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I.

The object of this essay is to take issue *not* with what Michael Moore has to say about the nature of the criminal act, but with some of what he says about the relationship of that act to the other elements of a crime, most notably the requirement of proximate causation. Moore's conception of that relationship emerges with particular clarity in his discussion of what he calls "Some Critical Legal Silliness about the Act Requirement."¹ Indeed, he says the only reason for even bothering to dispose of that "silliness" is that doing so affords us a clearer view of the precise role the act requirement plays within the context of the entire offense.²

The silliness in question is Mark Kelman's point that the act requirement "is vacuous in the sense that the requirement can be manipulated to yield whichever result one wants."³ To understand both Kelman's point and Moore's criticism of it, consider the two cases which both Kelman and Moore use to state their positions: *People v. Decina*⁴ and *Martin v. State*.⁵ In each case the defendant tried to defend on the grounds that he had not committed a voluntary act, but only in the latter case did this defense persuade the court.⁶ *Decina* involved an epileptic who, while driving his car, had a seizure and ran over several young children.⁷ He was charged with manslaughter.⁸ He argued that since he did not commit a voluntary act when he ran the victims over, he could not be convicted.⁹ The court, however, focused on the fact that the defendant had committed a voluntary act when he stepped into his car, and rejected his argument.¹⁰ *Martin* involved an intoxicated

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¹ MICHAEL S. MOORE, ACT AND CRIME: THE PHILOSOPHY OF ACTION AND ITS IMPLICATIONS FOR CRIMINAL LAW 35-37 (1993).

² See *id.* at 37.

³ *Id.* at 35.

⁴ 138 N.E.2d 799 (N.Y. App. Div. 1956).

⁵ 17 So. 2d 427 (Ala. Crim. App. 1944).

⁶ See *id.* at 427.

⁷ See *Decina*, 138 N.E.2d at 801, 803.

⁸ See *id.* at 803.

⁹ See *id.*

¹⁰ See *id.* at 803-04.

man who, for reasons not revealed in the opinion, was arrested and taken out of his home, to which he reacted by firing off a fusillade of profanities.¹¹ Because of his "boisterous . . . conduct . . . and profane discourse," he was charged with the crime of being drunk in public.¹² He defended on the grounds that he did not voluntarily go out in public but had been taken there by the police; therefore, he claimed, the act requirement was not met.¹³ This time the court accepted the defense.¹⁴

Kelman argues that the courts' application of the act requirement in these cases is plainly capricious.¹⁵ In *Decina*, the court engaged in what he calls "broad time-framing": it looked beyond the mere moment at which the defendant actually ran someone over and took account of his conduct just prior to the accident, namely his stepping into the car to drive.¹⁶ Stepping into the car, the court reasoned, did not occur during an epileptic seizure and therefore met the voluntary act requirement.¹⁷ In *Martin*, the court merely looked at the moment at which the defendant was taken out of his home. Being forcibly taken out of his home was not a voluntary act, the court reasoned, and therefore Martin's conviction violated the voluntary act requirement.¹⁸ Nothing, says Kelman, would have prevented the court from focusing only on the moment of injury in *Decina* and finding that there was no voluntary act in that case, or from focusing on the defendant's decision to drink in *Martin* and finding that there was a voluntary act in that case after all.¹⁹

Moore says there really is no time-framing problem at all. Kelman just doesn't understand how the act requirement fits with the other elements of an offense.

If there were a 'time-framing' choice to be made in criminal cases, Kelman is right in his observation that there would be no principled way to make it. But where did Kelman get his assumption that there is such a choice to be made? Every competent teacher of elementary criminal law that I know teaches the act requirement

¹¹ See *Martin*, 17 So. 2d at 427.

¹² *Id.*

¹³ See *id.*

¹⁴ See *id.*

¹⁵ See MOORE, *supra* note 1, at 35 (citing Mark Kelman's article, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591, 600-05, 618-20, 637-40 (1981) and book, *A GUIDE TO CRITICAL LEGAL STUDIES* 92-93 (1987)).

¹⁶ *Id.* at 36.

¹⁷ See *Decina*, 138 N.E.2d at 803-04.

¹⁸ See *Martin*, 17 So. 2d at 427.

¹⁹ See MOORE, *supra* note 1, at 35-37.

in the following way: if, from the big bang that apparently began this show to the heat death of the universe that will end it, the court can find a voluntary act by the defendant, accompanied *at that time* by whatever culpable *mens rea* that is required, which act in fact and proximately causes some legally prohibited state of affairs, then the defendant is *prima facie* liable for that legal harm. There is no 'time-framing' choice here. If there is *any* point in time where the act and *mens rea* requirements are simultaneously satisfied, and from which the requisite causal relations exist to some legally prohibited state of affairs, then the defendant is *prima facie* liable. The presupposition of Kelman's entire analysis is simply (and obviously) false.

Consider *Decina* again. The New York court rightly decided that Decina's bodily movements at the time of the accident were not acts, and that Decina's movements beginning to drive were acts. The court did not, however, arbitrarily focus on the earlier time because it had arbitrarily chosen a broad time-frame in which to look for a voluntary act. Rather, the court looked at all possible times and found one where Decina not only acted (in beginning to drive) but did so recklessly (in light of prior seizures he was aware of the risk to others posed by his driving), which reckless act caused the victim's death.²⁰

As to the *Martin* case, Moore writes:

Kelman thinks that the . . . court could justify its decision (of no voluntary act by Martin) only by 'narrow time-framing'; for a broad time-framing would reveal earlier acts by Martin that were voluntary, namely, the taking of drinks. What Kelman overlooks is that those earlier acts by Martin were not the proximate cause of his being drunk in public. The police officers' intentional placing of Martin in a public place constitutes an intervening cause on anyone's reading of that notion, making Martin not a proximate cause of the legally prohibited state of affairs.²¹

The most crucial point in all of this, the one that propels the rest of the analysis forward, is Moore's assertion that in applying the act requirement the court is to do the following: find a moment sometime between the big bang and the heat death of the universe at which the defendant engaged in a voluntary act, did so with the right kind of *mens rea*, and thereby *proximately* caused the harm prohibited by the statute. Plausible though this picture is, I believe

²⁰ *Id.* at 35-36 (footnote omitted).

²¹ *Id.* at 36-37 (footnote omitted).

it is not correct. In particular, I shall argue that what is amiss with it is this: just because a defendant has committed an act with the requisite mens rea (which is neither justified nor excused), and that act is proximately connected with the harm the statute forbids him from bringing about, does not mean he is guilty under that statute. What's more, even in cases in which the defendant is guilty, we would be wrong to focus too heavily on the mens rea-accompanied act proximately causing the statutory harm, as we decide on the extent of the defendant's blameworthiness.

To put the matter slightly less abstractly, there are plenty of cases in which a defendant commits an act proximately (and intentionally) causing death, but is not liable for any kind of homicide. (Note: I am *not* assuming that any justification or excuse is available.) And in those cases in which he really is guilty of some kind of homicide, the mens rea accompanying the act proximately causing death is not the crucial determinant of the wickedness of the homicide.

In the next Section, I shall offer a series of such examples in which a defendant proximately causes harm by an act that is accompanied by the required kind of mens rea but is nonetheless not guilty of anything. Each of the examples is vulnerable to various challenges. But, rather than dealing with those challenges, I shall simply let the cumulative impact of the examples do its work and, in the Section following, offer a more general argument as to why examples like these are bound to exist in a criminal law system that is not out-and-out utilitarian. In the final Section I shall revisit cases like *Decina* and propose an alternative analysis to Moore's.

II.

What follows, then, are my examples of defendants who commit intentional acts proximately causing a forbidden state of affairs, for which they cannot be held liable.

(1) In their article *Ducking Harm*,²² two philosophers, Christopher Boorse and Roy Sorensen, offer a series of startling examples to illustrate the dramatically different treatment we accord deaths caused by (what they call) "ducking" and deaths caused by (what they call) "shielding." Their essay opens with a joke that captures the distinction especially memorably:

²² Christopher Boorse & Roy A. Sorensen, *Ducking Harm*, 85 J. PHIL. 115 (1988).

[T]wo campers, Alex and Bruce, meet a ravenous bear. As Alex grabs his running shoes, Bruce points out that no one can outrun a bear. "I don't have to outrun him," Alex replies. "I only have to outrun you." Few . . . will criticize Alex for running away full tilt, or even for using his new Sauconys. But suppose Alex instead ties Bruce's ankles, or knocks Bruce unconscious and throws him to the bear. Alex is now blameworthy in ethics and in law. The result is the same in both cases: Bruce's death. Further, Alex may know the result to be the same if he knows he can outrun Bruce. Nonetheless most people sharply distinguish the two acts.²³

The joke is followed with a potpourri of further illustrations:

- (a1) Angela, at the end of a movie ticket line, sees X about to shoot a .22 automatic at her. Angela knows that a .22 bullet will kill one person but not two. Angela leaps aside; the bullet kills Brenda, who is next in line.
- (a2) Same as (a1), but Angela grabs Brenda and moves her in front as a shield; the bullet kills Brenda.
-
- (c1) Alison is one of 25 U.S. government officials on an airplane, each with a briefcase bearing an official seal. Terrorist hijackers announce they will kill one American per hour until their demands are met. Surreptitiously Alison covers her seal with a Libya Air sticker. The terrorists pass her briefcase and shoot Beatrice, the next American.
- (c2) Same as (c1), but Alison has no Libyan sticker. Instead she switches briefcases with Babette, a French novelist, while she is in the bathroom. The terrorists shoot Babette.²⁴

On a recent program on my local public television station, a detective actually converted these examples into practical advice on how to keep yourself from becoming a crime victim. (While I doubt he had read the original Boorse-Sorensen article, he did tell the bear joke by way of introducing his subject.) Make sure, the detective advised, that you are a "tough target." What is a tough target?

Here we've got two people. Now these two people have two apartments, and these apartments are right across the back porch from

²³ *Id.* at 115-16 (footnote omitted).

²⁴ *Id.* at 116.

each other. If you went up the back stairs, you will find that they have a common back porch. These two apartments are exactly the same. Except this woman, she went to the pet store and she bought a dog bowl. She bought a big dog bowl. She filled it with water, wrote the word "Killer" on it, and put it outside her door. Now when Mickey the Moke comes up the back stairs to do one of these apartments, which one is he not going to pick? See how easy it is? Not being selected is the most important thing that you can do. Tough targets are not selected.²⁵

I am not actually interested in this essay in exploring the intriguing distinction between ducking and shielding. Rather, I am interested in the ducking phenomenon all by itself. *What makes it interesting to me is that it seems to me a pretty unequivocal illustration of an act that proximately causes harm, but does not entail liability.*

Now you might object that the reason the ducker escapes liability in the foregoing examples is that she faced such a dire threat. But I don't think so. Our reaction to those examples would not change if the threat the defendant sought to escape were only a relatively minor one, and the damage she caused by ducking were death. Suppose, for instance, that Angela had been wearing a bullet proof vest and that the impact of the bullet would at worst have thrown her to the ground. She would still have been entitled to duck. Or, suppose that Alison had known she would only be manhandled by the terrorists (perhaps because one of them knows her), but that Beatrice would be killed. She too would still have been entitled to duck (which in this case, of course, means covering her suitcase with an Air Libya sticker).

(2) Similar to, but not identical with, the above cases is that depicted in Harry Mulisch's novel *The Assault*²⁶ (turned into an award-winning movie in the mid 1980s). In the waning days of the German occupation of Holland during World War II, the Dutch Resistance assassinates a Dutch police inspector who has been collaborating with the Gestapo. The inspector is shot in front of a house that is occupied by a sailor and his daughter, neither of whom have anything to do with the killing. The two understand that the Germans follow a simple principle of reprisal: Any Dutch civilian within suitable physical proximity of the killing will be punished.

²⁵ *Street Smarts: How to Avoid Being a Victim* (PBS television broadcast, Mar. 1, 1992).

²⁶ HARRY MULISCH, *THE ASSAULT* (Claire N. White trans., Pantheon Books 1985) (1982).

This will mean, at a minimum, torching their house (which would cost the old sailor a reptile collection he treasures dearly), a fair amount of manhandling, and, quite possibly, outright execution. The two decide to avert this potential calamity by shifting the corpse to the doorstep of one of their neighbors—who are subsequently killed by the Germans.

To remove distracting and irrelevant complications of international law or the law of war from this example, replace the Germans with a band of terrorists and keep every other fact the same. Now it is clear, I think, that the old sailor and his daughter have knowingly and proximately caused great harm to their neighbors, but nevertheless (without even getting into issues of duress or necessity) cannot be held guilty of homicide, given the way in which they did so.

(3) Ethelbert sees someone drowning in the middle of the lake. He jumps in to rescue him, takes hold of him, and starts for the shore. He then discovers that the victim is someone he has long regarded as his mortal enemy. Before reaching shore, he sloughs him off, as it were, and swims back by himself. His act of sloughing off the victim proximately caused his death. All the same, I do not believe he would be liable for any kind of homicide.

(4) Here is a story told about the 19th century financier Daniel Drew:

[N]othing brought more glee to the Old Bear's craggy features, or made his gray eyes glint more merrily, than the knowledge that he was unloading [stock] on a dupe. Henry Clews tells how once on Wall Street, after being severely squeezed in the market, Drew was made the butt of much jesting, especially by a group of young operators who literally laughed in his face. One evening he appeared at a club that the young men frequented, where he seemed to be looking for someone whom he failed to find. Intensely preoccupied, time and again he drew forth from his pocket a big white handkerchief to wipe his brow. Just before he left, one last flurry of the handkerchief tossed out a small piece of paper that, apparently unseen by him, fluttered to the floor, where one of the young men covered it at once with his foot. After Drew had left, they examined it and found an order to his broker to buy all the Oshkosh stock he could get. The young men were electrified: here was advance warning of a big rise in Oshkosh! Immediately they formed a pool and bought 30,000 shares the next day, following which the stock plummeted, giving them a

fearful loss. Of course the slip of paper had been planted and the stock had come from Drew.²⁷

Drew intentionally and proximately caused the other speculators to form a false belief, to buy stock on the basis of that belief, and to suffer a loss as a result. Yet he is not guilty of fraud or anything else of the kind.

(5) When Lincoln was first running for Congress, his opponent suggested that Lincoln was not a truly religious man, that he was something of a free-thinker if not an actual atheist.²⁸ Lincoln's first biographer, his long-time law partner, William Herndon, leaves little doubt that all this was essentially correct.²⁹ How did Lincoln cope with these damaging charges? He published a statement in a newspaper that satisfied most people that the charges were unfounded.³⁰ So had Lincoln lied? Not quite. For in the statement, as later critics noted, he only said that he had "never denied the truth of the Scriptures."³¹ Alas, notes Edmund Wilson, "he does not say that he affirms this truth."³² Lincoln wrote that: "I have never spoken with intentional disrespect of religion in general, or of any denomination of Christians in particular,"³³ which, as Wilson notes, does not say that he is actually Christian.³⁴ Lincoln wrote that he would not support any man for office "whom I know to be an open enemy of, and scoffer at, religion" because no man "has the right to insult the feelings, and injure the morals, of the community in which he may live."³⁵ This explanation again falls short of actually refuting the charges of his opponents. Nevertheless, it was clearly so taken by the public.

Lincoln had intentionally and proximately caused the public to form a false impression of his religious beliefs. Had he done so by lying, he would have done wrong. By doing it this way, he was all right.

²⁷ CLIFFORD BROWDER, *THE MONEY GAME IN OLD NEW YORK: DANIEL DREW AND HIS TIMES* 117 (1986).

²⁸ See EDMUND WILSON, *PATRIOTIC CORE: STUDIES IN THE LITERATURE OF THE AMERICAN CIVIL WAR* 101 (1962).

²⁹ See *id.* at 99, 101-02.

³⁰ See *id.* at 101.

³¹ *Id.* (quoting William Herndon).

³² *Id.*

³³ *Id.* (quoting William Herndon).

³⁴ See *id.*

³⁵ *Id.* at 101-02 (quoting William Herndon).

(6) Veronica is a fiercely competitive, highly successful piano virtuoso. She is on the verge of conceiving a child, but like the father of Johann Strauss, she is possessed of a pathological fear that her child might prove to be more successful in its chosen field than she. To make sure this does not happen, she swallows, prior to conception, a drug that is known to affect a woman's genes in a particular way: it alters them such that any child this woman should later conceive would be missing an index-finger. In due course, she conceives and gives birth to a child without an index-finger. *That injury, I would say, she has proximately caused, yet she would not be guilty of anything for causing it.*

What about the objection that what she has done is no different than cutting off her child's finger after it has been born or injuring the fetus while it is still in the womb, acts for which we would, in fact, hold her liable? Well, suppose that prior to taking the drug, she says to herself that she will not actually go ahead and conceive unless a lawyer and a moral philosopher tell her it's all right to go ahead and do so. It then becomes hard to see that she is doing anything wrong when she ingests the drug. After all, ingesting the drug if she will not conceive is unobjectionable. And ingesting the drug if she will only conceive if it is the moral thing to do is also unobjectionable. So, when she subsequently consults the lawyer and the moral philosopher, what should they tell her? How can they not tell her to go ahead and conceive? Surely, that is the advice they would give to any would-be mother who thinks about conceiving but hesitates because of such a comparatively minor genetic defect as a missing index-finger. Why would they give any different advice to someone who through her own fault ended up in this position?

This too, then, I consider a strong example of an act (the ingestion of the drug) proximately causing harm but not constituting a crime.

(7) Septimus is a surgeon who has been curious about what it would be like to operate on someone while he, Septimus, is in a slight state of intoxication. Realizing that to do so would be criminally reckless, he never actually goes through with the experiment. Instead, he makes painfully sure to be quite free of alcohol when he is actually on duty. But when he is off duty, he maintains a constant state of slight intoxication. His reason for doing so is somewhat devious. He hopes that some day an emergency will arise in which he is the only person with surgical skills far and wide, and despite his intoxication, his help will be eagerly sought. This does indeed happen. In the course of operating, Septimus's hands shake quite violently and the patient

suffers a good deal of damage which he would not have had Septimus been sober.

I would say about this case: *Septimus's policy of maintaining a constant state of light intoxication so he could find out what it would be like to operate drunk constitutes an act (or many acts, if you prefer) that proximately caused the patient's injuries, but that nevertheless Septimus is beyond reproach, at least legal reproach.*

(8) Obediah hates his neighbor's dog, who has on several occasions strayed onto his land and made off with some of his son's toys. This offense, let us suppose, is not enough to entitle Obediah to shoot the dog. What Obediah does instead is to approach the dog and remove the toy in a sudden, startling, and aggressive manner. This leads the dog to yap at his trousers, which in and of itself does not entitle Obediah to shoot him yet. Nevertheless, he deals with the attack on his trousers in a way likely to provoke the dog even further, tearing them away suddenly and in a manner most likely to arouse the animal. This sort of escalation game he carefully carries on until he has driven the dog to the point of actually making a dangerous assault on him. Whereupon, he kills the dog in self-defense. Obediah's actions have proximately caused the dog's death, and yet are perfectly legal, even though killing the dog outright would not have been. What he has done does not disturb the proximity relationship between his actions and the outcome but does render it legal.

(9) An heiress hears rumors that there is a gang of terrorists out there planning to kidnap the children of prominent families and to humiliate the parents by forcing the children to perform criminal acts at gunpoint. Imagine that the heiress actually finds the idea of participating in, say, a bank heist alluring, though she would never of course do so on her own. In fact, she comes to daydream about the possibility of being kidnapped by this gang, all of which she confesses in great detail to her diary. She grows so enchanted by the idea that she deliberately dissolves her private army of bodyguards hoping to make the gang's job easier. In due course, she is kidnapped and forced at gunpoint to carry out a bank robbery. When she is charged with bank robbery, she defends on the grounds of necessity, saying that if she had not done what she was asked to do she would have been killed. She would, I think, be acquitted despite those telltale diary entries. Yet, by her action of dispatching

the bodyguards, she would have intentionally and proximately caused the bank robbery.³⁶

(10) Matilda's tyrannical husband has a weak heart, and she is silently hoping for his death. A doctor suggests to her that she learn CPR so that she will be able to cope with a possible emergency until an ambulance arrives. Realizing that if she knows CPR, she will be under a legal obligation to render help in case such an emergency should occur, she declines to learn it. She goes so far that whenever a certain public-interest message is broadcast on her television giving brief instruction in CPR, she turns it off. In due course, her husband has a heart attack and dies before the ambulance can reach him. It is quite clear that had his wife been able to apply CPR, he would have come away unscathed. I think we can say at least this about Matilda's refusal to learn CPR: her deliberate avoidance of opportunities to learn CPR constituted an act that proximately caused her husband's death. Yet I do not think that she can be held guilty of murder for avoiding to learn CPR.

(11) Alaric's neighbor has a loud, but harmless dog whom Alaric hates and would like to see dead. One day Alaric learns that the dog has somehow gotten lost in the neighborhood and is being searched for, so far to no avail. Alaric decides to go on a long walk around the neighborhood with a devious design: he hopes that the loud dog will startle him and cause him to reasonably mistake it for some other more aggressive, more dangerous beast, which he will then be entitled to kill in mistaken self-defense. And this is exactly what happens. Alaric has intentionally and proximately caused the dog's death. Yet I do not see that he would be liable in any way.

(12) Ulysses, a dedicated psychologist who believes in the value of introspection, wants to experiment with the effects of alcohol on himself. He has been a teetotaler for many years because he remembers that in his youth the consumption of even slight amounts of alcohol rendered him very short-tempered, aggressive, and violent, although by no means irrational or insane. Thus, before conducting his experiments, he goes to extraordinary lengths to make sure that the room to which he will confine himself while he is under the influence is inaccessible to any other human being.

³⁶ You might say that there is no proximate causation here because of the intervening actions of the kidnappers, but that need not be so. We could have them perform all the actions they needed to take before she dispatched her bodyguards. Thereafter, everything is set in motion, either because machines or ignorant intermediaries carry out the commands previously issued by the kidnappers.

But because of a fluke or because of the malicious intervention of some colleague, somehow or other a stranger ends up wandering into the room just after Ulysses has imbibed. Some incautious remarks of the unwelcome visitor so enrage Ulysses that he ends up punching him out badly.

Ulysses has intentionally and proximately injured the visitor. He has no excuse or justification for doing so. Yet he should not be found guilty of an assault. I view it as an imperfection of the current law that it would find him guilty.

III.

My claim is this: In any system of morality that is even slightly nonutilitarian, that is, which is even slightly deontological in character, there are many acts that proximately cause harm which are nonetheless beyond reproach. To show how and why this is so, I propose to take a look at Judith Jarvis Thomson's famous trolley problem.³⁷

The trolley in question is heading down an incline when Edward, its driver, discovers that the brakes aren't working. On the track ahead of him are five people; the banks are so steep that they will not be able to get off the track in time. The track has a spur leading off to the right, and Edward can turn the trolley onto it. Unfortunately, there is one person on the right-hand track. Edward can turn the trolley, killing the one; or he can refrain from turning the trolley,³⁸ which would mean the death of the five. What to do? Nearly everyone would say that it is all right to turn the trolley, and many would go further and say that it is downright *obligatory* to turn the trolley.³⁹ Everyone, it seems, is inclined to behave like a good utilitarian.

The real problem with the trolley problem arises when we juxtapose it with another case—the case of the utilitarian surgeon. The surgeon in question has five patients all of whom need transplants. One needs a heart, two need kidneys, and two need lungs. He considers killing off a healthy patient who has walked in for his annual checkup so as to redeploy his organs for the benefit

³⁷ See JUDITH J. THOMSON, *Killing, Letting Die, and the Trolley Problem*, in RIGHTS, RESTITUTION, AND RISK 78 (William Parent ed., 1986) [hereinafter THOMSON, *Letting Die*]; JUDITH J. THOMSON, *The Trolley Problem*, in RIGHTS, RESTITUTION, AND RISK, *supra*, at 94 [hereinafter THOMSON, *The Trolley Problem*].

³⁸ See THOMSON, *Letting Die*, *supra* note 37, at 80-81.

³⁹ See THOMSON, *The Trolley Problem*, *supra* note 37, at 94.

of the other five. Nearly everyone would agree that that cannot be done. However strong one's utilitarian instincts are, this case brings out the residual deontologist within him.⁴⁰

The challenge has been to explain what makes the trolley scenario different from the surgeon scenario and warrants a utilitarian response in the former and not the latter. But that is not something I mean to get into here. Rather, I want to put the problem to a different use. What I will show is that if you are enough of a deontologist to concede that the surgeon is not entitled to cut up his walk-in patient, you are then committed to a system of morality in which it is frequently acceptable to commit an act accompanied by the requisite *mens rea* which proximately causes death or other kinds of harm.

Consider my own twisted version of the trolley hypothetical. Imagine that Edward, the driver of the unstoppable trolley, cannot make up his mind about what to do, and ends up running over the five instead of the one. Miraculously, he does not kill them, but only hurts them badly. Nevertheless, they are certain to die from their injuries unless furnished with certain transplant organs: namely, two kidneys, two lungs, and one heart. Suppose now that the driver deeply regrets not having turned the trolley and announces:

It would have been all right had I turned the trolley and thereby killed the one for the sake of the five. I hesitated because I wanted to give the matter more thought. Upon reflection, I have decided it would indeed have been better to have killed the one to save the five, and I want to make up for my earlier omission. The victim really isn't entitled to protest: he is giving up nothing other than what I would have been entitled to take from him anyway.

Does this argument work? Of course not. There is no going back on the decision to run into the five instead of the one. The mere fact that by killing the one we would simply bring about a state of the world we were entitled to bring about minutes earlier does not entitle us to do so now.

What this twisted version of the trolley hypothetical, this superimposition of the surgeon scenario on that of the trolley hypothetical, serves to do is to highlight a feature of the deontological point of view that tends to go unnoticed—its inherent formalism,

⁴⁰ See THOMSON, *Letting Die*, *supra* note 37, at 80 (presenting a comparable hypothetical).

or as the economist would say, its *path-dependence*. The very same result brought about by one path is forbidden, but brought about by another is acceptable.

There may be some readers who will be more willing to accept this lesson if it is taught with the help of an example less artificial than the twisted version of the trolley problem. It is for those readers mostly that the next three paragraphs are intended.

Imagine a doctor-administrator who is constantly engaged in decisions of medical triage: whether somebody should be put on certain scarce life-support systems, whether somebody should be taken off, who should be put on next, that sort of thing. It will happen that the doctor has put someone on life-support who, after a few days have passed, only stands a modest chance of really benefitting from it by making an eventual recovery. In that time, other patients will have arrived at the hospital who stand a much better chance of benefitting from the very same system, but who will have to be denied access because a less promising patient is already utilizing the equipment. The doctor is sorely tempted to just unhook the unpromising patient because he knows that by doing so he can save several other lives, while only accelerating the death of one already doomed patient. But he can't. To do that, he realizes, would be tantamount to organ-harvesting. He feels bad about it, but realizes that there is nothing he can do.

Until, that is, inspiration strikes. He remembers that there are different life-support systems on the market. Some of these systems require little servicing or refilling. Others must be rotated out every few days, and replaced by other systems while being serviced. In fact, the equipment that requires frequent rotation is slightly better than the equipment that does not, but most hospitals find it too bothersome to use, so they don't.⁴¹ What occurs to the doctor is that if he buys equipment that regularly has to be disconnected and replaced and serviced, he gets a flexibility he didn't have before. Once a patient has been disconnected, and once the decision has to be made whether to hook him back up to the new machine or to use that machine for someone else who is more promising, it's a whole new ballgame. Surely we are entitled to ask before deciding whom to hook up to some life-support system who would most likely

⁴¹ It is, let us say, similar to the difference between extended- and daily-wear contact lenses. The latter may be better but are more of a bother.

benefit from it, and that way we can forget about the unpromising patient and devote all of our attention to the more promising one.

To put the matter differently, with this new equipment the doctor-administrator is in the position of the trolley driver rather than the organ-harvesting surgeon. Just as the trolley driver is entitled to turn his trolley in whatever direction will maximize the lives saved, or minimize the lives lost, so the doctor-administrator is surely entitled to wheel his life-support system in whatever direction maximizes the lives saved, that is, minimizes the lives lost. The only difference between the doctor-administrator and the trolley driver is that by turning the trolley in a certain direction the driver causes the death of the person in whose direction he turned the trolley and prevents the deaths of the persons away from whom he turned the trolley. In the case of the life-support system, it's the other way around: the administrator causes the death of the person away from who he turns the life-support system and he prevents the death of the person in whose direction he turns the life-support system. But that is not an important difference. Fundamentally, the hospital administrator is now like the trolley driver and has the flexibility of the trolley driver as opposed to that of the surgeon.

That deontological systems are highly formalistic is only one lesson of these "twisted trolley" variations. The more pertinent lesson for this essay is that it frequently is possible to restructure a transaction one has in view so as to achieve a seemingly forbidden end by other means. *The restructured version of the transaction will almost invariably involve the actor's committing an act that intentionally and proximately brings about the forbidden result. If nothing else, the very act of restructuring will fit that bill.*

IV.

How does the foregoing change the analysis in cases like *Martin* and *Decina*? To see this most clearly, consider the facts of a well-known corporate law case—or rather, my stylized version thereof—in which a board of directors was charged with having negligently approved a disadvantageous merger deal for their shareholders.⁴² Although the negligence in question was civil rather than criminal, that's conceptually irrelevant here. The facts were these: the company's CEO put before his board a merger proposal. The board, without much debate, scrutiny, or background information,

⁴² See *Smith v. Van Gorkom*, 488 A.2d 858 (Del. 1985).

hastily approved the deal and submitted it for a shareholder vote. Shortly thereafter, the directors began to have second thoughts, convened another meeting to reconsider the deal, and took various corrective measures to let the shareholders know that they should not approve the deal.⁴³ Ordinarily, these measures would have sufficed to prevent a bad deal from actually being approved by the shareholders. Due to some special, but by no means extraordinary, circumstances the shareholders ended up not fully understanding the undesirability of the merger and therefore approved it.⁴⁴ The question for the court was: Is the board blameworthy for the damage wrought by this merger? Under the Moorean approach we would have to say: Yes, of course. They committed an act of negligence when they approved the deal and that negligent act resulted in damages. The approach the court actually took was to take account of the board's corrective, even if futile, efforts.⁴⁵ Which is what I too would do.

We can easily adapt the facts of this case to *Decina*. Change Decina's disability from epilepsy to intoxication. Knowing that he is intoxicated, Decina starts to drive. While driving, he exerts himself stupendously to counteract the effects of his intoxication, and very nearly manages to overcome them completely, meaning that his driving is nearly indistinguishable from that of a sober driver. Nevertheless, he has an accident. Under the Moorean approach, we would say: Decina is guilty of manslaughter because he acted with criminal negligence in starting to drive while in a state of intoxication and that negligence proximately caused death. (Decina's efforts to drive carefully need not break the chain of proximate causation.) If, on the other hand, we take the approach of the court in the corporate law case, we would rate the defendant's blameworthiness much lower than that. But to be able to do that we would have to give up on the Moorean fixation on the moment in time at which the defendant committed an act accompanied by the right kind of mens rea and proximately resulting in a forbidden state of affairs.

⁴³ See *id.* at 864-70.

⁴⁴ See *id.* at 870.

⁴⁵ See *id.* at 874, 881-88. The court did, however, reverse the Court of Chancery's decision and hold the directors liable. See *id.* at 893.