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## Causation in (Criminal) Law

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Within the criminal law, causation doctrines govern the connection between D's behaviour and consequence elements, if any, of an offence. They articulate the paradigm route by which ascriptive responsibility for those occurrences can be attributed to D.<sup>1</sup> But causation is not specific to the law. It was an earthquake that in February 2011 caused numerous buildings to collapse and lives to be lost in the city of Christchurch. Indeed, in many ways this sort of causal relation might be regarded as a paradigm. Its mechanics can be studied scientifically in order to understand why the buildings collapsed, and perhaps to help determine what engineering modifications are necessary to stop such consequences from recurring.

For some writers,<sup>2</sup> this type of extra-legal causation, this cement of the universe,<sup>3</sup> is the only type of causation there is. But a mere glance at the textbooks discloses that legal practice is not so simple. The unwelcome nature of a criminal conviction, or an adverse tort judgment, naturally creates pressure to accommodate normative considerations within causation doctrine. If adverse legal consequences, whether punitive or compensatory, follow from ascriptions to D of causal responsibility, those consequences need to be justified. In turn, one might object, how can the kind of raw physical relationship that an earthquake has to a collapsed building justify, or even support, the imposition of a criminal conviction—unless that relationship itself contains normative ingredients (such as, perhaps, foreseeability)?

A striking example of this type of concern is the 2013 Supreme Court decision in *Hughes*.<sup>4</sup> H, who was driving safely, rounded a corner and was hit head-on by V's car, which was travelling on the wrong side of the road. H had no chance of avoiding the collision, in which V died. He was none the less charged with "causing death by driving" at a time when uninsured: a strict liability offence.<sup>5</sup> Straining to quash H's conviction, the Court held that, as matter of general—"common sense"<sup>6</sup>—doctrine, causation requires "at least some act or omission in the control of the car, which involves some element of fault ... and which contributes in some more than minimal way to the death."<sup>7</sup>

The efforts by the Supreme Court are understandable against the backdrop of a strict liability offence. Indeed, in many ways the decision was not revolutionary. The "moralisation" of causation in law was already mainstream. Most legal academics nowadays take the attribution of causation to involve a two-step inquiry. They begin with a non-normative, or "factual" test, which is generally interpreted as asking whether the alleged cause (C) stands in a "but-for" or *sine qua non* relationship to the alleged effect (E). From there, the results are refined by also requiring that the cause stands in a "proximate" causal relationship with the effect. This second stage is *normatively sensitive*, in that it is informed by morally salient considerations, including *novus actus* doctrines. Since both factual and

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<sup>1</sup> I use "ascriptive" responsibility to distinguish the kind of attribution involved from judgements of "moral" responsibility and/or blame. See further below, § 2.1.

<sup>2</sup> e.g. M.S. Moore, *Causation and Responsibility: An Essay in Law, Morals, and Metaphysics* (Oxford: Oxford University Press, 2009). (Hereafter Moore, *Causation and Responsibility*.)

<sup>3</sup> Mackie's brilliant phrase: J.L. Mackie, *The Cement of the Universe* (Oxford: Clarendon Press, 1980).

<sup>4</sup> [2013] UKSC 56; [2013] 1 W.L.R. 2461.

<sup>5</sup> Contrary to s. 3ZB of the Road Traffic Act 1988 (UK), which makes it an imprisonable crime if D "causes the death of another person by driving a motor vehicle on a road" should D, at the time of driving, be driving without a licence, or without insurance, or while disqualified. (The predicate wrongs are themselves matters of strict liability.) The statutory phrasing makes it clear that the predicate wrong need not be causally salient to V's death; contrast, for example, the offence in *Taylor* [2016] UKSC 5; [2016] 1 W.L.R. 500.

<sup>6</sup> *Hughes* [2013] UKSC 56 at [32] *et passim*. The Court's holding was presented as a "common sense" causal analysis rather than as a general principle of liability or a glossing of the terms of the statutory offence.

<sup>7</sup> *Hughes* [2013] UKSC 56 at [36] (emphasis added).

proximate causation must be established, the mainstream approach to legal causation inevitably generates norm-laden conclusions.

Unsurprisingly, many writers therefore see causation findings as little more than a legal conclusion, rather than a real-world input into criminal or tort liability. When lawyers assert that D's conduct "caused" a harm, they may be doing no more than articulating a judgement that, through his behaviour, D should be held legally answerable for the harm that eventuated. Yet that suggests a problem. If causation is a legal conclusion, what does it add to the case *for* legal liability? As Clarke worries, "if causation were not independent of legal or moral liability, it would be a mere tautology to say that someone should be held liable for an injury because they caused it."<sup>8</sup> At the very least, it seems that we could eliminate the language of "causation" from our legal liability criteria, in favour of direct reference to the underlying norms. In turn, that would clarify overlaps with other liability elements such as culpability and, potentially, facilitate the law's simplification. Indeed, "proximity" might itself disappear. Its dependence on reasonable foreseeability, in particular, brings it into overlap with negligence and duty criteria, to the point that it may have little or no independent role to play.

The task for this paper is to pick a way through the minefield: to essay an account of causation in the criminal law that points toward some natural-world property that it rests upon, and which shows how that property is capable of bearing the moral freight that causation doctrines are thought to carry. The account seeks, as it must, to reconcile the tension between pre- and post-legal notions of causation, finding a place for the law's normatively loaded causation doctrines. In so doing, it helps to explain what criminal and tortious causation *must* have in common, and where space exists for their causal doctrines to diverge.

The result, seen below, is not a unitary but a multi-part analysis, one that makes room for *novus actus* doctrines as well as omissions, and for variations across different fields of law. To summarise, this paper will set out three major threads of causation. It begins with *direct* causation. Direct causation is a paradigm form, involving consecutive sequences of events, each of which brings about the next. Resting upon truths about the natural world, it is invariant across normative systems and independent of culpability.

Other threads of causation are interwoven with this paradigm form. *Indirect* causation operates in contexts where multiple chains of direct causation intersect. It, too, involves truths about the world, as causation must: but here we are in the realm of the so-called *novus actus interveniens*, and we trespass upon the domain of norms. Not all interventions break causal chains, or disrupt causal attributions. (Indeed, as we shall see, "*novus actus interveniens*" is a misnomer.) Even if we cannot establish a simple, direct causal chain from cause to effect, establishing indirect causation may be possible. However, the conditions under which indirect causation may be attributed are informed by normative argument and they legitimately vary across crime and tort. Finally, the third form of causation concerns omissions and other non-interventions. As will be seen, these are causally significant, and distinctively so, essentially because of their failure to disrupt direct and indirect causal chains. And it is this feature that explains why an omission cannot by itself constitute a so-called *novus actus interveniens*.

The analysis offered here is immediately at odds with unitary, purely mechanical accounts. At the same time, its account of direct causation is also at odds with the approach in *Hughes*. Contra the Supreme Court, there is a natural, non-normative form of causation that is properly recognised in law—in crime and tort alike.

## 1. Direct causation: physical chain reactions, the cement of the universe

The core of direct, or "mechanical", causation should be, and ordinarily is, familiar and uncontroversial. Suppose that D pulls a trigger, firing a bullet that pierces V's heart, stopping it. D's pulling the trigger causes V's death because we can trace a sequence of physical (including chemical and biological) *reactions* from cause to effect. In tracing that sequence, we discern why the effect occurred even if, for other reasons, it might anyway have happened when it did. This is a central thread of causal ascriptions: it subsists in (continuing<sup>9</sup>) physical chain reactions, of the sort that a forensic scientist might track.

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<sup>8</sup> D.M. Clarke, "Causation and Liability in Tort Law" (2014) 5 Jurisprudence 217 at 218.

<sup>9</sup> Below, § 1.2.

Like the Supreme Court, those with a focus on normatively-loaded tests of causation can easily overlook the truth that legal causation has a core physical thread. A standard example is the well-known case of *Smith*,<sup>10</sup> in which V was stabbed by D with a bayonet. His lung was pierced, an injury that went unrecognised by those who attended to him. He was dropped twice on the way to the medical station. There the medical officer failed to diagnose the seriousness of the situation and gave the wrong treatment, which very likely increased the risk of death. Perhaps V would not have died but for the mistreatment. Be that as it may, D's conviction of murder was rightly affirmed. The original injury was still, as the Court said, an “operating” cause of V's death,<sup>11</sup> in that the stab wound and consequent haemorrhage were immediate medical factors explaining V's death, albeit alongside other contributions.<sup>12</sup>

The attribution of causation in this case is non-normative. It rests on a finding about the facts of the matter. If we inquire forensically into the immediate physical cause of V's death, ongoing loss of blood from the stab wound is part of the explanation.<sup>13</sup> That means, *without more*, that D's act of stabbing V was *a cause* of death. We can ignore questions about whether any other actor in the drama was a *novus actus interveniens*: other causes can only be concomitant ones. Moreover, that pre-legal conclusion holds independently of whether, from a legal perspective, we are contemplating a crime or a tort. D's act was a direct cause of death and that's that. Criminal lawyers can move on to mens rea issues.

Contrast another familiar stabbing case, *Jordan*.<sup>14</sup> There, the victim died eight days after being admitted to hospital. However, the original injury played no role in the medical explanation of his death. Indeed, by then it had substantially healed. Death was in fact caused by the “palpably wrong” treatment he received in hospital (injection of medicine to which the victim was known to be intolerant, causing a massive allergic reaction, and intravenous administration of too much liquid). Here the original injury made no operating contribution to the victim's death. Thus, unless Jordan could be said to have caused death *via* the doctor's intervention,<sup>15</sup> he committed no homicide.

Often, the physical reaction chains underpinning direct causation are helpfully reconstructed backwards. In *White*,<sup>16</sup> for example, W poisoned his mother's glass of milk. She drank the milk but, before the poison could take effect, died of an unrelated heart attack. W failed to kill his mother. If we ask, “of what did she die?”, the immediate answer is, a heart attack; and, in turn, whatever triggered the heart attack—which was not the poison. Certain hard cases for tort liability dissolve pretty quickly on this analysis, at least for the criminal law. Suppose that D and E, not acting in concert, each culpably shoots at V. There is no-one else in the vicinity. V is injured by a single gunshot wound, but it cannot be proved whether the bullet came from D or E: *Cook v Lewis*.<sup>17</sup> Who is liable for killing V? In the criminal law, neither—even if both D and E had fired with murderous intent. We know who physically caused V's death: the person who fired the bullet that killed him. Unfortunately, we lack sufficient proof that either D or E was that person. But that evidential flaw is only vital because causal responsibility for V's death rests here on a finding about the presence of a physical causal chain linking discharge of D's or E's gun to V's death. We cannot establish that either D or E is different from White.

### 1.1 The scalarity of mechanical causation

While the backward reconstruction from immediate causes of death helps to distinguish *Smith* from *Jordan*, in Smith's case it shows us that other interventions may have played a vital role too. Indeed, there is nothing in a finding of direct causation that requires Smith's own contribution to have been

<sup>10</sup> [1959] 2 Q.B. 35.

<sup>11</sup> *Smith* [1959] 2 Q.B. 35 at 42-43.

<sup>12</sup> cf. *People v Lewis* (1899) 57 P. 470 at 473: “Drop by drop the life current went out from both wounds, and at the very instant of death the gunshot wound [inflicted by D] was contributing to the event.”

<sup>13</sup> This is not to suggest that being explanatory is a criterion of causation. Causal *explanations* are typically selective, highlighting those causes that are more significant or unusual.

<sup>14</sup> (1956) 40 Cr. App. R. 152; G. Williams, “Causation in Homicide” [1957] Crim. L.R. 429.

<sup>15</sup> Not on these facts: but see further below, § 3.4.

<sup>16</sup> [1910] 2 K.B. 124.

<sup>17</sup> [1951] S.C.R. 830; [1952] 1 D.L.R. 1 (S.C.C.); below, § 2.

sufficient (or necessary<sup>18</sup>) by itself to cause death, or even that it was the primary cause of death. Mechanical causation requires none of these things. In principle, any individual link in the chain can involve concurrent causes.

Suppose that Smith's act was not the only, or even the primary, cause of death. The significance to be attached to that possibility is not itself a causal issue. Moreover, it depends also on whether we are in the realm of criminal law or tort. At least in the criminal law, it is sufficient to show that the defendant's behaviour makes *some* causal contribution. Hence, *both* Smith and the medical officer could in principle be guilty of homicide-related offences regarding V's death. Tort law, by contrast, might choose to apportion liability. Whether it should do so is primarily an issue concerning *liability* rather than causation. There may be no doubt about the proportionate contributions made by two causal agents to some harm. The difficulty lies in deciding what we should do about it.

Still, the possibility of multiple causes highlights a point made by Moore: that mechanical causation is scalar.<sup>19</sup> Suppose that D1 and D2 each stabs V. D1 inflicts a major wound, causing massive loss of blood; D2 inflicts a less serious wound, also causing bleeding. If V dies from the combined loss of blood, both D1 and D2 cause death. But their causal contributions need not be equal.

Indeed, depending on their respective intentions, D2 may be guilty of a more serious offence than D1. But what if D2's contribution was trivial? Suppose that Doctor F takes a blood sample from V, who is dying from the stab wounds. The additional loss of blood for the sample may further weaken the patient and hasten death by, say, sixty seconds. Since criminal-law doctrine holds that the contribution made by the doctor (or anyone else) must be more than insignificant or *de minimis*,<sup>20</sup> F's role in V's death would be regarded as causally insignificant.<sup>21</sup> For practical purposes, that may be a useful rule of thumb for the criminal law. But we should be careful not to deny that F's conduct is actually a cause of death. Imagine that F stands to inherit from T's will should T's heir—V—not attain the age of majority, and that V will attain majority at midnight tonight. If F takes the blood sample in order to accelerate death, would we be so complacent about the absence of an *actus reus* here? Application of the *de minimis* rule to this kind of case is itself normatively sensitive.<sup>22</sup> It operates as a boundary rule for the legal system rather than a refutation of mechanical causation.<sup>23</sup>

## 1.2 Petering out

Direct causation does not continue forever. Suppose that, when Grandma gives birth to my father, she sets in train a sequence of events within which, eventually, I kill V. We may accept that there is *some* sort of causal relationship between (C) Grandma's giving birth and (E) my killing V, but we should deny that C is a direct cause of E.<sup>24</sup> Similarly, in terms of legal doctrine, we should deny that C was an "operating" cause of E. (For reasons to be discussed in § 3, we should also deny that it is an indirect cause of E and, thus, deny that C causes E.)

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<sup>18</sup> Consider, for example, a cascading domino chain which temporarily splits into two symmetric branches before reuniting. At the point of reunification, neither domino is necessary to continue the chain but both cause the next domino to fall.

<sup>19</sup> Moore, *Causation and Responsibility*, 118.

<sup>20</sup> See, e.g., *Cato* [1976] 1 All E.R. 260 at 265-66.

<sup>21</sup> cf. *Adams* [1957] Crim. L.R. 365. The direction to the jury in that case is reproduced in A. Arlidge, "The Trial of Dr David Moor" [2000] Crim. L.R. 31 at 34-35.

<sup>22</sup> It may be possible to explain *Adams* without any reference to a *de minimis* rule: by conceding that the doctor's intervention is a direct cause of death and, death being only obliquely intended, invoking a justificatory claim of necessity. I cannot pursue that possibility here.

<sup>23</sup> Neither should we focus overly upon *acceleration* of death. (Or anything else: after all, if D blinds V or razes his house, we might say that D has merely brought forward the moment when V no longer has sight or the building no longer stands.) We return to this point in § 4.1.

<sup>24</sup> A caveat is in order. Both within and outside the law, we may recognise different kinds of causal relationship (cf. "occasioning" or "inducing" something). However, I take *causing* to be the central kind of causal relation, and the one that normally matters in criminal law, at least for principal offenders.

The “operating cause” requirement accommodates the fact that causal impact can dissipate over time. Because mechanical causes are scalar rather than binomial, they can *peter out*. Moore’s metaphor is a helpful one:<sup>25</sup>

“The metaphorical picture is of the ripples emanating from a stone dropped into a quiet pond: gradually they diminish to nothing the further the ripples travel from their source. This attribute of legal causation presupposes that the relation is scalar, because only a more-or-less sort of relation can gradually peter out.”

That is to say: Suppose that we can trace each individual step of a sequence linking C to E as involving localised physical reactions, in which C (perhaps in conjunction with other factors) causes C<sub>1</sub>; C<sub>1</sub> (...)<sup>26</sup>) causes C<sub>2</sub>; C<sub>2</sub> (...) causes C<sub>3</sub>; and so on, until C<sub>n</sub> causes E. The bare existence of such a sequence of localised causes does not establish that C is a cause of E. Direct causation requires also that the links be *continuing* across the entire chain.<sup>27</sup> And the chain as a whole fails to exhibit continuity when the effect of C’s intervention has petered out by the time it gets to E.

To give an example: imagine that I drop a ping-pong ball into a turbulent stream. Further down, the stream splits into left and right channels. I can choose which side of the stream to drop the ball; thus, initially, I can influence the location of the ball in the stream. Moreover, the location of the ball at any given moment will be causally affected by its location the moment before. But it may not be the case that I have any control over which channel the ball enters. Over time, my own causal input peters out: it becomes swamped by other, non-sequential causal inputs into the location of the ball. Left or right? For me, it is random.

This type of phenomenon pervades our world. Physicists helpfully describe it as a form of *deterministic chaos*. Even though it may be possible to control for the initial conditions of an event, over time the link weakens between those initial conditions and the ensuing states of affairs. That is why, for example, long-range weather forecasts are less reliable than short-range ones. Ultimately, across a sufficiently lengthy period, the non-linearity of the dynamical systems involved means that one cannot predict or model how an event will unfold. Moreover, the boundaries upon our model in such cases are fundamental ones, not mere limitations of measurement accuracy. It is not merely that my placement of the ping-pong ball plays an insufficient role. Rather, it is that the contribution is, in fact, *immeasurably* small. Continuity fails.<sup>28</sup>

One might be tempted to quibble about this. What about my act of putting the ping-pong ball in the stream, *simpliciter*? Why is not *initiation* of the sequence that ultimately played out, whatever sequence it was, sufficient to establish causation? Sometimes, it is: but not as an instance of direct causation. As we shall see, that is a problem for indirect causation.<sup>29</sup> If the mere initiation of causal sequences which eventuate in an effect were sufficient to establish causation, both the continuity requirement and scalarity itself would have to be abandoned. And that seems undesirable as well as implausible. Grandma’s giving birth to my father may have played an indispensable role in putting into motion a chain of events that culminates in my killing V. But the ping-pong-ball analogy applies here. There are simply too many intervening factors to allow the conclusion that her doing so caused my lethal conduct. Contrast the bayonetting in *Smith*, where we can reliably trace the chain of physical reactions leading to death in a manner that allows us to conclude (indeed, to conclude beyond reasonable doubt) that the injury inflicted by Smith was a cause of that death.

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<sup>25</sup> Moore, *Causation and Responsibility*, 121. Moore’s discussion is specific to legal causation, but the point holds for mechanical causation generally.

<sup>26</sup> i.e., “perhaps in conjunction with other factors”.

<sup>27</sup> Some writers insist that causation is inherently transitive, so that if C<sub>1</sub> causes C<sub>2</sub> and C<sub>2</sub> causes C<sub>3</sub>, it follows that C<sub>1</sub> causes C<sub>3</sub>. (See, e.g., D. Lewis, “Causation as Influence” (2000) 97 Journal of Philosophy 182 at 196: hence V’s being born causes her death.) By contrast, on the scalar account presented here, causal sequences are non-transitive.

<sup>28</sup> Thus one might loosely say that mechanical causation has its own (non-normative) “proximity” constraint. Criminal law implicitly gestures at this with its requirements that direct causes be operating and not *de minimis*.

<sup>29</sup> See in particular the discussion of Hart, below, § 3.

## 2. The moral rawness of direct causation

Notoriously, the difference in outcomes between *Smith* and *Jordan*, like the verdict in *White*, need not reflect anything laudable about the actors involved. To this extent, causation often seems to generate differences in criminal verdicts that appear morally arbitrary. Suppose that Bob and Charles shoot Arnold, with Charles firing a few seconds after Bob does. Bob's bullet inflicts severe injuries that would have caused death within minutes. Charles's bullet then passes through the heart, killing Arnold instantly. In both tort and criminal law, as well as extra-legally, Charles kills Arnold and Bob does not. From a moral perspective, they may be equally reprehensible characters. From the perspective of causation and ascriptive responsibility, however, Charles is the author of Arnold's death. The status of Charles is very different from that of Bob, for causal reasons that need have nothing to do with the merits of their behaviour.

Such distinctions may seem unattractive. Yet moral arbitrariness is a conceptual feature of mechanical causation. Since it is norm-independent, this variety of causation is invariant across criminal law, tort law, and other parts of the legal system. By that same token, however, mechanical causation is unconstrained by culpability or desert—notwithstanding the discomfort of the Supreme Court. When Brandon Lee died tragically during filming of *The Crow*, after an error in preparing the prop gun, it was actor Michael Massee who pulled the trigger. Massee's doing so was a cause of Lee's death despite his lack of fault. We can trace a continuing physical chain reaction between his behaviour and Lee's death, one that is not conditional upon fault. By contrast, the “common sense” principle espoused in *Hughes* would lead us to conclude that Massee did not do an act that caused Lee's death. That conclusion, and with it the Supreme Court's analysis, should be rejected.

Similarly, the egg-shell skull “problem” dissolves as a challenge to causation on the same grounds. Suppose that a doctor, treating a hospitalised patient (P) with recognised symptoms, follows standard medical practice by administering the recommended medicine for P condition. Unfortunately and unknowably, P suffers a severe allergic reaction to the medicine and dies.<sup>30</sup> Faultlessly, the doctor has killed him.<sup>31</sup> Direct causation tracks physical reaction sequences that impact upon the world *as it is*, including any pre-existing natural conditions or vulnerabilities in the victim. Thus it is often said that “you take your victim as you find him.”<sup>32</sup> In a sense, even that is not quite to the point: the maxim articulates the causal upshot rather than the explanation why causation lies in such cases. The underlying point is that mechanical causal paths are not about the merits. If D's act initiated a sequence of events that would not have occurred had the world been different, from the perspective of direct causation that is neither here nor there. It is neither fair nor unfair to conclude that the doctor caused P's death. It's just true.

### 2.1 Why does mechanical causation matter?

Mechanical causation is thus the primary vehicle for allocating moral luck. For that very reason, however, we may question whether it can bear normative weight. Why not abandon physical causation, at least within the law, and substitute culpability-sensitive criteria such as foreseeability? Given the unfortunate fact that offences are sometimes enacted without adequate fault elements, this would not be otiose in the context of criminal law. Doubtless it would lead to significant overlaps in offences that do require proof of culpability. Yet redundancy may seem a small price to pay, compared to having an official blaming system that places substantial weight on arbitrary criteria such as mechanical causation.

There is not much to be found in the criminal-law literature by way of explanation why mechanical causation is morally significant. What discussion there is tends to tie its significance to the

<sup>30</sup> cf. *Master* [2007] EWCA Crim 142, in which D inflicted a number of stab wounds upon V, aggravating an existing condition of deep-vein thrombosis. In turn, this triggered a pulmonary embolism, from which she died. D was rightly held to have caused V's death.

<sup>31</sup> It is precisely to safeguard against causal miscarriages such as this in strict liability offences that jurisdictions sometimes enact defences of “accident”: see, e.g., Indian Penal Code 1860, s. 80.

<sup>32</sup> H.L.A. Hart and A.M. Honoré, *Causation in the Law* (2nd ed., Oxford: Oxford University Press, 1985) 173, 343 (hereafter *Hart and Honoré*); cf. *Blaue* [1975] 3 All E.R. 446 at 450 (below, § 4.3).

thought that it is more *culpable* actually to cause some harm than to risk or attempt it.<sup>33</sup> Thus the argument over mechanical causation becomes one about moral luck.

Views on moral luck differ. It is certainly respectable to maintain that causation makes a difference to culpability. On this view, the scalarity of causation should directly affect sentencing, in as much as differences in one's degree of causal responsibility would imply differences in one's degree of culpability. That possibility seems plausible as well as important.<sup>34</sup> But what I want to suggest here is that there is a more fundamental, binomial, role for causation. Rather than culpability, the primary role of a finding of causation concerns ascriptive responsibility. It identifies D as an author of the relevant event. In turn, the primary legal role of causation is to *identify defendants* (and plaintiffs) and, where appropriate, to link defendants to plaintiffs, victims, and harms.

Causation performs this function throughout the law. “Who killed whom?” is a starting point in identifying the appropriate participants in a tort action: D and P are linked in part by the fact that D caused harm to P. Consider too the old common law action for money had and received. Suppose that D receives a payment that P made to her by mistake, having intended to send the money to E. D’s enrichment is undeserved, but doubtless there are others in the jurisdiction who recently made windfall gains. Why does the law pick out D? Again, because there is a causal link between P’s loss and D’s gain. Once more, it is causation that connects D to P.<sup>35</sup>

We may retort: what’s the point in that? Why does it matter (not least to him) that it was Michael Massee who fired the gun that killed Brandon Lee? Or in tort, even supposing that we can prove who fired the fatal bullet in *Cook v Lewis*,<sup>36</sup> why should we care? Why not distribute the loss equally, if we think the protagonists are equally unmeritorious? For money had and received, why not use a windfall tax or some other redistributive mechanism to compensate those who have suffered unjustified losses?

Like the debate about moral luck, these are important questions. *But identification of defendants is not, in the first instance, a matter of desert.* What is at work here is a non-normative ground of ascriptive responsibility.

Ascriptive responsibility is inherent in how we think about the world, in our understanding of ourselves (and other creatures) as individual agents. We are not simply a collective, let alone a moral collective; we engage with the world as distinct agents, each with a transactional history that is part of our self-definition. So it is meaningful, even pre-morally, to ask who killed Brandon Lee. Such a question acknowledges that we are separate actors. Norms concerning self-determination and autonomy may rest on that separateness; but the separation exists prior to the norms. And ascriptive responsibility is, to that extent, pre-moral. So, too, with money had and received. Attributing an enrichment to the defendant does not begin with the merits. The merits will come later. It is the transfer itself that first marks out plaintiff and defendant.

Mechanical causal paths are embedded in the sense we have of our own and others’ identities, as individual *agents* in the world. As agents, we are, in part, what we do and bring about: our identity is bound up with our own agency, with our sense of ourselves (and our perceptions of others) as creatures who act in and upon the world. The association between action and effect is thus a natural reflection of the understanding we have of our specific relationships qua distinct human agents with the world, in terms of events, consequences, and their authors. At its most primitive, causation tracks our authorship as agents of events. In so doing, it helps to mark the boundaries of our agency. When D moves his finger and V falls dead, establishing a physical reaction chain between these two events gives us an answer to that very basic question, *who did it?* It does not follow that D should be blamed for killing V, nor that others should be exonerated; but it does connect V’s death to D’s agency. D is not the same agent as E, and this is one of the ways of marking out that difference.

Notice that this is not a claim about the “separateness of persons”,<sup>37</sup> in so far as that concept is deployed in anti-utilitarian arguments. The point here is yet more basic: that mechanical causation is

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<sup>33</sup> e.g. Moore, *Causation and Responsibility*, ch. 2.

<sup>34</sup> For a revealing study of folk intuitions, see J.T. Johnson and J. Drobny, “Proximity biases in the attribution of civil liability” (1985) 48 *J Personality and Social Psychology* 283.

<sup>35</sup> See the discussion in A.P. Simester, “Correcting Unjust Enrichments” (2010) 30 *O.J.L.S.* 579 at 595-97.

<sup>36</sup> Above, § 1.

<sup>37</sup> Neither is it a claim about “free, deliberate and informed” interveners (below, § 3.4).

required to preserve even separateness of *agents*, including non-human ones. We cannot maintain separateness of agents without recognising physical reaction chains.<sup>38</sup>

Even so, further questions remain. It may be natural, but why should the law place normative weight on it? There is space only to gesture at the reasons here. Apart from the thought that recognising the separateness of agents is valuable per se, some of those reasons are pragmatic. It hardly seems practical to allow P to sue anyone who happens to have been enriched, *e.g.* by a windfall, at around the time of P's loss. Rule of law values are also relevant, since liability may become too unpredictable if anyone who makes a gain can be coerced into subsidising the undeserved losers, or if anyone who can prevent harm becomes therefore exposed to criminal conviction.

But perhaps the most important reasons are freedom-related. Failing to distinguish causers from mere non-preventers would tend to cast the net of omissions-based liability too wide, in both criminal and civil law. Without that distinction, the occurrence of a harm would have potential to involve *anyone* as a possible defendant. This is primarily a matter of freedom. The requirement of a causal connection between conduct and harm fosters individual liberty by tending to narrow the range of persons who may come under obligations to intervene whenever such a harm is in play. It is generally<sup>39</sup> undesirable that those with an opportunity to prevent some event should be put to the burden of having to do so unless their connection to that event is sufficiently close. Sometimes, an indirect, non-causal connection to harm ought to be sufficient for criminal or civil liability. Physical causation chains merely supply the *primary* way of being involved. But discussion of omissions and complicity theory is for another day. Criminalisation factors supply good reasons why such liability is ancillary rather than core.

### 3. Indirect causation: bridging across interventions and the *novus actus* problem

Let us grant that physical reaction chains exist, and that the criminal law can acknowledge a form of (direct) causation that rests on natural rather than normative properties. How far can that take us?

Some distance. We can say that C causes E whenever there is a continuing physical reaction chain from C to E. Moreover, doing so allows us to acknowledge a form of causation that is not amenable to being defeated by a *novus actus interveniens*. The criminal law captures this conclusion via the principle outlined earlier: that if D's act is an “operating”, direct cause of (say) V's death, other causes are at most concurrent ones—whether deliberate or accidental, whether foreseen or unforeseeable.<sup>40</sup> In such cases, it is irrelevant whether the outcome can be causally attributed to other agents too.<sup>41</sup> Moreover, when multiple causes are concurrently at work, there is no requirement that a defendant's conduct must have been the most important, by itself sufficient, or even necessary to cause the V's death.<sup>42</sup> It always suffices for causation that D's own conduct was a direct contributor to bringing about the death.

But can we go further? In particular, can we say that C causes E *only if* there is a continuing physical reaction chain from C to E? Let us call someone who holds that view a “physicalist”. Moore is a self-confessed physicalist. On his account, so-called *novus actus* cases are merely scenarios where direct causation is absent.<sup>43</sup> For Moore, direct causation is all the causation there is.

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<sup>38</sup> Similarly, Hart and Honoré worries (at lxxx-xi) that “respect for ourselves and others as distinct persons would be much weakened, if not dissolved, if we could not think of ourselves as the separate authors of the changes we make in the world.” Honoré's own thoughts along these lines are sympathetically developed by J. Gardner, “Obligations and Outcomes in the Law of Tort” in P. Cane and J. Gardner (eds.), *Relating to Responsibility* (Oxford: Hart Publishing, 2001) 111 at 133-34.

<sup>39</sup> Not invariably. Clearly, not all liberties ought to be promoted. The thought here trades on the systematic nature of law and its potential for invasiveness if uncaused events *generally* were treated as things for which D was answerable. For an elaborated argument along these lines, see A.P. Simester, “Why Omissions are Special” (1995) 1 Legal Theory 311 at 332-35.

<sup>40</sup> cf. A.P. Simester and G.R. Sullivan, *Criminal Law: Theory and Doctrine* (Oxford: Hart Publishing, 2000) § 4.2(ii)(c); *Hennigan* [1971] 3 All E.R. 133.

<sup>41</sup> *Haines* (1847) 2 Car. & K. 368; 175 E.R. 152; *People v Lewis* (1899) 57 P. 470; *Blaue* [1975] 3 All E.R. 446.

<sup>42</sup> *Warburton* [2006] EWCA Crim 627 at [21]-[23].

<sup>43</sup> Moore, *Causation and Responsibility*, ch. 12.

Moore's position is worth exploring partly because it is antithetical to *Hughes*. To test it, we need to think in more detail about the criminal law's major *novus actus* principles. First is the familiar "FDI" principle: that a "free, deliberate, and informed" intervention by another mature human being "breaks" the causal chain between D and the relevant outcome, whether or not that intervention is foreseeable. Suppose the following example.

*South-side*: Following an argument, D assaults V, leaving him unconscious and seriously injured in a dangerous area of the city. V will die of his wounds if left untreated. Before that occurs, however, T comes upon V, who is a member of a rival gang. T deliberately shoots V dead. The risk that this would occur was reasonably foreseeable and indeed foreseen by D.

In the criminal law, it is generally accepted that D does not kill V, even if V's death was made likely by D's actions.<sup>44</sup> In tort law, by contrast, D *would* typically be held liable for V's death.<sup>45</sup> Thus the FDI principle is normatively sensitive.

The second major *novus actus* principle in criminal law is the so-called "foreseeability" principle: that interventions (human or otherwise) can "break" the causal chain, even though they are not free, deliberate, and informed, if they are, as is sometimes said, "extraordinary".<sup>46</sup> Consider the New Zealand case of *Hart*,<sup>47</sup> in which H assaulted V, leaving her lying unconscious on a beach below the high-water mark. V subsequently drowned under the incoming tide. The Court of Appeal held that H had caused the death of the victim. It seems the conclusion would have been different had V been abandoned above the high-water mark, and drowned from a freak tidal wave.<sup>48</sup>

Physicalists like Moore hold that these two *novus actus* principles have no place as principles of causation. Their justification in any legal system could only be normative. While they might be relevant to the allocation of *legal* responsibility for an outcome, they can have nothing to say about *causal* responsibility for that outcome. In the case of the FDI principle, physicalists would hold this even if it turned out that *no* mechanical causal path can ever be traced through free, deliberate, and informed intermediaries.<sup>49</sup> Admittedly, were that generalisation true, causation could not be ascribed in such a case: but *that* conclusion would follow just from the fact that direct causation was absent, not because of any special rule about free, deliberate, and informed action. So there is no need for an independent FDI principle, except perhaps as a convenient proxy. Moreover, Moore might add, it is not clear why we should concede the generalisation. We have yet to see why T's free, deliberate and informed action can *never* be caused by D.

The "foreseeability" principle fares even worse: it would be dismissed out of hand by a physicalist, for whom causal explanations are concerned undilutedly with how the world actually works, not with whether we saw it coming. If, like Michael Massee, D's act generated a chain of physical reactions that caused V's death *unforeseeably*, that may be relevant to D's legal liability; but we should not corrupt our metaphysics by pretending that D did not actually cause V's death.

### 3.1 The incompleteness of mechanical causation

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<sup>44</sup> See, e.g., *Dalby* [1982] 1 All E.R. 916; *Hilton* (1838) 2 Lew. C.C. 214; 168 E.R. 1132; *Latif* [1996] 1 W.L.R. 104; *Tse Hung-Lit* [1986] A.C. 876; *People v Campbell* 124 Mich. App. 333; 335 N.W. 2d 27 (1983). Canadian law seems to have lost sight of this: *Maybin* 2012 S.C.C. 24; [2012] 2 S.C.R. 30.

<sup>45</sup> See, e.g., *Stansbie v Troman* [1948] 2 All E.R. 48: D was painting P's house. He went out for two hours, leaving the front door unlocked. A thief entered and stole various possessions. D was held liable for P's loss. cf. also *Hines v Garrett* 131 Va. 125; 108 S.E. 690 (1921); *Richardson v Ham* 44 Cal. 2d 772; 285 P. 2d 269 (1955); contrast *Watson v Kentucky & Indiana Bridge & Railroad Co* 126 S.W. 146 (Ky. 1910).

<sup>46</sup> *Environment Agency v Empress Car Co (Abertillery) Ltd* [1999] 2 A.C. 22 at 34-36: below, § 3.2. It is worth re-emphasising that this principle does not apply if direct causation can be established.

<sup>47</sup> [1986] 2 N.Z.L.R. 408; cf. *Hallett* [1969] S.A.S.R. 141.

<sup>48</sup> cf. R.M. Perkins, "The Law of Homicide" (1946) 36 J. Crim. L. & Crim. 391 at 393-94; *Green-Wheeler Shoe Co. v Chicago R.I. & P. Ry. Co.*, 130 Iowa 123; 106 N.W. 498 (1906).

<sup>49</sup> We consider the possibility of causing another to act below, § 3.4.

The clarity and structural simplicity of the physicalist view is attractive. Deceptively so, unless causation is very much rarer than almost anyone thinks. In *Hart*, it seems natural to ascribe causal responsibility for V's death to H. Yet we cannot trace a continuing physical reaction chain from H's punch to V's death. If we ask, "of what did V die?", the answer is: drowning. The incoming tide killed her, *and that was not something H brought about*.

This is not a case of direct causation. *Hart* cannot be analysed in terms of a single mechanical causal chain. Even if V would otherwise have died from the injuries inflicted by H, there is no continuing sequence of physical reactions linking H's punch to V's death. It need not follow that H should be acquitted of manslaughter. In order to sustain a conviction, however, the physicalist would have to create new doctrines of attribution-responsibility, such as "opportunity creation"<sup>50</sup> and "aiding and abetting nature".<sup>51</sup> But that response is too free-and-easy. It short-changes the causal picture here.

On the physicalist view, throwing someone in front of a train, or tying him to the track, does not cause his death: it merely creates the opportunity for the train, like the tide, to do so. Yet H's relationship to V's drowning seems rightly characterised as causal. Certainly, H's punch was part of the sequence of events that explains why V died.<sup>52</sup> That explanation itself rests upon mechanical causal chains—but upon a combination of two of them, not just the one. Forensically, we might say, H made the second causal chain relevant. He put V in harm's way. Rather than direct causation, therefore, this is a case of *indirect* causation. A finding of indirect causation addresses D's causal responsibility for consequences of physical reaction chains that D did not originate. It allows us to conclude that the defendant in *Hart* authored his victim's death as much as Michael Massee authored Brandon Lee's.

Indirect causation is dependent upon, and interwoven with, the same physical reaction chains that constitute direct causation. Both are predicated upon facts about the world and about how D's intervention affected its operation. Moreover, to the extent that findings of causation are normatively significant, the two forms have like implications. D's ascriptive responsibility for the result in neither case requires proof of a duty to prevent that result, nor proof of the distinctive mens rea requirements for complicity-based responsibility. Consider too the common-law duty, articulated in *Miller*, "to take measures that lie within one's power to counteract a danger that one has oneself created."<sup>53</sup> M, a vagrant, was sleeping in an unoccupied house. He fell asleep while smoking a cigarette, which then set fire to his mattress. Waking to find the mattress smouldering, M simply moved to the next room and went back to sleep. The house caught fire; M was charged with reckless arson. On appeal, the House of Lords held that M's omission to take remedial measures satisfied the actus reus requirement. His inadvertent starting of the fire crystallised a legal duty to prevent risks caused by his earlier, positive behaviour. *Miller* is a direct causation case, but it surely applies also to indirect causal sequences. Had Hart knocked his victim unconscious by accident, perhaps while doing cartwheels excitedly on the sand, the same remedial duty would, and should, have arisen for him too.<sup>54</sup>

Of course, the sequence of events in *Hart* does not involve an "unbroken" or continuing chain of reactions linking H's punch to V's death. But that's the point. Because of that, the issue for causation becomes: when can we *bridge between* the two mechanical causal chains operating in this case? This question has normative dimensions. The important point to notice here is that the bridging is chain-constructive rather than chain-destructive. Moore describes the law's doctrine of *novus actus* as a doctrine that "certain interventions break the chain that would otherwise have existed between D's act and some harm to another."<sup>55</sup> While that reflects a conventional way of thinking about *novus actus*, the truth of the matter is the other way around. Only direct causation is mechanically unbroken. If we are to acknowledge causal responsibility in cases such as *Hart*, we need indirect causation: not to cut down direct causation, but to augment it.

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<sup>50</sup> Moore, *Causation and Responsibility*, 144-49.

<sup>51</sup> Moore, *Causation and Responsibility*, 145.

<sup>52</sup> Notice: as so often, the traditional *sine qua non* test is unhelpful here. Perhaps, if H had not knocked V unconscious, V would have gone to sleep there anyway (in which case the time and place of death would have been unchanged).

<sup>53</sup> *Miller* [1983] 2 A.C. 161 at 176 (H.L.).

<sup>54</sup> The practical importance of the duty in *Miller* is that it generates a second opportunity to satisfy the concurrence requirement in criminal law, i.e. when D—with mens rea—omits to save V from a risk that D has—without mens rea—caused.

<sup>55</sup> Moore, *Causation and Responsibility*, 229.

That is to say: a *novus actus interveniens* does not “break” the causal chain that otherwise, hypothetically, would link C to E. Indeed, *there is no legal doctrine that severs direct causal chains*. As mentioned earlier, “operating” causes are always sufficient. *Novus actus* doctrines do not operate as causal trumps. Quite the opposite: in cases like *Hart*, the mechanical chain is already broken. *Novus actus* doctrines are secondary upon this physical fact. They operate to inform us when we can, and when we cannot, span the gap.

### 3.2 Extraordinariness and normativity

We can bridge it, according to standard doctrine, when the intervention of the tide was reasonably foreseeable—ordinary—and not “something extraordinary”.<sup>56</sup> One way of thinking about the underlying idea here is that the intervention is no mere coincidence. Indeed (assuming the outcome is unwelcome), it is a prospect that supplies a reason we might sensibly give when stating why D should not act as he does. Contrast *Bush v Commonwealth*,<sup>57</sup> in which D shot V, who was taken to hospital and operated upon. V subsequently died of scarlet fever caught from the operating surgeon. On these facts, D’s conviction was quashed for lack of causation. Rightly so. Catching scarlet fever was “the visitation of Providence” and not a consequence of D’s act.<sup>58</sup>

This test is normative. Too see this, consider the indeterminacy of “extraordinariness” itself.<sup>59</sup> A tide may be higher than “normal” without being extraordinary. Partly, the difference is probabilistic, a matter of degree. If, on average, an extreme high tide occurs just once every 20 years, doubtless that would be extraordinary. Once a week, though, would not be. Yet how improbable must the intervention be? The question demands argument rather than stipulation. Moreover, regularity is pertinent. Rather like the equinoctial spring tides, a once-a-year “exceptionally” high tide might not be abnormal if it always occurs on a particular day. All this suggests that the “extraordinariness” standard embedded in indirect causation is tied to reasonable or ordinary expectations. But to adjudicate those, we need to know *whose* (non-omniscient) expectations are to be counted. Suppose that D is a city-dweller who knows nothing about tides, but perpetrates his waterside assault in a fishing village where every inhabitant knows the annual-highest tide is due that evening. Or suppose that D’s community has not yet developed to the point where tide patterns are understood. Abnormality in this context is a socialized concept. And a standard of this sort cannot be non-normative.

Neither should it be. In this respect, *Hart* is an extreme example of the ping-pong ball. Indirect causation reflects the insight that, where a person’s conduct does not directly, mechanically, cause an event, it can still be apt to regard her as authoring it. Even as they peter out, the direct effects of our actions intersect with a multitude of other causal processes and, in some respects, the world may go differently. Yet the ascription of responsibility for those differences is not automatic. Suppose that Hart had assaulted V *above* the high-tide mark, and a stray dog later dragged V below it. In such a case, we may not be willing to bridge the mechanical causal gap between Hart’s conduct and V’s death, despite the fact that his conduct affected the evolution of events. The criteria of indirect causation articulate the extent to which such further effects are to be laid at a person’s door—the extent to which her contribution is not merely part of the “historical setting”. Understood in this way, it becomes easy to see how a test of extraordinariness promotes the values discussed in § 3.1. It limits our responsibility for the effects of causal processes that do not belong to us.

### 3.3 Intended (or foreseen) extraordinary interventions?

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<sup>56</sup> *Environment Agency v Empress Car Co (Abertillery) Ltd* [1999] 2 A.C. 22 at 34-36. Or such as could not “sensibly have been anticipated”: *Girdler* [2009] EWCA Crim 2666; [2010] R.T.R. 28 at [43].

<sup>57</sup> 78 Ky. 268 (1880).

<sup>58</sup> Neither, one might add, was there any evidence that D died from a combination of scarlet fever and the original injury, in which case direct causation would lie.

<sup>59</sup> See on this point *Hart and Honoré*, 165-68; Moore, *Causation and Responsibility*, 246-47.

Many writers draw a line, however, in the context of *contrived* coincidences.<sup>60</sup> Against Hart and Honoré,<sup>61</sup> Moore rejects the law's extensional doctrine that an extraordinary causal route involving natural events will normally fail to constitute a *novus actus* when the ultimate result was intended by the defendant.<sup>62</sup> For him, "it is metaphysics, not legal policy, that tells us when an action *causes* a certain harm."<sup>63</sup> Thomson's view is similar. Discussing a scenario in which A fells B beneath a tree, which then topples onto B and kills him, Thomson rejects the conclusion that "whether A's hitting B caused his death turns on what A had good reason to believe, or knew, and what his intention was in hitting B." If that conclusion were correct,<sup>64</sup>

"Given one epistemic state and intention, A's hitting B did not cause B's death; given a different epistemic state and intention, A's hitting B did cause B's death. But that *cannot* be right. A's epistemic state and his intention, do have a bearing on whether A's hitting B was to blame for B's death. But it cannot be thought that a difference in A's epistemic state and intention fixes that in the one case A's hitting B caused B's death whereas in the other case it did not—for whether A's hitting B caused B's death turns on what the world is like and not on what A does or doesn't believe or want it to be like."

That's certainly true for mechanical causation. But we can now see that, in the context of indirect causation, there is no categorical reason to reject the extensional doctrine, since it operates as an exception to a rule that is itself normative. Once you've swallowed the camel, there's no point in straining at gnats. To allow bridging on the basis of ordinariness (whatever that is), while rejecting it when a causal path was anticipated,<sup>65</sup> even sought, by the defendant would be arbitrary.

We need to be careful about what is entailed by this. The claim is not that "intended [or foreseen] consequences are never too remote."<sup>66</sup> To characterise the exception in that way would be wrong. It would be to elevate a subordinate exception—an exception which itself concerns supplementary, indirect causation—to the level of a primary rule. That is not what is at stake here. To see this, consider a case where D shoots at V on a mountainside, meaning to kill him. She misses, but the noise of her shot triggers an avalanche in which V is killed. D cannot escape causal responsibility for V's death by pointing to the unexpected route of the complete physical reaction chain that she herself initiated. Conversely, recalling *White*,<sup>67</sup> the intention to kill his mother by poisoning could not make W causally responsible for her death of an unrelated heart attack. Intentions are irrelevant to direct causation. But the bridging principles governing indirect causation are normatively sensitive, and intention and foresight can have a limited place there.

### 3.4 Intervening human beings

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<sup>60</sup> Rather than causation, "one who purposefully utilizes extraordinary natural events to produce harm to others should be liable on an 'aiding of nature' ground." Moore, *Causation and Responsibility*, 145.

<sup>61</sup> *Hart and Honoré*, 170-71.

<sup>62</sup> See, e.g., *Anon* ('The Harlot's Case'), Crompton's Justice 24; *Demirian* [1989] V.R. 97 at 113-14; *Royall v R* (1991) 172 C.L.R. 378 at 392, 400, 411, 452 (H.C.A.).

<sup>63</sup> Moore, *Causation and Responsibility*, 230.

<sup>64</sup> J.J. Thomson, "Some Reflections on Hart and Honoré, *Causation in the Law*" in M. Kramer *et al* (eds.), *The Legacy of H.L.A. Hart* (Oxford: Oxford University Press, 2008) 143 at 162.

<sup>65</sup> As *Hart and Honoré* notice (at 171), much the same logic applies to foreseen interventions: "If [D] binds his victim and leaves him on the pavement at a place where he has reason to suppose a heavy tree will fall half an hour later, the victim's death from the fall of the tree is no coincidence." D's foresight would presumably have to be such that, for him, the intervention is not extraordinary.

<sup>66</sup> cf. *Quinn v Leatham* [1901] A.C. 495 at 537 ('the intention to injure the plaintiff negatives all excuses and disposes of any question of remoteness of damage'); *Hart and Honoré*, 170-72; G. Williams, *Textbook of Criminal Law* (2nd ed., London: Steven & Sons, 1983) at 388-89.

<sup>67</sup> [1910] 2 K.B. 124; above, § 1.

Time to return to *South-side*. Famously, the common law of crime knows a rule, and tort law knows no rule,<sup>68</sup> that intervention by a free, deliberate, and informed third party (T) “breaks” the causal chain between D’s wrong and the harm that ensues.<sup>69</sup> If D negligently creates an opportunity for T to damage V’s property, D may have to pay for it.<sup>70</sup> But D is not himself a vandal.<sup>71</sup> And unlike tort verdicts, convictions are personal.

The *legal* correctness of the FDI rule was endorsed by the House of Lords in *Kennedy (No. 2)*:<sup>72</sup>

“The criminal law generally assumes the existence of free will. The law recognises certain exceptions, in the case of the young, those who for any reason are not fully responsible for their actions, and the vulnerable, and it acknowledges situations of duress and necessity, as also of deception and mistake. But, generally speaking, informed adults of sound mind are treated as autonomous beings able to make their own decisions how they will act, and none of the exceptions is relied on as possibly applicable in this case. Thus D is not to be treated as causing V to act in a certain way if V makes a voluntary and informed decision to act in that way rather than another.”

As a proposition of criminal law, the FDI rule is relatively uncontroversial, at least in common-law jurisdictions.<sup>73</sup> Yet it leaves a puzzle. What is the metaphysical basis, if any, for the rule that D’s causal contribution to an outcome may be superceded by the free, deliberate, and informed intervention of T?

Moore thinks none. Following Davidson,<sup>74</sup> he points out that reasons too can be causes. It may be tempting to think of free, deliberate, and informed action as somehow self-originated: to view “the individual’s will as the autonomous prime cause of his behaviour.”<sup>75</sup> Criminal lawyers tend to treat the will as “an uncaused causer”.<sup>76</sup> But deliberate choices are made for reasons, and wills themselves are formed (in part) because of those reasons. As such, for Moore, “there is no reason whatever to think that willings are uncaused”—even willings that correspond to free, deliberate, and informed choices:<sup>77</sup>

“Such functionally specified, physically realized events [as willings] are both causes and effects of earlier causes, like all other events. They cannot, on such an account, be literal fresh causal starts breaking causal chains wherever they intervene.”

Moore is surely right about all this. But what Moore doesn’t see is that this fails to solve the puzzle. The important question is not whether T’s intervention is caused, but whether T’s intervention is *caused by D*. Put differently, the primary question here is whether *South-side* is like *Hart*, in the sense that it is a candidate for indirect rather than direct causation.

Admittedly, T’s intervention in *South-side* is reactive; it responds to something D has done. In this sense, the case is not like *Hart*, where D’s intervention has no significant effect upon the arrival of

<sup>68</sup> At least generally: contrast *Watson v Kentucky & Indiana Bridge & Railroad Co* 126 S.W. 146 (Ky. 1910). D spilled gasoline throughout the town. A fire ensued when T dropped his cigar into the petrol. The Court held that, if T’s act was of starting the fire were deliberate, it would relieve D of liability for that fire.

<sup>69</sup> cf. *Hart and Honoré*, 136, 326; *Pagett* (1983) 76 Cr. App. R. 279 at 288-89; *Latif* [1996] 1 W.L.R. 104 at 115 (H.L.).

<sup>70</sup> See the cases cited above, n. 45.

<sup>71</sup> Not just (though also) because vandals cause damage advertently. For *Hart and Honoré*, liability is only “quasi causal”: 194ff.

<sup>72</sup> [2007] UKHL 38; [2008] 1 A.C. 269 at [14]; reversing [2005] EWCA Crim 685; [2005] 1 W.L.R. 2159. D prepared a heroin mixture for V in a syringe. V then injected himself with the heroin and subsequently died. The House quashed D’s conviction of manslaughter on the ground that D had not caused V’s death. The intervention by V was free, deliberate, and informed.

<sup>73</sup> Contrast Scotland: *MacAngus and Kane v HM Advocate* [2009] H.C.J.A.C. 8.

<sup>74</sup> D. Davidson, “Actions, Reasons, and Causes” in *Essays on Actions and Events* (Oxford: Oxford University Press, 1980) 3; Moore, *Causation and Responsibility*, 266-67.

<sup>75</sup> As Glanville Williams puts it: above n. 66 at 391. cf. *Hart and Honoré*, 42-43, 51-59, 186-204, 363-88.

<sup>76</sup> Moore, *Causation and Responsibility*, 272.

<sup>77</sup> Moore, *Causation and Responsibility*, 273.

the tide.<sup>78</sup> From the perspective of mechanical causation, however, autonomous actors are, in effect, like units of deterministic chaos. Especially where T has second-order capacities to moderate his own first-order reasoning, there are so many confluent influences, past and present, upon an autonomous actor's values and decision-making processes that mere opportunity-creation does not exercise sufficient control over T's decision to count as having caused it by means of a continuing physical reaction chain. D's contribution is like dropping the ping-pong ball into the turbulent stream. It represents an input into a causal mechanism that is so profoundly complex that T exercises no control over the outcome save by creating the initial opportunity for T to intervene; what happened next was not up (or down) to D.

This is not always the case. For one thing, not all intervening agency is autonomous—think of Pavlov's dog. It is even possible to condition the responses of moral agents, something parents frequently aim at. Indeed, by the time we reach maturity, most human beings have acquired value-sets that were more or less unchosen, or at least unchosen by them *qua* autonomous moral agents. On the other hand, having unchosen values implies neither simplicity nor a lack of autonomy. No person is *perfectly* autonomous; it is enough for moral agency that they are *sufficiently* so. The matter is one of degree. And that means we cannot always exclude causation of one agent's acts by another. For an agent with sufficiently reduced autonomy or deliberative capacity, especially one incapable of second-order deliberation, it becomes plausible that responses may be mechanically caused by particular inputs. The responses of Pavlov's dog might well be the product of direct causation rather than deterministically chaotic.

Scenarios involving moral agents tend to be less straightforward. Ordinarily, virtually all of the factors that underpin T's choice will lie outside the control of D. Yet even as agents become more complex, particular cases may still involve direct causation of responses, as when T's reaction is motivated by a powerful fear that D's threat inspires. This suggests that there is no *tout-court* metaphysical reason why causal ascriptions of another person's acts should be ruled out, or even confined to extreme cases.<sup>79</sup> A choice made by T out of fear may be made rationally yet caused by D's threat—because fear of that threat dominated T's motivation. This time, the ping-pong ball was joined to an engine that cut through the turbulent stream.

Still, conceding this point does not foreclose the issue. The conclusion that D's act supplied a reason why T intervened need not explain why T acted *in the manner that she did*. Suppose that D inflicts a minor wound upon V that requires medical attention. T, the doctor, sees that treatment is required but, owing to incompetence, responds with radically inappropriate treatment that leads to V's death: *Jordan*.<sup>80</sup> Here, we might conclude, the original injury was no more than the historical setting for T's mis-intervention, the causes of which swamped D's contribution: like the (unpropelled) ping-pong ball from § 1.

The test that accommodates this consideration is the same test that applies in *Hart*: whether T's intervention was extraordinary in character. Thus, in *Martin*,<sup>81</sup> D was said not to have caused death after he offered his child a sip of an alcoholic drink, whereupon the child unexpectedly seized and consumed the entire drink. As we suggested in § 3.1, the same would be true if, in *Hart*, D had left V above the high-tide mark and a stray dog had later dragged her down the beach. It holds also in tort: as where V is injured by D, but is killed when the ambulance taking him to hospital is hit by a runaway truck.

So, too, for our unpropelled ping-pong ball. Let us suppose that, unbeknown to me, an explosion will occur if the ball ultimately enters the right channel downstream. When I drop the ball in the stream, I put it in harm's way; I create the opportunity for the stream to carry it down the right channel. We have seen that I do not cause it to do so *mechanically*. None the less, indirect causation will lie unless it was an extraordinary occurrence for the stream to carry the ball down that channel.

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<sup>78</sup> Insignificant rather than non-existent, in that the gravitational pull exerted by the bodies of D and V upon the tide would be trivial.

<sup>79</sup> Such as those in which T's own second-order capacities are bypassed by D's threat: a possibility eloquently portrayed in George Orwell's *1984* (London: Secker & Warburg, 1949), where Winston's primal fear of rats effectively subordinated his rational faculties and caused him finally to betray his commitment to Julia.

<sup>80</sup> (1956) 40 Cr. App. R. 152; above, § 1.

<sup>81</sup> (1827) 3 C. & P. 211; 172 E.R. 390.

### 3.5 The FDI rule

Hold on a moment, you may say. Aren't even free, deliberate, and informed interveners sometimes predictable? If the intervention in *South-side* was reasonably foreseeable, surely it wouldn't count as extraordinary? Even if we cannot trace direct causation through the complexity of T's dispositions, can we not locate a form of indirect causation here?<sup>82</sup>

They are; it would not; we can. Indeed, there is no reason why the point at which a person becomes so complex that her responses are not mechanically caused by another must correspond to her being free, deliberate, and informed. Our understanding of the mechanisms that lead moral agents to act remains too limited for us to locate that point unequivocally. Moreover, whether D is sufficiently free, deliberate, and informed to invoke the FDI rule is itself a matter of degree.

Ultimately, the distinctiveness of the FDI rule is not specific to causation. The rule is normative rather than metaphysical. Underpinning the FDI rule is what I have elsewhere called the *principle of personal control* over criminal liability,<sup>83</sup> according to which no-one should have the power deliberately to render another person guilty of a crime. Our liability, like our culpability, flows from what we do (or omit to do). It does not, and should not, spring from the choices of others. Hence, by contrast with torts, the common law knows no general doctrine of vicarious criminal liability. This is, in part, because it is normally wrong to blame one person for another's conduct. But it is also for rule of law reasons. To attribute criminal liability in such cases is to give that other person the power to put D in contravention of the law, enabling her deliberately to make D guilty of a criminal offence. Outside the adjudicative process, it is undesirable that such a discretionary power should rest in the hands of individuals, whether private citizens or officials.<sup>84</sup>

To be sure, our liability is often *affected* by what others do. D may avoid liability for murder because her attempt to shoot V dead is frustrated by V's taking cover. The example shows that the principle of personal control is asymmetrical: people may intervene to prevent criminal liability from arising, but not to generate liability. Neither is it disputed that others may make unintentional contributions to D's liability.<sup>85</sup> The principle is opposed only to autonomous *deliberate* choices that inculpate D. As such, it finds expression in the FDI rule, which operates to trump a finding of indirect causation.

The principle of personal control can be seen in other contexts. One illustration is the New Zealand case of *Jackson v Attorney-General*,<sup>86</sup> in which the High Court held that a reason for not imposing strict liability in the (then) offence of possessing cannabis in a prison cell was that its imposition would tend to encourage inmates to take retribution against another inmate, by placing cannabis or other drugs in that other's cell. A more important example is the English case of *Porter v Honey*.<sup>87</sup> D, an estate agent, was convicted of displaying a For Sale board on a property at a time when a second board was also displayed. When D erected the board, his was the only one on display. E, a competing estate agent, later erected a second For Sale board on the property. In quashing D's conviction, the House of Lords recognised that:<sup>88</sup>

“The courts should surely be slow to impute to Parliament so harsh an intention as to impose criminal liability on a citizen acting lawfully because another citizen, over whom he has no control, acts unlawfully.”

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<sup>82</sup> Compare Moore's persuasive criticisms of Hart and Honoré on this point: *Causation and Responsibility*, 263ff.

<sup>83</sup> A.P. Simester, “The Mental Element in Complicity” (2006) 122 L.Q.R. 578 at 580-81. The argument here draws from that earlier discussion.

<sup>84</sup> cf. the police-generated offences in *Larsonneur* (1933) 24 Cr. App. R. 74 and *Winzar v Chief Constable of Kent* The Times, 28 March 1983.

<sup>85</sup> As in *Roberts* (1971) 56 Cr. App. R. 95, where V injured herself in fleeing D's attack.

<sup>86</sup> [2006] 2 N.Z.L.R. 534 at 542. Compare too *Re Wairarapa Election Petition* [1988] 2 N.Z.L.R. 74 at 117 ll. 36–38 (HC).

<sup>87</sup> [1988] 1 W.L.R. 1420.

<sup>88</sup> [1988] 1 W.L.R. 1420 at 1426. See also *Tilley* [2009] EWCA Crim 1426; [2010] 1 W.L.R. 605 at [37]–[39]; *Robinson-Pierre* [2013] EWCA Crim 2396; [2014] 1 W.L.R. 2638.

Just so. Obviously, it would be wrong to punish D for the actions of E. But that is not the only objection. The criminal conviction labels D specifically, modifying D's status in the community. As such, the prospect of its imposition should lie in D's hands. Principles of equality before the law demand that others do not have the power to change D's status, by making a criminal out of someone who has, himself, done no wrong. It is the personal nature of criminal convictions, in particular, that gives the principle of personal control its special poignancy. So the principle does not speak as powerfully in tort law.<sup>89</sup>

In the criminal law, the principle mandates that one who assists or encourages another person to commit a crime must be dealt with by the special rules of complicity liability, which represent the only general exception to the principle of personal control. Those rules differ from the normal liability requirements of the relevant substantive offence, which would otherwise be in play if causation were found. Complicity rules are required, and they are distinctive, precisely because they govern the circumstances in which control over D's liability lies in the untrammelled hands of a fellow citizen.

#### 4. Omissions and other non-interventions

Omissions, needless to say, are different. Causally speaking, they are a species of non-intervention,<sup>90</sup> marked out in part by their very failure to interfere in the world.<sup>91</sup> When Pittwood, the railway gatekeeper, went off for lunch without closing the gate,<sup>92</sup> our complaint is not that he initiated, or helped to initiate, a series of physical reactions that led to White's death. Our complaint is not that he changed the world. It is that he failed to change the world, and thereby allowed the accident to happen. We complain, in other words, not about the effects of something Pittwood did, but about what happened when he didn't.

In that sense, omissions are not the cement of anything: more like the absence of solvent.<sup>93</sup> We may conclude that the cart entered the crossing "because" Pittwood failed to close the gate, but Pittwood did not propel it forward. It was pulled by horses, independently driven. This is not to deny that the underlying behaviour constituting an omission can have mechanical causal effects. Suppose that Victor is drowning. Rather than throw him an old rope she is holding, Diana casts the rope upon the bonfire. Her behaviour caused the destruction of the rope. But not under the description, failing to toss it to Victor. The point here is that the same underlying behaviour can be described in multiple ways, so that it simultaneously constitutes both positive acts and omissions. By tossing the rope on the fire, Diana caused the destruction of the rope, but this fact does not establish that her failure to throw the rope to Victor caused anything at all.

##### 4.1 Counterfactual outcomes?

By their nature, then, non-interventions cannot form links in mechanical causal chains. When we ask, "of what did Victor die?", the answer "Diana's failure to throw him a rope" is not only incongruous but in an important sense wrong. Victor died by drowning. Diana's failure to save Victor is constituted by the *absence* of behaviour on her part that would have prevented what ensued—more specifically, that

<sup>89</sup> Though it is not without force, in the context of the duty of care: see, e.g., *Michael v Chief Constable of South Wales* [2015] UKSC 2; [2015] 1 AC 1732 at [97].

<sup>90</sup> See § 4.2 for a non-intervention example that is not predicated on omissions. We shall focus primarily on non-interventions by omission here.

<sup>91</sup> Contrary, one may add, to a duty or expectation. That restriction will be assumed rather than pursued here.

<sup>92</sup> *Pittwood* (1902) 19 T.L.R. 37. D, a gatekeeper on the Somerset and Dorset Railway, was hired to keep the gate shut during the daytime whenever a train was passing. He went off for lunch one afternoon, forgetting that the gate was open. A hay cart subsequently attempted to cross the line and was hit by a train. One passenger (White) was killed.

<sup>93</sup> Indeed, some writers deny that omissions *can* be causes: notably Moore: *Causation and Responsibility*, 444-51. In a legal context, cf. G. Fletcher, *Rethinking Criminal Law* (Little, Brown, 1978) at 371, 589ff (although contrast 601-602, in the context of parents who starve their child to death); F.H. Bohlen, "The Moral Duty to Aid Others as a Basis of Tort Liability" (1908) 56 U. Pennsylvania L.R. 217 at 220-21.

would have prevented the completion of the mechanical causal chain that in fact resulted in his death. Omissions do not initiate causal processes; they permit other causal processes to unfold.

The common law approaches such cases with a counterfactual test. It holds that D's omission causes an outcome if, but for that omission, the outcome would not have occurred. In the well-known case of *Dalloway*,<sup>94</sup> for example, D was driving a cart without holding the reins when a young child ran in front of the cart and was struck and killed. The Court ruled that D could be convicted of manslaughter only if it were proved that, had D been using the reins correctly, the child would not have died.

At first glance, this but-for test looks sensible. If the child would have died anyway, it seems safe to conclude that D's omission made no difference, and that causal responsibility does not lie. On closer investigation, though, things are not so simple. For one thing, the foregoing analysis of *Dalloway* is oversimplified. Sooner or later, the child *would* have died—if of nothing else, then of old age. Indeed, since we are all going to die at some point, a simplistic but-for test of that kind would never be met, for act or omission. And that cannot be right.

It may seem straightforward to accommodate that concern by tweaking the but-for test. We could merely require that, had D not acted or omitted as she did, the victim would not have died *at the time that he did*. That was more or less the analysis in *Morby*, in which D failed to seek medical treatment for his eight-year-old son, who died of confluent small-pox. His conviction was quashed for lack of proof that D's neglect had “caused death or accelerated it”<sup>95</sup> As Coleridge LJ put it, “to convict of manslaughter it must be shewn that the neglect had the effect of shortening life.”<sup>96</sup> However, there are problems with this kind of approach. For one thing, it risks being massively overinclusive. Any failure, perhaps even any delay, by D becomes homicidal on this test if it accelerates the time of death *at all*. Subject only to the *de minimis* constraint, if his son would have survived an hour longer in hospital, *Morby* committed manslaughter.<sup>97</sup> Yet it seemingly overstates things to describe him as having caused his child's death. And it would surely be unjust to convict him of manslaughter on that basis.<sup>98</sup>

Moreover, if we construe the proposed but-for test (whether the victim would have died when he did) strictly, the difficulties become even greater. This is because there is nothing in the test that restricts it to *shortening* the victim's life; it would also be satisfied if life were lengthened. Indeed, while an “acceleration” constraint might be defended as a pragmatic matter, at the level of principle it would be arbitrary. Imagine the following variation upon McLaughlin's famous example:<sup>99</sup>

*Desert Traveller*: D1 poisons V's water canister just before V embarks on a journey into the desert. The poison she uses would produce instant death. Not knowing this, D2 adds his own poison to V's canister. The later poison blends with the earlier to generate a more slow-acting potion. V dies, as both intended. Both D1 and D2 cause death, even though D2's contribution had the practical effect of extending V's life.

Of what did V die? The compound poison. And that's all we really need to know. Shortening or lengthening is irrelevant. Of course, our McLaughlin variant involves an act. But the same point applies to omissions. Imagine the following case:

*Camel*: D, neglecting her duties, omits to fill most of V's water bottles. By the time V realises this, he is a long way out in the desert. V turns around and tries to get back. Alas, V (and the

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<sup>94</sup> (1847) 2 Cox C.C. 273.

<sup>95</sup> *Morby* (1882) 8 Q.B.D. 571 at 575 (Stephens J). cf. *Bradley v State* 79 Fla. 651; 84 So. 677 (1920).

<sup>96</sup> *Morby* (1882) 8 Q.B.D. 571 at 574. Statutory tests often take a similar approach: cf. the Indian Penal Code 1860, s. 299 Explanation 1, which provides that “A person who causes bodily injury to another who is labouring under a disorder, disease or bodily infirmity, and thereby accelerates the death of that other, shall be deemed to have caused his death.”

<sup>97</sup> A proposition explicitly accepted by the trial judge: *Morby* (1882) 8 Q.B.D. 571 at 572-73.

<sup>98</sup> Tort liability might begin to part company here, in as much as it might place a value upon the extent by which the plaintiff's life would have been lengthened.

<sup>99</sup> J.A. McLaughlin, “Proximate Cause” (1925) 39 Harvard L.R. 149 at 155 n 25.

camel) dies of thirst two days later before reaching safety. Had D done as required, V would have continued on his trek and been killed in a sandstorm the following day.<sup>100</sup>

Of what did V die? Thirst. Why? Because D failed to fill his water bottles. The “acceleration” test is artificial for omissions too.

#### 4.2 Interdependence with direct and indirect causation

Even as it illustrates that point, however, the Camel case offers us a way forward. It points toward a more general truth about omissions and other non-interventions as a basis for ascriptive responsibility judgements. Their significance is counterfactual, to be sure, but *not* in virtue of a but-for relationship between omission and outcome. Their causal significance lies in the fact that in the continuing causal sequence,  $C \rightarrow C_1 \rightarrow C_2 \rightarrow \dots \rightarrow C_n \rightarrow E$ , that brought about the result, at least one of the internal links was completed only because of D’s omission. D’s omission, that is to say, is causally significant because it *did not break the causal chain that brought about the result*. If D had intervened between C1 and C2, say, C would not have been a cause of V’s death.

One payoff of thinking about matters in this more fine-grained way is that it becomes easier to resist overinclusion. Suppose that, in *Morby*, the father’s obtaining medical treatment would have prolonged life by one day. Yet the child would have died of the same small-pox that killed him without the treatment. In this scenario, the causal path from C to E would have been more circuitous had treatment intervened. But it would still have wended its way to E. We should conclude of such a case that the father’s omission was not a cause of death.

Rather than asking a simple but-for question about the outcome’s *occurrence*, therefore, our account of non-interventions as causes needs to be tied more closely to how the outcome came about. The causal significance of D’s not-qing lies in her failure to prevent the unfolding of chains of events that led causally to the outcome, not in her failure to prevent the outcome as such.<sup>101</sup> More generally, the causal significance of non-interventions depends upon counterfactuals about direct and indirect causal sequences, and upon hypothetical scenarios about what would have happened otherwise.

This makes omission-based causation potentially extremely complicated, since non-interventions can be stacked on top of each other in diverse ways. In *Dalloway*, for example, D’s failure to pull on the reins, once the child ran in front of his cart, was a consequence of his antecedent failure to retain a grip upon those same reins. That antecedent failure was negligent; but the subsequent non-intervention made no difference, and so the negligence was non-causative. Non-interventions can even be the product of positive acts:

*Runaway Train:* An out-of-control train laden with explosives is headed toward an outback town. (Because the town is at the end of the railway line, an explosion is inevitable, destroying the town, if the train is not stopped.) Officer A fires a missile programmed to blow up the train before it reaches the town. Unfortunately, Officer B, who does not know about the looming disaster, observes the missile on radar and fires a second missile to intercept it. The second missile brings down the first, thereby permitting the train to destroy the town.<sup>102</sup>

In this case, Officer B’s act of firing the second missile brings about a non-intervention, since it prevents the first missile from colliding with the train. That non-intervention is, in turn, an omission-based cause of the town’s destruction. We may conclude that Officer B’s firing of the missile was a cause of the disaster.

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<sup>100</sup> If death by sandstorm is thought unprovable, remember that the burden of proof rests on the prosecution in causal matters.

<sup>101</sup> Obviously, this still leaves D constantly failing to prevent the unfolding of causal chains. In terms of ascriptive responsibility, overinclusion is avoided here only by requiring that D also has a *duty* to intervene.

<sup>102</sup> This kind of example is sometimes described as a “double prevention” case, in that Officer B prevents the first missile from preventing the explosion.

It lies outside the scope of this essay to analyse all the conceivable variants of non-intervention cases. Inevitably, many of the more complex cases will involve failures to pre-empt indirect causal chains. As such, they will depend on judgements about extraordinariness. The neglectful parent who leaves her child sleeping on the beach should not be ascribed with causal responsibility for his death by drowning if he was above the high-tide mark, or if he died from an unexpected lightning strike. At least where the complained-of conduct occurs prior to an (indirect) intercession by other causal agencies, the “bridging” test is generally the same—whether act or omission. So, for example, our conclusions about Pittwood’s causal responsibility for White’s death would be unchanged if it turned out that he had negligently opened the gate, and not merely failed to close it. By contrast, in more straightforward scenarios such as *Morby*, the relevant causal sequence is already underway—D’s contribution resides specifically in his failure to interrupt it.

#### 4.3 Omission as *novus actus*?

Earlier, we described omissions as equivalent to concurrent causes. Understanding omissions as non-interventions means their causal significance runs alongside the direct or indirect chains that they fail to prevent. Contra Hart and Honoré,<sup>103</sup> it follows that an omission cannot constitute a *novus actus interveniens*, in the sense that it cannot break the relevant causal chain—precisely because it is the failure to break that chain which is our ground of complaint. To illustrate, consider another example:

*Antidote*: V is brought to hospital having been poisoned by P. D3, the on-duty doctor, correctly diagnoses V’s condition but forgets to administer the standard antidote. V dies of the poison. Had the antidote been administered, V would have recovered.

Of what did V die? The poison. However egregious, D3’s omission does not, indeed cannot, break the mechanical causal chain leading to V’s death. It cannot break it as a conceptual matter, since it is that very failure to interrupt the causal chain which constitutes her omission; one cannot break causal chains by failing to break them.<sup>104</sup> In this case, *both* P and D3 cause V’s death. Their contributions are, in effect, concurrent causes.

This explanation is key to understanding the controversial case of *Blaue*.<sup>105</sup> In that case, V, a Jehovah’s Witness, was brought to hospital after being stabbed four times by D. Despite having lost a large amount of blood, she refused a blood transfusion on the grounds of her religious beliefs. As she knew she would, V died of blood loss the next day. D appealed his conviction of manslaughter, on the ground that V’s refusal to have a blood transfusion was a *novus actus interveniens* that broke the causal chain between the stabbing and V’s death. Clearly, the non-transfusion was *one* cause of V’s death. Nonetheless, the Court of Appeal ruled that the original wound inflicted by D remained an operating cause of death. Equally clearly, that ruling was correct. We can trace a straightforward, direct causal chain from the stabbing to V’s death.

The Court should have left the matter there. Alas, it did not. Counsel for D sought to argue that V’s refusal of the blood transfusion was an unreasonable one. In effect, counsel sought to recharacterise the causal path to death as indirect, and thus subject to constraints of foreseeability. Misguidedly, the Court met that submission on its own terms, responding that:<sup>106</sup>

“It has long been the policy of the law that those who use violence on other people must take their victims as they find them. This in our judgment means the whole man, not just the physical

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<sup>103</sup> Hart and Honoré, 361.

<sup>104</sup> Admittedly, it is possible for an omission to contribute to breaking a causal chain, but only when *combined* with a positive intervention: e.g., in a variant of *Pittwood*, when the railway gatekeeper fails to close the gate, causing the ambulance taking V to hospital to be hit by a train. The gatekeeper causes V’s death rather than V’s original assailant.

<sup>105</sup> [1975] 3 All E.R. 446; cf. *Holland* (1841) 2 Mood. & R. 351; 174 E.R. 313.

<sup>106</sup> [1975] 3 All E.R. 446 at 450.

man. It does not lie in the mouth of the assailant to say that his victim's religious beliefs which inhibited him from accepting certain kinds of treatment were unreasonable.”

That's not right. There is no legal requirement that we must take a victim's *choices* as we find them. As is well established by cases such as *Roberts*,<sup>107</sup> an intervening reaction by V *does* break the chain of causation where it is extraordinary (or, as was said in *Roberts*, “daft”). Responses by victims, just like other indirect causal interventions, are subject to reasonable foreseeability criteria. And this means that D does not have to bear responsibility for the consequences of V's choices whatever they may be. He must do so only in so far as V's reaction is a reasonably foreseeable possibility.

The truth of the matter is that *Blaue* did not turn at all on whether V's refusal of the transfusion was “daft” or unforeseeable, because the failure to transfuse blood was an omission. As such, the case presented a straightforward, unbroken mechanical chain from stabbing to death. We may wish that the causal chain had been severed. But an omission cannot, by itself, do that. The failure to transfuse, however unreasonable, could only be a concurrent cause of death.

## 5. Conclusion

*Blaue* returns us naturally to *Hughes*, the case with which we began. The key to both cases is not to lose sight of the core, physical dimension of causation. Mechanical causation is a real phenomenon, and the physical reaction chains that constitute it lie at the heart of our ascriptions of causal responsibility. Yet its recognition is coming under pressure, especially from those who want to make all causal findings normatively sensitive. Causation is at risk of losing its shape, and Clarke is right to worry whether it can any longer bear legal freight.<sup>108</sup>

This essay has been concerned primarily with concepts and structure, with core threads rather than detail. It addresses how lawyers, especially criminal lawyers, should think about causation.<sup>109</sup> At the level of case-law, the analysis is broadly consistent with existing decisions. It would, however, generate a different outcome in *Hughes* itself. The momentum of H's car contributed significant energy to the collision in which V was killed.<sup>110</sup> As such, H's driving the car was a direct cause of V's death. Any discomfort about that conclusion should be directed at the legislator.

Tort law, too, should start with mechanical causation. Hence the account offered here reduces, but also clarifies, the space for normatively sensitive ascriptions of causal responsibility. That still leaves plenty of room for manoeuvre. In principle, the rules of indirect causation can differ across crime and tort. Once in the realm of tort law, a different degree of foreseeability might apply; the FDI rule may be eschewed; and tort's concern (*inter alia*) with valuation might support divergent approaches to cases such as *Cook v Lewis*, as well as to overdetermined cases.

Indeed, most of the hard cases for causation arise when we go beyond mechanical causation—when physical reaction chains intersect, and when other agents are (or should have become) involved in the unfolding of events. Frequently, D's conduct is significant only because of its interaction with other causal processes that D has not initiated. In such cases, ascriptions of indirect causal responsibility allow the law to bridge between the direct physical effects of D's own actions and the way those effects get caught up in, and make a difference to, the causal maelstrom of the world. Indirect causation articulates judgements about the extent to which D is answerable for outcomes that she does not directly cause, but to which her actions have made a difference. Its principles supplement rather than displace our recognition of direct causation, and it is only once that is recognised that we can properly understand the place of so-called *novus actus* doctrines.

To map this landscape properly, we need to understand the mechanical aspect of causation, including its limits. Having such a map is essential, for the reasons set out in § 3. There is a concept of

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<sup>107</sup> (1971) 56 Cr. App. R. 95 at 102.

<sup>108</sup> Above, n. 8.

<sup>109</sup> One payoff of this essay is that academic lawyers could, without loss, abandon reliance upon the traditional *sine qua non* test. Under the approach proposed here, establishing a “but for” relationship between C and E does not help us to establish whether C actually caused E. The test is redundant.

<sup>110</sup> This point would have been more obvious if, say, V had merely run out in front of D's car.

causation that is capable of bearing normative freight. We should let it do its job. That job includes safeguarding the separateness of agents and, ultimately, helping to preserve our freedom.

A.P. Simester<sup>111</sup>

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