

Graduate Seminar: Causation and the Law

Professor: Sara Bernstein

How do questions of causal responsibility bear on questions of legal responsibility? Causation plays a central role in the law, from assessing criminal responsibility for outcomes to apportioning damages to victims. This course will examine the role of causation in various areas of the law, including which theories of causation are used to assess causal responsibility, how well those theories work as guides to legal responsibility, standards for omissive causation and negligence, legal evaluations of counterfactual possibilities, and definitions of attempts versus completed crimes. We will also discuss the law's stance on nonstandard causation cases, including cases of preemption, overdetermination, joint causation, and deviant causal chains.

This course can count for either the graduate metaphysics requirement or the graduate ethics requirement, depending on the work done in the course.

All readings will be on Sakai, but it is recommended that you purchase Hart and Honoré's *Causation in the Law*.

Assessment:

- 30% class participation
- 10% in-class presentation on a reading or a topic related to the reading
- 10% in-class presentation on paper topic
- 50% final paper

Tentative Schedule

January 17: Introduction to Causation in the Law

January 24: No class

- Recommended background reading: "The *Prima Facie* Demands of the Law on the Concept of Causation," (excerpt from *Causation and Responsibility*), Michael S. Moore

January 31: Concepts of Causation in the Law

- "Rethinking Actual Causation in Tort Law," the editors, *Harvard Law Review*
- "Causation in Moral and Legal Reasoning," David Lagnado and Tobias Gerstenberg
- "Cause-in-Fact After *Burrage vs. United States*" pp. 1733-1746, Eric Johnson
- Optional: "Causation and Responsibility" (excerpt from *Causation in the Law*), Hart and Honoré

February 7: Why Consider Causation in the Assessment of Legal Responsibility?

- "The Decline of Cause", Judith Jarvis Thomson
- "Blame, Punishment, and the Role of Result", Richard Parker

February 14: Counterfactuals and the Law

- "Rationality and Counterfactual Legal Analysis", Antonio Estella de Noriega
- "Counterfactual Contradictions: Interpretive Error in the Analysis of AEDPA", Amy Knight Burns

February 21: Omissions and Negligence (I): Duty to Intervene

- "Criminal Liability for Omissions: A Brief Summary and Critique of the Law in the United States", Paul Robinson
- "The Duty Requirement", Gideon Yaffe
- Optional: "The Metaphysics of Omissions", Sara Bernstein

February 28: Omissions and Negligence (II): Doing and Allowing Harm

- "Counterfactual Dependence without Causation" (excerpt from *Causation and Responsibility*), Michael S. Moore
- "Moore on Doing versus Allowing Harm", Carolina Sartorio

March 7: Degrees of Causation and Degrees of Responsibility (I)

- "'More of a Cause': Recent Work on Degrees of Causation and Responsibility", Alexander Kaiserman
- "Causal Proportions and Moral Responsibility", Sara Bernstein

SPRING BREAK

March 21: Degrees of Causation and Degrees of Responsibility (II)

- "Legal Responsibility and Scalar Causation", Helen Beebee
- "Concurrent Causes and Contributory Negligence" (excerpt from *Causation in the Law*), Hart and Honoré

March 28: The Role of Luck in the Law

- "Moral Luck and the Law", David Enoch
- "The Role of Luck in the Criminal Law", Kimberly Kessler

April 4: Probability-Raising and the Law

- "The Punishment that Leaves Something to Chance", David Lewis
- "Causation, Probability, and Risk: Problems on the Frontiers of Tort Liability" (excerpt from *Causation in Tort Law*), Richard W. Wright

Optional: *Attempts* (excerpt), Gideon Yaffe

April 11: Transitivity of Causation and Foreseeability

- "The Law of Tort: Causing Harm" (excerpt from *Causation in the Law*), Hart and Honoré
- "State Supreme Court Holds Appeals Court Misunderstood Proximate Cause in Michigan Personal Injury Case", Neumann Law Group
- Case Law: *Palsgraf v. Long Island Ry.*, 248 N.Y. 339, 162 N.E. 99 (1928)

April 18: Deviant Causation

- "Deviant Causal Chains and the Law", Sara Bernstein
- "Knowledge, Recklessness and the Connection Requirement Between *Actus Reus* and *Mens Rea*", Alexander Sarch

April 25: Student presentations of paper topics

May 2: Student presentations of paper ideas, continued; Review.

A few notes concerning...

Class Participation

Philosophical skill is best acquired by *doing philosophy* rather than passively learning about it. Active participation in class, which includes asking questions, coming up with cool and/ or silly examples, asking for clarification on confusing concepts, and/ or presenting an informed opinion about the reading, is central to learning to do philosophy. Talking once per class will be enough to do well in class participation.

Philosophical "Bedside Manner"

Academic philosophy has a reputation as a blood sport. It need not be so. We're all in the Truth Trenches together. Philosophical interaction can be friendly and collaborative while still being constructive and rigorous. Please contribute to class in ways that aim at discovering the truth rather than establishing intellectual dominance.

Syllabus Changes

It is possible that topics will be added, removed, or changed on the syllabus. If this happens, it will be announced in class and over email.

Plagiarism

Plagiarism is representing another person's work as one's own. Outside works must be clearly cited or placed in quotes. Any cheating will be handled according to the university's policy on academic dishonesty. Please see the Honor Code for more information.

Ways to Reach Sara

Email: sbernste@nd.edu

Office Hours: by appointment.