

Luck, responsibility, and counterfactuals

1. In an article of some years ago, Joel Feinberg contended that the justification of punishment should not be based on purely circumstantial grounds, as this would expose punishment to mere luck. Cases of this sort are best highlighted by thought-experiments in which the causal relation holding between an action and its effect elicits two distinct consequences:

A₁, with the conscious objective of killing his enemy B₁, gets B₁ in the sight of his rifle and carefully squeezes the trigger... [E]verything works out as A₁ planned....as A₁ intended, B₁ dies as a result.

Now consider another narrative with only a slight variation in the facts. This involves A₂,... he has precisely the same hatred for him that A₁ had for B₁ in the first story. He too sets out to kill his enemy. [...] A₂ misses his shot, and therefore escapes guilt for murder, since there can be no murder without someone dying as its consequence. On these facts, A₂ will be guilty only of attempted murder ... His unfortunate counterpart A₁, on the other hand, could be convicted of first-degree murder, and in most states he would be condemned to either life imprisonment or the death penalty. [...] In these examples, the moral blameworthiness of the criminals is identical; yet the punishment is much more severe in one case than in the other. Unless there is some reasonable explanation for this discrepancy, the sentences seem to be more arbitrary than rational, the difference between the fates of A₁ and A₂ being determined not by their deserts but by luck, plain and simple. [Feinberg 2003: 78]

2. A fine-grained analysis of intentional causation should provide a «reasonable explanation» for the discrepancy. However, such an explanation is unattainable if we analyse causation in counterfactual terms: the antecedent of the counterfactual does not grant the modal robustness required for eliciting mutually exclusive consequents: the failure in distinguishing between cases of successful and attempted murder shows that the justificatory force associated with counterfactual reasoning in ascertaining responsibility relies upon putative causal relations, which do not amount to an argument for attributing responsibility in the *actual* case. The papers presents two arguments to this effect.

2.1. Chance events deserve the status of actual and yet contingent events: in the jargon of the possible worlds, such events take place in the *actual* world, and therefore are also *possible*, but are not *necessary* in every possible world. Chance factors are *ineffable*, until they become manifest. Fairly enough, we should concede that actual sequences of events, once described as *a posteriori*, show a propositional surface which cannot but be couched in general terms. But, that description does not alter the contingent metaphysical status of the events involved. Indeed something is altered in a general description of this sort: detaching a chance event from the actual situation, recombines the whole situation in which the event originally occurred. As a consequence, one had to describe not what happened, but what *would* have happened.

2.2. Feinberg's case is a spurious comparison: it lets us imagine a hard case by adding an element to the initial situation; yet, in doing so, we are driven by our intuitions in the former case as they were still valid in the latter. But, the second scene inhabits in a fictional, not the actual world. Feinberg- style cases counterfactuals have a rather constitutive, not an expressive function.

Should we then say that we are only dealing with figures of speech, and that our imagination is tricked? Understanding the limit of counterfactual analysis can help us to delimit their province, their ambit of validity and proper function. Usually, fictional cases are important heuristics in sorting out aspects of

complex situations, or bypass the extremely costly computational effort involved in the analysis of complex situations. In fact, counterfactual models turns out to be a essential component not only in inductive, but also abductive argumentation, which has such a large importance in practical and legal reasoning.

References

Feinberg, Joel (2003), «Failed Attempts: Equal Punishment for Failed Attempts», in Id. *Problems at the Root of Law*, Oxford University Press.