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The Ascription of Responsibility and Rights

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XI.—THE ASCRIPTION OF RESPONSIBILITY AND RIGHTS.

By H. L. A. HART.

THERE are in our ordinary language sentences whose primary function is not to describe things, events, or persons or anything else, nor to express or kindle feelings or emotions, but to do such things as claim rights ("This is mine"), recognise rights when claimed by others ("Very well this is yours"), ascribe rights whether claimed or not ("This is his"), transfer rights ("This is now yours"), and also to admit or ascribe or make accusations of responsibility ("I did it," "He did it," "You did it"). My main purpose in this article is to suggest that the philosophical analysis of the concept of a human action has been inadequate and confusing, at least in part because sentences of the form "He did it" have been traditionally regarded as primarily descriptive whereas their principal function is what I venture to call *ascriptive*, being quite literally to ascribe responsibility for actions much as the principal function of sentences of the form "This is his" is to ascribe rights in property. Now ascriptive sentences and the other kinds of sentence quoted above, though they may form only a small part of our ordinary language, resemble in some important respects the formal statements of claim, the indictments, the admissions, the judgments, and the verdicts which constitute so large and so important a part of the language of lawyers; and the logical peculiarities which distinguish these kinds of sentences from descriptive sentences or rather from the theoretical model of descriptive

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sentences with which philosophers often work can best be grasped by considering certain characteristics of legal concepts, as these appear in the practice and procedure of the law rather than in the theoretical discussions of legal concepts by jurists who are apt to be influenced by philosophical theories. Accordingly, in the first part of this paper I attempt to bring out some of these characteristics of legal concepts ; in the second, I attempt to show how sentences ascribing rights function in our ordinary language and also why their distinctive function is overlooked ; and in the third part I attempt to make good my claim that sentences of the form "He did it" are fundamentally ascriptive and that some at any rate of the philosophical puzzles concerning "action" have resulted from inattention to this fact.

I.

As everyone knows, the decisive stage in the proceedings of an English law court is normally a *judgment* given by the court to the effect that certain facts (Smith put arsenic in his wife's coffee and as a result she died) are true and that certain legal consequences (Smith is guilty of murder) are attached to those facts. Such a judgment is therefore a compound or blend of facts and law ; and, of course, the claims and the indictments upon which law courts adjudicate are also blends of facts and law, though claims, indictments, and judgments are different from each other. Now there are several characteristics of the legal element in these compounds or blends which conspire to make the way in which facts support or fail to support legal conclusions or refute or fail to refute them unlike certain standard models of how one kind of statement supports or refutes another upon which philosophers are apt to concentrate attention. This is not apparent at once : for when the judge decides that on the facts which he has found there is a contract for sale between A and B, or that B, a publican, is guilty of the offence¹ of supplying liquor to a constable

¹ S. 16 of the Licensing Act, 1872.

on duty, or that B is liable for trespass because of what his horse has done on his neighbour's land, *it looks* from the terminology as if the law must consist of a set, if not a system, of legal concepts such as "contract," "the offence of supplying liquor to a constable on duty," "trespass," invented and defined by the legislature or some other "source," and as if the function of the judge was simply to say "Yes" or "No" to the question: "Do the facts come within the scope of the formula defining the necessary and sufficient conditions of 'contract,' 'trespass,' or 'the offence of supplying liquor to a constable on duty'?"

But this is for many reasons a disastrous over-simplification and indeed distortion, because there are characteristics of legal concepts which make it often absurd to use in connection with them the language of necessary and sufficient conditions. One important characteristic which I do not discuss in detail is no doubt vaguely familiar to most people. In England, the judge is not supplied with explicitly formulated general criteria defining "contract," or "trespass"; instead he has to decide by reference to past cases or precedents whether on the facts before him a contract has been made or a trespass committed, and in doing this he has a wide freedom in judging whether the present case is sufficiently near to a past precedent and also in determining what the past precedent in fact amounts to, or, as lawyers say, in identifying the *ratio decidendi* of past cases. This imports to legal concepts a vagueness of character very loosely controlled by judicial traditions of interpretation and it has the consequence that usually the request for a definition of a legal concept—"What is a trespass?" "What is a contract?"—cannot be answered by the provision of a verbal rule for the translation of a legal expression into other terms or one specifying a set of necessary and sufficient conditions. *Something* can be done in the way of providing an outline, in the form of a general statement of the effect of past cases, and that is how the student starts to learn the law. But beyond a point, answers to the questions "What is trespass?" "What is contract?" if they are not to mislead, must take the forms

of references to the leading cases on the subject, coupled with the use of the word "etcetera."

But there is another characteristic of legal concepts of more importance for my present purpose which makes the word "unless" as indispensable as the word "etcetera" in any explanation or definition of them and the necessity for this can be seen by examining the distinctive ways in which legal utterances can be challenged. For the accusations or claims upon which law courts adjudicate can usually be challenged or opposed in two ways. First, by a denial of the facts upon which they are based (technically called a traverse or joinder of issue) and secondly by something quite different, namely, a plea that although all the circumstances are present on which a claim could succeed, yet in the particular case, the claim or accusation should not succeed because other circumstances are present which brings the case under some recognised head of exception, the effect of which is either to defeat the claim or accusation altogether or to "reduce" it, so that only a weaker claim can be sustained. Thus a plea of "provocation" in murder cases, if successful, "reduces" what would otherwise be murder to manslaughter; and so in a case of contract a defence that the defendant has been deceived by a material fraudulent misrepresentation made by the plaintiff entitles the defendant in certain cases to say that the contract is not valid as claimed nor "void" but "voidable" at his option. In consequence, it is usually not possible to define a legal concept such as "trespass" or "contract" by specifying the necessary and sufficient conditions for its application. For any set of conditions may be adequate in some cases but not in others and such concepts can only be explained with the aid of a list of exceptions or negative examples showing where the concept may not be applied or may only be applied in a weakened form.

This can be illustrated in detail from the law of contract. When the student has learnt that in English law there are positive conditions required for the existence of a valid contract, *i.e.*, at least two *parties*, an *offer* by one, *acceptance* by the other, a *memorandum* in writing in some cases and

consideration, his understanding of the legal concept of a contract is still incomplete and remains so even if he has learnt the lawyers technique for the interpretation of the technical but still vague terms, "offer," "acceptance," "memorandum," "consideration." For these conditions, although necessary, are not always sufficient and he has still to learn what can *defeat* a claim that there is a valid contract, even though all these conditions are satisfied. That is the student has still to learn what can follow on the word "unless" which should accompany the statement of these conditions. This characteristic of legal concepts is one for which no word exists in ordinary English. The words "conditional" and "negative" have the wrong implications, but the law has a word which with some hesitation I borrow and extend: this is the word "*defeasible*" used of a legal interest in property which is subject to termination or "*defeat*" in a number of different contingencies but remains intact if no such contingencies mature. In this sense then, contract is a defeasible concept.

The list of defences with which an otherwise valid claim in contract can be met is worth a philosopher's inspection because it is here that reference to the factor that intrigues him—the mental factor—is mainly to be found. Thus the principal defences include the following:²

- A. Defences which refer to the knowledge possessed by the defendant.
 - i. Fraudulent misrepresentation.
 - ii. Innocent misrepresentation.
 - iii. Non-disclosure of material facts (in special cases, *e.g.*, contracts of insurance, only).
- B. Defences which refer to what may be called the will of the defendant.
 - i. Duress.
 - ii. Undue influence.

² This list of course is only a summary reference to the more important defences sufficient to illustrate the point that the defeasible concept of contract cannot be defined by a set of necessary and always sufficient conditions. There are important omissions from this list, *e.g.*, the disputed topic known to lawyers as "Mistake." Adequate discussion and illustration of these and other defences will be found in legal textbooks on contract, *e.g.* Cheshire and Fifoot, "Law of Contract," Chap. IV.

- C. Defences which may cover both knowledge and will.
 - i. Lunacy.
 - ii. Intoxication.
- D. Defences which refer to the general policy of the law in discouraging certain types of contract, such as
 - i. Contracts made for immoral purposes.
 - ii. Contracts which restrain unreasonably the freedom of trade.
 - iii. Contracts tending to pervert the course of justice.
- E. The defence that the contract is rendered "impossible of performance" or "frustrated" by a fundamental and unexpected change of circumstance, *e.g.*, the outbreak of a war.
- F. The defence that the claim is barred by lapse of time.

Most of these defences are of general application to all contracts. Some of them, *e.g.*, those made under (D), destroy altogether the claim that there is a contract so that it is void *ab initio*; others, *e.g.*, those under (B) or (C), have a weaker effect rendering it merely "voidable" at the option of the party concerned and till this option is exercised the contract remains valid so that rights may be acquired by third parties under it; while the lapse of time mentioned in (F) merely extinguishes the right to institute legal proceedings, but does not otherwise affect the existence of the contract. It is plain, therefore, that no adequate characterisation of the legal concept of a contract could be made without reference to these extremely heterogeneous defences and the manner in which they respectively serve to defeat or weaken claims in contract. The concept is irreducibly defeasible in character and to ignore this is to misrepresent it. But, of course, it is *possible* to obscure the character of such concepts by providing a general formula which seems to meet the demand often felt by the theorist for a definition in terms of a set of necessary and sufficient conditions and since philosophers have, I think, obscured in precisely this way the defeasible character of the concept

of an action it is instructive to consider how such an obscuring general formula could be provided in the case of contract and to what it leads.

Thus the theorist bent on providing a general definition of contract could at any rate make a beginning by selecting the groups of defences (A), (B) and (C), which refer to the will and knowledge of the defendant and by then arguing that the fact that these defences are admitted or allowed shows that the definition of contract requires as necessary conditions that the minds of the parties should be "fully informed" and their wills "free." And indeed legal theorists and also on occasion judges do attempt to state the "principles" of the law of contract much in this way. Thus Sir Frederick Pollock, writing³ of the consent of the parties required for the constitution of a valid contract, says "but we still require other conditions in order to make the consent binding on him who gives it. . . . The consent must be true, full and free." Now, of course, this method of exposition of the law may be innocuous and indeed helpful as a summary of various types of defences which usefully stresses their universal application to all contracts or emphasises the similarities between them and so suggests analogies for the further development of the law or what can be called "reasons" for that development. But unless most carefully qualified, such a general formula may be profoundly misleading; for the positive looking doctrine "consent must be true, full and free" is only accurate as a statement of the law if treated as a compendious reference to the defences with which claims in contract may be weakened or met, whereas it suggests that there are certain psychological elements required by the law as necessary conditions of contract and that the defences are merely admitted as negative *evidence* of these. But the defence, *e.g.*, that B entered into a contract with A as a result of the undue influence exerted upon him by A, is

³ "Principles of the Law of Contract," 10th edn., p. 442. The words omitted are "though their absence in general is not to be assumed and the party seeking to enforce a contract is not expected to give affirmative proof that they have been satisfied."

not evidence of the absence of a factor called "true consent," but one of the multiple criteria for the use of the phrase "no true consent." To say that the law requires true consent is therefore, in fact, to say that defences are such as undue influence or coercion, and any others which should be grouped with them are admitted. And the practice of the law (in which general phrases such as "true consent" are of little importance) as distinct from the theoretical statement of it by jurists (in which general terms bulk largely) makes this clear; for no party attempting to enforce a contract is required to give evidence that there was "true, full and free consent," though in special cases where some person in a fiduciary position seeks to enforce a bargain with the person in relation to whom he occupies that position, the onus lies upon him to prove that no influence was, in fact, exerted. But, of course, even here the proof consists simply in the exclusion of those facts which ordinarily constitute the defence of undue influence, though the onus in such cases is by exception cast on the plaintiff. Of course, the theorist could make his theory that there are psychological elements ("full and free consent") required as necessary conditions of contract, irrefutable by ascribing the actual procedure of the courts to the practical difficulties of proving "mental facts"; and it is sometimes said that it is merely a matter of practical convenience that "objective tests" of these elements have been adopted and that the onus of proof is usually upon the defendant to prove the non-existence of these necessary elements. Such a doctrine is assisted by the ambiguity of the word "test" as between evidence and criteria. But to insist on this as the "real" explanation of the actual procedure of the courts in applying the defeasible concept of a contract would merely be to express obstinate loyalty to the persuasive but misleading logical ideal that all concepts must be capable of definition through a set of necessary and sufficient conditions. And, of course, even if this program were carried through for the defences involving the "mental" element it is difficult to see how it could be done for the other defences with which claims in contract can be met, and, accordingly, the defeasible character of the concept would still remain.

The principal field where jurists have I think created difficulties for themselves (in part under the influence of the traditional philosophical analysis of action) by ignoring the essentially defeasible character of the concepts they seek to clarify is the Criminal Law. There is a well-known maxim, "*actus non est reus nisi mens sit rea*," which has tempted jurists (and less often judges) to offer a general theory of "the mental element" in crime (*mens rea*) of a type which is logically inappropriate just because the concepts involved are defeasible and are distorted by this form of definition. For in the case of crime, as in contract, it is possible to compile a list of the defences or exceptions with which different criminal charges may be met with differing effect and to show that attempts to define in general terms "the mental conditions" of liability like the general theory of contract suggested in the last paragraph is only not misleading if its positive and general terms are treated merely as a restatement or summary of the fact that various heterogeneous defences or exceptions are admitted. It is true that in crime the position is more complicated than in contract since fewer defences apply to all crimes (there being notable differences between crimes created by statute and Common-law crimes) and for some crimes proof of a specific intention is required. Further, it is necessary in the case of crime to speak of defences *or exceptions* because in some cases, *e.g.*, murder, the onus of proof may be on the Prosecution to provide evidence that circumstances are not present which would if present defeat the accusation. Yet, none the less, what is meant by the mental element in criminal liability (*mens rea*) is only to be understood by considering certain defences or exceptions, such as Mistake of Fact, Accident, Coercion, Duress, Provocation, Insanity, Infancy,⁴ most of which have come to be admitted in most crimes and in some cases exclude liability altogether, and in others merely "reduce" it. The fact that these are admitted as defences or exceptions constitute the cash value of the maxim "*actus non est reus*

⁴ See for a detailed discussion of these and other defences or exceptions, Kenny: "Outlines of Criminal Law," Chap. IV.

nisi mens sit rea." But in pursuit of the will o' the wisp of a general formula, legal theorists have sought to impose a spurious unity (as judges occasionally protest) upon these heterogeneous defences and exceptions, suggesting that they are admitted as merely evidence of the absence of some single element ("intention") or in more recent theory, two elements ("foresight" and "voluntariness") universally required as necessary conditions of criminal responsibility. And this is misleading because what the theorist misrepresents as evidence negating the presence of necessary mental elements are, in fact, multiple criteria or grounds defeating the allegation of responsibility. But it is easy to succumb to the illusion that an accurate and satisfying "definition" can be formulated with the aid of notions like "voluntariness" because the logical character of words like "voluntary" are anomalous and ill-understood. They are treated in such definitions as words having positive force, yet, as can be seen from Aristotle's discussion in Book III of the *Nicomachean Ethics*, the word "voluntary" in fact serves to exclude a heterogeneous range of cases such as physical compulsion, coercion by threats, accidents, mistakes, etc., and not to designate a mental element or state; nor does "involuntary" signify the absence of this mental element or state.⁵ And so in a murder case it is

⁵ Thus Mr. J. W. C. Turner, in his well-known essay (in the *Modern Approach to Criminal Law. English Studies in Criminal Science, Vol. I, p. 199*) on the Mental Element in Crimes at Common Law lays down two rules defining the mental element.

(First rule): "It must be proved that the accused's conduct was voluntary."

(Second rule): "It must be proved that . . . he must have foreseen that certain consequences were likely to follow on his acts or omissions" [p. 199]. Mr. Turner's view is indeed an improvement on previous attempts to "define" the mental element in crime so far as it insists that there is not a single condition named *mens rea* and also in his statement on page 199 that the extent to which "foresight of consequence" must have extended differs in the case of each specific crime. But none the less this procedure is one which really obscures the concepts it is meant to clarify for the words "voluntary" and "involuntary" are used as if they refer to the presence and absence respectively in the agent of some single condition. Thus on page 204, Mr. Turner gives the same title of "involuntary conduct" to cases of acts done under hypnotic suggestion, when sleepwalking, "pure" accidents, and certain cases of insanity, drunkenness, and infancy, as well as the case where B holds a weapon and A, against B's will, seizes his hand and the weapon and therewith stabs C.

a defence that the accused pulled the trigger reasonably but mistakenly believing that the gun was unloaded, or that there was an accident because the bullet unexpectedly bounced off a tree ; or that the accused was insane (within the legal definition of insanity) or an infant ; and it is a partial defence "reducing" the charge from murder to manslaughter that the accused fired the shot in the heat of the moment when he discovered his wife in adultery with the victim. It is, of course, *possible* to represent the admission of these different defences or exceptions as showing that there is a single mental element ("voluntariness") or two elements ("voluntariness" and "foresight") required as necessary mental conditions (*mens rea*) of full criminal liability. But in order to determine what "foresight" and "voluntariness" are and how their presence and absence are established it is necessary to refer back to the various defences and then these general words assume merely the status of convenient but sometimes misleading summaries expressing the absence of all the various conditions referring to the agents knowledge or will which eliminate or reduce responsibility.

Consideration of the defeasible character of legal concepts helps to explain how statements of fact support or refute legal conclusions and thus to interpret the phrases used by lawyers for the connection between fact and law when they speak of "the legal effect or consequences of the facts" or "the conclusions of law drawn from the facts" or "consequences attached to the facts." In particular, it shows how wrong it would be to succumb to the temptation offered by modern theories of meaning to identify the meaning of a legal concept, say "contract," with the statement of the conditions in which contracts are held to exist since owing to the defeasible character of the concept such a statement though it would express the necessary and sometimes sufficient conditions for the application of "contract" could not express conditions which were always sufficient. But, of course, any such theory of the meaning of legal concepts would fail for far more fundamental reasons : for it could not convey the composite

character of these concepts nor allow for the distinctive features due to the fact that the elements in the compound are of distinct logical types.

Two of these distinctive features are of special relevance to the analysis of action and arise out of the truism that what a Judge does is to judge ; for this has two important consequences. First, the Judge's function is, *e.g.*,⁶ in a case of contract to say whether there is or is not a valid contract upon the claims and defences actually made and pleaded before him and the facts brought to his attention, and not on those which might have been made or pleaded. It is not his function to give an ideally correct legal interpretation of the facts, and if a party (who is *sui juris*) through bad advice or other causes fails to make a claim or plead a defence which he might have successfully made or pleaded, the judge in deciding in such a case, upon the claims and defences actually made, that a valid contract exists has given the right decision. The decision is not merely the best the Judge can do under the circumstances and it would be a misunderstanding of the judicial process to say of such a case that the parties were merely treated *as if* there were a contract. There *is* a contract in the timeless sense of "is" appropriate to judicial decisions. Secondly, since the judge is literally deciding that on the facts before him a contract does or does not exist, and to do this is neither to describe the facts nor to make inductive or deductive inferences from the statement of facts, what he does may be either a *right* or a *wrong* decision or a *good* or *bad* judgment and can be either *affirmed* or *reversed* and (where he has no jurisdiction to decide the question) may be *quashed* or *discharged*. What cannot be said of it is that it is either *true* or *false*, logically necessary or absurd.

There is perhaps not much to tempt anyone to treat a judicial decision as a descriptive statement, or the facts as related to legal conclusions as statements of fact may be related to some descriptive statement they justify, though I think the tendency, which I have already mentioned, to regard the exceptions or defences which can defeat claims

⁶ Different considerations may apply in criminal cases.

or accusations merely as evidence of the absence of some necessary condition required by the law in the full definition of a legal concept is in fact an attempt to assimilate a judicial decision to a theoretical model of a descriptive statement ; for it is the expression of the feeling that cases where contracts are held not to exist "must" be cases where some necessary condition, required in the definition of contract, is absent. But sometimes the law is cited as an example of a deductive system at work. "Given the existing law" it will be said "the statement of facts found by the judge entail the legal conclusion." Of course, this could only be said in the simplest possible cases where no issue is raised at the trial except what commonsense would call one of fact, *i.e.*, where the parties are agreed that if the facts go one way the case falls within some legal rule and if they go another way it does not, and no question is raised about the meaning or interpretation of the legal rule. But even here it would be quite wrong to say that the judge was making a deductive inference ; for the timeless conclusion of law (Smith is guilty of murder) is not entailed by the statements of temporal fact (Smith put arsenic in his wife's coffee on May 1st, 1944) which support it ; and rules of law even when embodied in statutes are not linguistic or logical rules, but to a great extent rules for deciding.

II.

If we step outside the law courts we shall find that there are many utterances in ordinary language which are similar in important respects in spite of important differences, to the judicial blend of law and fact, but first, some cases must be distinguished which are not instances of this phenomenon but are important because they help to explain why it has been overlooked.

A. First, we, of course, very often make use of legal concepts in descriptive and other sentences and the sentences in which we so use them may be statements and hence

(unlike the Judge's decision in which legal concepts are primarily used) they may be true or false. Examples of these are the obvious cases where we refer to persons or things by their known legal consequences, status or position. "Who is that woman?" "She is Robinson's wife and the adopted daughter of Smith, who inherited all his property." "What is that in the wastepaper basket?" "My contract with John Smith."

B. Secondly, we may refer to things, events and actions not by their known legal consequences, but by their intended or reputed legal consequence or position. "What did your father do yesterday?" "He made his will." It should be noticed that this use may give rise to some curious difficulties if it is later found that the reputed or intended legal conclusion has not been established. What should we say of the sentence written in my diary that "My father made his will yesterday" if it turns out that since it was not witnessed and he was not domiciled in Scotland the courts refuse to recognise it as a will. Is the sentence in my diary false? We should, I think, hesitate to say it is; on the other hand, we would not repeat the sentence after the court's decision is made. It should be noticed also that we may make use of our own legal system and its concepts for the purpose of describing things or persons not subject to it as when we speak of the property of solitary persons who live on desert islands.

C. Thirdly, even outside the law courts we use the language of the law to make or reject claims. "My father made his will yesterday" may indeed be a claim and not a pure descriptive statement, though it will, of course, carry some information with it, because with the claim is blended reference to some justifying facts. As a claim it may be later upheld or dismissed by the courts, but it is not true or false.

But in all these instances, though such sentences are uttered in ordinary life, the technical vocabulary of the law is used in them and so we are alert to the possibility that they may not function as descriptive sentences though very often they do. But consider now sentences where

the words used derive their meaning from legal or social institutions, for example, from the institution of property, but are simple non-technical words. Such are the simple indicative sentences in which the possessive terms "mine," "yours," "his" appear as grammatical predicates. "This is mine," "This is yours," "This is his" are primarily sentences for which lawyers have coined the expression "operative words" and Mr. J. L. Austin the word "performatory."⁷ By the utterance of such sentences, especially in the present tense, we often do not describe but actually perform or effect a transaction; with them, we *claim* proprietary rights, *confer* or *transfer* such rights when they are claimed, *recognise* such rights or *ascribe* such rights whether claimed or not, and when these words are so used they are related to the facts that support them much in the same way as the judge's decision. But apart from this, these sentences, especially in past and future tenses, have a variety of other uses not altogether easy to disentangle from what I have called their primary use, and this may be shown by a sliding scale of increasing approximation to a pure descriptive use as follows :

(a) First, the operative or performatory use. "This is yours" said by a father handing over his gold watch to his son normally effects the transfer of the father's rights in the watch to the son ; that is, makes a gift of it. But said by the elder son at the end of a dispute with his brother over the family possessions, the utterance of such a sentence constitutes a recognition of the rights of the younger son and abandons the claims of the elder. Of course, difficulties can arise in various ways over such cases analogous to the problems that confront the Judge : we can ask whether the use of the words is a valid method of making gifts. If English law is the criterion, the answer is "yes" in the example given ; but it would be "no" if what the father had pointed to was not his watch but his house, though in this case it may be that we would consider the son morally entitled to the house and the

⁷ See his discussion of some cases in "Other Minds." Proceedings of the Aristotelian Society, Suppl. Vol. XX, pp. 169 to 174.

father morally bound to make it over to him. This shows that the rules which are in the background of such utterances are not necessarily legal rules. But the case to which I wish to draw attention is that where we use such sentences not to transfer or confer rights, but to ascribe or recognise them. For here, like a Judge, the individual decides *on* certain facts that somebody else has certain rights and his recognition is like a judgment, a blend of fact and rule if not of law.

(b) Secondly, sentences like "This is mine," "This is yours," "This is his" can be used simply as descriptive statements to describe things by reference to their owners. Taking visitors round my estate, I say, pointing to a field, "This is mine" or "I own this" purely by way of information.

(c) Thirdly, there are the more casual ascriptive use of these sentences in daily life which are difficult to classify. Suppose as we get up to go I see you have left a pen and give it to you, saying "This is yours" or suppose I am walking in the street and notice as the man in front takes out his handkerchief a watch falls from his pocket. I pick it up and hand it back to him with the words "This is yours." We might be tempted to say that we are using the sentence here simply as a descriptive statement equivalent to "You were carrying this and you dropped it or you left it"; but that this is not at any rate clearly so can be seen from the following considerations. If after we have handed back the watch the police drive up in a car and arrest the man for theft, I shall not willingly repeat the sentence and say it was true, though if it were "descriptive" of the physical facts why should I not? On the other hand, I will not say of what I said that it was false. The position is, of course, that a very common good reason for recognising that a person has some rights to the possession of a thing is that he is observed physically in the possession of it; and it is, of course, correct in such circumstances to ascribe such rights with the sentence "This is yours" in the absence of any claim or special circumstance which may defeat them. But as individuals we are not in the

position of a Judge ; our decision is not final, and when we have notice of new circumstances or new claims we have to decide in the light of them again. But in other respects the function of sentences of this simple and non-technical sort resembles that of judicial decisions. The concepts involved are defeasible concepts like those of the law and similarly related to supporting facts. It would be possible to take the heroic course of saying that sentences like "This is his," "This is yours" have acquired, like the word "give," a purely descriptive sense to signify the normal physical facts on which it is customary to ascribe rights of possession ; but this would not account for the peculiarity of our usage and would commit the mistake of ignoring their defeasible character and identifying the meaning of an expression with which we make decisions or, ascriptions with the factual circumstances which, in the absence of other claims, are good reasons for them. With more plausibility it may be said that there is a sense of "mine," "yours," "his" which is descriptive—the sense in which my teeth (as distinct from my *false* teeth) are mine or my thought and feelings are mine. But, of course, with regard to these we do not make and challenge utterances like "This is mine," "This is yours," "This is his," and it is the logical character of these with which I am concerned.

III.

So much for the ascription and recognition of rights which we effect with the simple utterances "This is yours," "This is his" and the associated or derivative descriptive use of these sentences. I now wish to defend the similar but perhaps more controversial thesis that the concept of a human action is an ascriptive and a defeasible one, and that many philosophical difficulties come from ignoring this and searching for its necessary and sufficient conditions. The sentences "I did it," "you did it," "he did it" are, I suggest, primarily utterances with which we *confess* or *admit* liability, make accusations, or *ascribe* responsibility ;

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and the sense in which our actions are ours is very much like that in which property is ours, though the connection is not necessarily a *vinculum juris*, a responsibility under positive law. Of course, like the utterances already examined, connected with the non-descriptive concept of property, the verb "to do" and generally speaking the verbs of action, have an important descriptive use, especially in the present and future senses, their ascriptive use being mainly in the past tense, where the verb is often both timeless and genuinely refers to the past as distinguished from the present. Indeed, the descriptive use of verbs of action is so important as to obscure even more in their case than in the case of "this is yours," "this is his," etc. the non-descriptive use, but the logical character of the verbs of action is, I think, betrayed by the many features which sentences containing these verbs, in the past tense, have in common with sentences in the present tense using the possessive pronouns ("this is his," etc.) and so with judicial decisions by which legal consequences are attached to facts.

I can best bring out my point by contrasting it with what I think is the mistaken, but traditional philosophical analysis of the concept of an action. "What distinguishes the physical movement of a human body from a human action?" is a famous question in philosophy. The old-fashioned answer was that the distinction lies in the occurrence before or simultaneously with the physical movement of a mental event related (it was hoped) to the physical movement as its psychological cause, which event we call "having the intention" or "setting ourselves" or "willing" or "desiring" to do the act in question. The modern answer is that to say that X performed an action is to assert a categorical proposition about the movement of his body, *and* a general hypothetical proposition or propositions to the effect that X would have responded in various ways to various stimuli, or that his body would not have moved as it did or some physical consequence would have been avoided, had he chosen differently, etc. Both these answers seem to me to be wrong or at least inadequate in

many different ways, but both make the common error of supposing that an adequate analysis can be given of the concept of a human action in any combination of the descriptive sentences, categorical or hypothetical, or any sentences concerned wholly with a single individual. To see this, compare with the traditional question about action the question "What is the difference between a piece of earth and a piece of property." Property is not a descriptive concept, and the difference between "this is a piece of earth" or "Smith is holding a piece of earth" on the one hand, and "this is someone's property" and "Smith owns a piece of property" on the other cannot be explained without reference to the non-descriptive utterances by means of which laws are promulgated and decisions made or at the very least without reference to those by which rights are recognised. Nor, I suggest, can the difference between "His body moved in violent contact with another's" and "He did it" (*e.g.*, "He hit her") be explained without reference to the non-descriptive use of sentences by which liabilities or responsibility are ascribed. What is fundamentally wrong in both the old and the new version of the traditional analysis of action as a combination of physical and psychological events or a combination of categorical and hypothetical descriptive sentences, is its mistake in identifying the meaning of a non-descriptive utterance ascribing responsibility in stronger or weaker form, with the factual circumstances which support or are good reasons for the ascription. In other words, though of course not all the rules in accordance with which, in our society, we ascribe responsibility are reflected in our legal code nor vice versa, yet our concept of an action, like our concept of property, is a social concept and logically dependent on accepted rules of conduct. It is fundamentally not descriptive, but ascriptive in character; and it is a defeasible concept to be defined through exceptions and not by a set of necessary and sufficient conditions whether physical or psychological. This contention is supported by the following considerations:

First, when we say after observing the physical move-

ments of a living person in conjunction with another today, "Smith hit her," or "Smith did it" in answer to the question "Who hit her?" or "Who did it?" we surely do not treat this answer as a combined assertion that a physical movement of Smith's body took place, and that some inferred mental event occurred in Smith's mind (he set himself or intended to hit her); for we would be adding something to this answer if we made any such reference to psychological occurrences. Nor do we treat this answer as a combination of categorical or hypothetical sentences descriptive of a physical movement and of Smith's disposition or what would have happened had he chosen differently. On the contrary, saying "He hit her" in these circumstances is, like saying "That is his," a blend. It is an ascription of liability justified by the facts; for the observed physical movements of Smith's body are the circumstances which in the absence of some defence, support, or are good reasons for the ascriptive sentence "He did it." But, of course, "He did it" differs from "That is his" for we are ascribing responsibility not rights.

Secondly, the sentence "Smith hit her" can be challenged in the manner characteristic of defeasible legal utterances in two distinct ways. Smith or someone else can make a flat denial of the relevant statement of the physical facts, "No, it was Jones, not Smith." Alternatively (but since we are not in a law court, not also cumulatively), any of a vast array of defences can be pleaded by Smith or his friends which, though they do not destroy the charge altogether, soften it, or, as lawyers say, "reduce" it.

Thus it may be said "He did it" ("He hit her")

1. "Accidentally" (she got in his way while he was hammering in a nail).
2. "Inadvertently" (in the course of hammering in a nail, not looking at what he was doing).
3. "By mistake for someone else" (he thought she was May, who had hit him).

4. "In self defence" (she was about to hit him with a hammer).
5. "Under great provocation" (she had just thrown the ink over him).
6. "But he was forced to by a bully" (Jones said he would thrash him).
7. "But he is mad, poor man."

Thirdly. It is, of course, possible to take the heroic line and say that all these defences are just so many signs of the absence in each case of a common psychological element, "intention," "voluntariness," "consciousness," required in a "full" definition of an action, *i.e.*, as one of its necessary and sufficient conditions, and that the concept is an ordinary descriptive concept after all. But to this, many objections can be made. These positive looking words "intention," etc. if put forward as necessary conditions of all action only succeed in posing as this if in fact they are a comprehensive and misleadingly positive-sounding reference to the absence of one or more of the defences, and are thus only understandable when interpreted in the light of the defences, and not vice versa. Again, when we are ascribing an action to a person, the question whether a psychological "event" occurred does not come up in this suggested positive form at all, but in the form of an inquiry as to whether any of these extenuating defences cover the case. Further, when a more specific description of the alleged common mental element is given, it usually turns out to be something quite special and characteristic only of a special kind of action, and by no means an essential element in all actions. This is plainly true of Professor H. A. Pritchards⁸ "setting ourselves" which well describes some grim occurrences in our lives, but is surely not an essential ingredient in all cases where we recognise an action.

Fourthly. The older psychological criterion affords no explanation of the line we draw between what we still call an action though accidental and other cases. If I aim at a post and the wind carries my bullet so that it hits a

⁸ See "Duty and Ignorance of Fact," p. 24 *et seq.*

man, I am said to have shot him accidentally, but if I aim at a post, hit it and the bullet then ricochets off and hits a man, this would not be said to be my action at all. But in neither case have I intended, set myself to do, or wished what occurred.

Fifthly. The modern formula according to which to say that an action is voluntary is to say that the agent could have avoided it if he had chosen differently either ignores the heterogeneous character of our criteria qualifying "He did it" when we use words like "accidentally," "by mistake" "under coercion," etc., or only avoids this by leaving the meaning of the protasis "If he had chosen differently" intolerably vague. Yet our actual criteria for qualifying "He did it," though multiple and heterogeneous, are capable of being stated with some precision. Thus, if the suggested general formula is used to explain our refusal to say "He did it" without qualification when a man's hand is forcibly moved by another, it is misleading to use the same formula in the very different cases of accident, mistake, coercion by threats or provocation. For in the first case the statement "the agent could not have acted differently if he had chosen" is true in the sense that he had no control over his body and his decision was or would have been ineffective; whereas in, *e.g.*, the case of accident the sense in which the statement is true (if at all) is that though having full control of his body the agent did not foresee the physical consequences of its movements. And, of course, our qualification of "He did it" in cases of coercion by threats or provocation (which have to be taken into account in any analysis of our usage of verbs of action) can only be comprehended under the suggested general formula if the protasis is used in still different senses so that its comfortable generality in the end evaporates; for there will be as many different senses as there are different types of defences, or qualifications of "He did it." Some seek to avoid this conclusion by saying that in cases where we qualify "He did it," *e.g.*, in a case of accident, there are, in fact, two elements of which one is *the genuine* action (firing the gun) and the other are its

effects (the man being hit), and that our common usage whereby we say in such cases "He shot him accidentally" is inaccurate or loose. "Strictly," it is urged, we should say "He fired the gun" (action in the strict sense) and "the bullet hit the man." But this line of thought, as well as supposing that we can say what a "genuine" action is independently of our actual usage of verbs of action, breeds familiar but unwelcome paradoxes. If cases of accident must be analysed into a genuine action *plus* unintended effects, then equally normal action must be analysed into a genuine action *plus* intended effects. Firing the gun must be analysed on this view into pulling the trigger *plus* . . . and pulling the trigger into cocking the finger *plus* So that in the end the only "genuine actions" (if any) will be the minimal movements we can make with our body where nothing "can" go wrong. These paradoxes are results of the insistence that "action" is a descriptive concept definable through a set of necessary and sufficient conditions.

Sixthly. When we ascribe as private individuals rights or liabilities, we are not in the position of a judge whose decision is authoritative and final, but who is required only to deal with the claims and defences actually presented to him. In private life, decisions are not final, and the individual is not relieved, as the judge often is, from the effort of inquiring what defences might be pleaded. If, therefore, on the strength of merely the physical facts which we observe we judge "Smith hit her" and do not qualify our judgment, it can be wrong or defective in a way in which the judge's decision cannot be. For if, on investigating the facts, it appears that we should have said "Smith hit her accidentally," our first judgment has to be qualified. But it is important to notice that it is not withdrawn as a false statement of fact or as a false inference that some essential mental event had occurred necessary for the truth of the sentence "He did it." Our ascription of responsibility is no longer justified in the light of the new circumstances of which we have notice. So we must judge again : *not describe again.*

Finally, I wish to say, out of what lawyers call abundant caution, that there are two theses I have not maintained. I have maintained no form of behaviourism for although it often is correct to say "He did it" on the strength only of the observed physical movements of another, "He did it" never, in my view, merely describes those movements. Secondly, I wish to distinguish from my own the thesis often now maintained as a solution or dissolution of the problem of free will that to say that an action is voluntary *means* merely that moral blame would tend to discourage the agent blamed from repeating it, and moral praise would encourage him to do so. This seems to me to confuse the question what we mean by saying that a man has done an action with the question why we bother to assign responsibility for actions to people in the way we do. Certainly, there is a connection between the two questions, that is between theories of punishment and reward and attempts to elucidate the criteria we do in fact employ in assigning responsibility for actions. No doubt we have come to employ the criteria we do employ because among other things in the long run, and on the whole not for the wretched individual in the dock but for "society," assigning responsibility in the way we do assign it, tends to check crime and encourage virtue; and the social historian may be able to show that our criteria slowly alter with experience of the reformative or deterrent results obtained by applying them. But this is only one of the things which applying these criteria does for us. And this is only one of the factors which lead us to retain or modify them. Habit, or conservatism the need for certainty, and the need for some system of apportioning the loss arising from conduct, are other factors, and though, of course, it is open to us to regret the intrusion of "nonutilitarian" factors, it yet seems to me vital to distinguish the question of the history and the pragmatic value and, in one sense, the morality of the distinctions we draw, from the question what these distinctions are.