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FOUR FRIENDLY CRITICS: A RESPONSE

Michael S. Moore
Program in Law and Philosophy, University of Illinois

In this reply, I seek to summarize fairly the criticisms advanced by each of my four critics, Jonathan Schaffer, Gideon Yaffe, John Gardner, and Carolina Sartorio. That there is so little overlap either in the aspects of the book on which they focus or in the arguments they advance about those issues has forced me to reply to each of them separately. Schaffer focuses much of his criticisms on my view that absences cannot serve as causal relata and argues that this commits me to the view that double preventions (such as beheadings) cannot be causal of events such as deaths. I deny that double preventions such as beheadings are not causal, while admitting that other double preventions are not causal but denying that this latter conclusion is unwelcome in its implications. Yaffe criticizes my view that a person substantially causing some harm H is sufficient for that person having performed the activity of H-ing, whereas I affirm that causing H is sufficient for doing the *action* of H-ing even if it is not sufficient for *intentionally* H-ing (Yaffe's definition of "activity"). Gardner takes issue with my "experiential argument" for the relevance of causation to moral blame; he urges that we cannot infer that we are more guilty (when we cause a harm than when we don't) from either the psychological fact that we feel more guilty or from the moral fact that it is virtuous to feel such heightened guilt, because it is viciously circular: we feel such guilt only because we have already judged that we are more guilty, and it is virtuous to feel such guilt only because we in fact are more guilty. I deny such circularity exists. Sartorio takes issue with my thesis that in omissive overdetermination cases (where each omission is sufficient to fail to prevent some harm, meaning neither is necessary) neither omitter is morally responsible for the harm. I trade intuitions with Sartorio about a range of related cases that we each think bears on the issue.

I. INTRODUCTION

This symposium joins a number of others that have been held on my book *Causation and Responsibility*.[1] Each of these symposia advances the cutting edge of our collective understanding of what is truly a tough nut to crack: causation. The present symposium in particular does this well. Partly this is due to the fact that the four critics collected here—John Gardner, Carolina

1. Michael S. Moore, Causation and Responsibility: An Essay in Law, Morals, and Metaphysics (2009).

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Sartorio, Jonathan Schaffer, and Gideon Yaffe—are such talented philosophers and legal theorists. But it is also due to the fact that each one of them has devoted considerable time and effort both to analyzing causation in general and to examining my theses about causation in particular.

It is no exaggeration to say that I am delighted with the present symposium. I am both flattered and honored by the continued attention given to my ideas by four such talented individuals. Such delight does not, of course, prevent me from venturing some further reactions to what each of these individuals have here written. These reactions I give below.

II. JONATHAN SCHAFFER ON DOUBLE PREVENTIONS

Jonathan's Schaffer's review is both generous in its praise for my book and clear and challenging in its criticisms.[2] Schaffer shares with me the organizing vision of my book, which is the thesis he calls "Unity," namely, that law, science, morality, and common sense share a single core notion of causation. Our disagreements lie in the details about what that core notion exactly is.

Schaffer has one criticism he takes very seriously, and after making that criticism early on in Section II of his review, he relies on it again several times in making what are nominally separate criticisms of my view. I thus start with Schaffer's dominant criticism.

A. Causation versus Double Prevention—"The Beheading Problem"

In the Talmud it is written that "Pseek raisha ve-lo yamut"—"you can't cut off the head of a chicken and then say you are not responsible for its death."[3] Schaffer would have his readers believe that my view commits me to denying this. For he interprets me (correctly) to think that absences can neither be causes nor be effects; that therefore omissions and preventions are not causal in nature; and that therefore double preventions cannot be causal either. From this Schaffer would have me conclude that there can be no cause-based responsibility for the death of a chicken (or a person) if you decapitate her (because decapitation only prevents what would otherwise prevent death—blood flow to the brain—and therefore is doubly preventative and not causal in nature).

This *is* an absurd conclusion, and if I were committed to it, I would be in trouble. In his review, Schaffer recapitulates his earlier work at some

2. Jonathan Schaffer, *Disconnection and Responsibility*, 18 LEGAL THEORY 399–435 (2012). Page references in the text of this section will be to Schaffer's review in this issue.

3. Talmud, *quoted in* John Martin Fischer, Mark Ravizza & David Copp, *Quinn on Double Effect: The Problem of "Closeness,"* 102 ETHICS 707–725 (1993), at 707.

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length.[4] This work showed how many instances of what we take to be causal relations are in reality double-preventative in nature if we but look closely at the details of what is going on. Schaffer then depicts a series of conclusions that he says must follow if one accepts that double preventions are noncausal in nature, such as the demise of the causal theory of action.[5] Any one of these would be hard to swallow.

What Schaffer downplays is that in my book I accept rather than deny the Talmudic conclusion: I affirm that decapitations are both causings of death and killings and that we are responsible for such deaths accordingly. And I do this while indeed affirming the thesis that Schaffer calls "No Absences," namely, that absences cannot serve as causal relata, neither as causes nor as effects.

I perform this hat trick by distinguishing two kinds of double-prevention cases that I variously call "macro" versus "micro," or "nonclose" versus "close."[6] Most of Schaffer's examples (such as that of decapitation) I class as "close," but perhaps some are "nonclose." In any case, there is responsibility enough to go around: for nonclose cases, the responsibility is based on the relation of counterfactual dependence, which I defend in the book as a desert base independent of causation;[7] and for the close cases, the responsibility is based on the causal relation, not that of counterfactual dependence.[8]

So why the fuss by Schaffer about these cases? For two reasons, apparently, one for each disjunct of the thesis of mine that Schaffer calls "Disjunctivism." One, Schaffer does not believe that my view can allow for a cause-based responsibility in the close cases; and two, Schaffer does not believe I can sustain counterfactual dependence as an independent desert base for nonclose cases, since such dependence seems too lax in its requirements for responsibility. As Schaffer divides his discussion of these two worries between two separate sections of his article, so do I, dealing with the first here and the second in the succeeding section.

Schaffer himself affirms that there is both causation and a cause-based responsibility in cases of close double preventions such as decapitation killings. What he denies is that I can (consistently with my No Absences thesis) join him in affirming these two conclusions. Schaffer's denial here is, he thinks, based on three reasons: first, the distinction between "close" and "not-close" is "unclear": Schaffer indeed denies that my distinction

4. Notably Jonathan Schaffer, *Causes Need Not Be Physically Connected to Their Effects: The Case for Negative Causation*, *in* CONTEMPORARY DEBATES IN PHILOSOPHY OF SCIENCE (Christopher Hitchcock ed., 2004).

5. A costly demise indeed. *See* MICHAEL MOORE, ACT AND CRIME: THE IMPLICATIONS OF THE PHILOSOPHY OF ACTION FOR CRIMINAL LAW (1993); Michael Moore, *Renewed Questions about the Causal Theory of Action*, *in* CAUSING HUMAN ACTION: NEW PERSPECTIVES ON THE CAUSAL THEORY OF ACTION (Jesus Aguilar and Andrei Buckareff eds., 2010).

6. MOORE, CAUSATION, *supra* note 1, at 454–455, 457, 461–466.

7. *Id.*, ch. 18.

8. *Id.* at 454–455, 458–459, 461–466.

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"is sufficiently articulated yet to take seriously" (411) (ouch!); second, my accepting that there is a cause-based responsibility in cases of close double preventions "is just a surreptitious way to abandon No Absences," and that "would be surrender" by me (412); third, I am allegedly inconsistent in that I admit that "the beheader 'did not literally' cause death" while I hold that the beheader has a cause-based responsibility for that death (413).

Schaffer's first point is the one requiring the most extensive discussion, so let me begin with it. Schaffer is unclear how my "macro/micro" distinction relates to my "nonclose/close" distinction; so let me clear that up first. My intent in the book is simply to have "micro" be the name for looking closely at the details of a case, which then allows one often to conclude that in detail it was a case of double prevention. If one looks in detail (i.e., "micro") at a case that had figured prominently in an earlier version of Schaffer's present paper, a case where a terrorist blows up a dam, floods a city, and kills its inhabitants, one sees the following: Terrorist's act of setting off the explosion causes the dam to crumble and fall to pieces; the water rushing out of the reservoir causes both the flooding of the city and, through that event, the death of the city's inhabitants. Finding intuitive (as do I) the conclusion that Terrorist has a cause-based responsibility, Schaffer in his former draft queried: "in what possible sense is the collapse of the dam 'close' to the thousands of scattered deaths from the ensuing flood?" .

Schaffer here ignored what I explicitly said in the book: in cases of double prevention, closeness is judged between the event/state of affairs[9] caused by Terrorist's act and *either* the harm for which responsibility is to be assessed *or* the cause of that harm which is unleashed by defendant's act.[10] I agree with Schaffer that the deaths of the city's inhabitants are not close to the collapse of the dam ; but my question was and is, is not the collapse of the dam *close* to the water right behind the dam rushing out of the reservoir immediately upon the dam's collapse?

Schaffer has now substituted another hypothetical case for the dam case just discussed (412). The new hypothetical involves the terrorist who blows up an air traffic control tower so as to prevent that tower from sending needed signals to pilots, with the result that there is a mid-air collision and massive loss of life of those on the colliding airplanes. This time Schaffer has succeeded in producing a regular (that is, non-close) instance of double prevention. The act of blowing up the tower caused it to fall, but its fall is close neither to the deaths of the passengers nor to what immediately caused those deaths, the collision of the aircraft.

9. I henceforth use "events" to designate either events or the finer-grained states of affairs. Although in many contexts the distinction between them as causal relata is important—thus MOORE, CAUSATION, *supra* note 1, chs. 14 and 15, deals with the differences between them at length—in the present context I do not need the distinction.

10. *Id.* at 461: There can be "closeness of the state caused (by the act of double-prevention) to one of two things: either to the state causing the harm, or to the harm itself."

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Such closeness judgments will seem "ad hoc" (413) and unmotivated until we broaden our vision somewhat, something we need to do anyway to address Schaffer's more general charge of "unclarity-so-serious-as-not-yet-to-be-worthy-of-consideration." Let us thus ask the "Why closeness?" question as a preliminary to asking the "What is closeness?" question.

In the book I advert explicitly to another "closeness" beheading problem,[11] one that I and other philosophers have dealt with for more than fifty years.[12] My forty-year-old example of the problem is this one: Can Herod truthfully deny responsibility for *intending* the death of (*intending* to kill) John the Baptist because, while Herod intended to decapitate John (in order to please Salome with John's head on a platter), Herod only *believed* that John could not live without his head?[13]

We use the intention/foresight distinction to distinguish both degrees of moral culpability and degrees of permissibility/impermissibility of consequential justification of actions.[14] Intending that one's acts cause a bad event (such as John's death) makes one more culpable than does merely foreseeing that one's act will cause that event; and intending that one's acts cause a bad event precludes consequential justification of those acts when foreseeing that one's acts will have those bad effects does not. In this, the moral uses of the intention/foresight distinction are very much like what I claim in my book to be true about the cause/counterfactual dependence distinction; for the latter distinction, too, is taken to mark both degree of blameworthiness in cases where no justification is in sight[15] and degrees of permissibility when consequential justifications are (because good consequences are in the offing) possible.[16]

Yet cases like that of beheading present a challenge to the intention/foresight distinction, just as they do to the causation/counterfactual dependence distinction. What seems intuitive is to say that Herod both intended to kill John the Baptist and that he did kill (i.e., caused the death of) John. Yet in the way of both judgments is the "micro" insight that Schaffer presses: what really killed John (by my No Absences thesis) were the processes of decay of brain cells when not supplied with oxygen and

11. *Id.* at 462.
12. The problem is usually traced to someone I am pleased to acknowledge as my first teacher in ethics: the late Philippa Foot. *See* Philippa Foot, *The Problem of Abortion and the Doctrine of Double Effect*, 5 OXFORD REV.5–15 (1967). Foot's intuitive view of closeness is discussed below.
13. *See* Michael Moore, Individuating Intentions, a paper given in 1980 at Stanford University and later both at University of Southern California and at the Eightieth Birthday Celebration for Herbert Hart in Jerusalem in 1984. A shorter version of the paper was published as Michael Moore, *Intention and* Mens Rea, *in* ISSUES IN CONTEMPORARY LEGAL PHILOSOPHY: ESSAYS IN HONOUR OF H.L.A. HART (Ruth Gavison ed., 1987), *reprinted in* MICHAEL MOORE, PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW (1997). I repeat the example in MOORE, CAUSATION, *supra* note 1, at 462.
14. MOORE, CAUSATION, *supra* note 1, at 48–49. *See* also Michael Moore, *Intention as a Marker of Moral Responsibility and Legal Punishability*, *in* THE PHILOSOPHICAL FOUNDATIONS OF CRIMINAL LAW (Antony Duff & Stuart Green eds., 2011).
15. MOORE, CAUSATION, *supra* note 1, ch. 18.
16. *Id.*, ch. 3.

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sucrose in the blood; Herod (again, by my lights as Schaffer sees them) only caused or intended the severance of John's head from his body. Herod neither caused nor intended John's death, even though John's death counterfactually depended on Herod's act and even though Herod foresaw with certainty that John could not live without his head. This, because counterfactual dependence is to be distinguished from causation, just as intent is to be distinguished from foresight (or predictive belief).

In the literature on the intention/foresight distinction, there are three general responses that philosophers have adopted over the last fifty years to Schaffer's kind of "micro" insight. One is the response with which Schaffer wants to stick me on the cause/counterfactual distinction: admit that Herod really neither caused nor intended John's death; he caused and intended only John's decapitation. This view lets the (moral responsibility) chips fall as they may, which is, of course, very counterintuitive.[17]

The second response is just as bad, but in the opposite direction. Rather than restricting what we intend, this response broadens what we intend to include all the things that we foresee with (relative) certainty.[18] This is the kind of view Schaffer holds about the cause/counterfactual distinction: let there be a causal connection in *all* double-prevention cases, because there is counterfactual dependence in such cases.

17. There are two versions of this response: a skeptical version and an optimistic version. The skeptical version says, "so much the worse for morality if it tries to mark this distinction." *See, e.g.*, Richard Hull, *Deconstructing the Doctrine of Double Effect*, 3 ETHICAL THEORY & MORAL PRAC. 195–207 (2000). The optimistic version, although also giving up on the intend/foresee distinction, thinks that the moral work such distinction was trying to do can be done by some other distinction. The best-known example here is that of my friend and former colleague, the late Warren Quinn. *See* Warren Quinn, *Actions, Intentions, and Consequences: The Doctrine of Double Effect*, 18 PHIL. & PUB. AFF. 334–351 (1989). Quinn's substituted distinction—between "direct" and "indirect" agency—is critically examined in Fischer et al., *supra* note 3; P.A. Woodward, *The Importance of the Proportionality Condition to the Doctrine of Double Effect: A Response to Fischer, Ravizza, and Copp*, *in* THE DOCTRINE OF DOUBLE EFFECT (P.A. Woodward ed., 2001); Jeff McMahan, *Revising the Doctrine of Double Effect*, 11 J. APPLIED PHIL. 201–212 (1994); David Mapel, *Revising the Doctrine of Double Effect* 18 J. APPLIED PHIL. 257–272 (2001). By analogy, I classify Phil Dowe as an optimist about the moral consequences of the counterintuitive applications of the cause/counterfactual dependence distinction, for Dowe substitutes another relation—"quasi-causation"—to fill in for real causation in supporting moral blame for beheadings and the like. *See* PHIL DOWE, PHYSICAL CAUSATION (2000); Phil Dowe, *A Counterfactual Theory of Prevention and "Causation" by Omission*, 79 AUSTL. J. PHIL. 216–226 (2001); Phil Dowe, *Absences, Possible Causation, and the Problem of Non-Locality*, 91 MONIST 23–40 (2008) (symposium issue on singularist causation, M. Moore ed.); Phil Dowe, *Moore's Account of Causation and Responsibility, and the Problem of Omissive Overdetermination*, 3 JURISPRUDENCE (2012) (symposium issue on MOORE, CAUSATION, *supra* note 1).

18. Herbert Hart goes some distance down this road in Herbert Hart, *Intention and Punishment*, 5 OXFORD REV.15–22 (1967), holding that *morally speaking* there is nothing to the distinction between intending and foreseeing. For discussion of the stronger view (more akin to Schaffer's on the cause/counterfactual distinction), namely, that to foresee in cases we call "close" *is* to intend, *see* Neil Delaney, *Two Cheers for "Closeness": Terror, Targeting, and Double Effect*, 137 PHIL. STUD. 335–367 (2008), at 342 (discussing this as the "package deal."). For an apparent example of this view, *see* Wilfrid Sellars, *Thought and Action*, *in* FREEDOM AND DETERMINISM (Keith Lehrer ed., 1960), at 134.

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The third response is the "closeness" response: admit that Herod has both an intention-based and a cause-based responsibility for John's death but deny that this is because John's death was either foreseen by Herod or counterfactually depended on Herod's actions, respectively. Rather, Herod has such an intention and cause based responsibility because Herod intended and caused something (decapitation) that is *close* either to John's death or to what immediately caused John's death.

The motive for this third response (which is the one I adopt explicitly in my book for both intention and causation) is simple. We cannot easily abandon the distinctions between intending/foreseeing and causing/being counterfactually necessary for (which the second response does), nor can we easily accept the counterintuitive conclusions of the micro view of these matters (which the first response does). Therefore we must use commonsense consolidations of "close" events (or representations of these, in the case of intentions) in our assessments of cause and intention-based responsibility.

This repair to the event consolidation of common sense extends beyond the intent/foresight and cause/counterfactual contexts. This, too, I point out in my book,[19] giving an extended example from the law of insurance contracts. As I recognize in the long appendix to my book,[20] when it comes to the sizing of events for determining how many occurrences there are of harm or harm-causing events under all-risk insurance policies, the true metaphysics of event-individuation has a limited role to play. More important are the macro-sized events of ordinary thought; this on the supposition that such macro-sized events are normatively relevant in the insurance-contract context because they are much more likely to figure in the intentions and expectations of contracting parties than are the micro-sized events that are the subject of some metaphysical theories of event-individuation.

Even closer to home is the fourth context in which some event/state of affairs consolidation plausibly plays a role, a context to which reference is also made in my book.[21] This is the context where we measure the degree of moral blameworthiness by the "unit of offense" determinations of double jeopardy.[22] In keeping blame and punishment proportional to desert, one must assess not only what wrong some culpable actor did but how many times he did it. While volume discounts are possible,[23] usually robbing one bank on Monday, another on Tuesday, and a third on Wednesday merits more blame and more punishment than simply robbing one bank one time (holding constant all other desert-determining features of such robberies, such as amount of money taken, force used, etc.). Here, too, some event

19. MOORE, CAUSATION, *supra* note 1, at 47.
20. *Id.* at 556–561.
21. *Id.* at 560.
22. Explored at length in MOORE, ACT AND CRIME, *supra* note 5, ch. 14.
23. *See id.* at 365, 380–381 (five quick shots in succession may be considered one unit of the offense of shooting into an unoccupied dwelling).

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consolidation is needed to render the metaphysics of act-token individuation usable for these normative purposes.

Other moral, legal, and commonsense contexts call for other forms of event consolidation. Where we must find the spatiotemporal location of events for various legal purposes, for example, often here, too, metaphysically distinct consequences of events are included as part of the event itself in order to reach normatively plausible, commonsense conclusions.[24] The motive for such event consolidation in all such cases, including the one presently at issue with Schaffer, is to keep distinctions we can ill afford to abandon in line both with common sense and with normatively plausible conclusions.

Despite these good reasons to adopt the third, "closeness" strategy distinguished above, it is still on point for Schaffer to ask (as he does) the "What?" question about closeness: In the context we are discussing, what does "closeness" mean? (1) Is it spatial closeness, Schaffer asks (411) (2) Temporal closeness?[25] (3) Spatiotemporal closeness?[26] (4) Some sort of logical connection?[27] (5) Some sort of mereological or constitutive relation?[28] (6) Strong or invariant causal connection?[29] (7) A moral connection of one type or another?[30] (8) A contingent, case-by-case connection, whereby it just turns out that to foresee a *close* consequence will (in almost all cases) also be to intend that consequence?[31] (9) A subjective criterion of closeness, whereby an actor who *thinks* that to intend x is to intend y will be held to intend y if he intends x?[32] My younger self[33] sounded a lot like the present

24. *See id.* at 293–301.
25. *See* JONATHAN BENNETT, THE ACT ITSELF (1995), at 207.
26. Relied on by me in other contexts. *See* MOORE, ACT AND CRIME, *supra* note 5, at 393–301; MOORE, CAUSATION, *supra* note 1, at 556–561.
27. My fellow theoretician of the criminal law, Antony Duff, once made an attempt in this direction: "'Brown is decapitated but survives' does not specify an intelligible possibility, since it is part of the logic of our concept of 'human beings' that decapitation kills them: if we could imagine a being who was not killed by decapitation, that would not be a human being." R.A. Duff, Mens Rea *and the Law Commission Report*, CRIM. L. REV. 147–160 (1980), at 153.
28. *See* William Fitzpatrick, *The Intend/Foresee Distinction and the Problem of "Closeness,"* 128 PHIL. STUD. 585–617 (2006).
29. One reading of Hart, *supra* note 18.
30. I criticize one version of such a moral connection in Moore, *Intention and* Mens Rea, *supra* note 13. For defense of another (and more sophisticated) moral criterion of closeness, *see* Ralph Wedgwood, *Defending Double Effect*, 24 RATIO 384–401 (2011).
31. Alison Hills, *Defending Double Effect*, 116 PHIL. STUD. 133–152 (2003); Alison Hills, *Intentions, Foreseen Consequences, and the Doctrine of Double Effect*, 133 PHIL. STUD. 257–283 (2007). This strategy in the intention literature has no analogue for the cause/double prevention distinction. Alison Hills concedes that one *can* literally intend to decapitate and not intend to kill; yet she denies that *in fact* hardly anyone who intends the former does not also intend the latter. (This, because of Hills' intention holism, which makes death a part of people's plans even when, strictly speaking, such deaths are not necessary for the ends pursued.) This strategy is plausible for mental states, because there we are dealing with representations of events and not events themselves. For the cause/double prevention distinction, we have no such representational holism available to us.
32. Sellars, *supra* note 18, at 113.
33. Moore, *Intentions and* Mens Rea, *supra* note 13. For another negative survey of some of these possibilities as well as others, *see* BENNETT, *supra* note 25, at 203–213.

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Schaffer (who, after all, is still young, comparatively speaking) in rejecting all of these in the context of drawing the intention/foresight distinction, for they all either beg the question (as do some versions of (7)) or draw the lines in the wrong places.

But consider the following variations on a tenth possibility, one that I shall call the "common sense" possibility.

a. Herbert Hart. "When a foreseen outcome is so immediately and invariably connected with the action done that the suggestion that the action might not have that outcome would by ordinary standards be regarded as absurd, or such as only a mentally abnormal person would seriously entertain," then to intend the action is to intend the outcome.[34]

b. Philippa Foot. "What is the criterion of 'closeness'? If we say that anything very close to what we are literally aiming at counts as if part of our aim?" Foot eschews giving such a criterion, answering instead by means of two paradigm examples:

(i) The crushing of a child's skull and that child's death must be identified as one for purposes of asking if the defendant who intended the first must be construed to have intended the second, else it would "make nonsense of it [the distinction] from the very beginning." These two events are "obviously much too close for an application of the" distinction.
(ii) The blowing to bits of a man by dynamite and his death may be identified as one for purposes of asking if the actor intended the second if he intended the first, else the distinction between intent and foresight would be shown to be "ridiculous."[35]

c. Jonathan Bennett. When one event is "tightly bound" to another event, to intend the one is to intend the other. Bennett defines "tight binding" as:

> The best I can find is rather loose, but it may be the whole truth about our intended/foreseen distinction. Not only is there no chance of turning the ashes back into a building, or the smithereens back into people, or of crushing the baby's head without killing it—these things are what the plain man would call *inconceivable*. We can fairly easily imagine getting technology that would allow bombs to be aimed much more precisely, or would allow a fetus to be brought to term outside the mother's body; whereas the idea of destroying the head but not the baby, or of restoring a person who has been burnt to a cinder, is sheer fantasy. Without denying that it is conceptually possible, something God could do, we have not the faintest idea of what it might be like to have the means to bring it about. That, I suggest, is the "tight binding" we have been looking for.[36]

34. Hart, *supra* note 18.
35. Foot, *supra* note 12.
36. BENNETT, *supra* note 25, at 213. By "inconceivable," I take it that Bennett does not mean what Vizzini, the Sicilian criminal mastermind, means in the Rob Reiner film, *The Princess Bride*.

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d. Neil Delaney. We should use "the notion of 'felt closeness' between effects in determining what an agent (directly) intends rather than merely foresees." Delaney gives two readings to "felt closeness":

(i) Where the two events are proper parts of the object of an overall complex intention; and
(ii) Where "a rational agent cannot have the former intention without at the same time having the latter."[37]

I take all of these to be variations of a conventionalist criterion of "closeness." Generally speaking, two events are too close to be separated (for purposes of ascribing either causation or intentionality) if ordinary folk would *feel* them too close to be separated; would regard it as absurd or ridiculous to separate them; would not have the faintest idea about how they could be separated; and so on. Such a test seems to allocate Schaffer's kinds of examples the way I in fact allocate them in my book: decapitations are much too close to death for one to maintain with a straight face that although one caused or intended the first, he did not cause or intend the second. The Talmud has it right about that chicken.

To be sure, no one should be exceedingly pleased with this commonsense criterion of "closeness." As Bennett concedes, it is "rather loose,"[38] or as Delaney, too, laments, giving "closeness" only two cheers, "sadly, the key notion (closeness) is vague and the salient principle (of intent consolidation) is a little 'hinky.'"[39] Still, that "closeness" is vague makes it not much worse than other, perfectly serviceable concepts.[40] Indeed, is "closeness" in the present context any fuzzier than the *close* possible worlds that David Lewis (and Lewisians like Schaffer) tells us are the worlds we are to consider when we ask after the truth value of the consequent clauses of counterfactuals?[41] Moreover, the alternatives (to retaining the closeness criterion) are both worse: conceding that decapitations are not killings; or saying that all counterfactual dependings are causings. I have long agreed with Schaffer's generally holistic approach to epistemic justification, according to which we should assess the plausibility of one item (like closeness) by the plausibility of what must be given up if that is given up. Unlike Schaffer, I find the least costly equilibrium of beliefs to be one affirming the closeness distinction, vague as it admittedly is.[42]

37. Delaney, *supra* note 18, at 341 .
38. BENNETT, *supra* note 25, at 213.
39. Delaney, *supra* note 18, at 348–349 .
40. *See* Fitzpatrick, *supra* note 28, at 606, where he concedes vagueness and indeterminacy to his own (constitutive) notion of "closeness" but also sees that this does not "undermine the interest or usefulness" of the concept.
41. I discuss problems with Lewis's similarity metric for closeness of possible worlds, in MOORE, CAUSATION, *supra* note 1, at 387–390.
42. In this I take some comfort from the fact that (for a time at least) Tom Nagel also acknowledged his lack of any very satisfying solution to this "problem of application" of the intent/foresight distinction but chose to maintain his moral use of the distinction despite the

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I am now in a position to spell out (much more quickly) my replies to Schaffer's other two objections. Recall that Schaffer's second objection is that by pursuing the closeness strategy, I am surreptitiously abandoning my No Absences thesis and that this is a "surrender" by me. Not so. To say that the beheader causes the death of his victim because he causes a state of affairs—decapitation—that is close enough to death is not to say that absences can be causes. The idea of closeness nowhere relies on causing by absences (omissions), causing of absences (preventions), or causing through absences (double preventions). Absences (in any of these roles) are absent in the closeness account.

Schaffer's third objection is that I have not dealt with the intuition that the beheader *caused* the death of his victim and therefore *killed* him. Indeed, I am supposed to be flatly opposed to this conclusion because I admit that the beheader did not literally cause death. In truth, my closeness doctrine allows me to say two otherwise contradictory things: "the beheader did not cause the death"; and "the beheader did cause the death." The first statement is true on the fine-grained (or "micro") view of events; the second statement is true on the coarse-grained (or "macro") view of events.

One might think that I am equivocating on the meaning of "cause," but that, too, is not so. I do not stipulate some secondary sense of "x causes y"[43] with the closeness maneuver; no more than one stipulates a secondary sense of "x intends y," with the analogous closeness maneuver. In both cases, what shifts is *what* is caused or intended; not what causings or intendings themselves are.

One might also think that I am giving up on the thesis Schaffer calls "Unity," namely, the thesis that law, science, morality, and common sense share a single core notion of causation. If by "notion of causation" one means things related (relata) as well as relation, then this is true to a certain extent. For although the causal relation is asserted to be the same in these four domains, the relata used in commonsense explanations, evaluations, and legal ascriptions would be in part conventional and thus somewhat divergent from the true metaphysics of these matters. Yet my book refuses to defend that version of "Unity" anyway. As I recognize in the chapters on causal relata, in law (as well as in morality and in commonsense causal explanations) we use a constructed notion of relata, close to Davidson's view of whole events, whereas the correct metaphysical relata of the causal relation are the much finer-grained states of affairs.[44] So further event

unresolved problem of closeness. THOMAS NAGEL, THE VIEW FROM NOWHERE (1986), at 179. Likewise, David Lewis concedes that his notion of closeness (or "overall similarity") is "vague—very vague." Yet Lewis thinks that we do make judgments in terms of it and that "however mysterious that notion may be . . . we can analyze counterfactuals in terms of it." DAVID LEWIS, COUNTERFACTUALS (1973), at 92.

43. As does Phil Dowe with his notion of "quasi-cause" (DOWE, PHYSICAL CAUSATION), and as does more clearly Ned Hall with his explicit causal dualism. Ned Hall, *Two Concepts of Causation*, *in* CAUSATION AND COUNTERFACTUALS (John Collins, Ned Hall & Laurie Paul eds., 2004).

44. MOORE, CAUSATION, *supra* note 1, at 367–368.

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consolidation via the notion of "closeness" is just more constructivism about relata, not a sudden loss of metaphysical purity.

This has been a long and complicated reply to Schaffer's dominant criticism of my book. This should not be surprising in light of the nature of the objection replied to, which is essentially, "you have not said enough about closeness." So I have said more. But in closing, notice that there is a much shorter route to answering Schaffer's criticism, one that does not depend on closeness. This is the route that sees the causal relation as being such that there is no bar to "action at a distance," perhaps some form of primitivist singularism, some kind of primitive powers view, or some form of reduction-to-laws view of the causal relation—indeed, any view of causation that can handle spatiotemporally remote causal relations. Then one could hold that acts of beheaders cause deaths *simplicitas*—not through any absence, not through any existent states of affairs such as head-severings, but directly. Such causings of death nowhere take absences as relata, for the moving of an axe and the victim's death are both existent events. The result of the strategy would be to regard double preventions as causal while preserving the No Absences thesis and thus preserving the view that omissions and preventions are noncausal.

Attractive as this last strategy is, it, too, comes at some moral cost (in addition to whatever metaphysical costs are attached to allowing for causation at a distance). One such cost is the need generally for double preventions to be noncausal. The distinction between causal and counterfactual relations is the metaphysical difference that can make sense of the moral differences between double preventions and causings, moral differences in blameworthiness and in permissibility. But more crucially, the double prevention/causation distinction is a seemingly critical part of the thousand-year-old distinction between doings and *allowings*.[45] An allowing is a case of double prevention where the actor's preventative act restores a status quo that she would have done no wrong in not disturbing to begin with. Schaffer nowhere discusses these cases,[46] yet giving them up would be an important cost to this last proposed version of how we should look at things.

45. "Doing versus allowing" in what I call its strict sense. *Id.* at 61–65.

46. In none of his work (to my knowledge) does Schaffer acknowledge the moral power of the causing/(true) allowing distinction. Instead, he asserts broadly that "disconnections create (full-fledged) moral responsibility for their outcomes." Schaffer, *Disconnection*, supra note 2, at 410. No they do not. I argue in MOORE, CAUSATION, *supra* note 1, that the *actual* Judge Tally, who countermanded (and thus prevented) the sending of a warning telegram (that would have prevented the death of the victim Ross, who was about to be attacked by the Skeltons), was less responsible for Ross's death than the Skeltons, who shot Ross. But passing this, surely the *hypothetical* Judge Tally who was the one who sent the original warning telegram (and then countermanded the delivery of that telegram because of second thoughts) had no greater responsibility than anyone else who did nothing at all to save Ross when they could. True allowings, like omissions, demand attention from those in Schaffer's position, but they have not received it so far.

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B. The Alleged Overinclusiveness of Counterfactual Dependence Unaccompanied by Causation: "The Problem of Correlates"

As previewed in the prior section, Schaffer also questions the other half of my disjunctive thesis about responsibility, namely, the half that attributes a distinct (if lesser) responsibility to counterfactual dependence when unaccompanied by causation. Like Chris Hitchcock[47] and Kim Ferzan[48] in their critiques of my book in another symposium, Schaffer worries about the possible overbreadth of a responsibility predicated on counterfactual dependence alone. Specifically, since in my book I assert (unlike Lewis) that counterfactual dependence exists, both backtracking (in time) from effect to cause, and across the horns of some epiphenomenal forks,[49] Schaffer wonders how I can rule such cases out from generating counterintuitive instances of moral responsibility.

Schaffer believes that what I must have "is an *in-principle* argument to the effect that no case of mere correlation or effectuation could possibly satisfy" my conditions for a counterfactual-based responsibility (415). I deny this, but since I have given detailed examples of both backtracking and epiphenomenal responsibility in my replies to Hitchcock and Ferzan,[50] I will not lengthen this response by recapitulating those examples and argument. The interested reader is referred to my earlier replies.

But Schaffer is correct this far: *most* cases of counterfactual dependence operating backward through time and across epiphenomenal forks do not result in responsibility for the bad states of affairs so depending on defendant's action. And I do need principles to rule such cases out. Among the conditions of responsibility that Schaffer adds to (1) mere counterfactual dependence are: (2) breach of duty; (3) ability to prevent (in cases of omission); and (4) intention (414–415). Yet these, he notes, are insufficient to rule out cases when intuitively there is no responsibility despite satisfaction of his versions of conditions (1) through (4). Needed, he thinks, is: (5) defendant's act must *cause* the bad state of affairs. But this, of course, would be to surrender the disjunctive thesis about responsibility.

Of course I will eat no such poisoned fruit as that tendered by Schaffer as (5). Rather, if we frame (3) and (4) carefully, I have all the limitations my view needs or wants. Condition (3) should be framed as follows (for backtracking/epiphenomenal cases): the actor must have the *ability* (in a compatibilist sense of that word)[51] to act in such a way that the earlier

47. Christopher Hitchcock, *The Metaphysical Bases of Liability: Commentary on Michael Moore's Causation and Responsibility*,42 RUTGERS L.J.377–404 (2011).

48. Kimberly Ferzan, *The Unsolved Mysteries of Causation and Responsibility*, 42 RUTGERS L.J. 347–375 (2011).

49. MOORE, CAUSATION, *supra* note 1, at 403–409 (backtracking); and *id.* at 400–403 (epiphenomena).

50. Michael Moore, *Causation Revisited*, 42 RUTGERS L.J. 450–509 (2011).

51. On the conditionalist, possible-world sense of ability I have in mind, *see* Michael Moore & Heidi Hurd, *Blaming the Awkward, the Stupid, the Weak, and the Selfish: The Culpability of Negligence*, 5 CRIM. L. & PHIL. 147–198 (2011).

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or epiphenomenal events for which he is to be held responsible did not happen. And condition (4) for such cases is: defendant must know he has such ability as he acts, and he intends to utilize such ability because he wants the earlier/epiphenomenal event to have occurred (or some effect of that earlier epiphenomenal event to occur).

This is pretty abstract. Apply it to this case, which I call Paralyzed Patriot:[52] Patriot wants to warn the rebels that the British are coming by land and not by sea. By prearrangement, he can do this by flashing one light rather than two in the tower of the Old North Church in Boston. Unfortunately he is completely paralyzed and cannot move his limbs. Fortunately, John-Dylan Haynes and the associates of the late Benjamin Libet have hooked him up with a mind/brain interface machine that reads both the readiness potential (a slow negative shift in electric potential) in the supplementary motor area of the brain, and the blood-flow patterns in the precuneus region of the parietal cortex.

They explain to him that if he wills the movement of his right index finger, the finger will, of course, not move to light the light (he is paralyzed, remember). But if he merely wills the movement, his aforementioned brain processes will have occurred one half to one second prior (in the case of the readiness potential) and seven to ten seconds prior (in the case of the parietal cortex blood-flow patterns) to his conscious willing. Further, they have hooked up readers of these processes, put an amplifier on the readers, and hooked that up to the light on the Old North Church. Will one movement, and the light will go off once; will two movements, and the light will go off twice. Patriot believes all this; it is all true; Patriot intends to warn his fellow rebels by willing the single movement of his paralyzed finger; he wills such single movement for that reason. By my lights, Patriot is responsible for warning the rebels and deserves a reward (if the rebels win) or to be hung (if the British win) for it.

Schaffer's Neighbor-Kingpin-Thug scenario (413–415) fails to generate responsibility because it does not satisfy my version of conditions (1) to (4). Specifically, with regard to condition (1), Schaffer accurately notes that I do not think there is always backtracking counterfactual dependence whenever there is (forward in time, of course) causation. In my book I limit such cases to those where the cause is *sufficient*[53] in some suitably nuanced sense of that context-sensitive word. Yet even here, cases ruled out include those of concurrent overdetermination, namely, Kingpin's phone call was sufficient for Neighbor to grumble where, when, and in the way he did, but so was Neighbor's independent hatred of being up that early in the morning; since neither the phone call nor the early wake-up were necessary to the

52. I discuss Paralyzed Patriot in Michael Moore, *Libet's Challenge(s) to Responsible Agency*, *in* CONSCIOUS WILL AND RESPONSIBILITY: A TRIBUTE TO BENJAMIN LIBET (Walter Sinott-Armstrong & Lynn Nadal eds., 2010).

53. MOORE, CAUSATION, *supra* note 1, at 401.

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grumble, the latter was sufficient neither for the phone call nor for the early wake-up.

With regard to condition (3), it is not very intuitive to think that Neighbor has the ability to have it be the case that Kingpin makes his phone call, as another of my commentators in this volume, Gideon Yaffe, has observed.[54] But as Yaffe also notes, how to distinguish cases like Schaffer's Neighbor from cases like my Patriot is a subtle matter requiring further exploration.

With regard to condition (4), Neighbor does not believe he has the ability in question, even if in fact he does, nor does Neighbor grumble with the intention of using any such known ability. Thus, on my versions of conditions (1) to (4), there is no responsibility for Neighbor, whereas there is responsibility for Patriot.

Schaffer anticipates that I might squeeze around his intended counterexample(s) with my version of the principles of a counterfactualist responsibility, but he nonetheless worries that even if I were to do so, I would not have made it intelligible why counterfactual dependence without causation can be an independent desert basis (415). My response here is simple: we all, Schaffer included, need to be careful in what we can fairly demand here, for it turns out that respectable philosophical arguments for why some natural property is or is not a basis for moral blame are few and far between. Take causation itself. As I detail in both Chapter 2 of *Causation and Responsibility* and Chapter 5 of *Placing Blame*, it is at once astonishing and disappointing how many terrible arguments for and against have been advanced by otherwise good philosophers on the issue of whether causing a harm increases one's blameworthiness, over and against merely trying to cause/risking the causing of such a harm.[55] The honest philosopher makes do with very short argument chains here, perhaps as short as, "this is how it seems to me."

Schaffer is handicapped in his ability to intuit how responsibility could flow out of mere counterfactual dependence by his acceptance of the counterfactual theory of causation. He thus does not have responsibility for omissions, for example, as an intuitive instance of counterfactualist responsibility, for omissions are all causal in nature for him. If he could get his head out of his merely possible world about causation into the actual world described in my book—if he would adopt the right theory of causation, in other words—I predict that counterfactualist-based responsibility would look quite intelligible to him.

54. Gideon Yaffe, *Comment on Moore*, given at the STANFORD TECHNOLOGY LAW REVIEW 2009 Symposium on Neuroscience and the Law, Stanford Law School, February, 2009.

55. Joel Feinberg joined me in disdaining the arguments of our predecessors on this issue. *See* the paper given on the occasion of Feinberg's retirement, Feinberg, *Equal Punishment for Failed Attempts: Some Bad But Instructive Arguments against It*, 37 ARIZ. L. REV. 117–133 (1995), at 122: The "arguments are subtle. . . . What puzzles me is how bad many of them are."

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C. Schaffer Needs to Explain Various Items if Absences Can Be Causes

As Schaffer notes, I offer three arguments for why there is no causation in omission, prevention, and double-prevention cases, arguments that I rely on in addition to relying on the ontological argument that absences are nothing and "nothing comes from nothing."[56] Schaffer makes two untoward moves in his dealing with these arguments in Section V of his article (429). The first is his stubborn refusal to concede, even *arguendo*, the correctness of my closeness argument discussed above. Thus he dismisses all of my examples as not really contrasting causation with omissions, double preventions, and so on (431). Yet this makes his reply here hostage to the correctness of his criticisms of the closeness maneuver. If he is wrong on the latter point, he apparently has nothing to say in response to my other three arguments. (And by "nothing to say," let me stipulate that I mean to refer to a true absence—see below.) So I ignore Schaffer's first argument here on grounds of repetition. If I am justified in treating decapitations (and drownings too—same point) as causings both in commonsense ascriptions of causation and in ascribing moral responsibility, as I argue above that I am, then Schaffer's first argument here disappears.

Schaffer's second misstep relates to his second argument against my three arguments for my No Absence thesis. He prefaces his move here by claiming that it is "optional" for him to advance *any* explanation for the metaphysical and moral differences that I advert to in my three arguments (432). Yet it is not optional, on Schaffer's own epistemological holism. Schaffer rightly sees that when one faces a set of premises leading to a very counterintuitive conclusion, one either swallows the conclusion or gives up one of the premises; in doing this, rationality dictates giving up the least supportable statement, whether it be premise or conclusion. This is the overall structure of Schaffer's argument against me in the body of his paper. Schaffer therefore needs to show why his view (of absence causation) does not lead to the obliteration of distinctions that we cannot afford to see obliterated. This means that he is not free to eschew giving explanations alternative to mine of the phenomena to which my three arguments advert.

Those alternative explanations that he does proffer, Schaffer confines to explanation of only one of the three phenomena to which I advert: the moral phenomenon.[57] The moral phenomenon to be explained is the

56. MOORE, CAUSATION, *supra* note 1, at 444–451, 453–459, 460–467.

57. This is unfortunate, for I am far from alone in finding the metaphysical intuition of difference between causing a harm and failing to prevent a harm and the lack of any distinction in omission cases between preemptive and concurrent overdetermination both fecund grounds for generating insights about causation. On the first, *see* DOWE, PHYSICAL CAUSATION, *supra* note 17; *See also* Stephen Mumford's straightforward statement of the intuition of difference: "Moore is perfectly right to say that omissions are not causes. . . . An omission is an absence of cause and absences are not causes." Stephen Mumford, *Causes forLaws*,3 JURISPRUDENCE (2012). On the second, *see* Hitchcock, *supra* note 47. On both, *see* Dowe, *Moore's Account*, *supra* note 17.

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differential stringency in the duty not to cause some evil, on the one hand, contrasted with the duties to prevent such an evil (omissions), not to prevent the absence of such an evil (preventions), or not to prevent a preventer from preventing such an evil (double preventions), on the other hand. The former duty seems more stringent than the latter duties (holding the evil in each of them constant, of course). The question is: Why should this be so?

I explain the moral difference in terms of the metaphysical difference in these pairs of cases: in the first, there is a cause-based responsibility, but in the second, only a counterfactual-based responsibility; and the thesis is that counterfactual dependence generates less blameworthiness than does causation.

Schaffer by contrast urges two explanations for this moral phenomenon. One is based on my idea that causal relations are scalar, an idea that has attracted much attention in the secondary literature on my book.[58] Schaffer hypothesizes that perhaps cases of omission, prevention, and double prevention, while still causal, are across the board less strongly causal of some evil than normal, connectionist causation would be.

While I find Schaffer's suggestions here ingenuous, I doubt that however scalarity of causation is cashed out—and I confess that my book does not go very far in cashing the notion out[59]—it will turn out that omissions, and so on will be *lesser* causes. Rather, they will be *zero* causes, that is, noncauses on the causal scale. Certainly that is true for transmission versions of physically reductionist, singularist views of causation, where degrees of causation correspond with degrees of force, energy, and so on; omissions and so on

The literature on Schaffer's side of the fence on the second of these issues should not prove very reassuring to him. In addition to Hitchcock, Richard Wright has long thought he could detect preemptive (v. concurrent) relations in cases of two or more omissions, each of which is sufficient to guarantee that the harm would occur. *See* Richard W. Wright, *Causation in Tort Law*, 73 CALIF. L. REV. 1735–1828 (1985), at 1801; Richard W. Wright, *Once More into the Bramble Bush: Duty, Causal Contribution, and the Extent of Legal Responsibility*, 54 VAND. L. REV. 1071–1132 (2001), at 1801; Richard W. Wright, *Acts and Omissions as Positive and Negative Causes*, *in* EMERGING ISSUES IN TORT LAW (J.W. Neyers et al. eds., 2007), at 304; Richard W. Wright, *The NESS Account of Natural Causation: A Response to Criticisms*, *in* PERSPECTIVES ON CAUSATION 285–322 (Richard Goldberg ed., 2010). Sympathetic to Wright's view here is Sandy Steel, *Review of Causation and Responsibility*, 126 LAW Q. REV. 176–180 (2010). Yet most legal theorists (including myself) find Wright's intuitions about his own cases unmotivated and, indeed, unintelligible. *See, e.g.*, David A. Fischer, *Causation in Fact in Omission Cases*, UTAH L. REV. 1335–1384 (1992), at 1357–1359; David A. Fischer, *Insufficient Causes*, 94 KY. L.J. 277–310 (2006); Jane Stapleton, *Choosing What We Mean by "Causation" in the Law*, 73 MO. L. REV. 433–480 (2008); Horacio Spector, *The MMTS Analysis of Causation*, *in* PERSPECTIVES ON CAUSATION 339–359 (Richard Goldberg ed., 2010). For my answers in written form, *see* Moore, *Causation Revisited*, *supra* note 50, and given orally, in a formal debate on this topic with Richard Wright at Bonn University on May 27, 2011.

58. Compare Mumford, *supra* note 57; Matthew Braham & Martin van Hees, *Degrees of Causation*, 71 ERKENTNIS 323–444 (2009); and Hitchcock, *supra* note 47, all of whom are intrigued by the suggestion. More dubious are Helen Beebee, *Legal Responsibility and Scalar Causation*,3 JURISPRUDENCE (2012); Larry Alexander & Kimberly Ferzan, *"Moore or Less" Causation and Responsibility*, 6 CRIM. L. & PHIL. 81–92 (2012); and Carolina Sartorio, *Michael S. Moore's Causation and Responsibility*, 119 MIND 830–838 (2011) (book review).

59. A charge on which Helen Beebee presses me. Beebee, *supra* note 58.

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will have zero of such force, energy, and so on, transmitted. While conceptions of scalarity might have greater flexibility under primitivist singularist theories, the one primitivist theory with which I am most familiar—Stephen Mumford's nonreductionist powers theory—explicitly affirms scalarity of causation while denying that omissions, and so on, register anywhere but zero on the causal scale.[60]

So I find Schaffer's first proffered explanation not sufficiently articulated yet to take seriously. In fairness, he himself conceded in an earlier draft of his present paper that he has "offered only brief and inconclusive speculations" here. But he feels free to do that only because he regards this entire (alternative explanation) exercise to be optional for him.

I am even less clear about what Schaffer's second suggestion here is intended to be. Schaffer urges that morality could consist of duties not to do certain act types and that the stringency of such duties could vary by these act types; further, that it could just happen to turn out that: (1) the act types that are the subject of duties of lesser stringency are all and only the ones I call omissions, preventions, and double preventions and (2) the act types that are the subject of duties of greater stringency are the ones I call causal (433).

What I find puzzling about Schaffer's second suggestion is its apparent incompleteness. For I could accept all of what is said and then explain this pattern (of comparative stringency of moral duties by act types) in terms of causation versus mere counterfactual dependency. To frame an explanation truly competing with mine, therefore, Schaffer needs to proffer his own natural property that the stringent (duty) act types possess but the less stringent (duty) act types lack. Or he needs to make plausible that there is no such property. I do not see either of such showings in the works, so this is also too poorly developed to assess further.[61]

It is a pity that Schaffer nowhere includes (in his discussion of the moral phenomena to be explained) any mention of that subclass of double-prevention cases that I call *allowings*. Take a double-prevention case that Schaffer does mention, the Tally case.[62] Judge Tally did not kill the victim, Ross; rather, he sent a telegram countermanding a warning telegram sent by others to Ross, thus preventing a preventer (the warning telegram) from preventing the killing of Ross by the Skelton boys. To make the case a true allowing, suppose (contrary to fact) that it was Tally himself who had sent the warning telegram to Ross but then thought better of it and sent a second telegram countermanding the delivery of the warning telegram to Ross. Then Tally *allowed* Ross to die exactly the death he would have died anyway without Tally's (self-canceling) actions.

60. Mumford, *supra* note 57.

61. One might see Gideon Yaffe's "active with respect to" as the kind of account which Schaffer seeks. Gideon Yaffe, *Moore on Causing, Acting, and Complicity*, 18 LEGAL THEORY 437–458 (2012). Yet this account is also very thinly developed, as I argue below.

62. State ex rel *Attorney General v. Tally*, 102 Ala. 25, 15 So. 722 (1894).

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Most people have the strong sense that cases like my reimagined Tally case instance little or no moral blameworthiness on Tally's part, certainly no more than for pure omissions.[63] (Indeed, a thousand-year-old tradition in ethics so distinguishes such doings from such allowings, such killings from such lettings-die.) A necessary part of my explanation for this is that Tally is only a double-preventer, not a causer of Ross's death. Schaffer needs an alternative explanation for this moral difference as much as he does for simpler cases of omission.

It is also a pity that Schaffer does not take seriously the other two phenomena on which I base my arguments. I would, in particular, have been pleased to hear his alternative account of the overdetermination phenomenon. That phenomenon is that in cases of ordinary causation, we have clear-cut intuitions separating cases of concurrent overdetermination from cases of preemptive "overdetermination." Yet in cases of supposed "omissive causation," we have no such intuitions. Indeed, we do not have a clue how to draw such a line, as I detail in my debate with Richard Wright.[64] To me, this suggests that omissions and so on are noncausal in nature. What other explanation is there?

D. The Semantics and the Ontology of Omissions: "The Problem of Nothingness"

Schaffer is careful and illuminating in his diagnosis of just what it is that we disagree about when it comes to the semantics of "absence talk" and the ontology of absences. Yet despite the carefulness and the sophistication of his treatment here, I think that he overstates our disagreement, misunderstands its significance, and mischaracterizes what disagreement there is. Consider a standard example of absence talk, namely, omission talk (OT):

OT: The plants died because Jones failed to water the plants

My semantic premise, as Schaffer calls it, is that the omission talk in statements like OT ("Jones failed to water the plants") is usually to be interpreted as externally negated, existentially quantified statements:

External negation: NOT (∃x) (Wx and Ax)

In English (sort of): it is not the case that there was something such that it was both a watering of the plants and that Jones did it.[65]

63. E.g., Mumford, *supra* note 57.
64. Bonn University, May 27, 2011.
65. Moore, Causation, *supra* note 1, at 52–55, 436–444; Moore, Act and Crime, *supra* note 5, at 22–34, 54–59, 267–278; Moore, Placing Blame, *supra* note 5, at 262–277.

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Schaffer, by contrast, would sometimes interpret such seeming absence talk in one of two ways (418), both of which move the negation inside the scope of the existential quantifier:

(Internal negation, wide scope): (∃x) (NOT (Wx and Ax))

There was something such that it either was not a watering of the plant, or it was not done by Jones. Alternatively:

(Internal negation, narrow scope): (∃x) (NOT Wx and Ax)

There was something such that, although it was done by Jones, it was not a watering.

The semantic disagreement between us, as I understand it, is how often statements like OT use omission talk my way ("external negation") versus how often such statements use omission talk Schaffer's way ("internal negation," wide or narrow scope). Neither of us deny that omission talk *can* be used in any of these ways in the appropriate contexts. Schaffer's attempt to construe me to deny this last (420) is contrary to what I thought I said.[66] He thus here overstates our disagreement.

He also mischaracterizes it. At one point he says that "Moore and I disagree about what absences actually are" (426). I think Shaffer should rather have said that he and I disagree about what omissions are, or even better, we disagree about how often omission talk really is talk about absences (rather than disguised talk about existent particulars).

Third, the significance of our semantic disagreement is less than may meet the eye in the context of the present debate. To the extent that Schaffer is correct (that seemingly negative statements actually pick out existing particulars), I have no ontological problem in countenancing the existence of such particulars—why would I? I also have no ontological problem in fitting them in as causal relata in the appropriate contexts. It would just turn out that in the instances Schaffer is correct about, there were no omissions; common speech just made it look as though there were. Now consider the cases where my interpretation is correct (that negative statements like that contained in OT refer to no particulars but are instead negative existential statements about the absence of any instance of types): Schaffer's general ontological view is surely that nothing is not something (outside of bad jokes and equally bad existentialist philosophy), and his apparently preferred view about causal relata is that true absences (absences of any instance of a type) cannot play these roles (417, 428–429). So for him, true omissions are not causes either.

66. MOORE, CAUSATION, *supra* note 1, at 438 n.23: "There are of course circumstances where the absence of some property is so surprising or so uniquely true of some event that we pick it out by such absence."

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So Schaffer and I in fact have only a wishy-washy, "how often" kind of semantic disagreement; it concerns only the intended referent of omission talk, not the question of what absences are; neither of us defends a categorical view of what such referent must always be; and our disagreement here has no significance as to the question of whether absences can enter singular causal relations but only significance in determining how often our omission talk is actually disguised positive-presence causal talk. Now, does anyone care who is right in this semantic dispute? Well, in truth, I do. That is because I want my No Absences thesis to have significance for most of our omission talk, for that makes most of our omission talk about something other than causation. It also does not require us to revolutionize our ethics of what are positive versus what are negative duties in morality—that is, we need not reclassify what we now think of as positive duties requiring us not to omit to do some action into negative duties enjoining us not to do some active causing.

So return to OT. How often do we utter OT meaning either of the things Schaffer proposes? As to the internally negated wide-scope variation, does anyone *ever* mean this? It is always true (unless the world went totally inert at the time interval in question) that *something* was going on *somewhere*, involving *someone* other than Jones, and that this something was not a watering of the plant in question. Even the most platitudinous of us rarely deliver up such vacuous truths. Schaffer assures us that context of utterance could narrow the range of possible things going on and thus decrease the vacuousness of the statement (422), but he gives no examples.

How about Schaffer's internally negated narrow-scope version? How often does an utterer of OT mean that at the time interval supplied by context, Jones did something, but what he did was not a watering of the plant? I think the correct answer is: "almost never." For notice that the counterfactual dependence of the plant's death on its nonwatering holds irrespective of whether Jones danced a jig, fed his pigs, or did nothing at all. And speakers typically appreciate this fact. In explanatory contexts where speakers often want to convey and listeners to learn what would have made a difference, why would perspicuous speakers pick out the way in which Jones did not water the plant (he was dancing a jig instead) rather than the generic fact that whatever Jones was doing, there was nothing that he did that was a watering of that plant? Or suppose we are not just explaining with OT why the plant died; suppose we are uttering OT to blame Jones for the plant's death. Do we blame Jones for dancing a jig? Hardly—he might be a terrific dancing waterer! We blame him for not watering the plant, not for anything he was doing at the time.

Once in a while we might use OT to pick out what Jones was doing at the relevant time. Suppose Jones was conversing with Schaffer; Jones was so puzzled by Schaffer's curious arguments about omissions that he entirely forgot that he should now water the plant, and the plant died for lack of water. A speaker who knows all of this *might* utter OT, meaning Schaffer's

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internal-negation narrow-scope version. Because now the conversing is explanatory, because now the plant's death counterfactually depends on the conversing (it is my hypothetical, so I can tell you this with certainty—without the distraction, Jones would have remembered to water the plant); and Jones can be blamed for conversing with Schaffer, a known Socrates-like seducer of curious gardeners.

Yet even here (in what is surely a rare and unusual case), OT might more often be uttered with my meaning: what explains why the plant died and what Jones is to blame for is: not watering the plant. When the speaker wants to explain *further* why Jones failed to water the plant or condemn Jones *further* for not adopting precautions such as a string on the finger, he might use OT Schaffer's way. But even in this last scenario, the speaker would do better to refer to the conversing with Schaffer with more perspicuous and less ambiguous wording, namely, "conversing with Schaffer." In that case, instead of uttering OT, he would utter action talk (AT):

AT: The plant died because Jones was conversing with Schaffer

Let me now turn to Schaffer's and my supposed metaphysical disagreements about absences. As I say above, I do not think we disagree about what absences—true absences, not negatively described presences—are. They are not particulars but are, as Lewis put it, "bogus entities"—that is, nothing at all. The absence of an act of saving is no more an existent particular than the absence of an elephant is a kind of ghostly elephant. Nor, as seen above, do Schaffer and I disagree about whether our statements sometimes are not about particulars but indeed are "about" absences. Nor does Schaffer (in his most preferred view, at least) disagree with what he calls my "metaphysical premise," namely, that true absences (the "things" captured by negative existential statements) cannot be causes or effects.

So on what do we disagree? Schaffer thinks it is about whether there is always a "robust metaphysical distinction" within pairs such as dying versus surviving or telling a secret versus keeping a secret (424). I am supposedly committed to the view that one of these must refer to an existent, while the other involves only an absence. And Schaffer finds my supposed "claim of a robust metaphysical distinction implausible" (424). Again, I think that Schaffer overstates our disagreement and mischaracterizes its significance. When I used these and other such pairs, I thought I was arguing against the skeptic who denies that we can *ever* separate presences from absences.[67] I thought (and think) that this is a daffy view, and so, I gather, does Schaffer. I tried to show how we can easily be confused as to whether a speaker intends to refer to a presence or an absence by a given utterance; but that cuts no ice toward establishing that there is no difference between presences and absences.

67. *Id.* at 442–444.

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For some pairs, my intuition is that J.L. Austin was right, that one of such pairs "wears the trousers" (in Austin's not so politically correct phrase) in the sense that it has sense and reference while the other of the pair takes its entire meaning by mere negation of the first.[68] Health is the absence of illness, or perhaps illness is the absence of health. If there are such contradictory pairs, then for them, Schaffer can sign me up for his "robust metaphysical thesis." But perhaps there are not, or perhaps, if there are, "death/surviving," and "telling/keeping a secret" are not among them. In which case why not say just what Schaffer says, namely, each of such pairs refers to some real existent?

Schaffer also wants to find something about which we can disagree by making light of my appeals to science to determine whether dying, surviving, neither, or both, are real existents to be referred to by speakers using these words (425). Yet Schaffer himself is willing "absolutely [to] grant that there is a distinction between actual objects and absent ones, and that there is a distinction between actual events and absent ones. There is a world out there" (425–426). So let us ask Schaffer: how do you tell whether an elephant is present or absent? Or whether a killing took place or did not, so that there was an absence of any killing? How do you decide whether deaths are events but nondeaths ("survivings?") are not? Do you have some access to these facts other than by the observational methods of science, broadly construed?

So again, there is not much on which Schaffer and I disagree here. Nor do I see much significance to whatever disagreement we may have on these matters. For if both "dying" and "surviving" do each refer to existents, then each is eligible to serve in true causal statements. Such an eventuality does not affect any of the theses or premises that Schaffer accurately enough depicts me as caring about.

III. GIDEON YAFFE ON ACTIVITY AND CAUSING

A. Introduction

Gideon Yaffe explores a distinct aspect of my book, one that deals with the relationship between the book's topic, *causation*, and the topic of one of my earlier books, *action*. He rightly focuses on the two chapters of my causation book in which I deal with this relationship: Chapters 1 and 13. In Chapter 1, I seek to show how causation is an element in many legal liability rules, even when it is not explicitly named. Prominently on display here are rules using causative verbs of action such as "kill," "rape," "burn," "hit," and so on. In Chapter 13, I seek to show how the semantics (in some cases, pragmatics) of certain of these action verbs gets in our way in ascribing responsibility to those who merely aid others in causing bad results. The meaning or typical

68. J.L. Austin, *A Plea for Excuses*, 57 Proc Arist Soc 1 (1957).

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use of such verbs seems to preclude liability, yet I argue either that this is not the case (if we look closely) or, if it is the case, that we should bypass such verbs for causal language in the framing of liability rules in criminal law.[69] This substitution obviates need for a special, supposedly noncausal basis for liability in cases of accomplices.

Yaffe rightly notes that in Chapter 1, I discuss an equivalence thesis between acting locutions and causing locutions. Let "V" stand for a verb of action like "kill," "rape," "burn," "hit," and so on The thesis is: (1) some agent x Vs if and only if (iff) x causes a V-ing to exist. (I stipulate that "V" on the left-hand side of this biconditional is transitive, whereas the "V-ing" on the right-hand side is intransitive—in "x killed y iff x caused a killing of y," the "killing of y" might be done by active agency or it might be a death of y originating in any way whatever.)

As I note in the book, seconded by Yaffe, this biconditional is fruitfully examined in these contexts by separately examining each of its two implicit conditionals: (1a) causing is necessary to acting (viz., x killed y only if x caused a killing of y); and (1b) causing is sufficient for acting (viz., that if x caused a killing of y, then x killed y). Yaffe, as in the considerable literature that I examine (Davidson, Bennett, Thomson et al.), finds (1a) much easier to defend than (1b). Indeed, Yaffe's careful reading accurately attributes to me only a qualified endorsement of (1b), namely, x kills y only if x not only causes a killing of y, but *substantially* causes that killing.

Notice that for the first of the purposes for which I examine the relationship between causing and acting in Chapter 1, I need to defend only (1a). That is, I am there trying to show the importance to law of understanding causation; this, by showing how endemic is our reliance on causation, even in liability rules that do not explicitly refer to it. Thesis (1b) is incidental to my purposes in Chapter 1, as I there say.[70] So if Yaffe succeeds in raising problems for (1b), that would not touch my defense of (1a), the thesis I need in Chapter 1.

Things are a bit different for my needs in Chapter 13 on accomplice liability. For it would be helpful to my purposes there if (1b) were true in the sense in which I defend it; for that would show that substantially causing accomplices literally kill, burn, hit, and so on, even though their causing is *through* the actions of another person (the "principal" under current law). Still, even here, if it turns out that (1b) cannot be sustained in some cases, I would be happy to eliminate action descriptions in the liability rules at issue in such cases, and substitute explicit causation language. This is to accommodate liability fairly placed on accomplices whose activities may not in such cases be correctly described by the relevant verb of action.

69. *Id.* at 295–299.
70. *Id.*, p. 7

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B. Yaffe's Substituted Equivalence Thesis

Early on his commentary, Yaffe makes a move that will surely puzzle many of his readers as it puzzles me. He substitutes his own Equivalence thesis for the thesis I examine in my book, which is (1). Yaffe replaces my action verb V on the left-hand side of biconditional (1) above with his "active with respect to a V-ing." This yields: (2) x is active with respect to a V-ing iff x caused the V-ing to exist. This of course yields Yaffe's distinct versions of my two conditionals (1a) and (1b) above. Respectively: (2a) asserts that causing is necessary to activity-with-respect-to; (2b) asserts that causation is sufficient for such activity.

What is puzzling about this is that Yaffe has literally changed the subject. "Activity with respect to" is his subject, not mine; I was (and am) interested in the relations between *actions* and causation, not something else. So in an important sense everything Yaffe has to say in the body of his paper passes me by like the proverbial ship in the night.

Yaffe gives two reasons for his change of topic. One is "to avoid confusion."[71] Yet what is the confusion in (1)? It cannot be lack of clarity, at least in comparison to (2) with its opaque phrase, "active with respect to." The latter phrase is paraphrased by Yaffe at one point into "agent who is involved in the event caused (454)." Does that help? Both phrasings remind me of the late Warren Quinn's attempt to capture the difference in agency between merely foreseeing a result of one's actions and intending it, with the requirement that in the latter case, where harm comes to some victims, there will have been "the agent's deliberately involving them in something in order to further his purpose precisely by way of their being so involved."[72] In Quinn's case, at least his excuse for involving the obscure notion of "involving" was to replace the somewhat obscure notion of closeness (between harms intended and further harms merely foreseen) that I examine above. Yaffe has no such excuse. Actions are comparatively well-understood items, or at least, so some of us think.[73]

Yaffe's avoidance of confusion motivation therefore cannot be a quest for clarity, substituting as it does an unclear notion for one that is clear enough. Another possibility, one that Yaffe appears to accept, is that actions such as killing, burning, hitting, raping, and so on are in some sense language dependent, while "what the agent is active with respect to . . . is not a matter of language but a matter of metaphysics" (441). Activity is thus a less "confused" concept than action. But not so fast. The only reason Yaffe has (or at least gives) for thinking that actions are language dependent is the famous old statement of Donald Davidson's that Yaffe quotes, to the effect that an act is an event that is intentional under some description (440). This indeed sounds linguistic, in the same way that Elizabeth's Anscombe's

71. Yaffe, *Moore on Causing*, *supra* note 61, at 441.
72. Quinn, *supra* note 17.
73. Moore, Act and Crime, *supra* note 5.

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well-known thesis that "the term 'intentional' has reference to a *form* of description of events" is linguistic.[74]

Yet I thought we all understood that Davidson's remark was to be freed of these holdover influences of ordinary language philosophy. In my action book, for example, I interpret Davidson's remark to mean no more than: an event is an act when but only when that event consists of an intention-causing-bodily movement, when that bodily movement instantiates the type of bodily movement represented in the object of that intention.[75] What Davidson was getting at was that intention is at the root of agency and action, even if he put the point in the locutions of an ordinary language philosophy that he more than anyone else destroyed. So I see no metaphysical leg up for Yaffe's activity over action. Both are equally in the world, ready to do service in explanations and evaluations.

Yaffe's second reason for preferring the "activity" phrasing in (2) to my action phrasing in (1) is that using this formulation will "focus our attention on the normatively relevant phenomenon" (441). Take Herb Morris's old example (picked up by Gil Harman and Yaffe), the verb "alert."[76] Yaffe correctly recognizes that one can *alert the burglar* without being responsible for the state of affairs that makes what one is doing an alerting: one could shoot the snake crawling toward one without knowing, intending, or even unreasonably risking the alerting of the burglar; still, it would *be* an alerting of the burglar. Therefore, Yaffe thinks, the actional alerting is not relevant to responsibility, and we need some richer notion that is (439). Enter Yaffe's "active with respect to."

Yet cannot something be *relevant* to responsibility without being *sufficient*, all by itself, for responsibility? That x acted in a way that alerted the burglar is relevant to responsibility; it shows that x did the wrong thing, that is, he was guilty of *wrongdoing*, at least prima facie. For x to be responsible and blameworthy, we need to know in addition whether x was *culpable* in doing the wrong thing.[77] Did he intend to alert the burglar? Know that he would? Unreasonably risk that he would?

Yaffe seemingly wants to build these aspects of culpability into his notion of "active with respect to." Certainly all of his examples throughout his paper add an intention that represents the result that one is then said to be active with respect to. Moreover, Yaffe needs such activity to require more than action (or else his (2) is no different from (1)); and what else

74. G.E.M. ANSCOMBE, INTENTION (2d ed. 1963), at 84.
75. MOORE, ACT AND CRIME, *supra* note 5, ch. 6.
76. FREEDOM AND RESPONSIBILITY (Herbert Morris ed., 1961), at 160.
77. Like Anglo-American criminal law (with its separate requirements of *actus reus* and *mens rea* to make up a prima facie case for criminal liability), I and many other moral philosophers (such as John Gardner, the late Bob Nozick, Heidi Hurd, etc.) think that blameworthiness consists of two distinct components, wrongdoing and culpability, and that *acting* only goes to the first. *See, e.g.*, MOORE, PLACING BLAME, *supra* note 5, at 191–193, 403–404. Yaffe's "active with respect to," by contrast, includes both wrongdoing and culpability, which to us standard moral theorists looks like adding confusion, not reducing it.

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could be added to action but intention or other mental states of culpability that would make Yaffe's activity "normatively relevant," in his sense of that phrase?

If this is what Yaffe is up to—and I give alternative interpretations of activity below—then we are entitled to ask whether his mode of proceeding does not run roughshod over the important moral distinction between wrongdoing and culpability. What is the gain in lumping both under some more general rubric, such as "activity with respect to?" As the saying goes, when you lump quite different things together, the result is bound to be a bit lumpy. I prefer my desert bases separate: to be responsible for some harm H, one must have wrongfully H-ed, and one must have been culpable (intent, foresight, risk) with respect to H.

So (2) is not only not my thesis; it is also not a thesis that is more worth discussing than my (1). Still, I follow Yaffe in pursuing (2), because at the end of the day he arrives at something that is worth discussing and about which he and I significantly disagree. Thus, think of (2) as a good heuristic—not of interest itself, but it can lead to something interesting. Heuristics, of course, know no criterion but success. (2) works for Yaffe. A cold shower or listening to Celtic Woman would have worked as well for me.

C. Does Action (and Activity) Require Causation?

Let us separate (2) into its two conjuncts, as does Yaffe in his discussion. Take (2a) first: the thesis that one is active with respect to some event e only if one's acts caused e. Here Yaffe and I can join hands, because as he recognizes, my (1a) is true just as his (2a) is true. Still, Yaffe seeks to find disagreement between us in the *reasons* for which I believe (1a) versus the *reasons* for which he believes (2a).

Take the case John Gardner raises in his criticism of my Chapter 13 when it was still in article form.[78] Gardner urges that (1a) is nonsensical in cases like that involving the verb "abuse." (1a) says that x abuses y only if x causes an abusing of y. Gardner objects that there is no "abusing" in the intransitive sense, that is, the sense leaving open whether the injury in question was inflicted by a person. Necessarily, Gardner thought, an *abusing* of y requires an *abuser* such as x; for Gardner, injuries produced by storms, accidents, and the like conceptually cannot be *abusing*—in which case (1a) is trivial: abusings of y are required for actions of abuse to y only because it is analytic of the concept of abusing that abusings require actions of abuse.

My response to Gardner is pretty much as Yaffe describes it.[79] It is twofold. First, I doubt that it is analytic that suffering abuse ("abusing") requires

78. John Gardner, *Moore on Complicity and Causality*, 156 U. PA. L. REV. 432–443 (2008); relied on in Yaffe, *Moore on Causing*, *supra* note 61, at 445–449.
79. Moore, CAUSATION AND RESPONSIBILITY, at 6–7

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a human actor in the role of abuser. "I suffered much abuse from the elements while in the lifeboat without food or water for days" strikes me as OK. But second and more important, leave the language for the underlying metaphysics. (1a)—and (2a), for that matter—do not depend on every verb V in English having an intransitive sense that can be used in "V-ing." What is required is that there be some state of affairs—say, of injury, as Yaffe supposes—that is caused by the agent and without which there can be no act by x whereby x V-ed. "X *abused* y only if x caused injury to y" sounds pretty good; and if there is anything wrong with it, it is because "injury" is an inapt choice. If "injury" does not stand to "abuse" (verb) as "death" stands to "kill," then the repair is to find a better analyses of the example, not to throw out (1a).

Yaffe accuses my second answer to Gardner of depending on "fancy and controversial metaphysical claims" (447). Just what these are is not easy to pinpoint. Apparently my second answer commits me to denying that "the relational property of x's being active with respect to it [suffering of abuse] may be essential to it" (447). And I am committed to this denial, Yaffe says, because I must think "that all of the essential properties of events are intrinsic" and that x's being active with respect to the suffering of abuse is not intrinsic (447).

I never raised the question of whether x's being active with respect to the suffering of y is an essential property of y's suffering abuse. My book is about actions, not Yaffe's "active with respect to." But with respect to Yaffe's concept, I do now deny that suffering abuse has as an essential property not only a human agent abuser (i.e., an actor) but also an intention of that abuser to abuse (i.e., an actor intentional with respect to abuse). (I deny, in other words, that one can suffer abuse only at the hands of one who is "active with respect" to that abuse.) "You are badly abusing him," "he is suffering much abuse at your hands," are both appropriate things to say to someone whose acts, unwittingly, are causing another to suffer. Intent of an abuser, like action of abuse by some human agent, is inessential to there being a suffering of abuse. And this is not because of some necessity claim, such as Yaffe's suggestion that only intrinsic properties can be essential properties. Rather, it is because the states of affairs (like suffering injury or abuse) referred to on the right-hand side of (1a) and (2a) do not happen to include any intention to inflict suffering, injury, or abuse among the properties making them the kind of states of affairs they are, anymore than the event type picked out by "big fires" happens to have as one of its properties: "intended by an arsonist."

D. Is Causing Sufficient for Action (and/or for Activity)?

Yaffe very nicely describes my limited acceptance of (1b) (444–445). While I do go out of my way to defuse many well-known counterexamples to (1b) in

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my book,[80] I myself restrict (1b) to cases of substantial causal contribution, as Yaffe notes. If x's acts (willed bodily motions) substantially cause y's death, then (but only then) does x *kill* y. But again, Yaffe would transform what I say—the amended version of (1b)—into something else, an equivalently amended version of (2b). Indeed, Yaffe describes me as being "somewhat cagey about exactly how he sees the relationship between being active with respect to an event and being a substantial causal contributor to it" (445). In my book I was not being cagey—I was being silent! Nonetheless, Yaffe eventually attributes to me the amended version of (2b), according to which x is active with respect to e only if x is a substantial cause of e.

Now, it is child's play to show that (2b)—either (2b) classic or (2b) amended—is false. For Yaffe thinks (as do I) that "there is more to being active with respect to another's suffering of abuse than [substantially] causing his injury; additional conditions may need to be satisfied" (448–449). Given the way that Yaffe conceives of being "active with respect to," that is surely right. Needed is some mental state marking the actor's culpability, and causing e in no way requires intending e, foreseeing e, or unreasonably risking e. So Yaffe pounds into dirt his mythical opponent. Rightly so—that guy is an idiot.

Despite this unseemly torching of a straw man he himself has created, Yaffe actually arrives at a significant issue in the second half of his article. He does this by focusing on one very narrow class of examples: not only those act types that have means restrictions built into them as essential properties but also that subclass of these that Sandy Kadish dubs "nonproxyable" act types.[81] The question Yaffe raises is whether (1b) (or 2(b)) can be sustained in this narrow class of cases. It is to that issue that I turn in the next section.

E. Is Substantially Causing Some Event Sufficient to Have Performed a Nonproxyable, Means-Restricted Act Type?

In the cases considered here, we are again focusing on the second conjunct of the biconditionals (1) and (2). In my book I examine (1b); Yaffe examines (2b). We will thus again be talking past each other. But unlike last time, perhaps we can talk enough about the same subject so that we can meaningfully disagree about it.

Yaffe accurately recapitulates my discussion of means restrictions generally and nonproxyable means restrictions particularly. An example of the first is Donald Davidson's: Is the substantial causal contribution of a surgeon's (s) acts to removing (intransitive) of a victim's (v) appendix sufficient for it to be true that s performed the *action* of removing v's appendix?[82]

80. Moore, Causation, *supra* note 1, at 8–14.
81. Sanford Kadish, *Causation and Complicity: A Study in the Interpretation of Doctrine*, 73 Cal. L. Rev 323–410 (1985).
82. Moore, Causation and Responsibility, at 9

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Or that s was *active with respect to* removing (intransitive) of v's appendix? If there are means restrictions to acts/activities of removal, the answer is in the negative, as Davidson thought; and (1b) and (2b) would be false.

An example of the second, the special cases of means-restricted *nonproxyable* act types, is provided by bigamy. Arguably one can perform an act of bigamous marriage only if the person who does the act is the selfsame person as the person who is caused by that act to be married to two different people at the same time. If that is so, then a substantial causal contribution by x to the state whereby one person is married to two others will not be sufficient for it to be true either that x performed the *action* of bigamy (entering a bigamous marriage); or that x was *active with respect to* x's being married to two people at the same time. And (1b) and (2b) would be false.

Yaffe very nicely points out my reply to the second sort of case. I urge that careful attention to *what* one must cause for (1b) to be true shows that (1b) is indeed true in these cases. Of course, it is not sufficient to cause *someone* to be married to one person while already married to another; (1b) properly formulated asserts rather that it is sufficient (for doing bigamy) to cause *oneself* to be married to one person while already married to another. As Yaffe accurately puts it, on my view "the restriction that the causer is identical to the marrier is to be folded into the event caused rather than seen as a limitation on *the way in which* that event is caused" (452). So interpreted, I assert that (1b) is true even of this class of cases.

Yaffe does not respond directly to my defense of (1b) just given. Rather, he seeks to commit me to an analogous defense of (2b). He does this by attributing the following belief to me: I supposedly deny the proposition (call it (ii)): [if x is active with respect to some event e (such as becoming married to one person while one is already married to another), then one has performed the action of bigamy (entering a bigamous marriage)]. Yet I of course said no such thing. Nor do I now think any such thing. Being *active with respect to* is Yaffe's phrase; in the meaning he earlier stipulated so as to achieve "normative relevance," being *active with respect to* includes activity but more besides. Above I construe the "more besides" to be intending, foreseeing, or risking, the mental states of culpability. But whatever the "more besides" is, on Yaffe's conception of being "active with respect to e," that notion includes doing the action of e-ing. So I do not deny what Yaffe says I deny, not in what I said, not in what I meant, and not in what I now think. Thus when Yaffe complains that "no reason has been given to reject (ii)" by me (452), I am at a loss. I do not have a reason to reject (ii) because I do not in fact reject (ii).

Yaffe is on much more solid ground when he leaves all of this and gets to something I actually do think. Take the example of x kissing y. About such nonproxyable cases, (1b) asserts that if x's acts substantially cause contact between z's lips and y's body, *and if* $x = z$, then x kissed y. Yaffe accurately attributes to me the following belief:

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> Moore's point is that by adding identity to a case of causation, we make the verb of action applicable. . . . The idea is that the relation between X and the lip contact with Y's body is *exactly the same* whether or not the lips are X's. . . . Our words are apt to mislead us about this—when X pays Z to kiss Y, X did not kiss Y—but we should not let them. We should recognize instead that even in such a case we have the same relation between X and the relevant event as we do when X kisses Y himself. At least, so Moore believes. (452–453)

With the caveat that it is usually easier to make a substantial causal contribution to lips touching the body of another when the lips are one's own rather than those of a third party, I agree with this attribution of belief to me.

With what does Yaffe here disagree? What he says is this: "The problem . . . is that there is no reason to believe that we are holding fixed the facts about activity when we alter the facts about identity" (453); whereas, Yaffe thinks, there *is* reason to believe the opposite: "our willingness to apply the relevant verb of action in the one case [where it is one's own lips doing the touching] and not the other [where it is someone else's lips one causes to do the touching] . . . indicates that we sense a difference in activity in the two cases" (453). So here we have Yaffe's troublesome concept again, "active with respect to" (or "activity").

Let me give two readings of "active with respect to," one of which engages Yaffe in a genuine disagreement with me whereas the other just has him talking past me again. The first reading of "active with respect to" makes the degree of "activity" proportional to the degree of causal contribution made by some act to some result (like lip contact with the body of another). Yaffe's claim here, then, is that "the facts about identity make a difference to the facts about activity," that is, to size of causal contribution.

I literally cannot imagine how this last claim of Yaffe's could be true. It is easy enough to see that, generally speaking, one's causal contributions will be larger for actions where one uses only one's own body as the means rather than acting through the body of another. But this is not always the case: imagine the germ-conscious person who uses another to do his kissing for him; he invents and assembles a kissing machine, fastens a paraplegic in it, and uses the machine-cum-paraplegic to touch the lips of the latter to the body of others. I take it that this abstemious kisser is as substantial a causer of lip contact as is the standard kisser.

More importantly, even if, in general, there is a correlation between degrees of causal contribution, on the one hand, and whose body gets used as the medium through which the causal contribution is made, on the other, this will not support Yaffe's claim. For Yaffe's claim is that "the facts about identity" [i.e., whose body gets used] "make a difference" to the facts about degree of causal contribution. These facts about identity are supposed to bleed into the facts about causation; identity (of agent and body used) is supposed to act like some kind of causal aphrodisiac, a causal enhancer or

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causal magnifier. Given what causation is, this dangerously borders on the unintelligible.

Despite being stuck defending a claim that is only marginally intelligible at best, Yaffe manfully adduces three sorts of evidence in support of it. The first is the linguistic fact to which I also advert in my book: that fact is that we do not typically use the causative verbs of action such as "kill," "laugh," "hit," or "kiss," to describe agents' causings of deaths, sounds, or contact with the body of another when those causings are achieved through the behavior of a third party. And Yaffe is right: in my book I dismiss this "evidence" as not evidencing anything very interesting or very deep. Rather, whether a causative verb of action is idiomatically applied to some agential causing depends mostly on the accidents of familiarity and repetition. We are unfamiliar with agents causing avalanches that destroy villages; so no matter how greatly x's acts causally contribute to an avalanche beginning, when that avalanche destroys a village, we do not say, "x avalanched the village." Yet when we are familiar with a kind of causing agents do with some frequency, we apply the causative verbs of action utterly indifferent to the fact that the causing was done through the body and/or agency of another. "x *swindled* her out of her money," applies perfectly well no matter whether x acted alone or acted via a con requiring the participation (innocent or otherwise) of others. Likewise with "x *deceived* y," which seems equally applicable when x says something false to y and when x induces z to do or say something that x knows will induce false belief in y.

Yaffe's exposition about his second piece of evidence harks back to the Davidsonian slogan with which Yaffe begins: "All actions are intentional under some description of them." Recall that the modern construal of this is metaphysical and not (merely) linguistic: all actions have their source in some intention of the agents whose actions they are. Now, Yaffe urges (correctly, I think), all such intentions are self-referential in their content. That is, at the source of all actions must be an intention of the form:

> (3) I intend that *I* do A.

And as Yaffe says, such action-originating intentions must cause act-tokens that instantiate the representations ("A") that are the content of those intentions.

All well and good, but here comes Yaffe's hogchoker, stated using the example of kissing:

> (4) "X did not cause his lips to be in contact with Y unless among the causes of the event was a mental representation of X's *of he himself making such contact with Y*." (454)

For the vast majority of action verbs in English (including both proxyable and nonproxyable verbs), (4) is obviously false. X can kill y, hit y, burn down

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y's house, offend y, defame y, and so on, without ever representing himself doing such things. That also seems to be true of kissing: x might *think* she is licking stamps, pressing her freshly lipsticked mouth against a tissue, leaving a kiss mark on a mirror, and so on, and instead she can actually be causing contact between her lips and y's body, in which case x is kissing y yet with no representation of herself "making such contact with," as (4) requires.

The only verbs for which (4) is plausible are those that Elizabeth Anscombe dubs "intention-drenched" verbs[83] and that I call "intentionally complex action descriptions."[84] Arguably at least, I cannot *fish* without intending to catch something, *hide* without intending to conceal myself, *rape* someone without intending penetration, and so on. Some such intention-drenched verbs may be nonproxyable, but most are not; again, the distinction is not marked by this (intention-drenched) feature.

So where does Yaffe go wrong in thinking (4) to be true? He confuses a true claim—all actions are sourced in self-referential intentions—with the false claim that such self-referential intentionality must extend not only to the most basic things one knows how to do (so-called "basic acts") but also to the more extended results of those basic acts, results such as lip contact on the body of another. The only way (4) could be true would be if it were amended into (4b):

> (4b) x was not active with respect to the contact of his lips on y unless among the causes of the event was a mental representation of x's of he himself making such contact with y.

Yet (4b) shifts the meaning of "active with respect to" away from "degree of causal contribution" and back to the culpability reading of "intended, foreseen, or consciously risked."

This culpability reading is the second interpretation of Yaffe's objection to me mentioned above. If *active with respect to* is again to mean "intended, foreseen, or consciously risked," then of course (4b) is true (because activity is defined in such a way that 4(b) has to be true). But this is also irrelevant to any meaningful disagreement with me. So Yaffe needs not to go this route.

Yaffe's third piece of evidence stems, he thinks, from John Perry's solution to the apparent self-reference paradox in Locke's memory-based theory of personal identity (454–455). Yaffe has to stretch for this analogy, but he need not have reached so far, because he could make his point perfectly well without it. His point is the familiar (and correct) one that intentions are the source of actions only when those intentions *cause* the bodily movements partly constitutive of such actions, *in the right way*. Alvin Goldman introduces this notion in 1970 to deal with so-called deviant causal claims and the

83. Anscombe, Intention, *supra* note 74, at 85–87.
84. Moore, Act and Crime, *supra* note 5, at 198–199.

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apparent counterexamples that such cases present to causal theories of action.[85]

Yaffe wants both to extend and precisify Goldman's requirement. The extension is from the causal relation existing between intention and bodily movement executing the intention (Goldman's concern), to the causal relation existing between that bodily movement and some further event in the world, such as lip contact, death, or injury. Yaffe urges that there are deviant causal chains here, too, and that such chains must be nondeviant if they can constitute being active with respect to such results (where *activity* is used in its causal sense, not its culpable-mental-state sense). In a general way this extension is surely warranted. Indeed, the lawyers' notions of *proximate* causation exist precisely to rule out such deviant causal chains, as does my own "substantial causal contribution" requirement.

The precisification Yaffe desires is what should be viewed as a per se rule of deviancy (nonproximateness, insubstantiality) of this second causal link: the "right way" for bodily movements to cause lip contacts, and so on, excludes using third-party bodies or agencies as causal intermediaries. Yaffe in effect recreates, as a supposed implication of the philosophy of action, a kind of doctrine of intervening causation that lawyers have applied for centuries and that I seek to demolish in chapters 11 to 13 of my book.

Yaffe makes no argument in favor of thinking that an agent substantially causing some event e cannot be an agent causing e through use of the body or agency of another. Perhaps Yaffe thinks this to be so obvious that it needs no argument. The only way he could think this is if he confuses the second causal link in actions with the first. For with regard to the causal link between intending to do the most basic thing we know how to do and the bodily movement events that partly constitute such basic acts, it is plausible to deny that there can be (as a causal intermediary) an act or body of another person. If there were such an intermediary, there must have been something even more basic we were trying to do, and that more basic act would cause the other agent or body to behave as we want.[86]

Yet the plausibility of Yaffe's intervening cause thesis evaporates entirely when he moves from link one to link two. We cause remote events through use of others' bodies and agency all the time. I argue this at length in chapters 12 to 13 of my book.

85. ALVIN GOLDMAN, A THEORY OF HUMAN ACTION (1970); Yaffe, *Moore on Causing*, *supra* note 61, at 455.

86. Even here, the claim is only plausible, not true in all cases. Suppose x, my germ-conscious kisser, is himself a paraplegic; yet he finds himself hooked up to a mind-brain interface machine that reads his attempts to move his limbs; such machine then moves the other paraplegic (z) into the kiss position, and thrusts z's lips onto the body of y; x knows how the machine works and intends to use it to effect lip contact of z with y. By my lights, x has kissed y (been active with respect to lip contact on the body of y, substantially caused lip contact on the body of y), even though his intention to do so does not exclude use of another's body.

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F. Yaffe on Accomplice Liability

Yaffe's conclusions about accomplice liability depend on his metaphysical conclusions in the last section. If his metaphysical conclusions are as shaky as I think they are, then his legal conclusions are also in trouble.

One conclusion Yaffe reaches is that those who culpably aid others in the latter's entering of bigamous marriages are worthy of criminal liability (457). I agree. The question is whether the law needs Yaffe's non-cause-based, accomplice liability to reach that result. Yaffe says yes, I say no. Secondly, Yaffe's says my "no" commits me to a form of strict liability (458). I deny it, so issue is joined.

On the first issue between us, Yaffe could be correct only if his reinvention of intervening causation could be sustained, that is, only if an agent causing some event e *through* the use of the body or agency of another was impossible. But it is not, as shown above. We can substantially and nondeviantly cause deaths, deceptions, injuries, lip contacts, and so on through all kinds of instrumentalities, other people included. So the law has no need of some noncausal accomplice theory of criminal liability, just as I argue in my book.

On the second issue between us, Yaffe can accuse me of imposing strict liability only if he changes yet again the meaning of his invented phrase, "active with respect to." Yaffe says that "in addition to causation, activity with respect to the relevant events requires identity with the person who says 'I do' and is doubly married" (457). Liability imposed where there is no such identity is liability imposed in the absence of activity, and that, Yaffe concludes, is strict liability for what happens to us rather than for exercise of our agency.

Now parse again Yaffe's "active with respect to." Does he mean: (1) the causal reading of activity, that is, there can be no substantial or nondeviant causing of some bad result by an agent if he does such causing through the body or agency of another? If I am right in my argument above, Yaffe's requiring identity for activity (in this sense) is false. Or does Yaffe mean: (2) the culpable-mental-state reading of activity, that is, there can be no culpable mental state causative of some bad result e if the mental state in question includes in its content a representation of someone else's body or agency being the immediate cause of e? This, too, I argue above is surely false. Or does Yaffe mean: (3) a new, identity reading of activity, that is, in addition to substantially and nondeviantly causing e, and (perhaps) in addition to intending to cause e through one's own body only and not through use of the body of another person, being active with respect to e requires an identity between the agent doing the intending and the causing, on the one hand, and the person whose body it is through which the causing is done?

I think Yaffe thinks he has established (3), yet the only arguments he presents are those that go through causation (1) or intention (2). And neither of those work. Of course, Yaffe can stipulate that what he means by activity is now (3); but that is not victory in any but the most empty sense.

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G. Conclusion

I do not think that Yaffe has yet formulated his real objection to my book, despite the obvious mastery he has of the book's details and despite the often accurate and nuanced description he gives of those details. He glosses the central notion of his critique, that of being active with respect to, treating it as if this were some well-established concept superior to the concept of action with which I work. Yet *active with respect to* is not a long-established, widely known philosophical concept, but rather an invention of Yaffe's. It might be a good or a bad invention, but we cannot tell until Yaffe decides just what it is he intends to denote with it. In the foregoing I tease out two main readings (causal contribution and intentionality), and possibly an independent third reading besides (identity). Yet I am unsure that any of these, or all together, capture the idea Yaffe is seeking to use. It is true that even if the idea were clarified, I would probably still object that critiquing me in terms of it would not be to critique the book I wrote so much as it would be to express the wish that I had written a different book. Still, if the different book would be a better book, that would be a legitimate form of criticism. But this, too, we cannot know without further elucidation by Yaffe of how he wants to conceive of *activity*.

IV. JOHN GARDNER ON MOORE'S MORAL EPISTEMOLOGY

I can be brief in my response to John Gardner because (as he also observes)[87] he and I agree on most of the fundamentals in the badly named "moral luck" debate that is the subject of his comment here. We agree, first of all, that it is a badly miscast debate in terms of *luck*; that the "revolutionary brigade" who oppose both of us rely mainly on a sense of "control" (as of "luck") that not only is peculiar but also cannot sustain their side of the argument; that results (and I would say consequences, too) do matter, both to the wrongdoing and to the overall blameworthiness of the actor who culpably produces them; that the *reductio* arguments he and I apply in favor of this last conclusion are persuasive (Gardner: "decisive"; 470); that the emotions matter to moral reasoning, at least as heuristics to discovering moral truths, perhaps as justificatory warrants for rational belief in such truths, but not as truth-makers of moral propositions; and that guilt and the backward-looking emotions in particular are apt for some epistemic roles vis-à-vis the discovery of moral truths and the justification of belief in such truths. So Gardner is right: his comment cannot but be a "friendly comment" (460).

The issue between Gardner and myself generally concerns the role of emotions in moral epistemology. This is a concern considerably broader than the context of the moral-luck debate; among other things, it has been

87. John Gardner, *Wrongdoing by Results: Moore's Experiential Argument*, 18 LEGAL THEORY 459–471 (2012), at 460.

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central to my defense of retributivist punishment theories, and in that context I have made an effort to articulate the relationship between emotional experience and moral insight.[88]

Gardner opens his approach to the issue between us by quoting a short statement of my experiential argument. Gardner's first worry about this argument is with respect to my use of the word "culpable." He finds it odd for me to assert that one of two equally *culpable* individuals could be more *blameworthy* by virtue of causing the results she culpably attempted or risked bringing about (page 462–463). This is a minor quibble, as Gardner recognizes, but nonetheless, let us clear it up first. I stipulate what I mean by "culpability" in what I call its narrower sense: to be culpable is to have a mental state of intent or belief about one's own wrongdoing. It is to intend some bad result, try to bring it about, (predictively) believe that it will come about because of one's actions, or consciously risk such a result for insufficient reason.[89] Culpability in this sense joins wrongdoing in determining overall blameworthiness.[90] It is by-the-by for Gardner to "doubt whether [my] 'narrower sense' [of 'culpability'] makes sense" because "there is no blameworthiness or culpability except the 'overall' kind" (462, note 17). Stipulative definitions, unlike lexical ones, are not hostage to the facts of ordinary use. Stipulative definitions like mine are to be judged by their theoretical fecundity—here, whether the "wrongdoing plus culpability equals blameworthiness" equation advances our understanding of responsibility. I thought that Gardner elsewhere joined me in thinking that it did. But in any case, there is no conventional fact of the matter about what "culpability" means that can be relevant to critique my stipulative definition.

Gardner also goes astray in the two other "oddities" he early on finds in my formulation of my experiential argument. Unlike the first oddity, these, he assures us, both "go to the heart of Moore's main point and cannot so easily be ignored," as can the supposed oddity about culpability (463). Yet the oddities are wholly of Gardner's invention and have nothing to do with my actual argument. The first supposed oddity focuses on my statement that "The reason we *feel* so guilty in such cases is because we *are* so guilty" (464). Gardner reconstructs this into a supposed argument by me that Gardner labels as *my* "Argument 1." He then queries why I would make such an argument when "clearly" I need the converse inference (from feeling guilt to fact of the matter about guilt) to make my experiential argument go (463). The second supposed oddity lies in what Gardner labels my "Argument 2," which argument at least gets the inference running the right way (from feeling to fact rather than vice versa); despite this, Argument 2 supposedly has a suppressed premise, according to Gardner (463). These two oddities

88. Michael Moore, *The Moral Worth of Retribution*, *in* RESPONSIBILITY, CHARACTER, AND THE EMOTIONS (Ferdinand Schoeman, ed., 1984), *rev'd and reprinted as* ch. 3 of MOORE, PLACING BLAME, *supra* note 5.
89. MOORE, PLACING BLAME, *supra* note 5, at 45–60, 191–193, 405–419.
90. *Id.*

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are then heightened by a supposed third: "So far as [Gardner] can see, the inverted inference in Argument 1 is supposed to supply the missing premise in Argument 2" (463–464).

No, no, and no again! Gardner has really to reach to stick me with any of this. With regard to supposed oddity number two: there is no suppressed premise in the argument I actually make—only in Gardner's truncated schematization of that argument in his "Argument 2." As Gardner well knows, in my earlier work I argue extensively for what Gardner here calls "the extra premise that Moore needs to complete his argument." The "extra premise" has to do with the epistemic reliability of the virtue of feeling certain emotions on certain occasions (464). Indeed Gardner himself later cites this argument by me (467–468).

With regard to supposed oddity number three: *my* argument for the supposedly missing premise never was and is not now Gardner's "Argument 1." Nor would I care to make such an argument now. This is because so-called "Argument 1" is not an epistemological argument at all. My actual experiential argument is an inference that rational agents are justified in drawing: they may (sometimes) infer the moral fact of guilt from the psychological fact of a feeling of guilt. That this is a warranted inference for rational agents makes it part of the moral epistemology that I defend. The sentence of mine on which Gardner focuses—"the reason we *feel* so guilty in such cases is because we *are* so guilty"—is no part of this inference, no part of my experiential argument, indeed, no part of my moral epistemology. That statement is one of *metaphysics* that I am happy enough to defend as true. (Indeed, for naturalist-realists in their moral metaphysics such as myself, that truth causes belief is pretty widely accepted.)[91] But metaphysics cuts no epistemological ice, and I have never pretended to the contrary.

So we need to start over. Indeed, Gardner does so, although he does this by first supplying me with his own version of my (supposedly) missing premise. He then goes after it in several pages of closely reasoned critique (464–467). He even complains at one point that the argument that he considers at length is one of "rococo elaborateness" (470). But the quite elaborate argument that Gardner leads us through has nothing to do with me or my actual experiential argument. As Gardner well knows, when what I actually say (and think) is allowed to supply my "missing" premise, I bypass the problems he creates for his version of my "missing" premise, whereas Gardner's version of that premise has it that the inference from feeling to moral fact is supported by the *appropriateness* of the guilt feeling, where "appropriateness" of feeling is cashed out (by Gardner) as "truth-warranted" (464). Gardner then pounces on the patent circularity of the inference (what makes a feeling or a belief appropriate or truth warranted is that it is

91. Explored at length in Michael Moore, *Moral Reality Revisited*, 90 MICH. L. REV. 2424–2533 (1992), *reprinted in* MICHAEL MOORE, OBJECTIVITY IN ETHICS AND LAW (2004).

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true, and therefore the judgment to which such feeling or belief points is true). And another straw man goes up in smoke!

The real issue between Gardner and myself is reached only when he thinks his way through the maze of his own invention and allows me to supply my own version of the "missing" premise. For Gardner eventually admits that I "would deny the analogy that I [Gardner] draw between the appropriateness of emotions and . . . the 'truth-warrant' of beliefs" (466). Gardner then quotes my 1984 essay in which I urge that the indicator of epistemic warrant (of emotions to moral truths) lies in the virtue of feeling such emotions on the occasions when they are felt by some actor: "the touchstone of our epistemically reliable emotion . . . is the virtue of feeling such an emotion."[92] Gardner concedes that this "seems to introduce a new and more promising line of inquiry" (467). Indeed! It has long been my only line of inquiry here.

Gardner then raises two interesting criticisms of this, my actual thesis here. Before getting to these criticisms, however, two clarifications of my thesis will sharpen the discussions. The first has to do with what I meant in 1984 by "epistemically reliable." Let us distinguish three possible connections between moral truth and certain emotional experiences. First, there is a metaphysical connection. If one were a subjectivist in one's metaethics, for example, one would hold that the truth conditions of a moral proposition were constituted by the subjective feelings of the speaker[93] (whereas if one were an emotivist, there would be no truth conditions for moral propositions, but there would be "conditions of appropriate utterance" given in terms of how the speaker felt).[94]

Second, there is the justificatory connection. The nerve of this epistemological (not metaphysical) connection lies in the justificatory warrant that emotions offer for belief in certain corresponding propositions. If emotions have this kind of connection to morality, then they give objective reasons for belief in the truth of the relevant moral propositions. A rational agent, in other words, could justify her belief that the proposition is true from her reliance on these emotional experiences.

Third, there is another epistemic connection possible,[95] and that is the heuristic connection. On this view, the having of a certain emotional experience (such as that of feeling guilty) is a good route to follow in discovering true moral beliefs (such as the belief that I am guilty). Reliable routes of discovery need not provide justificatory warrants; following my naked intuition in advanced mathematics may be a good heuristic for me, but I do not justify my mathematical beliefs by citing such intuition.

92. MOORE, PLACING BLAME, *supra* note 5, at 228.
93. Moral subjectivists are discussed in Michael Moore, *Moral Reality*, WIS. L. REV. 1061–1156 (1982), at 1075–1077, *reprinted in* MICHAEL MOORE, OBJECTIVITY IN ETHICS AND LAW (2004).
94. *See id.* at 1079–1086.
95. The classic separation of "contexts of discovery" from "contexts of justification" is in HANS REICHENBACH, EXPERIENCE AND PREDICTION (1938), at 4–5. *See also* ISRAEL SCHEFFLER, SCIENCE AND SUBJECTIVITY (1967), at 68–73.

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Reading Gardner's comment, I am unsure what it is he thinks I think about these three connection(s) of emotions to morality. He could be urging that we should want to know how virtuously feeling guilt could *make* it the case that we are guilty. This would make the emotions into truth-makers for moral propositions, a metaphysical connection. At one point Gardner suggests there is a justificatory connection: virtuous emotions yield up truth-warranted beliefs (467). Finally, Gardner also and plainly attributes a discovery route connection to me: "Moore's formulation suggests that when one's moral emotion is virtuous, one notices the morally salient feature of a situation thanks to one's moral emotion. The emotion 'leads' one to the moral truth" (468). Gardner's penultimate statement of my view, stated as "Argument 2c′," is: "virtuous feelings yield true moral verdicts" (467). This is triply ambiguous. If "yield" means "constitute truth," this is a metaphysical statement; if "yield" means "give rational grounds to believe" true, this is a justificatory statement; if "yield" means "give good routes to discover" truth, this is a statement of heuristics.

In the 1984 article that Gardner quotes I plainly reject the first (metaphysical) connection and accept the third (heuristic) connection. Thirty years later, both that rejection and that acceptance still seem to me to be correct. The second connection I was less clear about. I rejected the parallel between emotions and sensory experience, the emotions playing the role of justifying moral beliefs in a way analogous to the role of sensory experience justifying factual beliefs.[96] If emotions give justifying reasons to believe, they do not give such reasons directly, as do sensory perceptions.

I still find instructive my 1984 analogy to the role of conscious experience in the philosophy of mind.[97] Conscious experience is not constitutive of the mental, as a metaphysical thesis would hold. Conscious experience is plainly a good heuristic for each of us to discover what it is we intend, desire, and feel. But conscious experience also plainly seems to play a justificatory role in the justification of our beliefs about our own or others' mental states. Although not infallible, the experience of deciding to do some action A is a good prima facie justification for believing that one intends to A; just as feeling painful sensations or feeling in a depressed mood is a very good ground (again, not infallible) for believing that one is in pain or that one is indeed in a depressed mood.[98]

The "compelling power" of the emotion of guilt that I speak about in my experiential argument for moral luck[99] (and that Gardner, too, has felt; page 470) is of this sort. It is hardly veridical in the insight that it generates, which is that we *are* guilty for the results of our acts. But until contradicted

96. MOORE, PLACING BLAME, *supra* note 5, at 130–132.
97. *Id.* at 132.
98. The "privileged access" we each have to the contents of our own mental states is explored in MICHAEL MOORE, LAW AND PSYCHIATRY: RETHINKING THE RELATIONSHIP (1984), at 254–265.
99. MOORE, CAUSATION, *supra* note 1, at 31.

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by other evidence, it provides very good grounds with which to justify one's belief that we are guilty.

The second clarification has to do with the force of the epistemic connections (heuristic and justificatory) that I assert to exist between the emotions and the moral facts. Gardner has me asserting categorically: "Virtuous feelings yield true moral verdicts" (467). What I said in 1984, and what I still think to be true, is more qualified: that an emotional experience is virtuous to possess *tends* to mark that experience as epistemically reliable in the judgments that it produces.[100] I cite nonmoral guilt as virtuous to feel yet producing *false* judgments (for we are not in fact guilty in such cases);[101] I cite Lockean pride in personal accomplishment as too prideful to be virtuous yet yielding true moral judgments (of deserved property entitlements).[102] There are thus counterexamples both ways to the more categorical assertion with which Gardner would stick me, which is why I avoided making his stronger statement.

Thus clarified, we can now assess the two criticisms that Gardner directs against the reliance on emotions in my moral epistemology. Gardner's main criticism is that my view is trivial because circular. Gardner's thought is that part of what makes an emotion virtuous to feel is the true moral judgment that we are seeking to discover and/or justify with it—in which case, we already know the moral truth in question (and so do not need a heuristic) and we gain no justificatory power (because the conclusion is contained in the premise of our justificatory inference).

And at last we arrive at a true substantive disagreement between Gardner and myself. He thinks the virtue of an emotion depends on the antecedent truth of the judgment that accompanies it; this robs the virtue of an emotion of its justificatory power. He also thinks that our belief in the truth of the accompanying judgment causes the corresponding emotional experience (when it is virtuous to have such an experience); this robs the emotional experience of its power as a heuristic. Whereas I think neither of these things.

Consider the second of these thoughts by Gardner, the one relating to the heuristic connection of emotions to morality. Gardner ascribes to me the belief that guilt feelings produce judgments that one is guilty; whereas, he tells us, "in reality it is the other way round:" the judgment produces the feeling (468). Unnoticed by Gardner is a third possibility: the feeling and the judgments are coeffects of a common cause (which, for naturalist-realists like me, could be the moral fact of the matter). Or perhaps we should be eclectic about such matters: sometimes it is one of these relations, sometimes another, sometimes both together.

We can be agnostic about this bit of psychology, for the crucial issue here lies elsewhere. Gardner's criticism of feelings as a heuristic depends on

100. Moore, Placing Blame, *supra* note 5, at 132–138.
101. *Id.* at 135.
102. *Id.* at 135–136.

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priority of conscious awareness, not priority of causation. Feelings would be useless as a heuristic if they told us only what we already knew. Yet the judgments caused by (causing, or coeffects with) feelings need not be conscious even though they are ascribable to the agent. Indeed, Gardner and I join a long tradition in thinking that emotions are as intelligent as they are because they presuppose various cognitive judgments. Yet most of the time these judgments are implicitly, not consciously, entertained, in which case the very conscious feelings (say, of guilt) can tell us what we may not yet (consciously) know, namely, that we are in fact blameworthy.

Turning to the other of Gardner's thoughts here, pertaining to the justificatory role of the emotions, consider in more detail my 1984 example of nonmoral guilt feelings. In some tragic choices, where some people have to be lost that others may be saved, I argue (in what I hope is persuasive detail) that the right thing to do is to save those who can be saved.[103] The film *Sophie's Choice* presents one such situation, where a mother must choose one child to save on pain of losing both; the surgical separation of Siamese twins, where only one can live postseparation but neither can live without separation, is another;[104] as is the choice of an up-rope mountain climber to cut the rope holding his fallen companion, where otherwise both will be dragged to their certain death.[105] In all such cases, and many more besides, the right thing to do is to save those that can be saved. This means actors who do such things are guilty of no wrong and deserve no blame. Yet side by side with this deontic judgment is an aretaic judgment: it would be virtuous if the mother/doctor/mountain climber in such cases felt not only remorse and regret but also guilt at being the author or the allower of the harms befalling those who are sacrificed.

Both of these judgments together show that the virtue of feeling an emotion cannot depend, logically or psychologically, on the truth of the corresponding moral judgment—this is for the simple but sufficient reason that there is no such true moral judgment in these cases. It is virtuous to feel guilt about making such choices and doing such actions; yet it is not true that one is guilty in such cases. Ergo, being guilty in fact cannot be necessary to the virtue of feeling guilty; and knowing (i.e., believing truly) that one is guilty cannot be a necessary cause of feeling guilty in all cases where such feeling is virtuous to have.

It would be a fair question for Gardner to ask: What are the conditions for ascribing virtue to feeling certain emotions on certain occasions, if they are not the truth of the corresponding judgments? The beginnings of an answer (but only the beginnings) lie in the conditions of appropriateness we seem to employ in judgments about whether an emotion is virtuous to feel.[106]

103. *Id.* at 692–694, 700–701; MOORE, CAUSATION, *supra* note 1, at 65–68.
104. *Re A*, [2001] Fam. Ct. (Court of Appeals of England and Wales), [2000] 4 All E R 961.
105. JOE SIMPSON, TOUCHING THE VOID (1988).
106. *See* MOORE, LAW AND PSYCHIATRY, *supra* note 98, at 107–108.

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Grieve for your pet goose for too long, and we will judge it pathological and not virtuous. It is true that sometimes such norms may incorporate fragments of the criteria for deontic judgments of responsibility and blame, as may be the case in the tragic choices mentioned above. But incorporation of such mere fragments of deontic judgments is no help to Gardner's thesis. And in any event, not even these are present in judgments of virtue of some emotions—an example is the virtuous nonmoral guilt felt by survivors of catastrophes in which others similarly situated have lost their lives. In these cases one has done nothing, caused nothing, intended nothing, for which one could in fact be guilty—so there is not even a fragment of deontic-blaming criteria present—yet there is virtue to the feeling of guilt because it evinces the fellow feeling that decent people feel.

Could Gardner salvage something of his criticism here by the following thought: even if the truth of the corresponding moral judgment is not everywhere and always necessary to the virtue of the emotion, sometimes it is? And if sometimes it is virtuous, for example, to feel guilt because one *is* guilty, then in those cases at least, the virtue of the feeling cannot justify the judgment that one is guilty, on pain of vicious circularity.

Gardner could even quote a little more Moore here: "A moral being *feels* guilty when he or she *is* guilty of past wrongs.")[107] Yet this is not quite what Gardner needs. He needs the moral fact that a feeling of guilt is virtuous to depend on the moral fact that one is guilty; that the psychological fact (of feeling guilty) depends on the moral fact (of being guilty) is insufficient for his purposes. And even in the subclass of cases here considered—where there *is* guilt in fact—the fact of guilt is not what makes the feeling of guilt virtuous to feel.

Above I say that Gardner had two criticisms of my view of the connection between the emotions and moral belief. One is the circularity criticism, which I discuss just above. Gardner's second criticism goes to the comprehensiveness of my aretaic criterion for the epistemic reliability of our emotions. He queries whether there are not emotions that are epistemically reliable where nonetheless there is neither virtue nor lack of virtue in their possession. He raises the possibility that there are aretaically "valueless" emotions that are nonetheless of epistemic use in discovering and justifying belief in our (deontic) responsibility. If there are such cases, then my aretaic criterion would need to be supplemented with some other criterion of epistemic reliability for such cases.

Gardner's criticism is here so fleeting that he does not provide us with an example, plausible or otherwise (468). There are admittedly many emotions the having of which on various occasions neither speaks for or against our virtue. They are, as aretaic theorists call them, morally indifferent

107. Moore, Placing Blame, *supra* note 5, at 147.

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emotions.[108] Yet this general truth is not to the point. The question is whether we have any such aretaically indifferent emotions when they are epistemically reliable indicators of our guilt (or lack of it). Not only can I not think of any such examples, but it would be a peculiar morality that contained them. In 1984 I imagined a morality in which the moral fact is that the claims of distributive justice extend beyond national boundaries but the aretaic moral fact is that the emotion often accompanying this insight about distributive justice—compassion—is either lacking in virtue or morally indifferent. While possible, this would be, as I then put it, "an oddly cohering morality."[109] I thus doubt that the kinds of counterexamples on which Gardner's second objection depends actually exist.

Despite all the twists and turns, I end where I began: Gardner and I disagree about very little on the issues here discussed. With large enough magnifying glasses we have both found items to quibble about. But at the end of the day, we should step back from the proverbial trees and remember the shape of the forest that Gardner and I tend together. Centrally, results matter to moral blame, and causation thus matters to theorists of responsibility.

V. CAROLINA SARTORIO ON OVERDETERMINING OMISSIONS

I am flattered by Carolina Sartorio's continued interest in and attention to the issues raised in my *Causation and Responsibility* book. In her present essay she is intrigued by the issues raised by overdetermination cases, particularly those of overdetermining omissions (as opposed to overdetermining actions).

In my book I distinguish five forms of joint causation,[110] four of which are overdetermination cases: (1) the garden-variety concurrent-cause case, where each of the two or more independent factors is individually necessary but only jointly sufficient for the occurrence of some harm; (2) the concurrent (sometimes called "symmetrical") overdetermination cases, where each of two or more factors is individually sufficient but only jointly necessary for the occurrence of the harm; (3) the mixed concurrent-cause cases, where none of three or more factors is either necessary or sufficient for the occurrence of the harm, but some subset(s) of such factors is sufficient for the occurrence of the harm; (4) the preemptive overdetermination cases, where each of two or more factors is sufficient but only jointly necessary for the occurrence of the harm, but the factors are not simultaneous but seriatim, and the earlier factor preempts the later from causing the harm;

108. The usual aretaic categories are the supererogatory, the suberogatory, the quasi-erogatory, and the indifferent. *See* Michael Moore, *Liberty and Supererogation*, 6 ANN. REV. L. & ETHICS 111–143 (1998).
109. MOORE, PLACING BLAME, *supra* note 5, at 137.
110. MOORE, CAUSATION, *supra* note 1, at 411–412, 486–495.

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and (5) the asymmetrical overdetermination cases, where one or more factors is individually sufficient for the harm but other, smaller factors are not, and where none of the factors (including the larger one(s)) is individually necessary for the harm.

Sartorio focuses on cases of type (2) above, the concurrent overdetermination cases (although she anticipates that her analysis will have some implications for other of these categories of cases too). Within this focus, she is mostly interested in the moral implications arising from the overdetermination cases, unlike other philosophers preoccupied with the metaphysical (i.e., causal) conclusions that are proper about such cases.[111] However, Sartorio shares with me a belief that moral responsibility turns on the metaphysics of causation, counterfactual dependence, and the like, so her moral concerns, like mine, embroil her in some of the metaphysical issues raised by these cases.

Sartorio's moral interest in the overdetermination issue is unfortunately muted by her adoption of a familiar but nonetheless curious distinction, that between responsibility that "*extends* to an outcome" and responsibility being greater (i.e., deserving of greater blame) than it would otherwise be by extending to an outcome.[112] She chooses to deal only with responsibility extending to an outcome, meaning that an actor whose responsibility so extends is responsible *for* that outcome.[113] She leaves for another day whether such an actor has a heightened blameworthiness by virtue of such extension. She is thus unlike most philosophers who have seen this distinction but who, in the context of the moral-luck debate, shunt it aside as of little interest;[114] the interesting moral issue is causation's role in increasing blameworthiness, not the merely formal idea of whether causation changes the object of one's responsibility.

Sartorio is, of course, not engaged in the moral-luck debate. But nonetheless, the problem with her delicate agnosticism about that debate in this context is that she robs herself of the intuition pumps she needs to make her argument go. More specifically, the linchpin of her analysis is her intuition that in the omissive-concurrent overdetermination cases—where each actor's failure to do some preventative action is independently sufficient to guarantee the occurrence of some harm—each omitter is morally responsible for the harm she did not prevent. Sartorio finds my conclusion to the contrary "extremely counterintuitive" (478). She proceeds to bolster her

111. Chris Hitchcock also concerns himself with my treatment of omissive-overdetermination cases, but Hitchcock's concern is the metaphysical question of whether one can make out a preemptive/concurrent distinction between classes of these cases. Hitchcock, *supra* note 47.
112. Carolina Sartorio, *Two Wrongs Do Not Make a Right: Responsibility and Overdetermination*, LEGAL THEORY 18 (2012) 473–490, at 474.
113. In addition to the sources cited by Sartorio, *see also* Michael Zimmerman, *Luck and Moral Responsibility*, 97 *Ethics* 374–386 (1987), at 383: "The successful driver [who causes death to a pedestrian] is to blame for more events than the unsuccessful one . . . but this does not imply that he is to be evaluated negatively to a greater extent than is the unsuccessful driver."
114. *See, e.g.*, MOORE, PLACING BLAME, *supra* note 5, at 206: "nothing of moral relevance follows from this linguistic truth."

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intuition via two examples, Two Buttons (477) and (actually a case of type (3) above) Election (479), concluding that "it seems clear that the claim [i.e., mine] that agents are not responsible in overdetermination scenarios of omission is very counterintuitive" (479). This intuition then motivates the principle she calls "The Slogan" (479), to which she devotes most of the rest of her article and on which she rests her entire argument against me on this point.

Sartorio also seeks to bolster her own intuitions by noting, correctly, that others share her intuitive conclusion about responsibility in such cases (478–479, note 9). Phil Dowe is a well-known case in point.[115] Despite the difficulties that responsibility in omissive-overdetermination cases present for Dowe's own theory of causation, he (like Sartorio) has also concluded that there is responsibility for each omitter even though, given the need for other(s) also to act, such omitter could not have prevented the harm in question.

But Dowe (and others like him) is working with intuition pumps full of "water." They have the robust convictions of increased blame on which to draw. Sartorio, by contrast, works an intuition pump filled with very little water. She has only the dry, desiccated, formal conclusion of an "extended" responsibility (for which no greater blame need attach) with which to work. When it matters so little to anything we care about, why should we take seriously any conclusion produced by such dry pumping of our intuitions?

So I am putting aside Sartorio's adoption of this curious distinction and treating her as I treat Dowe: they both have a firm intuition that the noninchoate and thus greater blame deserved by those connected to a harm by relations of causation or of counterfactual dependence attaches to overdetermining omitters. Now we should assess this more morally robust intuition on its merits.

One question, relevant but far from determinative, is how widely the Dowe/Sartorio intuition is shared. Sartorio omits to mention a fact on which I rely in my book,[116] namely, that of the many courts that have judged the responsibility of overdetermined omitters, a majority share my intuition (of no noninchoate responsibility) and not Sartorio's and Dowe's. And such courts are working with the fullest of intuition pumps: not only are they dealing with increased blame (and not merely a conceptual conclusion of "extended responsibility") but they are also punishing or otherwise sanctioning people for that increased blame, when it exists. Samuel Johnson once remarked that nothing so focuses the mind as the prospect of being hung in the morning. My revision of Johnson is: nothing so focuses the mind of a decent person as the prospect of hanging someone in

115. I note Dowe's intuitions on this issue, expressed by him in response to a talk I gave at the University of Queensland in 2008, in MOORE, CAUSATION, *supra* note 1, at 450 n.54. Dowe expounds further on his view in Dowe, *Moore's Account*, *supra* note 17.
116. MOORE, CAUSATION, *supra* note 1, at 450 n.53.

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the morning. When real-world consequences are attached to judgments of degrees of blameworthiness, we have some reason to respect those judgments; for such people, as I say, are working with the fullest of intuition pumps.

By their nature, these third-person sociological considerations can hardly be conclusive in matters of moral philosophy. So go first person with Sartorio. In her Two Button case, she first imagines a one-button variation: you can prevent an explosion merely by pressing the button in front of you, but you do not do that because you want the explosion to happen. Assuming we are not fanatical libertarians, surely you have a duty to prevent harms that you can prevent with as little cost, effort, or damage as pressing a button in front of you, so we can agree with Sartorio's conclusion about this variation: "Clearly you are responsible for the explosion in this case" (478). But then Sartorio turns this into an omissive-overdetermination case, Two Buttons, where another person besides you (but unbeknownst to you) has to press his button as well for the explosion to be prevented. She asks (rhetorically she hopes), "Could the existence of this other agent and this other button relieve you of responsibility for the explosion?" (478).

Imagine a parallel argument about preemptive-overdetermination active-cause cases. In the first variation, you very much want to kill your saintly victim for no better reason than that you hate saints. You therefore place deadly poison in the victim's tea; the victim drinks the poisoned tea and dies because of it. Clearly you are responsible for the death in this case. Now imagine that after the poisoned tea is drunk by the victim but before it has had time to do its deadly work, another actor, unbeknownst to you, also wants this victim dead, and seeing the victim having his afternoon tea, shoots him dead there and then. "Could the existence of this other agent [and this other mechanism for causing death] relieve you of responsibility for the [death]?" After all, just as in Two Buttons, between the first and second variations of this scenario, nothing changes in your culpable mental states or in the actions by which you execute such mental states. And after all, also as in Two Buttons, you have no control over the existence or nonexistence of the other actor.

Yet, of course, these last factors (of identical culpability and identical lack of control) are insufficient to sustain any intuition of responsibility in the second variation of my scenario. Why not? Because you got morally lucky in the second variation: in a manner garnering no credit for you, you did not cause the death in the second variation, whereas you did in the first. Since moral luck matters, you are less blameworthy. The same is true in Sartorio's two variations of Two Buttons. In her second variation, you got lucky: in a manner garnering no credit for you, it turned out that you had no ability to prevent the explosion in the second variation, whereas you did in the first. Ability (i.e., counterfactual dependence), like causation, matters to your responsibility. You got morally lucky in the second variation by not having

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that ability even though you wanted to have it and even though you thought you did have it.

But hold on, Sartorio urges; if *you* are not responsible in Two Buttons, neither is the other guy. And that, she says, is counterintuitive: "how could the fact that more people failed to do what they were supposed to do result in no one's being responsible for the explosion? Two wrongs do not make a right" (478).

To examine this point, move to Sartorio's second example, which I am calling Election. Suppose in the first variation you are the all-powerful elector of some country, in the sense that every four years you and you alone choose the president of that country. The election law for this country provides that if you fail to choose a president on some occasion, the person then occupying the office automatically gets another term. Suppose further that at the end of George W. Bush's first term, you fail to select a president, and Bush then serves a second four-year term as president. Clearly you are responsible for Bush being a second-term president.

But now imagine that the country is a democracy, so your choice of president is but one of one hundred thirty million choices that, when summed, determine who will be president. You again fail to vote at all for anyone, but if you had voted you would have voted against Bush. Given that 59 million of your fellow citizens actually voted for Bush, given that he won reelection by a substantial margin, and given that millions of nonvoters would have voted for Bush had they voted at all, let us suppose further that many, many millions of your fellow nonvoting citizens were like you, namely, had they voted, they would have voted against Bush. Given the actual votes cast, however, Bush is reelected to a second term. Are you still responsible for Bush being a second-term president?

Sartorio thinks the answer is yes. Do you? I do not. To Sartorio's question—"how could the fact that more people failed to do what they were supposed to do result in no one's being responsible?"—the answer is easy: the other people's culpable omissions eliminate your ability to have prevented Bush's reelection. No ability to prevent, no responsibility for omitting to prevent.

Sartorio invites us to consider the responsibility of those who did vote for Bush in Election (479). Let us do so. Variation one: you are the sole elector, and you select Bush for a second term. Surely you are responsible for Bush being a second-term president. Variation two: you are but one of the 59 million voters whose votes elect Bush to a second term. Is it now clear that you are still responsible for Bush being a second-term president? Think about it. As Sartorio concedes, in all real-world election cases, the outcome of the election does not counterfactually depend on your vote. (That every rational person knows that this will almost certainly be the case in advance of their voting is what generates the so-called "Voter's Paradox.") So there is no counterfactual dependence on which your responsibility can rest. Is there causation? Alvin Goldman argues (rightly to my mind) that

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the answer is a qualified yes in these election cases.[117] But the qualification is a real hogchoker: yours is a very (very, very) small causal contribution.

This means one of two things for your moral responsibility: for people like me, who believe there is a threshold of substantiality (of degree of causal contribution) that counts for moral purposes, your contribution here is below the threshold and you are not morally responsible for Bush's reelection; or, for people who disavow the existence of such threshold, there is a very (very, very) small responsibility in proportion to the tininess of your causal contribution. In either case, your responsibility has again been eliminated (or drastically diminished) by "the fact that more people failed to do what they were supposed to do."

In none of these cases should my conclusion (of no noninchoate responsibility of individual actors/omitters) be confused with a quite different conclusion, that of collective responsibility. When foreign newspapers asked, after Bush was reelected in 2004, "How Could America be so Stupid?," they were rightly blaming Americans collectively for a bad outcome. We—all of us considered together, voters for Bush and nonvoters who failed to vote against Bush—were responsible for the election we caused or did not prevent. But collective blame does not trickle down to the individual persons making up the collective. At least, this is so when none of the conventional criteria for vicarious responsibility is present—agency relations as in partnerships, joint ventures, conspiracies, and the like. As I argue in my book,[118] to think (as does Sartorio) that other people's wrongdoings *cannot* make a difference to your responsibility in the scenarios just discussed is tantamount to imposing vicarious responsibility on *you* for *their* independent wrongdoings.

We see this last conclusion clearly if we advert to yet another variation of Sartorio's Two Buttons case, one she calls Two Buttons–One Stuck (485). First variation (Moore's, not Sartorio's): It is again necessary that two buttons be depressed if an explosion is to be prevented (meaning the absence of each such button-pressing is sufficient for the explosion to occur); you again fail to depress the one button under your control because you want the explosion to occur; the other button, however, is (during the time when you could have depressed your button) stuck in the "up" position (this, because at the beginning of this period a rotten tree happened to fall on the button board); the explosion thus occurs. Surely you are not responsible for the explosion, since you had no ability to prevent it. You may have an inchoate responsibility (and thus some lesser blame) because of your culpable choice made while thinking that you had an ability you in fact did not have; but you have no responsibility or increased blameworthiness for the explosion.

117. Alvin Goldman, *Why Citizens Should Vote: A Causal Responsibility Approach*, 16 Soc. Phil. & Pol'y 201–217 (1999), *reprinted in* Responsibility (E.F. Frankel-Paul et al. eds., 1999).
118. Moore, Causation, *supra* note 1, at 450–451.

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Compare the second variation: it is the same as the first, except that there is no rotten tree to stick the second button in the up position; rather, a second actor (call him the conflicted libertarian) holds the button in the up position with his left hand to prevent himself from yielding to any nonlibertarian, explosion-preventing inclinations with his right hand; and the explosion occurs as before. If one has Sartorio's apparent conclusion about such a case—namely, that now you are responsible for the explosion—can that be based on anything but the fact that a second wrong was done by another and that you are being held responsible only because someone else also made a culpable choice? On my view, you had no more ability to have prevented the explosion in the second variation than you did in the first and you are thus not responsible for the latter explosion any more than you are for the former explosion.

It is time to pause and take stock of the argument. I say the linchpin of Sartorio's argument is her intuition that there is moral responsibility (and to give us an interest in her argument, increased blameworthiness) for an outcome in omissive-overdetermination cases. She explicitly parallels her overall argument structure to one I use in the book (485). As Sartorio accurately depicts, in a related but distinct context I also start with what for me is a rock-bed moral intuition ("RBMI"):

> RBMI: We are morally responsible and blameworthy for those outcomes harmful to others that we could have easily prevented.

I then have a metaphysical premise ("MP"):

> MP: Omissions are absences, and absences cannot be causal relata.

From this I draw the following conclusion about possible natural relations that can connect a culpable actor to a harm in a way making him/her responsible for that harm (desert-base conclusion; "DBC"):

> DBC: There must be some desert base for outcome responsibility other than causation.

Finding the only plausible, noncausal relation to be counterfactual dependence, I then develop what Schaffer calls my disjunctive hypothesis about responsibility: either causation or counterfactual dependence can serve as such a desert base.

Sartorio explicitly adopts my argumentative strategy: "What I am suggesting is that here, too, we should reason in this way: we should take the assumption that the agents are responsible as a starting point and then look for an appropriate way to ground their responsibility" (485). Since Sartorio sees that in the ordinary senses of the words, there is neither causation nor counterfactual dependence in the omissive-overdetermination

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scenarios that sends her scrambling to cobble together some third kind of desert base operative in such cases (and perhaps elsewhere).

I have two problems with Sartorio's extension of my argument strategy to cases of omissive overdetermination. I go into one problem at some length just above: I do not share the intuition that is the linchpin of the argument; that is, I do not share the intuition that each culpable omitter in an omissive-overdetermination case is responsible for the bad outcome. And I am far from alone in this. So I get off Sartorio's boat pretty early—before it leaves the dock, one might say. It is thus difficult for me to motivate consideration of the rest of her argument, it being *academic*, in a pejorative sense of that word.

Still, two arguments are better than one. My second problem has to do with her substitute for my disjunctive hypothesis. Sartorio wishes to supplement causation and counterfactual dependence with what I am calling *extended* causation and *extended* counterfactual dependence. (Because I disavow causation by absences, I believe the extended counterfactual dependence is more promising, so I work with counterfactual dependence alone.) Extended counterfactual dependence exists between some omission O and some bad outcome E when:

(1) E counterfactually depends on a disjunctive fact D; and
(2) O is related to D in some way making the omitter of O responsible for D.

D is the disjunctive fact that neither omitter in omissive-overdetermination cases did the act that would have prevented E. In Two Buttons, for example, D is the disjunctive fact that "two buttons were not depressed at the relevant time," a fact that "obtains just in case at least one of the individual failures obtains" (486). Thus D is a triply disjunctive fact (because Sartorio uses inclusive rather than exclusive disjunction to define it): D is: either the first button is not pushed, or the second is not pushed, or neither is pushed.

So defined, D is necessary for E. Thus the truth of (1). But what about (2)? Sartorio recognizes that generally speaking, agents are not responsible for disjunctive facts when they are responsible for only one disjunct making up the disjunctive facts (488). The fact that x culpably killed y and therefore that x is responsible for y's death does not make x responsible for the disjunctive fact (y is dead or grass is green). So Sartorio engages in some fancy footwork to articulate a principle that excludes most responsibility for disjunctive facts but includes each omitter's responsibility for D in cases of omissive overdetermination (488–490). It is a delicate slalom for Sartorio, and I leave it to her readers to judge whether she stays on the course.

My reservation is a more general one. What motivates the setting of the gates marking the slalom course she seeks to navigate is no more and no other than her naked intuition that there is responsibility for each omitter in omissive-overdetermination cases. She thus asserts that an exception should

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be crafted (to the general exclusion of responsibility for disjunctive facts) for disjunctive facts such as D (488)—otherwise neither omitter would be responsible for E, and she finds that moral conclusion "counterintuitive." That her intuition here is formalized into a principle—"The Slogan"—does nothing to transform that unsupported intuition into anything else.

What Sartorio needs to do is to bolster her linchpin intuition, unshared as it is by many others besides myself. If I were to undertake that task, I would question Moore's use of *ability* as the touchstone of responsibility in omission cases. Is the *ability* to prevent some harm E a disguised counterfactual, as Moore (but not everyone) believes? And even if it is, can one amend the relevant ability-unpacking counterfactual so that in some sense one could truthfully say of each omitter in an omissive-overdetermination case, "he *could have* prevented the harm," despite the seemingly sufficient omission of the second omitter? And if so, is such a sense of "sufficiency" and "counterfactual necessity" the relevant sense for use in moral principles like the ought/can principle? While it is possible that some of Sartorio's present discussions of sufficiency and of counterfactual necessity could be turned in these directions (480–484), that is not where they are presently aimed. It would be interesting to see whether there would be any results that would look promising if they were.

VI. CONCLUSION

In closing, let me thank again my four interlocutors. I have learned much from working through their concerns and responding to them. It is my hope that we have also between us advanced a bit the cutting edge of our collective understanding of that difficult notion, causation.

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