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CHAPTER NINE

RESPONSIBILITY REGARDLESS OF CAUSATION

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Felix qui potuit rerum cognoscere causas.
—Publius Vergilius Maro, *Georgicon* 2. 490

In jure non remota causa sed proxima spectatur.
—Francis Bacon, *The Elements of the Common Law of England*, 1630

This paper deals with the relationship between legal responsibility and causation. I argue that legal responsibility is *not* necessarily rooted in causation. My discussion deals with *legal* responsibility, except when I explicitly refer to other kinds of responsibility.

The general claim I aim to disprove is that responsibility is descriptive because it is fundamentally rooted in causality, and causality is metaphysically real and founded. My strategy is *twofold*.

First, I show (in §1) that there are significant and independent non-causal form of responsibility that cannot be reduced to causal responsibility; *second*, in §2, I show that the very notion of causality is—*lato sensu*—not plainly descriptive. I will suggest that even causation is tied to evaluative elements, contrary to what is assumed by many theorists and practitioners working in normative domains.

In §3, I give a brief account of the three most discussed contributions to the relationship between causation and responsibility (legal and moral) in the last 50 years: H. Kelsen's *Society and Nature* (1948), Hart and Honoré's *Causation in the Law* (1959) and finally M. Moore's *Causation and Responsibility* (2009). I shall consider these contributions in light of the thesis I defend in this work.

Introduction: A Bird's Eye View

In this work causation will not be dealt with as an independent topic, i.e. causation tout court, but always in a certain normative system; thus, I will not deal with causation in the domain of natural sciences.

"Cause" is a rich and polysemic term. Just using "cause" or "causation" does not explain anything—arguably, in fact, not only are there different concepts of causation, there are also different *conceptions* of cause and causation, in different disciplines, used to advance different aims.[1]

Dealing with causation in the law is a complex task due to two related terminological problems and not only for reasons intrinsic to the matter of causation. In law, there is no bijective relation between the words "cause" and "causation" and "cause" and "causation" themselves: each time the law speaks of "cause" and "causation", it does not necessarily refer to cause and causation (a well-known example is, in Italian civil law, the use of "causa" to refer to the functions or reasons of contracts).[2] Clearly, there is nothing special about the ambiguity of natural language employed in legal contexts, but we should be forewarned not to take this language at face value.

We may be interested in causes with three different aims in mind. Those aims can significantly overlap sometimes, but can be kept separate for philosophical inquiries. They are:

Causation$_1$: forward-looking causation. This particular type is concerned with individuating future probable outcomes, given a certain state of affairs or a certain set of situations, i.e. "causes".

Causation$_2$: backward-looking causation. This particular type is concerned with individuating those states of affairs or certain sets of situations whose prior existence necessarily (?) determine a given outcome. It has an *explanatory* aim.

Causation$_3$: causal responsibility. This particular type of causality is concerned with ascribing to an agent (not necessarily a living agent) a given outcome, "that his, her or its agency serves to explain and that can therefore plausibly be treated as part of the agency's impact on the world (Honoré 2010)."[3]

Clearly, causation is relevant in all three declensions, but while *causation*$_1$ is probably more considered in the legislative, law-making process, *causation*$_2$ and *causation*$_3$ are those which play the prime roles in (criminal) courts.

Let us now sketch a provisional map of the possible relationships between responsibility and causation.[4]

CN: *Causation is necessary*

According to this view, causation is necessary for responsibility, but *not* sufficient. It means that one can be punished *only* for those offences one has caused, but not for *all* offences one has caused. This seems to be Moore's view: he has to build up a complex theory of causation in order to be able to account for those threshold cases where apparently there are no traces of causation. Another vivid example of this view is Antony Duff's jurisprudence, according to which causation is necessary (although not sufficient) for responsibility (cf. Duff 2008, 2009).

CS: *Causation is sufficient*

According to this rare view (possibly more common in tort law), one is liable for *all* offences one has caused, but not *only* for them. The fact that someone has caused an offence leads directly to responsibility, but this view does not exclude that there can be *other* foundations for responsibility.

CNS: *Causation is jointly necessary and sufficient*

According to this view, causation is jointly necessary and sufficient for responsibility. It means that one is criminally liable for *all* and *only* those offences he has caused.

CnNnS: *Causation is neither necessary nor sufficient*

According to this view, causation is neither necessary nor sufficient for responsibility. The basis for liability may be causation, but it may not be.

I will defend this last view (that causation is neither necessary nor sufficient for responsibility) in the rest of this paper.

1. First Argument: Causation is not necessary for responsibility

Betrachte einmal die Vorgänge, die wir "spiele" nennen. […] Denn, wenn du sie anschaust, wirst du zwar nicht etwas sehen, was allen *gemeinsam wäre, aber du wirst Ähnlichkeiten, Verwandtschaften, sehen, und zwar eine*

ganze Reihe. [...] Wir sehen ein kompliziertes Netz von Ähnlichkeiten, die einander übergreifen und kreuzen. Ähnlichkeiten im Großen und Kleinen (Wittgenstein 2009, §66).[5]

This section argues that responsibility is not based on causation. In particular, I shall point out several kinds of non-causal responsibility. The phenomena—legal and moral—usually grouped under the umbrella term of "responsibility" are so conceptually diverse that they cannot admit a common metaphysical basis.

The paradigmatic case of (criminal) responsibility is when the *mens rea* (the mental elements of the offence, depending on the jurisdiction) and *actus reus* (the "wrong deed") pertain to the very same individual.

There are, however, borderline cases, when either the *mens rea* or the *actus reus* are missing or are scattered across different people.

When there is criminal responsibility just for *actus reus regardless* of *mens rea* for *any* material element of the offence, common law jurisdictions speak of *strict liability*.[6] In this section, I focus instead on other kinds of "queer" responsibility, namely those I group under the term "collective responsibility". [7] While in *strict* liability the *actus reus* and the possible sanctions pertain to the very same individual, *collective responsibility* places the various elements (*actus reus*, *mens rea* and possible sanctions) across several individuals.[8]

DEFINITION: Responsibility is collective when the *actus reus*, *mens rea* and possible liabilities do *not* pertain to the very same individual.

Collective responsibility has at least three different "realizations": (i) group responsibility, (ii) shared responsibility, (iii) vicarious responsibility.

Group responsibility is defined as when the responsibility for actions is ascribed to members of that group *qua* group members, *regardless* of any *actus reus* or *mens rea* they could have or not have had, done or exercised.

A paradigmatic example is, I think, the responsibility for genocide imputed to Nazi party members (following Nuremberg) *regardless* of their intending or knowing the plan or putting it into practice.

Shared responsibility is defined as when the responsibility for actions is equally imputed to members of a group *qua* members of that group, assuming that all of them need to do or intend to do the action in question; in the absence of this, everyone is held equally liable. Group responsibility differs from shared responsibility because the former requires a status

(being member of a group) regardless of any action or intention, whereas the latter assumes actions and intentions as prior.

A paradigmatic example is, I think, the responsibility of cleaning a shared kitchen by members of an apartment block. All and individual members need to clean the kitchen, but it might be the case that, for special arrangements, only a part of the group is entrusted with this task. Were the kitchen unclean, all members would be held equally liable, regardless of previous arrangements among the parties.

Vicarious responsibility is defined as when an individual is held responsible (and consequently presumably liable) for an *actus reus* someone else committed. Vicarious responsibility differs both from group responsibility and from shared responsibility because the individual held responsible or liable has—by definition—no bearing on the act in question, either factually or mentally (no *actus reus* nor *mens rea*)—although he can (and often ought to) exercise control over those for whom he is vicariously responsible.

A paradigmatic example is, I think, the vicarious responsibility of an employer for his employees or that of an editor-in-chief for what appears in his publication.[9]

Causation is not necessary for responsibility: I have discussed three legitimate examples of responsibility where the ascription of responsibility is non-causal. In group responsibility, just being a member of a particular group is sufficient for being held responsibility for the (mis)deeds of the group, regardless of any personal causal contribution. In shared responsibility, there is the *mens rea* but not necessarily the caused *actus reus*. In vicarious responsibility, the responsible individual has no causal bearing on the act in question, which was committed by someone else, but responsibility is derived from a particular relationship or *status* one has.

Despite their diversity, none of the forms of collective responsibility discussed in this section thus far are based on a traditional notion of causality. This seems the case for two reasons: *first*, the source of responsibility is not necessarily or solely individuated in agency, but rather in a given *status* of an individual or a group, a *status* more often than not resulting from normative relations; *second*, the causal contribution (or omission) of a particular individual cannot be directly linked to the actions for which one is punished. What one has (or has not) caused is severed from his responsibility.

We have *two* ways out this impasse: *first*, to disown collective responsibility as an actual form of responsibility (because it is not causal-

based)—but this would be question-begging; *second*, we may acknowledge that there are forms of responsibility *de facto* non causal, and therefore conclude that causation is not necessary for responsibility.

Another argument shows the conceivability of non-causal forms of responsibility. Within a strict consequentialist view, one can do away with causation—exactly as with desert: what matters is not (only) past deeds, but what happens next. If the state of affairs justifies placing responsibility (or blame, or punishment) on someone completely unrelated to the action in question, an act-consequentialist is *prima facie* compelled to accept that causation is not necessarily linked to responsibility (although it might contingently be). And since (act-)consequentialism is a legitimate (even if not necessarily true or correct) moral theory that can account for responsibility, then it is not even a conceptual truth that responsibility is necessarily based on causation: this would ultimately depend on the (meta-)normative theory of values one endorsed (his *Wertanschauung*).

In this section, I have suggested that there are many substantially different phenomena grouped under the umbrella term of "responsibility"—many of which are even non-causal. None of these phenomena have anything descriptive (factual) in common, and thus, at least in these important cases, responsibility cannot be explained away by pointing to a (common) metaphysical, descriptive trait of the world, as causality is often interpreted.

2. Second Argument: *Causation in law and morals is* not *descriptive*

> *Wie ist denn der Begriff des Spiels abgeschlossen? Was ist noch ein Spiel und was ist keines mehr? Kannst du die Grenzen angeben? Nein. Du kannst welche* ziehen*: denn es sind noch keine gezogen* (Wittgenstein 2009, §68).[10]

The scope of this section is to hold the following thesis: even if causation were jointly necessary *and* sufficient to determine responsibility, this would *not* show that responsibility is non-normative, that is, grounded in something ultimately descriptive.[11]

The general argument can be summarized as follows:

(i) causation is necessary for responsibility;

(ii) causation is descriptive, or non-normative (because it is scientifically provable, etc.); therefore

(iii) responsibility is necessarily descriptive, or non-normative.[12] I will

reject this conclusion. Even assuming (i)—which has been discussed and rejected in §1, showing that causation is not necessary for responsibility—I shall show that (ii) is false, and that causation is neither descriptive nor non-normative.

Now I shall put forward *three* arguments I think summarize the problems with premise (ii), that is, the consideration of causation (in law and morals) as descriptive: *first*, the problem of remoteness; *second*, what I call the "causal sorites"; *third*, the heterogeneity of actions with regard to omissions. The non-descriptive aspects of causation in natural sciences are well-known in philosophy of science. I shall assume the reader is familiar with this shared background and the three arguments I shall discuss are to provide further evidence to the thesis that causation is also non-descriptive in legal and moral domains.

(i) Regressus ad infinitum/remoteness

This problem is pretty familiar (also) to lawyers: how far should one go before causes become irrelevant? Several acts are jointly necessary for an action to happen, and these acts can be remote. Now, are these remote acts (still necessary for further necessary things to obtain) of *legal relevance* for the action in question?[13]

Take a murder. If the killer's mother and father had not met, this particular homicide would not have occurred, because—it seems, on an intuitive reading—this particular killer would not have existed (and so on, back in time). From a purely descriptive point of view, the encounter of the killer's mother and father is a necessary condition for the killer's being there (and eventually committing the murder) so it should be considered a cause, or at least part of the relevant causal chain. In a counterfactual analysis, if the killer's mother and father had not met, then this killer would not have existed and this homicide would not have been committed. Now, the law (and morals) is usually not interested in this kind of "causal" chains. Instead, judges and lawyers are more concerned with a specifically *legal* cause, also called proximate, that is "near and immediate, or directly traceable, or foreseeable (Feinberg and Coleman, p. 603). The legal or proximate cause is called also *cause-in-fact*.

Now, it seems very hard to justify such a *choice* on purely descriptive grounds. The only *real* difference I can think of in the murder example isa temporal factor—but this still does not clearly point out why more recent or more remote causes are to be preferred or discarded without a choice already made on our part.

Please keep in mind that this argument has a specific *diachronic* dimension.

(ii) The causal sorites paradox

A lesser problem—quite distinct from the "regressus ad infinitum"—is the causal version of the Sorite paradox: not how far back in time we should go to pick the relevant cause, but *how much* our cause has to contribute to (say) the offence. Let us grant that causation is *metaphysically primitive* (i.e. not reducible to other physical things or forces). Still, it is plausible that causation is a "scalar relation" (Moore 2009, p. 105) and therefore a matter of degree.[14]

This might be a problem with accomplice liability, if we, counterintuitively, admit that the accomplice has had a causal (albeit maybe non-physical) role in the offence.

It is for the law (or for morals) to "draw the line": to decide whether a certain degree of contribution is going to count as a cause or not. And it is apparent that this line is not descriptively determined, but always based on some sort of evaluation.

Note that the "causal sorites" is quite different from the "regressus ad infinitum": the former is a *synchronic* problem, while the latter is *diachronic*.

(iii) Actions vs. omissions

A notion of responsibility that necessarily requires a descriptive conception of causation has a problem with omissions. In fact, whereas omissions are of some importance at least for criminal responsibility, descriptive criteria for causation cannot easily track the intuitive distinction between actions and omissions. Either omissions cannot cause anything (and one cannot be responsible for an omission, *contra* the evidence from criminal law), or—in order to assign responsibility for omissions—omissions are causes: this either makes them coincide with actions, or escalates into counterintuitive conclusions (for example, that roughly the whole humanity should be held responsible for the effects of any omission whatsoever).

Consider two situations where a person dies. Now, let us stipulate that situation (a), where a robber shoots a passerby, may be *prima facie* described as "killing"; another situation (b), where nourishment for a terminally ill patient is not provided, may be described as "letting die". Do (a) and (b) differ? Moral philosophers do not agree on this problem, so let us keep our discussion to the legal domain. It seems that they may be considered different even in finer cases, for instance in the distinction between active and passive *euthanasia*, and in radically different charges you can incur: in Italian criminal law, (a) would possibly get you a sentence for "omicidio volontario" [approximately: murder] (up to 21

years in prison), while (b) would possibly get you a sentence for "omissione di soccorso" [approximately: duty to rescue] (1 year sentence or a 2.500-euro fine).[15] If (a) and (b) were two different things (as criminal law seems to recognize), then a possible grounding would be identifying (a)—killing—with an action, and (b)—letting die—with an omission: actions would be causes, whereas omissions would not. On these grounds killing could be punished because someone actively caused it—in a legal (moral) framework where causation is necessary for responsibility. Given that, it is easy to see why in (a)—killing—one is responsible. But (b)—letting die—is rather puzzling. Either omissions are causes, in which case there should be no difference between responsibility for killing and letting die because the effects are the same, and the responsibility should be the same; or omissions are not causes, and since one has not caused anything with one's omissions, no responsibility is warranted.[16]

Carolina Sartorio (for instance cf. Sartorio 2009 and Sartorio 2012) argues that accepting this distinction between causal action and non-causal omission is an untenable position because it is metaphysically unfounded and because it would force us to accept absurd consequences. This is exemplified by the so-called "Queen of England's problem" in terms of omissions: my gardener is responsible for my plants' death, because if my gardener had watered my plants, they wouldn't have died; therefore, the Queen of England is also *responsible* for my plants' death, because, had she watered my plants, they wouldn't have died.

If we consider someone responsible for an omission, then (without further qualifications based on specific roles or requirements) we should also consider responsible all those who have not undertaken that action—because the descriptive criteria are the same—and literally all those imputable according to the the relevant criteria (age, (in)sanity, and so on).

Thus, descriptive criteria are not enough for responsibility, which needs non-descriptive elements to discriminate between finer alternatives.

An independent, "descriptive" view of causation cannot convincingly account for the traditional (and legally relevant!) distinction between killing and letting die, or more generally between actions and omissions: the law "treats omissions both as causes and yet not as causes (Moore 2009, p. 82)."

In this section I have suggested that the very notion of causality is not plainly descriptive, but tied to evaluative elements.

3. Three Views on Responsibility and Causation: Kelsen,

Hart and Honoré, Moore

In this section, I give an account of the three most discussed contributions to the relationship between causation and responsibility (legal and moral) in the last 50 years: H. Kelsen's *Society and Nature* (1948), Hart and Honoré's *Causation in the Law* (1959) and finally, M. Moore's *Causation and Responsibility* (2009). I will engage with their contributions with regard to the position I have developed in this work.

3.1 *Kelsen:* Kausalität und Zurechnung

Hans Kelsen (1886 – 1973), one of the major legal philosophers of the XX century, grappled with the problem of causation and responsibility in several works (cf. Kelsen 1939, 1943, 1960, 1973).

In brief, Kelsen held that (i) imputation [*Zurechnung*] is the principle used to ascribe sanctions in normative domains; (ii) imputation, while being analogous of causality [*Kausalität*], is not based on causality; (iii) quite on the contrary, it is causality that, as a cultural category, stemmed from the principle of imputation, as the Ancient Greek word "aitía" indirectly shows.

Thus, imputation (and thence responsibility) is not necessarily allocated on a causal basis: it may well be, but this does not have to be the case.

This conclusion flows well with the rest of Kelsen's pure theory of law: once we have the *principle* of imputation, it is for the actual laws to fill it with practical criteria. There is no need for responsibility to be based on causality. Kelsen's position is comparable to mine, although his is based on other arguments and on a different perspective: arguably he has a Kantian understanding of causation and imputation as pertaining to two sharply distinct domains.

We shall shortly see that not all legal theorists were of the same opinion.

3.2 *Hart and Honoré:* Causation in the Law

Published in 1959, Hart's and Honoré's (hereafter HH) monumental study *Causation in the Law* sought to found (normative) principles for attributing moral and legal responsibility upon the (descriptive) principle of causation.

The principles for moral and legal responsibility are not "inventions of the law" but, rather, are "common-sense principles of causation" that are

"part of the ordinary man's stock of general notions" and based on questions of fact "similar to the conventional view of the law's use of other highly general notions such as those of temporal or spatial location" (Hart and Honoré 1959, pp. 91-92).

HH were concerned with the concept of causation commonly used by ordinary people (and therefore—for them—reflected in law *via* ordinary language) rather than those used by philosophers or physicists (cf. pp. xxxiii-xxxiv, 1-3).

In an extreme synthesis, HH's argument can be summarized in the following way:

(1) legal responsibility (the criteria for) is justified if it tracks (the criteria for) moral responsibility;[17]

(2) causation is a necessary condition for moral responsibility;[18]

(3) the relevant concept of causation here is the concept commonly used by ordinary people in speech.

I shall rhapsodically note three problems (also problematic within HH's view).

Linguistic Analysis

Linguistic analysis (the method chosen by HH to tackle the issue of causation) does not exhaust empirical and conceptual aspects of the problem. It is thus a dubious method to investigate such a complex task.

Which event is a cause?

We have seen that not all necessary conditions (for the sufficiency of the set) are causes. Why is that the case? Because what can be a cause is not natural or descriptive, but depends on the aim we have to ascribe an action to that agent, and is therefore the evaluative part of the process.

Which cause is relevant?

Once we have a list of causes for our event, we still need to choose those which are relevant. Think of a so-called overdetermination case. A fire, deliberately started by John, reached Rachel's house and was about to burn it down. Suddenly, a violent earthquake made the house collapse.

Now, both events were independently sufficient to destroy the house. There is an important difference, though: while the fire was lit by John with the purpose of destroying Rachel's house (let us take this for granted), the earthquake was a natural, "extraordinary" event.

According to HH, both the fire and the earthquake are causal relevant factors, because each was independently necessary for the sufficiency of the set of factors that destroyed Rachel's house.

Now, is John to pay for reparation, even though the event that destroyed Rachel's house was the earthquake? It seems we must choose which cause is relevant for our purposes. If we adopt a mere chronological

criterion, the earthquake was the most recent event and therefore, perhaps, causally responsible. But again, this sort of relevance decision seems based not on purely arbitrary factors, but at least on evaluative premises.

In the end, HH overlapped and conflated the issue of natural causation with the issue of responsibility-attribution. They failed to see that the attribution of responsibility can be non-causal, and therefore that natural causation *and* the attribution of responsibility cannot be accounted for in the same (causal) way.[19] Natural causation and responsibility are different—though not unrelated—"things".[20] In this respect, HH's position is quite different from the argument I adopted earlier in this paper.

3.3 *Moore:* Causation and Responsibility

I shall briefly consider the position of Michael S. Moore, expressed in particular in his latest book, *Causation and Responsibility*. I cannot consider Moore's rich and complex position fully here. Thus, I shall try to underline and discuss the points most relevant to my thesis.

Moore thinks, for instance, that legal responsibility should closely track *moral* responsibility,[21] and that moral responsibility is based on *natural*, empirical properties such as causation, which is necessary for it and purely descriptive.[22]

I shall now quote two brief passages and then try to formalize and dismantle his argument.

> The metaethical postulate is that moral responsibility [...] supervenes on natural properties like causation, intention, and the like. The postulate of legal theory is that legal liability (in torts and criminal law) falls only on those who are morally responsible (Moore 2009, p. vii; cf. also Moore 1997).

In other words,

> [A]ll law, on my view of it, must be based on policy [...]. This policy would be to attach legal liability to morally blameworthy actions. It is morality, not legal policy, that tells us that actions that cause harm are more blameworthy than those that merely attempt or risk such harm. It is metaphysics, not legal policy, that tells us when an action *causes* a certain harm (Moore 2009, p. 230).

Moore's argument can be roughly summarized as follows:

(i) moral responsibility depends (necessarily but partially) on causation, and since

(ii.a) criminal liability (and *lato sensu* criminal law) is based on moral responsibility, and since

(ii.b) criminal liability (and *lato sensu* criminal law) *ought to* be based on moral responsibility, then

(iii) criminal liability substantially depends on causation, and

(iv) criminal liability ought to (i.e. it is justified to) depend on causation.

I do not think Moore's reasoning sound, and I reject both conclusion (iii) and (iv), for two key reasons. *First*, even granting both premises (ii.a) and (ii.b) for argument's sake,[23] I have argued (in §1) that premise (i) is false: responsibility in general is not *necessarily* based on causation—even if it may be contingently based on causation. *Second*, Moore's understanding of causation (in law and morals) as naturalistically justified is fundamentally wrong— as I have argued in §2.

To compare HH's argument, here is Moore's version:

(1) legal responsibility (the criteria for) is justified if it tracks moral responsibility (the criteria for);

(2) causation is a necessary condition for moral responsibility;[24]

(3) the relevant concept of causation here is NOT the concept commonly used by ordinary people in speech. A careful metaphysics theory of causation is needed to justify moral and legal doctrines.

For Moore, all responsibilities must be causal. Therefore, he has almost no choice: either his theory is factually disproved, or those non-causal responsibilities (vicarious responsibility, accomplice liability) must not be considered proper cases of responsibility. The latter is precisely his strategy.

The following paragraph is devoted to showing how Moore ignores the facts (the reality of accomplice, non-causal liability) to fit his theory (no liability/responsibility without causation).

Accomplice Liability

The key test for the notion of causation, both in the law and in metaphysics, is to account for accomplice liability. Obviously, an accomplice is a person who, it is presumed, helps or instigates the wrongdoer to commit the crime. However, the extent to which the accomplice's contribution is a *causal* contribution is open to question.

It is plausible to think this instigation requires both an *actus reus* and a *mens rea* to be considered accomplice liability.[25] Leaving aside the *actus reus* requirement, is *mens rea* limited to *knowledge* (of possible consequences) or could it possibly require *purpose* (the purpose of helping the future wrongdoer)? And must there be an *intention* to merely help the

future wrongdoer, or an intention to bring about the criminal offence, directly or indirectly *via* the wrongdoer? Unfortunately, Moore limits his discussion only to the *actus reus* requirement.

Moore seeks to abandon the accomplice liability doctrine. Why? I try to summarize (and, alas, somewhat simplify) his argument here:

(i) The attribution of responsibility (here, liability) must be strictly causal;[26]

(ii) An accomplice has a causal role only in HH's *intervening cause* sense;

(iii) HH's idea of intervening causes is metaphysically unfounded and should be abandoned;

(iv) The role of an accomplice cannot be causal (with regards to the offence) in any sound metaphysical sense.

Therefore:

(v) There must be no accomplice liability.[27]

But accomplice liability is a perfectly accepted form of (at least legal) responsibility, and since there are great difficulties in interpreting accomplice liability in causal terms, it seems advisable to forgo the causal requirement, as I argue in this paper.

Causation in law (and morals)

In the last part of his book, Moore finally tackles the "beast": the metaphysical notion of cause (causality). His analysis is, roughly, split into two parts: (a) an analysis of causal relata and (b) an analysis of the causal relation. In other words, accounting for what causation is ("counterfactual dependence, nomic sufficiency, probabilistic dependence, regular concurrence, something else or nothing at all (p. 327)") is quite different from (yet related to) accounting for the entities causation links ("events, aspects of events, facts, negative events (p. 327)").

(a) Causal relata: a deontic fallacy

As for (a): causal relata, we start to notice a crack in his mechanism. He loosely argues for a distinction between metaphysics and the law. In metaphysics, the true causal relata are "fine-grained" things: states of affairs. Instead,

> the relation most *desirable* for use in law is different: (coarse-grained) events are the relata on which legal liability *should* turn, recognizing that such relata will be *constructions* based on the *true* relata of the causal relations, which are states of affairs (p. ix, emphasis added).

Now, let me just put forward *two* informal objections:

First, from the basic descriptive level we creep into the domain of the

normative. He said that we need an objective, descriptive account of the metaphysics of causation and causal relata (as fine-grained states of affairs) and then he changes his mind and builds up new causal relata especially for the law, as the above quotation shows. Why? Because this relation is "most desirable for use in law". Those two different theories seem neither equivalent nor interchangeable. He simply appears to pick the most convenient, regardless of which is true.

Second and more generally, he commits a deontic fallacy:[28] the fact that something is desirable or should obtain (for instance, responsibility ought to be based on causation) determines our thinking that the world *is* as it should be (we select the relata so that responsibility is based on causation, and all other non-causal forms of responsibility—such as accomplice liability—do not exist).

(b) The nature of causation

As for (b): the nature of causation, (see pp. x-xi and part IV) the confusion continues. Moore identifies law's causal theory as counterfactual dependence.[29] For the law, counterfactual dependence (roughly, the thesis that *c* is a cause of offence *y* iff *y* would not have occurred if *c* had not occurred) is both necessary and sufficient for causation.

Moore adopts a *twofold* (and inconsistent) strategy: *first*, he provides us with a series of reasons and argument *against* both the sufficiency and the necessity of counterfactual dependence for causation (citing, among other things, the existence of *non*-causal counterfactuals, the need to consider omissions as causes, overdetermination, etc.): counterfactual dependence and causation are not the same thing; but *second*, he confidently argues that counterfactual dependence *is* a legal and moral "desert-determiner independent of causation (p. 426)." This is to say that blameworthiness (and *mutatis mutandis* liability) depends not (only) on causation but (also?) on counterfactual dependence. How and when? Moore presents us with counterintuitive cases, such as symmetrical and asymmetrical overdetermination (see Sartorio, 2012) and blameworthiness for omissions and preventions—cases that can hardly be accountable in terms of non-counterfactual causation. There, counterfactual dependence occurs without causation, and Moore wants to assign liability without causation.

For this last section on causation and counterfactual dependence, I shall adopt the so-called charity principle in reading Moore's theory. Above, we have seen that Moore's idea is that causation is necessary for responsibility (liability). Then, we saw how desert is often determinable only by using a criterion of counterfactual dependence; but we have seen

how—according to Moore—counterfactual dependence neither is, nor implies, causation.

Now, I would *prima facie* say that there is a *non-sequitur* in Moore's argumentation. But on a more charitable reading, we might try to apply the familiar, legal distinction between conviction and sentence. In this way, causation is necessary for conviction (i.e., the attribution of responsibility/liability); counterfactual dependence determines, instead, the (severity of the) sentence—even if I cannot say the extent to which counterfactual dependence would be either sufficient or necessary for the sentence.

But in the end, I think Moore's arguments are simply untenable. Just one example is as follows. We have seen that:

(a) He considers causation necessary for responsibility/liability;

(b) He repeatedly states that "omissions cannot be causes" (p. 444);

(c) He thinks that there must be liability for omissions (pp. 444ff.)

And these three premises are simply inconsistent. If (b) holds, than we must discard either (a), so that causation is not necessary for responsibility/liability, or (c), that is, we cannot attribute liability for omissions, since (b), they cannot be causes.

I do not think Moore's reasoning sound and I have rejected both conclusion (iii) (liability necessarily depends on causation) and (iv) (liability must depend on causation). Besides the two main reasons given above (responsibility in general is not *necessarily* based on causation; and causation is not simply "out there"), in this last section I have argued that Moore's reasoning is, at the very least, inconsistent, as the case of omissions shows.

4. To sum up

I have argued that causation is neither necessary for responsibility, nor convincingly descriptive. I have suggested that, although based on physical, empirical evidence, both law and morals need to draw a line based on evaluative considerations.

To sum up, I hope to have disproved the claim that responsibility is ultimately descriptive because it is fundamentally rooted in causality, and causality is descriptive. My strategy was *twofold*. I put forward *two* arguments: *First*, I showed that there are significant and independent non-causal forms of responsibility that cannot be reduced to causal responsibility; *second*, I showed that the very notion of causality (in law and morals) is—*lato sensu*—normative, or at least non plainly descriptive.

Empirical research might tell us where to look to find causes, but it

will not indicate which causes are relevant in order to ascribe responsibility—or, in other words, where to draw the line.[30]

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Notes

[1] For evidence bearing on this point, see my discussion of "aitía"—meaning both "guilt" and "cause"—in Faroldi (2014, p. 4–5). I will not go into the metaphysical discussion on causality here, but will only be concerned with the "zoom-level" of inquiry employed in legal and moral philosophy.

[2] Cf. Italian Civil Code, artt. 1325, 1343–45.

[3] For similar remarks, see Hart (2008) and Feinberg (1965, 1970).

[4] The matter is complicated because we have (at least) three unknowns, so to speak: moral responsibility, criminal responsibility and causation. A general and convincing theory must, of course, fully take into account the relationships between all three unknowns.

[5] "*Consider the activities we call "games". For if you look at them, you won't see something that is common to* all*, but similarities, affinities, and a whole series of them at that. We see a complicated network of similarities overlapping and criss-crossing. Similarities in the large and in the small*" (Wittgenstein 2009, §66).

[6] 'Regardless' here means that (i) there are no *mens rea* elements required for the offense to take place; (ii) mental elements are irrelevant for the offence. Of course *mens rea* and fault are not the same thing, as I pointed out in (Faroldi 2014, p. 92 and passim).

[7] For the concept (and consequences) of collective *moral* responsibility, see for instance Arendt (1987); Feinberg (1968); Smiley (2011); Benjamin (1976, 1998); Bobzien (2006); Braham and van Hees (2012); Caruso (forthcoming); Corlett (2001); Fischer (2006, 2012); Gilbert (2006); Graham (2006); Isaacs (2006, 2011); Mäkelä (2007); Miller (2001a, 2001b, 2006); Miller and Mäkelä (2005); Nahmias *et al.* (2005); Nelkin (2007); Risser (2009); Sheehy (2006); Shoemaker (2009); Silver (2006); Soares (2003); Tollefsen (2003); Velasquez (2003); Williams (2006).

[8] For a systematic analysis and classification of various forms of non-standard responsibility, see Faroldi (2013).

[9] Accomplice and corporate responsibility are examples of non-personal responsibility. On the moral significance of corporate responsibility, see Dubbink and Smith (2011); French (1984); Garrett (1989); González (2002); Graham (2001); G. Moore (1999); Risser (1985); Silver (2006); Smith (forthcoming); Soares (2003); Velasquez (2003); Welch (1992); Wilmot (2001). Corporate social

responsibility seems to me a very complex and interesting form of responsibility (if it is a case of responsibility *stricto sensu*, of course), but I will not deal with it in this work; cf. for instance Azzoni (2004, 2012). Accomplice responsibility will be dealt with in §3.3.

[10] *For how is the concept of game bounded? What still count as a game, and what no longer does? Can you say where the boundaries are? No. You can* draw *some, for there aren't any drawn yet* (Wittgenstein 2009, §68).

[11] For both subjective and objective limitations, I shall not be concerned here with a critique of the general, metaphysical notion of "causation". This section's title might also read as "Moral and Legal Causation as Normative".

[12] A similar argument is made by Moore (2009). On this, see *infra* at §3.3.

[13] Here, I am using the terms "act", "action" and "event" in non-technical senses.

[14] For the general problem of vagueness, see at least Williamson (1994).

[15] The Italian penal code (art. 40.2) states (stipulates, prescribes?) that omissions *are* (to be considered/count as?) causes: "[...] Non impedire un evento, che si ha l'obbligo giuridico di impedire, equivale a cagionarlo."

[16] I thank Fabio Bacchini for specific discussion on this point.

[17] Needless to say, they need not be coincident: "we must bear in mind the many factors which must differentiate moral from legal responsibility in spite of their partial correspondence [...]. [T]he fact that the individuals have a type of [causal] connection with harm which is adequate for moral censure or claims for compensation is only one of the factors which the law must consider" (p. 66).

[18] "*[D]oing or causing harm* constitutes not only the most usual but the primary type of ground for holding persons responsible in [this] sense." (p. 65, emphasis added).

[19] For a parallel reading of HH, cf. Wright (2008, p. 177): "They insisted that the principles of attributable responsibility should be treated as causal rather than noncausal principles. They seem to assume that in order to avoid ad hoc, policy-driven determinations of attributable responsibility, the principles of attributable responsibility (beyond the basic natural causation principle) must be 'causal' principles".

[20] The classical debate in (at least common) law was dominated by minimalist works (holding that the criteria for the attribution of responsibility are neither objective nor causal) such as Posner (1972, 1973) and by maximalists (holding that there are factual causal criteria for attributing responsibility) such as Epstein (1973).

[21] The postulate of legal theory is that legal liability (in torts and criminal law) falls only on those who are morally responsible Moore (2009, p. vii).

[22] "The nature of causation—what causation is—is a matter of fact, inviting theoretical speculation". Causation is "a real relationship in the world"—cf. (Moore 2009), passim. For a position different from both mine and Moore's, see Stapleton (2008, 2009): for her, the notion of cause in legal settings must be "untainted by normative controversies".

[23] I have shown elsewhere (cf. Faroldi 2014) that premises (ii.a) and (ii.b) are to be rejected. Briefly, I considered an argument from formalization (if criminal

liabilities were to be based ultimately (or informally) on moral responsibility, and moral responsibility depends on moral theories that are usually hard to formalize and codify (because they are subject to inter-community negotiation, emotion-based judgments and other peculiar traits), then there would be problems in drawing legal provisions—however indirectly—from moral theories); an argument from disagreement (on which moral theory should our concept of criminal responsibility be based?); and an argument from the judges' discretionality (if there was no agreed theory of moral responsibility, criminal legal systems could hardly be based upon a varying and inconsistent set of norms. The attribution of criminal liability would depend eventually on the moral system endorsed by the judge).

[24] "[A]bsence of causation *eliminates* responsibility (by licensing consequentialist justifications), rather than merely reducing it (when justifications are not in issue)" (p. 77).

[25] As many criminal statuses do—cf. Model Penal Code.

[26] *Vide supra* for my account of Moore's justification of this argument.

[27] Please note that I cannot expand on Moore's follow-ups on the topic here.

[28] On which, see Faroldi (2012). A deontic fallacy is deriving in some way an "is" from an "ought", for instance by acknowledging the reality of something not as it is, but how it should be.

[29] I cannot go into details about counterfactual dependence here. In sum, this view descends from this much quoted passage in Hume (1748, p. 87): *First definition*: "We may define a cause to be an object followed by another, and where all the objects, similar to the first, are followed by objects similar to the second." *Second definition*: "Or, in other words where, *if the first object had not been, the second never had existed*" (emphasis added for the definition of counterfactual dependence). In this quoted passage, Hume equated a *regularist* and a *counterfactual* (in italics) view of causation: these views are *not* extensionally equivalent. This equation is problematic, as noted, for instance, by Beebee (2013). For a general interpretation of causality and responsibility in Hume, see Russell (1995, 2008). Counterfactual dependence has recently been widely questioned in philosophy in general and ethics in particular, following Frankfurt (1969), who argued for a non-counterfactual-based attribution of responsibility.

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