jurisprudence" in his later collection. So why did Hart "decline" to reprint it? Why did he never return to "defeasible concepts"? I believe Hart found that there were more important things to do than to debate closed-minded logicians. Hart decided to be a philosopher of law, a great philosopher of law, rather than be a footnote beneath the footprint of deductivist dogma.

Shortly after Hart's fray with demonstrative logicians, Hart published "A logician's fairy tale":

> What accounts for ... failure is ... the incautious assumption that the methods of logical analysis, the principles of logical classification, and the symbolic notation which have

been so fruitful and so clarifying in the treatment of mathematical or other systems of necessary truth can safely be used ... in the elucidation of the non-necessary propositions of ordinary discourse. And since in modern manuals of logic this assumption determines the whole presentation of the subject, it is worth examining a single case where, as it seems to me, it calamitously breaks down, especially as a moral may be drawn for other cases where also the obviously valuable apparatus of modern logic seems not to clarify but to distort. (Hart, '60, p. 198)

> In making this criticism I am not contending for a third truth value, a "multi-valued" logic ... .[20] I am on the contrary defending a feature of ordinary speech against a formal logician's prejudice which has blinded authors as accurate as these ... .

These are parting words from one who has grown tired of his adversary. Hart then introduced Perelman's translated papers, *The Idea of Justice and The Problem of Argument* ('63):

> The connection between law and the study of argument ... is ... clear. Legal reasoning characteristically depends on precedent and analogy, and makes an appeal less to universal logical principles than to certain basic assumptions peculiar to the lawyer; it therefore offers the clearest ... example of modes of persuasion which are rational and yet not in the logical sense conclusive ... .[21] (Perelman (Hart), '63, p. vii)

Hart refers to Perelman's use of argument:

> ... argument which made appeal to those "proofs" which Aristotle characterised as dialectical in contrast to the analytic proofs of formal logic. (Perelman (Hart), '63, p. vii)

Hart would leave the fracas and let others join the fight.[22]

Hart is content to make claims about "action in law," and embittered to attack traditional logicians indirectly, e.g. (Hart, '83 ('53), p. 40 and '83 ('70), p. 265-6).

Logicians think it heresy to think there might be other formal systems of representation. They drove Keynes to economics and Hart to jurisprudence, refusing to receive the largess of each.

I don't believe Hart's conception of defeasibility was perfect. Today, we emphasize the defeasibility of rules, not the defeasibility of concepts defined through defeasible rules. Hart's claiming the impossibility of necessary and sufficient conditions needs to be made more precise;[23] consider:

> a *contract* exists *if and only if*
> there was a *contracting* and it was *effective*.

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18. "It is probably no accident that [Hart] reached these results while working in the borderland between jurisprudence and philosophy." (Toulmin, '58, p. 142)
19. Mackie makes this point with contempt for its very suggestion: "... the notion of a lower degree of responsibility is a confused one ... . What must be meant is that there is full responsibility for a less wrong act." (Mackie, 1955, p. 155)

20. I have omitted from Hart the phrase: "or the introduction of any sophisticated formal principle". A response to my paper can point here to claim that defeasibility, a formal principle introduced by Hart, is thus repudiated. But I think the emphasis on "words" like "unless" is consistent with adherence to defeasibility, which could as easily be "a feature of ordinary speech."
21. Hart continues, "This was not ... mere style ...." which I also argue (Loui, '91), contra Alchourron.
22. Hart later comes to use Perelman's word, "argument", which is conspicuously absent in the rest of his writing: "what is needed is ... reasoned argument directed to establishing the merits of conflicting theories, [or] divergent concepts or rules ... ." (Hart, '83, p. 6)

This cartoons the issue, but it does provide necessary and sufficient conditions, trivially, by remigrating the defeasibility.[24] Still, Hart's defeasibility needs no major updating to fit today's formal work.

To follow Hart, we should all aspire to elucidate great themes, rather than to participate in small rows. Why such a detailed revisiting of this old paper? Because Hart's ideas have been wronged and deserve to be restored. Every time we formalize another aspect of representation and reasoning, we learn how right Hart was.

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23. Mackie also makes this important point, but only in passing: "... of [Hart's] two reasons for [rejecting the principle of verification], the one depends on his lack of precision about necessary and sufficient conditions ... ." (Mackie, '55, p. 151)

24. Hart knew language to be Quine and Ullian's web, but he did not entertain this machination, which shifts statutory defeasibility to open-textured interpretation, in this context of providing necessary and sufficient conditions. He certainly knew of it, mentioning elsewhere, "... rules are expressly framed in such unspecific terms as 'reasonable' or 'material'." (Hart, '83 ('67), p. 103)