Singular Causation and Double Prevention Cases

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I. Introduction

It is an honor and a pleasure to write for a gathering honoring one of Germany's most distinguished legal theorists, *Ingeborg Puppe*. I had the pleasure of making Professor *Puppe's* acquaintance over a decade ago in Cologne and here in Bonn, although I had been an admirer of her cutting edge and careful work for some time before that.

One of the topics on which Professor *Puppe* and I have written extensively is causation, particularly as that notion is used in the law of crimes and the law of torts. I regret that my German is not up to the task of mastering her thoughts on that topic as those thoughts have been expressed in numerous German language publications over these past four decades. But fortunately, Professor *Puppe* has graced us with two lengthy English language summaries of her thoughts on causation in the law,[1] and I will largely rely upon them in making my remarks here.

Professor *Puppe* has long defended a version of what both she and I characterize as *generalist* theories of causation.[2] Although (as she recognizes) the law's ultimate concern in disputed cases at law is to attribute *singular* causal relations between actions and harms, a generalist nonetheless holds that those *general* relations holding between types of events[3] and that are constitutive of causal *laws*, are the basic relations out of which non-basic singular relations are constructed.

Varieties of generalist theories of causation abound, differing between themselves by what they take the structure of causal laws to be.[4] There are primitivist theories, holding causal laws to describe primitive relations between universals;[5] there are *Humean* regularity theories, taking causal laws to describe recurrent successions of one type of event by another; there are probabilistic theories, holding causal laws to be constituted by the relation of probabilistic dependence; and there are counterfactual theories, holding causal laws to be based on the relation of counterfactual dependence.[6] Despite their differing conceptions of causal laws, what marks all such theories as generalist is their insistence that the lawful connections that exist between types of events is basic, and that singular causal relations between tokens of events – the concern of the law of torts and of crimes – is constructed by adding space/time locators to instantiations of such laws.

Professor *Puppe* aligns herself in the particular kind of generalist tradition going back to *John Stuart Mill*,[7] continuing through *H.L.A. Hart* and *Tony Honoré*,[8] through *John Mackie*,[9] and to *Richard Wright*,[10] Professor *Puppe's* sometime collaborator and co-author. On this view, causal laws give sets of sufficient conditions for the occurrence of types of events that are effects, with the significant caveat that each member of the set of sufficient conditions must itself be necessary to the sufficiency of that set. This focus on minimally sufficient sets of conditions has become known as the NESS ("Necessary Element of a Sufficient Set") version of the generalist conception of causation.

Like all versions of the generalist tradition about causation, Professor *Puppe* rejects singularist theories of causation such as my own, theories that regard the singular relation between tokens of events to be basic and causal laws to be derived from these by induction.[11] As I understand her, she deploys five arguments against singularist theories.[12] Only one of these will be the topic of the present discussion (although it is to my mind the most serious of her objections to singularist theories).

II. The Issue of Causation by Double Prevention

The argument in question deals with what have become known as cases of "double prevention". These are cases where the action of some defendant ("D") prevents some preventer,

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[1] *Puppe*, in: Kahmen/Stepanians (eds.), Critical Essays on "Causation and Responsibility", 2013, p. 67; and *ead./Wright*, Chicago-Kent Law Review 91 (2016), 461. I have also relied upon *Puppe's* own unpublished English translation of "Causation by Double Prevention and by Omission and the Problem of Overdetermination", a paper given to the IVR World Congress in Legal Philosophy, Lucerne, Switzerland, 2019, and a copy of which she was kind enough to send me. I have also relied upon *Puppe's* written response to an earlier draft of this paper.

[2] *Puppe* (fn. 1 – Essays), p. 67; *Moore*, Causation and Responsibility, An Essay in Law, Morals and Metaphysics, 2009, chap. 19.

[3] I shall throughout prescind from the delicate issues of whether facts, tropes, events or states of affairs are the relata of the causal relation, and, if events, whether events are to be conceived as along *Davidsonian*, *Kimian* or *Lewisian* lines. For discussion, see *Moore* (fn. 2), chap. 14–15.

[4] See *Moore* (fn. 2), chap. 19, for a summary of these kinds of theories.

[5] *Armstrong*, What Is a Law of Nature?, 1984.

[6] Some counterfactual theories, like some probabilistic theories, are not generalist theories because they regard these relations as not law-derived but primitively singular. See *Moore* (fn. 2), p. 391, 503.

[7] *Mill*, A System of Logic, 8th ed. 1872.

[8] *Hart/Honoré*, Causation in the Law, 1st ed. 1959, 2nd ed. 1985.

[9] *Mackie*, The Cement of the Universe, 1974.

[10] *Wright*, California Law Review 73 (1985), 735.

[11] Unfortunately she tends to treat all singularist theories as if they were *physicalist* singularist theories, and even worse, to treat all physicalist theories as if they were transfer of energy theories like that of *Fair*, Erkenntnis 14 (1979), 219. For a more complete taxonomy of the possibilities here, see *Moore* (fn. 2), p. 498–506. *Puppe's* overly narrow identification of singularist theories does make some difference, as I note later.

[12] *Puppe* (fn. 1 – Essays), p. 80–85.

natural or human, from doing the preventative work that preventer would otherwise have done in forestalling some harm to some victim ("V"). (Thus the name, "double prevention", from such cases dealing with a preventing of a would-be preventer.) Consider by illustration an early example of mine:[13] D sees V in the ocean drowning; D also sees lifeguard "L" preparing to jump in and save V (which L, given his skill level, surely would have done); so D, wanting V to die, ties up L as L is running to save V; D thereby prevents L from preventing V's death by drowning, and V drowns. Professor *Puppe* should want to say in such cases that D *caused* the drowning death of V; because my singularist theory concludes the opposite, that, according to Professor *Puppe*, counts against my theory because common intuition (and the law) regard D as responsible for V's death.[14]

It is worth detailing more precisely just where Professor *Puppe* and I disagree about such cases. To begin with, the disagreement is about (the metaphysical conclusion of) causal responsibility. We both would hold D morally responsible and legally liable for V's death (although I would hold D to a somewhat lesser responsibility/liability than some other defendant who actively caused V's death by, for example, holding V's head underwater). Where we differ is on the grounds of such responsibility/liability: *Puppe* thinks D *caused* V's death;[15] I think that V's death counterfactually depended on D's act of tying up the lifeguard and that such counterfactual dependence is enough for responsibility for that death, even though that death was not caused by D's act.[16]

Secondly, notice how Professor *Puppe* reaches her causal conclusion. Some generalists (including some counterfactualists) reach such a conclusion because they can truthfully say that D's act was a necessary part of a set of conditions sufficient for V's death, or, alternatively, that D's act was necessary to V's death. For these folks – some NESS theorists and some *Lewis*-like counterfactualists about causation – their theory of causation allows them to skip the intermediate details of *how* D's act did its causal work. But that is not Professor *Puppe's* position. Rather, her version of the NESS version of generalist theory requires that there be a chain of causation here: D's act caused L to omit to save V, and L's omission to save V caused V to drown (and, by the transitivity of causation, therefore D's act caused V to drown). The fact that *Puppe's* causal intermediary in this chain consists of an absence – L's omission to save V – is no embarrassment to *Puppe*, because she (like most generalists and most counterfactualists) openly embraces absences as legitimate relata of the causal relation.

Neither of these routes to *Puppe's* positive causal conclusion is open to one convinced of my kind of singularist theory of causation. As to the first strategy, the strategy that *Puppe* eschews, no kind of physicalist singularist theory that I know of, and no kind of *plausible*[17] primitivist singularist theory, can admit the kind of "action-at-a-distance" on which this first strategy relies. Although relations of nomic sufficiency and of counterfactual necessity can hold between types of events even when those events are widely separated in space and time, singular relations require a chain of spatio-temporally contiguous events. Yet if one seeks to supply such a causal intermediary in cases of double prevention, the only candidates seem to be absences like the omission to save of the lifeguard in my earlier example. It is much more difficult for physicalist singularist (or even primitivist singularist) causal theories to admit absences into the set of things that can be either causes or effects (or, as in case of double prevention, causal intermediaries that are both effects of earlier actions and causes of later harms).[18]

So issue is joined between *Puppe* and myself on two large issues that seem determinative of whether we should think of cases of double prevention as causal or not: (1) the nature of the causal relation (so that it can or cannot countenance action at a distance); and (2) the nature of causal relata (so that there can or cannot be causal intermediaries consisting of absences of events). I hope that it is not too great a disappointment that it is not my ambition to solve either of these large conundrums here in this brief comment. Moreover, the cases we are considering – double prevention cases – were supposed to provide us with intuition pumps with which we could support conclusions when we do argue about these two larger issues. We cannot use those larger conclusions to support our intuitions about the causal status of double prevention cases without begging the questions.

III. Reductio Arguments against *Puppe* and against *Moore*

What we can do here is this: imagine two lines of cases extending from my lifeguard case, each line intended to constitute a *reductio* either of *Puppe's* position or of my position.

[13] *Moore*, Act and Crime, The Implications of the Philosophy of Action for the Criminal Law, 1993, p. 278 n. 42.

[14] *Puppe* (fn. 1 – Essays), p. 81–82, 103.

[15] So *Puppe* has written me (e-mail of Ingeborg Puppe from 21.7.2022): "The one who prevents the lifeguard from rescuing the child […] causes his death." Yet because this example involves a human preventor, this causal conclusion is less secure for *Puppe* than it would be if the preventor were a natural, non-human process. For *Puppe* believes (like *Woodward* and others soon to be discussed) that human choices are uncaused because such choices are too based on reasons to have sufficient conditions determining them; this metaphysical libertarianism makes *Puppe's* generalist causal conclusion harder to see in cases such as my lifeguard case.

[16] My view of course presupposes that causation is not to be identified as counterfactual dependence. See *Moore*, Causation in the Law, Stanford Encyclopedia of Philosophy, 2019 ed. See also *id.* (fn. 2), chap. 17.

[17] One can imagine a primitivist singularism that simply posited there to be a singular causal relation between act-tokens like D's tying up the lifeguard and remote harms like V's death by drowning. Indeed, *Rosen* casually seems to suggest as much in his review of my causation book, *Rosen*, Rutgers Law Journal 42 (2011), 405. After all, primitivisms are famously, well, *primitive*, and thus free to posit what they like about how the causal relation behaves; yet such an action-at-a-distance primitivism seems mysterious and ad hoc.

[18] For extended argument, see *Moore* (fn. 2), p. 444–451.

Against *Puppe's* conclusion (that D caused V's death by drowning), imagine double prevention cases where it is less and less intuitive that the preventer of a preventer of some harm, is a causer of that harm. Against my conclusion (that D did not cause V's death by drowning), imagine double prevention cases where it is less and less intuitive that the preventers of a preventer of some harm did *not* cause that harm.

First, as a *reductio* against *Puppe's* causal conclusion in double prevention cases, consider these classics from the philosophical literatures:

(1) Bomber Billy is on a mission to destroy an entire city; an enemy fighter piloted by Nasty Newt is on a patrol the course of which will certainly put him in the path of Bomber Billy, and it is certain that if Newt confronts Billy, Billy loses. As it happens, a duck enters the intake for Newt's plane and it explodes before Newt can find and destroy Billy. Billy therefore is able to destroy the city with his bombs. If all double preventions are causal, the duck caused the destruction of the city (because the duck prevented a preventer [Newt] from preventing the destruction of the city).[19]

(2) The Skelton brothers are riding to a neighboring town to kill one Ross, because Ross had earlier seduced the Skelton's sister. Judge Tally wanted Ross dead too, but was worried when he learned that a warning telegram had been sent to Ross telling Ross that the Skelton boys were coming for him. Tally, using his authority as a judge, sent a second telegram to the telegraph operator in the neighboring town ordering the latter not to deliver the warning telegram. The warning telegram was not delivered, and Ross was found and shot dead by the Skeltons. If all double preventers are causal, then Judge Tally, by preventing a preventer (the warning telegram) from doing its preventative work, killed (or at least caused the death of) Ross.[20]

(3) In June lightning started a forest fire. There would of course have been no such fire in June if the forest had burned in May, and there was sufficient lightning in May to have burned down the forest save for the fact that heavy rains in May prevented such a fire. If all double preventions are causal, then the rains of May caused the destruction of the forest in June (because the rains of May prevented the May fire which, had it occurred, would have prevented the June fire).[21]

I find each of these three causal conclusions extremely counterintuitive. Yet how does *Puppe* avoid them? Even if her version of a generalist theory eschews action at a distance, and insists on a spatio-temporally contiguous chain of events, so long as absences can count as causal intermediaries, surely there is such a chain in each of these cases?[22]

Now consider double prevention cases where it seems equally counterintuitive not to attribute causal status to the double preventative action:

(4) D shoves a knife into V's body, thereby cutting a vein, allowing blood to flow out of V's body, from which loss of blood V dies. D's act merely prevented something (the vein) from preventing the loss of blood. If all preventers of preventions are non-causal, then D did not cause V's death despite the colloquial description that "D stabbed V to death".[23]

(5) D cuts off V's head, and V dies. D merely prevented something (oxygenated blood) from preventing the death of brain cells in V's head. If all preventions of preventions are non-casual, D did not cause V's death by cutting off V's head.[24]

(6) Spring action pistols work by releasing a spring that propels the firing pin with a bullet, leading it to discharge. Pulling the trigger of such a gun (unlike a gun with a mechanical connection of its hammer to the trigger) prevents the sear that is otherwise holding back the spring from doing its preventative work. If all double preventions are non-causal, then the act of pulling the trigger of such a gun does not cause the gun to discharge.[25]

(7) Whether certain enzymes are synthesized in E. coli sufferers depends on the presence of lactose in the vicinity of the bacteria in the following ways: if lactose is not present, a repressor protein is produced that would prevent such synthesis, but if lactose is present, such as a protein is not produced allowing the synthesis of the enzymes to proceed. If all double preventions are not causal, then the introduction of lactose only prevents a preventer (the repressor protein) from preventing the enzyme synthesis, and does not cause that synthesis.[26]

(8) If V is supported by a pillar (or a rope, or a bridge), and D removes the pillar (cuts the rope, dynamites the bridge), and V falls to his death, D only prevented something (pillar, rope, bridge) from preventing V from succumbing to gravity. If all double preventions are not causal, D did not cause V's death.[27]

Negative causal conclusions about such cases I take to be contrary to common sense. If a theory such as mine cannot avoid them, that would count heavily against such a theory.

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[19] *Hall*, Noûs 36 (2002), 276 (277 et seq.). A further variation of the example is explored in *Woodward*, Philosophical Review 115 (2006), 1 (31 et seq.).

[20] *Moore* (fn. 2), p. 68. Anglo-American criminal law treats Tally as a non-causer in such cases, but then resorts to accomplice liability to hold Tally for helping the Skeltons, who did cause Ross' death.

[21] *Bennett*, Events and Their Names, 1988, p. 222 et seq.

[22] I shall later examine *Puppe's* limitation to the effect that, to be causal of some harm, a preventer of a preventer of that harm must stop a causal process that is not only certain to prevent such a harm (absent its own prevention), but that causal process of prevention is also: already "instantiated" at the time of its prevention; or that is also already existing "somewhere in the world" at the time of its prevention. *Puppe* (fn. 1 – Causation), p. 2 et seq. To preview the conclusion of that later examination: each of examples (1)–(3) in the text seem to satisfy *Puppe's* own interpretation of her limitation.

[23] *Puppe* (fn. 1 – Essays), p. 82.

[24] *Puppe* (fn. 1 – Essays), p. 82. Citing and replying on a like example in *Schaffer's* review of my causation book, *Schaffer*, Legal Theory 18 (2012), 399.

[25] *Schaffer*, Philosophy of Science 6 (2000), 285.

[26] *Woodward*, Philosophical Review 115 (2006), 1 (34 et seq.).

[27] Variations on the example of *Paul/Hall*, Causation, A User's Guide, 2013, p.191.

Yet if action at a distance is not allowed by the theory, and if absences cannot serve as causal intermediaries, how is one to avoid these absurd conclusions that are such an affront to common sense?

One could just tough it out on both of these sets of reductios, tough it out in the sense that one lets the chips fall where they fall. "One person's reductio can be another person's valid inference", as the common saying goes. *Puppe* could concede that there is indeed causation in cases (1)–(3), no matter how counterintuitive that conclusion might be; and I could concede that there indeed is not causation in cases (4)–(8), no matter how unpalatable that conclusion might be.[28] Preferable is some middle way.

IV. Various Routes to Avoiding the Reductios

That middle way should not take the form of a causal dualism such as *Ned Hall's*.[29] *Hall* urges that we waffle in our usage of "cause" between two conceptions, one he calls "dependence" (which is a counterfactual notion that can admit absences as its relata), and one he calls "production" (a kind of singularist conception that does not admit absences as its relata). This allows *Hall* to resist the conclusions of the first reductio by using "cause" in its production sense, and to resist the conclusions of the second reductio by using "cause" in its dependence sense. Yet these putatively distinct senses of "cause" have no such exclusion jurisdictions attached to their proper usages, with the result that both reductios are simply indeterminate, yielding "yes and no" answers to each case. Such dualism is the wrong sort of middle way.

So we should consider more promising routes to finding some middle ground that avoids the absurd conclusions of both reductios.

1. James Woodward and the Sensitivity of Counterfactual Judgments

An early route was *James Woodward's*.[30] *Woodward* builds on the agreed-upon counterfactual nature of double preventions: if action A prevents event E from occurring, and if E had occurred, it would have prevented event F from occurring, but F did occur, then the occurrence of F counterfactually depended upon the occurrence of action A. Despite the omnipresence of such counterfactual dependence in double prevention cases, *Woodward* wishes to regard only some of them as causal (including his earlier-mentioned example of the process whereby enzymes are synthesized), regarding others as non-causal. *Woodward* classifies double prevention cases depending on whether the counterfactual relationships in such cases are "sensitive" (and therefore causal) or "insensitive" (and therefore non-causal). As *Woodward* puts it, "it is not the presence of double preventions per se that makes us reluctant to regard a relationship of counterfactuals that prompts this reaction".[31]

"Sensitivity", as the name suggests, is for *Woodward* a property of counterfactual dependencies having to do with the breadth of the possible worlds in which they hold. Consider the 2007 collapse of the I-35 bridge over the Mississippi River at Minneapolis. It was found that such collapse counterfactually depended on eight gusset plates (that connected the steel girders of the bridge together in the middle of its main span) being too small for a bridge of that size. But despite this design flaw, the bridge had held for forty plus years. It took the added weight of a two inch resurfacing of the roadway on the bridge, together with the weight of evening rush hour traffic, together with the weakening of the gusset plates by corrosion from regular winter use of de-icing fluids, together with the placement of heavy construction equipment and material just at the weakest point of the main span, to bring about the collapse of the bridge on August 1, 2007. Had any of these other factors not been present, the consensus was that the span would have held despite its design flaw. *Woodward* would presumably clarify the dependence of the collapse on the design flaw as "fragile", "unstable" or "sensitive".

What *Woodward's* notion of sensitivity in reality tracks is strength of counterfactual dependence. As I have argued elsewhere,[32] necessity necessarily is a scalar relation that comes in degrees: the more distant from the actual world are the possible worlds in which such dependencies hold, the more strength such dependencies possess. Further, it is also true that because counterfactual dependence is itself a desert-determiner independent of causation,[33] the stronger the counterfactual relation is between some act and some harm, the greater is the actor's responsibility for that harm.

So *Woodward's* sensitivity criterion does track the degree of responsibility possessed by actors in double prevention cases (as elsewhere). Yet this does not explain why or how *causal* judgments are affected by sensitivity in counterfactual dependence.[34] Indeed, it seems plain that our causal intuitions

[28] This seems to be *Dowe's* reaction to cases like (4)–(8), see *Dowe*, The Monist 91 (2009), 23; *id.*, Physical Causation, 2000. Such an acceptance of these cases as being non-causal forces *Dowe* both to restrict what his theory is about (not causation as such but only some sub-species, *physical* causation) and to weaken what he can claim on behalf of that theory (he is not giving an analysis even of physical causation but only a contingently true description).

[29] *Hall*, in: Collins/Hall/Paul (eds.), Causation and Counterfactuals, p. 225.

[30] *Woodward*, Philosophical Review 115 (2006), 1.

[31] *Woodward*, Philosophical Review 115 (2006), 1 (35).

[32] Most recently, in *Moore*, Journal of Contemporary Legal Issues 23 (2022), 543.

[33] *Moore*, Journal of Contemporary Legal Issues 23 (2022), 543; see also *Moore* (fn. 2), chap. 18.

[34] Unless of course one regards causal judgment as following from moral judgments of responsibility rather than as grounding such moral judgment. For this skeptical view, unfortunately popular amongst legal theorists, see, e.g., *Dan-Cohen*, in: Kadish (ed.), Encyclopedia of Crime and Justice, 1983, p. 165 et seq. ("the statement that A caused B's death may, in ordinary speech, be as much a conclusory statement, based on the prior tacit judgment that A deserves to be punished for B's death, as it is an independent statement of fact […]"); see also the more recent skepticism about causation grounding moral judgment rather than the other way around, in

in example (1) to (8) above are blind to strength of counterfactual dependence in such cases. Make the counterfactual dependencies as robust as you please between, for example, the duck that destroys Newt's plane and the destruction of the city that Billy bombs in (1), still, the duck didn't *cause* the destruction of the city. For example, suppose that there were no other ways in which Newt's plane could have been blown up besides the duck; suppose further that Newt's route and skills were such that he would have shot Billy down no matter what Billy or anyone else did in trying to avoid that result; the duck was thus strongly necessary for the city's destruction. Even so, these facts for me do not decrease my disinclination to say that the duck *caused* that destruction.

Conversely, if someone stabs another through the heart or decapitates another, and that person dies, intuitively the first *caused* the death of the second, no matter how fragile or sensitive may be the counterfactual dependence of those deaths on the stabbing or the decapitating. (The limiting cases are those of concurrent, symmetrical overdetermination, where other stab wounds or other neck cuttings occur simultaneous with defendant's stabbing or cutting, each such stabbing or cutting being independently sufficient for death; for in such cases there is *no* counterfactual dependence ["extreme sensitivity?"] and yet still causation.[35])

Woodward supplements his general sensitivity criterion with a kind of per se rule of sensitivity (and thus, of no causation in double prevention cases) when those cases involve human choices, including choices about design. *Woodward* joins others[36] in thinking that human beings are too unpredictable in their choices for counterfactual dependency on how those choices are made to be anything other than "sensitive". This generates particularly counterintuitive conclusions such as this variation of (8): When it is a person S rather than a pillar, a rope, or a bridge that is preventing the death of some victim V by supporting V's weight; when defendant D maliciously knocks S out of the way and V falls to his death, the supposed unpredictability of S's decision to continue supporting V is too great to admit the conclusion that D *caused* V's death? *Hume* surely had the contrary conclusion correct: place a pot of gold at Charing Cross in London, *Hume* declared, and you can predict with great certainty that a passerby will pick it up. Human beings may not be as regular in their behavior as protons but they are hardly as unpredictable as the libertarians would have us believe.

2. Michael Moore and Closeness Substitutes for Causal Intermediaries

My own attempt to find the sought after middle ground in classifying double prevention cases as causal or not, focused on the casual relation that is baked in to all double prevention cases, baked in in the sense that the counterfactual dependence (between defendant's preventing act and the harm not prevented because of that act) presupposes such a causal relation. As I earlier analyzed double prevention cases,[37] when the defendant in my original lifeguard case ties up the lifeguard, that defendant does an act that causes a state of affairs ("S") to exist, namely, the lifeguard being tied up. That state of affairs is not an absence, so it is eligible to serve as such causal relata. I then urged that when S is "close", either to the harm ("H") that is failed to be prevented by the lifeguard – V's drowning in this case – or to the state ("S'") that more immediately causes H, then the defendant's action caused H because it caused S.

Such closeness does not exist between the tied up lifeguard and the drowning, nor between the lifeguard being tied up and the ocean currents causing the drowning, which is why for me that is a non-causal case; such closeness also does not exist between either the death of Ross or the shooting of Ross by the Skeltons, nor between either the forest fire in June or the lightning in June that caused that fire, on the one hand, and the heavy rains in May, on the other – which is why those are also cases where there is no causal connection between defendants' doubly preventative actions and the harms that they allow. On the other hand, such closeness does exist between stabs through the heart or decapitations, on the one hand, and deaths, on the other. Likewise between movement of a sear in a spring-action pistol, and the movement of the firing pin in that pistol; likewise between the production of lactose and the synthesis of enzymes in E. coli sufferers. So these are cases where the doubly preventative action does cause the harm that occurs.

The vulnerable point of my earlier analysis, of course, lies in the notion of "closeness". *Jonathan Schaffer* has complained that my notion is both underspecified and undermotivated.[38] My response has hitherto been an oblique one, a kind of broadening of the need for conventions of closeness when distinguishing intentions from predictive beliefs no less than when distinguishing causal from non-causal double prevention cases.[39] My conclusion was that when we make moral use of either of our two major desert determiners, causation or intention, we rely on common sense conventions of closeness to clump together what are metaphysically distinct events (or representations of events, in the case of intentions) into coarser items, and that these basic desert-determining notions would be unusable for these moral purposes unless we did that.

3. Bradford Skow and Interrupting Versus Blocking Double Preventions

Quite recently *Bradford Skow* has proposed a third analysis of the desired middle ground on double preventions.[40] *Skow*

Knobe/Shapiro, University of Chicago Law Review 88 (2021), 165.

[35] *Moore* (fn. 2), p. 410–418.

[36] *Woodward* cites *Hart* and *Honoré*, *Pearl*, and others for the supposed unpredictability of human choices and behavior. This is also a view shared with *Puppe*.

[37] *Moore* (fn. 2), p. 459–467.

[38] *Schaffer*, Legal Theory 18 (2012), 399.

[39] In *Moore*, Legal Theory 18 (2012), 491, I survey ten possibilities as to the meaning of "closeness" is both causal metaphysics and in the philosophy of mind.

[40] *Skow*, Two Concepts of Double Preventions, 2022, available at https://web.mit.edu/bskow/www/research/doublep.pdf (26.10.2022).

urges that we must distinguish between two kinds of double prevention cases, one, what he calls *blocking* double preventions, and the other, what he calls *interrupting* double preventions. Cases (1), (2), and (3) above are all to be classified as *blocking* double preventions. In (1), for example, defendant D blocks the lifeguard L from even trying to save victim V who is drowning in the water. By contrast, cases (4)–(8) above are all to be classified as *interrupting* double preventions. In (8), for example, one pillar is already preventing the fall of another pillar and so when the first pillar is removed, that pillar's preventing is interrupted by its removal.[41]

Skow urges that only interrupting double preventions are causal, while blocking double preventions are non-causal. His proposed, thus, if accepted, would (like my own) rescue me and others from the absurd conclusion in (4)–(8) that these are non-causal cases; his proposal also (like my own) has a similar potential of relieving those such as Professor *Puppe* from having to defend the existence of a causal relationship in cases (1) to (3) above.

It is possible to construe *Skow's* justification for adopting the blocking/interrupting distinction on the basis that it will divide the cases identically to my "closeness" distinction. As *Skow* puts one of his justifications for adopting the blocking/interrupting distinction:

> "Locality [of causes to their effects] is satisfied […] for interrupting double preventions generally. In blocking double preventions the double preventer can stop the would-be preventer far away from the main process, because a merely would-be preventer does not need to be anywhere near the main process. But by definition in interrupting double prevention the preventer is an actual and not a [merely] would-be preventer; it spends some time holding back the main process. And if process X is holding back process Y it seems that it must be locally connected to Y. Similarly, the double-preventer must stop X from holding Y back, and doing this seems to require a local connection to X."[42]

Thus, for *Skow*, in example (8) the two pillars, one supportive of the other:

> "[…] the pillar holding up the other pillar is right next to it. They are in physical contact. The preventing event, someone's pushing of the first pillar, happens where that pillar is; which happens right next to the fall of the second pillar."[43]

My own take is that this satisfaction of my closeness criterion is not even one of *Skow's* motives for adopting his blocking/interrupting distinction.[44] Rather, it is only his negation of an objection that some might interpose to his theory. In any case, it would not be my motive for adopting *Skow's* distinction. That motive rather lies in an alleged third feature[45] of double prevention cases, viz, the feature that they all require that an *absence* figure as the causal intermediary between the double preventer's act and the effect that the double preventer prevents from being prevented. That motive lies, in other words, on the seeming third feature of double prevention cases – that absences, although they can be neither causes nor effects, feature as effects of the double preventer's action and causes of the ultimate effect that is allowed to happen.

If this troublesome feature of at least some double prevention cases can be removed, then those double prevention cases for me become untroubling causal. Indeed, such cases would no longer be double *prevention* cases – this, because a truly preventative relation relates actions to absences of any instance of a certain type of event. If I prevent a fire at *t*, I have acted in such a way that it is not the case that some instance of the type, fire, occurs at *t*.[46] Whereas an act that causes some other event (like rains) which event then extinguishes a fire, is a normal cause of one event (rains) that cause another event (extinguishment of the fire). Such *interrupting* "double prevention" cases, if the analysis goes through, shows that there are not truly double prevention cases at all; just normal causal chains between real events.[47]

But does *Skow's* analysis go through? In *Schaffer's* case of the spring firing gun (6), *Skow* urges that the spring's earlier pushing on the sear "is a positive event" and so is the

[41] Notice that *Skow's* distinction has some vagueness to it matching the vagueness in my idea of closeness. Namely, one process *interrupts* a second process only if the second process has actually begun. The vagueness lies in pinpointing precisely when some preventing process begins (and thus can be interrupted rather than blocked). In the lifeguard case (1), for example, does the lifeguard's potential prevention of V's death begin when: L first sees that V is in trouble? When L leaves his stand and runs down the beach toward V? When L enters the water? Or only when L has ahold of V and is escorting V to shore? My guess is that *Skow* would opt for only the last, making his concept of interrupting very close in the discriminations that it works to my notion of closeness.

[42] *Skow* (fn. 40), p. 12.

[43] *Skow* (fn. 40), p. 12.

[44] *Skow* is actually trying to fit his distinction to *Hall's* locality constraint in causal connections of what *Hall* calls the productive kind (*Hall* [fn. 29]), so one might think that satisfying *Skow's* locality restraint has little to do with *Moorean* closeness (because for *Hall*, locality exists between causes and effects, and because nothing is the cause of itself, these must not be so close as to be treatable as the same). Yet in fact *Skow's* local-enough examples would also be close-enough under my approach.

[45] In counting features, recall that *Woodward's* solution relies on the *counterfactuals* that all admit are a feature of double prevention cases, and that my solution relies on the *causal relation* (between act and some state of affairs) that all admit are a second feature of all double prevention cases.

[46] For this analysis of prevention, see *Moore* (fn. 2), p. 452–459.

[47] *Skow* has pointed out to me that this conclusion depends on my finding definitional (as I do) of double prevention cases that they operate through absences as causal intermediaries.

stopping of that pushing: "The stopping pushing is then a cause of the spring's uncoiling. And a stopping pushing is a positive event, is not an [absence]."[48] From this, *Skow* concludes that the firing of the gun in (6), and like examples of interrupting double prevention, do not require that their causal chains run through any absences.

There are a raft of issues that need to be explored here. First off, before we delve into the delicate mysteries surrounding presences versus absences, we should be clear as to *what* it is that is said to be either present or absent. What are the relata of the singular causal relation? We have hitherto made do with a generous promiscuity in this regard, allowing the word, "event", to refer to a broad range of entities only some of which are truly events. We now need to be more discriminating. *Skow* appears to believe that singular causal relata are *Davidsonian* event-tokens. This is what gives him his intuition that an interrupting prevention is something positive; because the cessation of a process already underway is a change of state, and because events are often cast as being just such changes,[49] then a cessation of a process is the presence of an event, not the absence of one. Whereas in blocking prevention cases the process prevented has not yet begun, so the prevention of that process from even getting started involves no such change of state.

Without arguing the point here,[50] my own view is that talk of such events as relata is idiomatic English only because such talk is elliptical of a deeper, more basic discourse about *Armstrongian* states of affairs as causal relata. Such states of affairs[51] are usually analyzed as (1) the having (or possessing), of (2) a property, by (3) an object, (4) at a (literally, over an interval of) time.[52] Thus, if some person X is dead at *t*, that state of affairs is to be analyzed as X having of the property, being dead, at *t*.

How do we tell if a state of affairs is present ("positive", as *Skow* dubs it), or absent ("negative")? Notice that the ambiguity is the scope of the negation logical connective, "not", gives us two possible readings of an absent state of affairs:

(1) X possesses a negative property at *t*; or
(2) it is not the case that X possesses a positive property at *t*.

In the case of the dead person, X:

(1) X possesses the property of being non-alive at *t*; or
(2) it is not the case that X possesses the property of being alive at *t*.

My own view[53] is that there is no such thing as a negative property (no more than there are such things as negative events or negative objects). If so, this leaves (2) above as the only possibility for classifying what we mean by speaking of an absent state of affairs. Everything then turns on what we mean by an object *having* or *possessing* a property, and (if this is different) what we mean by a property being present, or instantiated, or there to be possessed, by an object.

Properties like being alive are abstract universals. By contrast, if some person Y is alive at *t*, Y's aliveness is a particular, often called a *trope* (or, alternatively, a "concrete universal", or yet again, an "abstract particular" – as *David Armstrong* once remarked, every happy discoverer seems to invent his/her own name for such entities). Y's possession of the property of being alive is a particular; by contrast, X's *not* being possessed of the property of living is not a particular. Rather, it is a negatively existentially quantified statement, either to the effect that it is not the case that any X-being-alive trope exists at *t*, or that it is not the case that any possessing by X of the property of being alive occurred at *t*.[54]

Coming now to the *Schaffer* example of the spring-fired gun that *Skow* adopts, if (as seems right) the pushing on the spring by the sear is the having of an actual property (pushing) by the sear at t_1, then is *Skow* correct to think that when the sear stops pushing on the spring it is the having of another actual property – a "stopping pushing" – by the sear at t_2? Or is the latter really the absence of the having of a property ("pushing") by the sear at t_2? If the former, then we have a state of affairs that can serve as a causal intermediary in such interrupting double prevention cases; if the latter, then an absence of a state of affairs is purporting to play the role of causal intermediary, showing (since absences cannot be causal relata) that the relationship is not causal in interrupting double prevention cases no less than in blocking double prevention cases.

Shift examples for a moment. Suppose P ("Preventer") was holding onto a rope that was preventing V's fall to his death; suppose further that IDP ("Interrupting Double Preventer") alternatively: persuades P to let go of the rope; coercively threatens P to let go of the rope; deceives P into letting go of the rope because P is deceived into thinking that V is no longer on the rope; or pries P's hands from the rope; and in each variation V falls to his death. In the first three variations P's letting go of the rope is the result of a choice he made to let go of the rope; such choices are datable events whose actuality should not be in question. Yet that truth about the mental state of choosing (or intending) is of little help here, because mental states can have physical effects only through movements of the bodies of the persons whose mental states they are.[55] So we need to ask about the letting

[48] *Skow* (fn. 40), p. 15.
[49] See, e.g., *Lombard*, Events, A Metaphysical Study, 1986 (events are instantiations of what *Lombard* calls *dynamic* properties by an object over an interval of time).
[50] See *Moore* (fn. 2), chap. 14–15.
[51] Often called "facts", although that term is fully ambiguous between naming true propositions and naming the truth-makers for true propositions; only the latter are states of affairs in my sense. See *Moore* (fn. 2), chap. 14–15.
[52] *Armstrong*, A World of States of Affairs, 1997.
[53] See my exchange with *Fumerton's* "Moore and the Metaphysics of Causation" in my "Responses and Appreciations" both in: Ferzan/Morse (eds.), Law, Morals, and Metaphysics: The Philosophy of Michael S. Moore, 2016.
[54] The first is the way a trope theorist would put it; the second is the way a states of affairs theorist would put it.
[55] See *Moore* (fn. 13), chapter 5. This *Davidsonian* thesis – that all human actions are bodily movements – requires a

go itself – is this an action by P, or merely an omission of P to continue clinging to the rope? And what about IDP's forced opening of P's hand in the fourth variation – is such loosening of P's grip an event or state of affairs, or merely the absence of the gripping that once existed but does no more?

In truth these are not difficult ontological questions. In each variation there are actual events/states of affairs/property tropes that are eligible to serve as causal intermediaries – things like fingers moving, grips released, pressures changed, and the like. The reason that these might seem insufficient is not because of some thought that the entities don't exist; rather, it is the thought that these are not the entities causing the fall and the death in cases like that supposed. Thus, though their existence is unproblematic, their causal relevance is in question. If one is in the grip of a particular kind of physicalist-singularist theory of the causal relation – namely, one that requires the transfer of physical energy – one might well think that the ontologically respectable entities that do exist in such cases nonetheless are not causally relevant (and thus cannot constitute the needed causal intermediary in double prevention cases). So, for example, the thought might be that it is gravity that causes V to fall to his death; and while things like physical pushes of V can cause V's death along with gravity, mere removals of items like ropes that are preventing gravity from doing its causal work add no energy to V's fall and thus do no causing of that fall or of the resulting death.

Such chain of reasoning is unshared by those hewing to other forms of singularist causal theories, including even other physicalist (let alone primitivist) singularist theories. In each of these cases of supposed interrupting double prevention there is a spatio-temporally contiguous chain of (pick your favorite causal relata) events/states of affairs/tropes. In case (4) above, when D cuts V's vein with a knife, blood flows out of that as a result, remaining blood cells carry only a low amount of oxygen as a result, and cellular death occurs as a result, there is a continuous chain of events (etc.) constituting the physical process by virtue of which V died. Similarly with the decapitation in case (5), the spring-action gun in (6), the enzyme synthesis in (7), the falling pillars in (8), and the letting go of a rope in the most recent hypothetical. In each case there is a spatio-temporally contiguous chain of events (etc.) constituting a physical process culminating in the ultimate harm suffered.

As was remarked on earlier, what this really shows is that so-called interrupting double prevention cases are not really double prevention cases at all. For one of the defining features of double preventions – that the causal intermediary between defendant's action and victim's harm be an absence – is lacking in all such cases when properly analyzed. The only reason that might tempt one to think otherwise stems from another intuition about causal relevance; one might intuit that what is still ineliminable in all such cases is some absence(s) because without such absence(s) the harm would not have occurred. It is the lack (absence) of oxygenated blood that kills V in (4) and (5), it is the lack of support by the sear that allows the gun to fire in (6), it is the lack of a repressor protein that allows the synthesis of enzymes in (7), and it is the lack of a supporting pillar that allows V to fall to his death in (8). So the worry is that no causal chain connecting defendant's action to these various harms can be complete without including these absences after all. Yet notice that this thought presupposes that such counterfactuals are necessarily involved in attributing causation. And singularist theories take some pains to deny that this is so. In overdetermination pre-emption cases, for example, for singularists there is plainly causation by the pre-empting factor even though equally plainly there is no counterfactual dependence of the harm on that factor.[56]

Suppose that D shoots an arrow on a windy day at V and the arrow strikes V. There is a straightforward causal process connecting what D did in aiming and releasing the arrow and the contact of the arrow on V's body, a process including intermediary events (etc.) such as flight of the arrow along the path it took. Surely that causal chain is complete without including the following information, accurate as such information might be: the cross winds that day were such that they would normally have prevented D's arrow from striking V, but the existence of a wall upwind of the shooting scene prevented the winds from disturbing the arrow's path. The fact that the wall is a double preventer of the striking of V with the arrow – the wall prevents the wind from preventing the hit – in no way renders the singular causal process connecting the hit to the release of the arrow incomplete, false, or in any way suspect. D caused the contact of the arrow on V even if it is also true that the absence of the wind and the presence of the wall were also necessary. It takes some non-singularist theory of causation – such as NESS – to think otherwise in such cases.[57]

4. Ingeborg Puppe and Instantiated Intervenors

Professor *Puppe*, like other generalists about causation, has had the option of making life easy for herself in the needed showing that there is causation in double prevention cases (4)–(8) above. For as was remarked on before, generalist theories analyze causation via relations admitting of action at a distance. Nomic sufficiency, counterfactual dependence, and probabilistic dependence all can hold between a defendant's preventative action, and the harm the prevention of which his action prevents, no matter how remote may be the two. But, as *Puppe* intuitively recognizes, such kinds of generalist theories result in the seemingly absurd causal conclusions in cases (1)–(3) above. So she eschews this action-at-a-distance route to salvaging causation in cases (4)–(8) in the

generous notion of bodily movement, as I detail in *Moore* (fn. 13), and *id.*, Mechanical Choices, The Responsibility of the Human Machine, 2020, chap. 3.

[56] See *Moore* (fn. 2), chap. 17.

[57] And even they might balk at reaching this conclusion, as I believe that *Puppe* would do. I believe that *Puppe* would say that the sufficient set of conditions described by the relevant causal law would not include the wall or the wind because ordinary causal explanations (in terms of course of some such causal laws) would make no mention of either.

hopes of a narrower route that yields such a salvaging while not yet committing her to a like causal conclusion about cases (1)–(3). She does this by making two moves.

The first of these moves is to join singularists in demanding that each link in a spatio-temporally contiguous causal chain be forged out of the relation claimed to constitute causation (minimally sufficient condition hood in *Puppe's* case). It is not enough, for example, to show that D's releasing of the rope supporting V was a necessary part of a minimally sufficient set of conditions for V's death; one also has to show that such releasing by D was a necessary part of such a set for V's falling, that such falling was a necessary part of such a minimally sufficient set for V's contact on the ground, that such contact on the ground was a necessary part of such a set minimally sufficient for V's death. So *Puppe* makes life difficult for herself in eschewing action at a distance and demanding that there be a chain of intermediate causes. Yet in making out these intermediate causal conclusions *Puppe's* kind of theory has the enormous advantage that it can make do with absences in finding such "filling" and thus in easily sustaining the causal conclusions in cases (4)–(8).

The second move *Puppe* makes is aimed to avoid necessarily having to reach affirmative causal conclusions in cases like those of (1)–(3). Here *Puppe* urges that only those potential preventers that are, at the time that the defendant does the action that prevents these preventers from doing their preventative work: *actual,* or *fully instantiated,* or *possible,* or *real. Puppe's* thought here is revealed by her examples. In one, V is drowning but a plank is floating nearby that could save V. D pushes the plank out of reach, and V drowns. As I read *Puppe,* it is not enough (to sustain the causal conclusion that D killed V) that the following counterfactual be true: "If the defendant had not pushed the plank away, eventually it would have been carried by the current to be within V's reach, V would have grabbed it, and V would not have drowned." Rather, the plank has to already be floating in the right direction toward V before its being pushed away by D can count as causation of V's death by D.[58]

Likewise, *Puppe* raises a hypothetical devised by *Erich Samson*[59] in which V, who is diseased in a remote jungle, can be saved by receipt of a certain serum; that serum has been produced and is ready for transport to V's location by plane; a plane is available and would have made it in time but a worker spills the serum while it is being loaded onto the plane, it thus never reaches V, and V dies.[60] *Puppe* urges that it is not enough (to conclude that the worker caused the death of V) "if somewhere in the world there are preconditions ensuring that the aggravation of the illness would be prevented". Rather, "all conditions for preventing the aggravation of the illness would have [to have] been instantiated at the point of loading the plane".[61] If the plane is not ready to go – because say it lacks working refrigeration equipment – then even if the serum would have gotten to V in time because the refrigeration would have been fixed, the worker's act of spilling would not have prevented an instantiated (real, actual) preventer of V's death and so would not be causal of that death.

This salience of the issue of instantiated versus uninstantiated sufficient conditions in the handling of double prevention cases by NESS theorists, finds resonance with a like salience of the issue in NESS theorists' handling of pre-emptive causation cases. As is well known, NESS theorists have some difficulty in resisting the conclusion that the pre-empted factor in pre-emptive cause cases is not as much of a cause as is the pre-empting factor; because after all, prima facie both are necessary parts of sets minimally sufficient for some harm to occur.[62] A standard move for NESS theorists to resist this undesired conclusion is to urge that pre-empting factors in pre-emptive cause cases are instantiated conditions whereas pre-empted factors are only uninstantiated conditions. Thus, when two fires are each sufficient to burn down V's house but the fires do not join and fire one makes it there first, burning down the house before fire two arrives, then even though fire two was part of a set of conditions abstractly sufficient to burn down the house, its set was not instantiated, viz, it was not at the house when it needed to be to have a house to burn.[63]

It is open to Professor *Puppe* to construe her instantiated requirement in such a way so as to resist any affirmative causal conclusions in cases of blocking double prevention such as cases (1)–(3) above. In (1), when the duck enters the intake for Newt's plane, Newt (the putative preventer of Billy's destruction of the city) has not yet confronted Billy; even if it's predictively certain that he would have intercepted Billy and that he would have shot Billy down had his plane not exploded, still, he is like the plank not yet floating towards the drowning victim who needs the plank in order to survive. Similarly, at the moment that Judge Tally does his preventative action (of sending the second telegram), the warning telegram is still in the hands of the telegraph operator and not out on delivery. Similarly, at the time it was raining in May in the forest, the thing those rains prevented – a fire in May which would have prevented the fire in June – didn't exist; the lightening that would cause such a fire hadn't

[58] *Puppe* (fn. 1 – Causation), citing an earlier article in German, *ead.*, in: Kindhäuser/Neumann/Paeffgen (eds.), Nomos Kommentar, Strafgesetzbuch, vol. 1, 5th ed. 2017, Vor § 13 para. 112.

[59] *Samson*, Hypothetische Kausalverlaufe im Strafrecht, Zugleich ein Beitrag zur Kausalität der Beihilfe, 1972, p. 95 et seq.

[60] *Puppe* (fn. 1 – Causation).

[61] *Puppe* (fn. 1 –Causation).

[62] I (perhaps somewhat too gleefully) pursue these difficulties in *Moore* (fn. 2), pp. 486–495.

[63] This use of the instantiated/uninstantiated distinction has more plausibility in cases of late pre-emption like that in the text; it has less success in dealing with cases of trumping pre-emption (e.g., troops march in response to major's order to march despite the simultaneous receipt of a like order from their serjeant whom, had he not given his order in the presence of a senior officer, would have been obeyed) because in such cases both sets of conditions seems fully instantiated. See *Moore* (fn. 2), pp. 486–495.

yet occurred and (as of the time of the rains) was only a future fact. In all such cases, thus, *Puppe* could conclude that the would-be preventers of the harm were not instantiated at the time their preventers went to work.

There is thus some potential similarity between *Puppe's* instantiated/uninstantiated distinction and *Skow's* interrupting/blocking distinction (and my closeness distinction, for that matter). How much depends on how *Puppe* would construe her distinction: if "instantiated" requires that a condition be beginning to prevent something so that "uninstantiated" described conditions that had not yet begun preventing that thing, then *Puppe's* distinction is the same as *Skow's*. I doubt, however, that Professor *Puppe* intends this vigorous a use of her distinction. In *Puppe's* plank case, for example, the vigorous interpretation would require that the plank had begun its preventative work – say, by the victim grabbing onto it – before it would be instantiated, and *Puppe* plainly doesn't mean that; she only requires that the plank be moving towards the victim. Likewise in her spilled serum case, the vigorous interpretation would require that the serum was in the body of the victim doing its disease preventative work; whereas *Puppe* only requires a working plane that will get the serum to where it can do such work, before she is willing to call the preventive serum instantiated (and thus the spillage as causal).

V. Conclusion

So which of these attempts to avoid both sets of absurd conclusions in double preventions cases is right? Any and all of them are to be preferred to the acceptance of either of the two extreme conclusions – either that all of what are thought of as double prevention cases are causal or that none of them is. All are equally vulnerable to the charge of indeterminacy. "Closeness" is a vague idea, when an action or other event starts its preventative work (so that it can be interrupted rather than blocked) is equally vague, and when conditions are real or instantiated, and not just future facts, shares a like indeterminacy. But indeterminacy is never a knock-down objection anyway; lots of perfectly serviceable concepts are vague.

Skow rightly notes that one could argue for one's preferred distinction on the basis of which best fits our pretheoretical causal intuitions about cases like (1)–(8). And this is surely right. Still, one would like also to argue the other way, that our causal intuitions about cases (1)–(8) are correct because they conform to an independently plausible causal metaphysics. But that broaches issues far beyond what we can do here today. Enough for the day to see the problem and to distinguish these proposals for dealing with it. Professor *Puppe* is to be commended, here as elsewhere in the literature on causation in the law, for her thoughtful contribution to the cutting edge of our collective understanding of these issues.

Kommentar von Prof. Dr. Ingeborg Puppe, Bonn

Was unsere kausaltheoretischen Überzeugungen betrifft, so könnten *Moore* und ich verschiedener nicht sein. *Moore* bezeichnet sich als gemäßigten Singularisten, ich bin ein „Nessi". Vor elf Jahren hatte ich die Ehre und das Vergnügen, eine Disputation zwischen *Moore* und *Wright* hier in Bonn zu moderieren. Die mussten eben nach Bonn kommen, um miteinander zu disputieren.

Die Singularisten machen als den Vorzug ihrer Kausalitätstheorie geltend, dass sie viel robuster ist, als die regularistischen Theorien, weil sie weniger Voraussetzungen macht. Die Singularisten halten den Generalisten entgegen, dass sie eine Kausalbeziehung nicht von einer analytischen Beziehung und einer bloß temporären Aufeinanderfolge von Veränderungen oder Zuständen unterscheiden können. Denn sie wüssten nicht anzugeben, was ein Kausalgesetz ist.[1] Aber die Singularisten haben das gleiche Problem. Sie lösen es, indem sie zwischen der Ursache und der Folge ein Verbindungsglied postulieren, das ebenfalls etwas Singuläres ist. Die Physikalisten nehmen dafür den Begriff der Energie oder der Energieübertragung in Anspruch und beschränken dadurch die Kausalität auf rein physikalische Prozesse.[2] *Moore* will sich, wenn ich richtig verstanden habe, auf keine Bestimmung dieses Zwischenglieds festlegen.[3] Deshalb kann er das Problem der Unterscheidung zwischen einem Kausalzusammenhang und einem Temporalzusammenhang auch nicht lösen.

Aber wie dem auch sei, wer ein solches Verbindungsglied als singuläres Phänomen fordert, kann die Abwesenheit von etwas, also beispielsweise auch die Abwesenheit einer menschlichen Handlung, nicht als eine Ursache anerkennen, weil eine Abwesenheit kein Phänomen erzeugen kann, das als Verbindungsglied zu einer Folge in Frage kommt. Trotzdem kann auch *Moore* nicht umhin, anzuerkennen, dass für Kausalverläufe die Abwesenheit von etwas eine Bedingung sein kann. Jedes Lebewesen mit einem Gehirn stirbt schließlich deshalb, weil nicht genug Sauerstoff zu den Gehirnzellen gelangt. Wenn Gehirnzellen nicht genug Sauerstoff erhalten, zerfallen sie. *Moore* akzeptiert also auch eine Beziehung zwischen der Abwesenheit von etwas und einer Folge als zurechnungsbegründend und demgemäß auch eine Unterlassung. Nur weigert er sich, diese Beziehung Kausalität zu nennen und will

[1] Näher dazu und zu den in Bezug genommenen Beispielen *Puppe*, RW 2011, 400 (420 ff.)

[2] *Kahlo*, Das Problem des Pflichtwidrigkeitszusammenhangs bei den unechten Unterlassungsdelikten, 1990, S. 282; *Haas*, Kausalität und Rechtsverletzung, 2002, S. 19 f.; *Merkel*, in: Paeffgen/Böse/Kindhäuser/Stübinger/Verrel/Zaczyk (Hrsg.), Strafrechtswissenschaft als Analyse und Konstruktion, Festschrift für Ingeborg Puppe zum 70. Geburtstag, 2011, S. 151 (165 ff.); *Gimbernat Ordeig*, in: Heferdehl (Hrsg.), Empirische und dogmatische Fundamente, kriminalpolitischer Impetus, 2005, S. 163 (175); *Perez-Barbera*, ZStW 114 (2002), 600 (607)

[3] *Moore*, Causation and Responsibility, An Essay in Law, Morals, and Metaphysics, 2009, S. 500 ff. Ebenso aus dem neueren philosophischen Schrifttum *Keil*, Handeln und Verursachen, 2000, S. 272 ff.; *ders.*, Making Causal Counterfactuals More Singular, and More Appropriate for Use in Law, 2013, S. 157; *Fumerton/Kress*, Causation and the Law, 2001, S. 83 (103); *Toepel*, in: Paeffgen/Böse/Kindhäuser/Stübinger/Verrel/Zaczyk (Fn. 2), S. 297: „Kausalketten erhalten dann vielmehr eine eigene Realität, nicht weniger als der Begriff der Ursache als Wirkkraft".

deshalb die Unterlassung milder bestrafen. Es gibt gute Gründe, eine Verursachung durch Unterlassung milder zu bestrafen als eine durch Tun. § 13 StGB sieht eine fakultative Strafmilderung vor. Ein Begehungstäter setzt seine Ressourcen für die Schädigung Anderer ein, ein Unterlassungstäter weigert sich lediglich, seine Ressourcen für die Rettung Anderer einzusetzen. Aber diese Frage sollte nicht auf der Ebene der Kausalität entschieden werden, sondern auf der des Rechts.

Das Problem der Hinderung rettender Kausalverläufe haben wir deshalb, weil wir nicht im Klaren darüber sind, wie wir bei der kausalen Erklärung mit störenden Bedingungen und mit deren Fehlen umgehen müssen. Wenn wir die Möglichkeit einer störenden Bedingung vernachlässigen, laufen wir Gefahr, eine falsche Kausalerklärung zu akzeptieren. Wenn wir aber die Negation aller denkbaren störenden Bedingungen in die Kausalerklärung aufnehmen, wird sie uferlos. Da wir aber ohnehin nicht alle Elemente einer hinreichenden Bedingung für eine Folge aufzählen können, sondern die meisten von ihnen, das sogenannte kausale Feld, einfach als gegeben voraussetzen, können wir die Regel aufstellen, dass wir in eine Kausalerklärung weder unvollständige störende Bedingungen aufnehmen, noch die Gründe, aus denen diese unvollständig geblieben sind. Das gilt jedenfalls für natürliche Kausalprozesse. Es bedeutet, dass es in natürlichen Kausalprozessen keine Hinderung rettender Kausalverläufe (double prevention) gibt. Wenn beispielsweise auf einen Ertrinkenden ein Brett zunächst zutreibt, das dann von einer Strömung im Fluss abgelenkt wird, so ist die Strömung im Fluss keine Ursache des Ertrinkens. Denn es steht von Anbeginn fest, dass das Brett den Ertrinkenden nicht erreichen konnte.[4]

Mit menschlichen Handlungen, die einen rettenden Kausalverlauf verhindern, müssen wir anders verfahren. Denn von menschlichen Handlungen nehmen wir, jedenfalls im Recht, nicht an, dass sie von vornherein determiniert sind. Mit einer menschlichen Handlung kommt etwas Neues in die Welt. Wenn also eine menschliche Handlung eine störende Bedingung für einen schädigenden Kausalverlauf ihrerseits stört, also unvollständig macht, so ändert sie den Zustand der Welt. Deshalb dürfen und müssen wir die Verhinderung eines rettenden Kausalverlaufs durch eine menschliche Handlung als Ursache des schädigenden Kausalverlaufs anerkennen.

Das gilt aber nur dann, wenn die störende Bedingung (der rettende Kausalverlauf) ohne die Handlung des Menschen vollständig gegeben war. Liegt also beispielsweise auf dem Weg des Brettes zum Ertrinkenden eine Strömung, die das Brett in eine andere Richtung getrieben hätte, so ist der Täter, der es zuvor schon in eine andere Richtung stößt, nicht kausal für den Tod des Ertrinkenden.

Um das nochmals an dem Beispiel von *Samson*[5] mit dem Kranken im Dschungel deutlich zu machen: Wenn das Serum ohne Kühlung während des Fluges zum Patienten verderben würde, weil die Kühlanlage kaputt ist und mit Bordmitteln nicht repariert werden kann, die Leute auf dem Flugplatz das aber nicht wissen und deshalb den Flug trotzdem vorbereiten, so ist der Arbeiter, der das Serum beim Beladen des Flugzeugs aus Versehen verschüttet, nicht kausal für den Tod des Patienten. Weil die Bedingungen für seine Rettung von vornherein nicht gegeben waren, hat das ganze Getue auf dem Flugplatz mit seinem Tod nichts zu tun.[6]

Wenn aber der Kausalverlauf, den der Täter verhindert, ein rettender war, so hat der Verhinderer den Schaden verursacht, und es gibt keinen Unterschied zwischen einer Blockierung und einer Unterbrechung eines rettenden Kausalverlaufs, weil jeder Kausalverlauf beliebig weit rückwärts verfolgbar ist. Ein Problem tritt aber auf, wenn der rettende Kausalverlauf ebenfalls eine menschliche Handlung enthält, die der Täter nun durch seine Handlung verhindert, denn menschliche Handlungen betrachten wir im Recht nicht als determiniert, sodass wir nicht entscheiden können, ob der verhinderte Kausalverlauf ein rettender war oder nicht. Aber das Recht kann hier Abhilfe schaffen, falls der verhinderte Retter zur Rettung verpflichtet war, indem es einen Satz anerkennt, den auch der BGH in solchen Fällen neuerdings anerkannt hat: Solange eine Person eine Rechtsnorm tatsächlich nicht verletzt hat, weil sie keine Gelegenheit dazu bekommen hat, kann das Recht von der Befolgung der Norm ausgehen.[7] Früher hat der BGH in solchen Fällen vom Tatgericht den Beweis verlangt, dass der verhinderte Retter seine Rettungspflicht erfüllt hätte, wenn nicht ein anderer, seinerseits pflichtwidrig handelnd, ihn daran gehindert oder ihm nicht Gelegenheit dazu gegeben hätte. In dem betreffenden Fall hatte der wachhabende Assistenzarzt pflichtwidrig den Oberarzt nicht vom kritischen Zustand einer Patientin benachrichtigt. Da sich aber der Oberarzt später selbst als pflichtvergessen erwiesen hat, verlangte der BGH für die Verurteilung des Assistenzarztes den Beweis, dass der Oberarzt sich pflichtgemäß der Patientin angenommen hätte, wenn der Assistenzarzt ihn von deren kritischem Zustand benachrichtigt hätte.[8] Da ein solcher Beweis prinzipiell unmöglich ist, musste der Assistenzarzt vom Vorwurf der fahrlässigen Tötung durch Unterlassen freigesprochen werden. Anders, wenn man den später vom BGH aufgestellten Satz anwendet, dass das Recht von der Befolgung seiner Normen ausgeht, solange ihre Nichtbefolgung nicht stattgefunden hat. Das ist auch gerecht, denn mag der Oberarzt noch so pflichtvergessen gewesen sein, er hat nicht deshalb in jener Nacht die Rettung der Patientin unterlassen, weil er pflichtvergessen war, sondern weil der Assistenzarzt ihn nicht alarmiert hatte.[9] War der Retter nicht verpflichtet, so lässt sich das Problem nur durch Anwendung von Wahrscheinlichkeitsgesetzen lösen.

[4] Näher *Puppe*, ZIS 2018, 484 (485)

[5] *Samson*, Hypothetische Kausalverläufe im Strafrecht, 1972, S. 95 f.

[6] *Puppe*, ZIS 2018, 484 (486); *dies*., ZStW 92 (1986), 863 (963 ff.); *dies.*, in: Kindhäuser/Neumann/Paeffgen (Hrsg.), Nomos Kommentar, Strafgesetzbuch, Bd. 1, 5. Aufl. 2017, Vor § 13 Rn. 112; *dies*., Strafrecht, Allgemeiner Teil im Spiegel der Rechtsprechung, 4. Aufl. 2019, § 2 Rn. 52 ff.

[7] BGHSt 48, 77 (94); *Puppe* (Fn. 5 – NK-StGB), Vor § 13 Rn. 113; *dies*. (Fn. 5 – AT), § 2 Rn. 33 ff.

[8] BGH NStZ 1986, 217, m. Bespr. *Kahlo* GA 1987, 66, und Bespr. *Puppe* (Fn. 5 – AT), § 2 Rn. 35 ff.

[9] Wer die für ihn geltende Norm tatsächlich verletzt hat, soll sich nicht damit entlasten können, dass ein anderer die für ihn geltende Norm möglicherweise verletzt hätte, wenn er die seine erfüllt hätte, *Puppe* (Fn. 5 – NK-StGB), Vor § 13 Rn. 113.