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CAUSATION *and* RESPONSIBILITY

An Essay in Law, Morals, and Metaphysics

MICHAEL S. MOORE

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For my long-established circle of fellow 60-something friends and colleagues in criminal law theory.

Preface

This is a long book, so it may be worthwhile giving a road map as to where it is headed. The general conception is to relate two contexts in which causation figures, that of legal and moral responsibility on the one hand, and that of scientific explanation on the other. The central idea that organizes the book is that causation as a prerequisite to legal liability is intimately related to causation as a natural relation lying at the heart of scientific explanation. This central idea is based on two thoughts, one is metaethics and the other is legal theory. The metaethical postulate is that moral responsibility (like all moral properties) supervenes on natural properties like causation, intention, and the like. The postulate of legal theory is that legal liability in (torts and criminal law) falls only on those who are morally responsible.

This book defends neither of these postulates, that being a task undertaken elsewhere.[1] The book rather uses the central idea as its guiding hypothesis and seeks to show in detail how it plays out. Analytically, the book thus has two parts: one in legal and moral theory, and the other in the metaphysics of causation. As originally conceived, the book was literally to be so divided. The first half was to plumb both legal doctrine and the morality that underlay it for presuppositions of what causation must be like; the second half would examine the metaphysics of causation, seeking to extract a metaphysics that both matched the law's presuppositions and that was independently plausible. In the writing of the book it became evident that such complete separation of legal/moral discussions from metaphysical discussions would interrupt the natural flow of the argument. Thus, for example, metaphysics intrudes in Chapter 12, in the middle of the discussions of intervening causation and accomplice liability, because one cannot assess the viability of those legal doctrines without taking a position on metaphysical issues. As another example, the critique of the counterfactual and nomic sufficiency theories of the metaphysics of causation is interrupted by the moral/legal thesis of Chapter 18, which is that counterfactual dependency is a desert basis independent of causation.

Still, the book generally proceeds from legal and moral usages of 'cause' to those usages involved in ordinary and scientific explanations. Part I deals with legal and moral doctrines framed in causal terms. Chapter 1 of that part examines legal liability rules in tort and criminal law. The essential thesis of the chapter is that our liability scheme in both areas of law is causation-drenched, and that this is so irrespective of whether those liability doctrines use the word 'cause'

[1] See Michael Moore, *Objectivity in Law and Ethics* (Aldershot: Ashgate, 2004); Moore, *Placing Blame: A general theory of the criminal law* (Oxford: Clarendon Press, 1997).

explicitly or whether those doctrines use causally complex verbs of action like 'hit', 'kill' , and 'disfigure'. Chapter 2 leaves the law for the morality underlying it; the question is whether these areas of law should be so focused on causation. The thesis of the chapter is that moral blame depends in part on whether one caused the harm one intended, foresaw, or risked, and that therefore any legal doctrines depending on such degrees of moral blameworthiness rightly take causation into account in framing its liability rules.

Chapter 3 combines a legal with a moral thesis because the open-ended legal provisions on necessity and balance of evils simply reference whatever morality holds to be the correct balance here. The issue is when good consequences can (legally and morally) justify the violation of seemingly categorical norms, such as those norms prohibiting killing and torture. The thesis of the chapter is that causation plays a large role in drawing the line of permissible consequentialist justifications in morality and thus, in law.

Part II leaves off Part I's concern with the *role* of causation in legal doctrines and moral norms, and turns to the presuppositions about the *nature* of causation made by such doctrines and norms. Chapter 4 begins with an examination of the law's own explicit theory about those presuppositions. The aim of the chapter is largely taxonomical, aiming to arrive at a workable taxonomy of legal tests of causation. But by charting the heavy qualifications the law itself adds to what I describe as the standard legal tests about causation, I intend also to cast doubt on whether the law is committed to the concept of causation these tests *say* it is committed to.

Chapters 5 and 6 leave the law's *explicit* theorizing about causation in favor of teasing out the law's *implicit* concept(s) of causation. Here I seek to draw out what the law must be committed to about causation implicitly, in light of what the law does with causation in its explicit legal doctrines. This is a matter of reconstructing a concept implicit in a body of practices, a matter always involving some interpretive choices. The thesis of these chapters is that the law's implicit concept of causation differs little from a concept of causation embedded in common sense explanations and evaluations of human behavior.

As Chapter 4 observes, there are three doctrinally dominant tests for proximate causation. These are the foreseeability, the harm-within-the-risk, and the direct-cause theories. Having said elsewhere my piece about foreseeability,[2] I in this book focus on the harm-within-the-risk and direct-cause theories. Parts III and IV are devoted, respectively, to each of these theories.

Part III deals with the risk theory. Chapter 7 lays out the history and essential tenets of the theory. I do this in some detail because the theory has been the standard educated view on proximate causation within the American legal

[2] In Moore, 'Foreseeing harm opaquely', in J Gardner, S Horder, and S Shute (eds), *Action and Value in Criminal Law* (Oxford: Oxford University Press, 1993), reprinted in Moore, *Placing Blame*, Chapter 8.

academy for most of the last one hundred years. It was the favored approach of 'the best and the brightest' of tort theory in America in the 1920s, the dominant approach of the leading criminal-law theorists of the 1950s, and has returned as the dominant approach of those tort theorists in America responsible for the third iteration of the *Restatement of Torts*. After Chapter 7's largely historical introduction, Chapters 8, 9, and 10 then seek to critique this dominant theory. They do this by urging that as applied to crimes and torts of negligence, the harm-within-the-risk test in incoherent (Chapter 8); that as applied to crimes and torts of negligence, the test is morally undesirable (Chapter 9); and that as applied to any crimes or torts, the test does not address the issues that tests of proximate causation do and should address (Chapter 10).

Part IV deals with the direct cause theory. Chapter 11 lays out the doctrinal intricacies of the test, spending considerable time on the crucial idea of an intervening cause. Chapter 12 looks at the metaphysical possibilities for making sense of there being (literally) breakers of causal chains. The thesis of the chapter is that nothing in nature answers to the concept of an intervening cause. (A related subsidiary thesis of Chapter 13 is that no artificial construction of legal policy can do the justifying work needed doing, either.) The upshot is that the direct-cause test is not viable, except as a rule of thumb about substantiality of causation.

Chapter 13 then raises the question of what should become of the criminal law doctrines of accomplice liability once the supposition on which that doctrine is based—that of intervening causation—is discarded. The answer, unsurprisingly, is that the various doctrines of accomplice liability also should go, which is the bottom-line conclusion of the chapter.

The book then turns to the metaphysics of causation. There are two questions raised in such metaphysics: what is the nature of the things related by causation, and what is the nature of the relationship between those things? Parts V and VI deal with those two metaphysical questions.

Part V has two chapters. The first of these, Chapter 14, seeks to lay out a taxonomy of the sorts of things that may plausibly be thought to be related by causation, things like events, facts, states of affairs, objects, persons, properties, etc. Chapter 14 begins with the law's framing of this issue, both because there is wisdom in the law's simplified taxonomy of these possibilities and because the law is our ultimate interest here. The thesis of the chapter is that all plausible causal relata can be reduced either to coarse-grained things (events under the Davidsonian conception of them) or to relatively fine-grained things (either tropes, states of affairs, or facts).

Chapter 15 seeks some resolution about what causal relata might actually be, amongst these four possibilities. The metaphysical resolution is that one of the fine-grained things, states of affairs, is the true relata of the causal relation. The relation most desirable for use in law is different: (coarse-grained) events are the relata on which legal liability should turn, recognizing that such relata will be constructions based on the true relata of the causal relations, which are states of affairs.

Part VI examines three leading sorts of theories as to the nature of the causal relation, the counterfactual theory, generalist theories (including nomic sufficiency, probabalist, and Humean regularity theories), and singularist theories. The counterfactual theory receives the most attention. This is in part because of the dominance of such theory in both law and recent philosophy. But also, as I explore in Chapter 18, there is something roughly right about the theory as it pertains to responsibility assessments, and thus the theory would require such attention even if lawyers and philosophers were not so preoccupied with it.

Chapter 16 begins with an examination of counterfactual conditionals generally, without reference to using them as the reduction base for causation. The thesis of the chapter is that there are two analytically distinct and historically important conceptions of these conditionals. These are: (1) the older, law-related view; and (2) the newer, possible-worlds account. I focus on the latter in framing the discussion about causation, although my own long-term bets are on the former conception of counterfactuals.[3]

Chapter 17 examines the counterfactual theory of causation, applying the possible world conception of counterfactuals. For a variety of reasons I conclude that not only is causation not to be identified with counterfactual dependency, but such dependency is also not either a necessary or a sufficient condition for causation. Such dependency is thus unreliable as a test for when causation is present or absent.

Chapter 18 nonetheless defends counterfactual dependency as a desert determiner, independent of causation. Lawyers have not been wrong in looking for such dependency as the touchstone for liability for omissions, preventions, double preventions, and cases of de minimis causal contribution (they have only been mistaken in lumping such dependencies in as a kind of causation). The thesis of Chapter 18 is that in such cases counterfactual dependency determines moral responsibility and legal liability quite independently of causation.

Chapter 19 returns to the metaphysics of the causal relation proper. The chapter examines generalist theories of causation, theories that seek to reduce that relation to some law-based relation. Particular attention is paid to the one such generalist theory that has had a large influence in legal theory. This is the nomic sufficiency theory of John Stuart Mill and his intellectual descendents, Hart, Honore, Mackie, and Wright. The thesis of the chapter is that generalist theories founder on the same seven arguments that doom the counterfactual theory as well.

Chapter 20 concludes with an overview of singularist theories of the causal relation. A variety of singularist sorts of theories are distinguished and assessed for their relative plausibility. My own conclusion is that some such theory best survives the metaphysical tests for a good theory of causation. Some such theory is also the theory closest to the common-sense view of causation examined in Chapters 5 and 6, and, because of that, the theory is also closest to the legal

[3] For the kinds of reasons suggested in Richard Fumerton, 'Moore, causation, counterfactuals and responsibility', San Diego Law Review 40 (2003), 1274–7.

presuppositions of what causation must be like. I do not choose precisely which singularist theory will win the contemporary tournament of theories going on in modern metaphysics.

The book throughout focuses on causation as an element of responsibility for some harm in situations where one's obligations are not voluntarily undertaken by promise. This is the kind of moral responsibility that underlies the law of torts and of crimes. The book closes by dealing with responsibility for breach of promise-based obligations; thus, the Appendix deals with causation in the law of contract. The distinctive nature of promissory obligations, it is argued, places different demands on the concept of causation than those placed upon the concept by the law of crimes and torts. Nonetheless some common ground is found in the incorporation of causation's requirements by the explicit or implied terms in particular contracts. The point is given an extended illustration in the contract of insurance on the Twin Towers in New York City, which insured the leaseholder of the Towers against all risks up to the amount of approximately $3.6 billion 'per occurrence'. The crucial language, 'per occurrence', is standardly interpreted by a 'causal test' under New York insurance law, and the Appendix enquires into just what that means in the context.

Each of these chapters and the Appendix was written with an eye both to separate preliminary publication as a free standing article and to subsequent integration into this book. I have sought to rewrite each chapter to eliminate redundancies, supply cross-references and ease transitions. Hopefully the organization and state of the whole has not been hampered by the requirements of such separate, preliminary publication.

It may seem surprising that in a book on causation in the law little attention is given to formulating some precise test of causation to be given to legal fact-finders. There are a number of reasons for this. One lies in my own skepticism about the utility of giving detailed doctrinal tests to juries on issues where ordinary folk already have strong, common intuitions. Consider in this regard the example of the legal tests for insanity. Volumes have been written on how legal insanity should be defined, and the resulting variety of legal formula is considerable.[4] Despite this, many jurors who intuitively understand the general idea that insanity is a kind of loss of moral agency ignore the legal verbiage when they retire, asking only if the accused is mad or not.[5] Another example is that of

[4] See Moore, *Law and Psychiatry: Rethinking the relationship* (Cambridge: Cambridge University Press, 1984), Chapter 6.

[5] As the Royal Commission on Capital Punishment observed about the insanity tests prevailing in England: 'Howevermuch you charge a jury as to the M'Naghten Rules or any other test, the question they would put to themselves when they retire is—"Is this man mad or is he not?" (*Royal Commission on Capital Punishment 1949–53 Report* (London: Her Majesty's Stationary Office, 1953), 112) As the Commission observed, this is a matter of common sense prevailing over the stated tests for insanity: '[W]hen common sense says the verdict should be "guilty but insane" and the M'Naghten Rules say it should be "guilty", judges and juries usually recognize that common sense must prevail.' (Ibid)

intention. As Justice Holmes famously quipped, 'even a dog knows the difference between being stumbled over and being kicked',[6] in which event detailed instructions about intention in terms of, say, recent neuroscience would be unnecessary and unhelpful.

The same is true of causation. The view of the relation this book ultimately defends is singularist. Not necessarily a primitivist singularism, as that is described in Chapter 20, but perhaps instead a physically reductionist version of singularism. On the latter kind of theory, the ultimate truth about causation will often be unknown in those particular cases where the causal conclusion is not itself difficult to reach. Under either kind of singularist theory, the jurors' intuitive understanding of the relation may be a better heuristic than would attempts at speculating about the physics of the situation.

There are some things that should *not* be said about causation to legal fact-finders—indeed, most of the things the law now tells them. The law now tells them that: there are two distinct causal enquiries, that of cause-in-fact and that of proximate causation (rather than one enquiry about substantiality of causal contribution); that the cause-in-fact enquiry exhausts the scientific question of causation whereas the proximate cause enquiry is a matter for normative judgment as to how far liability should extend; that the scientific notion of causation is that of counterfactual dependency, or minimal sufficiency, or raises in the conditional probability of an effect, or of necessity of the effect having the probability it did in fact have; that effects counterfactually depend on events that accelerate, but not on events that delay, those effects; that particular harms were either foreseeable or unforeseeable to defendants at the time at which they acted, but not both; that there is *a* risk that makes one negligent so that in each case it should be asked whether the harm that happened was within that risk; that certain kinds of events, if they intervene between the defendant's action and some later harm, sever any causal connection between the two that otherwise might have existed; that at least some omissions are causes; that to prevent something is to cause that thing not to exist; etc.

These common legal sayings are all false, and because false, probably misleading to be told to legal fact-finders. One has to be careful here, because successful heuristics are where you find them, and it is possible that telling literally false statements can produce better decisions than would be obtained by telling nothing but the truth.[7] But usually we do better in giving instructions that say plainly what we think to be true, just as usually the best way to hit a target

[6] Oliver Wendell Holmes, Jr, *The Common Law* (Boston: Little, Brown, 1881), 7.

[7] In the context of insanity instructions, for example, Abraham Goldstein once urged that the so-called 'justly held responsible' definition of legal insanity might produce less accurate decisions by the jury, not because that test inaccurately defined insanity, but because it put too much pressure on jurors (by making painfully obvious their complete responsibility in deciding on an accused's future). Goldstein, *The Insanity Defense* (New Haven: Yale University Press, 1967), 82.

with an arrow is to aim straight at it. In which event telling jurors these and other falsehoods about causation, risk, and counterfactual dependency, is not helpful.

The main reason why the book gives only occasional attention to legal tests for causation stems from my interests in writing it, which are more theoretical than practical. Many legal theoreticians believe that it is not causation that is at the core of legal and moral prohibitions, it rather being proposed that some mysteriously irreducible human agency is the core natural property on which moral responsibility supervenes.[8] They believe, alternatively, that neither causing harm nor being an agent of harm adds to one's blameworthiness beyond the blameworthiness already earned by intending, trying, or risking that harm's occurrence.[9] They believe, alternatively, that the doctrine of doing and allowing 'is a mess', that the causal distinctions at the root of that doctrine are myriad, confused, empty, or otherwise without moral merit.

Moreover, many legal theorists not only doubt the relevance of causation to legal and moral judgments; they also doubt that there is any fact of the matter about causation itself. This skepticism then inclines them to accept some policy-based substitutes for causation, such as the foreseeability and the harm within the risk tests. Or they flee to some more direct policy calculus, be it economic or otherwise.

Such legal theorists also find the metaphysics of causation to be hard. They thus have some incentive to find it insoluable, arbitrary, irrelevant, or even undemocratic. They want to agree with Sir Frederick Pollock, who years ago proclaimed that 'the lawyer cannot afford to adventure himself with the philosopher on the metaphysics of causation'.[10] One basis for avoiding this adventure is to think that legal purposes justify the lawyer in creating his own notions of causation, one unique to the law and one immune to the challenges of metaphysical critiques.[11]

This book is mostly written to correct these errors of legal theory. That there are also practical, doctrinal pay-offs is nice but not essential. Law schools were once defined as the unholy mixture of Plato's Academy and the training ground

[8] Eg, John Gardner, 'Moore on complicity and causality', University of Pennsylvania Law Review PENNumbra 156 (2008), 432–3. I directly answer the 'mysterians' about human agency in Moore, 'The mysterious agency of the mysterians', forthcoming in JH Aguilar and AA Buckareff (eds), *Causing Human Action: New perspectives on the causal theory of action* (Cambridge, Mass: MIT Press, a Bradford book, 2009).

[9] Eg, Larry Alexander and Kimberly Kessler Ferzan, with contributions by Stephen Morse, *Crime and Culpability: A theory of criminal law* (Cambridge: Cambridge University Press, 2008).

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

[11] Jane Stapleton, 'Choosing what we mean by "causation" in the law', Missouri Law Review (2008), 433–480, a shorter version appearing under the title, 'Causation in the law', in Helen Beebee, Peter Menzies and Chris Hitchcock (eds), *Oxford Handbook of Causation* (Oxford: Oxford University Press, 2008). Stapleton believes that 'causal language can be used to express information from a variety of interrogations into our world pursed for different purposes . . .'. From this (true enough) observation of ordinary language she concludes that the search for a unitary concept of causation—or worse, a unitary metaphysical nature—a real rather than a nominal essence—is a 'doomed project', that can only produce 'myths' for answers. Ibid, n 15.

for young Hessian mercenaries.[12] This book is on the Academy side of that line. I assume that it is worthwhile figuring out the function and nature of a property like causation, both in the law and out. There are practical benefits of achieving such understanding, but the reason for making the effort is, for me, mostly because it is there to be understood.

Writing this book has been a long-ongoing process and a large number of people have contributed to its completion. The students who have filled some of my seminars over the years communicated their insights and their enthusiasm, making this book a good deal more fun to write. This includes the law students in my Advanced Torts class at the University of Southern California who in 1989 opted to explore the legal literature on causation in extra sessions of that class; the philosophy students at the University of Pennsylvania who took my Philosophy of Action class and the Penn law students who took my moral luck classes; the law students in my seminar at the University of Virginia who worked through (what one of them accurately described as) the 'bone dry' literature in the history of causation in law; the philosophy students who filled my seminars on moral luck and on the metaphysics of causation at the University of Illinois Philosophy Department; finally, and most of all, the law students at the University of Illinois College of Law, who with interest and good humor worked through the present manuscript chapter by chapter in their seminar in the Fall of 2007. One of these students, Bill Houlihan, wrote his senior paper on causal apportionment, which was quite helpful to me in redrafting that section of Chapter 5.

A number of my colleagues in philosophy and in legal theory were kind enough to gather together in November 2006 to discuss the various topics raised in this book. This was at the Roundtable on Causation and Responsibility held at Timberline Lodge on Mt Hood, Oregon. I am indebted to the participants at that Roundtable—David Armstrong, Patrick Suppes, Peter Menzies, Dagfinn Follesdahl, Richard Fumerton, Michael Rota, Leo Katz, Claire Finkelstein, John Oberdiek, Laurie Paul, Jonathan Schaffer, Evan Fales, Phil Dowe, Doug Ehring—for lending their time and their energy to this project. I am particularly indebted to Richard Fumerton for his co-hosting of this event with me.

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[12] Alan Stone, 'Legal education on the couch', Harvard Law Review 85 (1971), 392–411.

Goldman, Richard Fumerton, Chris Hitchcock, Richard Wright, and Ken Kress, stand out in memory as being particularly helpful to me.

As the Acknowledgements pages make plain, I have individually defended the chapters comprising this book in many venues. I am indebted to the audiences at these numerous gatherings for their many helpful comments and suggestions. The book is better because of them.

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Michael Moore
Canberra, Australia
June, 2008

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Chapter 1 — The discussion of this chapter builds on portions of Chapter 8 of Michael S Moore, *Act and Crime: The Implications of the Philosophy of Action for the Criminal Law* (Oxford: Clarendon Press, 1993).

Chapter 2 — The discussion of this chapter builds on the discussion of 'The Independent Moral Significance of Wrongdoing', given at the Conference on Culpability versus Harm at the Organizing Principle of the Criminal Law, University of San Diego, 1994, first published in Journal of Contemporary Legal Issues 5 (1994), 1–45, reprinted in Michael Moore, *Placing Blame: A general theory of the criminal law* (Oxford: Clarendon Press, 1997); this chapter itself was given at the Roundtable on Retributive Punishment, Institute for Law and Philosophy, University of San Diego, 2008, and has not been previously published.

Chapter 3 — From 'Patrolling the borders of consequentialist justification', given as the 2005 Natural Law Lecture, Fordham University, to the Institute for Law and Philosophy, Rutgers University, 2005, to the University of Illinois Roundtable on Causation and Responsibility, Mt Hood, Oregon, November 2006, and to the Political Philosophy Forum of Cambridge University, Cambridge, England, November, 2007; first published in Law and Philosophy 27 (2008), 35–96.

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Chapters 11 and 12 From 'The metaphysics of causal intervention', first given at the Symposium in Honor of Sanford Kadish, School of Law (Boalt Hall), University of California, Berkeley, 1999; first published in California Law Review 88 (2000), 827–77.

Chapter 13 First given at the Workshop of the Program in Criminal Law and Procedure, University of Illinois, 2007, then to the Faculty Colloquium, University of Pennsylvania Law School, 2007, then to the General Aspects of Law Colloquium, University of California at Berkeley, 2007, and then to the Faculty of Law, Queen's University, Kingston, Ontario, as one of my Scholars in Residence lectures; first published in the University of Pennsylvania Law Review 156 (2007), 395–452.

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Chapter 18 First given at the Faculty Seminar, Department of Social and Political Theory, Research School of Social Sciences, Australian National University, Canberra, 2008, then to the Faculty Workshop, Department of Philosophy, University of Queensland, Brisbane, 2008, and then as the keynote address, annual

meeting of the Australian Society of Legal Philosophy, Melbourne University, Melbourne, 2008; first published in the Australian Journal of Legal Philosophy, 2009.

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Chapter 20 First written as the Introduction to the Symposium Issue on Singularist Theories of Causation, The Monist 91 (2008)(4).

Appendix First given to the Faculty Workshop, University of Pennsylvania Law School, Philadelphia, 2002, then to the Faculty Workshop, Cardozo Law School of Yeshiva University, New York City, 2002, then to the Faculty Workshop, University of Illinois College of Law, 2002, then as a plenary paper at the annual meeting of the Australian Society of Legal Philosophy, Canberra, Australia, 2002, and then as a plenary paper at the annual meeting of the Royal Institute of Philosophy, New College of Oxford University, Oxford, England, 2002, and finally at the Law Faculty Workshop, Cornell University, 2005; first published in J Hyland and H Steward (eds), *Agency and Action* (Cambridge: Cambridge University Press, 2004).