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## **On Legal and Moral Defeasibility**

*Abstract:* The paper discusses the notion of defeasibility and defeasible norms. It starts by examining different notions and understandings of defeasibility, highlighting key notions and paradigms associated with the concept of defeasibility. By utilizing defeasibility in the legal domain one usually aims to stress either the defeasible nature of law itself (defeasibility of legal norms, defeasibility of legal requirements) as admitting of exceptions that cannot be fully spelled out and specified in advance (a norm-based account of legal defeasibility), or defeasibility in legal reasoning as a consequence of the interpretation of legal provisions or concepts (an interpretation-based account of legal defeasibility). Several different models or interpretations of defeasibility are discussed in order to get a better grip on the issue. In the field of moral theory defeasibility is most often associated with moral principles or rules and is employed to accommodate the alleged exceptions to these moral norms and can thus in principle allow that the moral import of a given feature of action varies from case to case. Four such models of defeasible moral principles will be presented and discussed, namely (a) the model of 'that's it' moral principles; (b) the model of default moral principles; (c) the model of hedged moral principles; and (d) the model of defeasible moral principles as soft laws. At the end similarities and differences between both domains regarding the notion of defeasibility are discussed with a goal to propose a wider understanding of defeasibility covering the whole field of normativity. Several general features of defeasibility models for normativity-related domains are discerned and central features of defeasibility will be pointed out.

*Key words:* defeasibility, exceptions, moral principles, legal norms, legal reasoning.

# On Legal and Moral Defeasibility

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(draft)

The paper discusses the notions of defeasibility in general and defeasible norms in particular. This represents a very wide field of discussion and within it the focus will be on legal and moral defeasibility. By concentrating on defeasibility of legal and moral norms it aims to arrive to a more general understanding of defeasibility covering the whole field of normativity, including all normative domains. The structure of the paper is the following. Section I briefly introduces the concept of defeasibility and relates it to neighbouring concepts and notions. In section II three different models of legal defeasibility are presented and discussed. In section III I present and discuss four models of moral defeasibility, which can then be contrasted with models from the legal domain. In the concluding section a more general model of defeasible norms is considered with a focus on conditions for such a model and thus some of the central features of defeasibility are pointed out.

## I. The concept of defeasibility

The concept of defeasibility, especially in relation to the legal and moral domain, has become more and more popular point of discussion in the last couple of decades (Ferrer Beltrán & Ratti 2012; Hooker & Little 2000; Lance, Potrč & Strahovnik 2009). Defeasibility is a multi-faceted concept that is used in different senses and can be related to various subjects. There are several open questions or dimensions in relation to it. First, there are a number of candidates for being defeasible, among them concepts, norms, rules, standards, principles, ideals, reasoning, facts, opinions, statements, decisions, regulations etc. (Chiassoni 2012, 162). For the purposes of this paper I will focus my attention on defeasible norms, with a hope that what will be established will be in general transposable in more or less direct way to other defeasible phenomena. Next, there are several important open questions about the origins, nature, and scope of defeasibility. And finally, there is a question about the consequences of defeasibility for theoretical aspects of the given normative domain as well as for normative practice. Answers to these questions vary in the debate and we can find deep disagreements on almost all of the mentioned aspects.

The debate on defeasibility can be situated within a more general debate on the question of relationship between general norms and particular cases that has been present in

philosophy since its early beginnings. In Plato's dialogue *Statesman*, we can follow the debate between Socrates and a young stranger from Elea on what defines a good statesman, who would regulate public affairs justly, and the conversation also moves to the question of whether it is possible to rule and govern without laws. The stranger, while trying to defend the affirmative answer to this question, proposes the idea that it is better that a "royal man" governs instead of laws, since "[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". He continues by arguing that the one who governs will probably be unable to avoid any general law being put forward, and so one "will lay down laws in general form for the majority, roughly meeting the cases of individuals . . . under average circumstances", but nonetheless both Socrates and the stranger agree that if exceptions to those general norms were to emerge it would be unwise, unjust, or even ridiculous not to correct those case (Plato *Statesman*, 294a–b, quoted in Schauer 2012, 78).

Similar considerations can be found in Aristotle's *Nicomachean Ethics*. "The reason [i.e. that justice and equity are not quite the same thing, and that equity can be seen as a correction of legal justice; n. VS] is that all law is universal but about some things it is not possible to make a universal statement which shall be correct. In those cases, then, in which it is necessary to speak universally, but not possible to do so correctly, the law takes the usual case, though it is not ignorant of the possibility of error. And it is none the less correct; for the error is not in the law nor in the legislator but in the nature of the thing, since the matter of the practical affairs is of this kind from the start. When the law speaks universally, then, and a case arises on it which is not covered by the universal statement, then it is right, where the legislator fails us and has erred by oversimplicity, to correct the omission – to say what the legislator himself would have said had he been present and would have put his law if he had known" (Aristotle *NE*, 1137a-b).

Such discussions focus on the relationship between general norms on one hand and particularities and exceptions on the other, but often such understanding of these exceptions is not radical enough since they are understood as a sheer consequence of underspecified or incomplete general norms. Among others, Dworkin maintains such an optimistic view: "Of course a rule may have exceptions. ... However, an accurate statement of the rule would take [these exceptions] into account, and any that did not would be incomplete. If the list of exceptions is very large, it would be too clumsy to repeat them each time the rule is cited;

there is, however, no reason in theory why they should not all be added on, and the more there are, the more accurate is the statement of the rule" (Dworkin 1977, 24–25). Genuine defeasibility understood as "the hard problem" goes beyond and includes genuine exceptions, which are not such that they could already be properly included in a general norm or correctly specified subsequently (cf. Chapman 1998, 448).

What do we in fact mean when we say that e.g. a certain norm, rule, reasoning or concept is defeasible? To get an initial grip on the concept it is most useful to relate it to the concept of an exception, in particular to the presence of (the possibility) of exceptions, i.e. cases that on the one hand fall under a certain norm, rule, or concept, but at the same time have unbecoming normative consequences given which we tend to exclude these cases from falling under the mentioned norms, rules, or concepts. The notion of an exception or an exceptional case as opposed to the normal cases is thus the first hallmark of defeasibility. A norm is defeasible if it allows for exceptions, meaning there is a case that the norm should supposedly cover, but it proves otherwise. We must add some further amendments to this initial grasp of the concept. First, an exception must be in a sense "genuine" exception, meaning that the exception is not merely a consequence of an initially poorly specified norm or a use of the "rule of thumb" norms. The defeasibility of norms is in this way not merely due to their incorrect, imprecise or vague formulation that could in principle be resolved or more clearly spelled out. Defeasible norms are not some kind of "rules of thumb"; which we can use most of the time, but which we are also able, if necessary, to specify and turn into an exceptionless norm. If defeasible norms would be associated with just this type of "exceptions" they would not be a particularly interesting phenomenon.

Second, we can add the following posit to this. The set of possible exceptions must be in principle open, meaning that we can never enumerate all the possible exceptions to the norm and in this way close it off. If that would be the case then these taxatively specified exceptions could be built into the norm itself and the norm would cease to be defeasible. Third, a defeasible norm remains the same and retains its normative power even when we are able to find an exception to it; in this sense, it "survives" this exception and can hold for all further, non-exceptional cases. If we were prepared to abandon or modify the norm in the case, when we encounter an exception against it that would make the phenomenon of defeasibility fairly empty. Fourth, a defeasible norm remains in the "normative space" even in the case of an exception and can shed light on the nature of the exceptional case or indirectly influence the final normative solution. We can briefly demonstrate these points with a very simplified example of a supposedly defeasible moral norm: "Causing pain is morally wrong". For this norm to be defeasible it means that (i) it must allow for exceptions, i.e. cases of

causing pain, which are not morally wrong (e.g. cases of justified medical treatment, in which pain is unavoidable, or cases of causing pain as part of sports activities); (ii) these exceptions are genuine exceptions in a sense that they are not merely a matter of an imprecise formulation of the initial norm (e.g. "Unwarranted causing of pain is morally wrong"); (iii) the set of possible exceptions is open, in a sense that we could otherwise reformulate the norm in a way to include all the exceptions (e.g. "Causing pain is morally wrong except in cases where this is part of justified medical procedure or athletic achievement"); (iv) the initial norm remains the same and retains its normative power even after stumbling upon an exceptional case in a sense that the next time a paradigmatic case of pain-causing pops up it will still render our judgement about its wrongness warranted; and (v) the norm can remain a part of the normative space and can influence our judgment in an indirect way (e.g. if we had two options to perform a given medical procedure, both involving pain but one substantially less than the other, then it would still be part of our judgment about which one is morally optimal).

The conceptual space around defeasibility is usually inhabited by a cluster of related concepts, including that of indeterminacy, vagueness, normalcy, and open-texture. Let us try to clear the air around these a bit and we will later see how they are relevant (if at all) in different models of defeasibility.

Defeasibility is often associated with indeterminacy in the sense that a given norm or set of norms does not provide a definite "normative solution" for all cases. But this does not necessarily mean that within a given normative domain there is no such solution to be found, it merely means that relevant norms alone are not sufficient for a resolution of a given case. The next notion is the notion of vagueness; norm can be vague either as a whole or regarding particular concepts or formulations they contain. Vagueness can thus be seen as an origin of the defeasibility of norms. The relationship between vagueness and defeasibility is a complex one to grasp, but it primarily seems to be related to the question of the proper formulation and interpretation of norms. Next, a common approach to the defeasibility of norms is that they are characterised as holding only in normal, ordinary, or paradigmatic cases and circumstances. This readily explains the presence of exceptional cases, but what remains open is how to characterize and flesh-out this normalcy condition.

Defeasibility is also often linked to the famous Hartian concept of "open texture" (Hart 1961, 120-132), in the sense that it is impossible to clearly specify all the necessary and sufficient conditions for the use of a given concept or a given norm (similar to considerations

of vagueness).<sup>1</sup> With this idea Hart can be interpreted as opposing a strictly deductive model of law “as a complete normative system containing a multitude of legal rules and standards plus some fundamental legal principles and doctrine” and within which it is possible to “logically deduce the correct or sound legal decision in any given case” (Boonin 1966, 371). Since one of the key presuppositions of such a model is that it is at least in principle possible to identify and highlight the necessary and sufficient conditions for the application of legal norms, the open-texture nature of legal concepts brings troubles for it. Hart can be read as aiming precisely at this presupposition, not merely highlighting that some legal norms may have exceptions, but a much stronger one “that it is theoretically impossible to enumerate all the exceptions and state all the sufficient conditions for the rule’s application” (Boonin 1966, 372). It is exactly in this vein that most commonly the defeasibility of law is defined as “the idea that law, or its components, are liable to implicit exceptions, which cannot be specified *ex ante* (viz. before the law’s application to particular cases)” (Ferrer Beltrán and Ratti, 2012, 1).<sup>2</sup> This in principle possibility that one can always stumble upon a novel exception prevents the listing of all necessary and sufficient conditions. But the original concept and the related norm remain the same; each new exception “is capable of being absorbed as an exception to the rule without affecting the basic meaning of the rule” (Boonin 1966, 375; cf. Helm 1968, 173–175.). Exceptions therefore do not lead to any radical changes or permutations of legal concepts or norms. As Celano highlights this point, “[b]eing defeasible, the norm somehow survives the impact of such recalcitrant cases. Though somehow revised, amended, qualified, the norm, it is assumed, remains in place: it is still the same norm” (Celano 2012, 268).

## II. Models of legal defeasibility

In this section I want to turn attention to three selected models of legal defeasibility (B. Celano, R. H. S. Tur, R. Guastini) in order to get a better grasp on how defeasibility of legal norms could be understood and how this connects with the general facets of defeasibility outlined above.

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<sup>1</sup> Along these lines, Hart e.g. in relation to the concept of a contract claimed that we cannot put forward an “adequate characterisation of the legal concept of a contract [...] without reference to these extremely heterogeneous defences [facts, which may lead to invalidation or cancellation of the contract, e.g. the concealment of facts, coercion, immorality etc.: n. VS ], 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” (Hart, 1949, 176).

<sup>2</sup> Bix (2012) on the other hand argues that open-textured nature of legal concepts or norms and defeasibility are two independent phenomena and “only broadly analogous, in that both create circumstances in which judges have discretion to create new law or exceptions to existing law”.

The first model of defeasible legal norms starts from already mentioned considerations on the importance of exceptions. In addition to that Celano (2012, 268–287) closely relates defeasibility with the so-called “identity assumption”, namely the assumption that exceptional cases leave the norm intact. Consider the case of conflicting norms. One of the most obvious and straightforward possibilities for addressing the relationship between norms and exceptions is the specificationist approach. Each time when different legal norms conflict and it seems that we will have to make an exception to at least one of them, this model suggests that the proper way to proceed is to conclude that all “we have to do is specify (that is, suitably restrict the domain of application of) at least one of the norms, or the relevant norm, so that, thanks to the inclusion of further conditions within its antecedent ... the conflict – or the unsatisfactory verdict – eventually vanishes” (Celano 2012, 270). Specification reveals itself as the middle and most reasoned way between the pure subsumption model (excluding the possibility of such conflict) on one hand and the intuitive balancing of the relevance of moral norms in each particular case on the other. But the problem of this approach lies in the in-principle possibility of never being able to specify all the exceptions and thus also the claim that we are merely amending the same norm seems hollow according to Celano. “Achieving a fully specified ‘all things considered’ norm, thereby ruling out the possibility of further, unspecified exceptions (apart from those already built into the norm itself) would require us to be in a position to draw a list of all potentially relevant properties of the kind mentioned. And this, we have seen, is misconceived” (Celano 2012, 276).

Celano instead proposes to look at an alternative approach to defeasibility which regards exceptions as already implicitly included or provided for by the norm. A specified norm is thus just a sort of shorthand for the more complex norm that lies in the background. But this approach fails for the same reasons since it understands exceptions not as real or true exceptions – not as real “holes” in the norm – but as some sort of *prima facie* exceptions that allow for the filling in of the holes. Thus one must accept some sort of particularism in order to do proper justice to the (possibility of) genuine exceptions. In relation to this Celano thus proposes an understanding of “norms as defeasible conditionals liable to true exceptions, i.e., conditionals such that the consequence follows, when the antecedent is satisfied, under normal circumstances only” (Celano 2012, 285). With this suggestion to include some sort of a “normalcy condition” in the notion of legal defeasibility he also comes close and appeals to debates on moral defeasibility (especially to attempts to try to specify the notion of normalcy) and we will return to this in the next section.

Similarly, Tur (2001, 355–368) starts with the recognition that the open-textured nature of moral concepts and norms does not merely mean that those norms have exceptions but

that defeasibility goes beyond that, e.g. by claiming that the set of possible exceptions is open. He investigates the adjudication from the perspective that legal rules are typically defeasible, which means that they are hardly ever formulated in a way that would be “just right”, therefore defeasible in the sense that they open possibilities for “rule-generated injustice”. This claim is descriptive and not a conceptual truth and does not mean that we can establish the one and only absolute legal theory that should inform adjudication and our attitudes towards law and legal rules in general. On the other hand Tur does see a prescriptive element in this that in adjudication we should utilize or respect defeasibility more often and more openly. He starts with the recourse role of agents (especially judges, but also lawyers and citizens alike when an action to oppose an unjust consequences of a given rule are at stake and critical reflective attitude is called for) in these processes, that is defined by the responsibility that comes with the role of agents and enables them to override a legal rule in cases where that role’s ends (delivering justice) conflict with the prescribed means (legal rules). Radical alternatives to this are legalism in the form of rule-fetishism and anarchism in the form of rule-scepticism. Thus, this forms a basis for his “own idea that law may be best understood as open-ended, defeasible, normative, conditional propositions, that is in the form ‘if A, then B ought to be, unless...’ (2001, 365)”.

Tur distinguishes between three different versions of the rule-like formulae. The first is the “canonical form of the Kelsenian norm” (2001, 357): “If A, then B ought to be”, which is clearly not defeasible and allows for no exceptions. The second form seemingly allows for them since we can state it as: “If A, then B ought to be, unless x, y, z, ...”, a formulation that is supposed to be complemented by a list of exceptional cases. But, in fact, this type of norm can easily be transformed into the first type since we can include all the exceptions in the antecedent (2001, 359). This brings Tur to the third form of legal rules that are genuinely open-ended: “If A, then B ought to be, unless there is an overriding reason to the contrary”.<sup>3</sup> What does this amendment specify and what could be the sources of these overriding reasons? Tur understands them as considerations that could defeat or override the norm and which arise out of basic evaluative reasons or grounds such as “mercy, justice, equity, purpose, or rights” (Tur 2001, 359). At the end he specifies the general formula of a defeasible norm as follows:

If A (legally defined facts) is, then B (legally determined consequences) ought to be, unless there is EITHER (1) an operative exception, being (i) a known or established exception or (ii) an exception yet to be established; OR (2) an overriding consideration,

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<sup>3</sup> E.g. “If a + b + c exists and neither x, y or z is present, then a contract ought to be recognized to exist, unless it would be unconscionable (or otherwise intolerably unjust) to do so” (Tur 2001, 362).



including (iii) equity and/or justice, (iv) policy, (v) mercy, (vi) purpose, (vii) rights, or (viii) a residual category of 'damn good reason' or 'compelling objection'. (Tur 2001, 368)

For Tur defeasibility is not a mere presence of exceptions, since exceptions could always be build into the rule itself; defeasibility is connected with a more basic notion of overrides (related to consideration of e.g. mercy, justice, equity, purpose, or rights).<sup>4</sup>

The third model of the defeasibility of legal norms is that of Riccardo Guastini (2012, 182–192). Guastini relates defeasibility with notions of axiological gaps and interpretation. The starting point is an understanding of a defeasible norm as a norm that is susceptible to implicit exceptions which cannot be explicitly stated in advance, which in turn means that it is impossible to delimit circumstances that would represent genuine sufficient conditions for its use. Next, Guastini understands defeasibility and axiological gaps as phenomena related to the level of interpretation and not of normative system itself. When in relation to some norm as defeasible we allows for an exception, this creates an axiological gap (that some state of affairs is excluded from the norm and not regulated by some other norm). "Axiological gaps and defeasibility often look like two faces of the same coin. By defeating a rule one excludes from its scope certain fact situations (which on the contrary, according to a different interpretation, would actually be regulated by that rule). Sometimes, such fact situations appear to be regulated by other rules in the legal system, but in other circumstances this is not the case – those fact situations are not regulated by any rule at all. In such a case, there is a gap in the system. Therefore, by defeating a rule, a gap has been produced" (Guastini 2012, 187). What emerges is an axiological gap and not a genuine normative gap since we are not dealing with the absence of normative regulation of a given field, but with a gap that has appeared as a consequence of our interpretation of the norm. Most often a defeasibility and axiological gap appears due to the well-known phenomenon of the restrictive interpretation of a norm that is an argumentative technique for distinguishing between different subsets of different kinds of states of affairs supposedly governed by the same norm. For Guastini, defeasibility and axiological gaps are related to the axiological judgments of the interpreters of norms.

Defeasibility is not a special characteristic of legal principles; it is not an objective property of those norms that is already there before we start to interpret them. Axiological judgments employed within the interpretation are thus not the consequence of some objective defeasibility of the rule itself or a genuine, interpretation-independent normative

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<sup>4</sup> Tur points to several cases of such injustice based overrides to conclude that such defeasibility poses a challenge to exclusive legal positivism if the latter is understood as advocating a fixed conception of rules, specifically because of overrides and their being in conflict with the rule of recognition – the latter can strive to include more and more such sources of defeasibility and recognize them as parts of the law (a difficult task given open-endedness of such sources) or rest its case with that it only identifies some but not all relevant legal sources.

gap, but the origin or a cause of interpretative defeasibility. For Guastini, a literal interpretation is still an interpretation so there cannot be any neutral or value-free interpretation. Not only principles, but also rules can be defeated and therefore we cannot understand the presence of principles in the legal system as an origin of defeasibility. "Defeasibility and axiological gaps simply depend on interpreters' evaluations, and such evaluations often take the form of juristic 'theories' – 'dogmatic' theses framed by jurists in a moment logically previous to interpretation of any particular normative sentence and independently of interpretation. [...] Defeasibility does not pre-exist interpretation – on the contrary, it is one of its possible results. And interpreters' evaluations are precisely a cause, not an effect, of rules defeasibility, *we introduce exceptions to the rules when their 'strict' application would give rise to consequences that appear unjust* [this last italicised part appears only in the Italian original of Guastini's paper and in its Slovenian translation; n. VS]" (Guastini 2012, 189). The open-texture or vagueness of concepts therefore cannot be seen as special sources of defeasibility; they are merely ineliminable characteristics of natural languages. "Rules [...] are inert, they do nothing: they let themselves be defeated, but do not defeat themselves. As beauty is in the eye of the beholder, in the very same way defeasibility is not in rules, but in the attitudes of interpreters" (Guastini 2012, 190). Even though Guastini's model is a model based on interpretation approach to defeasibility, it still highlights several important dimensions. While Guastini is exceptionally clear in his arguments and examples, he seems to operate with a relatively narrow understanding of defeasibility at least from the aspect that the platitudes related to defeasibility point out that an "exception" to the rule is somehow informed by the rule itself and that the rule fully "survives" this point of meeting an exception. Within his picture nothing similar takes place; the interpretation is narrowed and the gap filled by a negative rule or condition.

### III. Models of moral defeasibility

Most models of the defeasibility of moral principles were developed within or as a consequence of the debate on moral particularism that appeared with the work of John McDowell (1998) and especially Jonathan Dancy (1983; 1993; 2004). Moral particularism questions the existence of exceptionless general moral principles,<sup>5</sup> proposing instead an

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<sup>5</sup> "Moral particularism, at its most trenchant, is the claim that there are no defensible moral principles, that moral thought does not consist in the application of moral principles to cases, and that the morally perfect person should not be conceived as the person of principle. There are more cautious versions, however. The strongest defensible version, perhaps, holds that though there may be some moral principles, still the rationality of moral thought and judgment in no way depends on a suitable provision of such things; and the perfectly moral judge would need far more than a grasp on an appropriate range of principles and the ability to apply them. Moral principles are at best crutches that a morally sensitive person would not require, and indeed the use of such crutches might even lead us into moral error" (Dancy 2013).

understanding our moral reasoning as essentially connected with our discernment of moral reasons in each particular situation and forming a judgment based on that discernment.

Initially the basic argument behind particularism rested on the idea of the holism of reasons or context-sensitivity of reasons, i.e. that the moral import of a given feature of action depends on the context in such a way that we cannot predict its functioning from one situation to another (Dancy 1993; 2004). This would supposedly preclude the formulation of exceptionless moral principles linking features of our actions with their moral import or status. One of the important shifting points in the debate was the recognition that such context-sensitivity or variability of reasons<sup>6</sup> does not necessarily imply the impossibility of general moral principles and that the two questions, namely (i) the structure and functioning of reasons (variabilism/invariabilism) and (ii) the possibility of general principles, rules or norms (generalism/particularism) must be separated.<sup>7</sup> Moral particularism can be characterised by a negative attitude to moral principles and generalism on the other hand as seeing principles as basic for moral reasoning and morality as such. Variabilism can be defined as a view that the moral import of a given feature of action (reason) can vary from case to case; invariabilism thus claims that a feature has the same moral relevance whenever it is instantiated. By separating these the debate therefore takes place on two levels, one being the level of moral reasons and the other the level of moral generalities (moral norms, principles, rightness, obligation). What we are therefore left with are four possible combinations (invariabilistic generalism, variabilistic generalism, invariabilistic particularism and variabilistic particularism). It is precisely in such "mixed" position of variabilistic generalism that theories of defeasible moral norms emerged.

One of the main motivations behind attempts to argue against traditional moral particularism (variabilistic particularism) was the worry about the flattened moral landscape that was raised in a similar manner by several authors (McNaughton and Rawling 2000; Crisp 2000; Bakhurst 2000; McKeever and Ridge 2005) and can be summarised in the following way.

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<sup>6</sup> Instead of talking about the holism of moral reasons, I will continue to focus here on the variability of reasons. Holism is a broader view that can encompass different claims, namely: (i) the context-sensitivity of moral relevance (a feature is a reason in one case, but not in another); (ii) the variability of moral polarity (a feature is a reason for an action in one case and a reason against in another); (iii) the variability of the strength of reason (the strength of a reason varies from case to case); (iv) organicity (reasons (for and against an action) do not add up in a simple, additive way); and (v) that the set of morally relevant features of actions is open.

<sup>7</sup> Cf. Holton 2002 and McKeever & Ridge 2006. Sensitivity to context could be captured in a set of general moral principles that would track exactly this sensitivity. If one wants to argue for particularism from holism an additional thesis must be introduced in the argument, namely that the context-sensitivity of reasons is 'uncodifiable', which is what particularism still wishes to establish. This really gives us particularism, but the burden of proof is now shifted towards arguing for this additional thesis. (Some particularists do not base their argument for particularism on holism or reasons, e.g. Thomas (2011) argues from the non-monotonicity of practical reasoning to moral particularism.

Given the holism of reasons the set of morally relevant features of actions is open; therefore any feature can be morally relevant and can stand as a reason for or against an action. Further – given the particularistic thesis – this set of features cannot be ordered by general principles, since the moral relevance varies from case to case. But why does morality on the other hand seem to be ordered in this manner? Why do we so often think that the morally central features have to do e.g. with causing pain and suffering, sincerity, honesty, the keeping of promises, benevolence, dignity of persons etc.? In more general terms, we can specify this concern in a way that one must find a middle way between the traditional model of exceptionless principles and a pure discernment theory that sees moral judgments as similar to the perception of the moral status of acts in each particular situation. These alternative approaches employ the notion of defeasibility.

The bulk of the more recent debate has thus dealt with a way to combine the variability of reasons with some kind of ethical generalities, precisely to avoid the flattening of the moral landscape and to preserve an initially appealing intuition that morality has to do with principles, while at the same time accommodating the variability of reasons that could represent an exception to moral principles. It seems that the overall dialectics is thus the following. Variabilism does not imply or even support moral particularism. Variabilism is nonetheless an appealing position that moral particularism pointed out. One should then find a way to capture this variability of moral reasons by a set of moral principles that can accommodate this context-sensitivity of reasons and explain all the examples of variance that particularism exposed.

A number of approaches have been put forward to resolve the issue of the flat moral landscape, many of them sharing the characteristics of offering a type of defeasible moral generalities that would be sufficient to explain the basic concerns behind it and at the same time allowing for some sort of variability of moral reasons and exceptions to moral norms. Here we will highlight four such models, namely (a) *'that's it'* moral principles; (b) *default* moral principles; (c) *hedged* moral principles; and (d) *defeasible* moral principles as *soft laws*.

*"That's it" moral principles:* *That's it* moral principles are part of a theory of principled particularism, a suggestion put forward by Holton (2002). These *that's it* moral principles escape what Holton calls the supersession argument, that is the argument that we can always provide an exception to a given moral rule or norm by pointing to some further possible feature of an action that would overturn our original judgment about a case.<sup>8</sup> For example,

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<sup>8</sup> "[G]iven any action whose features are described in non-moral terms, and a principle that says that an action having those features will be good, we can always think of some further feature which is such that, were the action to have that feature too, it would become a bad action. So the principle is inadequate as it stands. It must be

killing somebody is wrong, but not if it is done in justifiable self-defence. Therefore, we can devise moral principles that would explicitly exclude any further feature of actions that might provide such exceptions. Instead of *For all actions x: if x is a killing of a person → you should not do x*, we can devise a modified principle *For all actions x: if (x is a killing of a person & that's it) → you should not do x*, where the *that's it* functions so as to exclude any other relevant moral considerations, including that no other moral principles apply in the given case.<sup>9</sup> Further, when we find an exception that would otherwise overturn the original, unmodified principle, we can construct another moral principle that applies in all similar cases, e.g. *For all actions x: if (x is a killing of a person & it is a case of self-defence & that's it) → you are permitted to do x*. What we end up with a view according to which there is always a finite set of moral principles that entails and justifies a given moral verdict (Holton 2002).

*Default moral principles:* Default moral principles figure in an attempt by McKeever and Ridge to formulate an intermediate position labelled generalism as a regulative ideal. McKeever and Ridge argue that the possibility of moral knowledge in a particular case presupposes the availability of a certain kind of moral principles, namely default principles. These principles emerge out of recognition of a reason for action, i.e. a descriptive feature of a situation that favours or disfavors a certain action; together with a presupposition that there are no further morally relevant features present in a situation this yields a moral judgment. All this invites the possibility that this structure supporting reasons can be captured by a default principle. Such principles have the following general form:

For all actions x: if (i) x is A; and (ii) no other feature of the situation explains why x being A is not a moral reason not to perform the action; and (iii) any reasons (considered collectively) to x do not outweigh the fact that x is A, then x is wrong by virtue of being A (McKeever and Ridge 2006, 118).

We can rehearse a similar example as the one above. If an action is a killing of an innocent human being and no other feature of this action explains why this fact is not a moral reason not to perform the action and any reasons for this action do not (taken collectively) outweigh the fact that it is a killing of an innocent human being, then this action is wrong by virtue of being a killing of an innocent human being.<sup>10</sup> Instead of rightness and wrongness one could

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modified, or a further principle must be given outlining the exception. But once we have done that an exception to the amended principle(s) will be found, and we will be forced to amend again. And so on" (Holton 2002, 4).

<sup>9</sup> Holton specifies the *that's it* premise in the following way: "There are no further relevant moral principles and non-moral facts; i.e. there is no true moral principle and set of true non-moral sentences which supersede those which appear in this argument" (Holton 2002, 6).

<sup>10</sup> Such default principles emerging out of judgments about particular cases are the basis for McKeever and Ridge's defence of moral generalism. After they defend them against various objections, they take a step forward to unhedged principles. In order to defend generalism against particularist claims, they must show that the set of

bring into play any other thin verdictive moral predicates like obligatory or construct a default principle for being a moral reason.

We can see that default principles follow the idea already present in the *that's it* principles since they delimit the scope of morally relevant considerations in situations in which the principle applies, thereby eliminating the possibility of any exceptions to them by putting them outside the scope of principles. What is different from the *that's it* principles approach is that the default principles more closely follow the structure of moral relevance initially defended by Dancy in terms of the difference between reasons (favourers) and enablers<sup>11</sup>, e.g. the absence of specific disablers is ensured by condition (ii) and the presence of a general enabler in (iii). Both models are similar in that they devise moral generalities that are compatible with the context-sensitivity of the moral import of features of acts by 'disciplining' it and breaking the moral import of considerations into several invariable pieces. This seems to go against the spirit of defeasibility as we have sketched it at the beginning.

The following two approaches are somewhat different in this respect since they do not explicitly exclude variability from the principles.

*Hedged moral principles:* Hedged moral principles include the "normative bases" of reasons inside moral principles (Väyrynen 2006; 2008; 2009). An example of a hedged moral principle is: *For any action x, if x is F, then x is M by virtue of being F, provided that x instantiates the designated relation R for F and M* (where F stands for a reason (e.g. stand for causing pain), M for moral evaluation (e.g. wrongness) and R for the relation specifying the normative base of the reason (e.g. failing to exhibit the kind of concern or respect, which persons merit<sup>12</sup>). Väyrynen claims that just what relation R is, is a substantive moral question and we can even avoid the specific reference to it if we formulate a hedged principle as follows: *For any action x, if x is F, then x is M by virtue of being F, provided that x instantiates the designated relation for F and M*; e.g. Any act of causing pain is *pro tanto* wrong by virtue of its causing pain, provided that the act instantiates the designated relation for *causing pain* and *being pro tanto wrong*.

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morally relevant features is limited. The starting point of these arguments is practical wisdom – a practically wise person, according to McKeever and Ridge, is someone who has successfully internalised a finite and manageable set of unhedged moral principles that codify morality. Given a plausible assumption that moral thought and judgment presuppose the possibility of practical wisdom, a defender of generalism now has an argument against (anti-transcendental) particularism.

<sup>11</sup> A favourer is a feature that favours a given action, while the enabler (or enabling condition) enables the favourer to favour an action and stand as a reason for the action. E.g. the fact that I made a promise to do A favours this action, while further facts that my promise was not given under duress and that I am able to do A function as enablers (Dancy 2004, 38-45).

<sup>12</sup> In the case of a principle prohibiting killing of an innocent man such basis could be spelled out in the following way. "I propose, as first approximation, that one's judgment is guided by one's conception of the basis for the wrongness of killing. Suppose I believe that what is fundamentally wrong about killing a person, when it is wrong, is that it frustrates the victim's prudential interests in particular, her interest in continuing to live" (Väyrynen, 2009).

We can reformulate this proposal in terms of suitable conditions. F is a reason for action A when the conditions are suitable (when the presence of both overrides and underminers is ruled out), which means that conditions are suitable for F with respect to being M if and only if the relation responsible for F's having the normative force it does (if any) is the designated relation for F and M (Väyrynen, 2009).

The following model that will be presented also employs a similar notion of privileged conditions in which the relevant reason 'behaves normally', as opposed to the conditions that are not privileged and where it can vary its moral relevance.

*Defeasible moral principles as soft laws:* A model of defeasible principles is defended in a series of papers by Little and Lance (2005; 2006; 2007; 2008). Their model is clearly committed to variabilism since it incorporates what they call *deep moral contextualism*: right- or wrong-making, and good- or bad-making features of actions vary with context in ways that preclude codification by exceptionless principles. Lance and Little argue that the full-fledged recognition of exceptions to moral generalisations does not mean that one must accept a picture of morality as being entirely free from any important kind of generalities. The sharp divide between generalism and particularism is a consequence of too strict and narrow views about the nature of explanation. According to these views, genuine explanatory reasons must be governed by universal exceptionless principles. An alternative model of explanation figuring exceptions is offered, a model that covers non-moral ground as well. Features of such acts as promise-keeping, lying, inflicting pain or being kind are building blocks of everyday morality that entertain an intimate connection with their moral import (as core moral reasons that can unflatten the moral landscape). Those are genuinely explanatory features for the moral status of acts and may be captured within defeasible generalisations. Defeasible principles (e.g. *Defeasibly, lying is wrong; Defeasibly, killing is wrong, or Defeasibly, causing pain is wrong*) are introduced through the notion of privileged conditions. If we want to single out a connection between a particular descriptive feature of such act as "causing pain" and between the negative moral import of this feature that is neither necessarily universal nor pervasive or usual, we can do this by saying that defeasibly, causing pain is wrong-making. When a defeasible generalisation faces an exception something has gone off course – the context has relevantly changed in respect to privileged conditions and our moral understanding must track this. There are several types of such defeasibility dynamics, such as the paradigm/riff, justificatory dependence, and idealization/approximation.<sup>13</sup> Moral understanding is the

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<sup>13</sup> There are cases where a defeasible generalization tracks the paradigm cases, which are in this sense privileged, as it is in the case of Defeasibly, chairs are things we sit on, and there are riffs of this paradigm as in the case of ornamental chairs. The moral case would be the case of pain as defeasibly bad-making, but not so it the case of

understanding of the structure of moral privilege and exception. One must understand the nature of a certain feature in privileged conditions and when outside of such a context, the relation of this last context to the first one, the required compensatory moves, and the acceptability of various deviations (Lance and Little 2008, 64-68).

These are the four most recent attempts to capture the notion of defeasibility as it pertains to moral norms. We can recapitulate them in the following schematic way.

<i>'That's it'</i> principles	For all actions x: if x is A & that's it, then x is wrong/you should not do x.
<i>Default</i> principles	For all actions x: if (i) x is A; and (ii) no other feature of the situation explains why x being A is not a moral reason not to perform the action; and (iii) any reasons (considered collectively) to x do not outweigh the fact that x is A, then x is wrong by virtue of being A.
<i>Hedged</i> principles	For all action x: if x is A, then x is W (morally wrong) by virtue of being A, provided that x instantiates the designated relation R for A and W.
<i>Defeasible</i> principles	Defeasibly, for all actions x: if x is A, then x is wrong/you should not do x. In privileged conditions, for all actions x: if x is A, then x is wrong/you should not do x.

All the models tend to accommodate the alleged exceptions to the moral norms and thus in principle allow that the moral import of a given feature of action varies from case to case. One of the differences between them is that the latter two kinds of soft principles differ from the first two in a sense that they do not exclude exceptions to the norms in advance. These are sorted out later, when we e.g. must make a judgment on whether the case in hand really instantiates the relevant normative basis or if the privileged conditions are in force. In the terminology outlined above they allow for genuine exceptions.

#### **IV. Defeasibility in the normative domain**

Despite several differences between the models of legal and moral defeasibility they nonetheless share many important similarities. In this last section we will thus try to briefly outline conditions for a general model of defeasible norms. Many of the desiderata for this model were already mentioned at the beginning. The model must allow for genuine exceptions; a defeasible norm must allow for genuine exceptions that can be made in the light of e.g. the specificity of the case in hand. Next, the model must not limit the scope of possible exceptions in a way that it would be possible to list and include them in the principle itself

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athletic achievement. In other cases there is justificatory dependence between privileged and non-privileged cases in a sense that we must appeal to the privileged cases in order to explain and understand what is going on in a non-privileged case (e.g. lying and lying as a part of the Diplomacy game). And lastly, there could be idealization-approximation relation, as in the case of ideal gas law  $pV = nRT$  and actual behaviour of actual gases and in the moral case that in the Kingdom of Ends (full information, genuine autonomy, basic trust) people are owed the truth. (Lance and Little 2008, 64-73).



(open-endedness condition). Also the model must be such as to leave the initial norm intact when we make an exception to it; a defeasible norm must survive beyond this case of making an exception still remaining the same norm as before (identity condition). A defeasible norm must be such as to have a possible normative pull even in exceptional cases (possible relevance condition). And lastly, the model must be able to cover or accommodate legal, moral and all other normative domains, i.e. including but not limited to law, morality, epistemology, aesthetics,<sup>14</sup> social conventions, and etiquette.

These conditions delimit the scope of possible options for general notion of normative defeasibility. There are several open options how to proceed from here. One of the most plausible ones is to specify the formula for a defeasible norm simply with a prefix "defeasibly, ..." and then go on to further specify both general and domain-specific structures of defeasibility. Given the differences between the mentioned normative domains it is not hard to imagine, that there might be some variations in these structures. If in the domain of legal norms, there is a possibility to appeal to some sort of axiological background, then in the domain of moral norms this would mean more or sort of appeal to moral pluralism. Perhaps some domains (e.g. moral norms, epistemic norms, norms of etiquette) allow for a wider scope of defeasibility than legal domain.

We have seen that in the case of legal and moral norms one of the ways, in which the notion of defeasibility would be able to accommodate these conditions and requirements, is by developing an account that includes an appeal to a wider set of evaluative, axiological or normative background of basic moral and legal considerations. Models of defeasibility developed by Celano, Tur, and Lance and Little are attractive models, but they have to be understood against a background of basic reasons that we appeal to in deciding the relevant case or in our interpretation of a given norm. Lance's and Little's suggestion is possibly the most developed as regards the proposals to understand structures of defeasibility (paradigm/riff, justificatory dependence, idealisation/approximation, etc.; Lance and Little 2009). But nonetheless it seems that no matter how we work out these structures defeasible norms must appeal to some wider set of basic (moral, legal, ...) considerations that lie in the background and illuminate the exceptions.

Such basic values as an axiological background establish the framework for the functioning of individuals and societies alike, whether these frameworks are delineated by morality or by law. In more general terms, we can thus distinguish two fundamentally different views of the "codification" of such a background; on one hand, there is generalism which

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<sup>14</sup> Cf. Strahovnik 2004.

combines the possibility of codification and a deductive model of normative thought and, on the other hand, particularism which rejects the possibility of the (complete) codification of the field of normativity. The approach, which builds upon the notion of the defeasibility of norms, sits between the two approaches mentioned above. The defeasibility of at least some norms can be interpreted as a consequence of normative pluralism, the possibility of a conflict between fundamental considerations and the richness of the axiological background.

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