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Judith Jarvis Thomson

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CAUSALITY AND RIGHTS: SOME PRELIMINARIES

JUDITH JARVIS THOMSON*

Nobody believes it follows from the fact that X did something, his doing of which caused Y to suffer a harm, that X infringed a right of Y's. There are too many obvious exceptions. It would be very welcome if we could produce a list of kinds of exceptions which can plausibly be thought exhaustive. I am not able to do that; what I wish to do is draw attention to some considerations which I think call for study before so much as trying.

SECTION I

Consider the following story.

BRICK: A, B, and C are strangers. B was sitting at the bus-stop, waiting for a bus, minding his own business. C was walking towards the bus-stop, also minding his own business. A, on a whim, threw a brick at B. A's aim was bad. The brick hit C, bounced off C, and hit B, thereby causing B the loss of an eye.

On any view, I should think, A's throwing the brick caused B the loss of an eye; and I should think also that, on any view, A infringed a right of B's. But the person of more interest for present purposes is C. Did C's walking towards the bus-stop cause B the loss of an eye? If it did, then here is an exception to the thesis that if X did something, his doing of which caused Y a harm, then X infringed a right of Y's, since C surely did not infringe a right of B's in BRICK.

Well, *did* C's walking towards the bus-stop cause B the loss of an eye? I think the right answer is Yes.

Let us stop for a moment, however, over two things that might very naturally be thought to be reasons to think the answer is No.

We are sure to be struck, in the first place, with C's innocence: certainly it was no fault of C's that B lost his eye! But we cannot really—for more than a moment—think that reason to say C's walking towards the bus-stop did not cause B the loss of an eye, for there are so many very obvious instances in which X does something, his doing of which does cause an unwanted outcome, though X is not at all at fault for the coming about of that outcome. More generally, the question whether one

* Professor of Philosophy, Massachusetts Institute of Technology.

event X causes another event Y can hardly be thought to turn on anyone's moral failings.

Moreover, consider a variant on BRICK in which C walks towards the bus-stop, *not* minding his own business, but precisely in order to deflect A's brick into B's eye. (A is notorious for his brick-throwing whims. A is notorious for throwing to the right of the target. C could not be certain of succeeding, but had his hopes, hating B as he did. And so on and on.) Here, I think, one feels it correct to say that C's walking towards the bus-stop caused B the loss of an eye. But the question what led C to walk towards the bus-stop, or what were C's intentions in doing so, surely cannot be thought to fix whether the walking itself caused this or that outcome.

Something rather more interesting issues from one of the sources of the inclination many people feel to distinguish between causes and "conditions" (on some accounts, "occasions", or "circumstances").

I do not have in mind what leads Hart and Honoré, for example, to distinguish between causes and conditions—more precisely, what leads them to distinguish between causes and *mere* conditions, for on their view, all causes are conditions, but some conditions are not causes.

[I]n distinguishing between causes and [mere] conditions two contrasts are of prime importance. These are the contrasts between what is abnormal and what is normal in relation to any given thing or subject-matter, and between a free deliberate human action and all other conditions.¹

They do not mean just any free deliberate human action:

[A] voluntary human action intended to bring about what in fact happens, and in the manner in which it happens, has a special place in causal inquiries: not so much because this, if present among a set of conditions required for the production of the effect, is often treated as the cause (though this is true), but because, when the question is how far back a cause shall be traced through a number of intervening causes, such a voluntary action very often is regarded both as a limit and also as still the cause. . . .²

Thus if a fire started in a movie house, the presence of oxygen did not cause the fire, but was a mere condition of it, since oxygen is normal in movie houses, present whether fires start there or not; if oxygen escaped into a part of a laboratory which is normally kept free of oxygen for some experimental purposes, and in consequence there was a fire, then the presence of oxygen did cause that fire. Again, if I threw a lighted match

1. H.L.A. HART & A.M. HONORÉ, CAUSATION IN THE LAW 31 (1st ed. 1959) [hereinafter HART & HONORÉ].

2. *Id.* at 39.

onto a pile of old newspapers next to your house, in order to cause a fire, and in consequence there was a fire, then my throwing the match onto the pile of newspapers caused the fire: if unbeknownst to Jones and me, you arranged the wiring in Jones' house and mine so that when I next sneezed a fire would start in Jones' house, then your arranging the wiring caused the fire, but my sneezing did not.

Presumably, then, C's walking towards the bus-stop did not cause the loss of B's eye. For on the one hand, people generally (and we may suppose C in particular) often walk towards bus-stops: their doing so is normal. What is not normal is brick-throwing. And on the other hand, while we may suppose that C's walking towards the bus-stop was a free human action, even a free deliberate human act, it was not (by contrast with A's throwing the brick) an action intended to cause harm to B.

But what Hart and Honoré say here is better seen, not as an account of a distinction in nature between causes and (mere) conditions, but rather as an account of the conditions under which we will say that such and such caused so and so.³ When people want to know what caused a certain outcome Y, they very often, perhaps mostly, want to know this because they want to know what explains Y's coming about, or, where Y is something unwanted, what to blame for Y's coming about. It would not be surprising, then, if, when they ask "What caused Y?", they very often, perhaps mostly, regard the answer "X caused Y" as satisfactory—as supplying what they wanted—only if X does explain Y's coming about (thus if X is an abnormal circumstance which made the difference between Y's coming or not coming about) or, where Y is unwanted, where X can suitably be blamed for Y's coming about.

What I had in mind in suggesting that we should look at the inclination many people feel to distinguish between causes and conditions is something quite different, something ontological rather than pragmatic. Here is an example of the kind which might incline one to mark an ontological distinction between causes and conditions. We hit a glass with a hammer, and the glass then shattered. No doubt the glass would not have shattered if it had not been brittle; but its being brittle did not *cause* it to shatter, rather our hitting the glass with a hammer was what caused the glass to shatter. Or so, I think, many people feel. The glass, being brittle, on their view, may suitably be called a mere condition, more briefly a condition, of its shattering—I henceforth omit the "mere"—for it was literally a condition of the glass in virtue of which something *else*,

3. And (or?) an account of the conditions under which we will say that such and such was *the* cause of so and so. For more on "the cause," see Section II of this article.

namely our hitting the glass with a hammer, was able to, and did, cause the glass to shatter.

Hart and Honoré would probably say that the glass' being brittle would of course not be said to have caused the glass' shattering. Brittleness is normal in glasses, or we may anyway suppose it to have been normal in that glass. And the glass' being brittle was not an action at all, and *a fortiori* was not a free deliberate human action intended to shatter the glass—compare our hitting the glass with a hammer. But what I get at here is not what we would *say* about what caused the glass' shattering, but rather what *did* cause the glass' shattering; and what is of interest is the inclination I think many people feel to say that the glass' being brittle did not cause it to shatter, indeed, did not cause anything at all, since it is a *state of affairs* rather than an *event*. On the view I draw attention to here, it is only of events that we can truly say that they caused this or that.

I should stress that this is not Hart and Honoré's view. On their view, an abnormal state of affairs (such as there being oxygen in a room from which oxygen is normally excluded) could very properly be said to have caused something (a fire, for example). Still, I think the view I draw attention to here *is* at work in many people. That it is comes out in two ways. Consider, in the first place, how tempting it is to think of X as causing Y in that X consists in something's applying a force to something, and of the causal relation itself as involving a transmission of energy. You could not consistently hold this view if you thought that states of affairs were causes. A glass' being brittle, for example, neither is, nor involves, the applying of a force or the transmitting of energy. By contrast, events such as our hitting the glass with a hammer seem to be the very paradigm of causes. Consider, second, the strenuous efforts some philosophers have made to try to show that "acts of omission" (failures to do such and such) are themselves events. Their motive seems to have been clear. Acts of omission certainly do seem to cause things. (Could anyone plausibly deny that a signalman's failure to pull a lever might have caused a train crash?) But if acts of omission are not events, then how could they possibly cause anything? I suspect that the philosophers I mentioned think they could not, and that that is why acts of omission had therefore better turn out to be events.

Why might one think that only events can cause things? Here is one possible route to that thought. The glass we hit with a hammer was brittle. Indeed, we may suppose it was brittle all its life. But its being brittle never before caused it to shatter: the glass did not shatter until we

hit it with a hammer. It was our hitting the glass with a hammer that triggered the glass' shattering, and thus made it shatter.

More generally, only an event triggers, sets in motion, the coming about of this or that outcome; states of affairs merely provide the backdrop against which events do the work. So only events cause anything; states of affairs are at most conditions *in* which events cause things.

This reasoning connects with the ways in which we mark events off from states of affairs. The glass' being brittle: that is not an event, it is a state of affairs. Our hitting the glass with a hammer: that is plainly an event. There is of course a deep metaphysical question in the offing here, namely what exactly marks events off from states of affairs. But intuitively, an event is a happening, an occurrence. By contrast, a state of affairs is a something's-having-a-property (for example, a glass' being brittle, thus the glass' having the property "brittle"), or a something's-standing-in-a-relation-to-something (for example a man's sitting on a bench, thus the man's standing in the relation "sitting on" to a bench).⁴ Events *occur* at or through a stretch of time. By contrast, states of affairs *obtain* at or through a stretch of time. Many events occur at a point of time (for example, the event that consists in a hammer's arriving at the surface of a glass), but many take time to occur, and those that do take time to occur have temporally successive parts, which may be very different from each other (for example, our hitting a glass with a hammer takes time to occur, and begins with a swing of a hammer, and ends with the hammer's arriving at the surface of the glass). By contrast, although many states of affairs obtain only at a point of time (for example, if a thing is in motion, then its being at a certain place might obtain only at a point of time), many obtain through a stretch of time, but it is not at all clear what it would come to talk of the temporally successive parts of a state of affairs. (For example, what could we take the temporally successive parts of a glass' being brittle to be?)⁵ More would need to be said if

4. One popular account of what events are says that an event is a thing's having a property at (or through) a time, or several things' standing in a relation at (or through) a time. *See, e.g., Kim, On the Psycho-Physical Identity Theory*, 3 AM. PHIL. Q. 227, 231-35 (1966). On that account of what events are, every event is a state-of-affairs'-obtaining-at-(or-through)-a-time, and if a state of affairs obtains at (or through) a time, then there is an event which consists in its doing so. So far as I can see, there is only one reason for thinking it plausible, namely that it is in a measure ontologically economical. That is, events and states of affairs may well strike us as puzzling entities, and that account of events does at least connect them. It should be noticed, however, that it does not identify them, and that it is only "in a measure" ontologically economical, for no state of affairs is, itself, a state-of-affairs'-obtaining-at-(or-through)-a-time.

5. It is not at all clear whether this contrast between events and states of affairs can be squared with the account of what events are that I drew attention to in the preceding note. For further discussion of that account of events, see J.J. THOMSON, *ACTS AND OTHER EVENTS* at ch. VIII (1977).

we were to become really clear exactly how events differ from states of affairs. I suggest, however, that it is the difference people feel there to be between them that is anyway one source of the inclination to distinguish between causes and conditions.

Now if you think that only events cause things, then this is likely to have consequences for what you will think may be said about BRICK. On any view, A's throwing the brick caused the loss of B's eye. So far so good, for A's throwing the brick was plainly an event.

But what of C's walking towards the bus-stop? That was causally involved in the loss of B's eye only in that it caused C's being at a certain place, call it P, at the very time, call it T, at which the brick reached P. But C's being at P at T was not itself a cause of the loss of B's eye, for it is a state of affairs. (Contrast C's *arriving* at P at T, which is an event.) C's being at P at T was therefore only a condition of the loss of B's eye—by virtue of having been a condition of the brick's hitting C, and then bouncing off him towards B.

But this still does not tell us about C's walking towards the bus-stop. That was an event, and I suppose that friends of the thought I have been drawing attention to could say that while C's being at P at T did not cause the loss of B's eye, C's walking towards the bus-stop did cause the loss of B's eye. But I think it more likely to be said that since the causal role played by C's walking towards the bus-stop was exhausted by its having caused C's being at P at T, which did not itself cause the loss of B's eye, C's walking towards the bus-stop did not cause the loss of B's eye either—thus that C's walking towards the bus-stop did not cause the loss of B's eye, but only caused a condition in which A's throwing the brick was able to, and did, cause the loss of B's eye.

What should we make of all this? Well, let us have a closer look at the causal roles played by events on the one hand, and states of affairs on the other.

SECTION II

Two comments seem to me to be called for.

It *may* be that some who are inclined to want to restrict causes to events are so inclined in consequence of harboring the idea that there can be at most one thing of which it can truly be said that it caused a certain outcome Y. Certainly if a man says that the truth of "Our hitting the glass with a hammer caused it to shatter" *by itself* rules out the truth of "The glass' being brittle caused it to shatter," then we have good reason

to suspect that he, at least, has the idea that at most one thing can have caused Y.

But that idea is surely false. Suppose Smith shot Jones, and that Jones died of the wound. It might be the case that all of the following are true: Smith's shooting Jones caused Jones' death, the bullet's lodging in Jones' left side caused Jones' death, the onset of hemorrhage caused Jones' death. Indeed, I doubt that there is any outcome Y of which it could be said that there is one and only one thing that caused it.

The locution "the cause" seems to have caused trouble in legal writing. It seems to suggest uniqueness, thus that X is not the cause of an outcome Y unless X is the sole thing of which it can be truly said that it caused Y. No wonder it has seemed such a hard problem to work out the truth-conditions for "X is the cause of Y"—for it is doubtful that "X is the sole cause of Y" can ever be true.

Why is the locution "the cause" so common in legal writing? Why in fact is it so common in ordinary life? People who want to know what caused Y do very often put their question in words of the form "What was the cause of Y?" And even when people ask "What caused Y?", those whom they ask often answer in words of the form "X was the cause of Y."⁶ It is not at all clear why "the" is so common in such talk. As I said earlier, when people want to know what caused a certain outcome Y, they very often want to know this because they want to know what explains Y's coming about, or, where Y is something unwanted, what to blame for Y's coming about. Can it plausibly be thought that they think that, for any Y about which they want to know this, there is exactly one thing which explains Y's coming about, or which is to blame for Y's coming about? I doubt it; the idea is too odd.

Moreover, we really do not in general use expressions of the form "the so and so" in such a way as to imply uniqueness. Compare my saying to my guest: "I'll hang your coat in the closet." I do not mean: There is exactly one closet in the universe, and I'll hang your coat in it. I do not even mean: There is exactly one closet in my house, and I'll hang your coat in it.⁷ It is not easy to say exactly what the words "I'll hang your coat in the closet" do mean in English. Perhaps they mean just: I'll hang your coat in *a* closet. Or perhaps they mean: I'll hang your coat in an appropriate closet. (Thus not in a closet in my neighbor's apartment.) I am sure that something similar should be said about sentences of the

6. Consider the drift back and forth between "caused" and "was the cause of" in Chapter II of HART & HONORÉ, *supra* note 1, at 24-57.

7. I am indebted to George Boolos for reminding me of sentences such as this one.

form "X is the cause of Y," and thus that they too do not attribute uniqueness.

In any case, I shall throughout avoid the locution "the cause," simply to avoid even *seeming* to imply uniqueness.

Let us go back to the little piece of reasoning I set out earlier. I imagined a friend of the restriction of causes to events to proceed as follows. The glass (let us suppose) was brittle all its life. But its being brittle never before caused it to shatter: the glass did not shatter until we hit it with a hammer. It was our hitting the glass with a hammer that triggered the glass' shattering. It is only events that trigger the coming about of this or that outcome; states of affairs merely provide the backdrop against which events do the work. So states of affairs do not themselves cause anything.

What is certainly right is that the glass' being brittle did not "trigger" its shattering. If states of affairs cause things, then it is not in that way that they do so. But *is* that the only way in which we think one thing can cause another?

Consider Smith and Jones again. Smith shot Jones, and Jones died of the wound. I drew attention to the fact that the following might all be true: Smith's shooting of Jones caused Jones' death, the bullet's lodging in Jones' left side caused Jones' death, the onset of hemorrhage caused Jones' death. The shooting, the bullet's lodging where it did, and the onset of hemorrhage are all events. But isn't it also true to say that *Smith* caused Jones' death? And wouldn't we be speaking truly if we later pointed to the bullet Smith fired at Jones and said of it that *it* caused Jones' death? But consider Smith. He is not an event. Moreover, he has been in existence for many years, and it would not have been true of him at any time in those years (until after he had shot Jones, and Jones had died) that he caused Jones' death; yet he all the same caused Jones' death. Similarly for the bullet. So why should we suppose that since the glass had been brittle all its life, and it was not true of it at any time during its life (until after we hit the glass with a hammer) that the glass' being brittle caused it to shatter, it follows that the glass' being brittle did not cause it to shatter?

It is perhaps just barely worth mentioning the possibility of saying that "Smith caused Jones' death" is elliptical for "An event which consisted in Smith's doing something caused Jones' death." But what is the force of "do something" here? Compare pointing to a bullet and saying of it "That bullet caused Jones' death." Should we take that to be elliptical for "An event which consisted in that bullet's doing something

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

We really do not so use the verb "cause" that it can truly be said only of events that they cause things. People cause things. And so do bullets. This means that the little piece of reasoning I set out earlier cannot be advanced in support of the idea that states of affairs do not cause things.

Moreover, I can see no good reason to think that events, people, bullets, and—for let us now include them too—states of affairs do cause things, but only in different senses of the verb "cause." I can see no good reason to think that sentences of the form "X caused Y" are true only if the verb shifts in meaning with shifts in category of the entities referred to by their subjects.

What is surely a better idea is that events, people, bullets, and states of affairs cause things, not in different senses of the word "cause," but in different *ways*. People, for example, often cause things by acting in this or that way, their acts being events that cause things; events and states of affairs do not act at all, and *a fortiori* do not cause things by acting. Bullets also do not act, or anyway, do not act in ways in which people often do (is a bullet's lodging in a person's body an act of the bullet's?), and *a fortiori* do not cause things by acting in ways in which people do. On the other hand people sometimes cause things in ways in which bullets do. Thus, suppose Alfred and Bert are shoved out of a helicopter, and one lands on Charles, thereby causing Charles' death. We might ask which, and the answer might be that it was Alfred who landed on Charles and thereby caused Charles' death—just as it might have been a bullet that was shoved out of the helicopter, and landed on Charles and thereby caused Charles' death.

The ways in which events and states of affairs cause things are closely interrelated. An event E causes an outcome Y only given that certain states of affairs obtain at the time of occurrence of E, namely

those states of affairs S such that E causes Y because⁸ S obtains at the time of occurrence of E. Thus our hitting the glass with a hammer caused the glass' shattering only given that the glass' being brittle obtained at the time of occurrence of our hitting the glass with a hammer, it being because that state of affairs obtained at the time of occurrence of our hitting the glass with a hammer that our hitting the glass with a hammer did cause the glass' shattering. A state of affairs S causes an outcome Y only given that certain events occur while S obtains, namely those events E such that S causes Y because⁹ E occurs while S obtains. Thus, the glass' being brittle caused the glass' shattering only given that our hitting the glass with a hammer occurred while the glass' being brittle obtained, it being because that event occurred while the glass' being brittle obtained that the glass' being brittle did cause the glass' shattering.

In any case, there just is no good reason to think that states of affairs do not cause things. We may, if we like, characterize them as "conditions," to mark the fact that their causal role is not the same as the causal role of events. But there is no good reason to think that they are *mere* conditions—that is, entities which, by virtue of being conditions, are therefore not causes.

SECTION III

Let us go back to BRICK. On any view, A's throwing the brick at B caused the loss of B's eye. And what of C's walking towards the bus-stop? Well, if C's walking towards the bus-stop caused C's being at P at T, and C's being at P at T caused the loss of B's eye, then—by transitivity¹⁰—C's walking towards the bus-stop caused the loss of B's eye. But did C's being at P at T cause the loss of B's eye? C's being at P at T is a state of affairs, but as I have suggested, there is no good reason to think that states of affairs do not cause things. Is there good reason to think that that state of affairs in particular did not cause the outcome we are interested in, namely the loss of B's eye? So far as I can see, the answer is No.

Is there good reason to say that that state of affairs *did* cause the outcome we are interested in?

8. But exactly what is the cash value of this "because"? The account I give in the text is incomplete until that question is answered.

9. The same unanalyzed "because" again, as addressed *supra* note 8.

10. Hart and Honoré reject transitivity; see HART & HONORÉ, *supra* note 1, at 24-57. That is not surprising, given that what they are really after is what we will *say* caused (or was the cause of) this or that.

There is a bad reason for saying it did. What I have in mind issues from an idea that many people have—or anyway, an idea that many people used to have—about what it is for one event to cause another. The idea is that for an event *E* to have caused an event *Y* is for *E* to have been a necessary condition for *Y*, the expression “necessary condition” typically being understood in such a way that for an event *E* to be a necessary condition for an event *Y* is for it to be the case that *Y* would not have occurred if *E* had not occurred. In short,

(1) *For an event E to have caused an event Y is for it to be the case that if E had not occurred, then Y would not have occurred.*

For example, (1) tells us that for our hitting the glass with a hammer (which is an event) to have caused the glass’ shattering is for it to be the case that if our hitting the glass with a hammer had not occurred, then the glass’ shattering would not have occurred.

Thesis (1) is an account only of what it is for an *event* to cause an event. An analogous account of what it is for a *state of affairs* to cause an event all but suggests itself:

(2) *For a state of affairs S to cause an event Y is for it to be the case that if S had not obtained, then Y would not have occurred.*

For example, (2) tells us that for the glass’ being brittle (which is a state of affairs) to have caused the glass’ shattering is for it to be the case that if the glass’ being brittle had not obtained, then the glass’ shattering would not have occurred.

Now it seems right to think that the loss of B’s eye would not have occurred if C had not been at P at T. (If C had not been at P at T, then, A’s aim having been so bad, the brick would have sailed off past B, hitting no one.) So if (2) is true, then we have good reason to think that C’s being at P at T *did* cause the loss of B’s eye.

It seems right to think also that the loss of B’s eye would not have occurred if C had not walked towards the bus-stop. (After all, if C had not walked towards the bus-stop, he would not have been at P at T.) So if (1) is true then we have good reason to think that C’s walking towards the bus-stop also caused the loss of B’s eye.

Thesis (1) is very much less popular among lawyers than it once was. (I do not think any philosopher has ever accepted (1), though some accept a complicated variant on it.¹¹) The objections to (1) are obvious

11. David Lewis says that an event *E* causes an event *Y* just in case there is a chain of events, E, X_1, \dots, X_n, Y , such that for every link in the chain, if it had not occurred, then its successor would not have occurred. See Lewis, *Causation*, 70 J. PHIL. 556, 556-67 (1973). It is arguable, but not (I think) satisfactorily, that this variant on (1) escapes what I shall shortly call “the counterfactual second agent objection,” and other similar objections. See the discussion of “causal preemption” in

enough.¹² I shall mention only the one I think most crushing—it might be called “the counterfactual second agent objection.” Our hitting the glass with a hammer caused the glass to shatter. But is it true that if our hitting the glass with a hammer had not occurred then the glass’ shattering would not have occurred? That might well not be true. For it might be true that if we had not hit the glass with a hammer, then Alfred would have hit the glass with a shoe, so that the glass’ shattering would have occurred even if our hitting it with a hammer had not occurred. I know of no way in which this objection can be satisfactorily rebutted.

It seems to me a curious fact that lawyers did not on the whole canvass the possibility of replacing (I) with its first cousin.¹³ For consider the following idea: for an event E to cause an event Y is for E to be (not a necessary condition, but) a sufficient condition for Y—the expression “sufficient condition” being understood in such a way that for an event E to be a sufficient condition for an event Y is for it to be the case that if Y had not occurred, then it would have been the case that E had not occurred. Thus in short,

(I') For an event E to cause an event Y is for it to be the case that if Y had not occurred, then it would have been the case that E had not occurred.

Consider the glass again. (I') tells us that for our hitting the glass with a hammer to have caused the glass’ shattering is for it to be the case that if the shattering had not occurred, then it would have been the case that the hitting had not occurred; and it seems right to think that that *is* the case. The presence on the scene of the counterfactual second agent Alfred makes no difference. We may well suppose that Alfred was on the scene, ready to hit the glass with a shoe if we did not hit it with a hammer. All the same, if the glass’ shattering had not occurred, neither would our hitting it with the hammer have occurred.

Thesis (I) is often called the *sine qua non* account of causality; thesis (I') might be called, for obvious reasons, the backwards *sine qua non* account of causality.

Why has (I')—which so tidily bypasses the counterfactual second agent objection to (I)—not turned up in the legal literature? The ques-

Lewis, *Postscripts to "Causation,"* in 2 PHILOSOPHICAL PAPERS 172-213 (1986). For discussion of this and other difficulties that confront Lewis’ theory, see P. HORWICH, *ASYMMETRIES IN TIME* 157-76 (1987).

12. Hart and Honoré survey a number of them. See HART & HONORÉ, *supra* note 1, at 103-22.

13. A number of writers favor the idea of combining necessary and sufficient conditions as follows: An event E causes an event Y just in case E is a necessary member of a set of conditions sufficient for Y. See, e.g., Wright, *Causation in Tort Law*, 73 CALIF. L. REV. 1735, 1735-1828 (1985). But I know of nothing in the legal literature which resembles (I').

tion seems to me to be an interesting one, but I have no idea how to answer it.

One interesting fact about (*I'*) is that its analogue for states of affairs, namely,

(2') For a state of affairs *S* to cause an event *Y* is for it to be the case that if *Y* had not occurred then it would have been the case that *S* had not obtained,

seems less plausible than (*I'*) does. The glass' being brittle did cause it to shatter. But consider the following: if the glass' shattering had not occurred, then it would have been the case that the glass' being brittle had not obtained. Really? It is plausible enough to say that if the glass' shattering had not occurred, then it would have been the case that we did not hit it with a hammer, so that according to (*I'*), the hitting did cause the shattering. But it does not sound at all plausible to say that if the glass' shattering had not occurred, then it would have been the case that the glass was not brittle. In assessing the truth-values of counterfactuals, we are readier to think of the states of affairs (the conditions) involved in the generating of an outcome as fixed, and the events as optional, than we are to think of the events as fixed, and the states of affairs as optional.

By way of reminder of what preceded, we might usefully rephrase this point as follows: we are readier to think of the states of affairs involved in the generating of an outcome as part of the backdrop, the events being like the actors who do the work in front of it, and who may not even get to the theater on time.

Or at least this is mostly true, for sometimes we do think of the events as a fixed part of the backdrop. Consider the front steps of a public building, which people walk up and down every day and often. They suddenly collapse when Smith sets foot on them, and do so, not because Smith is especially heavy, but because the wooden beams supporting them were rotting, getting progressively weaker, and Smith just happened to have been the last straw. Here I think we do not say that if the collapse had not occurred, then it would have been the case that Smith did not set foot on them; I think we say that is false. I think we say that what is true is, instead, that if the collapse had not occurred, then it would have been the case that the beams supporting them were not as rotten at that time as they in fact were.

Examples like this are reminders of the fact—I think it a fact—that the truth-values of counterfactuals are affected by matters having to do with what is customary and what is expected, for they influence what we are likely to hold fixed in considering a counterfactual, thus in particular,

whether events or states of affairs. But what is customary, and what is expected, do not affect the truth-values of causal claims. No doubt they affect the truth-values of ascriptions of "proximate causality"; perhaps they affect the truth-values of assertions to the effect that such and such is *the* cause of so and so; no doubt they affect what we take to have caused so and so. But they have no bearing at all on what did cause so and so. If that is correct, and I think it is, then it is hard to see how any counterfactual analysis of causality can be right.

In any case, while (*I'*) tidily bypasses what I called *the* counterfactual second agent objection to (*I*), there is a similar counterfactual second agent objection, equally crushing for (*I'*). Here I need to shift examples, for a reason that will come out shortly. We press a certain button on Jones' door, thereby causing a bell to ring in his kitchen. So our pressing the button caused a bell's ringing. (*I'*) tells us that for that to be the case is for it to be the case that if the bell's ringing had not occurred, then it would have been the case that our pressing the button had not occurred. But that might well not be true. For it might be true that if the bell's ringing had not occurred, then that would have been because, although we did press the button, a counterfactual second agent Bert had cut the wire with a pair of scissors. There being such a counterfactual second agent Bert—who was planning to cut the wire, though he did not in fact do so—is entirely compatible with its being the case that our pressing the button caused the bell's ringing.

The shift in example was necessary since it is not easy to imagine a way in which a counterfactual second agent Bert might have prevented our hitting the glass from causing it to shatter.

SECTION IV

In section II we looked at an argument to the effect that *neither* C's walking towards the bus-stop, nor C's being at P at T, caused the loss of B's eye in BRICK, namely that the latter is a (mere) condition for the loss of B's eye, and hence not a cause of it, and the former's causal role in the history of the loss of B's eye is exhausted by its causing the latter. I suggested that that argument is not a good one. In section III we looked at an argument to the effect that *both* C's walking towards the bus-stop, and C's being at P at T, caused the loss of B's eye in BRICK, namely that both were (in the relevant senses) necessary conditions for the loss of B's eye. I suggested that that argument too is not a good one.

Did C's walking towards the bus-stop cause the loss of B's eye? *Did* C's being at P at T cause the loss of B's eye?

The answers to these questions seem to me to be plainly Yes. Consider again the variant on BRICK—I drew attention to it in section I—in which C walks towards the bus-stop, not minding his own business, but precisely in order to deflect A's brick into B's eye. Here it is surely correct to say that C's walking towards the bus-stop caused the loss of B's eye. But the question what led C to walk towards the bus-stop, or what were his intentions in doing so, surely cannot be thought to fix whether the walking caused the loss of B's eye. I here assume a thesis to the effect that whether X did such and such with the intention of causing a certain outcome is irrelevant to the question whether X's doing the such and such caused the outcome. More strongly: whether X did such and such with any intention at all, and if so, with what intention, is irrelevant to the question whether X's doing the such and such caused the outcome. But both of these theses seem to be entirely plausible.

And similarly for C's being at P at T. If C had gone there precisely in order to be there at that time, and then been there at that time, in order to deflect A's brick into B's eye, we would have had no reluctance (apart from worries about whether conditions are causes) to say that C's being there at that time caused the loss of B's eye. But again, C's intentions must surely be irrelevant to the question whether his being there then caused the loss of B's eye.

So BRICK really does provide us with an exception to the thesis that if X did something, his doing of which caused Y a harm, then X infringed a right of Y's. For C surely did not infringe a right of B's.

SECTION V

Similar reasoning yields that B's sitting down at the bus-stop, and his being there when the brick reached him, *also* caused the loss of B's eye. After all, we would have no hesitation in saying that a man who puts his head into the path of a brick, in order that it should hit him, causes the harm that comes to him when he succeeds. But B's intentions no more bear on the questions whether an act of his, or a state of affairs involving him, causes an outcome Y than C's intentions bear on similar questions asked about him.

Unlike C, B is not an exception to the thesis that if X did something, his doing of which caused Y a harm, then X infringed a right of Y's. For even given that B's sitting down at the bus-stop caused the loss of an eye, the eye lost was B's own.

But a number of legal writers seem to think that facts like this one about B have a major moral and legal significance. Richard A. Epstein

says: "The now fashionable position is that it is impossible to maintain in constructive fashion the distinction between 'causing a harm' on the one hand and 'not conferring a benefit' on the other."¹⁴ If this "now fashionable position" is correct, then it is not possible to rest anything in legal theory on that distinction. For example (this is the example that concerns Epstein in the book from which I quote), it is not possible to regard that distinction as at the heart of the distinction between "takings" that call for compensation under the eminent domain clause and "takings" that do not. But it seems plain enough that much else in legal (and, I should think, moral) theory would also be affected if we had to give up the distinction between causing harm and not conferring a benefit.

What has made this "now fashionable position" fashionable? Epstein suggests that people have been moved by a certain argument. He says:

To talk about preventing harm, the argument goes, it must be possible to identify that activity which is uniquely the cause of the harm. Since all relevant cases involve interactions between at least two parties, it is impossible to say whether the party regulated or the party protected is the cause of the harm in question. The distinction between the preventing of harm and the conferring of a benefit thus collapses. . . .¹⁵

Epstein takes a dim view of this argument; he rejects its conclusion. But I do not think he makes clear either what is going on in it, or what is wrong with it.

What exactly *is* going on in this argument? It is extremely murky. What I think its friends (if it really has any¹⁶) have in mind comes out best by way of an example. Consider,

FIST: *A and B are strangers. A, on a whim, decided to break B's nose.*

14. R. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 116 (1985).

15. *Id.*

16. I do not know of anyone who has explicitly laid out an argument summarizable in this way, though I suspect Epstein is right in thinking that anyway some of those who accept the conclusion of this argument do accept it for reasons like the ones he points to here. Moreover, traces of it are visible in a number of places. Consider, for example, Frank Michelman's discussion of *Miller v. Schoene*, 276 U.S. 272 (1928):

In that case the Supreme Court upheld a Virginia statute requiring destruction, without compensation, of cedar trees infested with a pest deadly to nearby apple orchards (a basic factor in the local economy) but harmless to the host cedars themselves. Now one may, if one pleases, say that a "nuisance" existed, there being obvious incompatibility between apple-life and cedar-life. Can we, however, find any basis for saying that the cedars, and not the apples, were "the" nuisance?

Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of Just Compensation Law*, 80 HARV. L. REV. 1165, 1198 (1967). Michelman thinks plainly not, and *therefore* that it is not possible to justify the statute by appeal to the fact that it aimed at preventing cedar-owners from causing harm to apple-owners. *Id.*

He swung his fist back to get ready to punch B hard in the nose. We could see what he was readying himself to do, and we intervened: we shouted, "Listen A, you punch B in the nose and we'll lock you in a cell for a year and a half!" Moved by this threat, A refrained from punching B in the nose, and thus refrained from breaking B's nose.

Here it seems plausible to say that we prevented A from punching B, and thus prevented A from breaking B's nose, and thus prevented A from causing B a harm. (I assume that it is acceptable to say "prevented," where what we did was only to issue a threat, as opposed to intervening physically, as by grabbing A's fist, or knocking him down. But perhaps that is a plausible enough assumption. In any case, it is the law that is in question here, and in so far as the law does prevent people from acting, it does so precisely by issuing threats.)

But did we "prevent harm"? Consider the first premise of the argument:

First Premise: "To talk about preventing harm, the argument goes, it must be possible to identify that activity which is uniquely the cause of the harm."

Well, no harm was in fact caused, because we intervened in the nick of time. Presumably what a friend of the argument means is this: in order for it to be true to say we prevented B's suffering a harm it has to be true that the activity we prevented (A's punching B in the nose?¹⁷) would have been—had we failed to prevent it—"uniquely the cause of the harm," that is, the sole thing of which it could truly be said that *it* caused the harm.

If that were true, then it surely would be the case that nobody ever prevents a harm. For whenever a harm does occur, its occurring is an event, and as I suggested earlier, it is surely doubtful that there is any event of which it can be said that it has one and only one cause. I suppose a person *might* think the first premise true precisely because he or she thinks that X did not cause Y unless X is the cause of Y, and thinks that X is not the cause of Y unless X is the sole thing that caused Y. But we have looked at that idea already; it is surely false.

I think it possible that a friend of this argument might have something rather weaker in mind by its first premise, namely: in order for it to be true to say we prevented B's suffering a harm it has to be true that the activity we prevented would have been—had we failed to prevent it—the sole *activity* of which it could truly be said that it caused the harm.

17. Note that there really is no such thing as *the* activity we prevented, since we did not only prevent A from punching B, we also prevented him from breaking B's nose, and indeed also from swinging his arm into the area then inhabited by B's nose, and so on.

That is weaker: it allows that there might be more than one thing that caused the harm, and requires only that there be only one activity that caused it. But the idea seems entirely arbitrary. Why allow many causes so long as at most one is an activity?¹⁸

Indeed, there seems to be good reason to think the first premise just is false. We may surely suppose it true that if we had not intervened, A would have punched B, thereby breaking B's nose. Then (i) if we had not intervened, it would have been true that A's punching B caused B a broken nose. Suppose we also grant (as I argued in the preceding sections that it is open to us to grant) that (ii) if we had not intervened, it would also have been true that B's having walked (let us suppose he walked) to where he was at that time caused B a broken nose. It is very hard to see how anyone could think it plausible to conclude from the conjunction of (i) and (ii) that our preventing A from punching B in the nose did *not* prevent B's suffering a harm. It is entirely plausible to think that in preventing A from punching B in the nose, we were doing exactly that, namely preventing B's suffering a harm.

Let us have a look at the second premise of the argument:

Second Premise: "Since all relevant cases involve interactions between at least two parties, it is impossible to say whether the party regulated or the party protected is the cause of the harm in question."

As I said earlier, no harm was in fact caused, because we intervened in the nick of time. So we should presumably rewrite the second premise as follows: since all relevant cases involve interactions between at least two parties, it is impossible to say whether the party regulated or the party protected would have been—had we not intervened—the (sole) cause of the harm in question. But why merely "impossible to say"? Why not, more strongly: since all relevant cases involve interactions between at least two parties, neither the party regulated nor the party protected would have been—had we not intervened—the (sole) cause of the harm in question. That neither would have been the (sole) cause of the harm seems to me true. It is precisely that that I was arguing for earlier.

So it seems to me that the first premise of the argument is false, and that there is something true that is anyway suggested by the second premise. The argument now proceeds directly to its conclusion:

Conclusion: "The distinction between the preventing of harm and the conferring of a benefit thus collapses. . . ."

Epstein himself thinks this conclusion false, but he thinks the people he has in mind think it derivable from the two premises we have been look-

18. Again: there isn't even any such thing as *the* activity we prevented.

ing at. How could *anyone* suppose that that conclusion follows from those premises?

One possible thought comes out as follows. Suppose that

(3) *Both injurer and victim will cause a harm to the victim, if we do not intervene*

is true. Then why should we say

(4) *If we make the injurer refrain, we will prevent the victim's suffering a harm*

as opposed to

(5) *If we make the injurer refrain, we will confer a benefit on the victim?*

The thought I mentioned is this: if (3) is true, then there is no good reason to prefer (4) to (5).

But why on earth should anyone think that the truth of (3) makes it be the case that there is no good reason to prefer (4) to (5)?

So far as I can see, the truth of (3) is quite irrelevant to the question whether or not there is good reason to prefer (4) to (5).

Moreover, so far as I can see, we ought not prefer (4) to (5), or (5) to (4), whether or not (3) is true. Consider FIST. We intervened in FIST: we made the (prospective) injurer A refrain from punching B in the nose. It seems to me true *both* that we prevented B from suffering a harm, *and* that we conferred a benefit on B. Surely you do confer a benefit on a man when you make someone refrain from injuring him.¹⁹ And it seems to me that both of these are true whether or not it is true that B (as well as A) would have caused the harm to B if we had not intervened.

It is probable that a different thought motivates the friend of this argument, namely: if (3) is true, then there is no good reason to prefer

(4') *If we make the injurer refrain, we will prevent him from causing a harm to the victim*

to

(5') *If we make the injurer refrain, we will make him confer a benefit on the victim.*

But why on earth should anyone think that the truth of (3) makes it be the case that there is no good reason to prefer (4') to (5')?

Consider FIST again. Suppose that just before issuing our threat, we thought the matter over. It is intuitively plausible to say that we would have been right to think (4') preferable to (5'). More strongly, it is intuitively plausible to say that we would have been right to think (4') true and (5') false.

19. A proviso is called for here, however. See *infra* note 21.

Is there some reason to think that this intuitively plausible idea is not correct? Perhaps so. But it is hard to see how the truth of (3) could be thought to show it is not correct. Indeed, so far as I can see, the truth of (3) is quite irrelevant to the question whether or not there is good reason to prefer (4') to (5').

Let us set (3) aside, then, and simply ask whether that intuitively plausible idea *is* correct.

SECTION VI

Why might a person think that there is no good reason to prefer (4') *If we make the injurer refrain, we will prevent him from causing a harm to the victim*

to

(5') *If we make the injurer refrain, we will make him confer a benefit on the victim?*

I think that there are two possible routes to the view that there is no good reason to prefer (4') to (5').

The first route goes as follows. I said earlier that if we make a prospective injurer refrain from injuring, then *we* confer a benefit on his prospective victim. But what benefit, exactly? Well, the benefit that consists in not suffering the harm the injurer would otherwise cause. (In FIST, a broken nose.) But if the injurer refrains from injuring, then doesn't *he* confer that very same benefit on his prospective victim? If we say "Yes, we confer that benefit, but the injurer does not confer it," then there is an asymmetry, which would call for explanation. A friend of these ideas might then think that no plausible explanation is forthcoming, so we had better reject the asymmetry and say that the injurer, and we, *both* confer a benefit on the victim. Thus that we had better say there is good reason to say (5'). Indeed, as good reason to say (5') as to say (4').

The second route is slightly more complex, and comes out most clearly by way of an example, an example other than FIST. Consider, *the case of a confectioner the noise and vibrations from whose machinery disturbed a doctor in his work. To avoid harming the doctor would inflict harm on the confectioner.*²⁰

I'll call this case CONFECTIONER. What is supposed in it is this. If the confectioner continues to operate his machinery, he will cause a harm to the doctor, for example, lost patients. If the confectioner refrains from operating his machinery, he gives the doctor freedom from noise and vibrations. But he does not merely give the doctor freedom from noise

20. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 2 (1960).

and vibrations, he does so at some cost to himself, for example, in decreased profits. So if the confectioner refrains, then he refrains from causing a harm; but he also confers a benefit. What benefit? Freedom from noise and vibrations—the confectioner's giving the doctor that freedom being marked as the confectioner's conferring a benefit on the doctor by virtue of its only being at some cost to himself that he does give that freedom to the doctor.

CONFECTIONER is a better example to give in support of this idea than is FIST, since it is not clear in FIST what the cost to A is in refraining from punching B in the nose, whereas we can readily imagine the cost to the confectioner if he refrains from using his machinery. Still, A did want to break B's nose; so refraining did cost him something. So it might have been said in that case too that A confers a benefit on B in refraining from punching him: in refraining from punching B, A provides B with not-having-a-broken-nose, and that *is* conferring a benefit since it is only at some cost to himself that A does provide B with it.

More generally, whenever a prospective injurer refrains from causing a harm by refraining from doing something he wanted to do, he refrains from causing the harm at a cost to himself, and thus does not merely provide his prospective victim with freedom from the harm: his providing his prospective victim with freedom from that harm is marked as the conferring of a benefit on his prospective victim precisely because his providing freedom from the harm is done at some cost to himself.

Another way to put the point is this. In light of the asymmetry there would otherwise be (first route), and of the cost to the injurer of refraining (second route), there is no good reason to prefer

(4'') *If the injurer refrains, he will refrain from causing a harm to the victim*

to

(5'') *If the injurer refrains, he will confer a benefit on the victim.*

But if there is no good reason to prefer (4'') to (5''), then there is no good reason to prefer (4') to (5').

It might pay to stress that these routes to the thesis that there is no good reason to prefer (4') to (5') do not proceed via the truth of (3)—they do not anywhere assume or presuppose it. If they are acceptable, then they are so whether or not (3) is true.

But they are not acceptable. The asymmetry is wrongly located, and cost is irrelevant.

Suppose that Alfred does such and such, and that his doing the such and such causes Bert to get something Bert does not want, a positive

harm, let us suppose. Then Alfred's doing the such and such causes Bert to suffer a harm. Suppose that Charles does so and so, and that his doing the so and so causes David to get something David does want, a positive benefit, let us suppose. Then Charles' doing the so and so causes David to get a benefit. So far, all is symmetrical.

Symmetry remains when we include consideration of the rights in question. Alfred's doing the such and such causes Bert to suffer a harm whether or not Bert had a right that Alfred not do the such and such. If A punches B in the nose, thereby breaking it, A causes B a harm even if they are participants in a boxing match, even if B has sold A the right to punch him in the nose, even if B has launched an attack on A which A can defend himself against only by punching B in the nose. Similarly, Charles' doing the so and so causes David to get a benefit whether or not David had a right that Charles do the so and so. You cause me to get a benefit if you do something for me even if I have paid you to do it, and thus have a right that you do it. Who has what rights is irrelevant to the question whether one person causes another to suffer a harm or get a benefit.

Not so for "conferring a benefit." I think we do not say that Charles "confers" a benefit on David when he does the so and so if David has a right that Charles do it. If it would be a benefit to me to have a bushel of apples, and I pay you to give me one, then in giving me one you cause me to get a benefit, but you do not "confer" a benefit on me in doing so. You confer a benefit on me in giving me a bushel of apples only if I had no right that you give me one, and you do so merely out of the goodness of your heart.²¹

Moreover, this remains true even if it would be costly for Charles to do what David has a right that he do. If we have a contract—I pay you five dollars, and you give me a bushel of apples—then once I have paid you five dollars, I have a right that you give me a bushel of apples. That means not merely that you do not confer a benefit on me when you do so, but more: you do not confer a benefit on me when you do so even if it suddenly turns out to your dismay that it will be costly for you to get a bushel of apples to give me.

So far, I think, so good. But we have looked only at action; let us look now at inaction, which is more troublesome.

21. The proviso I said was called for (*see supra* note 19) is this: we conferred a benefit on B when we prevented A from punching him in the nose only if B did not have a right against us that we prevent A from doing this. (For example, B could have acquired a right against us that we prevent A from doing this by virtue of having paid us to.)

Suppose now that just before Alfred does the such and such, he decides not to. Then Alfred refrains from causing Bert to suffer a harm. Can we say instead that Alfred causes Bert to get a benefit? Perhaps we can say that Alfred does cause Bert to get a benefit, but we cannot say this *instead*. That is, even if it is also true that Alfred causes Bert to get a benefit, it remains true that Alfred refrains from causing Bert to suffer a harm. Symmetrically for Charles. If just before Charles does the so and so, he decides not to, then Charles refrains from causing David to get a benefit. Even if it is also true that Charles causes David to suffer a harm, it remains true that Charles refrains from causing David to get a benefit.

*Is it also true that Alfred causes Bert to get a benefit? Is it also true that Charles causes David to suffer a harm? Which benefit? Which harm? Well, why not the benefit which consists in not-suffering-the-harm? (That, after all, is the benefit we conferred on B in FIST.) And why not, symmetrically, the harm which consists in not-getting-the-benefit?*²² (Compare "opportunity costs".)

Even if Alfred causes Bert to get a benefit, it does not follow that Alfred "confers" a benefit on Bert. If Bert has a right that Alfred not cause him the harm, then—even if Alfred causes Bert to get a benefit which consists in not suffering the harm—in causing Bert to get that benefit Alfred no more confers a benefit on Bert than you confer a benefit on me when you deliver a bushel of apples I have paid you to deliver. So even if an injurer who refrains from injuring causes his victim to get a benefit, there is every reason to prefer

(4") *If the injurer refrains, he will refrain from causing a harm to the victim*

to

(5") *If the injurer refrains, he will confer a benefit on the victim,*

if the victim has a right that the injurer not cause him the harm—and thus has a right that the injurer cause him to get the benefit of not suffering that harm at the injurer's hands.

In short, whatever else should be said here, there remains a difference between refraining from causing a harm and conferring a benefit.

22. Frank Michelman, for example, says that "[w]e might, if we found it convenient, say of one whose land is about to be converted by coercive social action into a public playground that *he* inflicts intolerable harm on society by refusing to dedicate his land to that use." Michelman, *supra* note 16, at 1200. I presume he thinks that saying this would be saying something *true*, whether convenient or not.

SECTION VII

It could of course be said that if Alfred causes Bert to get a benefit, then there is anyway no reason to prefer

(4'') *If the injurer refrains, he will refrain from causing a harm to the victim*

to

(5'') *If the injurer refrains, he will cause the victim to get a benefit.*

But that consequence should be no surprise, and is not of interest to law or morality, since we have made (5'') follow from (4'') if we have decided to count a man's refraining from causing a person harm as his causing his (otherwise) victim to get a benefit that consists in not suffering the harm.

SECTION VIII

But should we count a man's refraining from causing a person harm as his causing his (otherwise) victim to get a benefit that consists in not suffering the harm? Should we count a man's refraining from causing a person to get a benefit as his causing his (otherwise) beneficiary to suffer a harm that consists in not getting the benefit?

The most interesting objection seems to me to issue from the more general question how we are to understand what (if anything) is caused by non-doings generally.

I said earlier that "acts of omission" certainly do seem to cause things. I asked parenthetically: could anyone plausibly deny that a signalman's failure to pull a lever might have caused a train crash? Let us look at this. Jones is the signalman, and he was under a duty to pull a lever at 4:00 P.M. to cause a bit of track aiming leftward to swing to the right, to cause the 4:10 train to turn right. Jones got drunk, and failed to pull the lever, so the 4:10 crashed. Did Jones' failure to pull the lever at 4:00 P.M. cause the crash? Well, the track's aiming leftward caused the crash, so Jones' failure to pull the lever at 4:00 P.M. caused the crash if it caused the track's aiming leftward, by transitivity of causality. But did Jones' failure to pull the lever cause the track's aiming leftward? Wasn't the track's aiming leftward caused just by whatever first caused the track to aim leftward?—as it might be, Smith's pushing the lever this morning in such a way as thereby to aim it leftward?

It might be said instead that the track's aiming leftward at 4:10 caused the crash, so that Jones' failure to pull the lever caused the crash if it caused the track's aiming leftward at 4:10. But once the track was already aiming leftward, it is hard to see why anything at all is needed to

make it still be aiming leftward at 4:10. (Unless it was about to blow or in some other way move off to the right. If Jones had intervened to prevent the track from moving off to the right, then he would have caused it to be aiming leftward at 4:10. But then the charge against him would not have been "act of omission".)

It might be said instead that the track's not aiming rightward (or not aiming rightward at 4:10) caused the crash, so that Jones' failure to pull the lever caused the crash if it caused *that*. But this idea seems no happier. Anyone who caused the track to be aiming leftward has already caused it to not be aiming rightward.

A second difficulty is this. Jones failed to pull the lever. *A fortiori*, he did not pull the lever. Did his not pulling the lever cause the crash? None of us pulled the lever in fact; did your not pulling the lever cause the crash? The reply most commonly made here is that Jones was under a duty to pull the lever, and you were not. (Hence his not pulling it is a *failure* to pull it, whereas your not pulling it is not.) But how could the question whether Jones was under a duty to pull the lever matter to the question whether his not pulling it caused the crash? What has morality to do with the question whether one thing caused another?

Again, a certain paraplegic, Bloggs, also did not pull the lever. My typewriter also did not pull the lever. Bloggs and my typewriter were not under any duty to pull the lever, in part, I suppose, because neither of them could have pulled it. Why should that matter? What have X's capacities to do with the question whether X's not doing something caused something else?

I do not say these questions have no answers, merely that I do not see any in the offing, and do not think these questions have been taken as seriously as they should be.

I think also that it would pay to see if there isn't some way of holding fast to the ideas that Jones was at fault for the crash, that he was responsible for it, that he may properly be held liable for it, indeed, even that *he* caused the crash, while at the same time giving up the idea that his not pulling the lever (or his failure to pull the lever) caused the crash. Perhaps we can say that although his not pulling the lever did not cause anything at all, still *he* caused the crash in that there was an event or a state of affairs (the state of affairs consisting in the track's aiming leftward at 4:10, for example) such that he caused everything it caused in that he was both capable of preventing it, and under a duty to do so.²³

23. J.J. THOMSON, *supra* note 5, at 212-18, still seems to me to be right on the matter of "acts of omission."

But this begins a story that I am not now capable of finishing, and hence will have to leave for another occasion.²⁴

24. I am grateful to Paul Horwich for criticism of parts of an earlier draft of this article, and to NEH for support during the writing of it.