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Hart's Critics on Defeasible Concepts and Ascriptivism

Ronald P. Loui

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 along the lines of a Wittgensteinian game-theoretic semantics has largely been fulfilled. Even the most contentious part of the... [Read complete abstract on page 2.](#)

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**Hart's Critics on Defeasible Concepts and
Ascriptivism**

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WUCS-95-02

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HART'S CRITICS ON DEFEASIBLE CONCEPTS AND ASCRIPTIVISM

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Abstract

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Precis given at the Fifth Intl. Conf. on AI and Law, Washington D.C., May 1995

I. Main Contentions.

H. L. A. Hart's famous paper, "The Ascription of Responsibility and Rights," (1948) 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 the community where logic and law meet.

Hart, however, had critics who have described the work as "fraught with difficulties" (Bayles, 1992, p.12), "an abandoned wreck" (Howarth, 1981, p. 33), "inconclusive" and "circular" (Baker, 1977, pp. 37-8), and "glaringly at fault" (Cherry, 1974, 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*, 1968. Of the two critics Hart cited, one says of the work: "fundamentally incorrect" and "needs to be drastically reformulated" (Pitcher, 1960, 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, 1960, p. 221). "I shall ... refute Ascriptivism." Three obscure pages later, the critic announces: "With this, I dismiss Ascriptivism" (Geach, 1960, p. 224).

This daubery of Hart will not stand.³ 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, 1977, p. 43)

Clearly the full extent of defeasibility needs elaboration. The potential ... is considerable. (Howarth, 1981, p. 40)

The major question about defeasibility is what a Wittgensteinian game-theoretic semantics would be like. Most of the difficulty concerns the claim that defeasible warrant is somehow different from truth. 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 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.

Critics of defeasible reasoning who invoke the historical repudiation of Hart are

mistaken. In two prominent attacks that cite Hart, we hear that AI's defeasible reasoning is "misdirected" (McCarty, 1994) and "conceptually weaker [than belief revision]" (Alchourron, 1993). I will briefly respond to these attacks in the context of Hart's overdue restoration.

More important is the opportunity to reread this fundamental paper of Hart carefully to see how correct his view of logic, language, and law really was.

II. Hart's Revelations.

Quoting large fragments of Hart reveals his clarity: not only of prose, but more importantly, of his logical view.

II.1. Ascription of Responsibility.

Hart's central thesis is ambitious:

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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, 1958, p. 142; compare Toulmin, 1950, which cites only Ross). Also, David Gauthier's dissertation submitted in 1961: "practical principles are defeasible. (I take the term from Professor H. L. A. Hart.)" (Gauthier, 1963, p. 159) There is universal agreement that Hart's concept is in line with W. D. Ross's *prima facie* duty (Ross, 1930, p. 18ff; Loewer and Belzer quote Nell's interpretation of Kant as precursor to Ross; Causey gives Wittgenstein; Melden, 1959, p. 18 gives Ewing, 1947, p. 33, and Frankena, 1952, p. 196, and 1955, p. 231 as references to the use of *prima facie*, to which we must add Prior, 1949, p. viii and Barry, 1965 (his 1958 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 1964, "These questions concern: the 'defeasibility' of moral requirements ...," (Chisholm, 1964a, 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, 1957, p. 462) Chisholm reviews Hart that same year, "Similarly for ... those facts which would defeat the ascription of killing." (Chisholm, 1964b, p. 614) Also Firth, "Their warrant is not derived from ... coherence nor defeasible" (Firth, 1964, p. 552) My bibliography's references to Swain, Sosa, and Lehrer-Paxson show how the term became mainstream in epistemology in the mid-1970'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, 1980, Nute, (1985) 1988, Loui, 1987, Causey, 1991; 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" (compare Levi, 1976 and Chisholm, 1982). In AI, we return to Hart's original problem of *specifying* rules and *applying* them.

My central purpose in this article is to suggest that the philosophical analysis of the concept of a human action has been inadequate and confusing, 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*,⁴ 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, (1948) and (henceforth, just) 1951, p. 145)⁵

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, "This is mine", "This is yours", are primarily sentences for which lawyers have coined the expression "operative words" and which Mr. J. L. Austin the word "performatory". (Hart, 1951, pp. 156-7)

So much for the ascription and recognition of rights which we effect with the simple utterances "This is yours" I now wish to defend the similar but perhaps more controversial thesis that the concept of a human action is an ascriptive and a defeasible one 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 (Hart, 1951, 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.⁶

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,

2. Melden describes Hart's proposal as "drastic." (Melden, 1956, p. 532) But Melden seems to agree with Hart: Hart's proposal is only "more drastic" than what Melden puts forth.

3. Shakespeare used "dawbry": coarse painting, false pretence, whitewash; it appears deliberately in the recent American President's slogan to arms.

4. 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, 1967, pp. 31-2)

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

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. In Hart's example, a legal judgement of murder incontrovertibly carries a responsibility. We do not know in advance what that responsibility entails as punishment. But it already seems to differ from a legal judgement of manslaughter, which ascribes a different 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.

The idea of implicature is perhaps more important here than the idea of volition. The same kind of ascription arises with other implicatures, which are not related to action and

6. This qualification, though noticed by many critics, is not respected in their attacks. For instance, in Geach and Pitcher (see further). In Feinberg: "Any kind of action sentence can be *used* either descriptively or ascriptively." (Feinberg, 1965, p. 148) But what is the primary use? And in Howarth: "All of these examples are of human action, but in none of them is ... ascription ... directly at issue. ... It runs contrary to experience to suppose that all actions involve ascriptions. The fact is that we *can*, and often do, talk of human actions in primarily ... descriptive terms." (Howarth, 1981, p. 34) Talking, on occasion, in a manner which is both ascriptive and descriptive, but primarily ascriptive, is *one use* of action sentences (which Hart explicitly allows). What, though, is the *primary use* of such sentences? 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, 1969, p.55)

responsibility. Suppose that a community of philosophers takes "knowledge" to be nothing but "justified true belief." To describe a person as having knowledge that p is to ascribe among other things truth to p , to imply p . Moreover, if there are defeasible conditions for something being a belief, e.g.,

"A believing p " and "A believing q " are prima facie reason for "A believing p and q " then describing someone as "believing p and q " is defeasible, which makes "knowing p and q " also defeasible. "To know" becomes a defeasible concept supervenient on the defeasibility of the concepts that figure in its conventional entailments, e.g., on the defeasibility of "to believe." Since "believing p and q " can be subjected to dispute, so too can "knowing p and q ".

A. Melden simply stipulates Hart's linguistic convention:

In [my] paper I shall reserve the term "action" for the cases in which what an individual does can be ... in the appropriate circumstances the subject of moral review. (Melden, 1956, p. 523)

Melden then repaints Hart's picture warmly:

Just as we supply a background ... in understanding the bodily behavior of those engaged in playing chess, so we supply a complex background ... in understanding each other's behavior as action. This practical context ... is crucial *Without it* we employ the cool language of ... physiologists ..., and *with it* we are enabled to participate in the use of discourse by which we impute responsibility to individuals when we treat them as persons or moral agents (Melden, 1956, p. 539; emphasis added)

... Normal uses of action sentences risk defeat In normal uses of action sentences we ascribe responsibility ...; ... we impute to the individual our common moral form of life. (Melden, 1956, p. 540)

II.2. Defeasibility and Semantics.

Hart implies that sentences function in a variety of ways. Truth and judgement both may be adopted toward claims. Legal consequences are implied by legal judgements.

... the decisive stage in the proceedings of an English law court is normally a *judgement* given by the court to the effect that certain facts are true and that certain legal consequences are attached to those facts. Such a judgement is therefore a compound or blend of facts and law; and of course, the claims and indictments upon which law courts adjudicate are also blends of facts and law (Hart, 1951, p. 146)

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 rather than in the theoretical discussions of legal concepts by jurists who are apt to be influenced by philosophical theories. (Hart, 1951, 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*, logically necessary or absurd. (Hart, 1951, p. 155)

When ... our ascription of responsibility is no longer justified in the light of new circumstances of which we have notice, ... we must judge again: not *describe* again. (Hart, 1951, p. 165)

Thus, many sentences are descriptive, including sentences using legal concepts. They can be true or false. But 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 (Hart, 1951, pp. 147-8)

Several things are striking in these passages.

First, it is clear that critics who cannot determine whether Hart's defeasibility is somehow confusable with the simple possibility of denial are not reading closely enough. In systems of defeasible reasoning, denial of a claim might be considered a defeating or burden-shifting move. But defeat based on effective counterargument is "something quite different," and Hart could be no more explicit. When we see claims of confusion in Cherry (Cherry, 1974, p. 102) and Pitcher (Pitcher, 1977, p. 234), clearly, it is their confusion, not Hart's.

Second, Hart shows here, as elsewhere, his awareness that the procedural aspects of argument and counter-argument are what distinguish his semantical view from the

constrained logical view. The distinct semantical view "can be seen by examining the distinctive ways in which legal utterances can be challenged." (Hart, 1951, p. 147) This observation makes Baker's purported resuscitation (1977) and Feinberg's alleged clarification (1965) merely expoundings of what is already in Hart.

Third, Hart does not confuse punishment for an action with the doing of an action here. He does not confuse defeat of a putative action ascription, or excusing, with mitigation, or reduction of its penal implications. He simply used an unfortunate word, "reduction" (which he duly places in quotes), which makes possible a misreading of his subsequent example regarding the distinction between murder and manslaughter. Careful reading shows that Hart had a clear understanding of the logical character of defeasible reasoning. Hart explains of a "reduction" of a claim:

... that only a weaker claim can be sustained."

Hart does not say a weaker *sentence* can be imposed, but that a weaker *claim* can be sustained. Weakness here should be interpreted as weakness in terms of logical entailment, in the same way that *p* is weaker than "*p* & *q*".⁷ A better example for Hart would have been one in which successful counterarguments interfered with an argument for "*p* & *q*", but permitted an argument for "*p*".

Finally, 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 1958 work. In Toulmin too, the linguistic importance of "unless" is the springboard.

Hart's most famous passage in this paper introduces the term, defeasibility⁸:

When the student has learnt that in English law there are positive conditions required for the existence of a valid contract, ... his understanding of the legal concept of a contract is still incomplete, and remains so even if he has learnt ... interpretation For these conditions, although necessary, are not always sufficient and 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 words "conditional" and "negative" have the wrong implications, but the law has a word which with some hesitation I borrow and extend: this is the word "*defeasible*", used of a

7. This is not just my prestidigitation. Logical weakness and strength are standard concepts for philosophical logicians. Howarth refers to a similar use. (Howarth, 1981, p. 36)

8. Actually, Webster's *New International Dictionary* Unabridged 2nd Edition, 1950, and *Oxford Universal English Dictionary* 1937 both give definitions perfectly in line with Hart's use and contemporary use, with the latter giving 1586 as a date of introduction.

legal interest in property⁹ 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. (Hart, 1951, p. 152)

R. Brandt repaints the picture a decade later:

I ... propose that we make do with an incomplete or expansible set of necessary and sufficient conditions In view of the vagueness of 'blameworthy,' this is as much as we can properly hope for. (Brandt, 1958, pp. 18-9)

Brandt does not go as far as to use Hart's term, "defeasible", but he has the right idea that the logic of excuses is more closely connected to argument than to logic:

... The recognized excuses will be among the *reasons* we can offer for or against a charge of blameworthiness, in one sense or another of 'reason.' ... For a person to be blameworthy does not imply there are no mitigating excuses (Brandt, 1958, p. 21)

III. Critics.

III.1. Early Critics.

III.1.a. Geach.

Geach's criticism is outrageous. He sums Hart:

Ascriptivists hold that to say an action *x* was voluntary on the part of an agent *A* is not to *describe* the act *x* as caused in a certain way, but to *ascribe* it to *A*, to hold *A* responsible for it. Now holding a man responsible is a moral or quasi-moral attitude; ... there is no question here of truth or falsehood Facts may support or go against such a quasi-moral attitude, but can never *force* us to adopt it. (Geach, 1960, p. 221)

III.1.a.i. Geach and examples.

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.

9. When I told Pollock that Hart imported the term from English property law, he was not surprised; he advised that I consult, too, the etymology of "fact". "Modal" in contrast, appears in logic and in contract law at about the same time.

(As Wittgenstein said, when put on an unbalanced diet of examples, philosophy suffers from deficiency diseases.) (Geach, 1960, 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. "To attend" seems normally more active and voluntary, and correspondingly easier to have praise or blame attached.

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,¹⁰ 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.

III.1.a.ii. Geach and savage communities.

Geach then says

... Even when imputation and blame are in question, they can yet be distinguished from the judgment that so-and-so was a voluntary act. There are savage communities where even involuntary homicide carries the death penalty. (Geach, 1960, p. 222)

Here is a Geach fallacy. Hart is at best wondering whether responsibilities (such as the death penalty) are always attached to ascriptions of acts (such as voluntary homicide), not whether there might be responsibilities attached to involuntary events. Hart gives examples where involuntariness defeats ascription of responsibility; he does not require that involuntariness universally preclude responsibility.¹¹

10. Consider a text-editor that interprets *e* in some context as *extirpate* all of the text. Consider too exhaling smoke in socially unacceptable situations.

III.1.a.iii. Geach and speech acts.

Geach's last 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.¹²

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, ... calling a thing "*P*" has to be explained in terms of predicating "*P*" of a thing, not the other way round. (Geach, 1960, p. 223)

Geach's use of the word "hence" is purely rhetorical, since non-assertorial predications might still be explained in some other way (e.g., Hare, 1970).

Geach is misconstruing Hart (and perhaps all of the speech act work that follows Austin). 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.¹³

To a Fregean logician, there is a perfectly reasonable analysis. Hart seems to be saying that the formal representation:

$$P(a) \text{ and } (P(a) \text{ implies } R(a)),^{14}$$

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*.

11. Howarth also untangles the Geach illogic: "... it seems the possibility of ascription without human action remains with us. Thus, ... nothing prevents ascriptions being made independently of acts, so ascription is not even a sufficient condition for there being a human action." (Howarth, 1981, pp. 34-5) Remarkably, Howarth takes this to be a counterargument, when it is not; it is merely an irrelevant observation.

12. Although Hart is inspired by Austin, neither's view depends on the other's. Compare Austin's "Plea for excuses" (1956) with "Ascription of responsibility and rights." Austin's concerns are more broadly sweeping, hence, more readily attacked. Although Hart repeatedly refers to Austin, Hampshire suggests a more complex dependence: "Austin had begun this kind of investigation in a class with Professor Hart in 1948, concentrating on legal concepts associated with action and responsibility." (Hampshire, 1969, p. 37)

There is ample evidence that this is in line with Hart¹⁵:

... a "performative" use of language, where words are used in conjunction with a background of rules or conventions ... (Hart, 1983, p. 4)

... "He is out" is an utterance the function of which is to draw a conclusion from a specific rule ... (Hart, 1983 (1953), p. 40)

For words to have ... operative effect, there must exist legal rules Such rules may be conceived ... as giving to the language used a certain kind of force or effect which is in a broad sense their meaning ... (Hart, 1983 (1967), p. 94)

Legal rules are needed to supply the detail required to distinguish murder ... from excusable homicide ... (Hart, 1983 (1967), p. 114)

... Given a background of rules or conventions which provide that if a certain person says certain words then certain other rules shall be brought into operation, this determines the function or, in a broad sense, the meaning of the words in question. (Hart, 1983 (1970), p. 276)

"*Faktum und Recht zugleich*" (Hart (Jhering), 1983 (1970), p. 266; roughly, "fact and law at the same time")

Geach responds to the possibility of conventional implicature in a later *Philosophical Review* article that again criticizes Hart without naming him:

Of course, the anti-descriptive theorist will reply that his theory was not meant to cover such cases -- that the same form of words, after all, may have different uses on different occasions. This possibility of varying use, however, cannot be appealed to in cases where an ostensible assertoric utterance "*p*" and "if *p* then *q*" can be teamed up as premises for a *modus ponens*. Here, the two occurrences of "*p*" ... must have the same sense if the *modus ponens* is not to be vitiated by equivocation; and if any theorist alleges that ... "*p*" is really no proposition at all, it is up to him to give an account of the role of "*p*" that will allow of its standing as a premise. (Geach, 1971 (1965), p. 260)

13. 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, 1965, p. 151)

14. Here, *P(a)* and *R(a)* are not to be confused with "genuine action *plus* its intended effects," which Hart dismisses (Hart, 1951, 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, 1992.

My analysis of ascription as the implication of responsibility according to linguistic convention, represented as a conjunction above, suffices to refute Geach: it gives an account of the role of the utterance that will allow its standing as a premise.¹⁶ Geach, moreover, begs the question about whether the *modus ponens* is valid (not "vitiating by equivocation") for utterances of "p". Clearly it is not valid when "p" and "if p then q" are each uttered as conclusions of incompatible inductive theorizing, or as conclusions under a probabilistic acceptance rule. So why should it be valid for ascriptivists?

Geach wants to force conventional use of logic

... A proposition may occur in discourse now asserted, now unasserted, and yet be recognizably the same proposition. ... I shall call this ... *the Frege point* ...
(Geach, 1971 (1965), p. 250)

There is nothing in Hart that is inconsistent with the *Frege point*.

... We, of course, very often make use of legal concepts in descriptive and other sentences, and the sentences in which we so use them may be statements, and hence (unlike the judge's decision in which legal concepts are primarily used) they may be true or false. (Hart, 1951, p. 156, commas introduced)

III.1.a.iv. Geach and the importance of consistent (logical) notation.

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 "Ascription of responsibility and rights":

... Had I commanded at the time of writing Essay 1 in 1953 the seminal distinction between the "meaning" and the "force" of utterances, and the theory of "speech acts" the foundations of which were laid by J. L. Austin, I should not have claimed that statements ... were not "descriptive" ... (Hart, 1983, p. 2)

... In Essay 1 I fail to allow for the important distinction between the relatively constant meaning of sense of a sentence fixed by the conventions of language and the varying "force" or way in which it is put forward by the writer or speaker on different occasions. ... What compounds my error is that ... I deny

15. Hare thinks so, too: "... The modification ... takes the form of ... an alteration of ... its descriptive meaning, with the retention of its evaluative meaning. This, as has been pointed out to me by H. L. A. Hart, is how legal principles are often modified by judicial decisions ... (Hare, 1952, pp. 53-4) But Hare is making an even stronger point, taking implicatures to be deductive, and decisions to alter the principles attached to concepts. (Hare, 1952, p. 55)

that they are "descriptive" as if this were excluded by the status which I wrongly assign to them as conclusions of law ... (Hart, 1983, pp. 4-5)

Without digressing too much, some features of the current formalization of defeasible reasoning will explain Hart.

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.

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. The traditional logicians ask how to reconcile object-level assertion and meta-language predication of defeasibility, but their own answer (Tarski's

16. In fact, it is very close to Feinberg's understanding (see further). For a different response to Geach, Hare asserts: "To understand the 'if ... then' form of a sentence is to understand the place it has in logic." (Hare, 1970, p. 16) And "... The appearance of a word in ... conditional clauses provides no general argument against explaining its meaning in terms of the speech acts standardly performed in categorical affirmative utterances ...; once we understand the transformations which turn simple sentences into these more complex forms, we understand also how the words in them have meaning, even though the speech act in terms of which their meaning was explained are no longer being performed." (Hare, 1970, pp. 19-20)

truth schemata) is woefully stipulatory: "*p*" is true if and only if *p*.¹⁷

Hart even sees this reconciliation:

It has been contended that the application of legal rules ... cannot be regarded as ... any ... kind of deductive inference, on the grounds that [they cannot] be regarded as either true or false This view depends on a restrictive definition, in terms of truth and falsehood, of the notion of a valid deductive inference and of logical relations such as consistency and contradiction. ... Although considerable complexities are involved, several more general definitions of the idea of valid deductive inference ... have now been worked out by logicians. (Hart, 1983 (1967), p. 100)

Meanwhile, Hart appreciates the social nature of some predicates (such as "is a contract") and he appreciates that this social nature changes what attitudes we may adopt toward it, that is, how we may predicate it in the meta-language. A social term may be introduced by the role it plays in the social policies, the defeasible rules, that mention it, and may play no other role (cf., his Wittgensteinian discussion of what it means to be a "trick" in a card game, Hart, 1983 (1953), p. 33). There may be no other way to manipulate the term: not by induction, nor by derivation from tautologies.

Interestingly, Rescher later stakes dialectic (and defeasibility) on the social nature of the concept "to know". Pollock achieves success in epistemology by saying that grounds for asserting even the most basic phenomenological properties, such as "is red", are defeasible. Defeasibility is not reserved for quasi-legal or quasi-moral terms.

Hart's mysterious insistence that some sentences are defeasible is, if anything, not ambitious enough. He seems to say as much later when he moves closer to Waismann:

In all fields of experience, *not only that of rules*, there is a limit, inherent in the nature of language, to the guidance which general language can provide. (Hart, 1961, p. 123, emphasis added)

III.1.b. Pitcher.

Pitcher feels Hart has improperly generalized from wrongful actions to actions in general.

If I say "He played the piano" or "He sat down to dinner," can I be said to be ascribing responsibility to someone? Surely not. One feels that except under rather unusual circumstances, there is nothing in such cases for anyone to be

17. Quine asked me how we intended to restore semantic connections so that defeasibility was not merely a meta-logic of probability (personal communication). Why is probability allowed to qualify claims in the meta-language, but not defeasibility? In any case, the answer has been given by the constructivists, in game-theoretic semantics.

responsible *for*. (Pitcher, 1960, p. 226)

The response to Pitcher was made earlier in the appraisal of Geach but deserves more detail since Pitcher gives more detailed attack. Pitcher is right that the sentences do not usually ascribe much. However, had there been anything implied by responsibility, such as a rebuke for *faux pas*, the utterances ascribing playing and sitting would be ascribing responsibility, hence rebuke.

III.1.b.i. Pitcher and *inform-referent* speech acts.

Pitcher is correct that "Johnny did it," when answering the question "who did it?" primarily informs rather than attaches a penalty. It may well imply censure, but its "principal function" is resolving the reference of the interrogative pronoun. Hart nearly makes this same point himself (Hart, 1951, p. 162).

The point is not important. Rayfield disposes of these examples "which need not detain us" (Rayfield, 1968, p. 141); they "are comparatively simple, and I shall ignore them." (Rayfield, 1968, p. 141)

III.1.b.ii. Pitcher and the necessity of ascription.

Pitcher makes an error of modality:

If, in conversation, I say something of the form "He did it," am I necessarily claiming that the person is censurable and am I primarily doing this? (Pitcher, 1960, p. 230)

I see nowhere in Hart that the ascription of responsibility is entailed *necessarily*, not even in principal uses of an action sentence.¹⁸ In all contemporary work on conversational implicature, the implication is taken to be defeasible. Defeasibility is after all the source of Hart's ascriptivism. Hart says only that "the connection is not necessarily *vinculum juris*"; it is consistent to say that Hart viewed the connection as non-legal and at the same time indefeasible, but that is far-fetched. Pitcher should at least replace "and" with "when". Even in his uncharitable reading of Hart, Pitcher allows that

18. Rayfield appears to take "responsibility as a necessary condition for action" (Rayfield, 1968, p. 139) but clearly distinguishes "bound" from "unbound" actions. The latter do not attach responsibility because there is "an adequate defense." Rayfield's list of defenses is like Hart's. Then Rayfield echoes Hart: "the list is not exhaustive; ... I doubt that an exhaustive list of determining circumstances can be furnished." (Rayfield, 1968, pp. 143-4) Rayfield does not say that responsibility is thus defeasibly attached. But he says that unbound actions are *faux amis* of bound actions. Rayfield's reviewer, Kaufmann, immediately identifies the defeasibility: "*l'imputation a la caractéristique de pouvoir être défaite («defeasable»»).*" (Kaufmann, 1984, p. 10)

a necessary connection might yet exist "rarely, yes."

III.1.b.iii. Pitcher and the object of defeat.

Pitcher:

What [Hart] has not shown, and what he must show, is that if all the normal necessary and sufficient conditions are met, there are still defenses which can defeat the claim that Smith hit her. (Pitcher, 1960, p. 234)

This misses the point, which must have something to do with defeating claims of responsibility. What Hart needs to show is that an ascription of action shifts the burden to one who opposes the defeasible implication of liability (for whatever penalty or reward might separately be decided to be appropriate). It is for the opposition to claim "accidentally" or "by coercion" in order to sever the conventional connection.

Meanwhile, logicians might view the defeasibility suspiciously. But there is no Fregean alternative to defeasibility. To say that attachment of liability is defeasible is not to say something that cannot be falsified.¹⁹ As Hart tries to make clear, it is manifest in the shifting of burdens for opposing and establishing entailments. If there were no shift of burden (but indeed there is), Hart should be worried.

It is the idea of a default rule shifting burdens that none of Hart's early critics seems to appreciate.

III.1.b.iv. Pitcher and that for which an agent is responsible.

Pitcher is correct that Hart seems to ascribe responsibility for actions, which introduces complexity that Pitcher believes is unneeded:

Although many philosophers besides Hart speak regularly of a person's being responsible for his actions, I shall argue that this is an improper way of talking. (Pitcher, 1960, p. 227)

Hart speaks in this way only once, but in a central sentence: "to ascribe responsibility for actions" (Hart, 1951, p. 145). Hart can be interpreted to be doing it elsewhere:

to admit or ascribe or make accusations of responsibility ("I did it" ...) (Hart, 1951, p. 145)

The sentences "I did it", "you did it" ... *ascribe* responsibility; and the sense in which our actions are ours ... (Hart, 1951, p. 160).

But Pitcher is not giving Hart enough credit. Hart is at one point very clear about what is

19. Cf. Alchourron's discussion of Popper (Alchourron, 1992, p. 83)

ascribed when action verbs are used:²⁰

It is an ascription of liability ... (Hart, 1951, p. 162)

... utterances with which we ... admit liability. (Hart, 1951, p. 160)

... the non-descriptive uses of sentences by means of which liabilities or responsibility are ascribed. (Hart, 1951, p. 161)

When we ascribe ... rights or liabilities ... (Hart, 1951, p. 165)

III.1.b.v. Pitcher and condemnatory verbs.

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

If we can discover what it is about Smith that is reduced and perhaps altogether eliminated when we pass from "Smith hit her" to something like "Smith hit her accidentally," we will know what Hart means by "responsibility."²¹ I suggest that the only thing that is thus reduced is the degree to which Smith is deserving of censure or punishment ... (Pitcher, 1960, p. 229)

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, 1960, 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, 1960, p. 233)

20. See also Hart's postscript to *Punishment and Responsibility* where he explicitly discusses kinds of responsibility: role-responsibility, causal responsibility, liability-responsibility, and capacity-responsibility. (Hart, 1968, pp. 210ff.) Feinberg makes a similar point in 1965, and later: "... We might say he is properly subject -- or liable -- to blame, and then judgment could be characterized as an *ascription of liability*," (Feinberg, 1970, p. 128) And in Kaufmann, "... *Q'uil s'agit ici de la «responsabilité causale» et de la «responsabilité de capacité» ... et de la responsabilité au sens de «liability» ...* (Kaufmann, 1984, p. 10; "the question here is of ...") Also, for example, Farrer has: "'responsible' means 'answerable.' Everyone legally responsible is answerable to ... and answerable for A man is held ... answerable *for* his actions ...," (Farrer, 1958, p. 255) a use Pitcher would plainly have chosen to oppose.

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, 1960, 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."²² A second minor point is that Pitcher is not appreciating how context can affect implicature. Pitcher has no doubt that to "hit accidentally" is nevertheless to "hit," so inadvertence is no defeater for an ascription of hitting. 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 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.²³ 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:

... To "He did it" it may be pleaded:

1. "Accidentally" ...
2. "Inadvertently" ...
3. "By mistake for someone else"
4. "In self defence"
5. "Under great provocation"
6. "But he was forced to by a bully"

21. This formulation is not Pitcher's; Feinberg quotes Wittgenstein's §621 of *Philosophical Investigations*, "What is left over if I subtract the fact that my arm goes up from the fact that I raise my arm?" (Feinberg (Wittgenstein), 1970, p. 151)

22. Feinberg makes a similar point, extending the analysis to "defective ways of acting, but not necessarily morally defective." (Feinberg, 1965, p. 135) I have instinctively responded "why not?" upon hearing someone declare he would not "take credit for" his "doings."

23. Melden sees the subtlety, too: "Some sentences are employed with a view to determining whether blame is appropriate but where no blaming may actually occur (as in the hearings held in courts or during legislative fact-finding inquiries)." (Melden, 1956, p. 539-40)

7. "But he is mad, poor man." (Hart, 1951, pp. 162-3)

One must remember that as Hart wrote, at Nuremberg²⁴ it was the attachment of liability, the responsibility for action, that was principally debated. The question of punishment was secondary. It is possible for liability and penalty to be separate debates. Philosophers of action might view this additional mediation as unneeded complication, but law and morality, and perhaps conventional discourse, apparently do not.

III.2. Later Critics.

III.2.a. Cherry.

III.2.a.i. Cherry and modifying the concept.

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, 1974, p. 101)

... To claim successfully that *A* did *X* non-responsibly is, where *X* is [a legal concept], to defeat the claim that it was in fact *X* which *A* did. By contrast, to claim successfully that *A* did *X* non-responsibly, where *X* is [a non-legal concept] does not entail that it was something other than *X* which *A* performed. (Cherry, 1974, p. 104)

That *A* did *X* by accident ... presupposes that *A* did *X*. (Cherry, 1974, 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". ... "A played chess unwittingly" is odd, ... because it is barely credible that we could ever have

24. It seems clear Hart cared deeply about such things, going so far as to consider the argument "We are Germans; they are Jews" (Hart, 1955, p. 190). MacCormick details Hart's "hostility to Fascism," his "helping refugees from Nazi Germany during the 1930s," his birth in 1907 "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, 1981, pp. 2-12)

anything approaching a good reason for applying verb and adverb together. This is very different from cases like "He made a contract unwittingly", where ... the machinery of defeasibility comes into being. (Cherry, 1974, p. 103)²⁵

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."

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. Hart nearly says as much in a different example, pertaining to driving:

... Whenever we have an active verb like "drives", this implies, as part of its meaning, the existence of a minimum form of conscious muscular control
(Hart, 1968 (1960), p. 109)

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

25. Inexplicably, Bayles repeats Cherry's point but uses the example of contract instead of chess: "Defenses keep a contract from being valid, but an invalid or unenforceable contract still exists." (Bayles, 1992, p. 13):

suggestion, we should remember the varieties of doing (Baker, 1983, p. 704)

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.

Hart is clearer on all of these points in the later paper "Acts of will and responsibility":

A layman might say that in these cases the man's movements were "involuntary" or "not under his control" and if we call these "actions" it is only in the thinnest of all senses of that wide word, i.e., the sense in which it embraces anything we can say by putting together a verb with a personal subject. ... The layman, like the lawyer, would wish to distinguish tumbling downstairs from walking downstairs as not "really" an action at all. (Hart, 1968 (1960), p. 92)

... It might well be said that he drove the vehicle ... "in his sleep" or "in a state of automatism." Such cases can certainly occur. (Hart, 1968 (1960), pp. 109-110)

... In *Hill v. Baxter*, ... "after he has fallen asleep he is no longer driving". (Hart, 1968 (1960), p. 110)

... If the question of responsibility really were to be settled simply by reference to the question whether or not the accused's conduct could, in accordance with English usage,²⁶ be described as "driving", this might have very unfortunate results. (Hart, 1968 (1960), p. 110)

With any of these (closely related) responses, Hart's main point remains intact:

... Of course not all the rules in accordance with which, in our society, we

26. On the surface this could be used to claim that Hart now separates legal and common usage. However, they both might ascribe, while differing in the liabilities they ascribe.

ascribe responsibility are reflected in our legal code nor vice versa, yet our concept of an action, like our concept of property, is a social concept and logically dependent on accepted rules of conduct. It is fundamentally not descriptive, but ascriptive in character; and it is a defeasible concept to be defined through exceptions and not by a set of necessary and sufficient conditions (Hart, 1951, pp. 161-2)

III.2.a.ii. Cherry and defeasibility.

Cherry raises a further problem that concerns 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, 1974, 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, 1974, p. 107)

Cherry's observations are not fatal. Even if there is a broader class of indefeasible action concepts ("raw movements"?) employed in warranting defeasible action concepts (e.g., hitting), they may not predominate linguistic use. Secondly, Waismann would not be afraid to claim that all action concepts are defeasible, so why should Hart, who clearly sympathises with Waismann?

Open texture is a very fundamental characteristic of most, though not of all, empirical concepts, and it is this texture which prevents us from verifying conclusively most of our empirical statements. (Waismann, 1951, p. 121)

Waismann says "most, though not ... all." But instead of giving an example of an empirical concept for which texture is closed, much less an action concept for which texture is closed, Waismann discusses the direct ascertainment of the open-textured concepts. It is consistent with Waismann that action concepts are ascribed defeasibly without the existence of a mediating layer of indefeasible action concepts. In fact, in Waismann, the qualifier "most" is merely a hedge since his formula for opening texture seems to apply to any empirical concept.

Further, Hart perhaps thought of statives and sentences with impersonal subjects as providing defeasible reasons for action ascriptions. "She was hit by his arm," "His arm moved," and "Arm and female were in the same location at the same time," do not fall

within the purview of Hart's ascriptivism. Statives might present the conditions for defeasible derivation of actions. I think this would be a mistake, since statives seem just as defeasible to me as action sentences; it may have been a mistake to draw such a line between action sentences and statives in the first place. Statives are excellent candidates for ascription of liability in some contexts: in Hart's time, "being red" or "being a Jew" ascribed as much liability as any action sentence. "To be libelous" seems no less malignant than "to libel". But Hart might not have wanted to claim that the preponderant or primary use of statives ascribes responsibility.

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.²⁷ Using a defeasible reason requires a tentative commitment to its antecedent conditions. Such a commitment can in turn be challenged. Dispute might not end if there is no shared basis. So there must be a shared basis, an evidential ground or foundation.

Suppose such a shared basis. Now even if every empirical concept is defeasible, defeasible warrant can yet be achieved. All that is needed is to shortcut the process of rebuttal, to agree that a claim that could be challenged will not be challenged. It seems not to matter whether such a claim uses a verb that is stative, active, or passive, present, future, or imperfect. 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.2.b. Bayles.

III.2.b.i. Bayles and the declining.

Bayles writes:

Although he later declined to reprint that essay because "its main contentions no longer seem ... defensible", it is unclear that he rejects the analysis of defeasible concepts itself, as opposed to the claim that human action is the ascription of such a concept. (Bayles, 1992, p. 12)

Hart hardly can be said to disavow defeasibility in this passage from "Legal

27. Rescher makes a remark in line with Feinberg on this point: "In any essentially dialectical situation in which the idea of burden of proof figures, the very 'rules of the game' remain inadequately defined until the ... nature, extent, and weight of the range of operative presumptions has been resolved in some suitable way." (Rescher, 1977, p. 34)

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, 1968 (1958), 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 similarity between law's insistence on certain mental elements for both criminal responsibility and the validity of acts in the law is clear. (Hart, 1968 (1958), p. 35)

I do not think the general character of acts in the law (*Rechtsgeschäfte*) can be understood without reference to this idea of the performative use of language. (Hart, 1983 (1970), p. 276)

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 term²⁸), we should find Hart somewhere mentioning a shifting of burdens; such shifting is the mark of defeasibility. It is clear that Hart's view of legal justification includes a role for burden-shifting in all of his writings. It would be more satisfying if this later passage contained more explicit allegiance to the constructive semantics. But consider:

Another reason limiting the scope of the excusing conditions is difficulty of *proof*. (Hart, 1968 (1958), pp. 32-33)

Proof of mental elements ... is a difficult matter, and the law ... has used instead certain presumptions (Hart, 1968 (1962), 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, 1958, 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:

... Justification, Excuse and Mitigation made in answer to the claim that someone should be punished. (Hart, 1968 (1958), 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, (1958) 1968, 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, 1968 (1958), p. 30)

The performance of a human action is a very complex affair It may go wrong in many different ways, and some of these are brought home to us in such melancholy adages as "accidents will happen" or "we all make mistakes". (Hart, 1968 (1960), 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, 1983 (1967), p. 95)

28. Hart does return to the word, matter-of-factly, in 1955: "So my argument will not show that men have any right which is 'absolute,' 'indefeasible,' or 'imprescriptible.'" (Hart, 1955, 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 Universal 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 state. Chisholm used "overridden" and "may be overridden." (Chisholm, 1964a, p. 148) Sosa used "discredits." (Sosa, 1991 (1964), p. 16). Klein uses the term "disqualifying" (Klein, 1971, p. 475). Nozick introduces a bevy: "undercut, outweighed, neutralized, overcome, overshadowed, dissolved, canceled, consent-weakened, destroyed, nullified, undermined, upset, precluded." (Nozick, 1968, p. 29ff; the joining under quotes is mine)

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":

... What compounds my error is that ... I deny that they are "descriptive" as if this were excluded by the status which I wrongly assign to them as conclusions of law (Hart, 1983, pp. 4-5)

But Hart should not consider these aspects to be errors in the reasoning of "Ascription of responsibility and rights" 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.

Hart simply declined to "press the view."²⁹

III.2.b.ii. Bayles and defeasibility.

Bayles gives defeasibility short-shrift:

Although some philosophers since have happily used it, 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*". Hart was aware of this possibility 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 1977, p. 33). Is the absence of an insanity defense ... a negative condition? ... Absence of the defense seems to be a positive condition. (Bayles, 1992, *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, 1951, footnote, p. 152)³⁰

Bayles fails to perceive the importance to two kinds of negation in constructive logical systems. The past two decades of work on default reasoning, defeasible reasoning, logic programming, and argument, has shown that the difference between positive and negative conditions is crucial.³¹ Consider a rule "if *p* and *not-q* and *it-has-not-been-*

29. And as quoted above, Hart already perceives a response to Geach in 1967, a less "restrictive definition," of logical relations such as consistency and contradiction. (Hart, 1983 (1967), p. 100)

shown-that r, then *h*."³² The required distinction between positive and negative conditions is not a distinction between *p* and *not-q*, but between *p* and *it-has-not-been-shown-that r*. Obviously, *not-q* could be replaced with a new proposition, *q'*, so that the rule becomes "if *p* and *q'* and *it-has-not-been-shown-that r*, then *h*." This is mere syntactic manipulation. AI has shown however, as Hart believed, that the same cannot be done with *it-has-not-been-shown-that r*. This is the issue which is the fount of AI research into non-monotonic reasoning.³³

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 negating 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. (Hart, 1951, p. 153)

Bayles:

Hart also seems to have thought that it was impossible to formulate all the exceptions in advance. (Bayles, 1992, p. 12; see Hart, 1961, p. 123, and 1983 (1970), pp. 269-71, 274-5)

In the language of the writers on nonmonotonic reasoning, one might say that Hart understood the qualification problem³⁴: 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 1983 (1967), p. 103)

Pollock votes for Hart's view in the related context of induction:

30. 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, 1948a (Lafleur edition), pp. 72-3; the bibliography also gives a 1948 Oxford edition) If we consider this passage of Bentham, Hart's linguistic philosophy and practical experience as Barrister, and precursors such as Stevenson (1938, 1944) in analytic ethics, we can understand Hart's arrival at "Ascription of responsibility and rights."

How can we be justified in concluding on the basis of our sample that all *A*'s are *B*'s? The answer is that we do not have to rule out all ... possibilities beforehand. Our sample provides us with a prima facie reason. The sample is "innocent until proven guilty". (Pollock, 1990, p. 114)

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, 1992, pp. 12-13)³⁵

Bayles prefers to think in terms of cluster concepts, citing Miller (Bayles, 1992, p. 86; see discussion of Sartorius, p. 75), and paradigms, citing Putnam (Bayles, 1992, p. 13), with no support in Hart's text. Trying to define law, Hart says:

... There is the realization that the justification for applying general expressions to a range of different cases lies not in their conformity to a set of necessary and sufficient conditions but in the analogies that link them on their varying relationships to some single element. (Hart, 1983 (1967), p. 89)

This suggests that Hart viewed law as a cluster concept. But elsewhere, when Hart is discussing concepts more generally, Bayles seems to be quite wrong:³⁶

... There need be nothing common to all ..., though there *may* be some similarity or analogy between them ... unified simply by falling under certain rules; they *may* be otherwise as different as you please. (Hart, 1983 (1958), pp. 29-30)

... Insistence that there is not just one form of justification (the possession of common qualities) for classifying particulars under the same general terms serves to free speculation from a cramping prejudice (Hart, 1983, p. 4.)

III.2.b.iii. Bayles and epistemology.

Bayles says that Hart is too quick to replace meaning and definition with criteria, too quick to shift from semantics to epistemology. (Bayles, 1992, pp. 14-5) Hart is explicit:

31. It is the need for two different kinds of negation that makes deontic logicians suppose, mistakenly, that they can reduce defeasible reasoning (because they can negate within the modality and also outside of it).

32. For parity, we should perhaps say "if *it-has-been-shown-that*(*p* and *not-q*) and *it-has-not-been-shown-that*(*r*), then *defeasibly*(*h*)." See the discussion of meta-language in Simari-Loui, 1992.

33. My "Ampliative inference, computation, and dialectic" addresses finer issues of syntactic elimination (Loui, 1991a).

34. See for example Ginsberg, 1987.

[The] mistake was ... seeking a paraphrase or translation into other terms ... instead of specifying the conditions under which such statements are true and the manner in which they are used. (Hart, 1983 (1953), p. 40)

It is no coincidence that defeasibility finds its first true home in epistemology (Chisholm, 1964a), where criteria are central and definition incidental. Defeasible reasoning's development in artificial intelligence is likewise a recognition that epistemological issues dominate practice, while logical fictions "considered in abstraction" from "real life" are useless.

Hart displays epistemic leaning in other places, e.g.:

[Jhering satirizes] excessive preoccupation with concepts considered in abstraction from the conditions under which they have to be applied in real life. (Hart, 1983 (1970), pp. 265-266)

Compare John Pollock with Hart:

If concepts are not individuated by their definitions, how are they individuated? This is best answered by considering what the essential role of concept is. ... Philosophical logicians ... suppose that the basic logical properties of concepts must be their entailment relations or truth conditions. But ... the basic role of concepts is epistemological. ... What makes a concept the concept it is is (1) what constitutes a good reason for thinking that something exemplifies it or fails to exemplify it, and (2) what conclusions are warranted by the premise that something exemplifies or fails to exemplify the concept. (Pollock, 1986, p. 509)

IV. Reformers.

IV.1. Mackie.

Mackie's presidential address to The Australasian Association of Psychology and Philosophy is the earliest extended response to Hart in print. To my eye, it focuses on the most important issue.³⁷

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.

35. 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, 1977, p. 48) "Although this slogan [defeasibility] then disappeared, the underlying principles soldiered on unchanged." (Baker, 1977, p. 57)

36. Mackie would agree that Bayles is wrong, since Mackie assails Hart's insistence on heterogeneity of conditions (Mackie, 1955, p. 150ff).

37. None of the later critics of Hart seems aware of Mackie's paper.

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, 1955, p. 152) This is not to say that all the defences are homogeneous, that they all point to the absence of a single factor called intention;³⁸ but it is to say that the situation is less haphazard than Hart's account would suggest. (Mackie, 1955, p. 156)

Surely, despite what Hart says, intending, like consent, is an introspectively recognizable state of mind. (Mackie, 1955, p. 153)

Mackie has no trouble with the idea that there are such things as *prima facie* warrants. *Prima facie* warrants are allowed to guide the actual practice of reasoning; in fact, he wishes to shift the burden to those who would deny the presence of an actor's volition:

... 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, 1955, 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

38. We must contrast Mackie's "intention" with Aristotle's misgivings about "voluntary". The Aristotelian problem of volition is Hart's starting point (Hart, 1951, p. 150, 151, 154, 163), and Hart has largely preempted Mackie: "... no adequate characterization ... could be made without reference to these extremely heterogeneous defences," (Hart, 1951, p. 150); "... the attempts to define in general terms 'the mental conditions' ... are only not misleading if their ... terms are treated ... as a restatement ... of the fact that various heterogeneous defences or exceptions are admitted." (Hart, 1951, p. 152) Mackie chooses simply to disagree with Hart. See also Melden on Aristotle, 1956, p. 524.

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, 1956, p. 157; the liberal punctuation is Mackie's)

If we ask what *would* be evidence that a concept is 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, 1953, 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, 1953, footnote p. 29)

Williams' note is the earliest printed response to Hart I have found.

Although later proponents of defeasibility often take defeasible rules to demonstrate defeasibility of concept (e.g., epistemologists such as Lehrer and Paxson), some authors have been more careful. Nozick, for example, speaks of the *deductive structure* of rules. In contrast, a *defeasible structure* might be employed in the formulation of rules. The choice to use one structure or another is a matter of convenience.

A ... difficulty in attributing the deductive structure is that many people are unwilling to state or assent to any or to very many exceptionless principles of determinate³⁹ content Previously having explicitly accepted such principles, they found themselves gradually building-in explicitly described exceptions, in order to fit more and more complicated situations yet maintain the form as exceptionless. At some point, they found they could not state exceptionless principles Such a history, I imagine, would be common among lawyers, who are familiar with the difficulties in devising rules to handle adequately, in advance, all the bizarre, unexpected, arcane, and complicated

39.Nozick has reproduced essentially his text from 1968, but qualifies the content as "determinate."

cases ... (Nozick, 1981, p. 477)

This is a conventionalist view of defeasibility: that defeasibility is a matter of convenience, which could, in principle, be eliminated in favor of deductive structure. This view is appropriate until constructivist ideas are introduced: that judgements can be made on a partial hearing of the evidence, or could be made non-deterministically.⁴⁰ On this revised view, a concept is defeasible because it is introduced through defeasible rules and these rules are intended to be used in resource-bounded, non-deterministic, non-monotonic processes like legal hearings and dialectical deliberations. Hart was clearly a constructivist, which explains why he connected the defeasibility of rules with the defeasibility of the concepts contained in the rules.

IV.2. Feinberg.

Joel Feinberg's treatment of Pitcher's and Geach's attacks on Hart seems to have been underestimated among Hart scholars. Meanwhile, it is one of "the most important modern moral philosopher's"⁴¹ most frequently cited papers.⁴² Feinberg, too, uses charged words in his appraisal of Hart:

It is now widely agreed, I think, that Professor Hart's analysis, while containing insights of permanent importance, still falls considerably short of the claims its author originally made for it. ... I shall ... isolate ... the kernel of truth ... while avoiding ... his errors. (Feinberg, 1965, p. 134)

IV.2.a. Feinberg and defeasibility.

Feinberg understands defeasibility better than any of his predecessors. He notes the close association with a *prima facie* case, quoting a section of *Black's Law Dictionary*. He correctly 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

40. Baker makes these points. My "Ampliative inference, computation, and dialectic" (Loui, 1991a) is primarily concerned about the relation between constructivism and defeasibility. The point is extended in my "Process and Policy" (Loui, 1995).

41. So Feinberg is introduced in the collection of essays in his honor; see Coleman and Buchanan.

42. Feinberg is almost always cited for his metaphor, with most citations caring not at all about the main content of the paper (the appraisal of Hart): "This well-known feature of our language, whereby a man's action can be described as narrowly or broadly as we please, I propose to call the 'accordion effect'" (Feinberg, 1965, p. 146)

... Outside of the law the notion ... will be necessarily vague, though not necessarily obscure. (Feinberg, 1965, p. 136)

Feinberg prefers to speak more properly of concepts that are

... irreducibly discretionary, contextually relative, and 'something-like-defeasible'.

... Outside of legal and quasi-legal contexts, talk of 'cases', 'claims', and 'defences' may not seem quite at home. (Feinberg, 1965, p. 151)

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, 1965, p. 139), qualifying his new concept of "registrability" as defeasible (Feinberg, 1965, p. 141), and counting many imputations of fault as defeasible (Feinberg, 1965, 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, 1965, 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, 1977, p. 33)

[Hart] requires ... the elaboration of a non-legal notion of onus of proof (Baker, 1977, p. 34)

Howarth even goes so far as to consider an example in contractual litigation in which

... the onus lies upon the person holding the fiduciary position to prove that he did not abuse that position to extort the agreement. ... Does this situation amount to a counter-example against the principle that he who challenges *prima facie* evidence of there being a contract bears the burden of disproving the case? (Howarth, 1981, p. 37)

Howarth strains to explain the counterexample (and his analysis seems sound). But the issue is simpler than that.

Today's development of defeasible reasoning is precisely for normal, everyday epistemological and commonsense situations, not just for courtroom procedure. The meaning of a defeasible rule, any defeasible rule, indeed depends on the procedure in which it will be used, since a defeasible rule is essentially a rule of 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.⁴³ Either there are a lot of quasi-legal contexts, or else Feinberg is wrong to disparage the analogy between quasi-legal contexts and the contexts in which defeasible reasoning has found application, which includes contexts in which conventions of conversational implicature are in force.

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.⁴⁴ These dialecticians did not focus on the defeasibility of the rules because defeasibility is interesting to those who must first *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.2.b. Feinberg and ascriptions.

Regarding ascription of responsibility, Feinberg's main revision of Hart is one that we made above in response to Geach:

... The doing of the untoward act can be *charged* to one, or *registered* for further notice, or 'placed as an entry on one's *record*'. (Feinberg, 1965, p. 139)

To defeat the charge of being to blame by presenting a relevant strong excuse is to demonstrate that an action's faultiness is not properly 'registrable' on one of the agent's records (Feinberg, 1965, p. 140)

This permits Feinberg to make the finer distinctions that Hart surely contemplated and Pitcher did not.

[1] We can simply note that a given act is Jones's and that it was in some way faulty

[2] ... We [can] not only ascribe to him an action, which is somehow defective, [but] also hold him *to blame* for it.

43. For instance, four protocols are defined in my "Process and Policy" (Loui, 1995). Gordon (1994) and Vreeswijk (1993) define protocols as well.

44. For example, my "Analogy, decision, and theory-formation as defeasible reasoning," (Loui, 1993) and Toulmin et al., 1984. Also consider, Carl Wellman's dissertation, "... To borrow an illustration used effectively by Hart, reasoning is like a trial. Both are procedures" (Wellman, 1961, p. 252)

[3] ... We may put the record ..., with the fault duly registered therein, to any one of a great variety of *uses*, including, among other things, overt blame. (Feinberg, 1965, pp. 142-143)

If the logical representation of an action sentence in primary use is to be

$P(a)$ and (if $P(a)$ then defeasibly $R(a)$),

which might be instantiated:

Performed-Act-X(agent1) and
if *Performed-Act-X(agent1)* then defeasibly
Liability-Responsible-for-X(agent1),

and there is a rule of punishment or censure:

if $R(a)$ then $C(a)$
i.e., if *Liability-Responsible-for-X(agent1)* then
Consequence-Is-Throw-Stones-At(agent1)

then we might understand the stages of Feinberg as:

[1] $P(a)$
[2] $P(a)$ and $R(a)$
[3] $P(a)$ and $R(a)$ and $C(a)$.

It remains to be said how [1] can be asserted without also asserting [2], and how [2] can be asserted without also asserting [3]. Hart explains the first. To assert just [1], say, in the primary way, that someone did something, then amend the assertion with an excusing condition. For some excusing conditions, the negation, *not-R(a)*, may also be appropriate; for others, it may be better to assert neither $R(a)$ nor *not-R(a)*. To assert [2] without [3], simply suppose that the rule of punishment or censure is not fixed. There is rarely a mandatory punishment for an action; unlike hitting in the children's soccer game, there is usually a further moral or legal judgement to be made about consequences. The insight of Hart's original paper is to suggest that the distinctions between [1] and [2] are interesting even before questions of punishment are raised.

IV.3. Baker.

IV.3.a. Baker and judicial decision.

Baker possesses a broad understanding of Hart and Wittgenstein, though he is willing to recite Geach uncritically.⁴⁵

45. Bayles cites Geach uncritically, too. (Bayles, 1992, pp. 10-11)

Though flawed in several respects, this article is a landmark. It is ... essential for proper understanding of [Hart]. He moves gradually away from its emphasis on speech acts⁴⁶ while the notion of defeasibility quietly disappears. (Baker, 1977, p. 29)

The thesis that the primary use of legal concepts is found in judges' verdicts is difficult to reconcile with the use of these concepts in ... the antecedents of hypotheticals [and] in disjunctive statements (Baker, 1977, p. 30; cf. Geach)

Baker's main observation against ascriptivism is that Hart's view of judicial decision was overemphasized and not even right.

The thesis that the primary use of legal concepts is in judges' decision is radically mistaken. Especially so if [derived from] the claim that rules of law are ... rules guiding judges in reaching decisions. (Baker, 1977, pp. 29-30)⁴⁷

This mistaken outlook is ... a confusion between finality and infallibility in the case of judicial decisions. ... The decision, being final, is infallible. Judges' verdicts carry ... weight Yet this ... is not ... saying the judges' use of legal concepts is the primary one (Baker, 1977, p. 30)⁴⁸

Baker's counterargument can't be right. Even if there is something wrong with Hart's understanding of or emphasis on judicial decisions, his analogy between the defeasibility of legal concepts and the defeasibility of action concepts can remain. Baker thinks it is relevant that the concept of murder is as meaningful to citizens as to judges. Judicial decisions cannot be primary uses of legal concepts. But Hart is arguing about the primary uses of action concepts, by making an analogy to an interesting use of legal concepts. This use need not be the primary use of legal concepts. Baker has not even argued that the primary use of legal concepts by citizens is different from the primary use of legal concepts by judges. If both exhibit defeasibility, then Baker's point is useless.

IV.3.b. Baker and the non-demonstrative argument.

Baker believes, moreover, that if Geach is right about the flaws of speech act theory, then Hart has committed a fallacy:

... it is fallacious to conclude from ...

no judicial decision is entailed by the evidence cited in its support

... that

legal concepts ... cannot be reduced to non-legal concepts

... (Baker, 1977, p. 31; emphasis and indenting added)

The explanation, according to Baker, is that

Reductionist theories are generally taken to be compatible with the absence of entailment ..., provided that each [reduced] statement is taken to be logically equivalent to an infinitely complex statement in the reduction class. (Baker, 1974, pp. 31-2)

Baker is trying to make sense of Hart's stand on the impossibility of providing necessary and sufficient conditions. In so doing, he has strayed quite far from Hart's text, introducing his own "reductionist" criteria. But Baker is wrong even about Hart's logic: Hart does not present the conclusion as a logical entailment, hence Hart is not vulnerable to fallacy. Hart is clearly making an analogical argument and appeal to the intuition. To say that Hart has not completed a deductive argument is to misunderstand Hart's argument. Baker knows that arguments such as Hart's do not have to be demonstrative; elsewhere he makes the same attack on demonstrative argument that Hart, Toulmin, and Perelman make:

Why not argue that the *onus probandi* lies on the Classical theory to vindicate its introduction of what is apparently a bizarre sense of "certain"? (Baker, 1974, p. 182)

IV.3.c. Baker and defeasibility.

Baker is also unfairly characterizing defeasibility:

The second consequence of defeasibility is that applications of defeasible consequences are justified in particular instances only on the assumption of total evidence. (Baker, 1977, p. 32)⁴⁹

A contemporary scholar of defeasibility would disagree here. Defeasibility is important precisely because it allows a kind of justification based on less than total evidence. In fact, Baker belies his own earlier clarity on the subject:

46. Baker gives no evidence that Hart moves away from speech acts. Consider "These and other insights of modern linguistic philosophy are I think of permanent value" (Hart, 1983, p. 4) "... much of what [Wittgenstein and Professor Austin] had to say about the forms of language, the character of general concepts, and of rules determining the structure of language, has important implications for jurisprudence" (Hart, 1983 (1970), p. 274) Baker hints (1977, p. 57) at a resolution: "The original defence borrowed some gaudy plumes from Austin's work, while the later ones were more soberly dressed in ... open texture ..." (Baker, 1977, p. 57) But then Baker must explain the following: "... in Essay 1, written under the powerful and exciting influence of these ideas, ... it seemed to me (and still seems) that attention to the diverse and complex ways in which words work in conjunction with legal rules of different types would serve to dispel confusion" (Hart, 1983, p. 3)

Particular C-justifications, it could be said, are innocent until proved guilty. ... The onus of proof is on the sceptic who doubts a knowledge-claim based on C-support. This is not a dialectical ploy to embarrass the sceptic. ... This thesis about onus of proof is a fundamental part of any Constructivist Semantics based on C-relations; it is a point of logic or philosophical grammar. ... a C-supported claim to knowledge is *ceteris paribus* certain (Baker, 1974, p. 182)

IV.3.d. Baker and circularity.

Baker finally observes that the defeasibility of rules cannot be justified by referring to the open texture of the terms used in the rules. There would be a circularity of justification, since Waismann's openness of texture is based on the difficulty of formulating infeasible rules for concepts. It should be remembered that this is Baker's circularity, not Hart's, and Baker's conclusion is hardly a condemnation of Hart:

... the impossibility of eliminating the need for judicial discretion is inconclusive. (Baker, 1977, p. 38)

After decades of experience in knowledge representation, it would be hard for anyone to dispute either of the theses involved in the putative circularity. Rules that express criteria for action concepts tend to involve open-textured terms; meanwhile, it is hard to formulate rules for terms that do not permit some doubt on some applications. Both Hart's and Waismann's claims seem self-evident today in general ontologies, just as Hart took them to be self-evident for legal ontologies.

IV.3.e. Baker and Wittgensteinian games for defeasible semantics.

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, 1977, p. 43)

Instead of taking the theory of meaning as fixed and testing [Hart] against it, we take his analysis of legal concepts as fixed and search for a theory of meaning

47. Hart does claim this as premise, if not as protasis: "... rules of law even when embodied in statutes are not linguistic or logical rules, but to a great extent rules for deciding." (Hart, 1951, p. 156)

48. Hart indeed separates the two in 1961: "It is ... true to say that the scorer's rulings are, though final, not infallible. The same is true for law." (Hart, 1961, p. 140) But there is no evidence that he confuses them in 1951, unless Baker is confusing fallibility (possibility of being wrong) and defeasibility (possibility of being defeated).

that makes as much sense of it as possible. (Baker, 1977, p. 44)

Baker then describes a possible framework for defeasible reasoning:

We might expect to find the defeasibility ... to have implications for the structure of ... arguments. (Baker, 1977, p. 45)

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. (Baker, 1977, p. 45)⁵⁰

The logical description of a trial ... could be presented in the form of a tree-diagram [which] represents states of information. (Baker, 1977, pp. 45-6)

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, 1977, p. 46)

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, 1977, 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 .⁵¹ 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*

49. Baker adds: "The third consequence of defeasibility is that ... there are no circumstances severally necessary and jointly sufficient ...; merely conditions necessary and normally sufficient." (Baker, 1977, p. 32) Hart actually uses the phrase "necessary and sometimes sufficient," (Hart, 1951, p. 154). Hart should say "sometimes necessary and sometimes, when the defense rests, sufficient." In any case, defeasible reasons are neither necessary nor sufficient, not even normally necessary, nor normally sufficient (so Baker's text on p. 34 is not emendation).

50. 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, 1977, p. 45) If Baker means "total submitted evidence," he should say so.

51. Baker's discussion on p. 48 is slightly askew of this idea.

paribus rider]. (Baker, 1977, 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, 1977, p. 50)

Constructivism ... explains the sense of a sentence by specifying the conditions under which we correctly judge it to be true ... [alternatively] ... the sense of a sentence is determined by its assertion-conditions ... (Baker, 1977, p. 51)

... Defeasibility can be harvested only as the fruit of a new species of semantics. (Baker, 1977, 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:

... A constructivist semantics based on the C-relation is not fully worked out for any region of language, least of all for legal discourse.

... 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, 1977, 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.⁵²

I have tried to plant the seed of this Tree of Knowledge (Baker, 1977, p. 57)

Even Hart ... can know without understanding. (Baker, 1977, p. 56)

Here is a travesty. Hart passed his understanding to whomever was prepared to receive

52. Cherry disagrees, "[Hart]'s doctrine of defeasibility does not stand or fall with any particular account of meaning." (Cherry, 1974, p. 101) Cherry is wrong.

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 suggests⁵³ 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,⁵⁴ since Waismann was a follower of Wittgenstein. I do not know whether Baker came to his 1974 conclusions simply by reading Wittgenstein, or whether preliminary study for the 1977 paper influenced his work on C-relations. In any case, Baker seems to be just arriving at an understanding that Hart takes for granted. Baker is guilty of criticizing Hart for giving a logico-linguist's explanation instead of a philosophical logician's. It's fair to say that Hart left work to be done, but to impugn Hart's understanding is not fair.

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 Toulmin⁵⁵ and I have noted (the latter with no small jealousy), those working "in the borderland between jurisprudence and philosophy" have advantages over philosophical logicians.

IV.4. Howarth.

Most of Howarth's remarks on Hart are summaries of the critiques in Geach, Pitcher, Feinberg, and Baker. Howarth, like Baker, is concerned more about defeasibility than ascription. 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, 1981, p. 40)

But for Howarth,

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

53. "If Hart's conception of meaning is at root the truth-conditions account, then conversion to a constructivist conception would leave him no worse off" (Baker, 1977, p. 56)

54. Waismann's "*porosität der Begriffe*" is of course linked to Hart's "open-textured concepts." See, for example, Bix.

55. "It is probably no accident that [Hart] reached these results while working in the borderland between jurisprudence and philosophy." (Toulmin, 1958, p. 142)

We find [Hart] talking not only of defeat of contracts, but also the *reduction* and *weakening* of contractual claims. (Howarth, 1981, p. 40)

It is a simple point, but it deserves response, and the response touches the heart of the matter in "Ascription of responsibility and rights."

Defeasible reasoning is perfectly compatible with claims that admit of degrees of strength. We have seen that logical strength might be relevant, and this is the context in which Howarth finds Hart using the words "weaken" and "reduce". Pollock, in his main use of defeasible reasoning, is concerned with establishing probability claims, and these may be of different degrees. A defeasible reason for the probability of rain being .5 tomorrow is a defeasible reason for the probability *not* being .6. It is even possible to combine the two and produce a defeasible calculus of interval-valued probabilities, where a claim or $Prob(rain) = [.5, .6]$ is weaker than both of the conflicting claims.

The real point is that Hart's desire for "greater refinement" is what led to the ascriptive view in the first place. Howarth wants to know how different scopes of obligations under a contract, or varying remedies for different kinds of breach might be addressed. 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.⁵⁶ Withhold ascribing a specific kind of contract, or killing, as the action performed, until a moral or legal judgement can be made. As Gottlieb notes in a fine elaboration of Hart's view:

The decision on the meaning of the word-in-the-rule is not just a decision about linguistic usage; it is a decision whether to apply the rule or not Whereas the meaning of a word in common usage is settled by reference to its overall role in language, the meaning of the same word when it occurs in a rule may well be settled by reference to legal principle. It becomes a question of the application of law. . . . Much adjudication turns on questions like this, *is a flying boat a ship for the purposes of . . . property law?* (Gottlieb, 1968, pp. 48-9)

V. Misappropriation.

V.1. McCarty.

Professor McCarty wants to claim that

56. 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)

Most of the work in AI on defeasible reasoning, so far, has been misdirected.
(McCarty, 1994)

His argument is that

... there are really two kinds of defeasibility at issue

One kind is the defeasibility of concepts due to their open texture. The other kind is:

... the simpler problem of statutory defaults [which] has been the focus of almost all of the discussions in the AI literature, so far, on defeasible reasoning.
(McCarty, 1994)

In "Ascription of responsibility and rights," Hart does distinguish sources of the interpretive vagueness (which is more closely allied with his 1961 writing on open texture) from sources of defeasibility. *Concept of Law's* discussion of open texture clearly focuses on the impact of cases on interpretation, in contrast with "Ascription of responsibility and rights" which focuses on the defeasibility of rules.

... The judge is not supplied with explicitly formulated ... criteria defining "contract", or "trespass"; instead, he has to decide by reference to past cases or precedents ... identifying the *ratio decidendi* of the past cases. This imports to legal concepts a vagueness of character very loosely controlled by judicial traditions of interpretation

But there is another characteristic of legal concepts, of more importance for my present purpose, which makes the word "unless" ... indispensable ...; and the necessity for this can be seen by examining the distinctive ways in which legal utterances can be challenged. (Hart, 1951, p. 147)

McCarty is carefully making a distinction, but Hart doesn't seem to care:

Whichever device, precedent or legislation, is chosen; these ... will, at some point ..., prove indeterminate; they will have ... open texture. (Hart, 1961, p. 124)

Hart's later work still cares about defeasibility of rules, apart from open-texture of concepts occurring therein:

... those controversies ... which arise from conflict or incompleteness of legal rules ... (Hart, 1983, p. 6)

A similar indeterminacy may arise when two rules apply to a given factual situation (Hart, 1983 (1967), p. 103)

But nothing important depends on the distinction. McCarty hopes for a different formal mechanism, other than defeasibility, for the openness of a concept's texture. But this is

to repeat the puzzle rather than to offer solutions. Hart, Baker, and McCarty's own colleagues, Rissland and Skalak, offer solutions.

V.2. Alchourron

Alchourron is, like Hart, an interdisciplinarian and an innovator of important technical devices. Explicating the relations between Alchourron-Gaerdenfors-Makinson belief revision and defeasible reasoning is a much wanted service.⁵⁷ Alchourron's new paper is welcome, though flawed in many details.⁵⁸

Alchourron seems superficially sympathetic to Hart on the issue of truth:

... On many ... occasions, ... [normative propositions] express norms which lack truth values. (Alchourron, 1993, p. 44)

He quotes von Wright's original paper on deontic logic (1951):

[Treating] norms as a kind of proposition which may be true or false ... I think is a mistake. ... Logic, so to speak, has a wider reach than truth. (Alchourron (von Wright), 1993, p. 44)

But the paper is really an attempt to replace defeasible reasoning with a logical mechanism acceptable to Geach and other traditional logicians, to replace it with belief revision. Despite Alchourron's disclaimers, his aim is clear⁵⁹:

I will try to show ... that there is no need for a logic of defeasible norms because behind the requirement for such logics, as well as behind the requirement for non-monotonic logics, now in fashion in artificial intelligence, lies a mixture of a standard notion of consequence and the change of our premises in a dynamic perspective. (Alchourron, 1993, p. 44)

Alchourron is defending the "standard notion of consequence." But the user of defeasible reasons is happy to repudiate some classical syllogisms in order to express, with some integrity, the procedural, computational, and conventional aspects of rules. Belief revision formalizes only the reconsideration of claims, not the reconsideration of arguments. It is possible to go farther: Rescher does not permit revision of defeasible

57. Makinson, personal communication.

58. (Which I treat in a separate essay.) For example, it is not true that the consequences "lost" on p. 80 are ones that "we wanted to preserve"; nor that individuals cannot be subsumed under defeasible conditionals; these are rhetoric, as Alchourron reveals in the next paragraph.

59. Consider Alchourron's carefully placed uses of "possible confusion" (p. 69), "very easy to confuse", "a confusion ... occurs", "only that small part ... not fully analyzed" (p. 82), "the quiet darkness of Paradise or the risky lights of daily life", "not intended to disqualify ... nonmonotonic logics" (p. 83).

rules, but Toulmin does, and so does current work in AI and Law.

Most importantly, defeasibility has something to do with procedure and burden of proof. It cannot be replaced by choice and preference functions in the traditional mathematical semantic models. Like von Wright, Alchourron understands that the phrase, "contributory conditions," is better than "sufficient conditions." But why make this distinction? "Ascription of responsibility and rights" provides an answer: defeasible reasons are not sufficient reasons, but they are contributory.

Alchourron rightly notes that belief revision, like defeasible reasoning, permits

formal expression of the cognitive situations of those who have incomplete knowledge or express their knowledge incompletely, in the sense that they only know or express contributory ... conditions, in order to detect their logical commitments. (Alchourron, 1993, p. 83)

But defeasible reasoning isn't about logical commitments. It is about the possibility and the preventing of drawing conclusions on partial consideration of the possible arguments. That is why Hart stresses judicial decision and adjudication of ascriptions "on the facts before him." (Hart, 1951, p. 155)

Although Alchourron cites Hart, he does so only in the context of Hart's dispute with Dworkin; also, he attributes seminal uses of defeasible "technique" to papers on deontic and counterfactual logic of 1968, 1969, and 1973 which are clearly predated by Hart's paper of 1951.

Meanwhile, it seems that Hart invited the invention of deontic logic,

... [Bentham] anticipated a form of modern logic known as deontic logic. ... Austin followed very much in Bentham's footsteps, though he did not command his master's powers of innovation in logic. (Hart, 1983 (1970), p. 273)

I am more willing to find Hart guilty of fashion (with modal logic being the crime of fashion) than to believe that Hart's defeasibility is merely emergent deontic modality.

VI. A Logician's Fairy Tale, Great Themes, and Small Rows.

Did Hart renounce "Ascription of responsibility and rights?" I believe that Hart believed every bit of it (except perhaps the restriction of its scope to action verbs, especially verbs deployed in the present tense) in 1968 and in 1983, and I have cited the passages on which I base this belief.

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 supply of modern weapons, because they tempt the logician who wields them into 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, 1960, p. 198)

In making this criticism I am not contending for a third truth value, a "multi-valued" logic ...⁶⁰ 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

No doubt this close identification of the notion of meaning with the notion of being true or false is a fundamental principle of the "extensional" logic which has resulted from the transfer to empirical discourse of principles appropriate enough in the logical analysis of mathematics, but it leads here to the obliteration of a vital feature in the use we make of words. (Hart, 1960, p. 204)

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* (1963):

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 ...⁶¹

60. 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."

61. Hart continues, "This was not ... mere style" which I also argue (Loui, 1991a), contra Alchourron.

(Perelman (Hart), 1963, 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), 1963, p. vii)

Chaim Perelman in 1963 could already be perceived to be the greatest informal writer on non-demonstrative argument of his time. Hart would leave the fracas and let others join the fight.⁶²

Hart is content to make claims about "action in law," and embittered to attack traditional logicians indirectly:

Such cases can be resolved only by methods whose rationality cannot lie in the logical relations of conclusions to premises. (Hart, 1983 (1953), p. 40)

[Jhering satirizes (and Hart agrees with)] a false assimilation of the concepts and methods of legal science to mathematics; so that all legal reasoning is a matter of pure calculation in which the contents of the legal concepts are unfolded by logical deduction. (Hart, 1983 (1970), p. 265-6)

... the fundamental intellectual error about the nature of ... legal concepts, which drew fire from Jhering, ... exactly the same as stimulated Holmes and his followers to their attack, ... consists in the belief that legal concepts are *fixed* or *closed* in the sense that it is possible to define them exhaustively in terms of a set of necessary and sufficient conditions ...; it is logically closed (Hart, 1983 (1970), p. 269)

Logicians think it heresy to think there might be other formal systems of representation. They drove Keynes (from philosophy of probability) to economics⁶³ and Hart (from philosophy of language) 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;⁶⁴ consider:

a contract exists

62. 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, 1983, p. 6)

63. For a hauntingly similar story on Keynes' disagreement with Russell and Whitehead, see Loui, 1991b.

if and only if
there was a *contracting* and it was *effective*.

This cartoons the issue, but it does provide necessary and sufficient conditions, trivially, by remigrating the defeasibility.⁶⁵ Still, Hart's defeasibility needs no major updating to fit today's formal work. Hart's paper is oracular.

To follow Hart, we should all aspire to elucidate great themes, rather than to participate in small rows. I am guilty here of analyzing text and nuance, which merely invites more analysis, more quibbling about utterances: what was Hart's meaning? what was Hart's force? 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.

64. 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, 1955, p. 151)

65. 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, 1983 (1967), p. 103)

VII. Tables.

VII.1. Chronology of Notable Works.

erities

| <u>re: ASCRIPTION/ACTS</u> | <u>re: ASCRIPTION OF R & R</u> | <u>re: DEFEASIBILITY</u> |
|----------------------------|------------------------------------|--------------------------|
| | | '30 Ross |
| | | '38 Stevenson |
| | '48 Hart | '48 Bentham |
| | | '51 Waismann |
| | '53 Williams | |
| | '55 Mackie | |
| '56 Melden | | |
| '56 Austin | | |
| | '57 Ladd | '57 Chisholm |
| '58 Hampshire and Hart | | '58 Toulmin |
| '60 Pitcher | | |
| '60 Geach | | |
| | | '61 Gauthier |
| | | '64 Chisholm |
| | | '64 Firth |
| '65 Geach | | |
| '65 Feinberg | | |
| | | '67 Pollock |
| '68 Rayfield | '68 Hart | '68 Nozick |
| '69 Searle | | '69 Lehrer-Paxson |
| '70 Hare | | '70 Sosa |
| | '74 Cherry | '74 Pollock |
| | '77 G. Baker | '77 Rescher |
| | | '78 Swain |
| | | '78 Searle |
| | | '80 Doyle |
| | '81 Howarth | |
| '83 B. Baker | | |
| | | '85 Nute |
| | '92 Bayles | |
| | | '93 Vreeswijk |
| | | '93 Alchourron |
| | | '94 Gordon |
| | | '94 McCarty |

VII.2. Outline of Main Arguments and Rebuttals.

MAIN: HART'S PAPER IS DEFENSIBLE:

PRO: ACTION IS AN UNAVOIDABLY DEFEASIBLE CONCEPT.

CON: DEFEASIBILITY IS A FLAWED CONCEPT.

CON: BAYLES, MCCARTY> Hart rejects the paper, hence rejects defeasibility.

PRO: HART DOES NOT REJECT DEFEASIBILITY.

PRO: BAYLES> maybe Hart rejects ascriptivism instead.

PRO: LOUI> Hart merely "declined" to "press the view".

CON: FEINBERG> defeasibility is vague outside of a courtroom.

PRO: CHISHOLM, POLLOCK, RESCHER, NUTE, DOYLE, EPISTEMOLOGY, AI> defeasibility can be made precise.

CON: MACKIE> the fact that criteria are defeasible is not proof that the concept is heterogeneous and irreducibly defeasible.

PRO: NOZICK, WILLIAMS> the ontological issue is verbal; the defeasibility Hart observes in practice is very real.

CON: BAYLES, MCCARTY> Hart's own footnote shows how to list negative conditions as necessary conditions.

PRO: BENTHAM, HART, MACKIE, BRANDT, TOULMIN, DOYLE, AI> listing conditions in that way hides their special character as a different kind of negation.

CON: CHERRY> a regress of epistemic foundation -- defeasible upon what? upon other defeasible knowledge?

PRO: RESCHER> defeasibility terminates when the opponent fails to challenge.

CON: G.BAKER> Hart needs a constructivist semantics a la Wittgenstein.

PRO: WAISMANN, BIX> Hart descends from Wittgenstein.

CON: HOWARTH> defeasibility has a make-or-break character, but contracts do not.

PRO: MACKIE> to get finer concepts, individuate acts/contracts more finely (full responsibility for a less wrong act); do not try to refine defeasibility.

CON: ALCHOURRON> defeasibility is just confused belief revision.

PRO: HART> defeasibility has to do with procedure and shift-of-burden.

CON: DEFEASIBILITY IS THE WRONG CONCEPT.

CON: MCCARTY> open texture is more interesting than statutory defeasibility.

PRO: HART, BAYLES> the difference is not important.

PRO: PRIMARILY, ACTION ASCRIBES RESPONSIBILITY.

CON: THERE IS A PROBLEM WITH ASCRIPTIVISM.

CON: CHERRY> accidentally X-ing presupposes X-ing.

PRO: B.BAKER> those are different X-ings.

CON: CHERRY> playing chess under coercion is still playing chess.

PRO: LOUI> chess and murder are different examples.

CON: GEACH, PITCHER, HOWARTH> acts are not generally, nor necessarily ascriptive.

PRO: HART, SEARLE> acts are primarily ascriptive.

CON: PITCHER> some verbs are non-censuring.

PRO: FEINBERG, LOUI> non-censuring verbs are still liability-ascribing, and can censure in the right contexts.

CON: GEACH> the examples are bad.

PRO: LOUI> which examples are bad?

CON: GEACH> ascription makes sense even as a premise in modus ponens?

PRO: HARE, POLLOCK, WITTGENSTEIN, LOUI> modus ponens is part of what "if ... then" means.

CON: GEACH> non-descriptive predication is backwards: first examine descriptive predication, then do what you will with logic.

PRO: NON-DESCRIPTIVE FORCE IS QUITE REASONABLE.

PRO: AUSTIN, SEARLE, AI> speech acts are indispensable and provide a reasonable theory of meaning.

PRO: FEINBERG> Hart's non-descriptive predications are not wholly-descriptive.

CON: PITCHER> "who did it?" does not ascribe.

PRO: HART, RAYFIELD> "who did it?" is not a primary use of action sentences.

CON: PITCHER> one is responsible for one's consequences, not for one's actions.

PRO: HART, FEINBERG> liability-responsibility is the intended sense.

CON: GEACH> there can be responsibility without action.

PRO: LOUI> this is an irrelevant error of logic.

CON: G.BAKER> judicial decisions are not primary uses of legal concepts.

PRO: LOUI> this is an irrelevant error of logic.

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