CAUSATION AND RESPONSIBILITY*

By Michael S. Moore

I. Introduction: Liability, Responsibility, and Metaphysics

In various areas of Anglo-American law, legal liability turns on causation. In torts and contracts, we are each liable only for those harms we have *caused* by the actions that breach our legal duties. Such doctrines explicitly make causation an element of liability. In criminal law, sometimes the causal element for liability is equally explicit, as when a statute makes punishable any act that has "*caused* . . . abuse to the child. . . ."[1] More often, the causal element in criminal liability is more implicit, as when criminal statutes prohibit *killings*, *maimings*, *rapings*, *burnings*, etc. Such causally complex action verbs are correctly applied only to defendants who have caused death, caused disfigurement, caused penetration, caused fire damage, etc.[2]

One might think that the simple fact that these causation-drenched legal texts exist is enough to justify judges and legal theorists in taking an immediate leap into the scientific and philosophical theories of causation. Such a leap would be based on the supposition that when a legal text uses a word from science and everyday life like "cause," it must then mean for the word to be interpreted in its ordinary or scientific sense. Such a supposition is belied by the practice of most lawyers and legal theorists. Since at least the 1920s in America, the standard educated view has been that "cause" as used in the law is mostly or entirely a legal construct, serving the law's distinctive purposes and not corresponding to the concept that may be employed by other enterprises or disciplines. Specifically, the idea has been that "cause" as used in scientific explanations has little to do with "cause" as used to attribute moral and legal responsibil-

* I wish to thank Ken Abraham, Richard Epstein, Ellen Frankel Paul, Alvin Goldman, Sandy Kadish, Leo Katz, Alfred Mele, and Stephen Perry for their comments on an earlier draft of this essay. On the theory of causation developed in this essay, they did not cause the essay to be better, nor did they cause any mistaken statements that there might be (given my own free, informed, deliberate, intervening choices). Still, they aided my making the essay better, and they might have prevented such mistakes as there may be in the essay, and I cheerfully hold them responsible on those noncausal bases. These nice distinctions do not apply to my lifetime collaborator on this project, Heidi Hurd. She and I have discussed these issues so many times that I am unsure which thoughts are mine and which are hers. Hers is thus a causal responsibility, for good or for ill.

[1] Annotated Code of Maryland, Art. 27, Section 35A(2).

[2] Argued for in Michael S. Moore, *Act and Crime: The Implications of the Philosophy of Action for the Criminal Law* (Oxford: Clarendon Press, 1993), ch. 8.

ity. The oft-quoted words of Sir Frederick Pollock give one influential expression of this conclusion: "The lawyer cannot afford to adventure himself with philosophers in the logical and metaphysical controversies that beset the idea of cause."[3]

Part of the lawyerly distaste for metaphysical adventures about causation stems from a deep and abiding skepticism about metaphysics in general, whether it be a metaphysics of morals, minds, events, or causal relations. There are several strands to such skepticism. One strand is purely metaphysical: the doubt is that there is any reality to answer questions like, "What is a moral quality?," "What is an intention?," "How do we individuate events?" Another strand is epistemic: even if there are such things as causal relations, moral qualities, mental states, and natural events, and even if such things do possess unitary natures, we less-than-omniscient persons cannot know such things with any certainty. Yet another strand is political: even if there are such things and even if they can be known with certainty by someone, knowledge of such technical matters cannot be very widely shared or easily communicated; as a result, such truths ought to be avoided in designing workable legal institutions, because such truths will be controversial and thus productive of needless conflict.[4]

These kinds of doubts cannot be allayed in the abstract. The only way to allay such doubts is to seek to produce a plausible, understandable, communicable, metaphysical notion of causation. Searching for such a notion is also the only way such doubts can be justified. This basis for lawyerly disdain for the metaphysics of causation, thus, can hardly demotivate my present enquiry.

There does exist, however, a nonskeptical basis for denying the relevance of the metaphysics of causation to the interpretation of legal usages of "cause," and, if correct, this view would demotivate any enquiry such as this. Such a basis begins with the quite correct insight that legal texts are to be interpreted in light of the purposes (values, functions, "spirit," "mischief," etc.) such texts serve.[5] Often such purposes will justify an interpreter in holding the legal meaning of a term to be quite different from the ordinary meaning of the term in nonlegal English. "Malice," for example, means roughly "recklessness" in Anglo-American criminal law, whereas it means spiteful or otherwise bad motive in ordinary English.[6]

[3] Sir Frederick Pollock, *Torts*, 6th ed. (New York: Banks Law Publishing Co., 1901), 36.

[4] Such politics-based skepticism about metaphysics surfaced recently with regard to my use of the metaphysics of events to answer certain questions of criminal law. Compare Samuel Freeman, "Criminal Liability and the Duty to Aid the Distressed," *University of Pennsylvania Law Review* 142 (1994): 1455–56, with Michael S. Moore, "More on Act and Crime," *University of Pennsylvania Law Review* 142 (1994): 1750–59.

[5] On purposive interpretation of legal texts, see Michael S. Moore, "The Semantics of Judging," *Southern California Law Review* 54 (1981): 279–81; and Moore, "A Natural Law Theory of Interpretation," *Southern California Law Review* 58 (1985): 383–88.

[6] On the criminal-law meaning of "malice" in the law of homicide, see Moore, "Natural Law Theory," 332–36.

It is certainly possible that "cause" is like "malice" in this regard. Whether this is so depends on what one takes to be the purpose of those legal texts that use "cause." Consider American tort law by way of example. Following the welfare economics of A. C. Pigou, it became fashionable to think that the purpose of liability rules in tort law was to force each enterprise or activity within an economy to pay its "true costs."[7] Those costs included damage caused to others by the activity as much as they included traditional items of cost like labor, raw materials, capital, etc. The thought was that only if each enterprise paid its true costs would the goods or services produced by that enterprise be correctly priced, and only if such correct pricing occurred would markets achieve an efficient allocation of resources. This came to be known as "enterprise liability" in the tort law of 1950s America.

If the point of tort law were to achieve an efficient allocation of resources, and if such efficiency could be achieved only by discovering the "true costs" of each activity in terms of that activity's harmful effects, then "cause" as used in tort liability rules should mean whatever the metaphysics of causation tells us the word means. For on this theory it is the harmful effects that an activity really causes that are the true costs for that activity; and this rationale thus demands a robust use of some metaphysical view about causation.

Contrast this Pigouvian view of tort law with the post-1960 view of Ronald Coase: tort law indeed exists in order to achieve an efficient allocation of resources, yet such efficiency will be achieved whether tort liability tracks causal responsibility or not.[8] Coase's essential insight was that opportunity costs are real costs too, so that a forgone opportunity to accept a payment in lieu of causing another person some harm already forces the harm-causer to "internalize" all costs of his activities. Such harm-causer need not be liable for such harms in order to have him pay for the "true costs" of his activity; he already "pays" by forgoing the opportunity to be bought off by the sufferer of the harm. As each harm-causer and harm-sufferer decides on the desired level of his activity, he will thus take into account all effects of his interaction without tort liability forcing him to do so.[9]

On this Coasean analysis of tort law, there is simply no need for liability to turn on causation. Rather, either tort liability is irrelevant to efficient resource allocation (in a world of low transaction costs), or tort liability should be placed on the cheapest cost-avoider (in a world where trans-

[7] A late expression of this view of tort law is to be found in Guido Calabresi, "Some Thoughts on Risk Distribution and the Law of Torts," *Yale Law Journal* 70 (1961): 499–553.

[8] Ronald Coase, "The Problem of Social Cost," *Journal of Law and Economics* 3 (1960): 1–44.

[9] I thus put aside those who interpret Coase to be a causal skeptic. (See, e.g., Richard Epstein, "A Theory of Strict Liability," *Journal of Legal Studies* 2 [1973]: 164–65, for an interpretation of Coase according to which the Coasean insight was that we cannot say what is the cause of what.) Coase made a much better point than this "interactive effects" interpretation gives him credit for: it is that causation does not matter for the efficient allocation of resources.

action costs are high) in order to induce that person to take the cost-effective precautions. In either case, legal liability should not track causal responsibility, for even when there are high transaction costs the causer need not be the cheapest cost-avoider.

The irrelevance of causation to efficiency has left economists struggling to make sense of "cause" as used in American tort liability rules. Since no metaphysical reading of "cause" is appropriate to the goal of efficiency, some policy calculus is given as the legal meaning of "cause." Such policy calculus typically generates a probabilistic interpretation of "cause" in tort law, so that any activity that raises the conditional probability of some harm that has occurred is said to have "caused" that harm.[10] For any theory seeking to use tort law to give incentives to efficient behavior in a world of high transaction costs, this probabilistic interpretation is seemingly just what is required. To criticize such probabilistic interpretation of legal cause on the ground that probability is a poor metaphysical account of what causation is, would thus be beside the point . . . if efficiency is the point of tort law.[11]

My own view, undefended here, is that it is not. On my view, the best goal for tort law to serve is that of corrective justice. Such a corrective-justice view of tort law asserts that we all have primary moral duties not to hurt others; when we culpably violate such primary moral duties, we then have a secondary moral duty to correct the injustice we have caused. Tort liability rules are no more than the enforcement of these antecedently existing moral duties of corrective justice.

This corrective-justice view of tort law demands a robustly metaphysical interpretation of legal cause. For legal liability tracks moral responsibility on this view, and moral responsibility is for those harms we *cause*. "Cause" has to mean what we mean when we assign moral responsibility *for* some harm, and what we mean in morality is to name a causal relation that is natural and *not* of the law's creation.

This is even more clearly true of criminal law. If the point of criminal law were the utilitarian point of deterring crime, then a constructed idea of legal cause perhaps could be justified; such a functional definition would take into account the incentive effects of various liability rules. But the function of criminal law is not utilitarian; it is retributive. Criminal law serves the exclusive function of achieving retributive justice.[12] This

[10] See, e.g., Guido Calabresi, "Concerning Cause and the Law of Torts: An Essay for Harry Kalven, Jr.," *University of Chicago Law Review* 43 (1975): 69–108; Steven Shavell, "An Analysis of Causation and the Scope of Liability in the Law of Torts," *Journal of Legal Studies* 9 (1980): 463–503; and William Landes and Richard Posner, "Causation in Tort Law: An Economic Approach," *Journal of Legal Studies* 12 (1983): 109–34.

[11] For a good discussion of the economists' misuse of "cause" to name an increase in conditional probability, see Richard Wright, "Actual Causation versus Probabilistic Linkage: The Bane of Economic Analysis," *Journal of Legal Studies* 14 (1985): 435–56; and Wright, "The Efficiency Theory of Causation and Responsibility: Unscientific Formalism and False Semantics," *Chicago-Kent Law Review* 63 (1987): 553–78.

[12] Or so I argue in Michael S. Moore, *Placing Blame: A General Theory of the Criminal Law* (Oxford: Clarendon Press, 1997), chs. 2–4.

requires that its liability rules track closely the moral criteria for blameworthiness. One of those criteria is causation of morally prohibited states of affairs.[13] Thus, again, "cause" as used in criminal law must mean what it means in morality, and what it means in morality is to name a relation that is natural and *not* of the law's creation.

Putting aside any policy-based approach to defining "cause" for legal purposes allows us to ignore at least half of the legal literature on causation. For much of that literature is explicit in its eschewal of any attempt to plug in a correct metaphysical account of causation as the legal meaning of "cause." This is certainly true of economists like Guido Calabresi,[14] Steven Shavell,[15] William Landes, and Richard Posner,[16] whose analysis of legal cause (as probabilistic) is not based on the metaphysical view that the causal relation is in fact a probabilistic relation.[17] This is also true of those other descendants of the American Legal Realists, the Critical Legal Studies scholars like Mark Kelman.[18] Such "crits" join the older Legal Realists like Wex Malone,[19] Henry Edgarton,[20] and Leon Green[21] in relegating "legal cause" to the role of a mere label that decorates policy judgments made on strictly noncausal grounds. Such legal tests for causation as the "one house rule" in torts,[22] the "year and a day" rule in homicide,[23] the "harm within the risk" test of both torts[24] and criminal law,[25] the foreseeability test of proximate causa-

[13] See ibid., ch. 5, where I take issue with the Kantian view that our deserts are determined by our culpability ("inner wickedness") and not by the effects of our actions in the real world.

[14] Calabresi, "Concerning Cause" (*supra* note 10).

[15] Shavell, "Analysis of Causation" (*supra* note 10).

[16] Landes and Posner, "Causation in Tort Law" (*supra* note 10).

[17] Contrast the simple, conditional probability analysis used by economists (*supra* note 10) with the more complicated probability analysis of causation by philosophers. See, e.g., Wesley Salmon, "Probabilistic Causality," *Pacific Philosophical Quarterly* 61 (1980): 50–74. No philosopher would propose a simple increase in the conditional probability of an event E by the existence of an event C as an analysis of causation, for that completely fails to distinguish epiphenomena, accidental correlations, and preempted conditions, on the one hand, from true causal relations, on the other. Yet from the point of view of an incentive-based system that eschews any attempt to analyze a pre-legal notion of causation, such an increase in conditional probability may be an appropriate trigger for legal liability.

[18] Mark Kelman, "The Necessary Myth of Objective Causation Judgments in Liberal Political Theory," *Chicago-Kent Law Review* 63 (1987): 579–637.

[19] Wex Malone, "Ruminations on Cause-in-Fact," *Stanford Law Review* 9 (1956): 60–99.

[20] Henry Edgarton, "Legal Cause," *University of Pennsylvania Law Review* 72 (1924): 211–44, 343–75.

[21] Leon Green, *Rationale of Proximate Cause* (Kansas City, MO: Vernon Law Book Co., 1927).

[22] *Ryan v. New York Central R.R.*, 35 N.Y. 210, 91 Am. Dec. 49 (1866). (Railroad liable only for the first house that its negligently emitted sparks ignite, not for each subsequent house that first house, in turn, ignites.)

[23] See Joshua Dressler, *Understanding Criminal Law*, 2d ed. (New York: Matthew-Bender, 1995): 466–67. (A death occurring more than a year and a day from the act of a defendant conclusively presumed not to be the effect of that act.)

[24] See Green, *Rationale* (*supra* note 21). On this test, one asks whether the harm that happened was an instance of the type of harm whose risk made the defendant's action negligent to perform; this is not a causal inquiry, but rather a culpability inquiry.

[25] American Law Institute, Model Penal Code, section 2.03.

tion,[26] and the explicitly ad hoc policy balancing advocated by Edgarton and others,[27] all make no claims to reflecting any underlying reality about causation. They are policy-justified tests that divorce causation in the law from any understanding of causation outside the law. In what follows, I shall thus ignore this part of the legal literature on causation.

What I shall focus on are those cases, doctrines, and legal theories whose authors were at least attempting to get the metaphysics right in their analysis of causation in the law. What I wish to examine in the body of this essay is whether the law that has developed as a result of such attempts in fact contains within it a coherent conception of causation. I do not ask in what follows whether the concept of causation presupposed by the law is true; I ask only whether there is any concept that is sufficiently coherent that it *could be* true.

II. The Seeming Demands of the Law on the Concept of Causation

During the heyday of ordinary-language philosophy, Peter Strawson urged a task he termed "descriptive metaphysics."[28] The idea was that instead of asking how things are, we could ask how a given body of discourse presupposed things are. In other words, we can tease out the metaphysical presuppositions of a body of practices without ourselves committing to the metaphysics of such practices.

This is the task I set for myself in this essay. Without (here) taking a position on what metaphysics of causation is correct, I attempt to describe what the liability doctrines we have in the law presuppose causation to be like. I save for another day the question of whether this metaphysical view of causation is true.

I shall approach the law's presuppositions about causation in two steps. In this section of the essay, I shall take at face value the usages of "cause" by various legal doctrines, here assuming that all such doctrines are what they purport to be, doctrines of cause-based liability. In the next section of the essay, I shall be more critical, throwing out some doctrines on the grounds that they cannot be doctrines of cause-based liability, despite their self-labeling in these terms. This second step allows us to narrow the concept of cause employed by the law to a point where there might be

[26] On foreseeability, see Moore, *Placing Blame* (*supra* note 12), ch. 8. The test purports to ask a single question: Was the harm that happened foreseeable to the defendant as he acted?

[27] Edgarton, "Legal Cause" (*supra* note 20). ("Proximate cause" is the label put on the conclusion of balancing social and individual interests on a case-by-case basis.)

[28] P. F. Strawson, *Individuals* (London: Methuen, 1959). Ordinary-language philosophy (e.g., at Oxford University from 1945 to 1965) went further than I go in the text. Such ordinary-language philosophers as Gilbert Ryle, Ludwig Wittgenstein, and J. L. Austin thought that the *only* metaphysics one can do is the descriptive metaphysics described in the text. For a critique, see Michael Moore, "The Interpretive Turn: A Turn for the Worse?" *Stanford Law Review* 41 (1989): 927–34.

some chance of discovering an answering concept of cause in some plausible metaphysics.

A. Distinguishing causation from mere correlation

Juries are routinely instructed that they must not confuse mere temporal succession between the defendant's act and some harm, with causation between the two. For example, the defendant's negligently maintained transom hit the plaintiff at a certain place on his head; the plaintiff subsequently developed cancer at that spot. Not only is such temporal succession not identical to causation, but such succession is not even very good evidence of causation. Evidence of such succession, without something more, is not enough evidence of causation to get to a jury.[29]

What if the plaintiff introduces evidence that such trauma on heads is *always* followed by such cancers? This may well be enough evidence of causation to get to the jury, but it is still not to be identified as causation. Juries are still instructed that even invariant succession does not inevitably betoken causation.[30] After all, it might be true that there have been and will be only five such head traumas ever, that all five are followed by cancers, and yet, that there is no causal connection between any of these head traumas and cancer. It is universally true that all clumps of gold that ever have existed and that ever will exist are less than a cubic mile in size; yet there is no causal relationship between the fact that some clump is gold and the fact that such clump is less than a cubic mile in size.

Seemingly missing in examples such as the last is any *necessitation* of the second fact by the first. Missing is the kind of necessity seemingly present between the fact that a clump is uranium and the fact that a clump is less than a cubic mile in size. A clump of uranium *cannot* be a cubic mile in size (because it would exceed critical mass); that necessity backs up and explains why, in fact, there never has been a cubic mile of uranium. No such necessity backs up and explains why there never has been a cubic mile of gold.[31]

Thus, universal correlation cannot be identified as causation (even if the former is good evidence of the latter). Needed is some kind of necessity explaining why there is a universal correlation between two types of events such as head traumas and cancers.

Surprisingly, perhaps, such universal correlation backed up by some kind of necessity is still not to be identified as causation. For yet to be

[29] See, e.g., *Kramer Service, Inc. v. Wilkins*, 184 Miss. 483, 186 So. 625 (1939).

[30] Although *invariant* succession is admissable as good evidence of causation.

[31] The example is David Armstrong's in his argument that accidentally true generalizations must be distinguished from true causal laws. See Armstrong, *What Is a Law of Nature?* (Cambridge: Cambridge University Press, 1983).

ruled out is the problem of epiphenomenal correlations.[32] In the case of the head trauma and the cancer, suppose it were true that the kind of cancer involved is caused by, and can only be caused by, the kind of blow the defendant inflicted. Suppose further that the contusion on the victim's skin is not only caused by such a blow, but also it can only be caused by such a blow. Since the cancer takes longer to develop than the contusion, the cancer of necessity always succeeds the contusion, and thus one might think that the contusion caused the cancer. Yet we know this is false: the blow caused the cancer (it's my hypothetical) as well as the contusion, but the contusion is merely epiphenomenal to the cancer—in which case a universally true correlation, and one which is backed by a kind of necessity, is still not to be equated with causation.

All of this is, of course, quite commonsensical and not peculiar to the law's use of "cause."[33] Yet in its requirements that a jury be attuned to the possibility that a temporal sequence (no matter how universal and necessary) may not be a causal sequence, the law adopts common sense without change.

B. Distinguishing between equally indispensable conditions: The cause/condition distinction

The law, like common sense, assumes that causes necessitate their effects, as we have seen. They, in that sense, "make" such effects happen. The law also joins common sense in thinking that usually causes make a difference. This is expressed by the law in its widely used *sine qua non* doctrine, a doctrine which requires a jury to ask, "But for the defendant's acts, would the harm have happened?"[34]

An immediately obvious problem (for the idea that a cause is that which makes the difference for the happening of some effect) is that there are so many such conditions.[35] Sir Francis Drake could not have defeated the Spanish Armada without ships, without the lumber with which to build such ships, without oxygen in the air in England, without a Queen with some backbone, etc., etc. If all such conditions necessary to the happening of some event x are causes of x, then every case of causation is a case of *multiple* causation. (Such garden-variety multiple cause cases are

[32] For discussions of the epiphenomena problem, see Salmon, "Probabilistic Causality" (*supra* note 17); David Lewis, "Causation," *Journal of Philosophy* 70 (1973): 556–67; and Jaegwon Kim, "Epiphenomenal and Supervenient Causation," in *Midwest Studies in Philosophy IX: Causation and Causal Theories*, ed. Peter French, Theodore Vehling, and Howard Wettstein (Minneapolis: University of Minnesota Press, 1984).

[33] For a discussion of how law, morals, common sense, and science all converge to distinguish correlation from causation, see Moritz Schlick, "Causality in Everyday Life and in Recent Science," *University of California Publications in Philosophy* 15 (1932): 99–125.

[34] This is the dominant test for cause-in-fact in both torts and criminal law in America. See, e.g., *New York Central R.R. v. Grimstad*, 264 F.2d 334 (2d Cir. 1920); and American Law Institute, Model Penal Code, section 2.03(1).

[35] See Moore, *Act and Crime* (*supra* note 2), 267–76.

to be distinguished from the overdetermination kind of cases discussed in the next subsection.)

John Stuart Mill, with whom this problem is most famously associated, took exactly this view.[36] Each temporally present necessary condition had equal claim with every other such condition to be called the cause of some happening, in any suitably scientific sense of "cause." Mill relegated the discrimination we do make in ordinary speech, between "the cause" and "a mere background condition," to pragmatic features of the contexts in which such things were said. If we are doctors, we pick out the factors that we can treat; if we are moralists, those that are blamable; if we are historians, those that have appeal to normal human interest, as "the cause."[37] In reality, Mill held, all such conditions together constituted the cause.

It is often said that the law is much more discriminating than science in its usages of "cause."[38] This is easy to show with regard to temporally successive chains of conditions; as I shall explore later, the law's concept of cause presupposes that causation both tapers off over time and breaks off suddenly at certain points in time.

It is rare, however, that the law actually discriminates between *temporally co-present*, equally necessary conditions—what I am calling the ordinary, garden-variety multiple cause situations. It is only with its occasional "sole cause" doctrines that the law discriminates between equally necessary conditions, honoring one but not others as "the cause." Thus, one version of the irresistible-impulse test of insanity asks whether "the alleged crime was so connected with such mental disease, in the relation of cause and effect, as to have been the product of it *solely*."[39] Similarly, one version of the abuse-of-process tort imposes liability only if the improper ("abusing") motive was the *sole* reason motivating the defendant's use of court process. Since there are always other co-temporal conditions necessary for the actions at issue in these cases, and yet liability is imposed despite this multiplicity, the law presupposes some criterion for distinguishing causes from merely necessary conditions.

C. *Preserving the possibility of overdetermining causes*

A well-known conundrum in the law concerns what are often called the overdetermination cases.[40] These are what might be called the exotic

[36] John Stuart Mill, *A System of Logic*, Book III, ch. V, section 3.

[37] For a discussion of these pragmatic features in various contexts, see Joel Feinberg, *Doing and Deserving* (Princeton: Princeton University Press, 1970).

[38] Jeremiah Smith, "Legal Cause in Actions of Tort," *Harvard Law Review* 25 (1911-12): 104.

[39] *Parsons v. State*, 81 Ala. 577, 597, 5 So. 854, 866-67 (1887).

[40] The best contemporary legal discussion of these cases is to be found in Richard Wright, "Causation in Tort Law," *California Law Review* 73 (1985): 1775-98. Overdetermination cases are to be distinguished from garden-variety multiple cause cases. In the latter, no one event or state is sufficient to produce the harm, because more than one event is individually necessary to produce the harm. Such sets of individually necessary, only jointly sufficient conditions, are very frequent and may well be the most frequent kind of case. Wright

variety of multiple cause cases, in contrast to the garden-variety multiple cause cases discussed in the previous subsection. These are cases where there is more than one set of conditions sufficient to bring about the harm, in which case neither set is necessary to the occurrence of the harm. The law rather crisply assumes: (a) that we can distinguish concurrent overdetermination cases from preemptive overdetermination cases; (b) that for the concurrent type cases, each set of sufficient conditions is regarded as the cause of the entire harm; (c) that for the preemptive type cases, we can distinguish preempting causes from preempted factors; and (d) that preempted sets of sufficient conditions are not causes of the harm and that preempting conditions are causes of the harm.[41]

Thus, in the much-discussed "two fire" cases, where each fire is sufficient to destroy the building that has burned to the ground: (a) we should distinguish concurrent cases where the two fires join, and the larger fire resulting from this then burns down the structure,[42] from preemptive cases where one fire arrives first and burns down the structure, leaving nothing to be burnt by the second fire when it arrives; (b) when the fires join (the concurrent case), each fire is the cause of the destruction of the building; (c) where the fires do not join (the preemptive case), the first fire preempts the ability of the second fire to cause the building's destruction; and (d) therefore, in the latter case, only the first fire is the cause of the harm, and the second fire is not a cause of the harm.

With regard to (a) above, there is some ambiguity as to how we are to classify what I shall call *asymmetrical* overdetermination cases. That is, suppose the fire set by the defendant is much smaller than the second fire; the two join as before and the resultant fire destroys the structure. The second fire would have been sufficient by itself to have destroyed the structure, but the defendant's smaller fire would not have been, since it would have been extinguished by the available equipment before it could have destroyed the structure. There is some authority for the proposition that the larger fire is a preemptive cause, not a concurrent cause, and that therefore the defendant's fire is preempted as a cause of the harm.[43] Preferable, I think, is Richard Wright's view: these are concurrent causation cases, making both fire-starters liable for the whole damage.[44] Each

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mentions (in ibid., 1793) a kind of case intermediate between regular multiple cause cases and the overdetermination variety. If there are three fires, no one of which is sufficient, but any two of which are sufficient, to burn the plaintiff's structure, then no fire is individually necessary to produce the harm. Although I do not separately treat these, we should consider these too to be overdetermination cases.

[41] See ibid.

[42] These are the facts of *Anderson v. Minneapolis St. Paul & S. St. Marie R.R. Co.*, 146 Minn. 430, 179 NW 45 (1920); and *Kingston v. Chicago and N.W. Ry.*, 191 Wis. 610, 211 N.W. 913 (1927).

[43] Cf. *City of Piqua v. Morris*, 98 Ohio St. 42, 120 N.E. 300 (1918) (negligent maintenance of drainage wickets held not a cause of plaintiff's injury from overflowing reservoir, because the flood would have overflowed the reservoir even if the wickets were not clogged).

[44] Wright, "Causation in Tort Law" (*supra* note 40), 1794, 1800.

fire was still doing its burning (unless of course it could be shown that the large fire literally extinguished the defendant's fire by taking its oxygen or fuel), and each was a cause of the building's destruction.

With regard to (b) above, there is some authority for the proposition that it matters to the causal question exactly how each fire was started. Where (i) each fire is the result of culpable action by an individual, each individual's culpable act in starting his fire is the cause of the harm. But where only one fire is the result of the defendant's culpable action, and the other fire is the result of (ii) another person's innocent action, (iii) a natural event, or (iv) the victim's own culpable action, then the defendant's fire is not a cause of the building's destruction.[45]

This pattern of liability repeats itself for all kinds of physically caused injuries. Thus, where two defendants independently stab or shoot the victim, who dies of loss of blood, each is the cause of the victim's death.[46] However, where the first defendant inflicts a stab wound on the victim that would prove fatal given enough time, but the second defendant kills the victim instantly by shooting him, the shooting preempts the stabbing as the exclusive cause of death (so long as the shooting is "independent" of the stabbing in the sense that the latter in no way causes the former, as where a stabbing motivates the shooter to put the victim out of his misery).[47] Likewise, where two defendants shoot the victim through the head, but one of the bullets kills the victim before the second arrives, only the first shooter is said to have caused the death of the victim.[48] Where at the same time two defendants each ride their motorcycles by the victim's horse, which is startled and injures the victim, each caused the injury despite the sufficiency of the noise from each motorcycle to have done the job;[49] but it is otherwise if one motorcycle arrives first, scaring the horse before the second arrives.

This pattern of liability is also extended beyond physically caused injuries to overdetermined omissions, reasons, and dangerous conditions cases. With regard to omissions, suppose that each of two individuals has the legal duty to input his part of a code in order to prevent a rocket launch, and that it takes both parts of the code being separately inputted to prevent the launch. If each omits to input his part, each is the cause of the rocket launch. By contrast, where one person has a legal duty to fix a car's brakes, and another has the duty to use the brakes when the occasion demands it, and both omit to do their duty, the second omission is

[45] *Cook v. Minneapolis, St. Paul and S. St. Marie Ry.*, 98 Wis. 624, 74 N.W. 561 (1898).

[46] Agatha Christie, *Murder on the Orient Express* (New York: Pocket Books, 1960). See also *People v. Lewis*, 124 Cal. 551, 57 P. 470 (1899) (initial gunshot and later knife wound both caused victim's death, because "drop by drop his life current welled out from both wounds and at the very instant of death the gunshot wound was contributing to the event").

[47] See generally H. L. A. Hart and Tony Honoré, *Causation in the Law*, 2d ed. (Oxford: Clarendon Press, 1985), 124, 239

[48] *People v. Olugash*, 41 N.Y. 2d 725, 363 N.E.2d 1155, 395 N.Y.S.2d 419 (1977).

[49] *Corey v. Havener*, 182 Mass. 250, 65 N. E. 69 (1902).

said to preempt the operation of the first, making the accident the responsibility of only the second omitter.[50]

Occasionally the law concerns itself with the reasons for which an action was done. The reason sometimes, for example, is defined in such a way that one must act "with the intent to help the enemy."[51] If one acts for "mixed motives"—where a sufficient reason motivating the action was to help the enemy, but where another, also sufficient reason motivating the action was to help a friend—this suffices for conviction. Concurrent, overdetermined reasons are each causally operative. By contrast, if one wanted to help the enemy, stood ready to do so, but was then threatened with death if one did not do the act in question, this second sufficient reason preempts the first and is the exclusive cause of one's action.[52]

With regard to dangerous conditions, I shall below discuss how the removal of opportunities to prevent harm presents special problems meriting separate consideration. When I let the water out of your swimming pool, pull out the chair behind you, or take the only food available to you, I have created a dangerous condition by depriving you of an opportunity that you otherwise could have used to your own advantage. When nature takes its course, so that you injure yourself by diving into an empty pool, by hitting a hard floor, or by partially starving, I am said to have caused your injuries.

Suppose that a very large man is drowning in the ocean, that it takes two lifeguards to save him, and that the two lifeguards are about to do that from their respective lifeguard stands when each is prevented from doing so by an enemy of the drowning man. When the man drowns, I am confident that each lifeguard-preventer would be held to have caused the victim's death. A different case, it is thought, is J. A. McLaughlin's famous hypothetical:[53] A and B each independently intend to kill V, who is headed into the desert. A drains V's water keg, replacing the water with salt; B steals the keg; V dies of thirst in the desert. This is commonly said to be a case of preemptive overdetermination, not concurrent overdetermination, yet there is no agreement on who is doing the preempting, A or B. Some legal commentators hold A to be the preemptive cause of V's death;[54] others hold B;[55] and some even think that neither caused V's death because each preempted the other.[56]

[50] Wright, "Causation in Tort Law" (*supra* note 40), 1787.

[51] The less seriously punished treason statute in force in England during the Second World War. See *Rex. v. Stean*, [1947] K.B. 997, 32 Crim. App. Rep. 61, 1947-1 All Eng. L. Rep. 813.

[52] *Rex. v. Stean*.

[53] J. A. McLaughlin, "Proximate Cause," *Harvard Law Review* 39 (1925): 155 n. 25.

[54] This is Richard Wright's conclusion. See Wright, "Causation in Tort Law" (*supra* note 40), 1802.

[55] This is Wright's conclusion on a slightly varied version of the hypothetical, in ibid. See also J. L. Mackie, *The Cement of the Universe* (Oxford: Oxford University Press, 1980), 45–46.

[56] This is Hart and Honoré's conclusion in *Causation in the Law*, 239–40.

The overdetermination cases present a complex set of distinctions drawn by the law. We must simplify this pattern if we are to extract any coherent conception of causation presupposed by the law. In particular, we need to examine whether omissions can be causes, whether acts which create dangerous conditions by removing safety features can be causes, and whether culpability can affect causation. I shall thus defer commenting on what conclusions we should infer from the overdetermination cases until we have done some pruning in these directions.

D. The scalar nature of legal causation

Some qualities and relations are two-valued, all or nothing, like being the natural parent of someone else, or being dead. Others are matters of continuous variation, like color or age. In various places, the law assumes that the causal relation is in the latter category, so that there can be more or less of a causal relation, not just its total presence or total absence.

The clearest doctrinal home for this presupposition is in the idea of causal apportionment.[57] Causal apportionment would apportion liability in tort by degrees of causal contribution. This is in marked contrast to comparative fault, which at least formally apportions liability based on comparisons of culpability, not of causal contribution.[58] Comparative fault schemes make use of causal notions, but the use they make is only to require the fault to be causally relevant; "causal fault" thus refers to fault that is causally relevant, and the phrase is not an invitation to apportion damage based on degrees of fault *and* on degrees of causal contribution.

True causal apportionment is a doctrinal rarity, however much jurors may smuggle in such considerations to their calculation of comparative fault. Only in the product-misuse area of strict liability has explicit comparative causation gained much of a foothold.[59] Still, scholarly proposals often make use of the notion.[60] To the extent that such proposals are or become law, a scalar nature to causation is clearly presupposed.

[57] On the idea of causal apportionment, see Mario Rizzo and Frank Arnold, "Causal Apportionment in the Law of Torts: An Economic Approach," *Columbia Law Review* 80 (1980): 1399–1429; Kaye and Aickn, "A Comment on Causal Apportionment," *Journal of Legal Studies* 13 (1984): 191–208; and Mario Rizzo and Frank Arnold, "Causal Apportionment: Reply to the Critics," *Journal of Legal Studies* 20 (1986): 219–26. In his essay in this volume, Alvin Goldman nicely sets out how our obligations to vote—even when our individual vote is not a necessary condition for the election's outcome—can be explained on like grounds (of causal contribution to the outcome for which one's vote was not a necessary condition). See Goldman, "Why Citizens Should Vote: A Causal Responsibility Approach."

[58] In its original opinion creating comparative fault in California (*Li v. Yellow Cab Co. of California*, 532 P. 2d, 1226 [Cal. Sup. Ct. 1975]), the California Supreme Court held that one should apportion tort liability "in direct proportion to the extent of the parties' causal responsibility" (119 Cal. Rptr. 858 footnote 6a. [1975] [advance sheets only]). Prior to final publication, the court recognized its error, proportioning liability to degrees of fault, not to degrees of causation.

[59] See the citations in Rizzo and Arnold, "Causal Apportionment" (*supra* note 57), 1402.

[60] See ibid.

The second set of legal doctrines laying bare this presupposition is the "substantial factor" test first proposed by Jeremiah Smith[61] and adopted by both the *Restatement of Torts* and the *Restatement (Second) of Torts*.[62] Smith's idea was that we can judge whether a mere necessary condition to some injury was a legal cause of that injury, by asking whether it was a "substantial" cause (or factor) of the injury. Clearly a quantitative measure is intended here, presupposing that causation can be a matter of degree.

Two other doctrinal homes for this scalar idea about causation are to be found in certain excuses and justifications in criminal law and in torts. Consider first the legal excuse of duress in homicide cases. According to the common law, acting under the threat of another can never be a defense to murder—murder is so awful that one is supposed to "just say no" to the threatener.[63] For a time, however, English law distinguished the accomplice who only drove the car from the trigger man who did the killing, in that the former could avail himself of the defense of duress even though the latter could not.[64] This I take to be a causal discrimination: even though the accomplice contributes to the victim's death in the sense that he makes it possible, his causal contribution is nowhere near that of the actual killer. On the view that a lesser causal responsibility is necessarily a lesser moral responsibility, the lesser wrong done by the accomplice could thus be eligible to be excused by the existence of a sufficiently serious threat.

The English courts eventually abandoned the distinction,[65] but why they did so is also instructive: as they saw, there can be a great deal of difference between the causal contributions of accomplices. Consider the facts of *Abbott*:[66] the defendant held the victim while she was being skewered by a sabre, it taking several thrusts because the sword kept hitting bone. In such a case, the court properly concluded that the causal contribution of the accomplice (the holder) was not so much less than that of the principal (the skewerer) and refused the defense of duress to either.

Consider next the general justification defense ("balance-of-evils," or "necessity") in criminal law and in torts.[67] Despite the broad language of these doctrines, it is generally agreed that one is not justified in doing a normally criminal or tortious act—that is, an act causing bad consequences—simply because the act will also cause more good consequences.[68] Rather,

[61] See Smith, "Legal Cause" (*supra* note 38).
[62] *Restatement of Torts*, sections 431–35 (1934); *Restatement (Second) of Torts*, sections 431–33 (1965).
[63] *Regina v. Howe*, [1987-1] All Eng. L. Rep. 771.
[64] *Director of Public Prosecutions for Northern Ireland v. Lynch*, [1975] A.C. 653.
[65] *Regina v. Howe*.
[66] *Abbott v. The Queen*, [1976-3] All Eng. L. Rep. 140.
[67] See Michael Moore, "Torture and the Balance of Evils," *Israel Law Review* 23 (1989): 280–344; revised and reprinted as chapter 17 of Moore, *Placing Blame* (*supra* note 12).
[68] Moore, *Placing Blame*, ch. 17, 680–84.

the act must cause its bad consequences in the right way in order to be eligible for justification by its good consequences. Thus, we may not kill one person in order to harvest his organs, which are needed by five other, near-death patients. Yet we may (a) pick one person to be sacrificed for the survival of the others, if that one is going to die anyway with all the others if no one is sacrificed;[69] (b) pick one for someone else to kill, as where we send out one of our own in exchange for four hostages held by another when we know that the one will be killed in lieu of the four hostages who are released;[70] (c) redirect an already moving force (such as a flood, an avalanche, or a runaway trolley) so that instead of killing five people it only kills one;[71] and (d) omit to save one person in order to save five others equally in peril.[72]

All of these I take to be causal discriminations.[73] Put crudely, when we are not much of a cause of the evil the law normally prohibits, we may act so as to prevent greater evils; but when we are substantially the cause of the first evil, we may not act even though such action would prevent greater evils. Put this way, one sees the presupposition of causal scalarity clearly in these licenses for consequentialist justification.

E. The limited transitivity of the causal relation

A relation (R) is transitive when, if x Ry and y Rz, then x Rz. The causal relation would be transitive if one could trace causal chains through time in this way. If my lighting a match causes rum to ignite, and the ignition of the rum causes the entire ship to burn,[74] and the burning of the ship causes a large loss at Lloyd's of London, and the large loss at Lloyd's causes a certain insurance executive to take his own life—and if the causal relationship were transitive—then my lighting a match caused the death of the insurance executive (together with yet further consequences like the loss of support for his widow, etc.).

Although sometimes legal theoreticians have thought that the only truly causal notion used in the law is fully transitive in this way,[75] in fact no area of law traces causal responsibility indefinitely. One of the long recognized deficiencies with the necessary-condition test of factual causation is that, used alone, it would generate an unlimited liability into the

[69] Ibid., 692–94.
[70] Ibid., 696–98.
[71] Ibid., 694–96.
[72] Ibid., 689–90.
[73] Ibid., 698–703.
[74] These are the facts of *Regina v. Faulkner*, 13 Cox C.C. 550 (Ireland, Court of Crown Cases Reserved, 1877).
[75] See the *Restatement (Second) of Torts*, section 431, comment a (1965), which proclaims that in law, "cause" is used "in the popular sense, in which there always lurks the idea of responsibility, rather than in the so-called 'philosophic sense' which includes every one of the great number of events without which any happening would not have occurred."

future.[76] Our liability doctrines thus presuppose that causation is the kind of relation that can "peter out." The metaphorical picture is of the ripples emanating from a stone dropped into a quiet pond: gradually they diminish to nothing the further the ripples travel from their source. This attribute of legal causation presupposes that the relation is scalar, because only a more-or-less sort of relation can gradually peter out. Yet this attribute is a specific use of such scalarity, for it asserts a proportionality between proximity and more causation, between distance and less causation.

Early writers from Sir Francis Bacon[77] (who coined the Latin, *causa proxima*) on, held that spatiotemporal proximity of cause to effect, was that on which such strength of causation depended. Plausibility is lent to this Baconian view by the "spatiotemporal coincidence" cases. Consider the case of the streetcar motorman who recklessly speeds early on his route in one part of the city.[78] No one is injured while he is speeding, and when he catches up to his schedule he resumes his normal, non-reckless speed. Nonetheless, because he sped early on his route, he arrives at the last part of his route just in time to have a tree fall on his car, injuring a passenger. One may think that it is the simple fact of spatiotemporal distance (between the motorman's negligent act and the harm) that accounts for nonliability here.[79]

Yet simple spatial or temporal distance does not seem to be what diminishes or "tires" causation. Poisoned candy sent from California to Delaware, or from the moon, is still the cause of the victim's death if she eats it and is poisoned;[80] poisoned candy left in a place and in a state where it will be found and eaten a generation later, still causes death at that much-later time. Spatiotemporal proximity thus seems a proxy for something else.

One possibility is to look for those free, informed, voluntary human choices, or those abnormal conjunctions of natural events amounting to a coincidence, intervening between the defendant's act and the harm. Spatiotemporal distance might be a proxy for these kinds of "intervening causes." Yet intervening causes are not what is wanted here (although they may account for the streetcar coincidence case above). Such causes are abrupt (see the next subsection) in the way they break causal chains,

[76] See, e.g., Smith, "Legal Cause" (*supra* note 38), 109. The *sine qua non* test, or necessary-condition test, is discussed in the text accompanying note 34 *supra*.

[77] Sir Francis Bacon, "Maxims of the Law," in Bacon, *The Elements of the Common Law of England* (London: Assigns of I. Moore, 1630), 1.

[78] *Berry v. Borough of Sugar Notch*, 191 Pa. 345, 43 Atl. 240 (1899). For another coincidence case, see *Denny v. N.Y. Central R.R.*, 13 Gray (Mass.) 481 (1859) (railroad's negligence in delaying at one section of track, and its subsequent arrival at a flood plain just when a flood sweeps down and destroys goods on the train, held not to be a cause of the damage to the goods).

[79] Cf. *Bird v. St. Paul F. and Minneapolis Ins. Co.*, 224 N.Y. 47, 120 N.E. 86 (1918) ("There is no use in arguing that distance ought not to count, if life and experience tell us that it does"); and Edgarton, "Legal Cause" (*supra* note 20), 369–70.

[80] *People v. Botkin*, 132 Cal. 231, 64 Pac. 286 (1901).

whereas what is wanted is something that allows causation to diminish gradually in its strength. My own suggestion is that what the law uses here is simply sheer numbers of events that intervene between the defendant's act and the harm. None of these events need itself be an intervening cause as the law defines that phrase; rather, when there are too many event-"links" in the causal chain, it becomes too attenuated to support judgments of transitivity.[81]

The particular scalarity the law presupposes causation to have is thus a diminishment in the strength of causation in proportion to the number of events through which it is transmitted. Where all causal relata are events, if t causes w, w causes x, x causes y, and y causes z, t may well cause y but not z. That is what I mean by the limited transitivity of the causal relation as it is presupposed by our proximate-cause doctrines.

F. The sudden breaking of causal chains by (apparently) fresh causal starts

In addition to the gradual petering out of causation over sheer numbers of intervening events, the law assumes that the causal relation can be ended suddenly by the intervention of one of those special kinds of intervening events which the law designates an intervening (or superseding) cause. Such intervening causes may interrupt the causal contribution of an otherwise potent cause (in which case we have an instance of preemptive overdetermination); or such intervening causes may build on the causal contribution of the defendant's action.[82] In either case the intervention of such causes between the defendant's act and the harm relieves the defendant of any causal responsibility for that harm.

In *Causation in the Law*, H. L. A. Hart and Tony Honoré nicely detailed how the law recognizes two sorts of intervening causes.[83] One involves the free, informed, voluntary act of a third party that intervenes between

[81] A refinement may be necessary here. If the causal relation is transmitted over many events that are of the same *type*, then the diminishment of causation often seems to be less. See, e.g., *Scott v. Shepherd*, 96 All Eng. L. Rep. 525 (K.B. 1773) (liability for causing injury to plaintiff by explosion of a lighted squib that was thrown into a crowded marketplace by defendant, and then rethrown by each subsequent possessor of it so as to rid himself of the danger). The analogy here is to a long row of dominos; the falling of each is plausibly individuated as one event, but their ability to transmit causal force seems unrelated to the number of such events. A colorful example offered by Alfred Mele is a variation of *People v. Botkin* (*supra* note 80): Would it matter if the poisoned candy was sent from California to Delaware by Pony Express (with numerous handoffs) rather than by train?

[82] This line is much more difficult to draw than is recognized in any of the legal literature, yet it is a necessary line to draw in that preemption intervening causes do not have to meet the criteria below articulated for an intervening cause.

[83] Hart and Honoré, *Causation in the Law* (*supra* note 47). Although the clarity and the nonlegal analogues of the idea of an intervening cause were new with Hart and Honoré, they built on a solid body of case law. This case law is detailed in Charles Carpenter, "Workable Rules for Determining Proximate Cause," *California Law Review* 20 (1932): 229–59, 396–419, 471–539. Hart and Honoré's detailing of the case law is in *Causation in the Law*, 153–85, 325–62.

the defendant's act and the victim's injury. Thus, a defendant company negligently spills gasoline from its railroad tanker car into a city street, yet what ignites the gasoline and burns down the town is the intentional lighting of the gasoline by a cigar-throwing arsonist.[84] Even though the defendant's negligent spilling of the gasoline was quite necessary to the town's destruction, the arsonist's choice to use the results of the railroad's negligence to his own ends relieves the railroad of causal responsibility for the town's destruction. The choice by the arsonist operates as a fresh causal intervention breaking any causal chain that might otherwise have existed between the spilling of the gasoline and the destruction of the town.

Only free, informed, voluntary actions by a third-party intervenor will break causal chains in this way. As Hart and Honoré describe the cases, if

> (i) the bodily movement of the arsonist was *involuntary*, in the sense that the cigar slipped from the hand and was not dropped or thrown;
> (ii) the act of throwing the cigar *was not intentional* with respect to the burning of the gasoline, because the cigar-thrower was ignorant of the presence of the gasoline in the street;
> (iii) the act of throwing the cigar was done under the duress of dire threats, and so was in that sense *involuntary*;
> (iv) the act of throwing the cigar was done under the limited opportunities for choice created by natural necessity, as where the cigar would otherwise painfully burn its holder;
> (v) the cigar-thrower was so young, so crazy, or so intoxicated as to be adjudged irresponsible;

then the cigar-throwing act does not break the causal chain and the defendant's initial act of spilling the gasoline causes the destruction of the town.[85]

The second kind of intervening cause involves natural events, not deliberate human intervenors. Suppose that the defendant is negligent in its installation and maintenance of the roof bolts holding a multi-ton warehouse roof in place. If the roof bolts fail so that the roof falls on and injures workmen below, the defendant's negligent actions will be said to have caused the injuries to the workmen. This will be true even if a stiff (but not unusual) breeze contributed to the injuries, in the sense that without the pressures on the roof created by the breeze the roof would not have fallen when it did. If, however, the breeze is that kind of extraordinary event we call "an act of God," so that the roof does not simply fall but flies

[84] *Watson v. Kentucky and Indiana Bridge and Ry. Co.*, 137 Ky. 619, 126 S.W. 146 (1910).
[85] Hart and Honoré, *Causation in the Law*, 74–77.

over one hundred feet before it injures its victims, then such a gale will be an intervening cause relieving the defendant of causal responsibility for the injury.[86]

Hart and Honoré call such cases acts of "coincidence."[87] They analyze such intervening causes as satisfying five requirements. First, there must be an *abnormal conjunction* of natural events. Only winds extraordinary for this time and place qualify as abnormal; breezes normal for this time and place do not qualify. Second, the event in question must have *causal significance*. Merely co-present abnormalities do not qualify. Third, the wind must be *causally independent* of the defendant's actions. If the defendant's design for the building so focused the winds' strength as to make them abnormally high, the winds are not intervening causes. Fourth, the coincidence must be *uncontrived* by the defendant. If the defendant sent out the workmen to work where he hoped the forthcoming storm would blow off the roof, then he has used the storm for his own ends and it is not an intervening cause. Fifth, the intervening natural event must be *subsequent* to the defendant's action. Preexisting conditions, no matter how abnormal or coincidental they may be, do not eliminate the causal connection between the defendant's act and the harm.

There is an odd lacuna in both the case law and academic discussions of causation raised by the fourth criterion for a coincidence. One would have thought that the purposeful exploitation of a natural-event coincidence would give rise to a kind of noncausal liability, strictly analogous to the kind of "aiding of human intervenors" liability shortly to be discussed. Yet Hart and Honoré are correct that the cases treat contrived coincidences on strictly causal grounds. Thus, in the case of the extraordinary winds carrying the heavy roof to where it injured a workman, if the defendant had foreseen such a wind and the possibility of such resultant roof movement and had sent the workman to the spot in order to injure him, such "contrived coincidence" is treated as no coincidence at all. The wind then does not operate as an intervening cause; rather, the defendant is held liable for causing the injury.[88]

The law could have developed differently. It might have eschewed causal talk in such cases, just as it has in the analogous human intervenor cases. It might have said that all that need be shown in either case is that the defendant made it somewhat easier for either natural circumstances or human intervenors to do their causal work, in order to place a noncausal "aiding" liability on defendants. We shall pursue this neglected possibility when we seek to economize the law's metaphysical presuppositions in Section III.

[86] These are roughly the facts of *Kimble v. Mackintosh Hemphill Co.*, 359 Pa. 461, 59 A.2d 68 (1948).

[87] Hart and Honoré, *Causation in the Law*, 77–81.

[88] See cases cited, and discussion, in ibid., 170–71.

The law's notion of intervening cause is actually somewhat broader than the two criteria described by Hart and Honoré. Particularly with nondeliberate human intervenors, there are many cases in which, if the intervention is freakish or dramatic enough, the intervention is held to break the causal connection between the defendant's act and the harm. The more freakish of these cases can no doubt be explained by applying the Hart and Honoré criteria for natural coincidence, to human interventions.[89] That is, suppose that in the spilled-gasoline scenario a good Samaritan sees the gasoline, decides to drain it off the street, slips and falls in it, rushes to a house to dry off, instead ignites himself by running into a cigar-smoker, seeks to put out the fire on his body by jumping into a pool, which has unbeknownst to him become filled with the same gasoline, and sets off the entire town. Even though this case involves a human intervention, if we apply the criteria for a coincidence we may well find this to be one.

Also accounting for some of these merely negligent human intervenor cases are the factors at work in our judgment of preemptive overdetermination cases. If one defendant has intentionally poisoned the victim, who is gradually dying of the poison, but another defendant inadvertently (innocently or negligently) shoots the victim dead instantly, the second defendant's shooting is a preemptive cause.[90] It is a kind of intervening cause, no matter how unintentional or how lacking in culpability in any way it may have been. The shooting's status as an intervening cause also does not depend on any freakishness of the kind that makes one think of coincidence. We simply know that the victim died of the gunshot, not of the poison.

With these qualifications for some merely negligent intervenors breaking causal chains, Hart and Honoré accurately describe the law as regarding a free, informed, voluntary act of a human intervenor as breaking causal chains. Despite this, Hart and Honoré rather inelegantly excepted the giving of reasons and the provision of opportunity from their thesis.[91] That is, if the defendant suggested, offered, encouraged, threatened, or otherwise induced another into causing a harm, then such reason-giving behavior was a cause of that harm despite the intervening choice of the person to whom the defendant gave such reasons. Analogously, if the defendant's culpability consisted in providing an opportunity to another

[89] This is something which Hart and Honoré suggest in ibid., 136, 182–85.

[90] E.g., *State v. Scates*, 50 N.C. 409 (1858) (defendant who burned child not liable for the child's death if an intervening blow on the head by a third party killed the dying child).

[91] In the original edition of their book, Hart and Honoré simply except such situations from the normal rule about intentional intervening agents. See H. L. A. Hart and A. M. Honoré, *Causation in the Law* (Oxford: Clarendon Press, 1959). As Joel Feinberg noted, these were ad hoc, unexplained, and seemingly unlimited as exceptions. See Feinberg, "Causing Voluntary Actions," in Feinberg, *Doing and Deserving* (*supra* note 37). In the second edition of *Causation in the Law* (*supra* note 47), chapters VII and XIII now deal extensively with the provision of opportunities and the giving of reasons as "non-central" kinds of causings.

to cause harm—say by leaving the keys in the ignition of a bulldozer that some vandals then run down a hill into a house[92]—then such opportunity-providing acts are the cause of the harm despite the intentional acts of those who seize the opportunity.

The legal fact that Hart and Honoré were trying to accommodate is the fact that there is liability for such actions in both torts and criminal law. Oddly overlooked, however, was the fact that the law largely deals with the reason-giving half of this phenomenon in noncausal terms. That is, the liability of one who solicits, offers, suggests, or procures another to cause a harm is not for causing the harm; rather, the former is liable for the harm on the criminal-law theory of accomplice liability[93] and on the tort-law theory of a joint tort feasor by virtue of acting in concert. The principal in such a theory must cause the harm in question to be held liable, but it is well established that the procurer need not cause the harm; his soliciting, offering, suggesting, or procuring is enough for accomplice liability (or joint-and-several tort liability) without need of any causal relationship to the harm itself.[94]

The only catch here is that the procurer who induces the principal to cause the harm must do his inducing with the purpose (or "specific intent") that he induce the principal to cause the harm. If one gives reasons to another to cause a harm, but does so innocently, negligently, recklessly, or merely knowingly, this lesser culpability is insufficent for liability. In such cases the reason-giving procurer must be liable on causal grounds if he is to be liable at all; but the intervening choice of the one who causes the harm eliminates any causal responsibility here. The upshot is that a less-than-purposeful inducer is not liable for either aiding or causing.

The procurer who threatens another and in that way induces another to cause harm is distinguished from other types of procurers. The threatening procurer places the harm-causer under duress, making his choice to cause the harm not sufficiently voluntary to be an intervening cause. Thus, the threatener is liable for causing the harm he induces another to cause by his threats, and this causal liability does not require the high level of culpability (purpose) with which other types of procurers must do their procuring in order to be liable on an accomplice theory.

The existence of these two different bases for holding someone liable in both criminal law and tort law has generated considerable confusion. Suppose that a more-culpable procurer or other aider induces or other-

[92] *Richardson v. Hani*, 44 Cal.2d 772, 285 P.2d 269 (1955).

[93] Particularly clear and systematic about this is Sanford Kadish, "A Theory of Complicity," in R. Gavison, ed., *Issues in Contemporary Legal Philosophy: The Influence of H. L. A. Hart* (Oxford: Oxford University Press, 1987); and Kadish, "Causation and Complicity: A Study in the Interpretation of Doctrine," *California Law Review* 73 (1985): 323–410; reprinted in Kadish, *Blame and Punishment* (New York: MacMillan, 1987).

[94] See the two essays by Kadish cited in note 93 *supra*.

wise aids a less-culpable principal to cause some harm. For example, A tells B, falsely, that B's wife is having an affair with C. A tells B this with the intent that B (who is very jealous, has a nasty temper, and is prone to violence) will kill C. B does so in a fit of jealous rage, making B guilty in many jurisdictions of voluntary manslaughter. A, the theory goes, is guilty of aiding B in the voluntary-manslaughter killing of C, but A is not a voluntary-manslaughter killer of C himself because A did not cause C's death. But A is also guilty of causing C's death by his use of a partly innocent agent, B; since A was not provoked, his causing of C's death is murder. A both is and is not the cause of C's death, because B's act both is not and is an intervening cause of C's death![95]

Things are somewhat different where liability is predicated on the provision of opportunities to another to cause harm. There is a form of accomplice liability here in criminal law, as there is a form of joint tort feasor liability here for one not acting in concert. One can be liable in tort law or criminal law for aiding another to cause harm, when the aid is not of the reason-giving kind but is, rather, of a kind that makes it easier for the principal to cause the harm even when he does not know of the aid he has been given. I may intercept a warning telegram that otherwise would have warned the victim that a murderer is looking for him; I have no agreement with the murderer, we are not "acting in concert," and he does not know that I exist or that he has been aided. Yet such aid is sufficient for liability here, and the liability is noncausal.[96] I am held liable for making it easier for the harm to be caused; I am not liable for causing the harm, because intervening between my act of aiding and the harm is the free choice of the murderer.

So far, this is very much the same as it was for the reason-giving kind of aiding. And what was true of the latter is also true here: such not-in-concert aiders must act with the highly culpable mental state of *purpose* to be liable as accomplices. Merely negligent, reckless, or even knowing aid is insufficient for accomplice liability. Unlike the reason-giving situation, however, when an actor provides opportunities to another to cause harm, and the first actor is negligent precisely because of the risk of such causing of harm by another, there is a causal liability placed on the first actor, at least in tort law. Thus, where a defendant railroad negligently carries a passenger beyond her destination and then leaves the passenger on a dark and dangerous stretch of track, and the risk that makes this negligent is realized—the passenger is raped by a third party—the railroad is liable in torts for the rape.[97] Similarly, when a construction company leaves keys in a bulldozer after the close of work, and the risk that makes this negligent is realized—vandals start up the bulldozer and run it down-

[95] See Glanville Williams, *Criminal Law—The General Part*, 2d ed. (London: B. Henworths, 1961), 391.

[96] *State ex. rel. Att'y Gen'l v. Tally*, 102 Ala. 25, 15 So. 722 (1894).

[97] *Hines v. Garrett*, 131 Va. 125, 108 S.E. 690 (1921).

hill from the construction site into the plaintiff's house—the construction company is liable in torts for the damage.[98] In such a case, the free, informed, voluntary choice of the primary wrongdoer is *not* considered to be an intervening cause.

Putting aside, for now, this last exception (about tort liability for negligently providing opportunities to wrongdoers), the existence of a noncausal, accomplice basis for liability allows one to alleviate the apparent tension between saying *both* that free, informed, voluntary acts break causal chains *and* that the provision of reasons or of opportunities that a third party then freely chooses to exploit nonetheless causes the harm such a third party brings about. Rather, one can more consistently maintain that such third-party choices always break causal chains and yet maintain that sometimes noncausal liability is placed upon the original actor anyway.

This accommodating strategy works as well as it does because accomplice liability is designed to pick up behind the intervening-cause doctrine (of the free, informed, voluntary actor).[99] That is, if the would-be principal does not have the kind of free, informed, voluntary choice that breaks causal chains, then the would-be accomplice is liable for the harm on causal grounds, not on accomplice grounds. Suppose A threatens P with serious injury unless P causes a certain harm. If P causes the harm, P has an excuse of duress, and P's choice is not an intervening cause, so that A is liable for causing the harm. Similarly, if A knows that P is ignorant, crazy, intoxicated, under the duress of another or of natural circumstance, and A exploits this weakness by getting P to cause some harm, A again is liable on causal, not accomplice, grounds. It is only when P meets the conditions for being an intervening cause, so that A cannot be held on causal grounds, that the law makes use of accomplice liability.

G. The limited liability for omissions

The law has always had difficulty in dealing with omissions. It helps to be clear at the start about what omissions are: they are literally no things at all.[100] Suppose A stands on the dock and watches V drown, when A could have saved V with little risk or even inconvenience to himself. A has omitted to save V. What this means is that A did nothing to save V. More technically: there was no act-token of A's that had the causal properties needed for it to be an instance of the type of action, saving V. The omission to save V is literally the absence of any action of saving V by A.

For most omissions, the Anglo-American law of torts and crimes provides no liability. For some omitters, however, there is liability: (1) where

[98] *Richardson v. Ham* (*supra* note 92).

[99] See the two essays by Kadish cited in note 93 *supra*.

[100] Michael Moore, *Act and Crime* (*supra* note 2), 28–29; Moore, "More on Act and Crime," *University of Pennsylvania Law Review* 142 (1994): 1768.

A is the parent or other close relation of V, A is liable; (2) where A culpably causes V's condition of peril, A is liable; (3) where A innocently causes V's condition of peril, A is liable; (4) where A undertakes to rescue, but either abandons his undertaking, or performs it culpably, A is liable.[101]

There are two standard routes that attempt to account for these legal facts on causal grounds. The first rests on the premise that all omissions are causes, so that A's omission to save V is a kind of *killing* of V.[102] What distinguishes the usual case (where there is no liability) from the exceptional cases (where there is liability) is a noncausal notion of legal duty. Strangers owe no legal duty not to kill by omission (although they do have a duty not to kill by commission); close relatives, causers-of-the-condition of peril, and rescue-undertakers do have a legal duty not to kill by omission as well as by commission.

The second route begins with the opposite premise: almost all omissions are not causes of the harms they omit to prevent. In the exceptional cases, however, such omissions are causes. One might think this (rather crazily, to be sure) on the ground that the bare fact of legal duty can give causal potency to omissions that are otherwise without it.[103] More plausibly, this route looks behind the legal conclusion about duty to the facts that give rise to the various legal duties not to omit. Each of these facts, so goes the argument, represents a kind of causal involvement in the victim's situation.[104] By causing the condition of peril, by undertaking to rescue, or by entering into an intimate relation with the victim, A would have so entered into the genesis of the victim's harm as to be its cause.

H. Preserving the extensionality of causal statements while accommodating the distinction between "an act that is negligent causing" and "the negligence causing"

Imagine a case where unlabeled rat poison is placed with food near a stove in a kitchen.[105] A person in the kitchen is injured when the rat poison explodes because of the heat of the stove. A court focusing on the danger that such unlabeled rat poison might mistakenly be consumed might well say both (1) that the act of placing the rat poison in the kitchen caused the injury; and (2) that the act of placing *unlabeled* rat poison in the

[101] Joshua Dressler, *Understanding Criminal Law* (New York: Mathew Bender, 1987), 83.

[102] See, e.g., George Fletcher, "On the Moral Irrelevance of Bodily Movements," *University of Pennsylvania Law Review* 142 (1994): 1443–53.

[103] This is Joseph Beale's apparent view, in Beale, "The Proximate Consequences of an Act," *Harvard Law Review* 33 (1920): 637.

[104] See Epstein, "A Theory of Strict Liability" (*supra* note 9), 192; and Eric Mack, "Bad Samaritanism and the Causation of Harm," *Philosophy and Public Affairs* 9 (1980): 240–41, 242–43.

[105] This is the famous hypothetical used by Robert Keeton, *Legal Cause in the Law of Torts* (Columbus, OH: Ohio State University Press, 1963), 3. The hypothetical is based on the facts of *Larrimore v. American National Insurance Co.*, 184 Okla. 614, 89 P.2d 340 (1939).

kitchen did not cause the injury. Since the second is the description of the act that describes it in the way which reveals the act to be negligent, the second description is the basis for the causal judgment, relieving the defendant of liability.

It is not clear how the law can make both of these statements, at least on the most plausible view of event individuation. There was only one act of placing rat poison, even though there are many descriptions of that act differing from one another by their mentioning of differing properties possessed by that act.[106] It was "the first act the defendant did that morning"; it was "the stupidest act he did that day"; it was "the placing of unlabeled rat poison with the food in the kitchen"; and it was "the placing of combustible items near the stove."

Yet if this is but one act with many different descriptions, then it seems the law is guilty of violating Leibniz's principle that identicals are indiscernible in all of their properties.[107] That is, if "x" is one description of the act, and "y" is another, and x = y because there is but one numerically distinct act, then anything that can be truthfully said of x can also be truthfully said of y, and vice versa. Formalized, the principle is: $(x)(y)[(x = y) \supset (Fx \equiv Fy)]$. This is sometimes called the principle of substitutability *salva veritate*, because if x and y are one and the same thing, we can everywhere substitute one description for the other without changing the truth value of the overall expression in which they appear.

The legal example given seems to violate this principle. If "placing the rat poison" and "placing the unlabeled rat poison" are just two different descriptions of the same act, then any property of one must also be a property of the other. Yet the relational property, being the cause of the injury, is said to be true of the act described as "placing the rat poison," and false of the act described as "placing the unlabeled rat poison."

If one is a radical skeptic about law, one might celebrate this lack of extensionality to statements of legal causation.[108] For such statements' dependence upon description for a truth value is just what is wanted by the skeptic in order to deny sense to these statements. Anything can be the legal cause of anything else, or not, depending on which descriptions of the events are arbitrarily selected.

Such skepticism gives up on there being any relation in the world named by "cause." If we want to look for a concept of cause that the law uses and that makes sense, then we have to see what can be done to alleviate this problem, not celebrate its existence. The most obvious way

[106] For a defense of the view that there is only one act here, although there are many different descriptions of it, see Moore, *Act and Crime* (*supra* note 2), ch. 11.

[107] For a discussion of Leibniz's principle in a legal context, see Michael Moore, "Foreseeing Harm Opaquely," in John Gardner, Jeremy Horder, and Stephen Shute, eds., *Action and Value in Criminal Law* (Oxford: Oxford University Press, 1993).

[108] This is what Mark Kelman does, albeit with an imperfect grasp of just what extensionality is. See Kelman, "Necessary Myth" (*supra* note 18), 604–6.

to accommodate the pair of legal statements with which we began is to change what, quite literally, the statements are about.[109] Specifically, the idea is that the second statement is not about the *act* of placing the rat poison in the kitchen; rather, the statement's subject is really the *fact* that that act had a certain property, being the placement of a poison that was both near food and unlabeled.[110] So translated, the second statement really says that the fact that the act was one of placing *unlabeled* rat poison in the kitchen had no causal relevance to the fact that the injury took place.

Now there is no incompatibility between the two statements with which we began. It can be true that the *act* of placing the rat poison caused the injury, and yet also true that the *fact* that the injury occurred was not caused by the *fact* that the rat poison placed in the kitchen was unlabeled. The event that is the action is not the same as the fact that that event had a certain property, so both of these statements can be true without violating Leibniz's principle.

The law thus presupposes that there are such things as facts about events, as well as the events themselves. Such facts about events are often called tropes, or abstract particulars, or concrete universals.[111] The general idea is that the possession of a property by an event is a thing in its own right, in addition to both the particular thing (the event) and the universal thing (the property). Such having-of-a-property things can then be both causes and effects, as both the law and common sense recognize in their discourses.

The law could be committed to such a trope metaphysics in one of two ways.[112] In the moderate form, the law could assert that both events, and facts about events, can be causes and effects. The law would then have to spell out when events are to be used as causal relata, and when facts are to be used instead, because, as we have seen, events and facts give quite different answers to causal questions. The law would also have to make sense of two such different things standing in the causal relation. Alternatively, the law could be more extreme in its tropist metaphysical commitments: it could hold that the only true causal relata are tropes, that its usage of events is not to be taken seriously, and that the latter event-talk can be paraphrased away when it becomes troublesome.[113] In either the

[109] For a discussion of this reference-shifting strategy, see Moore, "Foreseeing Harm" (*supra* note 107).

[110] For an excellent discussion of the difference between facts and events, see Jonathan Bennett, *Events and Their Names* (Indianapolis: Bobbs-Merrill, 1988).

[111] See Keith Campbell, *Abstract Particulars* (Cambridge, MA: Blackwell, 1990). It is not uncontroversial whether facts are tropes, or whether they consist instead of a complex of substance-particulars and universals. See "Introduction," in P. H. Mellor and Alex Oliver, eds., *Properties* (Oxford: Oxford University Press, 1997), 18–20.

[112] These two kinds of commitments to tropes are distinguished in Chris Daly, "Tropes," *Proceedings of the Aristotelian Society* 94 (1994): 253–61; rewritten and reprinted in Mellor and Oliver, eds., *Properties* (*supra* note 111).

[113] See J. L. Mackie's position on facts versus events as causal relata, in *The Cement of the Universe* (*supra* note 55).

moderate or the extreme form, the law must make sense of there being such tropes and of tropes' being the kinds of things that can stand in the causal relation.

I. The causal relation must be temporally asymmetrical

The law joins common sense in presupposing that the causal relation is asymmetrical: if x causes y, then it is not the case that y causes x. Further, the law assumes that this asymmetry exists in only one direction in time: if x causes y, then y cannot precede x in time. Apparent counterexamples—such as when we attribute the solid hit on a golf ball to a golfer's follow-through on his swing[114]—are to be paraphrased away. A more accurate rendering is that the golfer's focus on his follow-through at or just before contact with the ball is what causes a square hit with the ball; since the mental focus precedes the hit, no violation of the temporal asymmetry of the causal relation is to be found in such examples.

The law's presupposition that causality is temporally asymmetrical is to be found in the law's liability doctrines. If A sets off his dynamite and scares B's minks into killing their young,[115] A may be liable for B's loss of minks; B is not liable for A's loss of his dynamite, because in no sense did the killing of their young by B's minks cause A's dynamite to be destroyed.

J. The greater the culpability with which an act is done, the greater the causal power of that act

There is a tendency, noted by many of the earlier commentators on causation in the law,[116] for courts to find a highly culpable actor to have caused a harm when a less culpable actor would not have been said to have caused such a harm. Culpability might increase because of the grossness of the negligence of the defendant; because his act was not only tortious but criminal; because his act was not merely negligent, but reckless or intentional; or because his motives were particularly bad.[117] In any case, such increased culpability has been treated as a kind of aphrodisiac to causation, enhancing the latter's reach and power.

Such a relationship between culpability and causation is distinct from the relationship discussed in connection with "contrived coincidences." In the latter cases, the defendant not only intends the type of harm that actually occurs—he also utilizes the quirks of nature as his intended means to bring about the harm. The cases presently considered make a cruder judgment: just because the defendant has greater culpability in

[114] Jennifer Hornsby, *Actions* (London: Routledge, 1980), 76 n. 1.
[115] These are the facts of *Foster v. Preston Mill Co.*, 44 Wash.2d 440, 268 P.2d 645 (1954).
[116] See, e.g., Smith, "Legal Cause in Actions of Tort" (*supra* note 38), 230–32.
[117] All of these cases are detailed in Edgarton, "Legal Cause" (*supra* note 20), 356–60.

virtually any dimension, he can be held liable for causing the harm even when the causal relationship between his act and the harm is quite attenuated.

III. Pruning the Law's Demands on a Concept of Causation

The single greatest common fault of the legal literature on causation has been its credulity with regard to the law's demands on the concept of causation. Typically, legal theorists have taken legal usages of "cause" at face value in the sense that, without questioning such usages, they have thought that their theory of legal causation had to fit all of them. For theorists with ambitions to account for legal causation in terms of a metaphysics of causation, this credulity and conservatism has made their task impossible. The law has mixed too many extraneous elements into what it calls "causation" for there to be much hope for any metaphysical translation. In this section, I shall, accordingly, seek to prune back these legal usages of causation so that the demands made on the concept are not obviously impossible ones for any metaphysics to meet.

A. Eliminating any supposed aphrodisiac effect of culpability on causal potency

I shall begin with the last demand just discussed, that causation be a relation affected by the degree of culpability with which the act (that is the putative cause) was done. As skeptics about causation in the law have often pointed out,[118] there is no metaphysical account of causation that could meet this demand. For to meet this demand would require the (metaphysically) strange view that the mental state of the actor itself had a causal influence on the injury, independent of its influence through the act that executes such mental state. If the defendant intends some harm H, and he acts in a way such that H comes about, albeit in a rather freakish way, then on this view the intent literally adds causal power to the act of the defendant's that executed his intention. The only way the intention could do this is by itself causing H, in addition to the causing of H done by the intention through the defendant's action. Absent some stronger evidence than we have about the telekinetic powers of our minds, this is surely impossible. Intending H by itself does not make H occur, and even clicking your heels three times won't help.

Now consider the role of gross negligence as a causal extender (as compared to ordinary negligence). To be grossly negligent, one need have no attitudinal difference vis-à-vis the person who is only ordinarily negligent; to be grossly negligent, it is enough that one does an

[118] Ibid.

objectively stupid act, namely, one where the harms risked far exceed any possible gains. (In the colorful language of the late Judge MacGruder, the difference between negligence and gross negligence is the difference between being a fool and being a damned fool.) In such cases of gross negligence, we do not even have a mental state of the actor to do the magically extra causal work. Rather, the moral quality of culpability (in the form of gross negligence) would have to pull the extra load here. Even to those moral realists like myself who are sympathetic to the causal power of moral qualities,[119] this seems a strange causal power to attribute to such qualities. The normal sorts of things moral qualities are said to cause are behaviors and beliefs of persons; this view would require us to think that moral qualities like culpability can also causally contribute—again, directly and without mediation by the acts of the individual who is culpable—to earthquakes and train wrecks.

If one finds the needed metaphysics to be too implausible to be even seriously considered, then one should reject those cases (and the doctrines they announce) that would impose this demand on legal causation. Such cases should be considered to be a kind of understandable mistake—understandable because often we cloud our judgment on one issue by our fervor on another, but a mistake because we have no need to double-count our culpability judgments. We should adjust our overall judgments of moral responsibility and legal liability by giving culpability its proper due, no more, no less; having done this, we have no reason to gerrymander other components of responsibility, such as causation, so as to give even more weight to culpability. If we are clear-headed about this, we will simply get rid of such doctrines, not try to accommodate them in our construction of the law's presupposed concept of causation.

The doctrines that we need to prune back here are four in number. First and foremost, we should eliminate the entire family of doctrines that allow the comparatively greater culpability of a defendant to extend the causal power of his actions through space and time. I refer to the proximate-cause doctrines alluded to earlier,[120] doctrines holding that "no harm is too remote if it is intended," etc.

The second place in which culpability is given magical causal powers is in the overdetermination cases of the concurrent type. Our earlier example was the two fires, independently set and each sufficient to burn the structure, that join to burn the structure. The doctrinal suggestion was that it matters to a culpable defendant's status as a cause of the destruction whether the other fire was also culpably set, or whether it was either innocently set or was a fire of natural origin. For reasons similar to those

[119] Michael Moore, "Moral Reality," *Wisconsin Law Review* 1982, 1061–1156; Moore, "Moral Reality Revisited," *Michigan Law Review* 90 (1992): 2424–2533.

[120] See the text accompanying note 117 *supra*.

just discussed, there is no metaphysics that can make sense of this distinction.[121] If the only difference between the second fires in the range of cases we are considering is the culpable intention, culpable negligence, or moral agency of the second fires' sources, that can make no difference in the defendant's causal responsibility. The suggestion that it does should be rejected, and the law should be treated (as it mostly is anyway) as finding the defendant causally responsible for the destruction in all variations of these concurrent overdetermination cases. This does not necessarily mean that the defendant will be liable in all of these cases, for there may be some noncausal doctrines that save certain causally responsible defendants from liability. Where the concurrent, overdetermining cause is the *victim's* own culpable fire-starting (in the two-fires-that-join sort of example), then the noncausal doctrines of "contributory negligence" and "assumption of the risk" will relieve the culpable fire-starting defendant of liability in tort (although not in criminal law).

The third doctrine to be eliminated here is the doctrine of contrived coincidences. As we have seen, contrived coincidences are not said to break causal chains. The factory owner who hopes that his workers will get hit by the roof being carried by an extraordinary wind, and sends them out for that reason, cannot escape a cause-based liability for their deaths despite the intervening act of God.

Here again, we have to alter doctrine if we are to have any hope of finding a coherent conception of cause presupposed by the law. For it cannot be the case that the very same storm is an intervening cause, or is not, depending on the state of mind of the defendant; it cannot be the case that the very same acts and omissions of the defendant are the cause of the workmen's deaths, or not, depending on the state of mind of that defendant. Again, our minds do not have these kinds of telekinetic powers.

We ought to say that the criteria for an intervening cause do not include contrivance by the defendant. This means that irrespective of whether the defendant intended the storm to kill the workmen, the defendant did not cause their deaths.

As I have suggested in Section II, this negative conclusion about cause-based liability does not end the possibility of a noncausal liability. Perhaps liability in such cases should be predicated on a kind of accomplice liability. Just as one who purposely aids an intervening human agent to cause a harm is liable as an accomplice for that harm, so one who purposely aids an intervening act of God to cause a harm should be liable as

[121] Skeptics about causation have perceived this, leading them to invoke these cases regularly. See Edgarton, "Legal Cause" (*supra* note 20), 346-47 ("D's act stands in the same *logical* relation to the result, whether the other actor is a wrongdoer, an innocent person, or a thunderstorm"); Shavell, "An Analysis of Causation and the Scope of Liability in the Law of Torts" (*supra* note 10), 495; and Landes and Posner, "Causation in Tort Law: An Economic Approach" (*supra* note 10), 110.

an accomplice for that harm. One has made it easier, and perhaps one has even made it possible, for the storm to cause its harm, and one has done so with the specific intent that this happen. That should be enough for liability, just as it is in the human-intervenor situation. And in both situations, no resort need be had to any cause-based liability. One has only aided, not caused, the bringing about of the harm.

Here, as in the case of human intervenors, one might well worry that such a noncausal basis of liability could be extended to the lesser forms of culpability of negligence, recklessness, and knowledge. If such extensions were made, then the intervening-cause doctrine would, again, not be rendered senseless, but it would be rendered pointless. However, here as well as in the provision-of-opportunity cases, such extensions cut against the central idea that animates accomplice liability: we can relax our normal causation requirement (from causing to mere aiding) only because of the high level of culpability with which the aider acts. Accomplice liability is like attempt liability in this regard. In both cases, one substitutes a lesser causal requirement[122] (respectively, of aid, or of proximity to success) because the actor is motivated by the wrong to be done to another. Such alternative, noncausal liabilities are less justifiable if one also relaxes culpability below this highest level.

The fourth doctrine requiring modification (on the ground that culpability judgments must be separated from causal judgments) deals with what I earlier called the negligent-provision-of-opportunity cases. In such cases, as we have seen, the foreseeability (to the defendant) of the intervention by a third party changes the causal status of both that intervention and the act of the defendant. Such alteration is inconsistent with a metaphysical reading of causation, on the same grounds as we have just seen. Nonetheless, I shall defer discussion of this fourth doctrine until we have examined omission liability (for reasons that will become apparent later).

B. Eliminating the demand that omissions be treated as causes

We should abandon both of the previously described strategies which seek to account on causal grounds for the limited liability for omissions in tort and criminal law. The first regards all omissions as causes, distinguishing the few for which liability is imposed from the many where it is not on noncausal grounds of legal duty.

There are metaphysical theories of causation that seemingly have the ability to explain how omissions can be causes. Counterfactual theories of causation (discussed briefly in Section IV), in particular, look promising

[122] I explore the lesser (but not nonexistent) causal requirement for attempt liability in Moore, *Act and Crime* (*supra* note 2), ch. 8.

in this regard. The problem with the first strategy, then, is not its metaphysical impossibility; rather, the problem is moral. In the first place, if we literally can kill, rob, rape, maim, etc., by omission as well as by commission, then how can we explain the usual absence of legal or moral duties not to kill, etc., by omission? Our obligations apply to causally complex act-types like killing, and if omissions cause deaths and are thus killings, why are these kinds of killings permissible for us? If we have a legal duty not to kill, and if omissions to prevent deaths are killings, then why do we not have a general legal duty not to omit to save? Secondly, where we do have a moral and a legal duty not to omit to prevent harm, why are our failures to do so regarded as so much less blameworthy than are our failures to refrain from killing, etc., by commission? Our negative duties not to kill by commission are so much stronger than are our positive duties not to kill by omission (that is, not to omit to save). Yet if these omissions truly are a breach of our obligation not to cause death—that is, not to kill—why should this distinction be drawn at all, and with such force?

We have a moral distinction we want to draw here. It is the distinction between our responsibility for making the world worse and our responsibility for making it better. The easiest, most intuitive way to draw this distinction is by using causation to mark the difference. We violate our negative duties when we cause harm, but not when we fail to prevent such harm; when there are less stringent positive duties, we breach them by failing to prevent harm, not by causing that harm.

Regarding omissions as causes is thus a mistake. Avoiding that mistake does not require us to change our doctrines of liability. Rather, it allows us to make better moral sense of the doctrines we have. Not making this mistake also has the added benefit of relieving us from causal perplexities about the overdetermination omission cases. We need not puzzle over cases like the omission to repair the brakes followed by the omission to use the brakes (which would not work if they were used). We lack intuitions about whether these cases are concurrent or preemptive kinds of cases, and, if they are preemptive, which omission preempts which. We lack any such intuitions because these are not causal issues at all, so we *should* be at a loss as to how to apply these causal distinctions.

The second strategy for explaining omission liability avoids the mistake of thinking of all omissions as causes. Yet this strategy reintroduces the mistake in its attempt to explain liability in the exceptional cases where we do owe positive duties to others. The crudest form of the mistake here is to think that the bare fact of legal duty can turn an omission from a noncause into a cause:

> [W]hereas an actor may always rightly be held to answer for the consequences of his act, since he has taken it upon himself to change the course of events, it is otherwise with a non-actor; he should be

> held responsible only if his failure to act was in itself a legal wrong, that is, if he had a duty to act. The non-action of one who has no legal duty to act is nothing. It does not alter the course of human events, and therefore it has no consequences. It is true that an omission of a legal duty also does not alter the course of events; but the non-actor, having been obliged by law to change events, is rightly held responsible for the consequences of not doing so.[123]

Surely the bare fact of legal duty cannot transform an omission from a nothing that can cause nothing, to a nothing that can cause something!

A more plausible approach is to take the existence of a legal duty not to omit to be a proxy for some other, more plausible causal discrimination. Thus, as Eric Mack[124] and Richard Epstein[125] argue, if we examine the four bases for a duty not to omit (described in Section IIG), we will discover a plausible causal responsibility in each case. The grain of truth in this argument lies in there being some kind of causal involvement by the defendant with the victim in the exceptional cases of duties not to omit. Yet what is crucial to see is that the liability of the defendants in these cases is not for any such causal involvement. When we hold an omitter liable because he had a duty not to omit to rescue one whose rescue he has undertaken, we are not holding him liable on the ground that his acts of undertaking the rescue caused the victim's death. Rather, our liability doctrines explicitly and correctly hold the failed rescuer liable for his omission to rescue, even though his duty not to omit rescue arose from those acts of undertaking rescue. Those acts needn't have worsened the victim's peril, nor need they have been done with a culpable *mens rea*, in order to give rise to the duty not to omit; by contrast, if such acts were an independent basis of liability on causal grounds, both these things would have to be proven about the acts of undertaking rescue.[126]

The upshot is that in the four situations earlier described, we hold omitters responsible for their omissions, not for any earlier acts of theirs that gave rise to their duty not to omit. This means that in these cases we are imposing a noncausal liability, and we should be up front about it. We are liable in such cases because we failed to prevent harm, not because we caused harm. Accordingly, no theory of causation in the law need accommodate such liability.

Of course, shelving omission liability under "noncausal" will not relieve us from all problems about omissions. In particular, we may still worry about the kinds of capacities (to have prevented a given harm) defendants must have had in order to be fairly held liable for failing to

[123] Beale, "Proximate Consequences" (*supra* note 103), 637.
[124] Mack, "Bad Samaritanism" (*supra* note 104).
[125] Epstein, "A Theory of Strict Liability" (*supra* note 9).
[126] This latter point is argued more extensively in Moore, *Act and Crime* (*supra* note 2), 31–34.

prevent that harm. And those capacity judgments may get quite tricky, as when we deal with what I earlier called the "overdetermination omission" cases; for in such cases each person's failure in his positive obligations seems to take away the other's capacity not to fail in his own obligations. Still, these problems are not problems that a theory of legal causation need resolve, for they make no demands on the concept of causation needed by the law.

C. *Cleaning up the doctrines of intervening causation*

One of the most troublesome areas of legal doctrine about causation is that having to do with the sudden breaking of causal chains by fresh causal starts. As we have seen, such fresh (or "intervening," or "superseding") causal starts are of three kinds: deliberate third-party intervention; extraordinary natural events amounting to a coincidence (or an "act of God"); and subsequent but preempting causes.

I have pruned all I intend to prune with respect to the second of these three kinds of intervening causes. Eliminating the defendant's intention as a criterion for when an extraordinary natural event should amount to a coincidence (and, thus, an intervening cause) is the major reform needed here. Yet notice that accomplice liability can and should be extended to place liability on just those defendants on whom the doctrine of contrived coincidence placed it. One who purposefully utilizes extraordinary natural events to produce harm to others should be liable, albeit not on causal grounds.

Such will be my general strategy in pruning the doctrines about the other two kinds of intervening causes. Often I shall urge that a noncausal basis for liability should be established to preserve the liability of one who is presently but erroneously held liable on causal grounds. In light of the just concluded discussion of omissions, we can now add omission liability to accomplice liability as a second, noncausal means for preserving existing legal results while economizing on the law's demands on causation.

I shall begin with the intervening human agent doctrines. Here there are two categories of troublesome cases, one having to do with supposedly cause-based liability for negligently providing another person with the opportunity to do some harm, and the other having to do with supposedly cause-based liability for giving another person reasons to cause some harm. I begin with the provision-of-opportunity cases.

1. The negligent-provision-of-opportunity cases: Noncausal but omissive liability. As we have seen, in cases like that of the railroad that drops its passenger off into a dangerous situation and the construction company that leaves its bulldozer (with the keys in it) perched above a house, the negligent provision of opportunity makes the defendant liable despite the intervening use of the opportunity by a free, informed, voluntary wrong-

doer. Such liability is a puzzle. Negligence is insufficient *mens rea* for accomplice liability, which requires purposeful aiding of the wrongdoer. Yet this seemingly forces us to concede an ad hoc exception to the intervening human agency doctrine.

Hart and Honoré's original reaction to these cases was simply to carve out an ad hoc exception and leave it at that.[127] In the second edition of their *Causation in the Law*, however, they sought to explain such liability in terms of a newly discovered, second kind of causal relation. On this new view, such cases represent a weaker form of causation called "occasioning," "enabling," or "inclining" causation. Such a special kind of causal relation is peripheral or penumbral to the "central case" of causation, where intervening intentional actors break causal chains; for such a weaker relation, its weakness paradoxically proves to be a kind of strength, for intervening intentional actors do not break these "weaker-linked" causal chains.[128]

This is pretty obviously hopeless as a reconciliation of the intervening human agency doctrine with the negligent-provision-of-opportunity cases. The original ad hoc solution is no solution at all, because it makes causation depend on whether the harm that happened was one within the risk that made it negligent to act—and this, on Hart and Honoré's own showing,[129] is a noncausal notion. Causation cannot be a real relationship in the world and be influenced by this kind of culpability ("harm within the risk") analysis. Likewise, the invention of noncentral notions of causation is of no help. Not only are such postulated special senses of concepts always suspicious, postulated as they are to save a theory that is otherwise in trouble; but left unexplained is why this second kind of causal relationship is not generally sufficient for liability if it is sufficient in the negligent-provision-of-opportunity cases. Why, for example, is the railroad which negligently spilled its gasoline throughout a town not liable when an intentional arsonist torches it off? Because, you say, the risk of the arsonist is not the risk that made it negligent to spill the gasoline? Yet that is, again, to resort to the noncausal criterion of "harm within the risk." The relation between the *action* of the railroad and the burning of the town seems in all relevant respects similar to the relation between the *action* of the railroad and the rape of its bounced passenger: each such action made possible (provided the "opportunity" for) the

[127] See note 91 and the accompanying text.

[128] Hart and Honoré, *Causation in the Law* (*supra* note 47), 186:

> The main feature that unifies "inducing wrongful acts" and "occasioning harm" is that these two types of "causal connection" (to use the expression in the wide sense commonly found in legal writings) are not negatived by the factors that negative the simpler type of causal connection . . . for both . . . may be traced through an intervening voluntary action and the second form may also be traced through an intervening coincidence.

[129] Ibid., lxii–lxv, 286–90.

causing of harm by a third party. It is only a culpability discrimination ("harm within the risk") that distinguishes these cases, and this kind of discrimination should be irrelevant to causation.

We could invent a negligence kind of accomplice liability for the provision-of-opportunity cases. Yet if we did this, we would face a problem analogous to that faced by Hart and Honoré: why isn't anyone who negligently acts in a way that makes possible the intervening intentional wrong of another liable on this ground? Such extensive accomplice liability does not make a hash out of our causal notions, as do Hart and Honoré's solutions; but such liability would render pointless the law's insistence that intervening intentional actors break causal chains.

Preferable to any of these solutions would be to decide that the provision-of-opportunity cases in torts are wrongly decided. Criminal law does not hold railroads or construction companies liable for negligently allowing others to rape, or to destroy buildings. (At most, criminal law creates separable crimes of leaving keys in the ignition, leaving vehicles unlocked, serving too much liquor to known drivers, etc.) One could preferably urge that tort-law doctrine is simply mistaken in imposing liabilities for harms when only an opportunity was negligently provided to another to cause such harms.

My own sense is that tort law is not mistaken here, however. Liability is proper in the negligent-provision-of-opportunity cases. However, the liability is not cause-based liability (nor is it liability for purposefully aiding another to cause). Rather, these are cases of true omission liability. When the railroad is held liable for the rape of its passenger, it is not liable because it caused the rape by a third party; rather, it failed to prevent the rape when it could so easily have done so by carrying the passenger to a place of safety. Likewise, a construction company is not liable because it caused the destruction of the house by leaving the keys in the ignition of its bulldozer; it is liable because it failed to prevent such damage when it could so easily have done so by removing the keys.

The duty not to omit in these cases arises because of the "culpable causing of the condition of peril" exception discussed above. The defendants in these cases have caused the victim to be placed in peril, and have culpably caused this because the peril presented by intervening third-party actors was so foreseeable. Their omission to correct a situation they have caused is the true basis for their liability here.

Such a noncausal, omission rationale explains why mere negligent provision of opportunity, which opportunity is utilized by a third-party wrongdoer, is not enough for liability. Rather, the opportunity must be provided to a wrongdoer the risk of whose intervention made the original actor negligent to start with. It is only prevention of the realization of *this* peril that is the first actor's duty; that other actors may come along and utilize the opportunity provided is not enough. Thus, when the railroad's negligence consists in the spilling of gasoline, that negligence does not consist

specifically in the foreseeable intervention of an arsonist.[130] Such arson is not the peril for whose creation the railroad was responsible, and thus for whose correction it has a duty. Likewise, when a railroad's negligence consists in carrying a passenger too far, but it does not drop her off in a place of danger but in a reputable hotel, where she is raped, the railroad has no liability because that was not the peril that made it negligent to carry her beyond her destination.[131]

One way to test whether we hold defendants liable in these cases for their omissions (when the duty not to omit arises from their having caused the peril), or whether we hold them liable for the culpable action causing the harm, is to eliminate culpability at the earlier time. Suppose the railroad is not at all negligent in carrying a passenger beyond her destination to some end-of-the-line, deserted freight yards; she was also not at fault, let us suppose, but overslept due to involuntary intoxication. If the railroad which has innocently caused her condition of peril—being at an isolated, dark, and dangerous location—were to fail to carry her further (when it could do so easily because another train is heading there anyway), and she is raped, then I take the railroad to be liable. It is liable because it omitted to prevent her rape when it could have done so at little cost or inconvenience to itself. It is not liable for having caused her rape by its action of carrying her to the end of the line, because that action was not culpable in any way.

Another way to test whether the proper basis for liability here is causal or omissive, is to imagine a scenario where there is no fair opportunity of the railroad to prevent the injury. Suppose, as in the actual case, the railroad negligently carries her beyond her destination to a dangerous place. However, this time the railroad arranges transportation back for her as soon as it can, and places her in the safest position possible in the interim. If she is still raped in that interim period, I take it that there would be no liability. Yet if the basis of liability in the actual case was the negligent action of carrying the passenger beyond her destination, there should be liability here. The reason there is not is because without any capacity to have prevented the rape, the railroad cannot be held liable for any omission to prevent it. Thus, it is omission that is the true basis for liability here.

It may seem that criminal law is remiss in not imposing punishment in these provision-of-opportunity cases. For criminal law, like tort law, provides that there is a duty not to omit when one has innocently or culpably caused the victim's condition of peril, and thus it might seem that there should be criminal omission liability wherever there is omission liability in tort law. Yet most of these provision-of-opportunity cases are negli-

[130] *Watson* (*supra* note 84).

[131] This is a variation of the facts in *Central of Georgia Ry. Co. v. Price*, 106 Ga. 176, 32 S.E. 77 (1898).

gence cases, and by-and-large criminal law does not punish negligence. Where criminal law does punish negligence, as in negligent homicide, there should be criminal liability in this class of cases—not for causing death, but for negligently failing to prevent someone else from causing death. And in those cases where the defendant is more than negligent—he knows to a practical certainty that vandals will use his bulldozer to ram another's house if he leaves the keys in the ignition—he should be convictable of any crime of property destruction requiring a *mens rea* of knowingly or recklessly failing to prevent someone else from causing such destruction. Criminal law thus does parallel tort law here, if one looks closely.

The upshot is that we do not need to modify the notion of an intervening cause to accommodate liability in the provision-of-opportunity cases. There is liability in such cases, but such liability is noncausal: one can be liable for purposefully aiding, or for knowing, reckless, or negligent omitting. This allows us to say clearly that a free, informed, voluntary third party's intervention between the defendant's act and the victim's harm breaks the causal chain between that act and that harm.

2. *The giving-of-reasons cases revisited: The playoff of causal versus accomplice liability.* If we now turn from the provision-of-opportunity to the giving-of-reasons cases, we also can sharpen the law's commitment to the status of a free, informed, voluntary act constituting an intervening cause. Such clarification is desperately needed, because the law otherwise seems committed to a flat contradiction here.

The contradiction is to be found in the partly innocent agent cases. As stated earlier, the official rationale for punishing the reason-giving procurer for a more serious crime, and the one procured (who committed the crime) for a less serious crime, is that the procurer is an accomplice as to the less serious crime but a principal as to the more serious crime. Take my earlier example of the intentional use of a provokable individual to have another person killed; the procurer tells the hot-tempered and jealous man that his wife is having an affair with the intended victim of the homicide. The procurer is said to have aided and abetted the voluntary manslaughter (provoked intentional killing) committed by the hot-tempered, jealous man; the procurer is also said to have caused the death of the victim himself through the use of a comparatively innocent agent, and therefore is guilty of murder as a principal. The contradiction lies in saying *both* that the choice to kill by the hot-tempered husband is, and that it is not, an intervening cause—and, thus, that the procurer's telling of the falsehood both did not, and did, cause the death of the victim.

This contradiction is easily eliminated if we but seize one horn of the dilemma or the other in any given case. That is, sometimes the one who is induced to commit a crime is so distressed, ignorant, or compelled as not to be an intervening cause on the ordinary criteria for that concept. If

the killer is misled about whether he is killing, or misled about facts that would justify the killing, then his choice to act is not intentional with respect to material facts. If the killer is threatened, or placed in a hard choice situation, or rendered not in control of his faculties, his choice also does not constitute an intervening cause on the ordinary criteria of that concept. In these cases, the one who induces the killer to kill, himself causes death. If the inducer's culpability is greater (or lesser, for that matter) than that of the one he uses, it is his own culpability that is used to measure the degree of his crime.

The only reservation one might have about this conclusion lies in the linguistic oddity one may experience in saying that the inducer *kills*. Indeed, this sense of linguistic oddity will increase for other verbs, like "rape," "hit," "maim," and "take." Surely, one might think, it is the person who is induced to do these things who does them; the inducer of rape does not rape, the inducer of a hitting does not himself hit, etc.[132]

Yet this linguistic discomfort should be momentary. If one looks at the acts prohibited by the criminal law, all of them are described by causally loaded verbs. Just as one kills by causing death, so one rapes by causing penetration, one hits by causing contact, one maims by causing disfigurement, and one takes by causing movement of the object taken. It is true that we often have a stereotype of how these causings are done—we picture the actor using his own body as the means. Yet these stereotypes do not give the meaning of these verbs. Those who induce others to use their bodies to cause the states of affairs which the law prohibits violate our pragmatic (in the linguists' sense) expectations of the typical way these states of affairs are brought about; such unusual routes no more relieve one from being considered a cause of such a state of affairs than would the use of any other unusual means. Inducers quite literally rape, hit, maim, and take, and are properly held liable for doing so.[133]

Furthermore, if one is uncomfortable with this linguistic conclusion, then one should urge adoption of language similar to that of the American Law Institute's Model Penal Code, section 2.06(2)(a). My rewording of that subsection would make one liable for the conduct of another person when, acting with the culpability sufficient for commission of the offense, he causes an agent who lacks the voluntariness, intention, or capacities sufficient for the status of an intervening cause, to engage in such conduct. If there is a linguistic problem here, one can simply stip-

[132] The argument is pressed by Kadish in the essays cited in note 93 *supra*; Bennett, *Events and Their Names* (*supra* note 110); Donald Davidson, *Actions and Events* (Oxford: Oxford University Press, 1980); and Judith Jarvis Thomson, *Acts and Other Events* (Ithaca, NY: Cornell University Press, 1977). Such a view is adopted in *Dusenberry v. Commonwealth*, 220 Va. 770, 263 S.E.2d 392 (1980) (no rape by a defendant who inserted the penis of another into the victim).

[133] I have argued this at some length in Moore, *Act and Crime* (*supra* note 2), ch. 8.

ulate it away. Where there is a causal relation between the inducer's reason-giving action and the harm, there should be liability as a principal, whatever the etymological accidents of language are construed to require.

Alternatively, sometimes the one who wields the knife meets the ordinary criterion for an intervening cause. The hot-tempered, jealous husband is, to my mind, such a person. He intentionally killed; his only ignorance was immaterial, since believing your wife to have had an affair is not a justification for homicide, not even in Texas anymore. His only "involuntariness" is due to his own emotional impulses, which, despite the partial defense of provocation, do not compel one to kill.[134] Easier cases are those where the inducer tells another where his intended victim may be found; when the victim is found and shot, the shooter's action is an intervening cause, making the teller's liability only that of an accomplice.

The conundrum in the law of accomplice liability, with which we began this subsection, is also present in certain of these cases. If the provider of false information in my main example can only be guilty as an accomplice and not as a principal, then under standard doctrine he may be held liable for no greater degree of homicide than can be proved of his principal. Since this is the hot-tempered man who may only be convicted of heat-of-passion manslaughter, this would limit the inducer to liability for aiding and abetting manslaughter. Yet the inducer's culpability is greater, since he intended to kill and was not provoked. If one finds this reasoning to be compelling, then the standardly stated rule should be discarded: an accomplice may be held liable for a higher degree of crime than the principal of whom he is the accomplice. One should make this reform directly, and not attempt to warp causal doctrines to accommodate it.

As it happens, such a reform is undesirable for the reasons Sandy Kadish has argued in detail.[135] The inducer's comparatively greater culpability is irrelevant to his proportional punishment. In cases where the actor who is induced does constitute an intervening cause, there can be no greater punishment for the inducer on causal grounds: for, by hypothesis, the inducer did not cause the legally prohibited state of affairs. Likewise, there should be no greater punishment for the inducer on accomplice grounds: for, by hypothesis, the more serious crime was not perpetrated by the induced actor, and thus there was no such crime whose perpetration the inducer could have aided. If one must punish the inducer more than the induced actor, it should be on the basis of attempt, not causation or complicity: perhaps one wants to say that the provider of false infor-

[134] See Moore, *Placing Blame* (*supra* note 12), ch. 13.

[135] See the essays by Kadish cited in note 93 *supra*. Kadish persuasively argues that the accomplice who does not cause the legally prohibited state of affairs (because the acts of the principal constitute intervening causes) is like the lucky attemptor who does not cause the harm he attempts; both are quite culpable, yet neither can be held responsible for a harm he did not cause.

mation attempted to *murder* the victim (who was only killed by a manslaughterer). Attempt liability is our usual pigeonhole for increased punishment for culpability alone, if that seems desirable in such cases.

3. *The subsequent, preempting cause cases: Eliminating any causal basis for whatever residual liability there may be for a preempted, overdetermined cause.* As we saw at the end of the discussion of intervening causes in Section II, a human act or natural event can be an intervening cause even if it does not meet the Hart and Honoré criteria. Preempting causes, if they occur subsequent to the "cause" they preempt, are a kind of intervening cause too. If a victim is falling to his death but is shot—either intentionally, negligently, or innocently, it doesn't matter—then the cause of his fall is not the cause of his death. Similarly, if a skydiver, whose parachute fails to open, is falling to his death and is electrocuted as he passes through the usual afternoon electrical storm, the negligent preparation of his parachute by another did not cause his death; rather, the storm killed him.[136]

Previously I used this preemption rationale to explain why there are cases where merely negligent (as opposed to intentional) human intervention sometimes breaks causal chains. Now, however, we need to examine the cases where there is liability on the part of the original actor despite the intervention of a seemingly preemptive cause. Consider, first, the case where the original actor purposely takes advantage of the preemptive cause in that, foreseeing such preemptive cause, he does what he needs to do to ensure that such preemptive cause can do its work to harm the victim. For example, the defendant knows that the victim is going swimming in the ocean, that the undertow is strong, and that the victim is a sufficiently poor swimmer that he will not likely survive the experience. Desiring exactly this result, he ties up the lifeguard in his stand. The victim enters the water and, because of the undertow, drowns.

The defendant undoubtedly is liable, in both criminal law and tort law; he is liable, most courts would say, because he *caused* the death. Yet notice exactly what the defendant caused: he caused the lifeguard to omit to rescue the victim from the undertow. If I am right that omissions do no causal work, then how can causing another to omit to save someone become a causing of death? If the omission does not have the requisite causal property, how can that which causes the omission have that property? If omissions are not causes, how can they transmit causal force?

Rather than trying to reconcile the idea that omissions cannot be causes with the idea that the omitter who is caused to omit by someone else nonetheless can transmit causal power, we would do better to recognize a noncausal liability here. The defendant in cases like these has again aided nature, in this case, the undertow. What the defendant did was to remove one of the victim's protections and then let nature take its course.

[136] *Dillon v. Twin State Gas and Electric Co.*, 85 N.H. 449, 163 A. 111 (1932).

This is again a purposeful aiding, even if what is aided is not another person but a natural event, and even though that natural event is not some extraordinary act of God (as in the contrived coincidence cases).

Now return to the overdetermination variant of this case: the victim is a large man whom it will take two lifeguards to save; fortunately, two are available for the job; unfortunately, two defendants, each acting independently of (not in concert with) the other, tie up each of the lifeguards, and the victim drowns in the undertow. As I said before, I am confident that each defendant is liable for the death, and that this result obtains no matter which defendant tied up his respective lifeguard first. Each made it easier for nature to cause the death, and each is liable for thus aiding the causing of death by nature, but not for causing death himself.

Utilizing this noncausal, accomplice-to-nature basis of liability also allows us to sort through the troublesome McLaughlin hypothetical.[137] When A replaces the water in V's keg with salt, and B steals the keg, and V dies of thirst in the desert, neither has caused V's death. A combination of natural processes we can lump together and call "nature" killed V. However, A aided nature in its killing by removing V's protection against these natural processes, and A is liable for the death on that basis. B attempted to aid nature, but there was no aiding to be done when he stole the keg. B is no more liable for aiding here than he would be if he had stolen V's watch, his camera, or anything else (like a keg of salt) totally unhelpful to V's survival.

In the Hart and Honoré variation of the McLaughlin example,[138] also discussed by J. L. Mackie[139] and Richard Wright,[140] A poisons V's water and B drains the poisoned water out of the keg before V dies of thirst in the desert. Again, neither A nor B caused V's death. Had V drunk the poisoned water and died of poisoning, then A would have caused V's death; but V did not die of poisoning. Nor did A aid nature or even try to; A tried to kill V by his own causal mechanism, and is liable for attempted murder. B, by contrast, did two things by draining the water: first, he prevented A from causing V's death; and second, he aided nature in killing V. Nature's only means of killing V was thirst, and thirst was the mechanism aided by B. He is liable for V's death as an aider of nature.

Now let us turn from purpose to lesser states of culpability, such as negligence or recklessness. For example, the defendant either knows or has reason to know that the victim is going swimming in the ocean, that the undertow is strong, and that the victim is a sufficiently poor swimmer that he will not likely survive the experience unaided. Despite this, the

[137] See McLaughlin, "Proximate Cause" (*supra* note 53).
[138] Hart and Honoré, *Causation in the Law* (*supra* note 47), 239–40.
[139] Mackie, *Cement of the Universe* (*supra* note 55), 45–46.
[140] Wright, "Causation in Tort Law" (*supra* note 40), 1802.

defendant negligently drives his car on the beach, hitting the lifeguard and incapacitating him from rescuing the victim.

Such a scenario may sound like the product of a law professor's overactive imagination, but in reality such cases are common as dirt. If I negligently: drain water from your pool, and you dive in; or bump the chair on which you are about to sit, and you fall to the floor; or destroy the lighting on a dangerous stair, and you fall because you cannot see; or destroy the brakes on your car, so that you cannot stop; or run my car into a flood barrier, weakening it such that the next flood breaks through; then I am liable, at least in torts, for your injuries.

These are the "dangerous conditions" cases on which many a causal theory in law has foundered.[141] For to the extent that the undertow, the diving, the sitting, the descending, the driving, and the flood are subsequent, preempting causes, there cannot be cause-based liability here. Yet absent any purposive exploitation of these natural forces by the original actor, there should not be an "aiding of nature" basis for liability either. Liability in such cases is thus a puzzle.

My suggestion is that these, too, are cases of omission liability. It is our failure to prevent the harm that our own actions have made likely, that is the true basis for liability in these cases. The positive legal duty (to eliminate the perils described) is based on our having caused the condition of peril, but the liability is still omission liability, not causal.

IV. Conclusion: The Prospects for a Metaphysics of Legal Causation

My "pruned" concept of causation presupposed by the law will have the following characteristics:

(1) Mere correlation is not causation. Some particular event x is not a cause of another particular event y just because x is an instance of some type of event X, y is an instance of some type of event Y, and Y regularly follows X. Something more is required. When the correlation is a weak, probabilistic one, so that an event of type X raises the conditional probability of an event of type Y, one has to "screen off" spurious causes from real ones by asking more complicated probability questions.[142] Something more is required even when the correlation is a stronger, universal one, where events of type Y always follow events of type X. Such correlations are modes of proving that a causal relation exists

[141] Notably Beale, "Proximate Consequences" (*supra* note 103); and Epstein, "A Theory of Strict Liability" (*supra* note 9).

[142] See the discussion in Salmon, "Probabilistic Causality" (*supra* note 17).

between x and y; they are not themselves constitutive of such a causal relation. As a special case of this last point, the correlation that exists between epiphenomena is not a causal relation. If x causes y and z, and y always occurs prior to z, y does not cause z. My jogging in the morning both scares my dog and makes me tired; my dog's fright does not make me tired.

(2) Not every condition necessary for the happening of some harm y is a cause of y. When the law enquires after the "sole cause" of some event, the existence of many such necessary conditions does not rule out some other event x being designated the sole cause.

(3) The causal relation may exist between an act x and a harm y even if x is not a necessary condition for the occurrence of y because some other condition z is sufficient for the occurrence of y; such causal relation will exist where x and z are concurrent overdeterminers, and it will also exist when x preempts z as a cause of y. In short, for x to cause y, it is not necessary that x be a necessary condition for y.

(4) The causal relation may sometimes not exist between an act x and a harm y even though x is a sufficient condition for the happening of y. This will be true in the preemptive overdetermination cases where another condition z sufficient for y preempts x from causing y. In short, for x to cause y, it is not sufficient that x be a sufficient condition for y.

(5) Causation is a scalar property. An act x may be *more* of a cause of a harm y than some other event z, even though z too is a cause of y.

(6) Causation diminishes over the number of events through which it is transmitted. This makes the causal relation one of only limited transitivity.

(7) Causal chains may be sharply broken and not merely gradually diminished. The intervening causes responsible for such breaks may be of three kinds: deliberate human interventions, freakishly abnormal natural events, and subsequent preemptive causes. Although there may be liability for failing to prevent certain such interventions, or for aiding such interventions in doing their causal work, there is no causal relationship across such intervening events at the basis of such liability.

(8) Omissions, being no things at all, do no causal work. While there is a counterfactual question to ask about omissions when they are the basis for liability—namely, the "capacity" question of whether the omitter could have prevented the harm—this is not a causal question.

(9) The causal relationship is asymmetrical, so that if x causes y, then y does not cause x. Moreover, the asymmetry is tempo-

ral, in that if x causes y, then x must not be preceded temporally by y.

(10) Both whole events and aspects of whole events ("tropes") are the relata of the causal relation. Causal contexts are extensional, and this extensionality can be preserved only by allowing both whole events and their aspects to be causal relata.

The question is whether there is any metaphysical theory of causation that can endow causation with these ten characteristics. None of the four major theories of causation look very promising in this direction. These four theories are all generalist theories stemming from the enormously influential views of David Hume.

Of these four theories, the best known is the view usually attributed to Hume himself, the regularity theory of causation.[143] Such a theory is strongly reductionist because of two—numbers (2) and (4) below—of its four essential tenets:

(1) The principle of uniformity in nature: There are regular conjunctions of classes of events in nature.
(2) The analytic reductionist principle about causal laws: A causal law is no more than a description of these regular conjunctions of classes of events.
(3) The universal presupposition about causal laws: Every singular causal statement, such as, "Event-token x caused event-token y," presupposes some causal law between types of events X and Y, where x is an instance of X and y is an instance of Y.
(4) The analytic reductionist principle about singular causal statements: The singular causal statement, x caused y, means no more than:
    (a) x existed, y existed;
    (b) y did not precede x temporally; and
    (c) x is an instance of some type X, and y is an instance of some type Y, such that there is an X/Y causal law.

Given the long-recognized and much-discussed difficulty of the Humean regularity theory in generating the first of the ten characteristics of causation, many philosophers otherwise sympathetic to Hume's theory disavow the second of these four tenets. Rather, on this modified theory, causal laws describe primitive causal relations between universals, rela-

[143] I am unconcerned with whether the regularity theory sketched below was really believed by Hume. On this, see, e.g., Barry Stroud, *Hume* (London: Routledge and Kegan Paul, 1977), chs. 3 and 4; and Galen Strawson, *The Secret Connexion* (Oxford: Clarendon Press, 1989). The Humean theory is an interesting and an influential one even if it turns out that Hume never held it.

tions that cannot be reduced to Humean regularities.[144] Such a theory is usually termed "neo-Humean," despite this putting of "causal glue" back in precisely where Hume eliminated it; the label is nonetheless appropriate because the theory reaffirms the rest of Hume's principles. The essence of causation on this neo-Humean theory is nomic (or lawful) sufficiency.

Both the Humean and the neo-Humean theories face deep and well-charted problems in accommodating the ten characteristics of causation presupposed by the law. One of these, number (1), poses special problems only for the standard Humean theory. The neo-Humean theory is formulated specifically to get around the "mere correlation" and "mere epiphenomena" problems.[145] Still, plenty of difficulties remain.

Both Humean and neo-Humean theories have a difficult time in accounting for the noncausal status of preempted sufficient conditions in the preemptive overdetermination cases. After all, in the "two fires" cases where the fires do not join, why isn't the second fire as sufficient for the damage as the first? Indeed, isn't the second fire connected to the damage by the very *same* causal law that connects the first fire to that damage? If so, how can it be that the second fire is *not* a cause while the first fire is a cause? Neo-Humeans like Mackie and Wright try to distinguish the preempted fire from the preempting fire on the grounds that it is only "actual" or "present" sets of sufficient conditions that can be causes.[146] They use this requirement to say that the second fire was not present or actual where and when the house burned down. Yet their supposed spatiotemporal criteria turn out to be causal: when a victim is poisoned by A's tea, and then is shot dead by B,[147] the poison can be described as not "actual" or "present" only in the sense that it did not *cause* the death. "Causation" is not analyzed by "actual sufficient conditions"; it is presupposed by this second notion.

Both Humean and neo-Humean theories have a difficult time accommodating the scalarity and limited transitivity of legal causation—characteristics (5) and (6) above. Universal regularities and nomic sufficiency are all-or-nothing matters; they do not admit of the quantitative conceptions needed by the law.

On Humean or neo-Humean theories of causation, it is also a puzzle how causal chains can be broken by intervening third-party actions or by abnormal natural events—characteristic (7) above. Regularities and causal laws seem able to cross such interventions easily. Hart and Honoré's account of why causal chains are broken by these two kinds of occurrences does little to alleviate this puzzle. They argue that our central or paradigm case of causation is captured by transitive verbs of action, such

[144] See Armstrong, *What Is a Law of Nature?* (*supra* note 31).

[145] Ibid.

[146] Mackie, *Cement of the Universe* (*supra* note 55); Wright, "Causation in Tort Law" (*supra* note 40), 1795.

[147] This is Wright's example; see Wright, "Causation in Tort Law," 1795.

as "he did it." When deliberate acts of a third party or abnormal natural events intervene between the defendant's act and the harm, any analogy to these central cases is broken.[148] This is a particularly unconvincing use of the old paradigm-case semantics, which was itself never very convincing at the best of times.[149] We should be explaining the usage of causally complex verbs of action by causation, not the other way around.

A more promising explanation of why these two kinds of events break causal chains might run as follows. Abnormal conjunctions of natural events amounting to a coincidence are, in common parlance, inexplicable events. One might think that there are no causal laws that explain such events, nor any *regular* conjunction of such events, else we would not call them coincidences. Such coincidences are popularly regarded as "acts of God" precisely because it is pure chance, not scientific law, that explains their genesis. Likewise, one might think that there are no covering laws that explain intentional human behavior; such behavior is always, thus, on this view, a kind of coincidence. One might think this on (metaphysically) libertarian grounds: deliberate human choices are free in the sense that they are uncaused. They are thus like *literal* acts of God, being *first* causes of each chain they initiate. They too, then, would act as barriers through which the causal contribution of earlier factors could not penetrate.[150] Alternatively, one might regard deliberate human choices as one would the *metaphorical* acts of God to which natural coincidences are likened; while there are singular causes of such choices, there are no psycho-physical laws that make causal explanations of such choices possible.[151] Thus, such explanatorily anomalous items might again prevent the kind of regular or law-like connection needed by the Humean or neo-Humean theories.

Both of these construals are obviously rather tenuous. They illustrate the kind of metaphysics that would have to be true if, on the Humean or neo-Humean theories of causation, causal relations are broken by natural coincidences or deliberate human interventions. If such claims of inexplicability are too tenuous to be sustained, some other metaphysical theory of causation must be found to match the law's needs in this regard.

There is nothing in the ideas of a universal regularity or of a universal causal law (or in their associated idea of a sufficient condition) that precludes an omission from being a part of a set of conditions sufficient to guarantee some harm. The absence of an event can seemingly complete a set of conditions as well as the presence of an event can. Accordingly, the

[148] Hart and Honoré, *Causation in the Law* (*supra* note 47), 28-32, lxxvii-lxxxi.

[149] I discuss the paradigm-case argument in Moore, "The Semantics of Judging" (*supra* note 5), 281-92.

[150] This is an interpretation of Hart and Honoré offered in the essays by Kadish cited in note 93 *supra*. Hart himself questioned this libertarian interpretation of intervening causation when one of Kadish's papers was initially presented in Jerusalem in 1984.

[151] This is a rendering of Donald Davidson's "anomalous monism." See Davidson, *Actions and Events* (*supra* note 132).

Humean and neo-Humean theories fail to account for the legal idea that omissions are not causes.

The asymmetrical nature of causation, and the fixed direction of causation through time, are well-known problems for Humean and neo-Humean theories. Laws and regularities seem perfectly symmetrical in their linkages of events, so that an X/Y law or regularity is equally a Y/X law or regularity. Ad hoc stipulations are possible—as in Humean tenet (4)(b) above—but they fail to satisfy because the asymmetrical direction of causation is not linked in any way to the essential nature of causation (regularities or laws, on these theories).

Lastly, regularities or laws connecting (sufficient sets of) types of events to some other type of event are democratic between each type of event making up the sufficient sets. As Mill famously observed,[152] each type of event or other condition making up a sufficient set is equally entitled to be called a cause; only pragmatic features of speech license the honoring of one such type of event as "the cause." Such undiscriminating theories of causation cannot account for the more discriminating notion of causation presupposed by the law.

All of these same objections resurface if we reject both classic Humean theory and the neo-Humean theory but accept the probability theorists' own version of Hume. On this third major theory of causation, one again accepts most of Hume's four principles, except that one substitutes probabilistic laws for either universal laws or universal regularities.[153] The comparatively minor nature of this emendation of Humean and neo-Humean theories is what accounts for a sharing of the above-mentioned problems with those other two theories. The striking exception to this is the ability of a probabilistic theory of causation to make sense of both scalarity and limited transitivity. Probability is a more-or-less affair, making a quantitative assessment of causation seemingly easy. Probability also diminishes through successive links: if x makes y 40 percent likely, and y makes z 40 percent likely, x makes z only 16 percent likely. Causation can "peter out" on a probabilistic theory of causation.

The fourth and last major theory is the counterfactual theory of causation.[154] The nature of such a theory is easily missed because most usages of counterfactuals with relation to causation have nothing to do with this theory. Neo-Humeans, in particular, often state that causal laws are to be distinguished from accidental generalizations by the ability of the former but not the latter to support counterfactual judgments. In such a way, counterfactuals become intertwined with the idea of causal laws.

As a truly independent theory of causation, the counterfactual theory makes no essential use of the idea of causal laws.[155] When one asks the

[152] Mill, *A System of Logic* (*supra* note 36).

[153] See generally Patrick Suppes, *A Probabilistic Theory of Causality* (Oxford: Oxford University Press, 1970).

[154] The defining article on this theory is David Lewis's "Causation" (*supra* note 32).

[155] As Lewis makes clear in ibid.

counterfactual question, "But for x would y have occurred?," one is not asking whether there is an X/Y law. Rather, one is asking: In the possible world that is closest to the actual world but where x does *not* occur, does y then occur? Such a "closest possible world" will inevitably not be one where all causal laws of the actual world will hold true, and this may include the X/Y law, if there is one.

There are, of course, severe problems here in making sense of the modal notion of a possible world without holding constant the causal laws of the actual world. There are even worse problems in making sense of there being "closer" and "closest" possible worlds. But these problems go to the truth of the counterfactual theory. My enquiry here is one of fit, not of truth: how well does the counterfactual theory fit the law's demands on a concept of causation?

It is widely recognized that the counterfactual theory has a difficult time accommodating the law's firm notions that in the concurrent overdetermination cases, both sets of sufficient conditions are causes, and that in the preemptive overdetermination cases, the preempting fire is the cause despite the existence of another sufficient condition (the preempted fire). For in both situations, the existence of a second fire that was independently sufficient to have caused the harm seems to imply that the first fire was not necessary.

The standard moves for getting around this objection are unsatisfactory. In the concurrent overdetermination situation, the usual idea is that we can individuate the harm finely enough so that *this* harm (in all its fine detail) would not have happened but for both fires joining and then burning the building as they did.[156] Such a response is both unsuccessful and unmotivated. It is unsuccessful because each fire that independently would have burned the house could be as qualitatively identical (to the joint fire that did burn the house) as you please, in which case no amount of fine-grained event-individuation will get rid of the troublesome conclusion that neither fire was necessary to producing that harm. It is unmotivated because there is nothing in the counterfactual idea of causation that suggests such extremely fine-grained event-individuation, nor is there any principled way to say how far we should go down this road in any individual case. "As far as it takes to get the intuitively right causal conclusion" is about the only principle that comes to mind, and this "principle" relies on some non-counterfactual idea of causation for its content.

In the preemptive overdetermination cases, the response is that the factor(s) that interferes with the ability of the second fire to do its work would still have been present even if the first fire had been absent.[157] The fuel around the house, or the oxygen, for example, would have been consumed even if there was no first fire to have consumed them; the second fire then would not have consumed the house, making the first

[156] See the discussion in Wright, "Causation in Tort Law" (*supra* note 40), 1777–80.
[157] Lewis, "Causation" (*supra* note 32), 204.

fire necessary after all. David Lewis urges that the possible world in which such interfering factors remain present (despite the absence of the first fire, which in the actual world caused them to be present) is "closer" to the actual world than is the possible world where such factors are absent.[158] This strikes me as an ad hoc stipulation of what is closest, giving a meaning to "closest possible world" that seems dependent on some non-counterfactual idea of causation.[159]

The counterfactual theory also does not fare well in meeting other of the law's demands on the concept of causation. Necessity, like sufficiency, is an all-or-nothing property that does not admit of degrees; it is difficult to see how the counterfactual theory can accommodate the scalarity and the limited transitivity of legal causation. The counterfactual analysis also seems completely indifferent to supposed intervening causes; if the defendant's action made possible such intervention, then the defendant caused whatever harms that intervention caused on the counterfactual analysis. Omissions can be as necessary to any harm's occurrence as any actions; the counterfactual analysis of causation must thus resort to some noncausal basis to explain the absence of any general omission liability.

With regard to asymmetry, it is not true that just because x is necessary for y, then y must also be necessary for x. Therefore, as a first cut, the counterfactual relation is asymmetrical, as is the causal relation being analyzed. Yet in the overdetermination cases, each fire is sufficient for the harm; this means that the harm is necessary for each fire's occurrence. Without some analysis of causation that includes more than counterfactual dependence, the burning of the house at t_2 on this theory caused the occurrence of each fire at t_1. One can, of course, simply stipulate that causes must not succeed their effects, so as to bar this unwanted conclusion. Yet what in the supposed counterfactual nature of causation motivates this otherwise ad hoc stipulation?

Lastly, the necessary condition (or counterfactual) analysis of causation is highly promiscuous in its nonselectivity of causes.[160] Every necessary condition is equally a cause of some harm, in marked contrast to the law's assumption that most necessary conditions may simply make up the background field in which causes operate without themselves being causes.

None of the four major theories bequeathed to us by David Hume thus holds much promise in delineating a concept of cause to match that presupposed by the law. In principle, one of these theories could still be true, in which event one might say, "so much the worse for the law." Yet, in fact, the ten characteristics sketched above are not presuppositions about causation that are peculiar to the law. Here, as in so many other places, what the law has done is to reflect some very common-sense ideas about causation. Any theory that gives up on accommodating these ten

[159] Ibid.
[159] See Moore, *Placing Blame* (*supra* note 12), 351.
[160] See Moore, *Act and Crime* (*supra* note 2), 268–69.

demands also gives up on fitting the concept of cause we all use in daily life as we explain and evaluate various goings-on in the world. It is, in fact, a damning failure for a theory of causation not to accommodate most of these ten characteristics, as the rich discussions of these issues in the philosophy of science attest.[161]

Assuming that such accommodation is not forthcoming for any of these four theories, one is left to look elsewhere for a plausible metaphysics of causation. It has recently been suggested that we look to singularist, not generalist, theories of causation.[162] A singularist theory rejects Hume's reductionist fourth tenet sketched above. A singularist, that is, refuses to analyze the singular causal statement, "x caused y," in terms of causal laws. Such a theory will thus be committed to the existence of singular causal relations (and not, as are generalist theories, only committed to the existence of universal or probabilistic uniformities, or of universal or probabilistic relations between universals).

Whether such a singularist theory can meet the ten demands of the law depends entirely on what the nature of the singular causal relation is taken to be. If that relation is taken to be a kind of epistemic primitive, unanalyzable in terms of any other properties,[163] then the causal relation seemingly can possess these ten characteristics without difficulty—for, lacking any essential nature to constrain the analysis, why not? Yet such plasticity is not a virtue of a theory of causation, but a deficit. Alternatively, if the singular causal relation is taken to be one of physical force, as some singularists propose,[164] then some analysis which is a whole lot better than what we have will need to be found; it will have to detail how such forces "come to rest," peter out, or are cut off by some other force.[165] That, however, is a topic for another day.

Law and Philosophy, University of Pennsylvania

[161] Thus, it is standard to use the overdetermination cases, the asymmetry of the causal relation, the problems of epiphenomena and other mere correlations, and the selectivity of "the cause," as arguments testing the *truth* of various theories of causation, and not just the legal adequacy of such theories. See, e.g., Douglas Ehring, *Causation and Persistence: A Theory of Causation* (Oxford: Oxford University Press, 1997).

[162] This is Michael Tooley's suggestion, in his "Causation: Reductionism versus Realism," *Philosophy and Phenomenological Research* 50 (Supp. 1990): 215–36; and in Tooley, *Causation: A Realist Approach* (Oxford: Oxford University Press, 1987).

[163] As it is in Elizabeth Anscombe, *Causality and Determination* (Cambridge: Cambridge University Press, 1971); and C. J. Ducasse, "On the Nature and the Observability of the Causal Relation," *Journal of Philosophy* 23 (1926): 57–68.

[164] See, for example, David Fair, "Causation and the Flow of Energy," *Erkenntnis* 14 (1979): 219–50.

[165] These are the metaphors employed by the cause-as-force theorists in law, Joseph Beale (*supra* note 103), and Richard Epstein (*supra* note 9).

VOLUME 16 NUMBER 2 SUMMER 1999

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CONTENTS

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