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The Morality of Criminal Law: A Symposium in Honor of Professor Sandy Kadish

***827 THE METAPHYSICS OF CAUSAL INTERVENTION**

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INTRODUCTION

This is the third in a series of articles on causation in the law. In the first article, [FN1] I sought to lay out the various legal doctrines and legal theories of causation; in the second, I sought to show how the law of torts and the law of crimes presuppose a concept of causation consisting of ten characteristics. [FN2] One of those characteristics--the one on which I shall focus in this Essay--goes under various names in the law. It has been called the doctrine of "isolating causes," "superseding causes," "intervening causes," "extraneous causes," or in the law-Latin favored in the nineteenth century, *novus causa interveniens* or *novus actus interveniens*. As I described the presupposition of this doctrine earlier:

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. [FN3]

Considerable exegetical work is required to derive this characteristic cleanly from the law we have. In particular, one has to reallocate liability for omissions, for provision of opportunities to third-party wrongdoers, for aiding and encouraging third-party wrongdoers, for aiding forces of nature, away from their supposed causal bases, into noncausal forms of liability. Having spent considerable time in one of the earlier articles doing this *828 exegetical work, [FN4] I shall not repeat or even summarize here the reasons for such reallocation. Rather, I shall here assume such reallocation to be justified so that we can say simply and without exception: Certain interventions by third-party actors or by nature break the causal chains that would otherwise have existed between some defendant's action and some harm to another.

My present inquiry is to see what metaphysical sense we can make of this intervening-cause doctrine of the law. How can causation be a relation that breaks off suddenly with the intervention of some new force or agency, rather than petering out gradually over space and time? I say "metaphysical sense" advisedly, because my inquiry is not into the policy reasons that may or may not support the construction of a legal doctrine of intervening causation. At

one time, for example, lawyers constructed a notion of intervening causation in the form of the last-wrongdoer rule. [FN5] The doctrine stated that the wrongdoer closest in time to the harm was alone liable for having caused that harm; the policy justification was that neither tort plaintiffs nor the state (in criminal prosecutions) needed more than one guilty party per wrong. All prior wrongs were "cut off" by the intervention of the last wrongdoer. Such a construction makes no bones about its fictional, constructed character; such intervening-cause doctrine seeks no support from any underlying metaphysics of causation.

By contrast, my inquiry is avowedly metaphysical. The question is whether the intervening-cause notions of the law can be based on a prelegal notion of causation, one that provides a solid grounding for the sharp breaks in causal chains so marked by the law. In such a case, the doctrines of intervening causation would not be bereft of policy justification--for all law, on my view of it, must be based on "policy," that is, on good reasons. But on the metaphysical view of intervening-causation doctrines, the policy justification would be two steps removed. The policy would be to attach legal liability (in the form of tort damages and criminal punishments) to morally blameworthy actions. It is morality, not legal policy, that tells us that actions that cause harm are more blameworthy than those that merely attempt or risk such harm. It is metaphysics, not legal policy, that tells us when an action causes a certain harm. Such a desert-oriented policy behind the law of torts and the law of crimes thus justifies not looking to policy in seeking the meaning of causation in general and of intervening causation in particular. A legal doctrine of intervening causation is justified--on this corrective justice view of torts and retributive justice view of crimes--if it corresponds to a prelegal, metaphysical notion of intervening causation.

*829 I realize that to many post-Legal Realist legal academicians the foregoing description of my enterprise makes them wonder whether they haven't landed on Mars. For the Legal Realists achieved some of their most resounding victories over their enemies, the "formalists," on the battlegrounds of intervening causation. [FN6] They convinced subsequent generations of legal scholars that all proximate cause doctrines, including those of intervening causation, were merely misleading metaphors for underlying policies, and that such policies were better brought into the light of day instead of being obscured in mysterious but ultimately empty metaphors of forces being spent, causes intervening, and the like.

Yet my intellectual forebears here are not simply those pre-Legal Realist scholars of **causation**, such as Joseph Beale, [FN7] Francis Bohlen, [FN8] Jeremiah Smith, [FN9] Henry Terry, [FN10] James McLaughlin, [FN11] and others. [FN12] Most notably, I have been anticipated in my post-Legal Realist rescue project by the significant work on intervening **causation** done by Herbert **Hart** and Tony Honore between 1956 and 1995. [FN13] For they too sought to rediscover a prelegal notion of **causation** that made metaphysical sense of the law's doctrines of proximate (and intervening) **causation**. In my explication of those doctrines in the next Part, I shall thus rely heavily on their work as well as that of the pre-Legal Realist scholars.

My other intellectual forebear here is Sandy Kadish. [FN14] For Dean Kadish [FN15] too felt the appeal of the **Hart** and Honore rescue project for *830 **causation** in the law and has added his own considerable talents to furthering that project. In particular, Kadish saw more clearly than **Hart** and Honore how embedded in criminal law doctrine is the notion of intervening **causation**. As Kadish has pointed out in great detail, the doctrine forms a watershed divide in criminal law, separating liability as a principal from liability as an accomplice. Indeed, as Kadish saw, it is precisely because of the nature of our intervening-cause doctrine that we impose a secondary liability for those actors whose wrongful conduct makes possible the later wrongdoings of others. Accomplice liability fits like soft clay around the contours of principal liability, contours set by the doctrines of intervening **causation**.

Kadish took this doctrinal insight in two directions. First, he sought to ground the doctrines of intervening causation in metaphysics, specifically, in a libertarian metaphysics of free will. Although he himself did not endorse or reject such a metaphysics, he sought to show how such a metaphysical view was plausible, accepted by many, and made metaphysical sense of the doctrines of intervening causation. Second, Kadish sought to ameliorate the Model Penal Code's rejection of intervening causation, by adding language to section 2.03 of that Code putting the concept back in. [FN16] Although California did not adopt Kadish's proposed language, other states have done so. [FN17]

By showing in detail how the notion of intervening causation is embedded in the basic structure of the criminal law, by deepening the notion's metaphysical groundings, and by extending the notion into hitherto alien quarters,

Sandy Kadish has made my present project possible. It is thus a pleasure, and a fitting tribute, to include my own musings on this topic in this symposium in his honor.

*831 I THE LEGAL DOCTRINES OF INTERVENING CAUSATION

A. The Role of Intervening Cause Within the Causal Requirements of the Law

In this Part, I undertake the description of what it is that needs justification in metaphysics, namely, the legal doctrines of intervening causation. Mostly I shall describe the content of such doctrines. Preliminarily, however, we need to assay the place of such doctrines in the larger scheme of things.

Least controversially, intervening-cause problems are a subset of the larger problems of proximate causation. [FN18] On this view, causation in tort and criminal law is divided into two separate requirements, causation-in-fact and proximate causation. Intervening-cause doctrines are assigned exclusively to the second of these requirements. They are something of a sideshow even here. The main show has to do with remoteness issues, couched in terms of spacio-temporal proximity, substantiality of causal contribution, foreseeability, and the like. Intervening-cause doctrines are needed only in that subset of cases where something unusual intervenes between defendant's action and his victim's harm. In all other cases, proximate cause issues are adjudicated without reference to such doctrines.

A more controversial role for intervening-cause doctrines is to see them as occupying the entire logical space of proximate causation. [FN19] A proximate cause is a "direct cause," and a direct cause is any cause-in-fact of the harm where no other cause has intervened. Such a direct-cause test of proximate causation relies on the notion of intervening cause to fill out entirely the legal requirement of proximate cause. On this view, simple remoteness is irrelevant; what counts is the intervention of those special events we call intervening causes.

The most expansive view of intervening **causation** is one fairly attributable to **Hart** and **Honore**. [FN20] On this view, the concepts involved in elucidating the notion of intervening cause are the very same concepts that give the meaning of **causation** generally. This view of intervening **causation** *832 thus has the idea occupying the entire field of **causation**, not just some separable part of it such as proximate **causation**. The criteria by which one ascertains what is or is not an intervening cause are the very same criteria by which one decides what a cause is at all. There is thus no separable, preliminary step of isolating "causes-in-fact." Rather, we use certain paradigms to ascertain what is the cause of a certain event, albeit we use them twice: What is a cause must both fit such paradigms and not be succeeded in time by some other event that also fits such paradigms.

For our present purposes we need not determine initially which of these roles for intervening causation requirements is correct. Such a role falls out naturally enough from the content of the doctrines of intervening causation and from the metaphysical rationale behind such content. We should thus turn to that content itself.

B. The Content of the Intervening-Cause Doctrines

It has been customary in the literature of intervening causation to divide intervening causes into two kinds, those consisting of extraordinary natural events and those consisting of wrongful human actions. [FN21] Although there are good reasons to honor this traditional division, and we shall do so later, initially it is helpful to regard intervening causes as a unitary phenomenon and to seek the general properties shared (or thought to be shared) by all species of the genus. I consider several such general properties below.

1. The Temporal Condition: Intervening Causes Must Intervene Between Defendant's Act and the Harm

The most basic feature of an intervening cause is that it must intervene. This will obviously eliminate events occurring after the victim's harm from the category of intervening causes (or, indeed, causes of any kind, causation not working backwards through time). Less obviously, this rule also precludes events that predate the defendant's action and states that are in existence at the time the defendant acts, from being intervening causes. [FN22] Thus, the event that is the placement of gas vapors in a ship's hold and the state of its presence at the time of the ship's

explosion do not intervene between the defendant's negligent act (dropping a plank) and the explosion caused by the sparks generated by the plank. [FN23] Contrast that scenario with one in which the gas vapor had been introduced after the *833 defendant had negligently lit his pipe (which was still burning when the vapors were introduced); in this variation, the introduction of the gas vapors would have intervened between defendant's negligent act and the explosion.

This well-entrenched, temporal distinction often takes the form of the maxim, "You take your victim as you find him." [FN24] No matter how abnormally or unforeseeably a person may be thin-skulled, a bleeder, an epileptic, a religiously scrupled person, [FN25] or otherwise predisposed to injury, a defendant will be held to have caused the extensive injuries resulting from his normally harmless actions. The onset of the peculiar vulnerabilities of the victim, and the existence of those vulnerabilities at the time of the defendant's action, do not intervene between defendant's action and the harm.

This temporal limitation of intervening causes brings with it an ontological limitation as well. There is an old debate about what sorts of things can stand in the causal relation, that is, what sorts of things can be ***"causal relata." [FN26] One subdebate here is between those who urge that only events can be causal relata and those who urge that states can also be causal relata. [FN27] However one comes out in this more general debate, for intervening causes one must restrict causal relata to events. As Hart and Honore put it: "If a contingency is ... to negative causal connection it must be an event [;] ... a state of the person or thing affected existing at the time of the wrongful act ... does not negative causal connection." [FN28] This is not only a temporal distinction, but an ontological one as well: "The distinction [is] between an existing state of affairs and an intervening event." [FN29]

One can see why the ontological requirement is a corollary of the temporal requirement by returning to the facts of *In re Polemis*. There was in fact an interval of time between defendant's act, dropping the plank, and the harm, the explosion of the ship. [FN30] During that interval, the state of gas-vapor- being-in-the-hold did exist. One thus disqualifies such a state from being an intervening cause on the ontological ground that it is a state, not *834 an event, whereas, in my contrasting hypothetical, the introduction of the gas vapor is an event and thus is eligible to serve as an intervening cause. This is to use an ontological distinction as well as the temporal distinction to make out intervening causation.

It is natural that those who favor a foreseeability approach to proximate causation will find the temporal/ontological distinction problematic. [FN31] After all, whether an extraordinarily unlikely thing occurs before or after a defendant's act, and whether that thing is an event or a state, makes no difference to the foreseeability of the harm that such a state or event makes possible; defendant can reasonably be ignorant of such a thing no matter what it is or when it comes into existence. The proper conclusion to draw from this, however, is that foreseeability has nothing to do with intervening causation. If we are restricting ourselves to a causal inquiry, not a culpability inquiry, we properly focus on what intervenes between defendant's act and the harm. All that went before has nothing to do with defendant's causal responsibility in bringing about some harm. Whether a world is extraordinary or dull, monotonous or uniform, is all one for the causal inquiry. Whichever it is, it is the stage on which defendant begins his causal contribution. [FN32]

2. The Independence Condition: Intervening Causes Must Not Themselves Be Caused by Defendant's Action

Another strand of the idea of "intervention" is the newness of that which intervenes. This strand is well captured by the English label "extraneous cause." To intervene between defendant's act and his victim's harm, an event must not itself be the product of defendant's act. If it is such a product, then the event is merely part of the mechanism or means by which defendant's act caused the harm; it is not an intervention preventing such causation by defendant.

Hart and Honore give this example: A defendant who culpably pushes his victim to the ground is not liable for that victim's death when the victim is killed on the ground by a falling tree. [FN33] The falling tree, in such a case, intervenes between defendant's push and the victim's death. By contrast, if the defendant's push caused the victim to stagger into a rotten tree, and the impact caused it to fall and kill the victim, the defendant is held to have caused the death. While the tree's falling was subsequent to the defendant's act of pushing, it was not causally independent of the push and so does not constitute an intervening cause.

*835 There is considerable case law support for the independence criterion of intervening cause. [FN34] Consider the example of *Bunting v. Hogsett*. [FN35] Defendant's culpable act consisted of operating a railroad engine at too great a speed. To avoid a collision with plaintiff, defendant reversed throttle, shut off the steam, and jumped. The collision occurred anyway, but did not injure plaintiff. The collision, however, opened the engine's throttle, and the engineer-less train backed with increasing velocity around its track (which met plaintiff's road a second time), again hitting the plaintiff and this time injuring him. None of these rather extraordinary events were causally independent of defendant's culpable act, and so none of such events were held to constitute an intervening cause. As the Pennsylvania Supreme Court described its rationale:

[N]o intermediate cause, disconnected from the primary fault and self-operating, exist[ed] in this case, to affect the question of the defendant's liability; it was the engineer's negligence that caused the first collision, and what occurred in consequence of this collision was not broken by the intervention of any independent agent, whatever. The first collision ... opened the throttle, and turned loose the destructive agency which inflicted the injuries complained of. [FN36]

Presumably, had the engine's throttle been set in reverse and opened up by a child at play, a bolt of lightning, or virtually anything else with a genesis independent of the first collision, the court would have deemed such events intervening causes.

The older literature on intervening cause regarded causal independence as an unproblematically universal requirement for intervening causes. [FN37] Yet as *McLaughlin*, [FN38] *Carpenter*, [FN39] and *Hart and Honore* [FN40] came to see, with regard to certain kinds of intervening causes, some qualifications have to be made.

Consider first intervening voluntary actions by human agents exploiting the situation created by defendant's culpable action. As *Hart and Honore* recognize,

*836 [A] voluntary act which negatives connection will always be found to be in some sense dependent on [defendant's original wrongdoing], e.g., it will be motivated by the fact that the wrongful act has occurred or by the belief that it may occur. It will be done in response to or in anticipation of some untoward situation. [FN41]

As an example of this last point, consider the facts of *Watson v. Kentucky & Indiana Bridge & Railroad Co.* [FN42] The defendant negligently spilled its gasoline throughout the town. The subsequent fire, however, was caused by the intervention of a third party; such person either dropped his cigar negligently into the petrol or intentionally threw it in to ignite a blaze. The court held that if it was the latter situation, the act of throwing the cigar would constitute an intervening cause and relieve the defendant of liability for the fire. In such a case, *Hart and Honore* would point out, the intervenor's act in some sense is not causally independent of the defendant's act, for the intervenor's act is made possible by the act of the defendant and in that sense is done in response to the defendant's act.

While all of this is quite in accordance with case law and commonsense notions of **causation**, unnoticed by *Hart and Honore* is the continued power of the independence criterion, even in the cases of intervening voluntary human action. Consider first intentional third-party intervenors, such as the second factual possibility in *Watson* above. As *McLaughlin* [FN43] and before him *Beale* [FN44] observed, it is generally true that "stimulated voluntary action" [FN45] by a third-party intervenor will not constitute an intervening cause. That is, if the defendant coercively supplies the motive for the intervenor's behavior, then that behavior does not break the causal chain between defendant's action and the harm. Whereas, as *Bohlen* put it long ago, if the intervening voluntary act "divert[s] the natural results of the wrong to some new and different end," [FN46] then there is an intervening cause. In *Watson* itself, the intervenor threw his cigar for his own, independent reasons. His motivation was in no way dependent on defendant, even if his action was made possible by defendant's negligence.

Hart and Honore do not so much disagree with this analysis as they reclassify it. Rather than talk of independence of motivation, they smuggle the same requirement into their concept of "voluntariness." Where the defendant threatens or pressures the intervenor into doing what he does, they, like *McLaughlin* and *Beale* before them, recognize that such "stimulated action" does not constitute an intervening cause. This is one of *837 *Hart and Honore's* categories of "nonvoluntary" action, as we shall see. [FN47] The intervenor choosing on his own to exploit the situation created by the defendant's wrongdoing is their paradigm case of voluntary action constituting an intervening cause. [FN48]

Consider secondly intervening voluntary acts in which the intervenor does not intentionally bring about the harm. In *Watson*, this is the negligent thrower of the cigar, one who does not know the gasoline to be present (although he should). With considerable support in the case law, [FN49] Hart and Honore observe that negligent action by an intervenor merely reactive to defendant's wrongdoing does not constitute an intervening cause. [FN50] Hart and Honore cast this again as a nonvoluntary/voluntary distinction, but it is easy to see the causal independence criterion at work here as well.

Hart and Honore also except animal behavior and involuntary human conduct from the independence requirement. That is, according to their theory, while an independent event of these kinds will always qualify as an intervening cause (if other requirements are met), sometimes a dependent event will also qualify if it is of one of these two kinds. For animals, if the intervening behavior of the animal is not in accordance with the nature of an animal of the kind in question, then that behavior, though causally dependent upon defendant's wrongdoing, may still constitute an intervening cause. [FN51]

Examples of such dependent animal behavior that nonetheless negatives causal connection are hard to come by. Most cases are like *City of Waco v. Branch*. [FN52] Defendant city negligently released its sheep from their pens located on municipal park land. A dog chased the sheep onto the *838 roadway in front of plaintiff's car. Plaintiff wrecked his car and injured himself in avoiding the sheep. Carpenter concluded that the city should properly be held liable, despite the causal dependence of the dog's intervention upon the defendant's wrong. As Carpenter put it, "The defendant's wrong in leaving the sheep in the park was a cause-in-fact of the dog's chasing them." [FN53]

Causal independence is a better theory to apply to such cases than is Carpenter's "foreseeability" or Hart and Honore's "in the nature of the beast" criteria. One has to get away from "but for" causation in assessing the causal independence of the intervention from the defendant's wrong. I would say, in the *City of Waco* situation, that the dog's intervention was causally independent of the defendant's act. Defendant's wrong in unpenning the sheep provided the opportunity for the dog's intervention, and in that anemic sense it made possible (was a necessary condition of) the dog's act. But the defendant's wrongful act gave no impetus to the dog to chase the sheep--no more so than the provision of opportunity to voluntary human intervenors, who when they exploit the situation presented by defendant's wrong do so for their own reasons. Contrast such a case with the facts in *Isham v. Estate of Dow*, [FN54] where defendant's wrong of shooting a dog sent the dog scurrying for cover in plaintiff's house, knocking plaintiff down and injuring him. There, the dog's behavior is truly causally dependent on defendant's wrong and was properly held not to be an intervening cause.

According to Hart and Honore, the cases also except certain intervening involuntary human acts from the causal independence requirement. On their reading of the cases, even a causally dependent involuntary act may "negative causal connection if not in accordance with human nature." [FN55] There is very little authority cited for this proposition, however. In *Commonwealth v. Root*, [FN56] for example, one of the cases cited by Hart and Honore, [FN57] the court held that defendant's act of starting an auto speed contest was not the proximate cause of a subsequent crash because the victim (who was the other racer) recklessly swerved into oncoming traffic during the race; there is no mention of human nature in the court's opinion, nor is it obvious that such recklessness isn't pretty natural for road racing. Hart and Honore's more general formula for dealing with intervening recklessness and negligence seems more apt; [FN58] if the reckless or negligent intervening action was done to escape or thwart the danger created by defendant's wrong, then it is not an intervening cause, whereas if the *839 intervening act is independently motivated (as it was in *Root*), then it can constitute an intervening cause.

Construing causal independence in this motivational manner for intervening human and animal actions allows us to retain the uniform requirement that a subsequent event must be independent of the defendant's wrong if it is to negative a causal connection between that wrong and some harm. The earlier writers on intervening causes were thus closer to the truth than they knew.

3. The Core of the Doctrine of Intervening Causation: Three Kinds of Chain- Breakers

a. Voluntary Human Actions

The guts of the intervening-cause doctrine lie in what (subsequent, causally independent) events qualify as intervening causes. Most theorists have focused their attention on voluntary interventions by third-party wrongdoers. Some of our clearest intuitions of causal chains being broken lie here; judges, too, have shared these intuitions in building a considerable body of case law.

The Watson case discussed earlier provides an example. [FN59] If Duerr, the cigar smoker, intentionally threw his cigar onto the gasoline that defendant railroad, by its negligence, had spilled into the city streets, and he did so in order to ignite the gasoline, then his action would constitute an intervening cause. Even though it was defendant's negligently spilled gasoline that soaked the town, Duerr's voluntary intervention was a fresh causal start making him alone causally responsible for the fire damage.

"Voluntary" is given quite an extended meaning in intervening causation doctrine. It includes principally: (1) voluntariness of action in the law's more usual sense, (2) accompanied by an intention to bring about the harm or, sometimes, foresight or even negligence, (3) which intention is formed in the absence of coercive pressure making the choice difficult, (4) by one sufficiently possessed of his faculties as to be a generally responsible agent. Let us consider these briefly one at a time. [FN60]

i. Voluntariness of Action in the Law's Usual Sense

To be an action at all, behavior must be voluntary in the sense used in criminal law and torts when assessing the defendant's (not the intervenor's) conduct. [FN61] In Watson, [FN62] if Duerr had dropped his cigar by reflex ***840** reaction, done so while asleep, unconscious, or under hypnosis, had the cigar knocked from his hand by another, a gust of wind, or a passing trolley, he would not have acted; in such cases, his cigar would have dropped from his hand as the leaves drop from trees, which is to say he did nothing causing it to drop. At a minimum, for Duerr's behavior to be an intervening cause, such behavior cannot consist of involuntary bodily movement.

When assessing the defendant's conduct, usually it is said that omissions to prevent some harm do not constitute a voluntary act unless the defendant was in one of the exceptional situations where he had a positive legal duty to prevent such harm. For the intervening actor, fortunately, the situation is not clouded with distinctions based on legal duties. Rather, omissions are not voluntary acts even where the intervening actor was under a legal duty not to omit. [FN63] Omissions, on the best conceptualization of them, are literally not things at all; they are the absence of certain events. [FN64] It is difficult to see how they could intervene as a new cause when they cannot constitute any kind of cause at all. [FN65]

ii. The Intervenor's State of Mind

The second aspect of "voluntariness" for these purposes has to do with the intervenor's state of mind. In the clearest cases of intervening causation, the intervening actor intends to exploit the opportunity left by defendant's wrongdoing, and he intends by his intervening act to accomplish the very harm for which the defendant is charged. In Watson, [FN66] if Duerr threw his cigar intending to torch the village, his act would constitute an intervening cause relieving the defendant railroad of liability because of its negligently spilled gasoline. Such an intent (when motivating an action that is subsequent and causally independent) is thus almost always sufficient to break the causal chain and relieve defendant of liability. [FN67] But is such intent necessary for a human act to be an intervening cause?

***841** In their article [FN68] and in the first edition of their book, [FN69] Hart and Honore thought so. By the second edition, however, they realized that they had to account for those numerous cases where the intervening actor is held to be an intervening cause despite the lack of any intention to cause the victim harm. Their revised description of the doctrine is that a "deliberate, informed" act "intended to exploit the situation created by defendant" is sufficient to constitute an intervening cause. [FN70] Their example is of an intervenor who decides to rob a victim rendered unconscious by defendant's negligence; if the intervenor accidentally injures the victim, defendant will not be responsible for such injury. "This is because the decision to exploit the situation by stealing from the pedestrian has intervened ... even though, in executing it, the thief has brought about a consequence which he did not intend." [FN71]

In examples like these, it is inevitable to attribute some degree of culpability to the intervenor: if not intention, then foresight, recklessness, or negligence with respect to the harm suffered by the victim. This is the grain of truth in the older maxim that criminal conduct by an intervenor is sufficient to constitute an intervening cause. [FN72] Yet this maxim suffered from serious overbreadth. Not any reckless or negligent act will suffice to create an intervening act. As Hart and Honore recognize, "every merely negligent act is nonvoluntary in our sense, since by hypothesis the actor did not intend to exploit the situation" created by defendant's wrong. [FN73] The actor must have enough knowledge of the circumstances created by defendant's wrong that his decision to go ahead is properly viewed as a decision *842 to take advantage of those circumstances. Such a decision may be merely reckless or negligent and still constitute an intervening cause, [FN74] but negligence or even recklessness by the intervening actor in failing to learn of such circumstances is not enough.

The only caveat to this is when the behavior of the intervening actor is so extraordinary that, although only negligent, it nonetheless fits the criterion (described below) of "abnormal natural events." If defendant's negligence has left the victim unconscious and with a broken arm, yet a doctor treats the patient with kerosene-soaked rags for fever, not noticing the broken arm, and the patient is severely sickened, the defendant should not be liable for the more severe sickening; the doctor's negligence would doubtlessly be categorized as gross negligence for the purpose of a suit against her but (more to the point in this context) such extraordinarily negligent behavior may well constitute an intervening cause by reason of its abnormality. [FN75]

iii. Absence of Coercion

The third feature making an intervening choice fully voluntary in the relevant sense is suggested by the adjective "free." [FN76] Hart and Honore define "free" in the compatibilist manner familiar from Herbert Hart's earlier writings: [FN77] A human agent is "most free when he is placed in circumstances which give him a fair opportunity to exercise normal mental and physical powers and he does exercise them without pressure from others." [FN78] I call this a compatibilist sense of "free" because it does not rely on any contra-causal kind of freedom; an act may be fully caused and yet "free" (in this compatibilist sense) in that the actor was possessed of adequate capacity to decide what to do and was given a fair opportunity to exercise that capacity. [FN79]

The factors that can erode adequate capacity or fair opportunity for free, unpressured choice are numerous. A threat of serious bodily harm, or of damage to property, or a threat of economic injury, can so reduce the intervenor's options as to render his choice to intervene nonvoluntary. "Threats" by natural circumstance can similarly reduce opportunities; if one's choice is reduced to burning to death or jumping to one's likely injury, the jump is involuntary and does not constitute an intervening *843 cause. Likewise, strong emotions, such as fear, provoked anger, addictive cravings, and the like may so incapacitate an intervenor as to render his choice nonvoluntary. [FN80] It is important to see that such threats, natural necessities, or emotional reactions need not originate with the defendant in order to make an intervening choice nonvoluntary. As we saw earlier, [FN81] if such items did originate with the defendant, then the intervenor's choice lacks causal independence and cannot be an intervening cause on that ground alone. It is where such items originate other than with the defendant that such nonvoluntariness disqualifies a choice on its own hook. It is defects in the intervenor's choice itself, not a causal connection of that choice to the defendant's action, that is doing the work here. Nonvoluntary choices are incapable of breaking the causal chains that may be broken by fully voluntary human decisions.

iv. Capacity Necessary for Voluntariness

Fourth, if the intervenor's general capacity to make choices is eroded, such intervening choices as he does make do not constitute intervening causes. The insane, those diminished in mental capacity due to mental disease, drugs, or alcohol, and the very young all lack the kinds of capacity that would enable their choices to qualify as intervening causes. [FN82] These are not compelled choices (see number three above) or ignorant choices (see number two above) so much as they are defectively reasoned choices. Only the chosen actions of sane, sober, adults can constitute intervening causes (unless insane or immature choices are so abnormal as to qualify as intervening causes on that distinct ground).

If one considers these four conditions of nonvoluntariness together, we can see the descriptive power of the old last-wrongdoer rule. For the voluntary act, mens rea, absence of coercion, and general capacity requirements pretty much constitute the conditions we use to assess culpable wrongdoing generally. As Hart and Honore recognize, "the various circumstances [of voluntariness for intervening cause purposes] correspond with the factors which diminish moral and legal responsibility." [FN83] Even so, not all culpable wrongdoing constitutes an intervening cause when it intervenes temporally between defendant's act and some harm, and not even all causally independent wrongdoing so qualifies. Holmes's old view is the right one here: While "the general tendency has been to look no further back than the last wrongdoer," [FN84] the tendency is shot so full of *844 qualifications that it cannot be elevated into the hard and fast rule the last-wrongdoer rule purported to be.

b. Abnormal Natural Events

Even if a subsequently arising, causally independent event does not qualify as a fully voluntary human act, that event may yet qualify as an intervening cause if it is in some sense "extraordinary." Such extraordinary events may be natural events, like floods, storms, and earthquakes, or they may be human actions. In either case, "acts of God" or "coincidences" may break causal chains as surely as the most deliberate intervention by a third-party wrongdoer.

Hart and Honore helpfully subdivide these cases into two kinds: events that are abnormal in almost any context, and events that are abnormal in conjunction with certain other events. [FN85] Meteorites, unprecedented winds or rains, [FN86] tidal waves, extraordinary floods, and the like are examples of the first kind, usually called vis major or "acts of God." Trees falling just where some victim has been placed by defendant's wrongdoing [FN87] and lightning igniting explosive dust negligently spilled by defendant into his warehouse [FN88] are examples of the second kind, aptly termed "coincidences." It is not unusual for trees to fall or lightning to strike; what is extraordinary is that such events should have happened just where and when they did, which was the only time and place at which they could have caused injury to a victim made susceptible to such injury by defendant's wrongful act. [FN89]

Hart and Honore nicely distinguish three rather glaring indeterminacies in the use of this abnormality criterion. [FN90] Most obvious is the indeterminacy stemming from the degree-vagueness of "abnormal": Just how extraordinary must an event (or conjunction of events) be in order to qualify as abnormal? [FN91] Light winds ordinary in the evenings for a given place are obviously not abnormal, while winds of unprecedented force are *845 abnormal; in between these extremes, one can only say, "highly unlikely," [FN92] "extremely unlikely," [FN93] or "very unlikely." [FN94]

The second indeterminacy is a bit less obvious. It stems from the fact that when assessing probabilities, we never assess the probability of a particular event. [FN95] Rather, we assess the probability of some event occurring that instantiates the type of event in which we are interested. Although idiomatic English misleads us here, when we ask, "What was the probability of that storm?" we actually mean, "What was the probability of some storm occurring where and when this one did?" Hence, indeterminacy number two: it is indeterminate what types we mean to use when we assign degrees of likelihood. Do we mean, for example, some instance of the type, rainstorm? Long rainstorm? Long, one-inch-per-hour rainstorm? Since probabilities differ considerably by the type one has in mind, the indeterminacy in assessing degrees of abnormality is a significant issue. [FN96]

Hart and Honore attribute to the law what they call the plain man's view: "It will in general be enough to take the description of the events which would ordinarily be given." [FN97] As they recognize, this does not uniquely determine types, but perhaps it restricts the range of variation somewhat.

The third indeterminacy is the uncertainty about the epistemic vantage point from which the assessment of likelihood is to be made. As Hart and Honore recognize, "like the cognate idea of what is 'foreseeable,' 'probable,' or 'within the risk,' the idea of coincidence is essentially a function of limited knowledge of the events concerned." [FN98] That is, from an omniscient epistemic vantage point, the likelihood of some instance of some type of event occurring during a given interval of time is either 0 or 1 (assuming a deterministic universe). For all of us less-than-omniscient mortals, the probability depends on what we know. [FN99]

One could assess the likelihood of a given conjunction of events from the epistemic vantage point of the defendant:

Given what the defendant knew or should have known, what likelihood would he have assigned if he were reasonable? This collapses abnormality into foreseeability. Preferable for these purposes is to repair again to the ordinary person's view. From the epistemic vantage point of most of us, the observers, what would we (in retrospect) judge the probability to have been? Although abnormality is *846 like foreseeability in that both are probabilistic notions, the epistemic vantage point from which probability is to be assessed differs.

c. Intervening Preemptive Causes

In the older literature on intervening causation it is often suggested that an event will be an intervening cause if it is "sufficient" by itself to have caused the harm. As the U.S. Supreme Court once opined:

One of the most valuable of the criteria furnished us by these authorities is to ascertain whether any new cause has intervened between the fact accomplished and the alleged cause. If a new force or power has intervened of itself sufficient to stand as the cause of the misfortune, the other must be considered as too remote. [FN100]

Terry and others were unable to find any clear meaning to "sufficient" in such cases. [FN101] My own interpretation of this criterion would be as follows.

It is well known that overdetermination cases pose thorny problems for many theories of causation. [FN102] A case is one of "overdetermination" when two independent events are each sufficient to produce a single, indivisible harm. For example, two individuals, not in concert, each negligently start a fire; each fire is sufficient to destroy the victim's house; as it happens, the fires join and the resultant fire destroys the house. Each is held to be a cause of the destruction. [FN103]

More relevant for our purposes are a subclass of the overdetermination cases, those often dubbed "preemptive" (as opposed to concurrent) overdetermination cases. [FN104] For example, the two negligently set fires do not join; defendant's fire reaches the victim's house first and destroys it; the other fire then arrives sufficient to have destroyed the house if it were still standing, but there is no house left to destroy. Defendant's fire is said to have preempted the other fire as the cause of the destruction.

Often a preemptive cause does its work after the factor preempted has begun to do its work. Examples: defendant poisons the victim, but as the victim is dying of the poison another comes along and shoots the victim *847 dead; [FN105] defendant's negligently constructed bridge allows victim to fall to what would be a certain death, but, as he is falling, victim is electrocuted by uninsulated wires; [FN106] defendant pushes victim from a tall building but half-way down victim is shot and killed instantly by another; [FN107] defendant seeks to kill victim by poisoning water needed by victim to cross a desert, but before victim drinks any poison another drains the poison from the keg and the victim dies of thirst; [FN108] defendant mortally burns victim but before victim dies of the burns another kills victim instantly by a blow to the head; [FN109] defendant's fire has begun to burn victim's property but before it can destroy much a flood extinguishes the fire and destroys victim's property. [FN110]

In all such cases the second factor that intervenes after defendant's action has taken place preempts the ability of defendant's action to cause the harm it was normally sufficient to cause. I call such subsequently arising, causally independent preemptive cause cases a third kind of intervening cause. For notice that the electrocution, the shots, the draining of the poisoned water, the blow to the head, and the flood in such cases may or may not qualify as intervening voluntary action or intervening abnormal natural events. Yet irrespective of their meeting either of these other two criteria, it is clear that such intervening events break the causal chain that would have existed between defendant's action and the harm. Thus, although it is uncommon so to classify them, I include such preemptive cause cases as a third kind of intervening cause, distinct from and in addition to voluntary human acts and abnormal natural events. It is such a preemptive variety of intervening causes that is the best interpretation of "sufficient" in the older doctrine of intervening causation.

4. An Absence-of-Culpability Condition: Defendant May Not Intend, Foresee, or Have Foreseeable to Him an Intervening Cause?

There is a considerable body of case law and commentary that purports to attach a fourth general condition to

intervening causation. I call it *848 an absence-of-culpability condition because it demands that a defendant not intend, foresee, or have foreseeable to him--that is, that he not be culpable with respect to--the putative intervening cause. I shall urge that this case law and commentary is entirely mistaken in presuming that the culpability of the defendant can affect the causal status of his action. If the legal doctrine of intervening causation has any claim to correspond to some underlying metaphysics of causation, it better not have any such culpability condition attached to it. [FN111]

a. Where Defendant Either Intends the Harm, or Intends the Intervening Cause that Is that Harm's Means

It is a sweeping maxim of the common law that no harm intended by the defendant can be too remote for liability to attach. As Terry stated the maxim, "Any intended consequence of an act is proximate." [FN112] This proposition is surely too broad. A defendant may intend to kill his victim by burns or by poison, yet if another intervenes, killing the victim by shots or blows to the head, the defendant has not caused the death of the victim, as we have seen. [FN113] More generally, when the harm intended by the defendant only comes about through the intervention of a causally independent cause of any of the three kinds just explored, the defendant is not liable for causing the harm [FN114] (although he may be liable for attempt in criminal law).

Hart and Honore sought to breathe new life into this old maxim by narrowing it. In their hands, the maxim became a fourth condition for intervening **causation**: If the defendant knows that a hurricane will hit victim's house, or knows that the victim's enemy will try to murder the victim at his house and defendant acts so as to cause victim to be in his house at the time, then no matter how abnormal the hurricane or voluntary the murderer, defendant has still caused victim's death. [FN115] We must exclude the possibility of "contrived coincidences" or of "contrived voluntary actions" if such items are eligible to be intervening causes, on their view.

Admittedly the cases better support this narrower use of intention, for there is liability of defendants in the cases cited by Hart and Honore. Overlooked by Hart and Honore, however, is the possibility that there is only noncausal liability in such cases. [FN116] In the case of voluntary intervention by human agents, defendants are liable but only as accomplices (in criminal law) or as noncausal joint tortfeasors (in torts). Defendants who persuade a victim to sleep in a house which defendants know will be *849 firebombed by another, [FN117] or who wrongfully eject victim from their bar knowing that assailants are waiting outside, [FN118] may be liable for the resulting injuries if they specifically intend such assaults to take place; yet this liability is for aiding another to cause such injuries, not for causing such injuries themselves. [FN119]

The same should be true for the contrived coincidence cases. The defendant who uses a foreseeable hurricane as his intended means to spread a fire he intentionally sets is liable for the whole damage; the proper grounds for such liability, however, is in aiding and not in causing. [FN120] The hurricane remains an intervening cause breaking the causal chain between defendant's act and the harm, despite defendant's intention, but the possibility of a noncausal liability remains nonetheless.

I thus conclude that absence of intention by the defendant is not a proper criterion for determining the presence of an intervening cause. Whether defendants intend the harm, or in addition intend the intervening action or other event as the means to cause such harm, is irrelevant to intervening causation. Such intentional use of another is the precise target of noncausal accomplice liability, and such intentional use of the freaks of nature should be the target of an analogous noncausal liability for aiding nature.

b. Where Defendant Foresees the Intervening Event Even if He Does Not Intend It

Suppose one foresees the above-hypothesized hurricane or murderer intervening after one's acts, but is indifferent to the harm it will cause. In such cases one does not adopt the intervening events as intended means to the harm one intends. In criminal law at least, this absence of a specific intent to aid another by one's acts eliminates accomplice liability. [FN121] So if there is liability in such cases, it cannot be on that noncausal basis.

Despite this, Francis Bohlen argued that a defendant's knowledge of such matters as predicted hurricanes or murderous intentions should exclude the events predicted or intended from the category of intervening causes.

[FN122] Thus, where defendant's negligence consisted in not removing his boats from blocking the victim's access to locks in a river that the defendant predicted would flood suddenly, the flood that did ensue and that *850 did sweep the victim's boat over a dam could not constitute an intervening cause because the result was foreseen by the defendant. [FN123]

I have elsewhere argued that liability may be proper in cases such as these, but it is again a noncausal liability. In such "provision of opportunity" cases, the defendant is liable for failing to prevent the injury that he clearly foresaw. [FN124] The positive duty to prevent, in such cases, arises because the defendant has caused something (even if not the injury), namely, he has caused the victim's peril. One who culpably or innocently bumps another into the water has a duty of rescue, a duty not shared by those free of causal responsibility for the victim's peril. [FN125] Similarly, one who places his boats so as to imperil plaintiff's boats has a duty to remove them. Failure in such positive duties, however, does not make one a cause of the harm. [FN126] One is liable for failing to prevent it, but not for causing it. Liability in such cases is thus noncausal, and we do not need to tinker with the concept of intervening causation in order to accommodate liability in such cases.

c. Where the Intervening Event Is Foreseeable to the Defendant

The commentary on the foreseeability of intervening causes is extensive and uniform. Nearly all of the early commentators were agreed that the foreseeability of an intervening event was relevant to that event's status as an intervening cause. [FN127] More specifically, the orthodox view was (and is) that unforeseeability of the intervention is a necessary condition for that intervention to be an intervening cause. [FN128] On this view, we should add unforeseeability to the other three main criteria for intervening causes.

Hart and **Honore's** contrary view came as a welcome dissent to this notion. [FN129] Part of their disagreement stemmed from a different reading of the cases: "When ... the intervening act is voluntary and is done with the deliberate intention of causing harm, it is at least doubtful, on the cases, whether the fact that the intervention was foreseeable is sufficient to render the wrongdoer liable for the ultimate harm." [FN130] Courts that have indulged the fiction that deliberate causing of harm is per se unforeseeable [FN131] give support to **Hart** and **Honore's** view, despite the lip service given in such cases to the unforeseeability requirement of intervening **causation**.

*851 Another facet of **Hart** and **Honore's** dissent was the easy slippage that exists between foreseeability and abnormality. [FN132] It is easy to slip from a judgment of improbability from an idealized epistemic vantage point ("abnormality") to a judgment of improbability from the epistemic vantage point of the defendant ("unforeseeability"). [FN133] **Hart** and **Honore** correctly observed that many decisions couched in terms of unforeseeability are in reality decisions based on intervening abnormal natural events.

Hart and **Honore's** major move to reconcile their view to the decided cases consists of their reallocation of the basis of liability in what they call the "provision of opportunity" cases. [FN134] They recognize that there is and should be liability in those (common enough) cases where defendant's negligence consists precisely in her failure to anticipate some foreseeably intervening, harm-causing, voluntary human action or abnormal natural event. Where defendant is negligent in leaving the ignition keys in another's car precisely because he should reasonably anticipate loss of the car through theft, defendant is and should be liable to the owner for the loss of the car, despite the intervening voluntary act of the thief. Such liability, **Hart** and **Honore** argue, is only "quasi-causal." [FN135] Defendant has only "enabled" or "occasioned" the harm in such cases; he has not caused the harm, by the central meaning of that concept.

This is almost right, but the liability that does properly exist in the provision-of-opportunity cases is not even "quasi-causal" or "noncentrally causal"; it is not caused-based liability in any sense. As in the case of foreseen harm, here the liability is entirely omission-based. [FN136] The defendant who fails to remove the keys is liable for failing to prevent the loss of the car, not for causing its loss. The duty to prevent the loss stems from earlier acts of the defendant, which placed the victim's car in peril, namely, parking where and when he did, and leaving the car with the keys in the ignition. These acts gave rise to the positive duty, failure in which is the true basis for liability here. Properly construed, liability in such cases thus places no demands on the concept of intervening causation. Liability not based on causation at all is irrelevant to intervening causation.

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It is probably true that some cases using foreseeability of the intervention as a basis for liability cannot be explained away in one of these three ways. So let me add a fourth: Foreseeability is such a manipulable concept [FN137] that any result that is intuitive on the basis of intervening-cause doctrines without the concept is also reachable with the concept.

***852** To the extent that there are cases that are not explainable in one of these four ways, they should simply be regarded as mistakes. That allows us to say clearly that intervening cause in no way depends on foreseeability or on any other matter having to do with defendant's culpability.

II

IS THERE A METAPHYSICAL RATIONALE FOR THE DOCTRINES OF INTERVENING CAUSATION?

A. Hart and Honore's Attempt to Avoid Both Policy Constructions and Traditional Metaphysics

Most of the older literature on causation was content with extracting consistent, usable legal rules of causation from the case decisions. [FN138] Very little attempt was made to justify such doctrines either by showing how as artificial constructions of the law they maximized desirable policies, or by showing how they captured the correct metaphysics of causation (and thereby maximized the policy of achieving retributive or corrective justice).

Hart and Honore's was the first sustained effort to justify the legal doctrines of intervening **causation**. [FN139] **Hart** and Honore were refreshingly clear about eschewing any justification of such doctrines in terms of extrinsic policies (policies, that is, that were extrinsic to the tracking of moral blameworthiness via some notion of **causation** that was not of the law's creation). This was to be their most sustained attempt to roll back the Legal Realists' "functionalist" approach to legal concepts, an approach that sought to construct a meaning for such concepts out of policies like deterrence, efficiency, or unfairness. [FN140]

Less clear is the relationship of **Hart** and Honore's justificatory ambitions to the metaphysics of **causation**. It is unclear whether they were attempting to ground the legal doctrines of **causation** in (what they saw as) the correct metaphysics of **causation**; this is mostly because it is unclear what kind of an enterprise they took metaphysics, in general, to be.

In very general terms, their justification of the law's doctrines of intervening causation should be seen in terms of three premises. Premise one: such legal doctrines would be justified if they match the conditions of moral blameworthiness. Premise two: the conditions of moral blameworthiness include causation, in a sense of causation that is not a creation ***853** either of law or of morality. Premise three: this prelegal, premoral notion of causation is the plain man's concept to be found in unselfconscious usages of "cause" and cognate terms in ordinary language.

Premise one strikes me as being entirely correct. It states no more than what I said in the introduction: The policy to maximize in criminal law is retributive justice, and the policy to maximize in tort and contract law is corrective justice. These forms of justice require legal liability to track closely moral blameworthiness. [FN141]

Premise two is likewise true. Causing the results one has culpably attempted to cause, foreseen to occur, or unreasonably risked, is more blameworthy than merely trying, foreseeing, or unreasonably risking when the events in question do not materialize. In short, causation matters to morality, and because it matters to morality, it matters to the law. [FN142]

It is premise three that is the troublemaker. Suppose that **Hart** and Honore were right about their claim of what the "plain man" thinks; he thinks that causes are either voluntary human actions or abnormal natural events that are necessary elements completing a set of elements sufficient for the effect, so long as no other such event intervenes between the first and that effect. [FN143] Why would this sociological truth justify legal doctrines in accord with such common sense views of "cause"?

Reacting apparently to a sense that theirs was a very conventional approach to issues like **causation**, **Hart** and

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"paradigm case argument" of Oxford-style ordinary language philosophy. [FN151] Like David Hume before them, **Hart** and **Honore** believed that we (collectively and individually) learn of the existence of something called **causation** by our ability to manipulate objects in the world. [FN152] We move objects, hit people, twist, push, bend things. Our central paradigm case of causing is doing these simple actions with our bodies. We then analogize from simple doings to more complex manipulations; by doing one thing we can cause something more remote to occur. [FN153]

The embryonic notion of cause that we construct from these simple action paradigms and their first analogical extension is that causation "is an interference in the natural course of events which makes a difference in the ways these develop.... The notion, that a cause is essentially something which interferes with or intervenes in the course of events which would *856 normally take place, is central to the common-sense concept of cause." [FN154] With this embryonic concept of cause under our belts, we then analogize further: Natural events, even when there is no human manipulation, may also be causes. In such cases, "the cause, though not a literal intervention, is a difference from the normal course which accounts for the difference in the outcome." [FN155] And from here, we analogize even further, to include states as well as events, omissions as well as actions, in the kinds of things that can be causes. [FN156]

It is because voluntary human actions are our basic, central paradigms of causation that we trace causal chains to such actions. [FN157] Moreover, it is because of their paradigmatic status that we refuse to trace causal relations through such actions. Where another voluntary human action subsequently intervenes, we lose our ability to analogize the more complex causings to the paradigmatic and simpler doings. [FN158] We cannot so analogize our indirect manipulations to simpler cases of direct action because another, more paradigmatic cause has intervened. "The intervenor did it" precludes us from analogically extending "the original actor did it" to "the original actor caused it."

The same is true for abnormal natural events. These are already at a level of secondary analogy to the paradigm cases of causation, that of simple human actions. When some subsequent event intervenes, it is closer to the paradigm case of causation than is the original abnormal event. Therefore, it too breaks our ability to analogize the first abnormal event to the paradigm case of causation. [FN159]

One has to understand the general nature of the paradigm case argument to appreciate the justificatory power **Hart** and **Honore** were seeking with the foregoing tale of how we developed our common sense concept of **causation**. Believers in the paradigm case argument in the 1950s believed that the meaning of words like "cause" was to be found in the paradigmatic exemplars of such words shared by some linguistic community. [FN160] Sensible use of words such as "vehicle," for example, depended on speaker and listeners both regarding blue 1958 Buicks as paradigmatic vehicles; skateboards, baby carriages, and bicycles might be vehicles too, but only by analogy to the paradigm case. [FN161]

*857 To find the paradigmatic application of a word like "cause" was to find a connection that could not be questioned. Such a connection was "true-by-convention." Anyone who questioned whether a blue Buick was a vehicle simply revealed that he did not know the meaning of "vehicle." Paradigms of words like "vehicle" or "cause" were necessarily instances of their respective labels, because they were what fixed the meaning of such words. And like the ordinary-language program in general, so here: things or relations like causation had no nature save that given by their paradigmatic exemplification and analogical extensions thereof. Meaning (as paradigms plus analogies) totally fixed nature, rather than vice versa.

So if **Hart** and **Honore** were right about the paradigms for **causation**, they would (according to the paradigm case argument) have shown us all that need be shown to justify the legal doctrines of intervening **causation**. Where there are intervening voluntary human actions or abnormal events, the analogy to the paradigm case of **causation** (simple doings) is broken, and to break the analogy is to show that no causal relation exists.

The main problem both with the paradigm case argument in general, and with **Hart** and **Honore's** use of it here, is the main problem with all of ordinary language philosophy: It allows the nature of the thing, **causation**, to be fixed by the conventions of present usage (in this case, the paradigms and analogies). It thus purports to cut off scientific theorizing about such nature on the grounds that anything ordinary thought doesn't already recognize as **causation** can't be **causation**. [FN162]

There are many other problems with the paradigm case argument, both in general and in Hart and Honore's hands. It is doubtful, for example, that people actually possess paradigms for very many of the words they use. Do you really have a standard instance of "vehicle" that you use to judge all other items by analogy? If you do, is the paradigm of vehicle for you the same thing as is the paradigm for others, in the way that the standard instance of "meter" is the iridium bar kept in the Bureau of Weights and Measures in Paris? Thirdly, it is bizarre to think that we possess any abilities to reason by primitive analogy to any paradigms that we do possess in common. Recall Potter Stewart being hooted out of accepting Nixon's offer of the chief justiceship [FN163] by his claim that he knew pornography when he saw it even though he could not define it. [FN164] We in fact have no magical abilities to sense "innate similarity spacings," nor is there any clear meaning to be given to any primitive notion of similarity.

The upshot of these last objections is that we should put aside the paradigm case approach to describing our common sense conception of cause. The upshot more generally is that **Hart** and Honore--or we--should *858 be interested in the common sense conception of cause itself only if we believe that conception to be accurate. Does the best theory of what the causal relation really is include the features so prominent in ordinary thought: the power of voluntary human acts and abnormal natural events to break the chains of **causation**? That is the question requiring an answer, an answer that can be found only in the metaphysics of **causation**, not in ordinary usage of "cause" and certainly not in supposed paradigms guiding such usage.

B. The Metaphysics of the Stone Age

Once we see the need for a metaphysics of causation to justify the legal doctrines of causation, and once we see that the common sense conception of causation does not foreclose or answer the metaphysical inquiry into the nature of causation, then we can appreciate the danger of relying heavily on common sense and ordinary usage. As J.L. Austin recognized, ordinary usage may not prescind from metaphysics as much as it naively engages in it. In Austin's colorful phrase, the worry is that ordinary thought may merely enshrine a naive metaphysics, the "metaphysics of the Stone Age." [FN165]

The Stone Age metaphysics suggested by the legal doctrine of intervening causation, and by the common sense conception of cause underlying such doctrine, seems to go like this. As a bumper sticker common in the 1990s had it: "Shit Happens." Sometimes, even at the macro level, events just go one way rather than another. Inexplicably, lightning strikes one person dead but leaves all others around him alive, or inexplicably, an evil impulse leads one person to kill another deliberately for no reason and with no cause. When such inexplicable coincidences or evil impulses intervene, they break the causal relations that would otherwise govern subsequent events.

The worry about intervening causation in the law is that such Stone Age (New Age?) metaphysics is about all there is to it. One might throw in a little theism--whatever science can't explain, God does. This could help. If there is any uncaused cause in the universe, it would be God. If She deigns to jump into human affairs occasionally--say by tossing down a lightning bolt every once in a while, or allowing the Devil to do some ungodly brainwashing on human beings just to keep the contest interesting--that would explain fresh causal starts. Yet such theism is even more primitive than the brute inexplicability of certain events that it was designed to replace. It is not for nothing that such anthropomorphism is called "primitive animism," primitive because it so naively assumes that *859 we can explain natural phenomena like gravitational attraction in terms appropriate to persons, such as love.

In fact, if we alternatively theorize such Stone Age approaches, we may find more serious candidates for a metaphysics that could rationalize the law of intervening causation. My own theoretical reconstruction follows, organized partly around the three sorts of intervening causes in the law (preemptive events, voluntary human actions, and abnormal natural events), and partly around different metaphysical accounts common to all.

C. An Opening Wedge: Preemptive Intervening Causes

The easiest sort of intervening cause for which to discover a plausible metaphysical basis is those subsequently arising, "sufficient" events that preempt the ability of the defendant's action to have caused some harm. [FN166] For what underlies the law and ordinary thought in such cases is pretty close to the surface.

We first need to rid ourselves of the obscuring talk of "sufficient" conditions. "Sufficient" is one of those context-sensitive words that depends so heavily on factors of particular application as to be useless as a general criterion. In this it is similar to the notion of "sameness." When we say that one thing is "the same" as another--and we mean qualitative, not numerical, identity--we never mean that the two things literally share all of the same properties. We always contextualize our judgments of sameness, so that we mean, implicitly, "the same in these (relevant) respects."

Similarly with "sufficient," when we say, "X is sufficient for Y," we never mean, "X is sufficient all by itself," for we know that many other conditions must be present or must be absent in order for X to produce Y. A spark is not sufficient for an explosion, because oxygen and fuel are necessary as well. These three together are not sufficient for the explosion because the absence of large amounts of inert material is also required. And so on.

True, in the overdetermination cases of the preemptive kind, we can say that the fire that arrived first was sufficient, but it is also true that relative to a different set of things considered, it was not sufficient (and neither was some set of conditions of which the fire was a necessary element). What we are getting at when we call the first fire to arrive "sufficient" is that the second fire to arrive was not necessary. And what we are really getting at in saying both of these things is that the second fire did not cause the damage-- the first one did.

"Sufficiency" thus does not explain the causal conclusions in the preemptive overdetermination cases; it merely redescribes those conclusions, and, moreover, does so in a less clear way. What is really going on in the *860 preemptive overdetermination cases is that there are two causal processes at work whose nature we know well enough to know that one process was completed (the first fire) while the second was not (the second fire). [FN167] We know enough about how poisons and burns work to cause death, and we know enough about how gunshots or blows to the head work to cause death, that, when we see cases like those earlier described, [FN168] we know that a particular victim was shot to death, not poisoned to death, or bludgeoned to death, not burned to death.

Indeed, once we rid ourselves of the unhelpful notion of sufficiency, we can also see that there is nothing unique, interesting, or especially problematic about preemptive overdetermination cases. Whenever we know enough of the underlying causal mechanism at work in a given case, we often see that one cause preempts some other factor from doing what it otherwise would have done. Consider the case where the victim dies from loss of blood; he is shot once by each of three defendants, and loses blood from all three wounds. Each defendant has caused the death, and this is true irrespective of whether: (1) each wound was sufficient to cause death by itself, so that no individual wound was necessary (but the three were jointly necessary); [FN169] (2) each wound was necessary by itself, so that no individual wound was sufficient (but the three were jointly sufficient); [FN170] or (3) no wound was either individually necessary or individually sufficient, but any two of the wounds was both jointly necessary and jointly sufficient. [FN171] We know each defendant caused the death because we know the causal mechanism connecting each of the defendants' action to the death. In the colorful language of the California Supreme Court in a related sort of case, "Drop by drop the life current went out from both wounds, and at the very instant of death the [earlier] gunshot wound was contributing to the event." [FN172]

Contrast my three variations of concurrent-cause cases above with a parallel case of preemptive causation: As before, the victim dies of loss of blood; as before, each defendant shot the victim; but here, only one wound *861 caused any bleeding, external or internal. If the victim dies of loss of blood, the cause of death is the wound whose effects can be traced to the death through the loss of blood; the other two actions lack this causal mechanism and are not causes of death. They are "preempted" from doing their causal work, assuming they would eventually have killed the victim by some other mechanical process, such as organ failure or blood poisoning.

The preemption cases should be our model for a successful metaphysical underpinning for the law of intervening causation generally. In the preemption cases we bring to bear our detailed knowledge of the physical world in justifying the causal conclusion reached by the law. There is no very general metaphysical truth being relied upon in such cases--save perhaps the truths that nothing can cause an event or state to occur that has already occurred, and that merely hypothetical events that might have occurred but which did not occur cannot cause anything else to occur. Yet the metaphysical underpinning of the law is nonetheless quite secure in such cases. Our best scientific theories show us that there is no causal relation in such cases, and the moral and legal conclusions tag along behind such metaphysics unproblematically.

I turn now to the other two kinds of intervening causes--voluntary human actions and abnormal natural events--to see whether some equally respectable metaphysics can be found that could justify these legal doctrines as well.

D. Causation and Explanation

There is a highly regarded tradition in the metaphysics of causation that follows the general lines propounded by David Hume. [FN173] The tradition recognizes that in ordinary speech we employ two quite different causal locutions. First, we cite a particular event as the cause of some other and later particular event, as in, "The spark caused the fire." Second, we explain some type of event by the occurrence of some other type of event, as in, "Sparks cause fires." The former are called singular causal statements, the latter, statements of causal laws.

Hume proclaimed ordinary speech to be misleading in this regard. In particular, he urged that the existence of singular causal relations was an illusion. All that could be meant when we say, "c caused e," is: There was an event c, there was another event e, e did not precede c temporally, c is an instantiation of some type C and e is an instantiation of some type E, where C and E are connected by a C/E law, and the C/E law amounts to no *862 more than the regular following of events of type C by events of type E. More recent variation of this tradition follows Hume in all of this, save the regularity view of causal laws. "Neo-Humeans" regard causal laws as primitive relations between universals, [FN174] and probability theorists regard causal laws as irreducibly probabilistic rather than exceptionless universal generalizations. [FN175]

Hume's regularity theory, the theory of the neo-Humeans, and the probability theory together make up the generalist approach to **causation**. For all three branches of the Humean tradition reduce singular causal statements to statements of causal laws. Thus, some particular event c cannot be a cause of e, unless c and e are instances of some C/E law, however construed. This reductionist metaphysical view of **causation** gives rise to two sorts of accounts of the law's notion of an intervening cause, both having some basis in **Hart** and **Honore's** writings.

1. There Are Natural End Points to Explanations in Term of Causal Laws

Hart and Honore's essential idea here is that causal explanations come to an end. [FN176] When we ask, "What caused the fire?" we are satisfied with the answer, "an arsonist." We do not need or want further explanations, like a history of the arsonist's unhappy childhood, his need for money from fire insurance, and the causes of that, and so on. Where no further explanation is appropriate no statement of singular causal relations is appropriate either (for remember, on this view, singular causal statements are just disguised explanations in terms of causal laws). Thus any event that occurs before the event that is the subject of a satisfying causal explanation drops into the background as a mere condition, not in any sense a cause, of the event being explained.

To complete this line of thought, Hart and Honore then urged that there were two sorts of satisfying causal explanations, those that stopped at voluntary human actions and those that stopped at unusual natural events. [FN177] When seeking an explanation for events like harms to victims, we search among the conditions necessary for such harms until we find one of these two types of items, and, when we find one, we search no further back in time for any other such items as may have preceded the item we already found.

There is no doubt that Hart and Honore captured important features of our explanatory practices. In seeking an explanation, for example, of why the Spanish Armada was defeated, we are most interested in voluntary actions like Drake's decision to take advantage of the rather stupid Spanish *863 decision to arrange their ships in the shape of a giant bird (pleasing to God in Heaven, no doubt, but exposed to concentrated fire at the tips of the wings). Add to this the great storm in the North Sea that dispatched a number of the ships that escaped Drake's fire, and we may well end up satisfied that we understand why the Spanish Armada was defeated ... so satisfied, indeed, that we look no further for earlier "underlying" or "root" causes.

Yet even on the generalist accounts of the Humean tradition, this surely will not do to account for the causal breaks posited by the legal doctrines of intervening causation. That is, even granting Hume's reductionist premise--no explanation, no causal relation--there surely is an explanation behind the decisions of Drake and of the Spanish, and

behind the great storm. There just is no explanation in which we are much interested, given that our curiosity began with the defeat of the Armada. And surely our interest, or the lack of it, cannot determine whether the decisions of Drake and the Spanish, or the North Sea storm, were caused. [FN178] If we were to take any other view, no tree would fall in the proverbial forest so long as we had no interest in hearing about it.

2. There Are Literally Inexplicable Events

So Hart and Honore needed a more radical use of Hume's reductionist metaphysics here. They needed to say (what they in fact came close to saying at times) that some events are truly inexplicable. What makes for an abnormal conjunction of natural events, for example, is just the lack of any causal law connecting the two types of events in question; what makes for an extraordinary natural event tout court is just the lack of any (ordinary) causal law explaining or predicting it. What makes for a fully voluntary human action is that there are no causal laws explaining or predicting such action. And now one could put Hume's reductionist metaphysics to good use: Such inexplicable events are literally uncaused events, so that there are no causes of them that could be looked to to explain the harm they themselves cause.

Yet are "acts of God," coincidences, and "free" human choices in fact inexplicable by causal laws? Consider first voluntary human actions. In the philosophy of social science generally, [FN179] and in the philosophy of history *864 more particularly, [FN180] there is a respectable body of opinion holding that human behavior is not subject to "covering laws." It is notoriously difficult to frame universal causal laws about human behavior, because what people do and why they do such things seems too variable to be captured by such laws. People just are not as boringly repetitive as protons. For such reasons, **Hart** and Honore distinguished the seeming **causation** of voluntary human action as in reality noncausal in any central sense:

Relationships between two persons' actions ... do not depend upon "regular connections" or sequence as the causal relations between physical events do. Hence the assertion that one person, for example, induced another to act is not "covertly" general [G]eneralizations have a place here but a less central one. [FN181]

Yet surely one could grant all of this, and still protest: First, at the macro level, there are at least probabilistic laws. Hume himself gave a good example: Leave a purse of gold at Charing Cross in London and come back an hour later; it probably will not be there because probably someone will pick it up. [FN182] Second, as we leave the macro level for the micro events making up human behavior and motivation, neo-Humeans like J.L. Mackie have urged that we will find universal "laws of working" connecting stages in what at the macro level we call a single action. [FN183] That we do not know such micro laws of working reflect only our empirical ignorance; it does not reflect any brute inexplicability to human choice.

In dealing with the obvious fact that many human choices can indeed be explained, **Hart** and Honore relied on a view quite prevalent in the ordinary language philosophy of the 1950s. [FN184] This was the view that uncompelled human choices were explicable by reasons, not by causes; that only when choices were compelled was it appropriate to speak of them as caused; [FN185] that it was thus a category mistake to speak of caused but *865 voluntary choices, the mistake of explaining something in one category (free choices) by something in a different category (**causation**). [FN186]

The main problem with this old view, like all variants of the category mistake argument, was that no amount of regimentation of ordinary speech into categories could seal off the insights of an advancing science. In particular, it has become clear that "reasons"--belief/desire sets of a certain content-- are as much causal of behavior as is anything in the natural world. [FN187] What sense are we to assign to the "because" in sentences of the form, "He did it because he wanted the money," if it is not the usual causal sense? It is thus difficult today to take very seriously the claim that the only way to explain free human choices is by resort to the language of "reasons" instead of "causes."

This more radical use of Hume fares no better if we move from voluntary human choices to abnormal natural events. After all, the "shit happens" view of coincidences is pretty naive. As Hart and Honore came to recognize, [FN188] even if there are no general causal laws connecting speeding in an automobile, for example, and a tree falling, surely there are Mackie's micro laws of working connecting successive stages of this larger conjunction and making the conjunction fully explicable. If we do not pursue such micro laws of working here any more than we do

for human behavior, that is only because of our limited explanatory interests. It is not because there are no such explanations (and thus, on this view, no such chain of causes going back to defendant's action).

The probabilist branch of the Humean tradition about causation has tried to salvage things here. [FN189] Adherents of this view note, correctly, that in cases of coincidence, the conditional probability of the victim's harm, given the defendant's action, is very low. They also note that the intervening event dramatically increases that probability. If one identifies singular causal relations with probabilistic laws--which is the probabilistic theory of causation in a nutshell--then the intervening event is a much bigger cause than even the defendant's original action. On a kind of de minimis principle one might thus relegate defendant's action to the status of a noncausal event, given that its contribution was below some threshold of significance.

***866** One problem with this view is the implausibility of the probabilistic theory of causation. One cannot simply identify causation with an increase in conditional probability, at least not without encountering obvious counterexamples. For example, epiphenomena: It appears that some common cause C at t sub1 causes men to develop pattern baldness B at t sub2 and heart attacks H at t sub3. No one thinks that baldness causes heart attacks. Yet the conditional probability of H given B is higher than the probability of H alone; so on a simple-minded probabilities theory, baldness does cause heart attacks. Probability theorists must thus propound theories of causation of much greater sophistication if they are to avoid such obvious problems. [FN190]

A second problem lies in the seeming overinclusiveness of the suggested account of intervening causes. Surely it is not just extraordinary winds that dramatically increase the risk of a fire spreading; normal evening breezes that resuscitate a fire about to go out dramatically increase the conditional probability of fire damage as well. Similarly, it is not just intervening voluntary action that can dramatically increase the probability of some harm; a coerced gun shot can be just as deadly as a freely chosen gun shot. The probability account thus seems to make far too many events into intervening causes, and it seems blind to the criteria of intervening causation.

E. Libertarian Metaphysics for Human Choices and Acts of God

Surely at the root of many people's intuitions about uncoerced human actions breaking causal chains is a libertarian metaphysics. On this view, voluntary human choices are literally uncaused events. They are thus fresh causal starts, relegating all prior events to noncausal status vis-a-vis the chain of events such fresh starts cause.

James McLaughlin early on summarized this metaphysical basis for the law on intervening human actions:

Where human or animal action is purely involuntary so that an instantaneous response is made to the defendant's direct force without the exercise of choice, there is no reason for treating such response as constituting a new or intervening force. Where there is voluntary action or action involving choice on the part of any being other than the defendant, a basis for distinction is apparent It may be a field for psychological speculation whether all such actions cannot be resolved completely in terms of physics and chemistry, but it is clear from all legal tradition and analogies that voluntary action must not be regarded as perfectly mechanical. The ***867** new element of conscious choice, which is elusive from a mechanical point of view, prevents causation from being direct. [FN191]

Hart and **Honore** similarly attributed a libertarian metaphysics both to the law and to the common sense notions they viewed as undergirding the law. Early on they held that "whatever the metaphysics of the matter may be [a deliberate] human action is never regarded as itself caused or as an effect." [FN192] In the two editions of their book they softened this line a bit; "in some sense," they thought, a fully voluntary human action could be said to be caused, but not in the central sense of "caused" used by the law to assign responsibility. [FN193] This is a kind of metaphysically dualist view about **causation**. The "central" notion is of a relation that fully determines (is "sufficient" for) that which is caused; the secondary notion is of a relation that only "occasions," "induces," or "inclines" that which it causes. The latter terms are used to connote a lack of determination and sufficiency in this kind of **causation**. Such lack is but another name for freedom, and so this softened line taken by **Hart** and **Honore** remained libertarian in its metaphysics. [FN194]

Despite these antecedents, it is mostly Sandy Kadish who has explored the (metaphysically) libertarian roots of intervening-cause doctrine. [FN195] Like McLaughlin, Hart, and Honore, Kadish doesn't tell us his own metaphysical views; rather, he too describes "the beliefs that underlie the criminal law." [FN196] Central to those

beliefs is the idea that "voluntary actions cannot be said to be caused," at least not in the sense that physical events are caused by relentless forces and necessary conditions. [FN197] Human actions may be "influenced" by various events, "but influences do not work like wind upon a straw." [FN198] Rather, humans are total sovereigns over their own actions, [FN199] in the sense that, despite the influences of genes and environment, a person is free to choose to act contrary to such influences. [FN200]

This robustly libertarian metaphysics does allow that some human behavior is caused, and not merely influenced, by prior events. Such behavior is, however, the kind of nonvoluntary behavior so fully explored by Hart and Honore. Reflex reactions, involuntary motor movements, *868 posthypnotic behavior, acts done under ignorance, duress, natural necessity, provocation, addiction, insanity, infancy, and the like are all less than wholly voluntary because they are less than wholly free. Such less than wholly voluntary behavior is typically excused because in such cases "my freedom to have acted otherwise was totally or partially impaired." [FN201] More pertinently for our purposes, behavior that is the expression of such impaired freedom does not constitute an intervening cause; after all, being totally or partially caused itself, it could not represent a fresh causal start breaking causal chains. Such unfree, nonvoluntary behavior is just another link in the causal chain, no different than other caused events.

Libertarian metaphysics is difficult to sustain, as we shall see. Perhaps for this reason, Kadish and his intellectual antecedents here all refuse to defend libertarian metaphysics as such. Rather, they defend the more modest, sociological claim that "commonsense" (that is, other people) believe in such a metaphysics. Such sociology is fine if one wishes merely to explain why we have the legal doctrines of intervening causation that we do. If our ambitions are to justify such doctrines, however, we need to leave off doing the sociology of other people's metaphysics and start doing our own. Voluntary human actions have to be uncaused--not just believed to be uncaused--if they are justifiably to serve the sort of chain-breaking function they do serve in our law.

There is a hint in McLaughlin of a contrary view, for he seems to think that the law as an autonomous discipline can just posit human freedom even if psychology could show us otherwise. [FN202] The hint is developed into an explicit defense of "autonomous legal metaphysics" by later criminal law theoreticians such as Jerome Hall [FN203] and Herbert Packer. [FN204] On this view, even if science tells us that voluntary human actions are fully caused, the law can presuppose just the opposite if it needs to do so for its own purposes. Such views of legal autonomy ignore the obvious here: If the legal doctrines (such as those of intervening causation) we seek to justify are based on the policy of fitting punishment to moral desert, and if moral desert itself depends on the facts of causation, then we cannot just posit any old "facts" about causation that we need. [FN205] In particular, if the doctrines of intervening causation make sense only if voluntary human action is uncaused, then it will not do just to posit that, for legal purposes, we will assume such behavior is uncaused. For the legal doctrines in question to be justified, we need such behavior to be uncaused. A fictional freedom here *869 is about as useful as is a fictional can opener to a starving man possessed of only tinned goods. [FN206]

There are three reasons to reject any libertarian defense of intervening-cause doctrines. One is that it does not account at all for acts of God. Even if human wills are free of being caused, that does not give any support to the doctrines of abnormal natural events and coincidences as intervening causes. Only a theistic view of such natural events can bring them under the umbrella of a free-will theory of intervening causation. (And even for theists, their God has to be only an occasional intervenor with a taste for the dramatic--He sends only freak winds, not normal evening breezes.)

The second reason to reject any libertarian basis for intervening-cause doctrines stems from the poorness of fit between the metaphysics and the legal doctrines. The legal doctrines, as we have seen in detail, draw the line (of actions constituting intervening causes) at: (1) voluntary (willed) bodily movement; (2) itself motivated by an intention (or sometimes, accompanied at least by foresight) to do the harm done; (3) which intention or foresight is formed in the absence of coercive pressures making the choice difficult; (4) by one sufficiently possessed of his faculties as to be a generally responsible agent. As we have also seen, [FN207] Hart and Honore treat these conditions as the boundaries drawn by common sense around when an action is truly free in the sense of uncaused. They thus find a good fit between the plausible libertarian metaphysics of "common sense" and the law's doctrines of intervening causation. I, on the contrary, think the fit to be quite poor. [FN208]

If I were a libertarian about free will (which I am not), I would draw the line of free versus caused action around items (1) and (4) above. That is, I would argue that what separates persons from all other creatures is their freedom

of will; thus, (4) above. Further, I would argue that the immediate locus of the will is on those voluntary bodily movements that are the essence of human actions, and that what makes a mere behavioral routine into a human action is the will that causes such behavior, when such will is itself uncaused. Thus, (1) above.

So far so good for the libertarian defense of intervening-cause doctrine. Yet even as this hypothetical libertarian about the will, I can see no *870 temptation to think that the willed bodily movements of a fully sane, adult human being become unfree if done in ignorance of certain properties of those movements. Consider the facts of Watson [FN209] again. Whether Duerr, the intervenor, knew the gas was present when he threw his cigar, and whether he knew that the cigar would ignite the town, doesn't change the fact that he willed the movements that sent the cigar on its way. His act was intentional vis-a-vis the harm only if he had such knowledge, but surely his act was as free in the one case as in the other.

Moreover, on the most plausible mode of individuating actions and other events, Duerr did but one act when he threw the cigar. [FN210] There are many ways to refer to that one act, utilizing different types of actions: He moved his arm, he moved the cigar, he lit the gasoline, and he destroyed the town. If Duerr acted at all--if, that is, he willed the bodily movements that resulted in the cigar touching the gasoline--then necessarily he did certain types of actions intentionally. [FN211] If he did not intentionally destroy the town or ignite the gas, he did intentionally move his arm. Are we to imagine that his one act was free under the description, "moved his arm," but caused under the description, "destroyed the town?" That would lead the libertarian to a flat contradiction, namely, the very same act was both free and not-free.

Intention and foresight thus cannot be a line separating caused acts from free ones. Any plausible libertarianism must eschew condition (2) as marking such a boundary. Yet (2) is very much part of the boundary separating those acts that are not intervening causes from those that are. Thus, the charge of lack of fit between the legal doctrines and any plausible libertarian metaphysics.

Things are no better with regard to condition (3). It is true that when a choice becomes difficult because of some threat, natural necessity, overpowering craving, or unhinging emotion, we easily speak of the forces causing us to do what we did. Yet what of those cases where the capacities of the intervening actor remain undisturbed, intact, and fully functioning? Suppose such an actor finds himself at the top of a burning building, the fire having been set by an arsonist; having steeled himself to look death in the face without fear or even excitement, he coolly decides to jump rather than burn to death. In such cases, Herbert Hart would say, the actor's capacities to decide are intact but his opportunity to use his perfectly functioning capacities is diminished. [FN212] Such an actor has an excuse, when his *871 own responsibility is at issue, and such an actor's constrained choice is said by the law to be less than fully voluntary and thus not an intervening cause when the arsonist's responsibility for the jumper's death is in question.

I should think that a sensible libertarian would find no temptation to regard such diminished-opportunity choices to be unfree. For in such cases the actor deliberates, decides, and executes his decision as rationally and as deliberately as in cases of greater opportunity. The phenomenology seems as free as any other case of deliberate choice, yet to fit the doctrines of intervening causation the libertarian would have to conclude that such choices were caused, not free.

Now let me stop pretending to be a libertarian about the will. In truth, I find libertarian metaphysics to border on the unintelligible. The closer one looks at this metaphysical position, the worse it looks. If "common sense" indeed subscribes to such a metaphysics, so much the worse for "common sense." It can be no justification of legal doctrine to be based on error this fundamental, no matter how widely shared such error may be in our populace.

Take the best case for libertarians, situation (1) above, where the will admittedly plays a decisive role in the concept of human action. We act only if we will. The libertarian temptation is based on the idea that willing is necessarily incompatible with causation of the will (but not, of course, with causation of further events by the will).

The will as an uncaused causer is a very strange idea. How can there be an event that causes other events yet is itself not subject to causal influences by earlier events? Aquinas gave this role to God, but are we so divine in all of our actions? To sustain such an odd idea, libertarians usually invent another, even odder idea: The will (that is free) operates in a realm distinct from the realm of ordinary natural events. Ordinary events exist in both space and time, but mental events like willings exist in time only. This is what insulates willings from causal influences. Or so the dualist story goes. (Of course, there is the awkward question of how willings cause events in the natural world,

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given the insulation of willings within the distinct world of mind.)

Just how odd a story this is should become more apparent the more one thinks hard about what willings are. As we learn more and more about the brain, we are increasingly able to isolate certain brain structures as having some role in the mental act of willing. We know that the supplementary motor area of the cortex is involved in willing bodily *872 movements. [FN213] We know that the brain functionally separates the initiation of motor movement from the regulation of movement once initiated and that this functional division is realized in different areas of the brain. [FN214] We know that in motor- movement initiation there are distinctive patterns of blood flow and electrical energy peculiar to willed (versus involuntary) motor movement. [FN215]

It is very unlikely that such physical events in the brain are uncaused. Therefore, if willings are uncaused ("free"), then they must be distinct from these brain events. Such brain events may be some other, distant event--one might call them "schwillings"--but on this view they could not be willings. [FN216] But then, what are willings? Mental events, construed as existing in a special realm, that of the mind, existing in time but not in space, accessible through a special mode of observation known as consciousness. [FN217] By such route the libertarian in metaphysics is driven ineluctably towards dualism in metaphysics.

It is much more plausible to think that "willing" refers to a functionally specified state of the brain, a state defined by its mediating and executing role between belief/desire/intention sets, on the one hand, and bodily movements, on the other. [FN218] Such a functionally specified state may have many different physical realizations, but in our brains the structural possibilities are far from infinite. Even though we only know part of the functional/structural story about willings, we literally mean more than we know when we speak of "willing." The same is true of other words, like "water," "gold," and "tiger." In all such cases we intend to refer to a kind whose nature is only partially glimpsed. [FN219] When scientists tell us more and more about that nature, they are not changing the subject--to "schmater," "schmold," "schwilling." Rather, they are telling us more about what water, gold, and willings are.

Taking this latter functionalist/physicalist view of mental states like willings, there is no reason whatever to think that willings are uncaused. Such functionally specified, physically realized events are both causes and effects of earlier causes, like all other events. They cannot, on such an account, be literal fresh causal starts breaking causal chains wherever they intervene.

*873 F. Intervening Causes as Sufficiently Big Causes as to Relegate Earlier Events to De Minimus Causal Contributors

Perhaps the most common account of the metaphysics underlying the intervening **causation** doctrines of the law is in terms of "forces." The general idea is that **causation** is a matter of physical forces acting on one another, and that one force can cut off the operation of another force so as to preclude any causal relation between the latter and some harm. Most of the earlier writers on intervening **causation** expressed themselves in this way. [FN220] Hart and Honore found such talk of "forces" to be too metaphorical to be of any real use. [FN221] They rightly noted that writers such as Beale never attempted to translate such ideas of "forces" into usable notions that could be applied to economic losses and other nonmechanical situations.

The continued use of such talk by contemporary legal theorists is not much more metaphysically self-conscious than was that of Beale or of his followers. Richard Epstein holds that "force and dangerous conditions are still the only issues material to the causation question" [FN222] and fleshes out the notion of a dangerous condition in terms of stored and unstable energy. [FN223] An intervening cause for Epstein then becomes a subsequently arising "big" force, while, by contrast, "little forces never break the chain of causation." [FN224] Yet none of this talk of forces and energy is fleshed out by Epstein because of his reliance on paradigms to give the meaning of "cause." As we recall, the paradigm case approach to meaning regards definitions of "cause" to be otiose. [FN225]

George Fletcher, to pick another contemporary example, willingly admits that his talk of "causal energy" is metaphorical. [FN226] Yet such talk by Fletcher is worse than metaphorical or vague; it explicitly mixes in things that could not be aspects of force or energy in any sense. Fletcher supposes a case in which the victim ("Gabe") is negligently injured by defendant ("Jack"). While in the hospital, the intervenor ("Mike") excutes Gabe. Fletcher's gives the following account of why Mike's act is an intervening cause:

When Mike enters Gabe's room and lays his hand on his intended victim, he invests more personality, more energy, into the unfolding of causes and events. This greater input of personal force brings his actions into the foreground Jack's initial injury of *874 Gabe is merely negligent Jack's contribution at the outset is less substantial and it is overwhelmed by Mike's committed and willful intervention. [FN227]

It should be apparent that Fletcher is exploiting the vagueness of "energy" in these contexts to smuggle in notions of moral culpability. Because Mike is more culpable than Jack, his causal contribution is said to be greater. Yet as we saw earlier, causation is supposed to be one of the criteria by which we assess moral blameworthiness; if we allow moral culpability to guide our causal judgments, then causation cannot be such a criterion.

Fletcher is not alone in mixing moral blameworthiness with his idea of force and energy. Earlier writers too assumed without argument that intentional intervenors brought more "force" to their interventions than did merely negligent intervenors, even when the physical behavior of each was identical. Without some metaphysical account of how this could be so, this looks for all the world like Fletcher's more explicit use of moral blameworthiness as a criterion of causation (rather than the other way around).

We cannot make complete metaphysical sense of the "forces" translation of intervening causes here, [FN228] but perhaps we can at least strip some of the vagueness and metaphor from this approach, as well as rob it of its illicit moral subtext. The way to begin to make sense of the forces approach is in terms of three propositions. The first two are metaphysical, and the third is a distinctively moral doctrine. Proposition one: causation is a scalar relation. [FN229] Scalar relations are more-or-less affairs, not matters of black or white. Being "redder than" is a scalar relation because one item can be more red than another. "Dead," by contrast, is an all or nothing quality; one either is or is not dead, so that one person being "more dead" than another makes no sense.

The idea here is that causation is a relation that can vary along a smooth continuum. One event can be more of a cause of some harm than another event, even if both events causally contribute to that harm. If two defendants each strike one victim, who dies of the loss of blood, it seems to *875 make sense to say that the blow that caused a greater loss of blood was more of a cause of death than the blow that resulted in a smaller loss of blood. Similarly with two fires that join: the bigger fire is more of a cause of the harm than was the smaller fire. Similarly, when a town is flooded by waters, most of which would have flooded the town even if defendant had not negligently damaged the drainage wickets protecting the town, the flood is more of a cause of the damage than is the defendant's action.

Second proposition: the scalarity of causation is specifically such that the causal relation diminishes over time. [FN230] This is the famous idea that causation peters out over time, much as the ripples from a stone dropped in a pond diminish as they travel outward. The basic metaphysical picture here is of an inverted cone of causation; every event has multiple causes so that the immediate effect of any given event is itself but one of numerous causes in the production of another event, and so on. At each successive period of time, the causal contribution of any given event diminishes in proportion to the number of other events contributing to the effect in question:

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c sub1 may cause e sub1 , but its contribution to f (or to events f in turn causes) may be de minimis, on this picture of causal relationships.

Third proposition: the amount of causal contribution needed for an actor to be morally responsible for some harm, is non-de minimis (or "substantial"). [FN231] When assessing an actor's blameworthiness, causation of a harm marks the difference between a serious degree of blameworthiness for the harm and a lesser degree of blameworthiness for only risking, foreseeing, or trying to cause, that harm. On the assumption that causation is a matter of degree, morality needs some line drawn on the continuum of possible causal contribution separating causers from mere riskers and attempters. The vague notion of "substantial" is as good a line as we are likely to get. The vagueness of the idea of substantiality is not a defect but a virtue. As Aristotle remarked long ago, we should not demand greater precision than a subject matter can bear. [FN232] This is particularly true of attempting to *876 quantify exactly where a line is to be drawn on a smooth continuum. We can stipulate that the difference between a city and a town is at 50,000 inhabitants; but to do so usually hinders, not helps, our use of the terms defined, as in generalizing, "living in cities leads to higher levels of anxiety than living in towns." [FN233] Mutatis mutandis for

precise definitions of substantial degrees of causal contribution.

Assent to these three proposition allows one to see why the subsequent, preemptive cause cases are our clearest examples of intervening causation. In the hypothetical case where one defendant poisons the victim and an intervenor subsequently shoots the victim dead, [FN234] we know that the poison did not get the chance to do its work in causing death, so its degree of causal contribution was zero. This is the clearest case of de minimis or insubstantial causal contribution. Almost as easy are the cases where the intervening cause is a vis major, or "act of God." Gale-force winds, unprecedented floods, and the like are pretty straightforwardly big forces that most of the time relegate earlier and smaller forces to de minimis or insubstantial status. Ordinary evening breezes, normal tidal movements, and other routine events do not overwhelm the causal contribution of wrongful action nearly so easily or so often.

More troublesome are the cases of coincidence and of fully voluntary human action. We understand that both such types of items draw our explanatory interest and that the second of these two draws in addition our moral attention. But such pragmatic accounts of our judgments are irrelevant to the metaphysics of **causation**. What is it about these types of interventions that overwhelms earlier causal contributions, relegating them to mere de minimis or insubstantial causes (**Hart** and Honore's "mere conditions")?

*** My own provisional answers to these last queries go like this. About coincidences, I share Hart and Honore's (and the case law's) intuition of nonresponsibility, but I do not think this conclusion can be defended on causal grounds. Rather, it is a culpability discrimination doing the work of most of these cases. Where harm risked or intended occurs only because of extraordinary coincidence--such as a tree falling on a man only because of his earlier speeding--the harm as it happened is too far removed from the harm risked or intended for the actor to be held liable for it. There is a causal connection between the defendant's action and the harm that came about in most cases of coincidence, but not enough of the causal route was *877 within the contemplation of the actor to hold him responsible for the harm. [FN235]

About voluntary human actions intervening between defendant's act and the harm: doubtlessly the same culpability criterion can often explain the original actor's nonresponsibility. Whether there is also a causal discrimination at work here is more troublesome. Prima facie, the choice to cause (or at least risk) the harm when made by the intervenor is a more substantial cause than the like choice made by the original actor. This is true because such choices, in the abstract, are on a par, but the intervenor's choice is in greater spacio-temporal proximity to the harm and is thus less diminished in its degree of causal contribution. Yet it is difficult to explain on causal grounds why choice itself is so significant. A negligent shot seemingly has as much causal power as an intentional shot, and even an involuntary movement can mimic exactly the physical characteristics of some voluntary movement. Absent some brute inexplicability or libertarian freedom for human choices, it is hard to see how metaphysics can explain these legal discriminations.

CONCLUSION

As is probably evident from the last Part, my own provisional bets on the metaphysics of **causation** are singularist and physicalist. Using such a metaphysics of force and energy, it is difficult to sustain some of the ordinary causal judgments we make not only in law but also in sociology, economics, and other of the human sciences. It is tempting at this point to issue a John Searle-like statement: "This is as far as a philosopher need go; the rest is up to the physicists." [FN236] After all, philosophy today is generally open to the insights of an advancing science in a way that would have shocked the Oxford ordinary language philosophy that lay behind **Hart** and Honore's approach to **causation**. Yet from what has been done here, such an attitude is premature. Before he may pass off the project to the fact-grubbers, a philosopher at least has to see how the facts could go so as to sustain some moral or legal conclusion. That is a point we have not yet reached about intervening **causation**.

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[FN1]. See Michael S. Moore, Causation, in 1 *ENCYCLOPEDIA OF CRIME AND JUSTICE* (Joshua Dressler et al. eds., rev. ed. forthcoming 2000).

[FN2]. See Michael S. Moore, Causation and Responsibility, *SOC. PHIL. & POL'Y*, Summer 1999, at 1.

[FN3]. *Id.* at 44.

[FN4]. See *id.* at 17-24, 31-43.

[FN5]. The last-wrongdoer rule is discussed in Laurence Eldredge, *Culpable Intervention as Superseding Cause*, 86 *U. PA. L. REV.* 121 (1938).

[FN6]. See, e.g., Henry W. Edgerton, *Legal Cause*, 72 *U. PA. L. REV.* 211, 343 (1924); Leon Green, *Are There Dependable Rules of Causation?*, 77 *U. PA. L. REV.* 601 (1929).

[FN7]. See Joseph Beale, *Recovery for Consequence of an Act*, 9 *HARV. L. REV.* 80 (1895) [hereinafter *Beale, Recovery*]; Joseph Beale, *The Proximate Consequence of an Act*, 33 *HARV. L. REV.* 633 (1920) [hereinafter *Beale, Proximate Consequence*].

[FN8]. See Francis H. Bohlen, *The Probable or the Natural Consequence as the Test of Liability in Negligence*, 49 *AM. L. REG.* 79, 148 (1901).

[FN9]. See Jeremiah Smith, *Legal Cause in Actions of Tort*, 25 *HARV. L. REV.* 103, 223, 303 (1911).

[FN10]. See Henry T. Terry, *Proximate Consequences in the Law of Torts*, 28 *HARV. L. REV.* 10 (1915).

[FN11]. See James Angell McLaughlin, *Proximate Cause*, 39 *HARV. L. REV.* 149 (1925).

[FN12]. See Norris J. Burke, *Rules of Legal Cause in Negligence Cases*, 15 *CALIF. L. REV.* 1 (1926); Charles E. Carpenter, *Proximate Cause* (pts. 1-3), 14 *S. Cal. L. Rev.* 1, 115, 416 (1940), 15 *S. Cal. L. Rev.* 187, 304, 427 (1941), 16 *S. Cal. L. Rev.* 1, 61, 275 (1943) [hereinafter *Carpenter, Proximate Cause*]; Charles E. Carpenter, *Workable Rules for Determining Proximate Cause*, 20 *Calif. L. Rev.* 229, 396, 471 (1932) [hereinafter *Carpenter, Workable Rules*]; Eldredge, *supra* note 5; Albert Levitt, *Cause, Legal Cause and Proximate Cause*, 21 *Mich. L. Rev.* 34, 160 (1922); Andrew C. McIntosh, *Intervening Criminal Act as Breaking Causal Chain*, *Law Notes*, Sept. 1931, at 109; Victor I. Minahan, *The Doctrine of Intervening Cause in the Law of Negligence*, 4 *Marq. L. Rev.* 75 (1919-1920).

[FN13]. See H.L.A. HART & A.M. HONORE, *CAUSATION IN THE LAW* (1959) [hereinafter *HART & HONORE, CAUSATION* (1st ed.)]; H.L.A. HART & TONY HONORE, *CAUSATION IN THE LAW* (2d ed. 1985) [hereinafter *HART & HONORE, CAUSATION* (2d ed.)]; H.L.A. Hart & A.M. Honore, *Causation in the Law*, 72 *L.Q. REV.* 58, 260, 398 (1956); Tony Honore, *Necessary and Sufficient Conditions in Tort Law*, in *PHILOSOPHICAL FOUNDATIONS OF TORT LAW* (David G. Owen ed., 1995).

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[FN14]. See Sanford Kadish, **Causation** and Complicity: A Study in the Interpretation of Doctrine, 73 CALIF. L. REV. 323 (1985), reprinted in SANFORD KADISH, **BLAME AND PUNISHMENT** (1987) [hereinafter Kadish, **Causation** and Complicity]; Sanford Kadish, A Theory of Complicity, in ISSUES IN CONTEMPORARY LEGAL PHILOSOPHY: THE INFLUENCE OF H.L.A. HART 287 (Ruth Gavison ed., 1987) [hereinafter Kadish, Theory of Complicity].

[FN15]. Although no longer Dean of Boalt Hall, Sandy is Dean of American criminal lawyers for many of us

[FN16]. Model Penal Code subsections 2.03(2)(b) and (3)(b) qualify its general harm within the risk test by requiring that a harm not be "too remote or accidental in its occurrence to have a [just] bearing on the actor's liability ~~OR ON THE GRAVITY OF HIS OFFENSE.~~" Kadish's proposed revision of this language was to add "or dependent on another's volitional act" after "occurrence." CALIFORNIA LEGISLATURE JOINT COMM. FOR THE REVISION OF THE PENAL CODE; PENAL CODE REVISION PROJECT § 408(j)(a)(ii) (Tentative Draft No. 2, 1988). California did not adopt this language because, as the late John Kaplan used to say, Kaplan and Kadish had also liberalized the Penal Code's marijuana provisions.

[FN17]. See the citations in CRIMINAL LAW AND ITS PROCESSES 581 n.2 (Sanford H. Kadish & Stephen J. Schulhofer eds., 6th ed. 1995).

[FN18]. This is the view of Sandy Kadish, among others. See particularly his proposed revision of Model Penal Code § 2.03, which makes intervening causation only a kind of per se rule about freakishness of consequences. For other examples, see Meir Dan-Cohen, Causation, in 1 ENCYCLOPEDIA OF CRIME AND JUSTICE 162, 163 (Sanford Kadish ed., 1983), who regards intervening-cause tests as supplements to more general tests of proximity and foreseeability. See also Bohlen, *supra* note 8; Carpenter, Proximate Cause, *supra* note 12; Carpenter, Workable Rules, *supra* note 12.

[FN19]. This is the view of Terry, see Terry, *supra* note 10, and (implicitly, as McLaughlin argues), of Beale, see Beale, Recovery, *supra* note 7; Beale, Proximate Consequence, *supra* note 7.

[FN20]. Jointly authored works always pose some special problems of interpretation. I am more confident that the view in the text was that of Herbert Hart than I am that it was fully shared by Tony Honore. As I explore below, Hart believed in paradigms as a mode of giving the meaning of expressions in natural languages, whereas Honore perhaps always held the view that one could define a separable notion of cause-in-fact in terms of necessary and sufficient conditions.

[FN21]. See, e.g., Beale, Recovery, *supra* note 7, at 87; Smith, *supra* note 9, at 321-27; and each of the works by Hart and Honore, *supra* note 13.

[FN22]. See the case citations and discussions in **HART & HONORE, CAUSATION** (2d ed.), *supra* note 13, at 79-80, 172-76; Beale, Proximate Consequence, *supra* note 7, at 641; Bohlen, *supra* note 8, at 162; Carpenter, Workable Rules, *supra* note 12, at 473-74, 476-84; and McLaughlin, *supra* note 11, at 159-64.

[FN23]. See *In re Polemis*, 3 K.B. 560 (C.A. 1921)

[FN24]. **HART & HONORE, CAUSATION** (2d ed.), *supra* note 13, at 173, 343.

[FN25]. See *Regina v. Blaue*, 3 All E.R. 446 (C.A. 1975) (holding liable a defendant who stabbed a victim who subsequently died at the hospital because she refused blood transfusion in accordance with her Jehovah's Witness faith).

[FN26]. To my knowledge, Jaegwon Kim has done the most to reintroduce this issue into modern discussions of causation. See Jaegwon Kim, *Causes and Events: Mackie on Causation*, 68 J. PHIL. 426 (1971).

[FN27]. The states/events debate is discussed briefly in MICHAEL MOORE, *PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW* 344-45 (1997).

[FN28]. **HART & HONORE, CAUSATION** (2d ed.), *supra* note 13, at 172.

[FN29]. *Id.*

[FN30]. Temporally locating acts and other events is itself a tricky metaphysical issue. I elsewhere defend at length the view that the defendant's act in a case like *In re Polemis* ends with that movement of his body that caused the plank to drop. See MICHAEL S. MOORE, *ACT AND CRIME: THE PHILOSOPHY OF ACTION AND ITS IMPLICATIONS FOR CRIMINAL LAW* (1993).

[FN31]. As does Glanville Williams, for example. See Glanville Williams, *Causation in the Law*, 1961 *CAMBRIDGE L.J.* 62, 81-83.

[FN32]. See **HART & HONORE, CAUSATION** (2d ed.), *supra* note 13, at 172, 179- 80.

[FN33]. See *id.* at 77-79.

[FN34]. See *id.* at 176-78, 347; see also the case law summaries in Beale, *Proximate Consequence*, *supra* note 7, at 646; Bohlen, *supra* note 8, at 157-58, 162-63; Carpenter, *Workable Rules*, *supra* note 12, at 484-85; Terry, *supra* note 10, at 20.

[FN35]. 21 A. 31 (Pa. 1891). The case is relied on by the Restatement (Second) of Torts, § 435 cmt. a (1965); by **Hart & Honore, Causation** (2d ed.), *supra* note 13, at 176-77; and by Bohlen, *supra* note 8, at 157-58.

[FN36]. 21 A. at 32 (emphasis added).

[FN37]. See the extended discussion in Levitt, *supra* note 12, at 55-60; see also Bohlen, *supra* note 8, at 162-63; Terry, *supra* note 10, at 20.

[FN38]. See McLaughlin, *supra* note 11, at 173-75.

[FN39]. See Carpenter, *Workable Rules*, *supra* note 12, at 526-39.

[FN40]. See **HART & HONORE, CAUSATION** (2d ed.), supra note 13, at 136, 181- 85.

[FN41]. Id. at 136.

[FN42]. 126 S.W. 146 (Ky. 1910).

[FN43]. See McLaughlin, supra note 11, at 173.

[FN44]. See Beale, Proximate Consequence, supra note 7, at 646-49.

[FN45]. The phrase is McLaughlin's. See McLaughlin, supra note 11, at 173.

[FN46]. Bohlen, supra note 8, at 163.

[FN47]. See **HART & HONORE, CAUSATION** (2d ed.), supra note 13, at 144-45.

[FN48]. See id. at 136-37. The intermediate cases are those in which the defendant supplies the motivation for the intervenor, but does so by way of offers, encouragements, requests, and the like, rather than by threats or pressure. **Hart** and **Honore** rightly observe that there is liability in such cases, and on "causal or quasi-causal grounds," so one could easily account for these cases on the independence criterion: Since the intervenor's motive was supplied by the defendant, there is no motivational independence and therefore no break in **causation**. I have urged, however, that in such cases there is no causal basis for liability; rather, in torts and in criminal law, defendants are held as an accomplice (or as a joint tortfeasor by virtue of actions in concert, rather than joint **causation**). See Moore, supra note 2, at 34-41. For me, the independence test here is thus trickier. Still, the difference between an offer and a threat lies precisely in what the recipient of the offer brings to his decision to accept: In the case of true offers (as opposed to "offers one cannot refuse"), the recipient who accepts finds reasons sufficient for his choice within himself, whereas in yielding to a threat the recipient has his motivation supplied by the coercive consequences threatened.

[FN49]. See Carpenter, Workable Rules, supra note 12, at 526-39 (dealing with acts done to avert threatened harm to the intervenor, to rescue others from threatened harm, to mitigate or repair damage done by defendant's act, to prevent deprivation of rights, and to defend from attack).

[FN50]. See **HART & HONORE, CAUSATION** (2d ed.), supra note 13, at 152; see also Burke, supra note 12, at 11 ("Courts often will not relieve a defendant where the intervening act, even though negligent, was motivated by a desire to prevent defendant's act ... from causing some apparent damage.").

[FN51]. See **HART & HONORE, CAUSATION** (2d ed.), supra note 13, at 182, 348.

[FN52]. 8 S.W.2d 271 (Tex. Civ. App. 1928).

[FN53]. Carpenter, Proximate Cause (pt. 3), supra note 12, at 16.

[FN54]. 41 A. 585 (Vt. 1898).

[FN55]. **HART & HONORE, CAUSATION** (2d ed.), supra note 13, at 183, 350.

[FN56]. 170 A.2d 310 (Pa. 1961).

[FN57]. See **HART & HONORE, CAUSATION** (2d ed.), supra note 13, at 350.

[FN58]. See id. at 152, 335-36.

[FN59]. See supra text accompanying note 42.

[FN60]. For an overview (although not in my four categories in the text), see **HART & HONORE, CAUSATION** (2d ed.), supra note 13, at 41-44, 74-77, 136-62, 326-40.

[FN61]. For a discussion of the meaning of "voluntary" in the criminal law's voluntary act requirement, see **MOORE**, supra note 30, at 6-8, 17-59, 245-79.

[FN62]. See supra text accompanying note 42.

[FN63]. See Restatement of Torts § 452 (1934) ("Failure of a third person to perform a duty owing to another to protect him from harm threatened by the actor's negligent conduct is not a superseding cause of the other's harm."); see also Carpenter, *Workable Rules*, supra note 12, at 485-90 ("[I]n nearly every case when the question has arisen an omission has been held not to constitute an intervening cause."). **Hart** and **Honore** are extremely unsympathetic to this doctrine, but this seems mostly due to their extreme lack of sympathy with there being any distinction between acts and omissions worth marking. See **Hart & Honore, Causation** (2d ed.), supra note 13, at 138-41.

[FN64]. See **MOORE**, supra note 30, at 22-34; **MOORE**, supra note 27, at 262- 72.

[FN65]. On the inability of omissions to be any kind of cause, intervening or otherwise, see **MOORE**, supra note 30, at 267-76; **MOORE**, supra note 27, at 273-74; Paul K. Ryu, *Causation in Criminal Law*, 106 U. PA. L. REV. 773, 779 (1958) ("One of the basic axioms in natural science is that 'nothing' cannot produce 'something.'"). Julie Andrews probably said it best in Rodgers and Hammerstein's *The Sound of Music*: "Nothing comes from nothing, and nothing ever could."

[FN66]. See supra text accompanying note 42.

[FN67]. Two large qualifications are in order here. One has to do with foreseeability. Many cases have said that even a fully intentional causing of the harm by a third-party intervenor will not relieve a defendant of liability if the intervention was foreseeable to the defendant at the time that he acted. As I discuss below, foreseeability has no place in the doctrines of intervening **causation**. Plus, the concept is so fully manipulable, see **MOORE**, supra note

27, at 363-99, that what courts do in fact (as opposed to what they may say they are doing) is to treat intervening intentional wrongdoing as per se unforeseeable, even when we know that it is not.

A second complicating factor lies in the kind of cases **Hart** and **Honore** categorize as "provision of opportunity" cases. See **HART & HONORE, CAUSATION** (2d ed.) supra note 13, at 59-61, 81-82, 194-204, 374-77. In those cases the intervention by a third-party wrongdoer is not merely foreseeable to the defendant; rather, it is precisely the likelihood of some such intervention that makes defendant negligent to start with. Leaving ignition keys in automobiles, for example, is negligent precisely because wrongdoers may steal them. **Hart** and **Honore** seek to except out such cases from the general rule stated in the text. By contrast, I have argued that the rule stated in the text makes no exception for such cases; there often is liability in such cases, but it is a noncausal liability (for failing to prevent such intervening wrongdoing). See **Moore**, supra note 2, at 36-38.

[FN68]. See **Hart & Honore**, supra note 13, at 267.

[FN69]. See **HART & HONORE, CAUSATION** (1st ed.), supra note 13.

[FN70]. **HART & HONORE, CAUSATION** (2d ed.), supra note 13, at 136. In a review of the first edition of their book, **Luke Cooperrider** had gently protested that the cases rather often allowed merely negligent intervening actions by third parties to break causal chains. See **Luke Cooperrider, Causation in the Law**, 58 MICH. L. REV. 951, 954-55 (1960) (book review). See generally **Eldredge**, supra note 5, for many such negligence cases.

[FN71]. **HART & HONORE, CAUSATION** (2d ed.), supra note 13, at 151.

[FN72]. See **Beale, Proximate Consequence**, supra note 7, at 657.

[FN73]. **HART & HONORE, CAUSATION** (2d ed.), supra note 13, at 138.

[FN74]. See *id.* at 141-42, 152-53.

[FN75]. See *id.* at 184.

[FN76]. *Id.* at 136.

[FN77]. See **H.L.A. Hart, Legal Responsibility and Excuses**, in **DETERMINISM AND FREEDOM IN THE AGE OF MODERN SCIENCE** 81 (Sidney Hook ed., 1958), reprinted in **H.L.A. HART, PUNISHMENT AND RESPONSIBILITY** 28 (1968).

[FN78]. **HART & HONORE, CAUSATION** (2d ed.), supra note 13, at 138.

[FN79]. I elaborate on **Hart's** adequate capacity/fair opportunity sense of freedom in **MOORE**, supra note 27, at 481-592.

[FN80]. All such cases are discussed in **HART & HONORE, CAUSATION** (2d ed.), supra note 13, at 144-149, 155-57, 330-35. See also **Carpenter, Proximate Cause** (pt. 3), supra note 12, at 72-86.

[FN81]. See *supra* text accompanying notes 36-54.

[FN82]. See **HART & HONORE, CAUSATION** (2d ed.), *supra* note 13, at 153-56.

[FN83]. *Id.* at 138.

[FN84]. *Clifford v. Atlantic Cotton Mills*, 15 N.E. 84, 87 (Mass. 1888).

[FN85]. See **HART & HONORE, CAUSATION** (2d ed.), *supra* note 13, at 163.

[FN86]. See *Kimble v. Mackintosh Hemphill Co.*, 59 A.2d 68 (Pa. 1948).

[FN87]. This is **Hart** and **Honore's** example. See **HART & HONORE, CAUSATION** (2d ed.), *supra* note 13, at 78; cf. *Berry v. Borough of Sugar Notch*, 43 A. 240 (Pa. 1899) (holding irrelevant the plaintiff's much earlier negligent speeding, even though that speeding placed him just where a tree happened to fall on him).

[FN88]. This is the hypothetical framed by the court in *People v. Warner- Lambert Co.*, 414 N.E.2d 660 (N.Y. 1980).

[FN89]. I ignore a distinction **Hart** and **Honore** draw within the coincidence cases; they separate out coincidences of time and place on the ground that in such cases, it does not matter how unlikely the conjunction might be, such coincidence still intervenes. See **HART & HONORE, CAUSATION** (1st ed.), *supra* note 13, at 157; **CAUSATION** (2d ed.), *supra* note 13, at xxxix, 168-70. I ignore the distinction because the time/place cases are some of the best examples of coincidences precisely because of the unlikelihood of such conjunctions.

[FN90]. See **HART & HONORE, CAUSATION** (2d ed.), *supra* note 13, at 165-68.

[FN91]. See *id.* at 168.

[FN92]. **WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS** 276 (4th ed. 1971).

[FN93]. **HART & HONORE, CAUSATION** (2d ed.), *supra* note 13, at 400.

[FN94]. *Id.* at 168.

[FN95]. See **MOORE**, *supra* note 27, at 382-89.

[FN96]. See *id.* at 389-95.

[FN97]. **HART & HONORE, CAUSATION** (2d ed.), supra note 13, at 166.

[FN98]. *Id.* at 165.

[FN99]. On the essentially epistemic nature of probability judgments, see Heidi M. Hurd, *The Deontology of Negligence*, 76 B.U. L. REV. 249 (1996).

[FN100]. *Insurance Co. v. Tweed*, 74 U.S. (7 Wall.) 44, 52 (1868); see also *Milwaukee & St. Paul Ry. v. Kellogg*, 94 U.S. 469, 475 (1876) ("We do not say that even the natural and probable consequences of a wrongful act or omission are in all cases chargeable to the misfeasance or nonfeasance. They are not when there is a sufficient and independent cause operating between the wrong and the injury. In such a case the resort of the sufferer must be to the originator of the original cause.").

[FN101]. See Terry, supra note 10, at 21; Smith, supra note 9, at 326-27.

[FN102]. The best contemporary legal discussion of these cases is Richard W. Wright, *Causation in Tort Law*, 73 CALIF. L. REV. 1737, 1775-98 (1985); see also Moore, supra note 2, at 9-13, 29-30, 46, 49-50.

[FN103]. See *Anderson v. Minneapolis, St. Paul & Sault Ste. Marie Ry.*, 179 N.W. 45 (Minn. 1920); *Kingston v. Chicago & N.W. Ry.*, 211 N.W. 913 (Wis. 1927).

[FN104]. See Honore, supra note 13, at 374-80; Moore, supra note 2, at 10; Wright, supra note 102, at 1775.

[FN105]. See Wright, supra note 102, at 1798.

[FN106]. See *Dillon v. Twin State Gas & Elec. Co.*, 163 A. 111 (N.H. 1932).

[FN107]. See JEROME HALL, *GENERAL PRINCIPLES FOR CRIMINAL LAW* 262 (1st ed. 1947).

[FN108]. This is a variation of McLaughlin's famous hypothetical. See McLaughlin, supra note 11, at 155 n.25. The standard view of who killed the victim in the desert is that the intervenor did so, given that the victim died of thirst rather than poison. See J.L. MACKIE, *THE CEMENT OF THE UNIVERSE: A STUDY OF CAUSATION* 45-46 (1974); Moore, supra note 2, at 12, 42; Wright, supra note 102, at 1802. Hart and Honore's long-held view was that neither defendant nor intervenor caused the victim's death because each was preemptive of the other (but each should be liable on some unspecified, noncausal basis). See **HART & HONORE, CAUSATION** (2d ed.), supra note 13, at 239-40. Tony Honore has recently recanted and joined the standard view here. See Honore, supra note 13, at 378.

[FN109]. See *State v. Scates*, 50 N.C. 409 (N.C. 1858).

[FN110]. Hart and Honore give this example. See **HART & HONORE, CAUSATION** (2d ed.), supra note 13, at 239.

[FN111]. See generally Moore, *supra* note 2, at 28-31.

[FN112]. Terry, *supra* note 10, at 17.

[FN113]. See *supra* text accompanying notes 105-110.

[FN114]. See Restatement (Second) of Torts § 435A (1965).

[FN115]. See **HART & HONORE, CAUSATION** (2d ed.), *supra* note 13, at 170-71.

[FN116]. I explored this in some length in Moore, *supra* note 2, at 34-43.

[FN117]. This is **Hart** and Honore's example. See **HART & HONORE, CAUSATION** (2d ed.), *supra* note 13, at 171.

[FN118]. See *id.*

[FN119]. For the causing/aiding distinction, see Kadish, Causation and Complicity, *supra* note 14; Kadish, Theory of Complicity, *supra* note 14; Moore, *supra* note 2, at 34-36, 38-41.

[FN120]. See sources cited *supra* note 119.

[FN121]. See Model Penal Code § 2.06 (1962).

[FN122]. See Bohlen, *supra* note 8, at 162.

[FN123]. See *Scott v. Hunter*, 46 Pa. 192 (1863).

[FN124]. See Moore, *supra* note 2, at 34-38.

[FN125]. See **JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 83** (1987).

[FN126]. For omissions are never causes. See sources cited *supra* note 65.

[FN127]. As Charles Carpenter summarized his predecessors in this regard, "where causes intervene, the practically universal view is that if they are foreseeable proximate cause exists." Carpenter, Proximate Cause (pt. 3), *supra* note 12, at 312. See generally *id.* at 275-313.

[FN128]. See Restatement of Torts §§ 447, 448 (1934); Prosser, *supra* note 92, at 266, 272, 276.

[FN129]. See sources cited *supra* note 13.

[FN130]. **HART & HONORE, CAUSATION** (2d ed.), *supra* note 13, at 280.

[FN131]. See *Watson v. Kentucky & Indiana Bridge & R.R. Co.*, 126 S.W. 146 (Ky. 1910).

[FN132]. See **HART & HONORE, CAUSATION** (2d ed.), *supra* note 13, at 278.

[FN133]. See *supra* text accompanying notes 98-100.

[FN134]. See *supra* note 67.

[FN135]. **HART & HONORE, CAUSATION** (2d ed.), *supra* note 13, at 194-204.

[FN136]. See Moore, *supra* note 2, at 36-308.

[FN137]. See *supra* note 67.

[FN138]. See the extensive case summaries in Beale, *Proximate Consequences*, *supra* note 7; Carpenter, *Proximate Cause*, *supra* note 12; Carpenter, *Workable Rules*, *supra* note 12; McLaughlin, *supra* note 11; Smith, *supra* note 9; Terry, *supra* note 10.

[FN139]. See sources cited *supra* note 13.

[FN140]. See, e.g., Edgerton, *supra* note 6. On the Legal Realists' functionalist approach generally, see Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935).

[FN141]. See MOORE, *supra* note 27.

[FN142]. See *id.* at 191-247.

[FN143]. See *supra* text accompanying notes 59-100.

[FN144]. **HART & HONORE, CAUSATION** (2d ed.), *supra* note 13, at xxxiv.

[FN145]. See H.L.A. Hart, *Morality and Reality*, N.Y. REV. BOOKS, Mar. 9, 1978, at 35 (reviewing GILBERT

HARMAN, THE NATURE OF MORALITY: AN INTRODUCTION TO ETHICS (1977) and J.L. MACKIE, ETHICS: INVENTING RIGHT AND WRONG (1977)).

[FN146]. See, e.g., Heidi Margaret Hurd, Relativistic Jurisprudence: Skepticism Founded on Confusion, 61 S. CAL. L. REV. 1417 (1988).

[FN147]. In a cryptic aphorism typical of Wittgenstein: "Meaning is use." LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS 20 (G.E.M. Anscombe trans., 3d ed. 1958).

[FN148]. To dredge up another 1950s saying: "the material mode and the semantic mode are really just two different ways of talking." On the generally antimetaphysical stance of ordinary language philosophy, see Michael S. Moore, The Interpretive Turn in Modern Theory: A Turn for the Worse?, 41 STAN. L. REV. 871, 927-34 (1989).

[FN149]. See id.

[FN150]. See HILARY PUTNAM, MIND, LANGUAGE, AND REALITY 215-71 (1975). See generally Michael S. Moore, A Natural Law Theory of Interpretation, 58 S. CAL. L. REV. 277 (1985).

[FN151]. For an introduction to paradigm case argument ("PCA") semantics, see Michael S. Moore, The Semantics of Judging, 54 S. CAL. L. REV. 151, 281- 92 (1981). Others besides Hart and Honore adopted PCA semantics in their approach to **causation**. See John Borgo, Causal Paradigms in Tort Law, 8 J. LEGAL STUD. 419 (1979); Richard A. Epstein, A Theory of Strict Liability, 2 J. LEGAL STUD. 151 (1973).

[FN152]. See HART & HONORE, CAUSATION (2d ed.), supra note 13, at 28.

[FN153]. See id. at 28-29.

[FN154]. Id. at 29.

[FN155]. Id.

[FN156]. See id. at 31.

[FN157]. See id. at 41-44.

[FN158]. See id. at 73.

[FN159]. See id. at 77.

[FN160]. See, e.g., J.O. Urmson, Some Questions Concerning Validity, in ESSAYS IN CONCEPTUAL ANALYSIS (Antony Flew ed., 1960).

[FN161]. This example is Herbert Hart's in his justly celebrated debate with Lon Fuller. See H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 607 (1958).

[FN162]. See generally MOORE, *supra* note 30; MOORE, *supra* note 27.

[FN163]. See BOB WOODWARD & CARL BERNSTEIN, *THE BROTHERS* 15-16 (1979).

[FN164]. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1961) (Stewart, J., concurring).

[FN165]. J.L. Austin, *A Plea for Excuses*, 57 PROC. ARISTOTELIAN SOC'Y A 11 (1957), reprinted in *FREEDOM AND RESPONSIBILITY* 6, 10 (Herbert Morris ed., 1961).

[FN166]. See *supra* text accompanying notes 100-111.

[FN167]. Douglas Ehring too finds the preemptive overdetermination cases to be crucial to understanding causation; he also sees the metaphysics involved in such cases, namely, a mechanistic metaphysics capable of carrying causal influence across discrete sets of processes. See DOUGLAS EHRING, *CAUSATION AND PERSISTENCE: A THEORY OF CAUSATION* 50-70 (1997).

[FN168]. See *supra* text accompanying notes 105, 109.

[FN169]. Standardly called an overdetermination concurrent cause case. See Moore, *supra* note 2, at 10.

[FN170]. What I have called the "garden variety concurrent cause case." *Id.*

[FN171]. What I have called the intermediate kind of concurrent cause case, intermediate between the overdetermination and the garden varieties. See *id.* at 9-10 n.40.

[FN172]. *People v. Lewis*, 57 P. 470 (Cal. 1899). Lewis is actually yet another variant, because the later knife wound caused a much greater blood loss than the earlier gunshot wound. I have elsewhere dubbed these "asymmetrical overdetermination concurrent cause cases." Moore, *supra* note 2, at 10. Lewis is nonetheless useably like the case described in the text because the larger knife wound in Lewis was not relevantly different (in blood loss) than two smaller gunshot wounds in my variation.

[FN173]. I am unconcerned with whether the theory sketched in the text was really believed by Hume. On this, see, for example, GALEN STRAWSON, *THE SECRET CONNEXION: CAUSATION, REALISM, AND DAVID HUME* (1989); BARRY STROUD, *HUME* 42-95 (1977). The Humean theory is an interesting and influential one even if it turns out that Hume never held it.

[FN174]. See, e.g., D.M. ARMSTRONG, *WHAT IS A LAW OF NATURE?* (1983).

[FN175]. See, e.g., PATRICK SUPPES, A PROBABILISTIC THEORY OF CAUSALITY (1970).

[FN176]. See HART & HONORE, CAUSATION (2d ed.), supra note 13, at 32-44.

[FN177]. See id.

[FN178]. For another example of this line of criticism of Hart and Honore, see MACKIE, supra note 108, at 120 (explaining that while our interests determine what is satisfying by way of an explanation, such interests are irrelevant to a theoretical account of causation which does not distinguish cause from conditions). Hart and Honore reject Mackie's interest-relative rejection of the cause/condition distinction as being only pragmatic and not truly causal. See HART & HONORE, CAUSATION (2d ed.), supra note 13, at xxxix. Yet it is very unclear how their own line of argument here is or can be anything other than "merely pragmatic."

[FN179]. See CARL G. HEMPEL, Aspects of Scientific Explanation, in ASPECTS OF SCIENTIFIC EXPLANATION 331 (1965); THE NATURE AND SCOPE OF SOCIAL SCIENCE (Leonard I. Krimerman ed., 1969).

[FN180]. Compare CARL G. HEMPEL, The Function of General Laws in History, in ASPECTS OF SCIENTIFIC EXPLANATION, supra note 179, at 231, and Carl G. Hempel, Reasons and Covering Laws in Historical Explanation, in PHILOSOPHY AND HISTORY 143 (Sidney Hook ed., 1963), with William Dray, The Historical Explanation of Action Reconsidered, in PHILOSOPHY AND HISTORY, supra, at 1050.

[FN181]. HART & HONORE, CAUSATION (2d ed.), supra note 13, at 51-52; see also Harton v. Forest City Tel. Co., 59 S.E. 1022, 1026 (N.C. 1907) ("The spontaneous action of an independent will is neither the subject of regular, natural sequence, nor of accurate precalculation by us."); Kadish, Causation and Complicity, supra note 14, at 163 ("[E]very volitional actor is a wild card; he need never act in a certain way.... No laws of nature can settle the issue.").

[FN182]. See DAVID HUME, ENQUIRY CONCERNING THE HUMAN UNDERSTANDING 93 (Clarendon ed. 1902).

[FN183]. MACKIE, supra note 108, at 120-25, 210-12.

[FN184]. See A.R. LOUCH, EXPLANATION AND HUMAN ACTION (1966); A.I. MELDEN, FREE ACTION (1961); RICHARD PETERS, THE CONCEPT OF MOTIVATION (1958); PETER WINCH, THE IDEA OF A SOCIAL SCIENCE (1958). For Tony Honore's sympathetic use of this old distinction, see Honore, supra note 13, at 382-84.

[FN185]. See Hart & Honore, supra note 13, at 80 ("When we do speak of a human action as caused, this is with the strong implication that the agent acted in one or more of those many different circumstances which are treated as inconsistent with his action being fully voluntary: we imply if we speak of an action as 'caused' that the agent acted under coercion or domination or that he had lost self control or was submitted to some special stress or emergency If it turns out that there were no such special circumstances the natural conclusion would be that nothing caused him to [so act]: he just deliberately did so.").

[FN186]. See GILBERT RYLE, *THE CONCEPT OF MIND* 11-24 (1949).

[FN187]. See Donald Davidson, *Actions, Reasons, and Causes*, in *ESSAYS ON ACTIONS AND EVENTS* 3 (1980).

[FN188]. See **HART & HONORE, CAUSATION** (2d ed.), *supra* note 13, at xxxix.

[FN189]. See Peter Lipton, *Causation Outside the Law*, in *JURISPRUDENCE: CAMBRIDGE ESSAYS* 143 (Hyman Gross & Ross Harrison eds., 1992).

[FN190]. For a sympathetic attempt to "tech" up the probabilistic theory to deal with epiphenomena, see Wesley C. Salmon, *Probabilistic Causality*, 61 *PAC. PHIL. Q.* 50 (1980), reprinted in *CAUSATION* 137 (Ernest Sosa & Michael Tooley eds., 1993).

[FN191]. McLaughlin, *supra* note 11, at 168.

[FN192]. Hart & Honore, *supra* note 13, at 80.

[FN193]. **HART & HONORE, CAUSATION** (2d ed.), *supra* note 13, at 42-43, 51-59, 186-204, 363-88.

[FN194]. I discuss Antony Flew's expression of this kind of dualistic determinism in **MOORE**, *supra* note 27, at 513-14. For two other attempts to articulate a nondeterministic "causation" of human actions, see **ALAN DONAGAN, THE THEORY OF MORALITY** 45 (1977); Antony Flew, *Psychiatry, Law and Responsibility*, 35 *PHIL. Q.* 425 (1985).

[FN195]. See Kadish, *Causation and Complicity*, *supra* note 14.

[FN196]. *Id.* at 137.

[FN197]. *Id.*

[FN198]. *Id.* at 141.

[FN199]. See *id.*

[FN200]. See *id.*

[FN201]. *Id.* at 142.

[FN202]. See McLaughlin, *supra* note 11, at 168 (arguing that law must treat human choices as nonmechanical even if psychology shows that they are at bottom fully mechanical).

[FN203]. See JEROME HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* 455 (2d ed. 1960).

[FN204]. See HERBERT PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 74-75 (1968).

[FN205]. I argue this at greater length in MOORE, *supra* note 27, at 514-16.

[FN206]. You know the old joke: The economist scornfully puts aside other suggestions about how to open the only can of food on a deserted island, saying that by his science it is easy: "Assume a can opener."

[FN207]. See *supra* text accompanying notes 59-83.

[FN208]. The argument that follows is similar to my earlier argument, see MOORE, *supra* note 27, at 491-502, 523-37, to the effect that a plausible boundary to when we are free and when we are caused poorly fits our legal doctrines of excuse. Herbert Hart himself came to question the fit between a libertarian metaphysics and the law's doctrines of intervening **causation** even before the publication of the second edition of **Causation in the Law**.

[FN209]. *Watson v. Kentucky & Indiana Bridge & R.R. Co.*, 126 S.W. 146 (Ky. 1910).

[FN210]. This "coarse-grained" mode of event-individuation is defended in MOORE, *supra* note 30, at 280-301.

[FN211]. See *id.* at 146.

[FN212]. Hart's well-known account of when we are excused: when we lack capacity or when we are denied opportunity to use such capacity. See Hart, *supra* note 77. Hart put forward this account of excuses precisely to sidestep any issue of determinism; he saw that one could have capacity and opportunity even when one's choices were fully caused.

[FN213]. See Gary Goldberg, *Supplementary Motor Area Structure and Function: Review and Hypotheses*, 8 *BEHAVIORAL & BRAIN SCI.* 567 (1985).

[FN214]. See Benjamin Libet, *Unconscious Cerebral Initiative and the Role of Conscious Will in Voluntary Action*, 8 *BEHAVIORAL & BRAIN SCI.* 529 (1985).

[FN215]. See *id.*

[FN216]. For such an ostrich-like reaction to the rapid-eye movement and EEG evidence about dreaming, see NORMAN MALCOLM, *DREAMING* (1959). For the corrective, see Putnam, *supra* note 150.

[FN217]. On the push of libertarianism to dualism, see RYLE, *supra* note 186.

[FN218]. See MOORE, *supra* note 30, at 113-65.

[FN219]. See Putnam, *supra* note 150; Moore, *supra* note 148.

[FN220]. See Beale, *Recovery*, *supra* note 7; Beale, *Proximate Consequences*, *supra* note 7; Bohlen, *supra* note 8; Carpenter, *Proximate Cause*, *supra* note 12; Carpenter, *Workable Rules*, *supra* note 12; Levitt, *supra* note 12; McLaughlin, *supra* note 11.

[FN221]. See HART & HONORE, *CAUSATION* (2d ed.), *supra* note 13, at 30, 96-97, 341.

[FN222]. Epstein, *supra* note 151, at 180.

[FN223]. See *id.* at 177-78.

[FN224]. *Id.* at 183-84.

[FN225]. See *supra* note 151.

[FN226]. GEORGE P. FLETCHER, *BASIC CONCEPTS OF CRIMINAL LAW* 66 (1998).

[FN227]. *Id.*

[FN228]. For an attempt to cash out the metaphors here, see David Fair, *Causation and the Flow of Energy*, 14 *ERKENNTNIS* 219 (1979) (representing a physicalistic reduction of the causal relation to one of energy-momentum transference in the technical uses of the words in physics).

[FN229]. I discuss this aspect of **causation** in Moore, *supra* note 2, at 13- 15. Whether **causation** is scalar in nature is a disputed matter, particularly by those enamored of necessary or sufficient condition analysis of **causation** (which tend to be all or nothing analyses). Compare Richard A. Epstein, *Defenses and Subsequent Pleas in a System of Strict Liability*, 3 *J. LEGAL STUD.* 165 (1974), and Mario J. Rizzo & Frank S. Arnold, *Causal Apportionment in the Law of Torts: An Economic Theory*, 80 *COLUM. L. REV.* 1399 (1980), and Smith, *supra* note 9 (all contemplating degrees of causal contribution), with HART & HONORE, *CAUSATION* (2d ed.), *supra* note 13, at 223, and MACKIE, *supra* note 108, at 128-29, and John Borgo, *supra*, note 151, at 448-52 (all questioning the sense of talk of degrees of causal contribution).

[FN230]. See generally Moore, *supra* note 2, at 15-17.

[FN231]. The moral premise of Jeremiah Smith's (and the Restatement of Torts's) "substantial factor" test. See Smith, *supra* note 9.

[FN232]. See ARISTOTLE, NICOMACHEAN ETHICS, bk. I, ch. 3, 347-48 (Richard McKeon ed., University of Chicago Press 1973).

[FN233]. The example is William Alston's. See his discussion of the beneficial uses of vagueness, in WILLIAM ALSTON, PHILOSOPHY OF LANGUAGE (1964).

[FN234]. This is Richard Wright's example. See Wright, *supra* note 102, at 1795.

[FN235]. How much of the causal route must be within the contemplation of the actor when he acts is a vague matter in morality, but this matches the vagueness in the ideas of coincidence and abnormality. On the general problem of fit between the harm done and the harm intended or risked, see MOORE, *supra* note 27, at 459-76.

[FN236]. Terry McDermott, No Limits Hinder UC Thinker, L.A. TIMES, Dec. 28, 1999, at A14 ("[C]onsciousness is solved as a philosophical problem and has become a matter of science. 'Let the brain stabbers figure out how it works'").

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***497 THOMSON'S PRELIMINARIES ABOUT CAUSATION AND RIGHTS**

Michael S. Moore [FNa]

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As the title of Judith Thomson's article indicates, her essay consists of some brush-clearing preliminaries to the topic that centrally interests her, the relation between causing harm to another and violation of another's rights. Before getting to those preliminaries, it is important that we clarify what the subject is to which these topics are preliminary.

The thesis that centrally interests Thomson is what I shall call the moral strict responsibility thesis (MSRT). According to MSRT, an actor infringes the rights of another whenever he, by his action, causes harm to the other. This thesis is not so bereft of friends as Thomson's opening sentence would indicate. [FN1] For example, those who urge that tort law exists to correct an injustice between two parties quite regularly espouse or presuppose some version of this thesis. Richard Epstein is one prominent example, [FN2] but others include: those judges who recognize private necessity as only a 'qualified' defense in tort law--qualified in the sense that if one causes harm to another's person or property in order to save one's own person or property, one is faultless but still must pay for the harm one caused because he violated the injured person's rights; [FN3] those judges who recognize a good samaritan duty for one who has innocently caused another to be in a condition of peril, where absent such causation *498 one has no such duty; [FN4] those judges and scholars who occasionally and inconsistently mouth the old maxim, 'as between two innocent parties, let he who caused the harm pay for it.' [FN5] Each of these legal doctrines is a natural implication of MSRT, because each could reflect the judgment that to cause harm is to violate rights and that violating rights is a wrong for which the wrongdoer must pay.

Mark Kelman, certainly no friend of MSRT, nonetheless finds a version of the thesis to pervade that strand of liberal thought he broadly labels 'libertarian.' Because libertarians are value skeptics, Kelman argues, they cannot find rights to be natural. Therefore, they 'must derive rights from a morally plausible general statement about what might constitute rights-violating behavior: prima facie, the obvious candidate is that one ought not to cause harm (at least without justification). We are all equally unentitled to cause harm . . .' [FN6]

The MSRT is one that Thomson herself could use to support a more traditional corrective justice theory of torts to which she may adhere, one in which fault is as necessary to liability as is causation. [FN7] A friend of MSRT might say that to cause harm is to violate moral and legal rights, even though one is excused from both legal liability and moral culpability if the causing was done without fault. [FN8]

The thesis may have implications in other areas of law and morality as well. Thomson illustrates this toward the end of her paper by her *499 discussion of 'takings' cases. [FN9] In this context one might say that if causing harm is to violate rights, then state regulation or prohibition of such harm-causing actions cannot be a taking of property for which compensation must be paid. Cedar-growers, for example, may be prohibited from causing harm to apple-growers (via wind transmissible cedar rust) because such actions are wrongs (rights violations) which no one has a right to do.

Thomson herself is as unsympathetic as she is to MSRT, because, I would guess, of the potential impact of the thesis on Thomson's own preferred solution to some of the difficult questions of moral and legal justification. Thomson has elsewhere argued that it is permissible to kill one to save five only when the means of using the one to save the five do not violate the one's important rights. [FN10] We may redirect a run-away trolley onto one person in order to save five because redirecting the trolley onto another track does not, by itself, violate anyone's rights; we may not bump the fat fellow standing next to us into the path of the oncoming trolley in order to stop it from hitting five because such bumping, by itself, violates the fat person's rights. If MSRT were right, then the rights of the proposed single victim would in each case be violated by the acts causing him harm; and Thomson would have to alter the basis of her distinction from rights to something else.

So Thomson is no friend of MSRT. The present paper is not a frontal assault on that thesis, however, but some preliminary skirmishing. The preliminaries to MSRT that Thomson examines all have to do with one problem for the thesis. This is the problem of whether causation is a sufficiently discriminating relation that it can limit causal candidates for any given harm only to those that are plausibly rights-violations. Thomson's story, BRICK illustrates the problem. In BRICK, B is hit by a brick thrown by A, who was trying to hit B but 'missed;' he hit C, whose body deflected the brick onto B, thereby causing B to lose his eye. If C's walking toward the bus stop, and B's sitting on the bench, are as much causes of B's loss of his eye as A's act of throwing the brick, then causation does not sufficiently discriminate; for no one (including Thomson), wants to say that C or B violated B's rights by their respective activities. To be plausible, MSRT must discriminate between those who are injurers and those who are either victims or innocent bystanders. Thomson's BRICK example seems to suggest that causation is not so *500 discriminating. [FN11]

In the body of her paper Thomson quickly discards three theses about causation that would allow it to do the discriminating work demanded of it by MSRT, and then examines in greater depth a fourth thesis. The three quick discards are:

- (1) The thesis that for any given harm there is only one cause; [FN12]
- (2) The thesis that for any given harm there is only one activity that is the cause; [FN13]
- (3) The thesis that for any given harm there is only one human action or natural event that we will say was 'the cause,' namely, those acts that are fully voluntary or those natural events sufficiently abnormal that their occurrence with the harm amounts to a coincidence. [FN14]

Surely Thomson is right in rejecting (1) and (2). There is no remotely plausible concept of cause under which one could say either of these things. However, I tend to think that Thomson's explanation for why we use the locution, 'the cause,' [FN15] is less successful. I think we mean what we say when we use 'the cause;' that the criteria that guide our selection for the application of this honorific phrase are not arbitrary or nonexistent; but that such criteria are pragmatic constraints on utterance of the phrase in particular contexts, not semantic criteria having anything to do with what 'cause' means or with what the relation of causation is.

Thomson I suspect would agree with the very last of these comments. I infer this because she clearly rejects the relevance (to MSRT) of affirming or denying the third thesis. She explicitly puts aside the well known thesis of Hart and Honore [FN16] (which thesis had to do with causal selection being based on voluntary human actions or abnormal natural events amounting to a coincidence) as 'pragmatic' and not 'ontological.' [FN17] In this rejection of merely pragmatic theses about what we will *501 say, Thomson reveals a metaphysical realism about causation that I share. Such realism distinguishes what people say when they use 'cause' and even the concept they implicitly employ when they talk of causation, from what the causal relation really is. [FN18]

Because such realism colors much of Thomson's argumentation throughout her essay, and because it is only implicit, it is worth making this presupposition explicit. Thomson at various points argues: (1) 'the question whether one event X causes another event Y can hardly be thought to turn on anyone's moral failings,' [FN19] and, more broadly, 'What has morality to do with the question whether one thing caused another?'; [FN20] (2) the question of motivation or intention of the actor 'surely cannot be thought to fix' the question of causation; [FN21] (3) the question of legal duty to act cannot be relevant to the question of whether a causal relation can exist from a mere omission to act; [FN22] (4) 'What have X's capacities to do with the question whether X's not doing something caused something else?'; [FN23] and (5), most importantly, 'what is customary, and what is expected, do not affect the truth-values of causal claims. . . . and therefore it is hard to see how any counterfactual analysis of causality can be right.' [FN24] These points are as obvious as they are to Thomson only because 'cause' for her names a real

relation that is not the same as things like morality, legal duty, or the intentions, capacities, or conventions of persons.

I do not bring Thomson's metaphysical presupposition into the foreground in order to criticize it. Quite the contrary. It is worth identifying in order to highlight the contrast between Thomson's realism and the anti-realism about causation of the Legal realist tradition in American legal scholarship, and of the two skeptical traditions Legal Realism has spawned, the Law and Economics movement and Critical Legal Studies. [FN25] Consider Mark Kelman's contribution to this volume by way of *502 illustration of the latter tradition. [FN26] Kelman claims we must 'weak up' from the nightmare of liberal tort law because it is based on a notion of causation that is incoherent and unknowable. [FN27] Many of Kelman's more particular arguments for the incoherence of any concept of causation presuppose a very conventionalist view of the world. Specifically, Kelman presupposes (and at times asserts) that: (1) no one, including Thomson, can define causation; [FN28] (2) in any event, even if someone could define it, she could not get agreement by others that her definition is what 'cause' means; [FN29] and (3) her definition in any event would have an unprincipled and unjustified distinction built into its application to concrete cases, viz, that internal evidence overrules external evidence even when the latter, judged probabilistically, is the 'better evidence.' [FN30]

Thomson's metaphysical realism is surely secure against assumptions like these. For notice that they in turn presuppose, respectively: (1) that you must be able to define a word if that word is to have meaning; [FN31] (2) that most language users in the relevant linguistic community must agree on that definition if the word is to have meaning for that *503 community; [FN32] and (3) that the evidence with which one verifies the application of a word to the world is determinative of that word's meaning. [FN33] Since anyone familiar with the developments in semantics of the last two decades will pretty much reject these presuppositions out of hand, [FN34] I think that we can pretty much put aside Kelman's anti-realism about causation. In addition, these conventionalist presuppositions to Kelman's more particular arguments assume a general anti-realist stance about the things (like causation) to which our words refer.

Not sharing this question-begging character are Kelman's specific arguments against any necessary condition analysis of causation. [FN35] I shall mention one of these three arguments, which leads to an intermediate conclusion (about the necessary condition analysis of causation, not causation itself) that Thomson, too, wishes to defend.

Consider the example of Hart and Honore [FN36] on which Kelman builds: [FN37] A fire that burns down a house appears to have two necessary conditions, D sub1 having started a fire near the house and D sub2 pouring gasoline on that fire. (The second is necessary because D sub1 's fire was about to go out when D sub2 threw on the gasoline.) According to Kelman, we might describe D sub2 's act either as 'pouring gas' or as 'doing whatever is needed to burn down the house.' [FN38] Because under the first description D sub2 's act *504 was necessary, but under the second it is not, [FN39] and because we have no 'strong conventions' allowing us to prefer one description to the other, [FN40] we are left with no answer to the question of whether D sub2 's act was a necessary condition of the harm.

Notice that Kelman's example, if analyzed his way, might force us to the view that causal contexts are not extensional. For its the substitutivity *salva veritate* of co-referring expressions holds true here, [FN41] then D sub2 's act should be a necessary condition regardless of which description of it is chosen.

What Kelman overlooks is the move to preserve the extensionality of causal contexts made by the very literature he is attacking. For Wright, [FN42] and behind him Mackie, [FN43] have anticipated Kelman's problem in the following way. If 'pouring gas' and 'doing whatever is needed to burn down the house' refer to the identical act-token, then it is just not true that different descriptions of that act-token yield different truth-values when plugged into the expression, 'x causes y.' [FN44] Temptations to say that these descriptions make a difference come only from other construals of the reference of these descriptions. One possibility is that these act descriptions refer to types of acts, abstract universals, not particular events. Such descriptions, so construed, do not refer to the same acttypes, and, because of this, no violation of extensionality need take place in order to say, with Kelman, that how you describe the act (types) matters. But the problem with this construal is that 'ex post causation' (Kelman's language for causation itself) is a relation between act-tokens, not act-types. For Kelman to take his descriptions to refer only to acttypes and not to particular actions is to presuppose the skeptical conclusion *505 for which he is

arguing, namely, that there is no such thing as causation. [FN45]

The real temptation to think that descriptions matter stems from a third construal of those description's reference. Both Mackie [FN46] and Wright [FN47] wish to countenance the possibility that such descriptions do not refer to acts at all, either types or tokens, but to properties of act-tokens. So taken, these descriptions refer to different properties, one of which is causally relevant (pouring) and the other of which is not (doing the act with the motive of burning down the house). On this third construal of the reference of these descriptions, extensionality is preserved (at least in higher order logics), despite the fact that the differing descriptions matter, because they are descriptions of different properties; yet, contrary to Kelman, these not being descriptions of the same property, there is no arbitrariness in our causal ascriptions (because of a supposed arbitrariness in our description selection). Quite the contrary: there is a determinate (objective) answer to what properties are causally relevant to particular harms, as both Mackie and Wright conclude, so that what description one chooses is determined by what property is causally relevant. In Kelman's example, that the act-token possessed the property, being a pouring of gasoline, is causally relevant, and that it possessed the property of being motivated by a certain desire is not (there would have been that burning no matter what desire prompted the act of pouring the gasoline). Unless Kelman wishes to claim that properties cannot be causes, which he nowhere does, Wright and Mackie seem secure from any challenge based on alleged failures of extensionality in causal contexts.

Thus, Kelman does not get his desired conclusion under any of the three interpretations of the reference of his descriptions that come to mind. We should turn, then, to Thomson's argument, [FN48] which leads to the conclusion sought by Kelman, viz, that the necessary condition analysis, *506 even when sophisticated a la Mackie and Wright, cannot be an adequate analysis of causation.

Contrary to Kelman, Thomson assumes 'cause' names a real relation, and then finds the necessary condition analysis of it wanting for its inability to preserve this realism. More exactly, put in the form of a reductio Thomson's argument is:

- (1) x is a cause of y if and only if x is a necessary condition of y (the necessary condition analysis of 'cause');
- (2) x is a necessary condition of y if and only if, if x did not occur, y would not occur (the counterfactual analysis of necessity);
- (3) if x did not occur, y would not occur if and only if, 'if x did not occur, y would not occur' has a truth value (a weak version of Tarski's disquotational device allowing semantic ascent); [FN49]
- (4) 'if x did not occur, y would not occur' has a truth value if and only if some choice is made with respect to all features of the situation surrounding x, distinguishing those that are varied (along with the absence of x) from those that are held fixed as part of the background (the element of choice in imagining the possible world in which the counterfactual is to be tested); [FN50]
- (5) if a choice is made with respect to all features of the situation, distinguishing those that are varied (along with the absence of x) from those that are held fixed as part of the background, then there is a convention or expectation guiding the choice of possible worlds in which the causal statement is tested. [FN51]

Therefore from (1), (2), (3), (4), and (5):

- (6) x is the cause of y only if there is a convention or expectation that guides the choice of possible worlds in which the causal statement is tested.

But (6) is inconsistent with Thomson's realism about causation:

- (7) '[w]hat is customary, and what is expected, do not affect the truth- values of causal claims.' [FN52]

Therefore, since Thomson firmly holds to realism about causation (7), she must reject (6); yet since she accepts (2), (3), (4) and (5), to reject (6) she must reject (1), the necessary condition analysis of causation. Indeed, given her argument, Thomson must reject not only the necessary condition analysis of causation, but also any counterfactual conditional analysis of causation, Mackie's and Wright's included, an implication she explicitly recognizes. [FN53] Unlike Kelman, for Thomson this does not mean *507 that we should giveup on our concept of causation; only that we should abandon any counterfactual analysis of it.

Before assessing this argument of Thomson's, we should see where it fits in to the overall argument structure of her article. Recall that she seeks some discriminating notion of cause that will distinguish injurers from both sufferers and innocent bystanders; such a discriminating idea of cause allows one, in turn, to maintain that to cause harm to

another is to violate that other's rights (which injurers do, but sufferers and bystanders do not).

Having summarily rejected three theses that would provide such a discriminating idea of cause, Thomson examines a fourth in the body of her article. This is a thesis about the domain over which the variable *x* can range in the two place predicate, '*x* causes *y*.' The thesis is that the proper domain of *x* is event-tokens (including act-tokens), but not states. Such a thesis would allow one to exclude such states as *C* being at the bus-stop at the time *A* throws the brick in Thomson's BRICK scenario, and arguably even excludes those events that cause harm only by causing states that cause harm, such as *C*'s earlier walking toward the bus-stop as well. [FN54]

After knocking down various arguments in favor of the thesis, [FN55] Thomson searches for a positive argument for the opposite thesis that states can be causes. One such positive argument would be that '*x* causes *y*' means '*x* is a necessary condition for *y*.' For if 'cause' is analyzed in terms of necessary conditions, states as well as events can be necessary conditions and thus causes. [FN56] Because of the reductio argument *508 just sketched, however, Thomson rejects this (and every other) counterfactual analysis of causation. [FN57] We now need to examine this argument of Thomson's.

If I were a friend of the counterfactual analysis of causation (my own hesitation here, because I am at present an educable agnostic on this issue), I would attack premises (4) and (5) in Thomson's argument. For I too endorse realism about causation (7), which leads me to reject the conventionalism explicit in (6). Further, since a counterfactual analysis of necessity seems right (2), and since one can hardly question (3), if one is not to reject the necessary condition analysis of causation (1), that leaves (4) and (5) as the suspect premises.

Before coming to the grounds on which one might suspect (4) and (5) to be false, we should see why these premises are at least plausible. I would describe their plausibility in the follow way. [FN58] When we say, contrary to fact, that 'but for *x*, *y* would not have occurred,' there is a lot that we have left unsaid. Two items we have not mentioned are, first, what are we to imagine happened in place of *x*? If the statement in question is, 'if Smith had not set foot on the steps, the rotten beams under them would not have collapsed,' [FN59] what replaces 'Smith setting foot on the steps' to test the truth of this counterfactual? If we replace it with 'Smith using a different stairway,' the counterfactual may well be true; if we replace it with, 'Smith bounding up the steps at just the time he actually walked up the steps,' it may seem to be false. Second, even once we choose, say, 'Smith using a different stairway' as the replacement, how many other things in the world are we to imagine having also changed along with Smith's change of entrance? For example, what had to change for Smith to have used a different entrance? Perhaps Jones, who is Smith's chauffeur and who is heavier than Smith, dropped Smith off at the safe entrance only to run Smith's forgotten briefcase up the rotten one. If this is what we vary, then the counterfactual may seem to be false; other events, neutral to weight equal to or greater than Smith's being on the stairs at the relevant time, would leave the counterfactual true.

*509 On both of these bases one might find plausible the idea that the truth of a counterfactual depends on what we hold fixed and on what we vary, thus, (4). Further, one might think, with Thomson, that what we do fix or vary is a matter guided solely by convention and not by any limitations imposed by the nature of the causal relation. One convention we likely follow is: 'hold fixed normal features of the situation.' Following such a convention, we would thus hold fixed Smith's weight (which Thomson allows 'is not especially heavy') and thus not ask any counterfactual question where what replaces the real Smith stepping on the stairs is a lighter or a heavier Smith doing so. [FN60] Likewise, the variations on walking (jumping, bounding, treading, etc.) would also be ruled out on similar grounds. Hence, the plausibility of (5).

Despite this plausibility, my friend of the necessity analysis of causation would reject (4) and (5). One ground for rejecting (4) would be that advanced by David Lewis, amongst others. [FN61] According to Lewis, when testing the counterfactual, 'If *C* had not occurred, *E* would not have occurred,' we test it in that possible world that is closest to our actual world. That is, when we suppose, contrary to fact, that *C* did not occur, we further suppose changes from our actual world only to the minimum extent necessary to make it true (in this closest possible world) that *C* did not occur. [FN62]

Attractive as this view is, it would require (as Lewis recognizes) that we make sense of the idea of over-all similarity, i.e., similarity that is parasitic on no particular properties but only on all properties. As I have argued in the context of precedent and induction, [FN63] this is not a very plausible idea of similarity. Lewis sees the problem

as one of vagueness (about similarity), but it is much deeper than that. Thinking that we can have a context-independent idea of similarity is like thinking that we can *510 have a context-independent sense to 'attributive' [FN64] adjectives such as 'big.' How big something has to be to be 'big' depends on what kind of thing we are talking about. Similarly, 'similar' depends on its context of utterance to specify what property on which it is parasitic. And with this context-dependent notion of similarity, we are back where we started in seeking some basis for varying some properties, but not others, as we construct a possible world that is 'most similar' to our actual world.

My own doubts about (4) are based on two different considerations. First, we need to be clear that the variables *x* and *y* in (4) range over event-tokens, not over event-types. It is true that if we take the reference of '*x*' and '*y*' in 'if *x* did not occur, *y* would not occur,' to be types of acts and types of harms, then there are the two problems of incompleteness mentioned (what replaces *x*, and how much else that was true changes). This is so because, for example, when we imagine Smith's heavier chauffeur stepping on the stairs at just the time Smith actually stepped on the stairs, the same type of event would have occurred--a collapse of the stairs. Yet causation is not a relation between event-types; it is a relation between event-tokens. Therefore '*x*' and '*y*' in those counterfactuals that are given as an analysis of causation should not be taken to refer to types, but to tokens. [FN65]

If we do take '*x*' and '*y*' to range over event-tokens, our second consideration is how to individuate event-tokens. If we employ a very fine-grained mode of individuating event-tokens, we do not get a dependence of the truth value of the counterfactual on how we complete the specification of the contrary-to-fact ('possible') world. If Smith walking up the steps did cause the collapse of the stairs, then it is true: no matter how else the possible world is specified, [FN66] if Smith had not walked just as *511 he did, the stairs would not have collapsed just as they did. More specifically, returning to each of our two problems of incompleteness: first, it does not matter if Smith bounded (rather than walked) up the stairs, hitting just the same stair at the same time; although the stairs would still collapse (let us suppose), there would not be the same collapse that there actually was. In this example, the two collapses--the actual one, and the one that would have happened if Smith had bounded up the stairs--are not plausibly supposed to be qualitatively identical. For the heavier bounding would likely produce a slightly more rapid, deeper, or less time-consuming collapse. [FN67] Second, it does not matter if Smith's heavier chauffeur were to walk up the stairs just after Smith did--again, a different collapse of the stairs. The counterfactual, 'but for *x*, *y* would not have occurred' seems to remain true no matter how the possible world imagined is completed in its particulars. Thus (4) seems to be false in its assertion that counterfactual statements have truth values only when choices are made about fixed versus variable features of the actual world. And if (4) is false, then (5) has no interest for us in this context.

Thomson's rejection of any counterfactual analysis of causation thus remains problematic. [FN68] In the context of her article, this need trouble her *512 little--it would only mean that she has one more argument that states as well as events can be causes. Still, the issue is an important one for the analysis of causation generally, and thus it has been worth following her musings on the topic. [FN69]

One of the curiosities of Thomson's article is that, although she tells us what causation is not (it is not analyzed by counterfactuals), she never tells us what the causal relation is. No small task, to be sure, but in the absence of any analysis of 'causes' in the expression, '*x* causes *y*,' I see no future in attempting to fix the domain over which the variables *x* and *y* may range. Thomson's handicap here is like the handicap we would face in specifying the domain of *x* and *y* in the expression '*x* loves *y*' if we had no idea what the relation of love is.

Despite this handicap, Thomson concludes to her satisfaction that states as well as events can be causes. Her principal argument for this is by extension from a clear case. [FN70] Thomson imagines a variation of BRICK in which *C* walks toward the bus-stop 'precisely in order to deflect *A*'s brick into *B*'s eye.' [FN71] Thomson argues:

(1) When *C* intends to deflect the brick into *B*'s eye, 'it is surely correct . . . that *C*'s walking towards the bus-stop caused the loss of *B*'s eye.' [FN72]

(2) The intention with which *C* walked 'surely cannot be thought to fix whether the walking caused the loss of *B*'s eye.' [FN73]

Therefore:

(3) It is [surely?] correct that *C*'s walking toward the bus-stop caused the loss of *B*'s eye even when *C* did not intend to deflect the brick into *B*'s eye.

This is an odd argument, for what makes the clear case clear in (1) is the intention of C; yet (2) denies the relevance of the intention, allowing *513 Thomson to decide the less clear case in (3). I do not see how such an argument can convince anyone. Anyone who finds (2) plausible (as do I) will not find (1) any more plausible than (3). And anyone who finds (1) more plausible than (3) will not find (2) plausible. I do not think, therefore, that there is an audience to which such an argument can appeal. It is like trying to convince someone (who is in doubt about whether a white, sweet object is a lemon) that it is a lemon, by arguing: 'this other object, because it is a yellow fruit tart of taste, is surely a lemon; yet surely the color and taste are not essential to an item being a lemon; therefore, this first object, differing from the other object only in color and taste, is also a lemon too.'

Earlier in her article Thomson has the beginnings of another positive argument for why states as well as events can be causes. The argument as she states it proceeds from a single premise, namely:

- (1) objects can be causes as well as events.

As Thomson puts it: 'We really do not use the verb 'cause' that it can truly be said only of events that they cause things. People cause things. And so do bullets.' [FN74] From this premise about objects as causes, Thomson concludes that one of the arguments for why states cannot be causes, [FN75] is no good. [FN76]

As a friendly critic, let me see how Thomson might advance this as a positive argument for the thesis that states can be causes (and not merely a negative argument against the thesis that states cannot be causes). Add to Thomson's argument a second premise:

- (2) The only distinction here worth defending is between events as causes versus all other things as causes; if items other than events can be causes, then so can states.

We might call this second premise the 'crossing of the Rubicon' premise, for it asserts that there is only one significant line to worry about here and that once that line is crossed, one might as well go on to sack Rome itself. Such mode of argument is reminiscent of Russell's argument for admitting qualities into our ontology as well as entities: since we have to let relations in anyway (to be able to talk of entities), we may as well let in other universals such as qualities. [FN77]

Thomson articulates a reason which might incline one to accept this *514 kind of argument here. The line between events and all other things might have some significance because of the following considerations: causes explain changes in the world; if one believes that only change can bring about change, [FN78] and that only events are changes, then one has reason to find the line between events and all other things significant when considering the question of what can be a cause.

Neither Thomson nor I believe that only changes are caused (as opposed to the persistence of stable states, for example), or that only changes can beget change, but a friend of the 'only events can be causes' thesis might very well believe both of these things. If so, then once Thomson establishes that objects (which are not changes) can be causes, she has crossed her adversary's Rubicon and he may as well surrender Rome. But has Thomson established that objects can be causes? She adverts to the facts of usage about 'causes,' truthfully noting that we certainly say things like, 'Smith caused Jones' death' and '[t]hat bullet caused Jones' death.' [FN79] Yet as Thomson would plainly admit (given her realism about causation), the facts of ordinary usage are far from the last word on what causation is. As Quine has remarked, 'Many of our casual remarks . . . would want dusting up when our thoughts turn seriously ontological.' [FN80]

Why might we say the things Thomson imagines? One of our pragmatic rules for appropriate utterance is to say no more than is needed on particular occasions. [FN81] If someone wants to know only who by his actions caused Jones' death, or what instrumentality Smith used in killing Jones, to say, 'Smith caused Jones' death,' or 'The bullet caused Jones' death' is all that needs to be said. We need take the apparent ontological commitments to persons or objects as causes no more seriously than we do when we say, 'there is something shared by both white dogs and white houses, namely, their whiteness.' [FN82] In each case, Quine admonishes us, we should paraphrase to find our true commitments.

The paraphrase that suggests itself here is just the one Thomson rather scornfully puts aside: [FN83] 'Smith caused Jones' death' is elliptical for, 'some act of Smith's (you do not need to know which one so I will *515 not tell you) caused Jones' death,' and 'the bullet caused Jones' death' is an ellipsis for, 'some event involving the bullet caused

Jones' death.' Thomson rejects these paraphrases because she finds the notion of 'involving' hopelessly indeterminate:

[I]t is plainly unacceptable to say that 'Smith caused Jones' death' is elliptical for 'An event in one or another way involving Smith caused Jones' death,' since every event in one or another way involves everybody. For example, Smith's shooting of Jones involves you in that it is an event which takes place on or before or after your fourth birthday; but you, after all, did not cause Jones' death. And I see no future in the effort to constrain the notion 'involvement' so as to make this idea work. [FN84]

This answer is much too short. Thomson's demand for any precision in spelling out the meaning of 'involvement' is misplaced. For if I am correct that we say such things in speech contexts where saying more would be inappropriate, then saying more would be inappropriate. 'Involve' is used here only as a place-holder for information that, given the context of the utterance, the listener does not need or want. Absent a context of utterance (i.e., in the null context), [FN85] we can only say the word does not mean, 'any relation to Smith,' no more than it means 'no relation to Smith.' In this indeterminacy, this usage of 'involve' does not suffer at all in comparison with the way we ordinarily use 'similar:' 'similar' never means, 'similar in all respects,' any more than it means, 'similar in no respects;' it only means 'similar in relevant respects,' the conditions of relevancy to be supplied when and if needed. [FN86]

All of this only blunts for me any facts of usage as constituting an argument one way or another about objects or persons as causes. Do people and bullets cause things, in some sense not reducible to events in which these objects are involved causing things? I am also an educable agnostic on this question, but nothing in Thomson's article convinces me one way or the other. [FN87] Her reconstructed Rubicon argument, accordingly, lacks a plausible first premise. And in default of any other argument appearing in Thomson's paper, that leaves us with the old Scottish verdict on Thomson's attempt to disprove that states cannot be causes: 'not proven.'

My concluding comment on Thomson's paper is to question whether a restriction that allowed only events but not states as causes *516 would give causation the kind of discriminating power demanded of it by MSRT. I think not, for such a restriction seems both under- and over-inclusive. To begin with, the restriction is too restrictive in that it excludes factors that are plausibly rights-violations by defendants. Imagine a variation of Thomson's BRICK scenario ('BANANA?'): A, a banana vendor, notices that a banana peel has dropped off his truck; knowing that B, whom A hates and wishes to see hurt, will be coming along shortly, A does not pick up the peel; B slips on the peel and falls, to his injury.

In BANANA, does not A violate B's rights? I think the answer might be yes, for two different reasons. Thomson herself mentions one of these: [FN88] A was both capable of preventing B's injury and, because it was his peel, A was under a duty to prevent the injury by removing the peel; A's duty is presumably the correlative of B's right, so that A's breach of duty is a violation of B's rights. Alternatively, it might be the case that there was some earlier act of A's (loading the truck with bananas, parking it where he did) that caused the state that caused B's fall and injury. In which case we would hold A for violating B's rights, not by omitting to pick up the peel, but rather by causing (through his positive actions) B's injury.

In either alternative it seems we need to conceive of states as causes. A's liability for omission seems to depend on the state of the peel being where it was causing B's fall--else how would A's breach of his duty to change that state cause B's injury? Similarly, for some earlier act of A's (such as parking his truck) to be the cause of B's injury, seemingly the state also must be a cause--for what the earlier act caused was a state which (with other events and states) caused B's injury.

This underinclusiveness of the 'only-events-may-be-causes' thesis for MSRT was implicitly recognized by those who championed the thesis. Beale, for example, thought that it was only 'active forces'--which it seems fair to construe to be events but not states because the activity of a force for Beale was external change--could be causes. Nonetheless, in order to maintain liability in cases like BANANA, Beale had to allow that the 'condition' (state) created by a defendant could be a cause:

If, then, this condition is unstable, if it is in appreciable danger of being acted upon by an oncoming force, the defendant who thus created a condition in the path of an oncoming force stands in a certain causal relation to the latter force, though the relation is worked out through the passive line. [FN89]

*517 Epstein similarly saw that he could not restrict causation to his three paradigms involving acts (events) by a defendant (force, fright, and compulsion); rather, to make plausible his thesis that causing another harm is to violate that other's rights Epstein allows that conditions, too, may be causes. [FN90] Like Beale before him, Epstein wants to hedge his metaphysical bets here: 'The creation of a dangerous condition, without more, does not cause harm in the narrow sense of the term. Some further act or event of the kinds already considered must be identified before the causal analysis is completed. . . .' [FN91] Still, Epstein too is driven to conclude that some states--the 'dangerous' or 'unstable' ones--can be causes, even if only in conjunction with events.

The over-inclusiveness of the 'events-only' thesis can be seen by varying Thomson's BRICK slightly: let the victim, B, be walking as well as the bystander, C, and let the movement of each of them be necessary for the deflection of A's brick onto B's eye. The 'events-only' thesis may be discriminating, but it does not seem to be discriminating enough: neither B nor C violated B's rights by their walking, but their walking is equally a cause with A's throwing the brick under the 'events-only' thesis.

So even if the 'events-only' thesis were true, it seems a poor candidate to do the discriminating work demanded of it by MSRT. Are there any other restrictive analyses of causation that are themselves plausible enough to make MSRT plausible? There are, so far as I know, only four possibilities, and I shall close by mentioning each briefly.

One might attempt to refine the Beale/Epstein paradigms so that the concept of causation that emerges better fits the demands of MSRT. Yet this is to work backwards, gerrymandering the concept of causation just so that it will fit the needs of MSRT (even though I would guess that that is pretty much the way Epstein arrived at his four 'paradigms' of causation). We need an independent analysis of what 'cause' means and what causation is that does not assume from the start that it has to fit some moral thesis. There is nothing in Epstein's method that would give us any reason to think his paradigms give either the meaning of 'cause' or describe the essence of the relation: such paradigms are partial descriptions of a few traditional legal causes of action (battery/trespass/assault/negligence/nuisance), not even an attempt at an analysis of the causal relation that exists quite independently of the law but on which the law is built.

Hart and Honore's justly celebrated theses about what is, and what *518 is not, a direct cause, have more promise as an analysis of what **causation** is, but they too, as Thomson recognizes, [FN92] ultimately fail to focus on the metaphysical or the semantic questions about **causation**. As they themselves recognize in their recently reissued edition of their fine book, [FN93] their analysis is of the usage, in ordinary language, of 'cause.' They thus distinguish two different contexts of use, explanatory and attributive, and extract a concept (or concepts) of **causation** accordingly. This focus on the conditions in which the word 'cause' is appropriately uttered ensures that their analysis is, as Thomson puts it, 'pragmatic' and not 'ontological.' [FN94]

While I agree with Thomson's pragmatic interpretation of Hart and Honore's causally discriminating principles, it would not be difficult to construct a metaphysical version. [FN95] In this version, there are two kinds of uncaused causes in the universe, free human actions and those natural events that are (given the circumstances in which they occur) 'just a coincidence.' On this gappy metaphysical view, we do not select one of these two events as 'the cause' of some other event because of pragmatic factors like explanatory relevance or the interests of the audience; rather, in this version we rightly gravitate to these two features because they are the only features that are the ultimate cause of anything. Put another way, they are the beginnings of all causal chains, so they are rightly emphasized over any other subsequent links in the chain when we engage in attributive, explanatory or any other tasks involving 'cause.'

*** A third approach is to take causation to be an unanalyzable primitive, and then to say that it is a relation that nonetheless admits of degrees. 'Cause' can be used to analyze other concepts, but no other concept can be used to analyze it; and the causal relation can be a more-or-less affair, so that one event can be 'more of a cause' of some harm than another event. Both of these views can fairly be attributed to Jeremiah Smith, whose highly influential series of articles in the 1911 Harvard Law Review concluded that all that may or need be said about causation to juries was whether or not defendant's action was a 'substantial factor in producing the damage complained of.' [FN96]

*519 Give Smith the two metaphysical assumptions above and his proposal is not nearly as vacuous as it has been thought to be by most subsequent scholars. If 'cause' is a primitive notion, then no test or definition need be attempted, as Smith himself argued. [FN97] If causation is a more-or-less affair, then one does need to specify how

much of it is a prerequisite for liability, and Smith's answer was, 'a substantial amount.' Although 'substantial' is vague, its vagueness may be a virtue if degrees of causation vary on a smooth continuum; precise stipulations are notoriously arbitrary when we seek to divide bald from not-bald, old from middle-aged. Moreover, notice how discriminating Smith's view could make causation: if there is a large size threshold for what counts as cause, then only a few of the many events or states necessary for the production of a harm are its causes. It might even turn out that all and only those acts that are 'large causes' are plausibly thought to be rights-violating acts--the discriminating notion of cause sought by the friends of MSRT.

As a last possibility, consider what I shall awkwardly call the Becht/Miller/Keeton/Wright view of causation. [FN98] Keeton's example [FN99] is helpful in elucidating this view. Suppose a defendant places unlabelled rat poison near a stove; because the stove was in the kitchen, the defendant's act also had the property of placing the rat poison near the food. The heat from the stove causes the rat poison to explode, injuring the plaintiff. If we ask whether the defendant's act of placing the rat poison where he did caused the plaintiff's injury, the answer is, 'yes.' But if we ask whether various properties of the defendant's action caused the plaintiff's injury, we can be more discriminating: that the rat poison was near the food was causally irrelevant, but that it was near to the stove was not.

To narrow the class of things that can be causes the Becht/Miller/Keeton/Wright view must defend two theses: first, a metaphysical thesis that only properties of event-tokens may be causes and that the event-tokens themselves may not be causes; and second, a moral thesis that, in order to determine whether an actor is responsible for a harm, we ask the *520 causal question only with respect to those properties of his act-tokens that are relevant to his culpability. What this second thesis means with respect to the negligent actor who placed the rat poison in the kitchen, for example, is that we ask whether the property of his act that made it negligent (the placing near the food, assuming arguendo that was the only significant risk) caused the harm; and we get a determinate answer, namely, this property did not cause the harm and therefore this actor is not responsible for the harm (even though another property of his act did cause the harm). [FN100]

This view of the range of objects that can be causes in attributive contexts is highly discriminating in these contexts. In Thomson's BRICK scenario, for example, only A's action has a property that is causally relevant to B's harm in attributive contexts, because only that property was relevant to someone's culpability. Much of the discriminating power of this view of cause, of course, stems from its moral thesis about how one picks properties about which to ask the causal question; it is thus difficult to characterize this view as a purely metaphysical view about causation answering to the needs of MSRT.

Each of these four analyses of **causation** hold out some promise of providing the discriminating idea of **causation** needed by a friend of MSRT. Yet each also has serious, perhaps crippling, problems: Epstein's 'paradigms' are not the kind of paradigmatic examples that some ordinary language philosophers, at one time at least, thought could give the meaning of a word such as 'causes,' [FN101] and even if they were, the 'paradigm case argument,' as a mode of meaning analysis, is pretty much dead, and for good reason; [FN102] Hart and Honore's analysis is either only pragmatic, or, if taken metaphysically, requires a gappy view of determinism that is an anathema to those of us with more smoothly determinist world views; Smith's big-versus-little-cause discriminations not only require us to take **causation** to be primitive--always a problem in non-foundationalist theories of knowledge--but even worse, requires us to believe **causation** is a scalar phenomenon that admits of degrees; [FN103] *521 and finally, the Becht/Miller/Keeton/Wright view relies on the questionable metaphysical view that a universal (a property) can be a cause in lieu of the act-token itself being a cause. [FN104]

My own prognosis is that the prospects for discovering the kind of discriminating view of causation required by MSRT are bleak. Causation may well be just too promiscuous a relation to play this large a role in our moral life. One point on which Thomson's paper and my own would fully agree, however, is the need for those interested in the question, lawyers included, to do the metaphysics without which it cannot be answered. The time is long past (if indeed ever it was appropriate) to say that 'the lawyer cannot afford to adventure himself with philosophers in the logical and metaphysical controversies that beset the idea of cause.' [FN105] Lawyers can ill-afford not to so adventure themselves, and those who repeat these oft-quoted words usually do so to excuse an inexcusable ignorance.

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[FN1]. 'Nobody believes it follows from the fact that X did something, his doing of which caused Y to suffer a harm, that X infringed a right of Y's.' Thomson, *Causality and Rights: Some Preliminaries*, 63 CHI.-KENT L. REV. 471, 471 (1987) (Professor Thomson's article appears in this symposium issue.). I assume in what follows that Thomson will allow, as a recognizable version of this thesis, that X causing a harm to Y will not only infringe a right of Y's, but that it will also violate a duty of X's.

[FN2]. Richard Epstein wrote that:

[T]he first task of the law of torts is to define the boundaries of individual liberty. To this question the rules of strict liability based upon the twin notions of cause and volition provide a better answer than the alternative theories based upon the notion of negligence, whether explicated in moral or economic terms. In effect, the principles of strict liability say that the liberty of one person ends when he causes harm to another. Until that point he is free to act as he chooses . . .

Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151, 203-04 (1973).

[FN3]. *Vincent v. Lake Erie Transp. Co.*, 109 Minn. 456, 124 N.W. 221 (1910).

[FN4]. See the discussion in Epstein, *supra* note 2, at 191-95.

[FN5]. See, e.g., Rizzo & Arnold, *Causal Apportionment in the Law of Torts: An Economic Theory*, 80 COLUM. L. REV. 1399, 1402-03 (1980): 'Our position . . . is that it is fairer, as a general rule, to impose the burden of an injury on the party who causes it than on the party who suffers it.' Since Rizzo and Arnold also believe that '[b]ehind every tort there must be . . . violation of . . . a right.' *Id.* at 1407 n.45. In their case it is particularly clear that MSRT underlies their acceptance of the common law maxim.

[FN6]. Kelman, *The Necessary Myth of Objective Causation Judgments in Liberal Political Theory*, 63 CHI.-KENT L. REV. 579, 583 (1987) (Professor Kelman's article appears in this symposium issue.). We should be skeptical of Kelman's (and Critical Legal Studies' generally) assumption that libertarians are value-skeptics.

[FN7]. See Thomson, *Remarks on Causation and Liability*, 13 PHIL. & PUB. AFF. 101, 101 (1984), wherein Thomson begins her discussion with a description of traditional tort law as involving three elements in any plaintiff's case: harm of the plaintiff, fault of the defendant, and an act by defendant causing plaintiff's harm. Between Epstein, Kelman, and Thomson one may glimpse three versions of a moral strict responsibility thesis worth discussing: one whereby causing harm to another, even if justified or excused, violates the other's rights (see, e.g., Epstein, *supra* note 2; *Vincent*, 109 Minn. at 456, 124 N.W. at 221); one whereby causing harm to another, where the causing is unjustified, violates that other's rights (Kelman's libertarian foe); one whereby unjustifiably causing harm to another violates that other's rights only insofar as the act causing the harm was not excused (one interpretation of traditional tort law requiring fault in addition to causation).

[FN8]. The hypothesized friend of MSRT is justified in saying this because excuses of a defendant, unlike justifications, cannot plausibly be thought to be relevant to whether the defendant did a wrong or whether in doing so he violated another's rights. Persons excused because of defective capacities or diminished opportunities still violate the rights of those they hurt; they just do not do so culpably.

[FN9]. Thomson, *supra* note 1, at 486.

[FN10]. Thomson, *The Trolley Problem*, 94 *YALE L.J.* 1395, 1403-12 (1985).

[FN11]. I ignore in the text a statement in Thomson's paper that puzzles me. She says: 'Unlike C, B is not an exception to the thesis that if X did something, his doing of which caused Y a harm, then X infringed a right of Y's. For even given that B's sitting down at the bus-stop caused the loss of an eye, the eye lost was B's own.' Thomson, *supra* note 1, at 485. That the eye lost was B's own seems to me to be a very good reason to deny that B violated B's rights. But then why does a friend of MSRT not need a notion of causation sufficiently discriminating that it excludes B's sitting as a cause? If B's sitting is a cause, B is as much a counter example to MSRT as is C--unless one adds to MSRT the ad hoc stipulation that for all X and all Y to which the thesis applies, X cannot be identical to Y.

[FN12]. *Id.* at 476-78, 487.

[FN13]. *Id.* at 487-88.

[FN14]. *Id.* at 477-78.

[FN15]. *Id.*

[FN16]. H.L.A. HART & T. HONORE, **CAUSATION IN THE LAW** (2d ed. 1985).

[FN17]. Thomson, *supra* note 1, at 472-73.

[FN18]. An example of clear-headed realism about causation is J. L. MACKIE, *THE CEMENT OF THE UNIVERSE* at ix (1980).

[FN19]. Thomson, *supra* note 1, at 471-72.

[FN20]. *Id.* at 495.

[FN21]. *Id.* at 485.

[FN22]. *Id.* at 495.

[FN23]. *Id.*

[FN24]. *Id.* at 484.

[FN25]. The skepticism about causation is most evident in Malone, *Ruminations on Cause-In Fact*, 9 *STAN. L.*

REV. 60 (1956), although much of the early skepticism about the meaningfulness of the concept of proximate causation also infected causation itself. See Edgerton, *Legal Cause*, 72 U. PA. L. REV. 211, 243 (1924); Green, *Are There Dependable Rules of Causation?*, 77 U. PA. L. REV. 601, 604-06 (1972).

The influence of Malone, Edgerton, and Green is quite evident in the law and economics literature on causation. Thus, Guido Calabresi concludes to his satisfaction that 'in the law 'cause in fact' . . . is in the end a functional concept designed to achieve human goals.' Calabresi, *Concerning Cause and the Law of Torts: An Essay for Harry Kalven, Jr.*, 43 U. CHI. L. REV. 69, 107 (1975). There, he reached this conclusion on just the grounds Malone used in reaching a like conclusion. See *id.* at 105-06. Similarly skeptical of causation are Landes & Posner, *Causation in Tort Law: An Economic Approach*, 12 J. LEGAL STUD. 109 (1983). Landes & Posner, in their rush to replace causation with probability theory, feel entitled to deride the philosophical attempt to define causation as 'fruitless,' totally context-dependent in its meaning, and in any event irrelevant to the purposes for which tort law should use the concept. *Id.* at 109-11, 119. Steve Shavell explicitly adopts Edgerton's and Calabresi's 'instrumentalist' approach to causation, defining the concept so as to serve 'well-specified social goals.' Shavell, *An Analysis of Causation and the Scope of Liability in the Law of Torts*, 9 J. LEGAL STUD. 463, 502 (1980). Shavell recognizes that there exists a commonsense notion of cause that antedates the law, but in such a common-sense concept, 'questions about causation are to an important extent resolved by resort to intuitions about the justness of applying a rule of liability.' *Id.*

Calabresi, Landes and Posner, and Shavell are not fully aware of how truly skeptical they are about causation, because often they seek to rescue the concept by giving it a probabilistic definition. If they clearly saw the difference between *ex ante* probability theory, which deals with types of acts, and *ex post* causation theory, which deals with particular actions ('act- tokens'), they would see that they are not in any sense analyzing causation but are replacing it with something else. On this, see Wright, *Actual Causation vs. Probabilistic Linkage: The Bane of Economic Analysis*, 14 J. LEGAL STUD. 435 (1985).

[FN26]. Kelman, *supra* note 6.

[FN27]. *Id.* at 637.

[FN28]. *Id.* at 581.

[FN29]. *Id.* at 587.

[FN30]. *Id.* at 592-93.

[FN31]. Think of all the words that we seem to use meaningfully that no one can define: The natural kind terms of ordinary speech, such as 'gold,' 'lemon,' or 'water'; nominal kind words such as 'game,' for which only Wittgenstein's criteriological analysis can be given; dispositional terms such as 'greedy' or 'soluble'; theoretical terms such as 'kinetic energy' or 'force;' and terms typically used in evaluative speech acts, such as 'good' or 'right.' See Moore, *The Semantics of Judging*, 54 S. CAL. L. REV. 151, 202- 46 (1981). Kelman is as naive as Socrates in his insistence that we must be able to define whatever we claim to know. The insight garnered by a less psychological view of meaning is that we may mean a great deal more than we know when we say, 'X causes Y.'

[FN32]. Why should we need agreement about what 'cause' means for it to have meaning? More plausibly, one should view linguistic communities as employing what Putnam calls a 'division of linguistic labor' (PUTNAM, *The Meaning of 'Meaning,' in MIND, LANGUAGE AND REALITY* 215 (1975)), such that most in a community can rely on others to fill in the theory that makes sense of the words they employ.

[FN33]. Even if Kelman were right in his criticism of Thomson's earlier distinction between the two kinds of

evidence with which we verify causal statements, only a verificationist about meaning would think that this irrationality in our methods of verification infects the meaning of those statements. For Thomson's distinction, see Thomson, *supra* note 7; see also Thomson, Liability and Individualized Evidence, 49 LAW & CONTEMP. PROBS. 199 (Summer 1986). It is thus not Thomson who is 'confusing a reasonable practical rule of thumb [favoring one kind of evidence over another] with a principled definition.' Kelman, *supra* note 6, at 593. Rather, it is Kelman who confuses practical rules of verification with meaning.

[FN34]. See, e.g., *supra* notes 31-33.

[FN35]. Kelman argues against the necessary condition analysis of causation, that:

(1) no action has only a single description that correctly picks it out, yet the truth of the causal judgment, 'X caused Y,' depends on how we describe X, and there is no principled way to pick one description of X over another, Kelman, *supra* note 6, at 604-06;

(2) there is a 'subset problem' in how we aggregate parts of events into whole events when we use events as causes, *id.* at 603-04;

(3) there are some cases where we cannot know whether a causal relation exists but where we pretend to greater evidence than we possess, *id.* at 606-08.

[FN36]. H.L.A. HART & A.M. HONORE, CAUSATION IN THE LAW 69 (1st ed. 1959).

[FN37]. Kelman, *supra* note 6, at 605.

[FN38]. *Id.*

[FN39]. *Id.* at 606-07.

[FN40]. *Id.*

[FN41]. The doctrine of substitutivity *salva veritate* holds that if two expressions X and Y refer to the same thing, then anything that can be predicated of X can be predicated of Y without changing the truth values of the overall expressions in which they occur, and vice versa. For the classic treatment of the 'principle of substitutivity *salva veritate*' and extensionality versus intensionality generally, see W. V. QUINE, WORD AND OBJECT (1960); QUINE, Reference and Modality, in FROM A LOGICAL POINT OF VIEW 139 (2d ed. 1961); and QUINE, Quantifiers and Propositional Attitudes, in THE WAYS OF PARADOX 183 (1966). See also REFERENCE AND MODALITY (L. Linsky ed. 1971); and WORDS AND OBJECTIONS, ESSAYS ON THE WORKS OF W. V. QUINE (D. Davidson & J. Hintikka eds. 1969). The extensionality of causal contexts is more specifically discussed in Anscombe, Causality and Extensionality, 66 J. PHIL. 152 (1969); Davidson, Causal Relations, 64 J. PHIL. 691 (1967); Follesdal, Quantification into Causal Contexts, in REFERENCE AND MODALITY, *supra*; Vendler, Causal Relations, 64 J. PHIL. 704 (1967). See also Achinstein, The Causal Relation, 4 MIDWEST STUD. PHIL. 369 (1969); Lombard, The Extensionality of Causal Contexts: A Comment, 4 MIDWEST STUD. PHIL. 409 (1979); and Rosenberg & Martin, The Extensionality of Causal Contexts, 4 MIDWEST STUD. PHIL. 401 (1979).

[FN42]. Wright, Causation in Tort Law, 73 CALIF. L. REV. 1735, 1766-74 (1985).

[FN43]. J. L. MACKIE, *supra* note 18, at 258-69.

[FN44]. See *id.* at 257.

[FN45]. Cf. S. KRIPKE, WITTGENSTEIN ON RULES AND PRIVATE LANGUAGE 66-68 (1982), wherein Kripke rightly labels any limitation of causal candidates to types of acts, not particular acts, as 'a sceptical [sic] solution' to Hume's problem about causation. Kelman, like the Legal Realists and the lawyer- economists, can of course follow Humean skepticism about causation. What he may not do is presuppose that skepticism in an argument designed to establish it.

[FN46]. J. L. MACKIE, *supra* note 18, at 257-62.

[FN47]. Wright, *supra* note 42, at 1766-74. This is not an endorsement of the Mackie-Wright thesis that properties of event-tokens can be causes, although one cannot answer them except by doing just the metaphysics that Kelman eschews. If I were to attack the thesis, it would be on the grounds that properties are used only in building the kind of causal generalizations that figure in causal explanations, and that although such generalizations give good grounds for inferring singular causal relations, the properties referred to in such generalizations are not themselves causes. Only the event-tokens that possess such properties are causes.

[FN48]. Thomson, *supra* note 1, at 481-84.

[FN49]. For a good, brief discussion of using Tarski-like truth sentences simply as 'disquotational' devices allowing semantic ascent, see M. DEVITT, REALISM AND TRUTH 28-31 (1984).

[FN50]. Thomson, *supra* note 1, at 483.

[FN51]. *Id.* at 483-84.

[FN52]. *Id.* at 484.

[FN53]. *Id.*

[FN54]. The 'arguably' is in the text because one would have to think that if the state of C being at the bus-stop at the relevant time cannot be a cause of B's harm, then neither can any event (such as C walking to the bus-stop) that caused that state be a cause of the harm. Thomson, *supra* note 1, at 476, seeks to explain this view: 'since the causal role played by C's walking towards the bus-stop was exhausted by its having caused C's being at P at T . . . C's walking towards the bus-stop did not cause the loss of B's eye . . . but only caused a condition in which A's throwing the brick was able to, and did, cause the loss of B's eye.' For defenses of just this sort of intuition (of the causal potency of events being exhausted by the creation of once-but-no-longer dangerous states), see Beale, The proximate Consequences of an Act, 33 HARV. L. REV. 633, 651-52 (1920); Beale, Recovery for Consequences of an Act, 9 HARV. L. REV. 80, 84-5 (1895); and Epstein, *supra* note 2, at 185. The Beale/Epstein intuition is close to that dealt with by Thomson, for both think that causation is largely a matter of events, or 'active forces.' E.g., Beale, The Proximate Consequences of an Act, *supra*, at 641: 'nothing but an active force can bring about that change of conditions which we call a consequence.' They allow states to be causes only insofar as they are unstable, and even then they might say that it is the release of stored energy (an event) that is the cause, not the state of its storage. And for both Epstein and Beale, once a defendant's action (an event) has caused a state that is 'stable' (Beale) or 'not in danger of releasing or redirecting forces' (Epstein), the causation by the defendant's action has, as Beale put it,

"exhausted itself' like a spent cartridge.' Beale, *Recovery for Consequences of an Act*, *supra*, at 85.

[FN55]. Thomson, *supra*, note 1, at 476-80.

[FN56]. *Id.* at 481.

[FN57]. *Id.* at 481-84.

[FN58]. See generally N. GOODMAN, *FACT, FICTION AND FORECAST* 9-17 (4th ed. 1983); Chisholm, *Law Statements and Counterfactual Inference*, 15 *ANALYSIS* 97 (1955); Rescher, *Belief-Contravening Suppositions*, 60 *PHIL. REV.* 176 (1961); Stalnaker, *A Theory of Conditionals*, in *STUDIES IN LOGICAL THEORY* 165 (N. RESCHER ED. 1968), for discussions of the problem of indeterminacy for counterfactual conditionals. The latter three essays are also collected in *CAUSATION AND CONDITIONALS* at 147, 156, 165 (E. Sosa ed. 1975), which contains a discussion of the problem in its Introduction. *CAUSATION AND CONDITIONALS*, *supra*, at 12-14.

[FN59]. See Thomson, *supra* note 1, at 483.

[FN60]. John Mackie, for example, finds that common-sense views of causality employ an 'all-or-nothing' convention in considering what is to replace matters susceptible of continuous variation such as weight. In discussing whether a hammer-blow is necessary for the crushing of a chestnut, Mackie holds that 'we regard the hammer-blow as a unit, and simply do not consider parts or subdivisions of it or quantitative alterations to it. The alternatives considered are that I strike the chestnut in the way described and that I do not. In constructing possible worlds, in considering what might or would have happened, we either plug in the hammer-blow as a whole or leave it out as a whole.' J. L. MACKIE, *supra* note 18, at 44.

[FN61]. See, e.g., Lewis, *Causation*, 70 *J. PHIL.* 556 (1973). See generally D. LEWIS, *COUNTERFACTUALS* (1973), and Michael Loux's introduction in *THE POSSIBLE AND THE ACTUAL* 32-34 (M. Loux ed. 1979).

[FN62]. Lewis, *supra* note 61, at 263.

[FN63]. Moore, *Precedent, Induction, and Ethical Generalization*, in *PRECEDENT IN LAW* 000 (L. Goldstein ed. 1987). For somewhat similar doubts, see H. PUTNAM, *REALISM AND REASON* 218 (1983).

[FN64]. For a discussion of attributive adjectives, see Geach, *Good and Evil*, 17 *ANALYSIS* 33 (1956).

[FN65]. The importance of getting the 'ontology of causation' right has been emphasized by Davidson, *supra* note 41, J. L. MACKIE, *supra* note 18, at ch. 10; and, in a criticism of Mackie's earlier efforts, Kim, *Causes and Events: Mackie on Causation*, 68 *J. PHIL.* 426 (1971), reprinted in *CAUSATION AND CONDITIONALS* 48 (E. Sosa ed. 1975). Yet because the problem of counterfactual conditionals has typically come up in the philosophy of science in the context of distinguishing laws from accidental generalizations (in each of which one refers to types of events), this attention to ontology often gets overlooked when counterfactual conditionals are being used in our analysis of singular causal statements. One who does not overlook it in this context is Lewis, *supra* note 61, at 562 n.9.

[FN66]. I assume that we do not allow variance of the laws that bear on Smith's walking up the steps being a cause

of their collapse. If those laws were allowed to vary, then it might very well be the case that the very same collapse of the stairs would take place even in the absence of Smith stepping on them as he did. We might even think, following Popper, that we should exclude variance of any laws of science when we test the truth of a causation-generated counterfactual against all possible worlds. K. POPPER, *THE LOGIC OF SCIENTIFIC DISCOVERY* 426-41 (11th ed. 1983). Then all that we may vary are the 'initial conditions' in which Smith's stepping took place, not any laws (including those governing that stepping). One of the benefits of excluding variance of any laws as we construct possible worlds is that it allow a crisp distinction between logical necessity (true through all possible worlds) and causal necessity (true through all possible worlds in which the laws of this world hold true). For development and criticism of this view, see J.L. MACKIE, *supra* note 18, at 209-30, and Lewis, *supra* note 61, at 566-67.

[FN67]. I assume that the two event-tokens are numerically distinct if they differ in properties other than certain relational properties (the relational properties excluded have to include the property, being-caused-by-Smith'd walking, else the counterfactual analysis of causation becomes trivially true). That a difference in properties does not automatically betoken a non-identity between the entities possessing such properties, is due to the difficulties we have in making transworld identity claims, because such difficulties force us to do something with Leibniz's otherwise true claim that identicals are indiscernable in their properties. See *THE POSSIBLE AND THE ACTUAL* (M. Loux ed. 1979) for a variety of approaches to this problem. I also leave aside the difficult question of whether, supposing the two collapses to be qualitatively identical in all respects, save being caused by Smith's walking, they may yet be numerically distinct. If one rejects Leibniz's other principle--the identity of indiscernibles--one might still believe that the actual collapse that occurred and the collapses that would have occurred in all possible worlds other than the actual one, are numerically distinct.

[FN68]. Although it is not clear that Thomson recognizes that she has made two distinct arguments against the counterfactual analysis of **causation**, she has; and I in my text have dealt with only one of them. I have ignored in the text Thomson's other argument for rejecting counterfactual analysis of **causation**, the one she calls 'the counterfactual second agent objection.' Thomson, *supra* note 1, at 482. This objection builds on overdetermination examples of the pre-emptive kind: two fires, each sufficient to burn plaintiff's house, are headed in its direction; the first fire (F sub1), as luck would have it, reaches the house first and burns it completely (if instantly) before the second fire (F sub2) gets there. Thomson thinks that the counterfactual, 'but for F sub1 occurring, the house's burning would not have occurred' is false even though F sub1 is the cause of the house's burning. Ergo, the counterfactual (and, *mutatis mutandis*, its converse) is not an adequate analysis of **causation**.

The problem with all of the examples Thomson uses in this argument is the same as in her argument discussed in the text: Thomson is either talking about event-types rather than event-tokens, or she has a course-grained theory of event-individuation over possible worlds. Only with one of these assumptions is it plausible to say, with Thomson, and with H.L.A. HART & T. HONORE, *supra* note 16, at xiii, that the glass would have shattered anyway because another was waiting to smash it with a shoe if it was not smashed with a hammer, Thomson, *supra* note 1, at 482; or that the bell's ringing would not, have occurred anyway, because another stood ready to cut the wire to the bell. *Id.* at 484. I would say, with Mackie, that these are different shatterings and different silences, just as the burning of the house in my example differs from the burning that would have occurred had F sub2 reached the house rather than F sub1. See J. L. MACKIE, *supra* note 18, at 44-46.

[FN69]. My 'educable agnosticism' on counterfactual analyses of causation remains despite the foregoing argument, partly because of my uncertainty whether such fine-grained individuation of harms does not reduce the counterfactual analysis to a trivial truth; partly because of the very non-discriminating notion of cause that such an analysis would justify (think how much is necessary for the occurrence of any event-token in all of its particularity); and partly because such an analysis of the counterfactuals necessary to support singular causal statements eliminates a seeming difference between such counterfactual discourse and explicitly modal discourse. On this latter point, see *THE POSSIBLE AND THE ACTUAL* 34 (M. Loux ed. 1979).

[FN70]. Thomson, *supra* note 1, at 484-85.

[FN71]. Id. at 485.

[FN72]. Id.

[FN73]. Id.

[FN74]. Id. at 479.

[FN75]. The argument (against states being causes), against which Thomson is arguing, is set forth by her in her contribution to this volume. Id. at 474-76, 478.

[FN76]. Id. at 479.

[FN77]: See the excerpt entitled *The World of Universals* from RUSSELL, *THE PROBLEMS OF PHILOSOPHY* (1912), reprinted in *UNIVERSALS AND PARTICULARS: READINGS ONTOLOGY* 16-23 (M. Loux ed. 1970).

[FN78]. Thomson, *supra* note 1, at 475, 478.

[FN79]. Id. at 478.

[FN80]. W. V. QUINE, *ONTOLOGICAL RELATIVITY AND OTHER ESSAYS* 100 (1969).

[FN81]. Grice, 1967 William James Lectures, Harvard University, published as *Logic and Conversation*, 3 *SYNTAX AND SEMANTICS, SPEECH ACTS* 41, 45-46 (P. Cole & J. Morgan eds. 1975). As Grice puts his quantitative maxim for appropriate conversation: 'Do not make your contributions more informative than is required.' Id. at 45.

[FN82]. Quine's example, in W. V. QUINE, *FROM A LOGICAL POINT OF VIEW* 13 (2d ed. 1961).

[FN83]. Thomson, *supra* note 1, at 479.

[FN84]. Id.

[FN85]. On the idea of a null context of utterance, see Katz & Fodor, *The Structure of a Semantic Theory*, 39 *LANGUAGE* 170, 174 (1963).

[FN86]. Cf. Goodman, *Seven Strictures on Similarity*, *PROBLEMS AND PROJECTS* (1976).

[FN87]. Nor do her attempts at making 'agent-causation' primitive for persons convince me one way or the other.

See R. TAYLOR, ACTION AND PURPOSE (1966).

[FN88]. Thomson, *supra* note 1, at 494.

[FN89]. Beale, Proximate Consequences, *supra* note 54, at 643.

[FN90]. Epstein, *supra* note 2, at 177-87.

[FN91]. *Id.* at 177.

[FN92]. Thomson, *supra* note 1, 472-73.

[FN93]. H.L.A. HART & T. HONORE, *supra* note 16, at xxxiii-xxxiv.

[FN94]. Thomson, *supra* note 1, at 473.

[FN95]. Sanford Kadish gives Hart and Honore such a metaphysical reading with respect to one of their two criteria for intervening and ultimate causes, free human action. See Kadish, Complicity, Cause and Blame: A Study in the Interpretation of Doctrine, 73 CALIF. L. REV. 323 (1985).

[FN96]. Smith, Legal Cause in Actions of Tort, 25 HARV. L. REV. 103, 223, 253, 303 (1911). Both of Smith's metaphysical presuppositions find echoes in more contemporary literature. Thus, in philosophy Richard Boyd urges that we should take 'cause' as primitive and give up the fruitless quest for its analysis. Boyd, Materialism without Reductionism: What Physicalism Does Not Entail, in READINGS IN THE PHILOSOPHY OF PSYCHOLOGY (N. Block ed. 1980). Richard Wright discusses a number of legal theorists similarly inclined. Wright, *supra* note 42, at 1784-88. With regard to Smith's second presupposition, product liability torts have given rise to renewals of the idea that we should apportion liability, not with respect to fault, but with respect to degrees of causal contribution to an indivisible injury. This mode of joint liability/contribution presupposes, with Smith, that causation is a more-or-less affair that admits of degrees. See, e.g., Rizzo & Arnold, *supra* note 5, at 1402-03.

[FN97]. Smith, *supra* note 96, at 305-08.

[FN98]. Their views can be found, respectively, in: A. BECHT & F. MILLER, THE TEST OF FACTUAL CAUSATION IN NEGLIGENCE AND STRICT LIABILITY CASES (1961); R. KEETON, LEGAL CAUSE IN THE LAW OF TORTS (1963); Wright, *supra* note 42.

[FN99]. R. KEETON, *supra* note 98, at 3.

[FN100]. For actors whose culpability is not negligence, but is intentionality or strict liability, this second thesis has to be worked out separately. See *id.* at 100-17; Wright, *supra* note 42, at 1769-71.

[FN101]. John Borgo has some fun with Epstein's misuse of the paradigm case argument in Borgo, Causal

Paradigms in Tort Law, 8 J. LEGAL STUD. 419, 427- 32 (1979).

[FN102]. See Moore, *supra* note 31, at 281-92, for a discussion of the paradigm case argument and its limitations.

[FN103]. It is important that this metaphysical question not be made to appear to be easier than it is. Of course, different types of events have higher and lower probabilities for bringing about certain other types of events, so that if one confuses probability theory with the causal relation between even-tokens, as do Rizzo & Arnold, *supra* note 5, then there will appear to be nothing difficult about conceiving causation to be a scalar phenomenon. Rizzo and Arnold attempt to justify their slide from probability to causation by observing that '[t]o identify causal relationships it is necessary to know something about the typical relations between events.' Rizzo & Arnold, *supra* note 5, at 1409 n.54. Fair enough, but their conclusion does not follow. Epistemology (how we know something) is not metaphysics (what there is). My earlier skepticism about degrees of causation is in Moore, Causation and the Excuses, 73 CALIF. L. REV. 1091, 1114-18 (1985).

[FN104]. For a sophisticated defense of this view, see J. L. MACKIE, *supra* note 18, at ch. 10. Although Mackie seemed to think that there were two kinds of causes--whole event-tokens, and properties of event-tokens--a close reading reveals that Mackie regarded only properties as causes, event-tokens being relegated to common sense notions of 'cause' but not to causation itself.

[FN105]. POLLACK, TORTS 36 (6th ed. 1901).

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