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Joel Mann

St. Norbert College, joel.mann@snc.edu

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**Causation, Agency, and Law in Antiphon:
On some subtleties in the second Tetralogy
Joel Mann, St. Norbert College**

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Pacific Division of the American Philosophical Association, April 1, 2010*

0. The beginning

In his masterly study of the Presocratic philosophers, Jonathan Barnes considers the refinements made by the early Greek sophists to the related concepts of cause and responsibility. Barnes judges Gorgias' *Helen* to have treated "in philosophical depth the issue of responsibility," in apparent contrast to Antiphon's second Tetralogy, which, presumably, does not. The Tetralogy itself comprises four speeches, two each by an imaginary plaintiff and a fictitious defendant. Certain facts are undisputed. In the course of an athletic contest among youths of training age, the defendant threw his javelin with the intention of hitting the prescribed target. Instead, the javelin hit a young man charged with picking up grounded javelins, who died instantly. The plaintiff pleads with the jury to find the thrower *aitios*, or responsible, for his son's death, while the defense maintains that the thrower is not responsible by virtue of the fact that, though he threw his javelin, he did not kill the deceased.

According to Barnes, the problem is that, like the English "responsible," there are two distinct uses of the Greek adjective *aitios*, and Antiphon fails to recognize the difference. Indeed, the term "responsible," like *aitios* (I shall henceforth employ the two interchangeably, as has become customary in the literature), has two basic senses, which Barnes formalizes as follows: "*A* is responsible for *X*" may be used to pick out *A* as an agent or cause, and it may be used to blame *A* or to mark *A* as an appropriate object of appraisal: the phrase has a causal and an evaluative use" (221). There is much overlap in the cases covered by these two uses. Usually, *P* is evaluatively responsible for *A* if he caused *A*; likewise, if *P* caused *A*, then the weight of evaluative responsibility will fall first upon his shoulders. Still, parents are sometimes ordered to pay their children's debts, even though they are not themselves causally responsible for them (the debts, that is, not the children). And a bus driver may play a causal role in bringing about an injury to a pedestrian but may not be evaluatively responsible for it, as might be the case if the injured attempted to cross the street against the pedestrian traffic signal.

This last example is particularly salient to Antiphon's second Tetralogy, which turns on the question of responsibility for unintentional harm. According to Barnes, Antiphon's defense should have made the argument we would supply for the bus driver. Instead, the defense "argues, bizarrely, that his client did not kill the youth at all, that he is not causally *aitios*. The correct defense, that the boy is causally but not morally *aitios* [moral responsibility being a species of the evaluative], was apparently too subtle for Antiphon" (222). If true, this is especially embarrassing for Antiphon and his defendant, who at several points in the Tetralogy flags the subtlety (*akribeia*) of his argument (3.2.1-2, 3.4.2). But embarrassment may well be Antiphon's due. Since Barnes published his remarks, other influential commentators have concurred, whether consciously or not, with his assessment that the defense denies its causal role in the death.¹

More recently, however, it has been suggested that in the second Tetralogy Antiphon has the distinction between causal and moral responsibility in full view (Hankinson 72). I agree, *pace* Barnes, that Antiphon was capable of making the distinction, but I accept also that Antiphon's defense fails to make the argument Barnes thinks he should have. I hope to show that this is due not to any lack of subtlety on Antiphon's part, but rather to his more general interest in identifying competing species of responsibility and posing difficult questions regarding their kinship. Antiphon is remarkable for drawing fine distinctions between confusing and oft-confused concepts, and so I turn now to discuss the subtleties of his second Tetralogy.

¹ Sorabji (292), Williams (61), and Gagarin (119) take the defense to be arguing that the thrower was not the cause of death.

1. The charges

Barnes' criticism rests on at least three distinct theses: first, that the defense argues (incorrectly) that the thrower was not causally responsible for the death; second, and most obviously, that causal and evaluative responsibility are not co-extensive; and, third, that the defense's strategy (correctly conceived) ought to have concentrated on absolving the thrower of moral responsibility for the death. For the moment, I will not say much about the first two theses, except to note that whether we accept the first depends upon what we take to be an adequate analysis of causation and that whether we accept the second depends also upon what we take to be an adequate analysis of moral responsibility. To my knowledge, there is still considerable debate on these matters, and so it could turn out that, even if Antiphon had not recognized the distinction (though I think he did), he might have been correct not to recognize it.

The third thesis must be rejected. The formal legal charge is that the thrower has violated the religious prohibition against killing and has therefore brought pollution, or *miasma*, on the city (3.1.2). As Bernard Williams describes it, *miasma* is conceived of as "an effect of killing a human being, and what modern philosophy calls the extensionality of the causal relation implies that if there are any such effects, then an event that is a killing of a human being will have the effect whether it is intended as a killing or not" (59). That is, whether the killing was intentional or unintentional, much less moral or immoral, is irrelevant, as confirmed by repeated references to the "law prohibiting killing justly or unjustly" (3.2.9; 3.3.7). A killer may be morally justified, as in cases of self-defense, but this is beside the point. The central concern of the second Tetralogy is to determine who killed the boy and brought about the (supernatural) effect.

The rejection of Barnes' third thesis has devastating consequences for the second. The species of evaluative responsibility of primary concern in the second Tetralogy is *legal*, not moral. The jury must decide whether to convict and punish the thrower. Given the nature of the law under which the thrower is prosecuted, the legal-evaluative question will be settled by addressing directly the question of causal responsibility. In short, the defense's only available option is to argue that the thrower did not, in some relevant sense, kill the boy. It is here that Barnes might rescue his first thesis, since it is difficult to imagine a theory of causation that would deny that the thrower was a cause of the boy's death. However, this assumes an equivalence between *being a cause* of someone's death and *killing* him, and there may well be no such equivalence. If we are permitted to say that the first phrase ("being a cause of someone's death") signals *causal* responsibility and the second ("killing him") signals *agent* responsibility,² then we may reasonably ask whether the latter reduces to the former.³ At least, this is one of the questions I understand Antiphon to be asking in the second Tetralogy.

These confusions notwithstanding, I believe that Barnes' bafflement over Antiphon's defense of the thrower is understandable. Antiphon certainly seems to have anticipated such reactions, as evidenced by the prosecution, who protests in his second speech to the jury that his "opponent has the audacity and the insolence to claim that his son, who both hit and killed, neither wounded nor killed..." (3.3.5).⁴ Even after we have distilled the essence of the defense, namely, that the thrower was not the agent responsible for the killing, the claim remains counter-intuitive. Barnes illustrates this with the following example: "I knocked the jug off the window-sill, but liability for blame attaches to the fool who put it there" (222).

² As Davidson points out (44), it is mistaken to think, as some philosophers have, that agency tracks to grammar such that to mention a person in the subject position in a sentence with a transitive verb in the active voice thereby imputes agency to that person. "I contracted malaria," is an obvious counter-example. However, Davidson admits that some verbs can serve as a litmus for agency, and it seems reasonable to suppose, at least provisionally, that the verb at issue in the second Tetralogy—kill—is just such a verb, and so by taking up the question whether the thrower killed the victim, Antiphon asks thereby whether the thrower was the agent of the killing. The classic contemporary treatment of this issue is found in Thalberg.

³ Davidson, for one, has argued that it does not (52).

⁴ Selections from the second Tetralogy follow, with some changes, the translation in Gagarin and Woodruff.

Here, agent responsibility and evaluative responsibility come apart. It is obvious that the fool is to blame, but this does not alter the fact that I knocked off (and presumably broke) the jug.

2. The defense

Yet, this is precisely what Antiphon's defense denies, and he makes a genuine attempt to articulate and explain his rationale, which task is doubly pressing for him, since he argues not only that the thrower is not agent-responsible for the killing, but also that the dead boy should rightly be considered the agent of his own death.

[The thrower] threw his javelin but did not kill anyone, according to the truth of what he did, but he is now blamed for someone else's self-injury, **(i)** which he did not intend. **(ii)** Now, if the javelin had hit and wounded the boy because it carried outside the boundaries of its proper course, then we would have no argument against the charge of killing. **(iii)** But because the boy ran under the trajectory of the javelin and placed himself in its path, one of them was prevented from hitting its target whereas the other was hit because he ran under the javelin... Since the boy was hit because of his running under, the youth is unjustly charged, for he hit no one who was standing away from the target. **(iv)** If it is clear to you that the boy was not hit standing still, but voluntarily⁵ [*hekousiōs*] running under the trajectory of the javelin, then it is shown even more clearly that he died on account of his own mistake [*dia tēn hautou hamartian*], **(v)** for he would not have been hit if he had stood still and had not run. (3.2.3-5)

From this we can begin to understand which considerations the defense finds relevant to the question of agent responsibility. First, there is the defense's reminder in **(i)** that the thrower did not intend the injury. Had he so intended, and had he in some suitable sense caused the injury, he would be agent-responsible for killing the boy. This, then, is Criterion 1: an event A is the action of a person P if some prior action of P caused A and P intended A to happen.

This criterion fails to convict either the thrower or the victim, as even the prosecution concedes from the outset that no one intended to kill his son (3.1.1). There must be an additional criterion that would convict in cases of unintentional action, and the defense seems to apply it in **(ii)** when he concedes that the thrower would be agent-responsible if his throw had transgressed the boundaries established for the athletic activity. Agency is supposed somehow to turn on a mistake, and the defense is adamant that the thrower made none. The victim killed himself, since his death was caused by a mistake, specifically by "running under the trajectory of the javelin." We are now in a position to appreciate the series of subtle distinctions Antiphon has made. First, he distinguishes between cases involving intentional harm and those involving unintentional harm, which, roughly speaking, amounts to what we today know as the difference between criminal law and the law of torts. Second, he understands that the standard of liability in tort law differs from that in criminal law. Third, he identifies the separately necessary but jointly sufficient standards of liability in tort law, cause and fault, and his criterion for determining cause is strikingly modern. To borrow David Lewis' terminology, Antiphon introduces counter-factual dependency as the fundamental test for the causal relations that obtain between events, what in contemporary legal jargon is referred to as a "but-for" condition.⁶ Thus, we may formulate Criterion 2 for

⁵ The adverb *hekousiōs* and its cognates are used throughout the second Tetralogy to signal that an action was performed intentionally, but that cannot be the correct sense here. The semantic opacity of sentences reporting intentional states would render the defense's claim utterly absurd. While the victim intentionally ran along a particular route, and this route happened to intersect the javelin's trajectory, he did not intentionally intersect the javelin's trajectory. Statements about voluntariness, on the other hand, are semantically transparent. If the victim ran this particular route voluntarily, then he ran voluntarily under the trajectory of the javelin. This is not a mere quibble. As will be made clear, the defense's argument requires the victim's action to have been voluntary, and it requires also that it was unintentional.

⁶ I refer of course to Lewis' now classic defense of a counter-factual analysis of causation as outlined in his 1973.

agent-responsibility: an event A is the action of a person P if some prior action of P's (call it B) caused A (that is, B is a but-for condition of A) and, in doing B, P made a mistake.⁷

Counter-factual dependency offers us an admittedly minimalistic test for causal responsibility, but minimalism is what the defense needs in order to widen the field of candidates for agency so as to include the victim. The field of potential agents will include the thrower, as well, so the defense's attention shifts to the fault standard. In an impressively lucid turn, he sums up Criteria 1 and 2 and charts the course of his argument.

Since, as you know, it is agreed that the killing, which came about from both parties [*ex amphoin genesthai*], was unintentional, one could decide even more clearly who was the killer by establishing which of the two made the mistake from which it came about. For those who make a mistake with respect to what they have in mind to do are the agents [*praktores*] of what is unintentional, while those who do or suffer anything intentionally are responsible for the sufferings that result. (3.2.6)

With these standards in place, the defense narrows its focus to the victim's actions prior to his death: he "decided to run out but mistook the right moment when he could run and not be hit" (3.2.8). The mistake was unintentional (*ibid.*) but voluntary (3.4.4 and *iv* above) and was ultimately the result of his own *aphulaxia*, or negligence (3.4.6).⁸

There is of course no way for us to evaluate the credibility of these statements, though we may note that they are contradicted by the prosecution, who insists that the victim was merely obeying the athletic trainer's commands (3.3.6). Instead of speculating about which of the two parties involved meets the standards for agent responsibility set by the defense, I should prefer to ask whether one should accept those standards in the first place. This question is no antiquarian diversion; it has been the source of considerable debate within contemporary philosophy of law. At one extreme lie those who, like the early Epstein, argue for strict liability as a general standard in tort law. Considerations of fault need play no role in determinations of responsibility; considerations of cause are sufficient. They do not deny that but-for conditions figure among these considerations, but they maintain that there is for every tort case some finite set of but-for conditions that will sufficiently determine who harmed whom. In other words, Antiphon's minimalist causal criterion is rejected. At the other extreme lie "cause-in-fact" theorists, those who, like Holmes and, more recently, Perry, doubt whether any non-minimalist causal criterion is sufficient. The supposedly sufficient finite set of causal but-for conditions in any hypothetical tort case must be augmented by fault considerations in order to yield a determination of responsibility. To quote Perry: "there is thus no simple [i.e., empirical and non-normative] distinction to be drawn between the parties to a tort action such that one can be labeled the 'active' injurer, and the other the 'passive' victim" (620).

The second Tetralogy is a textbook illustration of the cause-in-fact theorists' point. The prosecution opens its speech in the certainty that "when the facts are agreed on by both sides, the sentence is determined by the laws" (3.1.1). The facts he has in mind are the basic empirical facts of the case: "my boy, struck in the side on the training field by a javelin thrown by this youth, died on the spot" (*ibid.*). As a proponent of strict liability, he regards these facts as sufficient to convict the thrower. They show that the javelin was *the* cause of his son's death, and that the throw was an action by the defendant. This

⁷ Criteria 1 and 2 are exclusive disjuncts in a compound criterion for agent responsibility. A person is the agent of an action just in case either is met.

⁸ Of course, the mistake was unintentional under the description "running under the trajectory of the javelin" but intentional under the description "running this particular route." Antiphon's characterization of the mistake as unintentional raises substantive questions which he perhaps meant to invite. Why should we accept that an event A is the action of a person P just because P intended A under some description, when, had P been aware of the alternative descriptions, P would *not* have done A? Antiphon's invocation of *aphulaxia* may be designed to solve this problem: the victim was responsible for his ignorance of the alternative descriptions of the event, because he was intentionally careless. Still, how could somebody choose to be careless, knowing that it is bad? Antiphon is well aware that the solution is *akrasia*, or weakness of will; he mentions it as the cause of mistakes at 3.2.3 and 3.3.6. I don't find any evidence in the second Tetralogy that Antiphon sees *akrasia* as conceptually problematic.

comes out still more clearly in his confused response to the defense: “he asserts that my son, who did not lay a hand on the javelin and never thought of throwing it, thrust the javelin through his own ribs, missing the whole earth and all the other people on it” (3.3.5).⁹ The prosecution fails to understand that, in denying that the thrower killed the victim, the defense is calling into question the criteria for determining agency. There is no factual dispute over who threw the javelin, but the prosecutor—like Jonathan Barnes—cannot see any other way of construing the defense’s argument.

The defense’s approach, predictably, entertains hypothetical considerations of fault to demonstrate the indeterminacy of the agreed-upon facts. The thrower would be the agent had he been practicing an unassigned activity; throwing the javelin where others were exercising; or throwing toward the bystanders (3.2.7). If the training master had mistakenly called him at the wrong time, then the training master would have killed the boy (3.4.4). As it is, the victim himself is responsible because he “wished to run out but mistook the right moment when he could run and not be hit” (3.2.8).¹⁰ The basic facts, in and of themselves, do not determine who killed whom. They must be augmented with considerations of who is at fault. If that turns out to have been the victim, then the victim is the active injurer. In fact, the defense insists, not only did the victim kill himself, but, under the correct description of his action, he also prevented the thrower from hitting his target (see **iii** above).

The prosecution never fully comprehends the force of this argument. Even at the moment when he claims that the defense’s own *logoi* prove his case, he betrays only the hint of an awareness of what those *logoi* imply.

I shall now demonstrate on the basis of their own statements [*ex hōn autoi legousin*] that he is not innocent of the mistake or the unintentional killing but that both of these belong to the boy and the youth together. If it is just to treat the boy as his own killer because he ran under the trajectory of the javelin and did not stand still, then the youth is not innocent of the responsibility either, but only if the boy died while the youth was standing still and not throwing his javelin. So the killing came about from both of them [*ex amphoin de tou phonou genomenou*], and since the boy’s mistake affected himself and he has punished himself more severely than his mistake deserved (for he is dead), how is it right that the youth, his accomplice and partner in an error affecting those who did not deserve it, should escape without penalty? (3.3.10)

The phrase *ex amphoin de tou phonou genomenou* echoes the defendant’s remark at 3.2.6, quoted earlier, that the killing, which came to be from both, was unintentional. Thus, the prosecutor is using not just the defense’s arguments, but his exact words, against him. He understands the circumstantial conclusion of the defense’s arguments—that both parties were causally responsible—but he remains utterly in the dark with respect to the arguments themselves. His attempt to replicate the counter-factual reasoning that would establish the defendant’s throw as a but-for condition falls flat. Instead of pointing out, as he should, that his son would not have died had the defendant not thrown, he claims that the defendant is innocent only if he did not throw his javelin. But this is false. The defendant would be innocent also if he threw his javelin but the throwing bore no causal relation to the death. Again, the prosecutor confuses the *causal* question with the *factual* question of whether the defendant was the thrower. His hypothetical does not shed light on the relation between the established fact of the throwing and the death, as would a genuine but-for conditional, but merely reformulates the same tired objection.

For all that, there is something to what the prosecution says. If one accepts that the death may be traced back to both the (intentional) running of the victim and the (intentional) throwing of the defendant,

⁹ See also 3.3.7, where the prosecution asks, “But who threw the javelin? To whom should the killing be attributed?”

¹⁰ Compare to a contemporary example, employed by Perry. “Suppose that the defendant drives into and damages the plaintiff’s parked car. I presume it is obvious that it cannot be said without more that the defendant is liable, simply because he was active while the plaintiff was not. The question of who should bear the loss in this situation would seem necessarily to turn on such considerations as whether the defendant was speeding, for example, or whether the plaintiff had parked his car in a dangerous spot (in the middle of the road just beyond a sharp curve, perhaps)” (619).

whether via but-for conditions or any other causal criterion, it is intuitive to think that the actions initiated by the running and throwing extend to include the death in virtue of their having caused it. This is what Joel Feinberg termed the “accordion effect” of agency, which, if valid, would have the result that both thrower and victim would be agents of the killing.¹¹ As far as I can tell, the defense never addresses the challenge posed by the accordion effect. We might wonder whether the prosecution’s failure to comprehend the but-for criterion invites the subtle reader to correct the argument so that every agent figuring in a but-for condition of the victim’s death became thereby an agent of it. The number of killers would multiply exponentially and, from a juridical standpoint, unmanageably and arbitrarily. The thrower’s father would become a killer, as would the victim’s. That Antiphon is sensitive to this radical expansion of responsible agents is perhaps shown by the worry on both sides that blame will fall on those outside the conventional sphere of suspicion. The prosecution at one point defies the defense to name the killer, if it is neither the thrower nor the victim: “To whom should the killing be attributed? To the spectators or the attendants, whom no one accuses of anything” (3.3.7)? Similarly, the defense argues that, if he is held responsible for the killing, then so must all the other javelin throwers, which (he thinks) is patently absurd (3.4.6).

However, this assumes that there is no legitimate causal theory that could narrow down the vast field of but-for conditions to a more modest set of genuine causes. But perhaps there is. Such has been argued by H.L.A Hart and Anthony Honoré, among others. The prosecution, unfortunately but understandably, does not; nor is this essay the place to examine modern theories. Nevertheless, I should like to revisit Barnes’ example of the jug-knocker to suggest that we have strong intuitions about which causal chains trace to agents, and further that these intuitions are unaffected by considerations of fault. Most would agree with Barnes that when he knocks the jug off the window-sill, the knocking-off is his action, even though the fool who put it there is liable for the damages. The fool is at fault, but this does not affect the ascription of agent responsibility. Now let us fix the example to more closely resemble the case in the second Tetralogy. The fool sets the jug on the window-sill, where it doesn’t belong, and later that evening Barnes, as is his custom, swings his telescope out the window and knocks the jug off. Our intuitions remain the same. Barnes knocked the jug off the window-sill, even though the fool ought to pay for the broken jug. The theory of unintentional agency put forward by Antiphon’s defense would have us believe that the fool, who was at fault, knocked the jug off the window-sill.

Barnes has, in the final analysis, got his criticism backwards. Antiphon’s defense does not attempt to absolve the thrower of agent responsibility where it should have challenged his evaluative responsibility. Rather, the defense denies evaluative responsibility where it should have denied agent responsibility, but only because on its view there is no difference in cases of unintentional action. Paradoxically, Barnes is right that the defense does not formally recognize the distinction between the two types of responsibility, though not because Antiphon is confused, but rather because the defense collapses evaluative responsibility into agent responsibility on theoretical grounds. Antiphon himself recognizes the distinction; it is the very point of disagreement between the parties involved in the suit.

3. The consequences

As the jug-knocker example shows, the defense fails to provide an adequate general theory of agent responsibility for unintentional actions. However, if we recast his project in light of the concerns motivating modern cause-in-fact theorists, the view becomes more plausible. For theirs is not a general theory of unintentional agency, either; rather, they hold that concepts such as harm, injury, and loss, which are central to questions of legal responsibility, are inherently *normative* notions, and so attributions of responsibility for harm necessarily involve evaluative considerations. In order to say that Hamlet harmed Polonius, we first must be able to say that Hamlet did something wrong. Likewise, the defense in the second Tetralogy would have the jury believe that killing is an inherently normative notion; in order to say that the thrower killed the victim, we must first be able to say that the thrower did something wrong. Now it may not be that the English verb “kill” has this normative aspect, though I suspect it does.

¹¹ See Feinberg’s “Action and Responsibility.”

Prominent philosophers of law, including Joel Feinberg, have advocated a view strikingly similar to that championed by Antiphon's defense.¹² In any case, the litigants in the second Tetralogy freely refer to the boy's death not only as a killing [*apokteinaí*] but as a *phonos*, which has a connotation much closer to the English word "murder."¹³ Translated into these terms, it becomes much clearer that Antiphon's defense is at least defensible. The thrower might be the agent of the victim's death, but he's certainly no murderer. He might not even be a killer, if killing too is evaluatively inflected (or infected, depending on which side of the debate one favors). Antiphon thus exposes the imprecision of Greek legal language and its potentially tragic consequences for anyone whose fate hangs on it. While the defense makes the necessary conceptual distinction between agent and evaluative responsibility, this can be accomplished only by pushing the limits of linguistic convention. As outrageous as it may sound to the jury, he is forced to argue that the thrower did not kill the victim, not because he is confused, but because he has no other way to say what he means.

If responsibility for killing turns on evaluative considerations, as Antiphon's defense maintains, then the entire trial is a sham. For, as noted earlier, the prosecutor charges the thrower with breaking a religious law that prohibits killing *whether just or unjust*. But it turns out that no judgment about responsibility in this case can be rendered without expressly taking into account who was at fault, where fault will reduce to questions of right and wrong. The prosecutor himself accuses the thrower of having killed his son out of *akolasia*, incontinence or lack of self-control (3.3.6). The religious law is thus incoherent. It calls for the punishment of those who killed, but it expects an answer in terms of agent responsibility, as though killing were akin to knocking a jug off a window-sill. But it is not, if Antiphon and modern philosophers of law like Feinberg and Perry are correct, and to punish people for knocking jugs off window-sills without any thought for who is thereby harmed is grossly arbitrary by any standard of justice. So it is with a keen sense of irony that we must read the defense's closing remarks: "As for the law they cite, we should praise it, for it correctly and justly punishes those who kill unintentionally with unintended sufferings" (3.4.8). Antiphon has shown in fact that such a law can be neither correct nor just.

It is possible that Antiphon's critique of Greek law is designed to cut still deeper. In his final speech, the defense contemplates whether he could rightfully be held responsible for the killing even if he was at fault.

I shall now demonstrate that the youth has no greater part in the killing than his fellow javelin-throwers. If the boy died because of the youth's javelin-throwing, then all those practicing with him would share responsibility for the act, for they avoided hitting him not because they did not throw their javelins but because he did not run under any of their javelins. The young man made no greater mistake than they, and like them would not have hit the boy if he had stayed in his place with the spectators. (3.4.6)

This *reductio ad absurdum* relies on what we recognize as the concept of moral luck. It is a premise of ordinary moral judgment that an agent cannot be held morally responsible for circumstances beyond his control.¹⁴ But the success or failure of our actions always depends to some extent on such factors. I may intend to hit you with a javelin; but whether I end up having hit you with a javelin depends on a great many things besides my intention. There is serious doubt, then, as to whether I can be held responsible for successfully hitting you with the javelin. All I can legitimately be held responsible for is my intention and my attempt to carry it out. But this renders me no more responsible, from a strictly moral standpoint, than

¹² Feinberg writes that "to kill someone is to cause his death, and when the action of the defendant was only one of many important causal factors in the death of the victim, it can be difficult—and without the guidelines provided by precise legal rules, impossible—to know whether it can be selected out as *the* cause of the death.... Does a man "kill" his victim if the latter recovers from a wound in the lungs but is left in such a weakened condition that he succumbs to pneumonia three years later? These are not purely "factual" questions about whether or not a certain kind of action-word correctly "describes" what an agent did" ("On Being 'Morally Speaking a Murderer,'" 43).

¹³ *Phonos* or its cognates are found at 3.2.4, 3.2.6, 3.2.7, 3.3.10, 3.3.11, 3.4.8, 3.4.9, and 3.4.10.

¹⁴ Nagel (1979, 25). "Whether we succeed or fail in what we try to do nearly always depends to some extent on factors beyond our control." Nagel holds that moral luck does not seriously compromise our concept of morality. For a more skeptical view, see Williams 1976.

he who had and acted according to the same intention but who, due to some purely contingent set of circumstances beyond his control, did not succeed.

Antiphon's defense raises the problem of moral luck to force a dilemma on the jury. Either all the throwers are responsible (which is absurd, and no one would think of prosecuting them all) or none of them are (including the defendant). Since the other throwers both intended to throw and threw when the defendant did, they too are responsible for whatever mistake the defendant made. That the thrower happened to cause a death was purely contingent upon factors beyond his control, and so he can't be held responsible for that respect in which his action differs from the actions of the other throwers. Though the defense does not say it explicitly, Antiphon himself must have realized that moral luck could be used to absolve the victim of responsibility, as well. Thus, Antiphon supplies the philosophical artillery needed to destroy the credibility of the very institution in which his Tetralogy is set. To hold the thrower responsible would be utterly arbitrary. On the other hand, to attribute responsibility to all the throwers would be to admit that the standard legal conventions for limiting responsibility are purely arbitrary.¹⁵ And even if legal convention were brought into conformity with moral reality, no one at all could be convicted under the pollution law. The throwers might be responsible for throwing at the wrong time; the victim might be responsible for running at the wrong time; but no one would be responsible for anything like a "killing."

4. The end

That no one can or should be convicted in a law court on pollution charges is, I suggest, the implicit message of Antiphon's second Tetralogy. More than a mere rhetorical exercise, Antiphon offers us a rational and compelling critique of religious law and of legal responsibility generally. In so doing, he anticipates modern puzzles in the philosophy of law as well as some of their more sophisticated solutions. A work not only of ingenious skepticism but also of considerable subtlety, the second Tetralogy should be considered the product of a philosopher who made perhaps the most substantial extant contribution to law and legal theory before Plato and Aristotle. It is yet another reminder that philosophy in Greece could take many forms, including not only poems, dialogues, essays, and lectures, but even paired court speeches. If we have failed heretofore to appreciate this fully, then Antiphon is owed the least subtle of apologies, not just by Jonathan Barnes, but by all of us who have complained at some time about the alleged obscurity and imprecision of what appears to have been an admirably sharp and lucid mind.

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¹⁵ Feinberg contrasts legal responsibility with moral by noting that the former regularly makes arbitrary attributions of responsibility based on luck ("Problematic Responsibility," 31-2).

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