



Moore on Complicity and Causality (2008)

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Moore on Complicity and Causality[†]

JOHN GARDNER^{*}

Causal wrongs are those wrongs that one commits only if one makes a causal contribution c to some result r , where both c and r form part of the wrong. It is because c and r form part of the wrong that r is called a ‘result’ rather than a ‘consequence’ of the wrong. Consequences follow; results constitute.¹

Michael Moore believes, as I do, that causal wrongs exist, and that they exist not only in morally justified law, but also in morality outside the law – not only in captivity, as it were, but also in the wild. Moore also seems to believe, as I do, that moral and legal wrongs are paradigmatically causal, that one needs to understand the causal examples in order fully to understand the non-causal examples, or at least many of them. However Moore and I part company when we turn to the question of which moral and legal wrongs are causal wrongs. Naturally we agree about some of them. We agree that murder and manslaughter are causal wrongs, for example, and so are torture and extortion and wounding, and so are the common-law torts of negligence and nuisance and inducing breach of contract. Nevertheless there are various wrongs that Moore classifies as causal that I would classify as non-causal. There are also some that I classify as causal that he

[†] A comment in Michael S. Moore, ‘Causing, Aiding, and the Superfluity of Accomplice Liability’, *University of Pennsylvania Law Review* 00 (2008), 000. Hereinafter referred to as Moore, ‘Superfluity’.

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¹ This handy and widely-adopted terminology is owed to G.H. von Wright, *Norm and Action* (1963), 39ff.

would classify as non-causal. Let me say something about these two contrasting areas of disagreement in turn.

Moore classifies rape, assault, burglary and theft as causal wrongs on the ground that ‘there plainly are causal requirements to such [wrongs]’.² True enough. Whenever any of these wrongs is committed, there is something that makes a causal contribution to something. Consider a rape of V by D. Doubtless D’s intentions make some sort of causal contribution to D’s bodily movements, and doubtless D’s bodily movements make some sort of causal contribution to something involving V’s body. What does not follow, as Moore claims it does, is that D himself makes these (or any other) causal contributions. Moore’s own proposal about rape helps us to see why. He says that rape is committed only if D ‘by his bodily movements causes penetration’ of a body cavity of V’s.³ But this is topsy-turvy. If we ask what exactly it means for a penetration of a body cavity of V’s to take place, such that D could have caused such a penetration, the answer is that a penetration of a body cavity of V’s takes place, in the relevant sense, only if a body cavity of V’s is penetrated. And a body cavity of V’s is penetrated, in the relevant sense, only if someone penetrates a body cavity of V’s. In short, we need to know the sense in which D penetrated in order perspicuously to explain in what sense there was a penetration. That being so, it can’t also be the case that we need to explain in what sense there was a penetration in order to explain the sense in which D penetrated. Yet this inversion is exactly what Moore’s rendition of the *actus reus* of rape requires. It requires us somehow to see the act of penetrating as the act of causing a penetration, even though we already need to

² Moore, ‘Superfluity’, 2.

³ Moore, ‘Superfluity’, 2. Here Moore is summarising part of the explanation of action defended in his book *Act and Crime* (1993).

understand what the act of penetrating is in order to provide a sound analysis of the act of causing a penetration.

Moore anticipates this well-known circularity objection by trying to offer an agency-free account of penetration and the like, an account that does not mention what anyone does. This works for his innocuous example ('To move a table does require that it move'⁴) for here we can understand the table's moving (intransitive) without (yet) understanding what it means for someone to move it (transitive). But this does not work for the case of rape. There is no intransitive variant of 'penetrate' (either in language or in thought). We cannot understand what it means for there to be a penetration in the relevant sense – for V to have been penetrated – without first understanding what it means for someone to do the penetrating. The same is true of abusing,⁵ attacking, driving, threatening, offering, publishing, promising, conspiring, appropriating, accepting, entering, and countless other actions of moral and legal import. So inasmuch as there are wrongs that are committed by performing these actions (and not as part of more complex actions that include the consequences of these more basic actions among their results), these are non-causal wrongs.⁶ They do not consist in D's making any causal contribution *c* to any result *r*, even though there are obviously various causal things going on in the course of their commission. The explanation is that there is no independently specifiable result *r*, no result *r* that consists in anything other than the action in question having been performed.

So much for the cases in which I see non-causal wrongs where Moore sees causal ones. What about the converse cases? The main disagreement between us, or at any rate the one that is

⁴ Moore, 'Superfluity', 3.

⁵ Moore explains 'abusing' as 'causing abuse', paralleling his topsy-turvy error about penetration. Moore, 'Superfluity', 2.

⁶ Criminal lawyers call them 'conduct crimes' as opposed to 'result crimes'. [Sample citation?]

mainly at issue here, concerns the wrongs of accomplices. I say that the wrongs of accomplices are all of them causal wrongs while Moore says that many of them, inasmuch as they can be distinguished from the wrongs of principals, are non-causal wrongs. Yet Moore and I agree that debates over this question have long been mired in confusion. Many bad arguments have been advanced on both sides. Some of the bad arguments, as well as some disagreements between Moore and me, are nicely revealed by consideration of the following line of argument, which I will call the ‘master-argument’:

(1) D1 commits a causal wrong (as a principal) by causing result *r1*.

(2) D2 commits a causal wrong (as an accomplice) by causing result *r2*, where result *r2* is D1’s causing result *r1*.

(3) If D2 causes D1 to cause result *r1*, then D2 also causes result *r1*.

So (4) D2 commits (as a principal) the same causal wrong as D1.

So (5) there are no accomplices to causal wrongs, for all are principals.

The master-argument is plainly invalid. For a start, (4) plainly does not follow from (1), (2) and (3). It needs an ‘all else being equal’ proviso to allow for the fact that there could still be other unmentioned differences between D1 and D2 which make a difference to which wrong each commits. Maybe accomplices and principals are distinguishable in some non-causal respect, e.g. in respect of the *mens rea* element of their respective wrongs. I will not pursue this line of thought here since our immediate interest is in the existence or non-existence of causal differences, not other differences, between principals and accomplices.

More interesting for present purposes is the fact that (5) plainly doesn’t follow from (4). Why can’t there be accomplices to causal wrongs, contrary to (5), even though such accomplices are also principals, in line with (4)? Why isn’t D2 in the doubly

bad predicament of having committed two wrongs, one as principal in his own right and the other as accomplice to D1? I will call this the ‘double trouble’ view. There is much to be said for it as a moral view. Indeed I believe it to be the correct view in some but not all cases of complicity. Moore, however, frames his whole discussion in a different way, a more legalistic way, which helps to conceal the attraction of the double trouble view. Rather than talking about wrongdoing, he talks about ‘liability’, and he calls D2’s accomplice liability ‘superfluous’ in cases where D2 could equally be convicted as a principal. This is a misleading way to talk. It not only avoids the moral issue but distorts the legal one. We can agree, I think, that a criminal indictment seeking D2’s conviction for the two crimes cumulatively – both for the principal wrong and for the wrong of complicity – would be (as the common law puts it) ‘void for duplicity’. But the same does not apply if the prosecution seeks the two convictions in the alternative. It is often acceptable for the law to provide alternative ways of charging, indicting, prosecuting, trying, and convicting a single defendant in respect of the same action. The main English legislation on this subject, the Accessories and Abettors Act 1861, provides for the prosecution to hedge its bets in this way.⁷ Moore, it seems, regards this as a gratuitous complication in the law, perhaps even slightly comic.⁸ He therefore accepts (a version of) the inference from (4) to (5), albeit one mediated by implicit intervening premisses.

Moore does not, however, accept the master-argument in its entirety. Although he defends the inference from (4) to (5) he does not defend either (4) or (5) as they stand. And that is

⁷ In section 1, which allows (for example) ‘murder’ to be the charge and the conviction, while permitting the prosecution’s proof to be of either murder as a principal or murder as an accomplice without prior election.

⁸ It is in this connection that he cites the Blondie track ‘One Way or Another’, from *Parallel Lines* (1978). Moore, ‘Superfluity’, 14.

because he has worries about the earlier premisses. He has many interesting things to say, in particular, about premiss (2).

The master-argument is most often deployed as a *reductio*. Since (5) is an intolerable conclusion, the thinking goes, and conceding that the argument is valid, at least one of the premisses must be rejected. The premiss most often rejected is (2). Many people point to ‘aiding’, ‘abetting’ and ‘counselling’ as modes of complicity, inside and outside the law, that already undermine (2). Aiders, abettors and counsellors, it is said, often do not cause the acts of those whom they aid, abet and counsel. After all, their aiding, abetting or counselling is in many cases unnecessary for the principal’s wrong. Often the principal would have gone ahead with his wrong anyway, with or without the accomplice’s help or encouragement. And if the accomplice’s help or encouragement wasn’t necessary for the principal’s wrong, it is said, it also didn’t cause that wrong. A cause is a *sine qua non* of whatever it causes. So (2), many conclude, is false.⁹

Moore points out that this is a bad argument for rejecting (2). It rests, says Moore, on an inadequate theory of causation.¹⁰ Causation neither consists in nor depends on a *sine qua non* or necessity relation of the advertised kind. I agree with Moore on this point. But I do not share the rest of his reasoning. I think that aiding, abetting and counselling are all straightforward ways of making a causal contribution to the wrongs that are aided, abetted or counselled as the case may be, and for me it is an adequacy-condition for any analysis of causality that it accredits these cases correctly as cases of causal contribution. I also think that there are more subtle counterfactual analyses of causality (invoking a combination of necessity and sufficiency) that meet

⁹ See e.g. Joshua Dressler, ‘Reassessing the Theoretical Underpinnings of Accomplice Liability’, *Hastings Law Journal* 37 (1985), 109; Danial Yeager, ‘Helping, Doing, and the Grammar of Complicity’, *Criminal Justice Ethics* 15 (1996), 25; Christopher Kutz, *Complicity* (Cambridge 2000).

¹⁰ Moore, ‘Superfluity’, 9ff.

this adequacy-condition as well as meeting, when combined with various other criteria, all the further applicable adequacy-conditions. In short, I think that there can be an adequate partly-counterfactual analysis of causality. Moore, by contrast, has blanket objections to all attempts to analyse causality in even partly counterfactual terms, and he therefore repudiates the proposed argument against (2) without needing to come clean on whether he thinks that, in the cases under discussion, the aiding, abetting and counselling do indeed make a causal contributions to the principal's wrong. (He comes clean later and says that, in his view, they often but not always do.¹¹)

In the course of objecting to all counterfactual or partly-counterfactual analyses of causality, Moore spells out one of the adequacy-conditions that *he* attaches to analyses of causality. He says that any adequate analysis of causality must respect the *transitivity* of causality. It must be consistent with the proposition that 'if *c* causes *e* and *e* causes *f* then *c* causes *f*'.¹² Let's call this 'Moore's Transitivity Axiom', or 'MTA' for short:

(MTA) If *x* causes *y* and *y* causes *z* then *x* causes *z*.

You can see right away that premiss (3) of the master-argument is none other than an application of MTA to the case of D1 and D2. But MTA, it seems to me, is mistaken, and so is premiss (3). It takes whatever plausibility it has from the ease with which it is confused with the following true but weaker proposition, which we will call 'Gardner's Transitivity Axiom', or 'GTA' for short:

(GTA) If *x* makes a causal contribution to *y* and *y* makes a causal contribution to *z* then *x* makes a causal contribution to *z*.

¹¹ Moore, 'Superfluity', 29, discussing *Wilcox v Jeffrey* [1951] 1 All ER 464.

¹² Moore, 'Superfluity', 9.

In presenting GTA as weaker than MTA I am setting out my stall that causing something is not the only way of making a causal contribution to it. Perhaps causing is the simplest way; perhaps it is also the paradigmatic way; perhaps it is, in some contexts, the most important way. But there are other ways. I foreshadowed this in my characterisation of causal wrongs at the start of this paper, I allowed for causal wrongs to vary among themselves in (at least) two dimensions: in respect of result r and in respect of causal contribution c . In doing so I was already making logical space for my view that D2 (as accomplice) sometimes makes a different kind of causal contribution from that made by D1 (as principal), and thereby commits a different causal wrong, even though both wrongs have, in the end, the same result, $r1$. Indeed I was making logical space for my view that D2 (as accomplice) sometimes makes a different causal contribution from that made by D1 (as principal) precisely because D2 makes his contribution through D1.

So this causal pluralism, as we may call it, already sows the seeds of a new objection to the validity of the master-argument to (4). Consider the revised premisses which it forces upon us:

(1') D1 commits a causal wrong (as a principal) by making a causal contribution $c1$ to result $r1$.

(2') D2 commits a wrong (as an accomplice) by making a causal contribution $c2$ to result $r2$ (where $r2$ is D1's making a causal contribution $c1$ to result $r1$).

(3') If D2 makes a causal contribution to D1's making a causal contribution to result $r1$, then D2 also makes a causal contribution to result $r1$.

These revisions lay waste to (whatever is left of) the master-argument. They are consistent with D2's making the same causal contribution to $r1$ as D1 does, but also with D2's causal contribution to $r1$ being different from D1's. This preserves the

possibility that D2 does not commit the same causal wrong as D1 even though both causal wrongs have the same (eventual) result in *r1*, and this invalidates the inference to (4). In particular it preserves the possibility that D2's causal wrong is a wrong of *indirect* causal contribution to *r1* whereas D1's is a wrong of *direct* causal contribution to *r1*, where the indirectness of D2's causal contribution to *r1* lies precisely in the fact that D2's only relevant direct causal contribution is to *r2*, which is the result that D1-makes-a-direct-causal-contribution-to-*r1*.

Moore resists these possibilities by claiming that causing is the only possible kind of causal contribution, i.e. by rejecting causal pluralism. GTA, he thinks, boils down to MTA; *c1* and *c2* are both causal contributions by way of causing, for that is the only kind of causal contribution there is; so my so-called 'revisions' of premisses (1), (2) and (3) are only harmless reformulations. Causal contribution varies only by degree, says Moore, and not by kind. Causal contributions can be more or less 'substantial' but they cannot be direct or indirect. Or rather, causal contributions can be direct or indirect but this is not truly a distinction between them *qua* causal contributions. It can only be a non-causal distinction. Moore's reasons for thinking this are spelled out in more detail elsewhere¹³ and only sketched in the essay under discussion here, but if I understand them right they come down to these two. First, the official objection. A distinction between D1 and D2 drawn in terms of directness could be interpreted as a causal distinction only by adopting a 'panicky' metaphysics in which D1 is somehow the 'uncaused cause'¹⁴ of *r1*, or is at any rate 'not subject to the [full] necessitation of causal laws'.¹⁵ Second, the subtext. Whatever constitutes a causal distinction

¹³ In 'The Metaphysics of Causal Intervention', *California Law Review* 88 (2000), 827.

¹⁴ Moore, 'Superfluity', 15.

¹⁵ Moore, 'Superfluity', 18. The square-bracketed emendation is at 19.

must be instantiated 'in science'¹⁶ (=experimental or 'natural' science) and no causal distinction between direct and indirect causal contributions is so instantiated. Both these objections are weak. Let me consider them in reverse order.

I know of no reason to think that all causal distinctions must be instantiated in the experimental sciences and I know of no reason to privilege, as Moore does, writings in 'philosophy of science' as having some special jurisdiction over the subject of causality.¹⁷ I can, however, think of some good reasons not to do so. The most important is that the theory of causality is part (but only part) of the theory of agency, and the philosophical study of it belongs, if we must make these petty demarcations, to the philosophy of action, not the philosophy of science. To cause (or facilitate or occasion or allow or procure or inflict or induce ...) is to act, and can only be understood as a constituent of action. Notice that this returns us to the criticisms I made earlier of Moore's own theory of action. Moore tries to explain what an action is by explaining what a causing is, when really it must be the other way round. But be that as it may, the truth remains that if one studies only relatively simple agents – planets and stars, electrons and neutrons, winds and waves, bodies and brains and even minds, proteins and enzymes, gases and liquids, genes and chromosomes – then necessarily one uncovers only relatively simple causal contributions. These simple agents each have a relatively short list of actions that they are capable of performing, and notably a relatively short list of possible interactions with other agents. The list is short relative to the list of actions and interactions that can be performed by more complex agents, such as human beings. Human beings are, however, absent from the experimental sciences. There they are not studied as such but rather reduced to other agents, such as minds and brains and

¹⁶ Moore, 'Superfluity', 15.

¹⁷ Moore, 'Superfluity', 11.

bodies, that are more easily adapted to the restricted metaphysics and methodology of the experimental scientist.

In particular, all rational action (action-for-reasons) is filtered out of the scientific picture. Reasons are not visible to the experimental sciences because none of the simpler sub-agents studied by the experimental sciences answer to them. Brains and bodies and minds and genes are agents, but not rational agents. It follows that the experimental sciences do not see the causal distinctions that are structured by reasons, and which can only be understood by considering the actions and interactions of rational agents. What we need, in order to distinguish and analyse the full range of possible causal contributions, is to locate our study of causality with one foot in the humanities, with human agents, the most highly developed rational agents known to us, among our core examples of causal contributors. If we do so we will find causal distinctions not found elsewhere in nature, such as the distinction between causing and occasioning, the distinction between both of these and failing to prevent, the distinction between all of these and inflicting, and so on. Some writers resist this causal humanism, as we might call it, because they imagine that as soon as we take an interest in distinctions that are found only in human agency, we draw distinctions that are driven by human purposes and needs rather than by the reality of causality. Of course this is in one way a false contrast. As Moore points out, it is one of our human purposes and needs to find out who *really* – i.e. in causal reality – made which causal contribution to what, for this is frequently a matter of moral or legal importance.¹⁸ What is worrying is only the intrusion of *other* purposes and needs, leading to the drawing of non-causal distinctions which are only *presented* as causal. Surprisingly, this worry is enough to turn many writers away from causal humanism and towards what we might call causal scientism. Is

¹⁸ Moore, 'Superfluity', 12.

this what turns Moore in the same direction? That is not so clear. His causal scientism seems undermotivated.

Moore's wider resistance to causal pluralism is not, however, undermotivated. It is motivated by the view that one can only distinguish GTA from MTA if one adopts a partly libertarian metaphysics, in which human beings are partly exempt from causality. At any rate, he says, such libertarian reasons are 'the only reasons given to support the existence' of variations among types of causal contributions involving human beings.¹⁹ So when I talk of the causal distinctions to be found in the structure of rational agency, do I presuppose some such libertarianism? I doubt it. I am fairly sure that I have never had a metaphysically libertarian thought in my life. The explanation that I give for the variety of causal contributions instantiated in human agency, an explanation which Moore cites but does not discuss, focuses on the structure of rational agency.²⁰ As rational agents, each human being has a relationship with all the actions of every human being (and indeed every rational agent). It is rationally important for each of us what every one of us does. Rationally, we are always to factor everyone's actions into our thinking about our own actions, inasmuch as by our own actions we contribute to those other actions (and subject to the constraints of rational efficiency). Yet this already shows that we have a special relationship with our own actions, including their results. We are responsible directly for our own actions (including their results) and indirectly for the actions of others (only inasmuch as they figure among the results of our actions). This explains both the existence and the importance of causal contributions that are distinguished, and causally distinguished, in respect of their directness and indirectness. These distinctions are built into the

¹⁹ Moore, 'Superfluity', 18.

²⁰ The explanation is set out in 'Complicity and Causality', *Criminal Law and Philosophy* 1 (2007), 127, also in my *Offences and Defences* (2007). Moore cites it for other propositions in 'Superfluity' at 18 and 23.

structure of rational agency. Since they are built into the structure of rational agency, they belong to the metaphysics of agency, where we also find the metaphysics of causation.

What are these distinctions? They vary enormously. Sometimes D2 occasions *r1* when D1 causes *r1*, or D2 procures the infliction of *r1* when D1 actually inflicts *r1*. Sometimes D2 causes D1 to allow *r1* or allows D1 to cause *r1*. Sometimes D2 actually causes D1 to cause *r1*, although it does not follow, *contra* MTA, that D2 too causes *r1*. And it is also true, in spite of the falsity of MTA, that sometimes D2 causes *r1* through D2. There are often interdependencies hidden in the distinctions, such that what contribution D2 makes to *r1* depends, in some cases, on what contribution D1 makes to *r1*. Nevertheless all the distinctions are causal distinctions. They are distinctions among causal contributions and they distinguish them *qua* causal contributions. *Qua* causal contributions, of course, they are all to be analyzed in similar (partly-counterfactual) terms. But beyond that they all differ, and call for separate analysis, just as all other possible actions call for separate analysis once we have got beyond the common features that make them all actions.

This view is complicated and I have only sketched its main themes here. Nevertheless there are some obvious differences between it and the views criticized by Moore. Moore discusses only causal dualism (the view that there are two and only two possible kinds of causal contribution), which he associates (I am not sure correctly) with Hart and Honoré.²¹ My causal pluralism is obviously much more pluralistic. Moreover, Moore assumes that causal dualists hold that human beings cannot cause other human beings to act, or cannot cause results through other human beings; that their causal contributions, on the dualist view, must be something short of causing. I assume no such

²¹ Moore, 'Superfluity', 18, citing Hart and Honoré, *Causation in the Law* (2nd ed, 1985).

thing. I think the types of causal contributions made by accomplices to and through the acts of their principals vary, and sometimes includes causing. Sometimes, the accomplice is thereby also turned into a principal in respect of the same or another wrong; at other times not. It depends on the causal wrong committed by D1 and the type of contribution to it made by D2. Most importantly, *pace* Moore, my proposals have no glimmer of metaphysical libertarianism about them. Like all metaphysics, they work back from how things are to how things must be. Things are as I explain them with rational agency, and that is why things must be as I explain them with causality.

I have not had an opportunity, within the confines of this comment, to discuss Moore's own rival analysis of complicity, and his eventual replacement for the master-argument in which he preserves modified versions of (4) and (5). But one feature of Moore's own analysis demands comment. His resistance to causal pluralism, in spite of his energetic prosecution of it, turns out to be in some measure nominal. He allows that there are various ways of being an accomplice which are not 'truly causal'²² but each of which has something in common with the truly causal way of being an accomplice. They include notably, complicity by failing to prevent a wrong. This supposedly non-causal way of being an accomplice is straightforwardly causal. It is an adequacy-condition of any analysis of causality that it shows how one can make causal contributions by failing to act, including by failing to prevent actions by others. Moore does not agree that this is an adequacy-condition of an analysis of causality, and his analysis of causality proudly and consistently does not meet it. But interestingly his catalogue of the varieties of complicity includes certain ways of contributing, including failing to prevent, that were jettisoned, as non-causal, from his analysis of causality. I find this telling. What it tells me is that these ways of

²² Moore, 'Superfluity', 26.

contributing should not have been jettisoned, as non-causal, from his analysis of causality. For there is no way of contributing to any result, directly or indirectly, except causally. That is the only kind of contribution to results that exists, and since the only kind of complicity is complicity by contribution to results, complicity is always a kind of causal wrong.²³

²³ Moore suggests some additional varieties of complicity that we both agree are non-causal because they have no results. Moore, 'Superfluity', 45 (on non-operative chance-raising) and 48 (on unheard encouragers). My reaction is that these suggested varieties of complicity are not varieties of complicity. They are at most failed attempts at complicity. The US law that treats them as varieties of complicity, cited by Moore, is either confused or deliberately stretches the category of complicity for the sake of some ulterior objective.