CAUSATION REVISITED

Michael S. Moore*

I was of course pleased to hear that the Institute for Law and Philosophy at Rutgers was going to do a symposium on my book,¹ and even more pleased to hear the names of the six commentators selected. The commentaries orally delivered at the symposium more than matched my expectations. They were of uniformly high quality, matched by the quality of these published versions of those commentaries. It is an honor to have one’s book the subject of such attention.

Symposia such as the present one always emphasize the disagreements that may exist between the author and his commentators; but this is natural enough. There is little enough light, and virtually no entertaining heat, thrown out by mere celebrations of agreement. Advancing common insight is done only by pressing a view critically, which each of my commentators does here with admirable skill. For this I am of course both flattered and grateful.

Which is not to say that I agree with all of the criticisms directed my way by Professors Alexander, Ferzan, Sartorio, Hitchcock, Brand-Ballard, or Rosen. Far from it. So let me return the compliment contained in their careful, critical reads of my book, in the only way appropriate, which is by giving my own critical reactions to each of their criticisms. While I had thought I might be able to organize my responses by substantive issues rather than by authors, it turned out there is sufficient non-overlapping material so that it is better to address each critic’s points separately. This I do in what follows, noting overlaps between the criticisms as I go.

* Charles Walgreen University Chair, Professor of Law, Professor of Philosophy, Professor in the Center for Advanced Study, Co-Director, Program in Law and Philosophy, University of Illinois.

I. LARRY ALEXANDER

Like lawyers who always prefer having two arguments with which to support any conclusion rather than just one, philosophers often profess two beliefs critical of some position with which they disagree: first, that it is irrelevant, and second, that it is incoherent.\(^2\) I have long noticed a tendency in those who profess these two beliefs to let one of these beliefs influence the other,\(^3\) even though they are logically distinct criticisms. Such could be the case with Professors Alexander and Ferzan on causation. They firmly believe causation is irrelevant to the degree of moral blame;\(^4\) I fear that this makes it easy for them to conclude that the concept of causation, used by the law to mark degrees of blameworthiness, is incoherent, because they have no stake in it being coherent. Nonetheless each (manfully?) tries to put aside his or her unconcern about causation and thus tries to join my book in its search for a workable concept. If the search fails, well, that would be just another (but not needed) reason for them not to have undertaken it to start with.

Before coming to what I consider the gravamen of Alexander and Ferzan’s worries about my account, there are a number of slings and arrows headed my way by the two of them that we need to redirect. Alexander’s are eight in number.

(1) Alexander attributes to me the view that complicity is a basis of liability that is alternative to a truly cause-based liability.\(^5\) Alexander then proceeds to criticize how complicity doctrines would handle some of the cases he discusses—for example, he rightly finds it odd for complicity doctrines to make the accomplice’s liability depend on the principal’s

---

2. Nick Sturgeon once discovered that his graduate assistant was dividing his discussions of Sturgeon’s lectures into two parts, corresponding to the questions, “oh yeah?,” and “so what?” Nicholas Sturgeon, What Difference Does It Make Whether Moral Realism Is True?, 24 SO. J. OF PHIL. 115, 136 n.1 (Supp. 1986).
3. Those who argue that it makes no difference whether moral realism is true, for example, are invariably those very same people who believe that moral realism is false, incoherent, or simply preposterous. This latter belief often seems to motivate the thesis that the truth or falsity of moral realism does not matter. For examples in literature, see Michael Moore, Moral Reality Revisited, 90 Mich. L. Rev. 2424, 2450–52 (1992) [hereinafter Moore, Moral Reality].
undisclosed plan. Yet such criticisms are ones that I direct at existing complicity doctrines—they impose a vicarious liability that is proportionate neither to degree of culpability nor degree of causal contribution by the accomplice. Criticism of complicity-based arguments cannot thus be criticisms of my view, but only criticism of the view I myself criticized. That I described the complicity view early on in the part of the book systemizing existing legal doctrine, is no basis for attributing the view to me.

(2) The same is true of my suggestion in the book that one who contrives to use nature to serve his criminal ends could be conceptualized as an accomplice to nature—what I disparagingly call in the book, “God’s little helper.” Such suggestion was exegetical only—that this would be the most consistent way for existing law to treat these cases. My own view, stated later in the book in chapter 13, is that there should be no accomplices, not to persons, not to nature, God, or anything else. The argument structure of the book was to use the early going (chapters 5-6) to make existing legal doctrines as coherent as possible, before (in some cases, as here) recommending radical changes in those doctrines.

(3) Alexander also believes that I think accomplices are always lesser causes than their principals. Yet I advance no such hard and fast generalization in the book. I only said that on average, accomplices tend to be lesser causers than those they aid. But a mere tendency admits of exceptions. In the book I give an example of one such exception; in what he takes to be a criticism of me, Alexander but adds another.

(4) Alexander finds me inconsistent on the issue of whether the relationship of counterfactual dependence is or is not scalar. He juxtaposes me saying that counterfactual dependence is a matter of degree and my saying that “[c]ounterfactual dependence across chains of causes does not, as causation seems to, weaken or peter out. Also, counterfactual dependence does not take account, as causation seems to, of the substantiality of a factor’s contribution.” I do not find these statements inconsistent, instead I

---

6. Id. at 307.
7. MOORE, CAUSATION AND RESPONSIBILITY, supra note 1, at ch.13.
8. Id. at ch.5.
9. Id. at 139.
10. Alexander, Mysteries, supra note 5, at 308.
11. MOORE, CAUSATION AND RESPONSIBILITY, supra note 1, at 320–21.
12. Id. at 301.
14. Id. at 310.
15. MOORE, CAUSATION AND RESPONSIBILITY, supra note 1, at 448.
16. Id. at 399.
think counterfactual dependence is a scalar relation as is causation; but it
doesn’t weaken or peter out across chains of causes over time. Something
can be a more-or-less affair without having time or chains of causes be the
dimension along which it is more or less; likewise for talk of the
“substantiality of a factor’s contribution.”

(5) Alexander also can’t see any sense to scalarity of counterfactual
dependence. For him, being “a little necessary” makes about as much sense
as being “a little dead,” or “a little pregnant.” Alexander states, “[t]he idea of
a ‘small’ counterfactual dependence seems to make no sense.” Yet John
Marshall, for one, had no problem in conceiving of necessity as being a
matter of degree. See his discussion of when an unenumerated power is
necessary to the exercise of an enumerated power (under the U.S.
Constitution’s “necessary and proper” clause): “The word ‘necessary’ . . .
has not a fixed character . . . It admits of all degrees of comparison; and is
often connected with other words, which increase or diminish . . . the
urgency it imports. A thing may be necessary, very necessary, absolutely or
indispensably necessary.”

Presumably Alexander would simply add Chief Justice Marshall to the
list of those challenged to make sense of degrees of necessity.

Alexander says that in my talk of degrees of necessity, I give no
argument—at least none that Alexander can find—“how this can be so.” Yet
in the book I give what I take to be the current basis for a scalarity in
counterfactual dependence: “‘less necessary’ means the relevant
counterfactual holds true only in possible worlds closer to the actual world . .
. .” Something x being more strongly necessary to something else y, means
that the counterfactual, “If no x, no y,” holds true in possible worlds more
removed from the actual world; something being less necessary, means the
counterfactual holds true only in possible worlds closer to the actual world.
As long as the Lewisian similarity metric that I explore in the book is not
completely bankrupt, this quality-space notion of degrees of necessity seems
to me to make excellent sense.

If we now look back to point (4) above, we can see that closeness of
possible worlds (the metric for scalarity of counterfactual dependence) need
bear no relationship to petering out or weakening over time and over chains

17. Alexander, Mysteries, supra note 5, at 309.
18. Id. at 310.
20. Alexander, Mysteries, supra note 5, at 310.
21. MOORE, CAUSATION AND RESPONSIBILITY, supra note 1, at 320.
22. Id. at 387–89.
of causes. We can now see why there is no inconsistency in the two quotations Alexander juxtaposes in (4) above.

(6) There is also some lack of clarity by Alexander as to what it is I reject about the harm within the risk test of proximate causation (HWR). Alexander sees that I reject the HWR test as it applies to torts and crimes of negligence (chs. 7, 8, 9) and he applauds me for it.23 Yet he appears to think that I have thrown the baby out with the bathwater; the baby in this case is the question of fit between what a defendant intended, foresaw, or consciously risked, on the one hand, and what he caused, on the other. Although I reject this as a proximate cause test,24 I note that it is a necessary part of culpability determinations. If I break a window with the brick with which I intended to hit a person, I cannot be found guilty of intentionally breaking the window—for what I did fails to match what I intended to do.25 As I write in the book,26 it is indispensable to grading by culpable mental states that these fit questions be asked and answered.

(7) Alexander accuses me of introducing a “mechanism within the plan” (MWP) test of liability to deal with cases like his Pierre1 and Pierre2.27 But, Alexander asks, “why is MWP any more a determinant of blameworthiness than HWR? Moore never tells us; he just asserts that it is.”28 With respect to my old friend, colleague, and co-author Larry, this is not a very generous reading on his part.

First of all, I introduce no separate “mechanism within the plan” test—it is part and parcel of the more general fit question just described, that between mental state and action. For crimes of intention, there must be “a match between what the defendant did and what he intended to do.”29 Yet not a perfect match—“notice how much slop there is in fixing what it was that D intended.”30 Part of the “slop” is the degree to which causal route (and not just its end product) enters into the fit there must be before defendant can be said either to have intended to bring about some harm that he has caused or intentionally has brought that harm about.

The rationale for asking this question is thus no different than the rationale for requiring a fit between what a defendant intended, foresaw, or

23. Alexander, Mysteries, supra note 5, at 306.
24. MOORE, CAUSATION AND RESPONSIBILITY, supra note 1, at 217–25.
25. See generally Regina v. Pembilton, 12 Cox Cr. C. 607 (1874).
27. Alexander, Mysteries, supra note 5, at 313.
28. Id.
29. MOORE, CAUSATION AND RESPONSIBILITY, supra note 1, at 46.
30. Id.
consciously risked and what he caused—namely, one cannot make basic culpability discriminations for completed crimes without asking and answering these fit questions. Alexander’s failure to see this may be part and parcel of the bias introduced into his analysis by the always-in-the-back-of-his-mind judgment that causation is irrelevant to responsibility. For if causation were irrelevant—meaning that defendants would be blamed for their mental states alone—then indeed one would not ask these fit questions that match results actually caused to the content of the mental states with which such results were produced.

(8) Alexander at one point expresses doubts about the scalarity of the causal relation.\(^3\)
Chris Hitchcock, by contrast, finds that the “idea that causation might come in degrees as a matter of basic metaphysics is novel and interesting.”\(^\text{32}\) In truth the contours of the idea are only lightly sketched in the book, even though reliance is placed on it to explicate causal apportionment, substantial factor tests, licenses for consequentialist justification, intervening causation, accomplice liability, and defects in the counterfactual and nomic sufficiency theories of causation.\(^\text{33}\) The idea is admittedly underdeveloped in the book, and could use further explication. Richard Epstein once developed the notion for cases of force and energy,\(^\text{34}\) and more recently others have explored the idea in other contexts.\(^\text{35}\) As it stands, scalarity is (to me at least) an intuitive idea that is only partially explicated by others or myself.

With these clarifications and supplementations, we are now in a position to deal with Alexander’s attempt to show that I cannot resolve, in the way that seems intuitively correct, the cases he puts. Let me restate the tool kit available to me, which I may use to resolve such cases. I have five relevant moral distinctions to employ here in judging comparative blameworthiness in the kind of cases that Alexander poses: (1) the degree of causal contribution; (2) the degree of counterfactual dependence; (3) the greater

\(^3\) Alexander, Mysteries, supra note 5, at 313 n.28.


\(^\text{35}\) See generally Mathew Braham & Martin van Hees, Degrees of Causation, 71 Erkenntnis 323 (2009).
blameworthiness, *ceteris paribus*, of an act causing harm versus an act being counterfactually depended on by such harm; (4) the ascendingly greater culpability of inadvertently risking/consciously risking/foreseeing/intending some harm; and (5) the degree to which the action done instantiates the type of action consciously risked/foreseen/intended.

Alexander preliminarily objects that by virtue of counterfactual dependence being an omnipresent desert basis, it makes all other factors irrelevant; specifically, counterfactual dependence is said to always “swamp” causation as a desert basis. Yet there is no reason to believe this. Counterfactual dependence on average generates less blameworthiness than causation; weak counterfactual dependence certainly doesn’t “swamp” strong causation; and both strong causation and strong counterfactual dependence may not yet ground serious blameworthiness if the fit between harm caused and type of harm intended is not close enough.

Test this with the three cases that Alexander poses for me. The first is a case of natural coincidence: a motorman negligently speeds at $t_1$, and some significant time later $t_2$ arrives at just the time and place where a rotten tree falls on him. The common intuition is that the motorman’s negligent speeding at $t_1$ does not make him liable for the injuries from the falling tree at $t_2$ even though his speeding at $t_1$ was necessary for the injury at $t_2$. Cases like this are usually called “coincidence cases.”

Alexander rightly notes that I cannot use distinction (5) above, for this is stipulated to be a case of inadvertent-negligence liability. There thus is no object of intent or belief with which one can compare the harm that happened to the harm intended, foreseen, or consciously risked. And for reasons explored at length in the book, there is no single type of harm the inadvertent risk of which made the motorman negligent.

In my book, I treat some of the coincidence cases as instances of minor or *de minimis* causation, and deny liability on that basis. Alexander rejoins that surely these cases are nonetheless cases of counterfactual dependence and that (according to me) liability can be predicated on that basis alone. And indeed they are, yet notice: this already makes for lesser

40. *Id.* at chs. 7–9.
41. *Id.* at 277.
blameworthiness ((3) in my toolkit above); and these are also cases of minor counterfactual dependence ((2) in my toolkit above). The latter is true because of the fact that Alexander notes: only in possible worlds, very close to the actual world, does the tree fall on the motorman. A little more speed, a little less speed, and he would not have been hit. His speed was thus only weakly necessary for the harm. I disagree with Alexander that this will be true in virtually every case.

Alexander’s main stalking horse is the tale of Pierre and Monique, a wrongdoer and his victim who first made their appearance in the Alexander/Ferzan book. Pierre wants to kill Monique and shoots at her for this purpose; he misses, she is frightened, runs outside, and is killed by lightning. In version 1 of the tale, Pierre intended to kill Monique with the bullet and was surprised that she died by lightning rather than by his bullet. In version 2, Pierre intends only to frighten Monique with the bullet, which he wants to do in order to get her to run outside where she can be struck by lightning. Alexander intends that we intuit that Pierre is liable for Monique’s death but that Pierre is not. On standard intervening cause doctrines, these would indeed be the outcomes of the two versions of the tale. Pierre would escape liability because the lightning would be an intervening cause, breaking the causal chain between Pierre’s shooting and Monique’s death. Because Pierre’s plan fits within the exception for contrived coincidences, the lightning would not be an intervening cause.

But my tool kit includes no intervening cause distinctions (not any “God’s little helper,” aiding-of-nature distinctions either, for reasons gone into in chapters 12–13 of my book). How then, Alexander challenges, do I justify the differential outcomes in this pair of cases? Here things get really interesting,” Alexander tells us. Alexander rightly sees that there is no distinction in degrees of causal contribution between the two Pierre’s. If Pierre is a small or de minimis cause, so is Pierre. We should conclude the

43. Id. at 306.
44. Id.
45. Id. at 306–09.
46. ALEXANDER & FERZAN, supra note 4, at 184–85.
47. Alexander, Mysteries, supra note 5, at 306–07.
48. Id.
49. Id. at 307.
50. MOORE, CAUSATION AND RESPONSIBILITY, supra note 1, at 245–47.
51. Id. at 124–25.
52. Alexander, Mysteries, supra note 5, at 307.
53. Id.
same about counterfactual dependence. Although one might conclude that Monique’s death only weakly depended upon Pierre$_1$’s shot, the same should be true with respect to Pierre$_2$’s shot. While like some other coincidence cases these may well be instances of only weak counterfactual dependence, they are equally so. Therefore, no distinction between the two Pierre’s is to be found here.

It is distinction number (5) above that distinguishes the cases. What happened fits perfectly into the type of thing Pierre$_2$ intended; it did not fit well with the type of thing that Pierre$_1$ intended (save that Monique is dead). Alexander professes to understand neither the sense of this fit question nor the moral motivation for asking it.$^{54}$ The latter worry I dealt with in point (7) above and the discussion of “mechanism within the plan.” The former worry is equally easily dispatched. As I said in my book, “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.”$^{55}$ As I said earlier, we are generally “sloppy”$^{56}$ in fitting what a defendant did to what he intended to do. This applies to route questions no less than to other varieties of this type/token comparison. I find it odd to demand greater precision of morality than this in its use of the natural properties on which it bases its moral distinctions.

II. KIM FERZAN

Professor Kim Ferzan will have none of this. She does “not like [her] criminal law sloppy.”$^{57}$ She likes it precise and neat (like her house and office?). Presumably she thinks morality is itself precise and neat, enough so that it can deliver up a desert-based criminal law that is not sloppy in this way.

Before we assess the possibility and the desirability of Ferzan’s fetish for precision, we need to remind ourselves of some of the clarificatory points I earlier discussed with respect to Alexander, and to add to the list. Specifically:

(1) Ferzan too cannot see the sense or the moral motivation$^{58}$ for asking questions of how well what a defendant in fact did fits what that defendant

---

54. *Id.* at 313–14.
56. *Id.* at 46.
58. *Id.* at 356–57.
intended to do, foresaw that he would do, or consciously risked doing. Consider the moral motivation point first. Ferzan asks (rhetorically, she hopes):

[W]hy do we care at all about whether the harm occurred the way you planned it for purposes of culpability? If the defendant wants the [victim] dead and acts to achieve that result do we not have all we need? And how can culpability—not causation—provide a reason to distinguish the Pierre’s? From the standpoint of culpability, they are equally culpable.59

Spoken like a true believer of the thesis that results do not matter to blameworthiness! Yet to someone who believes that results do matter, culpability is not satisfied by finding that defendant intended a death and that a death occurred. For this to be an intentional (or intended) killing, what happened must at least roughly match what defendant intended to happen.

Ferzan, like Alexander, somehow thinks that it doesn’t matter how closely the connection between death and defendant’s act in fact matches the connection between death and that action in the mind of the defendant. I find this puzzling, for Ferzan sees that it does matter for culpability purposes how closely the end state in fact produced matches the end state intended.60 Ferzan must think that causal route can be no part of the identity conditions of the end state produced or intended. Death by lightning, bullet, and fright, etc., are all one to her. Yet surely not. The degree of match between acts intended and acts done is one measure of the degree of agency exercised by a defendant when he causes a harm. That he performed a voluntary act, and that he did so intending some harm, are also measures of such agency. So is the presence or absence of excusing conditions such as duress. But, so is the conformity of the world as he in fact alters it with the alterations in that world that he intended to achieve. An agent who scares a victim to death when he intended to shoot her to death just gets lucky; for he had less control over that she died by having less control over how she died. Successful pool shots are the same61—at least amongst skilled pool players who call all of their shots, this is well recognized. Intentions generally matter to culpability because it is these mental states that allow us to conform the world to our will. But this control exists only to the extent that what happens in the world.

59. Id. at 358–59.
60. Id.
61. Id. at 359.
matches what we intended to happen in our own mind; greater match, greater control.

(2) Like Alexander, Ferzan is misled by the structure of my book. She attributes to me views that I attribute to existing legal doctrine, when in fact I raised those legal views only to bury them, not to praise them. Thus, Ferzan twice quotes me as if I were seeking to keep the harm within the risk test “pure” by not considering causal routes but only considering the simple type-to-token question (of whether the harm that happened was an instance of the type of harm intended or foreseen). Yet my own second match question of culpability is not to be confused with the harm within the risk test of proximate causation. I kept the latter “pure” the better to criticize it. But again, it is a misreading to treat my set up of a view I will be criticizing, as my view.

(3) Ferzan also questions the sense/determinacy of the fit question as I ask it, not just its moral motivation. She confesses that she hasn’t “got a clue how culpability would answer these questions . . . .” Here she is like Alexander, who was also given to “confess that [he has] no idea how one would quantify the degree to which a causal mechanism is within the actor’s contemplation.” Since Kim and Larry are my longtime friends whose intellectual capacities I respect, I refuse to believe that they are really this clueless. Is it really any more difficult to assess the degree of fit between actual causal route versus route intended, than it is to assess the degree of fit between type of harm intended and token of harm in fact caused? If the question of fit between left eye destroyed (in fact) versus right eye destroyed (intended) can be resolved, why cannot the question of fit between killed by lightning (in fact) versus killed by bullet (intended)? I literally am at a loss as to why Ferzan and Alexander are clueless about the second comparison when they stand ready (with razor sharp precision and no sloppiness!) to make the first comparison.

Leaving these clarifications, let us now get to that precision of fit sought after by Ferzan. I gather that Ferzan wants two things here: she wants the law to eschew the deliberately introduced sloppiness in its fit requirements that I applaud; and she wants psychology to shape up in its fixing of the objects of what someone intends or believes. I think that both of these things are possible (although the second is presently beyond our reach); but I also think that neither of these things is desirable.

62. Id. at 357.
63. Id. at 360.
64. Alexander, Mysteries, supra note 5, at 313 n.28.
Take the first, forcing the law and the morality behind it to get unsloppy in its matching of harm done to harm intended or foreseen. After quibbling about my alleged inconsistencies in degrees of tolerable sloppiness here, 65 Ferzan herself has two suggestions for a consistent and non-sloppy approach to fit. The first is to “use the intention as fixed by the statute (fit question one) to determine success” in answering fit question two. 66 Thus, where Carl intends to hit Alice but instead hits Mary, Ferzan would recharacterize Carl’s intent as an intent to hit a human being (if that is the phrasing of the battery statute). And this intent matches what he did, hit a human being (even if a different human being).

With respect, this sloppily(!) confuses two different fit questions. 67 Fit question number one is to fit the intention defendant in fact had to the type of intention some statute requires for conviction. An intent to hit Alice is indeed an instance of the type of intention required by the battery statute, an intent to hit a human being. But this can’t also then be the answer to fit question number two. That is the question of whether what the defendant in fact did matches closely enough to what he intended to do that he should be held for intentionally doing that act. The statutory fit of defendant’s intention doesn’t change what that intention’s object in fact was—it was an intention to hit Alice. It is a fiction to pretend that Carl in fact had an intention to hit a person. There are such intentions—the English call them implied malice cases, 68 as where I shoot into a crowd intending to hit someone, in the sense of anyone, but no particular one. 69 Carl didn’t intend to hit someone in this sense; instead he had the intention to hit Alice.

Moreover, this would be a fiction with bad consequences. This fiction would unjustly overblame and overpunish, for it in effect abandons any requirement that the defendant do what he intended before he can be blamed for intentionally doing it. For example, defendant intends to damage his employer’s antique grandfather clock by over-winding it—an instance of the type of intention required for conviction of the crime of “intentionally damaging the property of another.” The clock is in fact undamaged, but what the clock-winding does is distract a motorcycle-riding antique lover, who is

65. Ferzan, Unsolved Mysteries, supra note 57, at 354–55.
66. Id. at 356
69. “Someone” is ambiguous, as is the indefinite article in English. See id.
looking through the window at the over-winding and who, because of that
distraction, runs into and damages a fourth person’s car. If we only ask
Ferzan’s revised match question, we should hold the defendant for
intentionally damaging the property of another—because that is what he did,
and that is what he intended (as she would construe what he intended).

Ferzan’s second suggestion is no better. It is that “we could allow the
defendant to define the success conditions. The defendant’s view as to
whether he succeeded or failed would determine whether there was a
match.”70 Are we to take Ferzan to mean that the after-the-fact state of
defendant’s satisfaction with what happened determines this match question?
So that if he intended to hit Alice, but was pleased to see Mary crumple
under the blow intended for Alice, he should be held to have intentionally hit
Mary? So that if a maimer intended to put out his victim’s left eye, but
discovers that when his blow misses and dents his victim’s BMW, and he is
just as satisfied, he should be held for intentionally destroying property of
another? Surely not.

Presumably we are to read Ferzan’s second suggestion differently. Like
this? Once we fix precisely (see below) what the defendant intended, if in
fact what he does is not fairly described by the object of that intention, there
is no match and he cannot be held for intentionally doing what he did. This
presumably means that Carl will not be held to have intentionally hit Mary,
and that the maimer would not be held for mayhem when he puts out the
victim’s right eye intending to put out her left. These results will obtain no
matter how motivationally insignificant (to the defendant) are the differences
between victims, eyes, or anything else. If a defendant aims a rock at one
window, but instead hits and breaks the next one over belonging to the same
victim, and even though the difference between the two windows being
broken has no motivational significance for him, then on Ferzan’s view, he
cannot be held for intentional destruction of property. This is neither current
law nor does it mirror the morality underlying that law; this, unlike Ferzan’s
first suggestion, seriously under punishes offenders.71

I come now to Ferzan’s desire that psychology shape up by giving us
precise descriptions of the objects of what someone intends on a given
occasion. No Moorean, two-tiered paraphrasing of intentional objects
allowed here!72 For this is sloppiness, and unprincipled sloppiness to boot.73

---

70. Ferzan, Unsolved Mysteries, supra note 57, at 356.
71. See Moore, Intention as a Marker, supra note 67, at 202.
72. Id. at 6.
73. Id. at 7.
Moorean psychology “has left us with a rather significant mess that needs to be tidied up . . . .” 74

Ferzan has elsewhere given us a detailed blueprint as to what a properly tidied up psychology would look like here, in terms of the conceptual understanding of the holder of the intention in question. 75 Her blueprint has some resemblance to my own venture in this direction years ago, framed in terms of a person’s “sense of synonymy.” 76 I now think that both of these suggestions are premature and that we will not be able to fix precisely the literal text of intentional objects until we generally solve the puzzle of how language is encoded in the brain. Is there a “language of thought” in the brain, as one of Ferzan’s Rutgers’ colleagues has long and famously proposed? 77 If not, how else is content realized in the brain? It may turn out that something like “conceptual understanding” or “sense of synonymy” may figure into the brain states individuating content. That remains to be seen.

My own guess as to how this will come out is that the literal text of intentional contents will be very finely individuated 78 so that an intent to decapitate will not literally be an intent to kill, an intent to destroy an eye will not literally be an intent to disfigure, etc. This being so, we will avoid undesirable (because underpunishing) legal and moral conclusions only by retaining the method of paraphrase of indirect discourse and of my two-tier approach. We in popular speech say that Herod intended to kill John the Baptist even if he literally had as the only object of his intention a decapitation of John. Morally too, we rightly blame Herod for intending to kill John in these circumstances. Legally too, we would punish Herod with the sanctions appropriate to intended killings, in any regime of criminal law that is based on moral desert. We do all of this rather than take Ferzan’s suggestion seriously because her suggestion would punish disproportionately to desert; specifically, her suggestion would systematically underpunish by reading degrees of culpability wrong.

74. Id.
75. See generally Kimberly Ferzan, Beyond Intention, 29 CARDOZO L. REV. 1147 (2008).
76. MOORE, PLACING BLAME supra note 68, at 473–74.
78. This is based on the fineness of response in human brains as to when an intention is successfully realized in action. See generally Stephan F. Taylor, Emily R. Stern & William J. Gehring, Neural Systems for Error Monitoring: Recent Findings and Theoretical Perspectives, 13 NEUROSCIENTIST 160 (2007). Surprise at minor variances (between acts done and acts intended) suggests an extremely fine-grained mode of individuating the content of intentions.
In the second half of her article, Ferzan also takes me to task, this time with respect to counterfactual dependence as an independent desert-base. Apparently, “once again, Moore leaves a mess behind.”79 The mess, I gather, is due to the incompleteness of my treatment of counterfactual dependence as an independent desert-base: “Causation and Responsibility may be the final word on causation, but it is a mere first paragraph in a theory of counterfactual dependence.”80

There is some truth to the latter characterization. Although I hold that counterfactual dependence is a desert basis independent of causation, nonetheless it definitely takes a back seat when it comes to explication in my book. I indeed treat it as the proverbial “poor relation” when it comes to connecting harms to acts for responsibility purposes. Still, let us see what can now be said to the variety of queries that Ferzan directs to me about it.

First, Professor Ferzan wonders “why counterfactual dependence is an independent desert basis . . . . Moore gives us a lovely diagram . . . . But where is the argument?”81 The argument is somewhat implicit in the book, so let me make it explicit here: if omissions, preventions, double-preventions, and allowing are non-causal,82 and if one thinks there is blame attached to culpable versions of these nonetheless, then some non-causal but still natural connection must exist between the defendant and the bad state of affairs for which he is responsible. What else could that connection be but counterfactual dependence? It is the latter relation that seems to do a great job of distinguishing omissions for which we have no non-inchoate responsibility for some harm (because we could have prevented some harm), from omissions for which we are not responsible (because the harm would have happened no matter how diligently we tried to prevent it).

Second, Ferzan, like Carolina Sartorio,83 notes that I believe counterfactual dependence to generate less blame than causation: “causing is worse than allowing, which is worse than omitting . . . .”84 Ferzan queries, “[w]hat is it exactly that makes this so?”85 My argument here too is both implicit and largely intuitive: in pair-wise comparisons where we hold all else constant, isn’t it intuitive that less blame attaches, e.g., for failing to

79. Ferzan, Unsolved Mysteries, supra note 57, at 360.
80. Id. at 365.
81. Id. at 366.
82. Moore, Causation and Responsibility, supra note 1 at ch.18.
84. Moore, Causation and Responsibility, supra note 1, at 319.
85. Ferzan, Unsolved Mysteries, supra note 57, at 366.
prevent a death than for causing that death? My own reading of the homicide cases show us that this intuition is not confined to me. Even when there is knowing failure for no good reason to prevent death when there is a duty to prevent death, this is rarely treated as murder; whereas, the knowing causing of death for no good reason is typically punished as murder, not manslaughter.

Third, Ferzan is worried about the indeterminacy of counterfactual judgments, particularly in light of the prosecutorial burden of convincing juries of the existence of such dependence beyond a reasonable doubt.\(^86\) I too worry about the indeterminacy of counterfactual judgments, both in general\(^87\) and with regard to its effect on legal judgments.\(^88\) Two points, however: (1) we should not exaggerate the degree of this indeterminacy. It is not an “utter indeterminacy”\(^89\) like I have argued that makes concepts such as foreseeability vacuous, deciding no cases whatsoever. David Lewis was right when he said that “somehow,” we do have notions that make counterfactual judgments determinate enough to be serviceable in many contexts.\(^90\) (2) The indeterminacy in question is not metaphysical but only semantic. That is, the indeterminacies that I explore\(^91\) are indeterminacies of what speakers mean when they say things like, “but for your omission to throw the rope, Jones would not have died.” If we specify completely the possible world in which the speaker intends us to test this, there need be no indeterminacy; it may be perfectly clear whether Jones died in that world or he didn’t. This is unlike true metaphysical indeterminacies, such as are involved in fuzzy bordered natural kinds. This being so, if the context of legal usage of counterfactuals makes plain enough the possible world (or range of related possible worlds) in which we are to test a given counterfactual (or range of related counterfactuals), there need be no troublesome indeterminacy.

Some concepts are so vacuous that we should discard them. Ferzan notes accurately enough that I have so urged about both foreseeability\(^92\) and harm within the risk.\(^93\) But neither in law or morality, nor in science and common understanding of the natural world, can we similarly dispense with counterfactual dependence. Unlike some of the critical this-and-thats I

\(^{86}\) Id. at 367.
\(^{87}\) MOORE, CAUSATION AND RESPONSIBILITY, supra note 1, at 380–82, 385–89.
\(^{88}\) Id. at 85.
\(^{89}\) Ferzen, Unsolved Mysteries, supra note 57, at 367.
\(^{90}\) See MOORE, CAUSATION AND RESPONSIBILITY, supra note 1, at 389.
\(^{91}\) Id. at 385–89.
\(^{92}\) MOORE, PLACING BLAME, supra note 68, at 363–64.
\(^{93}\) MOORE, CAUSATION AND RESPONSIBILITY, supra note 1, at ch.8.
I discuss briefly in the book,\textsuperscript{94} I raise the indeterminacy of counterfactuals as a problem to be dealt with one way or another; I do not use it as a springboard for rejecting use of counterfactual dependency altogether.

Fourth, Ferzan raises a series of worries about the reach of responsibility for counterfactually dependent harms,\textsuperscript{95} a worry also voiced fleetingly by Chris Hitchcock.\textsuperscript{96} The general idea is that if counterfactual dependence by itself (i.e., without causation) sufficiently connects a harm to an act or an omission to make the actor or omitter responsible for that harm, then some cause-like limitations will need to be imposed, lest responsibility extend too far. Specifically, Ferzan urges that if counterfactual dependence can exist (a) across the ends of an epiphenomenal fork; (b) backward in time; and (c) forward in time across vast reaches of time and space, then it cannot alone determine responsibility. Something else must be added to the account to keep counterfactual-based responsibility within intuitively plausible bounds. Ferzan predicts that I “will concede that counterfactual dependence is just as promiscuous and worrisome as ever” and that I need “external limiting principles.”\textsuperscript{97} In these predictions she is mistaken, making her suggested three principles of duty, ability, and law unneeded and unwanted by me for these purposes.\textsuperscript{98}

To begin with, notice that counterfactual dependence has its own internal limit in that it is scalar.\textsuperscript{99} Just as causation can be \textit{de minimis}, so can counterfactual dependence. This will by itself somewhat confine the breadth of the responsibility that can be based on counterfactual dependence alone. Such is the situation with some of the coincidence cases, as we saw earlier. This will not, however, completely take care of Ferzan’s specific worries about epiphenomenal, backtracking, and remoteness cases, so let me consider those separately.

Take the remoteness cases first. I take it to be a virtue of counterfactual dependence, not an embarrassment, that it justifies liability in butterfly effect-like cases (these are cases of remote harms with \textit{de minimis} causes).

\textsuperscript{94} Id. at 90–92, 487–91.
\textsuperscript{95} Ferzan, \textit{Unsolved Mysteries}, supra note 57, at 370.
\textsuperscript{96} Hitchcock, supra note 32, at 379–80.
\textsuperscript{97} Ferzan, \textit{Unsolved Mysteries}, supra note 57, at 368.
\textsuperscript{98} One of these, ability, I take to be internal to counterfactual dependence and thus would not be eligible to be an external limitation in any case. Indeed, as I analyze ability elsewhere, the ability to have prevented some harm just is the counterfactual: if the preventive act had been done, the harm would not have occurred. Michael Moore & Heidi Hurd, \textit{Punishing the Awkward, the Stupid, the Selfish, and the Weak: Negligence as Criminal Culpability}, 5 CRIM. L. AND PHIL. 147, 156–62 (2011).
\textsuperscript{99} See supra notes 17–22 and accompanying text.
Evil manipulators who knowingly use the counterfactual dependence of some remote harm by doing what is necessary for such harm to occur should be held responsible for such harms. It is a virtue of counterfactual-based responsibility that it can justify this result.100

Intention has an interesting role to play in such cases. I deny in the book that intention can be an “aphrodisiac to causation,”101 that is, I deny that intending a harm heightens the degree of causal contribution made by an action done in execution of such intention. This is less clearly true of counterfactual dependence, for if the possible worlds in which we are to test the counterfactual all include the actor intending the harm, more of those worlds will perhaps have the harm in them than in worlds where there is only unreasonable risking. This would make the counterfactual relation weaker in cases of intended harm, i.e., the act done in execution of the intention was less necessary to the occurrence of the harm than it would have been if the harm were not intended. This, because an actor intending a harm often would have exploited other actions if the one he in fact chose had been unavailable, making the action he did in fact choose less necessary. Despite this, my sense is that responsibility for remote harm is clearest for “evil manipulators,” i.e., those who knowingly exploit the necessities they see in the world in order to achieve their ends. Perhaps this compensatory effect of intention on counterfactual dependence is the grain of truth in the common law’s overbroad maxim that “no harm is too remote if it is intended.”102

Now consider the epiphenomenal and backtracking cases. Ferzan is surely right that in almost all of such cases there is no responsibility, so that if counterfactual dependence as an independent desert-determiner justifies responsibility in such cases, it goes too far and must be limited by some external principles. Yet we already have such an “external principle” in the culpability requirements for moral blameworthiness. Actors almost never intend that by doing a certain action, a certain harm would occur, when: (a) that harm precedes rather than succeeds the action in time, or (b) that harm is epiphenomenal to that action. Nor do actors typically believe that they can control the occurrence of such earlier and/or epiphenomenal events by doing an action. (We lack even a word to describe such a belief, unlike “foresee” for predictive beliefs; how about, “backsee,” for postdictive beliefs?)

The needed limiting principles are thus already in place and are well known. Yet it is important to grasp how they work with counterfactual

---

100. See Moore, CAUSATION AND RESPONSIBILITY, supra note 1, at 468–69.
101. Id. at 135.
102. See id. at 137.
dependence in ascribing responsibility. They are culpability principles that are truly external to counterfactual dependence doing its work as a wrongdoing-determiner. This means that if we find an epiphenomenal/backtracking case where the culpability requirements are met, there will also be wrongdoing present because of the counterfactual dependence present in such cases.

Consider two examples, one simple and familiar, the other complicated and unfamiliar. The simple example is the getting of a square hit on a golf ball by getting a good follow through on the swing.103 This familiar piece of golf-pro advice is not based on backwards causation. One does not cause a square hit at \( t_2 \) by getting a good follow through at \( t_3 \). Rather, the golfer following the golf-pro’s advice utilizes the counterfactual dependency that exists between the two events: the earlier square hit event counterfactually depends on the later follow through, i.e., no follow through, no square hit. This backtracking counterfactual itself depends on there being a certain underlying causal structure, namely that of an epiphenomenal fork:

\[
t_1 \quad \text{psychological set} \quad t_2 \quad \text{square hit} \quad t_3 \quad \text{good follow through}
\]

The common cause of both the square hit and the good follow through is a “psychological set” of getting a good follow through; as it turns out, this “set” causes a square hit as well as the good follow through aimed at. Knowing this, the golfer can get a square hit by getting a good follow through.104 His means, in other words, to the end of getting a square hit, is his later act of getting a good follow through. And he is responsible (praiseworthy in this case) when he achieves a square hit in this way.

The complicated example is what I call the case of the paralyzed patriot.105 Imagine that the alerting of Paul Revere at the start of the

---

104. Such examples show that the “by” relation of means to end is not necessarily causal. See Michael S. Moore, Act and Crime: The Philosophy of Action and Its Implications for Criminal Law 100–01 (1993) [hereinafter Moore, Act and Crime].
105. See Michael S. Moore, Renewed Questions About the Causal Theory of Action, in Causing Human Actions: New Perspectives on the Causal Theory of Action 40 (J.H. Aguilar & A.A. Buckareff, eds., 2010); Michael S. Moore, Libet’s Challenge(s) to
American Revolution went like this. By pre-arrangement, the signal as to the route to be taken by the British troops out of Boston is “one if by land, two if by sea.” The rebel who is to give the signal from the Old North Church is paralyzed by his wounds and cannot move his limbs to fire up the light. Luckily for him, however, a 21st century mind/brain interface machine has been set up so that the brain state precursors of his intentions and his willings will be registered by the light in question. This means that if he wills one movement of his finger, the light goes off once, and if he wills twice, the light will go off twice. This, without his finger moving (he is paralyzed, remember). Crucially, some neuroscientists have told us,\textsuperscript{106} the brain events in question occur between one-half to nine seconds prior to his willing the movement of his finger. Such brain events are conceptualized as predictors of his willings, but not constitutive of such willings themselves.

With all these assumptions, we again have an epiphenomenal structure:

\[
\begin{align*}
&\text{t}_1 &\text{t}_2 &\text{t}_3 &\text{t}_4 \\
&\text{light goes off} &\text{rebels warned} \\
&\text{brain events} \\
&\text{wills movement of finger}
\end{align*}
\]

If the paralyzed patriot knows of this structure, and uses it to warn the rebels, then I take it he is responsible for alerting the rebels. This, despite the backtracking counterfactual dependencies (between the willing and the brain events, and between the willing and the lighting) that are involved. He doesn’t cause the rebels to be alerted; but he has nonetheless alerted the rebels, and is responsible for doing so, by virtue of his knowing use of this structure.

Thus, culpability principles limit counterfactual-based responsibility ascriptions when they should, which is most of the time; and they do not limit such responsibility ascriptions when they shouldn’t, which are these occasional backtracking and epiphenomenal cases, as well as the remote evil


\textsuperscript{106} Michael S. Moore, \textit{The Challenges of Contemporary Neuroscience to Desert-Based Legal Institutions}, \textit{29 Soc. Phil. & Pol’y} 233, 251 (2012).
manipulator cases. Correct responsibility ascriptions do not want or need more limits than this, in particular, they do not need Ferzan’s and Hitchcock’s flat ruling out of backtracking counterfactuals.

III. CAROLINA SARTORIO

Professor Sartorio in her careful and focused analysis engages me on two points, one of which overlaps with some of Professor Ferzan’s concerns.\textsuperscript{107} This is the worry that I have not shown that there is a moral difference between counterfactual dependence and causation and, because of this, I have not shown that the moral difference between acts and omissions is grounded in the natural difference between causation and counterfactual dependence. Sartorio’s second worry is whether the moral difference between acts and omissions is such as to generate an asymmetry in the legitimacy of consequentialist justifications, an asymmetry whereby omissions may be more easily justified than actions.

As to the first of these worries: like Ferzan, Sartorio asks how I justify my belief that counterfactual dependence generates, on average, lesser blameworthiness than does causation. She asks: “why think that this thesis is true?”\textsuperscript{108} Sartorio anticipates the response I earlier made to Ferzan’s like question, a response based on an inference from the perceived lesser blameworthiness of omissions versus actions. Sartorio queries whether the claimed moral difference between counterfactual dependence and causation is the best explanation for the conceded moral difference between omissions and actions. Perhaps, she suggests, this latter difference is better explained in terms of the ontological difference between acts and omissions: acts are events whereas omissions are absences of any instances of a type of event.\textsuperscript{109}

Sartorio recognizes that this natural difference, the ontological difference, can better explain the moral difference between acts and omissions only if she shows that the ontological difference in fact makes some moral difference.\textsuperscript{110} She declines to pursue this, however. Yet if we were to pursue it, wouldn’t we start with the differential stringency of

\begin{thebibliography}{11}
\bibitem{107} See Sartorio, \textit{supra} note 83, at 435–36.
\bibitem{108} \textit{Id.} at 438.
\bibitem{109} \textit{Id.} at 441. I recognize that the moral difference between acts and omissions might be grounded in the ontological difference between these two items and not in the causal difference between them. Moore, \textit{Causation and Responsibility}, \textit{supra} note 1, at 77 (”[T]his is arguable, depending on whether it is causation or notions of general ontology that rule out negative relata . . . ”).
\bibitem{110} Sartorio, \textit{supra} note 83, at 439–40.
\end{thebibliography}
positive versus negative duties in ethics? Our negative duty not to $A$ (kill, for example) is stronger than our positive duty to prevent $A$-ing (a killing, for example). Can we separate out the role played by the ontological difference versus the role played by the relational difference in accounting for this differential stringency of duties? We do greater wrong (violate a more stringent obligation) if we kill rather than fail to prevent a killing. Is this because killings are events, and omissions to save (absences of preventions) are not? Or is this because killings involve causings of death whereas absences of preventions only involve necessary conditions for deaths? How are we to tell which of these two natural differences makes the moral difference? Particularly, how are we to tell this, when it is the ontological difference that largely explains why there is a relational difference?\footnote{See Moore, Causation and Responsibility, supra note 1, at 444–45.}

Given the universal co-occurrence of both of these natural differences in all act/omission pairs, we need some non-act/omission contrasts to isolate the moral difference-making potential of each of these natural differences. Sartorio supplies this when she examines my experiential argument from guilt.\footnote{See Sartorio, supra note 83, at 439.} She imagines two cases, one where a causer of harm discovers that his act wasn’t really necessary for the harm to occur because he discovers that someone or something else would have caused the harm if he hadn’t, and the other where an omitter to prevent a harm discovers (by reading my book no less!) that he is not a causer of that harm. Sartorio intuits that the first will feel a lessened guilt but that the second will not; from which she infers that counterfactual dependence may be more blameworthiness-making vis-à-vis causation, not less, as I claim.

I have several reservations about this move by Sartorio. First, Sartorio has gerrymandered the claimed differential in emotional response. Case one is a case of factual discovery, that one was not necessary to the harm; case two is a case of conceptual revision, that omissions are not causes. No surprise that conceptual revisions generate less emotional heat than factual discoveries. Second, Sartorio still has an act/omission contrast here. Any difference of emotional reaction in the two cases will thus still be ambiguous between the ontological versus the relational difference grounding the moral difference here.

We can remedy both of these deficiencies by changing the pair of cases thusly: in the first case, you shoot someone to death. You thought that your act both caused the death, and was necessary for that death to occur. You discover, however, that your shot wasn’t necessary because someone else
stood ready to shoot the victim dead right then and there if you had not. In
the second case, you only think that your shot caused the victim’s death; in
reality you were shooting blanks. Your act of shooting was still necessary for
the victim’s death, however, and you know this; this is because the sound of
the shot was just enough (when combined with a thousand other sounds, each
of greater magnitude) to scare the victim to death.

Suppose that Sartorio is right about the first case, i.e., that you would
feel some relief/lessened guilt upon learning that your act wasn’t necessary
for the death even though still causative of that death. Would you also feel
some relief/lessened guilt upon learning that your act wasn’t the cause of the
death, although the death still depended counterfactually on your act? My
guess is that you would. Now the hard question: which would lessen guilt
more, the discovery that you were not necessary (the first case), or the
discovery that you were not a (non-\emph{de minimis}) cause? I don’t know about
you, but I’d rather hear that I didn’t shoot him to death than that someone
else would have if I didn’t. My inference would thus be that being a cause
matters more to my blameworthiness than does being a necessary condition.

I turn now to the second of Sartorio’s worries. This, again, is the worry
whether the moral difference that causation makes includes a difference in
the legitimacy of consequentialist justification. I say yes,\textsuperscript{113} Sartorio says
no.\textsuperscript{114}

It will be helpful to the discussion that follows to be clear as to the
overall position on this issue that I develop in chapter 3 of my book. I do not
believe some of the things that Sartorio attributes to me, for example, that
\textsuperscript{“consequentialist justifications \ldots cannot legitimize strongly causing
harm”\textsuperscript{115} or that \textsuperscript{“it is not permissible to be a strong cause of a harm in order
to prevent more harm from being done.”\textsuperscript{116} Multiple factors combine to
determine the legitimacy of consequentialist justifications. Strongly causing
(versus not causing, or only weakly causing) is one such factor; but so is
intending (versus foreseeing or risking). So also is acting (versus omitting), if
this is an ontological distinction rather than a causal one. So is strong (versus
weak or non-existent) counterfactual dependence, in the “almost dead” cases.

Attending to the combinatory nature of the various factors here will
render it non-problematically true (for me as well as for Sartorio) that “there
are some instances of doing harm for which consequentialist justifications

\textsuperscript{113.} \textsc{Moore}, \textsc{Causation and Responsibility}, \textit{supra} note 1, at ch.3.
\textsuperscript{114.} Sartorio, \textit{supra} note 83, at 442–46.
\textsuperscript{115.} \textit{Id}. at 443.
\textsuperscript{116.} \textit{Id}. at 444.
seem acceptable.” So such statements cannot be a criticism of what I think; for they state what I think. Such attention will also blunt Sartorio’s pressing of a distinction between weakly causing a harm and not causing a harm at all. Perhaps the latter natural difference may make the moral difference (availability of consequentialist justification) only in combination with other natural differences, say that between intention and foresight. The combination of natural conditions foreclosing or permitting consequentialist justification need not be criterial, i.e., such that the absence of act, intent, (strong) cause, or (strong) counterfactual dependence is sufficient for permissibility, or that the presence of each such factor is sufficient for permissibility. The mode of combination of these natural conditions may be more criteriological, i.e., the presence of all of them is sufficient for permissibility and the absence of all of these is sufficient for permissibility, but for cases where some factors are present while others are absent, subtle differences (like those between strong cause and weak cause, or between weak cause and no cause) may make a difference to permissibility. I endorse this criteriological possibility explicitly in my book.

Still, let me put this general point aside and deal specifically with the redirection cases, since these are the entire focus of Sartorio’s discussion. There is still some further brush clearing to be done, however, which will be specific to these cases: (1) I don’t think that the redirection cases are cases where the actor doesn’t cause the harm the redirected threat causes. (2) Nor do I think that the degree of causation here necessarily or even usually falls below some de minimis threshold of contribution that marks its eligibility to be counted as a cause for blameworthiness assessment when justification is not in issue. (3) Nor do I think it matters whether we call redirected trolley (rockets, floods, crashing airplanes, etc.) cases as cases of allowing or not; here I gather Sartorio ultimately does not think so either. (4) Finally, it also is not the case that I think the new threat/redirected threat distinction is always a serviceable proxy for degree of causal contribution. Often it is serviceable enough, but sometimes it is not;

117. Id. at 442.
118. Id. at 443–45.
119. MOORE, CAUSATION AND RESPONSIBILITY, supra note 1, at 50–51.
120. Sartorio, supra note 83, at 443–44.
121. Id. at 444.
122. Id. at 442.
123. Id. at 443.
124. Id. at 445.
and at those latter times we should go directly to what matters, strength of causal connection.

This brush cleared, the interesting question Sartorio raises is whether my distinctions allow me to distinguish the redirection cases where consequentialist justification is generally thought to be permissible, for instance the standard trolley-rocket-flood-airplane cases, from the cases where it is generally thought that consequentialist justification is impermissible, like Judith Thomson’s example of bumping a fat man off the bridge to stop the threat.\textsuperscript{125} Both sides of this comparison are worth attention because each are puzzling. Thomson, for example, was puzzled about why simple redirection made for permissibility,\textsuperscript{126} and she should have been puzzled about why bumping her hypothetical fat man is impermissible because her own account of this, in terms of there being an independent rights violation here,\textsuperscript{127} was such an obvious non-starter.

Some philosophers, such as Larry Alexander and Chris Hitchcock, would explain the impermissibility of using the fat man as a barrier in terms of Kant’s third formulation of the categorical imperative, “never use another solely as a means but only as an end.”\textsuperscript{128} There is a physical consumption of the fat man that is a visceral using up of him, in a way not found in the ordinary trolley case, where a workman is trapped on the line onto which the trolley is redirected. My own view here is that “using” is either redundant or wrong as a criterion of permissibility. It is redundant if using amounts to no more than acting (not omitting) so as to strongly cause (not weakly cause or not cause at all) harm to the person used, while intending (not merely foreseeing or risking) that harm as a means to some good end. If “using” means no more than, “acts strongly causing an intended harm,” then it adds nothing to the act-intent-cause factors already in play in my own analysis in chapter 3 of my book. Alternatively, if “using” requires something more—a physical consumption of the victim that is of benefit to the user, for example—then I think it is not a good criterion here. In the lifeboat cases—where one person is eaten to save the rest from starvation—I take it the one

\textsuperscript{126} \textit{Id.} at 1408.
\textsuperscript{127} \textit{Id.} at 1409.
has been *used* in this sense, yet those are cases of permissible consequentialist justification (by my lights, at least). 129

Sartorio herself proposes an account of the difference in the redirection cases in terms of the *breadth* of the causal connection between defendant’s act and the harm, rather than in terms of the *strength* of that connection, as does my account. In her view, the standard trolley cases involve causing “death to happen in a particular way or through a particular route,” whereas the fat man variation involves acts that “cause[] the death to happen,” *tout court*. 130 The distinction proposed is drawn in terms of the generality of the state of affairs caused.

Sartorio is careful not to commit herself to the nature of causal relata, (here at least) leaving open whether they are whole, Davidsonian events, facts, tropes, or states of affairs. Whatever they are, they can be more or less particular, and it is this that she suggests has a bearing on whether consequentialist justifications are available. This is a puzzling suggestion, partly because I don’t see the moral relevance of generality, but even more because I do not think the metaphysics works, even lightly sketched as it is. The view of relata I urge in the book is that they are at bottom states of affairs; event-cause talk is derived and constructed, on my view, being an elliptical expression of states of affairs cause talk. 131 The upshot relevant here is that in the rejoining track case, Sartorio imagines both that the flipping of the switch caused the death of the one trapped workman to be from his left side (states of affairs talk), and that flipping caused his death *tout court* (events talk). On my metaphysics of causal relata there would be no difference between this case and the fat man case because in the latter case one could talk equally as well about causing a particular state of affairs or about causing the event in general. 132

So what is my resolution of the fat man off the bridge case? Sartorio anticipates one response I might give here, that the pusher of the fat man is a more substantial cause than is the switchman. Sartorio, in rejoinder to my anticipated reply, imagines that the switch requires great force to turn, whereas the fat man only requires a little push, teetering as he is at the edge.

---

129. *See* MOORE, CAUSATION AND RESPONSIBILITY, *supra* note 1, at 65–68 (discussing the lifeboat cases, and others of the “almost dead” category).

130. Sartorio, *supra* note 83, at 446.

131. MOORE, CAUSATION AND RESPONSIBILITY, *supra* note 1, ch. 15.

132. I also suspect that Sartorio’s conclusion demands a counterfactual theory of the causal *relation* to sustain it, contrary to what I argue at length in my book.
These suppositions make it difficult to characterize the switchman as a small cause but the pusher as a more substantial cause, as Sartorio intends.133

The factor that reveals itself in the fat man case is one that I neglected in my book and is of interest for the entire class of redirection cases. The factor is related to counterfactuals, as is also true in the almost dead cases, not to causation. It is what tort lawyers used to call the “zone of danger,” and what philosophers would characterize in terms of closeness of possible worlds. In the ordinary redirection cases such as the switchman case, the victim killed by the turning of the trolley was already in the “zone of danger” of the runaway trolley in the sense that, had the trolley not been switched, still it would have been a “near miss” for him. He was someone who could have been killed by the trolley in the sense that, in a possible world close to the actual world, with the actual world being one where he is not killed because the trolley is not turned, he would have been killed by the trolley. The same is true of all the ordinary redirection cases: the citizens of Sussex are potential victims of the German rockets, the persons in their homes are potential victims of a crashing Air National Guard fighter plane, the farmer and his family are potential victims of a flood headed down the river next to their farm. If no redirection had been done by the defendant in all of these cases so that the trolley, rockets, airplanes, or floods would have hit some other, more numerous group of people, these individuals nonetheless were within the class of those potentially suffering the whims of fate in nature’s lottery. The redirection merely redistributes the loss from some (more numerous) members of that class to other (less numerous) members of that same class. This is not a causal distinction, but a counterfactual one (as it is in the almost dead cases), here based on the differential closeness of possible worlds.

The fat man sitting on the bridge is not in this zone of danger. If he is not pushed, so that the trolley runs its course to kill the five trapped workmen, he does not have a “near miss” experience. He was safe from this threat. But change his situation so that he does come within the class threatened by the trolley. For example, make the vibrations of the runaway trolley such that he already is in serious danger of being bumped onto the tracks by vibrating natural objects on the bridge. Or make it the case that the tracks curve under the bridge on which he sits so that the runaway trolley could easily jump up high enough to kill him. Then pushing him onto the tracks to save the five becomes permissible. Although these dangers were not in fact actualized in

133. Sartorio, supra note 83, at 445.
134. See Moore, CAUSATION AND RESPONSIBILITY, supra note 1, at 75–76.
the world in which the fat man was not pushed, they could have been with but a slight change of that world. In which case, too, we could redirect the danger, from some larger number of members of the class threatened, to the one who is also in that class.

This was not said in my book, where I solely relied on degrees of causation to characterize the redirection cases. Now I think both causal and counterfactual notions are in play here, and I thank Professor Sartorio for forcing me to rethink these cases.

IV. CHRISTOPHER HITCHCOCK

There are a number of things to admire about Chris Hitchcock’s commentary on my book. One is the fair assessment of the book’s ambitions in metaphysics and law, and to some extent, in ethics, which is where he begins. Another is his accurate summary of the book, although he of course emphasizes the part of the book most germane to his own interests, that dealing with the counterfactual theory of causation. Hitchcock also treats us to an accessible summary of his own views on the metaphysics of causation, views worked out by him over the course of his career. These views include the idea that the relata of the causal relation are variables (in his sense of that word); that the basic causal relationship is the kind of counterfactual (or probabilistic counterfactual) that remains stable (or would remain stable) under real (or hypothetical) interventions; that our concept of this basic causal relationship is pluralistic along various dimensions; and that using “cause” as an honorific term designating some one variation or kind of causal relationship is bootless and unmotivated.

What I particularly admire about Hitchcock’s contribution is his willingness to engage in some interdisciplinary scholarship of his own in the body of his paper. He is willing to look in fields not his own, such as law and ethics, to see what might be the needs of those fields in their uses of causation. One of the instances of this is his concession that morals, and the law built on it, cannot use a notion of causation that Hitchcock as a metaphysician would otherwise favor, that of (what he calls) “causal dependence.” As he rightly sees, “unless one is a hard-core utilitarian . . . one

---

135. But it is related to the “same threat” criterion utilized by Thomson, supra note 125, at 1412–13.
137. Id. at 378–83.
138. Id. at 383.
139. Id. at 383–90.
thinks that the basic relation of causal dependence is not the one that is central to moral evaluation.”

The main instance of Hitchcock’s willingness to “go interdisciplinary” is to be found in his effort to nudge along the ball I put in play in my book, about the moral difference it makes whether a harm is connected to an act by relations of counterfactual dependence, or whether such connection is constituted by causation (in my sense, not Hitchcock’s “causal dependence” sense). Hitchcock thus undertakes the showing asked for from me by Ferzan and Sartorio, a showing of how it could be that this difference in natural relationships could make a difference in moral blameworthiness.

Hitchcock uses the cases I categorized as cases of prevention, omission, and double-prevention (“P, O, DP”) as his stalking horse for when counterfactual dependence is the exclusive, non-causal desert-base, and attributes to me (accurately) four theses about these cases.

He then speculates what the differences might be (between these cases where responsibility is based on counterfactual dependence and cases where responsibility is based on causation) that could plausibly be thought to ground a moral difference between these two relationships. As I would reorganize them, he comes up with seven possibilities, having to do with: (1) the necessity of there being counterfactual dependence—“yes” for P, O, DP, “no” for acts causing; (2) the ability of the relation to exist in cases where some extraneous factor not originating with the defendant is itself sufficient to cause the harm—“yes” for acts causing (viz, pre-emptive and overdetermining causes), “no” for P, O, DP (where there are no pre-empting or overdetermining dependencies); (3) the presence of a continuous causal process—“yes” for acts causing, “no” for P, O, DP; (4) the dependence of fineness of detail in the harm on a like fineness of detail of the defendant’s act—“yes” for acts causing, no for D, O, DP; (5) the need for some other factor (besides defendant’s action) to contribute before the harm could have occurred—“yes” for P, O, DP, “no” for acts causing; (6) the reliance on fortuity by anyone planning to bring about some harm—“yes” for P, O, DP,” “no” for acts causing; and (7) the burden of time, energy and resources consumed by a duty to A or not to A—heavy in the cases of omission where there is a duty to A, lighter in cases of acts causing, preventing, or double-preventing where there is not a duty to A.

Hitchcock is best understood to be offering four sorts of reactions in his treatment of these seven differences. The first is to deny that there really is

140. Id. at 392.
141. Id. at 394.
any natural difference between the two relations, at least in all cases. This is the tack he takes about (2) and maybe even (1) above. Hitchcock poses a series of six double-prevention cases where he believes that “it is clear what the relations are,” and more specifically, he thinks, there are pre-emptive and overdetermination relations exhibited in such cases. Just one of these examples: defendant ties up a lifeguard who was about to save victim, and victim drowns; but if defendant had not tied up the lifeguard, “backup” would have tied up the lifeguard, starting later but doing so more quickly, so that victim would have died precisely the death he in fact died anyway. Hitchcock intuits we will say this is a case of pre-emption: defendant is fully responsible, and backup is not, because defendant pre-empts backup.

Hitchcock does not give any concurrent overdetermination counterexamples, but they are not difficult to construct. For example, defendant and backup both intend for victim to drown, and each tie up the lifeguard simultaneously. Defendant locks the lifeguard’s feet to a post, and backup locks the lifeguard’s hands to a rail. Since both are blind, however, neither notices the other’s activity. Hitchcock, I am guessing, would regard this as an overdetermination double-prevention in which both backup and defendant are fully responsible for victim’s death.

Hitchcock also does not give any simple prevention examples, but these too are easily constructed so as to create both pre-emptive and overdetermination intuitions as compelling as those in double-prevention cases. More significant is Hitchcock’s omission to produce any omission counterexamples, for there are none to be produced. Notice the feature of Hitchcock’s cases that give rise to intuitions of pre-emption or of overdetermination; it is the causal structure of prevention and double-prevention that I argue in my book is always present in such cases. More specifically, in the first variation, defendant’s act causes the lifeguard to be immobilized and thus pre-empts backup’s act from causing the lifeguard to be immobilized; in the second version, defendant’s act and backup’s act concurrently cause (in an overdeterminative fashion) the lifeguard to be immobilized. There are pre-emptive and overdeterminative intuitions in such cases only because of the pre-emptive and overdeterminative relations attached to these underlying causal structures.

This does nothing to establish that two or more counterfactual dependencies can exist in such a way that one can pre-empt the other, or that

142. Id. at 403.
143. Id.
144. MOORE, CAUSATION AND RESPONSIBILITY, supra note 1, at 454–55, 461.
two or more can exist in an overdetermination situation. For how could that be? Logically, defendant’s act \( a \) cannot be necessary to some harm \( h \) if backup’s act \( b \) is sufficient for \( h \). This is why there are no analogous omission examples of pre-emption or overdetermination, despite what Hitchcock claims.\(^\text{145}\) For with omissions there is no underlying causal structure on which the counterfactual dependence supervenes, as I argue in my book that there is for preventions and double-preventions. For omissions, there is only counterfactual dependence, and this cannot enter into such second-order relations, such as pre-emption or overdetermination.

My guess is that Hitchcock, on reflection, would not disagree with the foregoing. But he might still stick with his conclusion “that in such cases [of prevention and double prevention, but now, not omissions], there can be liability for the outcome in the absence of counterfactual dependence.”\(^\text{146}\) Even so restricted so as to exclude omissions, I don’t think this conclusion is so clear, because the cases that Hitchcock has constructed pry about two things that are together in more typical cases of prevention and double prevention. Usually there is both an underlying causal connection (between the defendant’s act \( a \) and some state \( s \), where \( s \) is incompatible with harm \( h \) occurring), and counterfactual dependence of \( h \) upon \( a \). If we take away the underlying causal mechanism on which the counterfactual dependence supervenes, we know that there can still be full responsibility. Liability in ordinary omission cases shows us that. But if we take away the counterfactual dependence and only have the causal contribution to state \( s \) by the pre-empting or over-determining actor, it is not clear to me that these are

---


\(^\text{146}\) Hitchcock, supra note 32, at 403.
cases where non-inchoate responsibility is appropriate. For in such cases (let me call them “Hitchcock cases”) there is neither a causal connection nor counterfactual dependence between the actor’s act and the ultimate harm. What, then, is the natural relation that connects the act to the harm and that is a desert-basis for responsibility? The only seeming possibility for such a relation is: causing some state $s$, where $s$ is incompatible with $e$ occurring, where if $e$ had occurred it would have prevented harm $h$ from occurring. Where $s$ is “close” (as I use that term in the book) to either $h$ or the absence of $e$, then we should treat the actor as a causer; this means the preemptive and over-determination distinctions should be applied, so that the pre-empting or over-determining cause of $s$ should be treated as the cause of $h$. But Hitchcock stipulates that his cases are not of this kind. But then there is no causal relationship to $s$ that can do the work of allowing us to treat the actor as a causer of $h$; and, there being no counterfactual dependency of $h$ on the act, I see no basis for liability for the completed crime of $h$-ing.

The second kind of response that Hitchcock makes to these seven natural differences between acts causing harm and P, O, and DP is to admit the existence of the natural difference but deny its moral significance. This is one of the responses he makes to differences (3)–(7). As to (3), Hitchcock imagines a telekinetic killer who causes death by thinking bad thoughts of his victims. This is supposed to show that continuous causal processes (difference (3)) are a morally inert difference. Yet I have a very hard time in getting a handle on this thought experiment. If there is indeed an “unusual mechanism” at work in the telekinesis cases, then how are these not continuous causal process cases? More fundamental to Hitchcock’s thought here, perhaps, is just the unintelligibility (to him and others, such as Sartorio) of mechanistic connection making a moral difference. I think he finds intelligible (and maybe even plausible) that being connected to a harm via counterfactual dependence is blameworthy—for this connection is the “difference-making” connection that Sartorio plausibly enough thinks, “is a very significant relation.” So at bottom perhaps Hitchcock is expressing a general bafflement as to how physical process connection can be morally significant too.

---

147. Moore, Causation and Responsibility, supra note 1, at 455, 457, 461–64. I explain “closeness” at greater length in Michael S. Moore, Four Friendly Critics, 17 Legal Theory (forthcoming 2012).
149. Id. at 399.
150. Sartorio, supra note 83, at 438.
There is surprisingly little to say to skeptics about particular desert bases.\textsuperscript{151} Why is a voluntary act required for a punishable kind of blameworthiness rather than being punishable for bad character, bad mental states, or culpable omissions?\textsuperscript{152} Why does intention make one more blameworthy than foresight?\textsuperscript{153} Why does causation matter to blameworthiness at all,\textsuperscript{154} be it a true causation of continuous physical process or Hitchcock’s relation of “schmausation,”\textsuperscript{155} which is non-backtracking counterfactual dependence? The beginning of wisdom is not to demand too much by way of justification here, other than a good fit with a range of intuitions about other desert bases that (together with the desert base being questioned) form a coherent, systematic whole.\textsuperscript{156}

I rehearsed in my book why I thought that being the “author” of a harm gives rise to a deep responsibility for that harm, and why, by contrast, being the “editor” who fails to prevent that same harm gives rise only to a lesser kind and degree of responsibility.\textsuperscript{157} I don’t think these metaphors—or others in terms of owning the harms we cause, having our identity depend on taking responsibility for them, having them written into our moral ledger, etc.—do much more than restate one’s conclusions. Still, it is fair to demand of any skeptic about some desert base or another, to show you his justification for his favored desert-base. Chris?

By-and-large this same response is due Hitchcock’s fourth, fifth, and sixth natural differences as well. It is a feature of continuous physical process causation that it transmits fineness of detail from cause to effect; that any act that is such a kind of cause of a harm doesn’t need to have help in bringing about that harm (although it can tolerate such help); that “authors” (causers) can do their work when they want to, but “editors” (omitters, for example) have to wait for authors to do some work before they have any harm-producing work to do. These natural differences matter morally only because they are part and parcel of a relationship that matters morally, viz., the continuous causal process relation that exists between a cause and an effect. These individual natural differences do not have to matter morally in the fashion that Hitchcock demands—say, as together making causation the relation of choice for criminals who wish elaborately detailed modes of death.

\textsuperscript{151} \textit{See Moore, Causation and Responsibility, supra note 1}, at 23–24.
\textsuperscript{152} \textit{Moore, Act and Crime, supra note 104}, at 53.
\textsuperscript{153} \textit{Moore, Placing Blame, supra note 68}, at 408–10.
\textsuperscript{154} \textit{See Moore, Causation and Responsibility, supra note 1}, ch. 2.
\textsuperscript{155} \textit{See Hitchcock, supra note 32}, at 383.
\textsuperscript{156} \textit{Moore, Placing Blame, supra note 68}, at 224–46.
\textsuperscript{157} \textit{Moore, Causation and Responsibility, supra note 1}, at 433–35.
for their victims, or who do not wish to share with others the “glory” of a completed wrong, or who are too impatient to wait for others or nature to give them the opportunity to do their desired crime. It is not that causation matters because these individual differences matter; rather, these differences matter only because, and in the sense that, such causation matters to moral blameworthiness.

Hitchcock’s seventh difference is a bit different. This difference has to do with the degree of burden that is involved in complying with a negative duty, a duty prohibiting an act causing, compared to the degree of burden that is involved in complying with a positive duty, a duty requiring an action that would prevent a harm. I am unsure whether Hitchcock regards this as a relevant natural difference that makes for the moral difference between acts causing harms versus omissions failing to prevent them, because he doesn’t say one way or the other. But in any case, I don’t think this natural difference underwrites the moral difference between causing versus omitting.

This difference, in terms of degrees of burden in complying, does make some moral difference, just not this moral difference. The burden of complying with positive duties is a loss of liberty, and that burden is greater for compliance with positive duties than for compliance with the corresponding negative duties. But this is a separate moral factor justifying why the law should by-and-large not punish omissions, as I have argued elsewhere;\textsuperscript{158} it should be added to the differential blameworthiness of actively causing, versus passively failing to prevent, some harm. The greater cost in liberty does not explain or underlie the differential blameworthiness of acts and omissions; it is a separate moral difference, separately adding to the force of the moral difference that we have been examining here.

The third kind of response that Hitchcock makes to any claimed moral salience of the seven natural differences (between acts causing harm and P, O, and DP) is to deny that there is such moral salience, or at least, that there is as much as I say there is: “Despite these differences between simple causation and prevention, omission, and double prevention, I think that the moral differences between them are not nearly as strong as Moore maintains.”\textsuperscript{159} Indeed, in double prevention cases Hitchcock seems to believe such moral difference to disappear entirely (“Moore’s claim of moral difference is particularly implausible in many cases of double prevention.”).\textsuperscript{160}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{158} Moore, Act and Crime, supra note 104, at 56–59.
\item \textsuperscript{159} Hitchcock, supra note 32, at 401.
\item \textsuperscript{160} Id. at 402.
\end{itemize}
\end{footnotesize}
Taking the last point first, Hitchcock omits any discussion of that subclass of double-prevention cases I call “allowings.” This is unfortunate, since I take these to be cases where the most dramatic moral difference exists between active causing and double-preventing. Indeed, these kind of double-preventings seem no more blamable than would be comparable omissions. Seeing this, then one can do what I do in the book, which is to pry apart the two aspects of allowings that make them so different in moral blameworthiness than active causings. If, as I tried to show, the baseline feature of allowing doesn’t do all of the moral work, then the double-preventions/cause distinction must be doing at least some of that work. The amount of the moral difference attributable to the cause/double prevention difference needn’t be so great as to be recognized in different categories of homicide, as Hitchcock suggests, only a difference of degree that could better be reflected in criminal sentencing.

As to the moral difference made by omissions, Hitchcock shifts focus and moves from a difference in moral blameworthiness to a difference in the availability of consequentialist justification. We thus don’t know whether Hitchcock joins James Rachel and others in thinking that failing to prevent a harm is, other things being equal, fully as blameworthy as causing that harm to occur. What Hitchcock does tell us is that the differential availability of consequentialist justifications is not in his view attached to causing versus failing to prevent but rather, to using another as a means. For the reasons I discussed with reference to Sartorio earlier, I think that the using/non-using distinction is either redundant to more basic distinctions, like acts causing versus omissions failing to prevent or intending versus foreseeing; or it is wrong.

To see this, imagine the following hypothetical. D could save V, who is trapped on a track in front of an oncoming, runaway trolley. D does not do so because he wants to save five others further down the track, to whom he also owes whatever duty he owes to V; and he knows that V’s corpulent body will stop the trolley even though the impact will kill V. Does D use V

---

162. Id. at 464–66.
164. Id. at 401.
165. See Moore, Act and Crime, supra note 104, at 49–59; Moore, Causation and Responsibility, supra note 1, at 55–59, 447–49.
166. Hitchcock, supra note 32, at 401.
167. See supra notes 126–127 and accompanying text.
impermissibly in such a case, so that he cannot justify his inaction by its
good “consequences”? Or would D be using V if his reason for omitting to
save V was that V’s organs could legally be harvested to save five people
once V was dead? If there is no using in such cases by D, then the relevant
sense of “using” depends on the independent moral significance of a
causing/omitting distinction; if one says that there is a using here, because of
the physical consumption of the body of V for the benefit of others, then one
(by my lights) is wrong about the justifiability of the action.

Hitchcock’s fourth sort of response to any attaching of moral
significance to these seven natural differences is to accuse me of a kind of
attribute error. Even if there are the natural differences which I think there
are; even if there are the moral differences I think there are; and even if the
natural differences make these moral differences; still, Hitchcock thinks, this
won’t show that it is (Moorean) causation that grounds these moral
differences.

To grasp Hitchcock’s thought here requires that we repair to his
pluralistic causal metaphysics. Both in his essay in this volume,168 and at
greater length elsewhere,169 Hitchcock reveals himself to be something of a
pluralist and a pragmatist about causation. There are a number of different
dimensions along which we might slice the causal pie, and along any one of
these dimensions there will be several kinds of causal relations.170 It is thus a
mistake—the simple-minded kind of mistake made by one limited to a highly
parochial vision of when we make causal ascriptions—to simply conclude
one way or the other about what are the causes of musical sounds or of
inflation;171 for it all depends on what you want to know about such
phenomena that we would classify as “causal.”172

As applied to our use of causation to ascribe moral responsibility,
Hitchcock’s pragmatic, pluralistic tendencies incline him to throw cold water
on debates, for example, about whether omissions can really be causes.173
This is, Hitchcock tells us, “a purely verbal dispute,”174 like the dispute about
whether to call the turning of the knob adjusting the treble on his stereo a

168. See generally Hitchcock, supra note 32 (discussing causation of the metaphysical
bases of liability).
169. See generally Christopher Hitchcock, Of Humean Bondage, 54 BRIT. J. FOR PHIL.
SCI. 1 (2003).
171. Id. at 387–90.
172. Id. at 384–85.
173. Id. at 393–96.
174. Id. at 397.
cause of the music the stereo is producing.\textsuperscript{175} For once we know all the facts—for Hitchcock in moral contexts, these would be facts about the seven discrete natural differences that individually make for a moral difference—then there is nothing more to know. Classifying these seven differences as causal differences does not change what they are and how they make a moral difference. “The bare fact that one type of case is classified as causation, while the other is not, does not do any explanatory work by itself.”\textsuperscript{176}

My answer to Hitchcock’s second kind of response is pretty much my answer here. It need not be in virtue of some other, more discrete differences that the difference between causing (in my sense) and the counterfactual dependence in cases of P, O, and DP, makes a moral difference. Indeed, \textit{vis-à-vis} Hitchcock’s seven more discrete, natural differences, it is not in fact by virtue of them making a moral difference that causing makes a moral difference. Quite the reverse: because causing makes for the kind of authorship/ownership of a harm that failing to prevent that harm does not, various aspects of causing (such as its physical nature, etc.) can be seen to make a moral difference.

I am guessing that Hitchcock in general thinks that smaller is better in the sense that more discrete aspects of phenomena always win out in explanatory competitions with more aggregative phenomena. Yet the reality is that success in these matters is where you find it. Sometimes the larger entity or property does the explanatory work, rather than its constituent parts.\textsuperscript{177} I have argued that this is true about causation \textit{vis-à-vis} any of its more discrete properties.

\textbf{V. JEFFREY BRAND-BALLARD}

Professor Brand-Ballard focuses his comments on my argument that greater causal contribution to a harm merits greater moral blameworthiness for that harm.\textsuperscript{178} He focuses particularly on my epistemic argument for this conclusion. This argument is based on the evidential inference I draw from

\textsuperscript{175} Id. at 387–88.
\textsuperscript{176} Id. at 399.
the psychological fact that we feel greater guilt to the moral fact that we have greater guilt. Because the argument structure of Brand-Ballard’s contribution is complicated, I shall first spend some time laying out my own argument structure and where within it that Brand-Ballard wishes to make his challenges.

The normative relationships that I envision here are instances of the kinds of relationships I think generally to exist on responsibility issues: some metaphysical difference grounds (justifies) some moral difference, and this moral difference grounds (justifies) some legal difference. More specifically here, I think that the metaphysical difference between causing and not causing some harm grounds a moral difference in degree of blameworthiness, and that this difference in moral blameworthiness grounds the difference in legal sanctions attached to completed crimes versus inchoate crimes, such as attempts. This can be illustrated as follows:

<table>
<thead>
<tr>
<th>Metaphysics</th>
<th>Morals</th>
<th>Law</th>
</tr>
</thead>
<tbody>
<tr>
<td>(1) Greater causal contribution</td>
<td>(2) Greater blame-worthiness</td>
<td>(3) Greater punishment</td>
</tr>
</tbody>
</table>

Brand-Ballard throughout his article mainly questions my move from (1) to (2). However, in the later going, as we shall see, he also questions my move from (2) to (3), urging in effect that we can go straight from (1) to (3) without going through (2). It is therefore important that we be clear about what I claim for each of these relationships.

Regarding the move from (1) to (2), causation of a harm attempted or risked does not simply increase blameworthiness. It is causation as it is also reflected in the content of culpable mental states that increases blameworthiness. Take a felony-murder example. Suppose a defendant $D$ engages in burglary of an unoccupied dwelling, when a homeless intruder $V$ happens to be overnighting in the building. The act of breaking in causes $V$ to die of fright, an event neither foreseen by $D$ nor foreseeable to him. (It’s my hypothetical, so I can tell you this with certainty.) By my lights, the causing of the death of $V$ in no way increases the blameworthiness of $D$. Only when the death of $V$ was intended, foreseen, or consciously risked by $D$ when he broke in, does the blameworthiness for his act of breaking-in increase. This is pretty standard fare in discussions of responsibility, and is reflected

179. Moore, Placing Blame, supra note 68, at 192–93; Moore, Causation and Responsibility, supra note 1, at 20–21.
throughout Anglo-American criminal law (with occasional exceptions, such as the felony-murder rule).

Regarding the move from (2) to (3), this move by me is hostage to the correctness of some desert-based punishment theory. A retributivist about punishment such as myself will think that greater blameworthiness is the only reason that could justify greater punishment. A mixed theorist about punishment will think that greater blameworthiness must at least be a part of any mix of reasons justifying greater punishment; in addition, for the mixed theorist as for the retributivist, the greater punishment so justified must not exceed the limit set by greater blameworthiness. Only a pure utilitarian about punishment denies any relationship between (2) and (3), for only the pure utilitarian believes that moral blameworthiness is irrelevant to punishability.

With these clarifications, we can then proceed to my epistemic argument for why I am justified in believing that greater causal contribution grounds greater moral blameworthiness. My epistemic argument has two parts. First, there is the part that proceeds from a psychological fact: greater causal contribution to a harm causes greater guilt feelings in an actor, and that fact is best explained by the fact that greater causal contribution grounds greater moral blameworthiness (that is, by the connection of (1) to (2)). Put more simply, the best explanation for why we feel more guilty when we have caused harm than when we have not, is because we are more guilty in such situations.\textsuperscript{180} Second, there is the part proceeding from a moral fact: it is virtuous to feel greater guilt when one has culpably caused some harm, in comparison to cases where one has not, and that fact—on certain assumptions about the overall coherence of morality—is best explained by the fact that greater causal contribution grounds greater moral blameworthiness (that is, the connection of (1) to (2)). Put more simply, the fact that we are more virtuous if we feel greater guilt at causing harm, is best explained by the fact that we are more guilty when we cause harm.\textsuperscript{181} Putting both parts together: the best explanation for why we feel greater guilt for causing harm and for why such feelings are virtuous, lies in the fact that we are more guilty, that is, deserving of greater moral blame. It is thus both the psychological fact that we feel such guilt feelings together with the moral fact that it is virtuous to do so, that evidences that we are guilty in this case.

Professor Brand-Ballard only focuses his attention on the psychological part of this argument, proposing explanatory competitions only with that part.

\footnotesize{180. \textit{Moore, Causation and Responsibility}, supra note 1, at 30–33, 434–35; \textit{Moore, Placing Blame}, supra note 68, at 229–33.}
of my argument. This means that even if he were to succeed, his victory would be at best a partial one. I now want to show that even such partial success is to be doubted.

There are three arguments directed against my views here by Brand-Ballard. The first two of these go directly after the psychological fact from which my (psychological branch of the) inference to the best explanation argument proceeds. Brand-Ballard disputes that we always do have greater affect of any kind when we cause harm, as opposed to merely risking or trying to cause it; and he denies that such greater affect as we do feel in such cases is guilt, as opposed to some other emotion. He thus raises both a quantitative and a qualitative objection to my psychological premise.

Brand-Ballard frames the quantitative objection in terms of a familiar hypothetical: you culpably join a five-man firing squad that executes an innocent victim; only one of the five members had live ammunition, while the other four fired blanks. You feel guilty for your role in this. Brand-Ballard ventures that you would feel no greater guilt upon learning that it was you who shot the live round that killed the victim. He also believes that you should feel no greater guilt upon leaving this fact. Analogously, he ventures that if you did believe that you were the one who had fired the live round, finding out that you were not would cause you no relief, no sense of having had a “near miss” with the serious guilt that otherwise was yours to suffer. Nor should such discovery cause you any such relief, according to Brand-Ballard.

Let us examine Brand-Ballard’s descriptive claim first. Is it credible that he would not “feel guiltier if I learned that my rifle happened to contain the bullet”? Is it credible that you would not “feel less guilty about your participation if you were to learn . . . that you had actually fired a blank”? No one is infallible about his actual feelings on a given occasion, still less about the hypothetical feelings he would have in imagined situations. But suppose we credit Brand-Ballard’s testimony about himself. He must be very different than the norm for humanity. After all, firing squads routinely have one blank distributed amongst them to give each member the possibility that

182. Brand-Ballard, supra note 178, at 323.
183. Id.
184. Id.
185. Id. at 324.
186. Id. at 325.
187. Id. at 324.
188. For some difficulties here, see Dudley Knowles, Unjustified Retribution, 27 Israel L. Rev. 50, 54–58 (1993).
he is not a causer of death. Unless this practice is irrational, more people must be like me than like Brand-Ballard; and I know I would feel greater guilt in case of discovery of causation, lesser guilt on discovery of none.

Firing squad scenarios are in any event not good thought experiments to test these matters. Notice that firing squads involve concerted activity, and any feeling of great guilt by those people who only fired a blank could stem from the vicarious responsibility actors-in-concert (accomplices) are often said to feel. To rid ourselves of this potentially distorting irrelevancy, change Brand-Ballard’s hypothetical: make it five individual snipers each intending to kill because separately ordered to do so by their commanding officer; none knows of the existence or activity of any of the others; each fires simultaneously at V. One thought his gun had misfired and then discovered that it had indeed fired, killing V. Another thought he had shot V dead, but then learned he had only shot a blank. Each of these two then also learned that the order to kill V that they each received was unjustified, so that it was a culpable killing. If I were the first of the two, my guilt feelings would increase; if I were the second, they would decrease. How about you?

Now turn to the normative branch of Brand-Ballard’s thought here. How does Brand-Ballard ground his normative recommendations about what we should feel? It can’t be that we shouldn’t feel more guilty because we in fact are not more guilty. For that would assume the conclusion being argued for by Brand-Ballard. Perhaps he is taking up a lance against my contention that feeling guilt is virtuous, and thus challenging the moral branch of my argument after all. Yet this is hard to square with what he says he is doing; he says that he has no challenge to make to “the epistemic reliability of guilt as evidence of culpability” because he feels my responses to any such challenge to be adequate. Since my defense of the epistemic reliability of guilt is based on the virtue of feeling such an emotion when appropriate, I take it Brand-Ballard’s normative recommendation is not based on Nietzschean grounds disparaging guilt as a virtuous emotion to feel.

I think what is surfacing here is Brand-Ballard’s generally antiretributivist stance, which I discuss in more detail below: I am betting that he doesn’t think there is anything good in the guilty suffering their deserved punishments or even in their ascertaining the extent of their deserved suffering, that is, their guilt. I infer this from what he says would be better

189. See Moore, Causation and Responsibility, supra note 1, at 318–19 (exploring vicarious liability of those acting in concert).
190. Id. at 30; Moore, Placing blame, supra note 68, at 145–47.
for the guilty to do: apologize to the victim’s family, offer them compensation (including perhaps the opportunity to kill the offender), carry on the victim’s work (in promoting human rights), or overthrow the dictator who got one to kill. Indeed, Brand-Ballard seems to think that doing anything is better than staring at your navel and narcissistically obsessing on the extent of your own guilt. I understand this argument—indeed, I have regularly heard the like of it over the years, directed at my retributivist views. I of course do not agree with it, but that is by-the-by here. Rather, the relevant point is that this is not an argument directed against greater guilt feelings evidencing greater guilt; rather, it is an argument that moral guilt (desert) shouldn’t matter to punishment.

Brand-Ballard’s qualitative objection to my epistemic argument leaves the intensity of the guilt we feel at harm causing for the question of whether it is guilt that we feel at all here. He recognizes that Susan Wolf has traveled down this road before, but he has an emotion distinct from Wolf’s “agent-regret” that he believes I mistake for guilt. This is what he calls anticipatory shame.

In a nutshell, the idea is that the greater affect we feel when we cause harm is due to our anticipation of the greater shame we will feel when others learn of our wrongdoing and react negatively to it. Brand-Ballard recognizes that we also anticipate some shame when we culpably try to cause, or risk causing, harm even when we fail; but two factors dampen the degree of shame anticipated: (1) we are less likely to be detected in our wrongdoing if we fail to cause harm, so any shaming reaction by others is less likely; and (2) people react less vigorously to inchoate wrongs than to completed ones. Brand-Ballard thus hopes to undercut the epistemic credentials of our heightened affect at completed wrongdoing by re-characterizing that affect as something having nothing to do with any judgment that we are guilty and deserve to suffer. On Brand-Ballard’s view, we are only fearful or worried about being socially sanctioned, that is, shamed.

Two things keep me from crediting Brand-Ballard’s recharacterization of what we feel when we succeed in causing a harm that we attempted or risked. One is the degree of calculating intelligence anticipatory shaming would require in order to exist. Brand-Ballard imagines that an offender “subconsciously imagines how others would react if they were to learn of her

192. Id. at 323–24.
193. Id. at 328. See Moore, Causation and Responsibility, supra note 1, at 31–33 (discussing Wolf’s argument).
194. Brand-Ballard, supra note 178, at 328.
195. Id.
offense, so she begins to feel the stirrings of the emotion [shame] that she will feel more intensely if and when her offense is discovered.”

In truth I do not find this psychology very plausible. A predictive belief that one will feel an emotion if certain conditions obtain is not the same thing as feeling that emotion; nor does the feeling often accompany such a belief. I can predict: that I will get angry if you do what I anticipate you doing; that I will suffer withdrawal if I stop taking the drugs I currently take; that I will be fearful if you in fact make the threat I anticipate that you may make; etc., without feeling now much of anything. Indeed, the more calculative the predictive belief must be, and the more removed is the state where I predict I will be feeling something, the more exclusively cognitive (versus emotional) would be my present psychological state. Brand-Ballard’s anticipatory shame can arise only after a calculation about the likelihood of getting caught, the likelihood of others’ reactions on learning of my wrong, and the likelihood of my reaction to their reaction. These are both highly speculative and quite removed possibilities. Even if there were such cognitive husbandry of our emotions going on when we succeed at causing harm, I doubt that there is much affective feeling in it.

Brand-Ballard attempts to defuse this objection by urging that “the argument from anticipatory shame does not presuppose that the malefactor consciously believes that she will encounter blaming behavior from others.” Rather, he tells us, there could be a “mental association” of causing harm and being shamed that operates without calculation or consciousness. This is possible but, I think, implausible for shame. Such non-calculating, direct association is more plausible for guilt, even though guilt also involves a cognitive judgment. But for shame, the content of the judgment calls for external perception and inference in a way that guilt does not.

My second doubt stems from the nature of the phenomenology that we experience when we cause harm to others. The eating at one’s sense of self-worth that virtuous, or even minimally decent, people feel at their own completed wrongs, is distinctive of guilt feelings; it is not distinctive of real shame, let alone anticipated shame. Shame is an emotion dependent upon others’ beliefs; guilt is an emotion free of such mirroring ourselves in others’ perceptions of us. With guilt we deal only with ourselves. Brand-Ballard again attempts to blunt my response here, urging that “the phenomenology of

196. Id. at 327.
197. Id. at 329.
198. Id.
anticipatory shame is very similar to that of guilt." Yet Brand-Ballard himself sees the difference here: "[t]o feel anticipatory shame is to hear the shaming voice of one’s community in one’s head, whether one agrees with it or not." Just so. With guilt the only voice one hears is one’s own.

The third (and last) argument Brand-Ballard directs against me is what he calls the “secondary-harm argument.” This argument is in the form of a rejoinder by him to a reply he anticipates from me. The reply by me that Brand-Ballard anticipates is to the “anticipatory shame” objection interposed by him to my argument from guilt feelings. The reply Brand-Ballard anticipates from me is that the only reason for which people generally shame harm-causers more than harm-attempters or riskers, is because harm-causers are in fact more culpable than harm-attempters or riskers. To this anticipated reply and to relieve himself of the undoubtedly anticipated shame Brand-Ballard would otherwise feel, he rejoins that one can better explain the greater shaming tendencies of people by virtue of the secondary harm attendant upon (primary) harm causing but less attendant upon attemptings and riskings.

The secondary harm attendant upon harm-causings, Brand-Ballard tells us, consists of the crimes others are inspired to do by the example of harm-causing crimes. While inchoate crimes can inspire others’ criminal activities too, “[i]nchoate offenses attract less attention than the corresponding completed crimes.” The thought is, the greater the publicity, the greater the probability of this kind of secondary harm.

Notice that if this argument went through, it would not only answer an anticipated reply by me to Brand-Ballard’s anticipatory shame objection to my experiential argument for differential culpability from differential affect, but also such argument by Brand-Ballard would actually by-pass the entire complicated dialectic he has imagined. For if the state should mete out greater punishment for harm-causers based on the greater secondary harm they cause, then Brand-Ballard has the conclusion he desires directly, rather than as a negation of my negation of his anticipatory shame argument: harm-causers should indeed be punished more, but not because they are more blameworthy than inchoate offenders.

Indeed, that seems to be the way Brand-Ballard sometimes frames his secondary-harm argument: he is “defending differential sanctions without

---

199. Id.
200. Id.
201. Id. at 331.
202. Id. at 326–27.
203. Id. at 334.
appealing to differential culpability.” If we suppose “that the secondary-harm argument is sound,” then “we can agree with Moore that causation makes a difference to justified sanctions, without agreeing that it makes a difference to culpability.” So one criticism of me stemming from the secondary-harm argument is that my appeal to differential blameworthiness is unnecessary to justify differential punishments between completed and inchoate offenders. Yet Brand-Ballard also retains the other, indirect criticism he thinks stems from the secondary-harm argument: the greater emotion we feel for causing harm is not so much guilt as anticipatory shame; “the harm-causer feels more of this emotion . . . than inchoate offenders feel because the community has a pro tanto moral reason to sanction her more.” The latter criticism has as its conclusion that my experiential argument for greater blameworthiness fails.

Neither of two criticisms stemming from the secondary-harm argument can succeed because that argument is unsound. To begin with, the argument seems unmotivated: if greater secondary harm gives the state more reason to punish, why doesn’t greater primary harm? By definition, completed crimes cause more primary harm than inchoate crimes; if “[t]he state has a pro tanto reason to punish a crime more severely the more that crime increases the probability of secondary harm,” why wouldn’t that be equally true for crimes that increase the probability of primary harm? In that case, the secondary-harm argument is unnecessary to justify greater punishment for primary harm-causers.

In any case, causing harm as such is not a reason to punish; as we saw earlier, an offender must culpably cause harm if such punishment is to be justified. That I innocently bump into your vase and break it, or that some crazy Canadian will break two more of your vases if I break one, is neither here nor there in justifying greater punishment until it is shown that I intended, foresaw, or unreasonably risked these things happening. Causation of harm only matters to punishment when that harm is within the object of one of these culpable mental states. Criminal liability without such culpability is strict (as in the felony-murder cases) and unjustified.

Seeing this, Brand-Ballard imagines a “Crazy Canadian World” in which our benighted neighbors to the North attach secondary harms to our current

204. Id. at 331.
205. Id. at 334.
206. Id. at 335.
207. Id. at 333.
208. See supra notes 179–180 and accompanying text.
punishment practices.\textsuperscript{209} Offenders need not “be aware of this fact.”\textsuperscript{210} Brand-Ballard tells us; even so, we should alter our punishment practices in response to their secondary harm attachments. We should do this, Brand-Ballard tells us, even though the enhancements in our punishments would be undeserved by the offenders receiving them; their punishment would bear “no relation to culpability.”\textsuperscript{211}

Anyone who gets this far in Brand-Ballard’s argument must be a pure utilitarian about punishment, unconstrained by any limitations framed in terms of desert. Yet I should have thought that the reasons long given to refute that view were conclusive.\textsuperscript{212} But in any case, pure utilitarians have never been the audience for the argument about moral luck. That debate is carried on by (and indeed only makes sense to) those who care about blameworthiness and desert in relation to punishment.

VI. GIDEON ROSEN

Professor Gideon Rosen agrees with a key moral premise for my book: causation matters to responsibility, in the sense that it increases blameworthiness compared to mere attempting or risking.\textsuperscript{213} Since roughly one-half of the philosophic community agrees with us about this, Rosen rightly finds it puzzling that so few philosophers have not gone on to analyze the nature and extent of this enhancer of our blameworthiness.\textsuperscript{214} Rosen thus likes the central question asked by my book. I fear that he likes my answers to that question somewhat less.

Rosen begins by summarizing my overall view as to when, how, and why we are morally responsible for bad states of affairs in the world.\textsuperscript{215} As he sees, my thoughts here are, among other things: that there must be some metaphysical connection between an actor’s conduct (or omission) and any bad state of affairs for which he is properly blamable; that there are only two natural connections doing this moral work, causation and counterfactual dependence; that between the two, counterfactual dependence is the “poor relation” in the sense that it generates a lesser blameworthiness than causation; and that the second-order relations of pre-emption and

\begin{itemize}
\item[209.] See Brand-Ballard, \textit{supra} note 178, at 336–40.
\item[210.] \textit{Id.} at 338.
\item[211.] \textit{Id.}
\item[212.] See, e.g., MOORE, \textit{PLACING BLAME}, \textit{supra} note 68, at 94–97.
\item[213.] Rosen, \textit{supra} note 32, at 405–06.
\item[214.] \textit{Id.} at 405.
\item[215.] \textit{Id.} at 407–09.
\end{itemize}
overdetermination do not apply to counterfactual dependencies and so there can be no outcome-responsibility in such cases absent causation.

Rosen wishes to challenge this “theory of consequential moral responsibility,” as he calls it. He does so in a somewhat piecemeal fashion, directing seven arguments against different parts of the theory. His aim, however, is far from partial. In summarizing his article, Rosen says, “I have objected to almost every element of this package.” And indeed he has, in a clear and systematic way. I shall track his seven arguments, one at a time, seeking to gauge with what success his objections dismantle my “package.”

(1) Rosen first proffers what could be construed to be a friendly amendment. He seeks to realign my idea of causation with the common sense notion of causation in certain cases of double-prevention. He suggests that “near-causing” double preventions can and should be seen as true causal relationships. Since critics of my view like Jonathan Schaffer press this kind of double-prevention case against me, I would be pleased if such cases could be classified as Rosen suggests. Unfortunately I am dubious of the metaphysics that Rosen thinks makes this possible.

One suggestion of Rosen’s here is that “[i]ndirect causation is a constituted relation.” I gather what he means by this is that we construct indirect causation out of more basic relations. And nothing, Rosen thinks, prevents us from constructing a disjunctive relation here: c can indirectly cause e when c causes d, and d causes e (a causal chain kind of indirect cause); or when c causes d, d is close to dY and dY causes e (a double-prevention kind of indirect cause). We are as free, Rosen tells us, to construct indirect causation in this fashion as we are to construct the “uncle” relation out of two distinct patterns of natural kinship.

Rosen’s suggestion is reminiscent of David Lewis’ disjunctive analysis of “causal dependence” (Lewis’ name for remote counterfactual dependence). For Lewis held that some remote event e could counterfactually depend upon some earlier event c either directly (where e depends on c) or indirectly (where e depends on d, and d depends on c). Yet notice this proposal by Lewis introduced no new relations in constructing

---

216. Id. at 407.
217. Id. at 434.
218. Id. at 411–15.
220. Rosen, supra note 32, at 414.
221. Id. at 414 n.38.
“remote counterfactual dependence” (my coinage), for that is either just counterfactual dependence or it is step-wise counterfactual dependence. Not so for Rosen’s suggested construction of remote causation, because the second disjunct introduces a new, non-causal term (the closeness of \(d\) to \(dY\)). However this closeness is cashed out—and Rosen rightly sees that this is not easy\(^{223}\)—it will not obviously be a causal notion. So one wonders at the license Rosen envisions that we have to put in any old relation we need and calling it “indirect causation.” For example, \(c\) is an indirect cause of \(e\) if \(c\) caused \(d\) and \(d\) causes \(e\), or \(c\) is the uncle of \(e\)?

It would help here if Rosen could make good on his attempt to turn the second disjunct of his proposed definition into something causal. He tries to do that by introducing negative states of affairs.\(^{224}\) Then indirect causation between \(c\) and \(e\) is univocally: \(c\) causes \(d\) and \(dY\) causes \(e\), with the stipulation that \(d = dY\), where \(d\) is a negative event or state of affairs. Let \(c\) = the act of the defendant \(D\) in tying up the lifeguard \(L\) who was about to save the victim \(V\) in the water; let \(e = V\) drowning; then \(dY = L\) not swimming out to save \(V\), and \(d = L\) immobilized (by being tied up). Rosen characterizes \(dY\) as a “weak absence” because it “entails the existence of real things,”\(^{225}\) to wit, \(d\), which is \(L\)’s being immobilized.

Yet however fast one moves one’s fingers here, the stubborn fact is that \(d\) is not identical with \(dY\), nor does \(dY\) entail \(d\). Nor does \(d\) cause \(dY\). If there could be causation of negative states of affairs, we could say that \(d\) causes \(dY\), and if there could be causation by negative states of affairs, we could say that \(dY\) causes \(e\). Then we would have a complete causal chain, and no mystery.

Rosen’s proposal thus comes down to the question of whether negative states of affairs can be causal relata. In some sense he plainly thinks the answer to that question is in the affirmative.\(^{226}\) Yet he is ambiguous as to what it is exactly that he thinks here. He could be read as equating states of affairs with facts (in the sense of true propositions), in which event there can indeed be negative states of affairs without problem. Alternatively, his citation of Mellor and Armstrong\(^{227}\) suggests he thinks of states of affairs as (what Mellor calls) facta, which are not true propositions but are the truth-makers for true propositions. On this latter interpretation, the existence of

\(^{223}\) Rosen, supra note 32, at 412.
\(^{224}\) Id. at 414 n.40.
\(^{225}\) Id.
\(^{226}\) Id. at 407 n.6.
\(^{227}\) Id.
negative states of affairs requires that there be negative properties, an ontology too expensive for the likes of Armstrong and others. This is thus a crucial distinction to draw in this context, as I argued at some length in my book.\textsuperscript{228}

I don’t think we can accept either version of Rosen’s argument here. Propositions can easily be negative but (true or not) they don’t cause anything; and the truth-makers for propositions, while they can enter into causal relationships, cannot (without some very expensive ontological commitments) be negative.\textsuperscript{229} So I see little promise in Rosen’s suggested amendment of my view of “near-causation.”\textsuperscript{230}

(2) Rosen’s second concern has to do with morals, not metaphysics. He thinks that the metaphysical differences between causing and double-prevention make no moral difference. His argument is inductive: he examines a series of examples (torture lite, variations of passive euthanasia, aiding and abetting), concluding of each either that there is no moral difference or, alternatively, that such moral differences as there are can be explained on grounds other than the difference between causing and double preventing. Thus, Rosen looks for differences in degrees of harm caused,\textsuperscript{231} degrees of physical restraint in the means,\textsuperscript{232} degrees of violence to the body,\textsuperscript{233} diversions of pre-existing threats,\textsuperscript{234} degrees of activity,\textsuperscript{235} or degrees of causal contribution,\textsuperscript{236} as the alternative explanation for perceived moral difference in the cases I put. There is a bit of a kitchen sink feel to Rosen’s eagerness to find some factor, any factor, so long as it isn’t my causation/counterfactual dependence distinction, to explain away perceived moral differences. In any event, Rosen generalizes from his reinterpreted examples “to a modest conclusion: we have yet to see a pair of closely matched cases in which a moral difference between causing harm and the double-prevention of harm is best explained by the metaphysical difference between causation and double-prevention.”\textsuperscript{237}

\begin{itemize}
\item \textsuperscript{228} Moore, \textit{Causation and Responsibility}, \textit{supra} note 1, at 341–46.
\item \textsuperscript{229} \textit{Id.} at 347, 353.
\item \textsuperscript{230} I explore at some length my own explication of the “near-causation,” double-prevention cases, in Moore, \textit{Four Friendly Critics}, \textit{supra} note 147.
\item \textsuperscript{231} Rosen, \textit{supra} note 32, at 416.
\item \textsuperscript{232} \textit{Id.} at 417–19.
\item \textsuperscript{233} \textit{Id.} at 417.
\item \textsuperscript{234} \textit{Id.} at 418–19.
\item \textsuperscript{235} \textit{Id.} at 420–21.
\item \textsuperscript{236} \textit{Id.} at 421.
\item \textsuperscript{237} \textit{Id.} at 421–22.
\end{itemize}
Take but one of Rosen’s examples, the passive euthanasia cases. The harm is the same for active versus passive euthanasia—the patient dies. The benevolent/malevolent motivation is the same, we can stipulate. The means need be no more violent or constraining—substitution of mere water for intravenous nutrition, versus lethal injection administered in the same way. There need be no difference in degree of activity—either method involves the mere attachment of a new tube to the already in-place stent in the victim’s wrist. Rosen appears to make two points about such a case. First, he can see no moral difference, and he confidently predicts that others will agree with him: “Only a metaphysician would suggest that someone who negligently or maliciously removes a feeding tube has not killed his victim or caused his death.”238 Yet I for one don’t share his intuition here; and neither do the lawyers and judges who have actually had to decide these cases in the real world.239 I also doubt they view themselves as “metaphysicains,” a pejorative term for most lawyers (and not a few philosophers too, I gather). Removing an obstacle and letting nature take its course matters to many people, even if not to Professor Rosen.

Second, Rosen seeks to explain away any residue of moral difference in such cases by referring to the redirection intuitions I discussed earlier with regard to Professor Sartorio. Rosen shares the common intuition (of myself, Sartorio, Kamm, Thomson, Foot, and others), that “there appears to be an intuitive moral difference between causing harm by diverting an existing threat and causing harm by initiating a new threat . . . .”240 Rosen then proposes this as the explanation of any difference between active and passive euthanasia: “The doctor who administers the lethal dose of morphine initiates a threat that was not previously present; the doctor who removes life-support from a dying patient merely ‘redirects’ an existing threat.”241 Yet notice, this could be equally well said about all double-prevention cases: in such cases an old threat always exists, either in the form of natural circumstance (disease, for example), or in the form of human intention (the Skelton brothers Hell-bent on killing Ross, for example). The redirection cases under Rosen’s proposed construal would then be co-extensive with the passive euthanasia cases, so that the intuition that supports the one would also support the other.

238. Id. at 419.
239. See Moore, CAUSATION AND RESPONSIBILITY, supra note 1, at 60 n.88, 129 n.74.
240. Rosen, supra note 32, at 418.
241. Id. at 419.
Rosen cites Francis Kamm approvingly on the redirection cases.\footnote{Id. at 418.} Yet as I explore in my book, Kamm is the one who sees accurately that the passive euthanasia cases are not to be dealt with as if they were mere redirection of threat cases, which require a redistribution of an existing threat from one group of victims to someone else.\footnote{Id. at 424.} Rather, Kamm faces squarely the right issue about passive euthanasia: is it harder to justify actively killing by lethal injection than it is to justify passively letting die, by removing life-support? As I detail in my book, Kamm’s intuitions actually support Rosen on this, but not because she rationalizes them as mere redirection cases.\footnote{Id. at 423.}

(3) Rosen next goes after my claim that the only natural “glue” that connects a culpable act to a harm (in a way making the actor responsible for that harm), is either causation or counterfactual dependence. His argument is by way of counterexample: if he can show that there are some cases where neither causation nor counterfactual dependence is present and yet non-inchoate blame is intuitively appropriate, then there must be some third kind of responsibility-enhancing “glue.” Rosen produces only two candidates for such cases: supposedly overdetermining/pre-emptive double prevention cases; and supposedly overdetermining/pre-emptive omission cases. Since he separates his discussion of these two kinds of alleged counterexamples, I shall do so too, considering first the double prevention cases.

Regarding double-preventions, Rosen produces another example of what I earlier called “Hitchcock cases.” Unbeknownst to each other, and not acting in concert, two defendants each exert independently sufficient force to push an otherwise life-saving plank out of the victim’s reach, and he drowns (the overdetermining branch); alternatively, one defendant’s push gets the plank on its way before the second defendant’s push (which would itself have been sufficient) can exert any force on the plank (the pre-emptive branch).\footnote{Id. at 423.} Rosen finds non-inchoate responsibility intuitive for both defendants in the first variation, and for the first pushing defendant, in the second variation. Rosen has no doubt at all about this, noting that my contrary view “cannot be right,”\footnote{Id. at 424.} is “clearly wrong,”\footnote{Id. at 423.} and would perpetuate a “grotesque injustice,”\footnote{Id. at 424.} because these actors are “clearly” responsible\footnote{Id. at 423.} for the

\begin{footnotes}
\item[242] Id. at 418.
\item[243] MOORE, CAUSATION AND RESPONSIBILITY, supra note 1, at 64–65.
\item[244] Id. at 423.
\item[245] Rosen, supra note 32, at 423.
\item[246] Id. at 424.
\item[247] Id. at 424.
\item[248] Id. at 424.
\item[249] Id. at 423.
\end{footnotes}
outcomes in these cases. If vehemence of assertion ever won arguments, Rosen would have won this one hands down!

But are things so clear here? My earlier analysis of Hitchcock cases applies full bore to Rosen’s examples. The metaphysical differences he (like Hitchcock) detects about such cases are real enough—there can be overdetermining and pre-emptive causal relations between a defendant’s act and some state $s$, where $s$ is incompatible with some factor doing what it would otherwise do, which is preventing harm $h$. But since $s$ is not $h$, the moral question is whether this is enough to make these causally overdetermining or pre-empting actors responsible for $h$, when they neither caused $h$ nor were their actions necessary for $h$. I think not.

One way to put my objection to Rosen is in terms of there being no real preventer of the death of the victim in the cases that he puts. As each defendant acts (individually and not in concert) to push away the plank, he might as well have been pushing away a plank that couldn’t have supported the victim even if he had reached it. There was in fact no plank capable of saving the victim’s life in any of these cases. The only way Rosen can regard the plank to be a preventer of death is by considering both defendants’ acts together. And then, sure, vis-à-vis their acts collectively, the plank could have prevented the victim’s death. But as I argued against Hitchcock, such aggregation is an unjustified form of vicarious responsibility.

Imagine that there was only one plank-pushing defendant. But the plank he pushed out of the victim’s reach was insufficiently buoyant to support the victim even if he had grabbed hold of it. Why not aggregate here too, so that we ask whether, if the defendant hadn’t pushed and the plank hadn’t been so water-logged, would the victim have drowned? We can say that the push by a defendant of a non-supporting plank is necessary to a victim’s death too—if what we mean is that the cluster-event (the defendant’s push plus a non-buoyant plank) was necessary to the victim’s death.

But this is silly. In all of these plank variations the blunt fact is that no defendant could make any difference whatsoever to the victim’s death. There is thus no counterfactual dependence of the victim’s death on any of these defendants’ actions. Without causing that death, there is thus no basis for blaming these defendants for murder, as opposed to attempted murder or reckless endangerment. Why should it matter whether the other condition sufficient for the victim’s drowning making defendant’s act not necessary was a natural condition (non-buoyant plank, for example) or another independently acting human agent (a second actual or would be pusher, for example). In either case, the defendant’s act made no difference to the victim’s death. As I argue in the book, clumping his act with a second person’s act, but not with a natural condition, would be a form of vicarious
responsibility. Vicarious responsibility is a form of moral strict liability, an anathema to many including Rosen, as he tells us: “there is no such thing as strict moral liability.”

Rosen thinks that he has one more arrow in his quiver here. In yet another variation of the two defendants pushing away a potentially life-saving plank, Rosen imagines that each independently acting defendant pushes less hard so that each of the two pushes becomes necessary to prevent the plank from preventing the victim’s death. Now, Rosen rightly thinks, I would find each responsible for the victim’s death because each double-preventer’s act was necessary for that death. Yet, Rosen continues, if they each had pushed harder, so that each push was sufficient, making neither necessary, then neither defendant bears a non-inchoate responsibility. Rosen says: “This is a peculiar result—clearly wrong in my view, but certainly peculiar in any case.” Yet what is at all peculiar about this? To people (like Rosen and myself) who blanche not at all at the fortuities incident to moral luck of all kinds when it comes to causation, why should there be the slightest queasiness about a like fortuity when it comes to counterfactual dependence? If a natural circumstance is co-present, along with the defendant’s push, that circumstance could also be either a necessary condition or a sufficient condition for the plank’s removal, a fact over which the defendant need have no control. Yet it would be clearly wrong as well as peculiar not to distinguish these last two variations, such that only in one of them (the merely necessary natural circumstance) can defendant have a non-inchoate responsibility. Or would Rosen hold the defendant responsible for the harm no matter what, even in the variation where natural conditions (a gust of wind, for example) were sufficient to remove the plank with no need for any push by the defendant?

(4) Rosen wants to add overdetermining/pre-emptive omissions to his list of counterexamples, where there is outcome responsibility without either causation or counterfactual dependence. But like Hitchcock, Rosen produces no examples of pairs of omissions, where he or anyone else can separate pre-empting from overdetermining omissions. That is, as I said earlier, because there are no such examples. The counterfactual dependence of omission-based liability does not supervene on an underlying causal relation, as do the counterfactual dependencies of preventions and double preventions, and it is only that underlying causal structure that gives any purchase to

250. *Id.* at 406 n.5.

251. *Id.* at 424 n.59.

252. *Id.*
distinguishing overdetermining from pre-emptive double-preventions. Rosen claims that his omission examples are “analogous” to those involving double-preventions, 253 but they are not for the reason just given.

What Rosen does produce are two kinds of examples. The first duplicates those in my book: each of a pair of omissions is sufficient for the victim to die, meaning neither omission is necessary for that death. 254 Rosen simply contents himself with denying what I assert about such cases, adding as usual the emphatic denunciation that I am “clearly wrong” and “cannot be right.” 255 But surely not. Rosen nowhere answers the charge that his is but a form of moral strict liability, to wit, a vicarious liability making one actor outcome-responsible only because some other actor (with whom he is not acting in concert and about whom he need have no knowledge) is also culpably omitting. Rosen also nowhere answers the charge that his solution holds omitters outcome-responsible in cases where plainly they are not—to wit, cases where the other sufficient condition is a natural one so that defendant had no ability to prevent the harm for which Rosen would blame him. Alternatively, if Rosen denies outcome responsibility in these last cases, that can only be because he relies on an artificial distinction between natural conditions and second human agents, when either in fact operate as independently sufficient conditions making the defendant’s omission not necessary. As he himself admits, “it may matter whether the ‘pre-empted intervener’ is a human agent who consciously adjusts his conduct to mine, or a natural force operating blindly. Nothing we have said allows us to make sense of this fact . . . .” 256 Precisely.

The only new wrinkle on the omission-overdetermination issue that Rosen does introduce lies in a second class of examples. 257 These are supposed to be examples of pre-emptive omissions, but they are not because there are no such relations for pairs of true omissions. Rosen’s Frankfurt-inspired examples are all examples where the first defendant omits to prevent the victim’s death, but a second defendant stood ready to actively cause that death if the victim survives whatever danger it is that the first defendant failed to prevent. Still, even though these are not paired omission cases, they are not without interest here.

253. Id. at 424.
254. MOORE, CAUSATION AND RESPONSIBILITY, supra note 1, at 449–51.
255. Rosen, supra note 32, at 424.
256. Id. at 426 n.63.
257. Id. at 424–25.
Again, Rosen proclaims that “it seems perfectly obvious” that the first defendant is responsible for the outcome he did not attempt to prevent.\footnote{258} This, despite the fact that this first defendant’s attempt, if he made it, was guaranteed to fail. Suppose with Rosen that the case is one where the victim needs one pill to prevent blindness by morning, and you have a duty to give it to him. You deliberately do not give it to him so that he will be blind. Now variously suppose: the pill has been destroyed by a second agent, Mr. Black, and a placebo substituted, so that if you had given V the pill at hand he still would have gone blind. Or: Mr. Black has already injected the victim with a drug neutralizing the effect of the pill, so that if you had given it, again no effect. Or: this pill just doesn’t work for this kind of blindness. Or: this pill would indeed prevent the condition about to make the victim blind, but the pill also reacts with rare conditions (which the victim had) so that if given it would have produced blindness where and when the victim actually went blind. Or: Mr. Black stood ready to neutralize the pill’s effect if you had given it, so that the victim would have gone blind exactly where and when he did go blind with no pill given (Rosen’s own example). Not only do I not think that it is “perfectly obvious” that you have responsibility for victim’s blindness in these cases; I don’t think it is even right. You had no ability to prevent blindness in any of these variations. You are properly punishable for an attempt. True, you got lucky—the victim is blind, as you intended, yet your liability is only inchoate. But such luck is all around us. When you shoot at your victim, intending to kill him, but lightning strikes him dead before your bullet arrives, you are similarly lucky. In both cases you got what you wanted but at half its normal “punishment-price”—this, because although what you wanted to happen did happen, it did not happen (causally or counterfactually) because of your act or omission.

In his version of the case, when Black stands ready to neutralize the pill but he doesn’t have to because you never administer the pill, Rosen complains that Black’s presence is inert and thus “cannot possibly make a difference to your responsibility.”\footnote{259} Black’s presence is indeed causally inert; but it is not counterfactually inert. Indeed, it makes a huge difference counterfactually. Black’s presence, and intent plus ability to neutralize the pill, transforms the defendant’s omission from being necessary to being not necessary. It (and this is the same point) removes the defendant’s ability to save V by giving him the pill. There is nothing inert about Black’s presence,
at least to those not already certain that counterfactual dependence doesn’t matter to outcome responsibility.

(5) Rosen raises the pre-emption/overdetermination point one last time in cases of remote and de minimis causation.260 In what I call “butterfly effect” cases, where there is only insubstantial, de minimis causation, some evil manipulator presciently knows that some act of his is nonetheless necessary for some great harm, and he does the act in order that such harm be brought about.261 Rosen accurately notes that I fall back on counterfactual dependence to ground outcome responsibility in such cases.262

This sets up one last variation on the overdetermination/pre-emption kind of supposed counterexamples to my thesis that non-inchoate liability can only be based on causation or counterfactual dependence. Rosen imagines two not in-concert evil manipulators, either of whose actions would complete the complex series of events causing a hurricane. Neither’s act is necessary, and neither’s act is more than a de minimis cause of the hurricane. Yet Rosen again proclaims that “it is clear” that both evil manipulators are causes, just as it is clear (to Rosen) that if one manipulator replaces the other’s butterfly with his own, he has pre-empted the first and is fully responsible for the hurricane.263 I think that this is not only not clear; it is wrong and for the same reason that we have gone into before. Suppose there is one evil manipulator with one butterfly; he has it flap its wings over the Sahara with the intent that this is the last little thing needing doing to cause a hurricane in Miami two months later. But: the butterfly is too attracted to another butterfly to flap its wings in the right way; an unanticipated gust of wind blows it away from where its flapping does what it has to do; Rosen’s ever lurking Mr. Black flies his butterfly in just the right way so as to make the first butterfly unnecessary; etc., etc., etc. Yet nonetheless there is a hurricane in Miami because the sexually attractive butterfly, Mr. Black’s butterfly, or the gust of wind, does just what is needed to complete the set of conditions sufficient for such a hurricane. What is clear to me is that the evil manipulator is not outcome responsible for the Miami hurricane. He isn’t more than a de minimis cause; and his act wasn’t necessary for the hurricane—it would have happened no matter whether he set loose his butterfly or not.

260. Id. at 428–30.
261. Moore, Caution and Responsibility, supra note 1, at 469.
262. Rosen, supra note 32, at 429 n.73.
263. Id. at 430.
Rosen also worries about justification in the remote/de minimis cause cases. He notes, accurately enough, that my view regards a counterfactual dependency connection to be less blameworthy than a (substantial) causal connection. Rosen then predicts that my view must be “that it should be easier to justify killing an innocent human being by deliberately initiating a long and complex causal chain (or by initiating a short causal chain that exploits an overwhelming natural force) than it is to justify killing in more prosaic ways.” Rosen again believes, with his characteristic vehemence, that “that is obviously wrong.” Two points. First, Rosen like Sartorio ignores the criteriological mode of combination of the factors taking us outside the categorical force of agent-relative obligations and making it weakly permissible to use consequentialist justifications. By itself, the lesser blameworthiness of counterfactual-based responsibility need not take us out of deontology’s categorical prohibitions. Second, deontology has many puzzles of the sort Rosen envisions here. Leo Katz has devoted an entire book to Jesuit-like manipulation of the scope limitations on agent-relative obligation. Rosen presents nothing more problematic than Katz does for all of deontology’s scope limitations, such as intent/foresight, act/omission, etc.

(6) Rosen raises an interesting variant of Larry Alexander’s two Pierres cases. In Rosen’s variant both Pierres are only negligent killers. This seemingly deprives me of the tool I used to distinguish Alexander’s two versions of this case. This tool was that the harm that happened must be an instance of the type of harm intended, foreseen, or consciously risked, before an actor can be held for causing that harm with these levels of culpability. I have no such tool available in inadvertent negligence cases for the reason that both Alexander and Rosen reference: I reject the harm-within-the-risk test for such negligence because where the actor does not advert to a risk there is no canonically described type of risk making any actor negligent so that one cannot ask whether some harm was within that risk.

Rosen concludes that his variant “shows conclusively that there can be no purely metaphysical account of the conditions under which we are

---

264. Id. at 430.
265. Id.
266. See supra notes 115–117 and accompanying text.
268. See supra notes 52–56 and accompanying text.
269. Moore, CAUSATION AND RESPONSIBILITY, supra note 1, at 178–197.
responsible for the consequences of our negligent acts.”

But such cases show no such thing. What such cases could maximally show would be that counterfactual dependence as a desert base needs limitations, as Ferzan and Hitchcock both urge upon me. But these limits too could be framed in terms of natural (or “metaphysical”) properties, such as that a harm token is an instance of a harm type which the defendant intended to achieve. Moreover, as Alexander notes, my own view, like his and Ferzan’s, is that inadvertent negligence is an improper basis for criminal liability.

Most of what is called negligence in the criminal law actually involves some consciousness of risk (and with this my culpability limitation on liability is resuscitated). Yet in cases where there is no such awareness, negligence is no proper basis for blame. That renders correct Rosen’s conclusion about examples where there is no responsibility for remote harms like traffic accidents in Beijing 30 years after a negligent omission, but not for the reason he supposes. If there is no blameworthiness at all for truly inadvertent risk-taking, full stop, a fortiori there is none in cases of inadvertent risk-taking which results in freakish and remote harms.

(7) Rosen lastly transfers his worries about my view of counterfactuals generating limitless responsibility for negligent omissions, to a worry that my view of causation generates limitless responsibility for negligent actions. Rosen again poses a remote harm—“a traffic accident half way round the world in the far future”—and in this case has some negligent act be an insubstantial cause, but nonetheless a necessary condition, of this remote harm. Rosen assumes that we all agree that the negligent actor is not responsible for this remote harm, and then asks, “what is the best explanation for the fact that the agent is not responsible for the act?” That the act is not a substantial cause—my thesis—or that the harm does not meet some culpability criterion (such as not being foreseeable, or not being “within the risk”)—Rosen’s proffered alternative?

Since I have argued at length that there is no such culpability principle available for negligence cases, I should have thought the answer here was

270.  Rosen, supra note 32, at 431.
271.  Alexander, Mysteries, supra note 5, at 313 n.29.
272.  Michael Moore & Heidi Hurd, supra note 98, at 3.
273.  Id. at 3–4.
274.  Rosen, supra note 32, at 433.
275.  Id.
276.  See Moore, Placing Blame, supra note 68, at 363–402 (discussing foreseeability); Moore, Causation and Responsibility, supra note 1, at 178–97 (discussing harm within the risk).
both obvious and clear: it is the lack of substantial causal contribution that wins out over an account framed in terms of concepts (foreseeability or harm-within-the-risk) that are incoherent. Rosen here invokes his argument (see (6) above) that omission liability must be limited by such a principle. So he thinks “we have excellent reason for suspecting that . . . there is such a principle.” But as I argued in (6) above, there is no such principle in negligent omission cases and so that cannot be Rosen’s beachhead here.

In any case, there is no moral blame attached to inadvertent risk taking. Rosen’s question thus cannot arise, no more for negligent actions than for negligent omissions. Most of the cases treated as negligence are in fact advertent risk-taking—but in such cases, as I urged before, we can use our normal culpability limitation to limit responsibility. Regarding the traffic accident in Beijing, for example, that would have to be an instance of the type of risk to which the actor adverted if he is to be blamed for that remote harm. This gives us two good reasons not to hold advertently negligent actors liable in such cases: they didn’t substantially contribute to the harm and they were not culpable with respect to that harm. There need be no explanatory competition here, these both being good reasons for the same conclusion.

* * * *

Often when one writes a book on some topic, it is a way of being done with the topic, a way of putting that topic away. That is not so here. Despite the length and the detail of my Causation and Responsibility, I know that there are important issues left untouched (or in some case, that need some touch-up work). And I still find all of the issues connected to causation to be challenging and interesting. The six essays to which I have responded raise some of such challenging and interesting issues, and I am grateful to the authors for their critical prods to further thought about them. Discussions such as these advance the cutting edge of our collective knowledge in a way no single-authored work can do. It is my hope that others find sufficient interest and challenges in these essays and in my response to them, that they continue to advance from where we have here left off.

277. Rosen, supra note 32, at 432–33.
278. Id. at 433.