

CAUSATION IN CRIMINAL LAW

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Abstract

This thesis critically examines the doctrine of causation in English criminal law. The requirement of causation is of fundamental importance to our understanding of the actus reus in criminal law. This is because whenever a consequence is specified as part of the actus reus, it must be proven that the result occurred and that the defendant's behaviour legally caused that consequence. This thesis argues that the traditional bifurcation of causation (that is, factual and legal causation) is unhelpful in ascribing causal responsibility as it fails to communicate to the jury *when* and *why* an individual may be responsible for resulting harm in criminal law. This thesis explores the resulting jurisprudence and argues that the absence of an explicit culpability-based criterion within the causation doctrines accounts for the courts' difficulties. The aim of this thesis, therefore, is to present a normative yet practical account of how the criminal law should establish causation in criminal law. It looks to criminal law theory to develop the discourse and offer a new model of causation, 'culpable causation', which clearly articulates when resulting harms are attributed to individuals in criminal law.

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Introduction

This thesis presents a normative yet practical account of causation in criminal law.¹ At present, for resulting harm to be causally attributed to an individual (D) in criminal law, they must be held to have factually and legally caused that harm. However, in everyday language, the term ‘cause’ is used with very little thought to whether D is (causally) responsible,² culpable,³ or liable⁴ for the prohibited result. Moreover, although the causation doctrines are unproblematic in most criminal trials, establishing causation is one of the most basic requirements of criminal liability.⁵ This is for one simple reason – there can be no criminal responsibility for a prohibited result unless D legally caused the outcome.⁶ Therefore, it is the purpose of this thesis to develop the discourse on this subject and offer a new model of causation, based on culpability, that explicitly explains *when* and *why* resulting harms are attributed to individuals in criminal law.

It is essential to explain how causation is established to ensure the proper functioning of the criminal law and to define the limits of interpersonal obligations within society and the criminal justice system; consequently, it is inappropriate to defer such an essential question to notions of ‘common-sense’ to resolve causal disputes.⁷ Whether or not D is responsible for a resulting harm cannot be reduced to a ‘common-sense’ evaluation of D’s conduct and its causal relationship to that harm. The laxity in such

¹ This thesis is concerned with causation in English criminal law. Hereinafter, ‘English law’ is used as shorthand for the law of England and Wales. Similarly, the use of ‘England’ implies Wales.

² ‘Responsibility’ is a term that is employed when an actor can be held accountable for actions, omissions, and their results. On this point, Duff has stated that responsibility is concerned with answerability. See: RA Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law* (Hart 2007) 15; JR Lucas, *Responsibility* (Oxford: Clarendon Press 1993). For a critical discussion of ‘reason-responsiveness’, see: DN Husak, ‘Answering Duff: RA Duff’s *Answering for Crime*’ (2010) 29 *Law & Phil* 101.

³ ‘Culpability’ is concerned with the ways that an actor can be blameworthy for such actions, omissions, and their results. An actor’s blameworthiness is, in England, determined through intention, recklessness, or negligence. This thesis will, at various points, touch on each of these ways of being culpable.

⁴ ‘Liability’ is distinct from responsibility. It is, for example, possible to hold D criminally responsible for their conduct, but not liable because of (say) self-defence or duress (by either threats or circumstances).

⁵ It is an essential feature for two primary reasons. First, there can be no responsibility for a result-based crime unless an individual legally *caused* that result. Second, causation in criminal law is used to both determine and (de)limit the extent of responsibility for consequences in criminal law. This thesis critically evaluates these themes.

⁶ *Cf.* There are circumstances where D may be responsible, and indeed liable, despite the substantive offence not being ‘caused’ nor completed. The Criminal Attempts Act 1981, s. 1(1) provides that a person is guilty of an attempt if a person does an act which is more than merely preparatory to the commission of the offence.

⁷ See: HLA Hart and AM Honoré, *Causation in the Law* (2nd edn, Oxford: Clarendon Press 1985) (hereafter *CIL*) and *R v Kennedy (No 2)* [2007] UKHL 38; 1 AC 269, 276.

definition means that it is not possible to regulate one's behaviour in society or justify the ascription of responsibility to one causal contribution over another, meaning a more refined account is required. Therefore, causation needs to be fully understood and carefully articulated to realise the limits of responsibility in criminal law.⁸ Unfortunately, the English appellate courts have had difficulty in coherently defining the requirements and parameters of the causation doctrines. This thesis explores the jurisprudential complexity and argues that the absence of a sound theoretical framework is the primary cause of this confusion. It then uses criminal law theory to construct a defensible account of causation in criminal law based on voluntariness and foreseeability criteria. The proposed model of causation offered in this thesis uses culpability, based on subjective negligence and foreseeability as to the risk of harm, to ascribe responsibility for consequences in criminal law. This thesis posits that D legally causes a resulting harm if:

1. D's conduct made more than a negligible contribution to the harm;
2. D's conduct was culpably negligent. This is established when -
 - (a) D failed to take those precautions which any reasonable man with normal capacities would in the circumstances have taken; and
 - (b) D, given his mental and physical capacities, could have taken those precautions;
3. The aspect of D's conduct that made D negligent caused the harm; and
4. The harm was a reasonably foreseeable consequence of D's conduct.

If there is an intervening act by a third-party or victim (T), which saliently contributes to the occurrence of the prohibited result, question four is to be substituted with the following; D is only responsible for the prohibited result if:

- (a) The general nature of the intervention was reasonably foreseeable at the time of D's unlawful conduct; and
- (b) The intervention was one which any moderately reasonable person in the circumstances would have made, giving deference to T's attributes other than those whose only relevance to T's conduct is that they bear on T's general capacity to appreciate risk.

⁸ Williams stated that the doctrine of criminal causation is fundamental to establishing the limits of responsibility but is far from well settled and that 'hitherto the judges have made little progress in establishing [the] principles of [imputation]' in G Williams, *Textbook on Criminal Law* (2nd edn, Stevens & Sons Ltd 1983) 382 (hereafter *TCL*). This thesis argues that the uncertainty within the causation doctrines arises from focusing on disparate legal rules and not sound legal principles.

The principal differences between the proposed model of culpable causation and the current legal position are three-fold. First, this thesis rejects the bifurcation of causation; that is, the distinction between factual and legal causation. It is argued that although a mechanical relationship between D's conduct and resulting harm is a necessary, but not sufficient, requirement to establish causation, the proposed model provides for this *within* a test of legal causation. Therefore, based on this analysis, having factual causation as a distinct and independent limb is redundant. Second, causation in criminal law is intrinsically normative. Thus, the proposed model explicitly articulates that attributing casual responsibility requires an extra-legal and normative evaluation of D's conduct, measured against the ideas and interests of society and the criminal justice system. This normative evaluation is a feature that is only implicit within the current legal framework. Finally, the model uses culpability, in the form of subjective negligence, to establish criminal causation. This claim is one that is not typically advanced when examining the causation doctrines. However, it is a fundamental feature that is required to protect the jewel of the criminal law's general part – that is, individual capacity-based responsibility.

The model of culpable causation employs two fundamental principles to protect individual capacity-based responsibility, that of voluntariness (realised through culpable negligence) and foreseeability. Thus, this thesis defends the claim that unless D had the capacity to act otherwise when contributing to the resulting harm, and the result was a reasonably foreseeable consequence of D's conduct, D is not responsible for the resulting harm and causation is not established. It is in the offering of this new model of causation, based on culpability, that this thesis provides an original contribution to knowledge. Culpability is seldom understood as being an explicit criterion of causation and is typically considered once causation has been established. However, this thesis argues that culpability-based considerations already operate surreptitiously within the current doctrinal position, and the proposed model of culpable causation above makes overt what is currently covert. Moreover, not only is the 'culpable causation' model original but, methodologically, there is an original element of normative rational reconstruction taking place, which is targeted at existing causation doctrines in English criminal law. In order to defend the proposed model of culpable causation, this thesis is split into six chapters, together with this

introduction and a concluding chapter. The remainder of this introduction provides an outline of these chapters.

1. Chapter 1

Chapter one provides a doctrinal analysis of causation in English criminal law. The chapter critically examines the law's attempt to rationalise the ascription of responsibility for resulting harms through its use of ambiguous language and disparate legal rules. In doing so, this chapter considers the academic literature and analytical jurisprudence to establish whether causation is indeed well-settled,⁹ or, conversely, that judges have till now made very little progress in their understanding and articulation of the doctrine.¹⁰ The answer to this dichotomy, it is submitted, lies somewhere between these two positions.

A thorough analysis of the current legal landscape reveals the causation doctrines are both problematic and unsystematic. The rules employed by criminal law are hollow, elastic, and inconsistent. This chapter identifies that the primary reason for this is that the causation doctrines are not explicitly normative. This is predominantly due to an overreliance on mechanical causation and unhelpful terms such as 'significant' and 'operative', which fail to adequately articulate the moral evaluation that has to be made of D's conduct and its relationship to the resulting harm. Similarly, there is seldom consideration of D's culpability in causing the harm when establishing causation. This, it is submitted, is a gross omission. It is paramount, in protecting individual capacity-based responsibility, to consider whether D had the fair-opportunity to avoid the harm and determine whether the harm was reasonably foreseeable. Only on rare occasions have the court explained causation in such terms, an oversight which has proven costly.¹¹ This chapter uses the analysis of the current legal position to show that

⁹ In recent years, neither legal scholars nor the judiciary has described causation as being a well-settled doctrine, although most concede that it is seldom problematic at trial. However, The Law Commission in their *Draft Criminal Code*, now over thirty years old, explicitly stated that the causation doctrines are 'indeed well-settled' and that the legal rules, as they then were, are an adequate method by which the criminal law can ascribe responsibility for resulting harms. This chapter argues against this position and demonstrates that causation, as it is currently understood, is inherently problematic. See: Law Commission, *A Criminal Code for England and Wales* (Law Com No 177, 1989) 188.

¹⁰ See: Williams, *TCL* (n 8) 382. This particular comment is not made in the subsequent editions of this textbook.

¹¹ The courts explicitly considered whether D's conduct was open to criticism and could have avoided the resulting harm in *R v Hughes* [2013] UKSC 56. The Supreme Court held that since D was not at fault concerning the resulting harm, it is not possible to establish causation. This decision is critically evaluated throughout this thesis.

reliance must be placed on the principles of causation, not disparate policy-laden rules, to ascribe responsibility for results in the criminal law. However, these principles, by themselves, only advance our understanding so far. It is necessary to underpin such analysis with political, social, moral, and linguistic philosophy. This chapter provides the basis for the development of a normative and analytical framework of causation in criminal law that accommodates the various ideas and interests of the criminal justice system.

This chapter begins by considering the traditional bifurcation of causation – that is, factual and legal causation. At present, the prosecution must be able to show that D’s unlawful conduct was both a *factual* and *legal* cause of the prohibited result to hold D causally responsible for the criminal charge. This thesis argues this model is unhelpful in establishing causation for two principal reasons. First, factual causation is superfluous as it is both under and over-inclusive of the types of conduct that the criminal law is concerned with. Indeed, the courts have (in some instances) stopped short of expressly approving the test of factual causation, relying solely on legal causation.¹² Second, problems also arise within the rules of legal causation. Difficulties surface when evidence suggests D was not the only (blameworthy) actor who contributed to the result. It is because of this that most theoretical and practical issues of criminal causation surround intervening events. The courts have looked at intervening events, constituting a *novus actus interveniens*,¹³ predominantly in three distinct categories: (1) the (non-voluntary) conduct of third parties;¹⁴ (2) the conduct of medical professionals;¹⁵ and (3) victim responses.¹⁶ The *novus actus* doctrine typically provides that, if despite one of these intervening events,

¹² See: *R v Cato* (1976) 62 Cr App R 41. The relationship between *factual* and *legal* causation is considered in more detail in chapter four. It is submitted that a preferred approach would be to state that for D to be said to have caused the result, he must make a ‘more than negligible contribution’ to the occurrence of that result. Adopting this amended rule does not, however, solve the substantive issues raised by causation. This is because most problems of criminal causation do not concern this stage of enquiry; it is within the doctrine of legal causation where most of the judicial and academic attention has been placed.

¹³ Both academics and courts have used the Latin term *novus actus interveniens*, but its meaning is more difficult to translate into English satisfactorily. Despite this, it is a term still used today. See: Goff LJ in *R v Pagett* (1983) 76 Cr App R 279, 288. It is because of the entrenched nature of the term within the causation doctrines that this thesis continues to describe legitimate intervening events as a ‘*novus actus*’.

¹⁴ A classic example of when a third parties conduct is described as being non-voluntary, and therefore does not relieve the D of responsibility for bringing about the prohibited result is *R v Pagett* (n 13). This case is looked at in more detail in chapter one.

¹⁵ *R v Jordan* (1956) 40 Cr App R 152; and *R v Smith* [1959] 2 QB 35.

¹⁶ *R v Blaue* [1975] 3 All ER 446; *R v Roberts* (1971) 56 Cr App R 95; Cf. *R v Dear* [1996] Crim LR 595.

D's conduct remains a *significant* and *operative* cause of the resulting outcome, D is causally responsible. However, whether an intervening act is significant and operative enough to relieve D of responsibility is difficult to establish without considering the defendant's and intervener's culpability concerning that response.

This chapter surmises that the legal rules that have emerged from the jurisprudence on causation as being: (1) a defendant causes a result which is an element of an offence when he does an act which makes a significant contribution to its occurrence; and (2) a defendant's conduct may significantly contribute to the resulting harm even though his conduct is not the sole or primary cause of the result. A defendant's conduct does not contribute significantly to the occurrence of an outcome where either (a) a voluntary, independent intervention of another person, or (b) a subsequent event which was not reasonably foreseeable, so overwhelms the defendant's conduct as to render it merely part of the history or setting for the intervention to take effect.

The account of causation offered by the courts, as outlined in this chapter, is ambiguous and unsatisfactory. Without further analysis or explanation, the concepts are hollow, filled with the political motivation of the court and often influenced by the nature and scope of the offence. As such, 'hard cases'¹⁷ will always fall between disparate legal rules. Therefore, it is necessary to establish if it is *ever* possible to correctly ascertain whether, for the purposes of establishing causation, there is a right answer to whether D legally causes resulting harm. Moreover, if it *is* possible to establish the right answer in causation, it is necessary to consider the mechanism by which the answer is discovered. This question forms the focus of the subsequent chapter, chapter two.

2. Chapter 2

Chapter two advances two claims that are central to this thesis. The first is that establishing causation (in hard cases) requires an analysis of legal principles, not disparate rules. Second, it argues that it is necessary to 'pass the buck' to the jury to determine D's causal relationship to the resulting harm and

¹⁷ The phrase 'hard case' is in the Dworkinian sense. Hard cases are those cases where there is no settled rule which dictates a decision either way. As a result, legal rules cannot operate in a binary fashion, and the law must be understood as an interpretive concept. See: R Dworkin, *Law's Empire* (Belknap Press 1986) 50.

whether this relationship is sufficient to be a legal cause in criminal law. Furthermore, it argues that any model of causation offered in this thesis must incorporate a legally deregulated zone to allow the jury to consider extra-legal and normative considerations when evaluating D's unlawful conduct and the resulting harm. Both claims are essential for defending the proposed model of culpable causation. This chapter moves from the doctrinal analysis undertaken in chapter one and moves to explore the indeterminacy of legal rules inherent within the causation doctrines. This chapter argues that causation in criminal law is always indeterminate, and causal enquiries are 'hard cases'.¹⁸ Hard cases do not invite the courts to determine the correctness of legal rules, but instead require the courts to identify, interpret, and apply the correct legal rule(s) needed to ascribe causal responsibility in criminal law. Thus, ultimately, there *is* a right answer as to whether D legally causes a resulting harm, but this answer is only discoverable using constructive interpretivism and the jury as 'buck-passers'.

In order to substantiate these claims, this chapter is divided into two parts. The first half of the chapter applies the jurisprudence of Dworkin to argue that the causation doctrines inherently suffer from legal indeterminacy. Due to the highly contextual nature of causation, there is always indeterminacy of the relevant disparate legal rules. Despite this, there *is* always a right answer. To illustrate how this right answer is discovered in the criminal law, the analysis of Dworkin's hypothetical judge, Hercules, is critically employed.¹⁹ Judge Hercules, in the process of adjudication, focuses not on policies and disparate rules, but underlying legal principles which govern and shape the causation doctrine to find the right answer to any causal dispute. However, in hard cases of causation, it is not merely a case of the judiciary applying legal rules as a question of law. Due to the contextual and relative nature of causal enquiries, Hercules must defer to the jury to set the standard by which D's conduct is measured – that is, norm set. This, it is submitted, is a pre-condition to establishing causation and finding the 'right answer'. This can only take place, however, after establishing the correct legal rule for the jury

¹⁸ See: Dworkin, *Law's Empire* (n 17). The specifics of this term are expounded and critically applied to causation in criminal law in chapter two. Cf. HLA Hart and his jurisprudential analysis of the 'penumbra of doubt'. See: HLA Hart, *The Concept of Law* (2nd edn, Clarendon Press 1994).

¹⁹ In R Dworkin, *Taking Rights Seriously* (Duckworth 1977) and Dworkin, *Law's Empire* (n 17), Dworkin introduces us to Judge Hercules. Judge Hercules is explained as being an ideal omnipotent judge and used as an example of the proper process that is to be used in hard cases. This jurisprudential analysis is used to shed light on how the causation doctrines *should* be used to ascribe responsibility for prohibited harms.

to apply. Therefore, Dworkin's analysis can be used to argue that in determining whether D causes a resulting harm, there must be an evaluation of principles to determine the correct legal rule.²⁰

To illustrate the importance of this discussion, the second part of this chapter considers the appellate courts' difficulty in prosecuting drug suppliers with the manslaughter of their clients.²¹ During this narrative, the judiciary initially created legal rules that were overly specific in response to specific factual disputes, which in turn caused difficulties in future cases because the judiciary applied these rules in a binary fashion. To satisfactorily resolve the issue, the judiciary relied on legal principles rather than policy considerations.²² The judiciary balanced the interests and ideas of the criminal justice system – principally, harm and personal autonomy. However, once the judiciary focuses on finding the correct legal rule with these principles in mind, the right answer can *only* be discovered by the jury as a question of acceptability.

The benefit of deferring to the jury in cases of causation is two-fold. First, it allows causation to operate in a legally deregulated zone using the reasonable person to enable the jury to consider extra-legal considerations in determining whether D causes a resulting harm.²³ Second, it avoids the under or over-inclusiveness of precedent. The current doctrinal position is problematic because the courts' have created an excessive set of (binary) legal rules to account for novel and challenging cases of causation. However, owing to the gravitational force of precedent, this hinders the adjudication process and

²⁰ For judicial support for this position see Lord Hoffman in *Empress Car Company (Abertillery) Ltd. v National Rivers Authority* [1998] UKHL 5; [1999] 2 AC 22, 29 where he held that the first stage in ascribing responsibility to an individual for a prohibited result is to determine the rule that is to be applied, and the *purpose* for such rule.

²¹ In recent years there have been numerous cases concerning the liability of those who supply drugs to drug users who have subsequently died. The defendants who have supplied victims with controlled substances have been prosecuted and convicted of unlawful and dangerous act manslaughter, others for the supply of a controlled substance, and in some cases for gross negligence manslaughter. However, essential in all cases, the prosecution must also prove that D *legally* caused V's death.

²² In *R v Kennedy (No 2)* (n 7) the House of Lords placed their emphasis on the overruling principle of personal autonomy. Therefore, the court held that where V voluntarily self-injects a controlled substance, he relieves D of causal responsibility for the resulting harm, providing D did no more than supply the substance. *Cf. R v Evans (Gemma)* [2009] EWCA Crim 650. In this case, the court once more advanced their political desire to find drug-suppliers responsible for the resulting death of their customers. The Court of Appeal held that if D supplies a controlled substance to an individual, contributing to the creation of a dangerous situation, D is under a duty to act to prevent harm resulting. This case relies on, and controversially extends, the principle established in *R v Miller* [1983] 2 AC 161. These cases are considered in more depth throughout this thesis.

²³ John Gardner argues that the reasonable man provides the law with a deregulated zone where extra-legal considerations can inform the ascription of responsibility, without the creation of legal generalisations. This analysis is essential to the claims advanced in this thesis and is evaluated in-depth in chapter two. See: J Gardner, 'The Many Faces of the Reasonable Person' (2015) 131 *Law Quarterly Review* 563.

prevents the criminal law from accurately reflecting the society which it seeks to regulate. Having established that causal enquiries require the courts to consider questions of principle, not disparate legal rules, the question then becomes what these principles are and whether the same principles are relevant in all cases. It is this discussion that informs the substance of chapter three.

3. Chapter 3

Chapter three argues that key to establishing causation in criminal law are the concepts of ‘voluntariness’ and ‘foreseeability’, both of which underpin the model of culpable causation offered in this thesis. However, this chapter illustrates that the meaning of these concepts ultimately depends on the paradigm of responsibility adopted and the context and relativity of the enquiry. Therefore, to establish a framework upon which culpable causation can operate, chapter three considers whether there are a set of fixed legal principles of relevance in criminal causation; or, whether the principles of causation depend on the nature of the offence, facts of the case, and mischief of the legal rule. Three principal claims are advanced within this chapter.

The first claim is that causation in criminal law is best understood as a multi-paradigmatic concept.²⁴ That is, causation does not rely upon a single paradigm of responsibility to impute responsibility. Thus, it is necessary to employ a framework of causation that can support the various (and differing) paradigms of responsibility arising out of the ideas and interests of the criminal justice system.²⁵ The second claim is that causation in criminal law is based on the underlying principles of voluntariness²⁶ and foreseeability.²⁷ The final claim made in this chapter is that the meaning of these terms varies from

²⁴ The basic notion is that causation in criminal law does not require one single theory to explain the jurisprudence of this doctrine. Causation is mainly dependent upon the context, relativity of the enquirer, factual dispute, and legal rule. Therefore, this thesis explains why and how it is preferable to use a multi-paradigmatic model. See: L Wittgenstein, *Philosophical Investigations* (4th edn, Wiley-Blackwell 2001); L Wittgenstein, *Brown and Blue Books* (Oxford 1958). Lacey also relies upon a similar model to explain criminal responsibility more generally. See: Nicola Lacey, *In Search of Criminal Responsibility: Ideas, Interests, and Institutions* (Oxford: OUP 2016). For a review of this, with particular emphasis Lacey’s analysis of responsibility as a Wittgensteinian precept, see: D Bansal, ‘Nicola Lacey: In Search of Criminal Responsibility: Ideas, Interests, and Institutions’ (2017) 11(4) *Crim Law & Phil* 861.

²⁵ This framework is developed in chapter five. Before such framework is advanced, it is necessary to first critically explain that any account of causation *must* permit a variety of criteria to ascribe responsibility for results.

²⁶ *R v Kennedy (No 2)* (n 7).

²⁷ *R v Roberts* (n 16); *Cf. R v Dear* (n 16).

one factual dispute to another; thus, no fixed definition can be employed when establishing causation.²⁸

In order to advance these claims, chapter three is broadly divided into three sections.

The first section advances the claim that the concept of ‘causation’ in criminal law is best understood as a descriptive expression, defined by the criteria that are central to its meaning and definition. It is submitted that there is no single criterion (e.g. socio-political considerations) of causation that can effectively resolve all factual disputes and impute causal responsibility. The implication of this is *not* that none (or only one) of these factors are relevant when making causal judgements, but rather that they are all applicable in varying degrees based upon the context, enquirer, and mischief of the related legal rules. It is submitted that these extra-legal considerations are already at play within causation, but they currently operate covertly within the vague and unhelpful terminology that is employed within the tests of legal causation, such as ‘significant’ and ‘operative’.

The second section then moves to consider causation the Hart and Honoré way.²⁹ This analysis provides the theoretical justification for the second claim that causation in criminal law is based on the underlying principles of voluntariness and foreseeability. In defence of this claim, this chapter critically evaluates the main competing theories of causation; Moore’s analysis of causation based on metaphysics,³⁰ and Norrie’s claim that causal judgements invariably rest on socio-political considerations.³¹ It is submitted that Hart and Honoré’s analysis of causation is the most reflective of legal practice. However, their analysis does not go far enough; or rather, they do not make explicit what is implicit within their analysis. Namely, to determine the legal cause of a prohibited result much depends on the *interpretation* of voluntariness and abnormalities. They argue that we must look to common sense, and (sometimes) socio-political considerations, to justify our choice of causal contributors to ascribe criminal responsibility. However, this criterion is not the only consideration that features in the decision-making

²⁸ Cf. J Thomson, ‘Some reflections on Hart and Honoré, *Causation in the Law*’ in M Kramer (eds), *The Legacy of HLA Hart: Legal, Political, and Moral Philosophy* (OUP 2008). Thomson argues that before terms such as these can be used, they must first be sufficiently explained. Thomson argues that Hart and Honoré fail to adequately do this in their analysis of causation in the law.

²⁹ Hart and Honoré, *CIL* (n 7) xxxiii-xxxiv, 1-3.

³⁰ M Moore, *Causation and Responsibility: An Essay in Law, Morals, and Metaphysics* (OUP 2009) and AP Simester, ‘Causation in (Criminal) Law’ [2017] 133 LQR 416.

³¹ A Norrie, ‘A Critique of Criminal Causation’ [1991] 54 MLR 685; *Crime, Reason and History* (3rd edn, CUP 2014) 171 – 196 (hereafter *CRH*).

process. This chapter illustrates a multi-paradigmatic approach to causation better explains the existing case law and is more reflective of legal practice. Therefore, one original contribution of this thesis is the offering of a framework that enables all of these criteria to be relevant when imputing causation without undermining the legitimacy of the ascription of responsibility.

The final section of this chapter defends the third claim that the causation doctrines require the deployment of ambiguous terminology in order to operate effectively. This chapter argues that the meaning of terms, such as ‘voluntariness’, varies from one factual dispute to another, and to have a fixed definition would render the doctrine unhelpful and redundant. The ordinary-language philosophy of Wittgenstein is appropriated to support this position. Wittgenstein’s jurisprudence illustrates that when determining the characteristics of a descriptive expression (e.g. causation), one must not look to an exhaustive set of criteria, but rather the family-resemblance of criteria that are each present in varying degrees at any given point in time.³² This analysis has significant parity to that of Hart and Honoré’s analysis and neatly supplements the principal aims advanced within this thesis.³³

The linguistic analysis of Austin is then used to defend Hart and Honoré’s, and indeed this thesis’, usage of ambiguous terminologies, such as ‘voluntariness’, within the model of culpable causation.³⁴ Hart and Honoré’s analysis, per Austin, is that the ordinary person’s understanding of terms such as voluntary and reasonable are as far as needs to be drawn. What is perhaps more critical for the account offered in this thesis is that the specific causal enquiry is framed appropriately to enable the jury to impute responsibility within the parameters of the legal rule, drawn by the judge using social, political, and moral considerations. Therefore, this chapter seeks to define the criteria of causation of relevance when critically applying the model of culpable causation.

³² See: Wittgenstein, *Brown and Blue Books* (n 24). For an excellent discussion of Wittgenstein’s jurisprudence on this subject, see: C Wellman, ‘Wittgenstein’s Conception of a Criterion’ (1962) 71 *The Philosophical Review* 433

³³ Hart and Honoré, *CIL* (n 7).

³⁴ JL Austin, ‘A Plea for Excuses: The Presidential Address’ (1956) 57 *Proceedings of the Aristotelian Society* 1 and JL Austin, *How to do things with words* (2nd edn, Harvard University Press 1975).

Having established that causation in criminal law requires a multi-paradigmatic understanding of responsibility, it is necessary to advance the discourse and consider two further objectives. The first is to explain that although a mechanical relationship between D's conduct and resulting harm is a necessary requirement to establish causation, this analysis should operate *within* a test of legal causation.³⁵ The second objective is to illustrate that causation in criminal law is intrinsically normative, requiring D's culpability to 'link' D to resulting harm. Once these objectives are satisfied, it is possible to develop the model of culpable causation, which provides a normative framework that can accommodate culpability and moderate reasonableness to establish causation in criminal law. It is this discussion that informs the substance of chapter four.

4. Chapter 4

To provide a normative yet analytical framework for causation in criminal law to operate upon, chapter four evaluates the relationship between causation *in* law and *outside* the law. The purpose of this analysis is to determine the role that factual, or mechanical, causation plays (if any) in the ascription of responsibility for resulting harms in criminal law. In order to answer this question, this chapter assumes the following structure.

First, the chapter restates the problem of causation in criminal law by critically applying the current causal baseline to a 'hard case' of causation. The application of the causal baseline to this hard case illustrates that an individual (D) can be held criminally responsible for resulting harm without any culpability in causing that harm. This position, it is submitted, is undesirable for several reasons. First, the criminal law is typically only concerned with individuals when their conduct is open to criticism. Moreover, establishing causation without this threshold being met would fail to communicate to society the significance of being 'responsible' for a resulting harm in criminal law. Second, it ultimately places questions of liability (almost) exclusively on questions of *mens rea*. However, there a plethora of offences that are either strict or negligence-based within the criminal law. The implication of placing

³⁵ Many critics of Hart and Honoré have argued for a primarily mechanical (or metaphysical) analysis of causation in criminal law. See: Moore, *Causation and Responsibility* (n 30); Simester, 'Causation in (Criminal) Law' (n 30); Norrie, 'A Critique of Criminal Causation' (n 31) 685; Norrie, *CRH* (n 31) 171 – 196.

an over-reliance on mechanical causation would mean that D *may* be criminally responsible for a resulting harm (and indeed liable, in the case of strict offences) without any culpability in causing that harm.

The chapter then moves to evaluate the concept of causation *outside* criminal law. Causation outside law focusses primarily on a mechanical, or explanatory, understanding of cause and effect. This mechanical approach to causation involves the type of investigation that a forensic scientist might track. It looks to the natural sciences to trace backwards from the prohibited result to ascertain the explanatory cause(s). It is for this reason that this thesis argues that mechanical causation cannot be (solely) relied upon for causal selection and the ascription of criminal responsibility; there are irreconcilable contextual differences between both fields of enquiry. This is because causation in criminal law is *attributive* in nature, not explanatory. The principal aim of attributive causation is to identify which causal actor ought to be identified as being deserving of criminal responsibility for causing resulting harm, informed by the ideas and interests of the criminal justice system.

Finally, the bifurcation of causation that is conventionally stated by the judiciary and legal academics is rejected. Causation in criminal law traditionally employs *both* factual and legal tests to ascribe responsibility for resulting harms. The first limb, factual causation, requires D's conduct satisfy the non-normative counterfactual *but for* test to be causally significant.³⁶ However, this chapter argues that factual causation is unable to normatively discriminate between causal actors and ascribe causal responsibility in criminal law. This can only be achieved when one applies an enriched set of normative criteria, based on culpability, to the causal enquiry. Therefore, it is not possible to have factual (or explanatory) causation as a wholly distinct and separate limb to legal causation. To remedy this issue, the proposed model of culpable causation offered in this thesis provides for mechanical analysis *within* a test of legal causation. This analysis then moves to consider how the judiciary has discussed causation in criminal law, demonstrating that the principal focus is placed on culpable offenders within the tests of legal causation, and not mechanically relevant contributions when establishing causation. This

³⁶ *R v White* [1910] 2 KB 124.

chapter provides the groundwork to develop a framework of criminal causation that uses D's culpability to determine whether they are a legal cause of a prohibited result. It is this endeavour that forms the focus of the subsequent chapter.

5. Chapter 5

The preceding chapters of this thesis have illustrated that the current legal tests of causation fail to adequately explain *how* and *why* an individual is ascribed responsibility for resulting harm in criminal law. This chapter develops the discourse and presents a normative yet practical account of causation in criminal law, focusing on protecting the jewel of the criminal law's general part – individual capacity-based responsibility. This chapter employs the principles of voluntariness and foreseeability as to the risk of harm to provide an evidential threshold for establishing causation in criminal law.³⁷ This new model of causation is termed 'culpable causation'.

This chapter postulates that culpable causation is comprised of two distinct limbs. The first limb requires that D's conduct must be culpably negligent, and the aspect of D's conduct that made D negligent must cause the resulting harm. To determine whether this criterion is satisfied, this thesis uses the invariant and individualised standard of care to ascertain whether D's conduct, when causing the harm, fell below the accepted norm within society and whether D had the fair opportunity to avoid the harm. Thus, this model of causation uses subjective negligence to determine whether D's unlawful conduct was voluntarily performed and open to criticism. The rationale for including negligence within voluntariness is that it allows for reasonableness to enter in the assessment, allowing an explicitly normative evaluation of D's conduct within a legally deregulated zone. This, as is identified in chapter two, is a necessary pre-condition to finding the right answer to any causal enquiry.

The second limb focuses on the foreseeability as to the risk of harm. To be responsible for a resulting harm, in addition to the first limb, it is submitted that the harm must be a reasonably foreseeable

³⁷ By adopting this theoretical approach to criminal causation, social, economic, scientific, and policy considerations can all inform the normative decision to ascribe causal responsibility to D. Such an approach offers greater flexibility and offers the advantage of incorporating a wide variety of influencing factors present in the practice of criminalisation.

consequence of D's unlawful conduct. If D voluntarily performs the unlawful conduct, but the resulting harm too remote, causation is not established. It is essential to focus on reasonably foreseeable harms for two reasons. First, it acts as a limiting principle. Without this restriction, an individual could be responsible for all the ensuing harms that result from their unlawful conduct, and causation would be without limits.³⁸ The second reason is that it injects the doctrine with flexible and objective fairness. If D is responsible for a resulting harm which was *not* reasonably foreseeable, then protection of those that may be harmed is secured at the cost of D's liberty; D would be unable to regulate their conduct in society. Therefore, the inclusion of reasonable foresight provides a yardstick by which D can evaluate whether harms will be attributed to him when deciding whether (or not) to act. Without this second limb, D may not choose to act because unforeseeable harm may still be attributed to him, thus encroaching on his liberty and autonomy to act freely within society.

Therefore, this chapter presents a new model of criminal causation by asking whether (1) D's conduct was culpably negligent, and the aspect of D's conduct that made D negligent caused the harm; and (2) whether the harm was reasonably foreseeable.³⁹ To defend this proposed model, this chapter critically evaluates the theoretical approaches to ascribing responsibility for resulting harms in criminal law. The chapter then moves to develop the first limb of causation, focusing on the notion of voluntariness of action and its relationship to culpability. The second limb of causation is then formed, looking to reasonably foreseeable consequences as a limiting, objective principle. This analysis provides the foundation for establishing causation in criminal law that can be used as evidence that D *may* be causally responsible for a prohibited result.

The proposed model provides a normative yet practical framework for criminal causation that evaluates both D's conduct using subjective negligence and reasonable foresight. However, since most hard cases

³⁸ See: AP Simester and GR Sullivan, 'Causation without Limits' (2012) Crim LR 753, 776.

³⁹ This chapter uses Hart's doctrine of fair opportunity to underpin the current legal tests of causation. This is because for D to be responsible for his conduct, he must *choose* to act. See: HLA Hart, *Punishment and Responsibility* (2nd edn, OUP 2008). However, if D is to be responsible for a consequence of his conduct, e.g. a prohibited result, then he must have had the capacity to avoid such conduct. This ensures that the touchstone of responsibility is not shifted from choice to capacity, and therefore relegating choice to a subsidiary role. See: M Moore, 'Choice, Character, and Excuse' (1990) 7 *Social Philosophy and Policy* 29, 57; and J Horder, 'Criminal Culpability: The Possibility of a General Theory' (1993) 12 *Law & Phil* 193, 199.

of criminal causation concern the subsequent conduct of another, it is necessary to evaluate how culpable causation deals with *novus actus* interventions. Culpable causation by itself is insufficient at explaining intervening cases; it requires further examination. It is this that forms the subject matter of the next chapter, chapter six.

6. Chapter 6

Chapter six advances the model of culpable causation offered in chapter five by engaging with the problematic matter of causation and intervening events. Hard cases of criminal causation typically arise when D's unlawful conduct is not the only salient contribution in bringing about the resulting harm. In such circumstances, it is necessary to evaluate D's conduct alongside subsequent contributors (e.g. a third party) to determine whether D can still reasonably be described as a legal cause of the resulting harm for the criminal charge. The purpose of this chapter is to develop the account of culpable causation developed in chapter five to explicitly articulate *when* and *how* causal responsibility for intervening events is ascribed in the criminal law. Thus, this chapter seeks to address a question of both theoretical and practical importance – in what circumstances does a subsequent intervention consequent D's unlawful conduct absolve D of causal responsibility for the resulting harm?

In short, the answer to this question depends on the *type* of intervention. If a natural event causes death, lawyers typically enquire whether the occurrence of such an event was reasonably foreseeable at the time of the unlawful conduct. Similarly, if a third party (T), seeks to exploit the circumstances created by D, and T's conduct is voluntary, it is T who causes the result irrespective of whether D made the intervention more likely to occur.⁴⁰ These principles are uncontroversial and well settled. However, an indeterminate issue within *novus actus* cases concerns that of victim responses. That is, situations where a victim responds to D's unlawful conduct in a manner that is dangerous to their wellbeing, contributing themselves to the resulting harm. This analysis of victim response cases provides the foundation for establishing a general rule for establishing causation in all *novus actus* cases.

⁴⁰ *R v Dalby* [1982] 1 All ER 916; *R v Latif* [1996] 1 WLR 104; *R v Tse Hung-Lit* [1986] AC 876.

Some have argued the answer to this question is simple – D is only causally responsible in so far as V’s reaction is a reasonably foreseeable possibility.⁴¹ With respect, this is an oversimplification. This chapter illustrates that this position fails to give effect to a victim’s *voluntary* decision to respond following D’s unlawful conduct. While there is support in the literature for the position that voluntariness is irrelevant in response cases, this is both misguided and fails to protect the jewel of the criminal law’s general part – individual capacity-based responsibility. Furthermore, a critical examination of the novus actus principles illustrates that at their core is the requirement of (non) voluntariness. Therefore, it is the purpose of this chapter to (a) critically examine the relationship between voluntariness and foreseeability criteria in criminal causation and (b) offer a trial direction articulating *when* and *why* a subsequent actor is responsible for their response to another’s antecedent unlawful conduct. This analysis, combined with the proposed model of culpable causation offered in chapter five, will enable the courts to find the right answer in *any* causal enquiry. This chapter, drawing together the conclusions of each of the subsequent chapters, closes the analysis and provides a jury direction that gives practical effect to the findings of this thesis.

⁴¹ See, for example, D Ormerod and K Laird, *Smith, Hogan, & Ormerod's Criminal Law* (15th edn, Oxford 2018), 80-82.

Chapter 1

The current doctrinal position

1. Introduction

Whether an individual (D) causes a prohibited result in criminal law is governed by the causation doctrines. Some offences explicitly refer to causation in their definition;¹ however, for most offences, it is not merely a specific component; it is one of the most basic requirements of criminal liability. D's conduct must have legally caused a prohibited result that is the object of a criminal charge to be criminally responsible for a result-based offence.² It is evident, therefore, that the causation doctrines are essential for the proper functioning of the criminal law and it is desirable to have a well-defined arrangement by which D's behaviour, and the result, is judged. However, legal practice illustrates that this is not the case.

It is apparent from even the most peripheral glances at the decided case law and academic commentary on the matter that the causation doctrines are complex and difficult to articulate.³ This chapter goes further than this and argues that the current position is ambiguous, hollow, and elastic. The confusion within the causation doctrines invariably stems from the fact they must accommodate for a vast array of factual circumstances, influenced not only by notions of criminal justice, harm, personal autonomy, and culpability but also political and societal considerations. It is therefore unsurprising the courts have

¹ E.g. The offence of causing death by dangerous driving. See: Road Traffic Act 1988, s 1. The provision provides that a person who *causes* the death of another person by driving a mechanically propelled vehicle dangerously on a road or other public place is guilty of an offence (emphasis added).

² Ormerod and Laird write that, 'true conduct crimes, such as perjury, are rare. The term has been widely interpreted by Glanville Williams to include rape and abduction - in these crimes, "you do not have to wait and see if anything happens as a result of what the defendant does." If the test is whether you "have to wait and see" wounding is a conduct crime if committed with a knife but a result crime if committed with a gun, crossbow or catapult... these offences are better regarded as result crimes. A result has to flow from D's physical movements, whether you have to wait for it or not.' See: D Ormerod and K Laird, *Smith, Hogan, and Ormerod's Criminal Law* (15th edn, OUP 2018) 29-30.

³ Indeed, even the academic commentary on criminal causation is divided. These two quotations illustrate this perfectly. Williams stated that the doctrine of criminal causation is far from well settled and that 'hitherto the judges have made little progress in establishing [the] principles of [imputation]' in G Williams, *Textbook on Criminal Law* (2nd edn, Stevens & Sons 1983) 382. Conversely, six years later the Law Commission stated the opposite and that 'the principles [of causation] to be found in the common law...are reasonably well settled and can be stated quite shortly' in Law Commission, *A Criminal Code for England and Wales* (Law Com No 177, 1989) 188. This dichotomy is one that still continues to this day and is critically explored throughout the thesis.

actively avoided an overly theoretical approach to causation. However, this chapter demonstrates that this reluctance has proved costly; the causation doctrines are, or at least appear at times to be, incompatible and inconsistent. To illustrate this, this chapter advances three principal claims. First, factual causation is superfluous to establishing causation; a more useful starting place is that D's conduct makes more than a negligible contribution to the resulting harm. Second, legal causation relies on terminology ('significant' and 'operative') that is unhelpful in ascribing responsibility. Third, this chapter argues that the principles of voluntariness and foreseeability are at the core of causation in criminal law. These two central principles, when directly engaged with, are able to better articulate *when* and *why* conduct is legally relevant to causal responsibility. It is submitted that the combination of these two core principles establish the minimum degree of culpability that D must possess in causing the resulting harm to establish causation. Moreover, these three claims provide the foundation for the subsequent theoretical and jurisprudential analysis that takes place later in the thesis.

2. The current position in England & Wales

If D's unlawful conduct contributes to the occurrence of a prohibited result, it is the causation doctrines that determine whether D is responsible for *causing* the harm. If D is responsible for the harm (E), then the law is articulating that through D's behaviour, he should be held legally answerable for E.⁴ Conventionally understood, the current position comprises of two distinct elements: *factual* and *legal* causation.⁵ The prosecution must be able to show that D's unlawful conduct was *both* a factual and legal cause of the result to hold D liable for the criminal charge. The next sections consider these two limbs of causation, concluding that factual causation is superfluous to the ascription of responsibility; it is legal causation that 'links' unlawful conduct to resulting harms.

⁴ 'Responsibility' in this context simply means that D *can* be held legally accountable for their actions, omissions, and the consequences of such. For further discussion of this, see: RA Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law* (Hart 2007) 15. Duff argues, primarily, that holding D responsible for their conduct means that he is to answer for it. D is, on this model, required to be 'reason-responsive' to be held liable. For a further discussion of this, see: DN Husak, "Answering Duff: RA Duff's *Answering for Crime*" (2010) 29 *Law & Phil* 101.

⁵ This bifurcation of causation is disputed subsequently in this thesis, primarily within chapter four. This chapter argues that since 'factual' causation relies on normative considerations, both limbs of criminal causation are normatively loaded. Furthermore, incorporating into legal causation a requirement that D's conduct is more than negligible in contributing to the resulting harm removes the need for this distinction.

2.1 Factual causation

The starting point of any causal enquiry is the factual or *but for* test. The position is simple: D does not factually cause resulting harm if it would have occurred without D's unlawful conduct.⁶ Thus, causation is *prima facie* established if the result would not have occurred *but for* D's conduct.⁷ If factual causation is not established, then the causal enquiry typically stops here. This is a non-normative counterfactual enquiry. That is, it is a question to be answered by the jury using expert evidence, such as (say) evidence presented by a pathologist who investigated the medical cause of death for forensic purposes. It is not to be answered by looking at what consequences D knew, or should have known or foreseen, may result from his conduct. Thus, factual causation emphasises the need for a mechanical understanding of cause and effect, a requirement that is not (wholly) reflective of legal practice. This mechanical relationship between unlawful conduct and resulting harm is sometimes termed 'direct causation'.⁸

The facts of *R v White*⁹ neatly illustrates this mechanical approach to factual causation. D wanted to kill his mother by poisoning her glass of wine with cyanide. D's mother drank the wine, but before the poison took effect, died of a heart attack. A purely mechanical enquiry into *why* and *how* V died, always results with the finding "of a heart attack". D's *intentional* attempt to claim her life has no bearing upon this answer since factual causation is not, or does not appear to be, concerned with D's culpability.¹⁰

⁶ This also captures omissions, where *but for* D's failure to act (in accordance with their pre-existing duty of care) D brings about a prohibited result. See: A Leavens, 'A Causation Approach to Criminal Omissions' (1988) 76 *California Law Review* 547; JJ Thomson, 'Causation: Omissions' (2003) 66(1) *Philosophy and Phenomenological Research* 81.

⁷ See: *R v White* [1910] 2 KB 124. This limb of causation is sometimes described as a *causa sine qua non* cause. However, this terminology has purposely been omitted from this thesis. To present a clear argument, clarity of language must also be employed, and this is not helped by using Latin phraseology. It is important to note that when determining whether or not D was a factual cause of the prohibited result, the jury should not replace D's conduct with a hypothetical act. The jury should remove D's conduct from the factual matrix and ask whether the prohibited result would still have occurred. It is a non-normative counterfactual enquiry.

⁸ See: AP Simester, 'Causation in (criminal) law' (2017) 133 *LQR* 416, 422.

⁹ (n 7).

¹⁰ The relevancy of factual, or mechanical, causation is disputed in this thesis. See: chapter four. Additionally, it is argued that culpability, in the guise of subjective negligence, is relevant to determining whether D legally *causes* a prohibited result in criminal law. For a further discussion of this, and the proposed model of culpable causation, see: chapter five.

Therefore, since V would have died without D's conduct, D is not liable for the homicide of his mother.¹¹ The jury would be unable to conclude otherwise when presented with such evidence.

This link between *but for* causation and the natural sciences becomes overtly visible when issues of evidential certainty arise. The prosecution at trial must be able to demonstrate, through (say) a pathologist's report, that D's conduct was, beyond all reasonable doubt, an explanatory cause of the prohibited result. Thus, if two actors (A and B) attempt to harm V, and only one actor is successful, but it is not possible to evidentially prove whether it was A or B that harmed V, then *both* A and B's criminal liability is limited to an inchoate offence, and causation not established. To illustrate this, take the case of *Cook v Lewis*.¹² Here, A and B both (culpably) shot at V. V died from a single gunshot wound, but it was not possible to prove whether it was A or B's bullet that caused V's death. Therefore, neither A nor B could be held liable for the murder of V. It could not be said, beyond all reasonable doubt, that it was A's (or B's) bullet that fatally hit V. Therefore, in such circumstances, A and B could only be liable for the attempted murder of V.

However, where there are two independent and simultaneous acts by A and B, both of which are sufficient to bring about an outcome, it is possible A and B will *both* be held to have legally caused the outcome without satisfying the counterfactual test outlined above; A and B are concurrent causes in criminal law.¹³ The counterfactual analysis would not be satisfied in the circumstances such as these since it is not possible to say that, *but for* A's conduct, the result would have occurred, since B would have also brought about the same result independently of A. Although cases of this type are likely to be very rare, it highlights that the starting point for causal enquires are rendered ineffectual when it is not

¹¹ It is important to note, however, that D does not escape liability since he would still be liable for the attempted murder of his mother, contrary to the Criminal Attempts Act 1981, s. 1(1). This offence would be satisfied in this instance since there exists an intention to kill, not merely to cause grievous bodily harm, see: *R v Grimwood* (1962) 3 All ER 285. The requisite intention to kill can be inferred by the circumstances, see: *R v Walker and Hayles* (1990) 90 Cr App R 226. The approach of the courts, as illustrated by the discussion below, is that in some cases, it is clear that there is a desire to punish individuals for result offences rather than attempts or life-threatening conduct.

¹² [1951] SCR 830.

¹³ Ormerod and Laird provide the following example, "Even this basic rule may have exceptions, but only in very unlikely circumstances, e.g. D and E, independently and simultaneously, shoot at V. D's bullet goes through V's heart and E's bullet blows his brains out. It seems safe to assume that both will be held to have caused V's death." See: Ormerod and Laird, *Smith, Hogan, and Ormerod's Criminal Law* (n 2) 91.

possible to meet the threshold for evidential certainty. In practice, this has not posed difficulties for the courts since it is possible to conclude that A and B are both causes of E in the criminal law. It is possible to reach this conclusion because the criminal law is not solely concerned with a non-normative ascription of responsibility for resulting harms; however, this is something that is considered in more depth later in this chapter.

The Court of Appeal articulated the justification for holding both A and B as concurrent causes in the criminal law in *R v Cato*.¹⁴ They held that for D to have legally caused E, his conduct must be *an* operating cause and providing it was more than minimal, e.g. outside the *de minimis* range,¹⁵ causation can be established. In the example given above, provided that A or B was *a* cause, either (or both) could be causally responsible for the result in criminal law.¹⁶ The rationale offered for this is that the *but for* test imposes a lower standard than the *de minimis* test since many causal contributions are *but for* causes and negligible.¹⁷ Therefore, requiring D's conduct to be more than minimal, rather than a *but for* cause, is of practical benefit.¹⁸

The courts' reluctance to adhere to a strict application of the *but for* test is undoubtedly a correct one as, per Horder,¹⁹ the rule is both under and over-inclusive of the types of conduct relevant to causation.²⁰ A strict interpretation of this rule excludes causes of an event which are highly significant even if the event would have occurred without it. The facts of *R v McKechnie*²¹ demonstrates this under-

¹⁴ (1976) 62 Cr App R 41; [1976] 1 All ER 260.

¹⁵ *R v Cato* (n 14); *Cf. R v Hennigan* [1971] 3 All ER 133.

¹⁶ See: *Jones v Commonwealth* (1955) 281 SW 2d 920, 922-3. Despite this outcome being one that seems legally and morally permissible, it does cause issues when developing a theoretical or philosophical account of causation in criminal law. This is an important issue that is going to be looked at in subsequent chapters of this thesis. This thesis argues that since both A and B satisfy the requirements for culpable causation, both A and B are responsible for the resulting harm.

¹⁷ The Law Commission, in their *Draft Criminal Code*, included a similar provision in their clause on criminal causation. They stated that D's conduct may significantly contribute to the occurrence of a result even though his act is not the sole or main cause of the result. See: Law Commission, *A Criminal Code for England and Wales* (n 3) cl 17(2).

¹⁸ This is expanded upon further when looking at the doctrine of legal causation in criminal law later in this chapter.

¹⁹ J Horder, *Ashworth's Principles of Criminal Law* (9th edn, OUP 2019) 122.

²⁰ The normative basis for this claim is that factual causation is unable to discriminate between causal contributors who acted culpably and those who did not. This thesis argues for an act/omission to be causally relevant, an actor must culpably contribute to the prohibited result. This threshold is met when the prohibited result is a reasonably foreseeable consequence of D's conduct, and D had the capacity and opportunity to act otherwise. For a comprehensive account of culpable causation, see: chapter five.

²¹ (1992) 94 Cr App R 51.

inclusiveness. In this case, D, amongst others, attacked an older man by hitting him on the head with a television causing severe head injuries. While in hospital, it was discovered that V was suffering from a pre-existing duodenal ulcer. V was not able to be placed under general anaesthetic to treat the ulcer due to the head injuries inflicted by D. The duodenal ulcer burst, and V died. The substantive issue for the court was that D is not a (medical) *but for* cause of V's death. This is because V's ulcerated condition pre-existed D's aggressive attack, which may have remained undiscovered, bursting and killing V independently of D's conduct. D's conduct, on this analysis, is therefore not a strict medical factual cause. The court, however, held that D caused V's death since the head injuries remained a 'substantial' concurrent cause of death, which prevented V from receiving life-saving treatment. This decision is unquestionably a correct one; however, it is better rationalised under the limb of legal (not factual) causation.

It is worthwhile to note the material differences between this case and *R v White*.²² In *R v White*²³ the medical reason for V's death (heart attack) was unconnected with D's conduct (poisoning V). This act in no way establishes any mechanical causal link between D and E. However, in *R v McKechnie*,²⁴ although the reason that V died was an ulcerated duodenum, the treatment of this condition was prevented because of D's conduct. D's conduct, therefore, played a significant role in bringing about the death of V. In *R v White*,²⁵ D's conduct was not significant in bringing about the prohibited result (death). Furthermore, it does not always matter that D's conduct was not the mechanical cause of death, providing a direct and discernible link can be made between D's conduct and the prohibited result then

²² (n 7).

²³ (n 7).

²⁴ (n 21).

²⁵ (n 7).

causation can be established.²⁶ Of course, evidence of a physical chain will be of assistance to the jury in their deliberations.²⁷

Not only is factual causation under-inclusive, but it is also over-inclusive. A strict (and *very* literal) interpretation of this test would hold that D's mother in any given case is a factual cause of D's unlawful conduct, since *but for* D's birth, the prohibited result would not have occurred. Of course, this *type* of contribution would not be part of the legally important causes (e.g. the *causal relata*), but it is unjustifiable to exclude them based on a strict application of the rule. On a practical footing, the only reason that the courts do not trace through D's conduct to a prior (human) voluntary contribution is that it is D who is on trial.

Fulfilling the requirements of evidential certainty and demonstrating a physical causal link between D's unlawful conduct and the resulting harm is all that is required in most cases of causation. This is usually achieved through the admission of medical evidence and expert witness testimony at trial. This will indicate to the jury, in the absence of any unusual circumstances, grounds for establishing causation. However, establishing factual causation with the evidence of a physical causal link is only an *indication* of causation, and is not a substitute for true legal causation.²⁸ Thus, for the reasons advanced above, the preferred starting point in causal enquiries is the 'more than negligible' criterion stated above. However, since causation is not usually a substantive issue at trial, this often is enough for the jury to conclude that D caused E. However, for 'hard cases'²⁹ of criminal causation, there may be concurrent or multiple

²⁶ *R v W* [2018] EWCA Crim 690 [58]. Also see the role of omissions in criminal causation, which is discussed later in this thesis.

²⁷ This notion of a physical chain, akin to links in a chain, is advanced by legal academics such as Simester, who argues that mechanical causation plays an essential role in ascribing responsibility for resulting harms. See: Simester, 'Causation in (criminal) law' (n 8) 422. However, it is argued that this definition is not helpful. Indeed, it may be beneficial to consider causal contributions as point influences in a net. *Leyland Shipping Company Ltd v Norwich Union Fire Insurance Society Ltd* [1918] AC 350, 369 (Shaw of Dunfermline L). This 'net' analogy may, therefore, be of more use in analysing legal causation. This perspective allows for the comparison of the whole factual matrix (including intervening and subsequent contributions) before making a finding that D's action was a significant cause of E.

²⁸ *Cf. R v Lewis* [2010] EWCA Crim 1249 [9].

²⁹ The phrase 'hard case' is employed in the Dworkinian sense. See: R Dworkin, *Law's Empire* (Belknap Press 1986) 50. The specifics of this term are expounded and critically applied to causation in criminal law in chapter two. *Cf.* HLA Hart and his jurisprudential analysis of the 'penumbra of doubt'. See: HLA Hart, *The Concept of Law* (2nd edn, Clarendon Press 1994).

acts that create indeterminacy. It is at this point that the difficulty arises in providing a coherent account of causation based on criminal law theory.

In summary, establishing factual causation does not, by itself, provide an accurate method of determining whether or not D's conduct is a cause in law. This test requires the supplementation of additional legal rules to impute criminal responsibility accurately. On this point, the Supreme Court has emphasised that factual causation is no more than a starting point in causal enquiries;³⁰ it is legal causation that provides the definitive method of determining whether D's conduct is a true *legal* cause of the prohibited result.³¹ It is to this limb that we now turn.

2.2 Legal causation

Once it is satisfied that D's conduct is a *factual* cause it is necessary to apply questions of law to the causal enquiry. These questions of law require an additional investigation to determine whether D is a *legal* cause of E in criminal law. The considerations that take place within legal causation are challenging to state concisely since the courts have varied their approach on legal causation depending on the factual dispute and type of offence. This variance has resulted in an abundance of legal rules, which may or may not be relevant when ascribing responsibility. It is necessary to critically review these legal rules to provide a complete and accurate depiction of the current doctrinal landscape.

As noted above, there is not currently one single unifying test of legal causation that the courts can apply to establish causation. There is, however, a causal baseline that is applicable for all criminal offences. This baseline provides a yardstick by which causal responsibility can, in the absence of unusual circumstances (e.g. hard cases), be attributed to D. For D's contribution to be legally relevant it must be more than 'insignificant'.³² The limits of significant and *insignificant* contributions are not an easy one to draw. Indeed, the semantics of language has played an important role in legal causation.³³

³⁰ *R v Hughes* [2013] UKSC 56.

³¹ Indeed, this thesis presents the view that *all* tests of criminal causation pertain to *legal* causation, and that the current bifurcation model does not explain *why* and *how* responsibility is ascribed to an individual for causing a prohibited result. For a comprehensive discussion of this claim, see: chapter four.

³² *R v Cato* (n 14) 265-6.

³³ The pivotal role of language is essential to the proper understanding of the jurisprudence of criminal causation. It is a pervasive theme of this thesis that is explored in more detail in subsequent chapters, principally chapter three.

The courts have previously required D make a ‘substantial’ contribution to the bringing about of E to be causally relevant.³⁴ While these cases attempted to set the minimum threshold of legal causation, more recent judicial analysis has preferred the term ‘significant’ when referring to legal causation.³⁵ While the choice of wording is arguably one of semantics, there is an actual discrepancy between these two terms. The term ‘substantial’ is used to mean something akin to ‘principal’ or ‘predominant’, which would not accurately reflect the nature of legal causation. It is not that D’s conduct must be the ‘main’ or ‘predominant’ cause, but only something that is more than negligible – e.g. *de minimis*.³⁶

Therefore, the starting point for legal causation is that D *may* be a legal cause of the prohibited result if D’s conduct was a significant cause of the result. However, while factual causation may be demonstrable through the admission of scientific and expert evidence, establishing legal causation is not so straightforward. It requires the jury to perform a normative analysis to distinguish between conduct that is significant and *insignificant*. Unfortunately, the notion that a cause must be ‘significant’ to be legally relevant, without further clarification, is abstract and unhelpful for juries. The primary issue is that it fails to communicate to the jury *when* and *why* an individual may be responsible for resulting harm in criminal law. This thesis challenges this position and argues that it is necessary to explicitly state that the criminal law is only concerned with D’s unlawful conduct if it *culpably* causes the resulting harm.³⁷

It is worth noting at this stage that there may be situations where there are multiple causes of a prohibited result when establishing causation. Take the example where A and B simultaneously, culpably, and

³⁴ *R v Smith* [1959] 2 QB 35; *R v Hennigan* (n 15); and *R v Notman* [1994] Crim LR 518.

³⁵ *R v Cheshire* [1991] 3 All ER 670. The term ‘significant’ has been used here and not ‘substantial’ since that is how Lord Bingham summarised *R v Cato* (n 14) in *R v Kennedy (No 2)* [2007] UKHL 38.

³⁶ It was therefore wrong for the trial judge in *R v Hennigan* (n 15) to state that for D to be a cause of substance, he must more than one-fifth to blame for the prohibited result. The language used in this case is no longer accepted as being authoritative. Indeed, the term The Law Commission also adopted the term ‘significant’ for their proposed statutory provision on criminal causation. See: Law Commission, *A Criminal Code for England and Wales* (n 3) cl 17(1). The Law Commission’s proposals are looked at in more detail below.

³⁷ The claim that D’s culpability is relevant to establishing causation is explored in-depth subsequently in this thesis. The essential claim is that D does not legally cause resulting harm unless they acted voluntarily, having the capacity to choose otherwise, concerning the harm. If this threshold is met, it can be stated that D was subjectively negligent in causing the harm, and thus establishing causal responsibility in criminal law. See: chapter five.

fatally shoot at V.³⁸ Here, the general rule is that providing A or B's conduct is still an 'operating' and 'significant' cause of death, both A and B are a legal cause of V's death.³⁹ In this situation, (say) A has satisfied the actus reus for the prohibited result, it is immaterial that it can also be attributed to another individual, (B).⁴⁰ These situations do not provide much difficulty in legal practice since it is possible to prosecute both A and B. However, problems arise when the actus reus occurs in conjunction with a pre-existing condition,⁴¹ or because of the contribution of another individual,⁴² or the response of the victim.⁴³ The presence of such factors *may* alleviate D of responsibility for the result, but it is not always decidedly clear cut. These cases have proved most difficult for the courts, and it is necessary to explore the resulting jurisprudence of novus actus cases to understanding *how* and *why* causation is established in such cases. This analysis of intervening events shows that integral to establishing causation is the requirement of voluntariness, limited to those harms that are reasonably foreseeable.

3. Intervening events

For simple cases of causation, it is often enough that D's contribution is a *but for* and significant cause of the resulting harm, E. However, the majority of decided case law on the causation doctrines concerns that of intervening events.⁴⁴ For example, D's unlawful conduct may be followed by the action of a third party (or victim), which can be described as being the more immediate cause of the resulting harm. These interventions *may*, in certain circumstances, relieve D of responsibility for E.⁴⁵ This intervention, if it has such effect on the causal enquiry, is described as a novus actus and 'breaks the chain' of

³⁸ Presume that when A and B shoot at V that V dies instantaneously. It is not necessary to consider the potentially intervening nature of (negligent) medical professionals and their treatment, or unforeseeable natural disasters, at this point. The effect of intervening events and responses is considered later in this thesis, see: chapter six.

³⁹ *R v Warbuton* [2006] EWCA Crim 627.

⁴⁰ *R v Malcherek* [1981] 2 All ER 422; *R v Blaue* [1975] 3 All ER 446.

⁴¹ *R v Master* [2007] EWCA Crim 142.

⁴² *R v Pagett* (1983) 76 Cr App R 279.

⁴³ *R v Roberts* (1971) 56 Cr App R 95; *R v Williams and Davis* (1991) 95 Cr App R 1.

⁴⁴ Intervening events typically involve situations where the application of these two disparate legal rules is not enough to resolve causal indeterminacy. These intervening events occur when, after D's unlawful conduct, another causal contributor significantly contributes to the resulting harm – such as an unreasonable victim response or grossly negligent medical professional. In such circumstances, the court (and jury) must engage in a normative analysis of both D's and the third party's conduct to ascribe responsibility for the resulting harm. This causal analysis must utilise a legal framework that seeks to protect the various interests of the criminal justice system.

⁴⁵ See the facts of *R v White* (n 7) to illustrate this point. In this case, V's heart attack was the more immediate cause of death than D's poisoning of V, and D's unlawful conduct was no longer causally salient in bringing about the resulting harm.

causation between D's conduct and the resulting harm. Both legal academics and the courts have used the Latin term, but its meaning is more difficult to translate into English satisfactorily. Despite this, it is a term still used today.⁴⁶

Novus actus interventions are, therefore, best understood as an umbrella term used whenever there is a third-party, victim, or natural intervention between D's unlawful conduct and the occurrence of the prohibited result.⁴⁷ The effect of this rule is that, if satisfied, D is relieved of causal responsibility and D's conduct rendered *insignificant* and *inoperative* in bringing about E. The remainder of this chapter critically evaluates the novus actus rules, the circumstances in which actors are relieved of causal responsibility for resulting harms, and the theoretical and practical implications they pose for the causation doctrines. Many of the legal rules on causation have arisen out of these types of hard cases, where the application of the causal baseline is not enough to establish causation.

To illustrate this, take the example where D violently assaults V and leaves her lying on an isolated beach where she later drowns after the tide comes in. D's causal responsibility cannot be answered simply by applying factual causation. The answer to this question may depend, for example, on whether D placed V above or below the tidal line, and whether D *knowingly* did this. Alternatively, if, after D left her on the beach, V is taken to hospital where she contracts a hospital-acquired infection that she later dies from, factual and (basic) legal causation would once more fail to impute responsibility accurately. In this case, providing that the possibility of drowning was reasonably foreseeable, D *may* be a legal cause of V's death. Similarly, in the hospital-acquired infection case, unless D knows of the infection and V's acquisition of such infection was reasonably foreseeable, D does not cause V's death.⁴⁸ The remainder of this chapter aims to explain these findings in more detail, and to illustrate that at the core of causation in criminal law, including novus actus doctrines, are the principles of

⁴⁶ *R v Pagett* (n 42) 288.

⁴⁷ Despite criticisms of this term, it will be used throughout the rest of this thesis. It is used as no more than an umbrella term for a grouping of legal rules that articulate the circumstances in which D is relieved of causal liability following the intervention of a third party or victim response.

⁴⁸ The relevancy of intended and reasonably foreseeable consequences is looked at in more depth later on in this chapter. Concerning the 'hospital-acquired infection' hypothetical scenario given above, if it could be proven that D had knowledge of the infection and V's acquisition of such infection was reasonably foreseeable, causation could be established.

voluntariness and foreseeability. These principles, as will be illustrated throughout this thesis, provide the basis for the proposed model of culpable causation.

Looking at the principle of voluntariness, if D's conduct is followed by another's voluntary conduct, which also satisfies the causal baseline, it is assumed that the second actor's conduct relieves D of causal responsibility. To justify this position, it is necessary to explain why voluntary acts are given such particular emphasis within causation doctrines. Williams ably writes that:

I may suggest reasons to you for doing something; I may urge you to do it, tell you it will pay you to do it, tell you it is your duty to do it. My efforts may perhaps make it very much more likely that you will do it. But they do not cause you to do it, in the sense in which one causes a kettle of water to boil by putting it on the stove. Your volitional act is regarded (within the doctrine of responsibility) as setting a new 'chain of causation' going, irrespective of what has happened before.⁴⁹

Similarly, Hart and Honoré write that 'the free, deliberate, and informed intervention of a second person, who intends to exploit the situation created by the first, but is not acting in concert with him, is normally held to relieve the first actor of criminal responsibility'.⁵⁰ This analysis has been given judicial approval on numerous occasions, notably by the House of Lords in both *R v Latif*⁵¹ and *R v Kennedy (No 2)*.⁵² While it is clear there is overwhelming academic and judicial support for the importance of voluntary acts in criminal causation, the application of such principles is not so clear cut when applied to novus actus case law. The courts have looked at novus actus interventions in three different ways: (1) the non-voluntary conduct of third parties; (2) the conduct of medical professionals; and (3) the conduct of the victim. If despite one of these intervening events, D's conduct remains a significant and operative cause of the resulting outcome, D remains responsible for the resulting harm. The following sections of this chapter explore these categories in more detail. This analysis will show that the courts have been forced to create specific categories for novus actus cases because of a failure to focus on the underlying fundamental principles of voluntariness and foreseeability. Later in the thesis, principally in chapters five and six, the proposed model of culpable causation is offered that explicitly engages with

⁴⁹ G Williams, 'Finis for Novus Actus' (1989) 48(3) CLJ 391, 392.

⁵⁰ HLA Hart and AM Honoré, *Causation in the Law* (2nd edn, Oxford: Clarendon Press 1985) 326 (hereafter *CIL*).

⁵¹ [1996] 1 WLR 104, 115.

⁵² (n 35).

these two fundamental principles of causation, which can rationalise all novus actus cases without having to distinguish between *types* of interventions to establish causation. However, before this position can be advanced, it is necessary to consider the categories of novus actus interventions further.

3.1 Non-voluntary conduct of third parties

It is a general principle of criminal causation that if after D's conduct a subsequent actor voluntarily intervenes,⁵³ D is relieved of responsibility for the occurrence of the prohibited result.⁵⁴ For example, if D laced V's morning coffee with poison that would surely kill V, but before V had the opportunity to take a sip was fatally hit by T recklessly driving, it is T who is causally responsible for V's death, not D.⁵⁵ The rationale for this is that the courts have traditionally interpreted causal theory as focusing on the last voluntary human act and have not conducted a thorough review of the entire causal web.⁵⁶

There are, however, certain circumstances when the criminal law describes subsequent human intervention as being non-voluntary, thus not attracting causal responsibility. This distinction between voluntary, non-voluntary, and involuntary conduct is key to establishing causation in criminal law. However, what is not relevant when undertaking a causal analysis and ascribing causal responsibility is that of *involuntary* actions. The involuntary conduct of a third party or victim following D's unlawful conduct does not relieve D of responsibility for one fundamental reason; it does not attract responsibility in English criminal law.⁵⁷ It would, therefore, be superfluous to consider T's involuntary actions as affecting D's liability for E. We are only concerned with distinguishing between conduct that is voluntary and *non-voluntary*, or what is sometimes termed 'justified' or 'excused' interventions.⁵⁸ T's

⁵³ The third-party must also be an operating and significant cause of the prohibited result to relieve D of causal responsibility.

⁵⁴ It is important to note that D is still responsible for the conduct, but not the resulting harm. This may result in liability for a lesser or inchoate offence.

⁵⁵ See: *R v White* (n 7). D may still be liable for the attempted murder of V provided she acted with the requisite degree of fault. This offence would be satisfied in this instance since there exists an intention to kill, not merely to cause grievous bodily harm. See: (n 11).

⁵⁶ The theoretical justification for this is not considered here, as the intention of this chapter is to provide a doctrinal overview of the current legal position. This will, however, be looked at in greater depth throughout the subsequent chapters of this thesis.

⁵⁷ For a discussion of the defence of non-insane automatism and the relevant case law, see: *Hill v Baxter* [1958] 1 QB 277.

⁵⁸ Some writers have referred to this as 'impaired' voluntariness. See: KJM Smith and W Wilson, 'Impaired Voluntariness and Criminal Responsibility: Reworking Hart's Theory of Excuses-the English Judicial Response' (1993) 13 OJLS 69.

conduct, consequent upon D's unlawful conduct, is described as being *non*-voluntary when T acted voluntarily (in a literal sense) but is normatively justified or excused due to personal or circumstantial factors.

Take the case of *R v Pagett*.⁵⁹ This case neatly illustrates that a subsequent non-voluntary third-party intervention does not relieve D of causal responsibility for a resulting harm. D shot at police officers who were attempting to arrest him for various serious offences. D had with him a 16-year-old girl who was pregnant by him. D used the girl (V) against her will as a shield from any retaliation by the police officers. The officers returned his fire, and as a result, the girl was killed by a fatal shot. D was charged with V's murder. At trial, the judge left the offences of murder and manslaughter available to the jury. D was acquitted of murder but convicted of manslaughter. The trial decision was appealed on the grounds of misdirection on the issue of legal causation. Lord Justice Goff, in the Court of Appeal, upheld the conviction for manslaughter and provided two justifications in doing so. First, it was held that when the police officer returned fire at D, it was an act of self-preservation and therefore a justified action.⁶⁰ Second, the police officer was acting under a duty of care to prevent crime and ensure the arrest of D. It was held that the jury could, and did, properly establish legal causation for the homicide of V.⁶¹

This legal rule confirms that where T's intervention is a reasonable (lawful) act of self-defence, T bears no causal responsibility for the resulting harm. The justification for this proposition is that T's conduct is considered to be non-voluntary. When T is in circumstances where his options are either (a) the threat of self-danger or (b) the threat of danger to another, his range of options renders his conduct non-

⁵⁹ (n 42). For recent judicial analysis of this case, see Lord Clarke's judgment in *R v Gnango* [2011] UKSC 59 [83] – [89].

⁶⁰ Although the conduct of the police officer in returning fire towards D and V may be justified in the circumstances, it was nevertheless held to be negligent. In 1990, some ten years after V died, V's mother was awarded substantial damages against the police for their negligent handling of the siege. It was found that it had been a serious error for them to place themselves in a position where they were exposed to attack in an unlit area. Thus, from the perspective of the civil law, the police caused the death of V, not D. See, *The Guardian* 5 December 1990. Whether the negligent actions of an individual who is duty-bound constitutes a *novus actus* is explored in more detail below.

⁶¹ This case does not provide authority or guidance where the third-party intervening act is unlawful but in the interests of self-preservation, such as in *R v Dudley and Stephens* (1884) 14 QBD 273, 418. In such circumstances, it is likely that D is not relieved of causal responsibility, but that there are two unlawful causes of the result occurrence. D and T would both be concurrent legal causes in such instance.

voluntary since he was not able to operate in a truly free and informed manner. Thus, it is D who is causally responsible for the prohibited result since they placed T in the situation where they could not operate freely and autonomously; D's unlawful conduct is the last voluntary and significant contribution in bringing about the resulting harm.

This rationale also applies to situations where D sets out to use an adult as an 'innocent' agent, coaxing T to use false information to achieve their ultimate aim. For example, in *R v Michael*,⁶² D's child was under the care of T, the child's foster mother. D, wishing her child dead, gave T a bottle of poison under the pretence that it was medicine for the child. T decided not to provide the medication to the child, not seeing any use for it, and put on the top of her mantelpiece. T's child, Y, took medicine and gave it to the child. The child died as a result of the poison. The court held that Y's unexpected action, as a minor, could not be held to be voluntary, nor could T's if she had administered the poison to the child. Neither T's nor Y's conduct relieved D of responsibility for the child's death since they were both non-voluntary actions. This decision, coupled with *R v Pagett*,⁶³ illustrates that non-voluntary, or even incidental, conduct does not relieve D of responsibility for a prohibited result.

The cases above are concerned with situations where the third-party intervention was non-voluntary. That is, T acted voluntarily, but was influenced by the situation created by D, and can, therefore, be normatively perceived as justified or excused in the circumstances. In such circumstances, it is possible to describe T as acting with 'impaired' voluntariness.⁶⁴ Unfortunately, the division between voluntary and non-voluntary conduct is not black and white. The case law on this matter elucidates that it is all variants of grey. Thus, determining whether a third-party's intervention is justified or excused (pre-trial) is very difficult to predict. However, the principle in and of itself is simple; if T's conduct was 'fully' voluntary, D is relieved of causal responsibility for the resulting harm.⁶⁵ If it is not, then T is responsible for the result.

⁶² (1840) 9 C & P 356.

⁶³ (n 42).

⁶⁴ See: Smith and Wilson, 'Impaired Voluntariness and Criminal Responsibility' (n 58).

⁶⁵ D may remain responsible for his conduct, and therefore liable for a lesser or inchoate offence. However, D is relieved of criminal responsibility for the resulting harm.

The House of Lords affirmed this view in *R v Kennedy (No 2)*.⁶⁶ D prepared and handed V a syringe of heroin with which V then self-injected. V died as a result of the injection. The House of Lords held that D should not be convicted of V's death because D did not *cause* V to inject the heroin; it was self-administered. Therefore, it is trite to say that D who supplies drugs for V to self-inject can never be guilty of the constructive manslaughter if V is a fully informed adult making a voluntary decision to self-inject.⁶⁷ The emphasis within the judgment was on treating fully informed adults as autonomous agents responsible for the consequences of their actions. However, the clarity of this decision is not without its problems.

Norrie writes that the relationship between the drug supplier and the victim in such circumstances could affect our perception of voluntariness.⁶⁸ Giving the context of the situation greater emphasis may result in a finding of D and V acting in joint, concerted action. D knew (or could have reasonably foreseen) the result of handing a drug addict a syringe of heroin ready for self-injection. This contextual dispute is even more apparent in situations where D does more than hand over drugs; for example, the (incorrect) mixing of drugs, application of a tourniquet, and pressing of a syringe plunger increase D's involvement with V's self-injection. Therefore, examining *R v Kennedy (No 2)*⁶⁹ illustrates that what is deemed voluntary and *non*-voluntary could depend upon the social or political perspective from which it is viewed. Since establishing whether conduct is non-voluntary is ultimately a normative evaluation, whether causation is established becomes even more difficult to ascertain and articulate in practice.

Despite the ambiguity, the current position can be explained as, if D's conduct is subsequently followed by the actions of T (which brings about the actus reus of the prohibited result), then D is only relieved of responsibility for E when T is acting wholly autonomously and voluntarily. What this means in legal

⁶⁶ (n 35). Although this case is looked at in more depth later on in subsequent chapters, it is worth reviewing the facts of the case briefly here.

⁶⁷ This principle is undoubtedly correct, primarily because of the importance placed on the notion of voluntariness, protecting individual autonomy. However, as is illustrated later in this thesis, whether V had the fair opportunity to avoid the self-injection of a controlled substance raises an additional set of considerations. The court will not look at V's 'decision' to self-inject as being a voluntary act in isolation but informed by all of V's attributes, and the socio-economic and political considerations raised by drug use in society. See: chapter six.

⁶⁸ A Norrie, *Crime, Reason and History* (3rd edn, CUP 2014) 183 – 185.

⁶⁹ (n 35).

practice is much more difficult to ascertain.⁷⁰ However, the courts have not always used this method of ascribing responsibility. On some occasions, the courts have considered whether T's conduct is negligent rather than voluntary to determine whether it 'breaks the chain' of causation. The next section examines these cases further.

3.2 The conduct of medical professionals

Within the category of subsequent human conduct also lies the causal significance of medical professionals.⁷¹ This section focuses on the causal influence of a medical professional's (grossly) negligent conduct when undertaking causal enquiries. If D inflicts harm onto V, it is likely that if the level of injury is significant that V will seek medical treatment. If V dies on the operating table while doctors are attempting to save V's life, D cannot (ordinarily) claim the actions of the doctors relieve him of responsibility if the doctors accelerate death in doing so. This is typically the case even where the doctor's treatment was negligent, and V would not have died from the original injuries caused by D. Although this adheres to a vague common-sense notion of causation, the outcome seems contradictory based on a strict reading of the causal baseline articulated above. It has been stated above that a voluntary human action plays a unique role in ascribing causal responsibility, and the courts do not usually trace past the last voluntary and significant human act before V's death. The doctor's negligent treatment meets this threshold. This, therefore, presents an important theoretical question, in what circumstances does (negligent) medical treatment alleviate D of causal responsibility for greater harm or death? Relying on the rule that the conduct of the doctor only relieves D of responsibility if it is a *but for* and a significant cause of the harm does not necessarily follow the accepted line of authority

⁷⁰ This specific issue is addressed in more detail subsequently in this thesis. See: chapter six.

⁷¹ The courts evaluate the causal significance of medical professionals in criminal law as a separate group to that of other third-party actors. The courts have treated (grossly) negligent medical conduct as distinct from other causal actors. When a doctor (or indeed any other medical professional) treats V for harm caused by D, the courts focus on their negligence, rather than voluntariness, to determine their causal contribution (e.g. responsibility) for the prohibited result. This theoretical distinction is somewhat of a misnomer, and this thesis posits that voluntariness and negligence share much common ground. Chapters five and six uses subjective negligence to underpin capacity-based responsibility and voluntariness in causation. However, for this chapter, it is beneficial to keep the conduct of medical professionals as a distinct group to help illustrate this very claim.

on this area, especially when the conduct of the medical professional is *not* justified or excused, but negligent.⁷²

The courts have attempted to provide some guidance on this matter. The current doctrinal position states that D remains responsible for the resulting harm *despite* negligent medical treatment provided D's conduct remains an operating and significant cause of the harm, which is often death.⁷³ If, however, the negligent treatment is so abhorrent, the courts may perceive D's conduct as merely the setting upon which subsequent medical treatment operates, and relieve D of responsibility for the result.⁷⁴ Although it is theoretically possible for treatment to be so bad that it relieves D of causal responsibility, in reality, cases of this kind are likely to be rare.⁷⁵ This reluctance to uphold convictions is a policy decision made by the courts to reflect the nature and importance of those working in the medical profession. It would deter, or at least place fear in the minds of medical professionals if they thought they might be criminally liable for the death of a patient in circumstances where treatment is not entirely proper. Thus, it is only when treatment is so *grossly* wrong that the actions of medical professional amounts to a *novus actus*. This practical implication aside, the boundary between degrees of negligent treatment in practice is much more difficult to define. It is at this point where the indeterminacy of this legal rule becomes most evident.

The courts have attempted to distinguish between negligent and *grossly* negligent treatment in criminal causation. It is only when medical treatment is so negligent that it renders the effects of D's conduct

⁷² If, for example, the conduct of a medical professional was negligent. See: *R v Jordan* (1956) 40 Cr App R 152; *Cf. R v Smith* (n 34). Of course, any medical professional must first be duty-bound to the patient before there is a (legal) duty imposed upon them to act. When a patient is admitted to hospital, a duty of care relationship is created, which can be applied to any doctor that then comes into contact with them. This is not just restricted to the admitting team. It is because of this that it is sometimes argued that medical professionals are duty-bound to any patient that they come into contact with, but also by those who are employed by the Trust to deliver patient care. For a discussion of the circumstances that doctors become duty-bound to their patients, the repercussions of this, and liability for negligence, see: D Bryden, 'Duty of care and medical negligence' (2011) 11 *Continuing Education in Anaesthesia Critical Care & Pain* 124, 125-6.

⁷³ In circumstances where V's medical treatment is negligent, it is still possible to prosecute D for (say) a wounding offence; however, it is evident that the Crown Prosecution Service (CPS) and courts prefer to impute blame for a prohibited result rather than a lesser offence such as attempted murder or serious wounding offence.

⁷⁴ *R v Jordan* (n 72); *Cf. R v Smith* (n 34).

⁷⁵ The one case where medical negligence alleviated D of causal responsibility was *R v Jordan* (n 72). In this case, V died after being admitted to hospital. D's original wounding played no role in the medical explanation of his death; in fact, this had substantially healed. Death was caused by the 'palpably wrong' treatment by T where he administered medicine to which the victim was known to be intolerant.

insufficient as to the reason V died, that D is relieved of causal responsibility. The primary issue with this test is that it is cyclical and fails to provide any clear, practical guidance. There is no clear boundary between negligent and grossly negligent treatment when it comes to ascribing responsibility within the causation doctrines. More importantly, there is no apparent reason *why* the negligent voluntary conduct of the doctor, which is not negligent enough to be ‘abhorrent’, does not relieve D of responsibility.

Some writers have stated that the courts’ reluctance to discuss the causal significance of medical professionals (and police officers)⁷⁶ stems from a desire to ensure the conviction of a culpable offender.⁷⁷ Such an approach suggests an attachment to the ‘wrongful act’ approach to causation by deciding these issues by reference to broader notions of innocence and guilt. Horder goes further and states that in such circumstances since it is D who inflicted the original wound and created the need for medical treatment, they would be liable for attempted murder or a serious wounding offence even if the negligent medical treatment relieves D of responsibility for V’s death. However, those that adhere to the ‘wrongful act’ approach would not be satisfied by such conviction since they would want D to be responsible for the death of V, not merely an attempt or serious wounding offence.⁷⁸ These are lesser offences, and D’s responsibility is influenced by moral luck.⁷⁹

The rationale offered by the courts, starting with *R v Jordan*,⁸⁰ is far from satisfactory. The facts of the case are that D stabbed V, who was then admitted to hospital and died eight days later. At trial, it was held that it did not occur to the prosecution, defence, judge, or the jury that there could be any doubt but that the stab caused the death. The Court of Appeal quashed D’s conviction as new evidence came

⁷⁶ *R v Pagett* (n 42).

⁷⁷ Horder, *Ashworth’s Principles of Criminal Law* (n 19) 126. The importance of culpability and ascribing responsibility for consequences is looked at in chapter five.

⁷⁸ One rationale for seeking prosecution for a result crime over an inchoate offence, such as attempted murder is because of the higher threshold for conviction. For D to be liable for attempted murder, in contrast to the offence of murder, there must be an intention to kill, not merely to cause grievous bodily harm. See: *R v Grimwood* (n 11) and *R v Walker and Hayles* (n 11). On the issue of causation, the prosecution must show a causal link between the act or omission and the death. The act or omission must be a substantial cause of death, but it need not be the sole or main cause of death. It must have “more than minimally negligibly or trivially contributed to the death” as *per* Lord Woolf MR in *R v HM Coroner for Inner London ex parte Douglas-Williams* [1999] 1 All ER 344.

⁷⁹ For a discussion on the role of moral luck in criminal law, see: AM Honoré, *Responsibility and Fault* (Oxford: Portland 1999) 14 – 40.

⁸⁰ (n 72) 155.

to light showing that the treatment was ‘palpably wrong’.⁸¹ That is, the treatment was so negligent that D’s conduct merely provided a setting upon which the abhorrent treatment operated. The court did not explicitly state that the medical treatment that V received was negligent, although it is reasonable to infer that ‘palpably wrong’ means grossly negligent treatment.⁸² Therefore, if D harms V and V receives ‘normal’ medical treatment, D is guilty of homicide if V subsequently dies.⁸³ There is no specific guidance on how to determine whether treatment is ‘normal’, nor did the courts provide any explicit rationale for protecting medical professionals when their conduct is ‘normal’ but negligent, but not when treatment is ‘not normal’.⁸⁴

Following this, *R v Smith*⁸⁵ distinguished the decision in *R v Jordan*.⁸⁶ The facts of the case are that D, a soldier, stabbed V with a bayonet twice. One of V’s comrades dropped V twice on their way to the medical reception. At the reception, the medical officer, who was dealing with many patients, did not realise the extent of the injuries. One of V’s lungs had been pierced, and he was beginning to haemorrhage. Treatment was then given to V, which after the extent of his injuries were known, was stated as being ‘thoroughly bad’.⁸⁷ The court did not consider whether such treatment was *normal* or *abnormal* despite being presented by counsel. Instead, the court held that provided D’s conduct was an ‘operating and substantial’ cause of death then causation was to be established.⁸⁸ It is only if the subsequent cause is so overwhelming as to make the original wound merely part of the history can it be

⁸¹ *R v Jordan* (n 72) 157.

⁸² Ormerod and Laird, *Smith, Hogan, and Ormerod’s Criminal Law* (n 2) 104.

⁸³ This proposition includes medical treatment that is not so grossly negligent as to be categorised as being ‘normal’ within the circumstances. This also assumes that D acted voluntarily and culpably concerning the resulting harm. What is essential in such circumstances is that D’s unlawful conduct is salient in causing death.

⁸⁴ G Williams in *R v Jordan* [1957] Crim LR 430 stated that *any* negligent treatment by medical professionals should relieve D of causal responsibility providing that it is negligent to the degree it would be recognised by the civil courts.

⁸⁵ (n 34) 43. It is important to note that *R v Jordan* (n 72) was also distinguished by the Court of Appeal in *R v Blaue* (1975) 3 All ER 446.

⁸⁶ (n 72) 155.

⁸⁷ It was stated in *R v Smith* (n 34) that if V had been properly treated after his arrival at the medical centre, he would have had a seventy-five per cent change of recovery.

⁸⁸ See the discussion concerning the causes of ‘significance’ and ‘substance’ above. This case predates the recent judicial analysis of this discussion. It is submitted that the correct test is that D causes E when D is a *but for* cause of significance.

said that death does not flow from D's wounding.⁸⁹ This complex linguistic analysis does not help clarify this position; in fact, it only hinders our understanding further.

*R v Malcherek*⁹⁰ addressed this issue once more. Lord Chief Justice Lane thought that if they (the court) had to opt between following the decision in *R v Jordan*⁹¹ or *R v Smith*,⁹² that the latter would be preferred, although they did not believe it necessary to make such a choice and instead distinguished between both. It was held that while *R v Jordan*⁹³ was rightly decided on the facts; if the injured V receives proper and skilful treatment, albeit negligent,⁹⁴ and he dies from the treatment or operation, D will be held responsible for the prohibited result.⁹⁵ However, such a decision does not legitimately apply the accepted legal rules for causation since the voluntary act of another, which accelerates death not insignificantly, should relieve the original actor of responsibility for the result. If Lord Chief Justice Lane's statement is correct, then the reasons for this should have been clearly articulated in his judgment and further guidance provided. Several years later, in *R v Cheshire*,⁹⁶ the court sought to clarify matters by proposing the following test in cases of criminal causation and negligent medical treatment:

Even though negligence in the treatment of the victim was the immediate cause of his death, the jury should not regard it as excluding the responsibility of the accused unless the negligent treatment was so independent of his acts, and in itself so potent in causing death, that they regard the contribution made by his acts as insignificant.⁹⁷

⁸⁹ See: *R v Smith* (n 34) 42-43 (Lord Parker CJ). Also see: Law Commission, *A Criminal Code for England and Wales* (n 3) cl 17(3). The Law Commission in their draft clause on criminal causation stated that D's conduct does not contribute significantly to the occurrence of a result even though his act is not the sole or main cause of the result if the actions of a third-party so overwhelm the defendant's act as to render it merely part of the history or setting for the intervention or event to take place. The position posited by the court in *R v Jordan* (n 72) and the Law Commission is currently the accepted test for the novus actus status of medical intervention.

⁹⁰ (1981) 73 Cr App R 173.

⁹¹ (n 72).

⁹² (1959) 2 QB 35.

⁹³ (n 72).

⁹⁴ This statement is contradictory. It is counterintuitive to state that skilful and proper treatment can also be negligent; however, this is an accurate depiction of the current position of the causation doctrines.

⁹⁵ Indeed, the decision in *R v Jordan* (n 72) has been described as being a 'very exceptional' case that is confined to its facts. See: *R v Malcherek* (n 90). Therefore, it can confidently be stated that there is a very high threshold for a medical professional's conduct to be so grossly negligent as to relieve D of causal responsibility for a prohibited result.

⁹⁶ (n 35).

⁹⁷ (n 35) 258.

Once more, this test fails to clarify the position; instead, it only adds further linguistic confusion to when, and why, D may be responsible for a prohibited result despite negligent medical treatment. The terms ‘independent’ and ‘potent’ do not help address this uncertainty. It is not easy to unpack the meaning of these terms since D caused V to undergo medical treatment, and therefore, no medical treatment could be truly ‘independent’ of D’s conduct. Potency suffers from similar criticisms. In *R v Cheshire*,⁹⁸ a negligently performed tracheotomy was not held to relieve D of causal responsibility, despite the original wound being nearly healed. Clearly, on a strict interpretation, the doctor’s actions were the ‘potent’ cause of death. However, the court intended neither interpretation.

Despite the confusion and contradictions surrounding the conduct of medical professionals and the novus actus principle, the position now can be stated as being three-fold.⁹⁹ (1) Medical evidence is admissible at trial for the jury to determine whether the medical treatment of an injury was the cause of death, and the injury itself was not.¹⁰⁰ (2) If D’s inflicted injury upon V remained the operating and significant cause of death, D is responsible for V’s death despite any negligent treatment. (3) If D’s conduct was not an operating and significant cause of V’s death, but death was caused by medical negligence, the maltreatment must be so independent and potent as to relieve D of responsibility for V’s death. The difficulties in understanding these specific legal rules are extensive and incongruous. This analysis shows that negligence is an essential criterion in establishing causation. This thesis shows that it is possible to combine the requirement of voluntariness with negligence to explain both of these novus actus categories.¹⁰¹ To illustrate the additional criteria that may be relevant, it is necessary to look at the role victims can play in establishing causation.

3.3 The victim

This chapter moves from medical professionals and looks at how a victim’s response to unlawful conduct can influence the ascription of causal responsibility. The courts have established various rules

⁹⁸ (n 35).

⁹⁹ Following express approval in *R v Dear* [1996] Crim LR 595.

¹⁰⁰ *R v Jordan* (n 72).

¹⁰¹ For a comprehensive analysis of voluntariness and culpability, incorporating subjective negligence, in criminal causation, see: chapter five.

relating to victims and criminal causation concerning: (1) the medical condition of the victim before (or contemporaneous to) D's conduct; and (2) the conduct of the victim after D's conduct. The sections below explore both these categories.

3.3.1 The condition of the victim

It is well established in criminal causation that, like in civil law, D takes the wrongdoing of V as he finds her. This rule is particularly evident if V has some unique condition that makes her especially vulnerable to attack, also known as the 'thin-skull' rule.¹⁰² This rule is not just restricted to V's physical health,¹⁰³ but it also applies to V's psychological state.¹⁰⁴

For example, take the case of *R v Blaue*.¹⁰⁵ D stabbed V, a young girl, and pierced her lung. At the hospital, doctors told her that without a blood transfusion, she would die. V stated that due to her religious beliefs as a Jehovah's Witness, she did not want the life-saving transfusion. V died as a result of blood loss from the stab wound. D was convicted of V's manslaughter but appealed on the grounds that the refusal of a blood transfusion, being reasonably unforeseeable, ought to have relieved D of casual responsibility. Lord Justice Lawton held that the judge had correctly directed the jury and that D's conduct was an operating and significant cause of V's death. However, the extension of the thin skull rule to psychological conditions, albeit obiter, was unnecessary to the decision since D's conduct remained the cause of significance.¹⁰⁶ V's omission, however, egregious, could not alter the causal path stemming from D's unlawful conduct.

This judgment could have the effect of imposing causal responsibility upon D irrespective of a victim's (unreasonable) religious beliefs that alter the causal path beyond what D could have reasonably

¹⁰² *R v Blaue* (n 40).

¹⁰³ See: *R v Masters* (n 41). In this case, D stabbed V several times with a kitchen knife. V was hospitalised and treated for her stab wounds, bruising and a collapsed lung. She died two days later from a pulmonary embolism. V was suffering from deep vein thrombosis, which hastened her death and would have (eventually) killed her. The Court of Appeal, dismissing D's appeal, held that D's conduct made a significant contribution to her death, as supported by medical evidence, and therefore open for the jury to find that D caused V's death.

¹⁰⁴ *R v Blaue* (n 40).

¹⁰⁵ (n 40).

¹⁰⁶ The law relating to advance decisions to refuse life-sustaining treatment has now changed. See: Mental Health Act 2005, s. 25. If V refused medical treatment to spite D knowing that responsibility would be ascribed to them, or indeed for any other reason, the success in extending this legal rule is uncertain. Chapter six discusses this in more detail subsequently in this thesis.

foreseen.¹⁰⁷ In such case, since D would be liable for a wounding offence or attempted murder irrespective of the resulting offence, the rule seems unduly harsh. It is once more evidence of the criminal justice system exhibiting a greater emphasis on prosecuting individuals for result harms rather than life-threatening conduct.¹⁰⁸ Conversely, it could be argued, in the courts' favour, that whether V's refusal of transfusion relieves D of responsibility should be informed by societal norms and values rather than such a statistically rare occurrence. Since V's religious beliefs are taken seriously in the law,¹⁰⁹ it could be argued that V was unfree in making her decision and acting in a justified manner. This analysis would bring this decision in line with the basic rule stated at the start of this chapter; it is only the voluntary actions of third parties, including victims, which relieves a prior causal actor of responsibility for a prohibited result.

3.3.2 The conduct of the victim

In addition to the condition of the victim potentially affecting D's causal responsibility,¹¹⁰ the subsequent conduct of the victim can also affect D's responsibility. If D's unlawful conduct prompts a response from V that is dangerous to their wellbeing, D will remain liable if V's response is within the range of responses expected of a victim in her situation.¹¹¹ It is only if V's response is so 'daft' that it renders V's actions not non-voluntary,¹¹² i.e. justified or excused, that D will be relieved of responsibility for the prohibited result. Whether or not V's response is 'daft' is based on an objective assessment of whether it was reasonably foreseeable or not. This test of reasonable foreseeability

¹⁰⁷ The judgment in *R v Blaue* (n 40) did not consider the causal significance of unreasonable religious beliefs. However, it is submitted that this position could be resolved if V's response was assessed using subjective negligence. If V had the capacity to avoid responding to D's unlawful conduct in a particular manner, e.g. refusal of medical treatment, as V's religious beliefs were unreasonable, then it can be argued that V was acting voluntarily and therefore relieves D of responsibility for the prohibited result. This assessment would take into account all of V's personal and circumstantial attributes to ensure that V's personal autonomy was protected. For a comprehensive account of this position, see: chapter six.

¹⁰⁸ For an excellent discussion on this topic see: A Ashworth, 'Belief Intent and Criminal Liability' in J Eekelaar and J Bell (eds), *Oxford Essays in Jurisprudence* (OUP 1987) 1, 6.

¹⁰⁹ As evidenced by the protection of freedom of thought, conscience and religion as found in the Human Rights Act 1998, sch. 1, Article 9.

¹¹⁰ E.g. the thin-skull rule. See the discussion of *R v Blaue* (n 40) above.

¹¹¹ See: *R v Roberts* (n 43); *R v Williams and Davis* (n 43). Also see: chapter six for a discussion of culpable causation and responsibility for responses.

¹¹² This awkward expression is intentional. The decided case law on this subject does not critically evaluate when conduct is voluntary, but when it is not. Therefore, it is best described as being not 'non-voluntary' to reflect this analysis despite being a double negative.

considers the situation and circumstances that V finds herself in.¹¹³ Therefore, the general rule is that the consequences of V's intervention are attributable to D if (1) V's conduct is in reaction to D's wrongdoing, and (2) V's response was a reasonably foreseeable possibility. These two rules raise a critical theoretical issue of whether D is responsible for V's death if V is a contributory cause of the final result; a question addressed subsequently in this thesis.¹¹⁴

To explain these rules, take the case where D shoots V in the leg. V, knowing she was dying, shoots herself in the head. D's responsibility for V's death is questionable. In this instance, V's suicidal shot to the head becomes a significant and operative cause of death. The rationale offered in *People v Lewis*,¹¹⁵ which considered a very similar situation to this, confirms this position. However, suppose that instead of V shooting himself in the head, she cut her own throat. On one account of the law, D's conduct became a *de minimis* cause when V cut her own throat.¹¹⁶ On another, D's gunshot was arguably salient and significant. Whether D is relieved of responsibility can be analysed in terms of voluntariness and foreseeability. If V's (voluntary) suicide were held to be disproportionate (and unforeseeable) to the circumstances created by D, D would not be responsible for V's death. Moreover, if the conditions created by D's wounding had caused V pain rather than danger, and V only took their life to escape pain, D would not have been guilty of murder.¹¹⁷

This decision, although only informing this discussion and not providing binding authority, indicates that D in the hypothetical scenario above would not be relieved of responsibility for V's death. The rule

¹¹³ In *R v Mackie* (1973) 57 Cr App R 453, V, a three-year-old boy, fell downstairs after fearing ill-treatment at the hands of D. V died as a result of his injuries falling down the stairs. The Court of Appeal held that the V was only three years old and the court (and jury) must have regard for his age when determining whether his response was well-grounded on an apprehension of immediate/imminent violence and therefore reasonably foreseeable. Similarly, in *R v Corbett* [1996] Crim LR 594, the test of reasonable foreseeability considers V's intoxication and mental handicap.

¹¹⁴ See: chapter six.

¹¹⁵ (1899) 124 Cal 551.

¹¹⁶ This is once more an example of the criminal justice system, this time in the US, emphasising result-based offences than wounding or attempt offences.

¹¹⁷ See the *obiter dictum* in *R v Dhaliwal* [2006] EWCA Crim 1139, where it is suggested that a minor assault on a person with a fragile and vulnerable personality, who then committed suicide might be capable of constituting manslaughter. The authors of *Simester and Sullivan's Criminal Law* suggest that in most cases where V takes their own life in response to circumstances created by D would not be within the foreseeable range of responses. See: AP Simester and others, *Simester and Sullivan's Criminal Law: Theory and Doctrine* (6th edn, Hart 2016) 109-110.

in *People v Lewis*¹¹⁸ means that D's conduct provided the reason for V's suicide, and since committing suicide to prevent further excruciating pain when death is imminent could be reasonably foreseeable, D is responsible for the occurrence of the prohibited result.¹¹⁹ Despite appearing to be a sound legal rule, this point requires further sophistication as it does not accurately reflect the current position in England and Wales.

Ormerod and Laird present an interesting hypothetical that highlights the uncertainty in this area.¹²⁰ If D rapes V causing her to become so traumatised as to commit suicide by shooting herself, D's casual responsibility for her death is not so clear cut. There are two methods of determining D's responsibility in such a case. First, the court may state that V's shot rendered D's contribution insignificant and inoperative and withdraw the charge of manslaughter from the case. Alternatively, the court may state that V shooting herself following a traumatising event, such as rape, is within the range of responses that are reasonably foreseeable and therefore not 'daft'.¹²¹ These two rules can be seen to be protecting the interests of either party. The *but for* and significant cause rule ensures that a culpable D does not escape liability based on a technicality. Conversely, the 'daftness' of the victim's response protects D, ensuring that although the conduct of D threatened V's own life, D is not held to be responsible for unforeseeable consequences of V's response. It is finding the balance between these two interests that often present the most difficulty for the courts and academic commentators alike.

The unusual case of *R v Dear*¹²² considered this very issue. Here, D wounded V severely. After D's initial wounding, V intentionally caused his death by aggravating the wounds by reopening them and preventing them from healing. The court upheld D's conviction for murder stating that V would not have been able to compound his injuries *but for* the significant contribution of D. It did not matter that

¹¹⁸ (n 115).

¹¹⁹ Hart and Honoré, *CIL* (n 50) 244.

¹²⁰ Ormerod and Laird, *Smith, Hogan, and Ormerod's Criminal Law* (n 2) 81.

¹²¹ This may be the preferred route since even when there is a gap in time between the threat/harm (rape) and the victim's response (suicide), D could be found to have caused V's death. See: *R v Tarasov (Valodia)* LTL 23/11/2016. However, in this case establishing legal causation was on the premise that V acted to prevent further harm. For a further discussion of this issue and this case, see: chapter six.

¹²² (n 99).

V's actions were reasonably unforeseeable in this instance. This decision, although accepted, is difficult to reconcile with the rules stated above.

Similarly, this case does not present a conclusive answer to the hypothetical rape scenario illustrated by Laird and Ormerod. In *R v Dear*,¹²³ both D and V were significant and concurrent causes of death. In the situation above, it is V's suicide that is the (final, or proximate) significant cause of death. V would not have died from being raped. It is therefore unclear in these circumstances whether the rule established in *R v Dear*¹²⁴ would also apply to the hypothetical rape scenario. However, there is more recent case law that may illuminate this discussion.

In *R v Dhaliwal*,¹²⁵ D struck V with a minor blow to her head and V committed suicide shortly afterwards. V had been subjected to a long period of domestic violence at the hands of D, inflicting significant psychological harm. Upon acquitting D, the Court of Appeal stated, *obiter*, that 'where a decision to commit suicide has been triggered by a physical assault which represents the culmination of a course of abusive conduct, it would be possible...to argue that the final assault played a significant part in causing the victim's death.'¹²⁶ This rule, although only persuasive, is focused primarily on supplementing the voluntariness rule identified above. As V was subject to demeaning domestic violence for an extended duration, her decision to commit suicide was not altogether *truly* voluntary, and it was excused based on the circumstances in which she found herself.¹²⁷

The Court of Appeal considered this point directly in *R v W*.¹²⁸ D threw sulphuric acid over V. The injuries inflicted disfigured and maimed him, leaving him in a permanent state of complete paralysis and unbearable physical and psychological suffering that could not be alleviated by his doctors. He was taken to Belgium where he was voluntarily euthanised, by lethal injection, lawfully administered to him in a hospital in Belgium per the Belgian Act of Euthanasia of 28 May 2002 (Belgian 2002 Act). The

¹²³ (n 99).

¹²⁴ (n 99).

¹²⁵ (n 117).

¹²⁶ (n 117) [7].

¹²⁷ See: J Horder and L McGowan, 'Manslaughter by causing another's suicide' (2006) Crim LR 1035.

¹²⁸ (n 26).

issue was whether the conduct of D was a sufficient legal cause of V's death, or his request for voluntary euthanasia relieves D of causal responsibility. The court held that it was open to the jury to conclude that V's request to his doctors and the act of euthanasia were not discrete acts or events independent of the defendant's conduct. It was open to the jury to conclude that these acts were not voluntary as they were not the product of the free and unfettered volition to which Lord Bingham referred to in *R v Kennedy (No 2)*.¹²⁹ V's request for voluntary euthanasia was *not* a novus actus. The Court of Appeal held that for D's conduct to legally cause V's death in such circumstances where V commits suicide due to the harm inflicted by D, then (a) D's unlawful conduct must be a significant cause of death and (b) at the time of D's conduct, V's response (euthanasia) must have been reasonably foreseeable.¹³⁰

These are the two underlying and fundamental principles of criminal causation, and voluntariness and reasonable foresight are thus essential to determining whether the conduct of a third party relieves the initial actor of causal responsibility. Moreover, these two principles (voluntariness and foreseeability) apply to both actions and omissions when ascribing responsibility in criminal law. If D (voluntarily) fails to act when duty-bound and a prohibited result is reasonably foreseeable, it matters not that D did not positively contribute to the result; D is a legal cause of the resulting harm. However, rationalising the requirements for omissions in criminal causation has been more problematic for the courts compared to that of positive actions. Given the prevalence of omission-based offences, it is necessary to explore the relationship between causation and omissions in further detail before an account of culpable causation is provided.

4. Causation and omissions

In order to establish causation, criminal doctrine requires that D's conduct must be a (non-normative) factual, or *but for*, cause of resulting harm.¹³¹ It is, therefore, crucial to evaluate how a failure to act (omission) *causes* an event in law. Some writers have suggested that omissions cannot be causes.¹³²

¹²⁹ (n 35).

¹³⁰ *R v Wallace* (n 26) [86].

¹³¹ See: *R v White* (n 7).

¹³² M Moore, *Causation and Responsibility: An Essay in Law, Morals, and Metaphysics* (OUP 2009) 444; M Moore, *Act and Crime* (OUP 1993) 267-78.

This position argues that non-events, i.e. a failure to act, cannot bring about a prohibited result. This view is held because they claim that ‘nothing’ cannot initiate a causal process.¹³³ Notwithstanding the metaphysical perspective on this matter, the criminal law does recognise omissions in criminal law, and therefore this position is unhelpful.¹³⁴ The criminal law only perceives omissions as causes in law where there is a duty, and non-performance of that duty ‘causes’ a prohibited result. Therefore, because D was duty-bound to act, their non-action influences the world in the same way as a physical action. In law, responsibility for omissions involves a two-fold test: (1) Whether D owed a duty of care towards V; and (2) whether the omission of this duty made a difference to the occurrence of the prohibited result. That is, D’s omission must be an operating and significant *but for* cause of V’s harm to establish causation. The *but for* test is helpful in omissions cases due to the counterfactual nature of failing to act; however, the *de minimis* rule can also encompass such cases. Thus, D’s omission legally causes a prohibited outcome if the omission made more than a negligible contribution to the resulting harm.¹³⁵

Take, for example, the situation where D leaves a maintenance hole uncovered and V, walking by, falls 100m to their death. D’s omission legally caused V’s death.¹³⁶ In this case, D’s failure to cover the maintenance hole made more than a negligible contribution to V’s death; without D’s omission, V would not have died. Similarly, if D fails to close a gate at a railway crossing and V gets struck down and dies while passing said path, D causes V’s death.¹³⁷ It is important to note that the prosecution must be able to show, beyond a reasonable doubt, that D’s intervention would have made a difference in the bringing about of the prohibited result.

It is also necessary to consider the role of voluntariness and omissions in causation. It was stated previously in this chapter that if V is of adult age and sound mind, V can make a free, deliberate and informed decision to respond to the situation created by D. In such cases, V’s intervention amounts to

¹³³ See the example given in Simester and others, *Simester and Sullivan’s Criminal Law* (n 117) 111.

¹³⁴ See: Leavens, ‘A Causation Approach to Criminal Omissions’ (n 6); Thomson, ‘Causation: Omissions’ (n 6); and S McGrath, ‘Causation by Omission: A Dilemma’ (2005) 125 *Philosophical Studies* 125.

¹³⁵ See: *R v Morby* (1882) 2 QBD 571; *Barnett v Chelsea and Kensington Hospital Management Committee* [1969] 1 QB 428.

¹³⁶ *R v Haines* (1847) 2 Car & K 368.

¹³⁷ This presumes that D was duty-bound to ensure that the gate was closed at the time of relevance. See: *R v Pittwood* (1902) 19 TLR 37; *State v Shrout* (2013) 415 SW 3d 123.

a novus actus and relieves D of responsibility for the prohibited result. It is important to note that this is not the case with omissions. The non-performance of a duty cannot amount to a novus actus, but it can amount to a concurrent cause. Take the following example: D wounds V, who is a minor, badly. V runs home after the attack to see her mother. Her mother, T, recognising that V is severely injured and requires urgent medical assistance, instead of seeking help, tells V to lie down in bed. V dies from blood loss. Had T called for medical attention, V *would* have survived. In this case, T's omission to seek medical care for her daughter does not alleviate D of responsibility for V's death. However, T is also causally responsible for the resulting harm. Both D and T are concurrent causes of V's death. The main reason why T's omission is causally relevant to the prohibited result is that it failed to break the chain of causation between D's unlawful conduct and V's death. In this situation above where had T called for an ambulance, V *would* (not *might*) have survived, T's omission was an operating and significant cause of V's death.¹³⁸

5. Conclusion

This chapter has presented the current legal position on causation in English criminal law. However, the purpose of this chapter was to do more than this. It was also to illustrate that the current position is ambiguous, hollow, elastic, and often inconsistent. The basic premise of criminal causation is that D causes a prohibited result if that result would not have occurred *but for* his significant contribution to the prohibited result.

At the start of this chapter, the issues with factual causation were briefly stated. It was argued that the test is both under and over-inclusive of the types of conduct that concerns the causation doctrines. Indeed, the courts have, in some instances, stopped short of expressly approving the test of factual causation. Similarly, draft proposals of a Criminal Code by the Law Commission do not explicitly provide a clause for factual causation.¹³⁹ It is the Law Commissions' opinion that *but for* or factual causation is implicit in more sophisticated accounts of legal causation. Their preferred approach was that D causes the result if he makes a 'more than negligible contribution' to the occurrence of that result.

¹³⁸ See: *R v Blaue* (n 40).

¹³⁹ See: Law Commission, *A Criminal Code for England and Wales* (n 3) cl 17(1).

This test has the benefit of avoiding the conundrum identified at the start of this chapter, where A and B could be independent and sufficient (mechanical) causes of a result. It would not be possible to say that, *but for* the conduct of A, the result would not have occurred since B's conduct would have brought about the same consequence. Merely having a requirement that D must be *a* more than minimal cause avoids this issue. However, most problems of criminal causation do not concern this stage of the enquiry - the academic and judicial attention centres on legal causation.

In most cases, legal causation is ordinarily evident. However, it is the hard cases where these legal rules face problems. When applying the rules of legal causation, difficulties usually arise when the defence present information or evidence which suggests that D was not the only blameworthy actor contributing to the result. It is within the field of intervening causes that most theoretical and practical issues of criminal causation arise. The courts have looked at the conduct of intervening actions, constituting a *novus actus*, in three different ways: (1) the non-voluntary conduct of third parties; (2) the conduct of medical professionals; and (3) the conduct of the victim. If despite one of these intervening events, D's conduct remains a significant cause of the resulting outcome, D remains causally responsible.¹⁴⁰

The legal rules that have emerged from these three situations do not need repeating at length again. It is helpful, though, to explain the general position arising from the case law. (1) A defendant causes a result which is an element of an offence when he does an act which makes *a* significant contribution to its occurrence. (2) A defendant's action may significantly contribute to the occurrence of a result even though his act is not the sole or primary cause of the result. A defendant's action does not significantly contribute to the occurrence of an outcome where either: (a) a voluntary, independent intervention of another person, or (b) a subsequent event which was not reasonably foreseeable, so overwhelms the defendant's act as to render it merely part of the history or setting for the intervention or event to take effect.

¹⁴⁰ It is noted that this is no more than a generalised position. It is not possible to succinctly state the current position in its entirety so briefly. For a thorough examination of the effect of intervening events and victim responses in criminal causation, see: chapter six.

This summation of the current legal position, and the critical analysis of the causation doctrines within this chapter, has illustrated that, although the current legal position is ambiguous and (sometimes) contradictory, the current legal rules of causation are based upon the underlying principles of voluntariness and foreseeability. The importance of these two principles is often visible in the jurisprudence of the appellate courts, where the courts' critical application of these principles is utilised to resolve the tension caused by disparate legal rules when applied to hard cases. This analysis is most evident within the novus actus doctrines, but unfortunately, the current doctrinal position fails to explicitly and authentically engage with these two principles. Therefore, it is the aim of this thesis to offer an alternative account of causation, based on voluntariness and foreseeability, which makes overt what is currently covert in causation doctrines in English criminal law. This thesis argues that if a legal framework is constructed that explicitly engages with these two principles, it is possible to design a single test of causation. The proposed model of causation will have two benefits. First, it will remove the need to have different tests within causation that deal with specific factual disputes, and second, it will explicitly articulate the normative evaluation, based on culpability, that is to be made by the jury in the process of causal selection and the ascription of causal responsibility. It is this that culpable causation seeks to achieve.

The next chapter, chapter two, seeks to further the analysis advanced in this chapter and addresses two principal issues. The first is that the current legal position is inherently flawed owing to an over-reliance on disparate legal rules and an under reliance on the principles of voluntariness and foreseeability. Second, it is submitted that once a legal rule is established (i.e. culpable causation), it must be explicitly communicated to the jury that they are to make a normative analysis of D's conduct and its relationship to that harm using extra-legal considerations in a legally deregulated zone. It is these two endeavours that form the focus of the next chapter.

Chapter 2

Causation and constructive interpretivism

1. Introduction

Whether an individual (D) causes a prohibited result (E) in criminal law involves two primary processes of adjudication. First, it is necessary to identify the correct legal rule to determine D's causal responsibility for the prohibited result.¹ Second, the legal rule is to be applied by the jury as a question of fact.² The jury applies the rule, using ordinary language,³ to the context-specific enquiry to ascribe causal responsibility to D for E. Since criminal causation is not usually a substantive issue in determining D's liability for wrongdoing, questions of responsibility only occur in cases of indeterminacy. That is situations where there is no specific legal rule that resolves the causal enquiry and provides a definitive outcome.⁴ This indeterminacy may be due to one of two things; either the language of the legal rule is ambiguous, or the circumstances of the case are novel. This indeterminacy is an issue that plagues criminal causation. Therefore, it is these 'hard' cases in causation that forms the focus of this chapter.⁵

Chapter one has illustrated that the courts have inconsistently applied established causation principles to accommodate hard cases, and in doing so, created specific categories that operate within the doctrine. This deviation from the established principle is overtly visible within intervening events and novus actus cases. The proposed model of culpable causation advanced in this thesis relies on two fundamental

¹ Lord Hoffman, in *Empress Car Company (Abertillery) Ltd. v National Rivers Authority* [1998] UKHL 5; [1999] 2 AC 22, 29, held that the first stage in ascribing responsibility to an individual for a prohibited result is to determine the rule that is to be applied, and the *purpose* for such rule. He held that, 'the first point to emphasise is that common sense answers to questions of causation will differ according to the purpose for which the question is asked. Questions of causation often arise for the purpose of attributing responsibility to someone, for example, so as to blame him for something which has happened or to make him guilty of an offence or liable in damages. In such cases, the answer will depend upon the rule by which responsibility is being attributed'.

² As per the Crown Court Compendium Part 1: Jury and Trial Management and Summing Up (December 2019) <<https://www.judiciary.uk/wp-content/uploads/2016/06/Crown-Court-Compendium-Part-I-December-2019-amended-19.02.20.pdf>> accessed 15 January 2020, 7-33.

³ See: HLA Hart and AM Honoré, *Causation in the Law* (2nd edn, Oxford: Clarendon Press 1985) (hereafter *CIL*) and JL Austin, *How to do things with words* (2nd edn, Harvard University Press 1975).

⁴ Cf. HLA Hart and his jurisprudential analysis of the 'penumbra of doubt'. See: HLA Hart, *The Concept of Law* (2nd edn, Clarendon Press 1994) (hereafter *COL*). This is discussed in more detail later in this chapter.

⁵ The ambiguity of language is critically evaluated in chapter three of this thesis.

principles; first, that there is a right answer when ascribing responsibility and establishing causation in criminal law. Second, the judiciary cannot (and should not) perform this ascription of causal responsibility. It is strictly for the jury to apply the rules of causation to the factual dispute in a legally deregulated zone where they can consider moral, societal, economic, and political considerations.

In defending these claims, this chapter has two principal aims. The first aim is to show that establishing causation requires an analysis of fundamental principles, not disparate legal rules, to find the right answer. The second aim is to show that the right answer is only discoverable by the jury and its application of these principles to the context-specific dispute. Both claims are essential for supporting the proposed model of culpable causation offered in this thesis. This chapter argues that since causation is dependent on both the *context* and *relativity* of the enquiry, the legal rules of causation should not be under or over-inclusive, but instead reflective of the underlying principles of the criminal law.

Furthermore, the application of the causation doctrines should not create specific legal rules (generalisations) when establishing causation in hard cases. The creation of legal generalisations has the undesirable effect of creating particular legal rules that are not of general applicability, which fail to balance the interests and ideas of the criminal justice system. The critical discussion of the jurisprudence arising from the appellate courts' difficulty in prosecuting drug suppliers for the manslaughter of their clients evidences the adverse effects of legal generalisations.

This chapter illustrates that once the court has identified the relevant legal rule(s), using culpable causation, the right answer is only discoverable when the trial judge 'passes the buck' to the jury.⁶ This analysis allows the jury to ascribe responsibility for resulting harms in a legally deregulated zone that does not create binding precedent on future cases. Since causation concerns a plethora of extra-legal considerations and principles, a deregulated zone provides sanctuary for political, moral, and socio-

⁶ This phrase has been coined by Gardner and used in his analysis of the role of the reasonable person in law. Gardner identifies several benefits to 'passing the buck' to the jury in these cases, and his jurisprudential findings are of particular relevance to the aims of this chapter, and thesis more generally. See: J Gardner, 'The Mysterious Case of the Reasonable Person' (2001) 51 University of Toronto Law Journal 273; and J Gardner, 'The Many Faces of the Reasonable Person' (2015) 131 LQR 563. This work is looked at later in this chapter.

economic factors to be jointly applied and developed in a manner that is reflective of the community that it seeks to regulate.⁷

To defend the claims stated above this chapter adopts the following structure. The first section illustrates that criminal causation is inherently indeterminate. However, despite this indeterminacy, there is always a right answer to hard cases. A critical application of Dworkin's constructive interpretivism is employed to defend this claim. The second section demonstrates that in criminal law, it is justifiable, and indeed necessary, to defer the jury to determine the right answer to ascribe responsibility for resulting harms. This exists in the framework of culpable causation, as defined in this thesis, but is legally deregulated. Finally, the chapter moves to demonstrate that the jury applies extra-legal considerations when ascribing responsibility to ensure that the general principles of criminal law are protected. The proposed model of culpable causation achieves this through the incorporation of the reasonable person to regulate and evaluate the conduct of D. This deregulated rule applies to all (hard) cases of criminal causation. These claims are each considered in turn.

2. Constructive interpretivism

This chapter uses constructive interpretivism to critically analyse *how* and *why* causal responsibility is ascribed for results in criminal law.⁸ Constructive interpretation principally involves imposing a purpose on a practice (in this case, adjudication) to make of it the best possible example of the form to which it is taken to belong.⁹ Criminal cases involve issues of facts, questions of law, and issues of political morality and fidelity.¹⁰ The first refers to what happened, the second to what the pertinent law is, and the third to what a *just* outcome should be. Dworkin posits that the law and legal practice are, by their very nature, interpretative concepts. It is necessary to construct the value behind the practice by deferring to the interests, goals, and principles that the practice can be taken to serve.¹¹

⁷ It is not within the scope of this chapter to discuss this position here. This forms the focus of chapter three, where the view is advanced that causation does not depend upon one single criterion when ascribing responsibility, but rather several criteria that are each present in varying degrees in any given factual dispute.

⁸ Dworkin set out his theory on constructive interpretation in R Dworkin, *Law's Empire* (Belknap Press 1986).

⁹ Dworkin, *Law's Empire* (n 8) 52.

¹⁰ Dworkin, *Law's Empire* (n 8) 3.

¹¹ R Dworkin, *Law's Empire* (n 8) 52.

This analysis illustrates that ascribing causal responsibility for a prohibited result requires a review of the pertinent law and, once this has been established, the jury determines the just outcome based on the normative application of the legal rule(s). This section considers these two claims in turn. The first issue lies within correctly identifying the pertinent law in establishing causation. As illustrated in chapter one, the legal rules on causation are inconsistent and inherently binary. Therefore, the pervasive issue concerns that of legal indeterminacy.¹² That is, whether the law is a seamless web¹³ or shot through with gaps that require filling by the judiciary during the process of adjudication.¹⁴ This question has received significant jurisprudential discussion by eminent legal academics and philosophers. Because of this, it is not within the scope of this chapter to present an alternative view to that of existing literature, but rather to draw upon the existing commentary to defend the framework of criminal causation offered in this thesis.

To illustrate these issues and their relevance to causation, take two hypothetical scenarios. Both are similar; however, due to the specific terminology of the legal rule stated, it is not immediately apparent if the legal rule applies to both cases. Consider the following two scenarios:

Hitchhiker 1. D is driving a car and picks up a hitchhiker (V) who wants a lift. D attempts to sexually assault V once in the car. To escape the sexual assault V jumps from the moving car and suffers serious bodily harm. Assume that there exists only one legal rule on this issue, *Rule x*. The rule provides that an individual is responsible for the subsequent harm incurred by a victim who reasonably foreseeably responds to a threat of sexual harm by D. From the direct application of this rule, D legally causes V's injuries.

Hitchhiker 2. D is driving a car and picks up a hitchhiker (V) who wants a lift – in the same way as before. However, this time D does not attempt to sexually assault V. This time, D threatens to punch V if she does not hand over her personal possessions. Because of these threats, V jumps from the moving car and suffers serious bodily harm – much like in *Hitchhiker 1*. However, the application of *Rule x* does not directly apply to this situation. Assume that there is no other legal rule for determining whether D causes V's injuries in

¹² Dworkin gives the example of *Riggs v Palmer* (1889) 22 NE 188, which is also known as *Elmer's case*, to illustrate the inherent indeterminacy of legal rules. The case concerned the question of whether a legatee was entitled to benefit from an inheritance after being convicted of murdering the testator. See: Dworkin, *Law's Empire* (n 8) 16-20.

¹³ R Dworkin, *Justice in Robes* (Belknap Press 2006) 41 (hereafter *JIR*).

¹⁴ Hart stated that the words that we use in the law have a 'core of certainty' and a 'penumbra of doubt' and that the judiciary sometimes has the role of filling any gaps during the process of adjudication. See: Hart, *COL* (n 4) 123, 128 - 136.

such a case. Also assume that this scenario is novel for the judiciary. Whether D causes V's injuries is more difficult to adjudicate in this case.¹⁵

Hitchhiker 1 is different from *Hitchhiker 2* for one primary reason. *Rule x* is a rule governing responsibility in cases of *sexual* violence. Therefore, whether D causes V's injuries in the second scenario, where there is a threat of physical harm that is not sexual, is not decidedly clear cut based on a strict application of *Rule x*; there is the indeterminacy of the rule. This jurisprudential issue is prevalent in all aspects of law, but the purpose of this section is to critically evaluate the extent to which questions of causation are indeterminate. The question of whether D legally causes V's injuries in *Hitchhiker 2* has a right answer is determined by (1) considering the principles that the legal rules on causation seek to protect, and (2) by using the jury to regulate D's conduct and V's response. This chapter has several obstacles to overcome to reach this position. The first is in demonstrating that there is a right answer to every legal dispute. The second is in showing that to reach that right decision, it is necessary to defer to the jury to achieve a just outcome. It is to these two issues that this chapter now turns.

The question of whether D causes E is regulated by several legal rules that shape criminal causation. Chapter one provides a doctrinal analysis and identifies that causation has received significant judicial commentary.¹⁶ The importance of judicial analysis on this subject is even more critical given there are no statutory provisions determining whether D causes E in the criminal law, despite draft recommendations from the Law Commission.¹⁷ Instead, the legal rules on causation rely upon the general principles that underpin the criminal law more generally. When there are competing interests (e.g. that of D and V) there exist general, and often competing, principles that the judiciary seek to protect. The trial judge is required to evaluate the legal rules and determine which rule best protects the overall interests of the criminal justice system. In this decision-making process, the judge will apply

¹⁵ These two examples are based on the facts of *R v Roberts* [1971] EWCA Crim 4 and *R v Williams and Davis* [1992] Crim LR 198. These two cases were looked at in the previous chapter when looking at the causal responsibility of a defendant when a victim responds to the unlawful conduct in a reasonable and foreseeable manner, which is also a significant contributory cause of the resulting harm.

¹⁶ The importance of precedent is an important consideration that is looked at in further detail below. In some instances, the specific legal rules stated through judicial interpretation, and their application of such rules, has caused difficulties for subsequent cases which have tried to apply the same legal rules in situations where the facts are materially different.

¹⁷ Law Commission, *External Elements of Offences* (Unpublished 2002).

the relevant legal rules to the dispute and defer to the jury on related fact-finding issues. In doing so, the jury uses extra-legal considerations, and their ordinary grammar of causation,¹⁸ to regulate and evaluate D's conduct. Therefore, whether D causes E involves the careful balancing of competing interests to determine the correct legal rule that is to be applied by the jury. That there is a 'right' answer to questions of legal causation in the criminal law is critically evaluated in the subsequent section using Dworkin's constructive interpretivism and his 'right answer thesis'.

2.1 The 'right answer' thesis

Although causation is seldom problematic for the trial judge, cases of causation are always hard cases. This dichotomy exists because whether D is the cause of E can be often settled, on a practical level, without recourse to any theoretical or jurisprudential discussion. For example, it is often self-evident that because of D stabbing V, D is causally responsible for V's death. Similarly, if D punches V, who subsequently falls over and breaks their arm, D is causally responsible for V's injuries.¹⁹ It usually is enough for the prosecution to demonstrate that D both committed the act and possessed the required degree of fault (in causing the outcome) to convict D of murder or actual bodily harm. If both are present, the issue of causation is not even raised at trial. However, *why* and *how* causation is established is more difficult to rationalise on a theoretical and doctrinal level. This is evidenced by the inconsistent application of legal rules in the appellate case law discussed in the previous chapter. This is particularly evident in cases involving third parties,²⁰ abnormal intervening events, unforeseeable consequences,²¹ and grossly negligent actors.²² It is because of this that there usually is an absence of a physical chain of events flowing from D's unlawful conduct to the prohibited result. *Hitchhiker 1* and *2* illustrate these hard cases. These scenarios help to demonstrate the indeterminacy of legal rules.²³

¹⁸ The importance of the ordinary grammar of causation is stated briefly here; however, it is looked at in much more detail subsequently. It forms the substance of the proceeding chapter in this thesis.

¹⁹ Contrary to the Offences Against the Person Act 1861, s 47. It is worth noting that D must also possess the relevant degree of fault in punching V to be convicted of such an offence. It is not necessary to consider the mens rea requirements for the purposes of this example.

²⁰ A classic example of when a third parties conduct is described as being non-voluntary, and therefore, does not relieve the D of responsibility for bringing about the prohibited result is *R v Pagett* (1983) 76 Cr App R 279.

²¹ See: *R v Roberts* (n 15); Cf. *R v Dear* [1996] Crim LR 595.

²² See: *R v Jordan* (1956) 40 Cr App R 152; Cf. *R v Smith* [1959] 2 QB 35.

²³ Legal indeterminacy, as identified above, is the notion that standard written rules do not always help determine the outcome of the case.

Dworkin explains the issues inherent in judicial decision-making and practical lawyering, which provides useful insight into the operation and application of the causation doctrines. Dworkin's work on the law as integrity and his 'right answer thesis' resolves legal indeterminacy by logical reasoning and always has a right answer.²⁴ Dworkin was of the view that the law is to be treated as a seamless web where there is always a right answer discoverable by the judge in any given case.²⁵ The claim is that there is a single objective (correct) answer to legal disputes, not discoverable by a single definitive legal test, but rather through the application of principles and extra-legal considerations that operate in the contextually-dependant environment.²⁶ He makes the following statement, which succinctly states his position:

It is a claim made within a legal practice rather than at some supposedly removed, external philosophical level. I ask whether, in the ordinary sense in which lawyers might say this, it is ever sound or correct or accurate to say, about some hard case, that the law, properly interpreted, is for the plaintiff (or for the defendant).²⁷

The 'right answer thesis' states that in any case the judge is tasked with deciding whether the current law (legal rules) are in favour of the defendant or the victim (in cases of the criminal law). This view is abhorrent to the work of positivists, such as Hart, who argued that any indeterminacy in the law is only apparent in cases of 'open texture'.²⁸ The law in these 'open texture' cases is, according to Hart, unclear because of the uncertainties raised by the ineliminable open texture of natural language.²⁹ Hart claimed that due to the ambiguous nature of language, there are some cases where the legal rules of a rich legal system do not specify the correct legal outcome.³⁰ This open texture, it is posited by Hart, provides the

²⁴ Although some writers have suggested that Dworkin is not concerned with 'right answers' but rather 'best answers', he has referred to right answers in his more recent works, see: Dworkin, *JIR* (n 13). Also see: S Hershovitz (ed), *Exploring Law's Empire: The Jurisprudence of R Dworkin* (OUP 2006). For this reason, the term 'right answer' is used in this thesis.

²⁵ Dworkin argues that when viewing the law as integrity, it is necessary to perform a backward- and forward-looking exercise to ensure that the decision fits earlier decisions in addition to the current legal practice. See: Dworkin, *Law's Empire* (n 8) 225.

²⁶ It is important to note that the correct answer in such a case is not a claim that the answer is irrefutably right, but is a constructive interpretation made in legal practice by the judiciary. Dworkin stated that this is "not a claim of physics". It is the decision that is most justified, determined by the principles of fairness, justice, procedural due process, and integrity See: Dworkin, *Law's Empire* (n 8) 80, 230 – 231.

²⁷ Dworkin, *JIR* (n 13) 41.

²⁸ Hart, *COL* (n 4) 123, 128 - 136. Hart stated that the words that we use in the law has a 'core of certainty' and a 'penumbra of doubt'.

²⁹ See: Austin, *How to do things with words* (n 3).

³⁰ Hart, *COL* (n 4) 119, 123 – 125.

judiciary with authority to fill in any gaps in the legal rules raised by hard cases using their discretion.³¹ Although discretion is a critical facet of the judiciary's role, problems arise when presenting a new case without a relevant legal rule. Hart referred to these as the 'penumbra' cases.³² He gave the seminal example of an Act that prohibited vehicles in a park.³³ He stated that the settled meaning of the Act included cars (automobiles); however, the inclusion of (say) skateboards or bicycles, was subject to ambiguity. The car fits in the 'core of certainty' of the legal rule, whereas the penumbra of doubt covers skateboard and bicycle.³⁴

This ambiguity, as described by Hart, is not unique to the law since it is a general feature of our language. However, problems begin to surface when a judge is asked to decide if a legal dispute falls within the penumbra of a legal rule. For example, if there were a statute that expressly permits *a*, *b*, and *c* but does not mention *y*, then *y*'s inclusion may be determined based either the 'core of certainty' of the language or based on the mischief of the Act or rule. This ambiguity may arise because we are not specific enough about our use of language in drafting legislation, or because it is not always possible to predict the statute's future use.

Hart's example of open texture applies to the two hypothetical *Hitchhiker* examples described at the start of this chapter. In *Hitchhiker 1*, D's conduct falls in the core of certainty of *Rule x*; the repercussions of V's response to D's sexual advancement attributes to D. However, D's threat of non-sexual violence in *Hitchhiker 2* is less clear. Hart argued that to resolve this indeterminate dispute, the language of the legal rule would need to be evaluated to determine whether it is inclusive of D's conduct in the second example. It is a gap in the law that can only be resolved by the judge's discretion in deciding whether to extend the rule or not. Extending the rules requires demonstrating that it was an accepted societal norm to justify its inclusion, or that its inclusion is warranted based on the mischief of the Act. For Hart, this extensional indeterminacy of language, resolved through the adjudication

³¹ For HLA Hart, this is achieved using ordinary language philosophy. See: Hart, *COL* (n 4); Hart and Honoré, *CIL* (n 3) 123, 128 – 134.

³² Hart, *COL* (n 4) 123.

³³ See: HLA Hart, 'Positivism and the Separation of Law and Morals' (1958) 71 *Harvard Law Review* 593, 607.

³⁴ Hart, *COL* (n 4) 128 – 129.

process, is much smaller than the core of certainty that language provides where the term's application is precise. This approach means that when adopting a positivist view, the indeterminacy of law is a peripheral phenomenon and a rich legal system will often provide an answer to legal disputes. In both cases, the discretion of the judiciary solves both problems, albeit small ones. This view is abhorrent to the one presented in this thesis. Hard cases of criminal causation do not sit on the peripheral phenomenon but are indeed far more common than this.

These claims advanced by Hart are explicitly rejected by Dworkin.³⁵ He states that the judiciary is not legitimately entitled to such discretion and that the problem of indeterminacy is much larger than Hart cares to admit. In starting with the discretion with which the judiciary operates, Dworkin claims that it is beyond their authority to exercise their discretion in the manner Hart describes. He argues that since their primary role is to discover what the law *is* – there is always a right answer without the need for such discretion. Even in hard cases, the judiciary is governed by controlling standards based upon legal principles and rules. Dworkin objected to the judiciary acting as deputy legislators for two fundamental reasons. First, it offends the democratic notion that the public is governed by elected officials answerable to the electorate. Since the judge is not elected, they must not substitute their own will against the legislature. Second, if the judiciary creates a new law, it has the undesirable consequence of applying retrospectively in the case before them. As such, the losing party will be punished by a duty *ex post facto*. If true, both are unwelcome admissions of the adjudication process.

However, simply because there is no decided precedent on a particular issue does not mean that there is no right answer. Dworkin claims that if lawyers believe that there is an objective 'right' answer, the 'wrong' side would not go to court and claim that they were correct. The reason is that although there may be a right answer, that answer is dependent upon the judiciary's interpretation of the legal rules and principles concerning the contextually specific enquiry and the jury's consideration of extra-legal

³⁵ See: Dworkin, *Law's Empire* (n 8); R Dworkin, *Taking Rights Seriously* (Duckworth 1977) (hereafter *TRS*) and R Dworkin, 'No Right Answer?' (1978) 53 *New York University Law Review* 1. Dworkin's more specific claims are looked at later in this chapter.

considerations. This claim is rejected by positivists, like Austin³⁶ and Hart,³⁷ who state that when the rules ‘run out’ the judiciary operate as deputy legislators and fill in the gaps of the open texture of the law. Dworkin’s view is preferable to that of positivists since they are interested in absolute clarity of the law – something that Dworkin’s thesis does not provide, nor require.

Dworkin presents an alternative position. He states that there is a distinction between *strong* and *weak* judicial discretion. *Strong* discretion is where pre-existing standards set by the authority, i.e. Parliament, bind the judiciary. *Weak* discretion is, conversely, when the rule cannot be applied logically and mechanically to the dispute. In the latter, there is a need to evaluate what the standard means in a new case, balancing the principles that underpin the rule and applying it in a contextually specific manner. It is therefore not constitutionally appropriate for the judiciary to operate using strong discretion. Weak discretion, on the other hand, is permitted by Dworkin. Since there are no gaps, the law can be viewed as a seamless web. Weak discretion means that the judiciary has to find the right answer that is principled and prospective. Since principles of criminal law have always operated in society, evidenced by legal rules and precedent, the judge is legitimate in finding the right answer. Conversely, strong discretion has the effect of creating new rules, something that is not permitted by the judiciary.

It is necessary to evaluate the components of the law that Dworkin relies upon and see how they would operate if adopted in this thesis, and indeed within the doctrine of criminal causation. The law consists of both legal rules and principles.³⁸ Legal rules cannot account for a wide variety of cases since the law is much more than what these rules expressly stipulate. All legal rules produce hard cases that require a logical and mechanical application of rules to resolve. Dworkin argues that when deciding these hard cases, the judiciary makes use of extra-legal standards that do not function as rules but as principles. In the operation of a legal system, principles are more important than rules since they surround and define legal rules.³⁹ These legal rules are inflexible and operate in a binary fashion – they either apply or not,

³⁶ J Austin, *Lectures on Jurisprudence or the Philosophy of Positive Law* (R Campbell ed, New York 1885).

³⁷ Hart, *COL* (n 4) 123, 128 – 134.

³⁸ They both exist to express and protect rights in the legal order. For Dworkin, the central approach within the law emphasises rights and the protection of individual autonomy – an approach that places the protection of minorities who are often left out of utilitarian models.

³⁹ Dworkin, *Law’s Empire* (n 8).

and it is this ‘all or nothing’ application that cannot adequately explain a rich legal jurisdiction such as our own. This inflexibility is evidenced by the indeterminacy of law, as illustrated by the hypothetical examples, *Hitchhiker 1* and *2*, given at the start of this chapter. While Hart argued that these cases are seldom problematic for the law,⁴⁰ Dworkin argues that these cases are much more frequent than Hart cares to admit.⁴¹ Dworkin claims that the disparate legal issues between, (say) *Hitchhiker 1* and *2*, can be mutually resolved by looking at the similarities and connections between these types of cases.⁴²

In any single case then, there are several points of indeterminacy due to rule vagueness, not just one linguistic issue as Hart’s account illustrates. There are the principles that underpin legal rules and the discussion of whether D causes V’s injuries can be explained, not by inflexible legal rules, but through a meaningful investigation about the broader legal system.⁴³ Any one of these rules and principles could affect the outcome of the decision. This Dworkinian model provides a framework by which all ‘hard cases’ can be understood in a holistic legal system.

If legal rules operate in an all-or-nothing fashion, and D performs an action, in circumstances that result in E, then D only legally causes E if there is a specific rule that regulates such conduct. This approach is a dispositive concept in that, if such rule exists (such as *Rule x*) then the judge is under a duty to decide the subsequent case in one way. If *Rule x* does not hold, then the judge has a duty to decide oppositely and hold that D does not cause E. This bivalence thesis states that the judiciary must apply *Rule x* in either a positive or negative manner. Applying this to *Hitchhiker 1* and *2* (as discussed above) - In *Hitchhiker 2*, since D did not *sexually* assault V, *Rule x* cannot be extended in a binary fashion. A holistic application of criminal law principles may find that D does cause V’s injuries in *Hitchhiker 2*, but this cannot be decided using the Hartian ‘open texture’ of language. It is only evident after a

⁴⁰ Hart, *COL* (n 4) 128 – 129.

⁴¹ Dworkin, *TRS* (n 35) 81 - 130.

⁴² Both in the previous chapter and this one, it has been stated that in most criminal trials, criminal causation is not an issue. This, it is submitted, is not because criminal causation is ‘easier’ to prove, or that there is no legal indeterminacy of rules, but that the similarities and connections between previous cases are easier to assimilate and explain.

⁴³ Dworkin, *Law’s Empire* (n 8) 379 – 92. Similarly, at the start of the book, he explains the several decided cases that cannot be explained by legal rules alone. For example, he looks at the US Supreme Court in *Brown v Board of Education* (1954) 347 US 483 and *R v Clarence* (1888) 163 US 537. For a discussion of these cases in respect of legal indeterminacy, Dworkin, and Realism, see: S Smith, ‘Right Answers and Realism: R Dworkin’s Theory of Integrity as a Successor to Realism’ (2013) 64 NILQ 507, 511 – 513.

thorough investigation of the reasons for the implementation of *Rule x* and the interests that it seeks to protect, whether it applies to the conduct in *Hitchhiker 2*. The thesis does not adopt the limited application of Hart's 'open texture' approach to legal indeterminacy. Instead, it uses the Dworkinian notion that all legal rules are subject to indeterminacy but always has a right answer, discoverable through evaluation of legal principles.⁴⁴

There has been mention, thus far, of legal rules and legal principles, and it is worthwhile to state the difference between these two concepts in more detail. The legal principles that Dworkin advances are broad concepts that pertain to specific moral beliefs within society.⁴⁵ These principles are fundamental in that they apply across a range of cases and issues and interact with other principles to provide the best possible legal system in that contextual situation (and time).⁴⁶ The advantage of adopting this position is that it is much more expansive than the Hartian 'open texture' model. Hart's model only accounts for legal indeterminacy based on the penumbra of doubt, answered using ordinary language philosophy, which has the undesirable consequence of not directly considering the broad principles that underpin the doctrine when applying legal rules. Since legal rules are created to give effect to these principles, it is preferable to use them in cases to secure the most desirable legal system.

The start of this chapter states that cases concerning criminal causation are uncommon and seldom pose difficulty at trial. However, when causation is an issue, it is submitted that there is always legal indeterminacy, which is considered to be a hard case due to the reliance on contextual decision making. Legal rules will not always accommodate the factual dispute. Therefore, since Hart states that indeterminacy is uncommon in the law and that a holistic approach is not required in all cases, this thesis defends a Dworkinian approach in understanding criminal causation, and therefore, this thesis. Dworkin is correct in asserting that this indeterminacy is much more common than Hart suggested. The fundamental principles that underpin causation become necessary to provide answers to disparate rules.

⁴⁴ See: Dworkin, 'No Right Answer?' (n 35).

⁴⁵ Dworkin, *TRS* (n 35) 82.

⁴⁶ Dworkin, *TRS* (n 35) 81 – 130; Dworkin, *Law's Empire* (n 8) 95-96.

To return to the two hypothetical examples given at the start of this chapter, *Hitchhiker 1* and 2; D, in the first case, does not require any explanation or justification in ascribing the prohibited result to him. The legal rule makes explicit provision for attributing the prohibited result because of his conduct. The judge's decision is legitimate in ascribing responsibility to him. However, the position in *Hitchhiker 2* is more problematic. If a Hartian model were adopted, the judge could state that the penumbra of doubt entitled him to exercise his discretion to determine that violent threats, albeit not sexual, are covered by *Rule x*. For the reasons outlined above, D could claim that the judge's decision is retrospective and determined *ex post facto*. He was not duty-bound in this way at the time in which he made the threats to V. Similarly, he could argue that the judge exceeded his authority and raise constitutional issues relating to the separation of powers and the legitimacy and authority of the adjudication process. If the judge responds that V, in the second case, did not operate as a free, informed agent due to the circumstances in which D forced her to act, and therefore D is responsible for her injuries, D may also find this to be unsatisfactory. Similarly, the judge may state that s/he is entitled to interpret legislation, including its mischief, as part of their role as members of the judiciary.

However, such discretion is not unfettered and can only operate in a weak sense. Hart's strong direction results in a cyclical argument that does not provide a satisfactory justification for extending *Rule x* in the second scenario, *Hitchhiker 2*. Since Hart bases his approach on the authority placed on the judge or the interpretation of legislation, it is personal and specific to the judge. This view is contrary to the claim that there is an objectively right answer discoverable by the judge through an analysis of principles which pertains to legal rules. To present a decision that is objectively correct and satisfy the 'right answer thesis', the judge must be able to demonstrate that the decision is right under the circumstances, i.e. it is contextually correct. Although D in *Hitchhiker 2* may make a reasonable argument that would ensure in his acquittal, the judge can claim that their argument is better than all the alternatives, based on the principles that underpin the legal rule (and extra-legal considerations). It must be possible to show that it is the best objective answer to the legal indeterminacy. The judge must be able to claim that the decision to convict D using *Rule x* is right under the circumstances and an objectively true statement of the current criminal law.

The advantage of adopting a Dworkinian approach to legal indeterminacy and criminal causation is that it defends the position that the legal rules of causation cannot be applied mechanically,⁴⁷ nor is it divorced from the society in which it is set to regulate. The doctrine does not operate on its own without the consideration of other facts and aspects of societal life. It is therefore imperative that determining whether *Rule x* ought to be extended to *Hitchhiker 2*, in the same way, that it is in *Hitchhiker 1*, requires an evaluation of not only the legal principles but the society and community in which the rule operates. Whether a legal rule extends to different situations will always involve a range of various factors. It allows judicial decision making and practical lawyering to be looked at in more significant detail compared with, for example, the Hartian ‘open texture’ of language and rules. It requires that the judge establishes which principles are legally binding in any given case. Dworkin answers that they are those who belong to the ‘soundest theory of settled law’.⁴⁸ The seamless web of settled law consists of the legal rules and doctrines accepted as being authorities by the consensus of the legal community based on political and moral theory. To have the right answer, the judge must consider every area of law – the common law, statutes, administrative law, and constitutional law. Since no judge could ever perform such a task perfectly, Dworkin introduces us to a hypothetical idealised judge of superb intellect and reasoning – Judge Hercules. Dworkin’s personification of the perfect judge is looked at in the next section to defend the claim that even though a judge may have Olympian intellect, he too must defer to the jury in hard cases of criminal causation to reach a just outcome.

2.2 Judge Hercules

This chapter argues that hard cases of criminal causation do have a right answer. In *Taking Rights Seriously*⁴⁹ and *Law’s Empire*,⁵⁰ Dworkin introduces us to Judge Hercules as an exemplar of proper

⁴⁷ In *R v Kennedy (No 2)* [2007] UKHL 38; [2008] 1 AC 269 Lord Bingham held, at 276, that ‘Questions of causation frequently arise in many areas of the law, but causation is not a single, unvarying concept to be mechanically applied without regard to the context in which the question arises. That was the point which Lord Hoffmann, with the express concurrence of three other members of the House, was at pains to make in *Environment Agency (formerly National Rivers Authority) v Empress Car Co (Abertillery) Ltd* [1999] 2 AC 22... Lord Hoffmann made clear that (P 29E—F) common sense answers to questions of causation will differ according to the purpose for which the question is asked; that (P 31E) one cannot give a common sense answer to a question of causation for the purpose of attributing responsibility under some rule without knowing the purpose and scope of the rule.’

⁴⁸ Dworkin, *TRS* (n 35) 67 - 68, 79, 283, and 340.

⁴⁹ Dworkin, *TRS* (n 35).

⁵⁰ Dworkin, *Law’s Empire* (n 8).

adjudication. Hercules is an ideal omnipotent judge used as an example of the proper process in hard cases. Judge Hercules is not a real judge, but a hypothetical idealised version of a jurist with extraordinary skill and Olympian intellect who can challenge various predominating schools of interpretation and always find the 'right answer' to legal indeterminacy. Dworkin states that 'Hercules...is a myth. No real judge has his powers...Hercules is useful to us just because he is more reflective and self-conscious than any real judge need be or, given the press of work, could be'.⁵¹ Although Hercules is an ideal judge, the method by which he reaches decisions apply to real judges and ordinary citizens.⁵² Analogical reasoning requires, by both ideal and actual judges, the examination of past cases and aligning them to the present dispute. However, this requires the political theory to navigate through hard cases like those discussed above. If faced with a hard case, Hercules would evaluate all relevant legal provisions, statutes, judicial precedents, and their historical developments to ensure that the sources provide the most satisfactory concept of moral philosophy. Ultimately, this would ensure that there would be the best possible analysis of the legal heritage at his disposal to find the 'right answer'. Even though Hercules has powers beyond that of the mortal judge, Dworkin states that mortal judges are committed to both the logical possibility of arriving at the outcome Hercules would if he were to hear their cases. Mortal judges appeal to principles, not merely legal rules, and therefore give effect to pre-existing legal obligations when adjudicating. They do not make a political choice amongst competing rules.

In the search for the right answer, Hercules can, when faced with two conflicting precedents, follow whichever of the two he prefers on the basis that the other precedent is a mistake. In doing so, he must demonstrate that the admission of an error is preferable than claiming that there are no mistakes in judicial decision making, or that there are a different set of mistakes.⁵³ The judge should, in the practice of reasoning, assert the underlying principle of the legal rule that is not inconsistent with either legal rule. This approach is different from Hart's perception of judicial discretion since Hercules is not acting with strong discretion; rather, the necessity of discovering pre-existing rights truncates his discretion.

⁵¹ Dworkin, *Law's Empire* (n 8) 265 - 266.

⁵² Dworkin, *TRS* (n 35) 129 - 130.

⁵³ Dworkin, *TRS* (n 35) 118 - 123.

Such a process, therefore, forces judges to make political and moral judgments.⁵⁴ These judgments should not be unique to a judge and their discretion, but rather, judges should hold a theory about what the statute or the precedent itself requires. Although members of the judiciary will, of course, reflect their convictions in making that judgment, which is different from claiming that those convictions have some independent force in the argument just because they are from one judge.⁵⁵ Instead, '[Hercules] uses his own judgment to determine what legal rights the parties before him have, and when that judgment is made, nothing remains to submit to either his own or to the public's convictions'.⁵⁶ Dworkin's theory has the advantage of ensuring that there is a concept of equality that involves the right of the individual to equal concern and respect.⁵⁷ Therefore, the rights and principles Dworkin advances are guaranteed and do not depend upon the majority view.

The role of Judge Hercules is clear. It is his judicial duty to determine which legal rule best applies to any factual dispute between D and V. If there is a hard case or legal indeterminacy, then it is for Hercules to take an omnipotent viewpoint and determine which rule should be applied based on a historical, polemical, and moral evaluation of the rights and principles that the rules pertain to. Similarly, this is the role of actual judges (with the omission of 'omnipotent', of course). Therefore, if the law requires a *normative* evaluation on the formulation or applicability of a legal rule, then it is to be made by the jury. This position is required of the jury because it is not rule-based analysis, but rather a standard-setting. When there is a context-specific normative judgment while implementing the legal standard, the jury does so as an incident to their fact-finding role. It is for the jury to set the standard that is required by society in the application of the 'right' legal rule to reach a just outcome.⁵⁸ Judge Hercules, it is submitted, would therefore only defer to the jury where he is sure that is a pre-requisite to the finding of the 'right answer' once he has established from the judicial precedent the correct legal rule to which the jury apply their fact-finding standard. This, it is submitted, is required in all cases of

⁵⁴ Dworkin, *TRS* (n 35) 126.

⁵⁵ Dworkin, *TRS* (n 35) 117 – 118.

⁵⁶ Dworkin, *TRS* (n 35) 105.

⁵⁷ Central to all interpretations is the principle that all people should be treated with equal concern and respect. See: Dworkin, *TRS* (n 35) 182, 227.

⁵⁸ It is the role of the jury to set the standard by which D's conduct is measured in criminal causation. In other areas of law, such as the law of tort, it would be for the court to set this standard.

criminal causation. It is always necessary for the judiciary, and indeed Hercules, to defer to the jury when ascribing causal responsibility as it requires both an analytical and normative application of legal rules to ‘link’ D’s conduct to the resulting harm.

There are two attractive advantages to deferring to the jury to set the standard when applying the legal rule. The first is that it has the benefit of allowing causation to be contextually dependent as there are so many variables when ascribing responsibility; precedent concerning criminal causation should not set legal generalisations for any subsequent case. Avoiding these legal generalisations can only happen when consistently applying legal rules in hard cases of causation and using the jury to set the standard by which D’s conduct is measured to take account of contextual differences. Second, it allows criminal causation to operate in a legally deregulated zone where it is not questions of law that determine causal responsibility, but questions of fact that are answered by the jury. It is not that criminal causation is a mere tautology ‘is D to be responsible for E?’, but whether D *should* be responsible for E, taking into consideration underlying principles of the criminal justice system. It is, therefore, *only* the jury that can perform this normative evaluation of D’s conduct and ascribe causal responsibility for a resulting harm. The next section further considers both these claims in turn.

2.3 The gravitational force of precedent

This section looks at the role of precedent in judicial decision making and its relevance to hard cases of criminal causation. There will be some cases that are presented to the criminal justice system that do not fall within the natural application of the statute, nor a specific common law rule. However, both sides will argue that there exist earlier common law decisions that provide their respective party with a right to decide in their favour. The first task for the judge in such case is to ask whether the principles that are presented are the soundest, a task that is not subject to a mechanical process, nor is such an endeavour obvious. The effect of precedent is well known in common law jurisdictions. If judges decide at common law, using their weak discretion, then they lay down general rules that are to be followed in subsequent cases. Indeed, Dworkin, and by extension Judge Hercules, would state that earlier decisions (precedent) exert a ‘gravitational force’ on later decisions, even when they lie outside of its particular

orbit.⁵⁹ This analysis is part of Hercules' general theory of precedent. It is integral to the rule of law to treat like cases alike, and the gravitational force of precedent protects this interest. However, it is possible to depart from these decisions. There are instances, such as in those hard cases, that the gravitational force of precedent can be limited when arguments of principle justify it. Dworkin uses the example that if a decision is based purely on policy, then principle will 'trump' policy, and deviation essential for legitimate decision making. Although the legislature can enact legal rules based on policy, Dworkin claims that the judges must look to principle over policy. That is not to say that political philosophy cannot be of relevance, but that is something different from policy-based decision making.

The gravitational form of precedent also suggests the law is a seamless web. Since justifying the judicial decision on the grounds of principle, not policy, it is once more a statement of the 'right answer thesis', which can, in turn, be used to decide hard cases. As Dworkin states,

It provides a question – What set of principles best justifies the precedents? – that builds a bridge between the general justification of the practice of precedent, which is fairness, and [Hercules'] own decision about the general justification requires in some particular hard case.⁶⁰

This claim requires judges to determine, based on precedent, the principles that best fit the factual dispute in any given case. Although there is indeterminacy in any legal system, this does not mean that the law is *not* a seamless web. Defending the right answer thesis can only be justified by perceiving the principles that underpin the legal rules as being consistent.

The issue of precedent, for criminal causation, is that legal rules create legal generalisations. Because of the indeterminacy of law, based on a Dworkinian view, legal rules should not be under or over-inclusive of the types of conduct that it seeks to regulate. Rules should not be so overly vague that they provide no direction to a judge or ordinary person alike. Nor should they be so specific that they cannot develop with the pace with which society changes. Just like Hart's seminal example of a rule that prohibits vehicles in a park, as discussed above, at the time in which it was (hypothetically) enacted, skateboarding was not a prevalent recreational activity. Although initially aimed at modes of transport

⁵⁹ Dworkin, *TRS* (n 35) 138.

⁶⁰ Dworkin, *TRS* (n 35) 142.

like cars, motorbikes, and bicycles – the principal reason behind its enactment may be legitimately extended to cover the ambit of skateboards, and even more modern inventions such as (say) hoverboards. The legal rule should use language aimed towards the principle which it seeks to protect and not specifics. This claim does not depend on the ‘open texture’ of language, but rather a more ubiquitous indeterminacy that requires the principles of the rule to be evaluated to determine whether such rule covers the conduct in dispute. Legal rules should be couched in terms of principle and not conduct, as to allow the rule to take account of societal and political development.

The importance of the claim that causation must be left to the jury as a question of fact, without any hindering causal generalisations, is illustrated by undertaking a critical analysis the appellate courts' inability to adopt a principled approach to establishing causation in the drug-supply manslaughter case law. Often disparate legal rules are created to deviate from the gravitational force of precedent. This has undesirable repercussions for the causation doctrines. The subsequent section of this chapter critically evaluates causation in drug-supply manslaughter cases to illustrate the ill-effects of creating disparate legal rules. This analysis demonstrates that were there is legal indeterminacy the right answer is only discoverable through evaluating the principles of causation that underpin disparate legal rules. Integral to the state successfully prosecuting drug-suppliers for the manslaughter of their clients is a finding of legal causation; the drug-supplier must be a legal cause of the victims' death. However, whether an individual should be responsible for the ill-effects of the substances they supply raises analytical, normative, and conceptual issues for the causation doctrines. Furthermore, the case law on this matter provides an excellent opportunity to illustrate how disparate legal rules afflict the ascription of responsibility for resulting harms in criminal law generally.

3. Drug supply manslaughter

In recent years there have been numerous cases concerning the homicide liability of those who supply drugs to drug users who subsequently die from drug administration. Those who have supplied victims with controlled substances have been prosecuted and convicted for various criminal offences,

principally unlawful and dangerous act manslaughter, others for the supply of a controlled substance,⁶¹ and in some cases for gross negligence manslaughter.⁶² Some cases have not drawn much attention, whereas others have received fierce academic debate.⁶³ It is because of this ambiguity and inconsistency that this topic has received considerable academic and judicial commentary.⁶⁴ The substantive issue in these cases is that the prosecution must identify an unlawful act that has *caused* the victim's death. This is a requirement for all (involuntary) manslaughter offences. Typically, constructive (or unlawful and dangerous act) manslaughter has been the preferred option for the Crown. In establishing the offence, the base offence selected by the prosecution in these types of cases is that of 'maliciously administering poison to endanger life or inflict grievous bodily harm'.⁶⁵ However, while a base offence has been consistently and appropriately identified to secure a conviction, the issue of causation is still very much problematic.⁶⁶ The analysis of these cases is useful for three reasons. First, it illustrates the inherent indeterminacy of legal rules. Second, it is necessary to place reliance on underlying legal principles. Finally, it demonstrates the necessity in deferring to the jury to establish causation in criminal law properly.

In order to establish the crime of unlawful act manslaughter, it must be evidenced, *inter alia*, that (1) D committed an unlawful act; (2) that such unlawful act was dangerous;⁶⁷ and (3) D's unlawful act was a significant *cause* of the death of V.⁶⁸ It is the third of these requirements that is of principal importance

⁶¹ *R v O'Brien* (1994) 15 Cr App R 556; *R v Lucas* (1999) 1 Cr App R 78.

⁶² *R v Evans (Gemma)* [2009] EWCA Crim 650.

⁶³ See: L Cherkassky, 'Kennedy and unlawful act manslaughter: an unorthodox application of the doctrine of causation' [2008] 72 *Journal of Criminal Law* 387; D Baker, 'Omissions liability for homicide offences: reconciling *R. v Kennedy* with *R. v Evans*' [2010] 47 *Journal of Criminal Law* 310; and AP Simester and GR Sullivan, 'Causation as fault' [2014] 73 *CLJ* 14.

⁶⁴ Contrary to the Misuse of Drugs Act 1971, s. 4(1). For a discussion on this topic see: R Williams, 'Policy and principle in drugs manslaughter cases' [2005] *CLJ* 66; R Williams, 'Drugs, Manslaughter and Unorthodox Doctrine on Causation' [2005] *CLJ* 537; D Ormerod and R Fortson, 'Drug suppliers and Manslaughters (again)' [2005] *Crim LR* 819; D Radlett and L Phippen, 'Drugs and Manslaughter' [2005] 155 *NLJ* 1054; R Heaton, 'Principals? No principles' [2004] *Crim LR* 463; and R Heaton, 'Dealing in death' [2003] *Crim LR* 497.

⁶⁵ Contrary to the Offences Against the Person Act 1861, s. 23. The offence provides that, 'whosoever shall unlawfully and maliciously administer to or cause to be administered to or taken by any other person any poison or other destructive or noxious thing, so as thereby to endanger the life of such person, or so as thereby to inflict upon such person any grievous bodily harm, shall be guilty of felony, and being convicted thereof shall be liable to be kept in penal servitude for any term not exceeding ten years' (as amended).

⁶⁶ The Crown has historically preferred to go down the constructive manslaughter route to ensure conviction in such cases as D is not *always* duty-bound to V, thus ruling out the offence of gross negligence manslaughter.

⁶⁷ *R v Church* [1965] 2 *WLR* 1220. Also see, *R v Franklin* (1883) 15 *Cox CC* 163; *R v Lamb* [1967] 2 *QB* 981, 988; and *R v Dias* [2002] 2 *Cr App R* 96 [9].

⁶⁸ *R v Cato* [1976] 1 *WLR* 110, 116 – 117. (Emphasis added).

here. These cases demonstrate that the legal rules that govern the doctrine of causation are inherently indeterminate, both under and over-inclusive, and require an evaluation of principle to be satisfactorily resolved. The analysis of these cases shows that Dworkin's analysis provides significant insight into establishing causation in criminal law. Therefore, to resolve hard cases of causation, it is not legal rules that need to be critically evaluated and applied, it requires the evaluation and application of fundamental legal principles to establish causal responsibility. In the case of drug-supply manslaughter case law, it took the judiciary over thirty years to state the principles that are of primary importance in these cases.⁶⁹ It is beneficial to track these cases to illustrate the creation of (under or over-inclusive) legal rules and the resulting indeterminacy when overlooking principles.

The timeline starts with *R v Cato*.⁷⁰ D purchased some heroin and took the drugs home where he shared them with three others. He invited them all to use heroin. All the individuals prepared their solutions and their syringes. Once they had done this, they paired off and injected each other. D and V paired off. V prepared his syringe with the mixture of heroin and water to his liking and D injected him. This routine was repeated once more during the night. V's respiratory system failed during the night because of the intoxication from the drugs, and he subsequently died. The issue for the Court of Appeal was whether D caused V's death for the purposes of administering a noxious substance.⁷¹ The court held that D did legally cause V's death and V's consent was irrelevant to a charge of manslaughter.

As a matter of law, it was sufficient that the prosecution should establish that D's injection was a significant cause of V's death, provided it was outside of the *de minimis* range. D's contribution to V's death must be significant to establish a sufficient causal link for a finding of constructive manslaughter. This decision has the effect of creating the legal rule, and therefore legal generalisation, that where D injects V with a controlled substance,⁷² and V died because of intoxication from the injection, D legally

⁶⁹ The duration of thirty-one years is between *R v Cato* (n 68) and *R v Kennedy (No 2)* (n 47).

⁷⁰ *R v Cato* (n 68). The material facts of this case, and those that follow, are briefly stated to evidence that disparate legal rules cannot be adequately applied when there is significant variance in the factual matrix. It is not possible to apply these disparate legal rules in a binary fashion. It is necessary to rely on legal principles, such as voluntariness and reasonable foresight to ascribe responsibility for resulting harms in criminal law.

⁷¹ Contrary to the Offences Against the Person Act 1861, s. 23.

⁷² Contrary to the Offences Against the Person Act 1861, s. 23.

causes V's death.⁷³ This decision is not controversial and still represents the current position in English criminal law.⁷⁴ The two principles of relevance in this type of situation is that of autonomy and harm.⁷⁵ Since D injected V with an unlawful controlled substance, he directly inflicted harm upon him and violated his personal autonomy. Although V consented to the harm, it is immaterial when establishing a homicide offence; it is not possible to consent to such harm.

Following this decision, *R v Dalby*⁷⁶ came before the Court of Appeal. D supplied V with a controlled substance, Diconal tablets (a potent opioid drug). Both injected themselves with the tablets in a solution using a syringe and went to a party. In the morning, D tried to wake V but found that he had died during the night. D was prosecuted for the constructive manslaughter of V, stating that the supply of Diconal tablets was an unlawful and dangerous act which caused the death of V. The Court of Appeal held that the supply of drugs was not the cause of death, it was V's self-injection that was the cause of death. The legal rule developed in *R v Cato*⁷⁷ does not apply to this case since D did not administer the substance to V by injection. The indeterminacy, in this case, was resolved by the judiciary developing another legal rule, which held that the mere supply of a controlled substance by D was not a direct action that caused *direct* harm to V. While this legal rule is (on a practical level) correct, it once more creates further legal indeterminacy.⁷⁸ The Court of Appeal was influenced by underlying legal principles, that D is not causally responsible for the subsequent voluntary actions of V, where V is a sane adult making an informed decision. However, this was an implicit feature of the judgment and not explicitly stated in the judgment. The indirect reliance on autonomy should have been made directly by the judiciary in their judgment. The string of hard cases that followed illustrate that this would have been beneficial.

⁷³ In this instance, D would be convicted of the unlawful and dangerous manslaughter of V.

⁷⁴ It is submitted that from this case it can also be stated that where D laces V's food or drink with poison, then D's culpability would also be regulated by such rule. In this situation, V is not able to make an informed choice about the nature and quality of the food or drink, and D's infliction of harm to V would provide legitimate grounds for a constructive manslaughter charge.

⁷⁵ See: J Feinberg, *The Moral Limits of the Criminal Law Volume 1: Harm to Others* (Oxford: OUP 1987) and JS Mill, *On Liberty* (Penguin Classics 2006).

⁷⁶ (1982) 74 Cr App R 348.

⁷⁷ *R v Cato* (n 68).

⁷⁸ Furthermore, the correctness of this legal rule is only validated when the jury critically applies the criteria of voluntariness, negligence, and reasonable foreseeability to the facts of the case.

The issues of indeterminacy began in *R v Kennedy*.⁷⁹ D was V's drug supplier. On the day of the incident, V had been drinking before going to sleep in the evening. D visited V's residence to supply V with the controlled substance, heroin. V stated that he wanted 'a bit to make him sleep' and D told him to take care as not to fall asleep permanently. D did more than merely supply the heroin to V after this request, he also mixed the solution and prepared the syringe before giving it to V. V took the syringe, immediately self-injected and died within the hour. The cause of death was inhalation of gastric contents while acutely intoxicated by opiates and alcohol.

The substantive issue of law is whether, for constructive manslaughter, D is causally responsible for V's death. This issue was novel for the court. The legal rule in *R v Cato*⁸⁰ does not apply here since D did not administer the controlled substance and directly inject V with the heroin. This rule does not, therefore, provide an answer to the question of whether D is responsible for V's death. Similarly, the legal rule in *R v Dalby*⁸¹ does not help either because of the specific wording of the rule. The rule stated that the mere supply of heroin does not cause direct harm to V and cannot substantiate a finding of constructive manslaughter. Therefore, the legal indeterminacy of these two rules is apparent - what if D does more than merely supply, but does not go so far to inject V? Whether D causes V's death in these circumstances has raised significant judicial problems because of the rules stated above.

Since the D in *R v Kennedy*⁸² did more than merely supply the heroin to V, the Court of Appeal distinguished the rule in *R v Dalby*,⁸³ and held that because D prepared and handed the syringe to V, his actions were unlawful as assisting or encouraging V to self-inject. Perhaps more importantly, it was also held that V's self-injection was also unlawful. The handing of the injection for immediate injection was capable, should the jury see it that way, of amounting to a significant cause of death.⁸⁴ The decision was incorrect because the Court of Appeal failed to consider the principles of causation directly, and instead focused on the applicability of specific legal rules, the penumbra of doubt raised by earlier

⁷⁹ [1999] Crim LR 65. The facts of this case are essential since the developments that have arisen after this case hinges on the indeterminacy raised by the judgment in this case. The facts are, therefore, stated in some detail.

⁸⁰ *R v Cato* (n 68).

⁸¹ (n 76).

⁸² (n 79).

⁸³ (n 76).

⁸⁴ As per *R v Kennedy* (n 79) 66 (Lord Bingham).

decisions, and the desire to punish drug suppliers for the death of their clients. The principle that the Court of Appeal failed to consider fully is that of autonomy. Since the Suicide Act 1961, an individual commits no offence if they take their own life. Similarly, the extension of this is that the law does not prohibit a person from taking reckless risks with his own life or limb. Therefore, since there is no offence of self-manslaughter, D in *R v Kennedy*⁸⁵ commits no homicide offence by supplying and preparing a syringe for V to self-inject. This analysis is accurate even though he may be reckless as to V's death when V self-injects and is a person of full capacity, and the act is wholly voluntary. There is no direct harm, although V's self-injection was reasonably foreseeable, in simply handing a syringe to V in these circumstances. Despite this, the decision remained unchallenged for several years.

As identified above, the legal indeterminacy following the rule in *R v Cato*⁸⁶ and *R v Dalby*⁸⁷ has created significant problems for the judiciary because of reliance on the legal rule and not fundamental principles of criminal causation. *R v Dias*⁸⁸ once more evidences this problem. D and V were both drug addicts. They jointly purchased a small quantity of heroin. D prepared the solution of heroin and handed the syringe to V, who subsequently injected himself. V died because of the intoxication from the heroin. Following the wrong decision in *R v Kennedy*,⁸⁹ it was held that V's self-injection was a criminal offence, and D convicted of V's constructive manslaughter; D was aiding and abetting such offence as to make D criminally liable as a secondary party that resulted in V's death. The Court of Appeal held that since the self-injection by V was not a criminal offence, D could therefore not be liable for his manslaughter. There was no direct causation between D's unlawful conduct and V's death. This case attempted to resolve the problems raised in *R v Kennedy*⁹⁰ by emphasizing on the principle of autonomy and V's prerogative to self-harm if they chose to do so. However, this raises issues of the technicalities of legal rules and not legal principles.

⁸⁵ (n 79).

⁸⁶ *R v Cato* (n 68).

⁸⁷ (n 76).

⁸⁸ (n 67).

⁸⁹ (n 79).

⁹⁰ (n 79).

It is for this reason that the issue was once again topical in *R v Rogers*.⁹¹ V bought heroin for both himself and D. V injected D with one syringe, and then V injected himself using a similar syringe while D held his belt around the victim's arm as a tourniquet. V collapsed with cardiac arrest and died eight days later. Once more, D was charged with the constructive manslaughter of V. The unlawful act that D was charged with was the administration a noxious substance to V.⁹² The Court of Appeal (wrongly) held that since D was 'part and parcel' of the mechanics of the injection that caused V's death, there was an unlawful act.⁹³ The Court relied on the rationale of the earlier decision of *R v Cato*,⁹⁴ which held that the injection of others was a criminal offence and 'active participation' in injuring other should not be, as a matter of public policy, condoned.

These cases illustrate that there is a real desire to punish drug suppliers for the impact that drugs have on society. However, as Dworkin notes, if a decision is based purely on policy, then principle should 'trump' policy and deviation is essential for legitimate decision making.⁹⁵ Although the legislature can enact legal rules based on a policy decision, Dworkin claims that the judges must look to principle over policy. This decision is, therefore, illegitimate since it fails to take account of the principles that are essential to the criminal law. Since D did not perform the act of injection to V, D does not cause direct harm to V. This is analogous to the criticism of *R v Kennedy*,⁹⁶ where D prepared and handed the syringe to V. Neither of these situations constitute an unlawful act for a constructive manslaughter conviction – D did not inject V. Since V was a fully informed sane adult, his decision to self-inject means that there is no unlawful act committed by D. D is culpable, and indeed liable, for the supply of a controlled substance,⁹⁷ but not for *causing* (in law) the death of V. The use of a tourniquet on V's arm does not change this. The notion that it is artificial and unreal to separate the tourniquet from the injection is superfluous to the causal issue. The purpose and effect of the tourniquet were to raise a vein in which V could insert the syringe. V, therefore, caused their death, not D.

⁹¹ [2003] EWCA Crim 945.

⁹² Contrary to the Offences Against the Person Act 1861, s. 23.

⁹³ *R v Rogers* (n 91) [3].

⁹⁴ [1976] 1 WLR 110.

⁹⁵ Dworkin, *TRS* (n 35) 142.

⁹⁶ (n 79).

⁹⁷ Contrary to the Misuse of Drugs Act 1971, s. 4(1).

The House of Lords finally resolved the drug supply manslaughter saga in *R v Kennedy (No 2)*.⁹⁸ The House of Lords resolved the dispute by focusing on the principles of causation, rather than the legal rules and generalisations created by past precedent. The principles that are of relevance when determining whether D causes V's death, in situations outside of *R v Cato*,⁹⁹ are the harm principle and personal autonomy. The House of Lords made specific reference to these principles, and it is beneficial to consider these in turn:

[T]he act of supplying, without more, could not harm the deceased in any physical way, let alone cause his death. As the Court of Appeal observed in *R v Dalby* [1982] 1 WLR 425, 429, "the supply of drugs would itself have caused no harm unless the deceased had subsequently used the drugs in a form and quantity which was dangerous." So, as the parties agree, the charge of unlawful act manslaughter cannot be founded on the act of supplying the heroin alone.¹⁰⁰

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. There are many classic statements to this effect.¹⁰¹

In an attempt to resolve this indeterminacy, the House of Lords expressly considered the principles that underpin the criminal law. The effect of this decision is that unless D administers the noxious substance to V, i.e. injects him with the heroin-filled syringe, or places poison in their food or drink, D does not cause V's death when V is a fully informed responsible adult capable of making their own decisions.¹⁰²

The House held that the law treated the informed adults of sound mind as autonomous being able to

⁹⁸ (n 47).

⁹⁹ *R v Cato* (n 68).

¹⁰⁰ *R v Kennedy (No 2)* (n 47) 274 (Lord Bingham).

¹⁰¹ *R v Kennedy (No 2)* (n 47) 275 (Lord Bingham).

¹⁰² This position has been defended by both Hart and Honoré, and Williams. For example, Williams writes that, 'I may suggest reasons to you for doing something; I may urge you to do it, tell you it will pay you to do it, tell you it is your duty to do it. My efforts may perhaps make it very much more likely that you will do it. But they do not cause you to do it, in the sense in which one causes a kettle of water to boil by putting it on the stove. Your volitional act is regarded (within the doctrine of responsibility) as setting a new 'chain of causation' going, irrespective of what has happened before.' See: G Williams, 'Finis for Novus Actus' [1989] CLJ 391, 392. In Chapter XII of *Causation in the Law* Hart and Honoré write that, 'The free, deliberate, and informed intervention of a second person, who intends to exploit the situation created by the first, but is not acting in concert with him, is normally held to relieve the first actor of criminal responsibility.' See: Hart and Honoré, *CIL* (n 3) 326.

make their own decisions about how they would act. The House also held that any earlier authority that made legal rules that conflicted with the principles of personal autonomy and informed voluntary choice was wrong.¹⁰³ This concession is a clear example of the judiciary emphasising principle over legal rules and the disparate legal generalisations that they had previously set. The position on this area of law can be concisely stated as being – if D administers a noxious substance to V, then D may be responsible for the constructive manslaughter of V.¹⁰⁴ Anything short of this, assuming that V is a sane adult exercising a voluntary act, does not invite the offence of constructive manslaughter.¹⁰⁵ This analysis of drug-supply manslaughter case law has demonstrated that Dworkin’s analysis of legal indeterminacy can be resolved by critically evaluating the principles underpinning the legal rules. The creation of new legal rules, and therefore legal generalisations invite criticisms of legitimacy for being either under or over-inclusive of the types of conduct that the criminal law prohibits.

Legal indeterminacy is not the principal issue for criminal causation, providing the principles are appropriately considered in the adjudication process. Although several rules govern the doctrine, the substantive issue is one of standard setting. Ultimately, at trial, it is the jury who regulate and evaluate D’s conduct. This responsibility is different from the judicial obligation to determine the correct precedent and principle when selecting the correct legal rule, although this is also required. The starting point for criminal causation can be, it is submitted, applied mechanically. This starting point should be whether the aspect of D’s conduct that made D culpable caused the harm.¹⁰⁶

This thesis provides a normative and analytical framework upon which the minutiae of criminal causation can operate – that of third-party interventions, grossly negligent actors, and unforeseeable abnormalities, at the direction and discretion of the judge. It ought to take its shape from the recurring principles that precedent and legal rules dictate essential when ascribing responsibility. After this point, there will inevitably be considerations of abnormal and third-party interventions and grossly negligent

¹⁰³ *R v Kennedy (No 2)* (n 47) 276 (Lord Bingham).

¹⁰⁴ *R v Cato* (n 68).

¹⁰⁵ *R v Dalby* (n 76) and *R v Kennedy (No 2)* (n 47).

¹⁰⁶ This is a deviation from the orthodox position. Traditionally, questions of culpability do not enter into actus reus or causation deliberations. However, this thesis presents an alternative position, D must *culpably* cause a prohibited result to be responsible, and therefore liable, for the harm. See: chapters four and five.

interference from those who are duty-bound as noted above. However, before considering this, it is necessary to examine an important feature - the role of the jury in establishing causation. While the judiciary must select the appropriate legal rule, what they cannot do in a criminal trial is to regulate and measure D's conduct. That is the role of the jury. Therefore, the next section of this chapter looks at the theoretical justification for 'passing the buck', to appropriate Gardner's turn of phrase,¹⁰⁷ in deferring to the 'reasonable person' in such situations.

4. Causation as a question of fact

The law relating to criminal causation, as discussed above in this thesis, traditionally involves two causal enquiries - factual and legal causation. Based on an orthodox understanding of the adjudication process, the jury answers questions of fact and judges deliberate on questions of law. This division of responsibility is, however, not necessarily reflective of how the adjudication process works when criminal causation is at issue at trial. It is better to understand causation as being a question of fact, operating within a legal framework inclusive of a legally deregulated zone. This view has received both academic and judicial support. For example, in *R v L*,¹⁰⁸ Lord Justice Toulson (as he then was) held that *R v Hennigan*,¹⁰⁹ *R v Skelton*,¹¹⁰ and *R v Barnes*¹¹¹ established the following principles:

It is ultimately for the jury to decide whether, considering all the evidence, they are sure that the defendant should fairly be regarded as having brought about the death of the victim by his careless driving. That is a question of fact for them. As in so many areas, this part of the criminal law depends on the collective good sense and fairness of the jury.¹¹²

Previous attempts have been made by both academics and the judiciary to formulate a set of criteria that can objectively determine whether D causes E in the criminal law. This enterprise has been unsuccessful because the issue of criminal causation is, essentially, one of *fact* for the jury to answer and is contextually-dependant. For example, it is common to ask the jury - 'did the conduct of the defendant significantly contribute to the occurrence of the prohibited result?' Alternatively, 'was the

¹⁰⁷ See: Gardner, 'The Many Faces of the Reasonable Person' (n 6).

¹⁰⁸ *R v L* [2010] EWCA Crim 1249.

¹⁰⁹ [1971] 3 All ER 133

¹¹⁰ [1995] Crim LR 635.

¹¹¹ [2008] EWCA Crim 2726.

¹¹² *R v L* [2010] EWCA Crim 1249 [16].

third party's or the victim's intervening act reasonably foreseeable consequent D's unlawful conduct?'¹¹³ These questions of fact, derived from principles of law, require the jury to answer a more substantive question. That is the extent to which the conduct of the defendant causes the occurrence of the prohibited result is sufficient for the defendant to be held criminally liable.¹¹⁴ This chapter submits that there does not need to be the traditional bifurcation of causation – a question of fact and law. Since the jury answers the question of whether D causes E within a legal rule, the requirement of a test for 'factual causation' is obsolete and superfluous in ascribing causal responsibility.

This chapter defends the claim that whether D causes E does have the right answer, but that answer is sensitive to both the *context* and the *enquirer*. It is because of the sensitivity to context, and not even Hercules could come to the right answer using his Olympian skill and intellect to determine whether D, in law, causes E. It is necessary to put the question to the jury. Therefore, to allow the doctrine of criminal causation to perform correctly, it must be given the flexibility and freedom to do so outside of the constraints of the strict applications of legal rules and the generalisations that they create through the gravitational force of precedent. Obtaining this flexibility is accomplished through using the 'reasonable person' to create a legally deregulated sanctuary where extra-legal considerations can operate, free from precedent and judicial insight. Of course, once the starting point for causation is put to the jury, it is for the judge to deal with any legal indeterminacy that may be caused by unusual cases using the underlying principles that govern criminal law and causation more generally. The next section considers the role of the reasonable person in further detail.

5. The reasonable person

In the previous chapter of this thesis, it was noted that when determining whether D is a legal cause of a prohibited result, the jury is asked to consider whether it was *a significant but for* cause of the resulting harm. In some cases, especially in victim response cases, the jury is also asked to consider whether the

¹¹³ Law Commission, *External Elements of Offences* (n 17) 6.

¹¹⁴ Baker has stated that this is not just a question of fact, but also a question of morality, too. See: D Baker, *Glanville Williams Textbook of Criminal Law* (3rd edn, Sweet & Maxwell 2012) 199.

subsequent intervening act was voluntary,¹¹⁵ and if not voluntary, reasonably foreseeable.¹¹⁶ This thesis submits that the inclusion of reasonableness in criminal causation is integral to the workings of causation. It allows the jury to take into consideration the extra-legal principles that influence and determine whether acting is justified or not in any given enquiry. It provides a mechanism by which the criminal law can find the ‘right answer’ to questions of causation irrespective of circumstance and context. The proposed model of culpable causation offered in this thesis places significant reliance on reasonableness as a necessary feature when establishing causation. It is because of this reliance that it is essential to expand on this concept to demonstrate resolving legal indeterminacy in hard cases of causation. This section defends and illustrates the claim that the judiciary cannot find the right answer without reliance on the jury when undertaking causal enquiries. The doctrine concerns too many extra-legal variables that to articulate in a legal rule, nor would it be beneficial to do so because of the undesirable precedent this would create.

The reasonable person, in some form or another, frequents both factual and legal tests in the criminal law. It has been described as the longest-standing of ‘the select group of personalities who inhabit our legal village and are available to be called upon when a problem arises that needs to be solved objectively’.¹¹⁷ The law has relied upon the standard-setting of a hypothetical reasonable person on numerous occasions, not only in the criminal law, but also in tort, trusts, and contract law. There is the ordinary prudent man of business,¹¹⁸ the officious bystander,¹¹⁹ the fair-minded and informed observer,¹²⁰ and the reasonably well informed and normally diligent tenderer.¹²¹ Each of these variants of the reasonable person performs various standard-setting roles within their respective area of law. However, it is not just the judiciary who have used the reasonable person to provide an objective

¹¹⁵ See: *R v Kennedy (No 2)* (n 47) 276 (Lord Bingham). Within this criterion, the proposed model of culpable causation uses the invariant and individualised standard of care (subjective negligence) to ascertain voluntariness of action.

¹¹⁶ See: *R v Roberts* (n 15); *R v Wallace* [2018] EWCA Crim 690; *Cf. R v Dear* (n 21). If the resulting harm is a reasonably foreseeable consequence of D’s action, and D was culpable (subjectively negligent), then D legally causes the harm. Similarly, if there is an intervening event, and the general nature of the intervening event is reasonably foreseeable at the point of D’s conduct, D also causes the resulting harm.

¹¹⁷ *Helow v Advocate General* [2008] 1 WLR 2416, 2417-8 (Lord Hope).

¹¹⁸ *Speight v Gaunt* (1883) LR 9 App Cas 1, 19-20 (Lord Blackburn).

¹¹⁹ *Shirlaw v Southern Foundries* [1939] 2 KB 206, 227 (MacKinnon LJ).

¹²⁰ *Webb v The Queen* (1994) 181 CLR 41, 52 (Macon CJ and McHugh J).

¹²¹ *Healthcare at Home Ltd v The Common Services Agency* [2014] UKSC 49.

standard to legal disputes; Parliament has also incorporated the reasonable person in a wide variety of circumstances and legislation. It is, therefore, a common and integral feature of our legal system and warrants further examination.

It is worth noting, however, that the reasonable person does not set legal standards by which our actions are to be determined. Instead, it has been argued by Gardner that the reasonable person sets extra-legal standards that are notably versatile, with this being the reasonable person's most basic task.¹²² The reasonable person is not invoked by the law to set legal standards by which D's actions are judged but provides a normative standard by which to evaluate them. This usage is particularly evident in criminal causation, where the current legal tests do not offer an objective method by which D's actions and the result occurrence judged. Instead, it is passed to the jury to determine as factfinders. Whether D causes E is not, in this sense, a scientific enterprise judged objectively.¹²³ These legal rules are not based on pure legal standards since there is an inevitable and regular reliance on extra-legal principles. Therefore, it is not possible to have a purely legal question for criminal causation – there must be extra-legal questions that surreptitiously seep into them.

Gardner argued the reasonable person and the justified person are correlatives – two sides of the same coin.¹²⁴ The argument is that the reasonable person is justified whenever such justification is required. When actions call for justification, the reasonable person's actions are justified – likewise with his decisions, beliefs, emotions, and desires. The rationale for including the reasonable person in causation is because he is the personification of whatever rational conflict the law may throw at any dispute and can respond in a contextually specific manner. It is not to say that the reasonable person is perfect - far from it. The reasonable person can make mistakes and errors of judgement, of being selfish, and afraid.¹²⁵ Despite the reasonable person suffering from human weakness, he is always capable of

¹²² Gardner, 'The Many Faces of the Reasonable Person' (n 6) 564.

¹²³ Cf. AP Simester 'Causation in (criminal) law' (2017) 133 LQR 416. Simester's analysis of mechanical causation in criminal law is (largely) rejected in this thesis. See: Chapter four.

¹²⁴ See: Gardner, 'The Mysterious Case of the Reasonable Person' (n 6) and Gardner, 'The Many Faces of the Reasonable Person' (n 6).

¹²⁵ For a comprehensive account of the role of the reasonable person in tort law see: F Harper and others, *The Law of Torts* (2nd edn, Boston 1986) 389.

making the correct decision, depending on the standard-setting role that is required, with reasonable mistakes and errors of judgement when called upon.

When the reasonable person is called upon to provide the standard of what is justified, it invokes a question of fact, not of law.¹²⁶ This distinction, especially with matters of criminal causation, is very troublesome but of significant importance. If a decision has been reached ‘on the facts’, which is true of all cases of criminal causation, then it is not subject to legal generalisation. That is, if *x* causes *y* on a specific ruling, it does not automatically follow that *x* causes *y* on future occasions. It is assumed not to have caused *y* unless the same rationale, based on the general aims of the criminal law and specifics of the offence, can be met. There may be cogent reasons why a decision should not be followed and re-used in a subsequent case. This analysis is accurate even when a higher court has made the decision. However, extra-legal generalisations are made. What the reasonable person would have thought or done or said is a question of fact, and as such, these generalisations do not enter the law. They are used by the law to avoid the creation of a legal generalisation. Gardner has stated that the ability for the reasonable person to rely upon extra-legal generalisations that do not enter the law is both the genius as an all-purpose standard setter, but also an all-purpose ‘buck-passer’.¹²⁷ What this means is that the common law can develop an abundance of extra-legal generalisations for when *D* causes *E*, and in what circumstances, however, they are not legal generalisations and are subject to change depending on the standard set by the reasonable person. This analysis enables the law, and causation, to reflect societal norms and perceptions of what is right or wrong.

The reliance on these extra-legal generalisations raises an important issue. That is the extent to which individuals conduct their behaviour in everyday life, concerning both actions and how we reason towards action.¹²⁸ The argument is that reliance on the reasonable person to set the acceptable (or justified) standards for ordinary people in society is contradictory. The notion is that the criminal law provides a method to evaluate our intentions, actions, and the consequences of both of these. However,

¹²⁶ See: T Endicott, ‘Questions of Law’ (1998) 114 LQR 292.

¹²⁷ Gardner, ‘The Many Faces of the Reasonable Person’ (n 6) 569.

¹²⁸ See: J Raz, ‘Authority, Law, and Morality’ (185) 68 The Monist 295.

when grounding this standard on the ‘considerations which ordinarily regulate the conduct of human affairs’, it leaves in the same position we would be in if there were no law to regulate behaviour. It is essentially a legally deregulatory zone in the sense that the law leaves the standard-setting role as a question of fact. It is not that it has nothing to do with the law, but it is not subject to (a) legal generalisations, and (b) the reasonable person as he figures in the law.

The rationale for ‘passing the buck’ is that it avoids a significant responsibility. That is, it alleviates the responsibility from the judiciary who would have to set legal standards (and generalisations) that are fit for re-use in subsequent (similar) cases. The gravitational force of precedent and its undesirable effects on causation has been discussed above in this chapter. The notion is that in some circumstances, precedent may cause difficulties for the adjudication process. If a Hartian model were to be adopted, then it would require judges to use precedent to fill the gaps raised by new or novel cases of causation. However, such a requirement is not necessary on a Dworkinian view where all law is a seamless web, and the judge can defer to the jury to find the right answer, resolving any hard cases or legal indeterminacy. Therefore, viewing criminal causation as being based upon an extra-legal standard (reasonable person) allows for futureproofing with the correctness of all decisions being contextually dependant.

There is also an Aristotelian notion that defends the moral case for this position.¹²⁹ The criminal law provides reasons that help us to determine permitted actions in society. These rules cannot be either under or over-inclusive concerning the underlying considerations upon which we should act if we did not have the rule – e.g. norms. Aristotle articulates that the benefit of forming these extra-legal generalisations is that it allows us to provide a yardstick for the ‘usual’ cases. Although the (extra-legal) rule provides a standard, it does not necessarily follow that adherence to the rule is required in all situations. Departing from the rule may be justified; however, tailoring the rule to eliminate this deviancy will reduce the relevancy and value that it offers elsewhere (usual cases). Yet, in the (criminal) law, when the judiciary makes a ruling, it has a binding effect on subsequent (like) cases. Since the

¹²⁹ Aristotle, *Nicomachean Ethics* (R Crisp trans) (CUP 2000) 1137^b 10ff.

legislative process is slower in a common-law jurisdiction where the judiciary can soften and mollify the harshness of the law, the judicial development of the common law mitigates against this problem. It is because of this gradual development, as to include new rules and generalisations, the judiciary veer into the realm of over-inclusiveness.

The judiciary has the ability to distinguish one rule from another on the basis that the facts are materially different, but this produces more over-inclusiveness that it was trying to avoid. This analysis is representative of the current position on causation. There are so many legal generalisations and legal rules to determine whether D causes E is veering into the realm of over-inclusiveness. One solution, identified by Gardner,¹³⁰ is to build into a legal rule a deregulated zone in which all (or some) of the underlying considerations can be confronted by the factfinder in their ordinary form, applied directly, and unmediated by the law. This solution involves, necessarily, including a non-rule into a rule. This non-rule is a reasonable person. The reasonable person allows the jury to determine the actions of D concerning the ordinary standards of justification that would apply to the situation – taking the edge off the rule by using these extra-legal and underlying considerations. The device of the reasonable person avoids the cyclical criticism mentioned above.

Thus, the position is now that the legal rule includes the deregulated zone of the reasonable person where the factfinder can critically evaluate and apply the underlying considerations of criminal causation. There is an issue, however, conveying this is to the jury. There are three options. First, the juror may think that the reasonable person involves determining whether the belief of D was justified, using the juror's justified beliefs as the yardstick. Second, the juror may think that the question is what the average person would believe in D's position. Alternatively, the juror may consider it a combination of the first and second – what beliefs the average person would hold (justifiably or otherwise) as justified beliefs for someone in D's position to hold. This chapter adopts the first of these three options - the reasonable person should involve the juror concentrating on what would be a justified belief as to avoid an under or over-inclusive rule.

¹³⁰ Gardner, 'The Many Faces of the Reasonable Person' (n 6) 572.

One of the critical aspects of the reasonable person is the objective nature of the standard which he sets.¹³¹ The reasonable person is ‘available to be called upon when a problem arises that needs to be solved objectively’.¹³² This objective or impersonal, nature of the reasonable person means that the varying *personal* characteristics of D are not relevant in ascribing causal responsibility. There are instances, however, where the demands of the reasonable person lessen to reduce the standards by which we are held.¹³³ Attempting to personalise the reasonable person to mitigate against the impersonal or objective harshness sometimes gets into trouble. Some people are, at the time, incapable of being reasonable. They may be under the influence of a controlled substance, in a stage of rage, or under duress. A strict application of reasonableness has the undesirable effect of judging D (in this instance) against the standard of an unreasonable reasonable person, which does not make much sense.¹³⁴ The unwanted extension of this is that the law would be referring to the reasonable schizophrenic, reasonable obsessive, and reasonable psychopath.¹³⁵

It is possible to perceive the reasonable person as being the enemy of legal certainty. If legal certainty is desirable, it is essential to question why such a position is attractive in criminal law. The current tests are not searching for objective certainty as to whether D causes E. If D wishes to know whether he is responsible for the consequences of his actions, he is not able to consult treatises and judicial dictum. He must engage in ordinary practical reasoning. D has to determine how a factfinder (juror) will identify and count those considerations which ordinarily regulate the conduct of human affairs. The law provides no certainty for the imaginary end-user as to whether they are going to end up falling on the right side of the legal fence. By deferring questions of causation to the reasonable person, it ensures that the judiciary does not have to create a precedent that is limited to the specific facts of the case or engage in prospective overruling.¹³⁶ It enables the law to pass the buck to the fact finder, who can use extra-legal

¹³¹ See: *Re B (A Child)* [2013] 1 WLR 1911, 1965 (Baroness Hale); *Hayes v Willoughby* [2013] 1 WLR 935, 943 (Lord Sumption).

¹³² *Helow v Advocate General* [2008] 1 WLR 2416, 2417 (Lord Hope).

¹³³ For example, the law has referred to the reasonable child, see: *Re Bowen* [1997] 1 WLR 372.

¹³⁴ R Christopher, ‘Justification: Self-Defense’ in Joshua Dressler (ed), *The Encyclopaedia of Crime and Justice Volume 2* (2nd edn, New York 2002) 900.

¹³⁵ This has been discussed at great length by the courts, especially in relation to the (previous) law of provocation (now loss of control). See: *R v Luc Thiet Thuan* [1996] 3 WLR 45; *R v Smith* [2001] 1 AC 146; *Attorney General for Jersey v Holley* [2005] 2 AC 580; and *R v James* [2006] QB 588.

¹³⁶ See: *Re Spectrum Plus Ltd* [2005] 2 AC 680.

standards to bridge the gap from legal rule to legal ruling. It is not to say that this is a complete legal vacuum since the judiciary can provide various nuggets of guidance – based on policy or statutory interpretation.

6. Conclusion

This chapter has defended several claims that are integral to this thesis. The first section illustrates, using Dworkin's constructive interpretivism, the causation doctrines inherently suffer from the problem of legal indeterminacy.¹³⁷ This chapter shows that due to the highly contextual nature of causation cases, there is always legal indeterminacy of disparate rules. Despite this claim, there is a right answer to hard cases. To illustrate how to discover this right answer in the (criminal) law, Dworkin's uses a hypothetical judge - Judge Hercules. Hercules focuses not on policy and rules, but rather on the underlying principles that govern and shape the doctrine to find the right answer in any factual dispute.

However, when establishing causation, it is not merely a case of the judiciary applying legal rules as a question of law. Due to the nature of causation, Hercules would defer to the jury to regulate and evaluate D's conduct. It has been evidenced that Hercules only defers to the jury where he is sure that it is a pre-requisite to the finding of the 'right answer', after establishing from the judicial precedent the correct legal rule to which the jury apply their fact-finding standard. Therefore, Judge Hercules shows us that when determining whether D causes E requires an evaluation of principles to establish the correct legal rule, which is then applied by the jury as a question of fact.

This chapter has illustrated the relevancy of legal indeterminacy and competing principles through evaluating the appellate courts' difficulty in prosecuting drug suppliers with the constructive manslaughter of their clients. The judiciary initially created legal rules that were (overly) specific to the factual dispute, which caused difficulties in future cases since the judiciary tried to apply these rules in a binary fashion. It was only after the judiciary sought to rely on fundamental legal principles of criminal law, rather than policy and a desire to prosecute drug-dealers, that the issue was resolved. The judiciary

¹³⁷ Legal indeterminacy is the notion that standard written rules do not always help determine the outcome of the case.

was able to do this by properly balancing the two main principles of criminal causation – (foreseeable) harm and voluntariness. Once the judiciary focused on finding the correct legal rule with these principles in mind, this chapter illustrated that the jury only discovers the right answer by answering a question of fact to conclude the just outcome.

The benefit of deferring to the jury in cases of criminal causation is two-fold. First, it allows causation to operate in a legally deregulated zone using the reasonable person to enable the jury to consider extra-legal considerations in determining whether D causes E. Second, it avoids the under or over-inclusiveness of precedent. This chapter postulates that due to the gravitational force of precedent, having an excessive number of legal rules to accommodate for all cases in which causation is novel or challenging hinders both the adjudication process and prevents the criminal law from accurately reflecting the society in which it seeks to regulate.

It is the purpose of the subsequent chapter to determine when resolving the indeterminacy of hard cases in criminal causation, what the *principles* of criminal causation are. The chapter critically analyses whether there is (a) a fixed set of legal principles that pertain to doctrine of criminal causation; or (b) the principles of causation change and develop depending on the specific nature of the offence, the facts as they pertain to the case, and the causal enquiry itself.

Chapter 3

Multi-paradigmatic causation

1. Introduction

One of the principal claims in this thesis is that D only causes resulting harm in criminal law if D *culpably* caused that harm. This is established when D's conduct is construed as being voluntary (using subjective negligence) in bringing about the harm, and the harm is reasonably foreseeable. However, before this account of culpable causation is advanced, it is necessary to explore the paradigm of causation in criminal law in further detail. More specifically, it is essential to examine what terms such as 'voluntariness' and 'reasonableness' mean when they are employed in causation. Undeniably, these concepts are inherently ambiguous; they are sensitive to both the context and relativity of the enquirer. It is because of this sensitivity that moral, linguistic, and political lenses shape and define the meaning of these concepts – changing the paradigm of causation in criminal law. To address these concerns, and to defend a multi-paradigmatic account of causation in criminal law, this chapter advances three principal claims.

The first claim is that the concept of 'causation' in criminal law is best understood as a descriptive expression, defined by the criteria that are central to its meaning and definition. This analysis allows causation to be understood as a multi-paradigmatic concept.¹ This means that the process of causal selection and ascription of causal responsibility can be (explicitly) informed by not only the linguistic application of the relevant legal rule(s), but the social, political, and moral considerations that also are relevant when establishing causation. It is submitted that these extra-legal considerations are already at

¹ To illustrate that causation is best understood as a multi-paradigmatic concept, the linguistic philosophy of Ludwig Wittgenstein is utilised within this chapter. See: L Wittgenstein, *Brown and Blue Books* (Oxford 1958). For an excellent discussion of Wittgenstein's jurisprudence on this subject, see: C Wellman, 'Wittgenstein's Conception of a Criterion' (1962) 71 *The Philosophical Review* 433 (hereafter *Conception*).

play within causation, but they currently operate covertly within the vague and unhelpful terminology that is employed within the tests of legal causation, such as ‘significant’ and ‘operative’.²

The second claim is that causation in criminal law is based on the underlying principles of voluntariness and foreseeability. Indeed, this thesis has thus far illustrated, principally in chapter one, that the current legal rules of causation are based on these two principles, and that the appellate courts’ critical application of these principles is often utilised to resolve the tension caused by disparate legal rules when applied to hard cases. However, this chapter seeks to provide theoretical justification for the inclusion of these two principles and to achieve this aim, the work of Hart and Honoré is critically employed.³ Hart and Honoré argue that these two principles are ingrained within the ordinary person’s understanding of causation. In advancing this view, they argue against a philosophical or scientific analysis of causation, which has been proposed by other eminent legal scholars who have engaged with this subject.⁴ While Hart and Honoré’s work offers significant insight into the causation doctrines, this chapter submits that they did not go far enough in their analysis.⁵ The authors do not explicitly state that these principles should always be engaged with and that the jury must make a normative evaluation of D’s conduct, only that jurors should imply this from evaluation from the common stock of language utilised by the courts. Therefore, this chapter seeks to make explicit what Hart and Honoré leave implicit.

The final claim made in this chapter is that ambiguous terms, such as voluntariness, can only be understood in the context of their usage. In defence of this position, this thesis utilises ordinary language philosophy.⁶ It is necessary to adopt this view since the proposed model of culpable causation offered

² In showing that ‘causation’ requires the critical application of extra-legal considerations, the work of Austin and Wittgenstein is employed in this chapter. See: Wittgenstein, *Brown and Blue Books* (n 1); JL Austin, ‘A Plea for Excuses: The Presidential Address’ (1956) 57 *Proceedings of the Aristotelian Society* 1 (hereafter *Excuses*); and JL Austin, *How to do things with words* (2nd edn, Harvard University Press 1975). The work of these two jurists is critically evaluated later in this chapter.

³ Hart and Honoré’s work on causation is now the starting point for theoretical enquiries into causation and has been since its publication in 1959. See: HLA Hart and AM Honoré, *Causation in the Law* (2nd edn, Oxford: Clarendon Press 1985) (hereafter *CIL*).

⁴ See: JL Mackie, *The Cement of the Universe* (Oxford: Clarendon Press 1980) and M Moore, *Causation and Responsibility: An Essay in Law, Morals, and Metaphysics* (OUP 2009) (hereafter *Causation and Responsibility*).

⁵ Hart and Honoré, *CIL* (n 3).

⁶ Wittgenstein, *Brown and Blue Books* (n 1).

in this thesis purposely employs ambiguous terms to impute causal responsibility for resulting harms.⁷ However, critics of Hart and Honoré argue that their position is vulnerable to attack since they fail to provide a fixed definition of key terms, such as voluntariness, within their work. Therefore, if this thesis, and culpable causation, is to include these terms, it is of paramount importance to justify their inclusion. The final section of this chapter argues that these terms have been purposely left ambiguous and argues that to disambiguate these terms would result in the causation doctrines becoming inflexible, rigid, and unreflective of legal practice.

These three claims are of paramount importance in underpinning the normative rational reconstruction that takes place within this thesis, culminating with the proposed model of culpable causation. The next section of this chapter advances the first claim posited in this chapter; causation in criminal law relies on multiple paradigms of causal responsibility to establish causation.

2. Multi-paradigmatic causation

To provide the framework upon which the account of culpable causation is developed in this thesis, this section illustrates that causation in criminal law is a multi-paradigmatic concept.⁸ This means that rather than exclusively drawing on either the linguistic application of a legal rule,⁹ social or political motivations,¹⁰ or moral responsibility¹¹ to ascribe responsibility, it is necessary to use all (or some) of the various ideas and interests of the criminal justice system.

Traditionally, establishing causation involves distinguishing between conduct that is voluntary-non-voluntary, reasonable-unreasonable, and normal-abnormal. However, the application and parameters of these terms ultimately depend on the critical use of the criteria stated above. For example, if D planted

⁷ Austin, *Excuses* (n 2) and Austin, *How to do things with words* (n 2).

⁸ See: N Lacey, *In Search of Criminal Responsibility: Ideas, Interests, and Institutions* (OUP 2016) (hereafter *ISCR*). For a review of this, with particular emphasis Lacey's analysis of responsibility as a Wittgensteinian precept, see: D Bansal, 'Nicola Lacey: In Search of Criminal Responsibility: Ideas, Interests, and Institutions' (2017) 11(4) *Crim Law & Phil* 861.

⁹ Hart and Honoré, *CIL* (n 3).

¹⁰ A Norrie, 'A Critique of Criminal Causation' [1991] 54 *MLR* 685; A Norrie *Crime, Reason and History* (3rd edn, CUP 2014) 171 – 196 (hereafter *CRH*).

¹¹ This is not an exhaustive list of factors and, as is illustrated below, the number of considerations that are relevant when imputing causal responsibility in criminal law is more numerous than this. See: V Tadros, *Criminal Responsibility* (OUP 2005).

a bomb resulting in the death of V, a bomb disposal expert, who knew of the dangers before attempting to defuse the bomb, then on one account V's conduct is voluntary (autonomy) and another non-voluntary (socio-political considerations).¹² It is possible to argue that the bomb defuser's *decision* to attempt to defuse the bomb was both voluntary *and* non-voluntary depending upon the context and perspective of the enquirer. Indeed, it is possible to argue further that their actions were *both* voluntary and non-voluntary, depending on *why* we are enquiring. Thus, the term 'voluntary' is subject to change depending on context and relative position of the enquirer. As such, this chapter argues that there is no single criterion of causation that can adequately resolve the deep-rooted tension between the interests of D, V, and the state when imputing causal responsibility for resulting harm. All of the ideas and interests of the criminal justice system are relevant and necessary to mediate these competing interests - these are the linguistic, socio-economic, political, and moral judgements used when ascribing causal responsibility in criminal law - the 'criteria' of causation.

Most theories of criminal causation tend to emphasise one criterion when ascribing causal responsibility. For Hart and Honoré reliance is placed on linguistic analysis,¹³ Moore uses the natural sciences and metaphysics,¹⁴ and Norrie uses socio-political considerations.¹⁵ However, this chapter illustrates that no single criterion-based account of causation can adequately reflect legal practice. Therefore, the primary aim of this chapter is to offer a practical yet normative account of causation that accommodates all of these criteria of causation when determining whether D causes a resulting harm in law.

Presenting a theoretical account of criminal causation that mirrors legal practice is both a conceptual and philosophical issue. Indeed, many theories of criminal causation have attempted to unpack

¹² This example is based on Norrie's example in A Norrie 'Oblique Intention and Legal Politics' [1989] Crim LR 793. Norrie argues that V's conduct would not be deemed voluntary, and thus breaking the chain of causation, because of the socio-political justification in holding D legally accountable for (intentionally) placing the innocent third-party in such circumstances. The full extent of this issue spans far further than in the example given here and is looked at in more detail in the remainder of this chapter.

¹³ Hart and Honoré, *CIL* (n 3).

¹⁴ Moore, *Causation and Responsibility* (n 4). Also see: AP Simester, 'Causation in (Criminal) Law' [2017] 133 LQR 416.

¹⁵ Norrie, 'A Critique of Criminal Causation' (n 10); Norrie, *CRH* (n 10) 171 – 196.

causation's meaning using philosophically loaded language.¹⁶ However, adopting this approach results in the doctrine's application becoming inflexible, rigid, and inaccessible.¹⁷ This inflexibility results in the creation of new and unnecessary disparate legal rules to prevent undesirable outcomes.¹⁸ This thesis purposely avoids the creation of overly specific legal rules and alternatively uses linguistic analysis to advance a multi-paradigmatic account of causation. The primary reason for this is that, as Wittgenstein explains, 'philosophical problems arise when language goes on holiday'.¹⁹

Indeed, the language used by the courts when discussing causation can *itself* be used to deal with philosophical matters. When legal academics use philosophical language, the doctrine becomes bereft of meaning and utility. Therefore, the underlying claim in this chapter is that language, and by proxy linguistic analysis, can only be understood in the context of its usage and not through complicated and obtuse terminology.

The proposed model of culpable causation offered in this thesis allows the criminal law to respond to *any* causal enquiry, irrespective of the analytical and normative issues present in each case. At the core of the account offered, causation requires an evaluation of D's voluntariness (using subjective negligence) and reasonableness (using foresight) to ascribe responsibility for resulting harms. Once the courts direct the jury on the relevant legal rule(s) of culpable causation, the jury applies these to the factual dispute using the criteria of causation to inform their ascription of causation.²⁰ In illustrating the benefits of culpable causation, it is necessary to show that it is not possible to ascribe responsibility

¹⁶ A prime example would be the use of metaphysics and the natural sciences to explain *why* and *how* liability is imputed in the (criminal) law. See: Moore, *Causation and Responsibility* (n 4). In particular, Moore's analysis of omissions as causes in the criminal law. On this account, which is looked at later on in the thesis, Moore concludes that omissions are 'simply nothing' and cannot amount to changing the course of events in the natural world. As a result of this, they cannot attract causal responsibility in law.

¹⁷ The position advanced in this thesis is to defend an account of causation that is not overly theoretical, but rather to present one that is reflective of legal practice and is of utility in the criminal justice system.

¹⁸ For example, in chapter two, the jurisprudence of the drug-supply manslaughter case law was critically evaluated. It was argued that the decisions in *R v Cato* [1976] 1 WLR 110 and *R v Dalby* (1982) 74 Cr App R 348 illustrate that when specific legal rules are created, this only fosters and creates further ambiguity. Legal rules should pertain to general legal principles and not be (overly) focussed on the prohibited conduct (and result) that is created by the criminal offence.

¹⁹ L Wittgenstein, *Philosophical Investigations* (4th edn, Wiley-Blackwell 2001) 38.

²⁰ For a discussion on the role of the jury setting the normative standard by which D is to be judged, see: J Gardner, 'The Many Faces of the Reasonable Person' (2015) 131 LQR 563. This position has been critically evaluated in chapter two.

using a single unifying (mechanical) theory of causation. This shortcoming is because the mechanical, or single criterion-based, account of causation cannot accurately reflect the complicated legal practice of ascribing responsibility in criminal law. The next section critically applies Wittgenstein's conception of a criterion to causation in criminal law to substantiate and defend this claim.

3. Wittgenstein's 'criterion'

This chapter draws upon the jurisprudence of Wittgenstein to present a multi-paradigmatic account of causation in criminal law.²¹ Wittgenstein, in his philosophical analysis of language, developed his conception of a 'criterion'. It is this analysis which is critically applied in the account advanced in this thesis. In short, a 'criterion' is a linguistic expression that fits an object.²² The term is a relative one in that a criterion is always a criterion for something. It is commonplace to state that to describe something is to specify what it is like, and what it is unlike. To effectively use a criterion, for Wittgenstein, requires the identification of descriptive terms. Descriptive terms (or expressions) are used to divide things into kinds.²³ Therefore, if an individual uses a descriptive expression, it must be possible to distinguish between these different kinds of things. If this is not possible, it would not be possible to use the class name effectively; it would not represent anything.²⁴ It must be possible to tell which objects of expression fit a given description, and those that do not, to understand a description. It is this aspect of Wittgenstein's analysis that is of fundamental importance to causation in criminal law and, in turn, defending the principal aims of this thesis. To illustrate this, Wellman,²⁵ in his discussion of Wittgenstein's work, provides an excellent example of both descriptions and objects as they pertain to Wittgenstein:

Suppose that I am given a descriptive expression and asked to find an object which fits it.
I am, perhaps, told to go to the store and buy a lemon. But how can I recognize a lemon

²¹ Wittgenstein was a philosopher who worked primarily in the fields of mathematics and logic. Wittgenstein's philosophy of language is presented in Wittgenstein, *Brown and Blue Books* (n 1). However, this analysis was based upon his earlier, and extremely influential, *Tractatus Logico-Philosophicus* (London: Kegan Paul 1922).

²² By object, it is not a physical object, but whatever the linguistic expression refers to, is applied to, or is about. By fitting, it is meant that an expression fits and object when it is linguistically correct to apply it to that object. See: Wellman, *Conception* (n 1) 442.

²³ Wittgenstein, *Brown and Blue Books* (n 1) 159.

²⁴ For example, if the criterion was 'legal responsibility', then you must be able to distinguish this concept from others, such as 'moral responsibility' to use the criterion effectively. The same can be said of causation in the law. It is a criterion that must be distinguishable from other concepts for it to be used effectively.

²⁵ Wellman, *Conception* (n 1) 433

when I find one? I go to the store, look over the various objects which I find there, and sooner or later pick up a lemon. But how could I tell which object to pick up? How did I know that this object in my hand was lemon? By observing certain characteristics of it. I noticed that it was green-ish yellow, waxy, ovoid, smallish, and so forth.²⁶

This analysis provides an excellent illustration of some of the problems faced when using descriptive expressions. In Wellman's example, the lemon is chosen when in the store by recognising specific observable characteristics.²⁷ These observable characteristics are used to identify an object as an instance of a descriptive expression and are called 'criteria'. The issue with these criteria, however, is determining whether these are recognised correctly.

Expressions rely upon our conception of the criteria in mind. The individual in the example above may have picked up the lemon, thinking that it was yellow when it was green, and what was picked up was a lime. Therefore, the individual must have some criteria in mind compared to the object (a lemon) when in the store. On this point, Wittgenstein asks, 'do you always find this mental picture when you introspect?'²⁸ Similarly, knowing whether the right image has been called to mind is also difficult to ascertain. Wittgenstein posits that criteria are not determined through some mediating mental picture, nor by some single relation of word meaning object, but by all of the connections which exist within the actual activities of using the word in our everyday language.²⁹ To return to Wellman:

For example, when one first learned the use of the word "lemon," the characteristic color, texture, shape, and size of the lemons were pointed out. When one later called an orange a "lemon," the fact that this object was not greenish-yellow or ovoid was mentioned pointedly. And in the everyday activities of ordering lemons from the store, asking for lemon in one's tea, and declining a second helping of lemon meringue pie the word "lemon" continues to be used in situations involving greenish-yellow, waxy, ovoid, smallish objects. All of these various connections make up the meaning relation between word and object.³⁰

It is all of these connections that make up the meaning between word and object – their 'family resemblance'.³¹ A descriptive term has no meaning until it relates to some observable characteristics.

²⁶ Wellman, *Conception* (n 1) 435.

²⁷ Wittgenstein, *Brown and Blue Books* (n 1) 182.

²⁸ Wittgenstein, *Brown and Blue Books* (n 1) 165.

²⁹ Wittgenstein, *Brown and Blue Books* (n 1) 172.

³⁰ Wellman, *Conception* (n 1) 436.

³¹ Wittgenstein, *Brown and Blue Books* (n 1) 17. Indeed, it is this family resemblance that is of importance in understanding the causation doctrines in criminal law.

Therefore, any descriptive expression of an object is central to its meaning and integral to its definition.³² If something possesses the publicly observable characteristics (criteria) of (say) a lemon, there is justification in using that descriptive expression to refer to that object. When questioning the publicly observable characteristics, problems begin to surface with this position. If, for example, there is no justification in pointing to the colour ‘yellow’ as a criterion, then using the descriptive expression (lemon) cannot be attributed to that object.³³ Indeed, if one cannot refute that the observed colour is ‘yellow’, then there is no justification in calling it a lemon. It is possible to rebut this by stating that the ‘yellow-ness’ is not a publicly observable criterion, but the sensation of the colour in one’s mind, then this is evidence that the chain of reasoning comes to an end.³⁴ Therefore, the ultimate criteria for the use of descriptive language are the publicly observable features fitting the descriptive expression.

This analysis leads to a significant distinction between the kinds of justification. Wittgenstein distinguishes between justifying a descriptive expression through criteria or symptoms. Criteria, as stated above, are observable features directly connected to its meaning. Symptoms are features indirectly related to the expression through association with the criteria in our experience. More generally, symptoms appeal to an empirical generalisation and criteria appeal to a specific convention.

Distinguishing between these two concepts can be difficult and often present difficulties for the analysis offered by Wittgenstein. However, it is argued that when deciding whether or not to use a descriptive expression, we do so without determining which phenomena are to be taken as criteria or symptoms.³⁵ Wittgenstein concludes that you cannot distinguish between the two kinds. There is no sharp line between essential and non-essential characteristics of a term. Instead, terms are usually applied based on many overlapping characteristics that form a group likeness, or ‘family resemblance’.³⁶ Thus, there is no such thing as *the* criterion for the use of a descriptive expression. Whether a descriptive expression will apply will depend on several characteristics that may be present or absent in varying degrees — as

³² Wittgenstein, *Brown and Blue Books* (n 1) 10.

³³ This is only true if it is presumed that this is a necessary criterion for the descriptive expression.

³⁴ Wittgenstein, *Brown and Blue Books* (n 1) 73.

³⁵ Wittgenstein, *Brown and Blue Books* (n 1) 25.

³⁶ Wittgenstein, *Brown and Blue Books* (n 1) 17.

such, applying a linguistic expression is much more complicated than it first appears. A final difficulty, raised by Wittgenstein, are those descriptive expressions without criteria. Wellman offers a useful example here:

There is one piece of the puzzle which does not seem to fit into the picture at all. Suppose that, when asked to pick out something red from a collection of objects presented to him, a person selects a red pencil. How does he know which object to choose? What reason does he have to believe that the word “red” fits the pencil? Wittgenstein seems to say that there is no reason for such choice. If Wittgenstein really means what he seems to mean, then his conception of a criterion is indeed a puzzling one. If there is no reason to justify applying the word “red” to a red pencil, then either “red” is not a descriptive expression, or some descriptive expressions have no criteria, or some criteria cannot be used as reasons.³⁷

Using the example above argues that there is sufficient justification in calling the pencil ‘red’ by pointing to it as a publicly observable characteristic. What cannot be justified is calling the colour ‘red’. However, this does not (and cannot) matter since there are no further criteria once the colour ‘red’ and the object (pencil) are connected. Although such analysis is in and of itself philosophically proscribed, its usage in the application of language is one that is tangible and relatable. It subscribes to the notion that the meaning of language is determined by those that use it in every-day life. This analysis illustrates the relevance of Wittgenstein’s ‘family resemblance’ to criminal causation, which is even more apparent when viewing the causation doctrines as part of the broader criminal justice system. To further understand causation, the next section applies this linguistic philosophy of Wittgenstein. To do this, the object of imputing causal responsibility and the descriptive expression ‘causation’ are both critically evaluated in light of this principle.

3.1 ‘Causation’ as a descriptive expression

It is necessary to critically apply Wittgenstein’s linguistic analysis to develop the claim that causation is a multi-paradigmatic concept. To adopt such linguistic analysis requires perceiving causation as a descriptive expression. It is an expression which pertains to the imputation of responsibility for resulting harms in the criminal law (the object). When establishing causation in a factual dispute, the court

³⁷ Wellman, *Conception* (n 1) 438-439.

performs both an analytical and normative enquiry.³⁸ This enquiry requires the consideration of several different criteria of the criminal justice system. Therefore, to effectively use the descriptive expression, it must be possible to state what it is like and unlike. For causation, this involves identifying the considerations relevant to the imputation of responsibility, and those which are not. It must be possible to be able to use the class name effectively to determine whether that expression applies (or not) in any given case.

Per Wittgenstein's analysis, the descriptive expression must have observable characteristics to justify using that term in every-day life. These characteristics are the 'criteria' of causation. There are multiple considerations (or criteria) that are relevant to the imputation of responsibility in criminal law. Causation does not have a single criterion that must be present in all cases. Criteria are only relevant insofar as they pertain to the specific enquiry. Identifying these does not require some mediating mental picture; the criteria of causation are all the connections that exist within the actual activities of using the expression in our language. Thus, the term can only be used and understood in the context of its usage; not through complicated philosophical language.

For example, determining whether D's conduct is voluntary or non-voluntary may not involve questions of socio-political considerations, but issues of (say) moral responsibility. Determining D's voluntariness depends on several factors, including all relevant information about D, V, and the mischief of the specific legal rule.³⁹ As such, establishing causation for one offence will vary when compared to another.⁴⁰ On this point, Ryu has stated that 'the erroneous assumption – often unconscionably made –

³⁸ This is based on the traditional orthodoxy of criminal causation – the bifurcation of causation. That is, factual and legal causation. However, in chapter four, it is argued that both analytical and normative causation can be situated within the singular test of legal causation. See: chapter four.

³⁹ The mischief of the legal rule in a statute may be ascertained from the statutory provision itself, Hansard (the verbatim report of proceedings of both the House of Commons and the House of Lords), or judicial commentary. Common law legal rules require a discourse analysis of the scope and rationale of the offence.

⁴⁰ One example of this is the different approaches to causation for constructive manslaughter and gross negligence manslaughter. See: *R v Kennedy (No. 2)* [2007] 3 WLR 612 and *R v (Gemma) Evans* [2009] EWCA Crim 650. In *R v Kennedy (No. 2)* [2007] 3 WLR 612 the House placed significant emphasis on the V's personal autonomy to cause harm to himself, and in the latter, the Court of Appeal considered the socio-political concerns over the supply and distribution of controlled substances. These two cases, and offences, are looked in more detail below.

that the law of causation must be the same in all these areas of criminal law, notwithstanding the fact that each may be governed by distinct legislative policies, has led to considerable confusion'.⁴¹

On this understanding, causation in the criminal law simultaneously utilises linguistic, moral, and socio-political considerations to respond to the interests relevant in any given scenario; it does not involve applying the same mechanical test in every single case. The doctrine must react to the contextually specific enquiry in every case to protect the (relevant) interests of D and V. This is informed by the application of the legal rules on causation, as described in chapter one. Where there is no suitable legal rule directly applicable, as in hard cases,⁴² the judiciary develop rules to ensure that the overall interests and integrity of the criminal justice system are suitably protected. For example, as illustrated in the previous chapter, the House of Lords in *R v Kennedy (No. 2)*⁴³ sought to protect the overriding interests of agency and autonomy over socio-political and moral considerations when establishing causation in drug-supply manslaughter cases.⁴⁴ When viewed in this way, causation can respond to a specific enquiry in a clear, discernible manner without undermining the validity or appropriateness of other causal findings.

This analysis of a criterion illustrates that descriptive expressions do not have one single meaning. Instead, criteria form its meaning from its usage in society and the law. This understanding can be used to understand causation as an umbrella for a group of common terms that are together used by the courts to impute responsibility. The criteria of causation are; however, all united by points of family resemblance. It is necessary to determine the criteria of causation, and it is to this that we now turn to advance this Wittgensteinian analysis.

⁴¹ P Ryu, 'Causation in Criminal Law' (1958) 106 University of Pennsylvania Law Review 773, 775.

⁴² For further analysis on causal indeterminacy, see the analysis of Dworkin, constructive interpretivism, and causation in criminal law in chapter two.

⁴³ (n 40).

⁴⁴ This changed the attitude towards drug-supplier responsibility for manslaughter, as previous appellate judgments placed particular emphasis on the socio-political repercussions of the distribution and administration of controlled substances, whereby it was desirable to hold them criminally responsible for resulting harms. This is looked at in more detail subsequently in this thesis, see: chapter five.

4. Causation the Hart and Honoré way

Causation in criminal law is a complicated doctrine that has been subject to significant and rigorous academic discussion. It is prudent to draw upon the existing analysis offered to see whether any of the theories of causation provide an adequate framework for culpable causation to operate. Hart and Honoré's *Causation in the Law*⁴⁵ provides an excellent starting point for this endeavour for two primary reasons.⁴⁶ First, Hart and Honoré adopt a primarily linguistic account of the law, and this has significant parity to the jurisprudence of Wittgenstein used here. Second, the authors admit that linguistic analysis, in hard cases, is not enough to impute responsibility, and other considerations are relevant to the ascription of responsibility. However, as is illustrated below, this understanding of causation in law only takes us so far.

The thread that is central to Hart and Honoré's analysis is that they take how the 'ordinary-person' uses the descriptive expression 'causation' in every-day language to inform the parameters of the legal doctrine. Therefore, for them, causation is not based on any philosophical or abstract meaning. Their view is that since the ordinary-person uses causation to express a judgement of moral responsibility, blame, and legal responsibility in every-day life, it is this meaning that the courts should look to as well.⁴⁷ This analysis, they claim, provides the courts with all the clarity needed to inform the law. On this understanding, establishing causation involves much more than finding a mechanical or physical relationship between D's conduct and the prohibited result.⁴⁸ It is only by utilising linguistic analysis

⁴⁵ Hart and Honoré, *CIL* (n 3).

⁴⁶ Hart and Honoré's analysis of causation in the law is the principal starting point for legal analysis despite their 'common sense' approach falling out of favour amongst contemporary legal scholars.

⁴⁷ Critics of this position have stated that it does not advance the understanding of causation in the law. See: Moore, *Causation and Responsibility* (n 4). Moore provides an account of causation based on metaphysics and science. This is the view that when performing casual inquiries, one is searching for a 'true' cause of the end harm. Such a position is repugnant to that of Hart and Honoré's, and that advocated in this thesis. This will be looked at in subsequent chapters of this thesis. See: M Horwitz, 'The Doctrine of Objective Causation' in F Kairys (ed), *The Politics of Law* (New York: Pantheon Books 1982). The approach advanced by Horwitz is the individualistic emphasis on there being a 'natural' cause for every event that occurs, and that any other critical approach to causation is not sufficient. Such a position was favoured amongst American Realists within the United States in the nineteenth century.

⁴⁸ Cf. Simester, who argues there must be a mechanical relationship to ascribe responsibility, in cases of 'direct' causation, and that to argue otherwise would be to reject our metaphysics. See: Simester, 'Causation in (Criminal) Law' (n 14) 416. This position is discussed in the next chapter of this thesis.

that the doctrine will provide the necessary and relevant criteria to impute responsibility in the criminal law. It is essential to review their work critically, and it is to this that we now turn.

Hart and Honoré offer a linguistic understanding of causation in the law.⁴⁹ Their discussion focuses on the methods the courts have used to impute causal responsibility in law to provide an account which is reflective of legal practice. The authors begin their analysis by identifying the distinction between those contributions that are simply part of the mechanisms of the event, *a* cause, and those to be called *the* cause.⁵⁰ This distinction, they posit, is most prominent when there is the voluntary conduct of a sane adult.⁵¹ This focus on voluntary human acts explains why we cite the (intentional) dropping of a lit cigarette as the cause of the fire, and not the presence of oxygen, combustible materials, and absence of wind. The voluntary conduct of a human adult has the ability, in causal terms, to change the course of the events from how they would have ordinarily unfolded had they not acted.⁵²

This account is rooted in a Millian liberal individualist analysis of human agency.⁵³ This theory of agency, which provides for the maximisation of individual freedom, requires recognition of individuals as causal actors in the world whose voluntary interventions ‘make a difference’.⁵⁴ It is Hart and Honoré’s view that the actions (and omissions) of an individual in society is integral to our understanding of causal responsibility, and therefore, special weighting needs to be attached to them. As an individual in society, actions have consequences, and it is necessary to account for these consequences. On this account, once D has acted unlawfully, they are causally responsible for a

⁴⁹ See: Hart and Honoré, *CIL* (n 3).

⁵⁰ For clarity sake, it is necessary to explain how the language correlates with the rest of the thesis. Per Hart and Honoré’s account, *a* cause is anything within the *causal relata*, but not sufficient to be a legal cause. *The* cause denotes *a* legal cause for the purposes of ascribing responsibility in criminal law.

⁵¹ Cf. S Kadish, ‘Complicity, Cause and Blame: a Study on the Interpretation of Doctrine’ [1985] *California Law Review* 324, 329 – 336.

⁵² Hart and Honoré, *CIL* (n 3) 28 – 32.

⁵³ Hart and Honoré’s analysis is the paradigmatic expression of the philosophy of Hume and Mill. See: Hart and Honoré, *CIL* (n 3) 1xxix, Ch. 1. Also see: JS Mill, *On Liberty* (Penguin Classics 2006).

⁵⁴ For an account of the liberal principles for the imputation of causation, see: Norrie, *CRH* (n 10) 174.

prohibited result unless there is an intervening act – either the voluntary conduct of a third party or an abnormal event.⁵⁵

Therefore, the requirement of voluntariness is essential when ascribing responsibility for resulting harms in criminal law. At its most basic level, if D's unlawful conduct is not voluntary,⁵⁶ their conduct does not attract responsibility in the criminal law.⁵⁷ Therefore, if D voluntarily performs an unlawful action (or omission) that sets in motion a chain of events leading to a prohibited result, D will be held to have legally caused the result if it would not have occurred *but for* D's unlawful conduct and it was a significant and operative cause of the result. Since most cases at trial seldom pose difficulty for the trial judge or jury, this usually is enough to establish causation. It seems fundamental, therefore, that a necessary principle for establishing causation be that D's conduct, or the third-party's intervention, was voluntary.⁵⁸ However, the interpretation of the term 'voluntary' is subject to indeterminacy. The meaning of voluntariness must, therefore, be established to be used correctly.⁵⁹

Evidenced by the discussions by the preceding chapters, criminal causation usually is only an issue in hard cases. These cases typically involve an intervening event after D's unlawful conduct - such as an unforeseeable consequence, negligent actor, or victim's response. Hart and Honoré posit that there are two ways in which a subsequent event can render D's conduct a 'mere condition' of the prohibited result,⁶⁰ thus concluding that D did not 'make the difference' to the occurrence of the result. These are

⁵⁵ This is a general rule, but an over-simplification of how causation is established. D is only responsible for resulting harm if they satisfy the other requirements within the causation doctrines. That is, D's act must also be of significance and operative in causing the harm. For a discussion on the general rules of criminal causation, see: chapter one.

⁵⁶ This is referring to non-voluntary conduct, or normatively non-voluntary conduct, as opposed to involuntary conduct, which does not attract responsibility in the criminal law.

⁵⁷ It is a fundamental requirement that D cannot be held liable for the occurrence of an actus reus unless he was responsible for it. An important consideration in determining whether D is liable for the behaviour element is whether or not D's conduct is voluntary. On this, HLA Hart in 'Acts of Will and Responsibility' in *Punishment and Responsibility* (OUP 1968) 90, 107 stated that "what is missing in these cases appears to most people as a vital link between mind and body; and both the ordinary man and the lawyer might well insist on this by saying that in these cases there is not 'really' a human action at all and certainly nothing for which anyone should be made criminally responsible however 'strict' legal responsibility might be."

⁵⁸ The meaning of 'voluntary' for criminal causation is different to other legal issues. See: *R v Wallace* (2018) EWCA Crim 690. However, since the principle of voluntariness plays an essential role in events after D's conduct, its meaning is explored in more detail in the next section of this chapter.

⁵⁹ This theoretical and linguistic problem is picked up later in chapter five. This thesis uses the invariant and individualised standard of care (subjective negligence) to ascertain whether D was acting voluntarily.

⁶⁰ Hart and Honoré, *CIL* (n 3) 28-32.

(a) abnormal contingencies and (b) voluntary human actions. If there is evidence of either of these, the original actor is not responsible for the resulting harm and the putative chain of causation broken.⁶¹ An abnormal contingency has the effect of reducing the agency of the original actor to that of a background factor, and it is the abnormality that ‘made the difference’ as to whether the prohibited result occurred or not.⁶² Similarly, voluntary human interventions break the chain of causation because of the emphasis placed on free will and autonomy within criminal law.⁶³ Such intervention relieves the original actor of responsibility since voluntary human actions are of particular significance.⁶⁴ Hart and Honoré argue that if identified in a causal enquiry, a voluntary human action operates as both ‘a barrier and a goal’ in establishing causation.⁶⁵ These two principles form the foundation of their causal analysis and will be used throughout this chapter to provide a framework to develop a workable account of culpable causation.

It is necessary to analyse these two principles in greater depth to establish the proposed framework of culpable causation offered in this thesis. Since these general principles inform the legal rules on causation, it is necessary to determine their meaning and the parameters of voluntary-involuntary and normal-abnormal conduct. This chapter argues that it is the ‘criteria’ of causation that informs the answer to this question. In order to explain the importance of these principles, it is necessary to evaluate further Hart and Honoré’s understanding of abnormalities within causation. This discussion forms the subject matter of the next section of this chapter.

⁶¹ These conclusions have been corroborated by various experimental psychologists. The recognition of Hart and Honoré’s ‘abnormality’ principle has been seen in causal studies (vignettes) by Kahneman and Miller, who used ‘norm theory’ to defend the proposition that descriptively abnormal events break the chain of causation. See: D Kahneman and D Miller, ‘Norm Theory: Comparing Reality to Its Alternatives’ (1986) 93 *Psychological Review* 136, 143. Additionally, the ‘voluntariness’ principle has similarly been successfully replicated in vignettes. See: J McClure and others, ‘Judgments of Voluntary and Physical Causes in Causal Chains: Probabilistic and Social Functionalist Criteria for Attributions’ (2007) 37 *European Journal of Social Psychology* 879, 880.

⁶² Hart and Honoré, *CIL* (n 3) 33-41.

⁶³ The term ‘break the chain of causation’ is somewhat of a misnomer. It does not mean, literally, that the chain has been broken. If *a* supplies, and prepares, a syringe of heroin for *b* to administer to himself, and *b* subsequently does so, providing his action is a free, voluntary and informed action, it will relieve *a* of any causal responsibility toward *b*’s fate. Should *b* inject the heroin with fatal consequences, *a* is still part of the causal ‘chain’, but we say that the chain has been broken by the action of *b* to illustrate that causation cannot be established.

⁶⁴ Hart and Honoré, *CIL* (n 3) 41-44.

⁶⁵ Hart and Honoré, *CIL* (n 3) 44.

4.1 Abnormalities

The primary vehicle Hart and Honoré use to distinguish between causes and conditions are through the use of abnormalities. This principle, they posit, helps them to differentiate between those contributions that we identify as a cause, as opposed to ‘mere condition’, of a prohibited result.⁶⁶ In ordinary life, in contrast to the natural sciences, determining the cause of an event is motivated through a desire to explain the occurrence of a specific result, the presence of which is confusing because it is a departure from the norm.⁶⁷ The question is - why has A occurred when B usually would? Alternatively, why has V sustained physical injuries, when V normally would not? It is the desire and motivation to answer this question that best explains causation in criminal law, and Hart and Honoré place great significance on this in their linguistic analysis. Their use of abnormalities allows them to ascertain conduct that ‘made the difference’ in bringing about the result occurrence. For example, per Hart and Honoré, ‘in the case of a building destroyed by fire “mere conditions” will be factors such as the oxygen in the air, the presence of combustible material, or the dryness of the building’.⁶⁸

However, the exercise of analytically evaluating a list of contributions cannot by itself impute causal responsibility to an actor for a prohibited result. The conditions in the example above are present in both situations resulting in the building fire occurring, and those where it does not. None of these contributors ‘made the difference’ for legal purposes; that is determining who is to be blamed and to impute responsibility. The abnormality (the fire) might, however, be said to be caused by the dropping of a lit match that in turn ignited the combustible material. Indeed, in Hart and Honoré’s analysis, it is this condition that is singled out and has causal responsibility ascribed to it.⁶⁹ D’s dropping of the match, which caused the building to burn down, is a legal cause in the criminal law, and it is reasonable to

⁶⁶ A point of clarification is necessary at this point. In chapter one, it was stated that to satisfy legal causation, D need not be *the* principal or sole cause, but *a* significant and operative cause of the prohibited result. Hart and Honoré make the same distinction, albeit using different language. When they discuss ‘*the* cause’, they mean ‘*a* cause’. Similarly, they use the description ‘*a* cause’ to denote a ‘condition’ of a prohibited result. To reflect current legal practice, this thesis will use ‘*a* cause’ to represent conduct that satisfies the requirements of criminal causation, and ‘condition’ to represent conduct that does not.

⁶⁷ Hart and Honoré, *CIL* (n 3) 34.

⁶⁸ Hart and Honoré, *CIL* (n 3) 34.

⁶⁹ It will also be argued later in this chapter that it is not only legal responsibility, which is attached to the abnormal contingencies but also moral responsibility. It is this that may help further narrow the criterion for establishing causation in criminal law.

charge D with criminal damage and arson.⁷⁰ Reaching this conclusion requires further analysis. The rationale offered for this conclusion is that D's conduct is an abnormality. Buildings, in their ordinary functioning, do generally not catch fire. The list of factual, or scientific, conditions required for a house to burn down is present in both the normal day-to-day functioning and in the case where it is burnt down. However, D's conduct can be perceived as an abnormality and therefore attracts causal responsibility in the criminal law.

The rationale for placing a particular emphasis on voluntary human actions is that it is the only (stated) principle that is normatively sensitive. It is because of this that the free, deliberate, and informed conduct (FDI conduct) of a third-party is frequently used as both in causal enquiries as both a 'barrier and goal' in causal tracing.⁷¹ FDI conduct is not the only rule caught by Hart and Honoré's abnormality principle. It is also capable of singling out and identifying unforeseeable natural events such as natural disasters. This concept of abnormalities, they claim, is built into the ordinary person's understanding of causality. There are basic notions that the ordinary person holds about the relationship between cause and effect. The conditions above are an example of what is assumed by an enquirer when performing an investigation into the fire.⁷² The conditions stated are required for both the normal functioning and the prohibited result (fire). Constructing houses involves using combustible materials, oxygen is in the air, and houses are (sometimes) dry. Indeed, these factors are assumed by the enquirer when the investigation begins.⁷³

In some situations, an enquirer may be ignorant of surrounding factors that are later shown to be present through the advancement and discoveries made in the natural sciences. For example, we may learn through scientific progress a further understanding of combustion on a molecular level. However, this

⁷⁰ Contrary to the Criminal Damage Act 1971, s. 1(3).

⁷¹ To defend such position, a liberal individualist account of human agency is adopted throughout this thesis.

⁷² In this situation, the ordinary person would assume that if the building burnt down, there was oxygen and combustible material present, but their focus would automatically be on why the building burnt down when it usually would not. The generalisation of the ordinary person here would be focused on the igniter, or to look for something like this from several mere conditions. Generalisations will be looked at in more depth later in the chapter.

⁷³ It is assumed that these causal factors are present within the causal matrix when undertaking the causal investigation, unless their inclusion would be contrary to the norm. For example, in Hart and Honoré's example of a laboratory fire. In such example, the presence of oxygen was contrary to the norm. See: Hart and Honoré, *CIL* (n 3) 34.

would not change the imputation of causal responsibility in the arson example given above. Similarly, if D lights a petrol bomb and throws it through a store window, resulting in the building being burnt down, the enquirer would not identify this new scientific finding as a cause of the fire. Despite its ability to explain *why* and *how* it (scientifically) happened, the further understanding of combustion merely forms part of the background mechanism to which an actor performs, present in both the normal functioning and in the building burning down.

Therefore, the natural sciences may help to demonstrate that D's action was analytically relevant to causing the resulting harm, but it cannot impute causal responsibility in criminal law. When discounting factors from the enquiry, the ordinary person would discount scientific contingencies from being attributed as a legal cause since they do not 'make the difference'.⁷⁴ The criminal law focuses on human conduct when ascribing causal responsibility. This analysis leads to Hart and Honoré's principal distinction between normal and *abnormal*:

This, then, is the character of one principal distinction between normal and abnormal conditions: normal conditions (and hence in causal inquiries mere conditions) are those conditions which are present as part of the usual state or mode of operation of the thing under enquiry: some of such usual conditions will also be familiar, pervasive features of the environment: and many of them will not only be present alike in the case of disaster and of normal functioning, but will generally be known to be present by those who make causal inquiries.⁷⁵

While this distinction furthers the analysis of causation in law, it is not to be used without further qualification. This feature of Hart and Honoré's work is welcome but is limited by the interpretation of the term. The meaning and application will change depending on who is enquiring.⁷⁶ That these terms are contextually specific is influenced by the criteria of causation - the linguistic, social, political, and moral paradigms of the law. Therefore, what is normal and *abnormal* is a relative concept. This relativity is apparent in causation in two distinct areas. First, relativity can depend on the *context* of the question; and second, the position of the *enquirer* will also yield (potentially) different results.

⁷⁴ For a theory of causation, based on ordinary notions of causation, to work it would need to account for such subconscious reasoning, and explain why it is discounted from a causal inquiry.

⁷⁵ Hart and Honoré, *CIL* (n 3) 35.

⁷⁶ Cf. S Lloyd-Bostock, 'The Ordinary Man, and the Psychology of Attributing Causes and Responsibility' (1979) 42 *MLR* 143.

Therefore, to use this analysis, these terms need to be either disambiguated or expounded further. The next sections look at both types of relatively in turn.

4.1.1 Context-specific relativity

This section argues that the terms employed in causation: voluntary-involuntary, normal-abnormal, and reasonable-unreasonable are sensitive to the context that they are used. In this sense, they are contextually relative. Hart and Honoré's example neatly explain the relativity issue:

If a fire breaks out in a laboratory or in a factory, where special precautions are taken to exclude oxygen during part of an experiment or manufacturing process, since the success of this depends on the safety from fire, there would be no absurdity at all in *such* a case in saying that the presence of oxygen was the cause of the fire. The exclusion of oxygen in such a case, and not its presence, is part of the normal functioning of the laboratory or factory, and hence a mere condition; so, the presence of oxygen was the cause of the fire.⁷⁷

This example neatly illustrates the sensitivity of such terms. The context of the enquiry needs to be established to use these ambiguous terms in causation.⁷⁸ In this example, the presence of oxygen is not a common feature of both normal functioning and disaster; it is not possible to treat this factor as the contributor which 'made the difference'.

Therefore, the contextual relevance of the enquiry needs to be determined before an actor can be deemed responsible for a prohibited result. It is necessary to consider the specifics of the legal rule or norm to settle this contextual dispute. For example, if the presence of oxygen in a laboratory resulted in an investigation into whether there was evidence of negligence, then the legal rule would provide this.⁷⁹ If, however, V sustained injuries in the laboratory fire and an enquiry was undertaken to impute responsibility for a non-fatal offence,⁸⁰ there may be a different outcome. For example, the former may result in an institutional fine and the following individual criminal responsibility. Indeed, both of these

⁷⁷ Hart and Honoré, *CIL* (n 3) 35.

⁷⁸ Is it not, at this stage, clear what the context of the specific enquiry is for causation in criminal law. If the field of enquiry is a quantitative exercise, to collate information on breaches of laboratory regulations, then this would yield a very different outcome to a legal exercise. The former may determine the presence of oxygen of the cause, whereas the law may hold the cause to be the reason for the oxygen being present, culminating in a voluntary human action. Whether this is an exercise to apportion blame or responsibility, will be looked at later in this chapter.

⁷⁹ For example, there are principles of good laboratory practice that could be used in these situations. See: The Good Laboratory Practice Regulations 1999. Although this is not a statutory provision relating to the criminal law, it is useful in illustrating the different contexts that causation is relevant for the same factual dispute.

⁸⁰ Contrary to the Offences Against the Persons Act 1861.

outcomes could result from this situation with different interpretations of the expression 'causation'. Therefore, to establish causation, it is necessary to resolve the issue of context-relativity.⁸¹ It is because of this that there can be no single unified model of criminal causation. Criminal offences and the circumstances in which they can be committed vary vastly. No single paradigm of causation could satisfactorily accommodate all of the criteria as mentioned above. This relativity issue can be resolved quickly and does not pose any difficulties for causation.⁸² What is more problematic, though, is when the perspective of the *enquirer* affects the causal analysis.

4.1.2 Person-specific relativity

The second issue that requires attention is person-specific relativity. This type of relativity is where the distinction between normal and abnormal is drawn in different ways depending on the specific individual (or institution) enquiring. Hart and Honoré use the following example to illustrate this:

The cause of the great famine in India may be identified by the Indian peasant as the drought, but the World Food authority may identify the Indian government's failure to build up reserves as the cause and the drought as a mere condition.⁸³

When varying the perspective that is adopted, the cause of the famine in this example changes; the World Food Programme⁸⁴ may blame the Indian government, while a citizen of the state may blame the drought.⁸⁵ Resolving this issue is required to establish causation in criminal law. The solution advanced by Hart and Honoré is that practicality will often address person-specific relativity. However, an argument against this view is that establishing causation on this basis can only be rationalised

⁸¹ It will be suggested, later in the chapter, that the 'context relativity' is based on moral responsibility and is what causation in the law encapsulates.

⁸² Context relativity does, however, require further discussion when the relationship between analytical-normative, or factual and legal, causation is critically evaluated. It is submitted that because all processes of imputation are concerned with normative issues, mechanical causation is of little use in establishing causation in criminal law. Cf. Simester, 'Causation in (Criminal) Law' (n 14) and Moore, *Causation and Responsibility* (n 4). This is discussed in greater detail in the subsequent chapter of this thesis. See: chapter four.

⁸³ Hart and Honoré, *CIL* (n 3) 35. The inherent problem with such a proposal is the difficulty in knowing whether the correct perspective is taken. Correct, in the sense that it is the widest viewpoint that correlates with the objectives of the criminal law. How this realisation is known, though, is a point which will be discussed further.

⁸⁴ The World Food Programme is the food-assistance branch of the United Nations and the world's largest humanitarian organization addressing hunger and promoting food security.

⁸⁵ Cf. Norrie, 'A Critique of Criminal Causation' (n 10) 690.

retrospectively; that is after imputation has taken place. Due to the varying interests in any factual dispute, this would be backwards reasoning.

For example, take the facts of *R v Pagett*.⁸⁶ In this case, V's death was held to be D's conduct (holding V hostage) and not the police officer who shot V in error, intending to disable D. D's actions would have most certainly satisfied factual causation since without D holding her hostage she would not have been in a position to be shot. The mechanical cause of V's death is irrefutably the gunshot wound, not being held hostage by D. However, the tests of legal causation yield a different conclusion.

Analysing this decision can be interpreted in two different ways. Either, the judiciary exercised a backwards reasoning exercise, concluding that it was D's action that caused V's death and that to reach any other conclusion would render the legal tests ineffective and not fit for purpose.⁸⁷ Alternatively, the decision to impute responsibility to D was policy-driven. Although D's action would not of its own accord result in the death of V, there is a policy rationale in not holding the police officer responsible when responding to D's threat. Since the police officer was responding to the situation created by D, it would be contrary to public policy to hold a police officer legally responsible due to their function and status in society.⁸⁸ The latter explanation explicitly states the reason for holding D responsible, whereas the former leaves much to be desired.⁸⁹

Hart and Honoré do not defer to questions of morality, norms, and socio-political factors explicitly when addressing person relativity. Instead, they rely upon 'common-sense' notions to distinguish between what is normal and abnormal. It may be that common-sense notions utilise these ideas and interests (criteria) implicitly, but this needs to be made explicit. The principal reason for this is that

⁸⁶ (1983) 75 Cr App R 279.

⁸⁷ Goff LJ, referred to policy decisions throughout his judgment in *R v Pagett*. In particular, regarding Gifford L in *Commonwealth v Redline* 391 Pa. 486, 137 A.2d 472 (1958), and *R v Blaue* (1975) 61 Cr. App. R. 271, stating '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.' See: *R v Pagett* (1983) 75 Cr App R 279, [287] - [290].

⁸⁸ Although, it is submitted that this would have been different if the actions of T (the police officer) were grossly negligent. This conclusion is drawn from the judicial commentary concerning the negligent conduct of medical professionals constituting a *novus actus*. See: *R v Jordan* (1956) 40 Cr App R 152; and *R v Smith* [1959] 2 QB 35. For a discussion of these cases see chapter four.

⁸⁹ Chapter five in this thesis argues that the police officer's act of shooting D was non-voluntary, meaning that it does not relieve D of responsibility for the resulting harm. This analysis focuses on the socio-political considerations of the function of the police and protection of the police officer's autonomy.

when establishing causation, identifying the reason for the enquiry must take place before application – what the legal rule is and the mischief of such rule. The analysis of this will invariably bring other considerations into the fold.

Conversely, Hart and Honoré argue the broadest perspective of the factual dispute is all that is required to impute responsibility. Their ‘common-sense’ understanding of causation is used to classify conduct as either a cause or mere condition, which does not directly depend on the criteria of causation. In the famine example above, in ordinary language, both the failure to build up reserves and the drought can be said to be the cause of the famine. However, from a broader perspective, it is the failure to build up reserves that are seen to be the imputable cause. Since governmental precautions counteract the effects of droughts by food and water conservation, the drought becomes the typical feature and the failure to build reserves abnormal – therefore, a norm created. Not to follow such a norm makes the cause of the famine the controllable feature and not nature. This feature is the only controllable condition in this example; the drought is not controllable, and therefore cannot be said to be a causal abnormality. Therefore, there is no deviation from the norm in such a case.

However, controllability is not always a predominant feature of our everyday assumptions and therefore, normality. When something goes wrong, our perspective shifts. The motive that we have when making this enquiry is our wish to control it and prevent it from recurring. On this point, Hart and Honoré state:

When things go wrong and we then ask for the cause, we can ask for the cause, we ask this on the assumption that the environment persists unchanged, and something has ‘made the difference’ between what normally happens in it and what has happened in it in this occasion.⁹⁰

When imputing responsibility, the most extensive and broadest perspective should be the one which is adopted. Although at a local level, the terminology of the cause will seem accurate, it does not factor all of the norms. With these norms it allows us to rank a deviation from the norm as a cause and not a mere condition. When establishing causation, the law must determine what the position of the enquirer

⁹⁰ Hart and Honoré, *CIL* (n 3) 36.

is and their motive for inquiring. This judgment is linked directly with the interests protected in each case. If the court (or jury) prioritises the autonomy of D, then socio-political factors will have less influence on the ascription of responsibility. It is these interests that will dictate the relativity of the enquiry.

4.1.3 Omissions

In addition to positive actions, omissions also need examination in the context of abnormalities. In criminal law, it is not only actions that attract responsibility; a failure to act is also, in some circumstances, enough to constitute the actus reus of a criminal offence. Omissions have posed problems for criminal lawyers for a long time. Some see them as being ‘simply nothing’ and as such cannot form the substance of a criminal offence.⁹¹ When looked at this way, it is challenging to justify grounds for state prosecution.

However, this perception of omissions is not one that is adopted by English criminal law. It is possible, and indeed preferable, to look at omissions in the same way as positive actions. Moreover, it is also possible to categorise an omission as an abnormality. Every society establishes standards of behaviour and creates societal norms - thus, it is possible to identify an omission of such norm as being the legal cause of harm. Of course, an individual would need to have a pre-existing duty to be responsible for any resulting harm. Omissions in this sense are not used only to describe an absence of behaviour and therefore are not ‘simply nothing’. An omission can manipulate the world as affirmative actions do. Omissions describe the world by contrast to it, not by comparison as affirmative actions do.⁹² This approach to omissions works when the law recognises these standards of behaviour and norms. Therefore, omissions can satisfy the principle of abnormalities in causation, just as positive actions do.⁹³

⁹¹ Hart and Honoré, *CIL* (n 3) 38.

⁹² Hart and Honoré, *CIL* (n 3) 38. See also pg. 39, which states that a mere condition does not need to be contemporaneous with the cause. i.e. a breeze could come after the lighting of match, and spread a small fire to a nearby house, but the lighting of the match would still be the cause, not the latter breeze.

⁹³ Thus, for the remainder of this thesis, unless explicitly stated otherwise, D’s *conduct* includes both positive actions and omissions when discussing causal responsibility. Omissions and causation in criminal law is looked at in more detail subsequently in this chapter.

4.1.4 Conceptual problems with abnormalities

The predominant issue with this account of abnormalities is the relative viewpoint taken while establishing causation and ascribing responsibility. Hart and Honoré argue that causation is dependent on both context and perspective. Some legal scholars have criticised this conclusion as being contingent and subjective.⁹⁴ Therefore, it is necessary to defend the use of abnormalities as a principle of causation. Failing to do so would have the undesirable effect of concluding that their position is weak and unstable for ascribing responsibility for results. It is therefore imperative to critically evaluate the criticisms of Hart and Honoré's work that are made by scholars such as Thomson⁹⁵ and Norrie.⁹⁶

On Norrie's account of criminal causation, he posits that distinguishing between the normal-abnormal requires a variable evaluation of normality in social life.⁹⁷ Similarly, Thomson argues that these terms are abstract and do not further our understanding of the doctrine, but instead creates ambiguity.⁹⁸ Therefore, to use such terms, they must first be disambiguated. Thomson writes (about the abnormal-normal distinction) that:

It is the single most important point of this paper that if a legal theorist offers us an analysis of causation by use of those words, then we simply do not know what analysis he is offering us unless he tells us what he means by them.⁹⁹

This criticism would indeed be valid if these terms were, in fact, definable; however, this chapter rejects this position. If the linguistic analysis presented above is adopted, then using ambiguous language does not create theoretical problems. It is sound to rely on abstract terminology without specific definition. The terms voluntary and abnormality are principles of causation which draw meaning from the criteria of the criminal justice system. The criminal law benefits from a vast miscellany of case law, and this provides for a substantial amount of jurisprudential analysis. It is beneficial to tap into this authority to evaluate the use of such terms by the courts. This exercise demonstrates the interests that are of

⁹⁴ Norrie, 'A Critique of Criminal Causation' (n 10).

⁹⁵ JJ Thomson, 'Some reflections on Hart and Honoré, *Causation in the Law*' in M Kramer (eds), *The Legacy of HLA Hart: Legal, Political, and Moral Philosophy* (OUP 2008) (hereafter *Reflections*).

⁹⁶ Norrie, 'A Critique of Criminal Causation' (n 10); Norrie, *CRH* (n 10) 171 – 196.

⁹⁷ Norrie, 'A Critique of Criminal Causation' (n 10) 690.

⁹⁸ Thomson, *Reflections* (n 95).

⁹⁹ Thomson, *Reflections* (n 95) 148.

relevance when imputing causation. This analysis of interests provides an understanding of how causation has been used and for what purpose.

The application of these principles to impute responsibility depends on the criteria of causation. Using Wittgenstein's concept of descriptive expression, we can conclude that these terms do not need any further disambiguation. It is not necessary to constrict the terminology with unnecessary philosophy, as to do so will only hinder our understanding. Combining the work of Hart and Honoré with Wittgenstein demonstrates that there is no single criterion of a descriptive expression. It is only the publicly observable features that we use for that specific descriptive expression. Relying on terminology such as abnormality does not require explanations, only criteria. These criteria are the moral, social and political considerations of the criminal justice system.

In looking at the usage of abnormalities, Norrie uses Lord Scarman's report on the Brixton Disorders to evidence his claim that it is necessary to disambiguate such terms before using them.¹⁰⁰ Lord Scarman stated when discussing the cause' of the riots, that: 'deeper causes undoubtedly existed, and must be probed: but the immediate cause of Saturday's events was spontaneous combustion set off by the spark of one particular incident.'¹⁰¹ Norrie's claim here is that there is great difficulty in determining the factor which 'made the difference' - the deeper cause or the immediate cause?¹⁰² The deeper causes are factors such as poor social environment, racial discrimination, and police harassment.¹⁰³

This chapter suggests that the specific actions of the individual(s) involved are more immediate and relevant to causal responsibility. However, Norrie's argues that Hart and Honoré's model cannot conclusively explain which of these 'causes' is more relevant when ascribing causal responsibility. Resolving this is determined by ascertaining the reason for the enquiry. For example, if there is an investigation into an institutional failing of (say) a Local Authority or D for causing prohibited harm, this will change the nature of the causal enquiry and therefore require a different analysis. Lord Scarman

¹⁰⁰ Norrie, 'A Critique of Criminal Causation' (n 10) 690.

¹⁰¹ *The Brixton Disorders, 10-12 April 1981* (Cmnd 8427) 37.

¹⁰² Norrie, 'A Critique of Criminal Causation' (n 10) 691.

¹⁰³ *The Brixton Disorders* (n 101) 14, 16.

held that we are concerned with the responsibility and culpability of D, not of the conditions of the individuals could not excuse their behaviour or guilt. Lord Scarman said that D is living in society and therefore has a legal (and moral) responsibility as causal agents for the consequences of their actions.

The conclusions drawn by Norrie are indeed useful. He claims that socio-political considerations are essential to distinguishing between normal-abnormal is undoubtedly a correct one. The analysis offered by him is that it is necessary to make explicit that it is socio-political considerations that are relevant when imputing responsibility in the criminal law – not a ‘common-sense’ approach which is merely too vague to be useful. The view presented in this thesis is that both Hart and Honoré’s and Norrie’s account are helpful, but both require further supplementation. However, socio-political considerations are not *always* relevant when imputing responsibility. Indeed, to state that individuals are not responsible due to poor education, racial discrimination, and social utility would ebb away at the ideal model standard that the criminal law implements. As such, Lord Scarman, when discussing the Brixton Disorders,¹⁰⁴ did not wish to take into account socio-political interests, but instead focused on the liberal individualist analysis of human agency.

Because of the significant emphasis placed on a liberal individualist analysis of human agency in English criminal law, and the importance of FDI conduct in criminal causation, it is necessary to evaluate Hart and Honoré’s analysis on this point. As evidenced in chapters one and two, it is often an essential requirement in imputing responsibility in hard cases. It is, therefore, necessary to explore this principle in greater detail.

4.2 Voluntariness

The most common abnormal event that renders D’s conduct insignificant is subsequent voluntary human intervention.¹⁰⁵ The principle of voluntariness is, therefore, fundamental to imputing causation

¹⁰⁴ (n 101).

¹⁰⁵ Hart and Honoré, *CIL* (n 3) 41.

in criminal law and essential to the effective functioning of Hart and Honoré's theory of causation.¹⁰⁶

It is stated in the preliminary section of this chapter, per Hart and Honoré, that this is the primary way to 'break' the causal 'chain'. Hart and Honoré explain the reason for this:

Yet a voluntary human action intended to bring about what in fact happens, and in the manner in which it happens, has a special place in causal inquiries; not so much because this, if present among a set of conditions required for the production of the effect, is often treated as the cause (though it is true), but because, when the question is how far back a cause shall be traced through a number of intervening causes, such a voluntary action is often regarded both as a limit and also still the cause even though other later abnormal occurrences have provisionally been recognized as causes.¹⁰⁷

To illustrate this, an example used by Hart and Honoré is looked at:

If unusual quantities of arsenic are found in a dead man's body, this is up to a point an explanation of his death and so the cause of it: but we usually press for a further and more satisfying explanation and may find that someone deliberately put arsenic in the victim's food. This is a fuller explanation in terms of human agency; and of course we speak of the poisoner's action as the cause of the death; though we do not withdraw the title of cause from the presence of arsenic in the body – this is now thought of as an ancillary, the 'mere way' in which the poisoner produced the effect.¹⁰⁸

Hart and Honoré, using this example, illustrate the unique finality of FDI conduct. This finality, they claim, is in response to a 'common-sense' appreciation of what causal enquiries are inherently concerned within this example that is how the poison came to be in V's body and cause death. Once D's conduct is identified, we impute responsibility to him unless we can trace back further and find coercion or duress for a poisoner to do as he did.¹⁰⁹ FDI conduct is, therefore, both a barrier and a goal in tracing back causes in legal causation.¹¹⁰ Their notion of voluntariness is not without issues, however.

It is necessary to explore the parameters of this principle and resolve any conceptual problems that arise.

¹⁰⁶ Hart and Honoré, *CIL* (n 3) 41. This obviously leads to the problem of defining voluntary, along with their concept of agency. For a more general discussion on this, see: Hart and Honoré, *CIL* (n 3) Chapter 6. It should be noted, though, that not all human actions are causes, but are mere conditions. An action, which is not wholly voluntary, can still describe the deviation from the norm. These cases, although they involve human action, can be distinguished from causes using the methods which have already been discussed above.

¹⁰⁷ Hart and Honoré, *CIL* (n 3) 42.

¹⁰⁸ Hart and Honoré, *CIL* (n 3) 42.

¹⁰⁹ 'We do not therefore trace the central type of causal inquiry through a deliberate act', as per Hart and Honoré, *CIL* (n 3) 42.

¹¹⁰ A human action which is not voluntary is on par with other abnormal occurrences. Hart and Honoré, *CIL* (n 3) 43.

4.2.1 Conceptual problems with voluntariness

Like their analysis of abnormalities, there are also conceptual problems with the principle of voluntariness. Norrie is also critical of Hart and Honoré's voluntariness concept.¹¹¹ Norrie states, when discussing Hart and Honoré's principle of voluntariness, that 'the definition is too flexible, too open to broad and narrow interpretations of what the terms mean'.¹¹² His criticism is similar to that of Thomson's on this matter.¹¹³ Both are of the view that these terms are illusory and subject to interpretation.

Hart and Honoré concede that there are various usages of these terms, narrow and broad, depending upon the interpretation of such term. As such, the outcome will differ depending on the application of the term. This analysis is similar to the relativity issue that was identified more generally above. With these principles, much depends on who the enquirer is, and their norms, to determine between voluntary-involuntary. Hart and Honoré state that a person's conduct is voluntary if they have the fair opportunity to act otherwise.¹¹⁴ Therefore, much depends in part on what conduct is reasonable in the circumstances.¹¹⁵

On their analysis, this is to be determined using common-sense notions. Using common-sense is as far as they go in grounding their understanding of causation. This feature is a limiting feature of their work, and critics have often cited this as the reason that their work has limited practical application. This thesis rejects this position and offers a multi-paradigmatic account of causation using culpable causation. The distinction between normal-abnormal is drawn simultaneously from linguistic, moral, social, and political considerations – the criteria of causation. This analysis is used to explain why some FDI conduct is imputed responsibility and, in some situations, others are not.

¹¹¹ Norrie, 'A Critique of Criminal Causation' (n 10).

¹¹² Norrie, 'A Critique of Criminal Causation' (n 10) 691.

¹¹³ Thomson, *Reflections* (n 95).

¹¹⁴ See chapter five and six where this is used to provide a normative framework for culpable causation.

¹¹⁵ This point is not looked at in enough depth in their text, as it is submitted that moral responsibility plays a much more significant role here. To determine whether an action was voluntary will, in part, depend upon a normative enquiry. This will be looked at in subsequent chapters as a way of further developing Hart and Honoré's position on causation in the law. See: Hart and Honoré, *CIL* (n 3) 143.

Norrie also places significant importance on the interpretation of voluntariness, both individualistic and societal. It is not possible to view our actions as if they were in a vacuum due to how our actions influence the world around us.¹¹⁶ This influence is not just the natural world, but the mechanics of interpersonal relationships too.¹¹⁷ This analysis shows that the concept of voluntariness loses its unique finality characteristics when adopting a broader view of events and actions. This concession is valid, at least for Norrie's analysis. Therefore, in this view, Hart and Honoré's concept of voluntariness cannot see the other broader side of individual agency. This broader perspective, according to Norrie, is inherently rooted in social and political relationships. When this broader understanding confronts Hart and Honoré's model, their individualistic model has ebbed away.¹¹⁸

Conversely, however, Hart and Honoré's concept of voluntariness can rationalise how judges have talked about causation in criminal law. It also gives practical expressions to the concepts which are both implicit and expressed in their judgments in a way in which a legal reductionist, such as Norrie, cannot. A reductionist's view would argue that judicial decisions are no more than a mere façade, based only on policy grounds. This claim is because there is no practical way in that language could be used to express 'causation' in a world where causation is everywhere.¹¹⁹

While explaining their position, Hart and Honoré cite the American case of *State v Preslar*.¹²⁰ It is worthwhile to explore the facts of this case and their analysis. In this case, D badly beat V (his wife). V left the family home with her child to walk to her father's house. Two hundred yards from her father's home, V lay down stating she did not wish to continue until morning. V died of exposure during the night. Hart and Honoré believe, as did the court, that her action was to be considered voluntary. She made the deliberate decision to walk to her father's house, stop partway there and sleep during the night. The husband's domestic violence towards her did not legally cause her death. Norrie does not agree

¹¹⁶ This point is not mutually exclusive with Hart and Honoré's position; in fact, it is exactly the point they make throughout the first half of the book.

¹¹⁷ Take, for example, Norrie's example of J.B. Priestley's play, *An Inspector Calls*, in which the author persuades us to look behind the 'voluntary' act of a young woman's suicide to the conduct of the various members of the well-to-do family, who each in their own way have contributed to the girl's decision to take her life. See: Norrie, 'A Critique of Criminal Causation' (n 10) 691.

¹¹⁸ Norrie, 'A Critique of Criminal Causation' (n 10) 692.

¹¹⁹ Norrie, 'A Critique of Criminal Causation' (n 10) 692.

¹²⁰ (1885) 48 NC 417 in Hart and Honoré, *CIL* (n 3) 326 – 327.

with this line of thinking. He uses this case to defend his argument that a concept of voluntariness in causation is of limited value. Instead, his view is that her act of leaving the house was of self-preservation, an accepted ground for negating the voluntariness of an action. This, therefore, extended the causal chain to V's violent husband.¹²¹

Of course, if examining the individual's action from a broader perspective, there will always be a large number of influencing factors before deciding to act. This process is how individuals operate within society. No individual acts in an isolated vacuum with the natural world around them. However, it is only factors that have a legal impact on causation that will be of relevance in such enquiry.¹²² Therefore, the relevancy of these contributions is determined by (a) the offence, and (b) the application of legal rules that are to be interpreted using the criteria of causation.

No theorising or explanation of words can adequately explain causation in the law. It is a legal mechanism that must be flexible and responsive to a wide variety of factual disputes. This chapter argues that Hart and Honoré's position is the more coherent approach to causation and that Norrie's view is too narrow in its interpretation of terms. Adopting Norrie's theory negates many of the well-settled concepts that are fundamental in criminal law - primarily agency and voluntariness. This thesis offers a middle ground between these positions, where it is possible to use these terms, per the ordinary person's understanding, but subject to the broader interests of the criminal justice system.

Returning to *State v Preslar*,¹²³ Norrie's argues that this case is wrongly decided. Norrie, respectfully, is misguided on this point. The rigidity of his definition of voluntariness means that we are forced to hold D responsible for her death. Her action is one that may be considered 'daft' and not in the interest of self-preservation.¹²⁴ This analysis has connotations with Lord Scarman's remarks when discussing

¹²¹ Norrie, 'A Critique of Criminal Causation' (n 10) 693 – 694.

¹²² Of course, determining which factors are outside of this perspective is down to a combination of things, the 'person-specific relativity', the definition of 'voluntary' and 'abnormality' and the aim of the causal investigation, whether it be for legal purposes, or some other quantitative statistical exercise.

¹²³ (1885) 48 NC 417.

¹²⁴ *R v Roberts* (1971) 56 Cr App Rep 95 confirms this line of reasoning. The husband is legally responsible for his violent actions towards his wife, but her decision to sleep outside after fleeing the house is her own action, not his. Whilst it is likely that we would express sympathy for the circumstances surrounding V, this would not mean she is not responsible for the consequences of her actions.

Brixton Disorders. As seen above, Lord Scarman stated that ‘deeper causes undoubtedly existed, and must be probed: but the immediate cause of [the riots] was spontaneous combustion set off by the spark of one particular incident’.¹²⁵ Norrie’s point is that there is great difficulty in determining which factor made the difference: is it the deeper cause or the immediate cause?¹²⁶ While the upbringing and criminal background of the defendants, in this case, may cause us to express sympathy for their upbringing, it would not prevent the attribution criminal responsibility or blame to them. The same is true of the V in *State v Preslar*.¹²⁷

Not only does Norrie criticise Hart and Honoré’s voluntariness principle, but he also claims that determining voluntariness depends on the framing of the question, and the perception of what is (un)reasonable conduct.¹²⁸ This issue is pressing in those cases concerning self-preservation. In *R v Roberts*,¹²⁹ V was subjected to a sexual assault in a moving vehicle. V jumped out of the moving car and was injured. Whether her conduct was reasonable was based on whether her action was ‘daft’ or not. This term is not a definable one or a term which can have an exhaustive list of conduct that is considered daft, and that which is not. The result of the causal enquiry in *R v Roberts*¹³⁰ did not solely depend on causation, but the desire to empathise with V.¹³¹ Chapters five and six illustrate this desire stems from a normative evaluation of D’s (and V’s) conduct.

It is imperative, based on the analysis given above, to critically evaluate the use of abstract terminology in criminal law. As illustrated thus far, this thesis places significant emphasis on ‘voluntariness’, ‘abnormalities’, and ‘reasonable’ being fluid concepts. Indeed, critics of Hart and Honoré argue that since they do not define these terms, the application of causal tests is sensitive to not only the relativity of the enquirer and the context of the dispute but the interpretation of ambiguous language. While these issues have been (mostly) resolved in the discourse above; it is necessary to explain why it is not

¹²⁵ *The Brixton Disorders* (n 101).

¹²⁶ Norrie, ‘A Critique of Criminal Causation’ (n 10) 691.

¹²⁷ (1885) 48 NC 417.

¹²⁸ This is similar to the claims made by Hart and Honoré with ‘person specific relativity’ and ‘context relativity’. See: Norrie, ‘A Critique of Criminal Causation’ (n 10) 693.

¹²⁹ (n 124).

¹³⁰ (n 124).

¹³¹ Norrie, ‘A Critique of Criminal Causation’ (n 10) 695, fn 59.

possible to disambiguate such terms, nor should they be before being employed by the criminal law.¹³² To achieve this aim, the remainder of this chapter looks at linguistic analysis and ordinary-language philosophy and its applicability to causation in criminal law.

5. Linguistic analysis

The criminal law is rife with ambiguous and abstract language. This abstract language is frequently employed by both the legislature and judiciary to determine the circumstances in which D is criminally responsible (and liable) for a criminal charge. For example, an essential feature of sexual offences is that consent is absent on the part of V, yet there is no definition of the term that is serviceable for all of the contexts that the term ‘consent’ it is employed.¹³³ Similarly, to be convicted of wounding with intent,¹³⁴ it must be D’s ‘aim or purpose’ to wound V, yet the law provides no clear definition of intention. In causation in criminal law, the paradigm is the same. As illustrated thus far, terms such as voluntariness and abnormalities frequently make their way into discussions with no clear direction in which to interpret or define them. The issue that is of principal importance for this section is whether it is necessary to disambiguate these terms to use them effectively. With such terms habitually employed by the criminal law, this question is of fundamental theoretical and practical importance.

Not only has Parliament used such language in statutory provisions, but legal academics and philosophers also continue to use abstract terms to explain legal concepts. Indeed, Hart and Honoré are no exception. Their reliance on the terms voluntariness and abnormalities is fundamental to their account of causation in law. The position advanced in this thesis is that it is not possible to provide a precise definition of abstract terms, and *not* defining the terms provides several tangible advantages. This section submits that to define these terms is counterintuitive to the reason that they were employed. That is their flexibility and usability. Both of these features are integral to the proper functioning of the

¹³² Thomson, *Reflections* (n 95).

¹³³ One definition of consent has been provided in the Sexual Offences Act 2003, s. 74, which provides that ‘a person consents if he agrees by *choice* and has the freedom and capacity to make that choice’. Whilst the efficacy of this definition is arguable it does not apply to (say) consent to bodily harm, or any other offences in the criminal law.

¹³⁴ Contrary to the Offences Against the Person Act 1861, s. 18.

criminal law. It is necessary to draw on the linguistic analysis of ordinary-language philosophy in defence of this analysis.

The principal claim of ordinary-language philosophy is those clear ideas need clarification of speech and not elaborate constructions of philosophical systems to understand them.¹³⁵ Moreover, Austin posited that the technical jargon employed in philosophy to disambiguate could itself be the source of a philosopher's problems.¹³⁶ Words do not always stand for something, and we can clash into enquiries about things and what they stand for. Therefore, rather than seeking some objective truth about word and expressions, we should look at how words are used to understand them and employ them properly.¹³⁷ Thus, the terms employed in the criminal law ought to be free from technical jargon and philosophical constraints, and instead defined by the law's and society's usage.

In *A Plea for Excuses*,¹³⁸ Austin examines the application of ordinary-language philosophy to general defences in the criminal law.¹³⁹ Austin writes that "words are our tools, and, as a minimum, we should use clean tools."¹⁴⁰ The implication of this is that we should know what we mean, and not mean when using words. The theory is that the ordinary person holds a common stock of words that embodies all the distinctions men have found worth drawing.¹⁴¹ This linguistic philosophy is the foundation for the analysis presented here. To understand legal concepts, one need not use complicated philosophical notions; this only provides further ambiguity. The distinctions and observations about the world, made by the ordinary person, are as complicated and philosophical as required. Anything additional to this is

¹³⁵ For an excellent illustration of ordinary language, philosophy, see: G Ryle, *The Concept of Mind* (London: Hutchinson 1949). Ryle said that nouns like, 'intention', 'mind', and 'will' were the 'ghost in the machine' with no knowledge as to how it made the machine work. This approach to analytical jurisprudence was noted as being 'revolutionary' as it sought to rescue philosophy from misunderstandings about language. See: N McCormick, *HLA Hart* (2nd edn, Stanford University Press 2008) 23.

¹³⁶ Austin, *How to do things with words* (n 2).

¹³⁷ Austin, *How to do things with words* (n 2).

¹³⁸ Austin, *Excuses* (n 2). However, Austin's *How to do things with words* (n 2) is considered one of his more influential works, but in this chapter his paper given at the Presidential Address to the Aristotelian Society is used since it explicitly described his philosophy in the context of law. This also allows for the avoidance of additional abstract concepts and ambiguities, which would be counterintuitive to this thesis.

¹³⁹ Although this thesis concerns causation, the conceptual issues that are raised in excuses and justifications are of use and relevance to causation. His application and the conclusions drawn are used by Hart and Honoré, *CIL* (n 3). This will be explored in more detail below.

¹⁴⁰ Austin, *Excuses* (n 2) 1.

¹⁴¹ Austin, *Excuses* (n 2) 8.

counterintuitive to a theory that is intended to be reflective of legal practice. The attraction of using this in the law is apparent; adopting this means that when describing causation, the ordinary person's usage is all that is required. Terms such as abnormalities and voluntariness need no further clarification by way of exhaustive criteria.

5.1 Using ordinary-language philosophy

Two qualifications need to be made to use this philosophical approach to supplement the account of culpable causation offered subsequently in this thesis. First, people's usages vary. We talk loosely and say things interchangeably even though they are not. This looseness could mean that the foundations of language that a person bases their preconceived notions will be different from another. Also, if our usages were not to vary, sometimes, people will invariably disagree. Our conceptual systems may differ, yielding differing conclusions. Though the terms may be equally consistent and serviceable, we can still disagree about their meaning and application in everyday life.¹⁴²

Second, Austin notes that when it comes to excuses, people will say almost anything to 'get out of it'. Some may say: "I did not mean to do it" or, "it was an accident" or, "I did not think I would hurt him".¹⁴³ These are responses that an ordinary person may say for why they harmed another. However, these responses have different legal repercussions and will be used interchangeably despite this fact. It is due to these reasons that the use of ordinary language philosophy causes problems when used for legal purposes. Mistakes and accidents are different concepts in criminal law. That the ordinary person is likely to use multiple terms interchangeably create difficulties when it comes to employing such an approach to causation. It is because of this that when determining the cause of an event, there will be a significant amount of uncertainty since each person may have a different understanding of causation. It is, therefore, necessary to provide a framework to ensure that the questions asked by causation are clear and accessible.

¹⁴² Austin, *Excuses* (n 2) 8.

¹⁴³ Austin, *Excuses* (n 2) 8.

5.2 Methods and resources

In setting out to investigate the use of language in the criminal law, Austin identifies three essential methods and resources that are available. These are relevant to causation and the conclusions equally important. The objective is to examine the varying expressions employed and types of situations when making excuses. Austin lists the systematic aids in the order of availability to the ordinary person.¹⁴⁴ The resources of use are the dictionary, law, and psychology. This chapter only uses the second source, law, for this analysis.¹⁴⁵ The law is a beneficial source to determine what causation ‘is’ and ‘for’. In criminal law, there is a vast miscellany of case law that provides for a substantial amount of jurisprudential analysis. Indeed, the common law provides a diverse storehouse that helps determine causation’s use and how various interests are protected. It is therefore beneficial to tap into this authority and to evaluate the analysis than to use complicated philosophical notions.

For example, to determine what the term ‘intention’ means in the criminal law, this must include an exercise where case law is analysed to find when intention is (not) found. This exercise is an excellent starting place and collating together all this information is a beneficial endeavour. This analysis will, in turn, provide meaning to the descriptive expressions employed by the law. Applying this to intention, a review of these cases will illustrate when the intention has (not) been found. Without performing such an exercise, it is merely an abstract term that will mean very little to the lawyer and ordinary person alike. The same therefore applies to causation in the law. Cases, where causation is not established, will allow us to find the objects which are true of the expression. It is how people ‘do things with words’ that counts.¹⁴⁶

5.3 Concluding remarks on linguistic analysis

This chapter uses the philosophy of Wittgenstein and Austin to provide an account of causation that avoids technical language and philosophical ambiguity. This chapter shows that descriptive expressions are a culmination of different ideas and interests of the criminal justice system. When examining

¹⁴⁴ Austin, *Excuses* (n 2) 12.

¹⁴⁵ The dictionary and psychology sourcebooks will not be discussed at great length in this thesis due to the theoretical and doctrinal focus adopted.

¹⁴⁶ Austin, *Excuses* (n 2) 27.

individual ideas and interests, they are weak, unsound, and subject to scrutiny. However, when they are grouped, they become strong and resilient. Moreover, a single idea or paradigm of responsibility cannot describe descriptive expressions such as causation and responsibility.

This methodology has been utilised by Lacey when defining criminal responsibility.¹⁴⁷ Lacey bases her account of criminal responsibility on a multi-layered account of different ideas and interests of the criminal justice system. This analysis allows her to argue that it is only possible to understand words (in criminal law) in the context of their usage and social practice.¹⁴⁸ This approach avoids the need for a philosophical definition of abstract concepts, avoiding metaphysical and jurisprudential problems. The parity between Lacey's approach and the view presented here is similar.

In looking at the *ideas* of criminal responsibility, Lacey asserts that the paradigm of responsibility depends on the interest that is being protected. For example, to recognise and protect agency, a capacity-based theory to responsibility is adopted. When protecting personal autonomy, a choice-based theory is assumed; for societal harm, outcome-based responsibility; and more recently, risk-based notions of criminal responsibility.¹⁴⁹ It is not that each of these accounts of responsibility has fallen out of favour over different periods, but, instead, there have been different versions depending on the political and societal concerns at any given point. Also, different focuses on the criminal justice system shape our ideas of criminal responsibility. For example, advances in psychological and social studies have emphasised the intention, knowledge, and mens rea of D, promoting the *choice* of the defendant. Other examples include utilitarianism (capacity theory), moralism (character theory), and sex and gender (character theory).¹⁵⁰

This approach to criminal responsibility allows the concept to be flexible and adaptable to the needs of the court. If a specific interest needs to be protected, then one of the criteria of responsibility will be

¹⁴⁷ See: Lacey, *ISCR* (n 8).

¹⁴⁸ Lacey, *ISCR* (n 8) 203.

¹⁴⁹ Lacey, *ISCR* (n 8) 26.

¹⁵⁰ Lacey, *ISCR* (n 8) 56-57.

given greater emphasis, as outlined above. Lacey considers the works of Raz,¹⁵¹ Moore,¹⁵² and Tadros¹⁵³ on responsibility, and ultimately concludes that the positions offered to date mostly demonstrate a failure to protect the jewel of the ‘general part’ - individual capacity responsibility.¹⁵⁴ This account is one that is complementary to the view presented in this chapter. Raz,¹⁵⁵ Tadros,¹⁵⁶ Moore,¹⁵⁷ and Norrie¹⁵⁸ all write on causation in the law and present similar criticisms of Hart and Honoré’s work. Looking at causation in the law as a unitary theory that requires disambiguation and explanation is at odds with how causation works in practice. The paradigm of causation, similar to responsibility, also depends on the interest protected. Looking at causation as a multi-disciplinary and cross-institutional concept sheds light on the development and contextualisation in a way that criminal lawyers usually have not.

Lacey also develops an argument in favour of interpreting the criminal law alongside the socio-legal facts surrounding them, such as how cases are selected for a trial, processed post-conviction, and the institutional structure of the criminal courts. This idea has significant merit, as responsibility is generally thought of as being a normative, legitimising concept, and this can be transferred to causation. This thesis utilises this analysis and methodology. Hart and Honoré provide an excellent account of causation in law, but their analysis does not go far enough. It requires further supplementation. Therefore, using their work as a foundation is an excellent place to start. They identify that both voluntariness and abnormalities lie at the core of causation in the law. However, even in their analysis, these terms require further investigation. Like Lacey’s analysis of criminal responsibility, the paradigm of causation adopted depends on the interests that are being protected. These interests may be linguistic, societal, moral, or political in nature.

¹⁵¹ J Raz, *From Normativity to Responsibility* (OUP 2011).

¹⁵² M Moore, *Placing Blame: A Theory of the Criminal Law* (OUP 2010).

¹⁵³ Tadros, *Criminal Responsibility* (n 11).

¹⁵⁴ Lacey, *ISCR* (n 8) 179.

¹⁵⁵ Raz, *From Normativity to Responsibility* (n 151).

¹⁵⁶ Tadros, *Criminal Responsibility* (n 11).

¹⁵⁷ Moore, *Placing Blame* (n 152).

¹⁵⁸ Norrie, *CRH* (n 10); Norrie, ‘A Critique of Criminal Causation’ (n 10).

6. Concluding remarks on Hart and Honoré

Hart and Honoré take an approach to causal enquiry that is inherently rooted in abstract individualism. This individualism is one that is dependent upon common sense principles held by the ordinary person. The account of causation offered in this thesis achieves this focus on individualism by emphasising voluntary contributions, as identified by the ordinary person, as being of particular importance when ascribing causal responsibility. Moreover, in hard cases, Hart and Honoré argue that policy considerations define such terms. However, a preferred position would be to add further criteria to this position that are normative and socio-political in nature, which are present in varying degrees depending upon the specific factual enquiry and relevant criminal offence.¹⁵⁹

Looking at causation as a multi-layered accumulation of the various paradigms of causation, with different accounts taking centre stage at different times resonates significantly with the common-sense approach proposed by Hart and Honoré. However, there has been not only a criticism of using ambiguous terms in causation but also criticism of using common sense as the foundation for any legal device. Hoffman has argued, extra-judicially, against using common-sense to define the parameters of causation in criminal law.¹⁶⁰ His main view, opposing Hart and Honoré,¹⁶¹ is in line with the rationale offered by Stapleton¹⁶² and Norrie.¹⁶³ Hoffman provides an argument against causation being reducible to notions of common-sense.¹⁶⁴ It is his position that this common judicial expression reveals a complete absence of reasoning. It is his position that: if common-sense is the basis for establishing causation, then why is it quite often that the appellate courts reverse the findings of the trial court? It is worthwhile to explore this point as it is one that is repugnant to the claim advanced here. This common-sense view

¹⁵⁹ This would be in line with Hart and Honoré, as they acknowledge that moral considerations are relevant to causation, and that human action in society have a special finality to them. It is argued that this is because of their moral weighting in society, and this is what the ordinary person is taking into consideration when they automatically differentiate between mere conditions and causally relevant factors.

¹⁶⁰ Hoffman in his in his lecture to the Chancery Bar Association. See: L Hoffman, 'Common Sense and Causing Loss' (Lecture to the Chancery Bar Association, London, 15 June 1999) <www.chba.org.uk/formembers/library/annual-lectures/common-sense-and-causing-loss> accessed 03 September 2019.

¹⁶¹ Hart and Honoré, *CIL* (n 3).

¹⁶² J Stapleton, 'Unpacking "Causation"' in P Cane and J Gardener (eds), *Relating to Responsibility: Essays for Tony Honoré on his Eightieth Birthday* (Hart 2001) 145.

¹⁶³ Norrie, 'A Critique of Criminal Causation' (n 10); Norrie, *CRH* (n 10) 171 – 196.

¹⁶⁴ Regarding common-sense and causation, 'This is in the best tradition of English anti-intellectualism. It is also a good example of our characteristic polemical judicial style.' See: Hoffman, 'Common Sense and Causing Loss' (n 160) 2.

is one that is not held exclusively by Hart and Honoré. Although they are the leading proponents of such a position, Lord Salmon argues:

The nature of causation has been discussed by many eminent philosophers and also by a number of learned judges in the past. I consider, however, that what or who has caused a certain event to occur is essentially a practical question of fact which can best be answered by ordinary common sense rather than by abstract metaphysical theory.¹⁶⁵

Lord Salmon stated above, and throughout his judgment, that causation should not be tangled with notions of abstract theory but answered by the ordinary person's concept of causation. However, Hoffman argues that the definition of these principles is subject to change depending on the enquirer. He states that 'if you do not know the question, you will not be able to get the right answer'.¹⁶⁶ Hoffman's example of a polluted river is given to explain this point further:

What do I mean when I say that one must first identify the question? In the case about polluting the river, Lord Salmon thought it was easy. It was "what or who has caused a certain event to occur". In that case, it was chemicals getting into the river. As it happens, we now know that this was the wrong question to ask... In that particular case, what had happened was that the factory had pumps which were supposed to prevent the tanks full of noxious chemicals from overflowing, but they had got clogged with leaves and brambles in the autumn.

It might be better to go back and start again, and instead of asking "what or who caused the chemicals to get in the river?" ask "did the factory cause the chemicals to get into the river?"¹⁶⁷

Indeed, it is better to formulate the question in this way. It was the factory that was prosecuted for causing the chemicals to pollute the river. If the answer to the question above is in the negative, then they are to be acquitted. Hoffman argues that it is the rule of law which raises the question and asks: what is the extent of responsibility which this rule was intended to impose?¹⁶⁸ This approach is a very different venture in non-criminal case-law. The principle, though, is a transferable one. It is necessary

¹⁶⁵ *Alphacell Ltd v Woodward* [1972] AC 824, 847.

¹⁶⁶ Hoffman, 'Common Sense and Causing Loss' (n 160) 3. It is important to note at this juncture, that Hoffman's lecture is primarily concerned with causing loss in tort law. This is invariably different to that of the criminal law, as with tort there is a specific standard of liability which is imposed upon everyone's actions.

¹⁶⁷ Hoffman, 'Common Sense and Causing Loss' (n 160) 4.

¹⁶⁸ Honoré also makes this argument in his writings after *Causation in the Law*. See: AM Honoré, *Responsibility and Fault* (Oxford: Portland 1999).

to identify a vehicle for doing so to transfer this to criminal law.¹⁶⁹ In Hoffman's closing paragraphs, he states:

No one is in favour of abstract metaphysical theory. Nor is anyone against common sense. I do think, however, that judges should be encouraged to give the real reasons for their decisions. References to common sense often mean that they not really thought them through. They are looking for the answer in generalities rather than the specifics of the legal problem which raises the question. If one does examine the specifics, it will usually be found that the answer does indeed depend upon theory; not abstract or metaphysical, but concrete, economic and political: the theory which the judge holds about the proper scope of tort or criminal liability. If this were admitted and professed, I think we would all be a step closer towards understanding what we were doing.¹⁷⁰

Hoffman believes causation in the law rests upon two things. First, a question of fact. This question of fact is to be answered by looking at a question of law. The question of law is the second, determined by looking at the economic and political reasons in the statutory provisions. This analysis is very similar to that of Hart and Honoré. While both perspectives discuss the relativity of causation in the law, Hart and Honoré conclude that causation comes down to both the relativity of the context and enquirer.

It is also important to note that in the criminal law causal enquiry is asked with specific reference to the defendant. Namely, 'can D be said to have *caused* (for the specific criminal offence) the resulting harm to V?' If the answer is 'no', he is to be acquitted of that offence. It is essential to ascertain the answer to this question first. The second question follows the first. This question is the same as before but with 'should' in place of 'can'. That is, '*should* D be said to have caused the resulting harm to V? The first question is a factual enquiry, and the latter is a legal enquiry. The second question is the one that is inherently problematic and is the focus of this chapter. The first question, as is illustrated in the subsequent chapter, is mostly redundant when imputing responsibility in the criminal law. If the answer to the legal question is 'yes', then the other elements of the crime can be determined; mens rea and any defences that may mitigate or negate legal liability.¹⁷¹

¹⁶⁹ This contrasts with Hoffman's lecture, as he suggests that it is the language and policy of the statute that will dictate the rule of law. This is also very like Hart and Honoré's 'person-specific relativity' and 'context-specific relativity' which has been discussed above.

¹⁷⁰ Hoffman, 'Common Sense and Causing Loss' (n 160) 23-24.

¹⁷¹ This is a significant point that will be looked at in chapter four, which is dedicated to establishing a link between normativity and causation in law.

Others have proposed this view, for example, Stapleton, who advances the claim that the law determines whether a factor is causally relevant for any specific enquiry and not a single elemental concept in tort law.¹⁷² Her view is that it is not an ‘ordinary use of causal language’ but rather that ‘ordinary language’ is the starting point in determining causal responsibility.¹⁷³ It is because of this that the law needs a special meaning of causation. Without this, it would not be possible to single out a specific factor of relevance for criminal law. Per Stapleton, causation must do two things: ascribe blame and provide a relevant perspective for the causal enquiry.

Stapleton, who coined the NESS (necessary element in a sufficient set) formulation, has argued the NESS formulation allows us to determine whether a causal contributor is causally relevant in (tort) law. However, the NESS formulation only works when one understands the perspective that needs to be taken, and the *but for* criteria established.¹⁷⁴ To this end, Stapleton argues the NESS formulation helps in causal enquiries, but it does not provide a targeted *but for* test. Instead, NESS allows us to find a list of historically causally relevant factors to which one can then apply a selective *but for* test to each contributing factor to each from the viewpoint of the law. The NESS formulation was designed explicitly for tort, however, and it is not possible to transfer this directly to criminal law.¹⁷⁵

Concerning both context-specific relativity and person-specific relativity, Stapleton acknowledges that the law has a particular way of determining the viewpoint that is to be taken when undertaking any causal enquiry. This is fundamental because, as has been stated above, the perspective of the enquirer has a significant impact on the outcome of the causal investigation. A specific contribution of Hart and Honoré was to refute the work of Realism, and explain why we do not say: ‘[The] decision of the great-great-grandmother of Lee Harvey Oswald to have children was a cause’ of President Kennedy’s death

¹⁷² Although Stapleton focusses on the law of tort when discussing causation, the analytical jurisprudence is similarly relevant to the criminal law.

¹⁷³ Stapleton, ‘Unpacking “Causation”’ (n 162) 145-146.

¹⁷⁴ Stapleton, ‘Unpacking “Causation”’ (n 162) 145-146.

¹⁷⁵ Stapleton believes this ought to be done for each of the factors present. It is submitted, though, that we do this automatically for some factors, and exclude them from our inquiry. This was explained by Hart and Honoré who noted that we don’t look at the combustible material, presence of oxygen, and the dryness of the building as relevant factors, they are automatically excluded. It will be explored later in this thesis that this is because of a normative enquiry, which would focus on voluntary human intervention when we perform this inquiry. See: Stapleton, ‘Unpacking “Causation”’ (n 162) 145, 147.

in Dallas, can be adequately captured by the term ‘legal policy’¹⁷⁶ Both Stapleton and Hart and Honoré acknowledge that this more accurately described our conception of blame and moral responsibility.¹⁷⁷ We do not hold Lee Harvey Oswald’s great-great-grandmother morally responsible for his actions, and nor should we.¹⁷⁸

Common-sense notions of causation are fundamental in the preliminary steps in determining causal responsibility even if discounting subsequent factors. It may be that Hart and Honoré did not mean the ordinary person’s perspective of causation but, rather, the ordinary person’s perspective of causation in the context of allocating blame for the outcome. The ascription of causal responsibility would then rest upon a normative enquiry that is to be performed by the jury in a deregulated zone, as discussed in the previous chapter. Legal liability in criminal law will, however, continue to be shown through a combination of *both* mens rea and any relevant (supervening) defences that may be appropriate. Thus, maintaining the traditionalist view of criminal liability.

This chapter illustrates that the abstract language used by Hart and Honoré, voluntariness, abnormality, and causation are conceptually sound ones. This chapter also rejects Norrie’s claim that all the terms that are currently employed by criminal causation: (ab)normal, (in)voluntary and (un)reasonable are all conceptually uncertain and thus not fit for purpose. Although Hart and Honoré are of the position that the ordinary person’s understanding is as far as we need to look, this is sensitive to the criteria of causation.

¹⁷⁶ Stapleton, ‘Unpacking “Causation”’ (n 162) 145, 147.

¹⁷⁷ Stapleton does not expand upon these ideas any further in her chapter. She does not look at how these terms operate within causation. It is admission, however, that they are relevant to causal investigations, before mens rea is even considered. This is, on the assumption, that a traditionalist view of actus reus and mens rea are adopted in the criminal law.

¹⁷⁸ This is simpler when looking at causation in tort law, as per Stapleton’s focus. Both Honoré and Stapleton say that an individual should only be identified with some of the consequences of their actions, and not merely an endless stream of conduct, infinitely regress-able. This is easier to do in the context of tortious conduct, though, as there is a specific standard of liability which is imposed upon everyone’s actions. In the criminal law, this would be harder to do. It is not known if that ‘line’ is crossed into the criminal threshold until there is a finding of causation. This means that there may be both normative and mens rea considerations when we perform such enquiry.

7. Conclusion

This chapter has provided the theoretical underpinnings for the normative rational reconstruction of the causation doctrines in English criminal law that is proposed by culpable causation. In this chapter, it is argued that causation in criminal law is a multi-paradigmatic concept, defined by a plethora of legal and extra-legal considerations, which requires the critical application of the voluntariness and foreseeability principles to ascribe causal responsibility. In defence of this analysis, this chapter advanced three claims.

The chapter begins by arguing that the concept of ‘causation’ in criminal law is best understood as a descriptive expression, defined by the criteria that are central to its meaning and definition. This analysis is particularly important for the account of culpable causation as it permits causation in criminal law to be understood as a multi-paradigmatic concept. The benefit of this analysis is that the ascription of causal responsibility can be explicitly informed by the linguistic application of the relevant legal rule(s) *and* the social, political, and moral considerations that relevant when establishing causation. Although these extra-legal considerations operate covertly within the causation doctrines, this chapter argues that they ought to be made overt so that the jury can engage with these extra-legal considerations authentically within a test of legal causation.

The chapter then moved to argue that causation in criminal law is based on the two fundamental principles of voluntariness and foreseeability and provides the theoretical justification for the inclusion of these principles within the proposed model of culpable causation. To achieve this, this chapter critically employed the work of Hart and Honoré, defending and indeed advancing their common-sense account of causation. Although their work offers significant insight into the causation doctrines, this chapter illustrated that they did not go far enough in their analysis. Rather, they did not make explicit what is implicit within their work, that the principles of voluntariness and foreseeability ought always to be engaged with and that the jury must make a normative evaluation of D’s conduct. These findings provide the groundwork for culpable causation that is advanced later in this thesis.

Finally, this chapter argued that ambiguous terms, such as voluntariness, can only be understood in the context of their usage. In defence of this analysis, this chapter utilised the linguistic philosophy of Wittgenstein and Austin. This chapter illustrated that it is necessary to adopt this view since the proposed model of culpable causation offered in this thesis purposely employs ambiguous terms to impute causal responsibility for resulting harms. It was necessary to engage in this analysis since critics of Hart and Honoré have argued that their position is vulnerable to attack since they fail to provide a fixed definition of key terms, such as voluntariness, within their work. Therefore, to provide a theoretically robust account of culpable causation, which includes these terms, it is of paramount importance to justify their inclusion. The final section of this chapter explained why these terms have been left ambiguous within the proposed model and demonstrated that to disambiguate these terms results in the causation doctrines being inflexible, rigid, and unreflective of legal practice.

These three claims underpin the normative rational reconstruction that takes place within this thesis, principally within chapters five and six, which detail and defend the proposed model of culpable causation. However, before the account of culpable causation is offered within this thesis, it is necessary to establish whether the criminal law is concerned with a scientific (mechanical) or metaphysical analysis of causation. This question gives rise to two specific issues. The first is the extent to which, if at all, mechanical causation is relevant to causation in criminal law. The second, which is an extension of the first, is whether causation requires a normative analysis of an individual's conduct to justify the ascription of causal responsibility in criminal law. It is these aims that form the substance of the next chapter, chapter four.

Chapter 4

Causation *outside* criminal law

1. Introduction

This chapter considers the relationship between causation *in* criminal law and causation *outside* the law. The purpose of this analysis is to determine the role that factual, or mechanical, causation plays (if any) in the ascription of responsibility for resulting harms in criminal law. To answer this question, this chapter assumes the following structure.

First, the problem of causation in criminal law is restated by critically applying the current causal baseline to a ‘hard case’ of causation. The application of the causal baseline to this hard case illustrates that an individual (D) can be held criminally responsible for resulting harm without any culpability in causing that harm. This, it is submitted, is undesirable for several reasons. First, the criminal law is typically only concerned with individuals when their conduct is open to criticism. Moreover, establishing causation without this threshold being met would fail to communicate to society the significance of being ‘responsible’ for a resulting harm in criminal law. Second, it ultimately places questions of liability (almost) exclusively on matters of mens rea. However, there a plethora of offences that are either strict or negligence-based within the criminal law. The implication of placing an over-reliance on mechanical causation would mean that D *may* be criminally responsible for a resulting harm (and indeed liable, in the case of strict offences) without any culpability in causing that harm.

The chapter then moves to evaluate the concept of causation *outside* criminal law critically. Causation *outside* law focusses primarily on the mechanical, or scientific, understanding of cause and effect. This mechanical approach to causation involves the type of investigation that a forensic scientist might track. It looks to the natural sciences to trace backwards from the prohibited result to ascertain the explanatory cause. However, in establishing that mechanical causation is explanatory in nature, this highlights its incompatibility for use in criminal law. The causation doctrines are not concerned with explanatory causation, but rather attributive causation. Attributive causation does not ask *how* an event occurred but

rather, who ought to be identified as being criminally responsible for causing the prohibited result, informed by the ideas and interests of the criminal justice system.

Finally, the bifurcation of causation that is conventionally stated by the judiciary and legal academics is rejected. Causation in criminal law traditionally employs *both* factual and legal tests to ascribe responsibility for resulting harms. This two-limb model is the bifurcation of causation. The first limb, factual causation, requires D's conduct satisfy the non-normative counterfactual *but for* test to be causally significant.¹ However, the proposed model of culpable causation offered in this thesis argues that this limb is redundant. Rather, culpable causation asks only that D *legally* caused the resulting harm. This position is achieved by critically analysing the contextual differences between causation inside and outside of the law. This analysis then moves to consider how the judiciary has discussed causation in criminal law, demonstrating that the principal focus is placed on culpable offenders within the tests of legal causation, and not mechanically relevant contributions when establishing causation.

In closing, this chapter seeks to demonstrate that a mechanical or explanatory investigation of how resulting harm occurred is a necessary *but not sufficient* requirement to establish causation in criminal law. Although D must be an explanatory cause of resulting harm, both causal selection and the ascription of responsibility are intrinsically normative, requiring D's culpability to 'link' D to resulting harm.² Moreover, the proposed model of culpable causation can accommodate such a position *within* a test of legal causation; it is not necessary to have an individual 'factual' test of causation. This analysis is justified on the grounds that, per the analysis in chapter three, causation is best understood as a descriptive expression that is defined by reference to the 'criteria of causation', loaded with normatively sensitive considerations and not aided by scientific investigation. To achieve these aims, the problem of causation is once more restated. It is to this that we now turn.

¹ *R v White* [1910] 2 KB 124.

² The principal proponents of what is termed 'mechanical' or 'scientific' causation are M Moore, *Causation and Responsibility: An Essay in Law, Morals, and Metaphysics* (OUP 2009) and AP Simester, 'Causation in (Criminal) Law' [2017] 133 LQR 416. However, there are also others who also look at these considerations when imputing responsibility for causing a prohibited harm. See: V Tadros, *Criminal Responsibility* (OUP 2005) and, to some extent, HLA Hart and AM Honoré, *Causation in the Law* (2nd edn, Oxford: Clarendon Press 1985) (hereafter *CIL*). Each of these various positions is critically discussed in this chapter, ultimately concluding that the traditional bifurcation of causation does not adequately explain how responsibility is imputed through the causation doctrines.

2. The problem of causation

It is necessary to reiterate the theoretical and practical difficulties raised by hard cases to dispute the traditional bifurcation of causation in criminal law. The following example neatly illustrates these problems. On 31 March 1993 at a filming studio in Wilmington, North Carolina, Brandon Lee was tragically killed while filming *The Crow*. Michael Masee shot Brandon Lee with an incorrectly prepared prop gun. Masee's shooting of Lee was faultless; he did not know (nor could have foreseen) the tragedy that would subsequently unfold after pulling the trigger. The purpose of evaluating Masee's causal responsibility for Lee's death shows that establishing causation using the orthodox approach yields undesirable results. This problem can be remedied through the introduction of culpability-based criteria in causation – that is, culpable causation.³

Whether Masee is causally responsible for Lee's death can be (broadly) analysed in three ways. Firstly, responsibility can be attributed exclusively through mechanical causation.⁴ Secondly, responsibility can be attributed using mechanical causation, which is also subject to normative considerations.⁵ Thirdly, responsibility can be attributed utilising a multi-paradigmatic understanding of causation that focuses on culpability. The latter approach requires the critical application of the criteria of causation to evaluate the conduct of D, V, and mischief of the relevant legal rules.⁶ This chapter presents the view that the first and second of these approaches do not adequately explain causation in criminal law.⁷ Before illustrating these points, it is necessary to restate the traditional view. It is to this that we now turn.

³ That causation often overlaps with, and is concerned with culpability, is principally examined in chapter five. The purpose of this chapter is to offer the preparatory groundwork for establishing such an account of causation in criminal law. Cf. Clarke who writes that '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'. See: DM Clarke, 'Causation and Liability in Tort Law' (2014) 5 *Jurisprudence* 217, 218. This is, however, in relation to tortious causation and not criminal causation.

⁴ The position advanced by Moore, *Causation and Responsibility* (n 2) is the closest to this position. However, even Moore would acknowledge that there are normative considerations that enter into evaluations of whether D is legally responsible for a prohibited result, but not under the guise of causation *per se*.

⁵ See: Simester, 'Causation in (criminal) law' (n 2) and Tadros, *Criminal Responsibility* (n 2).

⁶ For a more detailed discussion of this view, see chapter three.

⁷ It is important to note that the ascription of causal responsibility is not the same as criminal responsibility. Criminal causation is one criterion that is used to determine criminal responsibility. Based on an orthodox understanding of criminal liability, both mens rea and an absence of any defence is also required to convict D of an offence. If Masee is said to be a (factual) cause, albeit not a (legal) cause, of Lee's death then this still carries significant weight. It is an assertion by the legal system that D's conduct is morally reprehensible and may warrant conviction. It is only by applying the tests of legal causation that would exonerate him of criminal liability.

3. The traditional view

On this view, for an individual to be responsible for resulting harm, they must be both the factual and legal cause of the prohibited result. Therefore, for D to be responsible for a prohibited result, their conduct must first be a factual cause. This factual enquiry is realised through the *but for* test, as outlined in chapter one.⁸ In summary, unlawful conduct satisfies the factual test if resulting harm would not have occurred *but for* the conduct of D. Therefore, if D's conduct is not a *but for* cause, the enquiry stops here. Applying this to the example above, Massee is indisputably a factual cause of Lee's death. Lee's death would not have occurred *but for* his conduct, the pulling of the trigger. However, it does not necessarily flow from this that he is criminally responsible for Lee's death. Hart and Honoré write that an enquirer can only be rescued of such an arbitrary outcome if causal bifurcation is adopted.⁹ That is, although Massee is a factual cause of Lee's death, Massee must also be subject to questions of legal causation.¹⁰

In criminal law, a factual cause is not sufficient *by itself* to resolve hard cases and impute responsibility. This shortcoming is because there may be, amongst other reasons, subsequent contributions that contribute to the prohibited result that render factual causation insufficient to ascribe causal responsibility. These subsequent contributions may be by a third-party's voluntary intervention, even though such intervention would not have occurred *but for* D's conduct. Thus, it is not possible to settle the causal dispute through such an arbitrary test, especially when there are additional contributions to the resulting harm. Therefore, Massee must also make a more than an 'insignificant' or *de minimis* contribution.¹¹ Based on a traditional and conventional application of these tests, Massee is (arguably) both a factual and legal cause of Lee's death.

Massee would not, however, be held liable for causing Lee's death. Massee may have satisfied the *actus reus* for the offences of murder and constructive manslaughter but is saved of liability because of his

⁸ *R v White* (n 1).

⁹ However, this is only true if factual causation is assimilated with explanatory causes, of which there are an infinite number.

¹⁰ For further discussion of the *but for* test in criminal causation, see chapter one. In addition, the following cases where this test is expressly discussed; *R v Smith* [1959] 2 QB 35; *R v Hennigan* [1971] 3 All ER 133; *R v Cato* [1976] 1 All ER 260; and *R v Notman* [1994] Crim LR 518.

¹¹ *R v Cato* (n 10) 265-6.

lack of mens rea; that is, his culpability. It was not Masee's aim or purpose to kill or injury Lee. Moreover, Masee could not have foreseen the result eventuating from his conduct. Although applying this traditional approach to causation (and liability) results in Masee not being criminally liable for Lee's death, this thesis argues it is undesirable establishing causation when Masee did not culpably cause Lee's death. A finding of causation in criminal law carries with it a significant normative and legal finding that D was *morally* responsible for the harm, even though perhaps not liable.¹²

In other cases, it may be that D causes a resulting harm because they were acting in self-defence or duress. In such circumstances, we would want to say that D *caused* the harm but was either excused or justified (depending on the defence) in bringing about the resulting harm. However, these findings are palpably different to Masee's killing of Lee. In the case where D causes harm but can utilise a general supervening defence, D *culpably* brought about the resulting harm. Thus, holding D as a legal cause of the harm in such circumstances is both necessary and desirable. This key component is missing when Masee fatally shoots Lee. Therefore, this chapter argues that D is only causally responsible for a resulting harm if they meet a suitable normative threshold, which communicates they are morally responsible for the resulting harm. This threshold is reached, it is submitted, when the requirements of culpable causation are established. In drawing this conclusion, it is important to articulate *why* and *how* Masee did not legally cause Lee's death, without relying on the mens rea requirements of an offence to save Masee of liability.

To reach the conclusion that Masee did not *cause*, in a legal – not mechanical – sense, Lee's death, it is necessary to enrich criminal causation with explicitly normative criteria. It is undeniable that Masee was a mechanical cause of Lee's death; however, the law is concerned with something extra-legal, and in addition to mechanical causation. A better phrasing of this enquiry might be that the law is concerned

¹² Williams writes that stating D *caused* a prohibited result carries with it moral and normative implications. It is the state communicating to D that they are responsible for an event occurring. On a traditional view of causation, this is independent of D's fault or culpability. Therefore, D is only saved of liability because of an absence of mens rea. This, it is submitted, is an undesirable conclusion. On this point, Williams argues that when D is ascribed responsibility for a result, a threshold of moral responsibility and justice has been met. See: G Williams, 'Finis for *Novus Actus*?' (1989) CLJ 391, 396 – 397.

with causal *selection* and not causation *per se*.¹³ Therefore, mechanical causation is necessary in the fact-finding stage, tracing contributions backwards from the event; however, after the fact-finding exercise has taken place, the law must use legal principles of causal selection to ascribe responsibility. Using culpability as a criterion of causation allows for this ascription of responsibility to take place. Before this claim can be advanced in chapter five, and to further the aims of this chapter, it is necessary to critically explore the relationship between causation *in* the law and causation *outside* the law.

4. Causation outside criminal law

Several eminent legal academics claim that causation in criminal law is concerned with a scientific or mechanical understanding of the world.¹⁴ For some,¹⁵ this is the *only* relevant type of legal causal enquiry. For others,¹⁶ it is merely a feature of causation. The principal aim of this chapter is to illustrate that the law is not concerned with this *type* of causal investigation. It is this disparity of types of causal investigations that this chapter now addresses.

4.1 Mechanical causation

Mechanical causation involves the type of investigation that a forensic scientist might track. It looks at the natural sciences to trace backwards from the prohibited result (E) to find an explanatory cause (C).¹⁷ For example, in *R v Smith*,¹⁸ D stabbed V with a bayonet, piercing his lung. While travelling to the hospital, he was dropped twice. The medical officer attending did not know that V's lung was pierced

¹³ Hereafter, legal causation is used as a synonym for causal selection. That is, a distinct set of principles used for identifying morally reprehensible conduct that may warrant criminal responsibility.

¹⁴ E.g. Moore, *Causation and Responsibility* (n 2) and Simester, 'Causation in (criminal) law' (n 2) 418 – 420.

¹⁵ See: Moore, *Causation and Responsibility* (n 2) and JL Mackie, *The Cement of the Universe* (Oxford: Clarendon Press 1980).

¹⁶ Simester, 'Causation in (criminal) law' (n 2) 418 – 420. Simester argues that '[imputation] 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 the legal system and independent of culpability'. However, he also writes that in some instances, indirect causation can ascribe responsibility *despite* weak mechanical causation. The analysis is therefore at odds with a unitary, purely mechanical approach. However, it also argues *pace* the Supreme Court in *R v Hughes* [2013] UKSC 56 that fault is a criterion of causation.

¹⁷ Such an enquiry may result in a number of causes being identified as being necessary to bring about a specific prohibited result. In this way, scientific investigation is unable to discriminate between those contributions that are to be identified as a *legal* cause, as opposed to a mechanical cause. There is, therefore, an apparent difference in the nature of the enquiry that is being undertaken.

¹⁸ (n 10).

and subsequently gave the wrong treatment. V would likely have survived if appropriately treated.¹⁹ At trial D was charged with, and convicted for, the murder of V. The Court of Appeal subsequently held that D's stabbing of V was the operating cause of V's death and his murder conviction correct.²⁰

Proponents of mechanical causation argue that this is a clear example of direct causation, utilising a purely mechanical account of causation in criminal law.²¹ At first glance, it is easy to see why the court reached this conclusion. D's action (stabbing V) traces through the contributions of other actors (the dropping of V and mistreatment by the medical officer) in a linear sequence of events. However, when V died, it was a result of not only D's action but D's action in combination with other contributions. The problem with this analysis is that a mechanical application of causation fails to convincingly explain why the other causal contributions do not attract criminal responsibility or alleviate D of responsibility; why was D identified as the cause of V's death when, in this case, V was dropped twice and received negligent treatment? This chapter argues that proponents of mechanical causation cannot answer this using direct causation - other causal contributors also require analysis.

If tracing each causal contribution linking C to E in sequence, the same way that a forensic scientist might, then C causes C1; C1 causes C2; until Cn causes E. Therefore, unless ascribing causal responsibility to a mechanical cause is based on additional normative criteria, the choosing of any of these contributions based on an analysis of mechanical causation is entirely arbitrary.²² Without critically applying any further normative criteria, there is no justifiable reason that C1, C2, or Cn should

¹⁹ Within the judgment, Lord Parker CJ noted that 'there was evidence that if he had received immediate and different treatment, he might not have died. Indeed, had facilities for blood transfusion been available and been administered, Dr. Camps, who gave evidence for the defence, said that his chances of recovery were as high as 75 per cent.' See: *R v Smith* (n 10) 42.

²⁰ *R v Smith* (n 10) 42.

²¹ Simester, on this point, argues that 'the attribution of causation in this case is non-normative. It rests on a finding about the physical facts of the matter' and that 'we can ignore questions about whether any other actor in the drama was a *novus actus interveniens*: other causes can only be concomitant ones'. See: Simester, 'Causation in (criminal) law' (n 2) 418.

²² Hart and Honoré draw a similar analogy, "in the case of a building destroyed by fire 'mere conditions' will be factors such as the oxygen in the air, the presence of combustible material, or the dryness of the building." Looking at these factors does not help determine the legal cause of the fire. These factors are present in those situations that resulted in the fire of the building occurring, and where it does not. Hart and Honoré argue that without further criteria, such an investigation is arbitrary. See: Hart and Honoré, *CIL* (n 2) 34. This is looked at in more depth in chapter three.

be (more or less) causally relevant by merely being ‘direct’.²³ Moreover, the assertion there is a ‘direct’ mechanical cause in law is a misnomer and does not reflect how the world works, or how the judiciary use causation in criminal law.

It is essential at this stage to reiterate the distinction between conduct and result crimes. Actual conduct crimes such as perjury,²⁴ rape,²⁵ and abduction²⁶ are each satisfied by mechanical causation.²⁷ The fact D performed such action is all that is required to satisfy the causal requirements of the offence. Therefore, a mechanical approach to causation is all that is required – their action is the prohibited result. Of course, D’s must still be answerable for their conduct to be responsible.²⁸

This analysis is not accurate for result crimes. For all result crimes, causation is either a specific component of the offence or a general principle of criminal law. For these types of offences, we are not merely concerned with the conduct of D, but the occurrence of a result flowing from D’s action. It is because of the non-immediate effect of D’s action that other factors are necessary for the result to occur. We must ‘wait and see’ whether D’s action brings about the prohibited result after an unlawful act has been committed.

To take Hart and Honoré’s example, if D strikes a match and throws it only the floor, intending to set the house alight, this conduct alone will not result in the building burning down.²⁹ This result will only occur if there are other conditions– oxygen in the air, combustible materials, and no unusual event preventing such eventuality – which is present at the time of D’s conduct. Whether D commits the offence of arson³⁰ depends on the presence of *all* these factors. As such, all of these are indiscriminate

²³ Simester writes that there are some cases of causation that are purely mechanical, providing there is a ‘direct link’ between E and C. See: Simester, ‘Causation in (criminal) law’ (n 2) 418 – 420.

²⁴ Contrary to the Perjury Act 1911, s. 1.

²⁵ Contrary to the Sexual Offences Act 2003, s. 1.

²⁶ Contrary to the Child Abduction Act 1984, ss. 1 – 2.

²⁷ Rape and abduction have been included as conduct crimes based on Williams’s interpretation of such term. This distinction between result and conduct crimes as defined by Williams is used throughout this thesis. See: G Williams, ‘The Problem of Reckless Attempts’ (1983) Crim LR 365, 368.

²⁸ For example, D’s conduct must be voluntary to be ascribed responsibility. See: RA Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law* (Hart 2007) 15. For a critical discussion of ‘reason-responsiveness’, see: DN Husak, “Answering Duff: RA Duff’s *Answering for Crime*” (2010) 29 Law & Phil 101.

²⁹ Hart and Honoré, *CIL* (n 2) 38.

³⁰ Contrary to the Criminal Damage Act 1971, s. 1.

mechanical causes of the house burning down. Although the example used by Hart and Honoré is relatively straightforward, if there were additional actors, (say) an accessory actor and a (grossly) negligent firefighter, this enquiry then becomes a hard case. As such, this factual dispute cannot be rescued using the arbitrary application of direct mechanical causation.

On a purely mechanical account, all contributions flowing from C1 through Cn are direct mechanical causes for result crimes. This result means that any process of causal selection that adopts this approach results in a purely arbitrary selection. It is not possible to find any contribution a *legal* cause by it being a mechanical cause since all other contributions also meet this threshold. Mechanical causation is indiscriminate, and no contribution is any more (legally) relevant than another unless enriched with some other normative considerations. It is these criteria that underpin legal causation.³¹ In most trials, criminal causation appears to be simple enough - D's action will be a mechanical cause of E; however, as illustrated by the legal analysis of this doctrine in chapter one, this is often not enough to adequately explain why D is responsible for the resulting harm.

The orthodox approach of mechanical causation is not an accurate depiction of the causal selection process. As discussed above, the first stage is inherently artificial since D's action must also be a 'significant' mechanical cause of E to establish causation. This requirement brings normative considerations to the causal selection process. A cause is only significant if it carries with it some normative weight and is morally, politically, or socially reprehensible. Therefore, causation *outside* of law cannot distinguish between significant and insignificant contributions since they are all prerequisites for the event occurring. Simester argues contra wise,³² re *R v Jordan*,³³ that when V died after being admitted to hospital, D's original wounding played no role in the medical explanation of his death since those wounds had substantially healed. T's 'palpably wrong' treatment caused death, where T administered medicine to which the victim was known to be intolerant. Simester argues that this is a

³¹ For further discussion on the criteria of criminal causation, see the discussion advanced in the previous chapter of this thesis. See: Chapter three.

³² Simester, 'Causation in (criminal) law' (n 2) 419.

³³ (1956) 40 Cr App R 152. For further discussion of this point see: G Williams, 'Causation in Homicide' [1957] Crim LR 429.

clear case of direct mechanical causation. The argument is that since D's contribution (the original injury) made no operating contribution to the victim's death, there is no responsibility for D since there is no direct causation.³⁴ This position argues that determining whether D was causally responsible for V's death is non-normative; however, this thesis rejects this claim. Concluding that D or T is a legal cause of V's death is normatively loaded.³⁵ The indeterminacy of whether a contribution is significant or insignificant, or indeed operative or inoperative, is normatively loaded. This point is somewhat conceded by Simester, who writes:

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.³⁶

Here Simester argues that, in cases such as *R v Jordan*,³⁷ whether D legally causes a prohibited result rests on questions of indirect causation, which on his account is normatively sensitive and incorporates the novus actus and foreseeability principles. This account presented by Simester argues against several legal authorities,³⁸ and this thesis rejects such a position.

This chapter rejects this position because mechanical and legal causation involves different types of enquiries, each pertaining to various criteria. The former is concerned with an indiscriminate fact-finding investigation about the world that cannot determine the 'significance' of a contribution and is explanatory in nature. The latter is concerned with ascribing causal responsibility, which is exclusively reliant on normatively sensitive criteria and is attributive in nature. This approach also rests upon the

³⁴ Of course, the negligent treatment by T may be open to criticism and give rise to responsibility in other areas of law. T's conduct may give rise to a civil action. V, or the claimant in such proceedings, could sue T for damages relying on the tort of negligence or (in the case of private treatment) for the breach of contractual obligations. See: *Bolam v Friern Hospital Management Committee* [1957] 2 All ER 118, 121 and the subsequent case law that confirms this position, e.g. *Sidaway v Bethlem Royal Hospital Governors* [1985] 1 All ER 643. It is also possible for V to bring a claim under contract law. Although there is no contract between an NHS patient and NHS staff, following *Reynolds v The Health First Medical Group* [2000] Lloyd's Rep Med 240, however this is possible if V was paying for private medical treatment. See: *Thake v Maurice* [1986] 1 All ER 497.

³⁵ For example, Simester argues that 'at least in the criminal law, it is sufficient to show that the defendant's behaviour makes *some* causal contribution'. See: Simester, 'Causation in (criminal) law' (n 2) 420. Therefore, on the facts of *R v Jordan* (n 33) it is not possible, when using mechanical causation, to reach the conclusion that D was *not* a mechanical and direct cause of V's death without normatively loaded considerations.

³⁶ Simester, 'Causation in (criminal) law' (n 2) 422. For an illustration of this, see particular the discussion of *R v Hart* [1986] 2 NZLR 408 at 426.

³⁷ (n 33). For further discussion of this point see: Williams, 'Causation in Homicide' (n 33).

³⁸ See: *R v Wallace* [2018] EWCA Crim 690; *R v Hughes* (n 16).

idea that causes are akin to links of a chain. This analogy does help provide some understanding, but it is minimal:

Causes are spoken of as if they were as distinct from one another as beads in a row or links in a chain, but — if this metaphysical topic has to be referred to — it is not wholly so. The chain of causation is a handy expression, but the figure is inadequate. Causation is not a chain, but a net. At each point influences, forces, events, precedent and simultaneous, meet, and the radiation from each point extends infinitely. At the point where these various influences meet it is for the judgment as upon a matter of fact to declare which of the causes thus joined at the point of effect was the proximate and which was the remote cause.³⁹

This ‘net’ analogy may, therefore, be of more use in analysing legal causation. This perspective allows for the comparison of the whole factual matrix (including intervening and subsequent contributions) before making a finding that D’s action was a significant cause of E.⁴⁰ It is not possible to explain this adequately when utilising a chain approach. For example, if D’s conduct (C1) causes C2; C2 causes Cn; Cn causes E, then using the chain analogy, we hold C1 as the cause of E. Perhaps this is because C1 is the only voluntary human action (FDI conduct) and all of the events leading from C1 to E are in a linear sequence.⁴¹ If there is then a novus actus (N1) which is independent of C1; Cn only then do we consider whether N1 is enough to relieve D of causal responsibility for E.⁴² This is not an appropriate analysis of C1 and N1. It has the undesirable effect of stating that D’s conduct was morally reprehensible and may warrant criminal responsibility *unless* another actor relieves them of responsibility.

³⁹ *Leyland Shipping Company Ltd v Norwich Union Fire Insurance Society Ltd* [1918] AC 350, 369 (Shaw of Dunfermline L).

⁴⁰ In most cases of criminal causation there will be a simple mechanical chain leading from C1 to E. The situation where there are multiple actors who have each contributed more than *de minimis* to the occurrence of E is rarer. A theory of criminal causation needs to be able to account for both the simple and complicated cases of causal selection, though.

⁴¹ It is noted that selecting C1 as more causally relevant than C2 or C3 is based on a novus actus principle, which is a normative principle. This is only done for the purposes of this example.

⁴² The facts of *R v Jordan* (n 33) illustrate this position neatly. The court were concerned with whether the negligent actions of T were *enough* to relieve D of responsibility for V’s death.

A preferred approach would be to have a simultaneous comparison of all factors (including C1 and N1) before concluding that a contribution is the cause of E.⁴³ However, irrespective of looking at causation using the analogy of a ‘net’ or ‘chain’, neither can operate on a solely mechanical understanding. It is an indiscriminate enquiry and cannot, without further considerations, identify whether a contribution is relevant for legal purposes. The Law Commission also share this view.⁴⁴ In their working paper on the *External Elements of Offences*, they suggested that the jury should be invited to look at the whole factual matrix before deciding whether D’s action made a significant contribution to the occurrence of the result.⁴⁵ This analysis allows for the comparison of C1 and N1 alongside each other. However, such an approach is only feasible if a ‘net’ approach is adopted that enriched with other normative considerations, and not a linear sequence of events akin to a chain.

Proponents of mechanical causation assert that causes are linear – akin to links in a chain - for two principal reasons. The first is that, in this view, causation is scalar and peters out. C1 and C2 can both be said to be causes of E but of differing proportions.⁴⁶ They cannot both be equal causes of E. The second is that novus actus principles are not relevant to mechanical causation. D is either a mechanical cause of E or not. Concerning the first of these two claims, Moore provides a useful example that is worth drawing on:

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.⁴⁷

⁴³ This is contrary to the view that is currently adopted. On the current view, once D’s contribution is found to be a significant and operative cause, D is only alleviated of responsibility if a new and intervening act (either as a naturally occurring phenomenon or some human conduct) operates so as to supplant D’s conduct as the legal cause. This is, therefore, a linear understanding of causation in the criminal law. See: Judicial College, *The Crown Court Compendium: Part I: Jury and Trial Management and Summing Up* (December 2019) 7 – 33.

⁴⁴ Law Commission, *External Elements of Offences* (Unpublished 2002) 21.

⁴⁵ The Law Commission, when discussing the potential impact that an intervening contribution has on D’s responsibility for a prohibited result, state that ‘In this way, the factfinders can consider the effects of intervening causes without having gone through the, perhaps artificial, first stage of reaching a conclusion on whether the defendant’s act was *prima facie* significant. The factfinders are invited to look at the whole factual matrix before making a decision on whether the defendant’s act made a significant contribution to the occurrence of the prohibited result. In our view this is a more intuitive way of looking at the question and will be less apt to confuse factfinders’. See: Law Commission, *External Elements of Offences* (n 44) 15 -16.

⁴⁶ The assertion that causation is scalar must be true. It is possible to hold two individuals criminally responsible for an event, but in different proportions. For example, principal and derivative (or secondary) liability for the same result harm.

⁴⁷ Moore, *Causation and Responsibility* (n 2) 121.

This summary is not reflective of legal causation in practice. The criminal law, as we have seen on numerous occasions, is capable of tracing through an actor's conduct to ascribe causal responsibility.⁴⁸ D's unlawful conduct, in contributing to the resulting harm, *may* peter out – to appropriate Moore's analogy - to be causally insignificant and inoperative, but this is only because the criminal law decided that it should. The same applies to when causal contributions do not peter out. Take, for example, the case of *R v Roberts*,⁴⁹ D made unwanted sexual advances to V in his car,⁵⁰ and V, being terrified, jumped from the moving car. The court held that since the response was reasonably foreseeable and non-voluntary, D caused V's resulting injuries; D's conduct did not peter out.

It is possible to explain omissions in this same way. In *R v Dalloway*,⁵¹ D was the coachman of a horse and cart as it drove along a public road. D was not holding on to the reins; they were resting on the horse's back. V, a small child, ran out into the road in front of the cart and was killed by the cart. D was charged for negligently driving his cart and subsequently causing the death of the child. Evidence was adduced at trial that D, even if holding the reins, would not have been able to stop the cart before it collided with and killed the child. Thus, D was culpable for not holding the reins, but not for causing the death of the child. As a result of this, the jury decided to acquit Dalloway, as they were satisfied that the child's death could not have been avoided. On Moore's account, we would have to describe D's omission as having petered out once V ran into the road and collided with the cart. However, D's omission was temporally close to the resulting harm. Moreover, D was also a mechanical cause of the resulting harm. It is only possible to save D of causal responsibility when using normative, not scientific or mechanical, considerations.

⁴⁸ *R v Roberts* [1971] EWCA Crim 4.

⁴⁹ (n 48).

⁵⁰ He told her of his sexual exploits and of how he had used force on women in the past. He attempted to remove her clothing and V, being terrified, jumped from the moving car.

⁵¹ (1847) 2 Cox 273.

The second assertion made is that novus actus principles do not apply to mechanical causation.⁵² Within the novus actus doctrine, there are two principles of particular significance. The first is that the ‘free, informed, and deliberate’ (FDI) conduct of another person ‘breaks’ the causal chain between E and C.⁵³ Second, the ‘foreseeability’ principle. These principles mean that an intervention can ‘break the chain’ of causation if it is extraordinary and not reasonably foreseeable at the point of D’s unlawful conduct.⁵⁴ This latter principle was seen above in the cases of *R v Blaue*⁵⁵ and *R v Roberts*.⁵⁶

Simester argues that the novus actus principles are only of relevance in ‘indirect’ cases of causation.⁵⁷ That is when the direct physical chains of mechanical causation intersect, and other agents are involved in the bringing about of a prohibited result.⁵⁸ Simester, on this issue, believes that ascriptions of indirect responsibility provide the law with the ability to bridge between two physical chains. Looked at in this way, it allows the law to articulate that, although D does not directly cause E, his actions ‘made a difference’. However, even on this analysis, Simester argues that the novus actus principles are chain-*constructive* rather than chain-*destructive* – emphasising the importance of mechanical causation and the search for a series of physical events.⁵⁹ Some writers, like Moore,⁶⁰ claim that these two novus actus principles have no relevance as principles of causation as they are normatively loaded. Moore would argue that D was not a mechanical cause, and the intervening conduct was a mechanical cause, meaning that D is relieved of responsibility for the resulting harm.

⁵² Moore is a self-confessed physicalist, requiring a continuing physical reaction from C to E. On his account, so-called *novus actus* cases are merely scenarios where direct causation is absent. For Moore, direct causation is all the causation there is and 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. See: Moore, *Causation and Responsibility* (n 2) Chapter 12.

⁵³ *R v Kennedy (No 2)* [2007] UKHL 38.

⁵⁴ Hart and Honoré advance the same position, although under the umbrella of ‘abnormality’ and ‘voluntariness’. See: Hart and Honoré, *CIL* (n 2).

⁵⁵ [1975] 1 WLR 1411.

⁵⁶ (n 48).

⁵⁷ Simester, ‘Causation in (criminal) law’ (n 2) 427.

⁵⁸ Simester, ‘Causation in (criminal) law’ (n 2) 441.

⁵⁹ He argues that ‘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’. See: Simester, ‘Causation in (criminal) law’ (n 2) 429. Cf. Moore who 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’. See: Moore, *Causation and Responsibility* (n 2) 229.

⁶⁰ Moore, *Causation and Responsibility* (n 2).

In applying this to the example of Brandon Lee's death discussed at the start of this chapter, Massee's action of firing the gun, killing Lee, undoubtedly satisfies mechanical causation. However, identifying Massee as the legal cause of Lee's death is normatively inappropriate.⁶¹ There is a myriad of other mechanical causes tracing back from E that would also be identified as a 'cause' on this understanding, but we do not name them as such; for example, the person who purchased the defective prop gun, prepared it for use in the scene or handed it to Massee. The primary purpose of causation is to determine whether an individual *should* be said to have caused a result for legal purposes. For Massee, even though he would not be liable for the death of Lee due to a lack of mens rea,⁶² he would still be held a legal cause of his death if we were *only* concerned with mechanical causation. This finding carries with it a significant moral connotation. Finding that an individual caused a prohibited result and is causally responsible, when other contributors are not, should be not ascribed on an arbitrary basis without normative considerations. On this particular point, and continuing with his example, Simester writes that:

If, like 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.⁶³

Simester's claim requires further qualification. It rests on the notion that holding Massee as a legal cause, although not culpable for the outcome, is a correct and desirable one. That Massee was a mechanical cause of Lee's death must be accurate. However, his conduct (C) was one of several contributions that resulted in Lee's death (E); the individual who purchased the prop, prepared it for the scene, and handed it to Massee are all direct physical contributions leading to E. All of these actions, on this understanding, were mechanical causes of Lee's death. If purchasing the prop was C1, Massee's firing of the gun can be Cn. It is ascribing responsibility to Massee for Lee's death using mechanical

⁶¹ It is not disputed that he is a mechanical cause of Lee's death. Rather, that the term 'legal cause' carries with it an assertion of moral responsibility. That is holding Massee's action as a (factual) cause has the effect of claiming it is morally reprehensible and may warrant criminal conviction for Lee's death. This is not true. This thesis presents the view that Massee is only responsible for Lee's death if he was subjectively negligent and the resulting harm was a reasonably foreseeable of his conduct. Since there is no way Massee could have reasonably foreseen Lee's death consequent his actions, he is not criminally responsible.

⁶² Mens rea, in this sense, refers to reckless or intentional wrongdoing.

⁶³ Simester, 'Causation in (criminal) law' (n 2) 427.

causation that results in an arbitrary finding of causation. This analysis does not help resolve the issue of causal selection.

Asserting that C_n was more relevant than (say) C₁, C₂, or C₃ is based on several considerations. First, when we enquire into why E occurred, we are interested in the conduct of a human being with agency.⁶⁴ It would be inadequate to call the bullet fired into Lee's chest as the cause of his death for this very reason. It does not allow us to ascribe responsibility for E and satisfy the purposes of the criminal law. Moreover, the bullet could not have penetrated Lee's chest without any human involvement. It is because of this that we trace from E until we identify a contribution as being relevant (for the criminal law). In this case, imputing that Masee's action was the legal cause is inappropriate. Although his conduct is undisputedly a mechanical cause of E, it is without culpability. Unless D is culpable, in some capacity, they should not be held to have legally caused a prohibited result.

Second, we look at the purpose of the offence and make a judgement based on whether C would satisfy those rationales. Since we are concerned with the culpable actions of individuals in society, it is essential to reflect this in the process of causal selection. As we manipulate the world around us, we are responsible for our actions.⁶⁵ Identifying C_n as a legal cause of E can only be done using normative considerations, such as the novus actus and foreseeability principles – both of which consider (to some degree) the culpability of the actor.⁶⁶ Therefore, without an enriched account of mechanical causation, the selection process is arbitrary. Scientific investigation cannot identify C₁, C₂, or C₃ as being any

⁶⁴ Most theories of criminal responsibility are based on the choice, capacity, or character of the actor. Capacity theory enables the basic moral intuition that it is only legitimate to hold people criminally responsible for things that they had the capacity to avoid, see: Nicola Lacey, 'Space, time and function: intersecting principles of responsibility across the terrain of criminal justice' (2007) 1 *Crim Law & Phil* 233, 237. Choice theory, as advocated by Williams, realises the importance of human capacity through the proof of subjective choice – intention, awareness, and knowledge, see: G Williams, *Textbook of criminal law* (2nd edn, London: Sweet & Maxwell 1983). Character-theory argues that if D's action indicates a character trait that is either unacceptable or undesirable according to the standards expected by the criminal law, D deserves to be criminally responsible for E, see: Tadros, *Criminal Responsibility* (n 2). These various positions are critically evaluated in chapter five, where an account of culpable causation is offered as the framework for causation in criminal law.

⁶⁵ To say otherwise would reject the separateness of agency. As Hart and Honoré write, '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 change we make in the world'. See: Hart and AM Honoré, *CIL* (n 2) Ixxx-xi. With respect to inactions, or omissions, responsibility is only attached to D if there is a pre-existing legal duty of care owed.

⁶⁶ That D must be culpable, in some way, for the prohibited result is a significant claim. It is not discussed here as this would distract from the principal aims of this chapter. This discussion does, however, form the substance of chapter five.

more legally relevant than any of the other contributions. Using the example of Lee's death, all mechanical contributions were evaluated to determine which were morally deserving of punishment. It flows from this that once the natural sciences have been used to trace backwards from E; it is not possible to ascribe causal responsibility without normative considerations.

Therefore, the notion that D is a direct mechanical cause of a prohibited result is a legal fiction. Whether or not D's contribution is causally relevant is not determined by constructing a linear sequence of events. This conclusion, however, can only be reached by (the jury) applying normatively sensitive criteria to the factual dispute. This enquiry will consider the conduct of D, alongside all of the other contributions, to determine whether D should be said to have legally caused a prohibited result, having regard to the 'criteria' of causation.

This chapter further rejects the mechanical approach to causation. To do so, an analysis of judicial expressions in cases concerning causation is drawn on. Second, a review of the context in which criminal causation is used to see whether mechanical and legal causation looks toward the same things. Finally, the chapter argues it is not possible to maintain a theoretical distinction between causation in fact and law. For this reason, mechanical causation does not help resolve our issues of causal *selection*; it is necessary to enrich causation with additional normative criteria. The remainder of this thesis will then essay a multi-paradigmatic approach to causation in criminal law, utilising normatively sensitive criteria, such as voluntariness and reasonableness.

5. Disputing the bifurcation model

This chapter now moves to reject the traditional bifurcation of causation to defend the proposed model of culpable causation offered in this thesis. The position submitted here is that it is not possible to divide causation into two distinct limbs as per the orthodox model. Instead, criminal causation only considers questions of *legal* causation, incorporating the multi-paradigmatic criteria of causation. When looked at this way, causation represents a culmination of different ideas and interests of the criminal justice system, not just *one* single idea. To further develop the account of culpable causation offered, this

chapter rejects the current bifurcation of causation. A doctrinal analysis illustrates that normative considerations are both fundamental and integral when establishing causation in criminal law.

5.1 Rejecting the traditional view

The traditional view provides that there is a distinction between the factual and legal stages of the causal enquiry. However, while these terms are descriptively useful, this chapter argues that they are not distinct and independent tests. The rationale for this is that the selection of one (factual) cause over another can only be performed when one applies an enriched set of normative criteria, based on culpability, to the causal enquiry. Therefore, it is not possible to have factual (or explanatory) causation as a wholly distinct and separate limb to legal causation. However, the traditional view does not adopt this approach and attempts to distinguish between (a) what the defendant did and (b) the moral (and legal) assessment of what the defendant did. In defence of the traditional view, Honoré and Tadros both place factual causation at the beginning of the causal enquiry, before any normative evaluation can be made. Honoré writes:

[A]moral assessment would depend on factors such as whether the outcome was good or bad, and whether the agent intended or knew that it was likely to come about. But first there was a preliminary question of fact to be settled: What did the defendant do?⁶⁷

Tadros also adopts the position advanced by Honoré and writes that:

An orthodox, and relatively straightforward, view of the structure of criminal responsibility places causation right at the beginning of the process of determining whether the elements of criminal responsibility are satisfied. In this view, we first work out what the defendant did, *which is a factual enquiry*.⁶⁸

However, these two positions do not illustrate what this enquiry is explicitly concerned with; that is, *should* D be causally responsible for the resulting harm and are they culpably linked to that harm. Both Honoré and Tadros reject this position and advance the claim that causation does not invite mens rea (culpability) considerations when ascribing causal responsibility in criminal law. However, this chapter argues that D's culpability is relevant not only to mens rea requirements but to causation also. Thus,

⁶⁷ AM Honoré, 'Appreciations and Responses' in P Cane and J Gardner (eds), *Relating to Responsibility: Essays for Tony Honoré on his Eightieth Birthday* (Hart 2001) 235.

⁶⁸ Tadros, *Criminal Responsibility* (n 2) 155 (emphasis added).

when determining whether D is a legal cause of the resulting harm, E, it is not always possible to neatly separate factual from legal causation. To defend this claim, the work of Broadbent⁶⁹ and Schaffer⁷⁰ is defended and used to supplement Hart and Honoré's analysis of causation in chapter three.⁷¹

A simple example of the way that factual and legal causation overlap is within the language employed in criminal law. Broadbent uses the example of reasonable foresight to illustrate this:

Many "objective" legal tests mix the questions in quite complex ways. For example, reasonable foreseeability is a legal doctrine that aims to capture an objective fact about what a reasonable person would foresee; yet a lawyer will be better able to predict what a court will consider reasonably foreseeable than the man on the Clapham omnibus.⁷²

Therefore, when looking at foreseeability, lawyers have settled case law to help define the parameters of 'foreseeability' as a linguistic tool and legal principle in criminal law. Contrariwise, the layperson does not have such points of reference and must rely only on their ordinary language. Thus, when the jury is asked whether a resulting harm was foreseeable, they are not being asked to apply 'foreseeability' criteria independently of legal doctrine. The court directs the jury, using the jurisprudence from previous case law, to frame the parameter and scope of their enquiry. Therefore, it is not the ordinary person's language (and common sense) that is exclusively at play when the jury makes their 'factual' assessments,⁷³ and these terms are not genuinely objective.⁷⁴ Thus, causation is not a factual enquiry about how the world works in nature; it is how the *law* perceives our conduct as manipulating the world around us. It is an exclusively legal enquiry.

The first way in which this thesis rejects the bifurcation model is through an analysis of linguistic philosophy. Factual causation, whether truly factual or not, is still an integral legal device in resolving

⁶⁹ A Broadbent, 'Fact and law in the causal enquiry' (2009) 15 *Legal Theory* 173.

⁷⁰ J Schaffer, 'Contrastive causation in the law' (2010) 16 *Legal Theory* 259.

⁷¹ Hart and Honoré, *CIL* (n 2).

⁷² Broadbent, 'Fact and law in the causal enquiry' (n 69).

⁷³ In chapter three, a multi-paradigmatic account of causation in criminal law was offered. The chapter presented the view that the framework of causation should be able to support the various (and differing) paradigms of responsibility arising out of the ideas and interests of the criminal justice system. These may be, for example, the linguistic, moral, political, and societal considerations that underpin the criminal law more generally. Therefore, the ordinary person's understanding of these terms is only one facet of imputing responsibility. It is also necessary for the social, political, and moral criteria of the criminal law to be considered by the judiciary.

⁷⁴ That these terms are both context and person relative has been discussed in chapter three. See: Hart and Honoré, *CIL* (n 2) 35; *Cf.* S Lloyd-Bostock, 'The Ordinary Man, and the Psychology of Attributing Causes and Responsibility' (1979) 42 *MLR* 143.

awkward causal puzzles and issues of criminal liability.⁷⁵ Therefore, it does not matter if it does not reflect causation *outside* the law - that is not its purpose. The purpose of causation is to ascribe responsibility for resulting harms that satisfy the underlying objectives of the criminal law.⁷⁶ In defending a purist view of causation,⁷⁷ Wright attempts to provide a satisfactory account that explains all aspects of (tortious) causation.⁷⁸ This work has been criticised by Broadbent,⁷⁹ and Fumerton and Kress,⁸⁰ as radically under-appreciating how difficult such a task would be.

The previous chapter of this thesis, chapter three, explained that constraining a descriptive expression, such as causation, with an exhaustive set of criteria is counterproductive to the aims and function of the criminal justice system. Such an endeavour would have the undesirable effect of rendering the causation doctrines inflexible, rigid, and unable to resolve hard cases. One advantage of rejecting the bifurcation model and relying exclusively on legal causation is that it can apply different tests in a variety of circumstances, which is something mechanical causation is unable to do. Thus, rejecting a distinct limb of factual causation provides adaptability for the types of hard cases that were discussed in chapter two.⁸¹ It is this very position that undermines a purist distinction between causation in law and fact. It is the courts which retain an active role in establishing the direction put to the jury in any given case. Factual causation, on this premise, is an integral tool of the criminal law that depends on legal analysis, and because of this is never *truly* factual.⁸²

The cases of causal redundancy can neatly summarise this. Imagine that A culpably shoots V, and as a result, V dies. Common sense dictates that there is a causal nexus between A's shot and V's death. We can comfortably say that A was a mechanical cause of V's death. If, however, B was also aiming for V

⁷⁵ R Wright, 'Causation in Tort Law' (1985) 73 *Californian Law Review* 1735, 1740. It is noted that Wright's account of causation presented in this article focuses on causation in the law of torts. It is because of this that his work will not be utilised in this chapter.

⁷⁶ Broadbent has used this term in his works on legal causation, and it will be adopted here, too. Broadbent, 'Fact and law in the causal enquiry' (n 69) 176.

⁷⁷ The term 'purist' represents an individual who claims that a factual/legal distinction can be theoretically maintained.

⁷⁸ See: Wright, 'Causation in Tort Law' (n 75) 1735.

⁷⁹ Broadbent, 'Fact and law in the causal enquiry' (n 69) 176.

⁸⁰ R Fumerton and K Kress, 'Causation and the Law: Pre-emption, Lawful Sufficiency and Causal Sufficiency' (2001) 64 *Law and Contemporary Problems* 83, 102.

⁸¹ Broadbent, 'Fact and law in the causal enquiry' (n 69) 176.

⁸² Broadbent, 'Fact and law in the causal enquiry' (n 69) 177.

when A shot at V, factual causation cannot be satisfied on a purist's account: *but for* A's shot, V would have also died by B's shot, assuming he would have also made the fatal shot.⁸³ In such a case, A would be found liable for the death in *both* cases. The rationale justifying this position is that A remains a legal cause of V's death, and prosecuting A satisfies the aims and purposes of the criminal law. The criminal law would not acquit A of liability of V's death simply because a purists account factual causation is not satisfied; that is, B *would* have killed V should A have been unsuccessful.⁸⁴

Alternatively, say A and B were both successful in shooting V, and both sufficient to cause the result without the occurrence of the other. Here, on a purist's account of factual causation, neither A nor B are *but for* causes of V's death. However, legal causation provides that A and B can be concurrent causes of V's death, without satisfying factual causation. Similarly, if A and B both successfully shoot V, but it is not possible to say who made the fatal shot, factual causation is once more not established. However, legal causation provides that it should also be possible for A to remain liable where his conduct is not, in the circumstances which transpired, sufficient of itself to have caused V's death.⁸⁵ The rationale for this, it is submitted, is based on the culpability of A and B. If these actors were, as Massee was in the example given at the start of the chapter, faultless, then holding them as a *legal* cause of V's death would be abhorrent to the aims of the criminal law. Legal causation is not concerned with the same thing as explanatory causation. This analysis demonstrates that a theoretical distinction between factual and legal causation is hard to maintain. What this allows us to conclude is that because causation in the law is such a multi-faceted legal device, it never need to be dependent or parasitic upon causal notions outside of the law. There are too many contextual differences for a purist's account of factual causation to be relevant when establishing causation in criminal law.

⁸³ These are sometimes called cases of over-determination and offer a useful insight into how causation in the law operates. This is an adaption of Broadbent's Queen assassination scenario. See: Broadbent, 'Fact and law in the causal enquiry' (n 69) 178.

⁸⁴ This is also the case with criminal attempts. Some causal nexus must be demonstrated, albeit not to the victim. The attempt must be more than merely preparatory. In causal terms, he must have begun making causal links, but was intervened before making the final one(s).

⁸⁵ Law Commission, *External Elements of Offences* (n 44) 21.

5.2 Contextual differences

The concept of causation is in many disciplines. The concern is whether all disciplines pertain to the same idea of causality; or, whether the law employs a unique account of causation. For example, for a scientist, when all facts are known, there can be no dispute of causation. It is known how the event occurred, including all contributory factors leading to its eventuality. It is possible to trace from E to Cn through to C1, and thus, there is no factual dispute about how E occurred. Lawyers, however, dispute legal causation even when agreeing upon all the facts. This asymmetry shows that lawyers use the concept of causation differently to how a scientist uses causation. Stapleton writes that the scientist is concerned with three distinct points when engaging in causal enquiries - (1) the discovery of facts, (2) the experimental method of comparison, and (3) the adequacy of multi-sufficient causation.⁸⁶ Stapleton's analysis illustrates that if causation were to be disagreed on by a scientist, then it is based on things such as experimental design or technique and not based on notions of legal responsibility. Legal causal theory, therefore, does not apply to scientists. Lawyers are interested in a very different *type* of causation.

Lawyers principally focus on *legal* causation.⁸⁷ Thus, when several causal contributions bring about a prohibited result, the question is, 'of the identified contributory factors, which is the most important for the purpose at hand?'⁸⁸ As such, the law cannot resolve such an enquiry by relying upon questions of factual causation, as determined by science or mechanics. The *purpose* of legal causation is to allow the court to perform a normative evaluation of D's conduct and the criminal charge,⁸⁹ a feature that is unique to the criminal law. It invokes an assessment of the criteria of causation and the rule of obligation

⁸⁶ J Stapleton, 'Scientific and Legal Approaches to Causation' in D Mendelson and I Freckleton (eds), *Causation in Law and Medicine* (Routledge 2002) 16.

⁸⁷ There will sometimes be disputes as to the question of fact, but these disputes are common in other areas such as tort, with evidentiary gaps. In criminal causation, these factual disputes can be resolved within the context of legal causation. For example, that D's conduct must contribute in a more than negligible manner will allow for a discussion as to whether D's conduct is salient in causing the result harm.

⁸⁸ The purpose being how causal responsibility should be ascribed in the context of a specific legal dispute.

⁸⁹ This distinction is implicit in the dictum of Lord Reid, 'The question [of legal causation] must be determined by applying common sense to the facts of each particular case. One may find that as a matter of history several people have been at fault and that if any one of them had acted properly the accident would not have happened, but that does not mean that the accident must be regarded as having been caused by the faults of all of them. One must discriminate between those faults which must be discarded as being too remote and those which must not' in *Stapley v Gypsum Mines Ltd* [1953] AC 663.

to ascribe causal responsibility.⁹⁰ This is often presented to the appellate courts in the guise of causal language; was D's conduct a 'significant' and 'operative' cause of the resulting harm. In answering this question, the court is concerned about issues of principle and policy, not scientific investigation, to properly ascribe responsibility in criminal law.⁹¹

There is an indisputable contextual difference between causation in law and outside the law. In scientific investigations, causal enquiries are principally explanatory in nature. That is, they seek to explain *why* or *how* something has happened. The focus is here because the resulting harm is (perhaps) abnormal and warrants explanation to prevent a reoccurrence.⁹² Thus, scientific causal investigations only yield explanatory conclusions. Conversely, criminal causation is *attributive* in nature; the focus is on attributing responsibility for resulting harms as per the ideas and interests of the criminal justice system.⁹³ Therefore, an explanatory investigation of how resulting harm occurred is a necessary *but not sufficient* requirement to establish causation in criminal law, and fails to explain *when* and *when* we attribute resulting harms to causal actors. The Law Commission also shared this view in their draft Criminal Code working paper,⁹⁴ where they proposed a single test of causation. Their view was that D causes a result, which is an element of an offence when they make a significant contribution to its occurrence. This cause does not have to be the sole or the main cause of the result. An act does not significantly contribute to the occurrence of a result where there is either a voluntary human intervention or a subsequent event which was not reasonably foreseeable. These, the Law Commission stated, have the effect of overwhelming D's act to render it part of the history.⁹⁵ While this is arguably what we already have in common law; however, what it omits is a distinct test of factual causation to allow for

⁹⁰ Stapleton, 'Scientific and Legal Approaches to Causation' (n 86) 18.

⁹¹ This is also the view that Stapleton adopts, "One step courts could take to help close that gap is by relying less on the causal packaging of legal disputes and by paying more attention to the responsibility and the policy disputes that lie at their heart." See: Stapleton, 'Scientific and Legal Approaches to Causation' (n 86) 37.

⁹² To use Hart and Honoré's example, in the case of a railway accident, this is a deviation from the norm and therefore a contingency. It is not known why or how this has happened. An 'explanatory' investigation will determine that it was the bent railway line, combined with the weight and speed of the train which caused the accident.

⁹³ Abnormality is used in the context as provided by Hart and Honoré defined in the previous chapter. See: Chapter two.

⁹⁴ Law Commission, *External Elements of Offences* (n 44).

⁹⁵ Law Commission, *External Elements of Offences* (n 44) 4.

an analysis of the whole factual matrix simultaneously. This omission is a desirable feature of their proposal.

Williams has criticised factual causation for failing to give it ‘...even give the barest indication that a question of moral responsibility or justice is involved.’⁹⁶ The Law Commissions draft proposal does not expressly distinguish between factual and legal causation. They argue that it is implicit in any test of criminal causation that D must have made a mechanical contribution to the occurrence of a result. What is of importance in criminal law is that D was a significant contribution to the event. It is this term, along with the current standard law tests of legal causation, which allows the law to distinguish between contextual differences of mechanical and legal causation. To defend this contextual disparity, it is necessary to evaluate further the work of those writers who support a mechanical approach to causation.

Tadros argues that causation *in* criminal law has a special relationship with our notions of causation *outside* of the law.⁹⁷ Moreover, that causation in the natural world connects to the idea of legal causation. This claim means that for proponents like Tadros⁹⁸ and Simester,⁹⁹ causation outside of the law is relevant to causation in criminal law.¹⁰⁰ Tadros states that causation can become independent from the natural world, but only once legal causation has been constructed from it. He claims that causation in law is parasitic on causation outside of the law. However, in this thesis, it is submitted that adopting an independent factual limb of causation is unworkable and not reflective of legal practice. Demonstrating that mechanical causation is not relevant to the criminal law invites an analysis as to whether causal investigations based on science yields different conclusions to normative enquiries.

Tadros, per Hart and Honoré,¹⁰¹ limits causal liability with concepts such as proximity.¹⁰² Tadros argues that the distinction between the cause and mere condition is one that is present in the natural world,

⁹⁶ Williams, ‘*Finis for Novus Actus?*’ (n 12) 396 – 397.

⁹⁷ Tadros, *Criminal Responsibility* (n 2).

⁹⁸ Tadros, *Criminal Responsibility* (n 2).

⁹⁹ Simester, ‘Causation in (criminal) law’ (n 2).

¹⁰⁰ The term ‘ascriptive’ responsibility is used to distinguish from judgements based on moral responsibility.

¹⁰¹ Hart and Honoré, *CIL* (n 2).

¹⁰² See: Tadros, *Criminal Responsibility* (n 2) and Hart and Honoré, *CIL* (n 2). Hart and Honoré argue that perspective determines proximity for the purposes of causal enquiries.

with cohesion between the two concepts.¹⁰³ For example, he states that the notion of remoteness is also present in the natural world. Tadros illustrates this point using the following example:

For example, suppose that lightning strikes causing a tree to fall. The tree causes the entrance to a rabbit warren to be crushed. This causes the rabbits to dig their way out into a neighbouring field. The neighbouring field is more exposed, allowing a hawk to spot a rabbit which it dives upon and kills. However, the rabbit has a rare virus which infects the hawk, resulting in its death. This leads to the death of the chicks, which the hawk was feeding. In investigation the cause of the death of the chicks, it is odd to refer to the lightning.¹⁰⁴

Tadros explains that it would be odd to refer to the lightning as the cause of the death of the chicks as it is too remote to establish causation. The issue with this analysis is that it assimilates legal causation with mechanical causation. In this example, it is irrefutable that the lightning was a mechanical cause of the death of the chicks. Without the striking of the lightning, the death of the chicks would not have occurred. This conclusion is inescapable. However, using a mechanical understanding of causation, it is impossible to claim that the lightning was too 'remote'. The only way to conclude otherwise is through the introduction of explicitly normative considerations.¹⁰⁵ Moreover, all the factors above are explanatory, and this type of investigation does not require attributive causation.

Tadros does state that it would be 'odd' to refer to the death of the chicks as the lightning. However, how he comes to such a conclusion is not wholly convincing. The reasoning for such is threefold. First, Tadros clearly states from this passage that the natural cause of death was not the lightning, as this is scientifically too remote. The problem here is that there is no such thing as a natural or scientific *cause*, per se. At least, not in an attributive capacity. Human beings are not able to observe nature objectively and be able to identify when and why specific events occur. There is an infinite number of factors and contributors at any one time. Therefore, when Tadros determines that it is not the lightning that caused the death of the chicks, he is drawing such conclusion by looking at this through an agent's perspective, loaded with normative considerations for the attribution of blame. Our perspective is blinded by what

¹⁰³ Tadros, *Criminal Responsibility* (n 2) 165.

¹⁰⁴ Tadros, *Criminal Responsibility* (n 2) 165.

¹⁰⁵ It will be demonstrated in the subsequent chapter that this also rests on normative factors being of relevance when ascribing causal responsibility. This is done pre mens rea considerations, too, when looked at in an orthodox manner.

it is that we think the natural cause *should* be for these purposes based on our use of causal language. We base this perspective on our ability to influence the natural world around us and have as such formed several generalisations that we can apply to such enquiries.¹⁰⁶ This judgment is not necessarily representative of what is happening in the natural world in an explanatory sense.

The second problem is an extension of the first. If it is possible to determine the cause of an event in the natural world, then this would only be true if we were to know all the contributing factors. Without this information, it is impossible to determine the factor that made the difference.¹⁰⁷ That is if such a concept applies to the natural world. If it cannot, then trying to apply such principles to nature is futile.

The final problem is that, per Hart and Honoré,¹⁰⁸ when determining what it is that made the difference, lawyers place particular emphasis on FDI conduct.¹⁰⁹ Since causation is concerned with the ascription of responsibility, it is inappropriate to hold that it was a natural event that caused the resulting harm to V *unless* it renders D's contribution insignificant and inoperative. This finding does not reflect the purpose and aims of the criminal law. It would be paradoxical to have a legal construct that finds that D legally caused E but conclude that it was a subsequent (foreseeable) natural event because it is a better explanatory cause, and therefore D is not criminally responsible. D should only be relieved of liability if his conduct is no longer normatively linked to the prohibited result. In this sense, purely explanatory causes are obsolete in criminal law.

These three criticisms show the looseness in Tadros' reasoning. It makes it possible to question whether causation in the law can ever be parasitic on causation outside the law. Despite such criticism, Tadros moves on to also suggest that acts, which break the chain of causation, e.g. the *novus actus* of a third party, is also a principle occurring in the natural world:

¹⁰⁶ Hart and Honoré, *CIL* (n 2).

¹⁰⁷ Using terminology such as 'made the difference' also constrains the doctrine with linguistic limits. The term 'made the difference' is determined using several legal and normative considerations to ascribe responsibility.

¹⁰⁸ See: Hart and Honoré, *CIL* (n 2) 41. For a more general discussion on this, see: Hart and Honoré, *CIL* (n 2) Chapter 6. It should be noted, though, that not all human actions are causes, but can be identified as mere conditions. An action, which is not wholly voluntary, can still describe the deviation from the norm. These cases, although they involve human action, can be distinguished from causes using the methods which have already been discussed above.

¹⁰⁹ See: Simester, 'Causation in (Criminal) Law' (n 2).

However, that the broad principle is applicable in the natural world can be seen if we return to the example of the scientific investigation of how many pigeons die of cancer. Suppose that a group of pigeons are killed by a sympathetic third party who cannot bear to see pigeons suffering from cancer. In that case, surely the chain of causation is broken, and those deaths ought to be excluded from the scientific study. This would be true even if there was regularity. That is, it would be true even if people tended to kill pigeons which suffer from cancer for reasons of sympathy. Hence, there are at least some parallel cases where third party intervention is relevant in scientific theory.¹¹⁰

Once more, Tadros is of the view that causation outside law features in legal enquiries. He states that in this case, the general principles that are used to distinguish causes from conditions are broadly consistent with the natural world. He acknowledges that the application does not fit precisely into one another and that the link between investigations in the natural world and the law is somewhat loose. However, there is still something important for Tadros. He argues there is a relationship between the two; therefore, the relationship between them has an impact on how to conduct causal investigations in the law.¹¹¹ As stated above, this conclusion is fabricated using notions of causality that are a projection of attributive causation. In this example, both cancer and being shot by a third party are mechanical causes of the pigeon's death. There is no way of scientifically determining that either contributor ought to be responsible for the death. For that specific event, both are requisites in the bringing about of the pigeon's death. Therefore, there is no way of allocating more weight to one contributor over another. Despite Tadros' assertion that some of the same broad principles of causation apply to both the law and nature, there is no evidence to support this claim.

Tadros adopts a similar position to that of Simester.¹¹² Both argue that although mechanical causation can resolve some causal disputes. However, both say that there are additional normative considerations after establishing mechanical causation. Tadros states that in determining whether *x* is the cause of *y* in fact, it is a question of fact in a weak sense.¹¹³ Weak in the sense that it is a question of the facts about social meaning. This approach is that criminal law adopts a mechanical understanding of causation,

¹¹⁰ Tadros, *Criminal Responsibility* (n 2) 166.

¹¹¹ Tadros, *Criminal Responsibility* (n 2) 166.

¹¹² Simester, 'Causation in (criminal) law' (n 2).

¹¹³ Tadros, *Criminal Responsibility* (n 2) 167.

which is sometimes subject to normative considerations. This conclusion means that there is no distinction between causation in natural and legal enquiries.

This chapter argues there is no parallel discovery about the world that could lead us to abandon our principles of legal causation. The principles that make up the ordinary grammar of causation would remain unchanged, even in the face of new scientific investigation. The alternative view, as presented by Tadros, states that the application of our causal principles is sensitive to the discoveries in the natural world. This section rejects this finding as the court can establish causation without reviewing all mechanical causes. If there is a discovery of a new fact about the world, this will not bear on the finding that D caused resulting harm. This finding is particularly true of causal tracing. If a new scientific finding illuminated how C1 caused E, with C1 being a deliberate human action, the law still traces through Cn (assuming that Cn is not a *novus actus*) when imputing causation in criminal law. This additional enquiry would be of benefit to explanatory causation; however, that is not the purpose of causation in the criminal law. The application of legal principles and concepts are not reliant upon the mechanics of the natural world. It is for this reason that mechanical (or explanatory) causation, while a necessary but not sufficient component of legal causation, cannot be relied upon for the purposes of causal selection and the ascription of criminal responsibility; there are irreconcilable contextual differences between both fields of enquiry.¹¹⁴ The law constructs its sense of what happens in the world using moral responsibility to ascribe blame to D for the bringing about of E. Tadros provides a useful example to illustrate this point, although he uses it to demonstrate the opposing view. He writes:

Foreseeability is often thought to be an important element of the law of causation. If a consequence is not foreseeable, it is said, it is not caused. There is a general problem with this idea. Due to a lack of knowledge, it may not have been foreseeable in 1900 that cancer would result from smoking, but that does not entail that in 1900 smoking was not a cause of cancer. Whether or not D caused E, then, is not sensitive to the knowledge that we have, or could be expected to have, about. It is quite possible that we do everything that could be done to establish whether D caused E and still be wrong about the answer because there is something about the world that we do not, and could not, know.¹¹⁵

¹¹⁴ Tadros argues that when ascribing responsibility for resulting harms in criminal law, the courts should take into account normative considerations. This is only possible, he claims, once the relationship between natural sciences and law has been clearly ascertained. See: Tadros, *Criminal Responsibility* (n 2) 173-175.

¹¹⁵ Tadros, *Criminal Responsibility* (n 2) 173.

It is true to say that attributive causation can take place, and responsibility ascribed, without knowing all that there is to know about the world. Therefore, future discoveries and scientific insight will not impact legal causation since it is serving a different purpose – it is explanatory in nature. Explanatory causation, on the other hand, seeks to convey what is happening in the natural world and is susceptible to new scientific discovery. It would render the original cause a mere condition. The example above demonstrates this point conclusively. Therefore, due to the contextual differences of legal and scientific causation, it is submitted that causation in criminal law is inherently normative and not mechanical. Discussions about causation outside of the law do not inform causation in the law. The courts, although adhering to the traditional bifurcation of causation, have held that establishing causation requires an explicit evaluation of D's conduct. This, it is submitted, ought to be couched in terms of D's culpability in causing the resulting harm. It is to this judicial analysis that we now turn.

5.3 Judicial analysis

The courts traditionally regard causation as including two distinct limbs, factual and legal causation. An act is a factual cause of an event if it would not have occurred *but for* the actions of D. However, as has been illustrated in this chapter thus far, merely being a factual (or mechanical) cause of the resulting harm does not mean that it is legally relevant. This may be because there was a subsequent voluntary intervention by a third party, even though such intervention would not have occurred *but for* the conduct of D. This chapter illustrates that when a mechanical cause is (dis)regarded as the legal cause, the law can only achieve this through an analysis of explicitly normative criteria, not scientific or metaphysical investigations, and ultimately invites consideration of D's culpability.

Williams, while criticising the *Draft Criminal Code Bill*,¹¹⁶ stated that a codified test of criminal causation should indicate to the jury that there is a question of moral responsibility or justice.¹¹⁷ Williams believed that factual causation poses a question of morality for the jury to answer. That is, whether the morally reprehensible nature of D's action is sufficient to be held criminally liable. This is very much like the jury being explicitly asked questions of morality in gross negligence

¹¹⁶ Law Commission, *A Criminal Code for England and Wales* (Law Com No 177, 1989).

¹¹⁷ Williams, '*Finis for Novus Actus*' (n 12) 396-397.

manslaughter.¹¹⁸ This emphasis on morally reprehensible conduct is one that the courts have also adopted. Take, for example, the case of *R v Hughes*.¹¹⁹ In this case, the court illustrated the undesirable and arbitrary repercussions of adopting a purely mechanical approach when establishing causation. The case concerned D, who did not possess the full UK driving licence and was uninsured, who was involved in a road traffic collision. His vehicle collided with V's car, which was travelling on the wrong side of the road. V died from this collision. D was charged with 'causing death by driving' at a time when uninsured under section 3ZB of the Road Traffic Act 1988. The section provides that:

A person is guilty of an offence under this section if he causes the death of another person by driving a motor vehicle on a road and, at the time when he is driving, the circumstances are such that he is committing an offence under – (a) section 87(1) of this Act (driving otherwise than in accordance with a licence); (b) section 103(1)(b) of this Act (driving while disqualified), or (c) section 143 of this Act (using a motor vehicle whilst uninsured or unsecured against third party risks).

It was for the Supreme Court to consider whether 'causing death',¹²⁰ for this criminal offence, included a purely mechanical application of causation. Lord Hughes and Lord Toulson, reviewing the legal rules of criminal causation, made several findings. The first is that *but for* causation, based on an orthodox understanding of the doctrine, is alone not enough to be a legally sufficient cause.¹²¹ Furthermore, the court held that 'in the case law there is a well-recognised distinction between conduct which sets the stage for an occurrence and conduct which on a common-sense view is being regarded as instrumental in the bringing about the occurrence.'¹²² Although this finding is not unfamiliar to the criminal law, it does highlight that mechanical causation needs to either be supplemented with additional normative criteria to ascribe criminal responsibility or discarded altogether. Mechanical causation cannot distinguish between causally relevant conduct using scientific enquiry alone.

¹¹⁸ For an example of this, see *R v Bateman* (1925) 19 Cr App R 8, 11-12 (Lord Hewart CJ), '...the facts must be such that, in the opinion of the jury, that negligence of the accused went beyond a mere matter of compensation between subjects and showed such disregard for the life and safety of others as to amount to a crime against the State and conduct deserving punishment.'

¹¹⁹ (n 16).

¹²⁰ Emphasis added.

¹²¹ (n 16) [23]. For a review of this topic, see: *Galoo Ltd v Bright Grahame Murray* [1994] 1 WLR 1360, 1373 (Glidewell LJ).

¹²² (n 16) [23]. Hart and Honoré also recognise such distinction in their work. The analysis of 'mere conditions' and 'causes' was looked at in chapter two. See: Hart and Honoré, *CIL* (n 2).

The second finding is that because of the wide-reaching implications of a criminal conviction that mechanical causation is not suitable for the ascription of responsibility.¹²³ Some of the implications of receiving a criminal conviction, as identified by the Supreme Court are; the risk of imprisonment, the gravity in labelling an individual a killer, disclosure in multiple situations in which one's history must be volunteered, and the public obloquy for killing someone.¹²⁴ Indeed, the offence relevant in this case is a form of homicide. The Supreme Court expressed great concern that an individual could be prosecuted for such a harsh offence without any morally reprehensible conduct justifying a homicide conviction. The court held that it is open to Parliament to legislate to create such a harsh offence, but it is not assumed to have done so unless compelled by the language of the statute. The Justices of the Supreme Court held that causation ultimately concerns the rule of construction.¹²⁵ Therefore, the court must look at the language of the statute and determine the extent of responsibility that it intended to impose. In this case, D's driving had been faultless and within the speed limit. Aside from driving while uninsured, there was no morally reprehensible conduct comparable to justify a homicide conviction. The court was faced with determining whether the mere presence of his uninsured vehicle on the road was enough to ascribe criminal responsibility for the homicide of V. Addressing this point, the court held:

For the reasons set out, enquiry into apportionment of liability in civil terms is not appropriate to a criminal trial. But it must follow from the use of the expression "causes...death...by driving" that section 3ZB requires at least some act or omission in the control of the case, *which involves some element of fault*, whether amounting to careless/inconsiderate driving or not, and which contributes in some more than minimal way to the death.¹²⁶

This third finding is very significant to the aim of this chapter. It demonstrates that the concept of causation incorporates consideration of D's 'fault', or culpability, in causing the resulting harm. This is a particularly unusual finding since the judiciary does not typically talk about the causation doctrines in this way. Such a decision is not wholly aberrant, however. There have been numerous instances

¹²³ (n 16) [26].

¹²⁴ (n 16) [26].

¹²⁵ (n 16) [26]. For an excellent analysis of construction in causation, see: L Hoffman, 'Common Sense and Causing Loss' (Lecture to the Chancery Bar Association, London, 15 June 1999) <www.chba.org.uk/members/library/annual-lectures/common-sense-and-causing-loss> accessed 03 September 2019.

¹²⁶ (n 16) [36] (emphasis added).

where the court has held that mechanical causation does not aid the ascription of responsibility, and we must look to normatively sensitive criteria to establish causation properly.

The reason that the court in *R v Hughes*¹²⁷ could not rely upon mechanical causation is that it serves a different purpose to that of legal causation. The scientific investigation of tracing C1 through to Cn merely explains how E arose and does not help attribute responsibility in criminal law. It is not just mechanical causes that are proximately and temporally close to the prohibited result that is caught by this rule. At the other end of the spectrum, there are cases where there is little to no mechanical relationship between D and the prohibited result, yet the judiciary has established legal causation. In some circumstances, it is merely enough that D culpably initiated a sequence of events that ultimately resulted in the prohibited harm. Take, for example, the case of *R v Wallace*.¹²⁸ Here, V died from voluntary euthanasia, by lethal injection, lawfully administered to him in a hospital in Belgium. The principal issue here is whether the conduct of D (who threw sulphuric acid over V) was a sufficient legal cause of V's death, or whether his request for voluntary euthanasia relieves D of causal responsibility. Undisputedly, the doctor's administration of the lethal injection was the most proximate mechanical cause of V's death, albeit a lawful one. However, the court held that it was open to the jury to conclude that V's request to his doctors and the act of euthanasia were not discrete acts or events independent of the defendant's conduct, and D could remain causally significant and responsible for the death.¹²⁹ In this instance, proponents of mechanical causation would argue that we must construct a causal bridge from D's act to V's death.¹³⁰ Therefore, to find D causally responsible for the death of V, one must reject notions of mechanical causation and focus exclusively on the tests of legal causation. Moreover, in determining whether D legally caused V's death, one must explicitly consider D's

¹²⁷ (n 16).

¹²⁸ (n 38).

¹²⁹ Cf. AP Simester and GR Sullivan, 'Causing euthanasia' (2019) 135 LQR 21. The authors argue that although the outcome in this case may have been correct, that the attempt by Sharp LJ to turn this case into a foresight-of-suicide case was misconceived. The jury should have been first asked whether V's response satisfied the FDI principle. If it did, there can be no liability for V's death. It is only if V's conduct was non-voluntary that the jury should consider whether it was reasonably foreseeable at the point of D's unlawful conduct. It is surprising to note that at D's retrial, she was not found guilty of murder or manslaughter, presumably because causation was not satisfied.

¹³⁰ Simester and Sullivan, 'Causing euthanasia' (n 129) 26.

culpability in causing the harm, much like in *R v Hughes*.¹³¹ Whether D is a *factual* cause of the resulting harm is not relevant to establishing attributive causation in criminal law.¹³²

6. Conclusion

This chapter has illustrated that when developing a normative yet analytical framework for causation in criminal law, mechanical (or explanatory) causation is best understood as a necessary but not sufficient component *within* legal causation, and not a distinct and independent limb. To reach this conclusion, this chapter has argued that the traditional bifurcation model of causation does not accurately reflect the ascription of responsibility that is required by the criminal law. In its place, this thesis utilises a model which focuses explicitly on a *normative* evaluation of D's unlawful conduct, requiring D's culpability to 'link' D to resulting harm, to establish causation in criminal law. In defence of this position, this chapter has illustrated, building upon the analysis in the preceding chapter, that causation is a descriptive expression that is defined by reference to the criteria of causation, loaded with considerations that are normatively sensitive and not aided by scientific investigation. Therefore, for D to be causally responsible for a prohibited result, D must *culpably* cause that harm.

To reach this conclusion, several claims have been made in this chapter. First, the chapter argued, through the critical application of mechanical causation, that an individual (D) can be held criminally responsible for resulting harm without any culpability in causing that harm. This, it has been demonstrated, is undesirable for two principal reasons. First, the criminal law is typically only concerned with individuals when their conduct is open to criticism. Second, it ultimately places questions of liability (almost) exclusively on questions of mens rea. The implication of placing an over-reliance on mechanical causation would mean that D *may* be criminally responsible for a resulting harm (and indeed liable, in the case of strict offences) without any culpability in causing that harm.

¹³¹ (n 16).

¹³² Chapter six argues that D causes V's suicide if D was subjectively negligent when attacking V with acid, and V's suicide was a moderately reasonable response. Whether V's response was reasonable takes into account all of V's personal and circumstantial attributes. See chapter six for a comprehensive account of this position.

The chapter then moves to evaluate the concept of causation *outside* criminal law critically. Causation *outside* law focusses primarily on the mechanical, or scientific, understanding of cause and effect. However, the problem with using mechanical causation as a primary method of causal selection and attributing responsibility is that it is explanatory in nature. This highlights its incompatibility for use in criminal law. The causation doctrines are not concerned with explanatory causation, but rather *attributive* causation. Attributive causation does not ask *how* an event occurred but rather, who ought to be identified as being criminally responsible for causing the prohibited result, informed by the ideas and interests of the criminal justice system.

Finally, the bifurcation of causation that is conventionally stated by the judiciary and legal academics is rejected. However, the proposed model of culpable causation offered in this thesis argues that this limb is redundant. Instead, culpable causation asks only that D *legally* caused the resulting harm. This position is achieved by critically analysing the contextual differences between causation inside and outside of the law. The contextual differences in legal and scientific enquiries render the latter redundant for the criminal law. This analysis then moves to consider how the judiciary has discussed causation in criminal law, demonstrating that the principal focus is placed on culpable offenders within the tests of legal causation, and not mechanically relevant contributions when establishing causation. In advancing these claims, this chapter has provided the groundwork for developing an account of criminal causation that uses culpability to determine whether responsibility ought to be attributed to D for causing a prohibited result in criminal law. The following chapter, therefore, seeks to present and defend a normative analysis of criminal causation using the concepts of culpability and foreseeability as to the risk of harm. A test of culpable causation is offered, in place of the current bifurcation of causation, which allows the court to make an explicitly normative evaluation of D's conduct (in causing the resulting harm) to ascertain whether D should be legally responsible in criminal law for causing that harm.

Chapter 5

Culpable causation

1. Introduction

The preceding chapters of this thesis have illustrated that the current legal tests of causation fail to adequately explain *how* and *why* an individual is ascribed responsibility for a resulting harm in criminal law. This chapter develops the discourse and presents a normative yet practical account of causation in criminal law, focusing on protecting the jewel of the criminal law's general part – individual capacity-based responsibility. This chapter employs the principles of voluntariness and foreseeability as to the risk of harm to provide an evidential threshold for establishing causation in criminal law.¹ This new model of causation is termed 'culpable causation'.

Culpable causation is comprised of two distinct limbs. The first limb requires that D's conduct must be culpably negligent, and the aspect of D's conduct that made D negligent must cause the resulting harm. To determine whether this criterion is satisfied, this thesis uses the invariant and individualised standard of care to ascertain whether the aspect of D's conduct in causing the harm fell below the accepted standard within society and whether D had the fair opportunity to avoid the harm. Thus, this model of causation uses subjective negligence to determine whether D's unlawful conduct was voluntarily performed. The rationale for including negligence within voluntariness is that it allows for reasonableness to enter in the causal analysis, thus allowing an explicitly normative evaluation of D's conduct within a legally deregulated zone. This, as is identified in chapter two, is a necessary pre-condition to finding the right answer to any causal enquiry.

The second limb focuses on foreseeability as to the risk of harm. To be responsible for a resulting harm, in addition to the first limb, it is submitted that the harm must be a reasonably foreseeable consequence of D's unlawful conduct. If D voluntarily performs the unlawful conduct, but the resulting harm too

¹ By adopting this theoretical approach to criminal causation, social-economic, scientific, and policy considerations can all inform the normative decision to ascribe causal responsibility to D. Such an approach offers greater flexibility and offers the advantage of incorporating a wide variety of influencing factors present in the practice of criminalisation.

remote, causation is not established. It is essential to focus on reasonably foreseeable harms for two reasons. First, it acts as a limiting principle. Without this restriction, an individual could be responsible for all the ensuing harms that result from their unlawful conduct, and causation would be without limits.² The second reason is that it injects the doctrine with flexible and objective fairness. If D is responsible for a resulting harm which was *not* reasonably foreseeable, then protection of those that may be harmed is secured at the cost of D's liberty; D would be unable to regulate their conduct in society. Therefore, the inclusion of reasonable foresight provides a yardstick by which D can evaluate whether harms will be attributed to him when deciding whether (or not) to act. Without this second limb, D may not choose to act because unforeseeable harm may still be attributed to him, thus encroaching on his liberty and autonomy to act freely within society.

Therefore, this chapter presents a new model of criminal causation by asking whether (1) D's conduct was voluntarily performed, as determined by the invariant and individualised standard of care, and the aspect of D's conduct that made D negligent must cause the resulting harm; and (2) the resulting harm was a reasonably foreseeable consequence.³ To defend this proposed model, this chapter critically evaluates the theoretical approaches to ascribing responsibility for resulting harms in criminal law. The chapter then moves to develop the first limb of causation, focusing on the notion of voluntariness of action and its relationship to culpability. The second limb of causation is then formed, looking to reasonably foreseeable consequences as a limiting, objective principle. This analysis provides the foundation for establishing causation in criminal law that can be used as evidence that D *may* be causally responsible for a prohibited result.

² See: AP Simester and GR Sullivan, 'Causation without Limits' (2012) Crim LR 753, 776.

³ This chapter uses Hart's doctrine of fair opportunity to underpin the current legal tests of causation. This is because for D to be responsible for his conduct, he must *choose* to act. See: HLA Hart, *Punishment and Responsibility* (2nd edn, OUP 2008). However, if D is to be responsible for a consequence of his conduct, e.g. a prohibited result, then he must have had the capacity to avoid such conduct. This ensures that the touchstone of responsibility is not shifted from choice to capacity, and therefore relegating choice to a subsidiary role. See: M Moore, 'Choice, Character, and Excuse' (1990) 7 *Social Philosophy and Policy* 29, 57; and J Horder, 'Criminal Culpability: The Possibility of a General Theory' (1993) 12 *Law & Phil* 193, 199.

2. Responsibility for consequences

There are, in every-day life, an infinite number of consequences that flow from our actions and inactions.⁴ Indeed, it is often challenging determining which of those consequences can be fairly attributed to a causal contributor. It is submitted that there are two extremes in determining whether D legally causes a resulting harm (E) in criminal law. At one end of the spectrum, there is an option (a) where D must answer for only those consequences that he was *intentional* in bringing about. The other option, (b), is where D must answer for all of the consequences that would not have occurred *but for* his actions. However, neither options (a) nor (b) provide an accurate depiction of causation of English criminal law. The problem with option (a) is that it gives too much authority to D. If D states that he did not intend E to result from his actions, and the prosecution cannot evidentially prove otherwise, he is not causally responsible for the resulting harm. Conversely, option (b) has the opposite, but still undesirable, effect of stating that D has no say whatsoever of whether E is attributed to him. Holding D responsible for the consequence of his conduct, irrespective of *any* culpability, is abhorrent to most theories of criminal responsibility.⁵ The criminal law places significant importance on capacity and choice in both the actus reus and mens rea components of criminal offences.⁶ It is because of this that both options (a) and (b) offer an unsatisfactory account of causation; a suitable middle ground must be advanced. To reach this point, it necessary to explore both options further.

The first option, (a), is that D is only causally responsible if he intended to bring about the prohibited result. This is a *fault-based* view. One of the dangers of establishing causation on a *fault-based* view is to say that D is granted liberty to act without fear of prosecution unless he intends a specific outcome.⁷

⁴ This is true in a mechanical or scientific context, but not a legal or normative one. Although outcomes may result from our actions and omissions, we not do *cause* all of the consequences that result. This is true in all aspects of law. As this chapter illustrates, the criminal law only ascribes resulting harms to actions if they are culpably caused.

⁵ Cf. B Wootton, *Social Science and Social Pathology* (George Allen & Unwin 1959).

⁶ For D to be liable for a criminal offence, it must be possible to show that D voluntarily acted, and was either intentional, reckless, or negligent with respect to the resulting harm (subject to the relevant offence). These requirements secure and protect D's agency and capacity – the essential feature of the general part of English criminal law.

⁷ Intention, in this context, means both direct and oblique intention. For a review of the relevant authorities on this topic, see: *R v Steane* [1947] 1 All ER 813; *R v Moloney* [1985] 1 All ER 1025; *R v Hancock & Shankland* [1968] 1 All ER 641; *R v Nedrick* [1986] 3 All ER 1; and *R v Woollin* [1998] 4 All ER 103.

Therefore, if D acts without intent, and is either reckless or negligent as to his actions,⁸ D does not need to consider with any degree of care the broad range of consequences that *may* flow from his action, including harm to others. D acts at the peril of others as he has the final say as to whether E should be ascribed to him.

The second position, (b), is that D is responsible for all of the consequences which would not have occurred *but for* D's action. This is an *outcome-based* view. Here, D acts at his peril as he does not know which consequences will be ascribed to him when deciding if at all, to act. Even if D acts with the necessary level of due diligence and care and does not foresee any specific harm resulting from his conduct, he may not choose to act because unforeseeable harm may still be attributed to him. Therefore, the protection of those that may be harmed is secured at the cost of D's liberty. This position is undesirable and not (wholly) reflective of the current doctrinal landscape. The contrast between these positions illustrates the degree to which D has the authority to determine which consequences are attributable to him as a result of his action.⁹ Additionally, any account of causation offered needs to ensure that it does not supplant the role of mens rea, as is the case in the *fault-based* option.

Thus, both options offer inadequate methods of establishing causation in criminal law - it is necessary to create a middle ground. The criminal law currently tries to accommodate this middle through the tests of legal causation. The orthodox causal baseline is that D is only causally responsible for E if his actions are a significant and operative *but for* cause of the resulting harm. However, these terms are unhelpful in establishing causation since they fail to explain *when* and *how* this causal baseline is met. It is necessary to explore the baseline further.

⁸ Recklessness in criminal law now has one meaning. Recklessness is now subjective and defined according to *R v Cunningham* [1957] 2 QB 396 as the conscious taking of an unjustified risk. The importance of *R v Caldwell* [1982] AC 341 objective recklessness, which was defined as the failure to think about a serious and obvious risk, was overturned by the House of Lords in *R v G* [2003] UKHL 50. Therefore, unless stated otherwise, this chapter will discuss recklessness per *Cunningham* recklessness. Negligence, traditionally, involves unreasonable conduct which creates an obvious risk of harm through genuine inadvertence. The different variants of negligence will be explored throughout this chapter.

⁹ Klimchuck, when discussing the doctrine of causation in Canadian criminal law, offers a similar position when criticising the inadequacy of fault-based (or subjective view, as he labels it) and outcome-based (objective view) methods of imputing causal responsibility. See: D Klimchuck, 'Causation, Thin Skulls and Equality' (1998) 10 *Canadian Journal of Law and Jurisprudence* 115, 130.

The starting point for legal causation in English criminal law is trite; D's conduct must be a significant and operative cause of E.¹⁰ The question for the court to consider is whether the contribution of D is (normatively) more significant than a factual (mechanical) cause to find D causally responsible for E. The courts have been imprecise in defining what 'operating' and 'significant' means for these purposes. Lord Parker, in *R v Smith*,¹¹ attempted to provide some guidance and clarification on this matter:

It seems to the court that if at the time of death the original wound is still an operating cause and a substantial cause, then the death can properly be said to be the result of the wound, albeit that some other cause of death is also operating. Only if it can be said that the original wounding is merely the setting in which another cause operates can it be said that the death does not result from the wound. Putting it in another way, only if the second cause is so overwhelming as to make the original wound merely part of the history can it be said that the death does not flow from the wound.¹²

However, Lord Parker's comments lack clarity as to when an action is 'merely the setting in which another cause operates', is not 'overwhelming', or 'merely part of the history'.¹³ It is imprecise because it is necessary to explicitly state that a normative investigation of D's conduct is required to ascertain which contribution 'stands out' from the list of causes using 'operative' and 'significant' merely as reference points to impute causation. This investigation is retrospective in that it involves looking back from the resulting harm to see which factor made the most 'important' contribution, and it is looked at independently of what D (should have) knew or expected about the consequences flowing from the conduct.

Establishing causation retrospectively and without *any* consideration of D's culpability fails to provide an adequate middle ground between *fault-based* and *outcome-based* causation. With an *outcome-based* approach, D is not allowed to have any say in whether E should be ascribed to him. It is looked at in a purely factual manner, irrespective of D's culpability or mens rea requirements.¹⁴ If such an approach

¹⁰ Although the orthodox position is trite, it is far from satisfactory. Chapter four illustrated that factual causation is superfluous in ascribing responsibility in criminal law; it is the tests of legal causation that are essential to the proper functioning doctrine. Furthermore, chapter one argues that the terms 'significant' and 'operative' are not explicit in communicating to the jury the normative evaluation required to ascribe responsibility. For this reason, they are inconsistent and ineffectual tools for this fundamental element of criminal liability.

¹¹ [1959] 2 QB 35.

¹² *R v Smith* (n 11) 42-43.

¹³ See: Klimchuck, 'Causation, Thin Skulls and Equality' (n 9) 130.

¹⁴ This position is explicitly rejected in chapter four.

were adopted, the security of innocent individuals in society would be realised at the cost of D's liberty. Similarly, on a *fault-based* approach, D is alleviated of causal responsibility for acting recklessly or negligently. However, this chapter advances the view that the law does not merely look at D's conduct and the impact that this has had on others. It also assesses D's culpability, requiring voluntariness of action and foreseeability as to the risk of harm, in determining whether state intervention is warranted and justified. However, there are some legal scholars, such as Wootton, who argue against such a position. Wootton writes that we should abandon the idea of distributing punishment according to some notion of individual responsibility.¹⁵ She argues that since the mental state of an individual is not publicly observable, it is not an appropriate ground for holding an individual criminally responsible. Instead, she advocates that the law should adopt a purely scientific view of the matter – punishment for specific conduct or outcomes. However, this chapter argues that both *outcome* and *fault-based* responsibility are unconscionable grounds for establishing causation.

The foremost reason why it is reprehensible to establish causation on either a *fault-based* or *outcome-based* approach is due to the concept of reasonableness. To treat individuals in society equally, their actions ought to be subject to the criterion of reasonableness. Moreover, Rawls writes that the concepts of equality and reasonableness are correlatives.¹⁶ Therefore, to act rationally is to act to further one's ends; to act reasonably is to interact with others in terms of equality.¹⁷ Therefore, the standard of reasonableness is required to treat (acting) individuals in society as equals. Both a *fault-based* and *outcome-based* approach to causal responsibility violate this principle. It is, therefore, necessary to incorporate a reasonableness criterion into criminal causation. This primarily Kantian approach permits individuals to act as equals in every-day life while striking a sufficient balance between their autonomy, on the one hand, and security on the other.¹⁸

¹⁵ Wootton (n 5).

¹⁶ J Rawls, *Political Liberalism* (Columbia University Press 1993) 48.

¹⁷ Both Ripstein and Klimchuck note the relationship between reasonableness and equality as it is used in objective standards in tort and criminal law. See: A Ripstein, 'Self-defence and Equal Protection' (1996) 57 *University of Pittsburgh Law Review* 685, 689; and Klimchuck, 'Causation, Thin Skulls and Equality' (n 9) 129.

¹⁸ See: Ripstein, 'Self-defence and Equal Protection' (n 17).

The notion of reasonableness is, however, subject to indeterminacy. Two concepts of reasonableness are of relevance when making normative evaluations; ‘idealistic’ and ‘moderate’ reasonableness.¹⁹ The first, ‘idealistic’ reasonableness, requires an assessment of D’s conduct and the resulting harm based on thinking and acting by right reason. The second, ‘moderate’ reasonableness, distinguishes the reasonable and the rational.²⁰ Moderate reasonableness, therefore, proposes that a reasonable person is not expected to possess preternatural powers of judgement. Thus, in some circumstances, a reasonable person may act irrationally. Moreover, given idealistic reasonableness would have the effect of imposing an all-things-considered standard upon D, it would not necessarily reflect a capacity-based approach to responsibility.²¹ This thesis, therefore, adopts a *moderate* approach to reasonableness, focusing on the middle ground between acting reasonably and unreasonably. As Shute argues, not all actions that are not reasonable are *unreasonable*. Similarly, actions that are not unreasonable are reasonable.²² All that is required, using moderate reasonableness, is that D’s conduct was not reasonable to establish causation.

Therefore, based on this Rawlsian analysis, this chapter offers an alternative middle ground to that of the current legal tests of causation, replacing the causal baseline with culpable causation, incorporating culpability and moderate reasonableness. Such a position has the attractive benefit of holding (acting) individuals in society as equals who are only causally responsible for resulting harms that are culpably performed and reasonably foreseeable. This proposed model of culpable causation permits social, political, and moral criteria to enter into the assessment of whether D causes E, per the multi-paradigmatic account presented in chapter three, genuinely and authentically. The next section of this

¹⁹ These concepts of reasonableness have been based on the work of Shute, see: S Shute ‘Causation; Foreseeability v Natural Consequences’ (1992) 55 MLR 584, 585-586.

²⁰ Rawls similarly distinguishes between the reasonable and the rational. The reasonable is a form of practical rationality; however, distinguishing the reasonable from the rational is much more difficult. Rawls explains that an individual’s action may be rational in the sense of that individual’s narrow interest, but unreasonable because it is unacceptable to others. Rawls uses ‘reasonable’ and ‘rational’ as helpful terms to mark the distinction that Kant makes between the two forms of practical reason, pure and empirical. This is a development of Kant’s use of *vernünftig* which expresses a full conception of reason covering both ‘reasonable’ and ‘rational’. See: J Rawls, *Lectures on the History of Moral Philosophy* (Harvard University Press, 2000) 164.

²¹ It is submitted that an ‘all-things-considered’ normative evaluation of D’s conduct and resulting harm has the effect of minimising the importance/relevance of fault in criminal liability. It is not just the outcome of D’s action that determines culpability, it is whether D’s actions were not unreasonable considering the facts known at the time. Therefore, D’s fault as to the circumstances and consequences matter.

²² Shute, ‘Causation; Foreseeability v Natural Consequences’ (n 19) 586.

chapter moves to consider the first limb of the proposed model of culpable causation and asks whether D's conduct was performed voluntarily and is open to criticism (culpably negligent), and the aspect of D's conduct that made D negligent caused the resulting harm. To achieve this aim, the next section critically evaluates the relationship between causation and culpability to determine whether subjective negligence is a suitable mechanism for establishing causation in criminal law.

3. Causation and culpability

The purpose of this section is to show that criminal causation requires consideration of D's culpability.²³ The relationship between fault and causation in criminal law is undoubtedly an important one. JC Smith argued that if D acts *intending* to produce a specific result, and that result occurs, then D will be found to have caused that result without any analysis of causation principles.²⁴ On this account, causation is not a substantive issue since D acted unlawfully with the knowledge (true belief) that it would result in a specific outcome, namely specific harm to V. This analysis is reflective of legal practice. A thorough analysis of causation doctrines by the jury in such a case would be superfluous since D's belief came to fruition in combination with their intentional unlawful conduct. However, if D does not act with mens rea corresponding to the actus reus and final result, causation is not so easily established. For example, If D intends to cause V actual bodily harm, but V dies from the infliction of such harm, ascribing responsibility for death is not straightforward. This can be described as the 'fit problem'.²⁵ D's belief concerning his conduct (the infliction of bodily harm), and the final result (death), no longer correlate. Kyd argues that, in such circumstances, causation bears an inverse relationship to the mens

²³ There are theoretical debates as to whether criminal causation is properly seen as a part of the actus reus of an offence, or whether it also includes consideration of D's fault. For an excellent discussion on this, see: P Robinson, 'Should the Criminal Law Abandon the Actus-Reus and Mens Rea Distinction' in S Shute and others (eds) *Action and Value in Criminal Law* (OUP 1993); and ACE Lynch, 'The mental element in the actus reus' (1982) 98 LQR 109.

²⁴ See: The previous edition of D Ormerod and K Laird, *Smith, Hogan, and Ormerod's Criminal Law* (15th edn, OUP 2018) by JC Smith, *Smith and Hogan's Criminal Law* (10th edn, Butterworths 2002) 55. This particular position is not reflected in the newer editions of this text. Experimental psychology has also demonstrated that 'intentional actions are typically judged more robust than unintentional ones', see: D Lagnado and T Gerstenberg 'Causation in legal and Moral Reasoning' in M Waldmann (ed), *The Oxford Handbook of Causal Reasoning* (OUP 2017) 584.

²⁵ Kyd and Turton have advocated a 'harm within the wrong' test to resolve these issues and ask whether 'the actual harm is of the kind which the violated rule was designed to prevent'. However, there is an inability for this account to rationalise the common intervening event-type cases, such as the thin-skull rule, and is primarily focussed on securing a justice-oriented theory of *both* criminal law and tort. See: S Kyd and G Turton, 'Causing Controversy: Interpreting the Requirements of Causation' (2019) 70 Northern Ireland Law Quarterly 425, 440.

rea requirement and must do more work to ensure D is suitably blameworthy to be labelled a killer.²⁶ It requires the jury to ‘fit’ the culpability of D with the result that occurred and determine whether it is close enough to justify the ascription of criminal responsibility.

Although this proposal has received some academic support, the judiciary has not typically discussed criminal causation in this way. One instance of the court speaking to intended results was seen in *R v Michael*.²⁷ In this case, D intended to kill her baby. She gave a bottle of poison to the baby’s nurse stating that it was medicine. The nurse left the bottle on the mantelpiece, unaware of the real contents of the bottle. A five-year-old child took the poison and gave it to the baby. The baby died as a result of the poison. The court held that the mother legally caused the death of her baby because it was her intention, despite the unexpected turn of events. However, if the facts of this case were slightly different, and D did not intend to kill her child, but instead recklessly left a noxious substance on the mantelpiece, which was later innocently administered by a third-party, speaking of *intended* consequences is unhelpful in ascribing responsibility. In such circumstances, because D was reckless, causation has to do more ‘work’ to ensure that ascribing responsibility for the resulting harm to D is appropriate. This chapter argues that these cases can be resolved by considering D’s voluntariness in causing the resulting harm.

Moreover, the position in this thesis is that in *R v Michael*,²⁸ neither the actions of the nurse nor the child in administering the poison, satisfy the requirement of voluntariness. The nurse’s (nor child’s) conduct would not be described as a *novus actus* since it was not voluntarily performed; we trace through such conduct. The nurse was not informed as to the true contents of the bottle and can, therefore, be described as acting non-voluntarily. Similarly, the young child is not of sufficient age to bear causal

²⁶ This is only true if D’s conduct also satisfies the criterion of factual causation. Kyd argues that ‘where an alleged offender (D) is proven to have the intention to kill, this in itself will mean that the law will rarely operate to prevent the finding of liability based on lack of causation. However, without such *mens rea* corresponding to the *actus reus* and the final result of death required for homicide, there is more work to be done by causation in ensuring that D is sufficiently blameworthy to be attributed with the label of a killer. It might be suggested that the importance of causation bears an inverse relationship to the *mens rea* requirement of any homicide offence.’ See: S Kyd, ‘Causing death’ in A Reed and others, *Homicide in Criminal Law: A Research Companion* (Routledge 2018) 119. The principal claim is that blameworthiness is essential to causation with lesser *mens rea* requirements.

²⁷ (1840) 9 C & P 356.

²⁸ (n 27).

significance in such enquiries; the law is concerned with the responsibility of individuals capable of forming the intent to commit a crime.²⁹ D's conduct, in this case, was the only voluntary act that made a more than negligible contribution. D's voluntary act warrants criticism because of D's culpability; D *intentionally* placed the poison on the mantelpiece so that another would administer it and kill V.

It would, however, be inappropriate to require a strict *fault-based* approach in all cases of causation. Requiring D to have intended a resulting harm would set an unworkable threshold for establishing causation. The criminal law hosts a plethora of offences that do not require intention as the mens rea requirement. Thus, if a strict *fault-based* approach to causation were adopted, it would not be possible to find an individual responsible for (say) causing grievous bodily harm³⁰ if they were to recklessly injure V since it would be necessary to prove that D *intended* the grievous bodily harm as a consequence of his unlawful force. Although recklessness is permitted within the scope of this offence, a strict causation principle would hold that if D recklessly acted, but did not intend or foresee serious harm, there could be no responsibility for the result. We are not concerned, therefore, with a strict *fault-based* approach to causation; there needs to be a lesser degree of culpability as not to supplant the role of mens rea and limit the scope of liability for existing offences.

At the other end of the spectrum, causation goes beyond an objective assessment of the outcome of one's actions.³¹ The law is not merely concerned with the conduct of D and any outcome resulting from this, but whether D's action, in the bringing about of E, is open to criticism.³² This chapter argues that when D is at fault in causing the result, in addition to the mens rea requirement for the offence, a jury is more likely to establish causation. The relationship between causation and fault is far from clear, but causation, normativity, and morality are interrelated concepts. Baker ably writes that:

²⁹ In England and Wales, the doctrine of *doli incapax* provides that no child under the age of ten years of age is capable of forming the intent to commit a crime. This is therefore the age of criminal responsibility. See: Children and Young Persons Act 1933 (as amended), s. 50. The Act as introduced set the age at eight and this was increased to the current age of ten by the Children and Young Persons Act 1963, s. 16.

³⁰ Contrary to the Offences Against the Person Act 1861, s. 20.

³¹ This is, broadly speaking, the purpose of factual causation. Causal responsibility is not ascribed solely on this basis, it is supplemented with tests of legal causation.

³² That D's conduct must be 'open to criticism' was explicitly required in *R v Hughes* [2013] UKSC 56. This, it is submitted, because the offence in question required no culpability requirement, and therefore required blameworthiness as integral to causation. This thesis presents the view that D *only* causes a prohibited result in law if their conduct is culpable with respect to the result, injecting blameworthiness in all causal enquiries.

When one has settled the question of but-for causation, the further test to be applied to the but-for cause in order to qualify it for legal recognition is not a test of causation but a *moral reaction*. The question is whether the result can fairly be said to be imputable to the defendant.³³

This extract illustrates that when ascribing responsibility to D for E, a value-judgement is made that is intrinsically linked to blameworthiness.³⁴ It is inappropriate to punish D for the conduct, and the corresponding result, which they could not avoid. If D had the capacity to do otherwise and continued anyway, this carries with it a significant negative moral connotation; D no longer acts innocently and *voluntarily* chooses to fall below the standard of care that is demanded by society. The inclusion of culpability criteria within the causation doctrines is not the orthodox approach. The orthodox position is that *mens rea* plays no role in determining whether D causes E. For example, Moore argues that causation determines what happens in the world in a purely descriptive manner.³⁵ However, as previously explained in this thesis, it is not possible to make such judgement without the inclusion of normatively sensitive criteria. It would also have the undesirable effect of stating that liability for an offence rests solely on *mens rea* principles.³⁶ This chapter argues that such a neat division between *actus reus* and *mens rea* is not defensible; culpability plays a distinct role in determining liability as (1) a criterion of causation, and (2) in *mens rea* principles.

Before undertaking an evaluation of culpability in causation, it is necessary to explore the views of some legal scholars, like Moore,³⁷ who claim that there is a dichotomy between (a) what happens in the world and of our evaluation of it and (b) bodily movements and states of mind. It is these dichotomies

³³ D Baker, *Glanville Williams Textbook of Criminal Law* (3rd edn, Sweet & Maxwell 2012) 199.

³⁴ Alicke argues that perceived blameworthiness is integral to establishing causation between conduct and a harmful outcome. His study demonstrates that when multiple forces contribute to an unfortunate outcome, people select the most blameworthy act as the prepotent causal factor. See: MD Alicke, 'Culpable Causation' (1992) 63 *Journal of Personality and Social Psychology* 368.

³⁵ See: M Moore, *Causation and Responsibility: An Essay in Law, Morals, and Metaphysics* (OUP 2009).

³⁶ D would have also had to unlawfully act to be responsible for the resulting outcome. However, this argument is that D's liability rests purely on *mens rea* principles. That is to say, D is responsible for a resulting outcome, but only liable if they acted with sufficient culpability as to the offence. The undesirable effect of such a position is that if D acts unlawfully and, through no fault of his own, is mechanically linked to the resulting harm, D could be liable for a strict liability-based offence. This thesis argues that D must culpably cause the resulting harm, even in cases of strict liability-based offences.

³⁷ M Moore, 'Causation and Responsibility' in EF Paul and others (eds), *Responsibility* (CUP 1999).

that lead to the conclusion that there cannot be an assessment of what happens in the world, which includes states of mind. For example, Moore writes:

If the defendant intends some harm H, and he acts in a way such that H comes about, albeit in a rather freakish way, then on this view the intent literally adds causal power to the act of the defendant's that executed his intention. The only way the intention could do this is by itself causing H, in addition to the causing of H done by the intention through the defendant's action. Absent some stronger evidence than we have about the telekinetic powers of our minds, this is surely impossible. Intending H by itself does not make H occur, and even clicking your heels three times won't help.³⁸

While it may seem attractive to separate our understanding of what is happening in the world from our normative assessment of what has happened, or the state of mind of D, this does not reflect the current doctrinal position. It has been demonstrated in chapter four that it is not possible to offer a normatively neutral account of the world when making causal enquiries.³⁹ A scientific evaluation of conduct and results offers little useful insight that can be imposed on models of criminal culpability and responsibility. Both of Moore's dichotomies (or dualisms) are considered below.

Moore's first dualism claims that there cannot be an assessment of what happens in the world that also includes an evaluation of D's state of mind. Countering this claim, Williams explains that it is implausible to have a normatively neutral method of describing the world.⁴⁰ Williams argues that there would be a limited number of descriptors available if norms were not included. The distinction between thick and thin ethical considerations explains this neatly. 'Thin' concepts are those that are normatively neutral and contain no descriptive content - words like 'right', 'wrong', and 'should'. Conversely, 'thick' concepts have more meaningful descriptive content - words such as 'cruel', 'dishonest', and 'malicious'. These words convey much more than moral disapproval; they express the kind of behaviour that is disapproved. Thick and thin concepts do not have a simple analytical structure that is to be

³⁸ Moore, 'Causation and Responsibility' (n 35) 28.

³⁹ The previous chapter of this thesis argued that it is not possible to offer a normatively neutral account of criminal causation. Chapter four argued that true mechanical causation is neither a necessary nor sufficient criterion for ascribing responsibility for a resulting harm in criminal law. Rather, establishing causation rests solely on *legal* tests that are informed and shaped by explicitly normative considerations. Therefore, we are not concerned with causation as understood by scientists and philosophers, but the criminal law's own definition of causation, using voluntariness and reasonableness as essential criteria for linking an individual's conduct to a prohibited result; whether D causes a harm is ultimately a question that is to be answered by the jury in a legally deregulated zone.

⁴⁰ B Williams, *Ethics and the Limits of Philosophy* (London: Fontana 1985) Ch 8.

developed from rationalisation.⁴¹ There is no way of determining whether ‘cruelty’ carries with it more descriptive content than say ‘maliciousness’. This is to be appreciated only by thinking of the extent to which they are descriptive.

Tadros, in applying the work of Williams,⁴² concludes that if Moore’s assertion is correct that states of mind are of no relevance to our understanding in the world, then we cannot use thick ethical concepts at all.⁴³ Such a position would only be possible if we can distil a normatively neutral observation of the world. If observations of the world are normatively loaded with our evaluations of what is happening, it is not possible to have such a neutral observation.⁴⁴ For example, there is no clear way in which our evaluations of cruelty are to be extracted from our observations of cruelty. Tadros writes:

Take the example of a man putting cigarettes out on a cat. The argument that I am presenting here suggests that this description fails to account for all of our observations. We observe that the man is cruel to the cat directly. That is not a mere evaluative addition to our observation of a man putting cigarettes out on the cat. And our motivations with regard to the case are at least normally generated directly through this perception.⁴⁵

This analysis shows that whether D causes E depends on whether such an evaluative description of D is appropriate. When we describe the world, and our understanding of it, if these thick ethical concepts make their way into an assessment of what D did, it is argued that it is more likely that D will be found to have caused E. If D’s conduct is described using such terms, it has the effect of criticising D. For example, if a causal contributor were purely factual or scientific, it would not be described using thick concepts. Legal causation, used in its current framework, employs thick concepts since it is not a normatively neutral descriptive expression. This distinction is what separates scientific (or metaphysical) causation from legal causation. Now, moving to Moore’s second dualism.

The second dualism is the claim that our bodily movements are independent of states of mind. However, there is nothing attractive about describing a bodily movement with some ‘neutral’ description in the

⁴¹ Tadros also reaches to same conclusion as this when looking at the work of Williams. See: V Tadros, *Criminal Responsibility* (OUP 2005) 178 – 179.

⁴² Williams, *Ethics and the Limits of Philosophy* (n 40) Ch 8.

⁴³ Tadros, *Criminal Responsibility* (n 41) 178

⁴⁴ Tadros, *Criminal Responsibility* (n 41) 178.

⁴⁵ Tadros, *Criminal Responsibility* (n 41) 178.

criminal law. Like the criticism of the first dualism, our evaluation of the world (and therefore bodily movements) are captured by the state of mind of D. On this point, Tadros writes:

We could say that Brenda's arm went through the air and connected with Sally's face or we could say that Brenda punched Sally. But there is no reason to suppose that the first description is more basic, to which the second is added. On the contrary, our impression of the event is captured by the second description in a very basic and direct sense, from which we are able to abstract the first description.⁴⁶

The ordinary grammar of causation is attached to our most direct description of the world, complete with normative and evaluative considerations, not 'neutral' descriptions of the world. Blame and causal responsibility are attributable in situations where D action is normatively unacceptable and open to criticism. Whether or not there is criticism, it is submitted, depends on upon their state of mind. If a reasonable person has the knowledge that E *may* flow from their conduct, then a jury can ascribe responsibility for a harmful outcome. Consider these two examples given by Tadros:

Shop Bomb 1. B is on his way out of a shop when he is confronted by A, who intends to kill B by stabbing him. He lunges at B with a knife, stabbing him in the leg and then runs off. B cannot leave the shop. Unbeknownst to A, a bomb has been planted in the shop which blows B to bits.

Shop Bomb 2. B is on his way out of a shop when he is confronted by A, who intends to kill B. He knows that there is a bomb that has been planted in the shop. He intends either that B will die by stabbing or that he will be trapped inside the shop when the bomb goes off. He lunges at B with a knife, stabbing him in the leg and then runs off (in exactly the same way as in Shop Bomb 1). B cannot leave the shop. B is blown to bits by the bomb (in exactly the same way as in Shop Bomb 1).⁴⁷

What these two examples evidence is that in SB1 since A did not know about the bomb planted in the shop, it would be inappropriate to say that A is causally responsible for B's death and therefore punished. A would-be more accurately described as being responsible for a non-fatal offence toward B.⁴⁸ Here, the aspect of A's conduct that made A culpable did not cause the harm. In SB2, however, as A took advantage of the knowledge that a bomb was in the shop and merely prevented B leaving by

⁴⁶ Tadros, *Criminal Responsibility* (n 41) 179.

⁴⁷ Tadros, *Criminal Responsibility* (n 41) 179 – 180.

⁴⁸ Contrary to the Offences Against the Persons Act 1861, ss. 18 and 20.

stabbing him, A does cause B's death.⁴⁹ This is because causation is concerned with B's state of mind. Using fault elements in causation does not, however, result in the conflation of that actus reus and mens rea. Mens rea is concerned with (false) beliefs; it is possible to intend a consequence without any knowledge that it will occur.⁵⁰ If D has the knowledge that E is likely to occur, then this will affect our enquiry as to whether D caused E.

Therefore, for D to cause E, this thesis argues that there must be a normative evaluation that concludes D's conduct, in bringing about E, was culpably performed.⁵¹ It is D's culpability in causing the resulting harm that is of principal importance here. Looking at D's culpability within causation is overtly visible in constructive and strict liability offences. Although this is principally a theoretical consideration, and the courts do not usually undertake overly theoretical discussions on the matter, they have explicitly considered this point on several occasions. There have been occasions when the courts have held ascribing causal responsibility in the criminal law also concerns an evaluation of fault - separate to the mens rea requirement of the offence.

The Supreme Court looked at this very issue in *R v Hughes*.⁵² This case held that when ascribing causal responsibility, there must be some element of fault concerning D's action, which amounts to

⁴⁹ In SB2 it is also clear that A (obliquely) intended to cause B's death, thus satisfying the criteria for the offence of murder. See: *R v Nedrick* [1986] 3 All ER 1; and *R v Woollin* (n 7). It is clear that A meets the evidential threshold for establishing intention as per Rix LJ in *Matthews & Alleyne* [2003] EWCA Crim 192 [45] where it was held that "Having said that, however, we think that, once what is required is an appreciation of virtual certainty of death, and not some lesser foresight of merely probable consequences, there is very little to choose between a rule of evidence and one of substantive law. It is probably this that led Lord Steyn to say that a result foreseen as virtually certain is an intended result." It is important to note that A's liability for B's death does relieve the bomber of liability for B's death.

⁵⁰ If D pushes V into a thunderstorm, to make it more likely that V will get struck by lightning then, but realistic that such an eventuality is minimal – then this is not an intended action. He intended to push V, but not for V to be struck by lightning. It is a mere wish or hope that he is. If, on the other hand, D believed that pushing V would result in a significant chance that V is going to be struck by lightning, then this is an intention. If by some coincidence V gets struck by lightning, D would not have caused the result, even though he has the mens rea. This is an adaptation of Tadros' example in Tadros, *Criminal Responsibility* (n 41) 180 – 181.

⁵¹ Culpability, or blameworthiness, has been seen to influence causal selections within the field of experimental psychology since 'in the realm of offensive or harmful human behaviour, blame is the engine that makes norm violations matter'. See: M Alike and others, 'Causation, Norm Violation, and Culpable Control' (2011) 108 *Journal of Philosophy* 670, 673. More specifically, causal selection is sensitive to mens rea considerations, such as a defendant's intentionality, foreseeability of an outcome, or knowledge (true belief) about the existence of prescriptive norms. See: J Samland and M Waldmann, 'How Prescriptive Norms Influence Causal Inferences' (2016) 156 *Cognition* 164, 165.

⁵² (n 32); *Cf. R v Brown* [2013] UKSC 43; and *R v Williams* [2010] EWCA Crim 2552.

carelessness,⁵³ and which made a more than minimal contribution to the bringing about of the resultant harm to warrant criminal liability.⁵⁴ The court held that the prohibited conduct performed by D must be open to criticism and involving some element of *fault* concerning the result.⁵⁵ The judgment has the effect of stating that the resulting harm is not attributable to D if the culpable component of D's conduct is in no way relevant to the result.⁵⁶ Thus, the aspect of D's conduct that made D culpable must cause the result.

This rationale was previously adopted in *R v Dalloway*,⁵⁷ where the court confirmed that there is a connection between the fault and causation has long been a feature of the criminal law. Here the court held that if a person was charged with causing death by dangerous driving, it is necessary to demonstrate that the death would not have occurred *but for* the negligence on D's part. Therefore, if D's negligence would not have prevented E from occurring, he is not causally responsible for E. If, however, there was an element of fault attached to D's action, which made more than a minimal contribution, then D legally causes E. This decision demonstrates that the fault element (in causation) for causing death by driving is negligence on D's part.

In *R v Taylor*⁵⁸ the Supreme Court once more looked at the role of fault in causation. D took a vehicle, without the owner's consent and while intoxicated, and subsequently collided with V who was riding a scooter. V died because of the collision. D was charged with aggravated vehicle taking while intoxicated.⁵⁹ The Crown asserted that D committed the offence of aggravated vehicle taking and that owing to the driving of the vehicle, an accident occurred resulting in the death to V. The issue for the

⁵³ The offence of causing death by driving: unlicensed or uninsured drivers, per the Road Traffic Act, s. 3ZB, neatly illustrates the blurred division between actus reus and mens rea principles in criminal law. The criteria of the offence are seemingly satisfied if D causes death while driving (while either unlicensed or uninsured). There is no mention of a mens rea requirement, meaning that it is an offence of strict liability. Provided that D was voluntarily acting when in control of the motor vehicle (while unlicensed or uninsured) and causes the death of another, he would be liable for a homicide offence. This offence looks unfairly harsh and has been subject to judicial interpretation. See: *R v Williams* [2010] EWCA Crim 2552; *R v Hughes* (n 32).

⁵⁴ *R v Hughes* (n 32) [36].

⁵⁵ *R v Hughes* (n 32) [32].

⁵⁶ Ormerod and Laird, *Smith, Hogan, and Ormerod's Criminal Law* (n 24) 92.

⁵⁷ (1847) 2 Cox CC 273. See also, *R v Lowe* (1850) 175 ER 152; *R v Haines* (1847) 2 C & K 368.

⁵⁸ [2016] UKSC 5.

⁵⁹ Contrary to the Theft Act 1968, s. 12A. The basic offence of this offence is under section 12(1) and is in conjunction with a circumstance set out in paragraphs (a) to (d) of subsection (2) of the Theft Act 1968, section 12A.

court was whether D caused V's death for a homicide offence. The Supreme Court was granted leave to appeal on the question of whether D could be convicted of the offence without any culpability as to the result. Lord Sumption held that the answer to the question must be no.⁶⁰ Per the Supreme Court's decision in *R v Hughes*,⁶¹ D's driving must be open to criticism to warrant criminal responsibility for a homicide offence.

What is essential for this chapter is the emphasis that D's conduct requires a culpable element concerning the result, distinct from the mens rea of the offence.⁶² This decision emphasises the importance of the relationship between culpability and causation. In this case, D had satisfied the mens rea for aggravated vehicle taking. However, the culpability of D's conduct did not correspond to a non-fatal or homicide offence.⁶³ At their core, both *R v Taylor*⁶⁴ and *R v Hughes*⁶⁵ confirm that causation is a legal device that uses moral judgements (based on culpability) to ascribe causal responsibility to D. In these cases, the emphasis has been placed on the fault concerning the consequences. Although both decisions are welcome, they do not provide clarity on several issues. The benefit of these decisions, however, is that they highlight the uncertainty of some fundamental principles in English criminal law – that is, the relationship between culpability and causation.

The role of culpability and causation is also evident in *R v Pagett*.⁶⁶ The courts' policy-laden response to the case focused on the foresight of harm and risk creation by D. The Crown asserted that D was responsible for the constructive manslaughter of V in that he committed not one, but two, unlawful acts, both of which were dangerous; (1) the act of firing at the police, and (2) the act of using V as a shield knowing that police may fire shots in his direction in self-defence to his gun-fire.⁶⁷ The second act, as

⁶⁰ *R v Taylor* [2016] UKSC 5 [33].

⁶¹ (n 32).

⁶² Summers has argued that the test for causation is often bound together with blameworthiness (culpability) considerations, which accord with psychologists' findings that ordinary people may be affected by an independent judgment of blame. See: A Summers, 'Common-Sense Causation in Law' (2019) 39 *Oxford Journal of Legal Studies* 50, 73.

⁶³ *R v Taylor* (n 60) [17].

⁶⁴ (n 60).

⁶⁵ (n 32).

⁶⁶ (1983) 76 Cr App R 279. The facts of this case have been discussed previously in this thesis. D used V, by force and against her will, as a shield to protect him from any shots fired by the police. The substantive issue for the court in this case is obvious – D did not fire the bullet that hit V.

⁶⁷ *R v Pagett* (n 66) 291.

identified by the court, highlights the importance on the knowledge of D. As a reasonable person would be aware of the risk that holding V as a shield that the police may, in reasonable self-defence, fire their guns in response to a lethal attack by D, it is possible to say that D causes E (V's death).

Baker argues that D causes E in this instance because of (1) the indirect causal contribution, (2) the foreseeable result, and (3) the culpability link between act and result.⁶⁸ It is (2) and (3) that is of importance here. D knew that if he used V as a shield, she *might* get caught in the crossfire between himself and the police officers. This knowledge, although not his intention, means that he is culpably linked with the resulting harm. D had the choice not to use her as a shield, but continued anyway; thus, culpably contributing to her death. His conduct fell below that which is normatively accepted in society. It is necessary, therefore, to ascertain the extent to which D's decision to act must fall below the accepted standard in society to merit criminal responsibility, and *how* this standard is to be applied.

4. Negligence in causation

Integral to the account of culpable causation presented in this thesis is that D must choose to fall below the standard accepted in society to be causally relevant. That is, D's decision to act (or not act, in the case of omissions) in causing the harm was culpably negligent.⁶⁹ However, negligence in criminal law takes many forms.⁷⁰ The purpose of the next section is to elucidate the extent to which D's decision to act must fall below the accepted standard in society to merit criminal responsibility, and *how* this standard is to be applied. This section provides an evaluation of the various theories of culpability in criminal law.

⁶⁸ D Baker, *Glanville Williams Textbook of criminal law* (4th edn, Sweet & Maxwell 2015) 200.

⁶⁹ It is not enough that D's conduct was negligent to be causally relevant, the result harm must also be one that was reasonably foreseeable at the time D acted/omitted to act.

⁷⁰ Negligence refers to conduct that does not conform to what would be expected of a reasonable person. Thus, a person is negligent if he is not able to comply with an objective standard of behaviour set by the law. Negligence is currently criminalised in various contexts. For example, gross negligence manslaughter, see: *R v Adomako* [1994] UKHL 6; and careless driving, see: Road Traffic Act 1988, s. 3. Although both of these offences use negligence as the fault basis for culpability, the standard by which D's conduct is measured is significantly different. For careless driving it is driving that falls below what would be expected of a competent and careful driver; for gross negligence manslaughter it is whether the breach of duty was, in all the circumstances, so reprehensible and fell so far below the standards to be expected of a person in the defendant's position with his qualifications, experience and responsibilities that it amounted to a crime.

4.1 Capacity-theory

The dominant way of looking at criminal responsibility in England and Wales is based on human capacity. More specifically, the normative demands of criminal law are only answerable by agents for specific actions that have been *chosen* by D.⁷¹ The choice of D turns on his knowledge of the circumstances, assessment of circumstance, and volition. The capacity theory states that D should only be responsible for the consequences of his actions (E) if he chose to bring E about in two ways (1) intentionally and deliberately acting to bring about E, or (2) acting with the awareness or knowledge that he may bring E about. It has been held that ‘the general basis of criminal responsibility is the power of choice involved in the axiomatic freedom of the human will.’⁷² This approach to culpability typically surfaces in the mens rea requirements of offences, whereby a subjective mental state (intention, recklessness, or foresight of consequences) on the part of the defendant is required to secure a conviction and ascribe responsibility.

Adopting this theory of culpability offers several advantages – (1) it explains defences such as duress and self-defence, where although he chose to act as he did, he is not (legally or morally) responsible for that choice; (2) it has the advantage of offering a legitimate theory of culpability is that independent of any evaluation of the relevant conduct. It is a question of fact as to whether D possessed the requisite intention or subjective recklessness pertinent to the offence;⁷³ (3) Capacity theory enables the basic moral intuition that it is only legitimate to hold people criminally responsible for things that they had the capacity to avoid to be fulfilled – either through (subjective) choice-theory or the doctrine of fair

⁷¹ Determining the meaning of ‘choice’ for the ascription of responsibility is outside the ambit of this thesis. Most would argue that *choosing* requires D to exercise their free will. For Duff, free will requires the ‘the capacity for choice...and of choice as a rational capacity which manifests our freedom as responsible agents’. See: RA Duff, *Criminal Attempts* (Oxford: Clarendon Press 1997) 150. Based on this analysis, this would mean that some exculpatory defences would be definitional, and not supervening defences. For example, if D acts under duress by threats, they would be exculpated as D is not *choosing* to act. They do not possess free will with respect to their actions. This, however, is once more beyond the scope of this research.

⁷² *DPP v Lynch* [1975] AC 653, 689 (Lord Simon).

⁷³ Both Norrie and Lacey offer this explanation for the progress and preference for a theory of culpability that is based on the capacity of the defendant. See: A Norrie, *Crime, Reason and History* (3rd edn, CUP 2014) 123 (hereafter *CRH*) and N Lacey, ‘In search of the responsible subject: History, philosophy and criminal law theory’ (2001) 64 MLR 350.

opportunity.⁷⁴ Choice theory, as advocated by Williams,⁷⁵ realises the importance of human capacity through the proof of subjective choice – intention, awareness, and knowledge. This thesis, therefore, adopts a capacity-based approach to culpability based on fair opportunity.⁷⁶ Such a position asks whether D had a fair opportunity to conform their behaviour to the demands of the law. If D did have a fair opportunity and continued, his (unlawful) conduct is open to criticism for falling below the normative standard. This position explains and legitimises not only subjective forms of fault, but also the objective standards of liability – negligence, strict liability, and defences that comprise of a reasonableness criterion.

Both Norrie⁷⁷ and Lacey⁷⁸ argue that Hart's variant of capacity theory more closely maps and rationalises the shape and structure of the criminal law. However, both writers also concede that in doing so, it makes the admission that criminal trials are, therefore, normative evaluations of D's conduct, and not a neutral, factual question. As Lacey writes, 'Did D do these things in circumstances in which we would say that they had a fair opportunity to avoid them?'⁷⁹ This question can be answered by looking at either the (a) intention, (b) recklessness, or (c) indifference or omission to avert risk. It is (c) that would explain and justify much of the criminal law that concerns itself with regulatory-type offences. This objective assessment of whether D has the capacities of a reasonable person would allow for the evaluation of D's conduct to be relative to the prevailing social norms and socially pervasive reactive attitudes of society.⁸⁰ This means that the question is now, 'What prevailing social norms judge us to have had a fair opportunity to help or choose?'⁸¹ It is this version of Hart's fair opportunity theory that more closely maps the criminal responsibility doctrines against the aims of functions of the criminal law.

⁷⁴ N Lacey, 'Space, time and function: intersecting principles of responsibility across the terrain of criminal justice' (2007) 1 *Crim Law & Phil* 233, 237.

⁷⁵ G Williams, *Textbook of criminal law* (2nd edn, London: Sweet & Maxwell 1983).

⁷⁶ Hart, *Punishment and Responsibility* (n 3).

⁷⁷ Norrie, *CRH* (n 73).

⁷⁸ Lacey, 'Space, time and function' (n 74) 237.

⁷⁹ Lacey, 'Space, time and function' (n 74) 237.

⁸⁰ P Strawson, 'Freedom and resentment' in G Watson (ed), *Free Will* (OUP 1982).

⁸¹ Lacey, 'Space, time and function' (n 74) 237

Herring argues that capacity-theories fails to take into account a large section of the criminal law that does not require the choice of D to be at the forefront of the enquiry – namely, negligence and strict-based offences.⁸² Second, this approach is concerned with making a moral judgement of D, and we may wish to look at other factors such as their motive, attitudes, and character to determine responsibility. If criminal responsibility is looked at as a multi-layered accumulation of the various paradigms of responsibility, with different accounts taking centre stage at different periods in time, then this ceases to become an issue. The law can look at the choice of D when it comes to establishing the culpability of D, as well as other considerations pre-trial procedure, admissibility of character evidence, and in sentencing guidelines.⁸³ The approach offered by Hart, the doctrine of fair opportunity, is used to explain why we state that D causes E in the criminal law in this thesis. This doctrine is looked at in more depth subsequently in this chapter. Before this, the following section outlines the two other prevailing views of criminal responsibility. In doing so, the subsequent sections argue they are unsuitable as a criterion for criminal causation.

4.2 Character-theory

Character-theory argues that if D's action indicates a character trait that is either unacceptable or undesirable according to the standards expected by the criminal law and deserves to be responsible for E.⁸⁴ The argument presented is that if D does not possess or reveal bad character traits, then there is no reason to punish. It is important to note that the criminal law will only consider inferences of bad character from conduct that is prohibited. Therefore, this approach to responsibility is based on D's faulty character choices. The guise in which character theory has been presented is varied. For example, Bayles offers a Humean account that explains criminal responsibility more generally.⁸⁵ However, Gardner presents an Aristotelian account of character-theory to explain defences in criminal law.

⁸² See: J Herring, *Criminal Law* (11th edn, Palgrave 2019) 8. Within this approach, the variant offered by HLA Hart can resolve the issue of negligence and strict-based offences. Hart suggested that this is possible where D had the fair opportunity to act otherwise.

⁸³ See: N Lacey, *In Search of Criminal Responsibility: Ideas, Interests, and Institutions* (OUP 2016).

⁸⁴ See: P Arenella, 'Character, Choice and Moral Agency: The Relevance of Character to Our Moral Culpability Judgments' (1990) 7 *Social Philosophy and Policy* 59. Arenella argues that the criminal law must concern aspects of the agent's character – his goals, desires, values, emotions, and perceptions of what courses of action are available to him – that motivate his rational choices.

⁸⁵ M Bayles, 'Character, purpose and criminal responsibility' (1982) 1 *Law & Phil* 5.

Gardner's view is that defences are concepts that prevent us from being criminally responsible for things that are out of our character.⁸⁶ Lacey⁸⁷ and Tadros⁸⁸ have also adopted such an approach to criminal responsibility. Duff has criticised the extreme variants of character-theory as being unacceptable because it allows people to be responsible for conduct that they did not have the fair opportunity or choice to act otherwise.⁸⁹ There have been attempts to reconcile both character and capacity based theories, whereby the criminal law holds people responsible for disclosing bad character by engaging the capacity-based agency of individuals.⁹⁰

Character-theory can be looked at in two distinct ways; (1) overall-character principle, and (2) cautious-character principle. The first, option (1) overall-character principle of responsibility, is the more radical of the two. The principle states that criminal responsibility is ascribed to those individuals whose conduct evidences an undesirable character trait that is not conducive or valued in society. These may be characteristics such as disregard for human life, lack of respect for personal and property rights. Once a value judgment has been made as to D's conduct, the criminal law then seeks to stigmatise and label them as such. On this view, it accounts for one of the underlying rationales for punishment – the removal of bad or anti-social character from the rest of society.

At the other end of the spectrum, there is an option (2), cautious-character responsibility, which restricts the analysis of D's conduct that forms the subject of the present offence or enquiry. As Lacey writes, 'does D's conduct in causing P's death or having sexual intercourse with P express a settled disposition of hostility or indifference to the relevant norm of criminal law, or at least acceptance of such a disposition?'⁹¹ Similarly, Tadros would ask whether D's conduct as a moral agent displays the sort of vice which calls for the criminal law's communicative role of expressing moral indignation to be invoked.⁹² This more cautious approach to character-theory offers the advantage of explaining some

⁸⁶ J Gardner, 'The gist of excuses' (1998) 1 Buffalo Criminal Law Review 575.

⁸⁷ N Lacey, *State Punishment: Political Principles and Community Values* (Routledge 1998).

⁸⁸ Tadros, *Criminal Responsibility* (n 41).

⁸⁹ RA Duff, 'Virtue, vice and criminal liability: Do we want an Aristotelian criminal law?' (2002) 6 Buffalo Criminal Law Review 147.

⁹⁰ See: Tadros, *Criminal Responsibility* (n 41) chapters 2 and 5.

⁹¹ Lacey, 'Space, time and function' (n 74) 239.

⁹² Tadros, *Criminal Responsibility* (n 41) chapters 2 and 3.

defences (duress, self-defence, loss of control) while preserving the corner-stone of criminal liability – an appreciation of whether D was a moral agent who is held responsible according to their mental state, belief, knowledge, and desires.

Character-theory is rejected as being unsuitable for use within the causation doctrines for two principal reasons. First, as Duff recognises, the extreme variants of character-theory are unacceptable as they permit individuals to be responsible for conduct they did not have the fair opportunity to avoid.⁹³ This is an essential requirement within causation as D's conduct, in causing the prohibited result, must be open to criticism to be causally significant. If D could not have done otherwise, like the D in *R v Hughes*,⁹⁴ causation is unlikely to be established. Additionally, the more cautious approaches to character-theory do not allow reasonableness to enter into the assessment of D's conduct in causing the resulting harm. As evidenced by the above analysis in this thesis, the inclusion of reasonableness (to accommodate a legally deregulated zone) is a prerequisite to establishing causation in criminal law.

4.3 Outcome-theory

Moving from character-theory, outcome-theory asserts that the criminal law is concerned with, and focuses on, what D did and not the mental state of D when he committed the act bringing about E. This position has been presented by Honoré, who stated that it was merely the cause of a particular outcome that provided sufficient grounds for the attribution of criminal responsibility.⁹⁵ The rationale for criminalising a purely objective standard is that it is necessary to have minimum standards of conduct, which are to be met by every citizen, and this should not be varied depending on the individual.

This form of responsibility is particularly true of strict liability offences but may struggle to rationalise other criminal offences that place the mental state of D at the forefront. Honoré argued, contrary to Hart,⁹⁶ that you could be criminally responsible for conduct even if D did not have the fair opportunity to act otherwise.⁹⁷ The central premise for this rationale was his view that causing events (E) to occur

⁹³ RA Duff, 'Virtue, vice and criminal liability: Do we want an Aristotelian criminal law?' (n 89).

⁹⁴ (n 32).

⁹⁵ AM Honoré, 'Responsibility and Luck: The Moral Basis of Strict Liability' (1988) 104 LQR 530.

⁹⁶ Hart, *Punishment and Responsibility* (n 3).

⁹⁷ Honoré, 'Responsibility and Luck' (n 95).

in every-day life is part and parcel of our identity as human beings. Although, our relationship to intended and unintended consequences are different, where both result in harmful outcomes, they are to be criminalised when taking this approach to criminalisation. Opponents of this position raise two primary aims (1) that it may produce unfair results if D cannot meet the minimum standards required, and (2) that the censure of criminal conviction should only be appropriate if D is to be morally blameworthy for E, assessed by their state of mind in causing E.

Outcome-theory is, similar to character-theory, rejected for use within this thesis. If this position were adopted, then D acts at his peril as he does not know which consequences will be ascribed to him when deciding if at all, to act. Even if D acts with the necessary level of due diligence and care and does not foresee any specific harm resulting from his conduct, he may not choose to act because unforeseeable harm may still be attributed to him. Therefore, the protection of those that may be harmed is secured at the cost of D's liberty. This position is undesirable and not reflective of the current doctrinal landscape on criminal causation.

4.4 Capacity and choice

This thesis, based on the above analysis, therefore uses a capacity-based approach to establish responsibility for resulting harms in criminal law. Hart, in *Punishment and Responsibility*,⁹⁸ offered a variant of capacity-based responsibility with his doctrine of fair opportunity based on *choice*. Although Hart is often cited as the first to propose this idea, Bentham claimed that we should not punish an individual who did not have the fair opportunity to conform his conduct to the law's demands.⁹⁹ In defending, and indeed advancing, Bentham's theory of retributivism, Hart proposes the fair choice theory of responsibility that is adopted in this thesis.¹⁰⁰ Hart claims that we ought not to punish those who do not have a fair opportunity to conform their behaviour to the demands required by the law.¹⁰¹

⁹⁸ Hart, *Punishment and Responsibility* (n 3).

⁹⁹ J Bentham, "An introduction to the Principles of Morals and Legislation" in W Harrison (ed), *A Fragment of Government with an Introduction to the Principles of Morals and Legislation* (Oxford: Clarendon Press 1960) 284.

¹⁰⁰ Hart, *Punishment and Responsibility* (n 3).

¹⁰¹ Hart's writing on this doctrine was an attempt to provide a unified theory of excuses as he was concerned with explaining the defences available in criminal law and the notion of voluntariness if they are invoked by the defendant.

The argument presented here argues that D does not cause E if D did not have the fair opportunity to avoid unlawful conduct, and (E) was not reasonably foreseeable. This analysis is an extension of Hart's position, as he is concerned with D's responsibility more generally. Hart argues that it is inappropriate to hold D criminally responsible for their conduct if they did not have the fair opportunity to do otherwise. This position explains, for example, defences such as self-defence and duress where D is said to have not been able to fairly chose his actions (or do otherwise).¹⁰² The normative argument presented by Hart in defence of this position is two-fold:

First, the individual has an option between obeying or paying. [...] Secondly, this system not only enables individuals to exercise this choice but increases the power of individuals to identify beforehand periods when the law's punishments will not interfere with them and to plan their lives accordingly.¹⁰³

This argument enables Hart to develop a theory of responsibility where the criminal law operates as a choosing system. This position is attractive as those who do not have the reasonable opportunity to conform to the law are not made to suffer any adverse consequences – namely, punishment. This approach is one which is familiar with proponents of utilitarianism, whereby the criminal law is simply an instrument for the benefits and burdens in society.¹⁰⁴ This also explains why strict choice or character theories are undesirable for causation in criminal law.

Hart's 'negative retributive'¹⁰⁵ fair choice principle of responsibility is the cornerstone of the criminal law's general part. Most theories of criminal responsibility require that the defendant either (1) intentionally or deliberately acting to bring about E, or (2) acting with the awareness or knowledge that he may bring E about. The main feature of Hart's theory, which is particularly useful for the account

¹⁰² For example, if A threatens to inflict serious bodily harm upon D unless he performs *x* against another, D does not have the fair-opportunity to act otherwise. It is possible, therefore, to state that D should be *excused* of any harm inflicted by D, up until the level of death. On this point, duress is commonly regarded as being the quintessential excuse – a concession to human frailty. Indeed, this defence was recently endorsed in such terms in the House of Lords in *R v Hasan* [2005] UKHL 22. It does indeed operate in the realm of excuses, which is to say that we would make D a subject of praise was he to resist the coercion and merely excuse him were he to submit to the pressure.

¹⁰³ Hart, *Punishment and Responsibility* (n 3) 23.

¹⁰⁴ For a general discussion on Hart's theory of responsibility see: M Thorburn, 'The Radical Orthodoxy of Hart's *Punishment and Responsibility*' in M Dubber (ed), *Foundational Texts in Modern Criminal Law* (OUP 2014).

¹⁰⁵ The term 'negative retributivism' has been used as genuine retributivism is concerned with the reasons in favour of punishment, however, Hart's model is concerned with the reasons against punishment.

presented here, is that it incorporates and defends the fault standard of culpable negligence in the criminal law. If people have the fair opportunity to conform their conduct to the criminal law's demands, it should not matter that they do so by indifference rather than by direct intention – where it is their aim or purpose to bring about an expressly prohibited result.¹⁰⁶ This analysis is particularly critical when looking at causation because at present the criminal law can ascribe causal responsibility to D even if they did not have the foresight that their conduct would cause any particular result. Hart incorporated negligence as a ground of liability, not on an objective, external, and impersonal standard that ignores D's capacity, but rather that punishment is only proper if the following two questions are answered in the affirmative:

- 1) Did the accused fail to take those precautions which any reasonable man with normal capacities would in the circumstances have taken?
- 2) Could the accused, given his mental and physical capacities, have taken those precautions?¹⁰⁷

This is Hart's two-part test for culpable negligence. These are called the 'invariant standard of care' and the 'individualised standard of care', respectively. This means that D should be responsible if the aspect of D's act that made them (culpably) negligent caused the harm, and given his or her mental capabilities, he or she had the capacity to avoid the harm. This position is particularly attractive since it ensures that D is treated as a rational being with capacity and autonomy. There are, however, some problems with Hart's account that need addressing before it can be utilised in causation. The primary issue with this theory is that it does not elucidate which of D's attributes and characteristics are relevant to capacity. For example, could (and should) D's low intelligence, alcoholism, or psychological conditions affect their capacity to appreciate risk? Perhaps all of these are (or should be) relevant to the enquiry. If D knew that they were acting carelessly, despite such attributes, this could show that they were acting with agency and therefore subject to criminal sanction.

¹⁰⁶ Hart, *Punishment and Responsibility* (n 3) 37. This account of criminal responsibility, especially with respect to negligent fault has been embraced by many criminal law theorists. See: M Moore, *Placing Blame: A General Theory of Criminal Law* (1997) 29; and, G Fletcher, *The Basic Concepts of Criminal Law* (OUP 1998) 11.

¹⁰⁷ Hart, *Punishment and Responsibility* (n 3) 152-157.

Hart does very little in the way of defining the boundary of capacity.¹⁰⁸ He writes that it is only gross forms of incapacity that could be demonstrated in practice as evidencing when D does not possess capacity,¹⁰⁹ and it is unlikely that there is a consensus on what amounts to incapacity due to the value pluralism in modern society.¹¹⁰ What is more, Hart does not distinguish between circumstances pertaining to the *situation*, and those relating to the *actor*. If the invariant standard of care becomes infused with both D's personal and situational circumstances, D's conduct will never diverge from the reasonable person's since they become the same. However, the jewel of Hart's doctrine is that he can ask whether D could have done better in the circumstances, and this ought to be protected. It allows for an objective assessment of D's conduct without compromising the focus on choice.

Although this theory does suffer from a lack of precise definition, this can be resolved with some minor modification. First, a distinction is to be drawn between circumstances relating to D's *situation*, and those relating to D, the *actor*. For example, the invariant standard of care requires the jury to determine whether a (moderately) reasonable person in D's situational circumstances could have done otherwise. Second, the individualised standard of care becomes infused with attributes relating to D, giving deference to D's attributes other than those whose only relevance to D's conduct is that they bear on D's general capacity to appreciate risk. Therefore, attributes such as low intelligence are relevant, but voluntary intoxication not. Thus, the jewel of Hart's doctrine, therefore, is that he can ask whether D could have done better in the circumstances. It allows for an objective assessment of D's culpability in causing the resulting harm without compromising the focus of choice. Although this theory does, in part, suffer from lack of precise definition, this is resolvable by using the jury to set the normative standard. This requirement provides a useful starting point for determining whether D legally causes a prohibited result. However, establishing whether D culpably caused the resulting harm is only a necessary, but not sufficient, criterion of legal causation.

¹⁰⁸ For an excellent discussion of this point, see: SH Pillsbury, 'The Meaning of Deserved Punishment: An Essay on Choice, Character, and Responsibility' (1992) 67 *Indiana Law Journal* 719, 748.

¹⁰⁹ Hart, *Punishment and Responsibility* (n 3) 155.

¹¹⁰ Lacey, *State Punishment* (n 87) 65.

In summary, to hold D responsible for resulting harm, D's conduct must be culpably negligent, and the aspect of D's conduct that made D negligent must cause the resulting harm. This is looked at by applying the invariant and individualised standard of care to determine whether D *voluntarily* caused the resulting harm. While the jury must establish that D's conduct was culpably negligent, it is also essential to limit such a wide-reaching principle. Without additional criteria, D can be held responsible for unforeseeable harm. The next section develops the account presented thus far and argues that unless the resulting harm was a reasonably foreseeable consequence of D's unlawful, culpably performed, conduct, it is not justifiable to establish causation.

5. Reasonable foresight

This chapter has thus far argued that for D to be responsible for causing resulting harm, it is essential to ask whether the aspect of D's act that made D culpably negligent caused the harm. However, this analysis of causation only takes us so far. Without further refinement, the threshold for establishing responsibility is set too low; D is responsible for all resulting harms which D could have avoided, and not acting otherwise was negligent. It is necessary, therefore, to provide a limiting criterion of causation. This limitation is achieved through the inclusion of a reasonable foreseeability criterion. This chapter argues that if the harm consequent to D's voluntary conduct was not reasonably foreseeable, causation is not established. It is necessary to focus on reasonably foreseeable responses for four reasons. First, it acts as a limiting principle, without which an individual would be responsible for all the responses that flow from their actions and causation would not have limits. Second, it injects flexible and objective fairness within the doctrine. If D is held criminally responsible for a response which was not reasonably foreseeable, then the protection of those that may be harmed is secured at the cost of D's liberty. Third, there is an inability to gain deterrence by imposing criminal sanctions upon those actors since the threat value is customarily thought to be non-existent for unforeseeable harms. Finally, it justifies and explains the well-established *novus actus* principles in causation. This section addresses the second limb of the proposed model of causation; foreseeability as to the risk of harm.

To see the importance of foreseeability in causation, take the following example: D punches V and V falls to the ground. D walks away from the scene, leaving V on the ground. V, now unconscious,

remains outside overnight. Due to the cold weather, V dies of exposure some time during the night. D may be subject to two criminal charges following V's death; gross negligence manslaughter¹¹¹ or constructive manslaughter.¹¹² Causation is principally an issue if D intended *only* to inflict unlawful force and was (say) reckless as to causing actual or grievous bodily harm. This is because, as per the discussion above, causation has to do more 'work' since D does not act with mens rea corresponding to the final result. If, however, D intended to kill or cause serious bodily harm to V, causation may be established more easily. In such circumstances, it would be necessary to establish that D intended to kill, or seriously harm, V by punching them; a coincidental route involving natural events does not typically relieve a prior actor of causal responsibility.¹¹³ Thus, it is not because intended consequences are too remote; D's conduct must remain salient in causing the resulting harm. Irrespective of either charge, it must be satisfied that D caused death.

Using the proposed model of culpable causation above, if D satisfies the invariant and individualised standard of care, D can be said to have negligently caused V's death – D voluntarily punched V, and in causing death, D's conduct is open to criticism. However, it is necessary to consider whether D *should* be causally responsible for this specific resulting harm. This section argues that foreseeability as to the risk of harm, implemented using the criterion of reasonable foresight, acts a limitation on an otherwise over-inclusive principle. If in punching V, it was reasonably foreseeable that V would die of exposure

¹¹¹ The offence of gross negligence manslaughter is committed where the death is a result of a grossly negligent (though otherwise lawful) act or omission on the part of the defendant. See: *R v Adomako* [1994] UKHL 6. The critical ingredients of gross negligence manslaughter can be summarised as being the breach of an existing duty of care which it is reasonably foreseeable gives rise to a serious and obvious risk of death and does, in fact, cause death in circumstances where, having regard to the risk of death, the conduct of the defendant was so bad in all the circumstances as to amount to a criminal act or omission. Therefore, D may be duty-bound in this situation following the creation of a dangerous situation, per *R v Miller* [1983] 2 AC 161; *R v Evans (Gemma)* [2009] EWCA Crim 650.

¹¹² The offence is made out if it is proved that the accused intentionally did an unlawful and dangerous act from which death inadvertently resulted. Constructive manslaughter requires proof that the defendant committed a relevant crime, with the mens rea for that crime. The unlawful act must therefore be criminal in nature and must also be dangerous, see: *R v Larkin* [1943] KB 174. In judging whether the act was dangerous the test is not did the accused recognise that it was dangerous but would all sober and reasonable people recognise its danger. The jury has to decide whether D's unlawful act exposed V to the risk of "some" harm, see: *R v Church* [1966] 1 QB 59. However, in the example above, the prosecution must establish that the unlawful act was a cause of the death without an intervening act to break the chain of causation, see: *R v Lewis* [2010] EWCA Crim 151. It is this issue that is most problematic and subject to indeterminacy.

¹¹³ See: *R v Michael* (n 27). The view that intended consequences are never too remote has been adopted by Moore, see: Moore, *Causation and Responsibility* (n 35) 230. This position, however, has been rejected in this thesis since it adopts a metaphysical understanding of causation in criminal law. See: chapter four.

from being unconscious and outside overnight, causation can be established without impinging on D's liberty. If, however, the resulting harm was too remote, D should not be answerable for the subsequent death of V. In this specific example, D's responsibility would, therefore, turn on whether the cold weather was normal or abnormal, or foreseeable or unforeseeable. If D punched V in the middle of a cold winter's night, death from exposure is likely to be reasonably foreseeable. If, however, it was the middle of the summer and the cold weather occurred abnormally, V's death is less likely to be reasonably foreseeable.

Foreseeability has long been utilised in this way to limit responsibility.¹¹⁴ Roughly stated, it is mostly accurate that 'a defendant is responsible for and only for such harm as he could reasonably have foreseen and prevented'.¹¹⁵ The rationale for this is that it holds an individual responsible for consequences which he reasonably ought to contemplate when deciding whether and how to act, which in turn helps define interpersonal obligations, personal wrongdoing, and the parameters of responsibility in the criminal law.¹¹⁶ The law ascribes responsibility for causing a prohibited result by evaluating the person's *capacity* and *choice* to act in a harmful way,¹¹⁷ in circumstances where they had the fair opportunity to do otherwise,¹¹⁸ and for consequences which are the reasonably foreseeable consequences of their actions.¹¹⁹ The inclusion of reasonableness modifies the requirement of foreseeability from the subjective and injects the concept with flexible and objective fairness.¹²⁰ It also

¹¹⁴ Edgerton, advancing this view, writes that, 'Except only the defendant's intention to produce a given result, no other consideration has affected our feeling that that it is or is not just to hold him for the result so much as its foreseeability; and no other consideration so largely influences the courts.' See: H Edgerton, 'Legal Cause: II' (1924) 72 *University of Pennsylvania Law Review* 343, 352.

¹¹⁵ HLA Hart and AM Honoré, *Causation in the Law* (2nd edn, Oxford: Clarendon Press 1985) 255 (hereafter *CIL*).

¹¹⁶ It is because humans are autonomous beings, able to make choices concerning alternative goals, and capable of contemplating the effects of their actions, that a society may judge the quality of the person's unlawful conduct that results in a prohibited harm.

¹¹⁷ Choices are fundamental to personhood. When choices are combined with the person's will, those choices are that person. See: J Finnis, *Natural Law and Natural Rights* (2nd edn, OUP 2011) 337-341. Finnis examines the views of Aquinas and others on the relation to decisions to act and human will.

¹¹⁸ See: Hart, *Punishment and Responsibility* (n 3).

¹¹⁹ The Kantian position is that the person 'owns' the harmful consequences of their unlawful conduct. See the 'reciprocity' conception of responsibility that links doers and sufferers of harm in A Ripstein, 'Justice and Responsibility' (2004) 17 *Canadian Journal of Law and Jurisprudence* 361, 374.

¹²⁰ The importance of objectivity within the causation doctrines has been explained previously in this thesis. Chapter two, using the jurisprudence of Dworkin and Gardner, explains that D can only be held to have legally caused a resulting harm if the jury reach such a conclusion after evaluating D's conduct with normatively sensitive criteria.

allows the criteria of causation to enter into this normative assessment, based on socio-political considerations, morality, and the mischief of the (relevant) legal rules. This chapter defends the position that unless, at the time of acting, E was a reasonably foreseeable consequence of D's action - D does not legally cause E.¹²¹ It is necessary to expound this claim further.

The appeal to foreseeability, in place of other policy considerations, is due to the factual nature of the test, and that it is not left to the choice of the trial judge or arbitrary rules of law.¹²² Indeed, outside of the law (in everyday language) the fact that harm was not foreseeable is frequently an important consideration when blaming another for its occurrence. Therefore, it is not surprising that foreseeability is often invoked to ascribe responsibility in criminal law. It represents a broader principle of responsibility than only causing harm or providing others with the opportunity to harm. There is legal analysis offering support for this principle. For example, in *R v Roberts*¹²³ D attempted to assault V in a car that he was driving. D verbally indicated that he intended to assault V sexually and that he has previously done so to other victims. V jumped out of the moving car in an attempt to escape such assault and suffered bodily injuries. The question before the court was whether D legally caused V's injuries. The court held that D must answer for V's injuries in so far as her actions were the reasonably foreseeable consequence of his actions. Stephenson LJ provided the following test of reasonable foreseeability:

The test is: Was it the natural result of what the alleged assailant said and did, in the sense that it was something that could reasonably have been foreseen as the consequence of what he was saying or doing? As it was put in one of the old cases, it had got to be shown to be his act, and if of course the victim does something so "daft," in the words of the appellant in this case, or so unexpected, not not that this particular assailant did not actually foresee it but that no reasonable man could be expected to foresee it, then it is only in a very remote and unreal sense a consequence of his assault, it is really occasioned by a voluntary act on the part of the victim which could not reasonably be foreseen and which breaks the chain of causation between the assault and the harm or injury.¹²⁴

¹²¹ It is important to note, that for the purposes of this chapter, the criterion of reasonable foresight assumes that there is no dispute as to whether the accused's actions were a more than negligible cause of E, and in all cases, D's connection to E is connected in a straightforward application of such a test. If there is an intervening event between D's unlawful conduct and the resulting harm, the test of reasonable foresight must be modified. It is this that forms the substance of the subsequent chapter of this thesis.

¹²² See: Hart and Honoré, *CIL* (n 115) 97-98, 254.

¹²³ (1971) 56 Crim App R 95.

¹²⁴ *R v Roberts* (n 123) 102.

In this case, the court held that D could have reasonably foreseen that V might have, in response to D's threats of sexual assault, jumped out of the moving car. Therefore, D caused E; that is, V's injuries. The court also required D's conduct to be a significant and operating cause of V's harm. However, the emphasis here is on the criterion of foreseeability as to the risk of harm. Klimchuck has argued that focusing on foreseeability in causation gives rise to a powerful moral intuition that it is unfair to ask an individual to answer for those consequences of their actions we could not reasonably have expected them to contemplate when deciding how to act or not act.¹²⁵ This position is attractive and efficacious, with the requirement that D must have been able to reasonably foresee the consequences of his actions offering both public and objective benefits. First, it provides the public benefit of providing a method by which individuals in society can guide their actions. If E is a reasonably foreseeable consequence of D's action, and E is harm to another, then D acts with the knowledge that he may be legally responsible for the outcome. Second, it offers an objective form of liability, based on foresight, to prevent individuals from measuring the rightness or wrongness in terms of their judgement.¹²⁶ This yardstick prevents the views of the irrational or ignorant from providing a defence.¹²⁷

Furthermore, since foresight of risk is inferred from the circumstances, it is necessary to ensure that the distinction between causation and mens rea remain distinct requirements of criminal liability. If these were to become conflated, it would mean that D may be responsible for consequences that they *could* not have ever foreseen. The rationale for this is that if a risk were so apparent that any ordinary person would have appreciated it, the accused would have difficulty convincing the court that they were, in

¹²⁵ Klimchuck, 'Causation, Thin Skulls and Equality' (n 9) 128.

¹²⁶ It is important to note that the focus on reasonably foreseeable consequences does not enable an individual (D) to escape responsibility for a resulting harm which is the result of the victim's thin skull. If V is suffering from a physical or psychological thin skull, then the question then becomes, 'is the resulting harm a reasonably foreseeable consequence of D's unlawful conduct, taking into account any of the V's physical and psychological conditions. D must take his victim as he finds her. See: *R v Blaue* [1975] 3 All ER 446, 450. However, this rule does not apply to actions by the victim. When V contributes to the resulting harm because of their own actions or inactions, it is necessary to establish whether their response to such harm was voluntary. For a further discussion of this point, see: chapter six.

¹²⁷ The account of causation offered in this thesis adopts utilises a both an objective and subjective approach to responsibility. It is important to begin with an objectivist approach, realised through the concept of reasonableness, to promote equality amongst (acting) individuals within society. See: Rawls, *Political Liberalism* (n 16) 48. This Rawlsian position was advanced and defended at the start of this chapter. Also see chapter two for a critical discussion of the necessary use of the reasonable man to find the 'right answer' and set the standard by which D's conduct is to be measured.

fact, unaware of it; and thus, reckless or intentional in causing the result. However, D's claim that they were *unable* to foresee the risk is irrelevant to causation. For example, if D was a minor with low intelligence,¹²⁸ then their appreciation of risk is going to be significantly lower to that of (say) a thirty-year-old competent adult. However, if D was a minor with low intelligence, these characteristics *may* prevent them from having the capacity to avoid the harm in the first limb of this test; thus, not being subjectively negligent. If they did have the capacity to do otherwise, but could not have ever foreseen the result occurring, D will be saved of liability by the mens rea principles.

The inclusion of this feature in the doctrine enables the jury to make an explicitly normative assessment of D's conduct.¹²⁹ This assessment already takes place within the criminal law and is overtly visible in two areas of causation – intervening events and omissions. Whether the subsequent action of a third party relieves D of responsibility is ultimately a normative consideration and involves an evaluation of both D and the third-party's conduct. This normative evaluation can be seen in *R v Williams and Davis*.¹³⁰ The facts of the case are that two defendants offered a lift to a hitchhiker on the side of the road. Once V had got into the car, both defendants allegedly attempted to rob him of his possessions. To avoid robbery V jumped from the moving car, sustaining significant head injuries and later died.¹³¹ The issue, of both practical and theoretical significance, is whether D is causally responsible for the death of V. In answering this question, the jury performs a normative evaluation of both D's conduct and V's response to the situation.¹³²

This case identifies essential principles that are relevant in determining whether D caused V's death. The first legal requirement is that if D's conduct is a 'significant' and 'operative' cause of the result, D is legally responsible for the resulting harm. As per the discussion above, this baseline does not

¹²⁸ See: *Elliott v C (A Minor)* [1983] 1 WLR 939.

¹²⁹ It is necessary to rely on the concept on reasonableness as the starting point in criminal causation to ensure that there is not a 'causation without limits' approach to responsibility. First, the jury are asked whether E was a reasonably foreseeable consequence of D's action, C. This approach accommodates the Rawlsian notion of equality and maintains D's liberty as an acting member of society. See: Simester and Sullivan, 'Causation without Limits' (n 2) 776.

¹³⁰ [1992] 2 All ER 183.

¹³¹ This case is factually similar to that of *R v Roberts* (n 123).

¹³² There are other considerations of relevance here, such as whether V's response was foreseeable to D. However, the issue of foreseeability and mental states is looked at subsequently and is not the focus of this section.

explicitly articulate how causal responsibility is to be ascribed. Indeed, this question cannot be looked at without also considering the actions of V. D will not be liable if there is a novus actus – that is, if V’s response is of a free, deliberate and informed nature which ‘breaks’ the chain of causation.¹³³ This conclusion would have the effect of rendering D’s contribution as something that is simply part of the background of events. Such a conclusion is drawn because the intervening event provides a better explanation of the resulting harm than that of D’s conduct for legal purposes. For example, in *R v Williams and Davis*,¹³⁴ since V voluntarily responded to the circumstances created by D, the fatal injuries V sustained after jumping out of D’s moving car were not causally attributable to D. In order to establish indirect causation, V must have (reasonably foreseeably) responded non-voluntarily to D’s conduct.¹³⁵ Two principles are drawn from such a sequence of events.

Firstly, if V’s action is a foreseeable act of self-preservation, then D is not relieved of causal responsibility.¹³⁶ Secondly, if V’s response to D’s action is not within a range of responses that are reasonable in the circumstances, D does not legally cause the result.¹³⁷ The two main concepts within these legal rules are foreseeability and reasonableness. The concept of reasonableness within causation affords to the jury the opportunity to perform a normative assessment of D and V’s conduct to determine who is to be held responsible for the resulting harm.¹³⁸ These doctrinal principles are also expressly adopted by the judiciary when directing the jury on matters of causation. The Judicial College provides the following guidance on such directions:

Where D’s conduct set in train a sequence of events leading towards the outcome concerned, but a new act intervened and became the immediate cause of the outcome (e.g. where D’s unlawful act caused V to react in a way which caused his injuries or death), the jury should

¹³³ This is irrespective of foresight. See: *R v Kennedy (No 2)* [2007] UKHL 38. Per the discussions in chapter four, although the term ‘break in the chain’ is commonly used, it is submitted that it is better to simultaneously consider the conduct of all relevant parties using a ‘net’ analogy.

¹³⁴ (n 130).

¹³⁵ The notion of non-voluntary responses is looked at in-depth later on in this chapter.

¹³⁶ Therefore, if such an act is not reasonably foreseeable, D’s contribution is no longer attributed as the cause of the result harm. See: *R v Pagett* (n 66).

¹³⁷ The question for the jury is whether the actions of V were daft or wholly disproportionate to D’s act. See: *R v Roberts* (n 123).

¹³⁸ There are, of course, other factors that are of relevance such as socio-economic factors, but these do not inform the deliberations of the jury directly. These considerations are relevant to the judiciary and policymakers, not the ordinary person.

be directed that before they can treat D's conduct as having caused the outcome concerned, they must be satisfied that:

- (a) A reasonable, ordinary, sensible person, in the circumstances which D knew about at the time of his conduct, could sensibly have foreseen that the new event might follow from his conduct; and
- (b) D's conduct contributed to the outcome in a way that was significant, that is more than trivial.¹³⁹

With these principles, and the directions provided by the Judicial College, there are two substantive considerations. First, there is the question of whether a reasonable person could have foreseen the resulting harm (or subsequent action of another); and second, whether the action of the third party was reasonable.¹⁴⁰ The principle of reasonableness has the effect of allowing the jury to apply normative considerations to the causal enquiry. It is for the jury to evaluate the conduct of D (or the third party) using societal and political norms to determine whether their action/intervention is answerable to the criminal law.¹⁴¹ The reasonableness principle features heavily in criminal causation and is essential in determining whether D causes E.¹⁴²

The normative evaluation that takes place for actions, in the guise of moderate reasonableness, also takes place for omissions. The role of omissions in criminal causation is a subject that has been subject to academic debate.¹⁴³ Some writers argue that omissions are 'nothing', and nothing cannot cause something.¹⁴⁴ This position is not advanced here. It is counterintuitive to argue that omissions have no

¹³⁹ As per the Crown Court Compendium Part 1: Jury and Trial Management and Summing Up (December 2019) <<https://www.judiciary.uk/wp-content/uploads/2016/06/Crown-Court-Compendium-Part-1-December-2019-amended-19.02.20.pdf>> accessed 15 January 2020, 7-33.

¹⁴⁰ A similar approach was taken in *R v Roberts* (n 123). The Court of Appeal held that D would be relieved of liability for V's injury in circumstances where V's actions were 'daft'. This is another illustration of the normative considerations that are at play when determining causal responsibility.

¹⁴¹ The jury are not determining whether D is criminally responsible for the conduct, only the result. With most result crimes, D has committed a separate conduct offence that they can be charged with. For example, in the case of constructive manslaughter. In *R v Kennedy (No 2)* [2007] UKHL 38. D was not criminally responsible for the death of V, but that does not prevent liability for the offence of supplying a class A controlled substance to another in contravention of the Misuse of Drugs Act 1971, s. 4(1).

¹⁴² The relevance of foresight is also integral to a finding of causation. The role of mental states in causation is looked at after the normativity of omissions is evaluated.

¹⁴³ Notably neither Moore nor Thomson would state that omissions can have a moral impact upon the world and can therefore be legal causes of a result harm. See: Moore, 'Causation and Responsibility' (n 37); and JJ Thomson, *The Realm of Rights* (Harvard University Press, 1990) 237-239.

¹⁴⁴ M Moore, *Act and Crime* (Oxford: OUP 1993) 267-278.

place in moral evaluations of the world, nor it is not an accurate reflection of English criminal law.¹⁴⁵ In terms of the judgement of culpability, acts and omissions are not distinguishable.¹⁴⁶ When we identify conduct as the legal cause of something, we are looking for an appropriate explanation of how and why E occurred to attribute responsibility. Appropriate explanations can include states and events, as with result crimes; however, the law also concerns itself with the regularity of the world. When the criminal law imposes specific standards upon individuals (legal duties), the absence of performing such duty provides an adequate explanation of why E occurred. Therefore, if something does not occur, when it regularly would, this may be significant enough to explain the situation in causal terms. Therefore, an omission can legally cause E and is captured by the proposed model of causation in this thesis.

On this point, numerous legal duties are imposed by criminal law upon individuals. Those who are duty-bound are legally required to take reasonable steps to prevent harm from befalling to those they owe the duty. For example, there is an obvious duty of care between parent and child.¹⁴⁷ In *R v Reeves*¹⁴⁸ a mother was charged with the gross negligence manslaughter of her son. D had left her two children unsupervised in a bath for around forty-five minutes. When she went back inside to check on them, both the youngest son had drowned. V died from cerebral hypoxia, cardiac arrest, and immersion. This resulting harm was not because of a physical activity carried out by D, but a gross breach of duty to a helpless child. The criteria of gross negligence manslaughter require that D causes the death of the victim.¹⁴⁹ In this case, the jury found D's failure to prevent harm befalling to her son as the (legal) cause of death. This duty is normatively instilled within our society and significant enough to explain the

¹⁴⁵ For example, in *R v Pittwood* (1902) 19 TLR 37, a gatekeeper of a railway crossing failed to close a gate, allowing a cart to cross the track which was then struck by a train. The driver died as a result of his injuries from the collision. It is normatively, and from the perspective of the law, appropriate to say that the gatekeeper caused the death of the driver. There are also several other situations in which the criminal law punishes those who fail to comply with a duty of care. It would be strange to present an account of criminal causation that cannot accommodate such offences.

¹⁴⁶ Norrie, *CRH* (n 73).

¹⁴⁷ *R v Reeves* [2012] EWCA Crim 2613. Other common categories of duty in which liability may arise are those involving doctor and patient, *R v Adomako* (n 111); employer and employee, *R v Dean* [2002] EWCA Crim 159; landlord and tenant, *R v Harrison* [2011] EWCA Crim 3139; but ultimately the number of categories is limitless and involves duties in a variety of circumstances. See: Ormerod and Laird, *Smith, Hogan, and Ormerod's Criminal Law* (n 24) 636-644.

¹⁴⁸ (n 147).

¹⁴⁹ *R v Adomako* (n 111).

situation in causal terms.¹⁵⁰ However, the criterion of foreseeability also applies in these cases. D's omission, in this case, was salient in bringing about V's death. If, however, D placed the child in the bath unsupervised, but instead, V did not die from drowning, but a congenital heart defect, D's conduct is no longer salient to V's death. Although D's conduct was subjectively negligent, the resulting harm was not reasonably foreseeable; because of this, D is not criminally responsible for V's death.

Stapleton also illustrates the significance of normative considerations in criminal causation and omissions.¹⁵¹ The example offered by her is that of a golfer who wishes to make a negligence claim against a golf course, which provides no weather shelters, for being injured by lightning. Tadros asks, 'if the golf course admits negligence, did it cause the injury through its non-action?'¹⁵² Stapleton responds:

What is really at stake here, given the facts are agreed, is the normative evaluation of whether a golf course should have provided shelters that were resistant to lightning. This is a dispute about responsibility, and it is one which reasonable minds might differ for a variety of moral as well as policy reasons.¹⁵³

While this example is one about tortious causation, the derived principle is still of relevance. The normative evaluation of whether the golf course *should* have provided lightning is not an 'all things considered' evaluation of the goodness or badness of the golf course's conduct. Since it was not the legal responsibility of the golf course to provide the shelters, i.e. duty-bound, it would be inappropriate to state that the golf course (legally) caused the injuries sustained by the golfer. Similarly, in *R v Reeves*,¹⁵⁴ it was not an all things considered evaluation of the mother's conduct that determined whether she was criminally responsible for the death of V. Since D was duty-bound to prevent harm occurring to V, any subsequent harm that V suffers is evaluated based on whether reasonable intervention would have prevented such harm. In this instance, in employing moderate reasonableness,

¹⁵⁰ For an excellent analysis of criminal causation and omissions, see: A Leavens, 'A Causation Approach to Criminal Omissions' (1988) 76 California Law Review 547.

¹⁵¹ J Stapleton, 'Unpacking "Causation"' in P Cane and J Gardner, *Relating to Responsibility: Essays for Tony Honore on his Eightieth Birthday* (Hart 2001). This position is similarly adopted by Tadros. See: Tadros, *Criminal Responsibility* (n 41) 172.

¹⁵² Tadros, *Criminal Responsibility* (n 41) 172.

¹⁵³ Stapleton, 'Unpacking "Causation"' (n 151).

¹⁵⁴ (n 147).

it must be shown that D's conduct was not unreasonable for D to be relieved of responsibility. In this case, the jury determined that D's conduct was unreasonable in the circumstances. Leaving V alone in a bathtub is normatively unacceptable and would be perceived as being unreasonable in the circumstances.¹⁵⁵

The importance placed on the reasonableness criterion in criminal causation demonstrates that normative evaluations are relevant in determining whether D causes E. Therefore, any framework of criminal causation needs to explain how this criterion can be incorporated. The specificity of what these norms concern is an important consideration; however, it is not within the scope of this chapter to address this here.¹⁵⁶ The next section develops the analysis of culpability and foreseeability as to the risk of harm and provides a legal test for establishing legal causation.

6. Establishing culpable causation

This chapter has illustrated that causation is underpinned by both culpability and foreseeability as to the risk of harm. Using culpable negligence in combination with risk of harm provides a theoretical framework upon which criminal causation can apply the various normative considerations employed by the current legal tests. This normative yet practical account provides a place for the jury to evaluate both D's fault and a normative evaluation of their conduct. The fault criterion – culpable negligence, and the normative criterion – (moderately) reasonable foresight achieve this aim. The overarching question is whether D performed an action in circumstances in which they were culpably negligent, and E was a reasonably foreseeable consequence of the unlawful conduct. It is submitted that this is the case if at the time of acting, these questions are each answered in the affirmative:

1. D's conduct made more than a negligible contribution to the harm;
2. D's conduct was culpably negligent. This is established when -

¹⁵⁵ If an 'all things considered' normative assessment of D's conduct was required, then the jury would also consider whether the imposition of the legal duty is correct when making their assessment of D's conduct. This is not the function of the jury in ascribing causal responsibility. The jury make a normative assessment based on D's actions, or omission, to determine whether the result is to be imputed to them.

¹⁵⁶ The specificity of what these norms concern is an important consideration. See: chapter three, which defends the position that D only causes E if D's conduct is normatively unacceptable when D owes moral responsibility to V.

- (a) D failed to take those precautions which any reasonable man with normal capacities would in the circumstances have taken; and
- (b) D, given his mental and physical capacities, could have taken those precautions;
- 3. The aspect of D's conduct that made D negligent caused the harm; and
- 4. The harm was a reasonably foreseeable consequence of D's conduct.

This provides a normative yet practical framework for criminal causation that evaluates both D's conduct, with respect to culpable negligence, and the prohibited result through reasonable foresight. To critically examine the workability of such approach, take the simple scenario where A punches B. If B suffers a broken nose consequent upon A's conduct, determining A's responsibility is relatively straightforward. The criminal law asks three questions of A to determine liability. The first is whether A responsible for their conduct? Second, did A's conduct *cause* the prohibited result? Finally, did A act with the necessary mens rea (as determined by the criminal charge)? The answer to the first question is (usually)¹⁵⁷ unproblematic. If A's conduct was voluntary,¹⁵⁸ the next substantive issue is whether A legally caused B's injuries. This is where the causation doctrines operate.

When applying the test of culpable causation, the first criterion is that A's conduct must have made a more than a negligible contribution – in this situation, this is irrefutable. Second, the conduct (punching B) must be conduct that a reasonable person *in the circumstances* could have avoided. Then, A must have been able to regulate his conduct to this standard. If a reasonable person would not have punched B, in the circumstances, and A *could* have done otherwise, then A satisfies this limb. Then, the aspect of A's conduct that made A negligent must cause the harm. Finally, if a reasonable person could have foreseen B's nose breaking as a result of A's conduct, then A causes B's broken nose. A has culpably caused B's injuries. Now we must ascertain A's culpability for a specific offence through the relevant mens rea requirement.

¹⁵⁷ Cf. The defence of automatism in *Bratty v AG for Northern Ireland* [1963] AC 386 and *Hill v Baxter* [1958] 1 QB 277. It is a fundamental requirement that D cannot be held liable for the occurrence of an actus reus unless he was *responsible* for it. An important consideration in determining whether D is liable for the behaviour element is whether or not D's conduct is *voluntary*.

¹⁵⁸ The importance of voluntary conduct was affirmed by Hart in 'Acts of Will and Responsibility' in *Punishment and Responsibility* (n 3) 90 - 107 where he writes that 'what is missing in these cases [of automatism] appears to most people as a vital link between mind and body; and both the ordinary man and the lawyer might well insist on this by saying that in these cases there is not 'really' a human action at all and certainly nothing for which anyone should be made criminally responsible however 'strict' legal responsibility might be.'

If A was charged with assault occasioning actual bodily harm,¹⁵⁹ then A must have recklessly or intentionally caused B's injuries. This test is distinct and separate from whether A caused the injuries. In this situation, A would likely have seen *some risk* of the harm resulting from their conduct.¹⁶⁰ This is, however, a subjective test and requires the jury to establish whether this threshold has been met.

If, however, instead of B breaking their nose, B falls over and breaks their arm as a result of A's conduct, culpable causation can similarly be used to ascribe responsibility. Per the findings above, if all of the other facts and circumstances remain the same, A would be causally responsible if B's injuries were reasonably foreseeable. Similarly, if B fell awkwardly and hit their head and died; as a result, culpable causation could once more determine A's causal contribution based on reasonable foresight of risk of death.¹⁶¹ Of course, in this latter example, A must also have the corresponding fault element to be liable for either murder or constructive manslaughter. These are, however, uncomplicated cases of causation in criminal law. As per chapter two, causation usually is typically an issue in cases where there is a subsequent actor who also significantly contributes to the resulting harm. In such circumstances, additional factors must be considered.

Take, for example, that B, after being punched to the ground by A, is taken to hospital to treat his injuries. At the hospital, due to the severity of his blood loss, B is advised that he requires a blood transfusion. B, on religious grounds, refuses such treatment. B dies in hospital. Assume that if B had received a transfusion, B would have survived with no adverse effects. Whether A causes B's death in this situation is more difficult to evaluate. It is even more complicated if (say) B commits suicide consequent upon A's unlawful conduct, knowing they would have to refuse a blood transfusion on medical grounds. It is, therefore, the aim of the next chapter of this thesis to ascertain *when* and *why* a

¹⁵⁹ Contrary to the Offences Against the Person Act 1861, s. 47. It is submitted that responsibility for conduct is determined by reference to D's *choice* to act, not whether they had the capacity to act otherwise.

¹⁶⁰ See: *R v Cunningham* (n 8), subjective recklessness is now understood as being the conscious taking of an unjustified risk. If A was voluntarily intoxicated then, *per* Lord Elwyn-Jones, the condition of intoxication is taken to *constitute* the culpability required for the offence. See: *R v Majewski* [1977] AC 443, 474-7.

¹⁶¹ See: B Mitchell, 'More Thoughts about Unlawful and Dangerous Act Manslaughter and the One-punch Killer' [2009] Crim LR 502. *Cf.* Horder who argues that from a moral luck perspective, causing death is indivisible from the violation of respect for physical integrity in an act of intended bodily harm. See: J Horder, 'Violating Physical Integrity: Manslaughter by Intentional Attack', in J Horder (ed), *Homicide and the Politics of Law Reform* (OUP 2012) 140.

third party, or victim, is responsible for their *response* to D's unlawful and culpable conduct and relieves D of responsibility for the prohibited result.

7. Conclusion

This chapter critically evaluated the relationship between culpability and causation. This analysis attempts to strike an effective balance between *fault-based* and *outcome-based* approaches to causal responsibility, requiring that D acted with the minimum degree of culpability as to the resulting harm. This mediating position ensures that D acted voluntarily and their conduct, in causing the harm, is open to criticism. It argues that to be criminally responsible for resulting harm, D must satisfy two tests. First, D's conduct must be culpably negligent, and the aspect of D's conduct that made D negligent must cause the resulting harm. To establish this, this chapter introduces culpable causation. In developing this position, this thesis rejects character-theory and outcome-theory as being suitable methods for establishing responsibility. Rather, this chapter advances a capacity-based approach to responsibility, which aims to protect individualistic agency. This test asks whether D failed to take the precautions of a reasonable person in the circumstances and whether D *could* have taken such precautions. This is the invariant and individualised standard of care, which uses subjective negligence to protect the cornerstone of criminal responsibility – autonomy. The premise behind this position is that if D's conduct, in causing the harm, fell below the standard expected in society, and D could have avoided such, they are open to criticism. It allows the jury to make an explicitly normative evaluation of D, which takes place in a legally deregulated zone.

However, this test requires the inclusion of a limiting principle to establish causation. If D's negligent conduct sets in motion a series of events, where D remains more than a minimal contribution, responsibility is limited through a foreseeability criterion. D is only answerable for those harms that are the reasonably foreseeable consequences of their actions. By integrating reasonable foresight into criminal causation, it gives rise to a powerful moral intuition that we should only ascribe responsibility for results culpably caused. If D is held criminally responsible for a resulting harm which was not reasonably foreseeable, then protection of those that may be harmed is secured at the cost of D's liberty. Therefore, the inclusion of foreseeability as to the risk of harm as a principle of causation enhances and

protects autonomy in criminal law. This chapter advances a proposed jury direction, which allows the criteria of causation (morals, social, political, and linguistic norms) to operate. Both limbs of this proposed model of causation rely on the concept of moderate reasonableness. This standard requires not that D acted reasonably in the circumstances, but that they were not unreasonable in acting in a particular manner. This approach to reasonableness, in contrast to idealistic reasonableness, protects liberty and autonomy by treating individuals within society in terms of equality.

The test of causation that has been advanced and developed in this chapter principally applies in circumstances where D's conduct is the only (human) contribution that *culpably* contributes to the resulting harm. However, as evidenced in chapter two, hard cases of causation invariably concern a subsequent third party's (or victim's) conduct that is salient in contributing to the resulting harm. These intervening events may arise due to a third-party, victim, or negligent medical professional making more than a negligible contribution to the resulting harm. It is, therefore, necessary to expound and examine how culpable causation can rationalise novus actus cases. It is argued culpable causation can deal with such cases by focusing on whether the intervener voluntarily and culpably responded to the original harm caused by D. This discussion forms the substance of the final chapter, chapter six.

Chapter 6

Responsibility for responses

1. Introduction

Hard cases of criminal causation typically arise when D's unlawful conduct is not the only salient contribution in bringing about the resulting harm. In such circumstances, it is necessary to evaluate D's conduct alongside subsequent contributors to determine whether D can still reasonably be described as a legal cause of the resulting harm for the criminal charge. The purpose of this chapter is to develop the account of culpable causation developed in chapter five to explicitly articulate *when* and *how* causal responsibility for intervening events is ascribed in the criminal law. Thus, this chapter seeks to address a question of both theoretical and practical importance – in what circumstances does a subsequent intervention consequent upon D's unlawful conduct absolve D of causal responsibility for the resulting harm?

In short, the answer to this question depends on the *type* of intervention. If a natural event causes death, lawyers typically enquire whether the occurrence of such an event was reasonably foreseeable at the time of the unlawful conduct. Similarly, if a third party (T), seeks to exploit the circumstances created by D, and T's conduct is voluntary, it is T who causes the result irrespective of whether D made the intervention more likely to occur.¹ These principles are uncontroversial and well settled. However, an indeterminate issue within novus actus cases concerns that of victim responses. That is situations where a victim responds to D's unlawful conduct in a manner that is dangerous to their wellbeing, contributing themselves to the resulting harm.

Some have argued the answer to this question is simple – D is only causally responsible in so far as V's reaction is a reasonably foreseeable possibility.² With respect, this is an oversimplification. This chapter illustrates that this position fails to give effect to a victim's *voluntary* decision to respond following D's

¹ *R v Dalby* [1982] 1 All ER 916; *R v Latif* [1996] 1 WLR 104; *R v Tse Hung-Lit* [1986] AC 876.

² See, for example, D Ormerod and K Laird, *Smith, Hogan, & Ormerod's Criminal Law* (15th edn, Oxford 2018), 80-82.

unlawful conduct. While there is some support in the literature for the position that voluntariness is irrelevant in response cases, this is both misguided and fails to protect the jewel of the criminal law's general part – individual capacity-based responsibility. Furthermore, a critical examination of the novus actus principles illustrates that at their core is the requirement of (non) voluntariness. Therefore, it is the purpose of this chapter to (a) critically examine the relationship between voluntariness and foreseeability criteria in criminal causation and (b) offer a trial direction articulating *when* and *why* a subsequent actor is responsible for their response to another's antecedent unlawful conduct. This analysis, combined with the proposed model of culpable causation offered in chapter five, will enable the courts to find the right answer in any causal enquiry.

This chapter is borne out of a desire to address both concerns, reconcile the current tests of legal causation, and offer an alternative approach to establishing voluntariness in criminal causation. Ultimately, it is posited if V does not act with the capacity to choose otherwise following D's unlawful conduct, and the response was reasonably foreseeable, there is no novus actus, and the law traces through V's response, establishing indirect causation. Before reaching this point, some preliminaries are in order.

2. Victim response cases

If an individual (D) culpably assaults another (V) and they sustain (say) a fractured arm and extensive bruising, D is responsible for occasioning actual bodily harm.³ It is clear that in such circumstances, D legally caused V's injuries. Similarly, the same is true if V is suffering from a 'thin-skull' at the time of the attack and dies because of the injuries inflicted; D is responsible for the constructive manslaughter of V.⁴ D must take his victim as he finds her.⁵ It is possible to state that D's assault caused V's injuries in both cases because we can trace a sequence of physical reactions from cause to effect.⁶

³ Contrary to the Offences Against the Person Act 1861, s. 47.

⁴ It would not be possible for D to be liable for murder since he did not intend either death or grievous bodily harm.

⁵ *R v Blaue* [1975] 1 WLR 1411, 1415. This includes both physical and psychological thin skulls. However, this rule does not apply to actions by the victim.

⁶ Some writers, such as Simester, call this 'direct', or 'mechanical' causation. See: AP Simester, 'Causation in (Criminal) Law' (2017) LQR 416, 417; *Cf. R v Nette* [2001] SCC 78 [83] where the Supreme Court of Canada held that criminal causation is never based on mechanical causation, but always based on concepts of moral responsibility.

However, if D, acting unlawfully towards V, prompts some response from V, a response which makes things worse rather than better for V; whether D is causally responsible for the harm following V's response is, at present, indeterminate. A review of the decided case law and jurisprudence on the matter illustrates that one of three approaches *may* be taken to establish causation – (1) the thin skull rule, (2) the flight principle, and (3) the free, deliberate, and informed (FDI) principle. An examination of these disparate legal rules shows that although the law is inconsistent in its ascription of responsibility in novus actus cases, the principles of voluntariness and foreseeability permeates throughout. While there is some doctrinal support for this position, the current legal framework (a) inconsistently applies these criteria and (b) fails to distinguish between conduct that is voluntary and *non*-voluntary convincingly. Each position is considered in turn.

3. Thin-skull rule

The first position is that D must take his victim 'as he finds her'.⁷ Thus, if V is suffering from a pre-existing medical condition, this is to be treated in law as a baseline. In *R v Hayward*,⁸ for example, D chased his wife out of the house, shouting threats at her. She collapsed and died. D did not physically touch her. She was suffering from a rare thyroid condition that could lead to death where physical exertion was accompanied by fright and panic. D was held responsible, and liable, for the death of his wife. It did not matter, in terms of causal analysis, whether D knew V suffered from the condition. It was also immaterial that the harm caused was more considerable than D could have reasonably foreseen.

However, the thin-skull rule does not apply solely to physical conditions. It is well established that this principle applies equally to psychological conditions and religious beliefs, thus capable of broader application.⁹ However, it is not certain whether reasonableness and voluntariness criteria feature within the application of the rule. Ought we to consider whether holding a particular normative belief is reasonable in the face of more significant harm or mortality and determine the extent to which the

⁷ *R v Hayward* (1908) 21 Cox CC 692; *R v McKechnie* (1992) 94 Cr App R 51.

⁸ (n 7).

⁹ *R v Blaue* (n 5) 1415.

victim's freedom and capacity to choose otherwise is relevant to the discussion. To address these questions, it is valuable to explore the case of *R v Blaue*.¹⁰

D stabbed V, a young girl, piercing her lung. V was taken to the hospital and advised that without a blood transfusion, she would die. V refused treatment due to her religious beliefs as a Jehovah's Witness. V died from blood loss resulting from the stab wound. The court was tasked with determining whether D's conduct remained a significant and operative cause of death, or whether the refusal of medical treatment amounted to a *novus actus*. In upholding D's conviction, Lawton LJ held D's unlawful conduct remained operating and significant; V's refusal did not affect this. This finding is both correct and unproblematic.¹¹ However, the court unnecessarily went one step further, stating that "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."¹² In such circumstances, it is (causally) no different than D pushing V to ground and V hitting her head on the kerb and dying. The existence of the kerb, much like V's religious beliefs, could not break the chain of causation. However, two questions arise from the *Blaue* principle that is of importance and germane to victim response cases. First, what characteristics fall within the application of this rule; and second, whether this rule applies to the victim's acts as well as omissions.

Moving to the first of these two issues. *Blaue* opens the door to a vast array of victim characteristics that (potentially) fall within the ambit of the thin skull rule. It is trite that pre-existing physiological medical conditions fall within the scope of the principle.¹³ This is both sensible and uncontroversial. It would be unnatural to describe V's physiological response to harm as an intervening event.¹⁴ However, whether all a victim's psychological vulnerabilities are relevant is uncertain. Take the case where D harms V, and V requires medical attention. If V refuses treatment due to a phobia of hospitals or doctors

¹⁰ (n 5).

¹¹ Since V's refusal amounts to an omission, her non-intervention was not capable of altering the mechanical and direct effects of D's conduct. V died from the stab wounds directly inflicted by D. Thus, the *dictum* was not necessary to establishing causation in this case.

¹² *R v Blaue* (n 5) 1415.

¹³ E.g. *R v Master* [2007] EWCA Crim 142. D inflicted a number of stab wounds upon V, aggravating an *existing* condition of deep-vein thrombosis. This triggered a pulmonary embolism, from which she died. *Cf. R v M* [2012] EWCA Crim 2293.

¹⁴ *Smith, Hogan, & Ormerod's Criminal Law* (n 2) 79.

and suffers greater harm, a strict application of the rule holds causal responsibility will be established for the resulting harm. Similarly, the principle extends to religious beliefs. If V, an Amish man, refuses a heart transplant, which is necessary to save his life following harm inflicted by D, causation is once more likely to be established. This is (apparently) irrespective of the reasonableness of holding such belief.

The rationale justifying this position is that a condition *pre-existing* the unlawful act is part 'of the stage already set'.¹⁵ To appropriate Hart and Honoré's language, the victim's condition becomes part of the 'normal' functioning of the causal analysis and cannot break the chain of causation.¹⁶ While this principle encapsulates recognised medical conditions and normative belief systems, it is unclear whether a victim's *propensity* to develop such conditions consequent upon unlawful conduct falls within the scope of the rule. Suppose D brutally attacks V, and upon admission to hospital V 'finds' religion and refuses medical treatment based on an *ex post facto* belief. Or, suppose the trauma causes a psychological condition, (say) post-traumatic stress disorder, which results in V re-opening her wound and consequently suffering greater harm or death. In both cases, V's propensity to find religion or develop psychological vulnerabilities was pre-existing and arguably relevant. However, it is not clear whether the *Blaue* principle incorporates such characteristics. Hart and Honoré's analysis of this principle does not resolve this uncertainty. However, it is reasonable to infer only pre-existing medical conditions and normative belief systems fall within the ambit of the rule - not a mere tendency to behave in a particular way or 'psychological quirk'.¹⁷ The rationale for this is based on recognition of the victim's impaired ability to make a free choice before or contemporaneous to D's act.¹⁸ For example,

¹⁵ HLA Hart and AM Honoré, *Causation in the Law* (2nd edn, Oxford: Clarendon Press 1985) 34-35 (hereafter *CIL*).

¹⁶ This argument is contradictory to Hart and Honoré's general claim that legally relevant causes are identified by ascertaining whether it is a *normal* or *abnormal* feature of the causal analysis. It is, on their understanding, only *abnormal* features that attract causal attribution. However, if V is suffering from a particularly unusual vulnerability, it is the apparently 'normal' thin skull that does not 'make the difference'. This is not true. V's thin skull *is* an abnormality and it is the feature that makes all the difference in this case. Hart and Honoré would have benefited from using their broad definition of voluntariness to encapsulate such position.

¹⁷ Hart and Honoré, *CIL* (n 15) 78-80, 361.

¹⁸ *Cf.* Horder who argues that her propensity to commit suicide consequent upon the effects of the harm were pre-existing and thus not capable of amounting to an intervening event. See: J Horder, *Ashworth's Principles of Criminal Law* (9th edn, OUP 2019) 124-127.

in a case where severe mental illness on V's part led her to refuse treatment, V's lack of capacity renders her response non-voluntary and does not amount to a *novus actus*.¹⁹

The justification bolstering the thin skull rule is, therefore, one which is based on freedom and choice.²⁰ When a victim refuses treatment based on a pre-existing normative belief system, one could argue that they are *unfree* to do otherwise. However, if this is the justification for extending the rule to psychological vulnerabilities, and the victim in *Blaue* was *unfree* to do other than follow her conscience, and the criminal law recognises this, ought the courts to explicitly engage in an assessment of voluntariness?²¹ This would ensure coherence with the voluntariness principle but result in a shift of legal practice. It would require the courts to determine whether V was acting *freely* in their refusal of medical treatment or subsequent actions. This is because, unlike a case involving physical susceptibilities, a victim refusing treatment does have the 'option' to revoke religious beliefs.²² In a secular society, the claim that religious persons who adopt moral commitments are acting 'involuntarily' is likely to be controversial; they act, and continue to act, voluntarily in upholding their beliefs.²³ This is perhaps most evident when V subscribes to an eccentric philosophy and is a member of a religious cult so radical as to be on the periphery of the religious convention. A reasonable person (and indeed criminal court) would probably be less sympathetic to the claim that V acted 'involuntarily' in upholding their beliefs. This contrasts with a victim suffering from (say) a recognised medical condition which is not afforded such 'option' in the face of mortality.

Nevertheless, if the principle is to include normative belief systems, because it is claimed that V was not *free* to abandon her beliefs, the court should directly engage in this assessment. This provides the courts with a definite method of establishing the conditions relevant to the principle, informed by the

¹⁹ This would only be applicable if V was not admitted to hospital. In such circumstances, if V lacks capacity then medical professionals act in the best interests of the patient. See: Mental Capacity Act 2005 and *Re MM (an adult)* [2007] EWHC 2003 (Munby J).

²⁰ J Herring, *Criminal Law* (11th edn, Palgrave 2019) 59.

²¹ Hart and Honoré argue, in defence of the *Blaue* principle, that the victim's refusal of medical treatment (due to religious beliefs) does not turn on the notion that you must take V, with all of her psychological vulnerabilities, as you find her because of the rationality of such beliefs, but rather that V could not have done otherwise in the circumstances. V was *unfree* in refusing the blood transfusion. Hart and Honoré, *CIL* (n 15) 361.

²² *Cf.* Hart and Honoré, *CIL* (n 15) 361.

²³ A Norrie, *Crime, Reason and History* (3rd edn, Cambridge 2014) 186-187 (hereafter *CRH*).

specific offence, contextual dispute, and normative values instilled within our pluralistic modern society. It also has the attractive benefit of not requiring an exhaustive list of characteristics to be drawn up that *may* apply to the thin skull rule, evading further indeterminacy. The effect of this proposition, if adopted, is likely to result in juries focusing on recognised medical conditions and disregarding religious beliefs when applying the thin skull rule.

Notwithstanding these potential implications, any condition that impairs a victim's ability to act morally autonomously clearly falls within the ambit of voluntariness, not the thin skull rule. For these reasons, this thesis posits the thin-skull rule should be limited to pre-existing (and coincidental) physiological medical conditions. When faced with a victim who suffers from a psychological vulnerability, and their ability to act freely is questioned, if the criminal law is accord proper respect to autonomy, the court should directly ascertain whether V acted voluntarily. If V was *unfree* in responding to D's unlawful conduct, this ought to not constitute a novus actus and break the chain of causation.

The second, and the more problematical, issue lies in whether the thin-skull rule extends to a victim's subsequent *actions*, which are also a contributory cause of the resulting harm. The approach by the courts and legal academics to date is to consider victim responses under other headings of causation – notably, foreseeability and reasonableness criteria. However, the focus on other principles does not address the applicability and relevance of the thin-skull rule. Instead, the divergence of legal practice only highlights the difficulty in establishing causation in such cases. Put simply, if V is suffering from a pre-existing condition, which means they directly respond to D's conduct in an unusual manner that is dangerous to their wellbeing, should D take his victim's *actions* as he finds them? The current legal position is arguably 'no'.²⁴ Consider a variation of *Blaue - Blaue II*. Here D stabs V, piercing her lung. V is taken to hospital and, per the original case, advised that without a blood transfusion, she would die. V then discharges herself and commits suicide to avoid a slow, uncertain, and painful death. One could argue that since V was placed in circumstances where death was unavoidable, due to the life-

²⁴ Simester, 'Causation in (criminal) Law' (n 6) 440.

saving treatment conflicting with her religious beliefs, her decision to commit suicide was the result of a pre-existing vulnerability and D's conduct remains operating and significant to the resulting harm.

There is some support in the literature for this position. In *R v D*,²⁵ the court suggested, *obiter dicta*, a minor assault on a person with a fragile and vulnerable personality, which is proved to be a material cause of death (even suicide), might be capable of constituting manslaughter based on the application of this rule.²⁶ However, if the principal question is whether D's conduct remains operating and significant, a victim's *choices* should enter this assessment; V may act unforeseeably, voluntarily, and or unreasonably in response to D's conduct, rendering V's response her own and not attributable to D. Furthermore, if V is suffering from a metaphorical thin skull, meaning they respond in an unorthodox manner, it is probable their response is also not voluntary. It is beneficial to analyse response cases in this way since the (non) causal effect of a non-voluntary reaction is easier to rationalise than the policy-driven thin skull rule. Thus, this thesis suggests the thin skull rule ought to be limited to physical abnormalities and omissions and should not apply to a victim's choices.

There is unlikely to be significant repercussions for true thin skull cases in adopting this approach. First, in the case of omissions, the exclusion of psychological vulnerabilities does not alter D's causal responsibility for unforeseeable harms where V refusal of treatment is based on a pre-existing normative belief system (however radical); V's non-intervention *cannot* alter the causal path. The reason for the omission (or non-intervention) is irrelevant. D's conduct remains the operating and significant cause of death in a direct and mechanical sense. V's non-intervention, however intolerable, does not and cannot alter the status quo. Therefore, although the omission in *Blaue* is undeniably *a* contributory cause of the resulting harm, D's conduct remains a concomitant operating and significant cause. This is also presumably the case if V refuses medical treatment out of spite and desire to increase D's liability.

Therefore, if one adopts the position that the thin skull rule only applies to *pre-existing* physical abnormalities where V suffers harm consequent upon D's unlawful conduct, a subsequent omission or

²⁵ [2006] EWCA Crim 1139.

²⁶ *R v D* (n 25) [8]. Congruently, Herring argues that a strict application of the thin skull rule could apply to a victim's actions. See: Herring, *Criminal Law* (n 20) 59.

(positive) response by the victim ought not to fall within this principle. Thus, (positive) response cases fall within the ambit of foreseeability and or voluntariness criteria. It is to these that we now turn.

4. The flight principle

Alternatively, the flight principle may be of applicability.²⁷ The position is that D *may* be responsible for causing greater harm or death if D's conduct prompted a response from V that is dangerous to their wellbeing.²⁸ D will remain responsible, despite the intervention, providing the response was (a) reasonably foreseeable and (b) within the range of responses which might be expected from a victim in her situation.²⁹ As per the thin skull rule, it is possible to rationalise this principle using voluntariness criteria. Indeed, this analysis goes further and argues the omission of explicit voluntariness provision impinges on a capacity-based account of responsibility. To reach this point, it necessary to expound the two requirements.

The first limb requires the response to be reasonably foreseeable. The rationale for deferring to foreseeable harms is that 'a defendant is responsible for and only for such harm as he could reasonably have foreseen and prevented'.³⁰ The inclusion of such provision holds an individual responsible for consequences which he reasonably ought to contemplate when deciding whether and how to act, in turn helping to define interpersonal obligations, personal wrongdoing, and the limits of responsibility in criminal law. Similarly, the appeal to foreseeability, in place of policy considerations, is due to the factual nature of the test and that it is not left to the choice of the trial judge or arbitrary rules of law. It allows the court, as identified in chapter two, to 'pass the buck' to the jury, where they can evaluate D's conduct and the victim's response in a legally deregulated zone, instilled with extra-legal and normative considerations.³¹ Outside of law and in everyday language, the fact that harm was not reasonably foreseeable is frequently an important consideration when blaming another for its occurrence. It is not

²⁷ *R v Roberts* (1972) 56 Cr App R 95.

²⁸ There is a long line of cases defending this position: *R v Pitts* (1842) Car & M 284; *R v Halliday* (1889) 61 LT 701; *Curley* (1909) 2 Cr App R 96; *R v Lewis* [1970] Crim LR 647; *R v Mackie* [1973] Crim LR 54; *R v Daley* (1979) 69 Cr App R 39.

²⁹ *R v Williams and Davis* (1991) 95 Cr App R 1; *R v Corbett* [1996] Crim LR 594.

³⁰ Hart and Honoré, *CIL* (n 15).

³¹ For an excellent discussion of the reasonable person as an all-purpose 'buck passer', see: J Gardner, 'The Many Faces of the Reasonable Person' (2015) 131 LQR 563, 569.

surprising, therefore, that foreseeability is invoked as a method of ascribing responsibility in criminal causation. It represents a broader principle of responsibility than only causing harm or providing others with the opportunity to harm. Additionally, it gives rise to a powerful moral intuition that it is unfair to ask an individual to answer for those consequences of their actions we could not reasonably have expected them to contemplate when deciding how to act or not act.³² If D is held responsible for harms not reasonably foreseeable, the protection of those that may be harmed is secured at the cost of D's liberty.³³ Therefore, the inclusion of foreseeability as a criterion of causation protects and enhances personal autonomy in criminal law.

The second limb requires the response to be within the range of responses which might be expected from a victim in her situation.³⁴ Or, in more familiar terms, a victim's response breaks the chain of causation if it was 'daft'.³⁵ The potential effect of this limb is that if a jury establishes V's response was not reasonably foreseeable, but *not* 'daft', this *may* have a reflexive effect and result in the jury finding the response reasonably foreseeable *ex post facto*, in turn establishing D's causal responsibility for the resulting harm. For example, if V commits suicide consequent upon the trauma of D's rape, V's response may not be reasonably foreseeable, but it is unlikely to be found 'daft'. Thus, a jury may find causation because of the heinous nature of D's conduct and tragedy of V's response.

However, a review of the decided case law on the matter illustrates that whether 'daftness' will be put to the jury is indeterminate. It is unclear whether a victim's response is subject to proportionality,³⁶

³² D Klimchuck, 'Causation, Thin Skulls and Equality' (1998) 10 Canadian Journal of Law and Jurisprudence 115, 128.

³³ It is important to note that the focus on reasonably foreseeable consequences does not enable an individual (D) to escape responsibility for a resulting harm which is the result of the victim's thin skull. If V is suffering from a physical or psychological thin skull, then the question then becomes, 'is the resulting harm a reasonably foreseeable consequence of D's unlawful conduct, taking into account any of the V's physical and psychological conditions. D must take his victim as he finds her. See: *R v Blaue* (n 5) 1415. However, this rule does not apply to *actions* by the victim. When V contributes to the resulting harm because of their own actions or inactions, it is necessary to establish whether their response to such harm was *truly* voluntary. See the discussion in the section above.

³⁴ *R v Williams and Davis* (n 29); *R v Corbett* (n 29).

³⁵ *R v Roberts* (n 27) 102.

³⁶ *R v Williams and Davis* (n 29) (Stuart-Smith LJ).

reasonableness;³⁷ daftness;³⁸ or voluntariness³⁹ criteria, or a combination of these terms. Despite the linguistic inconsistency, the necessity for the precision of language is not to be minimised – these terms are not synonyms. A victim’s response to unlawful harm may be reasonable and voluntary, reasonable and non-voluntary, unreasonable and non-voluntary, and so forth. Yet it is not clear which of these applies to the ‘flight’ principle to establish causal responsibility.

In picking through the varying terminology, it seems the inclusion of ‘daftness’ conceals a desire to empathise with victims. The claim is that when this desire is evident, the courts employ normatively biased language (e.g. daftness) to ascribe responsibility, masking whether the response is also voluntary. Where there is less empathy towards the victim, the courts use normatively neutral language – e.g. proportionality criteria. For example, if V runs into a busy road to avoid the infliction of harm from D and is struck by a passing motorist (T), an extra-legal analysis of the events will influence our ascription of responsibility and terminology used. The more empathy owed to V, the more likely the courts will require the response to be ‘daft’ to absolve D of causal responsibility. Perhaps say if V had been subjected to years of abuse at the hands of D and imminently feared another episode of violence. In such circumstances, due to a desire to empathise with V, the courts will allow greater flexibility in the reasonableness of the response. Contrast this to where V, who is met by hooded youth asking for spare change, flees fearing imminent robbery. Here V’s response is less likely to invoke feelings of empathy owing to an unreasonable subscription to a false stereotype.⁴⁰ Thus, the courts will not use daftness, but (say) proportionality criteria. However, the undesirable implication of deferring to this daftness test is that it circumvents both reasonableness and voluntariness criteria. In both examples, V’s response may be free, deliberate, and informed, yet the current legal framework does not (directly) consider this. If their responses are truly voluntary, this should absolve D of causal responsibility. This variance in language can be seen in *R v Roberts*,⁴¹ where it was possible to relate to the alarm experienced by a

³⁷ *R v Corbett* (n 29).

³⁸ *R v Roberts* (n 27) 102.

³⁹ *R v Lewis*
[2010] EWCA Crim 151.

⁴⁰ In this example, since D does not unlawfully harm V, he could not be causally responsible for the ill-consequences of V’s flight.

⁴¹ (n 27).

woman subjected to sexual assault; the court focussed on whether her response in jumping from the moving car was ‘daft’. Contrast this to *R v Williams & Davis*,⁴² where there was an absence of empathy toward the victim (owing to lack of cogent evidence) the jury was directed to consider whether the response was proportionate.

This variance in the language is both misguided and fails to give deference to the effect of truly voluntary actions within society. However, it is possible to link daftness and proportionality criteria within the flight principle to the requirement of (non) voluntariness. In *R v Lewis*,⁴³ Pitchford LJ held, concerning the flight principle, V’s response must not be so daft as to make it the victim’s *voluntary* act which intervened to break the chain of causation.⁴⁴ Therefore, the centrality of the voluntariness requirement can reconcile the divergence in approaches. If a victim’s response is not *truly* voluntary, it matters not that it is daft or disproportionate; D will remain responsible for the resulting harm. However, more pertinently, a non-voluntary response *is* reasonable, proportionate, and not daft when establishing causation – but these are unnecessary conclusions and distinctions to draw. What is important is whether the victim’s response was voluntary, and the court should engage in this assessment. Therefore, on this analysis, if D unlawfully harms V, and V responds dangerously, causal responsibility for the resulting harm is established if the response is (a) reasonably foreseeable, and (b) non-voluntary.

Germane to this position is that D’s conduct remains a significant and operative cause of the resulting harm.⁴⁵ This requirement is particularly essential in cases where V commits suicide consequent D’s unlawful conduct. In such circumstances, V’s death is (medically) unconnected with D’s harm and establishing causation thus more problematic. Suppose the following example:

Suicide: D violently assaults and rapes V. In the months following the rape V suffers from a variety of (undiagnosed) psychological conditions including depression, persistent PTSD, and general extreme distress and disruption in everyday life. These conditions

⁴² (n 29).

⁴³ (n 39).

⁴⁴ *R v Lewis* (n 39) [25]. Also see, *Smith, Hogan, & Ormerod’s Criminal Law* (n 2) 81.

⁴⁵ In *People v Lewis* (1899) 124 Cal 551, for example, D mortally shot V, from which he would have died within the hour. V cut his own throat and died within five minutes. D was held liable for manslaughter on the ground that the original wound was an operating cause. For further discussion see: *Smith, Hogan, and Ormerod’s Criminal Law* (n 2) 81.

cause her to become so traumatised that, several months after D's unlawful conduct, V shoots herself. V dies from the gunshot wound.

Here D's rape is not an operating and significant cause in the same sense as the physical wound in *Blaue*. Indeed, it is questionable whether the rape could ever be a sufficient *legal* cause of a victim's subsequent suicide. It has been argued that in such cases a jury might be willing to conclude that suicide was not outside the range of reasonable responses to be expected of someone in V's position, particularly where the jury was made aware of the history or devastating effects consequent D's unlawful conduct.⁴⁶ However, this is indeterminate. Some guidance can be extrapolated from *R v W*,⁴⁷ where the Court of Appeal directly considered the causal analysis of a victim's suicide consequent unlawful harm. It is worthwhile to review the facts of this case briefly.

D inflicted catastrophic injuries upon V which left him severely disfigured, permanently paralysed, and in a state of unbearable physical and psychological suffering. V travelled to Belgium and was euthanised in accordance with Belgium law. The issue for the Court of Appeal was whether D's unlawful conduct was a legally sufficient cause of V's death. Sharp LJ held that V's response was not independent of D's conduct, but rather a direct and discernible response to the injuries inflicted by D and to the circumstances created by them for which D was responsible.⁴⁸ Thus, causation could be established.

The decision in *R v W* is an important one, as it takes a step forward in the development of causation principles. There was previously only some indication in the case law that where a victim commits suicide following the D's act, the suicide might not break the chain of causation, and D might be held liable for the victim's death. While the outcome seems correct, the proposed trial direction within the judgment is unsatisfactory. To establish causation, the court held the jury must be satisfied that (a) D's conduct was an operating and significant cause of death; (b), that *at the time* of the attack it was reasonably foreseeable that V would commit suicide as a result of the injuries; and (c) whether V's

⁴⁶ J Horder and L McGowan, 'Manslaughter by causing another's suicide' [2006] Crim LR 1035. It is important to note that in the flight cases that have been discussed above, none of the victims have chosen to commit suicide, but rather behave in a manner that is dangerous to their wellbeing.

⁴⁷ [2018] EWCA Crim 690.

⁴⁸ Interestingly, at D's trial she was not convicted for the homicide of V. Rather, she was convicted of the offence of applying a corrosive fluid with intent contrary to section 29 of the Offences Against the Persons Act 1861, and subsequently sentenced to life imprisonment.

response was within the range of responses which might be expected from a victim in his situation.⁴⁹ What is unusual is the direction does not require the jury to consider the effect of truly voluntary interventions. This omission of this criterion may be because the court felt confident that the victim's response could not ever be truly 'free and unfettered'⁵⁰ or perhaps there was a desire to empathise with the victim.⁵¹ With respect, irrespective of the courts' rationalisation for the omission of an explicit voluntariness requirement, the trial direction is irreconcilable with Bingham L's *dictum* in *R v Kennedy (No 2)*⁵² and curtails the importance of voluntary actions in criminal law.

Therefore, on one reading of the flight principle, D is responsible for resulting harm, despite a victim's response, if it was reasonably foreseeable and not 'daft'. However, this gives rise to an undesirable divergence in causal principles which fails to provide deference to the effect of truly voluntary and morally autonomous interventions in criminal law. Therefore, to reconcile the flight principle with the voluntariness principle, it is submitted that only if a victim's response is (a) reasonably foreseeable and (b) non-voluntary should D be held responsible for any resulting harm. The principle of voluntariness is considered further presently.

5. Free, deliberate, and informed interventions

The final position is the free, deliberate, and informed (FDI) principle is of applicability. If following D's conduct, the resulting harm occurs because of another actor's FDI conduct, this will typically be a novus actus and absolve D of causal responsibility.⁵³ This principally occurs where a subsequent actor *knowingly* intervenes to bring about the resulting harm 'without her choice to do so being significantly induced, fettered or constrained by the situation D has created'.⁵⁴ The correctness of this principle was explicitly confirmed in *R v Kennedy (No 2)*.⁵⁵ It is worthwhile to consider the facts of the case briefly.

⁴⁹ (n 47) [86].

⁵⁰ (n 47) [61].

⁵¹ Norrie, *CRH* (n 23) 186-187.

⁵² [2007] UKHL 38, [2008] 1 AC 269, at [14] (Lord Bingham).

⁵³ In contrast, if the subsequent actor's conduct is not FDI, this will not alleviate D of causal responsibility for the resulting harm provided D's conduct remains significant and operative.

⁵⁴ AP Simester and others, *Simester and Sullivan's Criminal Law: Theory and Doctrine* (7th edn, Hart 2019) 99.

⁵⁵ (n 52) [14] (Lord Bingham).

D prepared a syringe of heroin for V, which he then gave to V. V self-injected with the heroin and subsequently died. D was convicted of manslaughter. The House of Lords quashed D's conviction on the ground that D had not caused V's death. Even though D had factually contributed to V's death, V's decision to self-inject was FDI; thus, amounting to a novus actus and absolving D of responsibility for homicide. It was immaterial that the victim's response (self-injection) was reasonably foreseeable and (potentially) within the range of responses expected of an addict in those circumstances.

The FDI principle is particularly important as it is of general applicability. This is because the criminal law, generally speaking, recognises the existence of free will. Informed adults of sound mind are treated as morally autonomous agents, able to make their own decisions how they will act. The corollary is that if D, or a third party, does not act voluntarily, his conduct and any resulting harm does not attract casual responsibility. The rationale for the FDI principle has been expressed on several occasions. Williams ably writes that:

I may suggest reasons to you for doing something; I may urge you to do it, tell you it will pay you to do it, tell you it is your duty to do it. My efforts may perhaps make it very much more likely that you will do it. But they do not cause you to do it, in the sense in which one causes a kettle of water to boil by putting it on the stove. Your volitional act is regarded (within the doctrine of responsibility) as setting a new 'chain of causation' going, irrespective of what has happened before.⁵⁶

Additionally, Hart and Honoré write that 'the free, deliberate, and informed intervention of a second person, who intends to exploit the situation created by the first, but is not acting in concert with him, is normally held to relieve the first actor of criminal responsibility.'⁵⁷ There is overwhelming academic and judicial support for the significance of free, deliberate, and informed (FDI) conduct in criminal causation. This reliance is assuredly correct, for if there is no voluntariness of action, there is no answerability. We do not hold a young infant criminally responsible for causing a valuable ornament to break if they knock it over while playing. Nor do we hold an adult (of sound mind) responsible for causing harm to an infant through the administration of a noxious substance if another deceived them

⁵⁶ Glanville Williams, 'Finis for Novus Actus' (1989) 48(3) Cambridge Law Journal 391, 392.

⁵⁷ Hart and Honoré, *CIL* (n 15) 326. Both statements were cited with approval by the House of Lords in *R v Latif* (n 1) 115 and *R v Kennedy (No 2)* (n 52).

as to its true contents. The relationship between causation and responsibility in these cases is indivisible. For the infant to be causally responsible for causing the breaking of the ornament and the adult causally responsible for causing harm to the infant, their conduct must first be construed as being voluntary. Indeed, in both cases, the actions of the infant and adult can be described as non-voluntary; they are not acting autonomously concerning the resulting harm. While the importance of FDI interventions is explicit, the division between conduct that is voluntary and not voluntary is more problematic.

The specific factual dispute informs the extent to which a subsequent actor's conduct is FDI, and very often a subsequent intervention will not meet the necessary FDI threshold. In *R v Pagett*,⁵⁸ for example, when a police officer (T) returned fire towards D, hitting V in the crossfire, T's conduct was held not to be FDI. Instead, it was a *justified* response to prevent further harm and an act of self-preservation. T's conduct was non-voluntary; it was not independent of the situation created by D and D's conduct remained significant and operative. Therefore, a subsequent actor's conduct is not FDI where it is a necessary or justified response to the demands of the situation created by D. However, how this to be addressed by a jury in response cases is not presently clear since it does feature explicitly within current jury directions.

Indeed, further indeterminacy is generated when one adopts a narrow or broad perspective of what it means to act voluntarily.⁵⁹ The meaning of 'voluntariness' varies depending on who the enquirer is and what their motives are in performing the causal analysis. Perhaps more relevantly for victim response cases, our actions in society cannot be viewed in a vacuum; they produce resultant consequences that tangibly influence the world around us. This is not just the natural world, but the mechanics of interpersonal relationships. On this point, Norrie provides a useful illustration of the fluidity of voluntariness - he writes:

⁵⁸ (1983) 76 Cr App R 279.

⁵⁹ Norrie is similarly critical of Hart and Honore's concept of voluntariness. Norrie, when discussing voluntariness, states 'the definition is too flexible, too open to broad and narrow interpretations of what the terms mean'. His criticism is that these terms abnormal and voluntary are illusionary at best and depends on interpretation. Hart and Honore concede that there are various usages of these terms, both narrow and broad, and depending upon interpretation the outcome will differ. See: A Norrie 'A Critique of Criminal Causation' (1991) 54 MLR 685, 691.

A good [example] is provided by J.B. Priestly's play, *An Inspector Calls*, in which the author persuades us to look behind the 'voluntary' act of a young woman's suicide to the conduct of the various members of the well-to-do family, who each in their own way have contributed to the girl's decision to take her life. Priestly forces the family to see that each of its members has in his or her own way caused the girl's death. They cannot conceal connectedness of relations between rich and poor, which ensure that any focus on individual agency can only be falsely narrow. The girl's suicide is 'voluntary,' but is still caused by the actors of the family, so that no special finality is given to her actions.⁶⁰

This excerpt shows that voluntariness loses its distinctive finality characteristic when a broader view of events and actions is taken. This position is detrimental because causation, and the normative evaluations that take place within it, are inherently rooted in social and political relationships. Thus, when this broader understanding of relationships confronts the FDI rule, the individualistic model is slowly ebbed away.⁶¹ It rests upon the analysis of the individual, engaging with other individuals and nature as a self-contained monad, capable of producing effects in the world as a cause in him/herself. This is the law's approach too, but what is missing from both (the law and Hart and Honoré's model) is any recognition of how individual agency is fundamentally constructed and constituted within pre-existing social relationships.

Time to return to *Suicide*. This rule holds that if V's decision to commit suicide consequent upon the effects of D's rape was FDI, D is absolved of responsibility for the death. However, it is not possible to know the true *reasons* for another's actions. V may have committed suicide for reasons wholly unconnected to the rape. Alas, even where the response is directly connected, it may only form *one* reason for responding in conjunction with a myriad of other pluralistic reasons. Thus, the FDI rule is unable to distinguish between first-order reasoning, influenced by second-order desires expressive of rational capacity, and mere opportunity creation (by D). This, in turn, raises an important theoretical and metaphysical question concerning one's ability to reduce another's moral agency to such a degree that any subsequent intervention becomes attributable to their particular input. In this case, V's response is *reactive* to D's contribution; it is not a self-originated autonomous prime cause of the behaviour.⁶²

⁶⁰ A Norrie 'A Critique of Criminal Causation' (n 59) 691.

⁶¹ A Norrie 'A Critique of Criminal Causation' (n 59) 692.

⁶² Hart and Honoré, *CIL* (n 15) 42, 51-59 and Simester, 'Causation in (criminal) Law' (n 6) 432. Whether this type of literal fresh causal analysis is at all metaphysically possible is questionable. See: *Cf.* M Moore, *Causation and Responsibility* (Oxford 2009) 272-273.

The question of principal importance here is whether it is possible to conclude that D legally causes V's suicide.

For some, what happens after D's conduct is not up to D; there are so many confluent influences that affect V's decision-making processes and normative values, many of which are outside of D's control.⁶³ However, if D's conduct directly impinges on V's capacity to act *sufficiently*, albeit not perfectly, *qua* morally autonomously then it seems plausible to hold V's reasons-responsiveness as being *attributable* to D. This then becomes a normative, and not metaphysical, issue. This is the principal role of the FDI rule, but it is unable to establish which responses are causally attributable to D without further refinement. Although D supplied V with a reason to respond, and thus renders the response non-voluntary, it does not explain *why* V responded in that particular manner. Therefore, whether the mechanism by which V responds to D's conduct is sufficiently, and normatively, voluntary for causation cannot be determined by the FDI rule; it only indicates whether D's conduct directly affects another's capacity to act morally autonomously. Thus, it is necessary to defer to an account of voluntariness explicitly based on capacity and choice to distinguish between voluntary and non-voluntary responses while protecting individualistic agency in its broadest sense. It is to this that we now turn.

6. Culpable causation and response cases

This thesis provides an alternative approach to ascribing causal responsibility in response cases, which attempts to coherently rationalise the novus actus principles critiqued above, by using the common denominators of a capacity-based account of voluntariness and foreseeability as advanced in chapter five. While arguably not a new method of ascribing responsibility in causation, this chapter posits D only causes resulting harm following a victim's response if the response was (a) reasonably foreseeable and (b) non-voluntary. The first task is to establish a method for distinguishing between voluntary and non-voluntary conduct, protecting both choice and capacity, while remedying the issues identified within the FDI principle.

⁶³ Simester, 'Causation in (criminal) Law' (n 6) 432-434.

To be responsible for one's actions, and the consequences that flow from them, the criminal law demands a free-acting agent.⁶⁴ This has frequently been translated into the requirement of voluntariness of action. Put simply, if we are not able to choose, we are not morally responsible.⁶⁵ Moreover, if we are not morally responsible, our actions do not affect our legal relations. The degrees of voluntariness of action in criminal law can be categorised as voluntary, non-voluntary, and involuntary. For D to be responsible for resulting harm, despite a subsequent response by V, then V's response must be non-voluntary.⁶⁶ Therefore, much depends on the distinction between voluntary and non-voluntary conduct and *how* this is to be defined.

The ascription of causality and voluntariness is ultimately a normative issue. More pertinently, distinguishing between voluntary and non-voluntary conduct is a normative issue. The courts have presented some linguistic offerings on this matter. Lord Bingham held that for an intervention to be voluntary, it must be 'free, deliberate and informed',⁶⁷ while Sharp LJ required a 'free and unfettered volition'.⁶⁸ There is, however, conflict between these two directions. It is unlikely that (say) a drug addict who self-injects heroin is exercising a free and unfettered volition, but is (truly) making a free, deliberate and informed decision.⁶⁹ However, one of the reasons that criminal law holds a drug addict as morally autonomous is because of the view that substance abuse is a *choice*, even for those suffering from addiction.⁷⁰

⁶⁴ See: RA Duff, *Criminal Attempts* (Oxford 1997) 150. For Duff, a free-acting agent is determined by the presence of free will, which according to Duff requires the 'the capacity for choice...and of choice as a rational capacity which manifests our freedom as responsible agents'.

⁶⁵ This applies to all actions, irrespective of whether they warrant praise or scrutiny.

⁶⁶ Involuntary responses are not considered here since involuntariness is antonymous to causal agency. See: *R v Bratty v A-G for Northern Ireland* [1963] AC 386 (Lord Denning). It is submitted that an individual *may* be held criminally responsible for involuntary conduct if a condition was self-induced which produced an involuntary action. For example, take D, who is a diabetic, and who purposely failed to take his insulin in order to induce a seizure and harm another. If he did then, in fact, consequently become hyperglycaemic, he would not be afforded the defence of automatism or insanity. He would also be unable to raise the defence of intoxication due to his condition being self-induced. See: *R v Majewski* [1977] AC 443.

⁶⁷ *R v Kennedy (No 2)* (n 52) [14].

⁶⁸ *R v W* (n 47) [61].

⁶⁹ See the facts of *R v Kennedy (No 2)* (n 52). For a discussion of the voluntariness and choice of drug addicts to choose otherwise, see: H Pickard, 'Responsibility without Blame for Addiction' (2017) 10 *Neuroethics* 169.

⁷⁰ The rationale for this is that there is evidence which suggests that drug use in addiction is not involuntary. Pickard writes that 'In short, the evidence is strong that drug use in addiction is not involuntary: addicts are responsive to incentives and so have choice and a degree of control over their consumption in a great many circumstances.' See: Pickard, 'Responsibility without Blame for Addiction' (n 69) 172.

It is important to note that concepts of choice and capacity do not operate in a binary fashion, but rather are present in varying degrees. As Pickard notes, ‘people can have greater or fewer choices genuinely available to them, and more or less capacity for control’.⁷¹ Thus, a model of responsibility must be able to accommodate all variants. Based on this analysis, it is uncertain whether a strict application of the FDI principle would be enough to impute causal responsibility in unusually tragic circumstances such as those present in *R v W*, discussed above. However, the upside of the approach adopted in *R v Kennedy (No 2)* is that the direction avoids the jury having to consider degrees of volition. The approach adopted by Sharp LJ in *R v W* requires the jury to engage in this theoretical assessment explicitly. The distinction between conduct that only appears to be voluntary from *truly* voluntary conduct may be one that a jury may struggle to appreciate. However, both rules suffer from the same issue – although they inform us as to when an actor’s capacity to act sufficiently *qua* morally autonomously is reduced, it does not ascertain whether the *mechanism* of the response is attributable to D. This remains indeterminate.

Let us reconsider *Blaue II*. D stabbed V, causing severe blood loss, resulting in V committing suicide. Here D’s unlawful conduct sufficiently inhibits V’s capacity to operate sufficiently morally autonomously. The restricted choices available to V, owing to the refusal of medical treatment due to her normative belief system, *is* attributable to D. The FDI rule confirms this. However, V is not afforded *carte blanche* to respond in *any* manner, and it is still attributable to D. A normative line must be drawn. Suppose V jumps from the top floor of the hospital or shoots herself in the head. This is normatively different from V receiving palliative care and dying from D’s stabbing in a direct and mechanical way. One way of drawing the line is through the inclusion of a reasonableness criterion. Thus, a victim’s response ought not to be attributable to D if the response is so unreasonable that no reasonable person would have responded in that manner, and D had the capacity to conform to this standard.⁷² This position holds the concepts of equality and reasonableness as correlatives. To act rationally is to act to further one’s ends; to act reasonably is to interact with others in terms of equality. This Kantian position permits individuals to act as equals in every-day life while striking a sufficient balance between personal

⁷¹ Pickard, ‘Responsibility without Blame for Addiction’ (n 69) 176.

⁷² See: J Rawls, *Political Liberalism* (Columbia 1993) 48.

autonomy, on the one hand, and security on the other.⁷³ Thus, the indeterminacy created by the FDI rule can be circumvented by asking whether V had the fair opportunity to act otherwise in the circumstances.

This position is attractive and efficacious since a liberal individualist analysis of voluntariness can be understood as being based on a ‘conception of a human agent as being most free when he is placed in circumstances which give him a *fair opportunity* to exercise normal mental and physical powers, and he does exercise them without pressure from others.’⁷⁴ Therefore, if V, consequent D’s unlawful conduct, did not have the fair opportunity to do otherwise, informed using reasonableness criteria, he does not act with *qua* moral agency. The question becomes:

1. Is V’s response to D’s unlawful conduct voluntary? This question is only satisfied if both (a) and (b) are answered in the affirmative:
 - (a) Did V fail to take those precautions which any reasonable person in the circumstances would have taken?
 - (b) Could V, given her mental and physical capacities, have taken those precautions?

These are the ‘invariant standard of care’ and the ‘individualised standard of care’, respectively.⁷⁵ This means that V should be responsible if, given his or her age and mental capabilities,⁷⁶ he or she had the capacity to see the risk and avert it, in circumstances where a reasonable person would have done so. Therefore, if both limbs are satisfied, V’s response amounts to a *novus actus* and absolves D of causal responsibility, providing the intervention renders D’s conduct a *de minimis* contribution of the resulting harm. If V had the fair opportunity to do otherwise and is a contributory cause, D does not cause the resulting harm and V’s conduct is normatively construed as being voluntary. If not, then it is possible to construct indirect causation and hold D responsible.⁷⁷ However, two issues are arising out of this proposed model. First, the extent to which an individual responding is to unlawful harm *can* and *should*

⁷³ A Ripstein, ‘Self-defence and Equal Protection’ (1996) 57 *University of Pittsburgh Law Review* 685, 689

⁷⁴ HLA Hart, *Punishment and Responsibility* (2nd edn, OUP 2008) 152 (emphasis added).

⁷⁵ HLA Hart, *Punishment and Responsibility* (n 74) 152-157.

⁷⁶ *R v Marjoram* [2000] Crim LR 372.

⁷⁷ Simester, ‘Causation in (criminal) Law’ (n 6) 422. For an illustration of this, see particular the discussion of *Hart* [1986] 2 NZLR 408, 426.

act reasonably when responding to unlawful harm. Second, the characteristics are when applying the individualised standard of care is unspecified. Both are considered in turn.

As discussed in chapter five, the notion of reasonableness per the invariant standard of care is subject to indeterminacy as two concepts of reasonableness can be employed. The first is ‘idealistic’ reasonableness and the second ‘moderate’ reasonableness.⁷⁸ The first, ‘idealistic’ reasonableness, requires an evaluation of V’s conduct and the resulting harm based on thinking and acting by right reason. The second, ‘moderate’ reasonableness, distinguishes the reasonable and the rational.⁷⁹ Continuing from the analysis in chapter five, since a reasonable person may act irrationally, it seems prudent to adopt a *moderate* approach, focusing on the middle ground between acting reasonably and unreasonably. As Shute argues, not all actions that are not reasonable are necessarily *unreasonable*. Similarly, actions that are not unreasonable are necessarily reasonable.⁸⁰ This is particularly true within response cases, evidenced by the desire to focus on ‘daft’ responses within the flight principle and not reasonable ones.⁸¹ Therefore, all that is required, using moderate reasonableness, is that V’s conduct in responding to D was not *unreasonable*.

There are, however, still some problems with this account that requires further attention. The second issue is that the individualised standard of care does not elucidate the victim’s attributes and circumstances relevant to questions of capacity. For example, could V’s low intelligence, alcoholism, or psychological conditions affect their capacity to appreciate risk? Perhaps all of these are (or should be) relevant to the enquiry. If V knew that they were acting carelessly, despite such attributes, this could show that they were acting with autonomy and therefore alleviate D of causal responsibility for the

⁷⁸ See: S Shute ‘Causation; Foreseeability v Natural Consequences’ (1992) 55 MLR 584, 585-586.

⁷⁹ Rawls similarly distinguishes between the reasonable and the rational. The reasonable is a form of practical rationality; however, distinguishing the reasonable from the rational is much more difficult. Rawls explains that an individual’s action may be rational in the sense of that individual’s narrow interest, but unreasonable because it is unacceptable to others. Rawls uses ‘reasonable’ and ‘rational’ as helpful terms to mark the distinction that Kant makes between the two forms of practical reason, pure and empirical. This is a development of Kant’s use of *vernünftig* which expresses a full conception of reason covering both ‘reasonable’ and ‘rational’. See: J Rawls, *Lectures on the History of Moral Philosophy* (Harvard 2000) 164.

⁸⁰ Shute ‘Causation; Foreseeability v Natural Consequences’ (n 78) 586.

⁸¹ *R v Williams and Davis* (n 29); *Corbett* (29).

resulting harm. However, Hart does very little in the way of defining the boundary of capacity.⁸² He writes that it is only gross forms of incapacity that could be demonstrated in practice as evidencing when V does not possess capacity,⁸³ and it is unlikely that there is consensus on what incapacity amounts to due to the value pluralism in modern society.⁸⁴ What is more, Hart does not distinguish between circumstances pertaining to the *situation*, and those relating to the *actor*. If the invariant standard of care becomes infused with both V's personal and situational circumstances, V's conduct will never diverge from the reasonable person's since they become the same. However, the jewel of Hart's doctrine is that he can ask whether V could have done better in the circumstances, and this ought to be protected. It allows for an objective assessment of V's conduct without compromising the focus on choice.

Although this theory does, in part, suffer from lack of precise definition, this can be resolved with minor modifications. First, a distinction is to be drawn between circumstances relating to V's *situation*, and those relating to V, the *actor*. The invariant standard of care requires the jury to determine whether a moderately reasonable person, in V's situational circumstances, could have done otherwise; thus, providing the yardstick by which V's conduct is to be measured. Second, the individualised standard of care becomes infused with attributes relating to V, *the actor*, giving deference to V's attributes other than those whose only relevance to V's conduct is that they bear on V's general capacity to appreciate risk. Therefore, attributes such as psychiatric harm are relevant, but voluntary intoxication not. This position is thus able to encapsulate thin skull cases, where a victim's condition is captured within the individualised standard of care. It is also able to satisfactorily accommodate flight cases, where a victim's response to harm is not evaluated in a self-contained monad, but in the situational circumstances, the victim finds herself in.

However, without a limiting principle supplementing this first limb, causation would not have limits. With this in mind, and based on the doctrinal analysis above, it is necessary to also require the response

⁸² For an excellent discussion of this point, see: SH Pillsbury, 'The Meaning of Deserved Punishment: An Essay on Choice, Character, and Responsibility' (1992) 67 *Indiana Law Journal* 719, 748.

⁸³ HLA Hart, *Punishment and Responsibility* (n 74) 155.

⁸⁴ N Lacey, *State Punishment: Political Principles and Community Values* (Routledge 1988) 65.

to be reasonably foreseeable. It is essential to focus on reasonably foreseeable responses for two reasons. First, it acts as a limiting principle, without which an individual would be responsible for all the responses that flow from their actions and causation would not have limits.⁸⁵ Second, it injects flexible and objective fairness within the doctrine. If D is held criminally responsible for a response which was not reasonably foreseeable, then the protection of those that may be harmed is secured at the cost of D's liberty.

While there are clear benefits in utilising foreseeability in criminal causation, what is less clear is specifically *what* must be reasonably foreseeable, and the *point in time* this is to be considered. If D harms V, and V responds to the harm in a direct and discernible manner, several factors will affect a finding of causation when using foreseeability. For example, if V's response is delayed, unusual, or statistically unlikely, the presence of these factors may result in D not being responsible for the resulting harm if reliance is placed solely on foreseeability criteria. For example, if V re-opens wounds caused by D, must it be reasonably foreseeable that V would suffer some harm consequent upon an assault, or must the mechanism by which V responds be reasonably foreseeable also? If it is the former, causation is likely to be established since D's conduct remains an operative cause of death. However, requiring the latter imposes a higher threshold to establish (indirect) causation. It is unlikely that a victim will re-open wounds caused by D to cause further pain and suffering, or indeed death. Nevertheless, concluding that D does not cause the resulting harm because the specific response is unlikely or unpredictable, and therefore not reasonably foreseeable, does not correlate to the existing jurisprudence on this matter.

The first issue lies within *what* must be reasonably foreseeable. The threshold concerning this criterion is arguably low – D will be responsible for resulting harm, irrespective of V's non-voluntary response, provided that *some* harm was reasonably foreseeable.⁸⁶ The requirement for only *some* harm being reasonably foreseeable stems from a desire to ensure the conviction of a culpable offender.⁸⁷ Such an

⁸⁵ D's conduct would have to remain a more than negligible cause to be causally relevant, but this criterion has a low threshold to be met. For a discussion on limiting principles within criminal causation, see: AP Simester and GR Sullivan, 'Causation without Limits' (2012) 10 Criminal Law Review 753, 766.

⁸⁶ *R v Pagett* (n 58); *R v Gnango* [2011] UKSC 59, at [83]–[89].

⁸⁷ Horder, *Ashworth's Principles of Criminal Law* (n 18) 126.

approach suggests an attachment to the ‘wrongful act’ approach to causation by deciding these issues by reference to broader notions of innocence and guilt. Conversely, some may argue against this position and state that, in such circumstances, since it is D who inflicted the original wound and created the need for such intervention, they should be liable for (say) attempted murder or a serious wounding offence and the intervention relieve D of responsibility for V’s death. However, those that adhere to the ‘wrongful act’ approach would not be satisfied by such conviction since they would want D to be responsible for the death of V, not merely an attempt or serious wounding offence.⁸⁸ These are lesser offences, and D’s responsibility is ultimately influenced by moral luck.⁸⁹

More recently, the question of foreseeability concerning victim interventions has become whether the mechanism of the victim’s response was reasonably foreseeable – not whether the type of harm was reasonably foreseeable.⁹⁰ However, these positions are not mutually exclusive, and this thesis suggests that both are required to establish causation in these cases. If V (non-voluntarily) responds to D’s unlawful conduct, both the general nature of the response must be reasonably foreseeable, and some harm must be reasonably foreseeable consequent upon D’s unlawful conduct to hold D causally responsible. Therefore, if there is an intervening act by a third-party or victim, which saliently contributes to the occurrence of a prohibited result, D is only responsible for the prohibited result, in conjunction with the other limbs of culpable causation, if:

- (a) The general nature of the intervention was reasonably foreseeable at the time of D’s unlawful conduct; and
- (b) The intervention was one which any moderately reasonable person in the circumstances would have made, giving deference to V’s attributes other than those whose only relevance to V’s conduct is that they bear on V’s general capacity to appreciate risk.

⁸⁸ One rationale for seeking prosecution for a result crime over an inchoate offence, such as attempted murder is because of the higher threshold for conviction. For D to be liable for attempted murder, in contrast to the offence of murder, there must be an intention to kill, not merely to cause grievous bodily harm. See: *R v Grimwood* [1962] 2 QB 621 and *R v Walker and Hayles* (1990) 90 Cr App R 226. On the issue of causation, the prosecution must show a causal link between the act or omission and the death. The act or omission must be a substantial cause of death, but it need not be the sole or main cause of death. It must have "more than minimally negligibly or trivially contributed to the death" as per Lord Woolf MR in *R v HM Coroner for Inner London ex parte Douglas-Williams* [1999] 1 All ER 344.

⁸⁹ For a discussion on the role of moral luck in criminal law, see: AM Honoré, *Responsibility and Fault* (Oxford 1999), 14 – 40.

⁹⁰ *R v Lewis* (n 39); *R v W* (n 47).

Thus, this provision of culpable causation is of utility not only in victim response cases but in third-party and medical intervention cases alike, encapsulating all of the novus actus categories. In the case of third-party interventions, subsequent voluntary and reasonably foreseeable actions *may* render D's contribution to that of a *de minimis* contribution, just as with victim response cases. Similarly, where V seeks medical treatment consequent D's unlawful conduct, such treatment only relieves D of causal responsibility for resulting harm where the medical professional's conduct is culpably negligent,⁹¹ which renders D's contribution to that of a *de minimis* contribution.

7. Conclusion

To conclude, this chapter has sought to address an important theoretical and practical question in criminal causation – namely, the circumstances in which a victim's response to D's unlawful conduct absolve D of causal responsibility for resulting harm. The answer to this question, it has been argued, lies within the critical application of a capacity-based account of voluntariness and reasonable foreseeability criteria. This chapter has illustrated the current legal framework both inconsistently applies these criteria and fails to distinguish between voluntary and non-voluntary responses convincingly. A critical review of the thin skull rule, flight principle, and FDI principle shows that although the criminal law is inconsistent in its ascription of responsibility in such cases, the criteria of voluntariness and foreseeability permeates.

This chapter reconciled the divergence of legal practise by presenting an alternative approach to establishing causation in response cases by explicitly focusing on the requirements of voluntariness and reasonable foreseeability. In analysing the requirement and need for voluntariness of action, it has been illustrated that, as currently employed, the principle is abstract, open-ended, and malleable to the factual dispute and type of offence. This thesis circumvents these issues by utilising Hart's invariant and individualised standard of care, asking whether the victim could have done otherwise in the circumstances, using the reasonable person to moderate the ascription of responsibility. This allows the

⁹¹ In determining whether the medical professional's treatment was culpably negligent, as defined by the invariant and individualised standard of care, it is likely the jury will only alleviate D of causal responsibility where the medical professional's treatment was so grossly negligent that no moderately reasonable professional would have ever performed such treatment.

jury to engage in an explicitly extra-legal and normative evaluation of both D and V's conduct while protecting the jewel of the criminal law's general part – individual capacity-based responsibility. Hart's model of responsibility has been modified to require a victim (or third party) to be measured against that of a *moderately* reasonable person, explicitly considering the victim's characteristics, other than those whose only relevance to V's conduct is that they bear on V's general capacity to appreciate risk.

If a response is held to be non-voluntary, D's causal responsibility is limited to those responses and harms that are reasonably foreseeable. This position is attractive and efficacious and has been argued as offering both public and objective benefits. It also gives rise to a powerful moral intuition that it is unfair to ask an individual to answer for those consequences of their actions we could not reasonably have expected them to contemplate when deciding how to act or not act. Ultimately, it is submitted that if V did not act with the capacity to choose otherwise consequent upon D's unlawful conduct, and the resulting harm was reasonably foreseeable, there is no *novus actus* and the law traces through V's response.

Conclusions

Here is what has been learned. This thesis has provided a normative yet practical account of how English criminal law should establish causation in criminal law. It uses criminal law theory to develop the discourse and offer a new model of causation, termed ‘culpable causation’, which clearly articulates when an individual may be responsible for a resulting harm in criminal law by overtly focusing on the principles of voluntariness and foreseeability.

This thesis demonstrated that the requirement for causation is of fundamental importance to our understanding of the actus reus in criminal law. This is because whenever a consequence is specified as part of the actus reus, it must be proven by the prosecution that the consequence occurred and that the defendant’s behaviour legally caused that consequence. Unfortunately, at present, for a resulting harm to be causally attributed to an individual in criminal law, the doctrine requires their unlawful conduct be a ‘significant’ and *but for* cause of that harm. It will be recalled that this doctrinal position fails to explicitly communicate to the jury *when* and *why* an individual may be responsible for a resulting harm in criminal law and fosters only indeterminacy. This central finding, and desire for an alternative model of causation, was elucidated by the findings made and conclusions set out in chapter one.

Chapter one provided a doctrinal analysis of causation in English criminal law. The chapter critically examined the law’s attempt to rationalise the ascription of responsibility for resulting harms through its use of ambiguous language and disparate rules. This analysis exposed an assemblage of legal rules that are both problematic and unsystematic. This, it was argued, is because the terminology employed is hollow, elastic, and inconsistent, and fails to communicate to the jury *if* and *when* a defendant’s conduct is causally significant in bringing about a prohibited result. This analysis demonstrated that the criminal law misguidedly places an overreliance on mechanical causation and unhelpful terms such as ‘significant’ and ‘operative’ to perform this ascription of responsibility. The disutility of this causal baseline invariably stems from the fact the causation doctrines must accommodate a vast array of factual circumstances, influenced not only by notions of criminal justice; harm, personal autonomy, and culpability, but also political, moral, and societal considerations. The current doctrinal position, it was

seen, fails to engage with each of these considerations convincingly. This chapter illustrated that although causation is typically unproblematic in simple cases, difficulties usually arise when evidence suggests that the defendant was not the only (blameworthy) actor who contributed to the resulting harm.

In response to these cases, it was shown how the courts have developed the *novus actus interveniens* doctrine to (broadly) encapsulate (a) the subsequent (non-voluntary) conduct of third parties; (b) the conduct of medical professionals; (c) and victim responses. These are some of the ‘hard cases’ of causation, where there is no specific legal rule that resolves the causal enquiry and provides a definitive outcome. Customarily, the novus actus doctrine provides that if despite an intervening event, the defendant’s conduct remains a significant cause of the resulting harm then causation is established. However, the jurisprudential analysis within the chapter illustrated that the courts have imprudently created a set of disparate (and often competing) legal rules that are applicable when ascertaining whether an intervening event renders a defendant’s conduct *insignificant* and *inoperative*, rather than focussing on the underlying principles of voluntariness (incorporating culpability) and foreseeability. Only on rare occasions have the court explained the causation doctrines in such terms, an oversight which has proven costly.

Having mapped out the current doctrinal understanding of causation in criminal law, it was determined that if a legal framework directly and explicitly engaged with these underlying principles, it would be possible to design a single test to establish causation in criminal law. Such a test would remove the need to have separate and distinct categories of novus actus cases and would clearly articulate the normative evaluation that needs to be made by the jury when establishing causation. It is this that culpable causation seeks to achieve. The proposed model of culpable causation offered here places explicit reliance on the principles of voluntariness and foreseeability to ascribe responsibility for consequences in criminal law. The subsequent three chapters of this thesis provide the groundwork upon which the proposed model of culpable causation operates.

One of the principal problems with the current position, as identified in chapter one, is that the courts have erroneously created an assortment of disparate legal rules to establish causation in hard cases. In

addressing this problem, chapter two developed a methodology which enables culpable causation to rationalise the current legal tests, despite the ambiguity of language, contextual application, and disparate rules that plague criminal causation. This was realised through the use of constructive interpretivism and provides the foundations for the proposed model of culpable causation offered here. To reach this conclusion, chapter two advanced two primary claims.

First, the chapter demonstrated that establishing causation (in hard cases) requires an analysis of legal principles, which cannot be resolved through the binary application of disparate legal rules. In defending this claim, this chapter applied Dworkin's theory of constructive interpretivism and illustrated that the causation doctrines inherently suffer from legal indeterminacy. It is because of the highly contextual nature of causation that there is always indeterminacy when ascribing causal responsibility. Despite this, there *is* a right answer when establishing causation and determining whether a defendant legally causes a prohibited result. To discover the right answer, this chapter identified that it is necessary to design a model of causation that places principal emphasis not on policy and rules, but on the underlying principles that govern and shape the doctrine. Therefore, to properly ascribe responsibility for resulting harms in criminal law, culpable causation must focus on the underlying principles of voluntariness and foreseeability.

Second, this chapter argued that once these principles have been utilised to create an alternative model, it is necessary, in the application of culpable causation, to 'pass the buck' to the jury to determine the defendant's causal relationship to the resulting harm. It is only the jury who can decide whether the defendant's unlawful conduct is sufficient, in bringing about the prohibited result, to be held as a legal cause in criminal law. The benefits of deferring to the jury in cases of causation were identified as being two-fold. First, it allows causation to operate in a legally deregulated zone, using the reasonable person to justify the inclusion of extra-legal considerations in the jury's analysis of whether the defendant is responsible for the prohibited result. Second, it avoids the gravitational under and over-inclusiveness of precedent. This chapter identified that due to the gravitational force of precedent, having an excessive number of legal rules within the causation doctrines to accommodate for novel cases hinders

the adjudication process and prevents the criminal law from accurately reflecting the society in which it seeks to regulate.

Chapter three defended the claim that the key to establishing causation in criminal law are the concepts of ‘voluntariness’ and ‘foreseeability’. However, this chapter demonstrated that the definition of these two concepts are fluid, and therefore without further refinement suffers from significant ambiguity, much like the current legal position. This is because the meaning of these concepts ultimately depends on the paradigm of responsibility adopted, and the context and relativity of the enquirer, when establishing causation. Therefore, to establish a framework upon which culpable causation can operate, chapter three determined whether there are a fixed set of legal principles relevant when establishing causation, or whether this ascription of responsibility is dependent upon the nature of the offence, factual dispute, and mischief of the legal rule. In defending the latter position, this chapter was broadly divided into three sections.

The first section saw that causation is best understood as a descriptive expression influenced by the ‘criteria’ of causation. The claim was that there is no single criterion of causation that can effectively resolve all factual disputes and impute responsibility in every case. Rather, causation requires an analysis of legal, linguistic, moral, social, and political considerations to effectively ascribe responsibility in criminal law. These are the criteria of causation. Thus, each of these considerations is relevant in varying degrees when establishing causation, conditional on the context, enquirer, and legal rule. The second section then moved to consider causation the Hart and Honoré way. In doing so, the predominant theories of causation were critically evaluated, and it was ultimately claimed that Hart and Honoré’s analysis is the most reflective of legal practice. This analysis provided the theoretical justification for the claim that causation in criminal law is based on the underlying principles of voluntariness and foreseeability. It was illustrated that Hart and Honoré similarly place significant reliance on the concepts of voluntariness and foreseeability, like culpable causation, but their shortcoming is that they rely (predominantly) on the ordinary person’s perception of causal responsibility. This, it was argued, is not a wholly reflective account of legal practice. It was seen that

causation is better understood as a multi-paradigmatic model, which enables all of the criteria of causation (including ‘common-sense’) to influence the ascription of responsibility.

The latter section of this chapter then demonstrated that causation requires the deployment of ambiguous language to effectively operate. It matters not that there is no specific functioning definition of terms such as ‘voluntariness’, the meaning of these terms varies from one factual dispute to another. This chapter demonstrated that to have a fixed definition would render the doctrine unhelpful and redundant. The philosophy of Wittgenstein and Austin defends the position that there is no definitive definition of an abstract descriptive expression such as causation. This chapter, in closing, further develops Hart and Honoré’s theory of causation in the law and offers a legal framework that is based on voluntariness, using subjective negligence and reasonable foresight. However, it was acknowledged that before this could be achieved, it would be necessary to address the claims of Hart and Honoré’s critics that causation in criminal law rests on a mechanical or scientific understanding of cause and effect, not normative and moral evaluations of the defendant’s unlawful conduct and its relationship to the resulting harm. It is this that formed the focus of chapter four.

Chapter four illustrated that when developing a framework for causation in criminal law, the ascription of causal responsibility does not rest upon causation *outside* of the (criminal) law. The chapter argued that the traditional bifurcation model of causation, that is, factual and legal causation, does not accurately explain the ascription of responsibility required by the criminal law. Moreover, it argued that a mechanical investigation of how resulting harm occurred is unable to identify causal actors who warrant criminal responsibility in criminal law. This can only be achieved when one applies an enriched set of normative criteria, based on culpability, to the causal enquiry. Therefore, this chapter argued that mechanical causation is better understood as a necessary *but not sufficient* requirement *within* a test of legal causation. The proposed model of culpable causation provides that although D must be an explanatory cause of resulting harm, both causal selection and the ascription of responsibility are intrinsically normative, requiring D’s culpability to ‘link’ D to resulting harm. It was illustrated, in conjunction with the analysis within chapter three, that causation is best understood as a descriptive

expression that is defined by reference to the criteria of causation, loaded with extra-legal considerations that are normatively sensitive.

To reach this conclusion, this chapter advanced several claims. First, the chapter argued, through the critical application of factual (mechanical) causation, that an individual can be held criminally responsible for a resulting harm without any culpability with respect to that harm. This, it has been demonstrated, is undesirable for two principal reasons. First, the criminal law is typically only concerned with individuals when their conduct is open to criticism. Second, it ultimately places questions of liability (almost) exclusively on questions of *mens rea*. The implication of placing an over-reliance on mechanical causation would mean that a defendant *may* be criminally responsible for a resulting harm (and indeed liable, in the case of strict offences) without any culpability with respect to that harm. This conclusion was illustrated as being unacceptable and not reflective of current legal practice.

The chapter then moved to evaluate the concept of causation *outside* criminal law. Causation outside law focusses primarily on a mechanical, or explanatory, understanding of cause and effect. This mechanical approach to causation involves the type of investigation that a forensic scientist might track. It looks to the natural sciences to trace backwards from the prohibited result to ascertain the explanatory cause(s). It is for this reason that this chapter argued that mechanical causation, while a necessary but not sufficient component of legal causation, cannot be relied upon for the purposes of causal selection and the ascription of criminal responsibility; there are irreconcilable contextual differences between both fields of enquiry. This is because causation in criminal law is *attributive* in nature, not explanatory. The principal aim of attributive causation is to identify which causal actor ought to be identified as being criminally responsible for causing resulting harm, informed by the ideas and interests of the criminal justice system.

Finally, the bifurcation of causation that is conventionally stated by the judiciary and legal academics was rejected. The chapter argued that factual causation is unable to normatively discriminate between causal actors and ascribe causal responsibility in criminal law. This, it was argued, can only be achieved

when one applies culpability informed criteria to the causal enquiry. Therefore, it is not possible to have factual (or explanatory) causation as a wholly distinct and separate limb to legal causation. To remedy this issue, the proposed model of culpable causation offered in this thesis provides for mechanical analysis *within* a test of legal causation. This analysis then moved to consider how the judiciary has discussed causation in criminal law, demonstrating that the principal focus is placed on culpable offenders within the tests of legal causation, and not mechanically relevant contributions when establishing causation. In advancing these claims, this chapter provided the groundwork for developing an account of criminal causation that uses culpability to determine whether responsibility ought to be attributed to a defendant for causing a prohibited result in criminal law. The following chapter, therefore, presents and defends a normative analysis of criminal causation using the concepts of culpability and foreseeability as to the risk of harm. A test of culpable causation is offered, in place of the current bifurcation of causation, which allows the court to make an explicitly normative evaluation of a defendant's conduct (with respect to the resulting harm) to ascertain whether the defendant should be legally responsible in criminal law for causing that harm.

Chapter five presented the proposed model of how English criminal law should establish causation in criminal law. It developed the discourse and presented a normative yet practical account of causation in the criminal law, focusing on protecting the jewel of the criminal law's general part – individual capacity-based responsibility. The chapter employed the principles of voluntariness and foreseeability to provide an evidential threshold for establishing causation in criminal law. This was termed 'culpable causation'.

Culpable causation provides that a defendant must have acted with the minimum degree of culpability in causing the resulting harm to be causally responsible in criminal law. This test comprises of two distinct limbs. The first limb requires that the defendant's conduct must be culpably negligent, and the aspect of the defendant's conduct that made the defendant negligent must cause the resulting harm. To determine whether this criterion is satisfied, this chapter adopted the invariant and individualised standard of care to ascertain whether the defendant had the fair opportunity to avoid the harm. Thus, this chapter used culpable negligence to determine whether the conduct was voluntarily performed. The

rationale for including negligence within the principle of voluntariness is that it allowed for reasonableness to enter into the assessment, permitting the jury to make an explicitly normative evaluation of the defendant's unlawful conduct within a legally deregulated sanctuary. This, as is identified in chapter two, is a necessary pre-condition to finding the right answer to any causal enquiry.

The second limb focuses on the foreseeability as to the risk of harm, realised through reasonable foreseeability criteria. It was argued, to be responsible for a resulting harm, in addition to the first limb, that the harm must have been a reasonably foreseeable consequence of the unlawful conduct. The implication being, if the defendant voluntarily performed the unlawful conduct, but the resulting harm was too remote, causation is not established. The chapter argued that it is necessary to defer to reasonably foreseeable harms for two reasons. First, it acts as a limiting principle, without which an individual *may* be responsible for all the ensuing harms that result from their unlawful conduct, and causation would be without limits. The second reason is that it injects the causation doctrines with objective and flexible fairness. It was argued that if a defendant is held causally responsible for a resulting harm which was *not* reasonably foreseeable, then the protection of those that may be harmed is secured at the cost of the defendant's liberty and they would be unable to regulate their conduct within society. Therefore, the inclusion of a reasonable foresight provision provides a yardstick by which an individual can evaluate whether resulting harms will be attributed to them when deciding whether (or not) to act. Thus, without this second limb, an individual *may* not choose to act (or not act) because unforeseeable harm may still be attributed to them, encroaching on their liberty and autonomy act freely within society.

This analysis was drawn upon to propose a trial direction that enables the criteria of causation (morals, social, political, and linguistic norms) to operate genuinely and authentically. Culpable causation asks whether (1) the defendant's conduct was culpably negligent, and the aspect of the defendant's conduct that made the defendant negligent caused the harm; and (2) the harm was a reasonably foreseeable consequence. If both limbs are satisfied, the jury will have established an evidential threshold by which the defendant *may* be responsible for the prohibited result.

The test of causation offered in this chapter primarily applies in circumstances where the defendant's conduct is the only (human) contribution that *culpably* contributes to the resulting harm. However, as was evidenced in chapter two, hard cases of causation invariably concern a subsequent third party (or victim) contribution that is salient in bringing about the resulting harm. These intervening events may arise due to a third-party, victim, or negligent medical professional making a more than a negligible contribution to the resulting harm. It is, therefore, necessary to expound and examine how culpable causation can rationalise the impact of novus actus events. It is proposed that culpable causation can deal with such cases by focusing on whether the third party or victim, voluntarily and culpably responded to the original harm caused by D. This discussion forms the substance of the final chapter, chapter six.

The earlier chapters of this thesis argued that the hard cases of criminal causation typically arise in circumstances when the defendant's conduct is not the only salient and blameworthy contribution in bringing about the resulting harm. Therefore, the primary purpose of chapter six was to modify the account of culpable causation offered in chapter five to explicitly articulate *when* and *why* causal responsibility for intervening events is ascribed in criminal law.

The answer to this question, it was argued, lies within the critical application of a capacity-based account of voluntariness and reasonable foreseeability criteria. The current legal framework both inconsistently applies these criteria and fails to distinguish between voluntary and non-voluntary conduct convincingly. The chapter critically reviewed the thin skull rule, flight principle, and FDI principle to evidence that although the criminal law is inconsistent in its ascription of responsibility in such cases, the criteria of voluntariness and foreseeability permeates.

This chapter reconciled this divergence in legal practice by offering an alternative approach to establishing causation in novus actus cases by explicitly focusing on the requirements of voluntariness and reasonable foreseeability. In analysing the requirement and need for voluntariness of action, the chapter illustrated that the current understanding of voluntariness is abstract, open-ended, and malleable to the factual dispute and type of offence. This chapter circumvented these issues by utilising Hart's

invariant and individualised standard of care, asking whether the victim (or third party) could have done otherwise in the circumstances, using the reasonable person moderate the ascription of responsibility. This allows the jury to engage in an explicitly extra-legal and normative evaluation of both the defendant's and victim's conduct while protecting the jewel of the criminal law's general part – individual capacity-based responsibility. Hart's model of responsibility is modified to require a victim (or third party) to be measured against that of a moderately reasonable person, explicitly considering the victim's characteristics, other than those whose only relevance to V's conduct is that they bear on V's general capacity to appreciate risk.

If a response is held to be non-voluntary, the defendant's causal responsibility is limited to those responses and harms that are reasonably foreseeable. This position is attractive and efficacious and has been argued as offering both public and objective benefits. It also gives rise to a powerful moral intuition that it is unfair to ask an individual to answer for those consequences of their actions we could not reasonably have expected them to contemplate when deciding how to act or not act. Ultimately, it was submitted that if the victim (or third party) did not act with the capacity to choose otherwise consequent the defendant's unlawful conduct, and the resulting harm was reasonably foreseeable, there is no *novus actus* and the law traces through the intervention.

In conclusion, this thesis goes some way to help understand and define the limits of causal responsibility in criminal law. Culpable causation attempts to rationalise the way that both the ordinary-person and lawyer ascribes responsibility for results in the criminal law. It uses criminal law theory to construct a defensible account of causation in criminal law that explicitly relies on culpability, moderate reasonableness, and foreseeability criteria to explain *when* and *why* an individual legally causes a prohibited result.

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