The Unsolved Mysteries of Causation and Responsibility

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Ferzan, Kimberly Kessler, "The Unsolved Mysteries of Causation and Responsibility" (2011). Faculty Scholarship at Penn Carey Law. 2603.
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The unsolved mysteries of causation and responsibility

Kimberly Kessler Ferzan

There is a theory which states that if ever anyone discovers exactly what the Universe is for and why it is here, it will instantly disappear and be replaced by something even more bizarre and inexplicable. There is another theory which states that this has already happened.

—Douglas Adams

When I straighten my house before my cleaning lady comes (yes, I am one of those people), I tend to do discrete tidying. And by “discrete tidying” I mean that I typically clear out one area at the expense of another. All those papers that I left on the kitchen table are combined into one giant stack and then dumped on top of my office credenza. The cleaning lady doesn’t go in my office. Quite frankly, no one dares. Except my husband, who occasionally risks his life to enter that room so that he can yell at me that my office is a mess.

In Causation and Responsibility, Michael Moore has certainly done quite a bit of tidying. The metaphysics of causation have never looked quite so spotless. Whether he actually put the plates in the correct cabinet, I will

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leave for others. I want to look elsewhere. I want to look behind the office door.

Specifically, I am interested in the gaps and the slop and the slippage between the metaphysics and the moral and legal. I am interested in the moments at which Moore tells us that well, “it is close enough for government work.” (As a former government employee, I do take a bit of offense at this.) In my view, while Moore was tidying the questions of causation, well, when the going got messy, Moore simply hid the mess elsewhere.

In *Causation and Responsibility*, Moore adopts a scalar approach to factual causation, with counterfactual dependency serving as an independent desert basis. Moore’s theory of causation does not include proximate causation. The problem is that the problems with which proximate causation dealt—how and when to limit cause in fact—remain unresolved.

In this paper, I want to focus on two sets of problems. The first set is the “fit” or categorization problems within the criminal law. I will focus on three matches: (1) the fit between what the defendant intended and what the law forbids; (2) the fit between the result the defendant intended and the harm actually caused; and (3) the fit between the way the defendant foresaw the causal mechanism working and the actual route that occurred. Although the first question was always a culpability question, Moore shifts the latter two inquiries from causation to culpability. I will argue that relocating the questions does not resolve them and that to the extent Moore offers some preliminary answers, they are insufficient. The second part of this paper turns to the role that counterfactual dependence plays. Moore argues that counterfactual dependence is not a form of causation but is its own independent desert basis, a basis that plays an important role in omission liability. Here, too, because Moore shifts the question outside of causation, he does not fully resolve the very problems he identifies. Hence, even if these questions have found their proper homes, they have not found answers.

I. “Fit”

The criminal law requires a number of elements. Roughly, the defendant must perform a voluntary act. He must have the requisite mental state. And, in many cases, he must cause the result. In asking whether the defendant caused the result, the criminal law asks whether the defendant was a but-for

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2. This puts to the side the fact that even conduct crimes require a result of a willed bodily movement, and thus, there is no crime that truly requires only conduct. *Id.* at 19.
cause (except when the test fails, and then criminal law hastily substitutes the substantial factor test) and whether the defendant was a proximate cause. Proximate causation, typically formulated as either a question of foreseeability or harm within the risk, limits the reach of causation in fact.

Moore tells us that causation is a relationship between the defendant's act and the harm that occurs. Graphically, one might look at causation thusly:

\[
\begin{align*}
\text{Act} & \rightarrow \text{[causation]} \rightarrow \text{Result} \\
\end{align*}
\]

What is not part of this picture is the defendant's mental state. Minds don't have any causal powers beyond bringing about actions. There is no telekinesis. Mens rea is still quite important however. There are, as Moore tells us, two fit questions. The first is whether the defendant's mental state matches the mental state prohibited by the statute. The second is whether the type of harm the defendant intended matches the actual harm that occurred. Although Moore never recognizes it as a distinct question from the second, I believe Moore introduces a third question as well: must there be a fit between the way that the defendant intended the harm to occur and the actual causal route?

A. Fitting the Intention to the Crime

Moore introduces the first fit problem in Chapter Three when he discusses the borders for consequentialist justification. Moore, having previously disfavored the Doctrine of Double Effect (DDE), has now shifted course and believes that intentions are relevant to our agent-relative obligations.\footnote{Id. at 47-51.} Under the DDE, one may not justify an intended harm with good consequences, but may justify, with such consequences, a harm that is only foreseen.

One well-known problem for the DDE is the problem of "closeness." Moore confronts this problem head-on with the following example:

Herod did not desire the death of John the Baptist for its own sake; he preferred that John live. Still, Herod did want to please Salome, and Salome wanted John’s head on a plate. So Herod cut off John’s head. Yet he did not
intend John's death, not as a motivating end nor even as a means. He merely foresaw that John was going to have a hard time living without his head.\textsuperscript{4}

The concern is that if intentions are this narrow, then the DDE almost never applies and is certainly absurd.

Notice that, at its root, this puzzle relies on what it is to "intend" something.\textsuperscript{5} The conventional understanding is that something is intended if it is motivationally significant. For example, for Elizabeth Anscombe, intentional actions are responsive to the question, "why?"\textsuperscript{6} Antony Duff claims that we intend a result when we act "in order" to achieve that result.\textsuperscript{7} Michael Bratman argues that a result is intended if one plans to achieve that result — if one engages in means-end reasoning about how to bring about the result, screens out alternative intentions inconsistent with the result, and endeavors to bring about the result.\textsuperscript{8} This requirement of motivational significance takes various forms but, in essence, represents one view of intentions.\textsuperscript{9} Because why we do something may be quite narrow, intentions appear to be quite narrow as well.

In \textit{Causation and Responsibility}, Moore takes what he dubs a "broaden-the-discomfort" strategy to the problem of "closeness."\textsuperscript{10} He notes that this is not just a problem for the DDE. "It is also a problem for the use of intention

\textsuperscript{4} \textit{Id.} at 44.
\textsuperscript{5} This section draws from Kimberly Kessler Ferzan, \textit{Beyond Intention}, 29 \textit{Cardozo L. Rev.} 1147 (2008).
\textsuperscript{6} G.E.M. \textit{Anscombe}, \textit{Intention} 9 (Harvard Univ. Press 2d ed. 1963) (1957) (suggesting intentional actions are ones "to which a certain sense of the question 'Why?' is given application . . .").
\textsuperscript{7} R.A. \textit{Duff}, \textit{Intention, Agency And Criminal Liability: Philosophy of Action and the Criminal Law} 58, 61 (1990) (advocating the "test of failure" — a result is intended if the action fails when that result is not achieved).
\textsuperscript{8} \textit{Michael E. Bratman, Intention, Plans, and Practical Reason} 140–43 (CSLI Pub. 1999) (rehearsing the trio of roles that intentions play).
\textsuperscript{9} \textit{See, e.g.,} Anthony Kenny, \textit{Intention and Purpose in Law}, in \textit{Essays in Legal Philosophy} 146, 148 (Robert S. Summers ed., Univ. of California Press 1976) (1968) ("To somebody who is not a lawyer, it might seem that there was a further question relevant to Smith's intention: not only what he foresaw, but what he wanted."); A.P. Simester, \textit{Moral Certainty and the Boundaries of Intention}, 16 \textit{Oxford J. Legal Stud.} 445, 446 (1996) ("Bluntly stated: things done as means or ends are intended; those done as side-effects are not."); John Finnis, \textit{Intention and Side-Effects, in Liability and Responsibility: Essays in Law and Morals} 32, 36 (R.G. Frey & Christopher W. Morris, eds., 1991) ("Whatever, then, is included within one's chosen plan or proposal, whether as its end or as a means to that end, is intended, i.e., is included within one's intention(s)").
\textsuperscript{10} \textit{Moore, Causation and Responsibility, supra} note 1, at 47.
as a marker of culpability generally.’’ The reason why this is a general problem is because the criminal law does not prohibit one actor from doing a specific act with a specific intention. No criminal code prohibits John from shooting Mary in the chest on February 2, 2010, at 4 p.m. and intending to do just that. Rather, criminal codes prohibit types of conduct and types of mental states. It is a crime to purposefully kill another. Whenever a jury finds a defendant guilty, the jury must therefore find that “the intention-token [the defendant] had instantiates the type of intention the norm prohibits.” The problem therefore is always how to say that an intention to decapitate on a certain date is an intention to kill, that an intention to poke out an eye is an intention to maim, or that an intention to kill Alice is an intention to kill a human being.

Before turning to this problem, we should first distinguish it from a close cousin. A defendant might argue that he has made a legal/moral mistake and thus does not have the requisite intent. For instance, if a crime of rape requires a man to compel a woman to have sexual intercourse by means of “force” and the defendant compelled his female employee to have intercourse with him by threatening to otherwise fire her, the question of whether this threat is “force” is a legal question. A mistake about whether this threat is “force” would not exculpate him because it is a mistake about how the law defines “force.”

This is not the sort of problem we are dealing with here. Rather, in these matching cases, the claim is one about the facts. The actor knows what decapitation is and knows what killing is and understands the law forbids killing. What the defendant asserts is that he can intend decapitation without intending killing. Herod would be perfectly happy for John to live without his head so how can he intend to kill? The problem also arises with circumstance elements. If Albert intends to kill Betty, and knows that she is a human being, why is it that Albert intends to kill a human being (as opposed to only doing so knowingly)? Indeed, if Albert did not believe that Alice was a human being, then the intent to decapitate her would not be sufficient for the match. It would not be a mistake of law.

If a defendant only intends one type of act but the criminal law prohibits a broader general category, how is it that the criminal law can match what the defendant intended to what the law prohibited? Moore argues that the law is sloppy. He stipulates that putting an eye out is “maiming” under the law,
and then imagines an actor who intends to put out his victim's left eye. Is the actor's intention — to put out the left eye — an instance of the prohibited intention of maiming? Moore argues:

Since very few wrongdoers use representations exactly matching the act-type descriptions of moral norms, we have to get sloppy . . . and we do. I am confident that D's intention-token will and should be taken to be an instance of the type of intention morality prohibits. D[efendant] intended to disfigure V[ictim] no matter which . . . representation[] . . . he had in mind. 14

I demur. I just do not like my criminal law sloppy. This objection is not aesthetic. The problem with sloppiness is that it can lead to disproportionate punishment. If the criminal law delineates having a particular intention as deserving of a particular quantum of punishment, then when we allow for any slop between the defendant’s representational content and what the criminal law prohibits, we run the risk that the defendant does not deserve the amount of punishment allocated by the statute. To see how this problem arises, let us return to Moore’s sloppy criminal law.

Moore’s approach is a two-tiered approach. It is a recognition that there is a difference between what goes on in the mind of the actor and the way in which the rest of the world describes the actor’s mental states. That is, while Oedipus would never say that he intended to marry his mother (because he did not know the woman he intended to marry was his mother), we might say that Oedipus intended to marry his mother, thus matching an external description of Oedipus’ intention with Oedipus’ own representational content.

The problem with the two-tiered approach should also be apparent from the illustration above. If it were a crime to intend to marry one’s mother, Oedipus would not be guilty of such a crime. We cannot substitute one description of an intentional object for another, even if the two descriptions denote the same thing. 16

13. Id. at 45. The actor misses and hits the right eye, but we will get to that wrinkle. Id. at 46.
14. Id. at 46-47.
16. See Rebecca Dresser, Culpability and Other Minds, 2 S. CAL. INTERDISC. L.J. 41, 81 (1993) (arguing that “[i]ntentional states have an important logical property called 'referential opacity,' or 'non-transparency'” and “[u]nlike other informational statements, the truth or meaning of intentional statements can change if a word or phrase is replaced by another that objectively refers to exactly the same thing.”). For a more detailed discussion of referential
The problem is that the two-tiered approach does not impose any limits on when we may say the actor had an intention and when he did not. The criminal law is ultimately concerned with representational content. If it were sufficient to simply match representational content to any other real world description then Oedipus may be guilty for intending to marry his mother.\(^{17}\) Sloppiness thus has the potential for grossly disproportionate punishment.

Now, I do not take Moore to be arguing for all substitutions.\(^{18}\) Still, even if one were to say that Moore’s actor is an intentional maimer because he knows that putting out an eye is maiming, we then need to know why all instances of knowledge are not sufficient to satisfy prohibited intentions. That is, why is it not the case that providing an answering service for known prostitutes is sufficient for intending to further their criminal enterprise?\(^{19}\) Why not say that providing the name and address of a known drug dealer is intending to aid in the distribution of narcotics?\(^{20}\) In both of these cases why not say that when the defendant intends an act and knows that it will aid, by the “principle of sloppiness” the defendant may be said to intend to aid?

As I have argued elsewhere, we cannot simply admit sloppiness between the law and representational content because there is no principle by which we can determine when it is permissible to be sloppy and when it is not.\(^{21}\) Rather, we must take the second approach. We need an account of representational content that explains why the intent to take out the left eye is the intent to maim.\(^{22}\) In my view, it is the defendant’s conceptual understanding of what it is to take out an eye that allows the match, just as it is Herod’s conceptual understanding of what it is to decapitate that allows us to say that he intended to kill.\(^{23}\) The point, for our purposes here, is that Moore has left us with a rather significant mess that needs to be tidied up if law or morality wishes to employ the DDE or rely on intentions.\(^{24}\)

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\(^{17}\) See Perry, supra note 15, at 394 (“When knowledge of a single object is not integrated . . . the two-tiered approach can be confusing and misleading.”).

\(^{18}\) See Moore, CAUSATION AND RESPONSIBILITY, supra note 1, at 46.

\(^{19}\) See People v. Lauria, 59 Cal. Rptr. 628, 635 (Cal. Ct. App. 1967) (holding that knowledge is not sufficient for conspiracy).


\(^{21}\) See Ferzan, supra note 5, at 1163.

\(^{22}\) Id.

\(^{23}\) See id. at 1186.

\(^{24}\) For worries about both, see Larry Alexander and Kimberly Kessler Ferzan, with Stephen Morse, CRIME AND CULPABILITY: A THEORY OF CRIMINAL LAW chs 2 and 4.
B. Defining Success

Our conception of intention is also fundamental to a second categorization question: how can we tell whether the defendant did what she intended? Although there are times when a defendant may succeed in exactly what she planned, our causal abilities are often imperfect. When these imperfections occur, we must determine whether the defendant may be held responsible for intentionally (or knowingly or recklessly) causing the harm.

Note that before Causation and Responsibility, this would appear to be a question of proximate causation. You intend to do something, but you do something else. Did you cause what you intended to cause? When we ask questions like whether the harm is foreseeable or within the risk, we seem to be getting at this matching question.

Moore shifts this question to culpability. "The place to ask and answer these questions of fit is with respect to mental states, not causation." And also, "the question asked by the harm-within-the-risk test must be answered by any justice-oriented theory of torts or crimes, at least with respect to crimes or torts of intent, knowledge, or recklessness; but that such culpability enquiry cannot supplant a true causal requirement for moral blameworthiness and attendant legal liability." So, Causation and Responsibility does not have to solve the fit question, because fit is not a causation question. It is a culpability question.

And how does Moore answer this culpability question? Moore’s actor intends to hit one eye but hits the victim’s other eye. Maimer? Or attempted maimer? Once again, Moore thinks we can simply be sloppy:

So what did D intend? Did he represent the type of event he was trying to bring about as a ‘putting out of V’s left eye’, as a ‘putting out of V’s right eye’, as a ‘putting out of an eye of V’s’ (in the sense of any eye), as a ‘putting out of an eye of V’s’ (in the sense of one particular eye), as a ‘harming V’, a ‘disfiguring V’, a “maiming V”, etc? My supposition is that any of these representations will suffice to match what D did to what he intended to do, to make D an intentional maimer, even though it is unlikely in the extreme he had more than one or two of them as the representation

25. MOORE, CAUSATION AND RESPONSIBILITY, supra note 1, at 102 n.69.
26. Id. at 110.
under which he acted. If so, notice how much slop there is in fixing what it was that D intended.27

I nonetheless would hold the defendant liable for mayhem . . . This, in effect, is a limited transfer of intention, one that operates within the type of harm the law prohibits . . . The defendant in the case imagined is close enough to success in achieving what he set out to do that he should be held liable for an intentional crime and not merely some lesser crime of recklessness or negligence.28

What is interesting is that Moore’s sloppiness is more limited in these cases. Only minor slippage is allowed. Consider a case where Carl aims at Alice but misses and hits Betty. Do we say that Carl did what he intended (i.e., killed a human being)? Or did he fail to do what he intended because he did not kill Alice? Here, Moore opts for the latter approach:

[When x intends to hit y, but hits z instead, what x has done in fact does not match what he intended to do. The hit on z is not an instance of the type of wrong intended, a hitting of y, whereas in the cases supposed in the text, the harm done is literally an instance of the type of harm intended.29

Although Moore classifies this as a culpability question, this is only a culpability question if you think that causing harm matters. If one believes (as I do) that results are irrelevant to responsibility and blameworthiness, this problem simply disappears.30 If we only care about what the defendant believed himself to be risking—and not the harm he actually causes—there is no need to play this matching game.

For those who care about results, this problem remains. And the results matter folks should be skeptical of any doctrine of slippage or sloppiness. My concern here is not about disproportionate punishment but about the integrity of our understanding of intentions. In my view, Moore can’t have it both ways. Either we have a maimer and a murderer or an attempted maimer and an attempted murderer, but he can’t allow slippage for one and not the other.

27. Id. at 46.
28. Id. at 207–08.
29. Id. at 206 n.16.
30. For a defense of this view, see Alexander & Ferzan, supra note 24, ch. 5.
Consider two possible approaches that yield consistent answers. First, we could use the intention as fixed by the statute (fit question one) to determine success. Under this approach we would say that Carl intended to kill a human being and that is what he did. Moore denies this:

Different is the question asked by those making this mistake: Was the intent of the defendant (say, to hit y) an instance of the type of intention (to hit someone) the law requires for conviction of intentional battery? In the classic transferred-intent cases, the answer to the second question is plainly yes, for defendant’s intention to hit y is an instance of the type of intention required; yet the answer to the first question is plainly no, for the hitting of z is not an instance of the type of act intended, a hitting of y. The doctrine of transferred intent thus cannot be dispensed with if there is to be liability for intentional wrongdoing in the classic transferred intent cases.31

But why is the fact that Carl intended to hit Alice relevant? That is, to perform the first match, we must first find that Carl’s intention to kill Alice is an intention to kill a human being. And, with the second match, Carl did succeed in doing what he intended to do, which is to kill a human being. Why is Moore suddenly so fine-grained about the description of the intention? An intention to kill Alice just is an intention to kill a human being and that is what he did.

Alternatively, 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. Then, Carl would not have succeeded. As for the maimer, that depends. What if the defendant sought to put out the victim’s left eye because that was the eye with which the victim winked at the defendant’s boyfriend? Then, which eye is injured matters. The defendant will feel that she failed if she does not injure the left eye. If you take intentions to be motivationally significant then the defendant no more maimed her victim than Carl intentionally killed Betty.32

Either of these solutions would give us consistent answers. My own answer would be more complicated both because I do not believe that results matter and because I do not believe that intentions are limited to those outcomes that are motivationally significant, but Moore rejects both of my

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31. Moore, Causation and Responsibility, supra note 1, at 206.
32. The law sometimes allows no slippage. In Mohr v. Williams, consent for an operation of the right ear was held not to constitute consent to operate of the left ear. 104 N.W. 12 (Minn. 1905).
moves. But even for someone who believes results matter and that intentions are limited to motivational significance, either of the approaches listed above would be far more consistent than the ad hoc principle of limited slippage that Moore endorses. It seems that what motivates him is the concern that the maimer’s liability ought not to be reduced because he hit the unintended eye. However, if we are going to impute culpability to say people did not do what they intended to do, but something that is close enough, we ought to be honest that this is what we are doing. Moreover, we then will need an account of “close enough.” I am skeptical that we will find one.

C. Contrivance and Coincidence

So far, this may seem to be much ado about nothing (actually, much ado about nothing is coming next in the discussion of omissions). But now the going gets good. The first match question is a pure question of culpability. Was the defendant’s representational state the type of state prohibited by the law? The second match question is a question of whether the result fits the defendant’s intention. It isn’t about how the result was caused. As Moore states, “Because the harm-within-the-risk question asks a simple type-to-token question—was the particular harm that happened an instance of the type of harm whose foresight by the defendant made him culpable—the test is blind to freakishness of causal route.” Nor, according to Moore, should harm within the risk (HWR) accommodate these twists and turns: “One should keep the HWR analysis pure, so that the relevant risks are of types of harms, not including the routes or instrumentalities by which such harms are produced.”

But then we have another question. What about the routes and instrumentalities? What of coincidences and contrivances? These are the puzzles Larry Alexander discusses in his contribution to this symposium. Alexander introduces two “Pierre’s.” In both cases, Pierre shoots at Monique and misses; Monique runs out afraid into a lightning storm and is hit by lighting. The difference is that one Pierre intended just that—to scare

33. MOORE, CAUSATION AND RESPONSIBILITY, supra note 1, at 101.
34. Id. at 221.
35. Larry Alexander, Michael Moore and the Mysteries of Causation in the Law, 42 RUTGERS L.J. 301 (2011) [hereinafter Alexander, Mysteries].
36. Id. at 306–07.
37. Id.
her so she gets killed by lightning—whereas the other Pierre had intended to kill Monique with the bullet.\(^{38}\)

I strongly suspect that Moore will answer Alexander's contribution to this symposium by pointing to the problem of fit.\(^{39}\) That is, if Pierre intends to kill Monique by scaring her with the bullet so she gets hit by lightning, he is, as Alexander argues, a small cause and a big counterfactual "cause." Add that this is what was intended and ... viola! We have criminal responsibility. But, when Pierre intends to kill via bullet but scares Monique and she gets hit by lightning then we have small cause but counterfactual dependence. I suspect that because there is such an imprecise match between what Pierre intended to do by firing the bullet and how he actually killed her, we are left with just an attempt. This, at least, is what I believe Moore would say. He notes:

Where harm consciously risked or intended occurs only because of extraordinary coincidence—such as a tree falling on a man only because of his earlier speeding—the harm as it happened is too far removed from the harm risked or intended for the actor to be held liable for it. There is a non-de minimis casual connection between the defendant's action and the harm that came about in most (but not all) cases of coincidence, but not enough of the causal route was within the contemplation of the actor to hold him responsible for the harm.\(^{40}\)

Such an approach to the contrivance problem preserves intuitions about mental causation (contrivance counts) by relocating them to their proper home—culpability. When you take advantage of a freak occurrence, you will likely be only a small cause, but you are still counterfactually critical, and when there is a strong match between what you do and exactly how you conceived it would be done, there is no culpability discount that seems to be accruing to you. This appears to shift the inquiry to where the inquiry should be.

But first appearances are deceiving. How are we to answer this fit question? Loose fit or tight fit? What this leads us to is something akin to the Model Penal Code's "too remote or accidental" test, a test that is a test of culpability.\(^{41}\) But then, why do we care at all about whether the harm

\(^{38}\) Id. at 307.

\(^{39}\) Moore has verbally confirmed these suspicions.

\(^{40}\) MOORE, CAUSATION AND RESPONSIBILITY, supra note 1, at 277.

\(^{41}\) See MODEL PENAL CODE § 2.03(3)(b) (1962).
occurred the way you planned it for purposes of culpability? If the defendant wants the defendant 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.\(^4\)

Consider a game of friendly pool. When I play, with the exception of the eight ball, anything counts anyway it happens. Hit the cue ball intending to sink a “ball” and, however circuitous the route, it still counts. But the eight ball is different. You have to call it. You have to intend the route. The reasoning for this discrepancy is normative. When playing a game of friendly pool, adhering too strictly to causal routes makes for a tedious game, but requiring that one call the eight ball correctly enforces a requisite degree of skill. But, while I understand the rule for billiards, I haven’t got a clue why the law (and culpability, specifically) would require precision for punishment.

Moreover, this is where the normative rubber hits the conceptual road. Recall that Moore did not want to give a culpability discount to the maimer who aims at one eye and hits the other. That actor demonstrated sufficient culpability that merely counting him as recklessly hitting the (wrong) eye seemed to under-punish the actor. But this problem is more severe because if the actor gets the “how” wrong, we are left with an attempt. There may not be a lesser mens rea. That is, when Pierre intends to kill with the bullet and misses, if we say that this mechanism lacks sufficient “fit,” then we also cannot say that Pierre knew he would kill her this way, or even that he was reckless to killing her this way. Pierre falls off the result cliff, and this should strikes us as odd. He intended to kill her. He caused her death. But this is an attempt because he did not intend the mechanism.

Nothing Moore has ever written gives us a reason to find this result attractive. (Indeed, it reveals that we should see the light and simply abandon results). Culpability is wrongdoing in the possible world created by our representational states.\(^4\) In that world, Pierre is culpable. And, if “causation matters,” well, Pierre caused it too (or minimally did, or is counterfactually dependent). There is no room in either account for mechanism.

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D. Where Does “Fit” Fit?

Before *Causation and Responsibility*, crimes had a number of components. We typically wanted an act. We wanted culpability. And, we often wanted the defendant to cause a result. Causation required the defendant to be the factual and proximate cause.

In this world, we needed to ask Moore’s first match question. It was a question of culpability. The second matching question appeared to be a question of causation—did the defendant cause what he intended to? Finally, our causation doctrines held defendants accountable for contrived results (however improbable) while denying causal responsibility for coincidences. Other questions of mechanism rarely needed to be foreseeable in tort law, while criminal law seemed to care about the causal route.

After *Causation and Responsibility*, Moore gives us new “cause in fact” that looks a lot like old cause in fact—but-for causation or substantial factor will do. Moore’s substantial factor test, or alternative counterfactual dependence, looks to, well, cause in fact. (Okay, I concede I am grossly oversimplifying all the marvelous analytical maneuvering that gets us to this point.) Moore then gives us no test for proximate causation because there is no proximate causation. So, the world appears to be neat and tidy. Factual causation is left largely undisturbed. We have reasons for our tests and reasons to retool our tests.

But let’s not ignore the bump in the carpet that Moore has been so kind as to move from proximate causation to culpability. Did the defendant cause the harm the way the actor intended? Knew? Consciously risked? But now, I haven’t got a clue how culpability would answer these questions, or more importantly why culpability ought to care. We are left with the same unprincipled intuitions that we had before. Moore has relocated the problem. He hasn’t solved it.

II. MAKING SOMETHING OUT OF NOTHING

Moore repeatedly argues that omissions, preventions, and double-preventions do not cause anything. Rather, according to Moore, omissions, preventions, and double preventions are morally blameworthy because a bad state of affairs in the world counterfactually depends upon the omission’s (non-)occurrence. In this section, I will take Moore’s claims that omissions, preventions, and double preventions are non-causal to be true. I will argue that once again, Moore leaves a mess behind.
CAUSA TION AND RESPONSIBILITY

A. An Independent Desert Basis for Omissions, Preventions, and Double
Preventions (as well as Actions)

Moore distinguishes omissions, preventions, and double preventions. A
pure omission (e.g., father lets his baby drown in a puddle) is, according to
Moore, “literally nothing at all . . . . An omission to kill is an absent event of
killing.” An omission is a “negative existentially quantified statement about
a type of action.” Omissions are not particulars. That is, when we talk
about the baby who drowns because his father failed to save him, we are
talking about a type of action the father failed to do, and we are not picking
out a particular thing that actually happened. Importantly, because omissions
are not particulars they cannot enter into singular causal relationships. Here,
Moore, quoting The Sound of Music, argues “nothing comes from
nothing.” QED, or is it do re mi?

One might try to argue that an omission can pick out a particular, but
Moore rejects this possibility. According to Moore, omissions cannot be
particular mental states because some omissions that are blamable are not
willed. He also rejects that omissions refer to what you were otherwise
doing. And, he maintains that omissions are not the “everything else” that
was going on when the omission did not occur because “the hole in the
metaphorical donut” is indeterminate. In addition, counterfactually, the
closest possible world isn’t likely to be one where the omitter rescues when
he was otherwise conversing; it is likely to be one where the omitter is
“dancing a celebratory jig” but the victim dies all the same.

The second type of case is a prevention. “[P]reventings are intimately
related to a causal structure even if they are not themselves such a structures.
When Jones saves Smith from drowning and thereby prevents Smith from
dying, Jones does do something . . . . Preventions are the causing of things
incompatible with the occurrence of any instance of the type of thing
prevented; and omissions are simply absent preventions.” In other words, if
I build a skyscraper that prevents light from getting to your house, I do cause

44. MOORE, CAUSATION AND RESPONSIBILITY, supra note 1, at 53.
45. Id. at 400.
46. Id.
47. Id. at 54–55.
48. Id. at 438.
49. Id.
50. Id. at 437, 439.
51. Id. at 439.
52. Id. at 54.
something. I cause a building to exist that is hit by the sunlight. And, what I
cause is inconsistent with what you want, which is sunlight getting to your
house. But vis-à-vis the latter statement, I do not cause you not to get light—
I prevent your receiving it.

For preventions, Moore makes three points. First, we are sometimes
legally and morally liable, but these liabilities are typically less serious.\textsuperscript{53}
Second, responsibility for preventions relies on counterfactual dependence.\textsuperscript{54}
Third, preventions are not causes because there is no event to be caused.\textsuperscript{55}
"To cause a nothing to exist makes no more sense that [sic] does nothing
causing something to exist."\textsuperscript{56}

Preventions are, however, slightly different than omissions. Moore notes
that preventions are acts and they are acts that cause something.\textsuperscript{57} "[T]he
relevant counterfactuals for preventions are true only because of an
underlying causal relationship that exists in the actual world."\textsuperscript{58} Because
preventions are acts that cause something, that something sometimes seems
quite close to the state of affairs prevented.\textsuperscript{59} This relationship is scalar.\textsuperscript{60}

There are also double preventions. One such case is passive euthanasia
where one removes life support.\textsuperscript{61} Turning off the respirator is not an
omission; it is an action.\textsuperscript{62}

When the doctor does something like pull the plug on the respirator, the
moral philosophers call this a 'removing of a defense'. The metaphysicians
call this a 'double prevention'. What the doctor literally does is prevent
something (the respirator) from doing what it was doing, namely, preventing
the patient's death. The doctor prevented a prevention of the death. Thus the
label.\textsuperscript{63}

\textsuperscript{53} Id. at 453.
\textsuperscript{54} Id.
\textsuperscript{55} Id.
\textsuperscript{56} Id.
\textsuperscript{57} Id. at 454.
\textsuperscript{58} Id. at 455.
\textsuperscript{59} Id.
\textsuperscript{60} Id.
\textsuperscript{61} Id. at 60.
\textsuperscript{62} Id.
\textsuperscript{63} Id. at 62 (citation omitted).
Preferable is the conclusion that failures to prevent and double-preventions are simply non-causal relationships of a counterfactual or probabilistic nature.  

It is important to note what Moore is and is not claiming. He is claiming that omissions, preventions, and double preventions cannot enter into causal relationships because vis-à-vis the baby drowning, the sunlight absence, and the patient dying, the relationship is non-causal. Things that aren’t particulars can’t enter into causal relationships. What he does not deny is that these cases may still be blameworthy. These bad states of affairs counterfactually depend upon the omission, prevention, or double prevention, and counterfactual dependence is an independent desert basis.

In addition, because counterfactual dependence is an alternative desert basis, it is relevant even when there is an action (and causation). “Counterfactual-based responsibility can exist for acts that cause harm as well, irrespective of whether such acts are large, small, or de minimis in the size of their causal contribution.” When both causation and counterfactual dependence are present, “the most seriously blamable relation governs, excluding the other from counting at all.” Counterfactual dependence thus plays a separate, independent role in determining blameworthiness.

B. Counterfactual Dependence

Importantly, Moore rejects that counterfactual dependence is causation. Thus, when Moore is speaking about the relationship that omissions have with bad states of affairs, he is not claiming that omissions cause bad states of affairs. He is claiming, however, that the particular relationship that omissions have to bad states of affairs is also blameworthy. That relationship is counterfactual dependence.

In Chapter 16, Moore introduces us to quandaries about counterfactuals generally. First, by virtue of what is a counterfactual statement true when both of its clauses are false? The first possibility is the covering-law account of counterfactuals. One problem for the covering law view is how
to distinguish a law from an accidental generalization.\textsuperscript{70} Even when there is no law, some counterfactuals are true. The more significant problem with this account is that counterfactuals are indeterminate.\textsuperscript{71} When we imagine that one fact is not true, what else has changed?\textsuperscript{72} Take the counterfactual statement, "if Sarah Palin were president, then the Gulf oil spill would have been resolved quickly." We can't just take this world and simply plop Palin into the presidency. Many other things about the world would have to have changed for Palin to be president, and there are many different ways the world could change to make it the case. Some ways the world could change would make the counterfactual true; other ways would make it false. There is no reason to pick one set of changes over another.

The second possible account of counterfactuals is the possible world view.\textsuperscript{73} There are two problems with this account. The first is the ontology that there are "real" possible worlds.\textsuperscript{74} The second is indeterminacy. One must specify the possible world in which we are testing the truth of the counterfactual.\textsuperscript{75}

Aside from these issues about counterfactuals generally are the particular problems of trying to view causation as counterfactual dependence. Moore makes several points about why counterfactual dependence is not causation. First, sometimes counterfactuals are true, and yet the dependence is not a causal relationship.\textsuperscript{76} Thus, the two are not identical.\textsuperscript{77} Second, counterfactual dependence is overbroad: "the counterfactual theory is committed to each of such de minimis contributors being a cause whenever their contribution was necessary to the injury occurring."\textsuperscript{78} Also, "[c]ounterfactual dependence across chains of causes does not, as causation seems to, weaken or peter out."\textsuperscript{79} And, then from a moral standpoint, even if causes are remote and de minimis, why, asks Moore, wouldn't corrective justice want to reach you? Third, counterfactual dependence is not asymmetric but causation is.\textsuperscript{80} Counterfactual dependence may work forward

\textsuperscript{70} Id. at 379–80.
\textsuperscript{71} Id. at 382.
\textsuperscript{72} Id.
\textsuperscript{73} Id.
\textsuperscript{74} Id. at 384–85.
\textsuperscript{75} Id. at 385.
\textsuperscript{76} Id. at 395.
\textsuperscript{77} Id. at 395–96.
\textsuperscript{78} Id. at 397.
\textsuperscript{79} Id. at 399.
\textsuperscript{80} Id. at 287, 403.
or backward through time, but causation only moves forward. Finally, some epiphenomenal events appear to be counterfactually dependent, but this certainly does not track a causal relationship between the two.

In sum, Moore gives quite compelling reasons for rejecting the view that counterfactual dependence is causation. He also introduces some more general concerns about counterfactuals. The question is, then, how to put Humpty Dumpty back together (and differently!) when we use counterfactuals for omission-type cases.

C. Counterfactual Dependence is Dead! Long Live Counterfactual Dependence!

I want to raise a host of concerns about Moore’s resurrection of counterfactual dependence as an independent desert basis for actions as well as omissions, preventions, and double preventions. It is important to note that in using counterfactuals in this way, we are no longer talking about causation. As Richard Fumerton notes, “we should make it clear that we are substituting for the intuitive idea that we are responsible primarily for what we cause to occur another and quite different idea—the idea that we are often responsible for the world’s being a certain way that it would not have been had we failed to act or, for that matter, had we acted.” The point I wish to make is that we will need external limiting principles to restrict the reach of counterfactual dependence. Simply shifting counterfactual dependence to its own desert basis is not sufficient resolve any of the problems that bedevil this basis of responsibility. Causation and Responsibility may be the final word on causation, but it is a mere first paragraph in a theory of counterfactual dependence. And, because counterfactual dependence is essential for responsibility for all omission-type cases, as well as being an independent desert basis for actions, there is much work that will need to be done to resolve the metaphysical, moral, and legal challenges it presents.

1. Establishing the Desert Basis

We should first ask why counterfactual dependence is an independent desert basis. In Chapter Two, Moore defends the moral relevance of his project. “‘Causation matters’ seems a pretty good candidate for a first

81. Id.
82. Id. at 400.
principle of morality." Thus, "we are more blameworthy when we cause some evil, than if we merely try to cause it, or unreasonably risk it." And, "what we feel, and rightly feel, is that when our culpability causes serious injury to others, we are much more blameworthy than when it does not. Causation matters morally in this way." Finally, "when there is a larger causal contribution there is greater wrongdoing."

These claims leave Moore's left flank undefended. That flank is whether counterfactual dependence matters. What does Moore tell us about the blameworthiness of counterfactual dependence? Moore takes counterfactual dependence to be a lesser form of blameworthiness than causation. "On average, and holding the mental states of culpability constant, causing is worse than allowing, which is worse than omitting; causing is also worse than risking and worse than trying." What is it exactly that makes this so? Moore gives us a lovely diagram to illustrate. We split the desert bases between culpability and culpability plus wrongdoing. Counterfactual wrongdoing is part of the latter. But where is the argument?

Causation is a doing, and the counterfactual dependence Moore cares about is a connection based upon laws. Metaphysically, they seem profoundly different. When Moore argues that causation matters, he tells us, "The principle to which these emotions and judgments point is a principle of 'ownership'—in some suitably extended sense, we own the results of our actions." But if omissions are nothings and can't cause anything, how can they own anything? Indeed, the fact that Moore thinks there is a moral distinction between causation and counterfactual dependence cut precisely against the notion of agency that he needs to tie us to greater wrongdoing for the "results" of our not doings.

2. Indeterminacy

Even assuming Moore can give us an account of the independent desert basis of wrongdoing based on lawful generalizations and/or possible worlds, we still have a number of questions. With counterfactual dependence,

84. MOORE, CAUSATION AND RESPONSIBILITY, supra note 1, at 29.
85. Id. at 30.
86. Id. at 33.
87. Id. at 72.
88. Id. at 317.
89. Id. at 319.
90. Id. at 433.
91. Id. at 435.
92. See id. at 447–48.
indeterminacy remains a problem. What else about the world has to change to make the omission become an act? Alternatively, what else about the world has to change for the act not to occur?

Moreover, even if we figure out what the world looks like for the condition to obtain, we then have to look at what the world looks like after the condition obtains. First, we face the indeterminacy that if we don’t know what changed before the omission, we don’t know what effects the non-action will have. We also face an epistemic hurdle: what else about the world would change if acts and omissions that did or did not occur were suddenly not to occur or to occur? Although the test may seem relatively straightforward if all we imagine is a mother letting her child drown in a puddle of water, life gets far more complicated. Once things get too complicated to prove beyond a reasonable doubt, courts shift from pure counterfactual dependency to criminal liability for loss of chance. This surely is not the right result from an omniscient perspective, but what are epistemically limited human beings to do?

I find it somewhat curious that this objection is not fatal to Moore’s endorsing counterfactual dependence. Admittedly, doing without counterfactual dependence would be to extricate quite a bit of entrenched machinery, but so is doing without foreseeability or the harm within the risk test, and Moore had no problem jettisoning either of those. Given the utter indeterminacy, how can Moore countenance retaining counterfactual dependence? And how can he think that the criminal law, which requires proof beyond a reasonable doubt, could credibly use the test?

3. The Breadth of Counterfactual Dependence

Assuming we ignore counterfactual dependence’s indeterminacies, the law will still need to confront all the problems that arise with the test. First, consider the epiphenomenal objection: that counterfactual dependency appears to exist for dual effects of a common cause. We don’t get rid of this problem simply by viewing counterfactual dependency as something other than causation. If when the clock strikes five, the workers will leave their

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94. See MOORE, CAUSATION AND RESPONSIBILITY, supra note 1, at 157–225 (offering a devastating critique of harm within the risk); MOORE, PLACING BLAME, supra note 43, at 363–99 (arguing that because there is no principled basis by which to determine the correct description of the harm so as to determine whether it was foreseeable, the foreseeability test is incoherent).
office buildings and the hitman will kill his victim, then it appears that but-for the workers leaving their office buildings, the victim would not have died.\textsuperscript{95}

Next, consider why the counterfactual dependence we care about will only move forward in time. If Villain is upset and expresses his anger by killing Victim, then if the Victim does not die, then Villain is not upset. We still need to cut through the back-tracking and asymmetry problems that Moore complained of when counterfactual dependence was thought to be identical to causation.

Finally, consider the "butterfly effect." Moore rejects counterfactual dependence as causation because it is too promiscuous. But he then reintroduces counterfactual dependence as its own desert basis. But that means he resurrects these problems: "the counterfactual theory is committed to each of such de minimis contributors being a cause whenever their contribution was necessary to the injury occurring."\textsuperscript{96} And, "[c]ounterfactual dependence across chains of causes does not, as causation seems to, weaken or peter out."\textsuperscript{97} How is Moore going to get counterfactual dependence to weaken or peter out then? I suspect he can't.

Counterfactual dependence could not do the metaphysical work of causation because it failed to do what causation does: move forward in time, specify causes, and distinguish causes from epiphenomenal events. Unfortunately, when Moore reintroduces counterfactual dependence, he still needs it to work the way that causation does. He still needs a forward-looking, limited, and epiphenomena distinguishing notion of counterfactual dependence. He needs a limit on but-for. What will replace what proximate causation did?

\textbf{D. Limiting the Reach of Counterfactual Dependency}

I suspect that Moore will concede that counterfactual dependence is just as promiscuous and worrisome as ever. He will further admit that he needs external limiting principles. And, he will argue that these principles are acceptable to impose because unlike assimilating counterfactual dependence to causation, where one needs to bastardize the notion of causation to make counterfactual dependence fit, here he can simply admit that counterfactual

\textsuperscript{95} This is a variation of an old hypothetical. See Moore, Causation and Responsibility, supra note 1, at 481.
\textsuperscript{96} Id. at 397.
\textsuperscript{97} Id. at 399.
dependency sweeps widely, but that morally we only care about certain sorts of cases. (Just as we do not care about all instances of causation.)

I do not object to this strategy. Rather, in this section, I want to focus on three possibilities for restricting counterfactual dependency’s reach: duty, ability, and laws. (A fourth that does not warrant extended discussion is mens rea, which certainly places limits on defendant’s criminal responsibility.) While Moore may leave us with simple singular causal relations, he leaves us with tremendous complexities for counterfactual dependence.

1. Duty

One way Moore can limit the reach of counterfactual dependency is to point out that an individual may not have a duty. It may be true that a child is dying right now because we are all at a conference instead of rescuing her, but we are under no duty to rescue (and we lack the mens rea as well). Duty restricts the reach of counterfactual dependence.

However, two of the tests that Moore rejects for proximate causation—foreseeability and harm within the risk—can be part of the duty analysis. Consider variations on People v. Kibbe. The defendants rob the victim and leave him on the side of the road half-naked when it is freezing cold outside. Assume they consciously disregard the risk of death, and assume they think he may freeze to death. I assume that whatever causal role the defendants play, they independently have responsibility based on counterfactual dependence. That is, Moore tells us that the railroad cases, where a railroad negligently leaves a woman in a deserted area and she is raped, are truly omission cases. The railroad had a duty to rescue her from the peril it created and that is why the railroad is responsible for the rape. Likewise, here, the defendants are responsible for leaving the victim in the situation where is he is exposed to the cold.

Of course, what really happened was the victim in Kibbe was hit by a truck. Were the defendants under a duty to rescue him from this peril? And what if the victim was hit by a hunter’s stray bullet? Moore must either say that this is a “match” question—did the harm occur the way the defendants envisioned, or a duty question “was this peril within the scope of what the

100. Id. at 148.
101. 321 N.E.2d at 775.
defendants had a duty to protect the victim from?” If Kibbe is now an omission case and “peril” covers a host of foreseeable harms to the victim, then we have simply relocated the proximate cause analysis into the duty analysis. Given Moore’s rejection of proximate causation tests on conceptual grounds, he should be troubled that the same unprincipled intuitions will simply appear elsewhere in our analysis.103

Moreover, although duty, however slippery, may work for omissions, let us not forget that Moore wants to use counterfactual dependency with actions as well. With actions, we have duties not to harm others. The workers who leave at five (when the victim dies) perform an action. We do not look to the scope of a duty to curb their responsibility. Duty cannot limit counterfactual dependency in action cases.

A book on causation certainly need not offer us a theory of duties. However, it is not hard to see that, if we were to apply Moore’s view of causation, we would begin to resurrect our policy limitations elsewhere. Duty is certainly a place to look.

2. Ability

As a second restriction, Moore can offer us ability. Indeed, he repeatedly uses the term “ability” to get at counterfactual dependence in omission cases.104 There is the question about what Moore means by ability. After all, ability sounds like a property of the defendant. She was tall, blonde, and had the ability to save her son. But I doubt Moore means this. After all, in discussion of propensities, Moore notes, “propensities would be real properties of token events; a horse would have four hooves, a long nose, and good chase of winning the Derby, all equally as its properties.”105 Moore considers this to be “ontologically very expensive.” 106 Moore doesn’t like expensive ontologies.

Rather, I take it that ability just is a form of counterfactual dependence. Moore seems to take this view at times:

Put more simply, they had the ability to prevent the rape and did not, and that is sufficient to ground their responsibility. Causation has no role to play in

103. This may, of course, just give us pause to think of these cases as actions, not omissions. I owe this point to Peter Westen.
105. Id. at 503.
106. Id.
this kind of responsibility, ability (i.e., counterfactual dependence) doing all of the work that needs doing.\(^{107}\)

A necessary condition for such blameworthiness for omissions is that the omitter could have prevented that which he omitted to prevent. He had to have, in other words, the ability to satisfy his positive duty. Such an ability is counterfactual: if, contrary to fact, he had not omitted to do some action A—if, that is, he had done A—then the state of affairs he was duty bound to prevent would not have existed. In a nutshell, counterfactual dependence (of the harm on omission) is necessary for responsibility for omissions.\(^{108}\)

At times Moore seems to be reaching for a normative limiting principle—“it would be patently unfair to demand the impossible of us: we can fairly be blamed only for not preventing what we had the ability to prevent.”\(^{109}\) Moore sees his view as aligning with the Model Penal Code’s, which states that one cannot be guilty for an offense unless there is a voluntary act or “an omission to perform an act of which he is physically capable.”\(^{110}\)

In offering us “ability,” Moore has hardly offered us an easy concept for limiting the reach of counterfactual dependency. The notion of abilities, though indispensable, is a rather thorny philosophical thicket.\(^{111}\) Equating counterfactual dependence with ability resolves some questions, but gives us plenty more. Indeed, one might say that Moore’s casual reference to ability as the panacea to counterfactual dependence is the equivalent of taking every single item in my entire home and cramming it behind the office door. Ability is a massive undertaking, worthy of its own five hundred-page book.

First, let us look at what question ability is intended to answer. I think we may need two tests of counterfactual dependence, not just one. That is, we don’t want to supplant all tests of counterfactual dependence with ability. Rather, I think we ought to consider separating ability, as a voluntariness question, from counterfactual dependence, as a “causation substitute” question. The question of whether the world is made worse off by your omission is a separate question from whether you could have acted if you

\(^{107}\) \textit{Id.} at 304.

\(^{108}\) \textit{Id.} at 436.

\(^{109}\) \textit{Id.}

\(^{110}\) \textit{Model Penal Code} § 2.01(1) (1962).

tried. Moore seems to conflate these. If Alex does not rescue his son because Alex is a quadriplegic, then it is still true that but-for Alex’s failure to rescue, his son would not have drowned. The death still counterfactually depends upon Alex’s failure to rescue, even if it is unfair to blame Alex for not rescuing. There is causation-like counterfactual dependence, but no ability.

There can also be ability without causation-like counterfactual dependence. Ability is not sufficient. Say you are drowning and I can rescue you but I choose not to. Ability is satisfied. But you don’t drown because someone else saves you. Your drowning does not counterfactually depend on my inaction, though I have the ability to save you and I do not exercise that ability.

The first notion of counterfactual dependence gets at the normative claim that it is unfair to punish someone for making the world worse off unless he could have avoided making the world worse off. If you are tied to a tree, can’t swim, or are a quadriplegic, you lack that ability. The harm still relies on your omission, but you cannot be blamed for your omission. The second notion gets at measuring harm—that the world is worse off. It is in this sense that overdetermination cases don’t count. We can’t blame you for making the world worse off if you didn’t make it worse off. What you are capable of doing does not matter because the world is unaffected by your action.

Untangling these two notions will keep omissions analytically symmetrical to actions. Assume that Betty reflexively kicks Joan, causing a bruise. I think it is fair to say there is causation, and that there is counterfactual dependence. But there is not a meaningful sense in which Betty could have done otherwise, or in which she is blameworthy. If mechanistic causation is insensitive to voluntariness and autonomy concerns, the same should be true of causation-like notion of counterfactual dependence.

A second set of issues involves sorting out a range of temporal distinctions that interact with specific and general abilities. I may be able to swim in the sense of being at the foot of the pool, or able to swim in the sense of being able to swim were I near water. Because of time-framing, criminal law may care about both. If I fail to rescue my drowning daughter, then it may matter whether (1) I was there (and if not, why not) and (2) whether I can swim at all. It may or may not be fair to blame me depending

112. See Moore, Causation and Responsibility, supra note 1, at 436.
upon whether, even if I were there, I would be able to rescue, and whether, even if I were not there, I would be able to be there and able to swim.

Indeed, the time framing on ability can go back further still. Any test of ability will need to pick out (1) whether the defendant had the specific ability on that day had he chosen to act and (2) whether even if the defendant lacked the ability, he had the “ability to acquire that ability”—such as a mother who consciously disregards the risk that her child might one day drown, but decides nevertheless not to take swim lessons. If the child is drowning, the mother did and did not have the ability to rescue her. Of course, if the world changed such that the mother was the type of mother to take swim lessons, then maybe the child would not have been swimming in the first place, or would have gotten in a deadly car accident on the way to a Mommy and Me Gymboree, or would have been visiting his grandmother that day. But we have already addressed the indeterminacy problem.

The myriad uses of ability also run against the certainty that Moore wants for counterfactuals. We can say that someone had the ability if we expect that most of the time the person will succeed. However, that sort of ability cannot be sufficient for counterfactual dependence. What we need is that the person could do it on that occasion. But “could have” is not always “would have.”

3. There Oughta Be a Law

I want to introduce a final concern. Even after we impose duties, require ability, and look to culpability, these restrictions may still be insufficient to get counterfactual dependence to do the work that Moore wants it to do.

Let us return to the epiphenomenal case. The clock strikes five. When the clock strikes five, the workers leave their offices and the hitman kills the victim. Add one fact: the hitman has advertised that he has a hostage and that he will kill that hostage at 5 p.m. The workers leave; the victim dies. Are the workers liable for murder because the victim’s death counterfactually depended upon them leaving?

The workers satisfy the actus reus. This is counterfactual dependence based upon action, and we clearly have willed bodily movements. (Leaving work is always willed.) Because this is an action, we can disregard any question of duty or ability. I think that, modifying the Model Penal Code as Moore must, we also have knowledge. The Model Penal Code defines knowledge as “if the element involves a result of his conduct, he is aware

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that it is practically certain that his conduct will cause such a result.” If we insert counterfactual dependence, then we have something along the lines of “if the element involves a bad state of affairs that counterfactually depends upon his conduct, he is aware that it is practically certain that the result counterfactually depends upon his conduct.” The workers know that if they are not leaving then it is not five and the victim does not die. (Okay, assume they are philosophers who understand counterfactual dependence.) And, we have the result that counterfactually depends upon the conduct.

Something is clearly wrong here. The criminal law is not interested in all cases of counterfactual dependence. Perhaps Moore will simply rely on ability and say that there is not ability here. Two results of a common cause have no ability to affect the other. That is possible. But I also wonder whether we should simply admit that criminal law cares about the counterfactual dependence cases that look like causation cases. I think, at the end of the day, that Moore will need yet another restriction. We will simply have to say that the counterfactual dependence that we care about is one that relies on covering laws that themselves are causal laws. So, ultimately, Moore’s singularist theory of causation will have to yield generalizations that support the covering laws that then apply to individual cases of counterfactual dependence. Let me repeat this claim. Because we do not want to hold the workers liable, we will need to say that despite the fact that there is counterfactual dependence, it is not the right sort of counterfactual dependence. Rather, the only counterfactual dependence cases that we care about for the criminal law (and for moral blameworthiness more generally) will be those that are causation-like. Thus, if counterfactual dependence is governed by laws, criminal law and morality will only be concerned with those laws that are themselves causal laws. Hence, even if Moore is correct that causation is itself a singular relation, these singular relations will ultimately need to generate general laws and it will be precisely those laws that will be used to limit counterfactual dependence.

I have only gestured at the questions and the possible answers here. And, it may be that other plausible answers may be given. However, for our purposes, it is sufficient to note that Moore’s recasting of counterfactual dependence as something other than causation does little to work out the nuances of how counterfactual dependence is going to work.

III. CONCLUSION

_Causation and Responsibility_ is a masterpiece. It should simply be malpractice to argue about, teach, or even think about causation without having read this work. Moore has achieved expertise in an extraordinarily difficult area and has changed how we will think about causation for decades to come. I am just waiting for the next book that answers all the questions that remain. I fear that it will need to be just as long, and the questions will be equally difficult. Of course, if anyone is up to the task, it is Michael Moore.