

Brooklyn Law Review

Volume 68

Issue 4

Symposium:

Responsibility & Blame: Psychological & Legal
Perspectives

Article 1

6-1-2003

Introduction

Lawrence M. Solan

Follow this and additional works at: <https://brooklynworks.brooklaw.edu/blr>

Recommended Citation

Lawrence M. Solan, *Introduction*, 68 Brook. L. Rev. 925 (2003).

Available at: <https://brooklynworks.brooklaw.edu/blr/vol68/iss4/1>

This Article is brought to you for free and open access by the Law Journals at BrooklynWorks. It has been accepted for inclusion in Brooklyn Law Review by an authorized editor of BrooklynWorks.

Brooklyn Law Review

Volume 68

2003

Number 4

SYMPOSIUM: RESPONSIBILITY AND BLAME: PSYCHOLOGICAL AND LEGAL PERSPECTIVES

INTRODUCTION*

Lawrence M. Solan[†]

This issue contains the proceedings of a Symposium held at Brooklyn Law School on October 18, 2002, sponsored by the Brooklyn Law School Center for the Study of Law, Language and Cognition. The Symposium was timely then, and this issue is timely now. As Dean Joan Wexler said in her introductory remarks at the Symposium:

Terrorist attacks in New York, Washington, and around the world; war in Iraq; and the disclosure of one financial scandal after another have forced us all to ask serious questions about blame and about how to hold wrongdoers responsible for their actions. Perhaps it is always the case that soul-searching comes at times of crisis. Clearly, we are at such a point now.

We live under a rule of law, and our legal system purports to establish through our body of laws just when a person or corporation has engaged in legally blameworthy conduct, and what should be done when that happens. An overriding theme of [the Articles published in this issue] asks a rather frightening question: What should we do if we learn that people really assign responsibility and

* © 2003 Lawrence M. Solan. All Rights Reserved.

[†] Professor of Law and Director, Center for the Study of Law, Language and Cognition, Brooklyn Law School.

blame in ways that are different from the ways that the legal system assumes? Most importantly, we must ask whether adjustments are necessary to align the legal system with its stated goal of doing justice.¹

In fact, significant advances in social psychology have shown that people often *do* assign blame in ways that the legal system does not take into account, sometimes making it unrealistic to expect the system to achieve its stated goals.

The Articles in this issue are organized into three groups. The first addresses the question of how cognitive and emotional factors contribute to the assignment of blame. Sharon Lamb argues that fear drives a great deal of moral attribution. She explores some ramifications of fear-based condemnation by drawing on the family as a mental model for blaming and exploring shaming sanctions. Because fear focuses on the future, Lamb's perspective relates to both retributive and deterrence models of justice.

Relying upon a somewhat different psychological literature, Neal R. Feigenson focuses on how emotions and cognition interact in our modeling of events in the world, and in attributing moral judgment. Drawing on work in social psychology, he explores some likely scenarios for the course of litigation arising out of the World Trade Center attacks. Feigenson highlights the interactions between emotions and cognition, which are complex and operate in both directions, speculating on how this will affect jurors in those 9/11 cases.

My contribution draws on both linguistic and psychological literatures to examine some of the cognitive foundations of blaming. It argues that most of the elements of the impulse to blame are very basic cognitive functions that we use routinely for purposes that have nothing to do with assignment of moral responsibility. Their ease of access explains in part the ease with which we assign blame. Like Feigenson's contribution, it discusses reactions to 9/11.

The second set of Articles addresses some of the same issues, in the context of tort law. Anthony J. Sebok's Article explores the history of blame as the controlling principle in private litigation. His arguments show that blame, while perhaps a natural psychological process, has not always

¹ Joan G. Wexler, Introductory Remarks at the Brooklyn Law School Center for the Study of Law, Language & Cognition Symposium, Responsibility & Blame: Psychological & Legal Perspectives (Oct. 18, 2002).

dominated tort theory, and is justified by somewhat contradictory theories. In determining how well the legal system assigns responsibility, it is necessary to consider the system's goals, whether they be an attempt to punish in circumstances that the criminal justice system often ignores, a somewhat unsatisfactory substitute for social insurance or an effort to deter careless conduct.

Three other Articles deal with psychological aspects of blame in the setting of contemporary tort law. Jeffrey J. Rachlinski examines the reasonable person standard against some robust findings in the psychological literature, which show that the system expects more of tort defendants than should be expected of an ordinary person. Factfinders tend to overestimate certain cognitive abilities, such as the ability to perceive change in the environment and the ability to perceive at the periphery. To the extent that these skills are implicated in legal disputes, the system is likely to hold blameless people responsible for harm. Rachlinski explores some of the consequences of this propensity.

Valerie P. Hans and Juliet Dee examine the phenomenon of blaming the victim in a classic tort setting: whiplash. Notwithstanding complaints that juries are biased against defendants and in favor of plaintiffs, people are very suspicious of plaintiffs claiming to have suffered from whiplash. Hans and Dee examine this negative reaction from both social psychological and political perspectives. For example, when people identify more with a defendant than with a victim, they tend to minimize the complaints of those in the "other" group. Other considerations, such as press coverage of the tort system, round out their discussion.

Jennifer K. Robbennolt, John M. Darley and Robert J. MacCoun investigate a complicated dynamic embedded in the allocation of responsibility in civil cases. Factfinders must evaluate the evidence and make decisions in order to further a number of goals that sometimes conflict with each other. For example, if compensating the plaintiff appropriately and seeing that a defendant gets its just deserts are both goals, then awarding punitive damages on top of compensatory damages, which overcompensate plaintiffs, requires that one goal be placed above the other. Their discussion explains a great deal of the apparent incoherence in civil litigation.

The final two Articles in this issue come from a different, very important perspective. The Symposium's title, "Responsibility and Blame," is open to multiple interpretations.

One understanding of the expression is that the two concepts—responsibility and blame—are very similar, perhaps two sides of the same coin. A decent society should hold blameworthy people responsible for their actions. Most of the Articles in this issue adopt that perspective. But there is another way of looking at these concepts. One can look at responsibility as a duty to impose on oneself: the duty to act responsibly. Leonard V. Kaplan's Article analyzes responsibility from just this perspective. Using Ingmar Bergman's film *Shame* as a vehicle for exploring personal responsibility, Kaplan focuses our attention on failures to take responsibility for the most basic interpersonal interactions in contemporary society. Academics are by no means excluded from the critique. Kaplan's Article relates to Sharon Lamb's in that they both focus on similar emotional responses and personal experiences in establishing models of conduct between oneself and others.

The final Article, by Susan Bandes, also plays on our ability to understand "responsibility" in more than one way. Bandes turns her attention to misconduct within government. Because government presumably represents the citizenry, government has a duty to *act responsibly*, and should be *held responsible* when it does not. But government, like other entities such as corporations, legislatures and the like, becomes slippery once something goes wrong. Since government purports to be a responsible entity (in the sense of acting responsibly), it eschews responsibility (in the sense of blame) when a bad actor within the government causes harm by acting outside this benevolent picture of the public's representatives. She illustrates this process dramatically with police torture cases.

As this brief summary of the issue suggests, the Articles all respond to a few complex, but closely related issues. This is not always the case when academics are asked to participate in a symposium with a stated theme. Yet the temporal proximity of this conference to the 9/11 attacks and the earlier accomplishments of the participants allowed it to happen here.

I conclude with two notes of thanks. First, Professor Dan Kahan participated in the conference and provided a great deal of intellectual stimulation. The Articles published in this issue are all the better for his contributions. Last, but by no means least, the concept and structure of the Symposium benefited greatly from the many valuable discussions that I had with my colleague, Tony Sebok, throughout the planning of the event.