

Session 12 Hart and Honoré, selections from *Causation in the Law*

I. Causation and Responsibility in Law and Morality

How might moral responsibility and legal responsibility come apart, even in a just legal system?

- In moral case, we make judgments of responsibility to assign praise and blame, to punish, and sometimes to determine whether and from whom compensation is required.
- In the legal case, we are also often concerned with punishment and with securing compensation.
- Can we be properly legally punished only for harms/risks of harm for which we are also *morally* responsible? H & H:

the fact that individuals have a type of connection with harm which is adequate for moral censure or claims for compensation is only *one* of the factors which the law much consider, in defining the kinds of connection between actions and harm for which it will hold individuals legally responsible. (p. 795)

Is it a necessary condition?

- Holding people *legally* responsible for every *moral* transgression would be too costly:
 - ... with respect to the legal infrastructure it would require;
 - ... with respect to the chilling effect it would have on many other valuable activities of society.
 - ... Limited liability may sometimes be socially preferable (e.g. the house-burning case)
- Conversely, social needs may require that someone be held *legally responsible* even where they are not morally responsible for some harm:
 - ... e.g., where no one is morally responsible, but there is a need for compensation – as in the case of parents’ legal responsibility for harm caused by their young children when they could not have prevented it;
 - ... e.g., where the person best placed to compensate is not the person (most) morally responsible for the harm (suing companies for damage done by their employees, Feinberg’s bank-robber case, reparations)
 - ... some of these cases may also be cases of people taking moral responsibility for harms they did not cause (e.g., the reparations case)
- So: moral responsibility seems neither necessary nor sufficient for legal responsibility.

- Also: Moral responsibility may properly be left a “vaguer” concept than legal responsibility:
 - we can afford to suspend moral judgment in cases where we cannot afford to suspend legal judgment: we tend not to be able to give a precise assessment of moral responsibility in any but the simplest cases, but the law must often determine precise legal responsibility in quite complicated and outlandish cases (e.g. *Palsgraf*)
 - The law must also sometimes, for reasons of practicality, draw sharp boundaries where morality does not: that is, two cases which would strike us as very similar *morally* may fall on different sides of some legal divide, and so be treated quite differently by the law (e.g. speed limits – depending, of course, on how we think the obligation to obey the law works)

II. Tracing the Consequences

For which consequences of our actions, broadly understood, should we be identified as the cause, in a defeasible responsibility-implying sense?

- Every practical purpose which pushes us to identify a *cause*, including but certainly not limited to the law, will carry with it implicit limits on what we will count as a cause or a consequence: e.g., explaining perplexing occurrences, attributing legal or moral responsibility, assessing contributions to the course of history...
- Our starting point in asking “what caused event E?” may be the set of *necessary conditions* for the occurrence of E. But this casts much too wide a net:
 - e.g., the waiter’s placing of the knife on the table is a necessary condition of the stabbing, but we would not say he caused the stabbing.
- So: how should we identify which necessary conditions are causes (and which later effects “consequences”) in the sense we’re after? Some suggestions:
 - The consequences of my action are those I *intended*, or *foresaw*, or *could have foreseen with reasonable care*.
 - *But*: “If smoking is shown to cause lung cancer, this will permit us to describe past as well as future cases of cancer as the consequence of smoking, even though no one foresaw or had reasonable grounds to suspect this in the past.”
 - Perhaps (as the case of the waiter may suggest) the *cause* of some event or harm is the set of voluntary actions that are necessary conditions for that harm, where no other voluntary action intervenes between the voluntary action(s) and the harm.
 - *But*: Sometimes we’re responsible for a harm even if another agent “intervened” in the causal process – e.g. if we left the car door unlocked in a high-theft area and the car was stolen.

- Perhaps I'm responsible for some event or harm E if that event or harm is tied to my action by "general laws asserting regular connection": that is, actions like mine usually lead to events or harms like E.
 - o *But*: we can sometimes trace a causal connection of the sort that interests us even when the initial action and the final event are not tied by any general laws of that sort (e.g. when a bizarre series of events leads to the fall of a tile that causes someone's death (Big Dig)).
- Also, should *objective* or *subjective* probability lead to judgments of cause? Both seem to have problems...
- Hart and Honoré's general account:
 - (1) Generally, the intervention of a *voluntary act* or a conjunction of events amounting to *coincidence* in the causal chain operates as a limit on our notion of cause, in the sense that events subsequent to these are not attributed to the antecedent action or event as its consequence even though they would not have happened without it.
- Some examples:
 - o Forest fire cases: the breeze necessary to cause the fire is not an "intervention" or a coincidence – rather, it's a "mere circumstance" or "mere condition" "through' which we trace" the events. But the presence of another agent fanning the flames, or pouring gasoline on them (if it's a necessary condition for the fire), does constitute a voluntary intervention sufficient to break the causal chain, regardless of the intentions of the original agent.
 - o The breeze seems to count as a background "condition" or "circumstance" in part because it's a common and pervasive feature of the environment. But H & H seem to think that even unlikely background conditions won't break the causal chain in the necessary way (e.g., the eggshell skull case – also, getting into a fist-fight with a guy with a heart-condition) – here H & H point to the fact that courts routinely treat such cases differently from cases in which the unlikely contributing factor was an *event* as opposed to an *abnormal prior condition* that was part of the "stage already set" before the act. *Do you think this distinction is defensible?*
- What makes an intervening action *voluntary*?
 - o Must be "fully" voluntary: not the result of defective muscular control, lack of consciousness or knowledge, the result of duress or predicaments (created by the first agent), the absence of 'fair' choice...
 - o Examples: the punch and the tree:
 - A causes B's bruises but not his death;
 - A's intent is irrelevant;

- so is the fact that the degree of harm resulting isn't the "normal" result of the punch (after all, according to H & H, A would be responsible for B's death if it was due to the punch plus a rare heart weakness, or if the punch caused B to fall into the tree and that caused the tree to topple onto B, killing him).
 - Also, A would not be responsible for the tree breaking B's watch, even if a broken watch *is* a normal consequence of a fist-fight.
- What makes a conjunction of events count as a *coincidence*?
- o The conjunction of the events with the action is "very unlikely by ordinary standards"
 - o Is for some reason significant or important (e.g. has a major effect on the resulting event)
 - o Occurs without human contrivance (by the agent whose causal role we're assessing?) – e.g., in tree case, despite the unlikelihood of success, if A had deliberately pushed B down under the tree in the hopes that it would later fall on him, the falling of the tree wouldn't count as coincidental).
 - o The events are *independent* of each other (e.g., the tree wasn't caused to fall by A's punching B, by, say, B's falling into the tree). This is why the heart attack that results from punching the guy with the heart condition doesn't count as a coincidence.
 - o Why doesn't the heart condition itself count as a coincidence? Because it's a "condition", not an event. *Again, can we defensibly discriminate on this basis?*
 - o Judging some conjunction of events to be coincidental is often a matter for judicial discretion, and may, for two reasons, resist precise formulation:
 - No precise statement how unlikely a conjunction must be to count as a coincidence, and in light whose knowledge: H & H – "very unlikely in the light of the knowledge available to ordinary men" (e.g., doesn't undermine coincidence claim in tree case if a tree specialist could have recognized on the basis of tree rot that the tree was about to fall).
 - Also, how coincidental the conjunction seems will depend on the precise description we give of the events (e.g., the tree's falling at *exactly this time in exactly (to the millimeter) this place* may seem a bigger coincidence than the tree's falling about now, about here). The choice of an appropriate description depends on the "degree of specificity of our interests in the final outcome of the causal process."

(2) Two kinds factors can provide exceptions to Hart and Honoré's general account:

- *Opportunities*: “The discrimination of voluntary interventions as a limit is no longer made when the case, owing to the commonness or appreciable risk of such harmful intervention, can be brought within the scope of the notion of providing an opportunity, known to be commonly exploited, for doing harm.” (p. 802).
 - One question we’ll ask ourselves in this context is whether the likelihood of the intervention’s occurring is high enough to render the behavior of the original agent *negligent*. (*Is this putting the cart before the horse? After all, aren’t we looking at cause in part to determine negligence?*)
- *Reasons*: Even a fully voluntary intervention may not “break the causal chain” in the way we have been describing if the first agent gave the second good reason (by bribing or advising or persuading him to act) to intervene. (Here, we naturally speak of A’s “procuring” or “inducing” B’s act.)
 - *There may be some interesting questions raised here about when things don’t go quite according to plan...*

III. *Questions*

- Can the length of a causal chain break responsibility? (E.g. *Palsgraf*)
- Can we appropriately rely on the distinction between coincidental events and unlikely background conditions?
- Is there a better, simpler way of accounting for legal responsibility, e.g., based exclusively on foreseeability of the harm?

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