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Book Review

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The Logic of Legal Requirements. Essays on Defeasibility

Book review of *The Logic of Legal Requirements*. *Essays on Defeasibility* (Eds. Jordi Ferrer Beltrán and Giovanni Battista Ratti), Oxford: Oxford University Press 2012

The book *The Logic of Legal Requirements* is an impressive and engaging collection of high-quality essays on legal defeasibility. It features twenty-two contributions resulting in a comprehensive, well structured as well as very challenging investigation of the subject. In what follows I will first introduce the subject of legal defeasibility in the light of the present collection. Then after briefly presenting the contents of the collection as a whole and topics and main lines of thought present in it I will briefly sketch the main ideas in all contributions, though space only permits me to deal a bit more closely with just a number of selected contributions, critically assessing the main arguments in them. In the introduction the editors, Ferrer Beltrán and Ratti, set a relatively modest aim for the collection, namely to cast some light on different meanings and uses of "defeasibility" in legal thought and clarifying the scope of "objects", which supposedly embody it. It certainly achieves that and much more, since contributions manage to situate the reader in the midst of the current state of the debate on the topic, bringing together prominent authors from the Anglo-American and Continental tradition of legal thought and by that addressing several other related and important questions in legal theory and philosophy.

Usually by defeasibility in the legal domain one aims to stress either the defeasible nature of law (legal norms) itself as admitting of exceptions that cannot be fully spelled out and specified in advance (norm based account of legal defeasibility) or defeasibility in legal reasoning as a consequence of interpretation of legal provisions or concepts (interpretation based account of legal defeasibility). Related to the very concept of defeasibility one can pose several basic questions. Starting with the definition of the term one can go on to ask what does it mean for something to be defeasible. What is or can be defeasible? What is the scope of defeasibility in the chosen domain? What is specific for legal defeasibility? What are the sources of this defeasibility and what are its consequences? Answers to these questions vary in the debate and we can find deep disagreements on almost all of the mentioned aspects.

The collection as a whole does well in exposing and clarifying them and presenting arguments for different views. It covers a wide area of debate on legal defeasibility. As a whole one could present it along several dimensions. From the perspective of the prevalence of defeasibility the majority of authors in the collection defend at least one kind of legal defeasibility. A minority opposes it, mostly offering a competing explanation of the phenomena supposedly related to defeasibility. Among the defenders of legal defeasibility the most common understanding seems to be that linked with defeasibility being related to interpretation. Some authors are concerned with consequences of defeasibility for moral theory, especially regarding the plausibility of (strict) le-

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gal positivism, but also with more general consequences for other central legal concepts such as validity, exception, principle, action, reason, and axiological gap. Others are more focused on the aspect of what are (or should be) the consequences of defeasibility for legal practice. A contrasting perspective is also present, namely how does legal practice itself inform the debate on defeasibility. Finally, several papers deal importantly with defeasibility in relation to legal argumentation and logic.

The collection is divided into four parts. Part I features seven papers that deal with general features of legal defeasibility. Part II includes five papers that deal with the notion of defeasibility as related to legal interpretation. In part III we can find six papers that investigate the consequences of defeasibility for the very concept of law. Part IV comprises of four papers dealing with defeasibility as related to adjudication.

Part I mostly discusses basic concepts like law, norm, interpretation, logic, and reasoning in relation to the concept of defeasibility. It opens with an excellent and exhaustive introductory piece by **Ferrer Beltrán and Ratti,** exhibiting a high level of scholarly knowledge, in which they survey different conceptions and uses of defeasibility, present a revealing narrative on recent history of the debate and at the same time put forward their own suggestion on how most plausibly relate notions of defeasibility, validity, and applicability of legal norms. They start their discussion by distinguishing several interpretations of defeasibility and with a short history of the debate, which originated in moral and legal theory, then mostly transgressed into the field of logic and artificial intelligence just to return to legal and moral theory again in recent decades. Attempts to understand defeasibility in terms of defeasible legal norms are labelled as a "structure based account" and a useful distinction between variously strong theses (all legal norms are defeasible, some legal norms are defeasible and none of the norms are defeasible) is made. They also point out that one must start with a sufficiently strong notion of defeasibility, otherwise one faces an objection that the proposed theory catches nothing really interesting besides the commonly accepted statement that (at least some) legal rules can have exceptions. In addition to that one must add a prerequisite that "it is theoretically impossible to enumerate all the exceptions and state all the sufficient conditions for the rule's application (p. 15)". On the other hand the "interpretation based accounts" claim that defeasibility is a product of the interpretation of legal provisions. Here Ferrer Beltrán and Ratti address the question whether standard, that is monotonic, (deontic) logic is capable of accommodating such a conception of defeasibility. They argue that proponents of non-monotonic logic approach must back down from their claim that only by introduction of non-monotonicity one can also have defeasibility (both in the sense that such logic can account for the existence of genuine normative conflicts and in the sense of offering a possible solution to them – this last bit is actually begging the question against standard logic, since logic is usually not in the business of providing final solutions for such conflicts; it is perfectly enough that it locates them). One further useful distinction that Ferrer Beltrán and Ratti make in the introduction is that between "*moral* defeasibility of legal standards" and "*legal* defeasibility of legal standards". The former position presupposes that moral norms are operating in the background of legal standards and can thus override them when a legal decision would be unjust. Such a picture quite naturally further presupposes the falsity of legal positivism (with a caveat that some of the contributors later argue against that). The latter conception is less problematical in this regard and so Ferrer Beltrán and Ratti present three different understandings of legal defeasibility of legal norms, namely that of Schauer, Alchourrón and Marmor. We cannot go into details here, so I will just note some of the important insights that they raise regarding defeasibility. One of them is that we want – despite advocating some sort of defeasibility – to retain a rather strong role for moral rules, since we do not want them to be completely opaque to other considerations (as background defeaters) in a way that every contrary consideration could overturn the decision made on the basis of the rule in question. Rules are important to retain predictability, stability and constraints on decision-makers. Secondly, it seems that defeasibility is closely related to a certain notion of a gap. Ferrer Beltrán and Ratti in this regard mention Al-

chourrón's interpretation of normative systems, within which a normative gap appears when we have no solution for one or more of cases that the norm is supposed to cover. Axiological gap on the other hand is a gap that appears as a consequence that a given normative solution of a case is "considered inadequate, from an axiological point of view, since it is drawn without taking into consideration a property that should be relevant according to a certain set of evaluations, which are external to the normative system under consideration (p. 27)". They warn against blurring both notions together, especially from the point of view of being internal/external to a legal order. Finally, there seems to be a close relation between notions of defeasibility and normal conditions, starting from a preliminary understanding of the defeasible rules as holding only for normal cases. This of course opens up a number of questions related to interpretation and epistemic questions of how one can recognize that the case at hand falls under normal. Ferrer Beltrán and Ratti conclude that "[a]t least two main models of interpretation can clearly be singled out in the discussion of substantive legal defeasibility we have sketched so far: a formalist, or opaque, model, according to which interpreters must stick to the literal or prima facie meaning of legal sentences (admitted that such a thing exists), and an anti-formalist, transparent, model, which responds to the supposed underlying reasons of legal regulations (or to the real or counterfactual intentions of the lawgiver). The choice of one of these two models – we submit – is the key-vault of the phenomenon to which theorists (more or less consciously) refer when they talk about "defeasibilism of legal rules (p. 31)".

Next, Ferrer Beltrán and Ratti present their own proposal of relationship between defeasibility and validity that they frame within a very useful conceptual analysis of both. In order to present their solution, we must introduce some of their distinctions. One can start with a question on what logical consequences of the expressed norms are to be considered as a valid law. If our answer is that all, then we are practically denying defeasibility. One could also answer that only some of the consequences are valid and appeal either to teleological (only those that comply with the underlying ground or reasons for the norm), authoritative (only ones that comply with the actual intentions of the lawgiver) or dispositional (only those that are in line with the disposition of the lawgiver to accept them) criteria for delimiting them. But not only norms themselves could be seen defeasible in this way, but also their criteria of recognition could be defeasible. In this sense we can distinguish between several possible situations regarding the relation between such criteria and validity of the legal norm (criteria pose necessary and sufficient conditions for validity; criteria pose necessary but not sufficient conditions for validity; criteria pose sufficient but not necessary conditions for validity; criteria pose neither necessary nor sufficient conditions for validity). We can now see that defeasibility could have at least two different sources. By distinguishing external (a norm N1 is externally applicable to case C, when some other norm N2 provides that N1 in applicable) and internal applicability (norm N1 is applicable to cases of the generic kind that the norm itself regulates) we can add a third, distinct one. Now there are three different situations where defeasibility arises. (1) A norm N1 is defeasible in the sense that the criteria of recognition for that norm are defeasible. (2) A norm N1 is defeasible in the sense that its external applicability (N2) is defeasible. (3) A norm N1 is defeasible in the sense that its normative content is itself defeasible. Ferrer Beltrán and Ratti now point to some really interesting consequences. "The external defeasibility of a norm N1 affects either its validity or its external applicability and is a consequence of the internal defeasibility of another norm N2 or of the criteria of identification of the system. By contrast, the internal defeasibility of a norm N1 affects its internal applicability, i.e. we cannot determine whether a certain case C can be subsumed under the antecedent of the norm, since it is not a closed antecedent. [...] In turn, the internal defeasibility of N1 brings about the external defeasibility of the norms derived from it. [...] Finally, we can say that the internal defeasibility of a norm is the product of interpretation. As a consequence, determining whether N1 is internally defeasible is a doctrinal question, not a theoretical one. When defeasibility has to do with the external applicability of a norm N1, in turn, it is also a consequence of an interpretive

decision, but carried out on another norm – N2 – which provides on the applicability of the former. On the contrary, if defeasibility has to do with the validity of a norm, it must be regarded as a consequence of taking the criteria of identification of the system at hand as defeasible (p. 37)". On the basis of this they conclude that one can discern three different uses of defeasibility in legal domain. Firstly, one can understand defeasibility as a pragmatic tool of legal interpretation within legal reasoning. Secondly, defeasibility can be linked with questions of applicability and validity of legal norms. Thirdly, one can link defeasibility to the notion of criteria of recognition. The introductory essay is very clear and does justice to the contributions that follow it, laying out the theoretical field of problems and specifying the limits for their possible solutions.

Part I continues with the contribution of **Carlos E. Alchourrón** that investigates the already mentioned pragmatic defeasibility of legal conditionals in relations to the consequences of that for legal logic (especially the ideal of deductive organization of law). He argues that despite defeasibility we can retain this deductive ideal and that the introduction of non-monotonic modes of reasoning is not necessary since interpretation can do the work of accommodating this defeasibility inside the system. As a continuation of the debates on these issues **Juliano S. A. Maranhão** takes a closer look at Alchourrón's position and points to some tensions between his basic claims, especially on the qualification and revision processes as a part of interpretation (epistemic conception of defeasibility). He exposes the use of the so-called refinement operator in sorting out inconsistencies as a source of defeasibility and in accommodating defeasibility. In an essay "Is Defeasibility an Essential Property of Law" **Frederick Schauer** argues that global (encompassing all of the rules of legal system) defeasibility (despite being widespread) is best seen as a merely contingent feature of law that is dependent on interpreter or enforcer. He identifies as a central idea behind defeasibility the "potential for some applier, interpreter, or enforcer of a rule to make an ad hoc or spur-of-the-moment adaptation in order to avoid a suboptimal, inefficient, unfair, unjust, or otherwise unacceptable, rule-generated outcome (p. 81)". He goes on to argue that defeasibility is thus not a property of rules at all, but a result of a decision on how to treat these rules. It is therefore not a conceptual or logical issue whether law is defeasible, but descriptive and prescriptive issue, pointing to how in some existing legal system rules are actually treated and whether it is good or desirable that they are treated so (given the goals we aim at). In essay 5 **Jorge L. Rodríguez** argues against defeasibility of legal rules, mostly on the basis that implicit and un-specifiable in advance (incapable of exhaustive statement) exceptions to a given legal rule would more or less make it impossible to carry out any inferences form it. He also addresses some of the supposed consequences that this issue has for positivism either being able or not to account for the defeasibility and phenomena that surround it and argues that the arguments from defeasibility against positivism are ineffective.

Giovanni Sartor in an exceptionally clear and well structured contribution first situates legal defeasibility inside a more general framework of defeasible reasoning. He introduces an outline of reasoning and reasoning schemata and further distinguishes between what he calls conclusive and defeasible reasoning, the first one being monotonic (one can always accept a conclusion from a given premises (reasons), disregarding any new premises that one might add to the initial set), and the second one being non-monotonic (sensible to new information). He presupposes that defeasible reasoning schemata in general is pervasive and mostly due to the fact that it is needed by us to cope with and function in an ever changing environment we are situated in (e.g. perceptual inferences, inferences based on memory, statistical syllogisms, etc.). In particular he claims that legal defeasibility is an essential feature of law. One important thing is to abandon the presupposition that defeasible reasoning is in some sense defective or inadequate and start seeing it as a "natural way in which an agent can cope with a complex and changing environment (p. 116)". Its functions are to provide for provisional conclusions that are usable at the time of the adoption of belief or acting intention, to activate inquiry process based on searching for defeaters to the initial conclusion until one reaches a stable point and

to enable our shared knowledge structures to persist over time despite getting new information in all the time. Sartor analyses the concepts of collision (distinguishing between rebutting and undercutting collision), defeat and reinstatement as a helpful way to get a more structured approach to defeasible reasoning. He rejects the suggestion that one could abandon defeasibility approach in favour of probability based approach, mainly for the reasons that we as cognitive agents are not very good at assessing and deriving probabilities and that sometimes (especially in practical context) in makes no sense to employ a probability calculus. Sartor presents a brief history of the idea of defeasibility in practical domain (Aristotle, Aquinas, W. D. Ross and Hart). Although the general line of thought is clear, the details of the accounts and justification for merging them into a single stream of thought are lacking, especially since both the sources of their inclinations towards defeasibility vary as well as consequences they draw for the relevant fields of inquiry. One can dispute e.g. that Ross notion of prima facie duty is in any way related to defeasibility, since prima facie duties clearly do not allow for exceptions and what situates Ross within the debate on defeasibility is his moral pluralism that results in a system of norms that is defeasible in the sense it doesn't provide us with a determinate normative solutions for every case. As already said when Sartor moves to look closer at defeasibility in the legal context, he starts with a presupposition that defeasibility is an essential feature of law (being either explicitly recognized as in cases of "unless clauses", explicit exceptions and presumption or as a consequence of conceptual construction in the sense that legal concepts in general presuppose defeasibility (p. 130)). He argues against Alchourrón deductive axiomatic ideal of law and offers three different reasons and arguments against that, but those seem not to fully establish the conclusion he is trying to make. A first set of reasons concerns considerations about the feasibility of non-defeasible formulations of legal norms and, even if they would be possible, their usefulness. The second reason is that non-defeasible formulations would preclude sensitivity to new information that become available after a given conclusion. And the last reason is that with merely employing non-defeasible reasoning one would not be able to engage in producing provisional outcomes needed in the course of legal inquiry. But is seems like none of the reasons themselves or together would get Sartor what he needs, that is essentially defeasible nature of law itself. Sartor background presuppositions take him to view law and legal decision-making as rather extreme, offering a picture where reasons and reasonings compete against each other in a more or less unstructured manner. By understanding defeasibility and defeasible norms as pervasive he seems to get defeasibility too easily and fails to distinguish between the "soft" and "hard" problem surrounding it. That is, by making every legal norm that allows for any kind of exception or defeater defeasible, the theory looses what is intriguing in the concept of defeasibility. Additionally, Sartor seems to presuppose some kind of a background forces that operate in legal reasoning, since he often makes appeals telling us which conclusions to prefer, what is a successful defence, balance of reasons, etc. E.g. he states "[f]or determining the relative strength of the arguments [...] we have to appeal to further arguments, telling us which one of the contradictory arguments is to be preferred and on what grounds (p. 135)". Now those background arguments and reasons are either defeasible or non-defeasible. If defeasible then one really runs into already mentioned troubles with at least moderate predictability and stability of legal order. If indefeasible then this would go against Sartor's affinities to claim that law is essentially defeasible.

Rafael Hernández Marín argues against Sartor and other advocates of legal defeasibility by offering a complex argument that supposedly establishes that there is no place for defeasibility in legal argumentation at all. Actually, his sceptical worries go as far as to deny any plausibility of employing deontic logic (defeasible and indefeasible) in legal reasoning and of employing any kind of defeasible reasoning also in ordinary descriptive logic. He starts by noting the "conceptual jungle" surrounding the notion of defeasibility and goes on to develop his own framework, within which he identifies two possible interpretations of defeasibility (Alchourrón's early theory being the main starting point here) using notions like literal sense, total sense and truth. According

to the first definition, an ordinary sentence is defeasible if a coincidence between its total sense and its literal sense "is a defeasible property, i.e. an only apparent, but unreal, property of the sentence (p. 138)". To use a well known example, a sentence "If (x is a gas and the temperature of x rises), then (the volume of x rises)." is defeasible since its total sense contains a possible exception (the pressure of x does not vary). According to the second understanding, a defeasible conditional is a conditional whose truth is defeasible, i.e. it can be defeated by an exception. He claims that because both definitions are non-equivalent (therefore opening space for the possibility that the same sentence at the same time being defeasible and indefeasible) such theory of defeasibility as a whole must be abandoned due to its contradictoriness. But note that this could only be an affective objection against a specific theory of defeasibility that would harbour both aspects and not against legal defeasibility in general. A similar problem arises when we move from ordinary to prescriptive sentences or premises, only that here the notion of truth gets replaced with that of effectiveness of legal sentences. Additional problem creeps in by raising the question on how to ascertain whether a given legal sentence is defeasible or not; here we must first determine its total sense, which is of course a burden for interpretation of that sentence. Therefore defeasibility is related to interpretation (and is on the other hand unrelated to debates on positivism Hernández Marín claims). Given the proposed definition of defeasibility in terms of the gap between literal sense and total sense, Hernández Marín proposes not to view the whole situation in terms of the total sense of the defeasible legal sentence being the same as literal sense of the non-defeasible legal sentence (as a way of specification of the original sentence that would include previously implicit exceptions, i.e. "S: Vehicles shall not enter the park" and "S*: Vehicles shall not enter the park, except ambulances"), since if the legislator or author of the original sentence S would mean actually the literal sense of S*, then it would have formulated it as such to begin with. This leads to the problem that "the total sense of [S] would depend on whether it is true that the author of this sentence would have introduced an exception, had she considered the case. Additionally, if we generalize this thesis, it would be impossible to know, in any case of legal interpretation, what is the total sense of a legal sentence: not only because of the difficulty of getting to know which would have been the thought of the legislator had she considered the possibility of introducing a specific exception in her regulation, but mainly because of the countless possible exceptions. In short, legal interpretation, which consists, as I have mentioned before, of determining the total sense of a legal sentence, would be an impossible task to perform if Alchourrón were right (p. 142)". Hernández Marín then turns to defeasible reasoning, which he understands as non-monotonic reasoning; what makes arguments defeasible is that the deducibility of their conclusion is defeasible, which he in turns interprets as this conclusion being a plausible consequence of the premises or that those premises are good enough reasons to believe the conclusion. Both of these notions lack precision for Hernández Marín, moreover one has to get rid of the presupposition that standard and defeasible deducibility are two species of the same genus. On the contrary, defeasible deducibility is not a proper logical deducibility at all, just as real truth and apparent truth are not both truths, since apparent truth is no truth at all. This goes for ordinary arguments as well as for mixed (involving at least one prescriptive sentence). Here Hernández Marin introduces his general scepticism on deontic logic, which he bases on the fact that no acceptable definition of semantic relation of logical consequences among prescriptive sentences was provided (p. 146). Given all the stated problems it is according to Hernández Marín therefore best to abandon the idea of legal defeasibility all together. However, his contribution is especially strong in criticizing defeasibility-based approaches, but lacks positive proposals on how to solve the detected problems. (To be fair Hernández Marín directs the reader to some of his other works for further answers.) It seems that he does not do full justice to the different aspects of the phenomenon of legal defeasibility (like to ones pointed out by Sartor), and that he presupposes that in the field of legal argumentation and interpretation some sort of specificationist approach will provide us

with all we want in this regard, bringing us close to the deductive ideal.

Part II moves away from these more general issues and focuses on the relationship between legal defeasibility and interpretation. In essay 8 **Pierluigi Chiassoni** investigates the relationship between the notions of legal indeterminacy and defeasibility. He methodically analyses both concepts from different perspectives (subjects, forms, sources, problems, consequences). Within such an approach he identifies eight subjects of indeterminacy and, more importantly, four notions of indeterminacy – adjudicative, textual, normative, and methodological – out of which the latter is the basic form for him and all others are more or less dependent on it. As regarding defeasibility, he helpfully identifies eleven subjects that defeasibility is predicated to, namely facts, beliefs, concepts, norm formulations (legal texts), interpretations, norms (rules, principles, standards), reasonings, positions, arrangements, claims, and conclusions. Chiassoni also discusses the relations between norm defeasibility and axiological gaps. He concludes with some remarks on the relationship between legal indeterminacy and defeasibility, where he identifies two predominant positions. The first one is that indeterminacy and defeasibility are basically one and the same phenomenon, and that discussion on defeasibility collapses into discussion on indeterminacy. The second one is that defeasibility and indeterminacy are two separate notions and that indeterminacy is somehow dependent on defeasibility. The contribution concludes with three more specific theses. (1) Textual indeterminacy may depend on norm defeasibility. (2) Normative indeterminacy may depend on norm defeasibility. (3) Norm defeasibility depends on methodological indeterminacy (arising out of an open and unordered set of tools that are used in legal decision-making or when these tools are in themselves indeterminate).

In an essay "Defeasibility, Axiological Gaps, and Interpretation" **Riccardo Guastini** primarily understands defeasibility as a consequence of the act of interpretation. The starting point is the understanding of a defeasible norm as a norm that is susceptible to implicit exceptions, which cannot be explicitly stated in advance, which in turn means that it is impossible to delimit circumstances that would represent genuine sufficient conditions for its use. Next, Guastini understands defeasibility and axiological gaps as phenomena related to the level of interpretation and not that of normative systems. When some defeasible norm is defeated and allows for an exception, this creates a certain gap (in the sense that the case at hand is indeed regulated by a certain legal rule, but we find such regulation unacceptable or unsatisfactory and are not ready to accept the particular conclusion). Therefore what emerges is an axiological gap and not a genuine normative gap since we are not dealing with the absence of the normative regulation of a given field, but with a gap that appeared as a consequence of our interpretation of the norm. Most often defeasibility and axiological gaps appear due to the well-known phenomena of the restrictive interpretation of a norm; that is an argumentative technique of distinguishing between different subsets of different kinds of states of affairs supposedly governed by the same norm. For Guastini, defeasibility and axiological gaps are therefore related to the axiological judgments of the interpreters of norms. Furthermore, defeasibility is not a special characteristic of legal principles; it is not an objective property of those norms that is already there before we start to interpret them. Axiological judgments employed within the interpretation are thus not the consequence of some objective defeasibility of the rule itself or a genuine, interpretation-independent normative gap, but the origin or a cause of interpretative defeasibility. For Guastini literal interpretation is still interpretation, so there cannot be any neutral or value free interpretation (this goes closely in line with Hernández Marin's thoughts on literal and total sense). Not only principles, but rules also can be defeated, and therefore we cannot understand the presence of principles in the legal system as an origin of defeasibility. "Defeasibility and axiological gaps simply depend on interpreters' evaluations, and such evaluations often take the form of juristic 'theories' – 'dogmatic' theses framed by jurists in a moment logically previous to interpretation of any particular normative sentence and independently of interpretation. [...] Defeasibility does not pre-exist interpretation – on the contrary, it is one of its possible results. And interpreters' evaluations are precisely a

cause, not an effect, of rules defeasibility (p. 189)". Open-texture or vagueness of concepts therefore cannot be seen as special sources of defeasibility; they are merely ineliminable characteristics of natural languages. "Rules [...] are inert, they do nothing: they let themselves be defeated, but do not defeat themselves. As beauty is in the eye of the beholder, in the very same way defeasibility is not in rules, but in the attitudes of interpreters (p. 190)". Guastini concludes with an argument that if we accept such a view of defeasibility, then in becomes clear that defeasibility cannot be used as an argument against legal positivism, since the latter includes merely the thesis that law can be identified without an appeal to moral evaluation, and not that moral evaluation cannot figure in the interpretation of law and as such interpretation is not identification of law but a part of the law itself. While Guastini is exceptionally clear in his arguments and examples it seems to operate with a rather narrow understanding of defeasibility at least from the point of view that the platitudes related to defeasibility point out that an "exception" to the rule is somehow informed by the rule itself and that the rule fully "survives" this point of meeting an exception. Within his picture nothing similar takes place; the interpretation is narrowed and gap filled by a negative rule or condition.

Brian H. Bix investigates the relationship between Hart's idea of open-texture of concepts and legal defeasibility. He traces the roots of the notion of open-texture back to Wittgenstein and Waismann, but notes that the original idea was far more restricted and that it operated within the context of verificationism, not in the sense of actual vagueness of concepts but more related to the problems associated with the possibility of vagueness. Hart then broadened this sense and also loosened its use as it is evident from his "No vehicles in the park." example to cover ideas about vagueness, and unusual or borderline cases. Bix then moves to the Hartian notion of defeasibility of concepts that is framed as a possibility that a given criteria for their use might get defeated by additional fact thus making the rules and arguments defeasible (where an initial conclusion might be warranted but might be overruled by addition of other factors). He concludes that open-texture and defeasibility are two essentially unrelated phenomena, but might lead to the same sort of practical consequences in the form of indeterminate outcomes, allowing authority to make an exception in the particular case, fill in the gap or modify or clarify the original rule in cases where a more literal reading of the rule would lead to severe injustice or absurdity. **Daniel Mendonca** in an essay titled "Exceptions" puts forward a proposal on how to understand exceptions as negative conditions of rules. Starting from a view that many conditional statements of the form "if A, then B" are often formed within a presupposed background of conditions that have to be meet, he analyses several different forms of exceptions and the way to understand them within the logic of defeasibility. Legal defeasibility is often linked with interpretations of legal norms and framing exceptions in the light of the interpreter's appraisal of the intentions behind the norms. He concludes that by better understanding of the logical-formal aspects of exceptions within legal argumentation and interpretation we could gain greater logical accuracy and clarity. In Chapter 12 **Richardo Caracciolo** deals with different conceptions of defeasibility and specifically argues against the dispositional approach to defeasibility (Alchourrón) as related to the pragmatic version of defeasibility. Appeals to dispositions of the lawgiver (in the sense of considering that the legislator did not foresee some circumstance C that we see as representing an exception to a given norm, and that had he considered C under this light, he would have introduced it as an exception) brings in more troubles and open questions than clarity in the notion of defeasibility. He concludes that "it is not therefore possible to associate norms to normative formulations considered defeasible, inside any conception of normative defeasibility which make use of counterfactual analysis of value judgements to identify norms. So, normative formulations will be not useful to resolve practical problems, because they will not allow one to reach a final solution. It seems, then, that the plausible alternative is to return to Alchourrón´s first proposal about general defeasibility (p. 222)".

Part III of the collection deals with defeasibility and different conceptions of law, especially in the light of the relationship between law and morality. We have already indicated some points on

which the debate about whether full admission of defeasibility is compatible with legal positivism arose. The debate continues here. In an essay "Legal Defeasibility and the Connection between Law and Morality" **José Juan Moreso** argues in favour of the thesis that defeasibility somehow presupposes a close link of law and morality, especially if we understand defeasibility in terms of there being moral defeaters of legal rules. He usefully distinguishes between different versions of identification thesis and between identification of law and adjudication. Due to the complexities of human or social situations legal rules can often be subject of implicit exceptions. He usefully relates his discussion with that between generalist and particularist approaches to morality in the field of moral theory, where he finds most sympathies with so-called thick intuitionism (David McNaughton, Piers Rawling, Pekka Väyrynen), representing a middle ground between strict insistence that morality is completely principled and particularist claim that we can dispense with moral principles altogether. Thick intuitionism argues that moral rules are formulated with thick concepts (thick properties as a normative bases of such rules), which cannot be completely definable and spelled out in non-moral terms and are therefore susceptible to certain defeaters. If legal rules are similarly susceptible to moral defeaters, then exclusive legal positivism "is unsuitable from a conceptual point of view and, from a normative point of view, there are no good reasons for sustaining ethical positivism (p. 237)". Next, **Manuel Atienza and Juan Ruiz Manero** dwell on the similar issue and frame the debate within the notion of defeasibility emerging out of the gap between legal principles and rules (as it is the case in Dworkin's two-levelled conception of law). Since the underlying level of values and purposes can defeat the legal rules on the surface level (that only establish conditions that are ordinary or typically considered sufficient for their validity), defeasibility is a genuine feature of law in this mentioned sense. They illustrate this point by focusing on atypical illicit and licit acts and analyse them in terms of (un)lawfulness and (in)validity. They share Moreso's view that such conception of law is in tension with strong or exclusive positivism. In Chapter 15 **Wilfrid J. Waluchow** continues this debate, acknowledging that law is always morally defeasible, but at the same time reaching the opposite conclusion, namely that defeasibility of legal norms poses no fatal problems for positivism, and furthermore that we can even use it to reconcile the divide between exclusive and inclusive positivism. He makes a disanalogy between moral and legal defeasibility and goes on to argue that positivism can accommodate both epistemic and logical defeasibility, and that actually both exclusive and inclusive positivism pointed out several facets of defeasibility that are important for legal practice and our understanding of law.

Next, **Bruno Celano** in his contribution titled "True Exceptions: Defeasibility and Particularism" returns to the topic of exceptions and its relation to defeasibility. He closely relates defeasibility with the so-called "identity assumption", that is the assumption that the exceptional case leaves the original norm somehow intact. One of the most obvious and straightforward options to address the relationship between norms and exceptions is the specificationist approach. Every time different legal norms conflict and it seems that we will have to make an exception, the proper way to proceed is to conclude that all "we have to do is specify (that is, suitably restrict the domain of application of) at least one of the norms, or the relevant norm, so that, thanks to the inclusion of further conditions within its antecedent [...] the conflict – or the unsatisfactory verdict – eventually vanishes (p. 270)". Specification reveals itself as the middle and most reasonable way between the pure subsumption model on one hand and the intuitive balancing of each particular case on the other. But the problem of this approach lies in the in-principle possibility of never being able to specify all the exceptions and thus also the claim that we are merely amending the same norm seems hollow according to Celano: "Achieving a fully specified 'all things considered' norm, thereby ruling out the possibility of further, unspecified exceptions (apart from those already built into the norm itself) would require us to be in a position to draw a list of all potentially relevant properties of the kind mentioned. And this, we have seen, is misconceived (p. 276)". He instead proposes to look at a further alternative approach to defeasibility which regards exceptions as already implicitly included or provided

for by the norm. A specified norm is thus just a sort of shorthand for a more complex norm that lies in the background. But this approach fails for the same reasons since it understands exceptions not as real exceptions – not as real holes in the norm – but as some sort of *prima facie* exceptions that allow for the filling in of the holes. (In this sense some of the debates on legal defeasibility really miss their target since they stay with such *prima facie* exceptions as a basis for defeasibility of norms.) He then proposes that one must accept some sort of particularism in order to do proper justice to the (possibility of) genuine exceptions. In short, he proposes to understand "norms as defeasible conditionals liable to true exceptions, i.e., conditionals such that the consequence follows, when the antecedent is satisfied, under normal circumstances only". This notion of normalcy (normal circumstances) is very close to the notions of defeasibility and privileged conditions for a norm as developed by Mark Lance and Maggie Little in moral theory. His contribution is in this sense a really insightful investigation of the defeasibility debate in ethics and in legal theory, which is a rare approach, since both spheres of the debate ran quite back to back in recent decades, although the targeted questions and problems regarding defeasibility are analogous along several dimensions. What remains open is of course how one can spell and cash out this notion of normalcy. There are several attempts to do that in moral theory but none seems to be fully successful. What is especially problematic is that most of these attempts seem to collapse on an understanding of some sort of indefeasible background normative factors and we lose an interesting sense of defeasibility. Celano offers no suggestions on how to overcome this issue. **Juan Manuel Pérez Bermejo** also draws from the debate on defeasibility and particularism in moral theory and starts with the seemingly opposing intuitions about the nature of law that get subsumed under two contrasting labels of regularism and particularism. He then goes on in search for a middle ground position that could accommodate both particularistic and regularistic intuitions and finds it in a version of principilism, which understand legal principles both defeasible and as underlying legal rules and legal arguments. In the conclusion this position gets spelled out in more detail, especially in terms of arguing against the so-called weight-theories (ascribing a certain weight to principles and values when in conflict and then balance it to reach an overall conclusion) and instead arguing for coherence-theories that appeal to holistic and coherentist interpretation of the application of principles understood as combined in an all embracing coherent system. The last essay in Part III by **María Cristina Redondo** is an investigation of the relation between reasons for action and defeasibility. After posing the question whether reasons for action can be thought of as defeasible she distinguishes between ontological and epistemic sense of defeasibility. Next, following a very clear elaboration of both views on defeasibility she goes on to argue that – with respects to reasons for action – a realist view on reasons (one that understands facts as reasons for action and not e.g. our beliefs about facts) is not compatible with the ontological defeasibility, that is that if we picture reasons for actions as objective facts then it is impossible that such fact would be defeasible. She therefore prefers a constructivist approach to reasons for action that can better accommodate both ontological and epistemic dimensions of defeasibility. But her arguments are inconclusive. One thing that is left out of the discussion is that the notion of a reason itself can be problematic in respect to the offered analysis of epistemic defeasibility. Jonathan Dancy – as a moral particularist and a realist about reasons (e.g. in his book *Practical Reality*, 2000) – makes it clear that when dealing with defeasibility and related phenomena it would be a mistake to say that in a given case the fact that I made a promise to do A is actually not a proper reason for me to do A, since what would really constitute a reason would be a whole set of contributing factors, enablers and absence of disablers (e.g. I made a promise to A + this promise was not given under duress + it's not immoral + I am able to do A + I have not other important moral obligation that would prevent me to do A + the promisee did not recall her claim + ...). That doesn't look any more as a reason; a reason could simply be the fact that I made a promise. The other thing is that one could distinguish between there being reasons that are defeasible and facts about reasons being defeasible. It seems that an objectivist about rea-

sons therefore could accommodate ontological defeasibility.

In Part IV contributors reflect upon the questions of defeasibility in adjudication. The debate is framed around a central question what role does defeasibility play in adjudication and the answers of authors vary significantly. All contributions consider a vast number of actual cases and procedures in order to back up their arguments. In an essay "Legislation and Adjudication" **Fernando Atria** lays out some fundamental issues related to defeasibility, legislation and adjudication and presents them with an emphasis on the historical development of these ideas. He criticizes both formalism and rule-scepticism (Hart) for putting too much stress on the "judge as an automaton model" of adjudication, disregarding conceptual and institutional dimension of defeasibility. He advocates an understanding of legislation and adjudication within a broad idea that we must make "the application of abstract, legislated rules probably sensitive to the particularities of the case at hand without having to pay the price of denying the authority of law (p. 332)". While legislation procedure brings forward legal rules that are based on reflection on what would best reflect the interest of everyone involved in typical cases, in adjudication the judge is not limited to such general reflection, but must be responsive to the particularities of the case at hand, take into consideration all relevant elements, at the same time applying the law and administrating justice owned to the citizen in light of the full reflection of her dignity. **Richard H. S. Tur** investigates the adjudication from the perspective that legal rules are typically defeasible, which means that they are hardly ever formulated in a way that would be "just right", therefore defeasible in the sense that they open possibilities for "rule-generated injustice". This claim is descriptive and not a conceptual truth and does not mean that we can establish the one and only absolute legal theory that should inform adjudication and our attitudes towards law and legal rules in general. On the other hand Tur does see a prescriptive element in this that in adjudication we should utilize or respect defeasibility more often and more openly. He starts with the recourse role of agents (especially judges, but also lawyers and citizens alike when an action to oppose an unjust consequences of a given rule are at stake and critical reflective attitude is called for) in these processes, that is defined by the responsibility that comes with the role of agents and enables them to override a legal rule in cases where that role's ends (delivering justice) conflict with the prescribed means (legal rules). Radical alternatives to this are legalism in the form of rule-fetishism and anarchism in the form of rule-scepticism. Thus, this forms a basis for his "own idea that law may be best understood as open-ended, defeasible, normative, conditional propositions, that is in the form 'if A, then B ought to be, unless...' (p. 365)". Defeasibility is not a mere presence of exceptions, since exceptions could always be build into the rule itself; defeasibility is connected with a more basic notion of overrides (related to consideration of e.g. mercy, justice, equity, purpose, or rights). Tur points to several cases of such injustice based overrides to conclude that such defeasibility poses a challenge to exclusive legal positivism if the latter is understood as advocating a fixed conception of rules, specifically because of overrides and their being in conflict with the rule of recognition – the latter can strive to include more and more such sources of defeasibility and recognize them as parts of the law (a difficult task given open-endedness of such sources) or rest its case with that it only identifies some but not all relevant legal sources. A defeasibilist theory of law is therefore "descriptively accurate, normatively appealing, methodological precept claiming only that 'law is best represented, understood, and taught in the form of open-ended, defeasible, normative conditional propositions'(p. 375)". However, within such a model there remains an open question of how to account for knowledge in case of such open "unless..." principles. **Jonathan R. Nash** points to the vast body of evidence that shows that in the sense of defeasibility that is related to evolved portions of the existing legal systems one can find so-called substantial indefeasibility that enables law to avoid undermining its legitimacy and turning into "transcendental nonsense". He usefully distinguishes between four conceptions of defeasibility pointing out how context-sensitive defeasibility is and that different conclusion could easily be reached about its nature, prevalence and consequences. He opts for the concep-

tion that relates defeasibility to a developed and persisting legal system in which rules have their cores established and major legal concepts are matured. Even within such a system there will be some cases that are hard to decide due to the open-textured nature of legal concepts and universal assertions. Nevertheless such cases can be seen in the light of development or evolution of those concepts and not as defeasance. He then offers evidence from US jurisprudence to show that this is the most plausible view on defeasibility given actual legal systems. **Bruce Chapman** in his contribution "Defeasible Rules and Interpersonal Accountability" investigates the differences between common law process that is related to defeasible rules and a single stage summary rule. In the former case possibility of engaging with arguments and claims of the other party open up a space of responsibility not towards some abstract idea of moral facts in the world, but towards what claims can justifiably be made in the light of authority of law establishing a kind of shared rationality and joint accountability. This brings him back to the debate about defeasibility and positivism in a way that interestingly points to positivism as the winning side in the debate with antipositivism.

In conclusion, the book *The Logic of Legal Requirements: Essays on Defeasibility* is a comprehensive collection of essays that cover most of the aspects of the debate on legal defeasibility. It nicely manages to relate this debate to many other fields of legal theory and legal philosophy, as well as to fields like general theory of normativity, ethics and moral theory, epistemology, logic and legal argumentation, and philosophy of language. The essays included are informative, engaging, and interesting. The collection as a whole offers some nice opposing views and a vivid debate among different positions takes place. There is an extensive overlap in the debate; the contributors clearly dwell on the same sources of the defeasibility debate, also supplementing those sources with a variety of other sources from different areas that provide a rich background for central problems discussed. There is some debate on questions of defeasibility in moral theory, but in most cases (with a few exceptions) this debate is only marginally covered or covered just on its surface. The collection will certainly become a required reading for all interested in legal theory and argumentation, as well as legal scholars in general and philosophers working within the fields of normativity and ethics alike. As the majority of topics and problems are appropriately introduced and explained in most essays the reading is clearly accessible to students as well. The editors did a very good job in organizing and introducing the contributions. So at the end I can only recommend dwelling into this sophisticated and challenging discussion on defeasibility that the book offers.