Is Defeasibility an Essential Property of Law?

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Defeasibility is widespread in law. Lawmakers are not omniscient, and accordingly cannot reliably foresee what the future will bring. Situations will thus arise that were not anticipated, and often could not have been anticipated by even the best of lawmakers. This imperfect view of the future is part of the human condition, and as a consequence legal rules, if literally or faithfully followed, will sometimes generate outcomes that are absurd, silly, unfair, unjust, inefficient, or in some other way suboptimal. When such unfortunate consequences occur as a result of the inevitable over- and under- inclusiveness of rules,[1] advanced legal systems commonly provide a mechanism by which legal decision-makers may ameliorate the harsh consequences of necessarily coarse rules. But is it necessary that legal systems do so? Is a legal system that fails to do so not a legal system at all, or less of a legal system, or a defective legal system, because of that failure? To put the question directly, is defeasibility necessary to legality? I have argued previously that the defeasibility of legal rules does not necessarily follow from the defeasibility of language,[2] but even if my argument is sound, defeasibility may still emerge as the necessary consequence not of the nature of language, and not of the nature of rules, but of the nature of law. But does it? Is global defeasibility – the defeasibility of all of the rules of a legal system - an essential component of any non-defective legal system? That is the question that motivates this paper.

I.

There are many varieties of defeasibility, and I will leave to others the task of

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[1] On the under- and over- inclusiveness of rules, see Larry Alexander and Emily Sherwin, *The Rule of Rules: Morality, Rules, and the Dilemmas of Law* (Durham, North Carolina, Duke University Press, 2001); Frederick Schauer, *Playing By the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* (Oxford: Clarendon Press, 1991).

[2] Frederick Schauer, "On the Supposed Defeasibility of Legal Rules," *Current Legal Problems* (M.D.A. Freeman ed.), vol. 48 (1998), pp. 223-240.

analyzing and distinguishing among them in greater detail.[3] Nevertheless, a quick overview of the central idea of defeasibility will usefully provide the prelude for what is to follow.

Historically speaking, we can trace the principle of defeasibility to Plato. In the *Statesman* he offered the reader a conversation between Socrates and the Eleatic Stranger in which the Stranger identifies the inevitable and (to him) undesirable imperfection of general rules.

> "[L]aw can never issue an injunction binding on all which really embodies what is best for each: it cannot prescribe with perfect accuracy what is good and right for each member of the community at any one time. The differences of human personality, the variety of men's activities and the inevitable unsettlement attending all human experience make it impossible for any art whatsoever to issue unqualified rules holding good on all questions at all times."[4]

Yet although general laws can thus not guarantee the correct outcome on all occasions, the Stranger recognizes that governance nevertheless requires that general rules be employed.

> "[T]he legislator who has to preside over the herd . . . will lay down laws in general form for the majority, roughly meeting the cases of individuals . . . under average circumstances."[5]

For the Stranger, however, the necessity of governing by the use of general laws does not entail acceptance of the poor outcomes that the generality of laws will sometimes produce precisely by virtue of their generality. When such outcomes do arise, he argues, it would be "absurd," "evil," "ridiculous," "a disgrace," and an "injustice" not to provide the necessary correction in each case, and "nothing would be more unjust" than to fail to do so.[6]

Although Plato in the *Statesman* provided us with the first discussion of the alleged necessity of providing justice-based correction for the flawed outcomes that are

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[3] A valuable introduction to such an enterprise would be Walter Sinnott-Armstrong, *Moral Dilemmas* (Oxford: Blackwell, 1986), usefully distinguishing among overriding, defeating, excluding, and other forms of defeasibility.

[4] Plato, *Statesman* 294a-b (J.B. Skemp trans., Bristol, England: Bristol Classical Press, 1952).

[5] *Ibid.*

[6] Ibid. at 295d-e.

inevitably and occasionally produced by general rules, justice-based correction for rule-driven errors is an idea that we now associate most commonly with Aristotle. In the *Nicomachean Ethics* Aristotle too identified the way in which laws by virtue of their generality were incapable of inevitably reaching the best result in every instance, and thus he explained why to him it was necessary that there be "a rectification of law in so far as law is defective on account of its generality."[7] This rectification is what Aristotle called *equity*, and Aristotle's claim was not simply that equitable correction of legal mistakes is useful or desirable – rather, Aristotle insisted that equitable correction was compelled by the very idea of justice.

> "The explanation of this is that all law is universal, and there are some things about which it is not possible to pronounce rightly in general terms; therefore in cases where it is necessary to make a general pronouncement, but impossible to do so rightly, the law takes account of the majority of cases, though not unaware that in this way errors are made. And the law is none the less right; because the error lies not in the law nor in the legislator, but in the nature of the case; for the raw material of human behaviour is essentially of this kind. So when the law states a general rule, and a case arises under this that is exceptional, then it is right, where the legislator owing to the generality of his language has erred in not covering the case, to correct the omission by a ruling such as the legislator himself would have given if he had been present there, and as he would have enacted if he had been aware of the circumstances . . .
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> This is why equity, although just, and better than a kind of justice, is not better than absolute justice – only than the error due to generalization."[8]

Aristotle's remarks about equity in the *Nicomachean Ethics* are by no means chance or offhand, for he says much the same thing in the *Rhetoric*:

> "For that which is equitable seems to be just, and equity is justice that goes beyond the written law. These omissions are sometimes involuntary, sometimes voluntary, on the part of the legislators; involuntary when it may have escaped their notice; voluntary when, being unable to define for all cases, they are

[7] Aristotle, *Nicomachean Ethics* 1137a-b (J.A.K. Thomson trans., Harmondsworth, England: Penguin, 1977).

[8] *Ibid.*

> obliged to make a universal statement, which is not applicable to all, but only to most, cases; and whenever it is difficult to give a definition owing to the infinite number of cases . . . for life would not be long enough to reckon all the possibilities. If then no exact definition is possible, but legislation is necessary, one must have recourse to general terms." [9]

This is not the place to recount in detail the subsequent history of equitable correction, a history that includes the writings of Cicero in the *Laws*, the development of *aequitas* in Roman law and the power of the Praetors in Rome, and the growth of the courts of equity and then the emergence of a distinctive law of equity in England.[10] And the principal reason for not laboring over the history here is that all of these subsequent developments are variations on the basic theme that we have inherited from Plato and Aristotle – legal rules by virtue of their intrinsic generality will sometimes produce wrong answers, and it is possible for a legal system to create mechanisms and institutions whose job is to correct those wrong answers. When such mechanisms are in place, and thus when individuals and institutions have the power to correct the recalcitrant experiences that are the inevitable consequence of general rules, we can say that the rules of the system are defeasible. Legal rules might be defeated, and good outcomes substituted for rule-generated bad ones, when faithful application of the rules themselves would on a particular occasion[11] otherwise produce the wrong answer.

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[9] Aristotle, *The "Art" of Rhetoric* 1374a (John Henry Freese trans., Cambridge, Massachusetts: Harvard University Press, 1947).

[10] Some of this history is recounted in Frederick Schauer, *Profiles, Probabilities, and Stereotypes* (Cambridge, Massachusetts: Harvard University Press, 2003), chapter 2.

[11] I distinguish defeasibility from two different forms of *revisability*. Sometimes when the individual or institution that first made the rule perceives the rule producing a poor outcome, the rulemaker will use this new knowledge to amend, qualify, rewrite, repeal, or otherwise revise the rule. In addition, when the rulemaker has the power both to make a rule and then to apply it, as is often the case with common law decision-making, the occasion of a potentially bad outcome will lead the applier of the rule to rewrite it or remake it in the process of application. Both of these forms of revisability, and especially the latter, can be understood as species of defeasibility, but for purposes of clarity I limit my discussion of defeasibility here to the situation in which the applier of a rule putatively takes the occasion of application not to revise the rule, but instead to make an exception for just the case at hand. In this pure case of defeasibility, the original rule persists in largely unrevised form, save the specific exception that is made for exactly this case. It should thus be apparent that this form of defeasibility is largely a potential characteristic of rules with crisp canonical formulations. When no such canonical formulation exists, either because the rule is vague or because it is a common law rule whose revisability is understood, the interesting questions about defeasibility do not arise. It is no accident that all of the classic examples of defeasibility, some of which will be discussed below, arise in the context of statutes or statute-like regulations. The question of defeasibility is the question whether such statutes should be treated as if they were court-made common law rules (see Guido Calabresi, *A Common Law for the Age of Statutes* (Cambridge, Massachusetts: Harvard University Press, 1982), and obviously *that* question does not arise with common law rules

Defeasibility can be institutionalized in any number of ways. Among the most familiar is the one we have inherited from Aristotle and then Cicero and then the English, the mechanism by virtue of which some person or institution – the chancellor, for example – has the authority to correct law's mistakes when those mistakes would work an injustice. This is what has traditionally been called "equity," but the issues are complicated. Initially there is the question of whose job it is to do equity. As equity arose in England, for example, the power to make an equitable correction was separated from the power to enforce, apply, and even interpret the law. Residing originally with the chancellor, and then with jurisdictionally separate courts of equity, the power of equitable correction, by being distinct from the law, was not inconsistent with the non-defeasibility of legal rules. The legal rules might work an injustice, but from the perspective *of the law* (in the strict sense, and *not* including courts of equity), there was nothing to be done about it. And in this sense the rules of the law were not defeasible, even though the power of defeat – of equitable override - was granted within an institution that, more broadly, was part of the legal system.

Over time, however, the institution of equity as a discrete system of separate courts and separate procedures has withered in most common law countries. Equity still exists, more or less, but courts of equity and distinct equity-focused institutions and procedures are becoming extinct, even though they have not fully become so yet. But even with the decline of distinct equity jurisdiction and procedure, and arguably because of that decline, common law courts still routinely exercise the power of equitable override, and this is the central form of defeasibility. When application of the law – whether a statute or a common law rule with a widely-shared formulation – will produce an unjust result, common law courts often retain or claim the power to set aside the rule or the statute in the service of justice.[12] Sometimes this process of setting aside the rule will be conceptualized as adding an exception to the existing rule,[13] and so

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themselves.

[12] See Richard H.S. Tur, "Defeasibilism," *Oxford Journal of Legal Studies*, vol. 21 (2001), pp. 355-368. More qualified but to the same general effect is Neil MacCormick, "Defeasibility in Law and Logic," in *Informatics and the Foundations of Legal Reasoning* (Zenon Bankowski, Ian White, & Ulrike Hahn, eds., Dordrecht, Netherlands, Kluwer, 1995), pp. 99-157.

[13] See Alfred C. Aman, Jr., "Administrative Equity: An Analysis of Exceptions to Administrative Rules," *Duke Law Journal*, vol. 1982, pp. 277-331.

Richard Posner has claimed that courts *always* (the word is crucial) retain the ability to add "*ad hoc* exceptions" to existing and exceptionless rules.[14] And Posner's claim is virtually identical to Hart's that not only can a rule with an "unless" clause still be a rule, but also that the list of "unlesses" cannot be exhaustively specified in advance.[15] Richard Tur's position is similar to Hart's and Posner's, for he too insists that treating rules as defeasible is not merely desirable or useful, and not merely common, but is an essential component of a well-functioning – non-defective -- legal system.

There are two qualifications that need to be noted here. First, the power of equitable override – of equity-driven defeasibility – will collapse into a rule-free system of equity if the standards for an equitable override are not higher than the simple fact of the existing rule producing an unjust result. If *any* injustice is a sufficient condition for an equitable override, then a regime of rules subject to equitable override is extensionally equivalent to a regime of no rules at all in which the decision-makers are empowered simply to reach the most just all-things-considered outcome.[16] And the same can be said if we substitute efficiency, utility maximization, fairness or anything else in the foregoing formula. In order for the rules to do the work that rules are expected to do – provide predictability, stability, and constraint on decision-makers – the standards for equitable override of a rule-produced mistake must be one of *extreme* injustice, or *great* inefficiency, or something of that variety. If defeasibility implicitly incorporates the necessity of the standard for defeat being higher than the standard sufficient for the same considerations to have indicated a result in the absence of a rule, then rules will still have a role to play, but the outcomes the rules indicate will be presumptive and not absolute, with the presumption capable of being overridden when the injustice or inefficiency or other suboptimality of the rule-indicated outcome is sufficiently extreme.

Second, it is important to note the difference between a rule that is changed because of a recalcitrant event and a rule that remains unchanged even if the recalcitrant

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[14] Richard A. Posner, "The Jurisprudence of Skepticism," *Michigan Law Review*, vol. 86 (1988), pp. 827-8, at pp. 834-835.

[15] H.L.A. Hart, *The Concept of Law* (2d ed., Penelope A. Bulloch & Joseph Raz eds., Oxford: Clarendon Press, 1994), p. 136. See also Neil MacCormick, "Law as Institutional Fact," *Law Quarterly Review*, vol. 90 (1974), pp. 102-126.

[16] *See* Frederick Schauer, "Exceptions," *University of Chicago Law Review*, vol. 58 (1991), pp. 871-904; Frederick Schauer, "Is the Common Law Law?" *California Law Review*, vol. 77 (1989), pp. 455-71.

event is dealt with by some form of avoiding the rule-generated erroneous outcome. When a rule requiring drivers to drive no faster than sixty miles per hour is overridden by the necessity for some driver of rushing an injured person to the hospital, for example, the rule remains unchanged. But when an unexpected event occasions a *revision* of a rule,[17] as is often the case in the common law, the revised rule is not the same as the rule that existed prior to the revision. It may be unique to the common law – or at least definitional of common law method – that rules can be revised in the process of application, but when and how that occurs is not my primary focus here. Nevertheless, it is important to note that changing a rule in order to avoid an erroneous outcome is different from overriding a rule in order to avoid an erroneous outcome, even though both can be understood as forms of defeasibility.

II

The key to the idea of defeasibility, therefore, is 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. Sometimes the method of adaptation may be an equitable override by the same or another institution, sometimes it will be the power to engraft a new exception to a rule in order to prevent a bad outcome, and sometimes it will be the modification of a rule at the moment of its application.[18] At times, and especially as championed by Ronald Dworkin, avoidance of a poor outcome indicated by the most immediately applicable legal rules will be clothed in the language of locating the "real" rule lying beneath what had only superficially seemed to be the applicable rule.[19] But whatever the method, and whatever the language in which it is described, the consequences are plain: What would have been a poor result had the rule been

[17] And see note 12 above.

[18] I set aside a soft form of defeasibility in which the rule is held to apply, but the sanction for its violation is substantially or totally ameliorated. This approach is the one championed by the mythical Justice Truepenny in Lon Fuller's legendary "The Case of the Speluncean Explorers," *Harvard Law Review*, vol. 62 (1949), pp. 616-645, and is usefully compared with the opinion of Fuller's own alter ego, Justice Foster, who comes much closer to the idea of genuine defeasibility and who would simply have held the rule not to have applied in that case.

[19] Ronald Dworkin, *Law's Empire* (Cambridge, Massachusetts: Harvard University Press, 1986), pp. 16-17. Dworkin's approach sows the seeds of confusion, however, to the extent that he wants to incorporate into the very definition of a rule or statute the full corpus of his entire theory of legal interpretation. Far better is to distinguish what a rule *says* from what it will be understood to *do*, and we can make great gains in clarity in by avoiding Dworkin's attempt to collapse this distinction.

faithfully[20] followed is avoided by treating the rule as defeasible in the service of larger values of reasonableness, justice, efficiency, commonsense, fairness, or any of a number of other measures by which a particular outcome might be deemed deficient.

There is no doubt that defeasible rules are ubiquitous in law. Richard Tur provides numerous examples from English law,[21] and the American legal system furnishes far more.[22] Perhaps most famous these days is *Riggs* v. *Palmer*,[23] a case whose fame is substantially due to Dworkin's efforts, although extended treatment of the case can also be found in the canonical Hart and Sacks materials on the Legal Process.[24] The facts of *Riggs* are well-known – Elmer Palmer poisoned his grandfather so as to prevent him from changing his will and consequently eliminating Elmer's legacy -- but the important thing to understand is that *Riggs* was not a hard case under the relevant statute. In both the majority opinion of Judge Earl and the dissenting opinion of Judge Gray in *Riggs*, the New York Statute of Wills was understood to be clear -- Elmer Palmer was entitled to inherit under the will even though he had murdered the testator. Thus it was the tension between what the statute plainly said and what justice appeared to demand that made *Riggs* a hard case, but it is crucial to distinguish cases like *Riggs*, in which the most obviously applicable legal rule gives an answer but it is a bad one, from cases in which the rules give no answer at all.

When the New York Court of Appeals concluded in *Riggs* that Elmer Palmer could not inherit because of the maxim that "no man shall profit from his own wrong," it is best understood as having treated the most immediately applicable legal rule as defeasible in the service of justice. It is true that the "no man may profit from his own wrong" principle is narrower than the full domain of justice, but there are few dimensions of

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[20] "Faithfully" is perhaps too loaded a term here, and "literally" might be better, as long as we assume that literal application of a legal rule can include uncontroversial technical meaning and uncontroversial application of subsidiary principles of interpretation.

[21] *Op. cit.*, note 13.

[22] I say "far more" because it is widely believed that legal rules are even more defeasible under American law and practice than they are in Great Britain. See P.S. Atiyah & Robert S. Summers, *Form and Substance in Anglo-American Law: A Comparative Study in Legal Reasoning, Legal Theory and Legal Institutions* (Oxford: Clarendon Press, 1987). See also D. Neil MacCormick & Robert S. Summers, *Interpreting Statutes: A Comparative Study* (London: Ashgate, 1991).

[23] 22 N.E. 188 (N.Y. 1889).

[24] Henry M. Hart, Jr. and Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* (William N. Eskridge, Jr. & Philip P. Frickey eds., 1991), pp. 60-102. .

justice – probably no dimensions of justice -- that are not instantiated by some common law principle. Although the New York Court of Appeals drew on a concrete legal principle somewhat narrower than justice *simpliciter*, it is most plausibly understood as simply having avoided a potentially unjust outcome by concluding that legal rules are generally defeasible in the service of justice. Much the same conclusion follows when the result that a legal rule generates appears to be unreasonable or ridiculous, even if the nature of the bad outcome is not best described in terms of injustice. In *United States* v. *Kirby*,[25] for example, the defendant was a Kentucky law enforcement officer who had been convicted under a federal law making it a crime to interfere with the delivery of the mail. And that is exactly what Kirby had done. He had unquestionably interfered with the delivery of the mail, but he had done so in the process of boarding a steamboat to arrest a mail carrier named Farris who had been validly indicted for murder by *a* Kentucky court. The case reached the Supreme Court, where the Court treated the statute as defeasible, holding that it should not be applied where the outcome it literally indicated was inconsistent with the purpose of the statute, inconsistent with commonsense, and inconsistent with justice.

If we depart from the realm of the real and enter the domain of the hypothetical, we see the same phenomenon captured in Lon Fuller's famous response to Hart's example of the rule prohibiting vehicles from the park.[26] As is well known, Hart suggested that bicycles, roller skates, and toy automobiles might represent hard cases in the penumbra of such a rule, and thus would be, for him, cases in which the exercise of (legal[27]) discretion was inevitable. These penumbral cases were to be contrasted, Hart maintained, with the straightforward core cases in which the language of rule dictated the outcome, as with, Hart suggested, cases involving ordinary automobiles. But Fuller responded with the hypothetical example of a group of patriots who installed a fully functional military truck in the park as a war memorial. This would clearly be a vehicle,

[25] 74 U.S. (7 Wall.) 482 (1868).

[26] Lon L. Fuller, "Positivism and Fidelity to Law – A Reply to Professor Hart," *Harvard Law Review*, vol. 71 (1958), pp. 630-672; H.L.A. Hart, "Positivism and the Separation of Law and Morals," *Harvard Law Review*, vol. 71 (1958), pp. 593-629, at pp. 608-15. See also Frederick Schauer, "A Critical Guide to Vehicles in the Park," *New York University Law Review*, vol. 83 (2008), pp. 1109-1134.

[27] Hart would not have maintained that all answers were equally good, for he properly recognized that some answers even in the area of legal discretion would be better than others as a matter of policy, morality, politics, or any other legally legitimate but not legally mandated source of non-legal guidance.

Fuller argued,[28] but just as clearly would it be ridiculous to exclude it from the park on the authority of the "no vehicles in the park" rule.

As legions of examples resembling *Riggs* and *Kirby* illustrate, Fuller may well have had the best of the empirical argument. That is, if Hart is understood as claiming that the plain meaning of the terms of a rule actually provided a conclusive answer in most or all real cases in real legal systems, and if Fuller is understood as responding that the answer provided by the plain meaning was typically defeasible and never conclusive in well-functioning legal systems, then Fuller's claim appears to be closer to American reality, and possibly closer to the reality in some number of other modern legal systems. Insofar as Fuller was implicitly arguing that American law allowed and possibly even required legal interpreters to prefer the answer indicated by a rule's purpose to the answer indicated by the rule's language when the two came into conflict, he was almost certainly correct.[29]

But Fuller also made a broader claim. For Fuller, it was not merely a contingent empirical matter that legal rules were always or at least typically (and preferably) defeasible in common law legal systems, but also that the defeasibility of legal rules was an essential feature of legality itself, a necessary component of any non-defective legal system, and thus on a par with the other *desiderata* of legality that for Fuller came pretty close to defining law – or at least tje ideal of legality -- itself.[30] For Fuller, failing to treat a rule like the no-vehicles-in-the-park rule as defeasible was simply to abandon reason, and for Fuller it was of the essence of law that it be reasonable. A system that did not allow purpose-based or reason-based or equitable

[28] Actually he didn't, but he should have. Occasionally in the grip of a radically contextual view of language and meaning, Fuller hinted that maybe the truck/statue was not a vehicle at all. This not only displays a mistaken view about language, but undercuts his own point, for the power of the example for Fuller's purposes resides precisely in the fact that the truck/statue whose exclusion from the park under this rule would be absurd *is* a vehicle, and *is* literally encompassed by the rule.

[29] Hart did later acknowledge that legal systems might well understand the core of a rule in such a purpose-driven way. H.L.A. Hart, "Preface," in *Essays in Jurisprudence and Philosophy* (Oxford: Clarendon Press, 1983), p. 8. But this seeming concession is not much of a concession at all, because it simply takes the debate one level back, and that is because we can imagine that even serving the purpose behind a particular rule might produce an outcome inconsistent with the purpose behind the purpose, or with an all-things-considered conception of justice. And at this level there is no reason to suppose that the basic dispute between Hart and Fuller would not still have existed. See Frederick Schauer, "Formalism," *Yale Law Journal*, vol. 97 (1988), pp. 509-548.

[30] Lon L. Fuller, *The Morality of Law* (revised edition, New Haven, Connecticut: Yale University Press, 1969).

overrides of the plain indications of a legal rule when necessary to achieve a reasonable outcome was for that reason just so much less of a *legal* system, and perhaps was not even a genuine legal system at all. Indeed, we can understand Fuller's claim in the best light, and without saddling him with the view that nondefeasible law is not law at all,[31] by interpreting him as maintaining that non-defeasible law is necessarily *defective* as law, even if the defective law is still law. Just as *any* boat that leaks is defective as a boat even as it remains a boat, so Fuller is best understood as insisting that any legal system is necessarily defective as a legal system, and as law, insofar as it treats its rules as non-defeasible.

III

In evaluating the claim that defeasibility is an essential property of the ideal (or the idea) of legality, we should set the stage by making clear that we can understand what a non-defeasible rule would look like, and how it would operate. As the very existence of a dissent makes clear, it was hardly necessary or obvious that Elmer Palmer should lose in *Riggs* v. *Palmer*. The New York Court of Appeals *could* have said that Palmer would inherit despite the wrong he committed, just as the United States Supreme Court could have concluded that Kirby violated federal law even though he did it for good reason, and even though punishing someone like Kirby was inconsistent with the purpose of the law he literally violated. And some hypothetical judge could conclude that a war memorial made from a functioning military truck was nevertheless a vehicle, and consequently excluded from the park by virtue of the literal meaning of the no-vehicles-in-the-park rule. Such a result might have been condemned as ridiculous, absurd, or, in what is perhaps an even worse condemnation these days, *formalistic*, but that outcome would not have been a conceptual or linguistic impossibility. As long as we accept that words have plain or literal meanings and that those meanings have a context-independent core, and thus as long as we reject (as Fuller did not) the notion that the meaning of a word is entirely a function of the particular

[31] It is difficult to situate Fuller within the "bad law is no law at all" tradition, a tradition exemplified by Blackstone and Cicero, but not Aquinas. See generally Philip Soper, "In Defense of Classical Natural Law Theory: Why Unjust Law is No Law at All," *Canadian Journal of Law and Jurisprudence*, vol. 20 (2007), pp. 201-223. Fuller was plainly sympathetic to the view that widespread failure to follow the dimensions of procedural legality he outlined would produce a system not properly called a legal system at all, but with respect to individual components of legality, such as defeasibility, he would more likely have described legal systems without them as defective legal systems than as not being legal systems at all.

context in which it is used on a particular occasion, then we can see that rules – which are written in words – can indeed generate poor outcomes, and we can see that some judge might in fact issue a ruling consistent with that poor outcome.[32]

Indeed, not only can this happen, but in fact it does happen – and with some frequency. Perhaps most dramatic is the fact that *Riggs* v. *Palmer* turns out to be more exceptional than normal, even in the highly anti-formal American judicial system. Although there are other cases in which the outcomes resemble those in *Riggs*, there are also many in which beneficiaries who were in some way or another culpably responsible for the death of the testator were allowed to inherit.[33] In other cases applications of statutes with arguably suboptimal policy consequences were allowed to stand, as in *Tennessee Valley Authority* v. *Hill*,[34] in which a literal application of the Endangered Species Act mandated the preservation of the habitat of a small, unattractive, and ecologically unimportant fish called the snail darter, even at great cost to the aggregate public welfare as a result of the blocking of an important public works project. And in *United States* v. *Locke*,[35] a statute setting a filing deadline of "prior to December 31" was upheld even when it resulted in the arguably unfair exclusion of a claim filed on December 31 by someone who assumed, not unreasonably, that the statute really meant to say "on or prior to December 31."

Numerous other cases fit this mould, both in the United States and elsewhere, and thus it would be a mistake to describe the defeasibility of legal rules as a universal or even overwhelmingly common feature of decision-making by judges and by the

[32] I recognize that in some circles this would be considered a controversial (or simply wrong) position, but this is not the place to belabor the standard responses to post-modern theories of meaning. Suffice it to say that without the ability of words to have acontextual or trans-contextual meaning, it is hard to see how we could understand each other, and even harder to explain the compositional nature of language, our ability to understand sentences we have never heard before. We know, absent any context, that "The cat is on the mat" is about cats and not dogs, mats and not ponds, and about a relationship captured by the word "on" that is different from the relationship suggested by "near," "next to," and "under."

[33] Many of them are described in Frederick Schauer, "The Limited Domain of the Law," *Virginia Law Review*, vol. 90 (2004), pp. 1909-1956.

[34] 437 U.S. 153 (1978). The case is described and criticized by Dworkin in *Law's Empire*, *op. cit.* note 20, at pp. 20-23.

[35] 471 U.S. 84 (1985). The decision has often been criticized. See, for example, Richard Posner, "Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution," *Case Western Reserve Law Review*, vol. 37 (1986), pp. 179-217; Nicholas S. Zeppos, "Legislative History and the Interpretation of Statutes: Toward a Fact-Finding Model of Statutory Interpretation," *Virginia Law Review*, vol. 76 (1990), pp. 1295-1374, at pp. 1314-1316. For a rare defense, see Frederick Schauer, "The Practice and Problems of Plain Meaning," *Vanderbilt Law Review*, vol. 45 (1992), pp. 715-741.

institution we commonly call a "legal system." Although legal decision-makers indeed commonly do treat the rules with which they deal as defeasible, just as commonly they do not. They treat the literal or plain language of a rule formulation as conclusive, and thus refrain from adding exceptions at the moment of application, from overriding the indications of the rule in the service of justice or equity or fairness or efficiency, and from modifying the rules at the moment of application. Putting aside the question for the moment whether such non-defeasibility is wise, it is at the very least possible, and indeed it is widespread. Rule-formulations have meanings that are distinct from the purposes or background justifications lying behind the rules and are distinct from what the best (or even a good) rule-free outcome in some particular instance would have been. Rules are defeasible to the extent that such rule-formulations may be changed at the moment of application for any of a number of reasons, but examples like those above, and countless others, show that rules are often applied as written – treated as non-defeasible – even when what seem to be valid defeating conditions are present. In the contemporary debates about jurisprudential methodology, it is sometimes claimed that identifying the essential features of the concept of law is largely or entirely a descriptive matter, albeit one that for some theorists requires identifying law's "function or purpose."[36] From this perspective defeasibility would be an essential property of the concept of law, or of a non-defective legal system, if it were ubiquitous in modern legal systems, and if we could scarcely imagine a legal system without it. But it turns out that neither is the case, and as a descriptive matter it is hard to defend the position that a legal system without widespread and legitimate defeasibility is for that reason not a legal system at all, or is a legal system but necessarily a defective one.

IV

That legal rules are often treated as non-defeasible does not mean that such a course is a wise one. Not does it mean that such a course is consistent with legality in the deeper and richer sense, and it is that question that we must now take up. Although legal decision-makers often treat legal rules as non-defeasible, are they right to do so, or is every example of failure to do so also a failure of legality?

[36] See, for example, Jules L. Coleman, "Incorporationism, Conventionality, and the Practical Difference Thesis," *Legal Theory*, vol. 4 (1998), pp. 381-425, especially at pp. 387-395; Joseph Raz, "On the Nature of Law," *Archiv für Rechts- und Sozialphilosophie*, vol. 82 (1996), pp. 1-25.

The arguments for rules are not unfamiliar, and most of the arguments for rules in general are arguments for treating rules as non-defeasible. If, for example, we (the designers of some decision-making environment) are wary of discretion, and distrustful of judges and other legal decision-makers who might be biased, corrupt, incompetent, ill-equipped for the job, or just very rushed, then we might want to constrain them by rules rather than granting wide discretion. Moreover, when the reasons for constraining decision-makers by rules are at their most powerful, we might not even trust the decision-makers to decide when some application of a rule is ridiculous or absurd, let alone unfair, inequitable, unjust, or inefficient.[37] It is easy to say that it would be absurd to exclude the truck used as a war memorial from the park, but the real question is whether and when some class of officials should be empowered to decide which applications are absurd and which are not. Moreover, rules also serve to allocate decision-making responsibility and therefore effectuate the separation of powers, in the non-technical sense of that term. To treat a rule as non-defeasible, therefore, is simply to decide that some but not other officials will have the power to cancel, override, amend, or modify an existing rule. And insofar as rules also bring the advantages of certainty, predictability, settlement, and stability for stability's sake, treating the rules as defeasible comes at the sacrifice of each of these values, even though of course it brings the potential advantages of fairness, equity, and, in theory, reaching the correct result in every instance.

Thus, once we recognize that it is linguistically and conceptually possible for there to be non-defeasible rules, the inquiry shifts to one about the advantages and disadvantages of treating rules as defeasible. To treat rules as non-defeasible is to accept the possibility – indeed, the virtual certainty over time – of some number of unjust or otherwise erroneous outcomes in particular cases, but that is endemic to the Rule of Law generally. Unless the Rule of Law is simply a synonym for reaching the best all-things-considered outcome, any addition of procedural values or considerations of stability for stability's sake or constraints on the decision maker's discretion – and these are precisely what differentiates the Rule of Law from simply doing the right thing – will also commit the legal system to some number of suboptimal outcomes.

[37] See John Manning, "The Absurdity Doctrine," *Harvard Law Review*, vol. 116 (2003), pp. 2387-2462.

And once we recognize this, it turns out that the difference between the non-defeasibility of legal rules and the Rule of Law more generally is simply a matter of degree. Non-defeasibility takes things to an extreme, but it is an extreme broadly consistent with the very idea of the Rule of Law itself.

From this perspective, it becomes apparent that the traditional defenses of the necessary defeasibility of legal rules – whether Hart's, or Posner's, or Tur's – mostly rest on a certain view about the powers and abilities of judges. Few people would maintain that police officers, for example, or ordinary bureaucrats, ought to have the power to revise the rules that constrain them when those rules appear to indicate a poor outcome in a particular case. And if that is so, then the view that defeasibility in the hands of judges is required by the Rule of Law while defeasibility in the hands of others is not turns out to be a view about the capacities of judges within particular legal systems. But although it is tempting to celebrate judicial reason in advanced common law legal systems – Lord Coke's glorification of the powers of judges and the artificial reason of the law pervades the common law consciousness centuries after Coke's death – it should be relatively non-controversial that this kind of confidence in judicial wisdom is hardly a universal characteristic of every legal system. So long as we can imagine something properly called a legal system in which the power of rule revision and rule override is not entrusted to judges, then we can imagine something properly called a legal system in which defeasibility is somewhat or even largely (as, for example, Jeremy Bentham would have preferred) absent. Moreover, even if we take the position that specifying the central features of the concept of law is at least partially and perhaps largely a normative enterprise,[38] it is far from clear that defeasibility is so plainly normatively desirable in all places and at all times that we should consider it an essential part of the concept of law itself.

V

One less obvious implication of the foregoing is that defeasibility is not a property of rules at all, but rather a characteristic of how some decision-making system will choose to *treat* its rules. The Wittgensteinian maxim that rules do not determine

[38] See, for example, Stephen Perry, "Hart's Methodological Positivism," in Jules Coleman, ed., *Hart's Postscript: Commentaries on the Postscript to* The Concept of Law (Oxford: Clarendon Press, 2001), pp. 311-354. See also Ronald Dworkin, "Thirty Years On," *Harvard Law Review*, vol. 114 (2002), pp. 1655-1687.

their own applications has become trite, but it reminds us that how a rule will be treated is not something that is inherent in the rule itself. Indulging again the assumption (and belief) that the plain or literal (but not necessarily the ordinary language) meaning of a rule can indicate an outcome, it is a function not of the rule but of how the rule will be treated whether that indicated outcome is to be taken as conclusive, presumptive, or even, at the extreme, as having no weight in itself, being but a totally transparent (to its background justification, or to the all-things-considered best outcome) heuristic or rule of thumb. The question of defeasibility is not a question about what is *in* a rule, but is rather a question about how what is in a rule, or about how what a rule says, is to be treated, and this is not, and can never be, something that can be determined by the rule itself.

Although it is possible that how the rules of a legal system will be treated will be function of yet further rules, it might be a useful shortcut to think of the determination of how the indications of a rule are to be treated as a component of the Hartian ultimate rule of recognition. And as such, it is a question of fact and not of law, although what this component of the Hartian rule of recognition *should* be might also be the subject of normative debate, in which the grounds of the debate would necessarily be philosophical, moral, political and much else, but not themselves legal.

The question of defeasibility is thus exposed as a descriptive and prescriptive one, but not a logical or conceptual one. It is logically and conceptually possible for rules to be interpreted, understood, applied and enforced according to the literal meaning of the component language of their formulations. Whether in this or that legal system they are in fact so treated is a descriptive question and, it turns out, as the few examples above illustrate, that as a descriptive matter defeasibility is less universal in actual legal systems than we might have thought, even in the legal systems in which we might have most expected it to exist.

With respect to the prescriptive question, whether the literal meaning of a rule-formulation will be treated as what the rule indicates, and whether what the rule indicates will be treated as conclusive, are questions that cannot be answered by reference to the moral goals of particularized justice. Those goals exist, to be sure, as Plato, Aristotle, and countless successors have argued. But so too do the Rule of Law

goals that might be thought of as the goals of generalized justice, or aggregate justice, or systemic justice. And as long as those non-particularistic goals have a place in our moral and prescriptive reasoning, then we cannot conclude – the actual practices of some parts of some legal common law legal systems notwithstanding – that the defeasibility of legal rules is a necessary part of all legal systems, or that the defeasibility of rules in general is a necessary part of all decision-making environments. Defeasibility may well be a desirable component of some parts of some legal systems at some times, but it is far from being an essential property of law itself.