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# Moore, Causation, Counterfactuals, and Responsibility

RICHARD FUMERTON\*

Professor Michael Moore's contribution to this symposium represents a deep and thorough examination of the relationship between counterfactual and causal tests, the meeting of which are often taken to be necessary conditions for various sorts of moral and legal responsibility.<sup>1</sup> After an ontological investigation into the possible "truth-makers" for counterfactuals, Professor Moore concludes that one cannot *define* causal connections in terms of counterfactuals. Nevertheless, he also argues that one might conclude that the assessment of counterfactuals remains a critical part of assessing legal responsibility. However, as philosophers of law, we should make it clear that we are *substituting* for the intuitive idea that we are responsible primarily for what we cause to occur another and quite different idea—the idea that we are often responsible for the world's being a certain way that it would not have been had we failed to act or, for that matter, had we acted.

The importance of counterfactuals in law is not restricted to questions concerning which agent's action or failure to act, if any, is responsible for a given harm. It became obvious from some of the discussion at this symposium that whether or not we employ tests to determine at whose feet harm should be laid, we will almost certainly need to employ counterfactuals in deciding whether or not someone was harmed in the

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\* I would like to thank all of the participants in the University of San Diego conference on What Do Compensatory Damages Compensate? and, particularly, Michael Moore, for discussion that helped me see more clearly some of the issues discussed in this paper.

1. See Michael Moore, *For What Must We Pay? Causation and Counterfactual Baselines*, 40 SAN DIEGO L. REV. 1181 (2003).

first place. Being harmed by an agent's action or inaction could plausibly be understood in terms of being placed in a state worse than that in which one *would* have been in the absence of that agent's action or inaction.

Moore's paper is so rich in detail that it defies a simple summary. Let me begin by presenting an overview of the many issues upon which we agree. I would like to begin this overview with a discussion of the "possible worlds" account of counterfactuals. Professor Moore did a wonderful job of exposing the philosophical vacuity of possible worlds accounts of the truth conditions for counterfactual or subjunctive conditionals. I regard the frequency with which philosophers now appeal to the metaphor of possible worlds to be a blight on our efforts to seek genuine understanding. Hilary Putnam is surely right to characterize modal realism as a "dotty idea."<sup>2</sup> Indeed, we would do well to keep firmly in mind the philosophical slogan that there is but one and only one actual world and everything that is made true is made true by some feature of that world. Even truths about what is necessary and possible are made true by some feature of the one and only actual world—properties of propositions, thoughts, universals, ideas, events, and so on. When we are interested in understanding the truth conditions for modal claims, counterfactuals, causal claims, property ascriptions (both accidental and essential), and the like, our task is to uncover what it is in the actual world that makes the respective claims true. Again, one might think that it is but a harmless metaphor to suggest that the counterfactual—if *X* were the case then *Y* would be the case—is true just when the relevantly close possible worlds in which *X* is the case are worlds in which *Y* is the case. Indeed, if one thinks of talk about possible worlds as just talk about conjunctions of propositions, then one might embrace Stalnaker's suggestion that to evaluate the proposition that if *X* were the case then *Y* would be the case, we simply add *X* to the true propositions that describe the world and see whether or not the conjunction entails *Y*.<sup>3</sup> Of course, we cannot do *just* that, for the truths that describe the actual world include both not-*X* and not-*Y*. Therefore, we need to add that we make whatever changes are *required*, implicitly or explicitly by the addition of *X* to the description of the actual world. We use the word "required" and, if possible, mutter it under our breath, because we do not want people to notice that our account of counterfactuals has become circular. The "required" changes include everything that would have been different had *X* been the case. If we knew how to figure out what *that* involved, we would already

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2. See HILARY PUTNAM, REALISM AND REASON 218 (1983).

3. Robert C. Stalnaker, *A Theory of Conditionals*, in CAUSATION AND CONDITIONALS 165, 168 (Ernest Sosa ed., 1975).

understand the truth-makers for counterfactuals.

Notice that the above problem also affects covering law accounts of subjunctives. It might be tempting to suppose that the contingent subjunctive conditional—if *X* were the case then *Y* would be the case—asserts that there is some law *L* (we need not have any particular law in mind), and some set of conditions *C* (we need not know what they are) such that *X* and *C* together with *L* entails *Y*. To avoid obvious objections we need to add that *X* is *nonredundant*, meaning that *C* and *L* alone do not entail *Y*. To meet less obvious objections, we need to add that if *C* is truth-functionally complex, then none of its *parts* together with *L* alone entails *Y*.<sup>4</sup> Yet, once again, we do not take *C* to represent *all* of the conditions that actually obtain. We hold *C* as constant as we can while making whatever changes we need to make in order to describe the changes that would have occurred were *X* to obtain. So when I assert that if Jesse Jackson were Secretary of State we would not have gone to war with Iraq, I am most likely imagining the world being different not just with respect to Jackson's political position. I am presumably also imagining a world in which we have a different President, or a President who had undergone a radical change of political heart sometime in the relatively recent past, or an America whose people have radically different political sympathies, and the list goes on and on.

As Professor Moore notes, covering law accounts of counterfactuals face the additional problem of requiring an account of *law* that does not itself invoke counterfactuals.<sup>5</sup> The most obvious difference between lawful generalizations (for example, that all metal expands when heated) and accidental generalizations (for example, that all of the coins in my pocket now are quarters) is that the former's being lawful entails that if this wood were metal it would expand when heated, while the latter's being accidental does not entail that if this penny were in my pocket it would be a quarter.

There have been many heroic attempts to analyze the distinction between lawful and accidental generalizations within the framework of a Humean regularity theory of law.<sup>6</sup> However, it would be an understatement

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4. See generally R.A. Fumerton, *Subjunctive Conditionals*, 43 PHIL. SCI. 523 (1976) (claiming that those who try to analyze contingent subjective conditionals using the concept of law approach do not always provide the correct analysis).

5. Moore, *supra* note 1, at 1197.

6. See generally RICHARD BEVAN BRAITHWAITE, *SCIENTIFIC EXPLANATION: A STUDY OF THE FUNCTION OF THEORY, PROBABILITY AND LAW IN SCIENCE* (1959); A.J. Ayer, *What Is a Law of Nature?*, 10 REVUE INTERNATIONALE DE PHILOSOPHIE 144 (1956); Carl G.

to suggest that such accounts have been met with less than unqualified success.<sup>7</sup> One need not, of course, embrace a regularity theory of law in order to offer a covering law account of counterfactuals. We might embrace Armstrong's suggestion that there are genuine ontological necessary connections holding between universals.<sup>8</sup> However wrong-headed Hume's positive account of law might be, he did have some pretty good reasons for rejecting this sort of necessary connection.<sup>9</sup> The necessary connection between universals holds, presumably, in virtue of the intrinsic character of the universals. Since it does not make sense to suppose that a universal could be intrinsically different than it is, the necessary connection would presumably need to be an internal relation—one that necessarily holds, given the existence of the relata. Yet, internal relations seem to be such that we can know that they obtain a priori provided that we can know the intrinsic character of the relata. Unfortunately for the necessitarians, and, I suppose, for the progress of science, one simply cannot discover laws by reflecting hard on the nature of the universals whose exemplification they describe.

In addition to the above worries, Professor Moore also discusses contingent counterfactuals that make no obvious reference to laws. If there are ten people in the room, I can assert truly that if another person enters the room, there would be eleven people in the room. As I understand him, Professor Moore ends up suggesting that such counterfactuals are really analytic. However, that does not seem quite right. It is still contingent that if another person enters the room, there would be eleven in the room. What this conditional has in common with other counterfactuals is probably just that the antecedent together with conditions that obtain entails the consequent, where, with this example, the existence of lawful *regularities* does not seem to be necessary to derive the consequent.

In the end, I am inclined to agree with Chisholm's suggestion concerning counterfactuals.<sup>10</sup> I think Chisholm ultimately argues that they simply have no determinate truth value. Stalnaker is on the right track to

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Hempel & Paul Oppenheim, *Studies in the Logic of Explanation*, 15 PHIL. SCI. 135 (1948).

7. The most promising are so-called contextualist accounts. In the past, I have suggested that the lawful generalizations occupy a place in a hierarchy of generalizations such that if that hierarchy conflicts with any other hierarchy, the hierarchy with which it conflicts has fewer instances. Two hierarchies conflict when each includes a generalization that conflicts with a generalization in the other. Two generalizations conflict when their conjunction with the proposition that they have instances is a contradiction. I can do a decent job defending this approach, but I cannot really bring myself to believe it.

8. See generally D.M. ARMSTRONG, *WHAT IS A LAW OF NATURE?* (1983).

9. See DAVID HUME, *A TREATISE OF HUMAN NATURE* §§ 1.3.3, 1.3.6 (David Fate Norton & Mary J. Norton eds., Oxford Univ. Press 2000) (1896); see also Ayer, *supra* note 6.

10. Roderick M. Chisholm, *Law Statements and Counterfactual Inference*, 15 ANALYSIS 97 (1955).

suppose that, when we assert them, we have in mind the derivability of the consequent from the antecedent and *some* set of conditions. However, while the context sometimes makes clear which conditions we hold constant in asserting the conditionals, it often does not. So, as Chisholm suggests, we can assert all of the following (with appropriate emphasis): (1) If that piece of metal had been heated, then it would not have been true that all metal expands when heated (where here we hold constant that it did not expand); (2) if that piece of metal had been heated, then it would have expanded (where here we hold constant the law that metal expands when heated); (3) if that had been heated, it would not have been metal (where here we hold constant both the law and that it did not expand). We should not even *try* to get involved in a discussion about what would be happening in the Middle East if Jackson were Secretary of State without first just asking what the person who makes the assertion would like you to be holding constant.

Given the difficulty of saying anything illuminating about determinate truth conditionals for counterfactuals, it might be a bit distressing that they seem to play such a prominent role in law and morality. On the other hand, they seem to *pervade* language. It is next to impossible to explain dispositional concepts without them, and it is difficult to give an uncontroversial example of a property that some well-respected philosopher has not treated as a power. Therefore, I think that it makes perfectly good sense for Professor Moore to assert that the prospects of understanding causation using counterfactuals may be possible were we to get a good understanding of counterfactuals (a counterfactual if ever there was one).

I agree with Professor Moore that the prospects of ever understanding causation employing counterfactuals are not particularly good. David Lewis has tried very hard with one paper after another to handle preempted causes within the framework of a counterfactual analysis of causation. Nevertheless, he has had a singular lack of success.<sup>11</sup> I also agree with Professor Moore that the problem of epiphenomena (lawful but not causal connection) is nasty,<sup>12</sup> as is the rather embarrassing consequence that without simply tacking on temporal priority as a separate necessary condition for causation, we can get casual

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11. See, e.g., David Lewis, *Causation as Influence*, 97 J. PHIL. 182 (2000). Lewis thinks that the preempted cause is such that there are more close possible worlds in which things would have been significantly different had it not been in the picture.

12. Moore, *supra* note 1, at 1227–30.

connections (on the counterfactual analysis) between present states of affairs and past states of affairs.

On the other hand, I do not agree with Professor Moore's attempt to drive a wedge between true counterfactuals and true causal claims by appealing to thought experiments involving long chains of counterfactual dependence extending indefinitely into the past, omissions, or even concurrent overdetermination (though I will not talk about the last). Professor Moore and I have had this argument many times in the past and are probably destined to have it many times in the future. He is a realist with a vengeance about causal connection. He thinks he can tell which of the many different lawfully necessary conditions are real causes and which are not. It may be that we disagree about omissions primarily because of an underlying ontological dispute about the relata of causal connection. I think Professor Moore takes the relata of causal connection to be *events* (where events, like everything else, can *have* properties but do not stand in causal relations only in *virtue* of their exemplification of certain noncausal properties). As a result, he finds it odd to describe not saving the drowning child as the cause of the child's death. A nonevent is a nothing, and a nothing cannot stand in a robust causal relation to a something—the death.

Now, I am not even sure what events are. I think I know what a fact or a state of affairs is—the exemplification of properties, nonrelational and relational at a time. Also, I think I know how to individuate facts or states of affairs. I am happy to view facts or states of affairs as the relata of causal connection. But I do not even know how to *individuate* events. When I played “The Star-Spangled Banner” loudly on the piano last night, waking up my neighbor, whose mood quickly turned ugly, how many events occurred? Was my playing the piano the same as my playing the piano loudly? Was it the same as my playing “The Star-Spangled Banner”? Was it the same as waking my neighbor? Was it the same as my annoying my neighbor? I think Professor Moore believes he knows how to count events, but I do not.

If we think that *facts* are the relata of causal connection, then there is no reason to think of negative facts as any less causally robust than are positive facts. My not helping the drowning victim is the truth-maker for the proposition that I did not help the drowning victim, and it has as good a claim to be the cause of the victim's death as does the action of the person who pushed him in the water. To be sure, Mill was right to observe that “[t]o make anyone answerable for doing evil to others is the rule; to make him answerable for not preventing evil is, comparatively

speaking, the exception.”<sup>13</sup> Mill did not elaborate, but I suspect that if asked to explain the difference, he would cite primarily *practical* problems. There are usually simply too many people whose inactions are relevant to what happened and we cannot plausibly go after them all. As Harman pointed out, we also prize our freedom greatly, and a proliferation of moral or legal duties to aid others would put too much pressure on us to abandon the kind of life we want to live, a life free from unpleasant intrusion by the state.<sup>14</sup> Concerning Judy Thompson’s famous example, I do not even share most people’s intuitions that it would be alright to sever the lifeline to the violinist, though I cannot imagine framing a law that would be broad enough to be useful and that would apply to a case like this.<sup>15</sup>

Similarly, I think that, against Professor Moore’s position, it is various pragmatic considerations that lead us to break causal chains where we do for the purposes of assigning legal responsibility. Except in movies about “dead-end kids,” we do not go all the way back to the criminal’s poor upbringing to find actions we intend to punish in the criminal law or the actors from whom we seek to gain compensation in the case of civil law. However, I am convinced that this is so only because we can so easily see how wild and uncontrollable the legal system would get if we did not place limitations on how far back we go. I suspect that trying to hold bartenders responsible for the damage their drunken patrons cause is already a bit of a nightmare for the legal system. I am also somewhat sympathetic with Lewis’s puzzlement about what to say of concurrent overdetermination. However, I will note in passing that it certainly is not the case that Lewis gets in any trouble with DeMorgan’s theorem.<sup>16</sup>

Given limitations of space, I cannot even begin to plausibly explain why we *do* seem so obsessed with causation when it comes to employing criminal legal sanctions and assigning civil responsibility. It does seem that, strict liability aside, we have strong moral intuitions that

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13. JOHN STUART MILL, ON LIBERTY 15 (Currin V. Shields ed., 1977).

14. GILBERT HARMAN, THE NATURE OF MORALITY 100–11 (1977).

15. Judith Jarvis Thomson, *A Defense of Abortion*, 1 PHIL. & PUB. AFF. 47, 49 (1971).

16. Moore argues that allowing that disjunctive states of affairs can be causes, when neither of the states of affairs in the disjunctive state of affairs is a cause, violates DeMorgan’s Law. Let the disjunctive state of affairs be  $X$  or  $Y$ . From the fact that  $X$  did not cause  $E$  and  $Y$  did not cause  $E$ , it does follow that it is not the case that either  $X$  caused  $E$  or  $Y$  caused  $E$ . It does not follow that it is not the case that  $X$  or  $Y$  caused  $E$ . See Moore, *supra* note 1, at 1239.



we ought to let considerations of negligence (of one form or another) do much *more* of the work than Professor Moore wants it to do. He is committed to the view that one cannot so easily divorce questions of moral culpability and responsibility from questions concerning what we have caused or how things would have been had we acted differently. That is because he does not want to identify the morality of an agent's action with the internal states of the agent—the agent's subjective beliefs, or, better perhaps, the justification the agent had at the time she acted for believing that her actions would affect the world in certain ways.

In the last few pages of his article, Professor Moore does a nice job of defining the philosophical terrain. On the one side, we have the subjectivists or internalists who are a bit puzzled over the fact that we tie so many of our assignments of legal responsibility to factual questions of what was actually caused by an agent's actions. As Professor Moore points out, even if these internalists become convinced that one cannot *define* causation using counterfactuals, they are going to be equally puzzled by the fact that we tie assignments of legal responsibility to counterfactuals concerning how the world was made different by acts and omissions. The subjectivists or internalists who identify the moral character of an act with the internal states of the actor may concede that we have actual consequence consequentialist intuitions. Yet, they also think that those intuitions are not all that stable or reliable. They think that, to the extent that we want our legal sanctions to hook up with our considered moral evaluations of agents and their actions, we would, *in an ideal world*, do things very differently.<sup>17</sup> We might, for example, fine people who act negligently, whether they harm others or not, pool the resources, and compensate nonnegligent victims out of that pool. We would not worry all that much about what caused what, or how the world would have been different had the agent refrained from acting, or, in the case of omissions, had chosen to act.

Why don't those of us who resist the relevance of actual consequences to moral evaluation of actions propose such radical changes in the legal system? Usually, this is because we think that we have good reason to believe that doing so would probably have some unwanted and very bad consequences. In particular, we are probably quite right to fear an

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17. For an attempt to explain reservations about allowing actual results to play too prominent a role in the law, see generally Richard Parker, *Blame, Punishment and the Role of Result*, 21 AM. PHIL. Q. 269 (1984); Judith Jarvis Thomson, *The Decline of Cause*, 76 GEO. L.J. 137 (1987). Of course it is not at all clear that, as consequentialists, we should care all that much whether punishment "fits" the wrongdoing. A consequentialist would need a consequentialist argument for placing a great deal of importance on this feature of punishment.

overly zealous and overly intrusive state watching over every aspect of our life to detect inappropriate action, or worse, failures to act. The prospect is particularly frightening if we are right and the moral culpability of an agent is a function of internal states to which others often have highly problematic epistemic access. Nevertheless, we *do* want to compensate people who have been harmed through no fault of their own, yet we *do not* want to penalize everyone for the harm, and so we somewhat artificially limit the people to whom we look to for resources to compensate. Restricting our search for compensation to those who have acted badly and who have *caused* harm through their actions is one way to keep our task manageable. Further restricting the casting of our net to those whose actions are held to be proximate causes is a way of keeping it more manageable still. If Professor Moore is right, and there are true counterfactuals about actions and inactions and ensuing harms in cases in which people have been harmed but we cannot find actions that *caused* the harm, then we might turn to those counterfactuals in an effort to cast our net more widely. We do not make a habit of this for the very reasons that Professor Moore stresses in his paper. Counterfactual dependence spreads all over the place and we will catch way too many acts and omissions than we want to deal with in managing our problem of finding a culpable actor to do the compensating.

The full story is, of course, much more complicated than these brief remarks suggest. Ultimately, the gist is that pragmatic considerations are doing an enormous amount of work in justifying a legal system that does not always tie responsibility, punishment, and obligations of compensation to moral culpability.

