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ANALYTIC PHILOSOPHY AND JURISPRUDENCE

JEROME HALL

ONE of the greatest hindrances to the progress of philosophy is the difficulty of testing philosophical arguments in definite ways; as the old truism has it, a philosophy is not refuted, it merely loses its attraction. It is, therefore, a matter of general significance that an appraisal of the application of analytic philosophy to jurisprudence can be made in relatively precise, objective ways, since there is available, as a testing ground, an advanced legal system with its profusion of concepts and well-known methods of elucidation.

Among the diverse contributions to analytic philosophy, that of the late J. L. Austin has been recognized for its special relevance to jurisprudence. In describing his method of "doing philosophy," his colleague, J. O. Urmson,¹ said that Austin worked with a group of scholars and that first they chose an "area of discourse" and selected terms and idioms that seemed significant, that is, that were interesting; this was done by free association, reading documents and books, not by philosophers, but, for example, the law reports of cases and books on psychology and, of course, the dictionary. Members of the group then gave examples of the correct and incorrect use of these terms and, finally, an explanation of their use.

On the face of it, there are several puzzles about this way of doing philosophy. In the first place, dictionaries are omnibus collections, and it would seem that one makes good use of their con-

tents only if a problem or other guiding line is held in view. But while that makes the foray intelligible, it contradicts the alleged mode of selection.² There are also problems regarding the use of law reports.

For example, in "A Plea for Excuses"³ Austin sets out the report of *Regina v. Finney*, a case decided in 1874, in which the defendant, an attendant in an insane asylum, was tried for manslaughter in that, being in charge of a patient who was taking a bath and thinking the patient had left the tub, he turned on the hot water instead of the cold, thus scalding the patient "to death." Austin makes two comments: (1) both the lawyers and the judge used a large number of terms of excuse ("accident," "negligence," "mistake") as though they were indifferent or equivalent or alternatives, when they are not; and (2) Justice Lush's instruction to the jury was "a paradigm of the faults," while the defendant was a "master of the Queen's English." When one has recovered from his surprise at this preference for the speech of a male nurse over that of a High Court English judge and is informed that, under the law, the defendant could not have been convicted of manslaughter unless he was *reckless* in turning on the hot water, it is apparent that there was no reason, in the determination of that issue, to distinguish "accident" from "negligence" and "mistake."

If the purpose of "A Plea for Excuses" was not to criticize the language

of judges from a non-legal perspective but was, instead, to understand the use of legal terms, other difficulties are met. First, many ordinary words are used in a technical sense, and it requires a great deal of study, in effect a legal education, to understand how those terms are used. For example, burglary includes an "entry," but the image summoned by ordinary speech—a man inside a house—is not the legal meaning of "entry." Part of a hand inside a window, engaged in raising it, a bullet shot into a room, and even a hole bored in the floor of a granary, through which the grain drops into sacks held below the floor, are entries in the legal sense. The common-law definition of murder is killing a human being with "malice aforethought"; but "malice" does not mean malice, and "aforethought" is not premeditation in the dictionary sense. The philosophical significance of lay criticism of a random selection of expressions from law reports is not immediately apparent.

The pertinent question, however, does not concern the use of "philosophy" but the fact that there are different levels of discourse, which have distinctive significance and functions. If we take constitutions, statutes, and decisions (case law) as the data of positive law, we may distinguish the lawyer's elucidation of their terms and expressions from their elucidation by use of legal theories and legal philosophies. The analysis of a rule of criminal law, for example, containing "burglary," consists partly in reducing it to its so-called material elements, namely, breaking, entry, dwelling house, nighttime, and intent to commit a felony. Lawyers and judges work in relatively close proximity to the legal data and feel no great need to systematize their knowledge of a field of law. They are

familiar with the "material" (essential) parts of the definitions of crimes, the causes of action, and the various defenses; and the case law is their authoritative dictionary.

The legal theorist knows all this, but his interest extends beyond the average practitioner's knowledge. For him, the further elucidation of legal concepts depends on relevant theories, that is, organized sets of propositions which interrelate the basic concepts so that the significance of each and, consequently, of every part of the law referred to is maximized. For example, a theory of criminal law, in which I have had some interest, is posited (*a*) on distinctions drawn among principles, doctrines, and rules; (*b*) on their interrelations; and (*c*) on the thesis that only voluntary conduct should be punishable.⁴

The rules specify what is distinctive of each crime; they include verbs such as "burn," "kill," "carry away"; and, finally, they presuppose the "normal adult" and "normal conduct." The doctrines comprise statements in terms of (*a*) infancy, insanity, intoxication, mistake of fact or law, coercion, and necessity and also (*b*) in terms of attempt, solicitation, conspiracy, and complicity. It is doctrines of the first type, concerning incapacity or unusual situations, to which Austin and others refer as "excuses"; the latter doctrines concern the degree of harm. It is necessary to see that the doctrines refer to common elements of all the crimes and that the entire criminal law is defined by the addition of all the doctrines to all the rules. Finally, if one examines this body of criminal law, comprised of the union of the rules and the doctrines, it will be seen that there are seven principles that underlie and permeate that legal structure; they are stated in terms of legal-

ity, *mens rea*, act, the concurrence or fusion of *mens rea* and act (to form conduct), harm, causation (connecting conduct and harm), and punishment.

Criminal-law theory not only constructs the above concepts and draws the above distinctions, it also interrelates the propositions that include those concepts. Something was said above about the interrelations of rules, doctrines, and principles; the principles are also interrelated to each other, that is, conduct to causing to harm, for which punishment must be imposed, all presupposing the framework of legality. Enough has been set out, it is hoped (and more will be said later), to indicate how the elucidation of terms, expressions, and questions by use of a legal theory is distinguished from the directly case-guided, unorganized elucidation of statutes and cases employed in the practice of law. It would seem to follow rather oddly, if Austin was "doing philosophy" in "A Plea for Excuses," that some treatises on criminal law are more philosophical, in increasing understanding of the concepts discussed there, than that essay; at least a test of that is available by comparing Austin's discussion of coercion, mistake, and act with that in English or American texts on criminal law.

If "doing philosophy" is only an exercise in logic, it makes no difference whether the propositions one discusses include "burglary" or "mistake" or "right" or "law." But if there are important differences among these levels of elucidation, and if the construction of patterns opens deeper layers of understanding, one should draw relevant inferences about "philosophy." Accordingly, if we ascend from the level of a legal theory (i.e., from that of the legal theories of the various particular fields

of law) to a still higher level, we enter the realm of legal philosophy. Here the central concept is that of "law" (as contrasted with that of criminal or contract or property law); and relevant subordinate concepts are designated by such terms as "right," "duty," "power," "privilege," and various other "fundamental legal concepts." In sum, the lawyer's elucidation, legal theory, and legal philosophy represent progressively higher levels of generalization; and it is equally important to keep in mind that each of these types of discourse is an elucidation of rules of positive law, that is, propositions that have both normative and descriptive significance.

The elucidation of legal expressions by use of the above descriptive-normative theory may be contrasted with another exercise in analytic philosophy, which will bring some of the above matters into sharper focus. In a recent symposium on responsibility, Professor Edgar Bodenheimer, a legal scholar, opposed the current thesis that punishment is obsolete. In his discussion of punishment, he spoke of "requit for a wrong" and of a "blameworthy act" deserving "disagreeable consequences." He recognized that "punishment" has various meanings, and he was careful to say that the term "will be used" by him in its moral sense; he noted that "this restricted meaning" conforms "with the popular notion of the term."⁵

His discussion was followed by that of Professor Joel Feinberg, who took exception to Bodenheimer's analysis "in one important respect," namely, he objected to the ethical connotation of Bodenheimer's definition of "punishment." He gave three examples of what, he said, "all of us would agree in identifying . . . as instances of legal punish-

ment"⁶—a traffic violation, the conviction of a South African Caucasian for entertaining Negroes in his home in violation of law, and a conviction of murder. "All of them" he said, "are perfectly clear examples of legal punishment . . . [they] are clear and non-controversial models of legal punishment."⁷ Like Bodenheimer, Feinberg recognized that "punishment" is ambiguous, but unmoved by the fact that a legal scholar preferred its moral connotation, Feinberg rejected that: It has the disadvantages that "on this definition many of the cases *generally called* punishment are not really instances of punishment at all, and this is true even of some of the *standard* examples of legal punishment."⁸ For example, despite the fact that the South African Caucasian who entertained Negroes in his home may have acted from "the highest moral purposes," "there is no question that he was punished for his act, and that his punishment was legal punishment."⁹ So, too, "of a man who violates . . . a business regulation of whose existence he was wholly unaware."¹⁰ He added that "the greatest drawback of a definition of 'legal punishment' in moral terms is that it tends to obscure the discussion of the justification of punishment and it invites equivocation"; but since he gave no reasons to support these assertions, they may be passed over.

An immediate difficulty is that, on the face of the discussion, there are two linguistic facts, two "paradigm" or "standard" uses or cases,¹¹ that seem directly opposed, namely, the popular use of "punishment" and the frequent use of "punishment" to cover the various cases put by Feinberg. Something more is therefore needed than the assertion of a linguistic preference. The

statement that "we" and "all of us" would agree in identifying as instances of punishment . . ." obviously excludes Bodenheimer and all others who hold that in its most important function "punishment" has a moral connotation and that clarity is also advanced if "punishment" is given that restricted meaning. "We" and "all of us" would exclude Socrates (who distinguished the Tyrants' "mere command" from law); those who espouse a natural-law philosophy; presumably Negroes of South Africa who do not recognize the discriminatory regulations as law; and, also, legal scholars who distinguish criminal law from quasi-offenses or mere violations. One may infer either that ordinary language is internally inconsistent or, more probably, that different purposes and contexts are implied in different uses.

Even if all scholars could be persuaded to use "punishment" in one sense (a futile quest), this uniformity would hardly touch the difficult problems of punishment that scholars try to solve. If one seeks more thorough elucidation of "punishment" than that provided by reference to an alleged "standard" use,¹² that can be had by consulting legal theories and the discussions of philosophers. If this is done, one discovers many important facts, for example, that the moral connotation of "punishment," beginning with Aristotle's *Ethics*, where "punishment" is restricted to voluntary wrongdoing, has been elucidated in many thoughtful discussions. He would also discover, as was noted above, that criminal-law theory interrelates punishment with other significant concepts; instead of asking how "punishment" is ordinarily used (which gives a variety of apparently contradictory answers), one elu-

cidates "punishment" by relating it to voluntary conduct, social harm, and causation and, also, by bringing that set of interrelations into the larger pattern of the interrelations of the principles, doctrines, and rules.

We must now consider the question, noted above, regarding the variety of "laws" in modern legal systems, for example, murder, the South African case, traffic and technical business regulations, and inadvertent negligent behavior. This question was discussed in an essay by H. L. A. Hart,¹³ where he criticized the writer's theory of criminal law on grounds that indicate that much more than analysis is involved in analytic philosophy.

In this essay, Hart criticizes the thesis that *mens rea*, the central term in the basic principle of criminal liability, is the "intentional or reckless doing of a morally wrong act," and he criticizes especially the statement that "though *mens rea* differs in different crimes there is one common essential element, namely, the *voluntary* doing of a *morally* wrong act forbidden by the law."¹⁴ Hart states that, if the above theory of criminal law "were merely a theory as to what the criminal law of a good society should be, it would not be possible to refute it. . . . But of course Professor Hall's doctrine does not fit any actual system of criminal law because in every such system there are necessarily many actions . . . that if voluntarily done are criminally punishable, although our moral code may be either silent as to their moral quality, or divided."¹⁵

The relevant facts are simple enough and require no legal competence to be understood. Our legal system includes strict liability, where punitive sanctions are imposed regardless even of

the degree of care taken, for example, if misbranded food or drugs are innocently shipped from a factory; there are penalties for inadvertent negligent behavior, and every legal system reflects an inevitable accretion of archaic laws. But the further fact is that almost the whole corpus of the common law of crimes and a vast array of serious statutory crimes all require *mens rea* as a basic condition of liability.

In view of the practical consequences and for everyday purposes, one definition of "criminal law" is understandably focused only on the punitive sanction, and another definition is even more formal than that, specifying only the criterion that the relevant legal proceedings are instituted and controlled by the state. When Stephen wrote his treatise a century ago, he was impressed by the diversity of laws to which punitive sanctions were applied as well as by even that of the many crimes in which *mens rea* was required. He therefore maintained that there was no *mens rea*; there are only *mentes reae*, that is, a multiplicity of the "states of mind" indicated by the variety of rules and statutes. This led to the formality that *mens rea* is whatever state of mind or absence of any state of mind (inadvertent negligence) is expressed in any proscription by the sovereign of any conduct or any behavior, so long as that was sanctioned by "punishment." There were other deficiencies in the current views of criminal law, for example, the lack of appreciation of the significance of "harm" and "causation" and, above all, the lack of any system or definite organization of the fundamental concepts.

For the indicated reasons, a theory of criminal law was constructed which, while it does "not fit" the whole of "any

actual system of criminal law" (if "criminal law" is employed in the relatively formal sense noted above), does fit the most important part of that law (thus formally defined)—"importance" referring to the predominant significance of the common law of crimes and a vast body of statutory law marked by the gravity of the harm and the severity of the punishment. By adhering to a descriptive-normative meaning of "mens rea," it thus became possible to construct a theory that encompassed what everyone recognizes as criminal law (as contrasted with "quasi-offenses" and "public torts" that scholars apply to strict liability violations), which is indeed the basic criminal law of all advanced legal systems. That is the theory previously described in terms of certain principles, doctrines, and rules.

Far from being merely of academic significance, the theory not only conforms to the judges' preferences expressed in centuries of decision¹⁶ but also maximizes the resourcefulness of lawyers in dealing with offenses that do not fall within the orbit of the theory; and the judges' interpretation of statutes also shows innumerable efforts to narrow or circumvent statutes whose literal terms oppose the principle of mens rea. Some of the most important recent decisions of the U.S. Supreme Court, for example, their recognition, as defenses, of ignorance of a city ordinance¹⁷ and ignorance by a bookseller of the obscene contents of certain books,¹⁸ were based on the statutes' contradiction of the mens rea principle. So, too, the fact that offences subjected to strict liability (foreign legal systems require at least negligence as the condition of liability) have been called "public torts," etc., by many scholars

also reveals the significance and influence of a descriptive view of criminal law.¹⁹ In sum, by distinguishing among the proscriptions ordinarily called "criminal laws," it became possible to construct a theory that not only fits a very large and most important part of them but also lays the groundwork for an organized knowledge of them; and the theory also supplies a firmly established vantage point from which to criticize and improve "laws" that do not conform to the specified standards and criteria. It may be added that the fact that a theory covers only certain data, but not others, is characteristic of all theories; hence, the way to refute a theory is to construct a different theory which, with at least equal significance, covers those data as well as other data.

The above descriptive-normative theory of criminal law is posited not only on mens rea but also on the further effort ("act") characteristic of the voluntary conduct that produced the harm; on causation, in the sense of authorship; on harm viewed as a social disvalue; and on punishment, interpreted in its relation to those descriptive-normative concepts. When these notions are brought into significant interrelations, each of them gains in significance; the same kind of advance in understanding and elucidation that is represented by theories of physical science, as opposed to the early ad hoc trial and error aided by a conglomeration of unorganized doctrines, is also reflected in a theory of a branch of law.

"In the abstract," the analytic philosophy of excuses might take account of such theories. But this would require a neutral analysis that is not characteristic of that philosophy, whose metaphysical preferences resemble those of Ryle's *Concept of Mind* (1949).²⁰ He

said there that in "ordinary employment" "we discuss whether someone's action was voluntary or not only when the action seems to have been his fault. . . . In the same way in ordinary life we raise questions of responsibility only when someone is charged, justly or unjustly, with an offense." "But philosophers," he added, "tend to describe as voluntary not only reprehensible but also meritorious actions, not only things that are someone's fault but also things that are to his credit."²¹ He later added that sometimes "we oppose things done voluntarily to things suffered under compulsion." But this, he said, is only to decide whether a person did something or whether it was done to him.²² Again, one finds a preference for a particular usage and neglect of the fact that ordinary speech includes the use of "voluntary" and "responsibility" in a meritorious sense, for example, "his fasting, when rations were short, was voluntary"; "the suspect voluntarily came to the police station"; the citation read, "Private X voluntarily took up his post at the most dangerous point"; and similar uses of "responsibility" could be stated. "Voluntary" is closely associated with "freedom"; and "freedom" in the sense of capacity or power to do what one wants to do is as common or "standard" as is "freedom from coercion."²³ There is, also, the difference between freedom of choice and freedom of action. The former is a matter of knowledge and is therefore enlarged by education. A relevant first-person report might be: "I knew what I wanted. I decided to do X. I sensed the effort I was making and my ability to achieve my goal."

With these various linguistic uses in view, one can more readily apprehend the thrust of Hart's well-known essay,

"The Ascription of Responsibility and Rights,"²⁴ where he states, "There are in our ordinary language sentences whose primary function is not to describe things . . . or anything else, nor to express or kindle . . . emotions, but to . . . claim rights . . . recognize rights . . . ascribe rights . . . transfer rights . . . and also to admit or ascribe or make accusations of responsibility." His "main purpose" is to show that such statements as "he did it" are not descriptive but ascriptive; their function is "to ascribe responsibility for actions." Although Hart speaks of the "primary" function of such expressions, his purpose is plain—he wishes to prove that certain concepts are not descriptive.²⁵

At the outset, there are difficulties in the way of speaking of the ascription of responsibility for an *action*. The statement "he did it" (which Hart employs) serves to identify a person; moreover, we speak of being responsible for an effect, for example, a harm, not for one's acting. But, since these questions have been discussed by others,²⁶ it is necessary here to add only that the ascription of responsibility for a criminal harm presupposes the competence or normality of the actor and the fact that he produced (caused) that harm. The ascription of responsibility, in the sense of imputing or imposing liability, is only the last stage of an inquiry which must have been preceded by the factual determinations of competency and causation. It is possible, of course, to draw a hard line between these facts and the imposition of liability ("ascription of responsibility"), but this only ignores the close relationship between the facts and the judgment. The judgment is obviously not a description of the above facts in the ordinary sense of "description," say, in

terms of a color. But the facts of competency and causation and the judgment are so closely connected that the latter "fits" or is "apt" or "correct" only by reference to the former. It hardly suffices merely to assert that the ascription of responsibility is not descriptive.

That legal expressions which include such terms as "contract," "murder," and "responsible" are partly ascriptive is common opinion; nor would Austin's discovery that such statements as "I promise" and "I agree" are "performative" be news to any law student or to anyone who has made an agreement. Hart's thesis, however, extends far beyond the boundary of disputes regarding ethical judgments and the imputation of liability. As noted, he argues that statements regarding action, such as "he did it," are ascriptive, not descriptive, and he carries this to the point of maintaining that "intention," "mens rea," and "voluntary" are also *only* ascriptive. There is, of course, no necessary connection between the two positions, and a philosopher might well hold that "intention" is descriptive of a mental state and also that a moral judgment is not descriptive.

The present issue, then, is narrowed to the question whether the legal terms Hart discusses, especially "mens rea" (criminal intention) and "voluntary," are descriptive or explanatory or anything else, as well as ascriptive. Hart does not consider that there may be crucial differences between contract and criminal law, and he applies his thesis of ascription equally to both. But it is well known that in some theories of contract law and, perhaps, in the prevailing view, "meeting of the minds" is given a wholly external meaning, which, as will appear more fully,

is not normally the case in criminal law as regards "intention" and "voluntary."

Hart states that legal concepts such as contract, murder, voluntary, intention, and act are "defeasible," and he speaks of "this characteristic of legal concepts."²⁷ But what he refers to is that certain excuses "can *defeat a claim* that there is a valid contract."²⁸ This confusion between defeating a claim and the concept of the claim itself runs through his discussion, with unfortunate consequences, as does his later confusion of a prosecutor's charge with the concept of the crime charged; but either a crime was committed, that is, all the essential elements were present, or the contrary is true.²⁹

Discussing "contract," Hart notes that a plaintiff's claim can be opposed by a denial of the facts or, more important for his purpose, by a plea of exception or excuse, for example, misrepresentation, undue influence, lunacy, etc. (and, he might have added, by admission of the facts but submission that they do not comprise a cause of action). He grants that philosophers (he might have added legal scholars)³⁰ have supplied relevant formulas and that Pollock, an authority on contract law, said, "The consent must be true, full and free."³¹ "But," states Hart, "such a general formula may be profoundly misleading [for whom, is not specified], for the positive looking doctrine, 'consent must be true, full and free' is only accurate as a statement of the law if treated as a compendious reference to the defenses"; it "is therefore, in fact, to say that defenses such as undue influence and coercion, and any others which should be grouped with them, are admitted."³² And, for Hart, the practice of law "makes this clear," since he believes the plaintiff must not

prove that there was "true, full and free" consent.

But this confuses legal procedure with the significance of that procedure when it is combined with the assumption of normal capacity and normal action, upon which it rests. For example, everywhere in criminal law it is also assumed that the defendant was sane, and it would be absurd to require the prosecution to prove in every case that the defendant was sane. When a plea of insanity is raised, in most of the states, the prosecution must prove that the defendant was sane when he acted, while elsewhere, including England, the defense must prove insanity; if it fails, the verdict "guilty" implies that the requisite *mens rea* was present. Similarly, one who sues for breach of contract must prove certain actions and conditions (offer, acceptance, and consideration) that are assumed to be normal until that is controverted by the defense. If the jury finds for the plaintiff, its verdict rests on the preponderance of his evidence that the conditions were normal; the finding of normal consent is necessarily an inference, drawn from the external facts interpreted in the light of the jurors' experience.

Applying his thesis to the criminal law, Hart states that "attempts to define in general terms 'the mental conditions' of liability . . . are only not misleading if their positive and general terms are treated merely as a restatement or summary of the fact that various heterogeneous defenses or exceptions are admitted."³³ Then he states a very different thesis: "What is meant by the mental element in criminal liability (*mens rea*)," he now says, "is only to be understood by considering certain defenses or exceptions, such as

Mistake of Fact, Accident, Coercion, Duress, Provocation, Insanity, Infancy."³⁴ For, plainly, to state that one must consider the excuses in order to *understand* *mens rea* (which, of course, is granted) is far from stating that *mens rea* is *only* "a restatement or summary of . . . various heterogeneous defenses." Hart then states that, "in pursuit of the will-o'-the-wisp of a general formula, legal theorists have sought to impose a spurious unity . . . upon these heterogeneous defenses . . . suggesting that they are admitted as merely evidence of the absence of some single element ('intention'). . . . And 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."³⁵ But this does not consider the possibility (the current "standard" usage) that the reason for excusing a person ("defeating the allegation of responsibility") is that he lacks a required *mens rea* (i.e., the two go together); hence it is arbitrary to formulate the issue in terms of *either* necessary mental element *or* defeat of responsibility. Hart does not discuss any functional difference between "evidence negating . . ." and "grounds defeating . . ."; instead, after a dubious use of Aristotle,³⁶ he acknowledges: "It is, of course, *possible* to represent the admission of these different defenses or exceptions as showing that there is a single mental element ('voluntariness') . . . required as necessary mental conditions (*mens rea*) of full criminal liability."³⁷ But he reaffirms his thesis that "*mens rea*" is not descriptive, that it only excludes excuses.

Of course, *mens rea* excludes the excuses. But this does not prove that

mens rea has no descriptive or *positive* normative function. That it has such functions in the theory of criminal law discussed above is evident from the fact that the principles, including that of *mens rea*, are derived, not from the doctrines (excuses) alone, but from the doctrines added to the rules (which, it will be recalled, are stated in terms of the intentional or reckless commission of certain harms). Thus *mens rea* does not mean *only* that the excuses were excluded; its meaning is also that the defendant intentionally or recklessly did what the rules proscribe. A criminal act is the fusion of a *mens rea* with the effort required to effect the harm, for example, "A intentionally shot B." To say that A was not insane, did not think B was a deer, and was not threatened by anyone does not wipe the slate clean; it leaves A's action, proscribed by the rule. Thus, the excuses resemble negative concepts which necessarily presuppose positive ones—mistake presupposes correct perception, insanity, sanity, and so on. The exclusion of the excuses presupposes the normality of the defendant and his conduct; "*mens rea*" is descriptive of his mental state, and that principle also expresses disapproval of his conduct.

The rules are more important than the doctrines in that they imply the normal condition; and it is therefore possible to conceive of a (primitive) legal system that consisted only of rules but not of one that consisted only of doctrines (excuses). For an enumeration of all the excuses would still leave it necessary to state, whenever no excuse was accepted, that a person is liable because he voluntarily committed a proscribed harm. Nor will it do to say that the exclusion of excuses im-

plies only that the defendant is liable, since there is no such thing as "liability in the air"; in daily life, as in law, it is necessary to answer the question—liable for what? The rules, not the doctrines or their exclusion, answer that question.

In everyday experience and in many psychologies and philosophies, "action" implies thinking, planning, the anticipation of an end to be achieved, the visualization of a change in a state of affairs, and, of course, the effort required to effect a plan. Law builds on that ordinary experience, and most cases turn on denials of the asserted facts (the rules). Nothing is said about mistake, insanity, coercion, etc.; if the premise of normal conduct is not challenged, the *mens rea* is found as a matter of course, as implied in the verdict of guilt. In a minority of the cases an excuse is pleaded, and the prosecution must not only refute the plea, it must also prove that the defendant did certain things. Suppose the defendant simply denies having done what is charged, for example, pleads an alibi or mistaken identity. Discussion of the excuses would be irrelevant, and their exclusion could not possibly lead anyone to conclude that he had committed the crime. And if those pleas (alibis, etc.) were rejected, the *mens rea* would characterize that defendant's action just as it does if a plea of insanity or mistake is rejected.⁸⁸

Instead of arguing that "*mens rea*" functions only to exclude excuses, it would be correct and persuasive to argue that the acceptance of an excuse functions to exclude *mens rea*. But this does not imply that the excuses are mere formulas or functions. On the contrary, it is because an excuse is descriptive of a mental state and relevant

abnormal conduct that it functions to exculpate. Thus, if the purpose of the analytic philosophers' treatment of excuses was to exorcise mental states, they have employed concepts that are inconsistent with that purpose. So, finally, pleas of excuse are just as "defeasible" as the claim that a contract was made or the charge that a certain crime was committed; the jury may not believe the defense.

The influence of Ryle on the linguistic analysis of excuses is obvious—to substitute "pleas of excuse" for "expressions of theories" is simple enough. While Ryle's emphasis on the expression of theories rather than on their discovery or construction gave some plausibility to his identification of thinking and talking, that is hardly available as regards legal excuses. For a discussion of those excuses cannot avoid the rules of law and their reference to mental states, since excuses cannot be understood unless one understands what is to be excused.

Long before Ryle's verbal behaviorism,³⁹ Watsonian behaviorism and that of his successors in psychology had stimulated legal realists and others to discover ways of dispensing with mental states. They floundered on the rocks of criminal law and other branches of law which are intelligible only if mental states are considered. The external behavior of an intentional killer, a negligent one, and a mistaken one might be identical. The significant differences are ascertainable only by discovery of the respectively different states of mind, for example, whether putting a spoonful of sugar into another person's cup of tea was an innocent act or an attempt to kill. Of course, an inference regarding another's state of mind must be based on observable actions or on talk,

including confession; but the actor can immediately disclose his state of mind. It is also true that one makes many decisions that are never carried out; only he has knowledge of those mental states.⁴⁰ Thus dependence on external action in fact-finding and the existence of internal states are very different matters.

A way of doing philosophy is judged by its product; hence the conclusions reached above are bound to influence one's estimate of the methods employed in the application of analytic philosophy to jurisprudence. Yet methods are sometimes valued in themselves, apart from any aesthetic quality or interest. Hart discussed his way of doing jurisprudence in an essay intended to elucidate the use of "right" and "corporation." In his view, the use of these terms "is not understood because compared with most ordinary words these legal words are . . . anomalous," by which he means that words like "corporation" and "right" "do not have the straightforward connection with counterparts in the world of fact" that most ordinary words have.

In trying to understand Hart's method, one must first contrast it with the theories he dismisses: (1) that a word stands for an unexpected or complex or psychological fact, for example, the American legal realists' theory that a right is a term used in predicting the behavior of judges; (2) that a right is a fiction, standing for no fact (the Scandinavian realists' theory); (3) that a right stands for something (a corporation) different from other things just in that we cannot touch it, hear it, see it, feel it (a "now unfashionable" theory)⁴¹; and (4) the (nominalist) license to define words as one pleases since this "trivializes" the questions asked about

"law" and "right."

He then describes his method of "elucidation" by explaining how a game of cards is played—its rule regarding the highest card, that a particular player "scores a point," and so on—and he concludes, "in these circumstances that player is said to have 'taken a trick.'" This, he says, is not providing a synonym; it elucidates the use of the above expression by specifying the conditions under which the whole sentence is true and by showing how it is used in drawing a conclusion from the rules in a particular case. And he concludes:

I would therefore tender the following as an elucidation of the expression "a legal right": (1) a statement of the form "X has a right" is true if the following conditions are satisfied:

(a) There is in existence a legal system.

(b) Under a rule or rules of the system some other person Y is, in the events which have happened, obliged to do or abstain from some action.

(c) This obligation is made by law dependent on the choice of X or some person authorized to act on his behalf so that either Y is bound to do or abstain from some action only if X (or some authorized person) so chooses or alternatively only until X (or such person) chooses otherwise. (2) A statement of the form "X has a right" is used to draw a conclusion of law in a particular case which falls under such rules.⁴²

In the first place, one must ask, are legal terms anomalous in the above sense? Do they differ, in the way Hart states, from ordinary terms? Hart's ordinary term is "table," hence it is immediately apparent that he is comparing a very narrow concept of perception with a high-level jurisprudential conception. (What would result from a comparison of "legal right" with "matter" or "beauty"?) It is also implied that ordinary terms and legal terms are sharply separable, but "table" may be a legal term, for example, if a park reg-

ulation forbids sitting on tables and there are flat pieces of furniture that are higher than benches but lower than the tables used at meals by people on picnics. Hart also oversimplifies the problem of elucidating words that have "counterparts in the world of fact." He assumes that the ordinary definition of "table" suffices to understand its use but that, as regards legal concepts, "we are puzzled when we try to understand our own conceptual apparatus."⁴³ But epistemological controversies regarding perception raise many puzzles, and considerable sophistication is required to understand such statements as "there is a table."⁴⁴ To assume that we immediately understand such statements but that a lengthy analysis is required to understand "X has a right" is to prejudge both problems and to cloud understanding the one by arbitrarily contrasting it with understanding the other.

Nor is the specification of conditions, necessary to the "truth" of an expression, peculiar to the elucidation of statements that include legal terms. Every expression, to be intelligible, requires its inclusion in a context; and to elucidate propositions about tables to persons of a very different culture, one should specify that people do not spread cloths on the floor or place food on it or squat on benches, etc. Thus, if "truth" has a logical connotation, what Hart says about the "truth" of legal expressions applies to all expressions that are implications of certain propositions; for example, one could formulate a major and a minor premise that implied "this is a table."

The terms "true," "existence," "legal system," "rule," "obliged," and "obligation," are among the most "anomalous" terms in the language. Thus, Hart began with one anomalous term, "legal

right," and his elucidation of it ended with six anomalous terms. It will also be noticed that his demonstration hangs on an "if"—*if* there is a legal system, *if*, under a rule and so on, *then* it is "true" to say "X has a right." The logic may be impeccable, but it supplies neither evidence nor reasons that support the conditions; the "truth" of the conclusion "X has a right" is necessarily and equally hypothetical.⁴⁵

Every analytical jurist from John Austin to Kelsen has discussed legal rules and legal rights in relation to a legal system. Kelsen has long included the choice of the plaintiff, in instituting legal action, in his notion of the "delict" that requires the imposition of the sanction, and thus explains the plaintiff's

right. Hohfeld, building on Terry and other notable predecessors, drew important distinctions among the various uses of "right." If Hart has added anything to our understanding of the use of "X has a legal right," the increment has not been recognized by some very able legal scholars.⁴⁶ Apparently, it does not advance jurisprudence to regard theory as an "incubus."⁴⁷ On the contrary, some definite evidence was given above, it is hoped, to reveal the significance of the "strong and persistent desire to see how the various aspects of experience hang together [which] is perhaps the one characteristic common and peculiar to philosophers."⁴⁸

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NOTES

1. J. O. Urmson, "J. L. Austin," *Journal of Philosophy*, LXII (October 7, 1965), 499.

2. In fairness to Austin it should be noted that he preferred "linguistic phenomenology" to "linguistic" or "analytic" philosophy and recognized that "fact is far richer than diction" (*Philosophy Papers* [London: Oxford University Press, 1961], pp. 130, 143).

3. J. L. Austin, "A Plea for Excuses," *Aristotelian Society Proceedings*, LVII (1956–57), 1–30.

4. Jerome Hall, *General Principles of Criminal Law* (2d ed.; Indianapolis: Bobbs-Merrill Co., 1960), and "From Legal Theory to Integrative Jurisprudence," *University of Cincinnati Law Review*, XXXIII (1964), 154–68.

5. Carl J. Friedrich (ed.), *Responsibility, Nomos III* (New York: Liberal Arts Press, 1960), pp. 88, 89.

6. *Ibid.*, p. 153.

7. *Ibid.*, p. 154.

8. *Ibid.*, p. 156; italics mine.

9. *Ibid.*

10. *Ibid.*, p. 157.

11. Cf. H. L. A. Hart: "in the analysis of concepts we need first to establish . . . the paradigm or standard case of the use of an expression" ("Analytical Jurisprudence in Mid-Twentieth Century: A Reply to Professor Bodenheimer," *University of Pennsylvania Law Review*, CV [1957], 968); cf. John Passmore, "Professor Ryle's Use of 'Use' and 'Usage,'" *Philosophical Review*, LXIII (1954), 62–63.

12. See R. B. Brandt, "Moral Philosophy and the Analysis of Language" (Lindley Lecture, University of Kansas, 1963).

13. H. L. A. Hart, "Legal Responsibility and Excuses," in S. Hook (ed.), *Determinism and Freedom in the Age of Modern Science* (New York: New York University Press, 1958), p. 81.

14. *Ibid.*, p. 89.

15. *Ibid.*, pp. 89–90.

16. J. W. C. Turner, *Kenny's Outlines of Criminal Law* (Cambridge: Cambridge University Press, 1952), p. 29. "The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil" (*Morissette v. United States*, 342 U.S. 246, 250 [1952]).

17. *Lambert v. California*, 355 U.S. 225 (1957).

18. *Smith v. California*, 361 U.S. 147 (1959).

19. "If it is considered that strict liability really must exist for certain petty offenses, then these offenses should be excluded from the criminal law in the narrower sense and, following the example of some European countries, put into another branch of the law, e.g., law of violations or similar category. A modern criminal code should not include in its rules the punishment of those who are not culpable persons" (Mihajlo M. Acimovic, "Conceptions of Culpability in Contemporary

American Criminal Law," *Louisiana Law Review*, XXVI [December, 1965], 38).

20. Also, Gilbert Ryle, "The Theory of Meaning," in C. A. Mace (ed.), *British Philosophy in the Mid-Century* (London: George Allen & Unwin, 1957), p. 239; and cf. Passmore, *op. cit.*

21. Gilbert Ryle, *The Concept of Mind* (New York: Barnes & Noble, 1949), p. 69.

22. There is the not unusual hedging—"questions of inculcation and exculpation *need* not arise" (*ibid.*, p. 73, italics mine).

23. "Legal freedom does not say what one can but what one may do. . . . only thru what-one-can-do does what-one-may-do receive any actual significance" (Nicolai Hartmann, *Ethics III*, trans. Stanton Coit [London: George Allen & Unwin, 1932], p. 40).

24. H. L. A. Hart, "The Ascription of Responsibility and Rights," reprinted in A. G. N. Flew (ed.), *Essays on Logic and Language* (London: A. R. Mowbray & Co., 1951), p. 145.

25. P. T. Geach, "Ascriptivism," *Philosophical Review*, LXIX (1960), 221: "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; and so, Ascriptivists argue, there is no question here of truth or falsehood, any more than there is for moral judgments." In fact, it is difficult to discern, in Hart's essay, a consistent position which is opposed to the general view that the concepts he discusses are both descriptive and ascriptive. Thus, Hart writes that a legal judgment is "a compound or blend of facts and law" ("The Ascription of Responsibility and Rights," p. 146); but he concentrates on the ascriptiveness of the "legal element of these compounds or blends" (*ibid.*) and goes on to argue that they are "defeasible."

26. George Pitcher, "Hart on Action and Responsibility," *Philosophical Review*, LXIX (1960), 226.

27. See n. 25, above. Hart later acknowledges that "we, of course, very often make use of legal concepts in descriptive and other sentences and . . . they may be true or false," for example, "she is Robinson's wife" (Hart, "The Ascription of Responsibility and Rights," p. 156). What must be noted is (a) precisely the same descriptive use is made in "D murdered X"; (b) in a court of law "she is Robinson's wife" depends just as much on rules of laws (of marriage and divorce, jurisdiction, and full faith and credit) as does the judgment "D murdered X"; and (c) that judgment is not only or merely ascriptive, for it is based on the finding of fact, no less than is the non-legal statement, "she is Robinson's wife."

28. Hart, "The Ascription of Responsibility and Rights," p. 148; italics ("claim") mine.

29. The choice of "defeasible" was not a happy one, because a "defeasible estate," which suggested it, is one that has vested but that may in the future be divested, e.g., on the failure of a specified condition. Hart's point is not that a crime was committed and that that is somehow later annulled (e.g., by a governor's pardon) but, as all agree, that a crime was not committed (or contract made) if a legal "excuse" is accepted.

30. "If the law does not explicitly provide otherwise, a person is punishable only if he commits a felony or misdemeanor with intent. Whoever commits an act knowingly and willingly commits a felony or misdemeanor with intent" (Swiss Federal Criminal Code of Dec. 21, 1937, Title II, § 3, Art. 18). Article 7, Yugoslav Criminal Code (enacted in 1951 and supplemented in 1957): "2/ A criminal offense is committed with intent when the offender was conscious of his act and wanted to commit it (*direct intent*); or when he was conscious that a prohibited consequence might result from his activity or omission and had consented to its occurring (*eventual intent*)" (Mihajlo M. Acimovic, "Conceptions of Culpability in Contemporary American Criminal Law," *Louisiana Law Review*, XXVI [December, 1965], 31).

31. Hart, "The Ascription of Responsibility and Rights," p. 150.

32. *Ibid.*, p. 151.

33. *Ibid.*, p. 152.

34. *Ibid.*, pp. 152-53.

35. *Ibid.*, p. 153. Actually, there is great diversity among Continental and American theorists and between these groups regarding excuse and justification. For example, in German theory, questions of capacity—infancy, insanity, and gross intoxication—are treated as presuppositions of guilt; i.e., "excuse" presupposes normal capacity and is limited to such matters as coercion and excessive self-defense. In Anglo-American law, excuse and justification are interpreted simply as defenses, and no thorough efforts are made to distinguish them. The writer has related excuses and justifications to principles of criminal law.

36. Hart states that in "Aristotle's discussion (*Ethics*, Book Three) . . . the word 'voluntary' in fact serves to exclude [cases of excuse] . . . and not to designate a mental element or state" (Hart, "The Ascription of Responsibility and Rights," p. 153). But Aristotle not only discussed excuses, he also said: "Now the man acts voluntarily; for the principle that moves the instrumental parts of the body in such actions is in him, and the things of which the moving principle is in a man himself are in his power to do or not to do. Such actions, therefore, are voluntary" (1110a 15-18). He repeats this several times (1110b, 1111a 22-23) and he also says that "choice involves a rational principle and thought" (1112a 17-18). "We deliberate about things that are in our power and

can be done" (1112a 30). "The origin of action—its efficient, not its final cause—is choice and that of choice is desire and reasoning with a view to an end" (1139a 32–33).

37. Hart, "The Ascription of Responsibility and Rights," p. 154.

38. Hart shifts from the exclusion of excuses to the exclusion of all defenses. This, however, does not help his case. One who denies having done something ("I did not do it." "I did not shoot him.") is not pleading an excuse either in law or in ordinary speech; and even if Hart's shift to all defenses is accepted, it does not follow that the only "cash value" of mens rea is to exclude defenses. For the defenses, being negative in significance, cannot be understood apart from a relevant positive state of mind and action.

39. See C. A. Campbell, "Ryle on the Intellect," *Philosophical Quarterly*, Vol. III (1953), and A. C. Ewing, "Professor Ryle's Attack on Dualism," *Aristotelian Society Proceedings*, Vol. LIII (1952–53) (both reprinted in H. D. Lewis [ed.], *Clarity Is Not Enough* [London: George Allen & Unwin, 1963]), and the articles in the *Journal of Philosophy*, XLVIII (April 26, 1951), 257–301.

40. Hart states: "I have maintained no form of behaviorism, for . . . 'He did it' never, in my view, merely describes those movements" (Hart, "The Ascription of Responsibility and Rights," p. 165). Presumably, this means that "he did it" is ascriptive. Hart's persistent exclusion of "certain psychological elements," "necessary mental elements," and the like, suffice to associate him with the psychological behaviorists. Besides, it may be suggested, verbal behaviorism is incongruous, as is the exclusion of states of mind coupled with reliance on the significance of ascription.

41. H. L. A. Hart, "Definition and Theory in Jurisprudence," *Law Quarterly Review*, LXX (1954), 39, n. 2.

42. *Ibid.*, p. 49.

43. Hart, "Analytical Jurisprudence in Mid-Twentieth Century," p. 964.

44. "The thing perceived in everyday life is more than a simple sense presentation. It is a thought object, a construct of a highly complicated nature, involving not only particular forms of time-successions . . . and of space relations . . . but also a contribution of imagination of hypothetical sense presentations in order to complete it" (Alfred Schuetz, "Common-Sense and the Scientific Interpretation of Human Action," *Philosophy and Phenomenological Research*, XIV [September, 1953], 1).

45. "Hart's argument is reduced to the truism that when a legally defined word is used in a sentence which is uttered in a context in which the legal definition is relevant, the meaning of the word is determined by the rules which define the meaning" (A. W. B. Simpson, "The Analysis of Legal Concepts," *Law Quarterly Review*, LXXX [1964], 557).

46. Carl A. Auerbach, "On Professor H. L. A. Hart's Definition and Theory in Jurisprudence," *Journal of Legal Education*, IX (1956), 39; Edgar Bodenheimer, "Modern Analytical Jurisprudence and the Limits of Its Usefulness," *University of Pennsylvania Law Review*, CIV (1956), 1080; and Simpson, *op. cit.*

47. Hart, "Definition and Theory in Jurisprudence," p. 39.

48. C. D. Broad, "Two Lectures on the Nature of Philosophy," *Inquiry*, Vol. I, No. 2 (1958), reprinted in H. D. Lewis (ed.), *Clarity Is Not Enough* (London: George Allen & Unwin, 1963), pp. 60–61; cf. Jerome Hall, "From Legal Theory to Integrative Jurisprudence," *University of Cincinnati Law Review*, XXXIII (Spring, 1964), 153.