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The Syntax of Legal Exceptions
How the Absence of Proof Is a Proof of Absence Thereof

Dr. Kyriakos N. Kotsoglou, Liverpool

Abstract

In this review article of *Duarte d'Almeida* (Allowing for Exceptions: A Theory of Defences and Defeasibility in Law. Oxford: University Press, 2015), I am going to survey and criticise the concept, philosophical background and legal applications of defeasibility and legal exceptions in law. Through critical engagement with *Duarte d'Almeida's* methodological assumptions and theoretical presuppositions, I shall identify a series of pressure points in the book's central claims and theses about the theoretical status of legal exceptions (defeaters). First, I will facilitate a proper understanding of *HLA Hart's* conceptual apparatus by pointing out its roots in the Oxford Ordinary Language Philosophy. Second, I will read *Duarte d'Almeida's* monograph against this background and facilitate a better understanding of the syntax of defeaters, *Hart's* original topic. Third, I will show that defeaters in criminal adjudication are part and parcel of a justificatory structure, whose main feature is the defeasibility of the respective exceptions.

Keywords: legal exceptions, defeasibility, Duarte d'Almeida, Hart, criminal law

1. Introduction

A. *On Essentialism*

What is an *F*? A conception of a definition as an investigation into *essences*, ie as an inquiry into finding what is quintessentially *F*-ish, is ubiquitous. Essentialism, from the quotidian "What is a chair?" to the momentous "What is justice?", has preoccupied us since the dawn of western philosophy. *Plato*, to begin with, conceived a definition of *F* as an investigation into the essential nature of *F*-ness.[1] The same methodology was an integral part of *Aristotle's* way of thinking. He believed that the proper definition of the object or notion denoted by a word is to be achieved by the specification of its '*genus'* and '*differentia',* ie its necessary and sufficient conditions.[2]

[1] Plato, *Cratylus*, § 388c.
[2] Aristotle, *Metaphysics*, Book 7, part 12; See Benedict de Spinoza, 'On the Improvement of the Understanding', *The Chief works of Benedict de Spinoza vol. 2* trans. RHM Elwes (Dover Publications, 1955) § 95. Spinoza

Questions like the ones mentioned above by no means sound strange to the legal community. On the contrary, legal thinking can be conceived as an exercise in essentialism, namely the doctrine that some of the attributes of a thing are necessary.[3] The traditional way to frame a legal question, "What is *x*?", can be rewritten as the formula: an object *x* has a property *y*, essentially, if and only if *z* conditions apply.[4] For example, if we hold someone criminally liable for having *F*-ed, we'd want to understand what *F*-ing means (the characteristic marks composing the concept of F as a unique entity). By managing to define a legal concept, it will–so the mainstream approach–in turn *qua* pre-existing rule apply smoothly (deductively) to the things that fall under it, in virtue of these things' possessing essential properties (*genus proximum et differentia specifica*).

Or so one might argue. *HLA Hart* was–among others–not sympathetic to these ideas. Both essentialism and the image of judicial activity conceived as a calculus were taken to be deeply flawed. We can even argue that anti-essentialism was the main thrust of *Hart's* way of thinking.[5] He was at pains to stress that 'subsumption and the drawing of a syllogistic conclusion no longer characterise the nerve of the reasoning involved in determining what is the right thing to do'.[6] Therefore, it shouldn't come as a surprise that *Hart's* masterpiece begins with a similarly 'persistent' question: 'What is law?'.[7] So ingrained in his philosophical thinking was this view that it keeps coming back throughout his oeuvre. Thus, *Hart* wants to make clear that seemingly 'innocent requests for definition'–*Hart* regards this type of question as a 'blinding error'[8]–like 'What is a contract?' or "What is a legal exception?" cannot be meaningfully raised.[9] It is in Hart's opinion 'absurd' to use the language of necessary and sufficient conditions in connection with them.[10] To say that does not mean to replace one

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wrote, among others, that 'a definition, if it is to be perfect, must explain the inmost essence of a thing'. Last but not least *G Frege*, who is considered as the founder of modern mathematical logic and so-called grandfather of analytic philosophy was equally troubled about the difficulty we have in answering the question "What is a number"? (see *M Dummett*, Gottlob Frege, in: *AP Martinich/D. Sosa* (ed.), A Companion to Analytic Philosophy (Blackwell: Malden, 2001) 6). It is a scandal, *Frege* contends, that the science of mathematics 'should be so unclear about the first and foremost of its objects' (G Frege, *The Foundations of Arithmetic* trans. JL Austin (Blackwell Publishing, 1953) 2.

[3] For a short discussion on the intelligibility of essentialism, see RL Cartwright, 'Some Remarks on Essentialism' (1968) 65 Journal of Philosophy 615.

[4] Ibid, 623.

[5] Cf. *F Schauer*, 'Hart's Anti-Essentialism' in L Duarte d'Almeida and A Dolcetti (eds), *Reading HLA Hart's: The Concept of Law* (Hart Publishing, 2013), 424–443.

[6] HLA Hart, The Concept of Law, 2nd ed. (Clarendon Press, 1994) 127.

[7] *Ibid*, 1 et passim; cf. his inaugural lecture, HLA Hart, 'Definition and Theory in Jurisprudence', *Essays in Jurisprudence and Philosophy* (Oxford University Press, 1983) 22.

[8] HLA Hart and T Honoré, *Causation in the law* (Clarendon Press, 2002) 3: "legal language and reasoning will never be understood while it [the search for 'one true meaning'] persists".

[9] Hart, 'Definition and Theory in Jurisprudence' (n 7) 39.

[10] HLA Hart, 'The Ascription of Responsibility and Rights' (1949) 49 *Proceedings of the Aristotelian Society* 173; cf. Hart, 'The Concept of Law' (n 6) 116, where he, nonetheless, uses in a very inconsistent way the very same criterion that he rejects: 'There are therefore two minimum conditions necessary and sufficient for the existence of a legal system'.

account of *F*'s essence with another, but to rather give up the whole attempt to inquire into such a question by eliminating these temptations at their root. For *Hart* advanced a different approach according to which rules governing our language games form a more comprehensive and complex syntax than the one that can be adequately described by formal logic or a theory of meaning.

B. *Hart's Philosophical Background*

But how did *Hart* come to repudiate essentialism and the necessary and sufficient conditions as a methodological tool for yielding legal definitions? I suggest that this answer comes relatively easy. A few years before, *Ludwig Wittgenstein*–who had become very suspicious of the intelligibility of essentialism–had, wave after wave, shaped the landscape of British philosophy. As *Russell* explains:[11]

'During the period since 1914 three philosophies have successively dominated the British philosophical world: first that of *Wittgenstein's* Tractatus, second that of the Logical Positivists[12] and third that of *Wittgenstein's* Philosophical Investigations'.

One could demur that this explanation is too abstract–admittedly. Let's get more specific. Misleading as it may be to put labels, Oxford–the place where *Hart's* legal thinking flourished–had by that time become the stronghold of the analytic philosophy of language (aka "Oxford Ordinary Language Philosophy"), namely a school of thought based on *Wittgenstein's* Philosophical Investigations.[13] *Hart* himself names *JL Austin* and *L Wittgenstein* as the two most important figures in his philosophical development.[14] For better or worse, this was the philosophical 'oxygen'[15] *Hart* was breathing. Contemporary analytic philosophy had a 'deep impact'[16] on his work–among other things: *Wittgenstein's* late philosophy, namely the abandonment of the very possibility of a theory of meaning or of discovering the logical form of a proposition. For those were the 'grave mistakes'[17] he had been forced to recognize by rejecting the idea, according to which non-elementary propositions could be understood in terms of truth-

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[11] B Russell, *My Philosophical Development* (Allen & Unwin, 1959) 216.

[12] The Vienna Circle was a group of Austrian philosophers who met once a week in order to discuss, mainly, the ideas expressed in *Wittgenstein's* Tractatus Logico-Philosophicus (L Wittgenstein, 'Tractatus Logico-Philosophicus' trans. DF Pears and BF McGuiness (Routledge and Kegan Paul, 1958)). The basic tenet of their (antimetaphysical) doctrine was the proposition that if a proposition is to have meaning at all, there must be a method of establishing its truth and falsity. As *Monk* (R Monk, *Ludwig Wittgenstein* (Vintage Books, 1991) 286-7) remarks 'This became known to the Vienna Circle as "Wittgenstein's Principle of Verification", and […] has been regarded ever since as the very essence of logical positivism".

[13] PMS Hacker, 'Hart's Philosophy of Law' in PMS Hacker and J Raz (eds), *Law, Morality and Society: Essays in Honour of H.L.A. Hart* (Clarendon Press, 1977) 2; cf. S Schroeder, *Wittgenstein* (Polity Press, 2006) 237-8.

[14] D Sugarman and HLA Hart, 'Hart Interviewed: H.L.A. Hart in Conversation with David Sugarman' (2005) 32(2) *Journal of Law and Society* 267; see also A Lefebvre, 'Law and the Ordinary: Hart, Wittgenstein, Jurisprudence' (2011) 154 *Telos* 99.

[15] *Wittgenstein* once said for himself: "I manufacture my own oxygen" (cited from Monk, *Ludwig Wittgenstein* (n 12) 6).

[16] Hacker (n 13) 3.

[17] L Wittgenstein, *Philosophical Investigations* trans. GEM Anscombe (Basil Blackwell, 1958) viii.

conditions, based on an axiomatic system of predicate logic and a finite vocabulary.[18]

Therefore, it would be no exaggeration if holding that a) the idea that indeterminacy in language is ineliminable (that essentialism is unintelligible), and b) formal logic in conjunction with rule-scepticism 'are the Scylla and Charybdis of juristic theory',[19] are integral parts of *Hart's* oeuvre.

C. *Allowing for Exceptions*

However, the present study is not designed to offer any exegesis of *Hart's* theory of law, let alone of his general philosophy of language, since this is just a review article. And this is where *Luís Duarte d'Almeida* steps in. In his recent monograph 'Allowing for Exceptions – A Theory of Defences and Defeasibility in Law' (Oxford: University Press, 2015),[20] the author tries to draw on one of *Hart's* original topics by clarifying the misunderstandings about defeasibility in law and by developing a proof-based account of legal exceptions. Precisely, he wants to clarify their theoretical status by showing that the absence of a legal exception is not something that has to be ascertained (eg 'for someone to be properly convicted of rape', 132).

Through critical engagement with *Duarte d'Almeida's* methodological assumptions and philosophical presuppositions, I shall identify a series of pressure points in the book's central claims and theses. Our introduction (sections 1.A and 1.B) have delivered the arguments in order to attack the premises of the book and to highlight some convoluted ideas and shortcomings. Since I will concentrate on these issues and engage in a critical exegesis, let me state unequivocally that this is a valuable work of legal theoretical scholarship.

2. *What is a Legal Exception?*

A. *On Exceptions*

Duarte d'Almeida gets straight down to business from the first page of his book. He provides a detailed insight into the appearance of courts' activities, which in turn explains why it is imperative to gain clarity about the use of legal exceptions. Courts seem to suspend general rules like 'You ought not to kill' whenever 'faced with exceptional turns of events' (3). Not only, I think, do we depart from rules by allowing exceptions– depriving the law of one of its genetic elements, its generality–but we do so in uncontrolled, theoretically unwarranted ways.

In fact, we lack a synoptic view of legal exceptions (defences). Undoubtedly, we can say that duress is a defence and that, most importantly, someone who

[18] Schroeder, *Wittgenstein* (n 13) 238.
[19] Hart, 'The Concept of Law' (n 6) 147. See also at 139 where *Hart* calls them 'unattainable ideal[s]'.
[20] Unattributed page references in the text and ensuing notes relate to this book.

confesses her wrongdoing will not be convicted if she brings a defence into play. Furthermore, every legal system is being criss-crossed with exceptions and while we can, seemingly, cope with situations like those described above, we go wrong every time we 'go theoretical' on these issues. As with any practical ability, we can give hints and rules of thumb for the practice of exceptions; but this practice, I think, cannot be systematised or reduced to a set of rules. All this raises the question of what an exception *is*, to begin with–a question on which there is no consensus at all. The picture sketched above–that '[w]ithin limits, the law allows for exceptions' (3)–is 'deceptively clear' (4). There seems to be a contradiction between applying a general rule and taking into consideration exceptional circumstances.

As a result, too many questions remain unanswered insofar as the doctrinal status of legal exceptions remains unsatisfactorily conceptualised. 'Should courts be allowed to set aside the relevant legal rules when faced with exceptional turns of events?' (3). What authorises them to do so? And are we talking about exceptions *to* the law or to some other general rule? Is there any pervasive difference other than the (deliberate) legislator's choice that 'we think of self-defence in murder as a defence or exception and don't similarly think of consent as a defence or exception in rape?' (6). How can we–last but not least–correctly convict someone although we have not ruled out all his possible defences; even those not actively been brought into play?

Duarte d'Almeida is utterly right in stressing that our *theoretical understanding* of exceptions cannot depend on 'contingent matter[s]' such as the lawmaker's *decision* 'whether the negation of some given fact *x* is classified by law as an offence-element, or *x* is classified as a defence instead' (6). Only by engaging in a thickly descriptive[21] analysis and by shedding light on the microstructure of the inferential patterns and linkages (underpinning the rule-governed use of legal exceptions) can the role of exceptions in judicial decision making be understood. Otherwise the rule sceptic shows his teeth. For he can claim that whenever we apply exceptions, we deviate from the rule, and do so in ways that are not governed by rules. Legal adjudication can, thus, easily start rolling down the slippery slope of an open-ended set of exceptions. So *d'Almeida's* objective is to identify essential commonalities in rules governing legal exceptions, thus providing their grammar and allowing the law to 'perform its action-guiding function' (3).

Duarte D'Almeida thus sets an ambitious goal which everyone should embrace. In an era of rather one-dimensional doctrinal analysis in which (academic) lawyers automatically switch off as soon as they are confronted with

[21] *Duarte d'Almeida* stresses the fact that his 'concern throughout this book has been descriptive, not normative'. His aim is, thus, not to say anything about the content of legal exceptions, ie 'which facts *ought* to be classified as exceptions' (266) – My emphasis. *Kelsen* has famously advanced the 'structural analysis of law as a system of valid norms' to the quintessence of his pure theory of law, see H Kelsen, *General Theory of Law and State* trans. Anders Wedberg (The Lawbook Exchange, 1945) 162-3.

theoretical legal inquiries–let alone conceptual formulas–the author chooses to provide us with a theoretical understanding of our practical considerations: 'One goal of this book is to challenge the way lawyers commonly think about legal defences and the interplay of claims or accusations and answers in procedural contexts' (7). For questions like the ones asked above, he argues, are 'the product of several interconnected and widespread mistakes'. The author wants to overcome these mistakes by deploying his 'proof-based account–that seeks to reconcile the seemingly conflicting', but not yet properly articulated, 'intuitions that we have about exceptions' (7). In order to reach his goal, *Duarte d'Almeida* revisits and scrutinises *Hart's* influential and later retracted[22] paper 'The Ascription of Responsibility and Rights'.[23] Neither *Duarte d'Almeida* nor I'd like to provide an exegesis of *Hart's* ideas. However, since in the entire first and large parts of the second chapter, the author exclusively engages critically with *Hart's* paper, we should pause for a moment and remind ourselves what *Hart's* original idea was.

B. *The Zero Hour for Defeasibility*

In his ground-breaking paper on defeasibility and legal exceptions, titled 'The Ascription of Responsibility and Rights', *Hart* drew the attention of the legal, and as it turned out, of the philosophical and scientific community to a language game, where the central component is the word 'unless'.[24] The conjunction *Hart* qualifies as 'indispensable' for natural languages on the one hand and a 'characteristic of legal concepts' on the other hand has the function of *rebutting a claim*. *Hart* had stumbled upon a peculiarity of legal concepts. *Hart* observed that by providing an account of all necessary conditions of a legally binding (valid) contract, we won't make a law student understand what a 'contract' really *is*. For she still has to learn what 'can defeat a claim that there is a valid contract, even though all these conditions are satisfied'.[25] There are two ways distinctive in their presuppositions in which legal utterances can be challenged. First, one can deny the accusation or the claim of her opponent. More specifically, she can deny some or all of the positive conditions– in the case of a (valid) contract, these are: at least two parties, an offer by one of them, acceptance by the other, in some cases a memorandum in writing and consideration.[26] However, this is just one side of the coin, *Hart* contends. These

[22] As *Hart* (Sugarman and Hart (n 14) 276), stresses about his paper: "There were some things which were quite useful and true in it, but I think there was a central mistake. I claimed that the statement that a person has done an action is not a description but an ascription – let's say, a way of saying it's your responsibility. And I think that's wrong".

[23] Hart, 'The Ascription of Responsibility and Rights' (n 10) 171–194.

[24] Ibid, at 174. The general importance of Hart's remarks lies in the fact that they initiated a debate, which in turn gave birth to a whole new area of logic; see D Nute, 'Preface' in D Nute (ed), *Defeasible Deontic Logic* (Kluwer Academic Publishers, 1997) vii.

[25] *Ibid,* 174–5.

[26] *Ibid,* 174–5.

conditions, 'although necessary, are not always sufficient'[27] since there is more than one way to challenge the accusations or claims 'upon which law courts adjudicate'.[28] Besides a denial of facts, there is a way for which (back then) no term existed[29] and which is

'quite different: namely, a plea that although the circumstances are present on which a claim could succeed, yet in the particular case, the claim or accusation should not succeed because the other circumstances are present, which brings the case under some recognised head of exception'.[30]

Any concept is 'defeasible' if its application is subject to this kind of defeat.

In the core of this argument lies *Hart's* attempt to modify the point of view from which we approach legal problems. The concept of defeasibility was born as a research topic in this very moment. And the conjunction 'unless' is its linguistic expression.

3. *The Unity of Law*

A. *Setting the Stage*

Duarte d'Almeida finds *Hart's* approach 'misguided in many respects' (7). He seems to suggest that *Hart* was fighting with his hands tied. For he was 'constantly chasing an intuitively appealing but as yet diffuse and slippery thought about exceptions in law' (7-8).[31] Therefore, *Duarte d'Almeida* sets on an intellectual quest to carve out *Hart's* actual claim. *Hart*, he argues, brought forward the argument that whenever the definiendum happens to be a defeasible concept, the theoretical model of a definition in terms of a set of necessary and sufficient conditions is logically inappropriate (11). According to *Duarte d'Almeida*, the conclusion *Hart* was trying to defend can be expressed by the following proposition:

> (T_1*) Defeasible concepts cannot be defined in terms of a set of necessary and sufficient conditions. (11)

But T_1*, *Duarte d'Almeida* demurs, is diffusely expressed (17). Why on earth, he seems to lament, would *Hart* want to *define* any legal term, such as 'contract', or embark on any other lexicographical endeavour? For if we, the argument goes on, take *Hart* by his own words, we conclude that he was concerned with the 'actual procedure of the courts' and particularly with the

[27] *Ibid,* 175.
[28] *Ibid,* 174.
[29] *Ibid,* 175.
[30] *Ibid,* 174; *Hart* is in this point not just reluctant, but to a certain extent opposed to using the term 'negative condition' in order to describe this phenomenon. He writes: „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'" (175).
[31] We should not forget that *Hart* himself talks (*Ibid*, 175) about a practice for which back then no word existed.

'judge's function… in a case of contract',[32] but not 'with the explanation or definition of concepts' (12). That motivates *Duarte d'Almeida* to dig slightly deeper and excavate *Hart's* substantial claim:

> (T3) Defeating circumstances are not reducible to necessary conditions of correct judgments. (17)[33]

Duarte d'Almeida calls 'T3' the 'irreducibility thesis'. And, rather naturally, he feels inclined to discuss the two following questions in the next two chapters:
(1) Is the irreducibility thesis right?
(2) How does it relate to the claim of 'T_1*' that no set of necessary and sufficient conditions of a correct judgement *J* can be specified when the correctness of *J* depends on the non-emergence of defeating circumstances (13, 17-18)?

Let us pause here for a second. We have seen in section *I*.2 that *Hart's* line of thoughts can, indeed *must*, be seen in the light of Oxford Ordinary Language Philosophy.[34] His philosophical background warrants the conclusion that the negation of the 'irreducibility thesis' is not false but nonsensical. *Hart* offers a new question rather than a new answer.[35] The 'per genus and differentia specifica' approach fails–not only for *Hart*, but for large parts of analytic philosophy–not *just* for defeasible concepts but as a philosophical tool, due to its commitment to essentialism (see section 1.A). Concepts in general–and not only defeasible ones–cannot be intelligibly defined in terms of a set of necessary and sufficient conditions. Furthermore, essentialism and more specifically the idea that what a proposition tells us is shown by its accordance with some logical syntax (such as 'T3')–*Duarte d'Almeida* embarks on an expedition to the discovery of the logical form of an individual norm allowing for exceptions throughout his whole book–echoes the Tractatus doctrine, according to which formal logic is something sublime. *Wittgenstein*'s rejection of his own older concept elicited *Hart's* philosophical background. What I want to suggest here is that *Hart*, among others, would treat the irreducibility thesis as a meaningless philosophical dogma that fails the requirements of bipolarity (the ability to be both negated and asserted). It is true that exceptions are not reducible to necessary conditions of defeasible decisions. But actually, nothing is!

I think that *Duarte d'Almeida* fails to understand what *Hart* was up to when he was trying to define a 'contract'. *Hart* examined the grammar of

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[32] Hart, 'The Ascription of Responsibility and Rights' (n 10) 178, 182.
[33] *Duarte d'Almeida* arrives at T3 through a series of inferential steps, which I cannot go after here.
[34] It is noteworthy that Hart begins his paper with the following words: "There are in our *ordinary language* sentences whose primary function […]" – My emphasis (Hart, 'The Ascription of Responsibility and Rights' (n 10) 1).
[35] Cf. GP Baker, 'Defeasibility and Meaning' in PMS Hacker and J Raz (eds), *Law, Morality and Society: Essays in Honour of H.L.A. Hart* (Clarendon Press, 1977) 26.

defeasible concepts as something grounded on regularities of human behaviour, such as the (rule-governed) use of a 'contract'. He thus brought 'words back from their metaphysical to their everyday use' by examining the language game of contracts (or legal defences) in the context of the actual court procedures, which is their 'original home'.[36] We conclude that *Hart's* philosophy of action (asking what it means to utter the sentence 'He did it' or 'this is a valid contract')–problematic as it may have been–is a function of his philosophy of language where meaning is conceived as rule-governed use. The detachment of his oeuvre from its philosophical premises created this confusion.

B. *P-facts and D-facts*

However, this has not been the only focus of the book's first chapter. *Duarte d'Almeida* manifests very early that he does not intend to reside with one or another of the received accounts of legal defences–for very good reasons. For both the *incorporationists* (who claim that the negation of each admissible exception is itself a condition of a correct decision (14)) and the *non-deductivists* (who stress the non-monotonic character of legal reasoning) are based on a presupposition–common to both sides of the dispute–that can easily be challenged.

This common theoretical platform is the acknowledgement of positive and negative conditions for a (correct) legal decision. *Duarte d'Almeida* objects and effectively brushes the entire argument aside. He remarks that both the elements of, say, a crime (*P*-facts), and the possible legal defences (*D*-facts), can be contingent on a rather deliberate decision of the lawmaker. They can be both: positive or negative conditions. The insight on the other side, which *Hart's* paper *did* offer, is that defeaters (propositions that can defeat a claim) are somehow 'quite different' in their function from the elements that are normally required in order to establish a crime. So the distinction between elements that have to be present and the admissible defeaters transcends the boundaries drawn by the distinction between positive and negative conditions. The point is, as the author contends, 'that this contrast doesn't map onto any distinction between positive and negative conditions'; for '*P*-facts and *D*-facts can be either positive or negative' (p. 15). The importance of this remark cannot be overstated. Let's memorise at this point that the author coins his new terms by naming the facts that need to be 'present'[37] for a claim to be successful '*P*-facts' and the facts that can defeat a claim '*D*-facts'.[38] The latter term draws our attention to defeasibility–*Hart's* original topic.

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[36] Wittgenstein, *Philosophical Investigations* (n 17) § 162.

[37] Hart, 'The Ascription of Responsibility and Rights' (n 10) 174.

[38] As *Duarte d'Almeida* remarks at page 50, '"P" stands for the conjunction (P_1 and P_2 and…P_n) of those elements whose presence is required for the judge's decision, and "D" stands for the disjunction (D_1 and D_2 and… D_n) of the admissible exceptions'.

C. *Filtering Out The Noise*

"Defeasibility" is a perennial topic in legal theory.[39] The term is widely used and referred to by legal scholars who argue that it is a key element towards a better understanding of legal argumentation. But the term "defeasible" is often convoluted, confused, and misinterpreted. And every (legal) scholar feels uncomfortable in a situation in which the same term signifies different concepts; when its semantics are not fixed. Therefore, *Duarte d'Almeida* devotes some space to filtering out the noise, before the second part of his book (ch 3-6), by deploying his *own* theoretical approach. I will get back to this point later.

The first use of 'defeasible' is the one which 'tracks the non-final character of some of our decisions and judgments' (23).[40] Admittedly, leading scholars in the field of default logic admit that 'the relationship between default and non-monotonic logics appears to be complex'.[41] Yet, *Duarte d'Almeida* explains in a convincing way that the notion of a defeasible judgement, in the legal field or otherwise, is not intrinsically connected to non-finality–this is what he calls 'defeasible$_{NF}$' (27). For fallibility does not seem to grasp the main function of defeasible concepts, namely to rebut certain claims – this is what *Duarte d'Almeida* calls '"defeasible$_P$" (for defeasibility *proper*)' (27-28). Defeasibility$_{NF}$ and defeasibility$_P$ are held to be independent properties (29). This is a very helpful remark. New information acquired at t_{n+1} may force us to revise the judgment we made at t_n (eg it was *B*–and not *A*, as we used to believe–who killed *C*). However, the distinctive function of defeaters is a different one. The body of information at t_{n+1} may remain intact, but the claim can still be defeated (eg *A* killed *B*, but he acted in self-defence). The proposition "*A* killed *C*" remains true but misses its target. In other words: non-finality is a feature of the concept "(fallible) knowledge", whereas defeasibility$_p$ is a procedural element allowing for utterances which 'are admitted *as defeating circumstances*' (30).

While the first step to reduce noise is successful, the next steps are open to criticism, as I will show. *Hart* is being accused of relating defeasibility to questions of meaning, such as the term 'contract' (35-36). Admittedly, *Duarte d'Almeida* is right to say that defeasibility is not a problem of semantics but an epistemic one: A change in validity conditions does not affect the meaning of "valid contract". It affects only (or may affect) which contracts may count as valid in which system' (39). However, *Hart* would be the first one to acknowledge that (default) logic 'does not prescribe interpretation of terms; it dictates neither the stupid nor intelligent interpretation of an expression. Logic

[39] Cf. DN Walton, *Argumentation Methods for Artificial Intelligence in Law* (Springer -Verlag Berlin Heidelberg, 2005) 75–114; JF Beltrán and GB Ratti, 'Legal Defeasibility: An Introduction' in JF Beltrán and GB Ratti (eds) *The Logic of Legal Requirements: Essays on Defeasibility* (Oxford University Press, 2012) 1.

[40] See Walton (n 39) 75. He suggests that "a defeasible argument […] is one in which the premises, relative to the given information, support the conclusion, even though new information may defeat the argument."

[41] R Reiter, 'A Logic for Default Reasoning' (1980) 13 Artificial Intelligence 81.

only tells you hypothetically that if you give a certain term a certain interpretation then a certain conclusion follows'.[42] For the *rules* upon which (default) logic operates are, at the same time, the rules that govern the use of a word, its meaning. Again: *Duarte d'Almeida* understands meaning as a lexicographical inquiry while *Hart* understands it as rule-governed use.

Duarte d'Almeida continues and points out that defeasibility is neither about meaning nor about concepts since the judge's function is not to apply any concept but to come to a decision. This is the case 'when all *P*-facts are present and no *D*-fact emerges' (39): To suggest, as *Hart* does, that a defeasible proposition such as 'there is a contract' could possibly issue an individual norm (ie to say that 'defeasible decisions can be described as being decisions to the effect that '"there is an *x*"' (40)) conceals in *Duarte d'Almeida's* opinion the normative conditions of a correct decision.

Admittedly, this should have attracted a fair amount of criticism if *Hart* had committed the error of treating the phrase 'there is an *x*' in 'a purely descriptive sense'.[43] But for him–as for *Wittgenstein*[44] and *Austin*[45]–words are deeds. By saying that 'there is a contract', *Hart* is not reporting a fact. The token judgement, 'there is a contract', is a performative utterance, (eg leading to award damages for the breach of (a valid) contract, and not the set of normative conditions for that utterance). In that sense, defeasibility *is* about concepts insofar as it enables us to describe their normative structure.

D. *The Proof-Based Account*

Any discussion about *D*-facts (defeasibility) is contingent upon them being irreducible to *P*-facts–otherwise, it would be a truism or a violation of the principle of the economy of thought to use two distinct terms for two identical objects. Therefore, it has to be shown that these two propositional sets behave in different ways, so that a defendant who denies that (at least) one of the relevant *P*-facts is present is doing something quite different from the one who admits all relevant facts, but offers a defence instead. This also means that the absence of *P*-facts is different from the absence of *D*-facts.[46] Only this idea seems to lie behind *Duarte d'Almeida's* remarks, and I think it is useful to quote in full: 'one is accepting that *absence of self-defence* is not something that has to be ascertained for someone to be properly convicted of murder, while *absence of consent* does have to be ascertained to a given standard for someone to be properly convicted of rape" (132). In other words: absence of proof (of legal exceptions), is for all procedural uses, a proof of absence thereof.

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[42] HLA Hart, 'Positivism and the Separation of Law and Morals' (1958) 71 Harvard Law Review 593.
[43] Hart, 'The Ascription of Responsibility and Rights' (n 10) 187.
[44] See eg Wittgenstein, *Philosophical Investigations* (n 17) § 546.
[45] JL Austin, 'Performative Utterances' in JO Urmson and GJ Warnock (eds), *Philosophical Papers* (Oxford University Press, 1979) ch 10.
[46] See page 50-1 of the book for more discussion.

Duarte d'Almeida senses that (at least according to the received view, ie the 'substantive representation' (58) of facts) both *P*-facts and *D*-facts either depict a true state of the world or that they do not–*tertium non datur*. According to the received view, we care only about the actual *events* and not the *evidence*.[47] *Duarte d'Almeida* considers this view to be deeply flawed (59). He argues that (what we call) metaphysical realism will not get us far in a legal (ie procedural) context. This is insofar correct as legal adjudication can, and indeed *must*, be understood as procedurally structured reasoning under uncertainty. Of course it is crucial to guarantee a 'reasonable congruence between verdicts of guilty and factual guilt',[48] but as legal evidence scholars remark, 'how is the court to see that *A* really did kill *B*?'[49] Fact finders are (by definition) not omniscient gods, and metaphysical realism in conjunction with the substantive representation of facts only makes sense if we adopt a god's eye view.[50] Furthermore, we should not forget that (at least) legal theory seeks to articulate legal systems in their full complexity. Once we realise that we have to deploy and validate large sectors of a legal order–otherwise we are talking about a 'helter-skelter of uncoordinated individual norms'[51]–in order to make a single decision, most of our theoretical illusions disappear.[52]

Duarte d'Almeida's approach is not only theoretically consistent but also descriptively accurate. Finding legal evidence with a probative force is a way of establishing guilt or liability, not the other way around. Both legal masterminds, *Hans Kelsen* and *HLA Hart*, unequivocally agree on that issue.[53] They argue that we cannot impose external criteria on the assessment of a judge's/fact-trier's epistemic performance. *Defendants* (and not perpetrators or law-abiding citizens) are being convicted *because* an authorised court has ascertained in a procedure determined by the legal order that a certain individual has committed a crime.[54] In other words: fact finders are not convinced of the defendant's guilt because the latter *is* guilty as a matter of fact. Quite the opposite is the case. Defendants are convicted *because* fact finders are convinced that they are 'guilty as charged'. To say that the decision was 'wrong' only because, the defendant

[47] See C Nesson, 'The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts' (1985) 98(7) *Harvard Law Review* 1357, where he stresses that it is a psychological need that predisposes us to accept the verdict of guilt or liability as a statement about the past event.
[48] For more discussion, see P Roberts, 'Renegotiating Forensic Cultures' (2013) 44(1) *Studies in History and Philosophy of Biological and Biomedical Sciences* 47–59.
[49] HL Ho, *A Philosophy of Evidence Law* (Oxford University Press, 2008) 57.
[50] See A Goldman, *Knowledge in a Social World* (Oxford University Press 1999) ch 9.
[51] W Ebenstein, 'The Pure Theory of Law: Demythologizing Legal Thought' (1971) 59(3) *California Law Review* 637.
[52] One of these misconceptions is the idea that eg self-defence is an exception *to* a rule. The argument, *Duarte d'Almeida* contends, that there is some $rule_D$ (eg self-defence) permitting us not to apply some other relevant $rule_R$ (eg killing someone) is created only because of a 'conceptual and terminological blunder' (163).
[53] See H Kelsen, *Allgemeine Theorie der Normen* (Manz 1979) 195; Hart, 'The Concept of Law' (n 6) 138.
[54] H Kelsen, *Pure Theory of Law* trans. M Knight (University of California Press, 2nd.edn 1967) 239-40.

did not kill the victim in reality, 'has no consequences within the system', as *Hart* observes.[55]

Duarte d'Almeida stresses that the substantive representation of legal rules (exceptions included) allows–through the external parameter of absolute facts–for the claim that the rule of criminal law stipulates the obligation to punish only 'those who have committed murder' (61-62). But since there are no self-evident facts, he remarks that it is the view of the authorised judge and not of an omniscient god that ascribes truth values to the factual claims uttered in a (criminal) court (58). Legal orders attach legal consequences not to a fact in itself, but only to facts validated by their triers in a procedure prescribed by the legal order.[56]

This insight enables *Duarte d'Almeida* to come to a warranted conclusion. *P*-facts and *D*-facts follow the same logico-grammatical rules, but only if we examine them from a metaphysical (substantive) perspective, which excludes uncertainty. Therefore, we have to change our perspective and operate not with absolute facts, such as *X*–which in reality can be either true or false–but with the following fourfold range of possibilities:

i. *X* is proved.
ii. *Not-X* is proved.
iii. *X* is *not* proved.
iv. *Not-X* is *not* proved. (53)

Introducing the 'proof-based account' (52) is a decisive move. Legal consequences are not contingent on self-revealing facts, but on some procedurally structured method of knowledge-claim validation. As *Duarte d'Almeida* remarks, a 'fact can be said to be proved (or not), in the legal sense of the notion, only by reference to some standard of proof legally set for it' (107). Read against the 2x2 matrix depicted above, the idea that the absence of a *P*-fact (see *iii.*) is radically different from the absence of a *D*-fact (*iv*.) appears to be utterly convincing (74). For example, the absence of one of the *probanda* hinges on different conditions and brings different legal consequences than the absence of one of the admissible exceptions. In that sense, *Duarte d'Almeida* contends that the following formulation is 'an apt rendition of the sufficient conditions of defeasible decisions' (p. 83) (ie the logical form of a defeasible decision):

> (13P) If it is proved that P and not proved that D, then it is correct to decide for the plaintiff. (63)

[55] Hart, 'The Concept of Law' (n 6) 141.
[56] See H Kelsen, *What is Justice?: Justice, Law, and Politics in the Mirror of Science* (University of California Press, 1957) 252.

So *Duarte d'Almeida* chooses to articulate the logical form of defeasible decisions through an 'if *x*, then *y*' relation, as a conditional–rather inconsistently, since he uses both conditionals and biconditionals (eg 55, 57, 74), alas without explaining the difference. It must be stressed that *Duarte d'Almeida* aspires to describe the judge's activity in logico-mechanical terms and 'come up with some combination of statements of law and statements of fact that deductively justifies' the decision (52). However, the idea of using conditionals in order to put the deductive machinery in motion is not a good one. For logical relations, which we are by no means bound to accept in natural language, become valid within the logical framework described above.[57] *Duarte d'Almeida* is aware of these consequences and tries to defend his model against criticism by explicitly abstaining 'from commenting on how our natural language conditionals ought ultimately to be interpreted' (19). Yet, this move is not convincing. Given the author's commitment to deductive inferences and necessarily true conclusions, and given that only formal logic could support such a machinery, we conclude that *Duarte d'Almeida's* own methodology invalidates his disclaimer. In jurisprudence as in life, you can't have the cake and eat it too. In other words: either a model is a closed system based on logical deductions, but then one has to apply the grammar of formal languages (determinacy of language); or a model is not a closed system, since it allows semantics, but then any claim for deductivity is unwarranted.

At the same time, *Duarte d'Almeida* makes one more unwarranted move. He wants to make clear that he 'does *not* endorse *Kelsen's* view' concerning the correctness of a legal decision.[58] Such a decision is, as *Duarte d'Almeida* remarks, based on the application of legal rules, and, of course, judges (or more generally, fact-finders) 'may fail to apply these rules correctly' (61).[59] They may

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[57] See Wittgenstein, 'Tractatus Logico-Philosophicus' (n 12) § 5.101. In order to examine whether it is helpful to treat defeasible decisions in accordance with the logical syntax of conditionals (*if* x, *then* y), we just have to take a look at their truth table:

x	y	x→y
1	1	1
1	0	0
0	1	1
0	0	1

Table 1.1

Among other things, we see that by using the conditional (→) as a canon of argumentation, we have the following situation: If the consequent (y) is true, the antecedent (x) can be either true or false (ex falso sequitur quodlibet: from falsehood, anything follows), see Table 1.1, lines 1 and 3. Hence, trying to formalise legal norms as 'if-then' relations will mean that even if eg the fact-trier imposes a legal consequence – although someone's behaviour does not instantiate the elements of a crime –, we still have a valid relation (see Table 1.1, line 3). This contradicts our most basic intuition about the meaning of normativity or what it means to follow a rule. This is one of the reasons why legal scholars traditionally treat the logical relation between eg 'guilt' and 'innocence' as *biconditional*, ie a bi-directional implication.

[58] As we saw above (see section *III*.3) this is not *only Kelsen's* view, but *Hart's* as well.

[59] My Emphasis.

'declare that some fact is proved when according to the relevant rules it should *not* be considered proved, or vice versa' (62). *Duarte d'Almeida* admits that such a judicial decision will be 'valid'. However, he says that it will not be 'legally correct' (50, 52). Now, the question is: whose point of view is relevant for deciding on the 'correctness' of a decision? Aren't we almost by definition assuming that the judge has reached a conclusion or the trier of facts has applied a legal rule in a way *she* deemed–here, I use *Duarte d'Almeida's* terminology–'legally correct'? Here, we catch *Duarte d'Almeida* in *flagranti* using double standards. He is a relativist when examining knowledge claims, whereas he is a realist when discussing legal norms. This is a striking asymmetry. While he does *not* allow the external criterion of "objective truth" to supersede the epistemic performance of a fact-finder, he *does* allow the external criterion of 'legal correctness' to supersede the legal decision of an authorised judge or the application of a rule, (necessarily) based on somebody's point of view. This is a severe error, yet on a side point of *Duarte d'Almeida's* book.

E. *Economy of Thought*

On top of this, *Duarte d'Almeida* is right in adding uncertainty to the mix and reminding us that the 'substantive' approach is flawed because it is anything but a scaled-down version of the judicial phenomenon. He argues that defeasibility in law is 'a by-product of the need to reach a decision in the face of uncertainty about the occurrence of relevant facts' (184). Here, we can identify one more major pressure point in his analysis. As already mentioned above (*III*.2), defeasibility cannot be reduced to fallibility. Every real-life decision is a judgement under uncertainty. But defeasibility does more than that. It is about making decisions whenever we have absolutely no information about the acceptable defeaters. We ascertain by default that *A* killed *B*, even if we have no information about *A* being in self-defence; accordingly, we ascertain that *Tweety* (a random bird) can fly even if we have no information about *Tweety* being a penguin or an ostrich,[60] even if we cannot exclude the defeaters who have gained membership to a previously known set of defeaters. Hence, we can issue an individual norm whenever all elements (*P*-facts) have been ascertained *unless* a defeater (*D*-fact) comes into play.

The problem I want to raise here is related to the necessity of this discussion. *Raymond Reiter*, the founder of default logic, makes clear that default logic does not aim at modelling a non-monotonic information-acquiring process *such as*, in *Duarte d'Almeida's* terms, Def_{NF}. The patterns of inference in scope, he says, are quite different and have the form '*in the absence* of any information to the contrary, assume …'.[61] And default logic (ie the theoretical

[60] This is the famous example used from *Reiter* (Reiter (n 41) 82.
[61] Reiter (n 41) 81; for more discussion, see N Rescher, 'Default Reasoning' in DM Gabbay and P Thagard and J Woods (eds) *Philosophy of Logic* (Elsevier BV, 2007) 1167.

framework of defeasibility) offers us reasoning patterns for exactly this kind of situations in which we want to jump to conclusions unless, and until, one of the defeaters comes into play *such as*, in *Duarte d'Almeida's* terms, Def_P.

So the touchstone of default logic (which is *Reiter's* seminal paper) did not receive *Duarte d'Almeida's* attention. Of course, this is not a *mala in se*. But if we treat the economy of thought as a methodological axiom in academic research, *Duarte d'Almeida's* omission automatically becomes a *mala prohibita*. And the more emphasis we put on the economy of thought, the harsher the criticism becomes. In his book, *Duarte d'Almeida* starts over to create a new theory of defeasibility pretty much from scratch, although default logic, originally presented in *Reiter's* paper, provides formal methods to support just this kind of reasoning.[62] *Duarte d'Almeida's* move is unnecessary, forbidden indeed.

F. *What About the Burden of Proof?*

We have seen above that *Duarte d'Almeida's* whole project boils down to the conceptual formula (13P) discussed above. The latter hinges on *P*-facts and *D*-facts *having been proved* and not just on facts in themselves. Thus, the *strictly legal point of view* is crucial: In order to discern which facts are exceptions relative to some decision type, 'we need to look at what facts must and must not be ascertained for the decision to be correct' (122).

This brings us to the next issue concerning the question of *who* is required to prove *what*. *Duarte d'Almeida* feels obliged to address possible criticism deriving from the doctrinal learning on burdens of proof. Since he goes to great lengths discussing these issues, I will focus on only two of these possible objections. *First*, the critics could object that the model seems to disregard that if the defendant succeeded in making an exception a 'live issue', it becomes the plaintiff's/prosecutor's job to disprove the exception. In other words, the burden of proof shifts back and forth and the model fails to grasp and explain this shift. *Second*, the model ignores that the 'burden' carried by the plaintiff/prosecutor relative to *D*-facts is quite different from the burden relative to *P*-facts (83-85). *Duarte d'Almeida* manages to show that these objections are grounded on presuppositions that are mistaken. First of all, he makes clear that in case the defendant offers evidence for some exception, the plaintiff or the prosecutor will undoubtedly be required to offer counter-evidence. But this is a matter of procedural tactics (94). From a strictly legal point of view, *Duarte d'Almeida* suggests nothing changes since the only thing a plaintiff or prosecutor must prove are *P*-facts–which in cases like these are simply not sufficient for them to win the case. For 'winning' or 'losing' are predicates of personal, not legal interest. In other words, there is "no legal obligation proper for any procedural

[62] For an application of a default-deontic language (M3D) on legal presumptions see K Kotsoglou, 'Zur Theorie gesetzlicher Vermutungen. Beweislast oder Defeasibility?' (2014) 45(2) *Rechtstheorie* 243.

party to 'discharge' her 'burden' (89). Examining the burden of proof or the procedural tactics of any given party would take us away from legal or procedural theory to psychology and decision theory. And *Duarte d'Almeida's* model does not examine the ways of success for any procedural party, but the conditions of correctness for a legal decision.

In order to dissolve the problem of a distinction between a burden of proof and a 'mere *evidential* burden' (p. 94), *Duarte d'Almeida* investigates the grammar of exceptions. After working out that the (legal) standard of proof is a 'minimum threshold that has to be met' (109), he stresses that 'the complement of a threshold is not in itself another threshold that has to (or even can) be met' (109). As we have seen above, the absence of proof is a proof of absence, but only for *D*-facts–not for *P*-facts. *D*-facts will not bother the trier of fact unless they become a live issue. In that sense, the plaintiff/prosecutor still carries the burden of 'ensuring that no defence–no exception–is actually proved' (117). The question whether the burden of proof relative to justifications should be placed on the defendant is 'unintelligible and unanswerable' (133).

Duarte d'Almeida's analysis is consistent and convincing. He manages to silence these types of arguments effectively. Yet I want to briefly highlight a slightly different issue. According to the received view, the role of the burden of proof within the framework of adversary trial is to 'break the logjam and overcome the stalemate'[63] in case of a tie (*non-liquet*).[64] Bearing in mind that the burden of proof will address the question about what will be proved by whom, we conclude that, for example, the Presumption of Innocence (PoI), *is* the burden of proof in criminal procedure law, since it inter alia states that it is the duty of the prosecutor to prove all elements of the crime. Hence, the PoI in criminal procedure law is not just about breaking the logjam. It makes it logically impossible to have a *non-liquet* situation, since it instructs the fact-triers to acquit, *unless* the legal proof is obtained (beyond a reasonable doubt). What I am trying to say is that it would make sense to apply the methodological tools provided by the model (*P*- and *D*-facts) to unravel the mysteries of the PoI as well as the legal presumptions of fact in general, which in turn would also *dissolve* the problem of the burden of proof.[65] Working out the element of defeasibility from the PoI would offer an explanation that avoids subjective terms like decision *in favour of* the defendant or the plaintiff, litigation *tactics* etc. That would be (more) consistent with *Duarte d'Almeida's* methodological assumptions, namely to adopt a strictly legal point of view.[66]

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[63] P Roberts and A Zuckerman, *Criminal Evidence* (Oxford University Press, 2nd edn 2010) 224.

[64] Burdens of proof, even for many of the scholars, who operate with them, cannot shift; see Roberts and Zuckerman (n 63) 220.

[65] Admittedly, this approach is confined only to the realm of criminal law, leaving outside of its explanatory power the civil process.

[66] See H Kelsen, '"Foreword" to the Second Printing of Main Problems in the Theory of Public Law' in SL Paulson and B L Paulson (eds), *Normativity and Norms: Critical Perspectives on Kelsenian Themes* (Oxford

G. *On Explicit and Implicit Exceptions*

There is another problem concerning the explanatory power of the model, *Duarte d'Almeida* admits. 'So far we have been concerned with so-called "explicit" exceptions only' (135); facts that have been classified as exceptions as a matter of *general law*, like self-defence, duress etc. This seems to cause an explanatory gap that needs to be filled. 'Implicit' exceptions[67] (in which the decision involves an exercise of discretionary judgment) can be identified as such only in an individual case, namely, as 'facts not previously identified or identifiable as such' 137). Therefore, we need to examine whether implicit exceptions can also be accounted for in proof-based terms.

The problem with implicit exceptions, *Duarte d'Almeida* contends, is that we can only have an open-ended list thereof: 'There is no closed list of the circumstances that classify as exceptions under this provision' (137). This could be seen as a threat to *Duarte d'Almeida's* model: 'Whenever implicit exceptions are allowed, we may know the applicable legal rule, know what the relevant standards of proof are, and know exactly what facts have and have not been ascertained […] and we still won't be able to tell what the correct decision should be' (138). Rather naturally, he deploys a strategy in order to solve this problem. Yet, does this argument really pose a threat? Again, *Duarte d'Almeida* worries about the problem concerning 'implicit exceptions', where we–at least seemingly–have a gap between rules and their applications because there is no explicitly formulated list of the circumstances that classify as exceptions under a certain provision.

I think that the real question is: do we in (legal) language *ever* have such a closed list of circumstances? Isn't it the case that the judge has to exercise judicial discretion, even in circumstances in which she has to decide whether some particular facts qualify an 'explicit' exception (eg self-defence)? No matter how big the similarities are, the judge will still have to 'add to a line of cases *a new case* because of resemblances which can reasonably be defended as both legally relevant and sufficiently close'.[68] In other words: isn't the so-called 'rule-following problem'[69] – derived from the insight that rules can *never* dictate their own application–equally applicable to 'explicit' and 'implicit' exceptions? Of course, the discretional power a judge must apply in order 'to pick out easily

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University Press, 1998), 3–22, where he criticizes the legal scholars for factoring in psychological elements such as (dis)advantage etc. He observes that this is a 'questionable heritage, taken over from the theory of Roman advocacy jurisprudence, which considers the law only from the standpoint of the subjectively interested party, only from the perspective of whether and to what extent this law is "my" law'.

[67] Although *Duarte d'Almeida's* does not agree with the used terminology, he chooses–thankfully–not to introduce one more time his own notation.

[68] Hart, 'The Concept of Law' (n 6) 127 – My Emphasis.

[69] See Wittgenstein, *Philosophical Investigations* (n 177) § 138–242. For a comprehensive introduction to the problem of rule-following see M McGinn, *Routledge Philosophy GuideBook* to *Wittgenstein and the Philosophical Investigations* (Routledge, 1997) 73–112.

recognizable instances'[70] is not the same for explicit and implicit exceptions–albeit the difference is in *degree* and not in *kind*. Even for 'explicit' exceptions, we can, indeed *must,* anticipate situations in which new, previously unanswered questions arise. Unlike formal logic (which 'takes care of itself'[71]) rules, linguistic or legal rules do not dictate their own application. The necessity of judgement is present even if we have the illusion that we 'automatically' apply the law to facts, since non-standard cases will perforce arise.[72] Since legal rules–no matter how precise–are intimately bound up with facts, and facts are infinitely variable, we will unavoidably end up being entangled in the unpredictability of 'our own rules',[73] always in need of a decision, even in cases of rules including 'explicitly formulated catalogue of admissible exceptions' (135).[74] For the legal evidence in question or the conceptual/doctrinal logical framework cannot speak up and say 'I am a legal exception for the purposes of this rule'.[75]

The fact that legal systems in an increasingly complex world are unable to anticipate the future and contain rules allowing for exceptions incapable of exhaustive statements is a historic lesson we have learnt at least since the Prussian Legal Code (1794) with its more than 20,000 paragraphs. In a constantly evolving world characterised by a radically unpredictable future, every codification–no matter how thorough or voluminous–would be in need of radical revision moments after its enactment in order to catch the multitude of situations that can occur in real life.[76] Only if we could anticipate all possible combinations of fact, *Hart* observes, open texture would be an unnecessary *feature of rules*.[77] However, such knowledge is neither possible nor intelligible. As *Hart* explains, how extensive a use the legislator will make of implicit exceptions, depends on a compromise between the social need for legal certainty and the flexibility of the law.[78]

Let me recapitulate: The fact that rules, in general, have exceptions 'not exhaustively specifiable in advance'[79] is a function of the 'open texture'[80] of language, an ineliminable feature of language–not of a rather arbitrary distinction between explicit and implicit exceptions. *Duarte d'Almeida* is unknowingly dealing not with a theory of defeasibility (ie a logical framework for default reasoning), but rather with a quasi-theory of meaning. The property

[70] Hart, 'The Concept of Law' (n 6) 127. After all, one should also think if it is easier to bring a particular case *x* under 'self-defence'? A short look at the vast literature will, at least, give us a hint.
[71] Wittgenstein, 'Tractatus Logico-Philosophicus' (n 12) § 5.473.
[72] Hacker (n 13) 7; Hart, 'The Concept of Law' (n 6) 127.
[73] Wittgenstein, *Philosophical Investigations* (n 17) § 125.
[74] Hart, 'The Concept of Law' (n 6) 122.
[75] Cf. Hart, 'Positivism and the Separation of Law and Morals' (n 42) 607.
[76] Cf. Hacker (n 13) 7.
[77] Hart, 'The Concept of Law' (n 6) 135.
[78] *Ibid.,* 130.
[79] *Ibid.,* 139.
[80] *Ibid.,* 128.

of being an explicit or implicit exception is not a variable that could determine the correctness of the incorporationist strategy.[81] Therefore, the extra mile the judge has to go when facing 'implicit' exceptions is an issue of semantics *of* the legal norms providing exceptions–not a problem of the *cardinality* of the set of the admissible exceptions. The particular case, such as a therapy dog called *Pluto* not previously identified as a legal exception to a rule (say, 'No dogs allowed in this restaurant, unless special circumstances require it'), will not come into play as a 'therapy dog' per se (*condicio sine qua non*) but as an instantiation of an (necessarily) abstract legal rule allowing for exceptions (*condicio per quam*). The 'and so on' clause in implicit exceptions does not describe the dots of laziness but is a catalyst of adaptation to social change. In other words, the flexibility of legal rules' *semantics* (their open-endedness) does not dissolve into an anything-goes mush, for their *syntax* is not fluid. And we in law are constantly facing not a structural problem, but one of (unstable) semantics. For many, as for *Hart*, this problem is 'to be welcomed rather than deplored',[82] since it allows the law to adapt to constantly evolving new challenges by regulating the dynamic process of increasing (or decreasing) the concretisation and individualisation of legal rules. Indeterminacy is inherent in language: In all fields of experience, not only that of legal rules, there is a limit to the guidance general language can provide.[83] If one is interested in a theory of defeasibility or exceptions, she shouldn't worry about semantics, since 'logic is silent on how to classify particulars'.[84] *Duarte d'Almeida* is fighting against philosophical shadows once again. He gives the right answers. It's just that the question is wrong.

3. *Defeasibility in Action*

A. *Daily Contexts*

The third part (ch 7 and 8) of *Duarte d'Almeida*'s book provides a survey of the model's possible applications. He wants to 'put the proof-based account to the test' (187). His target is the interplay of accusations and answers in extra-legal, everyday contexts (ch 7) as well as in legal, procedural contexts.

Duarte d'Almeida acknowledges that the endeavour of structuring non-legal, everyday accusations, 'which are not constrained by institutionalised evidentiary rules and standards and procedures of proof' (210), is not easy a

[81] As *Duarte d'Almeida* remarks 'If implicit exceptions are to be theorized in terms of overrides, then so are explicit ones. … Explicit and implicit exceptions, theoretically speaking, stand or fall together' (162).
[82] Hacker (n 13) 7; the underlying principle of this idea is that language games facilitate communication, not despite but *in consequence* of the indeterminacy of their components (words). As *Wittgenstein* observes: 'We want to walk [ie communicate],so we need friction [ie indeterminacy]. Back to the rough ground!' (Wittgenstein, *Philosophical Investigations* (n 17) § 107).
[83] Hart, 'The Concept of Law' (n 6) 126.
[84] Hart, 'Positivism and the Separation of Law and Morals' (n 42) 610.

task. In fact, it has been treated with scepticism from the very beginning.[85] But to deny that everyday accusations or responsibility ascriptions are based on rules just because these rules are not explicit or institutionally scrutinised is, I think, to deny that those rules have meaning (ie a rule-governed use). An evaluation of this move goes far beyond the scope of the present study. The point I want to raise is a slightly different one. We have seen above how *Duarte d'Almeida* struggled to formulate the logical form of a defeasible decision ('13P'). Now, and while it's time to deliver (practical) results, *Duarte d'Almeida* discusses a new relevant but distinct philosophical issue: *HLA Hart's* and *J L Austin's* ideas on ascription of actions and responsibility. Of course, the topic is convoluted, relevant, and highly interesting. And there 'is much to learn from the exercise' indeed (187). But it's not the time for learning. It's time for action–'defeasibility in action' (185), as the author had previously adumbrated. I'm afraid that this procrastination is somehow irritating for the reader. Regardless of this criticism, I think that *Duarte d'Almeida*'s account passes the first test. In the domain of daily-life accusations, we do apply *P*-facts and *D*-facts. For the utterance 'A did φ' can, in an accusatory context, be answered in two different ways: either by denying its factual character or by offering an excuse/justification. Most importantly, we do not have to rule out all possible defeaters in order to accuse someone: 'You dropped the tea-tray' (194).

B. *Legal Contexts*

After having applied the theoretical framework to normal, daily contexts, *Duarte d'Almeida* endeavours on casting light on the fundamental distinction between offences and defences in a legal context (219). But before doing that, he wants to read the results of his model against the doctrinal analysis of a different legal tradition and thus narrow the gap, better say the 'great chasm that separates the modern Continental legal system from the Anglo-American system'.[86] In order to achieve this goal, he examines the 'dominant Continental theoretical approach' and attacks its flagship, the German doctrine of crime, '*Verbrechenslehre*', (219) in which the strict distinction between wrongfulness on the one hand and the issues of blameworthiness, on the other hand, is a feature of the model.

But let me take things from the beginning. The fourth chapter (§§ 32-35) of the German Penal Code (GPC) contains both justificatory and exculpatory defences. However, after its enactment in 1871, a totally new concept was 'discovered'[87]: a supplementary doctrinal stage of analysis called 'legal

[85] See Baker (n 35) 33.
[86] John Langbein, 'Historical Foundations of the Law of Evidence: A View from the Ryder Sources' (1996) 96(5) *Columbia Law Review* 1168.
[87] For an elaborate discussion on the term 'discovery' in the context of German Jurisprudence see MD Dubber, 'The Promise of German Criminal Law: A Science of Crime and Punishment' (2004) 6 *German Law Journal* 1049.

wrongfulness' (*Rechtswidrigkeit*), which led to the extraction of justificatory defences (such as self-defence) from the concept of guilt (*Schuld*) and factored them into the new concept of unlawfulness (*Unrecht*). The result was the so-called 'three-step analysis of criminal liability'.[88] Now the question is: can the German *tripartite* model account for criminal defences on the one hand and what we call *P*- and *D*-facts on the other hand (220)–which is, as we have seen above, a basic feature of natural languages?

Let us now go back to *Duarte d'Almeida's* presentation of the tripartite model. First, the author says, the action of an agent must satisfy the description of a legally defined '*Tatbestand*' (eg homicide, theft etc.). So far, so good, since the correspondence of an action or omission to some *Tatbestand* is 'similar, in content and function, to the Anglo-American notion of a criminal offence' (220). But of course, the correspondence of an action or omission to some criminal offence is not sufficient for it to count 'as a criminal "*Verbrechen*[89]"' (221). For there is a second element of the concept of 'crime', he reminds us; legal wrongfulness. Accordingly, an action shall not be deemed illegal although it corresponds to a specific 'Tatbestand' (eg if committed in self-defence. Finally, the condition of culpability is to be met. The reasons for *Duarte d'Almeida's* discontent must have become obvious by now. How is it possible, he wonders, that a model operating with three (positive) elements, which have to be jointly ascertained, can incorporate defeating circumstances (p. 221)? His answer is straightforward: It cannot! The German model, he suggests, is treating legal wrongfulness as 'some other definitional "element"' (229), namely as something 'that must be "present" for there to be a crime' (228). Therefore, the German model is (according to his own one) conceptually confused. *Duarte d'Almeida* is echoing here the old (Hegelian) aphorism: "If the German legal order contradicts the 'proof-based account', the worse for the German legal order." First, he contends, 'whoever denies that absence of self-defence is required for a murder conviction to be correct makes a descriptive mistake about law' (229). Second, the German model, the argument goes on, 'conflates the object-level of constitutive facts and the meta-level of the theoretical notions introduced to account for certain interesting aspects of constitutive facts' (229).

Let's start our discussion with the second objection. *Duarte d'Almeida* seems to ignore that legal wrongfulness is not just a theoretical term–exclusively serving purposes of systematisation *of* the law; merely as a logical stage of legal analysis. Legal wrongfulness is much more than that, since it is an integral *part* of the law itself. For example, the culpability of the participant will be examined only if the act of the perpetrator is 'legally wrongful' (§§ 26, 27 GPC).

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[88] It must be brought to attention that there is an extensive and vivid discussion going on concerning this analysis. Various criminal law theorists suggest the introduction even of a fourth step of analysis.

[89] *Duarte d'Almeida* is using here the wrong term 'Verbrechen', which translates into 'serious offence' (felony) and which leaves all the misdemeanors ('Vergehen', § 12(2) GPC) out. What he really means is '[Straf]Tat' (§ 1 GPC), which is the general term and translates into 'offence'.

In order to tackle the first objection, we will need more space. *Duarte d'Almeida* stresses the fact that in German criminal procedure, defences are treated 'very much like anywhere else'. German '[c]ourts do not need to satisfy themselves that the *absence* of each one of the admissible defences has been ascertained before they correctly convict someone' (220). This insight warrants, as *Duarte d'Almeida* suggests, the conclusion that there is 'an immediately discernible division–a bipartite division–between kinds of circumstances that bear on the legal correctness of criminal convictions' (220). Thus, this insight is taken to be a bug in a model, which promises to be nothing less than scientific.[90] The superimposition of the *theoretical* tripartite analysis on the *actual* bipartite divide between *P*- and *D*-facts–'which the model superficially ignores' (229)–seemingly creates an unsustainable asymmetry between theory and procedural practice, an–in *Kuhnian* terms–'anomaly'[91] which under normal circumstances should force the theorists who operate with the German legal order to give up on the model.

However, *Duarte d'Almeida's* analysis is wrong for the following reasons. The tripartite character of the German–and not: Continental[92]–concept of 'crime' is a function of its design's architecture. This is a matter of positive law. But this is by far not the end of the story, at least for all those who understand law as a unity–and *Duarte d'Almeida* is undoubtedly one of them. The bipartite divide is a rather different problem that is not attached to the structure of the German outline of crime. The distinction between *P*- and *D*-facts relates, as we have seen above (section 3.B), to the asymmetrical structure of their ascertainment. But this is an *epistemic* problem, not one of *syntax*. *While* fact-finders in German courts have to 'positively' ascertain the (subjective and objective) elements of some crime, they are not authorised or, indeed, allowed to examine all possible justifications or exculpation defences in order to proceed to the next procedural level and to finally convict the defendant–*unless* these exception/defeaters have become a 'live issue'. This has been *Hart's* insight all along. As soon as we positively establish the correspondence between an action and a respective 'Tatbestand' (offence), by ascertaining all elements of the crime, the absence of proof of justification or exculpatory excuses is a proof of absence thereof. What is really important is that the syntax of 'crime' is not only compatible with a bipartite divide between *P*- and *D*-facts. Its ascertainment follows a rather default pattern. The 'presumptive account' *Duarte d'Almeida* notices (226), is exactly the appearance of such a defeasible structure for both steps 2 and 3 of the tripartite analysis.

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[90] Dubber, 'The Promise of German Criminal Law: A Science of Crime and Punishment' (n 87) 1049–1072.

[91] TS Kuhn, 'Anomaly and the Emergence of Scientific Discoveries' in O Neurath (ed), *The Structure of Scientific Revolutions* (The University of Chicago Press, 3rd edn 1996), ch 6.

[92] For example, in the French Penal Code defences are laid down in Art. 122-1 to 122-8 thereof (Art. 122-1 C. pén). The legal consequence of all legal defences is simply unpunishability ('n'est pas responsible').

In a nutshell: German doctrine distinguishes several categories and stages of grounds of nonconvictability such as justifications (necessity, consent, etc.) and excuses (intoxication, insanity, etc.), whereas there is no legal or doctrinal distinction between those categories in a jurisdiction such as those in the UK.[93] This enables the German model to treat similar cases alike and different cases differently, thus increasing the level of justice in the administration of the law.[94] Of course, the tripartite analysis of 'crime' does not stop us from applying a defeasible structure for the *ascertainment* of legal wrongfulness and culpability, but, on the contrary, allows us to do that in more differentiated–or, allow me to say: elegant–ways, thus triggering a range of doctrine-based legal consequences. The German model has the complexity to differentiate in terms of legal consequences between justificatory and excusatory defences, believing–as a (very) German philosopher would say–that 'seeing things as similar and making things the same is the sign of weak eyes'.[95] This feature is a function of the model's ability to process more combinatorial possibilities.[96] While defences lead to an acquittal in general, the distinction between 'Unrecht' and 'Schuld', indeed the mere existence of a wrongful act, is relevant for the judicial decision-making process for a number of legal reasons. Here are only a few examples:

– Self-defence is permitted only against unlawful actions (§ 32 GPC).
– The distinction between *Unrecht* and *Schuld* allows us to attach the punishability of the accessor to the wrongfulness of the perpetrator's act (§§ 26, 27 GPC, accessory liability).
– A person who committed a wrongful criminal act without having acted culpably can be subjected to a measure of rehabilitation and security (§ 63 GPC).[97]

In other words, the very concept of legal wrongfulness facilitates more combinatorial possibilities by establishing more and more accurate connections between different elements of the model. Of course, as *Weigend* remarks, 'German law does not have a concept of "defences" in the sense that a defendant would have to come forward with certain grounds that exclude punishability'.[98] But this is a general feature of models: allowing for certain combinations of

[93] See only A Ashwort, 'United Kingdom' in KJ Heller and MD Dubber (eds), *The Handbook of Comparative Criminal Law* (Stanford Law Books, 2011) 541.
[94] Hart, 'Positivism and the Separation of Law and Morals' (n 42) 624: 'It is, however, true that one essential element of the concept of justice is the principle of treating like cases alike. This is justice in the administration of the law, not justice of the law.'
[95] F Nietzsche, *The Gay Science* trans. W Kaufmann (Vintage Books, 1974) para 128; after all, it is *Duarte d'Almeida* himself, who among others laments that the term 'defences' encompasses diverse circumstances (32, with more discussion in the footnotes).
[96] On saying this, I do not close my eyes to the endemic problems of the 'German' model.
[97] With the 'Law against dangerous recidivists and regarding measures of protection and rehabilitation', Nov. 24, 1933, measures of security and rehabilitation were added to criminal penalties provided from the German Penal Code.
[98] T Weigend, 'Germany' in KJ Heller and MD Dubber (eds), *The Handbook of Comparative Criminal Law* (Stanford Law Books, 2011) 268.

elements and at the same time excluding others. If put forward in an effective way, justifications and excuses will get us 'out of it' (192)–just like defences do. Yet they will do it in very different and (regarding the legal consequences) distinctive ways. *Duarte d'Almeida's* blitzkrieg against the tripartite analysis of 'crime'–he devotes 10 pages to such a thorny matter–takes its toll: creating confusion about both the content of German criminal law and its theoretical blueprint.

4. *Final Remarks*

In this review article, I have first tried to facilitate a proper understanding of *Hart's* legal theoretical oeuvre by pointing out its roots in the Oxford Ordinary Language Philosophy. My goal was to read *Duarte d'Almeida's* monograph against this philosophical background which yields, I suggested, a better understanding of the syntax of legal exceptions (defeaters). The pressure points I have put forward should not blur the picture. I have written this article in admiration for the project of clarifying the theoretical status of legal exceptions. In a nutshell, one could say that this is one of those irritating review articles 'that heaps up its praises with an undertaker's shovel'.[99] I mention that in all sincerity, because *Duarte d'Almeida* scrutinises the paradigm rather than confining himself in an uncritical puzzle-solving within an unsustainable distinction between substantive and procedural rules.[100]

The result is a challenging book that merits our attention. The most notable feature of *Duarte d'Almeida's* approach is his aspiration to root judicial practice in fundamental principles of legal theory. Problematic are the principles he chooses to operate with. From a set of axioms and rules as well as by using the resources of a predicate calculus, *Duarte d'Almeida's* model is supposed to yield for every defeasible decision φ a statement of the form "φ is correct if and only if ψ". I endeavoured to show how the predicate calculus is not a viable choice in order to excavate the form of a judicial decision through logical analysis, which is allegedly 'disguised by natural language'.[101] We must not forget that this has been the dominant approach in the philosophy of science during the first half of the 20th century (syntactic view of theories).[102] Leaving aside the fact that according to this approach, the respective theory is expected to be axiomatised within a formal language (which could provide the suitable tools for achieving the desired precision), the main problem has been that it is

[99] P Roberts, 'Loss of Innocence in Common Law Presumptions' (2014) 8(2) *Criminal Law and Philosophy* 317.
[100] See Kuhn (n 91) 42; Popper treats 'normal scientists' as 'a person one ought to be sorry for'. For he 'has been taught badly […] He has been taught in a dogmatic spirit […] He has learned a technique which can be applied without asking for the reason why' (K Popper, 'Normal Science and its Dangers' in I Lakatos and A Musgrave (eds), *Criticism and The Growth of Knowledge* (Cambridge University Press 1970) 52-3).
[101] Schroeder, *Wittgenstein* (n 13) 228.
[102] W Stegmüller, *The Structuralist View of Theories: A Possible Analogue of the Bourbaki Programme in Physical Science* (Springer, 1979) 4-5.

'not humanly possible' to carry out the programme suggested by the syntactic view of theories. *Stegmüller* warns us that even for an extraordinary logician, the difference between formal logic (ie axiomatisation in a formal language) and informally set theory 'is the difference between a few years of work and a few weeks (or perhaps afternoons) of work'.[103]

Fortunately, defeasibility is radically simpler than that.[104] The language game we play in order to master it is already being taught at a very early age. For example every time a mother tells her child, 'You will stay in your room *unless* the sun comes out', the child understands that a) her *default* status is to remain in her room and to play or do her homework, and b) the only thing (defeater) that could change that is 'sunshine'. Admittedly, a legal process is much more complicated than that. But this is not a matter of syntax.

Duarte d'Almeida sets unusually high standards. He wants to 'succeed where *Hart* has failed'.[105] I think that his aspiration is wrong from the very beginning. But this does not change much, since science and philosophy are nothing but a chronicle of failures.[106] And *Duarte d'Almeida's* (part-way) failure is our *success*, since his model helps the theoretical legal community regain its character as a catalyst of legal practice. What is perhaps most distinctive about his book is that the model cuts across the substantive or the procedural readings of legal orders and treats law as a unity. This has been *Hart's* agenda all along, too: to abandon formalism and to pursue a model-based doctrinal study of law instead. The economist or the scientist, *Hart* remarks, 'often uses a simple model with which to understand the complex; and this can be done for the law'.[107] I can only add: this has been done here, too. *Duarte d'Almeida's* model suffers–I think–from various shortcomings, albeit this is an entirely different story.

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[103] *Ibid,* 6.
[104] One should not confuse the simplicity of the argument with its superficiality.
[105] L. Duarte d'Almeida, 'A Proof-Based Account of Legal Exceptions' (2013) 33(1) *Oxford Journal of Legal Studies* 133.
[106] M Williams, *Unnatural Doubts: Epistemological Realism and the Basis of Scepticism* (Oxford University Press, 1991) 17.
[107] Hart, 'Definition and Theory in Jurisprudence' (n 7) 42.