Law and Theory of Human Action

Author : Dennis Patterson

Date : June 28, 2017

John Hyman, Action, Knowledge, & Will (**Oxford Univ. Press**, 2015).

Every once in a while a book comes along that completely changes the way scholars think about their field. In the realm of what is referred to as "Action Theory," Elizabeth Anscombe's *Intention* was such a book. Together with Ludwig Wittgenstein and Gilbert Ryle, Elizabeth Anscombe pioneered a revolution in philosophical thought that replaced the Cartesian paradigm of inner reflection with an emphasis on thought and meaning grounded in intersubjective practices and public criteria of meaning.

John Hyman works in the tradition of analytic philosophy of mind just described. His previous work has been in aesthetics (he is Professor of Aesthetics at Oxford) but, over the years, he has developed a position in action theory that is informed by the work of philosophers in the tradition mentioned above. In the book under review, Hyman works through the work of the philosophers just mentioned and advances a new way of thinking about human agency. His book should be of special interest to lawyers as it contains illuminating discussions of many topics found in law (e.g., will, action, act and knowledge).

Hyman's book centers on what he calls "The Modern Theory of the Will." Starting with Descartes and running through much of British Empiricist philosophy (as well as Bentham and Mill), human action is conceived of as a mental act of will that manifests itself in physical action. As the source of all voluntary or intentional action, the will is the engine of human activity: the will is the mark of human agency.

Hyman argues that the Modern Theory of the Will is a simplistic and explanatorily troubled picture of human action. It is simplistic in that all of human action is reduced to a single paradigm: the will as the seat of all action. It is explanatorily troubled because, owing to its simplicity, there is confusion over the proper explanatory categories for human action. I shall consider one of these in a moment. First, let me present Hyman's taxonomy for understanding human action.

The centerpiece of Hyman's analysis is his view that human action has four distinct and irreducible dimensions: physical, psychological, ethical and intellectual. The principal error of the modern theory of the will is to confuse and conflate these four dimensions. By disentangling each of these from the garbled narrative that is the modern theory of the will, Hyman demonstrates how human action can be understood in more perspicuous and efficacious terms.

One of the best examples of the power of Hyman's four dimensions of human agency is found in the distinction between intentional and voluntary action. At least since Anscombe, voluntariness and intention have been joined together. The conventional wisdom is that an act done intentionally is done voluntarily. Hyman shows why this view is false. In drawing the distinction between these two concepts, Hyman identifies voluntariness not as a psychological notion but as an ethical one. An act is voluntary, Hyman argues, "if it is due to choice as opposed to ignorance or compulsion." (P. 7.) Voluntariness is a negatively-defined concept. A certain act is voluntary "if, and only if, it is not done out of ignorance or compulsion." (P. 77.) Compulsion, such as duress, has the effect of negating voluntariness. Hyman shows how voluntariness—properly understood—gives us fresh insight into duress. If he is right, then the law may need to rethink its understanding of this central notion.

I shall consider Hyman's argument from the point of view of contract law. The question about duress, Hyman argues, is "whether a person who acts under duress acts voluntarily." (P. 81.) When voluntariness is linked with the intentional, this can lead to paradox. In one of the most interesting discussions in *Action, Knowledge & Will*, Hyman analyses this

paradox, specifically in the legal context. Generally speaking, “voluntariness is associated with choice.” (P. 81.) When he was Lord Chief Justice, Lord Widgery gave the following summary of duress in a perjury case (*Hudson and Taylor*). He wrote:

It is clearly established that duress provides a defence in all offences including perjury (except possibly treason or murder as a principal) if the will of the accused has been over- borne by threats of death or serious personal injury so that the commission of the alleged offence was no longer the voluntary act of the accused.[1]

Hyman notes that “the majority of judgements in criminal and civil cases involving duress have endorsed Lord Widgery’s position.” (P. 82.) But there is an opposing view, one held by some jurists and not a few scholars. The view is simply stated: threats, no matter how terrible, “influence but do not abolish choice, and therefore do not negate voluntariness.” (P. 82.) This position—Hyman dubs it “the revisionist position”—has serious implications, if for no other reason than “[a]t the limit, it might seem to undermine the justification for a defence of duress entirely.” (P. 83.) Hyman puts it this way: “a person who gives way to duress could choose to resist, even if doing so would be dangerous; and a person who pays a fine or joins the army as a conscript could refuse to do so, even if this would be unwise, futile, or wrong.” (P. 81.) Taken together, the two positions present an antinomy (a paradox) about duress, which expresses itself in competing intuitions.

Getting clear about duress means understanding the relationship between ability, possibility, and choice. In every case of duress, the victim could have refused to comply with the demand and endured the threatened act. In such situations, we say “I had no choice.” Hyman thinks that this statement—which is quite common in such circumstances—is “a clue rather than a solution to the puzzle about voluntariness and choice.” (P. 93.)

Hyman offers a three-part test of voluntariness. This test dissolves the antinomy regarding duress in a way that accommodates our competing intuitions about the concept. First, if one does an act to avoid a threatened harm of sufficient gravity, then the act is not done voluntarily. Whether someone acted voluntarily may turn on whether they believed they had a choice, an alternative. Thus, “there is an inescapable subjective element in the concept of voluntariness . . . .” (P. 97.) Second, whether or not someone really had a choice “depends both on the severity of the threat and on the value of the interest sacrificed by giving way.” (P. 98.) Finally, a person compelled to do something in response to a threat is—ceteris paribus—able to resist. Thus, “if it is possible for someone to avoid doing something, it does not follow that he does it voluntarily.” (P. 98.)

The conventional legal understanding of duress is that the party asserting the defence needs to show that the wrongful threat or act was such that his or her will was overcome. I have no doubt that focus on the will—a psychological focus—can be explained as a corollary of the dominance of the modern theory of the will. Hyman substitutes focus on the will with a revised conception of voluntariness. His three-part test replaces the “will theory” of duress.

In addition to resolving the antinomy regarding duress, Hyman’s analysis shows what is really at stake in judgments about duress. What we care about is not so much the will (a causal focus) but the impropriety of the threat that gives rise to the claim of duress. What Hyman accomplishes is a reorienting of our understanding of duress from a psychological to an ethical perspective. This will not only clarify what is really going on in these cases. Further, it will set the stage for a wider inquiry into the relationship between legal doctrine and the four dimensions of human agency.

There is a great deal more I could discuss from this fascinating book. For one thing, Hyman offers a new account of the nature of knowledge, a topic that has preoccupied philosophers for millennia. There is so much in this book for lawyers. Written in accessible prose, the book is a must read for anyone with an interest in the philosophy of action, epistemology, and legal theory.

1. R v. Hudson and Taylor [1971] 2 All ER 244. [?]

Cite as: Dennis Patterson, *Law and Theory of Human Action*, JOTWELL (June 28, 2017) (reviewing John Hyman, Action, Knowledge, & Will (**Oxford Univ. Press**, 2015)), http://juris.jotwell.com/law-and-theory-of-human-action/.