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THOMSON’S PRELIMINARIES ABOUT CAUSATION AND RIGHTS

MICHAEL S. MOORE*

As the title of Judith Thomson’s article indicates, her essay consists of some brush-clearing preliminaries to the topic that centrally interests her, the relation between causing harm to another and violation of another’s rights. Before getting to those preliminaries, it is important that we clarify what the subject is to which these topics are preliminary.

The thesis that centrally interests Thomson is what I shall call the moral strict responsibility thesis (MSRT). According to MSRT, an actor infringes the rights of another whenever he, by his action, causes harm to the other. This thesis is not so bereft of friends as Thomson’s opening sentence would indicate.¹ For example, those who urge that tort law exists to correct an injustice between two parties quite regularly espouse or presuppose some version of this thesis. Richard Epstein is one prominent example,² but others include: those judges who recognize private necessity as only a “qualified” defense in tort law—qualified in the sense that if one causes harm to another’s person or property in order to save one’s own person or property, one is faultless but still must pay for the harm one caused because he violated the injured person’s rights;³ those judges who recognize a good samaritan duty for one who has innocently caused another to be in a condition of peril, where absent such causation

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¹ “Nobody believes it follows from the fact that X did something, his doing of which caused Y to suffer a harm, that X infringed a right of Y’s.” Thomson, Causality and Rights: Some Preliminaries, 63 Chi.-Kent L. Rev. 471, 471 (1987) (Professor Thomson’s article appears in this symposium issue.). I assume in what follows that Thomson will allow, as a recognizable version of this thesis, that X causing a harm to Y will not only infringe a right of Y’s, but that it will also violate a duty of X’s.

² Richard Epstein wrote that:

[T]he first task of the law of torts is to define the boundaries of individual liberty. To this question the rules of strict liability based upon the twin notions of cause and volition provide a better answer than the alternative theories based upon the notion of negligence, whether explicated in moral or economic terms. In effect, the principles of strict liability say that the liberty of one person ends when he causes harm to another. Until that point he is free to act as he chooses . . . .


one has no such duty;⁴ those judges and scholars who occasionally and inconsistently mouth the old maxim, "as between two innocent parties, let he who caused the harm pay for it."⁵ Each of these legal doctrines is a natural implication of MSRT, because each could reflect the judgment that to cause harm is to violate rights and that violating rights is a wrong for which the wrongdoer must pay.

Mark Kelman, certainly no friend of MSRT, nonetheless finds a version of the thesis to pervade that strand of liberal thought he broadly labels "libertarian." Because libertarians are value skeptics, Kelman argues, they cannot find rights to be natural. Therefore, they "must derive rights from a morally plausible general statement about what might constitute rights-violating behavior: prima facie, the obvious candidate is that one ought not to cause harm (at least without justification). We are all equally unentitled to cause harm . . . ."⁶

The MSRT is one that Thomson herself could use to support a more traditional corrective justice theory of torts to which she may adhere, one in which fault is as necessary to liability as is causation.⁷ A friend of MSRT might say that to cause harm is to violate moral and legal rights, even though one is excused from both legal liability and moral culpability if the causing was done without fault.⁸

The thesis may have implications in other areas of law and morality as well. Thomson illustrates this toward the end of her paper by her

⁴ See the discussion in Epstein, supra note 2, at 191-95.
⁵ See, e.g., Rizzo & Arnold, Causal Apportionment in the Law of Torts: An Economic Theory, 80 COLUM. L. REV. 1399, 1402-03 (1980): "Our position . . . is that it is fairer, as a general rule, to impose the burden of an injury on the party who causes it than on the party who suffers it." Since Rizzo and Arnold also believe that "[b]ehind every tort there must be . . . violation of . . . a right." Id. at 1407 n.45. In their case it is particularly clear that MSRT underlies their acceptance of the common law maxim.
⁶ Kelman, The Necessary Myth of Objective Causation Judgments in Liberal Political Theory, 63 CHI.-KENT L. REV. 579, 583 (1987) (Professor Kelman's article appears in this symposium issue.). We should be skeptical of Kelman's (and Critical Legal Studies' generally) assumption that libertarians are value-skeptics.
⁷ See Thomson, Remarks on Causation and Liability, 13 PHIL. & PUB. AFF. 101, 101 (1984), wherein Thomson begins her discussion with a description of traditional tort law as involving three elements in any plaintiff's case: harm of the plaintiff, fault of the defendant, and an act by defendant causing plaintiff's harm. Between Epstein, Kelman, and Thomson one may glimpse three versions of a moral strict responsibility thesis worth discussing: one whereby causing harm to another, even if justified or excused, violates the other's rights (see, e.g., Epstein, supra note 2; Vincent, 109 Minn. at 456, 124 N.W. at 221); one whereby causing harm to another, where the causing is unjustified, violates that other's rights (Kelman's libertarian foe); one whereby unjustifiably causing harm to another violates that other's rights only insofar as the act causing the harm was not excused (one interpretation of traditional tort law requiring fault in addition to causation).
⁸ The hypothesized friend of MSRT is justified in saying this because excuses of a defendant, unlike justifications, cannot plausibly be thought to be relevant to whether the defendant did a wrong or whether in doing so he violated another's rights. Persons excused because of defective capacities or diminished opportunities still violate the rights of those they hurt; they just do not do so culpably.
discussion of "takings" cases. In this context one might say that if causing harm is to violate rights, then state regulation or prohibition of such harm-causing actions cannot be a taking of property for which compensation must be paid. Cedar-growers, for example, may be prohibited from causing harm to apple-growers (via wind transmissible cedar rust) because such actions are wrongs (rights violations) which no one has a right to do.

Thomson herself is as unsympathetic as she is to MSRT, because, I would guess, of the potential impact of the thesis on Thomson's own preferred solution to some of the difficult questions of moral and legal justification. Thomson has elsewhere argued that it is permissible to kill one to save five only when the means of using the one to save the five do not violate the one's important rights. We may redirect a run-away trolley onto one person in order to save five because redirecting the trolley onto another track does not, by itself, violate anyone's rights; we may not bump the fat fellow standing next to us into the path of the oncoming trolley in order to stop it from hitting five because such bumping, by itself, violates the fat person's rights. If MSRT were right, then the rights of the proposed single victim would in each case be violated by the acts causing him harm; and Thomson would have to alter the basis of her distinction from rights to something else.

So Thomson is no friend of MSRT. The present paper is not a frontal assault on that thesis, however, but some preliminary skirmishing. The preliminaries to MSRT that Thomson examines all have to do with one problem for the thesis. This is the problem of whether causation is a sufficiently discriminating relation that it can limit causal candidates for any given harm only to those that are plausibly rights-violations. Thomson's story, BRICK, illustrates the problem. In BRICK, B is hit by a brick thrown by A, who was trying to hit B but "missed;" he hit C, whose body deflected the brick onto B, thereby causing B to lose his eye. If C's walking toward the bus stop, and B's sitting on the bench, are as much causes of B's loss of his eye as A's act of throwing the brick, then causation does not sufficiently discriminate; for no one (including Thomson), wants to say that C or B violated B's rights by their respective activities. To be plausible, MSRT must discriminate between those who are injurers and those who are either victims or innocent bystanders. Thomson's BRICK example seems to suggest that causation is not so

9. Thomson, supra note 1, at 486.
discriminating.  

In the body of her paper Thomson quickly discards three theses about causation that would allow it to do the discriminating work demanded of it by MSRT, and then examines in greater depth a fourth thesis. The three quick discards are:

(1) The thesis that for any given harm there is only one cause;

(2) The thesis that for any given harm there is only one activity that is the cause;

(3) The thesis that for any given harm there is only one human action or natural event that we will say was "the cause," namely, those acts that are fully voluntary or those natural events sufficiently abnormal that their occurrence with the harm amounts to a coincidence.

Surely Thomson is right in rejecting (1) and (2). There is no remotely plausible concept of cause under which one could say either of these things. However, I tend to think that Thomson's explanation for why we use the locution, "the cause," is less successful. I think we mean what we say when we use "the cause;" that the criteria that guide our selection for the application of this honorific phrase are not arbitrary or nonexistent; but that such criteria are pragmatic constraints on utterance of the phrase in particular contexts, not semantic criteria having anything to do with what "cause" means or with what the relation of causation is.

Thomson I suspect would agree with the very last of these comments. I infer this because she clearly rejects the relevance (to MSRT) of affirming or denying the third thesis. She explicitly puts aside the well known thesis of Hart and Honoré (which thesis had to do with causal selection being based on voluntary human actions or abnormal natural events amounting to a coincidence) as "pragmatic" and not "ontological."

In this rejection of merely pragmatic theses about what we will

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11. I ignore in the text a statement in Thomson's paper that puzzles me. She says: "Unlike C, B is not an exception to the thesis that if X did something, his doing of which caused Y a harm, then X infringed a right of Y's. For even given that B's sitting down at the bus-stop caused the loss of an eye, the eye lost was B's own." Thomson, supra note 1, at 485. That the eye lost was B's own seems to me to be a very good reason to deny that B violated B's rights. But then why does a friend of MSRT not need a notion of causation sufficiently discriminating that it excludes B's sitting as a cause? If B's sitting is a cause, B is as much a counter example to MSRT as is C—unless one adds to MSRT the ad hoc stipulation that for all X and all Y to which the thesis applies, X cannot be identical to Y.

12. Id. at 476-78, 487.
13. Id. at 487-88.
14. Id. at 477-78.
15. Id.
17. Thomson, supra note 1, at 472-73.
say, Thomson reveals a metaphysical realism about causation that I share. Such realism distinguishes what people say when they use "cause" and even the concept they implicitly employ when they talk of causation, from what the causal relation really is.18

Because such realism colors much of Thomson's argumentation throughout her essay, and because it is only implicit, it is worth making this presupposition explicit. Thomson at various points argues: (1) "the question whether one event X causes another event Y can hardly be thought to turn on anyone's moral failings,"19 and, more broadly, "What has morality to do with the question whether one thing caused another?";20 (2) the question of motivation or intention of the actor "surely cannot be thought to fix" the question of causation;21 (3) the question of legal duty to act cannot be relevant to the question of whether a causal relation can exist from a mere omission to act;22 (4) "What have X's capacities to do with the question whether X's not doing something caused something else?";23 and (5), most importantly, "what is customary, and what is expected, do not affect the truth-values of causal claims. . . . [and therefore] it is hard to see how any counterfactual analysis of causality can be right."24 These points are as obvious as they are to Thomson only because "cause" for her names a real relation that is not the same as things like morality, legal duty, or the intentions, capacities, or conventions of persons.

I do not bring Thomson's metaphysical presupposition into the foreground in order to criticize it. Quite the contrary. It is worth identifying in order to highlight the contrast between Thomson's realism and the anti-realism about causation of the Legal Realist tradition in American legal scholarship, and of the two skeptical traditions Legal Realism has spawned, the Law and Economics movement and Critical Legal Studies.25 Consider Mark Kelman's contribution to this volume by way of

20. Id. at 495.
21. Id. at 485.
22. Id. at 495.
23. Id.
24. Id. at 484.
25. The skepticism about causation is most evident in Malone, Ruminations on Cause-In Fact, 9 STAN. L. REV. 60 (1956), although much of the early skepticism about the meaningfulness of the concept of proximate causation also infected causation itself. See Edgerton, Legal Cause, 72 U. PA. L. REV. 211, 243 (1924); Green, Are There Dependable Rules of Causation?, 77 U. PA. L. REV. 601, 604-06 (1929).

The influence of Malone, Edgerton, and Green is quite evident in the law and economics literature on causation. Thus, Guido Calabresi concludes to his satisfaction that "in the law 'cause in fact"
illustration of the latter tradition. Kelman claims we must "wake up" from the nightmare of liberal tort law because it is based on a notion of causation that is incoherent and unknowable. Many of Kelman's more particular arguments for the incoherence of any concept of causation presuppose a very conventionalist view of the world. Specifically, Kelman presupposes (and at times asserts) that: (1) no one, including Thomson, can define causation; (2) in any event, even if someone could define it, she could not get agreement by others that her definition is what "cause" means; and (3) her definition in any event would have an unprincipled and unjustified distinction built into its application to concrete cases, viz, that internal evidence overrules external evidence even when the latter, judged probabilistically, is the "better evidence."

Thomson's metaphysical realism is surely secure against assumptions like these. For notice that they in turn presuppose, respectively: (1) that you must be able to define a word if that word is to have meaning; (2) that most language users in the relevant linguistic community must agree on that definition if the word is to have meaning for that

. . . is in the end a functional concept designed to achieve human goals." Calabresi, Concerning Cause and the Law of Torts: An Essay for Harry Kalven, Jr., 43 U. CHI. L. REV. 69, 107 (1975). There, he reached this conclusion on just the grounds Malone used in reaching a like conclusion. See id. at 105-06. Similarly skeptical of causation are Landes & Posner, Causation in Tort Law: An Economic Approach, 12 J. LEGAL STUD. 109 (1983). Landes & Posner, in their rush to replace causation with probability theory, feel entitled to deride the philosophical attempt to define causation as "fruitless," totally context-dependent in its meaning, and in any event irrelevant to the purposes for which tort law should use the concept. Id. at 109-11, 119. Steve Shavell explicitly adopts Edgerton's and Calabresi's "instrumentalist" approach to causation, defining the concept so as to serve "well-specified social goals." Shavell, An Analysis of Causation and the Scope of Liability in the Law of Torts, 9 J. LEGAL STUD. 463, 502 (1980). Shavell recognizes that there exists a commonsense notion of cause that antedates the law, but in such a common-sense concept, "questions about causation are to an important extent resolved by resort to intuitions about the justness of applying a rule of liability." Id.

Calabresi, Landes and Posner, and Shavell are not fully aware of how truly skeptical they are about causation, because often they seek to rescue the concept by giving it a probabilistic definition. If they clearly saw the difference between ex ante probability theory, which deals with types of acts, and ex post causation theory, which deals with particular actions ("act-tokens"), they would see that they are not in any sense analyzing causation but are replacing it with something else. On this, see Wright, Actual Causation vs. Probabilistic Linkage: The Bane of Economic Analysis, 14 J. LEGAL STUD. 435 (1985).

27. Id. at 637.
28. Id. at 581.
29. Id. at 587.
30. Id. at 592-93.
31. Think of all the words that we seem to use meaningfully that no one can define: The natural kind terms of ordinary speech, such as "gold," "lemon," or "water"; nominal kind words such as "game," for which only Wittgenstein's criteriological analysis can be given; dispositional terms such as "greedy" or "soluble;" theoretical terms such as "kinetic energy" or "force;" and terms typically used in evaluative speech acts, such as "good" or "right." See Moore, The Semantics of Judging, 54 S. CAL. L. REV. 151, 202-46 (1981). Kelman is as naive as Socrates in his insistence that we must be able to define whatever we claim to know. The insight garnered by a less psycholog-
community; and (3) that the evidence with which one verifies the application of a word to the world is determinative of that word's meaning. Since anyone familiar with the developments in semantics of the last two decades will pretty much reject these presuppositions out of hand, I think that we can pretty much put aside Kelman's anti-realism about causation. In addition, these conventionalist presuppositions to Kelman's more particular arguments assume a general anti-realist stance about the things (like causation) to which our words refer.

Not sharing this question-begging character are Kelman's specific arguments against any necessary condition analysis of causation. I shall mention one of these three arguments, which leads to an intermediate conclusion (about the necessary condition analysis of causation, not causation itself) that Thomson, too, wishes to defend.

Consider the example of Hart and Honoré on which Kelman builds: A fire that burns down a house appears to have two necessary conditions, D1 having started a fire near the house and D2 pouring gasoline on that fire. (The second is necessary because D1's fire was about to go out when D2 threw on the gasoline.) According to Kelman, we might describe D2's act either as "pouring gas" or as "doing whatever is needed to burn [down the house]." Because under the first description D2's act...
was necessary, but under the second it is not, 39 and because we have no "strong conventions" allowing us to prefer one description to the other, 40 we are left with no answer to the question of whether D's act was a necessary condition of the harm.

Notice that Kelman's example, if analyzed his way, might force us to the view that causal contexts are not extensional. For if the substitutivity salva veritate of co-referring expressions holds true here, 41 then D's act should be a necessary condition regardless of which description of it is chosen.

What Kelman overlooks is the move to preserve the extensionality of causal contexts made by the very literature he is attacking. For Wright, 42 and behind him Mackie, 43 have anticipated Kelman's problem in the following way. If "pouring gas" and "doing whatever is needed to burn down the house" refer to the identical act-token, then it is just not true that different descriptions of that act-token yield different truth-values when plugged into the expression, "x causes y." 44 Temptations to say that these descriptions make a difference come only from other construals of the reference of these descriptions. One possibility is that these act descriptions refer to types of acts, abstract universals, not particular events. Such descriptions, so construed, do not refer to the same act-types, and, because of this, no violation of extensionality need take place in order to say, with Kelman, that how you describe the act (types) matters. But the problem with this construal is that "ex post causation" (Kelman's language for causation itself) is a relation between act-tokens, not act-types. For Kelman to take his descriptions to refer only to act-types and not to particular actions is to presuppose the skeptical conclu-

39. Id. at 606-07.
40. Id.
41. The doctrine of substitutivity salva veritate holds that if two expressions X and Y refer to the same thing, then anything that can be predicated of X can be predicated of Y without changing the truth values of the overall expressions in which they occur, and vice versa. For the classic treatment of the "principle of substitutivity salva veritate" and extensionality versus intensionality generally, see W.V. Quine, Word and Object (1960); Quine, Reference and Modality, in From a Logical Point of View 139 (2d ed. 1961); and Quine, Quantiﬁers and Propositional Attitudes, in The Ways of Paradox 183 (1966). See also Reference and Modality (L. Linsky ed. 1971); and Words and Objections, Essays on the Works of W.V. Quine (D. Davidson & J. Hintikka eds. 1969). The extensionality of causal contexts is more speciﬁcally discussed in Anscombe, Causality and Extensionality, 66 J. Phil. 152 (1969); Davidson, Causal Relations, 64 J. Phil. 691 (1967); Follesdal, Quantiﬁcation into Causal Contexts, in Reference and Modality, supra: Vendler, Causal Relations, 64 J. Phil. 704 (1967). See also Achinstein, The Causal Relation, 4 Midwest Stud. Phil. 369 (1979); Lombard, The Extensionality of Causal Contexts: A Comment, 4 Midwest Stud. Phil. 409 (1979); and Rosenberg & Martin, The Extensionality of Causal Contexts, 4 Midwest Stud. Phil. 401 (1979).
43. J.L. Mackie, supra note 18. at 258-69.
44. See id. at 257.
sion for which he is arguing, namely, that there is no such thing as causation.\textsuperscript{45}

The real temptation to think that descriptions matter stems from a third construal of those descriptions' reference. Both Mackie\textsuperscript{46} and Wright\textsuperscript{47} wish to countenance the possibility that such descriptions do not refer to acts at all, either types or tokens, but to properties of act-tokens. So taken, these descriptions refer to different properties, one of which is causally relevant (pouring) and the other of which is not (doing the act with the motive of burning down the house). On this third construal of the reference of these descriptions, extensionality is preserved (at least in higher order logics), despite the fact that the differing descriptions matter, because they are descriptions of different properties; yet, contrary to Kelman, these not being descriptions of the same property, there is no arbitrariness in our causal ascriptions (because of a supposed arbitrariness in our description selection). Quite the contrary: there is a determinate (objective) answer to what properties are causally relevant to particular harms, as both Mackie and Wright conclude, so that what description one chooses is determined by what property is causally relevant. In Kelman's example, that the act-token possessed the property, being a pouring of gasoline, is causally relevant, and that it possessed the property of being motivated by a certain desire is not (there would have been that burning no matter what desire prompted the act of pouring the gasoline). Unless Kelman wishes to claim that properties cannot be causes, which he nowhere does, Wright and Mackie seem secure from any challenge based on alleged failures of extensionality in causal contexts.

Thus, Kelman does not get his desired conclusion under any of the three interpretations of the reference of his descriptions that come to mind. We should turn, then, to Thomson's argument,\textsuperscript{48} which leads to the conclusion sought by Kelman, \textit{viz}, that the necessary condition anal-

\textsuperscript{45} Cf. S. KRIPKE, WITTGENSTEIN ON RULES AND PRIVATE LANGUAGE 66-68 (1982), wherein Kripke rightly labels any limitation of causal candidates to types of acts, not particular acts, as "a sceptical [sic] solution" to Hume's problem about causation. Kelman, like the Legal Realists and the lawyer-economists, can of course follow Humean skepticism about causation. What he may not do is presuppose that skepticism in an argument designed to establish it.

\textsuperscript{46} J.L. MACKIE, supra note 18, at 257-62.

\textsuperscript{47} Wright, supra note 42, at 1766-74. This is not an endorsement of the Mackie-Wright thesis that properties of event-tokens can be causes, although one cannot answer them except by doing just the metaphysics that Kelman eschews. If I were to attack the thesis, it would be on the grounds that properties are used only in building the kind of causal generalizations that figure in causal explanations, and that although such generalizations give good grounds for inferring singular causal relations, the properties referred to in such generalizations are not themselves causes. Only the event-tokens that possess such properties are causes.

\textsuperscript{48} Thomson, supra note 1, at 481-84.
ysis, even when sophisticated a la Mackie and Wright, cannot be an adequate analysis of causation.

Contrary to Kelman, Thomson assumes "cause" names a real relation, and then finds the necessary condition analysis of it wanting for its inability to preserve this realism. More exactly, put in the form of a reductio Thomson's argument is:

1. \( x \) is a cause of \( y \) if and only if \( x \) is a necessary condition of \( y \) (the necessary condition analysis of "cause");
2. \( x \) is a necessary condition of \( y \) if and only if, if \( x \) did not occur, \( y \) would not occur (the counterfactual analysis of necessity);
3. if \( x \) did not occur, \( y \) would not occur if and only if, "if \( x \) did not occur, \( y \) would not occur" has a truth value (a weak version of Tarski's disquotational device allowing semantic ascent);\(^49\)
4. "if \( x \) did not occur, \( y \) would not occur" has a truth value if and only if some choice is made with respect to all features of the situation surrounding \( x \), distinguishing those that are varied (along with the absence of \( x \)) from those that are held fixed as part of the background (the element of choice in imagining the possible world in which the counterfactual is to be tested);\(^50\)
5. if a choice is made with respect to all features of the situation, distinguishing those that are varied (along with the absence of \( x \)) from those that are held fixed as part of the background, then there is a convention or expectation guiding the choice of possible worlds in which the causal statement is tested.\(^51\)

Therefore from (1), (2), (3), (4), and (5):

6. \( x \) is the cause of \( y \) only if there is a convention or expectation that guides the choice of possible worlds in which the causal statement is tested.

But (6) is inconsistent with Thomson's realism about causation:

7. "[w]hat is customary, and what is expected, do not affect the truth-values of causal claims."\(^52\)

Therefore, since Thomson firmly holds to realism about causation (7), she must reject (6); yet since she accepts (2), (3), (4) and (5), to reject (6) she must reject (1), the necessary condition analysis of causation. Indeed, given her argument, Thomson must reject not only the necessary condition analysis of causation, but also any counterfactual conditional analysis of causation, Mackie's and Wright's included, an implication she explicitly recognizes.\(^53\) Unlike Kelman, for Thomson this does not mean

\(^{49}\) For a good, brief discussion of using Tarski-like truth sentences simply as "disquotational" devices allowing semantic ascent, see M. Devitt, Realism and Truth 28-31 (1984).

\(^{50}\) Thomson, supra note 1, at 483.

\(^{51}\) Id. at 483-84.

\(^{52}\) Id. at 484.

\(^{53}\) Id.
that we should give up on our concept of causation; only that we should abandon any counterfactual analysis of it.

Before assessing this argument of Thomson's, we should see where it fits in to the overall argument structure of her article. Recall that she seeks some discriminating notion of cause that will distinguish injurers from both sufferers and innocent bystanders; such a discriminating idea of cause allows one, in turn, to maintain that to cause harm to another is to violate that other's rights (which injurers do, but sufferers and bystanders do not).

Having summarily rejected three theses that would provide such a discriminating idea of cause, Thomson examines a fourth in the body of her article. This is a thesis about the domain over which the variable \( x \) can range in the two place predicate, "\( x \) causes \( y \)." The thesis is that the proper domain of \( x \) is event-tokens (including act-tokens), but not states. Such a thesis would allow one to exclude such states as \( C \) being at the bus-stop at the time \( A \) throws the brick in Thomson's BRICK scenario, and arguably even excludes those events that cause harm only by causing states that cause harm, such as \( C \)'s earlier walking toward the bus-stop as well.\(^{54}\)

After knocking down various arguments in favor of the thesis,\(^{55}\) Thomson searches for a positive argument for the opposite thesis that states can be causes. One such positive argument would be that "\( x \) causes \( y \)" means "\( x \) is a necessary condition for \( y \)." For if "cause" is analyzed in terms of necessary conditions, states as well as events can be necessary conditions and thus causes.\(^{56}\) Because of the reductio argument

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54. The "arguably" is in the text because one would have to think that if the state of \( C \) being at the bus-stop at the relevant time cannot be a cause of \( B \)'s harm, then neither can any event (such as \( C \) walking to the bus-stop) that caused that state be a cause of the harm. Thomson, supra note 1, at 476, seeks to explain this view: "since the causal role played by \( C \)'s walking towards the bus-stop was exhausted by its having caused \( C \)'s being at \( P \) at \( T \) . . . \( C \)'s walking towards the bus-stop did not cause the loss of \( B \)'s eye . . . but only caused a condition in which \( A \)'s throwing the brick was able to, and did, cause the loss of \( B \)'s eye." For defenses of just this sort of intuition (of the causal potency of events being exhausted by the creation of once-but-no-longer dangerous states), see Beale, The Proximate Consequences of an Act, 33 Harv. L. Rev. 633, 651-52 (1920); Beale, Recovery for Consequences of an Act, 9 Harv. L. Rev. 80, 84-5 (1895); and Epstein, supra note 2, at 185. The Beale/Epstein intuition is close to that dealt with by Thomson, for both think that causation is largely a matter of events, or "active forces." E.g., Beale, The Proximate Consequences of an Act, supra, at 641: "nothing but an active force can bring about that change of conditions which we call a consequence." They allow states to be causes only insofar as they are unstable, and even then they might say that it is the release of stored energy (an event) that is the cause, not the state of its storage. And for both Epstein and Beale, once a defendant's action (an event) has caused a state that is "stable" (Beale) or "not in danger of releasing or redirecting forces" (Epstein), the causation by the defendant's action has, as Beale put it, "'exhausted itself' like a spent cartridge." Beale, Recovery for Consequences of an Act, supra, at 85.

55. Thomson, supra note 1, at 476-80.

56. Id. at 481.
just sketched, however, Thomson rejects this (and every other) counterfactual analysis of causation. We now need to examine this argument of Thomson's.

If I were a friend of the counterfactual analysis of causation (my own hesitation here, because I am at present an educable agnostic on this issue), I would attack premises (4) and (5) in Thomson's argument. For I too endorse realism about causation (7), which leads me to reject the conventionalism explicit in (6). Further, since a counterfactual analysis of necessity seems right (2), and since one can hardly question (3), if one is not to reject the necessary condition analysis of causation (1), that leaves (4) and (5) as the suspect premises.

Before coming to the grounds on which one might suspect (4) and (5) to be false, we should see why these premises are at least plausible. I would describe their plausibility in the following way. When we say, contrary to fact, that "but for x, y would not have occurred," there is a lot that we have left unsaid. Two items we have not mentioned are, first, what are we to imagine happened in place of x? If the statement in question is, "if Smith had not set foot on the steps, the rotten beams under them would not have collapsed," what replaces "Smith setting foot on the steps" to test the truth of this counterfactual? If we replace it with "Smith using a different stairway," the counterfactual may well be true; if we replace it with, "Smith bounding up the steps at just the time he actually walked up the steps," it may seem to be false. Second, even once we choose, say, "Smith using a different stairway" as the replacement, how many other things in the world are we to imagine having also changed along with Smith's change of entrance? For example, what had to change for Smith to have used a different entrance? Perhaps Jones, who is Smith's chauffeur and who is heavier than Smith, dropped Smith off at the safe entrance only to run Smith's forgotten briefcase up the rotten one. If this is what we vary, then the counterfactual may seem to be false; other events, neutral to weight equal to or greater than Smith's being on the stairs at the relevant time, would leave the counterfactual true.

57. Id. at 481-84.
58. See generally N. GOODMAN, FACT, FICTION AND FORECAST 9-17 (4th ed. 1983); Chisholm, Law Statements and Counterfactual Inference, 15 ANALYSIS 97 (1955); Rescher, Belief-Contravening Suppositions, 60 PHIL. REV. 176 (1961); Stalnaker, A Theory of Conditionals, in STUDIES IN LOGICAL THEORY 165 (N. Rescher ed. 1968), for discussions of the problem of indeterminacy for counterfactual conditionals. The latter three essays are also collected in CAUSATION AND CONDITIONALS at 147, 156, 165 (E. Sosa ed. 1975), which contains a discussion of the problem in its Introduction. CAUSATION AND CONDITIONALS, supra, at 12-14.
59. See Thomson, supra note 1, at 483.
On both of these bases one might find plausible the idea that the truth of a counterfactual depends on what we hold fixed and on what we vary, thus, (4). Further, one might think, with Thomson, that what we do fix or vary is a matter guided solely by convention and not by any limitations imposed by the nature of the causal relation. One convention we likely follow is: "hold fixed normal features of the situation." Following such a convention, we would thus hold fixed Smith's weight (which Thomson allows "is not especially heavy") and thus not ask any counterfactual question where what replaces the real Smith stepping on the stairs is a lighter or a heavier Smith doing so. Likewise, the variations on walking (jumping, bounding, treading, etc.) would also be ruled out on similar grounds. Hence, the plausibility of (5).

Despite this plausibility, my friend of the necessity analysis of causation would reject (4) and (5). One ground for rejecting (4) would be that advanced by David Lewis, amongst others. According to Lewis, when testing the counterfactual, "If C had not occurred, E would not have occurred," we test it in that possible world that is closest to our actual world. That is, when we suppose, contrary to fact, that C did not occur, we further suppose changes from our actual world only to the minimum extent necessary to make it true (in this closest possible world) that C did not occur.

Attractive as this view is, it would require (as Lewis recognizes) that we make sense of the idea of over-all similarity, i.e., similarity that is parasitic on no particular properties but only on all properties. As I have argued in the context of precedent and induction, this is not a very plausible idea of similarity. Lewis sees the problem as one of vagueness (about similarity), but it is much deeper than that. Thinking that we can have a context-independent idea of similarity is like thinking that we can

60. John Mackie, for example, finds that common-sense views of causality employ an "all-or-nothing" convention in considering what is to replace matters susceptible of continuous variation such as weight. In discussing whether a hammer-blow is necessary for the crushing of a chestnut, Mackie holds that "we regard the hammer-blow as a unit, and simply do not consider parts or subdivisions of it or quantitative alterations to it. The alternatives considered are that I strike the chestnut in the way described and that I do not. In constructing possible worlds, in considering what might or would have happened, we either plug in the hammer-blow as a whole or leave it out as a whole." J.L. MACKIE, supra note 18, at 44.


62. Lewis, supra note 61, at 263.

63. Moore, Precedent, Induction, and Ethical Generalization, in PRECEDENT IN LAW 000 (L. Goldstein ed. 1987). For somewhat similar doubts, see H. PUTNAM, REALISM AND REASON 218 (1983).
have a context-independent sense to "attributive"\(^\text{64}\) adjectives such as "big." How big something has to be to be "big" depends on what kind of thing we are talking about. Similarly, "similar" depends on its context of utterance to specify what property on which it is parasitic. And with this context-dependent notion of similarity, we are back where we started in seeking some basis for varying some properties, but not others, as we construct a possible world that is "most similar" to our actual world.

My own doubts about (4) are based on two different considerations. First, we need to be clear that the variables x and y in (4) range over event-tokens, not over event-types. It is true that if we take the reference of "x" and "y" in "if x did not occur, y would not occur," to be types of acts and types of harms, then there are the two problems of incompleteness mentioned (what replaces x, and how much else that was true changes). This is so because, for example, when we imagine Smith's heavier chauffeur stepping on the stairs at just the time Smith actually stepped on the stairs, the same type of event would have occurred—a collapse of the stairs. Yet causation is not a relation between event-types; it is a relation between event-tokens. Therefore "x" and "y" in those counterfactuals that are given as an analysis of causation should not be taken to refer to types, but to tokens.\(^\text{65}\)

If we do take "x" and "y" to range over event-tokens, our second consideration is how to individuate event-tokens. If we employ a very fine-grained mode of individuating event-tokens, we do not get a dependence of the truth value of the counterfactual on how we complete the specification of the contrary-to-fact ("possible") world. If Smith walking up the steps did cause the collapse of the stairs, then it is true: no matter how else the possible world is specified,\(^\text{66}\) if Smith had not walked just as

\(^{64}\) For a discussion of attributive adjectives, see Geach, Good and Evil, 17 Analysis 33 (1956).

\(^{65}\) The importance of getting the "ontology of causation" right has been emphasized by Davidson, supra note 41, J.L. Mackie, supra note 18, at ch. 10; and, in a criticism of Mackie's earlier efforts, Kim, Causes and Events: Mackie on Causation, 68 J. Phil. 426 (1971), reprinted in Causation and Conditionals 48 (E. Sosa ed. 1975). Yet because the problem of counterfactual conditionals has typically come up in the philosophy of science in the context of distinguishing laws from accidental generalizations (in each of which one refers to types of events), this attention to ontology often gets overlooked when counterfactual conditionals are being used in our analysis of singular causal statements. One who does not overlook it in this context is Lewis, supra note 61, at 562 n.9.

\(^{66}\) I assume that we do not allow variance of the laws that bear on Smith's walking up the steps being a cause of their collapse. If those laws were allowed to vary, then it might very well be the case that the very same collapse of the stairs would take place even in the absence of Smith stepping on them as he did. We might even think, following Popper, that we should exclude variance of any laws of science when we test the truth of a causation-generated counterfactual against all possible worlds. K. Popper, The Logic of Scientific Discovery 426-41 (11th ed. 1983). Then all that we may vary are the "initial conditions" in which Smith's stepping took place, not any laws (including those governing that stepping). One of the benefits of excluding variance of any laws as
he did, the stairs would not have collapsed just as they did. More specifically, returning to each of our two problems of incompleteness: first, it does not matter if Smith bounded (rather than walked) up the stairs, hitting just the same stair at the same time; although the stairs would still collapse (let us suppose), there would not be the same collapse that there actually was. In this example, the two collapses—the actual one, and the one that would have happened if Smith had bounded up the stairs—are not plausibly supposed to be qualitatively identical. For the heavier bounding would likely produce a slightly more rapid, deeper, or less time-consuming collapse. Second, it does not matter if Smith's heavier chauffeur were to walk up the stairs just after Smith did—again, a different collapse of the stairs. The counterfactual, "but for x, y would not have occurred" seems to remain true no matter how the possible world imagined is completed in its particulars. Thus (4) seems to be false in its assertion that counterfactual statements have truth values only when choices are made about fixed versus variable features of the actual world. And if (4) is false, then (5) has no interest for us in this context.

Thomson's rejection of any counterfactual analysis of causation thus remains problematic. In the context of her article, this need trouble her

we construct possible worlds is that it allows a crisp distinction between logical necessity (true through all possible worlds) and causal necessity (true through all possible worlds in which the laws of this world hold true). For development and criticism of this view, see J.L. Mackie, supra note 18, at 209-30, and Lewis, supra note 61, at 566-67.

67. I assume that the two event-tokens are numerically distinct if they differ in properties other than certain relational properties (the relational properties excluded have to include the property, being-caused-by-Smith's walking, else the counterfactual analysis of causation becomes trivially true). That a difference in properties does not automatically betoken a non-identity between the entities possessing such properties, is due to the difficulties we have in making transworld identity claims, because such difficulties force us to do something with Leibniz's otherwise true claim that identicals are indiscernable in their properties. See The Possible and the Actual (M. Loux ed. 1979) for a variety of approaches to this problem. I also leave aside the difficult question of whether, supposing the two collapses to be qualitatively identical in all respects, save being caused by Smith's walking, they may yet be numerically distinct. If one rejects Leibniz's other principle—the identity of indiscernibles—one might still believe that the actual collapse that occurred and the collapses that would have occurred in all possible worlds other than the actual one, are numerically distinct.

68. Although it is not clear that Thomson recognizes that she has made two distinct arguments against the counterfactual analysis of causation, she has; and I in my text have dealt with only one of them. I have ignored in the text Thomson's other argument for rejecting counterfactual analyses of causation, the one she calls "the counterfactual second agent objection." Thomson, supra note 1, at 482. This objection builds on overdetermination examples of the pre-emptive kind: two fires, each sufficient to burn plaintiff's house, are headed in its direction; the first fire (F₁), as luck would have it, reaches the house first and burns it completely (if instantly) before the second fire (F₂) gets there. Thomson thinks that the counterfactual, "but for F₁ occurring, the house's burning would not have occurred" is false even though F₁ is the cause of the house's burning. Ergo, the counterfactual (and, mutatis mutandis, its converse) is not an adequate analysis of causation.

The problem with all of the examples Thomson uses in this argument is the same as in her argument discussed in the text: Thomson is either talking about event-types rather than event-tokens, or she has a course-grained theory of event-individuation over possible worlds. Only with one of these assumptions is it plausible to say, with Thomson, and with H.L.A. Hart & T. Honore.
little—it would only mean that she has one more argument that states as well as events can be causes. Still, the issue is an important one for the analysis of causation generally, and thus it has been worth following her musings on the topic.69

One of the curiosities of Thomson's article is that, although she tells us what causation is not (it is not analyzed by counterfactuals), she never tells us what the causal relation is. No small task, to be sure, but in the absence of any analysis of "causes" in the expression, "x causes y," I see no future in attempting to fix the domain over which the variables x and y may range. Thomson's handicap here is like the handicap we would face in specifying the domain of x and y in the expression "x loves y" if we had no idea what the relation of love is.

Despite this handicap, Thomson concludes to her satisfaction that states as well as events can be causes. Her principal argument for this is by extension from a clear case.70 Thomson imagines a variation of BRICK in which C walks toward the bus-stop "precisely in order to deflect A's brick into B's eye."71 Thomson argues:

(1) When C intends to deflect the brick into B's eye, "it is surely cor-
rect . . . that C's walking towards the bus-stop caused the loss of B's eye."72

(2) The intention with which C walked "surely cannot be thought to fix whether the walking caused the loss of B's eye."73

Therefore:

(3) It is [surely?] correct that C's walking toward the bus-stop caused the loss of B's eye even when C did not intend to deflect the brick into B's eye.

This is an odd argument, for what makes the clear case clear in (1) is the intention of C; yet (2) denies the relevance of the intention, allowing

supra note 16, at xiii, that the glass would have shattered anyway because another was waiting to smash it with a shoe if it was not smashed with a hammer, Thomson, supra note 1, at 482; or that the bell's ringing would not, have occurred anyway, because another stood ready to cut the wire to the bell. Id. at 484. I would say, with Mackie, that these are different shatterings and different silences, just as the burning of the house in my example differs from the burning that would have occurred had F; reached the house rather than F1. See J.L. MACKIE, supra note 18, at 44-46.

69. My "educable agnosticism" on counterfactual analyses of causation remains despite the foregoing argument, partly because of my uncertainty whether such fine-grained individuation of harms does not reduce the counterfactual analysis to a trivial truth; partly because of the very non-discriminating notion of cause that such an analysis would justify (think how much is necessary for the occurrence of any event-token in all of its particularity); and partly because such an analysis of the counterfactuals necessary to support singular causal statements eliminates a seeming difference between such counterfactual discourse and explicitly modal discourse. On this latter point, see THE POSSIBLE AND THE ACTUAL 34 (M. Loux ed. 1979).

70. Thomson, supra note 1, at 484-85.
71. Id. at 485.
72. Id.
73. Id.
Thomson to decide the less clear case in (3). I do not see how such an argument can convince anyone. Anyone who finds (2) plausible (as do I) will not find (1) any more plausible than (3). And anyone who finds (1) more plausible than (3) will not find (2) plausible. I do not think, therefore, that there is an audience to which such an argument can appeal. It is like trying to convince someone (who is in doubt about whether a white, sweet object is a lemon) that it is a lemon, by arguing: "this other object, because it is a yellow fruit tart of taste, is surely a lemon; yet surely the color and taste are not essential to an item being a lemon; therefore, this first object, differing from the other object only in color and taste, is also a lemon too."

Earlier in her article Thomson has the beginnings of another positive argument for why states as well as events can be causes. The argument as she states it proceeds from a single premise, namely:

(1) objects can be causes as well as events.

As Thomson puts it: "We really do not use the verb 'cause' that it can truly be said only of events that they cause things. People cause things. And so do bullets."74 From this premise about objects as causes, Thomson concludes that one of the arguments for why states cannot be causes,75 is no good.76

As a friendly critic, let me see how Thomson might advance this as a positive argument for the thesis that states can be causes (and not merely a negative argument against the thesis that states cannot be causes). Add to Thomson's argument a second premise:

(2) The only distinction here worth defending is between events as causes versus all other things as causes; if items other than events can be causes, then so can states.

We might call this second premise the "crossing of the Rubicon" premise, for it asserts that there is only one significant line to worry about here and that once that line is crossed, one might as well go on to sack Rome itself. Such mode of argument is reminiscent of Russell's argument for admitting qualities into our ontology as well as entities: since we have to let relations in anyway (to be able to talk of entities), we may as well let in other universals such as qualities.77

Thomson articulates a reason which might incline one to accept this

74. Id. at 479.
75. The argument (against states being causes), against which Thomson is arguing, is set forth by her in her contribution to this volume. Id. at 474-76, 478.
76. Id. at 479.
kind of argument here. The line between events and all other things might have some significance because of the following considerations: causes explain changes in the world; if one believes that only change can bring about change,\(^{78}\) and that only events are changes, then one has reason to find the line between events and all other things significant when considering the question of what can be a cause.

Neither Thomson nor I believe that only changes are caused (as opposed to the persistence of stable states, for example), or that only changes can beget change, but a friend of the "only events can be causes" thesis might very well believe both of these things. If so, then once Thomson establishes that objects (which are not changes) can be causes, she has crossed her adversary's Rubicon and he may as well surrender Rome. But has Thomson established that objects can be causes? She adverts to the facts of usage about "causes," truthfully noting that we certainly say things like, "Smith caused Jones' death" and "[t]hat bullet caused Jones' death."\(^{79}\) Yet as Thomson would plainly admit (given her realism about causation), the facts of ordinary usage are far from the last word on what causation is. As Quine has remarked, "Many of our casual remarks... would want dusting up when our thoughts turn seriously ontological."\(^{80}\)

Why might we say the things Thomson imagines? One of our pragmatic rules for appropriate utterance is to say no more than is needed on particular occasions.\(^{81}\) If someone wants to know only who by his actions caused Jones' death, or what instrumentality Smith used in killing Jones, to say, "Smith caused Jones' death," or "The bullet caused Jones' death" is all that needs to be said. We need take the apparent ontological commitments to persons or objects as causes no more seriously than we do when we say, "there is something shared by both white dogs and white houses, namely, their whiteness."\(^{82}\) In each case, Quine admonishes us, we should paraphrase to find our true commitments.

The paraphrase that suggests itself here is just the one Thomson rather scornfully puts aside:\(^{83}\) "Smith caused Jones' death" is elliptical for, "some act of Smith's (you do not need to know which one so I will

78. Thomson, supra note 1, at 475, 478.
79. Id. at 478.
81. Grice, 1967 William James Lectures, Harvard University, published as Logic and Conversation, 3 Syntax and Semantics, Speech Acts 41, 45-46 (P. Cole & J. Morgan eds. 1975). As Grice puts his quantitative maxim for appropriate conversation: "Do not make your contributions more informative than is required." Id. at 45.
82. Quine's example, in W.V. QUINE, FROM A LOGICAL POINT OF VIEW 13 (2d ed. 1961).
83. Thomson, supra note 1, at 479.
not tell you) caused Jones’ death,” and “the bullet caused Jones’ death” is an ellipsis for, “some event involving the bullet caused Jones’ death.” Thomson rejects these paraphrases because she finds the notion of “involving” hopelessly indeterminate:

[I]t is plainly unacceptable to say that “Smith caused Jones’ death” is elliptical for “An event in one or another way involving Smith caused Jones’ death,” since every event in one or another way involves everybody. For example, Smith’s shooting of Jones involves you in that it is an event which takes place on or before or after your fourth birthday; but you, after all, did not cause Jones’ death. And I see no future in the effort to constrain the notion “involvement” so as to make this idea work.84

This answer is much too short. Thomson’s demand for any precision in spelling out the meaning of “involvement” is misplaced. For if I am correct that we say such things in speech contexts where saying more would be inappropriate, then saying more would be inappropriate. “Involving” is used here only as a place-holder for information that, given the context of the utterance, the listener does not need or want. Absent a context of utterance (i.e., in the null context),85 we can only say the word does not mean, “any relation to Smith,” no more than it means “no relation to Smith.” In this indeterminacy, this usage of “involving” does not suffer at all in comparison with the way we ordinarily use “similar:” “similar” never means, “similar in all respects,” any more than it means, “similar in no respects;” it only means “similar in relevant respects,” the conditions of relevancy to be supplied when and if needed.86

All of this only blunts for me any facts of usage as constituting an argument one way or another about objects or persons as causes. Do people and bullets cause things, in some sense not reducible to events in which these objects are involved causing things? I am also an educable agnostic on this question, but nothing in Thomson’s article convinces me one way or the other.87 Her reconstructed Rubicon argument, accordingly, lacks a plausible first premise. And in default of any other argument appearing in Thomson’s paper, that leaves us with the old Scottish verdict on Thomson’s attempt to disprove that states cannot be causes: “not proven.”

My concluding comment on Thomson’s paper is to question whether a restriction that allowed only events but not states as causes

84. Id.
86. Cf. Goodman, Seven Strictures on Similarity, PROBLEMS AND PROJECTS (1976).
87. Nor do her attempts at making “agent-causation” primitive for persons convince me one way or the other. See R. TAYLOR, ACTION AND PURPOSE (1966).
would give causation the kind of discriminating power demanded of it by MSRT. I think not, for such a restriction seems both under- and over-inclusive. To begin with, the restriction is too restrictive in that it excludes factors that are plausibly rights-violations by defendants. Imagine a variation of Thomson's BRICK scenario ("BANANA"): A, a banana vendor, notices that a banana peel has dropped off his truck; knowing that B, whom A hates and wishes to see hurt, will be coming along shortly, A does not pick up the peel; B slips on the peel and falls, to his injury.

In BANANA, does not A violate B's rights? I think the answer might be yes, for two different reasons. Thomson herself mentions one of these: A was both capable of preventing B's injury and, because it was his peel, A was under a duty to prevent the injury by removing the peel; A's duty is presumably the correlative of B's right, so that A's breach of duty is a violation of B's rights. Alternatively, it might be the case that there was some earlier act of A's (loading the truck with bananas, parking it where he did) that caused the state that caused B's fall and injury. In which case we would hold A for violating B's rights, not by omitting to pick up the peel, but rather by causing (through his positive actions) B's injury.

In either alternative it seems we need to conceive of states as causes. A's liability for omission seems to depend on the state of the peel being where it was causing B's fall—else how would A's breach of his duty to change that state cause B's injury? Similarly, for some earlier act of A's (such as parking his truck) to be the cause of B's injury, seemingly the state also must be a cause—for what the earlier act caused was a state which (with other events and states) caused B's injury.

This underinclusiveness of the "only-events-may-be-causes" thesis for MSRT was implicitly recognized by those who championed the thesis. Beale, for example, thought that it was only "active forces"—which it seems fair to construe to be events but not states because the activity of a force for Beale was external change—could be causes. Nonetheless, in order to maintain liability in cases like BANANA, Beale had to allow that the "condition" (state) created by a defendant could be a cause:

If, then, this condition is unstable, if it is in appreciable danger of being acted upon by an oncoming force, the defendant who thus created a condition in the path of an oncoming force stands in a certain causal relation to the latter force, though the relation is worked out through the passive line.89

88. Thomson, supra note 1, at 494.
89. Beale, Proximate Consequences, supra note 54, at 643.
Epstein similarly saw that he could not restrict causation to his three paradigms involving acts (events) by a defendant (force, fright, and compulsion); rather, to make plausible his thesis that causing another harm is to violate that other’s rights Epstein allows that conditions, too, may be causes. Like Beale before him, Epstein wants to hedge his metaphysical bets here: "The creation of a dangerous condition, without more, does not cause harm in the narrow sense of the term. Some further act or event of the kinds already considered must be identified before the causal analysis is completed. . . ." Still, Epstein too is driven to conclude that some states—the "dangerous" or "unstable" ones—can be causes, even if only in conjunction with events.

The over-inclusiveness of the "events-only" thesis can be seen by varying Thomson’s BRICK slightly: let the victim, B, be walking as well as the bystander, C, and let the movement of each of them be necessary for the deflection of A’s brick onto B’s eye. The “events-only” thesis may be discriminating, but it does not seem to be discriminating enough: neither B nor C violated B’s rights by their walking, but their walking is equally a cause with A’s throwing the brick under the “events-only” thesis.

So even if the “events-only” thesis were true, it seems a poor candidate to do the discriminating work demanded of it by MSRT. Are there any other restrictive analyses of causation that are themselves plausible enough to make MSRT plausible? There are, so far as I know, only four possibilities, and I shall close by mentioning each briefly.

One might attempt to refine the Beale/Epstein paradigms so that the concept of causation that emerges better fits the demands of MSRT. Yet this is to work backwards, gerrymandering the concept of causation just so that it will fit the needs of MSRT (even though I would guess that that is pretty much the way Epstein arrived at his four “paradigms” of causation). We need an independent analysis of what “cause” means and what causation is that does not assume from the start that it has to fit some moral thesis. There is nothing in Epstein’s method that would give us any reason to think his paradigms give either the meaning of “cause” or describe the essence of the relation: such paradigms are partial descriptions of a few traditional legal causes of action (battery/trespass/assault/negligence/nuisance), not even an attempt at an analysis of the causal relation that exists quite independently of the law but on which the law is built.

Hart and Honoré’s justly celebrated theses about what is, and what

90. Epstein, supra note 2, at 177-87.
91. Id. at 177.
is not, a direct cause, have more promise as an analysis of what causation is, but they too, as Thomson recognizes,92 ultimately fail to focus on the metaphysical or the semantic questions about causation. As they themselves recognize in their recently reissued edition of their fine book,93 their analysis is of the usage, in ordinary language, of “cause.” They thus distinguish two different contexts of use, explanatory and attributive, and extract a concept (or concepts) of causation accordingly. This focus on the conditions in which the word “cause” is appropriately uttered ensures that their analysis is, as Thomson puts it, “pragmatic” and not “ontological.”94

While I agree with Thomson’s pragmatic interpretation of Hart and Honoré’s causally discriminating principles, it would not be difficult to construct a metaphysical version.95 In this version, there are two kinds of uncaused causes in the universe, free human actions and those natural events that are (given the circumstances in which they occur) “just a coincidence.” On this gappy metaphysical view, we do not select one of these two events as “the cause” of some other event because of pragmatic factors like explanatory relevance or the interests of the audience; rather, in this version we rightly gravitate to these two features because they are the only features that are the ultimate cause of anything. Put another way, they are the beginnings of all causal chains, so they are rightly emphasized over any other subsequent links in the chain when we engage in attributive, explanatory or any other tasks involving “cause.”

A third approach is to take causation to be an unanalyzable primitive, and then to say that it is a relation that nonetheless admits of degrees. “Cause” can be used to analyze other concepts, but no other concept can be used to analyze it; and the causal relation can be a more-or-less affair, so that one event can be “more of a cause” of some harm than another event. Both of these views can fairly be attributed to Jeremiah Smith, whose highly influential series of articles in the 1911 Harvard Law Review concluded that all that may or need be said about causation to juries was whether or not defendant’s action was a “substantial factor in producing the damage complained of.”96

92. Thomson, supra note 1, at 472-73.
94. Thomson, supra note 1, at 473.
95. Sanford Kadish gives Hart and Honoré such a metaphysical reading with respect to one of their two criteria for intervening and ultimate causes, free human action. See Kadish, Complicity, Cause and Blame: A Study in the Interpretation of Doctrine, 73 CALIF. L. REV. 323 (1985).
96. Smith, Legal Cause in Actions of Tort, 25 HARV. L. REV. 103, 223, 253, 303 (1911). Both of Smith’s metaphysical presuppositions find echoes in more contemporary literature. Thus, in philosophy Richard Boyd urges that we should take “cause” as primitive and give up the fruitless quest for its analysis. Boyd, Materialism without Reductionism: What Physicalism Does Not Entail, in
Give Smith the two metaphysical assumptions above and his proposal is not nearly as vacuous as it has been thought to be by most subsequent scholars. If "cause" is a primitive notion, then no test or definition need be attempted, as Smith himself argued. If causation is a more-or-less affair, then one does need to specify how much of it is a prerequisite for liability, and Smith's answer was, "a substantial amount." Although "substantial" is vague, its vagueness may be a virtue if degrees of causation vary on a smooth continuum; precise stipulations are notoriously arbitrary when we seek to divide bald from not-bald, old from middle-aged. Moreover, notice how discriminating Smith's view could make causation: if there is a large size threshold for what counts as cause, then only a few of the many events or states necessary for the production of a harm are its causes. It might even turn out that all and only those acts that are "large causes" are plausibly thought to be rights-violating acts—the discriminating notion of cause sought by the friends of MSRT.

As a last possibility, consider what I shall awkwardly call the Becht/Miller/Keeton/Wright view of causation. Keeton's example is helpful in elucidating this view. Suppose a defendant places unlabelled rat poison near a stove; because the stove was in the kitchen, the defendant's act also had the property of placing the rat poison near the food. The heat from the stove causes the rat poison to explode, injuring the plaintiff. If we ask whether the defendant's act of placing the rat poison where he did caused the plaintiff's injury, the answer is, "yes." But if we ask whether various properties of the defendant's action caused the plaintiff's injury, we can be more discriminating: that the rat poison was near the food was causally irrelevant, but that it was near to the stove was not.

To narrow the class of things that can be causes the Becht/Miller/Keeton/Wright view must defend two theses: first, a metaphysical thesis that only properties of event-tokens may be causes and that the event-tokens themselves may not be causes; and second, a moral thesis that, in order to determine whether an actor is responsible for a harm, we ask the

Readings in the Philosophy of Psychology (N. Block ed. 1980). Richard Wright discusses a number of legal theorists similarly inclined. Wright, supra note 42, at 1784-88. With regard to Smith's second presupposition, product liability torts have given rise to renewals of the idea that we should apportion liability, not with respect to fault, but with respect to degrees of causal contribution to an indivisible injury. This mode of joint liability/contribution presupposes, with Smith, that causation is a more-or-less affair that admits of degrees. See, e.g., Rizzo & Arnold, supra note 5, at 1402-03.

97. Smith, supra note 96, at 305-08.

98. Their views can be found, respectively, in: A. Becht & F. Miller, The Test of Factual Causation in Negligence and Strict Liability Cases (1961); R. Keeton, Legal Cause in the Law of Torts (1963); Wright, supra note 42.

99. R. Keeton, supra note 98, at 3.
causal question only with respect to those properties of his act-tokens that are relevant to his culpability. What this second thesis means with respect to the negligent actor who placed the rat poison in the kitchen, for example, is that we ask whether the property of his act that made it negligent (the placing near the food, assuming arguendo that was the only significant risk) caused the harm; and we get a determinate answer, namely, this property did not cause the harm and therefore this actor is not responsible for the harm (even though another property of his act did cause the harm).100

This view of the range of objects that can be causes in attributive contexts is highly discriminating in these contexts. In Thomson’s BRICK scenario, for example, only A’s action has a property that is causally relevant to B’s harm in attributive contexts, because only that property was relevant to someone’s culpability. Much of the discriminating power of this view of cause, of course, stems from its moral thesis about how one picks properties about which to ask the causal question; it is thus difficult to characterize this view as a purely metaphysical view about causation answering to the needs of MSRT.

Each of these four analyses of causation hold out some promise of providing the discriminating idea of causation needed by a friend of MSRT. Yet each also has serious, perhaps crippling, problems: Epstein’s “paradigms” are not the kind of paradigmatic examples that some ordinary language philosophers, at one time at least, thought could give the meaning of a word such as “causes,”101 and even if they were, the “paradigm case argument,” as a mode of meaning analysis, is pretty much dead, and for good reason;102 Hart and Honore’s analysis is either only pragmatic, or, if taken metaphysically, requires a gappy view of determinism that is an anathema to those of us with more smoothly determinist world views; Smith’s big-versus-little-cause discriminations not only require us to take causation to be primitive—always a problem in non-foundationalist theories of knowledge—but even worse, requires us to believe causation is a scalar phenomenon that admits of degrees;103

100. For actors whose culpability is not negligence, but is intentionality or strict liability, this second thesis has to be worked out separately. See id. at 100-17; Wright, supra note 42, at 1769-71.
101. John Borgo has some fun with Epstein’s misuse of the paradigm case argument in Borgo, Causal Paradigms in Tort Law, 8 J. LEGAL STUD. 419, 427-32 (1979).
102. See Moore, supra note 31, at 281-92, for a discussion of the paradigm case argument and its limitations.
103. It is important that this metaphysical question not be made to appear to be easier than it is. Of course, different types of events have higher and lower probabilities for bringing about certain other types of events, so that if one confuses probability theory with the causal relation between event-tokens, as do Rizzo & Arnold, supra note 5, then there will appear to be nothing difficult about conceiving causation to be a scalar phenomenon. Rizzo and Arnold attempt to justify their slide
and finally, the Becht/Miller/Keeton/Wright view relies on the questionable metaphysical view that a universal (a property) can be a cause in lieu of the act-token itself being a cause.104

My own prognosis is that the prospects for discovering the kind of discriminating view of causation required by MSRT are bleak. Causation may well be just too promiscuous a relation to play this large a role in our moral life. One point on which Thomson's paper and my own would fully agree, however, is the need for those interested in the question, lawyers included, to do the metaphysics without which it cannot be answered. The time is long past (if indeed ever it was appropriate) to say that "the lawyer cannot afford to adventure himself with philosophers in the logical and metaphysical controversies that beset the idea of cause."105 Lawyers can ill-afford not to so adventure themselves, and those who repeat these oft-quoted words usually do so to excuse an inexcusable ignorance.

from probability to causation by observing that "[t]o identify causal relationships it is necessary to know something about the typical relations between events." Rizzo & Arnold, supra note 5, at 1409 n.54. Fair enough, but their conclusion does not follow. Epistemology (how we know something) is not metaphysics (what there is). My earlier skepticism about degrees of causation is in Moore, Causation and the Excuses, 73 Calif. L. Rev. 1091, 1114-18 (1985).

104. For a sophisticated defense of this view, see J.L. Mackie, supra note 18, at ch. 10. Although Mackie seemed to think that there were two kinds of causes—whole event-tokens, and properties of event-tokens—a close reading reveals that Mackie regarded only properties as causes, event-tokens being relegated to common sense notions of "cause" but not to causation itself.
