Counterfactual Dependence as an Independent, Non-Causal Desert-Determiner

MICHAEL S. MOORE†

I. Introduction

I have argued in an earlier paper[1] that causation is distinct from counterfactual dependence, in the sense that the two relations are not identical nor is the second a good test for the first. This is true as a matter of fact, and even as a matter of law despite the legal pretensions to the contrary involved in the 'sine qua non' or 'but for' test of cause-in-fact. Suppose one accepts this conclusion. Such a conclusion in no way precludes counterfactual dependence from being morally and legally relevant on its own hook, independently of causation. That is the topic of the present paper.

To probe this independent role of counterfactual dependence as a desert-determiner it will be helpful to distinguish four sorts of cases in which some actor D does or fails to do some act A, and some victim V suffers some harm H:

1. A causes H but H does not counterfactually depend on A.

---

† Visiting Fellow, John Fleming Centre for Advancement of Legal Research, Faculty of Law, Australian National University, Canberra, 2008; Walgreen University Chair, Professor of Law, Professor of Philosophy, Professor in the Center for Advanced Study, Co-Director of the Program in Law and Philosophy, University of Illinois. This paper was given as one of the keynote addresses at the annual meeting of the Australian Society for Legal Philosophy, Melbourne University, June, 2008. It was also given at the Faculty Workshop, Department of Social and Political Theory, Research School of the Social Sciences, Australian National University, March, 2008, and at the Philosophy Department Colloquium University of Queensland, Brisbane, May, 2008. My thanks go to all those whose comments at these presentations have improved this paper.

1 Michael Moore, 'For What Must We Pay? Causation and Counterfactual Baselines,' *San Diego Law Review* 40 (2003), 1181-1272.

2. H counterfactually depends on A but A does not cause H.

3. H does not counterfactually depend on A, and A does not cause H.

4. H counterfactually depends on A, and A causes H.

I intend in this paper to spend most of my time on cases of the second sort. These are the cases of omissions, preventions, allowings, and double preventions that are not full allowings, all of which require considerable attention, both as to the question of whether the relevant liabilities are non-causal and as to the question of whether it is counterfactual dependence that is the relevant desert-determiner for liability. I shall argue that those who mistakenly identify causation as counterfactual dependence can have most of the bottom line conclusions about responsibility that they want, if they will but recognize counterfactual dependence to be a desert-determiner independent of causation.

Preliminarily, I shall spend some time on cases of the first sort, cases that raise some questions about whether causation can be a desert-determiner independent of counterfactual dependence. My answer is in the affirmative, despite some occasional case-law intimations to the contrary.

Cases of the third sort require no attention in this enquiry. These are cases of inchoate liability. If some defendant culpably tried or culpably risked some harm, and (independently of whether that harm does or does not eventuate) there is neither counterfactual dependence of the harm on the defendant's act nor is there causation of the harm by the defendant's act, then defendant's liability is inchoate. In such a case, the occurrence of the harm doesn't count in assessing the degree of his blameworthiness. We can thus ignore such cases for present purposes.

The same might seem to be true of cases of the fourth sort. Surely, one might think, these are as easy a case *for* liability for a harm as are cases of the third sort cases of *non*-liability for that harm. Cases where both desert-determiners are present should be as obvious in their resolution as cases where neither are. Despite this being true, there are some issues to be examined in such cases, so I shall close the paper doing just that.

II. Causation Without Counterfactual Dependence

The issue in the first sort of case distinguished above is whether counterfactual dependence is necessary to the sort of blameworthiness that takes into account the occurrence of some harm. Even if, in other words, some harm is caused by the defendant's act, if that same harm would have occurred

anyway (even without defendant's action) the thought is that the defendant cannot be blamed for that harm's occurrence. (He may of course have a lesser inchoate liability, but such liability ignores the occurrence of the harm in question and is lesser for that reason.)

A. Three Legal Examples Where Causation Seems in Need of Being Supplemented by Counterfactual Dependence as a Desert-Determiner

Consider in this regard three sorts of cases. The first is a concurrent overdetermination case where the co-cause not attributable to the defendant is a natural event or some non-culpable human actor. An overdetermination case is one where two putative causal factors are in play and either is sufficient, by itself, to cause some single injury. A concurrent overdetermination case is one where such causal factors operate simultaneously. A typical example is that of two fires burning their way toward plaintiff's house. Either fire, by itself, will be sufficient both to reach plaintiffs house and burn it to the ground.[2] As it happens, the two fires join, and it is the larger, resultant fire that destroys plaintiff's house. Suppose a defendant has negligently started one of the two fires, but the other fire is of natural origin caused, for example, by lightning, spontaneous combustion, or the like. Alternatively, suppose the second fire is the result of innocent human action. A minority of American courts deny liability of defendant to plaintiff for his house in either of the sorts of cases just supposed.[3]

The stated rationale for this result is that defendant's act of starting his fire didn't *cause* the destruction of the plaintiff's house. Yet this cannot be a causal distinction at work here. Whether defendant's fire caused the harm cannot depend on the moral innocence of the origins of the second fire. Yet once we separate causation from counterfactual dependence, we can see the counterfactual rationale for this liability rule: if defendant had not started his fire, plaintiff's house would have been burnt to the ground regardless. Defendant's action, in other words, made no difference to what was going to happen anyway in the ordinary course of nature.

---

2 Anderson v. Minneapolis, St. Paul & S. St. Marie R.R. Co., 179 N.W. 45 (Minn., 1920); Kingston v. Chicago & N.W. Ry. Co., 211 N.W. 913 (Wis., 1927).

3 *Cook v. Minneapolis, St. Paul & S. St. Marie Ry. Co.*, 74 N.W. 561 (Wis., 1898). This appears to be the majority rule in the English Commonwealth. *See* Peter Cane, *Responsibility in Law and Morality* (Oxford: Hart Publishing Co., 2002), 121-122. It is rejected by the weight of authority in America, although there are few cases. See *Kyriss v. State,* 707 P. 2d 5, 8 (Mont. 1985); Charles Carpenter, 'Concurrent Causation,' *University of Pennsylvania Law Review* 83 (1935), 945-946.

A second sort of case relevant here is what I call asymmetrical concurrent overdetermination case.[4] An asymmetrical, concurrent, overdetermination case is one where there is one big cause ('big' meaning sufficient, by itself, to cause the harm), joined by one or more little causes ('little' here meaning, not big enough to cause the harm alone, either individually or jointly with the other little causes). Some examples: defendant's small fire joins a much bigger fire, and the resultant fire destroys plaintiff's house; defendant's acts stop up the drainage wickets in a flood control levy, but such a big flood occurs that the harm to plaintiff would have occurred even with the unstopped-up drainage wickets;[5] defendant nicks a cable holding plaintiff's cable car, a large force well in excess of the original carrying capacity of the cable without the nick causes the cable to break, but it nonetheless breaks at the nicked point, sending plaintiff to his doom.[6]

There is some authority for the proposition that there is no liability in these cases.[7] The rationale is again counterfactual: these injuries would have happened anyway in the natural course of events. If contrary to fact, defendant hadn't started his small fire, stopped up the drainage wickets, or nicked the cable, these injuries would still have occurred. Therefore, defendant's act made no difference to the world and he cannot be made to pay for these harms.

The third sort of case is the pre-emptive overdetermination case. A pre-emptive overdetermination case is one where there are two events, each of which could be sufficient to cause some injury, yet unlike the concurrent cause cases, here one event pre-empts the other from becoming a cause of such injury.[8] In the two fires example, this is where the fires do not join, and the defendant's fire burns plaintiff's house to the ground before the other fire arrives. The first fire pre-empts the second, so the first fire is universally held to be the cause of the harm.

Despite such clear causation of the harm, often in tort law damages are limited to the value of just that temporal duration between the house's actual destruction and the destruction it would have had by the pre-empted fire if defendant's action had not existed. We measure, in other words, the amount of loss for which the defendant is liable by comparing what did happen to what would have happened had defendant not started his fire. In cases where that

4 See Moore, 'For What Must We Pay.'

5 *City of Piqua v. Morris*, 120 N.E. 300 (Ohio, 1918).

6 For a variation of the example see Richard Wright, 'Causation in Tort Law,' *California Law Review* 74 (1985), 1794, 1800.

7 *E.g.*, *City of Piqua*, 120 N.E. at 303.

8 For examples and analysis, see Moore, 'For What Must We Pay.'

temporal interval is quite short, tort law eliminates damages entirely, on a kind of de minimus principle.[9]

In criminal law, of course, there are no damages recoverable by the victim to be limited in this way. Rather, there either is or is not a legally prohibited state of affairs that has been caused by the defendant. It is no defense to homicide, for example, to show that if defendant had not caused the death of the victim something or someone else would have. Pre-emptive-cause killings are still fully homicides. Still, even in the criminal context, the lack of counterfactual dependency in the pre-emptive cause cases makes for the difference I have explored elsewhere in what I have called the 'acceleration cases':[10] if the harm that defendant caused was about to be caused anyway by some natural occurrence, then defendant may have a consequentialist, balance of evils defense for his behavior that would otherwise be unavailable. In the lifeboat cases, for example, many find the result in *Dudley v. Stephens*[11] to be wrong. Many agree with Glanville Williams, and they do so for the reason that he pointed out: that the cabin boy, who was killed and eaten so the rest could survive until rescued, was about to die anyway of natural causes.[12] Really, the argument is, those who stabbed the cabin boy clearly caused his death but only by accelerating it. This idea of acceleration is fully a counterfactual notion: if the defendants had not stabbed the cabin boy, he would have died shortly anyway.

If these various legal doctrines reflect some underlying truth about moral blameworthiness, then causation would not be a desert-determiner independent of counterfactual dependence. Then, even if counterfactual dependency is a poor theory of the true metaphysics of causation, such dependency would nonetheless determine desert in just the way the counterfactual theory of causation says it does.

---

9 *Dillon v. Twin State Gas & Electric Co.*, 163 A. 111, 115 (N.H., 1932); *Jobling v. Ass'n Dairies Ltd.*, 1982 A.C. 794 (H.L. 1991) (appeal taken from Eng.).

10 Michael Moore, 'Patrolling the Borders of Consequentialist Justification: The Scope of Agent-Relative Prohibitions,' *Law and Philosophy* 27 (2008), 35-96.

11 *The Queen v. Dudley & Stephens*, 14 L.R. 273 (Q.B.D. 1884).

12 Glanville Williams, *Criminal Law -- The General Part* (London: Stephens and Sons, 2d ed. 1961), 739-41. Williams' conclusion is an old one, reflecting the considered judgments of Cicero, Kant, Bacon, Holmes, and the drafters of the Model Penal Code. For discussion and citations see Michael S. Moore, 'Torture and the Balance of Evils,' *Israel Law Review* 23 (1989), 303, *reprinted in* Michael Moore, *Placing Blame: A General Theory of the Criminal Law* (Oxford: Oxford University Press, 1997), 693.

None of these results, however, is morally compelling. Consider first the concurrent overdetermination cases where the other cause is a natural event or innocent human action. The intuitions that guide these cases are: (1) a sense that what was going to occur naturally is a morally significant baseline; and (2) that the counterfactual, 'but-for defendant's action, plaintiff would have lost his house to nature,' is true. The baseline judgment in (1) is crucial here, because that is what distinguishes these cases from others where the second fire is of *culpable* human origin. In these latter cases (of culpable origin), plaintiff would have lost his house too, had defendant not set his fire, only not to natural circumstances but to another, perhaps equally culpable, human choice. If counterfactual dependence is necessary to the cases of a non-culpable origin for the second fire, why isn't it equally necessary in cases of culpable origin? Prima facie counterfactual dependence cannot distinguish these cases any better than can causation. If causation is the sole desert determiner, there is liability in both such kinds of case; if counterfactual dependence is necessary, then there is no liability in either sort of case.

Crucial is the baseline notion: we are invited to test the counterfactual in possible worlds where second fires of culpable origins are removed but where second fires of non-culpable origins are not removed. Yet nothing in the contemporary metaphysics of counterfactuals justifies this artificial construction of such a possible world in which to test the relevant counterfactual.[13] Nor is it morally very compelling. If it matters that plaintiff was going to lose his house anyway, why should it matter whether that loss would have been due to nature, innocent human misadventure, or culpable human choice?

One might of course swallow hard here and deny liability in either kind of concurrent overdetermination case. But in torts that would leave plaintiff uncompensated despite the loss of his house because of two culpably set fires and two blameworthy defendants who could pay for the harm they caused; in criminal law that would result in a merely inchoate liability for the two culpable fire starters, despite the destruction of a house because of their actions. No jurisdiction has been able to stomach these results in torts or criminal law, and rightly so. Counterfactual dependence is not and should not be necessary in these cases. Causation of the harm is sufficient for liability for that harm.

The asymmetrical overdetermined concurrent cause cases pit counterfactual rationales rather directly against cause-based rationales. When a court finds liability for a minor wound that together with a mortal wound

---

13 On the possible worlds truth conditions for counterfactuals, see Moore, 'For What Must We Pay.'

produces death through loss of blood,[14] it is marching under the banner of causation. The minor wound was a cause of the death, even though that death would have happened anyway. When a court denies liability for negligently maintained drainage wickets on the ground that the flood was so large that it would have exceeded the capacity of the drainage wickets even if they had been properly maintained, it is marching under the colors of counterfactual dependency.[15] The split in legal authority is wholly due to a divergence in rationale along these lines. Once one sees that causation and counterfactual dependency are not the same thing, one can at least see this split in its proper light.

My own view here too is that the culpable causation of harm should be sufficient for liability. The fact that the harm would have happened anyway, even without defendant's action, should not change this result. True enough, this conclusion here is not buttressed by the *reductio* that supports a like conclusion in the symmetrical concurrent overdetermination cases. (That reductio was that if you can't hold one culpable causer of the harm when there is an innocent co-causer of the harm, you can't hold that culpable causer when there is another culpable co-causer, and if you can't hold the second culpable co-causer you can't hold the first because there is no difference between them -- and that would be absurd.) We can't use this exact *reductio* because in the asymmetrical cases there is a difference between the big and the little causes in that only the former was necessary; so that when that big cause is a culpable human agent we can hold him liable even though we do not hold the smaller, non-necessary, culpable causer liable.

Yet we can construct another, distinct but similar *reductio*: holding the size of defendant's causal contribution constant, imagine a case where the larger causal contribution comes from a combination of culpable human agents, each of whom was just like the defendant in terms of size of causal contribution. Now, if defendant cannot be held liable because his causal contribution was not necessary to the harm, neither can any other culpable harm-causer be held liable -- for none of them, individually, were necessary to the harm either.[16] And that too seems unacceptable. In torts, it would mean a plaintiff would suffer the loss uncompensated, despite the fact that he lost his house because of the culpable actions of several defendants. In criminal law, it would mean that each defendant can only be punished for the inchoate version of the crime of property destruction, despite the fact that each culpably caused the destruction of the property in question.

---

14 *People v. Lewis*, 124 Cal. 551, 57 P. 470 (1899).

15 City of Piqua v. Morris.

16 The hypothetical is what I elsewhere call a 'mixed' concurrent cause case. Moore, 'For What Must We Pay.'

In the third sort of case, the pre-emptive overdetermination cases, courts that limit damages collectible from a pre-empting-harm-causer often proceed under false colors. Often they talk as if this were a cause-based limitation: when defendant's fire arrives first and burns the house to the ground, and thus pre-empts the ability of a second fire to have done so, defendant is often said to have caused only the loss of the use of the house in the interim between the two fires. Once one divorces causation from counterfactual dependence, one can dispense with this fiction. The defendant clearly caused the destruction of plaintiff's house, flat out. The only question is how we should value that house. There is no inconsistency in holding the defendant liable for causing a destruction of the victim's house but then using the counterfactual judgment about what would have happened to plaintiff's house had defendant's fire not destroyed it as a measure of the loss to the homeowner from that destruction.[17] Liability in such a case wholly turns on causation even when (if) the degree of harm suffered is measured by counterfactuals.

As we saw, criminal law doctrine differs from tort law doctrine here. In criminal law the pre-emptively causing defendant is liable for the completed crime because he caused the legally prohibited result; and this, despite the fact that his act was not necessary to that result occurring because another factor was about to cause it if he didn't. In criminal law there is no second, independent judgment needed to value the victim's loss, as there is in tort law. There is thus no room in criminal law for counterfactual judgments to play a role in limiting damages.

Criminal law surely has it right here. Even as a tort law damage measurement rule, the role of counterfactuals in this way is highly problematic. If the tort law damage rule is applied even to cases where the pre-empted factor is a culpable human action, plaintiff can't recover against anyone. Suppose two culpable defendants, D_1 and D_2, each try to kill some plaintiff, V; they act not in concert; D_1 shoots a gun at V just as D_2 shoots an arrow at V. Both shots are true but D_1's bullet pierces V's heart before D_2's arrow does so, so that V is dead when D_2's arrow strikes V. V's estate has no

17 On separately using counterfactuals to define the extent of damage (i.e., the value of the harm rather than defendant's connection to it), see Stephen R. Perry, 'Harm, History, and Counterfactuals,' *San Diego Law Review* 40 (2003), 1283-1314. As Richard Fumerton accurately perceives, even if we do not use counterfactuals 'to determine at whose feet harm should be laid, we will almost certainly need to employ counterfactuals in deciding whether or not someone was harmed in the first place.' Even when causal connection determines who is responsible and liable for some harm, harm itself 'could plausibly be understood in terms of being placed in a state worse than that in which one would have been in the absence of that agent's action or inaction.' Fumerton, 'Moore, Causation, Counterfactuals, and Responsibility,' *San Diego Law Review* 40 (2003), 1273-1282.

basis for recovery against D_2 -- D_2's arrow didn't cause death, nor was it counterfactually necessary. So if V cannot recover anything against D_1 (or recover only a de minimus amount equal to the value of a few seconds of life), V cannot recover at all. Yet V has suffered a loss he would not have suffered if D_1 had not done his culpable action. For D_1 both caused V's death, and prevented D_2 from having to compensate V (by preventing D_2 from causing V's death). So the loss D_1 has occasioned should be the sum of the harm he caused V, and the benefit (D_2's payment) he prevented V from receiving.

In any case, however one comes out on valuing the loss in these pre-emptive cause cases in torts, counterfactual dependency is not required for liability, in torts no more than in criminal law. Even if counterfactual judgments, are necessary to measure damage in torts, they are not necessary to liability. Causation by itself is sufficient.

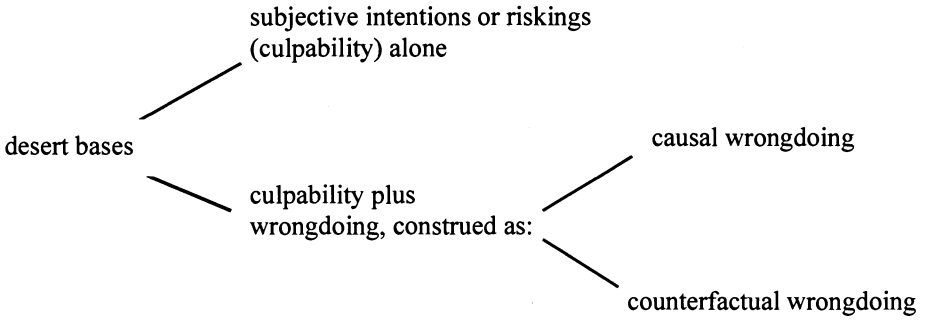
B. The General Sufficiency of Causation as a Desert-Determiner Even When Counterfactual Dependence is Absent

We now should step back from these (three legal examples the symmetrical concurrent cause cases where one sufficient cause is a natural event, the asymmetrical concurrent cause cases, and the damage limitation rule in cases of pre-emptive causation). If we abstract a general principle from some courts' decisions of these cases, it would be that the absence of counterfactual dependence was sufficient for non responsibility -- or, equivalently, that counterfactual dependence was necessary to responsibility, even in cases where there was causation.

It is the symmetrical concurrent overdetermination cases which most clearly focus this general issue, for in these cases there is plainly causation of the harm and equally clearly that causing makes no difference to how bad the world ends up becoming. As we have seen, the law generally makes the causer liable in such cases, but that hardly settles the question of moral correctness. The moral question is, what matters here, causing a harm or making a difference?

My particular arguments so far have been in the form of *reductios* aimed at producing counterintuitive results as natural extensions of each of the three kinds of cases I discussed. What is now needed is something much more general. Needed are arguments as general as the conclusion argued for, which is that culpable causation of a harm is by itself sufficient for being blamed for that harm; making a difference (i.e., being necessary for the harm's occurrence) is not necessary.

In the better known debate between causal theorists and subjectivists about responsibility that I have addressed in other papers, arguments for why causation matters are hard to come by. My earlier survey of my predecessors on this topic made me wonder whether there are any reasons capable of supporting the judgment that causation matters.[18] That it does may be more basic than anything we can adduce in support of it. So I am not sanguine about what can be said here. Still, the relation between the two debates can be seen as two nodes on a decision tree:



One gets to the second node -- deciding between causation and counterfactual dependence as desert-determiners -- only after one has rejected the purely subjectivist branch at the first node of the tree. So it is possible that whatever arguments there are that are capable of selecting objective wrongdoing as a desert-determiner (over subjectivism) are also capable of more particularly selecting the causal version of objective wrongdoing.

The main argument that I and others have used against subjectivists about responsibility has been a kind of *reductio ad absurdum* of an argument subjectivists deploy.[19] This subjectivist argument urges that we lack control over the results of our actions so that our blameworthiness cannot be increased by the happenstance of such results. Increased blameworthiness for factors over which we lack control would be a kind of 'moral luck,' and morality, so the argument goes, cannot be so arbitrary as to admit the existence of such luck in determining the degree of our blameworthiness.

---

18 Moore, 'The Independent Moral Significance of Wrongdoing,' *Journal of Contemporary Legal* Issues 5 (1994), 1-45, reprinted in Moore, *Placing Blame,* 196-211.

19 *Id.*, 233-246.

The *reductio* against this is based on the fact that we have no such control over what we intend, believe, or will either, so if this kind of control is necessary for blameworthiness there is no such thing as moral blameworthiness. This kind of response, while effective against subjectivists, cuts no ice against 'counterfactualists.' For proponents of counterfactual dependency as a desert-determiner do not rely on some supposed control actors have over what difference their actions make in the real world, a control over results such actors could then be said to lack. Counterfactual theorists are, in this respect, in the same boat with causal theorists, for it is implausible that there is any more control of 'what would have happened if . . .' than there is of what actually results from our actions.

The more positive argument that I have directed against the subjectivists is based on the epistemic power possessed by the twin emotions of guilt and moral hatred.[20] The general idea is that our emotional reactions, when they are virtuous, are good but not infallible guides to the truth of the moral judgments that such reactions cause.[21] Feeling guilty, for example, can be a good indicator that one is guilty. Against subjectivists, the argument is that there is a large difference in the emotional reactions to failed attempts and unrealized riskings, on the one hand, compared to successful attempts and realized riskings, on the other. It is the latter that gets the blood to the eyes, the former generating usually no more than relief at a 'near miss.'

This argument can be deployed against counterfactualists if we hone in more precisely on what it is that makes us feel so guilty for ourselves and so angry at others. Consider the pre-emptive overdetermination cases. If you have culpably caused a serious harm to an innocent, does it diminish your sense of guilt in the slightest that another person or nature stood ready to cause that harm if you did not? True enough, as a pre-emptive cause your action made no difference because right behind you someone or something else stood ready to cause the harm. Yet that fact seems to make no moral difference. Think how ill it lies in the mouth of a wrongdoer to try to lessen his responsibility by saying, 'if I hadn't done it, someone else would have.' Similarly, if you were the pre-empted factor, should you feel the guilt of the actual doer of the deed? Or, isn't the reaction still one of relief at a near miss: 'I almost did a great wrong, but as luck would have it, I didn't -- someone (or something) else did.'

The principle to which these emotions and judgments point is a principle of 'ownership' -- in some suitably extended sense, we *own* the results of our actions. Such results become a part of our history. They write an entry in our moral ledgers, for the good if they are good, otherwise if they are bad.

---

20 *Id.*, 229-232.

21 *Id.*, 127-138.

Some such as Peter Cane[22] and Tony Honoré[23] wish to go further, arguing that our very identity depends on our being responsible for what we cause. Yet if we keep personal identity over time to truly essential properties, surely we could be the person we each are even if, contrary to fact, we hadn't caused some harm; what we cause is too contingent a feature of our lives to be plausibly listed as essential to personal identity.

It is true that often those who speak of 'personal identity' do not mean it literally. Rather, they mean what I have called elsewhere the *sense of* identity that we each possess.[24] We each do have a sense of the kind of person that we are and a sense of the kind of person we want to be, what psychoanalysts used to call our ego-ideal. These senses of self are impacted by what we culpably cause, for owning up to those items is what does and should shape our sense of who we are. I see this as another way of putting the 'ownership' metaphor mentioned above.

However this is put, it is not yet much of an argument. It will appeal only to those who have been horrified, ashamed, or numbingly distressed, by some awfulness of which they were the author. Such people know that causing things matters to responsibility in a way that requires no other argument. Those with either better characters or more fortunate opportunity sets will lack the relevant experience that makes this intuitively so plain to the rest of us.

III. Counterfactual Dependence Without Causation I: Blameworthiness for Omissions

I turn now to the second sort of case distinguished in the introduction of this article. I refer to cases where there is no causation of a harm by a defendant yet the existence of that harm did depend counterfactually on the defendant. My first example, dealt with in this section, is omission.

In this section I need to defend three propositions:

(1) We do have positive moral duties. These are duties to do certain actions, as contrasted to negative duties not to do certain actions. Breach of such positive duties (by omitting to do the actions we have a duty to do) is blameworthy. In short, there is a moral responsibility for some omissions.

---

22 Cane, *Responsibility in Law and Morality*, 57, 106, 117, 185.

23 Tony Honoré, *Responsibility and Fault* (Oxford: Oxford University Press, 1999).

24 Michael Moore, *Law and Psychiatry: Rethinking the Relationship* (Cambridge: Cambridge University Press, 1984), 407-409.

(2) A necessary condition for such blameworthiness for omissions is that the omitter could have prevented that which he omitted to prevent. He had to have, in other words, the *ability* to satisfy his positive duty. Such an ability is counterfactual: if, contrary to fact, he had not omitted to do some action A -- if, that is, he had done A -- then the state of affairs he was duty bound to prevent would not have existed. In a nutshell, counterfactual dependence (of the harm on omission) is necessary for responsibility for omissions.

(3) Causation (of the harm by the omission) is not necessary for responsibility for omissions. Indeed, causation could not be necessary for omissive responsibility, because omissions are not causes of the harms they fail to prevent.

These three propositions yield the conclusion I wish to defend in this section: counterfactual dependence, not causation, is the desert-determiner for omissive responsibility. I shall say little about the first two propositions here, because I think that they are uncontroversial. To deny the first would be to adopt a rabid libertarianism that is morally repellant. We have many positive duties, not just to the near and dear but also to strangers, even if Anglo-American tort and criminal law enforce only certain sorts of these. Yet (as the second proposition asserts) it would be patently unfair to demand the impossible of us: we can fairly be blamed only for not preventing what we had the ability to prevent. It is the third proposition that is the locus of serious disagreement. Whether omissions are or are not causes is hotly contested territory.

A. What Is an Omission?

It helps to remind ourselves what an omission is. Clarity here removes some needless controversy about the causal status of omissions. My stipulated sense of 'omission' is that an omission generically is an absent action.[25] An omission by me at t to save Jones from drowning is the absence of any act-token of mine at t that instantiates the type of action, saving Jones from drowning. Such an omission is not a particular event or a particular state of

[25] Argued for originally in Michael Moore, *Act and Crime: The Implications of the Philosophy of Action for the Criminal Law* (Oxford: Oxford University Press, 1993), 22-31; Moore, *Placing Blame*, 262-266. I am continually surprised at how many of the critics of my generic concept of omissions do not see this, supposing instead that I defend some much more particular view such as that omissions are stillness's of bodily movement. See, e.g., George Fletcher, 'On the Moral Irrelevance of Bodily Movements,' *University of Pennsylvania Law Review* 142 (1994), 1443-1453; Stephen Mathis, 'A Plea for Omissions,' *Crminal Justice Ethics* (Summer/Fall, 2003), 15-31.

affairs, like a particular act of saving only existing as a particular *not*-saving. Omitting to save is no more a particular something than is an absent elephant a particular something, an odd and ghostly kind of elephant, a 'non-elephant.'

My stipulation is mostly for clarity and for the systematic argumentation it makes possible on the causal status of omissions. But I also take such a meaning to statements about omissions to be in conformity with ordinary usage and the semantic intentions of ordinary speakers when they speak of omissions.

This generic meaning to 'omission' will raise obvious problems for omissions being eligible to serve as causes. Seeing this, a number of theorists sympathetic to omissive causation seek to substitute a different generic meaning for 'omission,' a meaning that takes omission to be some actually existent particulars (and not just absences of any instances of types, as I contend). I divide those who seek some such more positive meaning of 'omission' into three camps. First, there are those who wish to conceive of omissions as *mental* particulars that unproblematically exist. This is the view taking the phrase, 'my omission at t to save Jones', to refer to my willing (deciding, intending, etc.) not to save Jones. Second, others wish to construe omissions as referring elliptically to some one event that is going on in the spatio-temporal region in question. On this view, 'my omission at t to save Jones' refers to what I *was* doing at t. If I was sitting quietly, dancing a jig, conversing with a friend, or whatever, it is some such particular act to which reference is made. Third, one might take omission language to refer to everything else going on in the relevant spatio-temporal region. 'My omission at t to save Jones,' on this view, refers to the totality of states of affairs in this region at t. Such a phrase refers to the omission in the same way that a donut isolates for us a donut hole -- the omission (like the donut hole) is where nothing is going on (or where there is no donut).

There is nothing ontologically suspect about any of these three alternative conceptualizations of omissions. There are mental events, willings being one of them, and like all representational states there is nothing untoward or awkward about intending or willing *not* to do something. The content of such representational states is propositional, and negative propositions are unproblematic (as contrasted to negative properties or negative events).[26] Similarly, conversing, dancing, etc., are unproblematically things we do, and such human actions are one species of events that unproblematically exist. Likewise, a totality of such events or states of affairs exists as robustly as does the events or states of affairs composing such a

---

26 On this, see Michael Moore, 'Causal Relata,' in Sharon Byrd and J.C. Joerdan, eds., *Philosophia Practica Universalis: Festschrift for Joachim Hruschka, Annual Review of Law and Ethics* 13 (2005), 589-641.

totality. Breaking a rack in billiards is a perfectly respectable event, as respectable as the events which compose it such as hitting the apex ball with the cue ball.[27]

Queer ontology is thus not the objection to any of these three proposals. Nonetheless we should reject each of them. There are two objections to the first construal, the mental state construal. One is Bentham's quite accurate observation that many of the omissions in which we have both explanatory interest and for which we blame people, are not willed omissions.[28] I can will myself to do nothing to save Jones; but I also can fail to advert (negligently or non-negligently) to Jones' peril, and *omit* to save him nonetheless. Secondly, even when some omission is willed, the semantic intentions of speakers who use the phrase, 'my omission at t to save Jones,' is *not* to refer to the willing. Their semantic intention is to refer to the fact that I did not in fact save Jones. We know this because of what they would say if I did will not to save Jones, but saved him nonetheless through misadventure: I did *not* omit to save Jones, even though the thing to which they were supposedly referring -- my willing -- was present.

The second and third construal of omissions are subject to this last objection too. My semantic intention in using the phrase, 'my omission at t to save Jones,' is not to refer to what I was doing at t. I know how to refer to what I was doing at t -- I use words like 'sitting,' 'reading,' 'conversing,' etc. True enough, Donald Davidson accurately pointed out that we often use descriptions of non-essential properties of an event to pick out that event.[29] We can refer to an avalanche event as 'the most talked about event of the year,' without for a moment thinking that the talking was any part of the avalanching. What we don't typically do is use a property an event does *not* have to form a description with which to pick out that event. We do not pick out some avalanche at t by saying, 'the non-red event at t.'[30] Imagine picking out *objects* by properties they do *not* have. Take the sentence, 'no dog was at dinner last night.' Is this elliptical for, 'there *is* something such that (it is no

---

27 On fusing many smaller events into fewer larger events, see Judith Jarvis Thomson, *Acts and Other Events* (Ithaca, N.Y.: Cornell University Press, 1977), 78.

28 Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (Oxford: Oxford University Press, 1789), 72 n.1. See the discussion in Moore, *Placing Blame*, 262-266.

29 Donald Davidson, *Essays on Actions and Events* (Oxford: Oxford University Press, 1980).

30 There are of course circumstances where the absence of some property is so surprising or so uniquely true of some event that we pick it out by such absence. E.g.: 'the least talked about event of the war' might refer to some surprisingly secret action.

dog and it was at dinner last night)'?[31] One can (just barely) imagine that this would be a way of picking out your attractive dinner companion of the previous evening -- she certainly is no dog, you might think -- but no one I know uses language this way. They mean, 'it is not the case that there was any token of the type, dog, at dinner last night.' Which is how I construe talk about absent events too.

There are two additional objections to the third alternative construal of omissions, objections not dependent on the semantic intentions with which we speak. One objection is that of indeterminacy: the hole in the metaphorical donut (of totality states of affairs) includes too much -- indeed, it is as large as the universe surrounding the donut. Less metaphorically: what is *not* going on at t when everything that is going on at t *is* going on, is very very large. True enough, there is no saving of Jones by me going on at t; but the Martians are not invading, the moon is not disintegrating, the flies are not buzzing at t too. The totality of what is going on -- even if we restrict the spatial region severely -- does not uniquely isolate any non-saving of Jones by me. Secondly, much of what *is* going on (in the totality of states of affairs at t) is causally irrelevant to Jones death. If the motive for reconstruing omission talk to be about something(s) is to have ontologically respectable relata for causal relations, this won't do it. On no plausible theory of the causal relation is my *conversing* a cause of Jones' death, even in the situation where that was what I was doing rather than saving Jones. On the counterfactual theory, for example, the closest possible world in which we should test the counterfactual, 'if I had not been conversing, Jones would not have died,' is *not* the possible world in which we replace the conversing I did in the actual world with a rope-throwing.[32] If Jones is my old enemy, for example, and I noticed his plight but kept conversing, the closer possible world in which to test the counterfactual is one where we replace my conversing with my laughing, my dancing a celebratory jig, or my sitting quietly. And in those worlds, Jones dies all the same.

I conclude that my construal of omissions (as the absence of any instance of a type of action) is secure. This gives 'omission' what I call its *generic* meaning. Nothing in this construal precludes overlaying this generic

---

31 Jonathan Schaffer's construal. Schaffer urges that we 'regard the absence description as a way of referring to a present event, so that "the father's negligence" [in not watching his child] is just a way of referring to his actual nap, or whatever he actually did.' Schaffer, 'Causes Need Not be Physically Connected to their Effects: The Case for Negative Causation,' in Christopher Hitchcock, ed., *Contemporary Debates in Philosophy of Science* (Oxford: Blackwell, 2004), 212. At dinner at the 2006 Mt. Hood Conference on Causation Schaffer made explicit the paraphrase in the text, which moves the negation from outside the existential quantifier and places it inside that quantifier's scope.

32 Schaffer's strategy, *id.* I deal with this in *Act and Crime*, 29-31.

meaning with many things lawyers in particular are often keen to add. The omissions (absent actions) in which we are interested are often those generic omissions where in addition:

(1) there was an ability to make a difference;

(2) there was a moral or legal duty not to omit;

(3) there was some expectation of the action omitted so that the omission is surprising;

(4) omitting was faulty (at least negligent); or

(5) omitting was intentional.

In various contexts we may well restrict the omissions that we wish to talk about to one or more of these subclasses of omissions. For my purposes, however, we need to work with the generic sense of an omission. For it is this sense that tests our question here, which is whether absent things -- omissions -- can ever be causes.

In addition to those who would substitute a different meaning for 'omission' for my stipulated, generic meaning, there are those who reject the significance of such meaning because they doubt the coherence of *any* act/omission distinction. Omission talk is just a form of action talk, on this view, so that 'action by omission' versus 'action by commission' is no real distinction. The worry here is whether we can reliably distinguish actual events or states of affairs, from absent ones. There is a nest of worries here, so let me separate four of them. The first worry is the problem known as the problem of 'embedded omissions.[33] The problem arises the moment one regards the individuation of act-tokens like an accordion, so that one can look narrowly or broadly in time for 'parts' of 'the same act.' Suppose a defendant starts driving his auto at t_1, accelerates to the legal speed limit at t_2, and is travelling in a straight line at that speed at t_3 when a child darts out in front of him. He fails to hit the brakes at t_3, the child is hit at t_4, and dies at t_5. The omission, it is said is 'embedded' within a larger 'course of conduct' for which the driver can be held responsible.[34] Now the skeptical worry: 'any omission

---

33 Discussed by me in Moore, *Placing Blame*, 269; Moore, *Act and Crime*, 35-37.

34 'Course of conduct' is the term of art used by the American Law Institute's *Model Penal Code* ' 2.01. The English common law invites this same sloppy analysis. See, e.g., *Fagon v. Metropolitan Police Commissioner*, [1969] -1 Q.B. 439, where the court debated whether not moving the car which earlier the defendant had driven onto an officer's foot was an act or

can be characterized as part of a larger encompassing act'[35] if one is free to 'play the accordion' by expanding the time frame during which one looks for acts and not omissions.

The antidote to this form of the conceptual worry about omissions is not to be so sloppy in the formulation of the act requirement. Do not formulate that requirement in terms of some ill-defined 'course of conduct;' rather, ask at each relevant time whether there was some act or omission of the defendant with the relevant (causal or counterfactual) properties. In the driving example, there are acts at t_1 and t_2, but do they cause the death? There is an omission at t_3 (the duty with respect to which arose by defendant's acts at t_1 and t_2 placing the child in peril), but would the child not have died if defendant had not omitted to apply his brakes? These more precise questions do not allow one to conclude that 'any omission can be characterized as part of a larger encompassing act.'[36]

A second but distinct worry stems from what I have elsewhere called the 'true doctrine of "embedded omissions."'[37] This is the doctrine holding that omissions to change some state of affairs can always be reconceptualized as the existence of the state of affairs not changed which is itself a circumstance present when the defendant performs some positive action. For example, the defendant who omits to obtain the woman's consent to sexual intercourse is not guilty of a crime of omission when he is convicted of rape; rather, his act of causing penetration took place in the circumstance that no consent had been given. That he could have (perhaps) prevented this circumstance from existing but omitted to do so, is neither here nor there. His act took place in the circumstance of no consent, and it is for that act in that circumstance that he is rightly punished.

There is of course nothing whatsoever wrong with this conclusion or analysis for crimes like rape. Not fastening a seatbelt or not wearing a motorcycle helmet are not crimes of omission; driving or riding in a car or a motorcycle without these items are crimes and crimes requiring positive action. Likewise, operating a railroad engine without a spark arrestor is not a crime of omission; it requires the action of operating a locomotive in the circumstance that no spark arrestor is present.[38] Yet there is no general worry

---

an omission (rather than seeing that there was an act at t_1 *and* an omission at t_2).

35 David Fischer, 'Causation in Fact in Omission Cases,' *Utah Law Review* (1992), 1339.

36 Id.

37 Moore, *Placing Blame*, 269.

38 David Fischer's example, from which he concludes that 'this distinction between act and omission is meaningless because as a matter of semantics, any omission can be characterized as part of a larger encompassing act. . . .

about the conceptual line between acts and omissions to be found here. From such examples one cannot generally conclude that any act can be characterized as an omission; nor can one conclude, as does Hyman Gross, that all 'crimes of omission are committed only when specified acts are done . . . Even though liability is imposed *because* something was not done, liability nevertheless is *for doing* certain things without doing certain other things.'[39] The gross mistake here is overgeneralization: what is true of some crimes and of some moral failings, is taken to be true of all. And it is not. Not rescuing a person in peril that one has a duty to rescue is *not* doing something else while not rescuing. Such omissions are as stubbornly omissive as the earlier examples were stubbornly active: it is the absence of doing any rescuing that is morally and legally prohibited.[40]

A third worry here is one that collapses my earlier distinctions between semantic intentions. Thus, Amit Pundik in a recent paper imagines a nurse who drinks tea rather than administering some medicine to a patient. Pundik supposes that the nurse's 'omission can be described as an action by emphasizing what the agent *actually did* (e.g. the nurse drank tea), or as an omission by emphasizing what the agent *failed to do* (e.g. the nurse did not administer the infusion).'[41] The equal availability of these descriptions of course assumes that the descriptions describe the same thing. Rather patently, they do not. As I argued above, the referential intentions here are typically different. To use the first description is to intend to refer to an act-token, one of tea drinking; to use the second description is to intend to refer to an omission, the absence of any act-token instantiating the act-type of administering an infusion. There is no confusion of act/omission here, except in the mind of those who fail to distinguish these distinct semantic intentions and their correspondingly distinct speech acts.

The most troublesome of this nest of conceptual worries is a fourth one. It is that even when both forms of the embedding worries are put aside so that we are focusing on one discrete act or omission, and even when we do not elide two semantic intentions together by pretending they are the same when they are not, still (the objection is) it is arbitrary how we classify things into

---

It is equally plausible to characterize the railroad's behavior as an act (carelessly operating a locomotive) or as an omission (failure to equip a locomotive with a spark arrestor).' 'Causation in Fact in Omission Cases,' 1339.

39 D. Hyman Gross, *A Theory of Criminal Justice* (New York: Oxford University Press, 1979), 65.

40 Explored by me at greater length in Moore, *Act and Crime*, 31-34.

41 Amit Pundik, 'Can One Deny both Causation by Omission and Causal Pluralism? The Case of Legal Causation,' in Russo and Williamson, eds., *Causation and Probability in the Sciences* (London: College Publications, 2007), 25.

acts or omissions. Is death an event, but not-dying its absence? Or is surviving the event, and not-surviving (i.e., dying) its absence? Is telling the secret an event, but not telling the secret its absence? Or is keeping the secret the event, and not-keeping it (i.e., telling) the absence?

Examples like this might lead one to think that the positive/negative valencing of events is a purely arbitrary feature of language, not a feature of the world itself. Hart and Honoré seem to be hinting at this when they say that we are confused about negative statements: we easily think of omissions as 'negative events' and these in turn as 'simply nothing.' Hart and Honoré conclude 'that negative statements like "he did not pull the signal" are ways of describing the world, just as affirmative statements are, but they describe it by *contrast* not by *comparison* as affirmative statements do'[42] One construal of this is that it is statements that are positive or negative, not the world; that both positive and negative statements describe something equally real, just by different techniques; and that for every seeming negative statement there is some positive translation, if one can but find the right word. 'Not telling a secret' sounds negative, but 'keeping a secret' sounds more positive; 'not throwing a rope' sounds negative, but 'ignoring the pleas of the drowning man' sounds more positive. 'Dying' sounds positive, while 'not surviving' sounds negative, just as 'surviving' sounds positive while 'not dying' sounds negative.

This suggestion is surely false. What is true is that the active/passive shifts of English are unreliable guides to presences versus absences. Keeping a secret is an absence, a not-telling, no matter how much idiomatic English may cover up this fact. Dying is also a presence, even if it can be described as a 'not-surviving,' and surviving is an absence, even if it sounds like it is referring to some actual state of affairs.

Consider the following examples from a recent article. Amit Pundik, a skeptic about the conceptual coherence of the act/omission distinction, believes the problem to be exacerbated for what he calls 'quantitative omissions,' which are not failures to act in a certain way in toto but are failures to *do enough* of the act in question. Contrast, Punkik tells us, 'the nurse administering *too little* infusion' with the nurse '*not* administrating *enough* infusion;' contrast 'driving too fast,' with 'failing to drive slowly enough;' contrast, 'providing too little information about an insurance policy,' with 'failing to provide enough information.'[43] Believing these to be equally available descriptions that describe the same things, and believing each

---

42 Hart and Honoré, *Causation in the Law*, 2d edit. (Oxford: Oxford University Press, 1985), 38.

43 Pundik, 'Causation by Omission,' 28.

contrasting pair to contain an active and an omissive description, Pundik defies us to give a principled reason to prefer one description to another.

Yet surely these are no more difficult to classify than are the death/survival, keeping a secret/not-telling examples. If the referential intentions in each of these pairs of examples are the same,[44] then the single reference in each of these is clear. As to the nurse, these are two ways of referring to an omission; as to the driving, these are two ways of referring to an act; as to the insurance policy, these are two ways of referring to an omission. It is only the language that misleads; the reality is plain enough.

The only unclarity to be found in such examples lies in the semantic intentions of some speakers. In certain contexts of utterance one could refer to either an action or an omission with each of these pairs of descriptions. In response to a question of why the driver arrived too soon, for example, the utterer of the second pair of descriptions could be referring to an absence, a failure to drive at a certain speed. Yet this context-dependence of plausible referential intention proves nothing about the indeterminacy of the act/omission distinction. That on occasion we may be uncertain as to which a speaker may be referring does not at all confuse the too different things to which he could be referring.

J.L. Austin used to think that one could tell which of contrary pairs like 'dying/surviving' dominated ('wore the trousers,' as he put it) by looking at the facts of ordinary usage.[45] What the foregoing examples do show is how unpromising is Austin's suggestion; to my ear at least, each of such pairs form equally idiomatic English. Rather, what is an actual event or state of affairs, and what is an absence, is a matter for science. It is up to our best science to tell us whether there are really dyings, or whether survivings is the actual event. Just as it is up to our best science to tell us whether death is a natural kind of event, or only a nominal kind. It is up to science to tell us what there is and what there isn't, here as elsewhere.

It is interesting why many people find this answer less plausible for events and states of affairs than they do for objects. If one thinks about whether there are elephants and whether there are Pegasus-like creatures, it does not seem that these are anything but questions that the best science, and the best science alone, should answer. The same is true about the question of

---

44 If they are not the same, then this is just another instance of the eliding of two distinct semantic intentions earlier discussed. In the context of blaming the nurse, the driver, and the insurance agent, I take the referential intention to be the same in each of these pairs of examples.

45 J.L. Austin, 'A Plea for Excuses,' *Proceedings of the Aristotelian Society* 57 (1956), 1-30.

whether a particular elephant was at a particular waterhole at a particular time (when, say, some grass was trampled). There is no room for any plausible skepticism about the distinction between actual elephants and absent ones, even if in particular cases there is of course room for considerable factual uncertainty.

This conceptual confidence is less for some people with respect to events and states of affairs that for objects. My own diagnosis of this is that such people are not realists about universals -- properties, relations, types. They think that being a brother, and being a single child (that is, not having a sibling), are equally 'real' properties – because their only criterion of what is a real universal is that some English predicate exists naming it.[46] On such a view, of course the distinctions between not-being a brother and being a brother, not being a single child and being a single child, are illusory, depending as they do on the accidents of description-selection. Given the dependence of both events and states of affairs on properties, this view carries over naturally to a like skepticism about there being any real difference between absent or present events or states of affairs.

I shall *not* undertake a general defense of realism versus nominalism. (And while I *will* be doing something else, I am not referring to that with the omissive sentence just uttered!) Knowledge may be a seamless web, but we have to stop somewhere.[47] But since skeptics about universals are also necessarily skeptics about the act/omission distinction, their twin skepticisms must answer arguments suggesting that we need the latter distinction, both in our metaphysics and in our morals. It is to those arguments that I now turn.

B. Why Omission Liability Cannot Be Cause-Based Liability: Omissions Cannot Be Causes

Once we are secure that omissions are absences, we can address the main question of interest here: can absences be causes? There are four reasons for thinking that absences cannot be causes. The first lies in the fact adverted to before: we are not referring to a negative particular when we speak of omissions. Rather, we are referring to *types* of events only, saying that there was no instance of some type of action A at t when there is an omission to A at t.

---

46 David Armstrong's name for this view is 'predicate-nominalism,' Armstrong, *Universals and Scientific Realism I: Nominalism and Realism* (Cambridge: Cambridge University Press, 1978), ch. 2.

47 David Armstrong argues generally *for* the reality of universals, and *against* there being negative universals, in Armstrong, *Universals and Scientic Realism II: A Theory of Universals* (Cambridge: Cambridge University Press, 1978), 23-29.

One good reason for this semantic fact lies in the ontological fact that negative events, negative states of affairs, and negative properties don't exist. They are, as David Lewis rightly says, 'bogus entities.'[48] It would make for a very queer ontology to think that in addition to real tramplings of grass by real elephants, there were non-tramplings of grass by absent elephants. There are of course negative facts, in the sense of negated propositions that are true. It could be a fact that no elephants trampled the grass in the park today, for example. But it boggles the mind to think that the truth-maker for that negative proposition is some particular non-elephant and particular non-trampling 'done' by that non-elephant.

If negative events and negative states of affairs neither are referred to nor exist to be referred to by talk of omissions, it is baffling how there could be relata for singular causal relations involving omissions. In the (admittedly quite idiomatic) statement, 'my failure to throw Jones the rope caused him to drown,' we have a perfectly respectable drowning event to serve as the effect-relata. But what is the cause relata? Absences of certain things are not themselves some things (except in bad jokes and Heideggerean philosophy).

One possibility here is to take facts (in the true proposition sense) to be the relata of singular causal statements involving omissions. It was the fact that I didn't throw the rope to Jones that caused him to drown. Yet this is too high a price to pay, as I have argued elsewhere.[49] Propositions don't cause changes in the world; the states of affairs such propositions are about cause changes in the world. It is a category mistake to regard propositions as causes, and if regarding omissions as causes drives us to this, it is an unacceptably high price.

It may seem that another possibility is to be found in the adoption of the reductionist view of causation familiar in legal circles:[50] on this view, singular causal statements are but ellipses for statements of causal generalizations. Causal generalizations are only about types of events or of states of affairs, so no worries can arise about the lack of singular relata in singular causal relations. Yet this avenue affords no escape. Even such reductionist views require tokens for there to be types; causal generalizations about types of

---

48 David Lewis, 'Causation as Influence,' *Journal of Philosophy* 97 (2000), 195.

49 Michael Moore, 'Causal Relata.'

50 See, e.g., Richard Wright, 'Causation in Tort Law,' *California Law Review* 73 (1985), 1735-1828. I critique this view in Moore, 'Causation and Responsibility: An Essay in Law, Morals and Metaphysics,' in John Deigh and David Dolinko, eds., *Philosophy of Criminal Law* (Oxford: Oxford University Press, 2009) Chapter 19.

absent events require there to be token-absences.[51] Generalization about how failure to water plants cause plants to die require commitment to there being individual absences of watering. And this is what is ontologically suspect.[52]

A second reason for thinking that absences cannot be causes lies in a widely shared metaphysical intuition Phil Dowe calls the 'intuition of difference:'

> There are cases where we have the intuition that ... [the omission relation is] not strictly speaking a genuine case of causation. 'The father caused the accident by failing to guard the child.' It's natural enough to use the word 'cause' here, but when we consider the fact that the child's running into the road was clearly the cause of the accident, but that the father did nothing to the child, in particular that the father did not cause the child to run into the road, then one has the feeling that this is not a real, literal case of causation .... we do recognize, on reflection, that certain cases of .... omission are not genuine cases of causation. I call this the 'intuition of difference.'[53]

Part of the popular appeal of the intuition of difference stems from the fact adverted to earlier: in omissions such as that of Dowe's hypothetical father, the father literally does nothing to guard his child. The intuition, put crudely, is that '"nothing" cannot produce "something."'[54] Or as Julie Andrews rephrased this in *The Sound of Music*: 'Nothing comes from nothing, and nothing ever could.'[55]

---

51 One might think one could make do with causal generalizations about absent types of events, not about types of absent events, and that absent types requires no absences as tokens. This I think reduces to the view that explanations using such causal generalizations relate facts in the propositional sense, where no commitments to negative events or states of affairs is needed, and thus is redundant to the first possibility considered in the text.

52 I thus put aside as unpromising the Davidsonian temptation to find sense (for omission as cause talk) in *explanatory* uses of causal generalizations, a sense requiring no real commitment to negative relata for singular causal relations. Helen Beebee goes down this road in her 'Causing and Nothingness,' in J. Collins, N. Hall, and L.A. Paul, eds., *Causation and Counterfacuals* (Cambridge, Mass.: MIT Press, 2004).

53 Phil Dowe, *Physical Causation* (Cambridge: Cambridge University Press, 2000), 217-218.

54 Paul Ryu, 'Causation in Criminal Law,' *University of Pennsylvania Law Review* 106 (1958), 779.

55 'Something Good,' in Rogers and Hammerstein, *The Sound of Music.* Shakespeare got here first. In *King Lear*, Lear tries to prod his daughter Cordelia into speaking by admonishing her that 'nothing can come of nothing,'

Put this way, the second objection to omissions as causes may seem wholly duplicative of the first objection (which was that there are no particular things to serve as the relata of singular causal relations in cases of omission). Yet there is more going on here. The 'intuition of difference' is based on an intuitive view of the causal *relation* and then, because of that view, only secondarily on an intuitive view of causal *relata*. The intuition is that the singular causal relation is most clearly revealed in cases of pre-emptive overdetermination, where we crisply and confidently conclude that the pre-empting cause (fire, noise, flood, shot, poison, whatever) completed its causal work while the pre-empted factor did not. However we characterize the relation that the pre-empted factor lacked that the pre-empting cause had, *nothing like that* is possessed by omissions. However we conceive of the father's *not* taking certain precautions, there is no relation between that not-doing and the child's death that is at all like the relation between shots causing death, noises scaring horses, floods inundating houses, etc. -- nor like (as in Dowe's example) a car hitting the child or the child running out in front of the car.

Humeans and neo-Humeans are wont to deride this intuition of difference as widely shared only because of a widely shared misconception about the causal relation. Logical positivists such as Moritz Schlick attributed such intuitions to the popular confusion of causation with a 'glue-like' relation whereby one event 'makes' (or forces, produces, or compels) another event to occur.[56] Whereas, Schlick thought, once we strip causation of these misconceptions and see with Hume that it is no more than regularity of succession, such intuitions will disappear. After all, a 'something' can regularly succeed a 'nothing,' and if that is all we mean by causation then one *can* 'get something from nothing.'

For reasons others have explored in detail,[57] there are today few subscribers to the Humean regularity account of the causal relation. On most theories of the relation, causation does have some 'glue' to it, whether cashed out in terms of counterfactual necessity, nomic sufficiency, or something else. So the intuition of difference is not to be explained away on the ground that it was based on some naive confusion of causation with a compulsive making-happen. But the grain of truth in the Humean objection to the intuition of difference is this: the intuition is hostage to there being some theory of the nature of the causal relation that can explain why the intuition is well founded.

---

56 Mortiz Schlick, 'Causality in Everyday Life and in Recent Science,' *University of California Publications in Philosophy* 15 (1932), 99-125.

57 David Armstrong, *What Is a Law of Nature*? (Cambridge: Cambridge University Press, 1983).

Singularist theories of causation attempt just that,[58] whereas counterfactual and nomic sufficiency theories on their face seem incompatible with the intuition (both as it operates in the omission cases and as it shows itself in the pre-emptive overdetermination cases). To the extent that we have reason to favor singularist theories over their rivals,[59] we have reason to validate the intuition of difference by regarding omissions as non-causally related to the states of affairs that they fail to prevent.

With this *caveat*, is not the intuition of difference compelling? Omitted waterings kill plants no more than absent elephants grow grass. In each case, we may be confident: that some act of watering the plant would have kept the plant alive, and that some number of elephants walking to the waterhole would have killed the grass. Had those acts been done, the plant would have lived and the grass would have died; those acts would have thus *prevented* the death of the plant and would have *prevented* the continued growth of the grass. Such omitted waterings or tramplings are thus failures to prevent some event or state of affairs. But failing to prevent something doesn't seem anything like causing that thing to exist. Suppose you hold someone's head under water until they drown and I don't stop you. Have we each caused the victim's death? The metaphysical intuition I find compelling: you caused the death, whereas I only failed to prevent it.

This metaphysical intuition (of a difference between causings and failings to prevent) is matched by a moral intuition, which is my third reason for thinking omissions not to be causes. This is the intuition that there is a large moral difference between our positive duties of beneficence and our negative duties not to cause harm. I have a strong negative duty not to kill you even though you are a stranger to me; I either have no positive duty to prevent your death (for strong libertarians) or, more plausibly, a considerably less stringent duty to prevent your death when compared to my duty not to cause your death.

These are several ways to test the relative stringency of duties.[60] One is the degree of seriousness with which we regard their breach. If I breach my negative duty not to kill strangers, I am rightly punished severely for some form of criminal homicide. By contrast, if I breach my positive duty to rescue

---

58 I explore the nature of singularist theories of causation in Moore, 'Introduction: the Nature of Singularist Theories of Causation,' *The Monist* 92 (2009), 3-22.

59 This dependence of the intuition of difference on certain views of the causal relation and not others in stressed by Jonathan Schaffer in his 'The Case for Negative Causation.'

60 These are explored in Moore, 'Patrolling the Borders of Consequentialist Justification.'

strangers from deadly peril (when I can do so at no peril to myself), I am rightly punished much less severely -- not perhaps as trivial as the $100 fine some states exact for such violations, but much less severely than for killing.

One can also test the relative stringency of paired negative and positive duties -- such as the duty not to kill versus the duty to rescue from death -- by asking when good consequences justify apparent violations of the duty. If one person is drowning in one location, three in another, and I can only throw a rope to the one or to the three, I may justify not throwing the rope to the one by the good consequences of saving the three. Whereas if in the same scenario the one has the rope in his hands and is saving himself with it, I may not justify holding his head under water long enough to drown him in order to get the rope so that I can again use it to save the three. My duty to prevent the death of the one is less stringent than my duty not to kill that one.

How are we to make sense of this moral distinction except with a metaphysical distinction between killing and not-saving, or more generally, between actions causing and omissions failing to prevent? If both are examples of causing death, how does one distinguish between them? Surely it is of no help to pretend that there are two kinds of killings, two kinds of causings; for that just returns us to the questions, what marks the difference and why does that difference make a moral difference? Categorical obligations not to cause death (kill) but only weaker, consequentialist obligations to prevent death (save), is a clear moral distinction based on a clear metaphysical distinction. Take away the metaphysics and it is hard to see how the morality here survives.

It may seem like I am letting the moral tail wag the metaphysical dog. And if I were arguing that because there was a metaphysical difference there must be a moral difference (between causing and failing to prevent) this would be true. But I am arguing the converse: because there is a moral difference there must be a metaphysical difference. The metaethics that makes sense of this last 'must' is a naturalist-realism that sees moral properties as supervening on natural properties (such as causation).[61] Supervenience is asymmetrical co-variance: the supervening property needn't vary just because the base properties vary, because the supervening property can be alternatively realized by different base properties.[62] But every difference in the supervening property must be underlain by some difference in the base properties supervened upon. There cannot be a moral difference not reflective of some natural difference.

---

61 I defend such a naturalist realism in twenty-odd years of essays collected in Moore, *Objectivity in Law and Ethics* (Aldershot, U.K.: Ashgate, 2004).

62 *Id.*, 190-201, 376-379.

We must thus find some natural difference to account for the large moral difference between breach of our negative duties as against breach of our positive duties. The most intuitive natural difference is that between causation and non-causal failing to prevent. It is because causing death is so much worse than failing to prevent death that our negative duty here is so much more stringent than its positive counterpart.

Of course, one could locate the needed natural difference elsewhere. Jonathan Schaeffer, for example, would call both shooting someone and failing to prevent the shooting of someone, *causings* of death, but distinguish them on the basis of two kinds of causation: shooting is a kind of *physical* causation whereas failing to prevent a shooting is a kind of *non-physical* causation.[63] One could then explain the large moral difference by this difference, urging that physical causation gives rise to much more stringent moral duties than does non-physical causation.

Surely this is not very satisfying. In my view, causal dualisms are always suspicious.[64] We need some reason (other than saving a theory in trouble) for inventing second kinds of causal relations. They must share some essential features plausibly belonging to the genus, causation, yet that is rarely shown. Absent such feature common to both kinds of causation, the inclusion of non-physical with physical causation seems *ad hoc* and unjustified. Moreover, even if we were to concede the existence of two kinds of causation, physical and non-physical, in the context of moral blame it is *physical* causation that does the heavy moral lifting. The causal dualist would then have to admit that, 'while omissions may be causes of some kind, they cannot be *physical* causes, and that is what we care about in this context.' The significance of the distinction will not disappear just because we relabel it.

It is in fact preferable to keep the labels we have. If I *cause* death, I breach a stringent negative duty; whereas if I only fail to prevent death, I do not breach a stringent negative duty because I do not cause death. I may breach a less stringent positive duty -- one built on counterfactual dependence, not on causation -- but that is another matter.

My fourth argument for why omissions are not causes stems from 'overdetermination' omission cases. Suppose a bus mechanic is under a duty to fix the brakes of a school bus in the morning but he fails to do so. The bus driver is of course obligated to use the brakes when coming to a stop sign, but

---

63 Schaffer, 'The Case for Negative Causation,' 211 ('Positive and Negative causation are different: the first involves physical connection and the second doesn't.')

64 I attack some of such dualisms in Moore, 'The Superfluity of Accomplice Liability,' *University of Pennsylvania Law Review* 156 (2007), 412-414.

he fails to do so on a given occasion (he either hits the clutch by mistake, or he fails to see the stop sign altogether).[65] Suppose further that if the bus driver had hit the brakes they would not have worked in their unfixed condition, and that if the mechanic had fixed the brakes the bus driver would not have used them anyway. The respective omissions of the mechanic and the bus driver were each sufficient for the accident that ensued when the bus ran the stop sign; meaning that neither omission was necessary.

We saw in the early part of this article that in the concurrent causal overdetermination cases each causer is liable no matter how unnecessary may have been his contribution. If omissions were causes, that should be true in omission overdetermination cases like the example above. Yet it is not.[66] From which I conclude there is no causation present in such cases. That makes the substitute for causation, counterfactual dependence, essential for omission liability. And since neither the bus driver nor the mechanic had the ability to prevent the accident, neither can be blamed for the accident. (They may of course both be blamed for their culpable omissions unconnected to the harm, but that would be an inchoate liability; the accident itself does not go in their moral ledger.)

I have noticed that there is some resistance to this conclusion among the theorists to whom I have presented it. Such resistance arises in cases of symmetrically culpable co-omitters, particularly if the culpability of each is that of intent (and not mere negligence). So: D_1 wants V to die, and so D_1 intentionally fails to fix V's brakes when he had a legal duty to do so; D_2, who also wishes V dead, intentionally fails to warn V of an unmarked danger on the road V will be driving when D_2 had a legal duty to warn V. Only if V had both known of the danger in advance, and had had the use of his brakes could he have saved himself. Each omission was thus sufficient to send him to his death. But neither D_1 nor D_2 did what they had a duty to do, so V died.

My resolution of such cases is to hold D_1 and D_2 only for some inchoate crime such as attempted murder; we should not hold them liable for V's death, not in criminal law and not even in torts. For vis-a-vis the omission of each of them that death was going to happen anyway, irrespective of the individual omissions of each defendant considered separately. There is thus no counterfactual dependence of V's death on each of D_1's and D_2's omissions,

---

65 The example is from Fischer, 'Causation in Fact in Omission Cases,' 1349. It is adapted from the only slightly different facts of *Saunders System Birmingham Co. v. Adams*, 117 So. 72 (Ala. 1928).

66 The case law is actually ambiguous on this moral point. Many cases hold there to be no liability for either omitter, others impose liability, and still others treat the last omitter as pre-empting the liability of the first omitter. See *id.*, 1349-1360.

considered separately. There being no causation either, there is no desert basis for holding D_1 or D_2 responsible for V's death.

Those theorists inclined to decide cases the other way employ a kind of moral clumping principle.[67] One sees this clearly by asking for their resolution of contrasting overdetermination cases, those where one of the sufficient factors in due to nature or non-culpable human misadventure. For example, V's brakes went out because of thrown gravel hitting the brakeline; or the sign warning of the hazard blew down in a windstorm. Now the conclusion that neither D_2, who fails to warn (when there were no brakes anyway), nor D_1 who fails to fix the brakes (when there was no warning sign anyway), are not responsible for V's death -- because V was going to die irrespective of their omissions. It is only when there are symmetrically culpable human actors that this conclusion is reversed. They are then clumped together for purposes of asking after the moral responsibility of each of them.

Yet isn't this just an unacceptable form of vicarious responsibility? We have doctrines of vicarious liability in both criminal law and torts: if D_1 and D_2 act in concert, then on agency grounds we attribute the acts and omissions of one to the other and vice-versa, with the result that the omissions of both of them (considered as a unit) were necessary for V's death. What the moral clumping principle above would do is extend vicarious liability to those who do not act in concert, do not rely on another's actions, and do not even know of the other's existence. D_1 and D_2 have no form of agency relationship and yet D_1 gets stuck with D_2's culpable omission and D_2 gets stuck with D_1's. We

---

67 Phil Dowe has tentatively suggested a metaphysical rather than a moral clumping principle. Perhaps we could say that when two omissions are individually sufficient and only jointly necessary, there is an 'indissoluble omission cluster' consisting of the two omissions. When the cluster is necessary for the harm (as it is in these cases), then any part of it is also necessary. This is essentially the suggestion by J.L. Mackie and others that I examined in 'For What Must We Pay,' albeit under the guise of causation rather than counterfactual dependency as an independent desert determiner. The suggestion is rife with the difficulties there mentioned: (1) it is unclear how to represent Mackie's 'event-cluster,' as a conjunction of O_1 and O_2 or as a disjunction; (2) as a conjunction, it is hard to see how (O_1 and O_2) could be necessary to some harm h when neither O_1 nor O_2 are necessary to h; (3) it is hard to give sense to a disjunction of negative events; (4) if sense can be made of it, the disjunctive version of the principle seems too broad: if O_1 or O_2 is individually necessary for h because the cluster, (O_1 or O_2) is necessary for h, why isn't *any* condition necessary for h? E.g., the disjunction of failing to apply the brakes or absence of fish in Lake Michigan is necessary for victim V's death, so the absence of fish is also necessary for V's death?

attribute one omission to the other, and then ask of the *two* omissions together, was that unit (of one *or* the other of them) necessary?

Rather than bloating our notions of vicarious responsibility in this way, surely it is better to explain away intuitions of responsibility for the harm in cases of symmetrically and seriously culpable omitters. Such intuitions are no more than the overweighting of culpability I have diagnosed elsewhere:[68] because we sense serious (if inchoate) culpability, we double count it by using it as the basis of adding in responsibility for the harm. Such double counting is illegitimate, here as elsewhere.[69]

C. The Necessity of Counterfactual Dependence for Responsibility for Omissions

If omissions give rise to a moral responsibility for some harm that is not based on there being a causal relationship between the omission and the harm, it is pretty clear that counterfactual dependence is the relation between the omission and the harm that is doing the moral work here. If the defendant had no ability to prevent the harm in question -- if in other words the harm's occurrence did not counterfactually depend on defendant omitting some act he had a duty to do -- it is everywhere uncontroversial that he has no responsibility for that harm.[70] There may be an inchoate liability for such culpable but unsuccessful omissions. But there can be no responsibility for the harm without the counterfactual dependence in question.

---

68 Moore, 'Causation and Responsibility,' *Social Philosophy and Policy* 16 (1999), 1-51, reprinted in E. Paul, F. Miller, and J. Parl, eds., *Responsibility* (Cambridge: Cambridge University Press, 1999).

69 Another instance in which courts bloat our ideas of agency is in the Russian roulette and drag-racing cases. When the defendant puts the gun at his head and pulls the trigger to no effect and then the victim does the same, killing himself, some courts are dissatisfied with the result of applying the intervening cause/accomplice liability doctrines (which in their present form generate no liability as a principal because the victim's act is an intervening cause, and no liability as an accomplice, became the victim's suicide is not a form of criminal homicide). So such courts pretend that the victim and the defendant do but one act together, the act of 'playing the game,' Then there is nothing that intervenes between that 'act' and the victim's death. See, e.g., *Mullane v. Commonwealth* 354 Pa. 180, 47 A.zd 445 (1946). As Paul Robinson observes, such a 'combined effect' analysis (his phrase) paints with far too broad a brush beyond the confines of normal agency attributions. Robinson, *Fundamentals of Criminal Law*, 2d edit. (Boston: Little, Brown, 1995), 235.

70 As, for example, *Model Penal Code* ('2.01) provides.

IV. Counterfactual Dependence Without Causation II: Preventions

One can omit to do any type of action. If one omits to kill Jones at time t, for example, then absent will be one or more features of any action at t that would have made that action an action of *killing*. One might have failed: to try to move one's body at t; to have had the willing of bodily movements actually cause those movements; to have had those movements actually cause the death of Jones at t. The causal nature of the act-type, killing, tells us what must not be present for there to be an omission to kill Jones at t.

The omissions we care about morally are typically not failures to *cause* something to occur. Rather, they are failures to *prevent* something from occurring. To understand these more typical omissions, we need to understand something other than causation, namely, the idea of a prevention.

We need to examine preventions anyway, for in their own right they present us with another example of where counterfactual dependence without causation can ground moral responsibility. As an example of a prevention, consider a property owner O building a tall building on his own land. Neighbor N heats the building on his adjacent property by both fireplaces with chimneys and solar panels. O's new building both shades N's solar panels and blocks the prevailing breezes so that N's fireplaces no longer draw properly. O has *prevented* the light from reaching N's solar panels, O has *prevented* the wind from drawing across the tops of N's fireplaces, and because of this, O has *prevented* the heating of N's premises.

American tort and constitutional law reflects the kinds of distinctions I now want to urge morality recognizes as well. The primary mode of being responsible for some unhappy state of affairs is by causing it. Alternatively, however, a more occasional and lesser form of responsibility for some such state exists even without causation, and that is based on counterfactual dependence. If I prevent a benefit otherwise headed your way, I haven't caused you a harm but I have deprived you of something of value that you would otherwise have had. I may well be morally responsible for that unhappy state of affairs, although not as frequently or as seriously as I would be if I had made you that much worse off by causing you harm equal in value to your loss of benefit.

As with omissions, there are three points to consider here. The first is again uncontroversial: sometimes we are legally liable (as in nuisance) and morally responsible for benefits we prevent others from receiving. Also like omissions, the moral facts are nuanced: our responsibility for preventions is less frequent and (often) less serious than would be our responsibility for

causing an equivalent harm, holding all else constant. This latter moral fact is less marked than in the cases of omissions, for duties to prevent (like duties not to cause) are negative duties, as a class more stringent than positive duties not to omit.

The second point should also be uncontroversial: responsibility for preventions requires counterfactual dependence. The benefit of which the victim is deprived must be one that he would have received if, contrary to fact, defendant had not done his preventative act. In the ordinary run of cases this seems unproblematically true. As with omissions, the harder test cases are those analogous to causal overdetermination cases, cases where each of two or more acts of prevention are *sufficient* to deprive the victim of some benefit (thus making each act of prevention not *necessary).* We shall have occasion to consider one such case later in this section.

The third point in contention here is that preventions are not causes. One who prevents light and air from reaching land it otherwise would have benefitted does not cause loss to the victim. It is because this conclusion is so controversial that I spend the balance of this discussion on the third point.

Preventions are not causes for much the same four reasons as were given for why omissions are not causes. First, there is no event or state of affairs to be caused in cases of prevention. *Not* receiving a letter is not an event or a state of affairs. Neither is *not* receiving light from the sun, nor is *not* receiving the wind one used to receive. If preventions were to be said to cause something, such 'somethings' would have to be absences like these.

Absences can no more stand in the effect position of the singular causal relation than they can stand in the cause position (as would be required for omissions to be causes). To cause a nothing to exist makes no more sense that does nothing causing something to exist.

To be sure, some of the reference-shifting strategies we saw with omissions are also possibilities here. When speaking of preventing sunlight from coming onto solar panels, for example, one might urge either that: (1) the phrase, 'sunlight not coming into solar panels,' really refers to a state of affairs that does exist and that is caused by the defendant's acts, such as the construction of a high building on the defendant's land; or (2) the phrase isolates the absence of sunlight on the solar panel at t by referring to the totality of states of affairs in the vicinity of the solar panels at t, which totality (like the proverbial donut) does not include sunlight hitting the solar panels. Yet these reference shifting strategies are as flawed here as they were for omissions, and for the same sort of reasons. First, the semantic intentions of all normal speakers when using phrases about sunlight and solar panels is *not* to refer to buildings and their construction. We have perfectly good words to

refer to these items, and we use such words when we intend to so refer. Second, a totality of states of affairs at t fails to pick out just the absence of sunlight at t. Third, most of the items making up the totality of existing states of affairs at t are causally irrelevant: they are neither caused by defendant's action of building the building, nor do they in turn 'cause' the absence of sunlight (under any standard theory of the nature of the causal relation, such as the counterfactual theory).

The strategy of fleeing to facts (in the sense of true propositions) is of course also available here. As we saw before, negative facts (such as the fact that no sunlight hit the solar panels at t) are unproblematic, as unproblematic as any other negated proposition. Yet again, what makes negative facts unproblematic is just what makes them ineligible to serve as causal relata, viz, their propositional nature.

The second argument against omissions being causes was Phil Dowe's 'intuition of difference,' and that argument too applies to preventions. Admittedly, the intuition of difference is muted for preventions as contrasted with omissions. One doesn't write duets for musicals proclaiming that 'somethings cannot cause nothings, and somethings never can,' for example.[71] Many people find it more acceptable to think that something real can produce an absence rather than vice-versa. It doesn't have the flavor of something from nothing, as in the case of omissive causation.

Yet as we saw with respect to the Humean objection to the intuition of difference regarding omissions, this aspect of the intuition of difference was illegitimate anyway. That omissions can't push, pull, or make things happen -- while 'things' prevented can be pushed, pulled, or made not to happen -- may seem intuitive, but only on an illegitimate picture of the causal relation. The intuition of difference remains after excising these extraneous features.

Even with this corrective in mind, the intuition of difference is lesser for preventions than for omissions, when each are contrasted with true causings. This sense of a lesser difference is easily explained. Recall that preventions *are* acts, unlike omissions. Moreover, they are acts that cause something (even if they do not cause the absences prevented). When I prevent you from receiving a letter of invitation you otherwise would have received, I act in such a way that I cause a state of affairs to exist that is incompatible with your receiving the letter: I cause a substitute letter (of rejection) to be in the envelope or I cause the letter to be misaddressed, or I cause the destruction of

---

71 In contrast with the earlier referenced Julie Andrews in the duet, 'Something Good,' in *The Sound of Music*: 'Nothing comes from nothing and nothing ever could.'

the letter. Such alternative ways of preventing your receipt of the invitation letter are acts causing states of affairs such as these.

Omissions depend wholly on counterfactual dependence to make a defendant responsible for a harm. To be sure, the content of the relevant counterfactual is about causation: when I am blamed for omitting to save you, the relevant counterfactual asserts that had I done a certain act (such as throw a rope) it would have *caused* a certain state of affairs (such as you being pulled ashore) that is incompatible with your drowning. Yet this is causation only in the possible world in which the counterfactual is tested.[72] Preventions, by contrast, require in addition that there be causation in this world, the actual world. It is because of the causal relationship between my act and the substitution/readdressing/destruction of the letter that the relevant counterfactual is true: if I had not so acted, you would have received the letter. Preventions, like omissions, are counterfactual and not causal in their nature; but unlike omissions, the relevant counterfactuals for preventions are true only because of an underlying causal relationship that exists in the actual world.

When the logical distance between the state of affairs caused and the type of state of affairs prevented is great, the intuition of difference is correspondingly great. My prevention of your having heat by my building a building tall enough to block the draft on your fireplaces, for example. But when the state of affairs caused is very close to the type of state of affairs prevented -- as perhaps is my causing the destruction of your letter to your not receiving that letter -- then the intuition of difference is much less. This scalar fact about preventions becomes crucial when we consider the moral difference between causing and preventing, as we shall now do.

The third consideration in favor of thinking there to be a metaphysical distinction between omittings and causings was a moral one: we typically are much less blamable for failing to prevent a certain state of affairs than we are for causing it. That consideration is present for preventions too. The metaphysical intuition of difference here too is matched by a moral intuition: the responsibility attached to a prevention is more occasional and less serious than for a corresponding causing. Legal reflections of this moral difference are to be found in the cause-based limitations of trespass and takings, I mentioned before. As with the metaphysical intuition of difference above discussed, this moral difference is muted for preventions in contrast to omissions. It is both less blamable to block the draft of your chimneys (resulting in smoke from your own fires filling your house) than it is to blow (an equal amount of)

---

72 Phil Dowe calls such counterfactual dependencies who content includes causation, 'quasi-causation.' Dowe, Physical Causation; Dowe, 'Absences, Possible Causation, and the Problem of Non-Locality,' *The Monist* 92 (2008), 23-40.

smoke from my property into your home; it is also more easily justified. Still, the difference in this pair of cases is less than the corresponding difference in cases of omissions.

One might think that there is *no* moral difference between preventions and causings, and that the lesser blameworthiness in these pairs of cases is due to something else. The leading candidate for the 'something else' would be the differing entitlements involved in these pairs of cases. Causings giving rise to responsibility here involve the existence of *detriments* to the victim, whereas preventings involve the absence of *benefits*. The thought would be that we each have stronger entitlements to what we presently have than we do to what we presently do not have but which we would gain in the future (if there is no interference). On this view, it is the detriment/benefit asymmetry vis-a-vis a baseline of the status quo that is doing the moral work, not the presence/absence difference in causation/prevention.

Yet any serious consideration shows this thought to be untenable. Any right we might have to our present holdings just is a right not to have those holdings damaged; the correlative duty is not to cause such damage. Any right we might have to receive a benefit over and above our present holdings just is a right not to be deprived of that benefit; the correlative duty is not to prevent the receipt of such benefit. If one right is stronger than another, that is just another way of saying that one correlative duty is more stringent than the other, *viz*, breach of the one duty is morally worse than breach of the other. Our duties not to cause are stronger than our duties not to prevent.

Alternatively, one might urge that there is no moral difference between these pairs of cases, and thus, that one needn't search for some explanation of that difference alternative to the causing/preventing distinction. Justice Antonin Scalia seems to take such a position in his takings opinions, urging that there is no conceptual distinction (and *a fortiori* no moral distinction) between harms caused and benefits prevented.[73]

One thing that motivates Scalia we should acknowledge just so we can put it aside. This is the well-charted human tendency to regard out of pocket costs as more serious than opportunity costs of equal value. Economists have long charted such 'framing effects' in popular psychology, but this is not what is involved in regarding preventings as less serious breaches than their corresponding causings. The preventing/causing distinction is not about the

---

[73] In *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), Scalia defies one to see a real difference between saying that the landowner's proposed use of his coastal property *caused harm* to South Carolina's ecological resources or saying that the use prevented the benefit of having an ecological preserve.

same state of affairs being differently valued, depending on whether one now has it or only expects it in the future. Indeed, in cases like that of smoke in one's room, the ultimate state of affairs is the same -- smoke. The difference lies in how it got there -- by being blown in, or by the non-drawing of the fireplace due to a blocked drought.

Even so, one pressing Scalia's objection would urge that route -- via causing, or via preventing -- is morally irrelevant. Yet except on a purely consequentialist morality, route often matters. I may have a strong, agent-relative permission to block your chimney's droughts whereas I have no such permission to blow smoke into your house; alternatively, I may have a weak permission to block your droughts (and thus *allowing* smoke to envelope), if good consequences are in the offing, even though I have no such weak permission to *cause* smoke to enter your premises.[74]

To my own mind, the cases differ considerably here. Indeed, the strength of the moral difference between causing and preventing seems to track closely the perceived strength of the metaphysical intuition of difference discussed earlier. In cases where the state of affairs caused by the preventative act is close to the type of state of affairs prevented, the moral difference (like the metaphysical difference) tends to evaporate. If I squeeze your neck blocking air from reaching your lungs, I have merely prevented air reaching your lungs. Yet what I had to cause to make the relevant counterfactual true is the state of closure of your wind pipe, a condition in which it is impossible for air to pass through. In such cases I cause a state of affairs to exist (wind pipe closure) that is very close to the type of state of affairs complained of, an absence of air passing to the lungs. Thus, I didn't *cause* the absence; but what I did cause (to be a preventer of air) is so close to the absence of benefit that I may be as morally responsible as one who causes poisoned air to enter the lungs.

Contrast such cases with the preventings with which we began this section. If I do a series of acts that cause a tall building to abut your property, I have done a causing by virtue of which the counterfactual relevant to a preventing is made true: I have prevented your chimney from receiving the wind it would otherwise have received. Yet the state of affairs that I cause is not close to the type of state of affairs, about the absence of which you make complaint. Blocking droughts is a morally distinguishable prevention, in a way that blocking windpipes is not.

---

74 A weak permission permits an action if good consequences justify doing it; a strong permission permits an action even if good consequences do not justify doing it. See Moore, 'Patrolling the Borders of Consequentialist Justification.'

This raises large issues having implications well beyond the causing/preventing distinction. These issues have to do with the meaning of 'closeness' involved here, and the relationship between morality and metaphysics when the morality doesn't (quite) cut nature at its metaphysical joints. Since these same issues will be squarely before us with double preventions, to be discussed shortly, I shall defer discussion of them briefly.

I come now to the fourth argument for not considering preventings to be causings of the absence prevented. This is the argument arising out of concurrent overdetermination cases; what we need to consider are cases of concurrent overdetermination *preventions*. Try a variation of the old McLaughlin hypothetical.[75] Victim was sent a written offer of a valuable opportunity to join a scientific expedition that would have greatly furthered her career; she never learned of the offer and the opportunity it afforded her until after the expedition had completed its work. The reason for this loss lies with the actions of three rivals, D_1, D_2, and D_3, who did not know of each other's acts and thus did not act in concert. D_1 substituted a rejection letter for the acceptance letter that had been sent to her; D_2, thinking the acceptance letter was still in the envelope, readdressed the envelope and its return address so that the letter would end up lost in the Post Office's dead letter section; D_3, not knowing either of these facts, threw what he believed was a properly addressed acceptance letter into the fire. Each of these acts was sufficient for the victim to lose her opportunity to join the expedition; none was therefore necessary. Is the responsibility of D_1, D_2, and D_3 inchoate, or is their responsibility the more serious one of preventing her from receiving this benefit to which she was entitled?

If preventings were causings, there should be no doubt of a non-inchoate liability here, D_1, D_2, and D_3 were each a concurrent cause of her loss, and the fact that none of their acts (considered individually) were necessary for that loss to occur would be irrelevant. Yet this fact doesn't seem irrelevant. Counterfactual dependence seems necessary here. Each of course are blameworthy for *trying* to prevent her from receiving the benefit. And considered collectively, of course, they did *together* prevent her from going on the expedition. Yet judged as individuals they did not. D_1 didn't in fact do what he was trying to do. D_1 did not succeed in preventing her from going, because she wouldn't have gone even if D_1 had not done what he did. And *mutatis mutandis* for D_2 and D_3. Her loss counterfactually depended on none of their acts (considered individually), and that fact seems determinative of the degree of their responsibility in a way it would not be if preventings were causings.

---

75 James McLaughlin, 'Proximate Cause,' *Harvard Law Review* 39 (1925), 155 n. 25.

As with omissions, there are those who do not find this resolution intuitive. Such critics want to hold D_1, D_2, and D_3 responsible for the loss of V's opportunity, both in torts and also in criminal law (if this were a crime of some sort). The considerations against this contrary resolution of such cases are the same as those against a like resolution of the overdetermination-omission cases: it is either a form of double counting of culpability or it is an illegitimate extension of vicarious responsibility to not-in-concert actors. Being duplicative, I won't repeat the arguments.

There is, however, one new wrinkle in cases of overdetermining preventions. This stems from the fact mentioned before about preventions: although like omissions preventions create responsibility based on counterfactual dependence, unlike omissions, preventions require a counterfactual dependence that supervenes on a causal relationship in this, the actual world: for action A to have prevented benefit B, A must have caused some state S, where S is incompatible with the existence of B. As we have seen, as S gets very close to an absence of B, we are tempted to assimilate preventions to causings. Now suppose there are three actions A_1, A_2, and A_3 independently performed by three actors, each action being sufficient for S; in such circumstances, A_1, A_2 and A_3 are all causes of S; as causers of S, they also will be regarded as causers of the absence of B, where S is very close to such absence. So *in these cases* of overdetermined preventions, one might well hold each preventer jointly liable with the others for the loss of the benefit in question. (I do not think the altered/misaddressed/destroyed letter scenario is such a case, however, for each actor causes a different state S to exist incompatible with V's receipt of the offer letter.)

V. Counterfactual Dependence Without Causation III: Blameworthiness for Double Preventions

A third sort of situation making an actor morally responsible for some harm that he did not cause but which counterfactually depended on his act, is that of a double-prevention. As we saw in chapter 3, these are cases where an actor does some act that prevents something else from happening which, if it had happened, would have prevented the occurrence of some harm. Thus the name, 'double prevention.'

An example of a double prevention is provided by the well known case of Judge Tally.[76] Judge Tally acted in such a way as to prevent the delivery of a warning telegram to one Ross; had Ross received the warning telegram (on one version of the facts), he would have not been found and killed by the Skeltons. In such a way Tally prevented a preventer (the warning telegram) from preventing Ross' death.

---

76 *State ex. rel. Martin v. Tally*, 15 So. 722 (Ala. 1894).

As with omissions and (single) preventions, there are three points to establish. First, that we are morally responsible for the harms that at least some double preventions make possible. Second, that the connection between the defendant's act and the harm that grounds the actor's moral responsibility for that harm is the counterfactual dependency of the harm on the act. And third, that such acts do not cause the harms that they make possible in this way.

Judge Tally's case illustrates how obviously true is the first proposition: Tally and people like him are morally responsible for the harms their acts make possible. It is true that in Tally's case the legal form this responsibility takes in criminal law is that of accomplice liability; but that fact is due to the accidents of legal history. Tally is no more and no less responsible for Ross' death than would be a person who prevented a lifeguard from saving a drowning victim responsible for the death of the drowning victim. Both defendants are seriously blamable for preventing something that would have prevented death. That the death of Ross was by human hands, whereas the death of the drowning victim was due to nature, is incidental.

As with omissions and preventions, however, the moral facts are nuanced for double preventions. Two points. First, there is a subclass of double preventions where both the degree of moral blameworthiness, and the availability of consequentialist justifications, parallel that of omissions. These are cases of *allowings*, where one is significantly less blameworthy and where the consequentialist justifications are much more available, than for the equivalent causings. In passive euthanasia cases, for example, when doctors who initiated the use of a respirator prevent that respirator from preventing a patient's death, their blameworthiness is less, and their justifications more available, than would be the case for an active killing.[77]

Second, even for the double prevention cases that are not (full) allowings -- because the double-preventer does not return the victim to some morally appropriate baseline -- the blameworthiness is less, and the justification more available, than in contrasting cases of causation. An example is the stress and duress techniques -- 'torture lite' -- employed in Northern Ireland, Israel, Afghanistan, and elsewhere.[78]

The second proposition required to be established in this section was that counterfactual dependence is the relevant desert-determiners at work in these cases. This should be uncontroversial. Surely what makes Tally responsible for the death of Ross is that Tally's act (of preventing the delivery of the warning telegram) made it possible for the Skeltons to kill Ross. Tally

---

77 I discuss the doing/allowing distinction in detail in Moore, 'Patrolling the Borders of Consequentialist Justification.'

78 *Id.*

did what was needed to get Ross killed, which was to remove an impediment to that killing. For that he is surely blameworthy.

One can see the necessity of counterfactual dependence to blameworthiness here most clearly in the allowing subspecies of cases. For what makes allowings so much different (morally speaking) from other double preventions is the return to baseline aspect of them. If, for example, it was Tally who had sent the warning telegram, then it is much less blamable of him to countermand the delivery of that telegram and thus allow Ross to be killed. Such full allowing cases largely remove the counterfactual dependency of the harm on that act of the defendant: Tally's two acts together -- the sending of the warning telegram, and the sending of the countermanding telegram -- pretty much cancel each other out, leaving Ross to die the death he was going to die anyway if Tally had done nothing. Such cases of full allowings thus show us the power of counterfactual dependency: when Tally's act makes a real difference (the bare double prevention version of the facts), Tally is seriously blamable; but when Tally's act(s) make no real difference (the full allowing version of the facts), his blameworthiness is no greater than that of an omission.

The third proposition is again the controversial one; this was that double preventionists like Tally do not cause the harms their acts make possible. In arguing for this third proposition, I shall rely again on four arguments, the same arguments deployed to show why preventions and failures to prevent (omissions) are non-causal.

First, there is the hard-to-dispute truth of general ontology: there are no negative properties, no negative events, and no negative states of affairs. Absences, thus, cannot stand in the singular causal relation -- as either causes (omissions) or as effects (preventions) -- for the simple reason that they are not particulars. This fact of general ontology may at first glance seem to be less damning of construing double preventions as causal, than it is of a like construal of omissions or preventions. After all, in cases of double prevention there is an act of the defendant that is real enough -- an act such as Tally's sending the countermanding telegram. In such cases there is also an event that unproblematically exists such as the death of Ross. So one might think the ontological objection to be idle here. Yet it isn't. In double prevention cases the alleged causal intermediary is an absence, and that is problematic because such causal intermediaries need to be both effects of an earlier cause, and cause of yet later effects, and absences can be neither. If Tally caused something of relevance to Ross' death, it was the non-receipt by Ross of the warning telegram; it was this non-receipt that was necessary for Ross to be killed. Such non-receipt is an absence, and it can neither be the effect of Tally's act nor the cause of Ross's death, as it would have to be if double preventions were causal in nature.

As with preventions and omissions, one can sidestep this worry by moving to facts (in the propositional sense) as causal relata. Yet as I argued before, that move comes at a high price. For those of us not willing to pay that price, double-preventions can be causal only if there are negative events, states of affairs, and properties, an anethma to just about everyone.

Second, there is the argument stemming from the intuition of difference earlier discussed. This was the difference sensed to exist between the two relations, double-prevention and causation. 'Making possible' (by removing an impediment to nature or someone else causing) seems different than 'causing,' is the intuition. As before, to the extent this intuition is not simply an expression of the sense (just mentioned) that negative relata do not exist, it is based on a sense about the causal relation. The intuition is singularist in its origins, premised on a view that sees the causal relation as not being counterfactual dependency, probabalistic dependency, or nomic sufficiency (since each of these seemingly can accommodate negative causation). To the extent that we have reasons to prefer some form of singularism to these theories,[79] -- then Dowe's intuition of difference has adequate support.

Also, as in simple prevention cases, so in double prevention cases, the intuition of difference seems scalar in its intensity. The intuition weakens in proportion to the closeness of the state caused (by the act of the double preventer) to one of two things: either to the state causing the harm, or to the harm itself. Many of Jonathan Schaffer's telling counterexamples are on the 'close' end of this spectrum.[80] If some actor A causes a bullet to go through his victim's heart, the ultimate harm for which we hold the shooter responsible (the death of the victim) is immediately caused by cellular death in his brain and elsewhere. Such cellular death is close to the state the actor indisputably caused. A ruptured heart is not literally the same state of affairs as cellular death in the person whose heart it is; but it is pretty close. This is also true of Schaffer's other examples. Where A's willed bodily movements cause the trigger of a gun to move, which trigger movement moves a sear from the path of the spring behind the hammer of the pistol, what A has caused -- the movement of the sear -- is close to the state of affairs which caused the bullet to fire, viz, the spring behind the hammer moving. Likewise in Schaffer's example of voluntary motor movement: A's willing to move his trigger finger unproblematically causes a calcium cascade through A's muscle fiber which in turn causes calcium-troponin binding; this is not literally the same state of affairs as actin-myosin binding (which is what immediately causes the finger muscle to contract) but it is pretty close.

---

79 As I argue in Moore, 'Introduction to the Symposium on Singularist Theories of Causation,'.

80 Schaffer, 'The Case for Negative Causation,' 199-200.

Schaffer is right about all of these examples in two respects: (1) common intuition tells us that A *caused* the death of his victim, A's finger movement *caused* the bullet to fire, and A's willing of his finger to move *caused* his finger muscles to contract in such a way as to move his finger. The intuition of difference, in other words, evaporates for such examples. And: (2) at the micro level Schaffer specifies, these supposed 'causal chains' involve negative intermediaries: it is the *lack* of oxygen that makes possible cellular death, it is the *lack* of sear that enables the hammer spring to uncoil, it is the *lack* of tropomyosin on the actin binding sites that allows the myosin to bind there, etc.

In contrast to these cases of micro-double preventions, the intuition of difference seems quite robust for the macro-level double preventions that were our earlier examples: Judge Tally causing a countermanding telegram to be sent prevented the warning telegram from being delivered, only making it possible (but not causing) the killing of Ross, the enemy of a drowning victim who ties up the lifeguard who otherwise would have saved that victim prevented rescue but did not himself cause the death of the victim. The intuition of difference is robust in such cases because what the defendant causes in each case -- receipt of the countermanding telegram, an immobilized life guard -- is at some remove both from the immediate cause of death -- the shots of Ross' actual killers, or the ocean currents -- and from death itself.

This problem should sound familiar. For the doctrine of double effect there is a similar problem about the other major desert-determiner, intention.[81] Herod intends to please Salome, and as his means to this he intends John the Baptist to be decapitated and his head put on a platter. Yet one might think that Herod did not intend John's death; he foresaw that John would die from decapitation but would have been perfectly happy if John could have lived without his head.

Anyone using intention as a marker of culpability or of permissability (of consequentialist justification) must resist this fine-grained characterization of what Herod intended. Decapitation, it is commonly said, is 'too close' to death to intend the one but not intend the other. This has long been noticed in the philosophy of intention. Philippa Foot: 'even if it be argued that there are here two different events -- the crushing of the child's skull and its death -- the two are obviously much too close for an application of the doctrine of double effect.'[82] Tony Duff: there is a 'logical connection' between decapitation and killing: '"Brown is decapitated but survives" does not specify an intelligible

---

81 Explored in Moore, 'Patrolling the Borders of Consequentialist Justification.'

82 Philippa Foot, 'The Problem of Abortion and the Doctrine of Double Effect,' *Oxford Review* 5 (1967), 6-7.

possibility since it is part of the logic of our concept of "human beings" that decapitation kills them: if we could imagine a being who was not killed by decapitation, that would not be a human being.'[83]

In applying 'intention' we must quite self-consciously 'get sloppy.' The same is true of 'cause.' Decapitations and deaths are close enough that we should say that to intend the first is to intend the second. Analogously, we should say that to do an act causing the first is to do an act causing the second. In each case this is true irrespective of the actual metaphysics of event-individuation or the true identity of states of affairs and of mental representations. Even if Herod didn't literally either cause or intend John's death, what he did cause and intend is close enough that his moral responsibility is that of an intender and a causer of death.

I am relatively confident of this as a truth of morality. Morality makes do with 'good enough for government work' intentionality and 'good enough for government work' causality rather than the finer-grained truths of microphysics. But it also seems that our folk psychological explanations, and our folk causal explanations, make do with this 'close enough' approximation. Moral blame aside, few people have any 'intuition of difference' between the Herod who intends John's death and the Herod who only intends John's decapitation, or between the Herod who causes John's death and the Herod who only causes John's decapitation.

This might lead one to proclaim a kind of causal dualism, according to which we have both a scientific concept of cause, and a popular concept. Some such as Phil Dowe indeed go this route.[84] Yet there aren't two senses of 'cause' in play here, any more than there are two senses of 'intend' in play when we say that to intend p *is* to intend q. 'Intend' and 'cause' are univocal. What is being played with -- and perhaps being played fast and loose with -- is the identity of events, of states of affairs, and of representations. We know that literally being headless is not the same as being dead; yet for these purposes we will say that they are, so that to cause/intend one is to cause/intend the other.

---

83 R.A. Duff, '*Mens Rea* and the Law Commission Report,' *Criminal Law Review* (1980), 153.

84 As noted before, Dowe allows that one might speak of a kind of 'quasi-causation' existing in cases where there is counterfactual dependency, no literal causation, but the counterfactual is about the causation that would exist in a close possible world. Dowe, *Physical Causation*. See also Ned Hall, 'Two Concepts of Causation,' in J. Collins, N. Hall, and L.A. Paul, eds., *Causation and Counterfactuals*.

This running roughshod over the true metaphysics of event-identity is not confined to applications of 'intend' and 'cause' in morality and in folk explanation. As I have argued elsewhere,[85] ordinary thought also utilizes a course-grained answer to event-identity in legal contexts such as double jeopardy and 'per occurrence' limitations in insurance contracts. Because of the mereological problem, the true metaphysics of events may be quite indeterminate in answer to the question, 'how many events occurred with the collapse of the World Trade Center?' Yet the common sense relied on by the law in such contexts narrows the plausible answers to, 'one' or 'two.' We confidently aggregate many fine-grained events/states of affairs, into the macro-sized events that we rightly think determine how much punishment or how much compensation the law should impose under 'single event' tests and the like.

I come now to the third argument for why double preventions are not causal. This argument is based on the moral difference(s) between acts that prevent a prevention of a harm, and acts that cause that harm (or cause some state close enough to that harm). Double preventions come in two varieties. Consider first full, non-omisive *allowings*. One example is where Tally himself had sent the telegram that would have warned Ross, but then, changing his mind, acted so as to prevent the delivery of that warning telegram. This hypothetical Tally's double-preventative act merely returned the world to a morally appropriate baseline, and we could properly characterize what Tally did as merely *allowing* (but not causing) Ross' death.

That Tally merely allowed Ross to die has large moral consequences. If Tally was under no duty to warn Ross when he sent the warning telegram, then his later act (of sending the countermanding telegram) is not one that violates any duty and he is not blamable at all; if Tally had such a duty to warn, then Tally's sending of the countermanding telegram violates a duty no more stringent than his positive duty to warn (which is considerably less stringent than a duty not to kill Ross). In addition to these culpability differences, allowings make permissable consequentialist justifications that would be impermissable for the corresponding causings.

One might think that it is the return to a morally appropriate baseline that is doing all the work in making allowings so morally different than causings in these ways. In which case the causing/double prevention distinction would be morally idle. There are two ways to test this. One is by making the double-preventing into a causing while retaining the moral baseline feature. For example, we transform passive euthanasia cases into

---

85 Moore, 'The Destruction of the Twin Towers and the Law on Event Identity, in J. Hyland and H. Steward, eds., *Agency and Action* (Cambridge: Cambridge University Press, 2004).

active euthanasia cases, retaining the medical justification (say, a better use of the life-saving equipment for other patients with better prospects). Can we actively cause death (by knife in the heart, lethal injection, etc.) in order to obtain the same good consequences? In the so-called ducking cases, where I may 'duck' by removing myself as your only defense against a pursuing grizzly, may I also shoot you dead so that the bear can feed on you (and thus save my life)? If some violinist is attached to me who will die if unattached within nine months, since I can allow him to die by removing myself as his defense against death, may I also shoot him dead (if that is the only way to get him unhooked)? I don't think the double prevention/causing distinction is idle in these cases, however much work is being done by the return to a morally appropriate baseline feature.

The other way to test how much of the moral difference between causings and allowings is done by the causing/double prevention distinction, is by eliminating the return to a morally appropriate baseline feature (but leaving the double prevention feature) of a full allowing. Such 'partial allowings' (as we might call them) we should want to test anyway. These are the second subspecies of double preventions where, if there is a moral difference with causings, it is considerably less than the difference between full allowings and causings.

Return to Judge Tally, the actual Judge Tally who was not the one who had earlier sent the telegram warning Ross that the Skeltons were on the way to kill him. In terms of degree of blameworthiness, Tally is indeed blameworthy for making it possible for Ross to be killed; but is he not *less* blameworthy than the Skeltons who actually caused Ross' death? It is true that formally in the criminal law Tally is an accomplice to the Skeltons' murder and is thus eligible for the same punishment as the Skeltons. The same is true in torts, where Tally would be an in-concert joint tort feasor in any wrongful death suit brought by Ross' estate. Yet the law-in-action here is different than the law-on-the-books: Tally would almost certainly receive a lesser punishment than would Ross' actual killers.

In terms of the permissability of consequentialist justification, suppose good consequences would follow from Ross' death. E.g.: Ross was the one person who knew of the British capture of the German Ultra coding machine in World War II and unless killed Ross was about to tell the Germans. Could not Judge Tally (or MI-6) make sure Tally is not warned and so that he goes to his grave with the secret? Isn't it easier to justify letting others kill Ross than killing Ross yourself?

One example of this class of cases is the so-called 'torture-lite,' the stress and duress techniques that rely on nature to do most of the dirty work (sleep deprivation, sensory deprivation, and the like). The reason this is easier

to justify than is true torture seems to lie in the double-preventionist nature of such interrogative techniques, a nature not shared by the cause-based techniques of 'torture-heavy.'

I conclude that even though there is less moral freight carried by the cause/double prevention distinction than by the cause/failure to prevent (omission) distinction, still some is carried. It matters morally (and thus legally) whether people like Judge Tally are causers of death or are merely a preventer of something or someone who would otherwise have prevented that death.

It is admittedly disappointing that this moral difference does not track clearly the metaphysical distinction between causings and double preventings. As we have seen, to be morally plausible we need to expand the class of causings with the addition of those double preventions that are 'near-causings.' We did this by getting deliberately sloppy and coarse in our mode of event/state/property individuation: when the counterfactual making the act A of defendant D a double-prevention is based on two causal truths -- A having caused state S and state S' having caused harm H -- and when S is 'close' either to S' or to H, then D's responsibility is that of a causer of H, not a double preventionist. This was analogous to what we have to do with the other major desert-determiner in addition to causation, intention.

In both cases, the clean metaphysical distinctions of intention/belief and of cause/double prevent only partly ground the moral distinctions. These two distinctions in natural properties need to be supplemented with the coarse-grained mode of event individuation at work in common thought, a mode that regards 'close' as good enough. This is not to abandon the supervenience of the moral on the natural; for closeness is still a natural property. The disappointment lies in its scalarity and thus the vagueness inherent in its application. It would be nice if the intention/foresight and cause/double prevention applications were cleaner. But they are not.

The fourth and final argument for not thinking acts of double prevention to be causes, again stems from the overdetermination cases. Consider in this regard James MacLaughlin's famous hypothetical.[86] The victim V is a prospector headed into dry desert country in which water will be necessary to his survival. V has two enemies (D_1, D_2) bent on his death, neither of whom know of the other's existence or activity. D_1 drains the water from V's kegs, replacing the water with rock salt for weight (so V won't notice). Later on, D_2, not knowing of the substitution of rock salt for water in the barrels, destroys the barrels. V dies in the desert of thirst. In Hart and Honoré's[87] slight revision

86 MacLaughlin, 'Proximate Cause,' 155 n. 25.

87 Hart and Honoré, *Causation in the Law*, 239-240.

of this scenario (also discussed by J.L. Mackie[88] and Richard Wright.[89]), D_1 does not drain the water, he poisons it; then D_2, not knowing the water to be poisoned, drains it out.

Legal theorists are all over the map on this case. Some regard D_1 and D_2 as concurrent causers, in which event each are liable for V's death as intentional killers. Others regard D_1 as the causer of death, and D_2 only as an attempter (because death was inevitably headed Vs way after D_1's act (of either draining or poisoning the water). Still others regard D_2 as the pre-emptor, particularly in the second variation of the hypothetical where D_2 drains the poisoned water and V dies of thirst. Still others think D_1 and D_2 mutually pre-empt each other from being causes of V's death, but that each are responsible for that death anyway, on some unspecified ground.

These are all mistaken analyses because the use of such causal distinctions (concurrent/pre-emptive overdetermination) is misplaced. These are also all mistaken bottom line conclusions on responsibility for V's death. Neither D_1 nor D_2 are responsible for V's death. They are quite culpable, and each is liable for attempted murder. Yet their acts individually did not cause V's death, nor did such death counterfactually depend on either of their actions. They are no more responsible for V's death than they would be if some natural condition (such as naturally poisonous caulking in V's water barrels) had already poisoned V's water prior to anything D_1 or D_2 did to poison it, drain it, or destroy it. No one is tempted to think that D_1 or D_2 is responsible for V's death in such cases; the lack of counterfactual dependency is conclusive against such a conclusion. The same is true here, where there is no natural condition being sufficient for V's death. Only if one attributes the actions of one to the other, so that one asks the question of counterfactual dependency about *both* acts considered together as a disjunctive unit, can one sustain responsibility here. Yet this is to extend vicarious responsibility from in concert actors, to merely parallel actors.

If we are willing to make such vicarious attributions, why don't we also do so in true pre-emptive cause cases? Suppose both D_1 and D_2 simultaneously fire at V, both hitting him in the heart with an instantaneously mortal wound. Because D_2 was at greater distance, his shot arrived too late, since V was already dead from D_1's earlier bullet. No one believes that D_2 is responsible for V's death on causal grounds. Yet why not clump D_2's behavior with that of D_1, say that the *combination* of D_1's and D_2's behaviors *was* necessary to V's death, and hold D_2 responsible for V's death, on a non-causal counterfactual basis? D_1's and D_2's behavior and culpability is exactly parallel; why not lump

88 Mackie, *The Cement of the Universe*, (Oxford: Oxford University Press, 1980), 45-46.

89 Wright, 'Causation in Tort Law,' 1802.

them together, ask the counterfactual question, and hold them both for murder? Anyone who believes in the kind of moral luck that makes results matter to blameworthiness should find this conclusion absurd. They should accordingly reject the premise that generates it, viz, that parallel actions done by separate actors not in concert can be attributed to each actor as we ask, 'but for his action(s) would the victim have died?' And without this premise, there is no basis for holding D_1 or D_2 responsible for V's death in MacLaughlin's hypothetical. Neither caused V's death, and neither was necessary to V's death.

VI. The Interaction of Causation with Counterfactual Dependence When Both Are Present

We finally need to address the fourth of the possible combinations of causation and counterfactual dependence distinguished at the beginning of this article. This is where some action A causes some harm H *and* where H counterfactually depends on A. This is a very large number of cases. In the vast majority of instances in which A causes H, H will counterfactually depend on A; conversely, in a large percentage of cases where H counterfactually depends on A, A will have caused H.

As was said in the introduction to this article, this fourth combination of causation and counterfactual dependence may seem to be an easy class of cases to deal with, as easy as the class of cases where neither causation nor counterfactual dependence obtains. In the latter class of cases the actor is clearly *not* responsible for H (although she may have an inchoate form of responsibility). It may seem as unproblematically true here that the actor *is* morally responsible for H.

Sometimes, happily enough, the obvious is also the true. So here. The bottom line conclusion is surely right: where both relations obtain, the actor is surely responsible for H, both in morality and in the law built on that morality. Yet this bottom line conclusion glosses over some interesting and important nuances having to do with how these two relations interact with each other in determining the appropriate level of responsibility.

Blameworthiness and responsibility are matters of degree, and so are both causation and counterfactual dependence. This sets up the final question that interests me in this article: can the fact that some act A is strongly necessary for some harm H 'make up' for the fact that A is only a minor cause of H? Suppose, for example, that A is a minor wound in the victim compared to other wounds he has received but that he dies from loss of blood from all

wounds.[90] As I argued in the first section of this article, A is responsible on a causal basis for the victim's death so long as the degree of his causal contribution crosses the *de minimus* threshold. Does it add to the actor's responsibility if his small wound was strongly necessary to the victim's death? (We might suppose, for example, medical help arrived too late to save the victim with all wounds, although the help would have been timely if the defendant had not added his small wound to the others.)

One thing should be plain about such cases, although it is worth making this explicit since doing so will forestall certain counterexamples being advanced against the singularist conception of causation that I defend. The fact that should be plain is that the presence of a minor causal contribution cannot detract from the responsibility that exists because of the counterfactual dependency of some harm such as death on the defendant's act of wounding. Polluters whose additional pollution just crosses the threshold for when harm occurs, voters whose votes are the deciding votes in some election, audience members whose attendance is just enough to ensure that some illegal performance takes place, all have a counterfactual-based responsibility undiminished by the fact that their causal contributions are quite small. After all, if a serious level of counterfactual-based responsibility exists when there is *no* causal contribution (as in cases of omission, prevention, and double prevention), it surely exists when there is *some* causal contribution, as in these last sort of cases.

I call these minor cause sorts of cases the 'butterfly effect' kind of counterexample. The idea is to mention some quite trivial causal contributor to some large scale harm, much as the mythical flapping of a butterfly's wings in the Sahara is supposed to causally contribute to hurricanes in the Atlantic. Precarious boulders being given a slight nudge, powerful rockets being given slight course corrections, suggestions that place victims in the path of falling pianos, etc., are the common pattern of small (and sometimes *de minimus*) causal contribution. Then add counterfactual dependence: stipulate that none of these harms would have occurred without the butterfly doing its thing, etc. And finish with an evil manipulator: the defendant in each of these scenarios knows how necessary it is to get the proverbial butterfly to flap its wings, etc., and he causes just that to happen with the intent that such flapping produce the harm it does indeed produce. The sting of these examples is supposed to lie in the juxtaposition of *serious* blameworthiness with *tiny* causal contribution (if cause is taken in the singularist way I take it).

The existence of a counterfactual-based responsibility removes the sting of such examples. There is serious blameworthiness in these cases; only it is not cause-based so it does not have implications for what causation must be

[90] The facts of *People v. Lewis*, 57 P. 470 (Cal. 1899).

like. There is no reason to think that counterfactual based responsibility is limited to cases where causation is absent -- cases of omissions, preventions, and double preventions. Counterfactual-based responsibility can exist for *acts* that cause harm as well, irrespective of whether such acts are large, small, or *de minimus* in the size of their causal contribution.

Seeing this possibility does raise the question of how causation and counterfactual dependence interact when both are present to determine responsibility for some harm. Granted, the small wound, minor pollution, single voter, and paid audience member of the earlier examples each have a serious counterfactual-based responsibility for the outcomes their actions make possible. Does it add to the degree of such actors' responsibility that they are also minor causers of the respective harms?

The problem in testing this is that we cannot get rid of the causal contribution and keep the examples parallel. (We can get rid of the counterfactual dependence easily enough, and that makes a large difference downward in the degree of one's responsibility.) Maybe this example will help.[91] Defendant wanted to kill his old enemy and so clubbed him on the head with a blow sufficient to kill most people. He then threw (what he took to be) the body over a high cliff in order to dispose of it. Seeing the body inert on the rocks below, he then left. In fact, the blow only rendered the victim unconscious. And the fall, which should have killed him, didn't. The victim, weakened and injured because of the blow and the fall but nonetheless alive at the base of the cliff, could find no way up the cliff in his injured condition and so died of exposure.

Suppose we put aside the doctrines of intervening causation.[92] Then the defendant's clubbing and his throwing causally contributed to the victim's death (it's my hypothetical so I can tell you definitively that it was his injuries and the exposure together that killed him). Defendant is seriously blameworthy for such causal contributions. Do we add responsibility for his having had the ability to prevent the victim's death (by rescuing him from the base of the cliff), an ability he (at least negligently) ignored?

The standard Anglo-American criminal law answer is I believe the right moral answer here. On standard double jeopardy grounds the defendant can be

---

91 From the facts of *Thabo Mali v. Regina*, [1954] 1 All Eng. Rep. 373 (Privy Council).

92 I agruge we should do this in Moore, 'The Metaphysics of Causal Intervention,' *California Law Review* 88 (2000), 827-877, and Moore, 'The Superfluity of Accomplice Liability,' *University of Pennsylvania Law Review* 156 (2007).

guilty of but one homicide here,[93] the degree depending on the most severe degree of any of the three possibilities. The causing of death done by the clubbing was done with an intention to kill, so that the negligent or reckless omission to save drops out as adding to the defendant's blameworthiness, (as does the throwing). Such lesser counterfactual-based responsibility does not add to the greater cause-based responsibility.

If the converse is also true -- that when the counterfactual-based responsibility is greater, a smaller cause-based responsibility does not increase blameworthiness -- then we have the conclusion I think to be true. Causation and counterfactual dependence are not additive as desert-determiners. When both are present, the most seriously blamable relation governs, excluding the other from counting at all.

93 See generally Moore, *Act and Crime*, chs. 12-14.