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OMISSIONS, NON-INTERVENTIONS AND CAUSATION: ANDREW SIMESTER'S ACCOUNT

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Simester has defended the following conclusions: (1) an omission to φ can cause outcome *x*; but (2) an omission to θ (where θ-ing would have prevented *x*) cannot relieve another agent of causal responsibility for *x*. In relation to (1), I contend that a fuller explanation of why the law should recognise omissions as *causes*, rather than as an independent head of responsibility-attribution for results, is required, and that any such explanation will raise questions regarding Simester's distinctions between causal elements. Conclusion (2) follows from Simester's view that "direct" causation is sufficient for causation of *x*. It will be argued that Simester has not yet made the case for preferring this model over a more familiar one, whereby an initial finding of "factual" causation is always open to being defeated by doctrines of intervening causation to ensure that responsibility for outcomes is doled out appropriately by the criminal law.

I. Introduction

Consider the following hypothetical scenario:

> *Dr Enemy*: D slashes at V with a knife, causing a wound. V's wound becomes infected, and he is taken to hospital. V is put under T's care. T and V are sworn enemies, and so T declines to give V any treatment. V's infection develops into sepsis, and V dies. Had T administered antibiotics upon V's arrival at hospital, expert evidence suggests that he would have survived.[1]

Who caused V's death? D, D and T, or T?

In impressive recent contributions to the literature on causation,[2] Andrew Simester has defended the following conclusions: (1) an omission to φ can cause

* Professor of Criminal Law, University of Cambridge. Thanks to Mark Dsouza, Andrew Simester, Rachel Clement Tolley and Alec Walen for comments on earlier drafts. I am also grateful to the audience at a Cambridge Centre for Criminal Justice work-in-progress workshop in November 2024 for their comments.

1 *Cf* the golfing doctor example in Herbert LA Hart and Tony Honoré, *Causation in the Law*, 2nd ed (Oxford: Clarendon, 1985) at 361 and the similar example in John J Child *et al*, *Simester and Sullivan's Criminal Law: Theory and Doctrine*, 8th ed (Oxford: Hart Publishing, 2022) at 120. On a causal wrinkle that arises even in a basic example such as this, see note 5, below.

2 Andrew P Simester, "Causation in (Criminal) Law" (2017) 133 Law Q Rev 416; Andrew P Simester, *Fundamentals of Criminal Law* (Oxford: Oxford University Press, 2021) at ch 5 [Simester, *Fundamentals*]. I will be using *Fundamentals* for the purposes of citation, but most arguments are expressed identically in "Causation in (Criminal) Law". See, also, Andrew P Simester, "Free, Deliberate and Informed?" in Andrew P Simester (ed), *Modern Criminal Law: Essays in Honour of GR Sullivan* (Oxford: Hart Publishing, 2024) 3.

outcome *x*;[3] but (2) an omission to θ (where θ-ing would have prevented *x*) cannot relieve another agent of causal responsibility for *x*.[4] In familiar common law parlance, an omission can be a cause, but not an intervening cause. This would suggest, assuming that we are content to view D's stabbing of V as a cause of V's death,[5] the following propositions: (1) *both* D and T (concurrently) caused V's death; and (2) T's omission *cannot* call into question the conclusion that D caused V's death. The individual liabilities of D and T would be determined by their *mens rea*, and any relevant defences.[6]

In Part III of this article, I will put pressure on Simester's conclusion (1), and contend that a fuller explanation of why the law should recognise omissions as *causes*, rather than as an independent head of responsibility-attribution for results, is required. It will be suggested that it remains unclear precisely how omissions fit within the causal architecture constructed by Simester, or if/why they must do so. I will analyse various arguments for the conclusion that omissions can be regarded as part of causation. The most compelling of these explanations raises some difficult questions about how foundational parts of Simester's general account of causation in criminal law should be understood.

In Part IV, I will examine Simester's claim that conclusion (2) follows because a certain type of causation (which Simester terms "direct causation" – explored below)[7] is sufficient for causation of *x* in criminal law, and that causation in criminal law is sufficient for legal responsibility for *x* in the form of an *actus reus*.[8] (Again, there are other elements of the criminal law that might result in the defendant being *acquitted* following this result, such as *mens rea* and defences.) This view is, as Simester recognises, at odds with a common way of thinking about how causation functions in the criminal law (also to be explained soon). Ultimately, it will be suggested that Simester might have given us reason to be more explicit about aspects of that common mode of thinking, rather than reason to reject it. It will be suggested that the law should distinguish between causation of *x* and responsibility for *x*, with the former being at most a necessary, and not necessarily a sufficient, condition of the latter. (Once more, responsibility for *x*, on this view,

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[3] As will be elaborated upon below in Part III, Simester is not committed to the view that omissions *must* be recognised *as* causes, but could instead be satisfied with their being sufficiently analogous to causation that they too ground ascriptive responsibility.

[4] Technically, no *non-intervention* can fulfil this role. Simester focuses on omissions, and so, for the most part, will I: Simester, *Fundamentals*, *supra* note 2 at 121. There is, however, a difficulty raised by the distinction between omissions and other types of non-interventions (particularly "double preventions", which can, just to add to the confusion, involve omissions). See, further, Part III(D), below.

[5] I assume that Simester would be so content, but am not sure if this is an example of direct causation (does the infection follow physically from the stabbing?) or indirect causation (does the infection arise from its own physical causal chain, and a bridge is built between the stabbing and that causal chain in virtue of its reasonable foreseeability?). Does the distinction depend on whether the infection-causing bacteria are on the knife, rather than somewhere else? Can the law work with such distinctions? I leave these questions to one side.

[6] Simester, *Fundamentals*, *supra* note 2 at 99. Whenever I talk in such terms in this article, I am assuming there are no issues regarding D's being a voluntary actor, *etc*.

[7] Technically, Simester holds that either direct or indirect causation is sufficient for causation in law. In Part IV, I will concentrate on direct causation, because indirect causation presupposes the rectitude of a particular view of the law's *novus actus interveniens* doctrines that I am not (yet) convinced by.

[8] Again, I assume that there are no concerns over D's being a voluntary actor, etc.

does not foreclose the defendant's acquittal on other grounds, such as lack of *mens rea*, or due to a defence.)

As the summary above suggests, one cannot grasp Simester's account of causation and omissions without engaging with his more general views on criminal causation.

Part II gives an overview of Simester's account.

II. Simester on Causation in the Criminal Law

Central to Simester's theory of causation are the concepts of direct and indirect causation. As he explains: "Direct causation is a paradigm form [of causation], 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."[9] Indirect causation, by contrast, covers situations where direct causation of *x* via D's conduct is absent, but the law allows causation of *x* to still be attributed to D.[10] Take one of Simester's commonly-used examples, the New Zealand case of *Hart*.[11] D had assaulted V and then dragged her, unconscious or semi-conscious, to a nearby beach and left her below the tide line. D did not *directly* cause the tide to come in, and it is the tide coming in that (directly) caused water to enter V's lungs, and ultimately (directly) caused V to drown.[12] Indirect causation of V's death was nevertheless attributed to D here because, Simester explains, what D directly caused (V's location and helplessness) was *reasonably foreseeably* going to lead to the ultimate result of V drowning when the tide came in.[13] The gap between what D directly caused and what the tide directly caused can accordingly be spanned. (Things would be otherwise if, for instance, D left V above the tide line, but an abnormally high tide resulted in V's drowning.)[14]

In diagrammatical form:

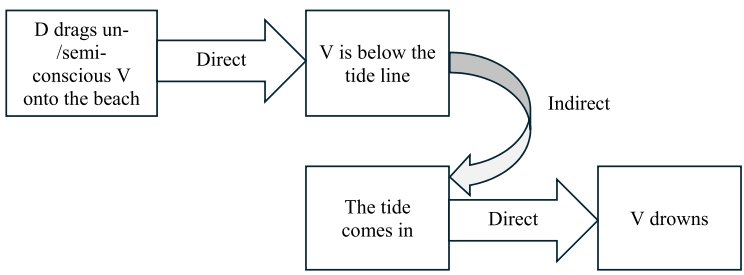

Figure 1: The expansive role of indirect causation in *Hart*

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9 Simester, *Fundamentals*, *supra* note 2 at 97.

10 *Ibid*.

11 *R v Hart* [1986] 2 NZLR 408 (CA) [*Hart*]. *Hart*'s facts are instructive, but the Court of Appeal was not concerned on appeal with the question of causation, but instead with defects in the trial judge's summing up regarding other aspects of the prosecution and defence cases.

12 As Rachel Clement Tolley has pointed out to me, *Hart* can be reconceived as an instance of double prevention: D caused the absence of whatever physical process would have prompted V to move when the water began to touch her, preventing her drowning. Double preventions are dealt with below in Part III(D), below.

13 Simester, *Fundamentals*, *supra* note 2 at 111.

14 *Ibid*.

On such a view, the law's doctrines of intervening causation are doctrines about the limits of permissible bridging of gaps between direct causal chains. What the common law normally calls doctrines of intervening causation are "chain-*constructive*, rather than chain-destructive".[15]

Adopting this direct/indirect distinction allows for a revolutionary change in causal thinking. The common way of thinking about causation in the criminal law is, as Simester acknowledges, via a two-stage analysis.[16] First, the law asks whether the defendant's conduct was a "but for" cause of *x* (so-called factual, or *sine qua non*, causation). Secondly, the law filters those factual causes of *x* through a range of limiting doctrines referred to variously as intervening causation, *novus actus interveniens* and proximate causation. Only the filtered factual causes can be "legal" causes of *x*. In diagrammatical form:

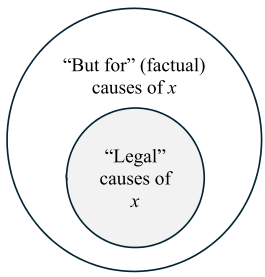

Figure 2: The filtering role of intervening causation doctrines

To return to *Hart*, D's leaving V unconscious on the sand was a "but for" cause of her ultimate death, even if he did not directly cause the tide to come in. Factual causation is present. The question of whether V's death was reasonably foreseeable is then a *limiting* one, removing some factual, "but for" causes – including those that were not reasonably foreseeably going to lead to the relevant result at the point of D's contribution – from the realm of legal causation.

The two accounts sketched above are, importantly, not dealing with the same base concept. Simester's own descriptions of direct causation suggest that it is concerned not with a "but for" relationship between *x* and *y*. Indeed, Simester rejects the "but for" test on the bases that such a test is hopelessly over-inclusive (D's great-grandparents are "but for" causes of whatever results D is a "but for" cause of) and that it discloses only a logical relationship, not a causal connection, between D's conduct and *x*.[17] In other words, "but for" causation is not actually a test *for* causation, but merely an unreliable heuristic. Simester pursues instead a particular type of physical relationship between D's conduct and *x*.[18] He describes direct causation in terms of "a sequence of physical (including chemical and biological)

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15 *Ibid* at 112.

16 *Ibid* at 96. For a clear example, from Singapore, see *Guay Seng Tiong Nickson v Public Prosecutor* [2016] 3 SLR 1079 (HC) at [31]–[32] [*Guay Seng Tiong*].

17 Simester, *Fundamentals*, *supra* note 2 at 129.

18 *Ibid* at 123–125.

reactions from cause to effect"[19] and "physical chain reactions, of the sort that a forensic scientist might track".[20] This endorsement of the "physical" is what gives rise to the first worry about Simester's account concerning omissions and causation: omissions are typically viewed by sceptics as non-causal *because* of their lack of this type of "physicality". On that basis, should omissions be banished from the causal realm? The next section provides a negative answer to that question.

III. Why Count Omissions as Causes?

Simester, like all people who have written about causation and omissions, realises that omissions are "different" from actions, in causal terms.[21] The reason for this specialness is that omissions do not intervene "physically" in the world in the same manner as actions. Indeed, the complaint in omissions cases is that the person who bore the relevant duty to intervene to prevent *x* did *not* intervene to prevent *x*.[22] It is the *lack* of a physical, real-world contribution that is taken issue with by sceptics regarding causation by omission.

The difficult question for a theorist of criminal causation is how to respond to this aspect of omissions. As seen already, the common law's answer is a simple modification of its "but for" test, whereby an omission to φ is a cause of *x* if φ-ing would have prevented *x*'s occurrence. Despite his disavowal of "but for" causation tests more generally, Simester's account of the causal potential of omissions sounds superficially similar:

> [Omissions'] causal significance lies in the fact that in the continuing causal sequence, C → C1 → C2 → … → Cn → E, that brought about the result, at least one of the internal links was completed only because of D's omission, D's omission, that is to say, is causally significant because it *did not break the causal chain that brought about the result*.[23]

He continues that:

> The causal significance of D's not-φ-ing lies in D's failure to prevent the unfolding of chains of events that led causally to the outcome, not in the failure to prevent the outcome as such. More generally, the causal significance of non-interventions depends upon counterfactuals about direct and indirect causal sequences and upon hypothetical scenarios about what would have happened otherwise.[24]

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19 *Ibid* at 98 (emphasis in original). For a similar formulation, see *Yohannan v State of Kerala* AIR 1958 Kerala 207 at [21].

20 Simester, *Fundamentals*, *supra* note 2 at 98.

21 *Ibid* at 121. For Simester's views on the distinction between acts and omissions, see *ibid* at 88–89, 91–92.

22 *Ibid* at 126.

23 *Ibid* (emphasis in original).

24 *Ibid*.

All of this suggests that omissions are not part of direct or indirect causation, but something else entirely. This conclusion is strengthened by Simester's other comments about omissions. For instance, Simester says: "By their nature, non-interventions cannot form links in direct causal chains."[25] Omissions and other non-interventions presumably also cannot form part of indirect causal chains, because those presuppose the intersection of distinct direct causal chains. Omissions' causal role is explained elsewhere by Simester as "distinctive",[26] and described as a "third major thread of causation".[27]

If omissions are not part of the direct/indirect framework, why recognise them as part of causation? Why not say that their role in attributing responsibility for *x* is non-causal? Such an answer has most famously, in legal circles, been presented by Michael Moore.[28] Moore is a prominent proponent of a "physicalist" or "scientific"[29] account of causation. Such accounts look at the precise nature of the link between behaviour and phenomena, typically in terms of energy release and absorption. This sounds very similar to Simester's direct or, as he sometimes calls it, "mechanical" causation, even if it is difficult to substantiate a claim that they are identical to one-another.[30]

Moore argues that viewing omissions as relevant to the kind of physical causation that appears to underpin direct causation (and, consequently, indirect causation) is a "crude" mistake.[31] Moore thinks that, as omissions are "literally nothing at all",[32] they have no part in such causal explanations: "'Nothing comes from nothing, and nothing ever can' is good metaphysics, as well as catchy lyrics in musical productions. Absent elephants grow no grass by their absence; absent savings cause nothing, and certainly not the deaths they fail to prevent".[33] As Moore puts it, unlike when interrogating causation by acts, one cannot sensibly ask whether *x* would have occurred had D not φ-ed, because D did not φ. The question is meaningless. That is why the law changes the question, under the banner of factual causation: would *x* have occurred if D *had* φ-ed?[34] But, for Moore, this is to give up the causal

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[25] *Ibid* at 123.

[26] *Ibid* at 97 (emphasis added).

[27] *Ibid*.

[28] See, too, Kimberly K Ferzan and Larry Alexander with contributions by Stephen J Morse, *Crime and Culpability: A Theory of Criminal Law* (Cambridge: Cambridge University Press, 2009) at 235 ("omissions do not and cannot cause anything").

[29] Alec Walen and Bettina Weißer, "Causation and Responsibility for Outcomes" in Kai Ambos *et al* (eds), *Core Concepts in Criminal Law and Criminal Justice: Volume 2* (Cambridge: Cambridge University Press, 2022) 57 at 64–66.

[30] For instance, when discussing how physicalists would deal with certain cases of *novus actus interveniens*, Simester compares their answer to the absence of direct causation: Simester, *Fundamentals*, *supra* note 2 at 110.

[31] Michael S Moore, *Causation and Responsibility: An Essay in Law, Morals and Metaphysics* (Oxford: Oxford University Press, 2009) at 141 [Moore, *Causation and Responsibility*].

[32] Michael S Moore, *Act and Crime: The Philosophy of Action and Its Implications for Criminal Law* (Oxford: Oxford University Press, 1993) at 28.

[33] Moore, *Causation and Responsibility*, *supra* note 31 at 54–55. The quoted lyrics are from "Something Good", from *The Sound of Music*. As my colleague Rachel Clement Tolley pointed out to me, the lyric should in fact be "nothing ever could".

[34] *R v Broughton* [2021] 1 WLR 543 (CA, Eng) [*Broughton*].

enterprise and ask about something else entirely (more specifically, the relevance of counterfactual dependence to assessments of responsibility for outcomes).

It will not do, in answer to Moore, to point out that *x* came about only because there was no intervention to stop *x* coming about. That would be to point to the evidence from which Moore draws his conclusion that omissions do not cause anything, and attract the response "See!". What is needed, then, is a *positive* answer to the question of why omissions and other non-interventions should be recognised as causes.

The next subsections survey such possible arguments, and settle on the conclusion that *some* non-interventions *need* to be recognised as causal if causation is to do any useful work in the criminal law. This is no mere semantic dispute, then: some non-interventions *are* causal, rather than just being "cause-like" or treated as a distinctive aspect of responsibility ascription. They must, I contend, at least sometimes feature in Simester's direct/indirect model.

A. *Lay Usage*

In a textbook edited by Simester, it is noted that, "neither ordinary language nor the law has much compunction about attributing causal responsibility to omissions".[35] It is true that ordinary lay language attributes causal effect to omissions. If I omit to feed my cat, I suspect I would indeed be accused of causing him to become malnourished. (Fear not, reader; he is presently at his ideal weight.) Some sceptics about the causal potential of omissions have at least finessed their views in response to this sort of fact.[36] There is nevertheless reason for caution here. Ordinary usage is the product of a hodgepodge of different factors, which undermines its coherence and in turn its diagnostic value.

First, it is unlikely that many ordinary English speakers have spent long contemplating whether causation of a result is a *necessary* condition of responsibility for that result, or whether other, non-causal forms of responsibility for a result are equally acceptable. It might be that, without such reflection, the ordinary-language conclusion that D caused *x* is simply standing in for a judgement that D ought to be held responsible for *x*, which is plausibly a different matter, to be addressed using distinctive conceptual apparatus.[37] A plausible, independent basis for responsibility here, for example, is that D had undertaken a duty to avert *x*, and failed to perform that duty, even if this fact seems irrelevant to the factual question of whether D

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[35] Child *et al*, *supra* note 1 at 117. Lifting the veil slightly, Simester has primary responsibility for this chapter. I assume that, by reference to ordinary language, Simester does not intend to invoke philosophical work about rules/maxims of language and relevance, which might bear upon proper speech regarding omissions.

[36] *Eg*, George P Fletcher, *Rethinking Criminal Law* (Boston: Little & Brown, 1978) at 596.

[37] Compare Douglas N Husak, *The Philosophy of Criminal Law* (Totowa, New Jersey: Rowman & Littlefield, 1987) at 164 and Jonathan Bennett, "Whatever the Consequences" (1966) 26 Analysis 83 at 93–94. For other accounts that say that not causation, but something else sufficiently like it, are relevant in cases of omissions, see Joel Feinberg, *The Moral Limits of the Criminal Law – Volume 1: Harm to Others* (New York: Oxford University Press, 1987) at 175–84 and John Kleinig, "Good Samaritanism" (1976) 5 Phil & Pub Aff 382.

("physically") caused *x*. To put matters another way: the duty that is essential to the legal concept of an omission is independent of the causal inquiry regarding omissions. This is because the fact that I am under a duty to feed my cat does not (and cannot) alter the physical universe in any way. Accordingly, the existence of the duty does not (and cannot) contribute physically to the cat's malnourishment. But the existence of a duty to feed my cat might nevertheless make it appropriate to hold me responsible for its state of malnourishment, without necessarily making any causal claim.

Secondly, the intuitive pull to regard D's conduct as a cause of *x* may exist because D did not *merely* omit to φ, but engaged in a course of complex conduct, including various acts, that can be seen as leading, physically, to *x*.[38] Examples of causation by omission in the literature often have D arrive on the scene as disaster unfolds, but real life is typically more complex. For instance, in *Perry*,[39] a mother had put her child in the bath, left the room to send a message on her phone, and did not return in time to prevent the child from drowning after he slipped from his bath seat. Perry was convicted of manslaughter by gross negligence. Demonstrating the lay use of causal language in such cases, a news headline regarding the case describes Perry as having "killed" her child, and "kill" is usually understood as causally-laden language.[40] A large part of the explanation for this appropriateness may, however, centre on Perry's actions (running the bath, putting the child in the bath, leaving the room), and *their* physical relationship to the eventual result of drowning, rather than her discrete omission to prevent her child's death after he had slipped. Even ignoring the difficulties presented by the act/omission distinction, most complex cases of alleged causation by omission are plausibly structurally similar to this case.[41] Accordingly, it is not clear that ordinary language's lack of compunction in attributing causation to omissions tells us anything reliable about omissions specifically, rather than about reactions to a complex mix of earlier acts that also led to the relevant result.

Ordinary language can be more strenuously tested, then, against a case where there is no antecedent act by D that itself seems physically, causally potent at the time of the relevant result's occurrence. Consider the following hypothetical case:

> *Nanny*: D employs T to look after D's child, V. T is very well qualified, and performs her duties well. She has been a valued employee of D's family for two years. Part of T's duties involves bathing V before bedtime. T places V in the bath and is then distracted by a phone call. D comes home, notices that V is struggling in the bath, and does not intervene. V drowns before T returns.[42]

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[38] For some doubts in this regard, see John Kleinig, "Criminal Liability for Failures to Act" (1986) 49 Law & Contemp Probs 168 at 177–178.

[39] Unreported, Northampton Crown Court, March 2021 – see BBC News, "Northamptonshire Mum Jailed for Killing Baby Son Left Alone in Bath" (23 April 2021) <https://www.bbc.co.uk/news/uk-england-northamptonshire-56860846>.

[40] *Ibid*.

[41] Compare the "complex" acts discussed in Eric Mack, "Causing and Failing to Prevent" (1976) 7 Southwestern Journal of Philosophy 83 at 88–89.

[42] I have deliberately left D's motivation unstated, in case this muddies the example. If it helps, however, readers might wish to consider situations where D has an urgent work matter to attend to, is on a phone call with a dying relative, or simply would prefer to live without responsibility for V, *etc*.

Perhaps ordinary English usage points towards the conclusion that D has caused V's death in *Nanny*, but I predict (as ever in criminal law theory, without empirical evidence) that a debate about whether D has caused V's death or merely *failed to prevent* V's death is more likely to arise here than in cases like *Perry*. The causing versus failing to prevent debate is usually seen as one in which causation is being compared with its absence.

So far, I have raised some doubts about ordinary, lay language's lack of compunction concerning the characterising of omissions as causes. Even if one remains unconvinced by these doubts, however, a further question must be addressed: why follow ordinary English here? Typically, the law follows ordinary language because laypersons must live by the criminal law and have an interest in it not using language in an alien fashion.[43] The primary worry about the law developing its own meanings for terms arises from concerns about citizens' autonomy and freedom: citizens must be enabled to choose to act (or omit to act) in a manner that avoids criminal liability. Using the justification of ordinary usage to *extend* causation in a way that is at least controversial, from a (meta)physical perspective, does not further this action-guiding role. Additionally, a jury is not going to be confused by a direction that would not regard omissions as "causes" of results in law. Such a direction would, presumably, mandate that they find an *act* that was a significant cause of the relevant result, or otherwise acquit.[44]

Lay usage does not, then, provide a secure basis for viewing omissions as causes.

B. *The Law's Language*

In terms of *the law's* language, admittedly homicide liability for deaths based on causation by omission seems to have existed since at least the 16th century.[45] The shakiness of the courts' grasp of the distinction between acts and omissions nevertheless means that placing too much normative weight on the identification of D's conduct as an act or omission is unwise. Relatedly, the point about the complexity of real-world behaviour compared to neat hypotheticals, considered above, applies with equal force in the context of the decided cases.

Additionally, judicial opinion has wavered at points, even if subtly. Sometimes, for example, the courts have talked not in terms of causing death, but in terms of letting someone die.[46] Again, these ideas tend to be juxtaposed in the debate about omissions and causation,[47] not used interchangeably. At other points, the courts have been more express in their trepidation: "the failure of the prisoner to discharge her

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[43] See Findlay Stark, *Culpable Carelessness: Recklessness and Negligence in the Criminal Law* (Cambridge: Cambridge University Press, 2016) at ch 3.

[44] If omissions are not recognised as causes, but are instead seen as involving a free-standing ground for holding an agent responsible for a result, then the jury could be given a suitable direction without invoking causation: for instance, they just have to be sure that, had D acted in accordance with his duty, the result would not have followed.

[45] See Peter R Glazebrook, "Criminal Omissions: The Duty Requirement in Offences against the Person" (1960) 76 Law Q Rev 386.

[46] *R v Nicholls* (1874) 13 Cox CC 75.

[47] For instance, in the debate over euthanasia – see, famously, Bonnie Steinbock and Alastair Norcross (eds), *Killing and Letting Die* (Fordham: Fordham University Press, 1994).

legal duty at least accelerated the death of the deceased, if it did not actually cause it".[48] These judicial comments suggest that the courts were aware that they were not *really* dealing with causation, and were instead holding D responsible on the basis of the failure to perform a legally-recognised duty and thereby avert disaster. The courts' statements can be read, plausibly, to suggest awareness of there being two distinct potential bases for legal responsibility for a result at issue, with only one being causal. Of course, the law formally requires causation of death for there to be an *actus reus* in offences of homicide, and so the courts could not expressly say that there was *no* causation in these cases. The resulting fudge encourages confusion in this regard, which is a theme to be returned to in Part IV, below.

Finally, it is worth noting the recent English case of *Broughton*.[49] There, the Court of Appeal slipped repeatedly from the language of causation into talk of "contribution" (and related terms). This distinction may seem trivial – causation is a form of contribution to a result, one might think – but it does raise issues with causal doctrine in England and Wales more generally. The English courts are clear that one can *contribute* to a consequence without *causing* it: the most famous example being that the supply of drugs can contribute to a dangerous state of overdose, but cannot – due to the "free, deliberate and informed" decision of the drug user to inject the drug – cause it.[50] It is unlikely that this language in *Broughton* is the result of conscious reflection on the causal potential of omissions. It is, nevertheless, further reason to be wary of placing too much reliance on the courts' repeated assertions that omissions can cause results, especially if that is understood as making a (meta) physical claim.

Indeed, as the "role of causal language in the criminal law is so complex, not to say confused",[51] it is perhaps unwise to put too much stock in what the courts routinely say on this matter. Everybody familiar with causation in English criminal law, for instance, will be aware that the courts will refuse to be held to what they said about causation in context A if they wish to apply a different approach in context B. After all, "common sense answers to questions of causation will differ according to the purpose for which the question is asked",[52] and "the meaning of causation is heavily context-specific and… Parliament (or in some cases the courts) may apply different legal rules of causation in different situations… it is not always safe to suppose that there is a settled or 'stable' concept of causation which can be applied in every case".[53]

Legal doctrine (in England and Wales, and I fully expect beyond) does not, then, provide a firm foundation for the view that omissions can cause anything.

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48 *R v Instan* [1893] 1 QB 450 at 454. See, similarly, *R v Morby* (1882) 8 QBD 571 at 575.

49 *Broughton*, *supra* note 34.

50 This approach was confirmed in *R v Kennedy* [2008] 1 AC 269 (HL, Eng) and *R v Evans* [2009] 1 WLR 1999 (CA, Eng).

51 Jane Stapleton, "Choosing What We Mean by 'Causation' in the Law" (2008) 73 Mo L Rev 433 at 448.

52 *Environment Agency (formerly National Rivers Authority) v Empress Car Co (Abertilly) Ltd* [1999] 2 AC 22 (HL, Eng) at 29.

53 *R v Hughes* [2013] 1 WLR 2461 (SC, Eng) at [20].

C. *Acknowledging Our Ability to Intervene*

A third avenue to pursue is presented in the seminal work on causation by HLA Hart and Tony Honoré. They accommodate omissions in causal theory on the basis that we have a good sense of our ability to intervene in ongoing physical causal chains.[54] As explained vividly by John Harris, such views are contrary to one that:

> … contains only the setting in motion of trains of events where previously all was at rest… [T]he real world of action is busy with trains of events, some we have the power to set in motion, others are already in motion (whether caused by other agents or by the brute forces of nature) and we have the power to stop them or, by operating or not operating the points, determine where they will end up and what damage they will do on the way.[55]

As evidence of this awareness of the causal potential of omissions, Hart and Honoré point out that, where we would expect an agent to intervene in the causal chain leading to *x*, the fact that there was *no* intervention strikes us as highly pertinent in answering the question of how *x* came about, which is, apparently, identical to the question of what *caused x*. Consider Hart and Honoré's famous gardener example:[56] when we ask "Why did the flowers die?", the answer "Of a lack of water" is unlikely to satisfy us if we know that someone had accepted responsibility for the flowers' care. We will naturally wonder why, contrary to our expectations, the gardener failed to intervene in the plants' death through dehydration.[57] And this, for Hart and Honoré, shows that failures to stop causal processes that are already in motion can themselves have causal significance, including in the law.[58]

There is, however, a gap in Hart and Honoré's explanation of why omissions are causes. That we are aware of our ability to intervene to prevent outcomes, and that we expect such interventions and comment on their absence, does not establish that omissions *are* causes of anything. It might only establish that we ascribe responsibility for outcomes in such situations, which is – once more – not to say that such responsibility is necessarily causal. Alternatively, it might be that Hart and Honoré have given us reason to think of omissions as part of *causal explanations*. But, as Helen Beebee explains, "such explanations can give information about the causal history of the event to be explained even though the explanans does not stand to the explanandum as cause to effect".[59] In other words, it is coherent to hold that omissions do not cause anything, after all. We could, however, abandon causation as the ground of responsibility in favour of causal explanations (or whatever other term we might invent), but that is to accept Moore's critique, not refute it.

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54 Hart and Honoré, *supra* note 1 at 37.

55 See John Harris, "Bad Samaritans Cause Harm" (1982) 32 Phil Q 60 at 64.

56 Hart and Honoré, *supra* note 1 at 38.

57 *Ibid*.

58 For further useful examples, see George P Fletcher, "On the Moral Irrelevance of Bodily Movements" (1994) 142 U Pa L Rev 1443 at 1448.

59 Helen Beebee, "Causing and Nothingness" in John Collins *et al* (eds), *Causation and Counterfactuals* (Cambridge, MA: MIT Press, 2004) 291 at 304. See, also, Marcelo Ferrante, "Causation in Criminal Responsibility" (2008) 11 New Criminal Law Review 470.

Moore's challenge is, again, not met if our ability to intervene in ongoing causal chains is relied upon to ground the causal potency of omissions.

D. *The Necessity of (at Least Some) Absences and Non-Interventions to Causation*

Various candidates for a justification of the causal potential of omissions examined thus far are, accordingly, not promising. All are entirely compatible with the conclusion that it is not *necessary* to view omissions as causes (as opposed to something else).

The final argument to be considered here is that, if a role for at least *some* omissions or absences in accounts of causation is not found, those accounts are uselessly narrow. Indeed, it has been argued that Moore's account is susceptible to *reductio ad absurdum* replies, and his response to them is unsatisfying.

A major worry for Moore's account, highlighted by Jonathan Schaffer and others,[60] is that it leads to the conclusion that things that appear to be paradigmatic examples of causation are not, after all, instances of causation. The clearest examples involve "double preventions", where "A prevents B from preventing C from doing something".[61] Once such phenomena are taken to have causal potential,[62] the levee has broken, and one then must explain where the causal potency of non-interventions more generally (including omissions) stops. Consider:

> *Brain Death*: D shoots V through the heart. V suffers brain death a short while afterwards.[63]

If this is not a situation in which D has caused V's death, then it is difficult to know what is. But, as Schaffer has explained clearly, what brings about V's death is the *non-functioning* of V's heart, and the resulting *absence* of oxygenated blood from V's brain.[64] Put another way, the "bullet prevents [V's] heart from preventing their brain from dying from oxygen starvation".[65] If omissions, absences and non-interventions *cannot* cause results in a physical sense, then for Moore it seems as if death is *not* caused, in a physical sense, by D's action in *Brain Death*.

Taken to extremes, a problem is raised with all human actions, insofar as these will require muscle contraction, which itself requires the disconnection of the tropomyosin barrier.[66] If such absences cannot physically cause anything ("Nothing comes from nothing"), then Moore seems to be committed to saying that no human

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[60] See Richard W Wright, "Causation: Metaphysics or Intuition?" in Kimberly K Ferzan and Stephen J Morse (eds), *Legal, Moral and Metaphysical Truths: The Philosophy of Michael S Moore* (Oxford: Oxford University Press, 2016) 171 at 181.

[61] Bradford Skow, "Two Concepts of Double Prevention" (2022) 9 Ergo 805 at 805.

[62] One need not agree that *all* "double prevention" cases involve causation. See, for instance, *ibid*.

[63] Compare the "beheading problem" in Jonathan Schaffer, "Disconnection and Responsibility" (2012) 18 Leg Theory 399.

[64] See *ibid* at 405–407.

[65] Skow, *supra* note 61 at 810.

[66] Schaffer, *supra* note 63 at 407.

action physically causes anything. And that is absurd. Once this point is accepted, the space for full-blooded causation by omission, absences and non-interventions opens, even if its precise topography remains to be mapped.

Moore's unsatisfying response to such double prevention cases is that the "closeness" of D's conduct and V's death in *Brain Death* allows us to "get sloppy" and say that D did in (physical) fact cause V's death.[67] As Alec Walen has argued in reply, it is not clear that this invocation of sloppiness is legitimate.[68] It is entirely possible to split the elements of V's death in the manner suggested by Schaffer, so the problem is not one of sloppiness being *necessary*.[69] In the absence of necessity, sloppiness seems precisely what philosophers and lawyers hoping to understand causation should avoid.

Furthermore, Moore's sloppiness argument runs counter to the avowedly scientific ambitions of physicalists. Science *does* tend to count the absence of things that would prevent *x*'s occurrence as causes of *x* – think of vitamin C and scurvy.[70] Accordingly, a non-sloppy defender of a view like Moore's has two bullets to bite: (1) such accounts render virtually all human action non-causal; and (2) such accounts are narrower than the science that they tend to look to in order to present a unitary account of causation. Maybe these bullets are worth biting for some, but it is notable that Moore refuses to partake.[71]

Ultimately, the difficulty is that Moore's conception of causation is implausibly narrow insofar as it is concerned exclusively with active involvement in causal chains.

What has been established, so far, is that *some* absences and non-interventions – at least those involved in double preventions – *need* to be identified as causes, or at least part of "physical" causal accounts of a result, not merely because ordinary language and the criminal law *say* so, or because we are aware of our ability to intervene to prevent results from occurring. They need to be recognised as causes (or at least part of "physical" causal accounts of a result) because otherwise the concept of causation is so narrow as to be useless, particularly in an enterprise such as assessing criminal responsibility.

This is not to claim that *all omissions are causal*, because not all omissions, non-interventions and absences are double preventions (although many are), and it might be that not all double prevention cases involve causation.[72] This article cannot present a complete account of how far the causal power of absences, non-interventions and omissions goes;[73] its purpose is to examine Simester's account. The point that has been substantiated is that a fully fleshed-out account of causation is going to have to accommodate *some* omissions, *etc*, *within* causation, even if others are dealt with under other umbrellas (causal explanations, counterfactual

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67 Moore, *supra* note 31 at 461–462.

68 Walen and Weißer, *supra* note 29 at 63 (Walen is identified as the author of the relevant text). See, further, Alec Walen, "More Contra Moore on Absences as Causes" (2022) Crim L Bull.

69 See, further, Schaffer, *supra* note 63 at 411–413.

70 *Ibid* at 409. See, also, Stapleton, *supra* note 51 at 447.

71 On the equivalent hoops that certain German theorists jump through to avoid excluding causation by omission, see Walen and Weiße, *supra* note 29 at 65–66.

72 For such an argument, see Skow, *supra* note 61.

73 For some discussion, see Ferrante, *supra* note 59.

dependence, and so on). There is no universal answer to the question of whether omissions, *etc*, are causes.

Simester's reaction to cases like *Brain Death* is contained in a footnote:

> Strictly speaking, we can trace a sequence of physical chain reactions from the firing of the bullet to the stopping of V's heart. Death then results because V's blood ceases to circulate and transfer oxygen to the brain tissue… this further link involves a form of "double-prevention"… I take such links to be causal in nature. Moreover, I take at least some instances of such links, like the one that leads to V's death, to be morally insensitive, and in that sense akin to direct causation. However, there is not space here to develop an account of *which* kinds of double-prevention links are morally (in)sensitive. That task requires another book.[74]

One can "take [some] such links to be causal in nature" and analogise them to direct causation, but that does not mean that they *are* indisputably instances of causation, as it has been argued above that some must be. Furthermore, it is not enough to say that these cases – *ie*, double preventions – involve something merely "akin" to direct causation. If the argument is that, without (at least some) omissions, absences and other non-interventions, we cannot identify a cause of virtually anything that the criminal law would care about, that seems to suggest that those omissions, *etc*, are *internal* to the causal accounts we give, rather than something running parallel to them.[75] If (at least some) omissions, *etc*, are part of scientific understandings of how phenomena occur, they *must*, despite the above-mentioned suggestions to the contrary, be part of direct causation, for it is concerned with "truths about the natural world" concerning "consecutive sequences of events".[76] Indeed, Simester later deals with an example like *Brain Death* as an instance of direct causation (and not merely "akin" to one).[77]

The ultimate conclusion to be drawn from this discussion is that, once the question of *why* omissions, *etc*, should be considered as having causal significance is delved into, it becomes harder to see what direct causation consists in, and how omissions, non-interventions and absences feature in that answer. This raises significant questions about the ease with which direct causation can be found, the ease with which direct causation can be distinguished from indirect causation, and the ease with which omissions can be identified as concurrent (and independent) causes of results. Simester is no doubt correct that resolving these issues requires another book, but until it is written the foundations of his account of causation are less steady than they initially appear.

The next part of this article puts pressure on the way in which Simester argues that *novus actus interveniens* doctrines perform an expansionary, rather than limiting, role in attributing responsibility for results. Simester's approach has the consequence of excluding omissions from the category of phenomena that can block

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74 Simester, *Fundamentals*, *supra* note 2 at 98.
75 Walen and Weiße, *supra* note 29 at 64.
76 Simester, *Fundamentals*, *supra* note 2 at 97.
77 *Ibid* at 98.

a finding that D was causally responsible for *x*. It will be argued that Simester has not yet done enough to justify jettisoning an additional blocking function, such as that that exists under the common law's standard approach to causation. He has, however, given us good reason to be more explicit about the distinctive function of such liability-limiting rules.

IV. Why Can't Omissions Intervene?

Recall that, on the typical, common law view of causation, an omission can be a cause of *x* if, "but for" the omission, *x* would not have occurred. Recall also that, on the typical, common law view, intervening causation doctrines *limit* the number of "but for" causes that will qualify as legal causes. On such a view, there is nothing that logically stops an intervening cause from being omissive in nature, assuming that the relevant omission occurs *after* D's ongoing contribution.[78] To return to *Dr Enemy*, D's stabbing V is certainly a "but for" cause of V's ultimate death. If D had not stabbed V, then V's death would not have come about in the relevant fashion (through infection caused by the knife wound). On the common law's normal approach, however, this would not resolve the question of whether it is appropriate to hold D causally responsible for V's death. It might be wondered if the unforeseeable and deliberate nature of T's non-intervention means that legal causation would be doubted here.

There is, unhelpfully, no case law that points clearly in either direction.[79] Simester has tended to focus on *Blaue*,[80] but as he notes, the judgment is notoriously opaque. The Court of Appeal was faced with a case where D had stabbed V repeatedly. V was taken to hospital, where she was told that she required a blood transfusion to survive. V was a Jehovah's Witness and believed that undergoing this medical procedure would rob her of her chance for eternal salvation. She accordingly refused the transfusion and died. D was convicted of V's manslaughter. On appeal, D argued that V's decision not to undergo the transfusion was a *novus actus interveniens*. The Court of Appeal rejected this argument, but, as it was making a judgment on the facts, did not explicitly say that omissions could *never* intervene in a causal chain started by D's conduct. Instead, they first explained that the stab wounds were still an operating cause of V's death – "[t]he physical cause of death… was the bleeding into the pleural cavity arising from the penetration of the lung".[81] They then rejected the idea that D could query the reasonableness of V's decision to refuse a transfusion.[82] In so doing, they did not clearly have a general underlying thesis about omissions and *novus actus interveniens* more generally. (Indeed, as I will suggest below, it is controversial to even view V's decision as a duty-breaching "omission" here.)

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78 *Cf* the tragic facts of *Guay Seng Tiong*, *supra* note 16, where V's parents had omitted to secure V in a child restraint in their car. D subsequently collided with V's parents' car, and V was killed in the collision. It is certainly plausible that V would have survived, but for her parents' negligence. This did not, however, interfere with a finding that D had caused V's death.

79 I offer some possible explanations for this dearth of authority below.

80 *R v Blaue* [1975] 1 WLR 1411 (CA, Eng) [*Blaue*].

81 *Ibid* at 1415.

82 *Ibid*.

Simester focuses on the court's first answer in *Blaue*. For him, omissions *cannot* "intervene" to relieve a person who has directly or indirectly caused the relevant result of causal responsibility for that result. Simester explains that: "an omission cannot constitute a *novus actus interveniens*… precisely because it is the failure to break [the relevant causal chain] which is our ground of complaint".[83] To put the matter differently: "The event that could have been prevented, had the agent performed the action he actually refrains from performing, is neither the result nor the consequence of the refraining. It is just another phase in a causal process that goes on without any intervention on the part of the agent in question."[84] When Simester asks, pithily, "Of what did V die?",[85] the answer will invariably be whatever lies along that physical path.[86] As "one cannot break causal chains by failing to break them",[87] omissions cannot, conceptually, ever be *novus actus interveniens*. *All* of the omission-based examples cited thus far are thus resolved identically, assuming that there is direct or indirect causation present: the omission cannot relieve another agent of causal responsibility for the relevant result.

To put the matter yet another way, once we have worked out that the knife wound directly or indirectly caused V's death in *Dr Enemy* and *Blaue*, we know all that we need to know about whether D caused V's death.[88] Again, *novus actus interveniens* doctrines help us see when indirect causation will function, on Simester's view. They do not – indeed *cannot* – dislodge an extant finding of direct (or indirect) causation.[89] And once we have causation of *x*, we have the *actus reus* of a result crime,[90] and the discussion moves on to *mens rea* and defences.

A worry about cases like *Dr Enemy* is that it is already to get ahead of ourselves to look for some form of "intervention" between D's conduct and V's death. In Simester's examples of direct causation, the wound caused by D is an "immediate medical factor explaining V's death, albeit alongside other contributions".[91] This is certainly true of *Blaue*. In *Dr Enemy*, however, one might doubt whether the knife wound was such an "immediate medical factor"; that contribution might have, as Simester evocatively puts it, "petered out".[92] In turn, one might doubt that V's stabbing D was a direct cause of V's death. Again, the boundaries of direct causation are not entirely clear, but my suspicion is that "petering out" will be more likely to be found when one does not want D's contribution to be causally relevant to the

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83 Simester, *Fundamentals*, *supra* note 2 at 127.

84 Elazar Weinryb, "Omissions and Responsibility" (1980) 118 Phil Q 1 at 10.

85 Simester, *Fundamentals*, *supra* note 2 at 127.

86 A difficult case is *R v McKechnie* (1992) 94 Cr App Rep 51 (CA, Eng). D assaulted V, who was then discovered to be suffering from a pre-existing, life-threatening medical condition. Because of the injuries inflicted by D, the doctors decided it was not safe to operate on V, who was killed by the pre-existing medical condition. Here, the physical cause of death is the underlying health condition, but D did cause the doctors' non-intervention that failed to prevent death, which makes it plausible to hold D responsible for V's death. What if the doctors had been D or V's enemies, and *that* is why they did not operate?

87 Simester, *Fundamentals*, *supra* note 2 at 127.

88 Compare *ibid* at 99.

89 See, also, *ibid* at 108–109, 112.

90 Again, I am assuming that there is no doubt over D's voluntariness *etc*.

91 Simester, *Fundamentals*, *supra* note 2 at 99.

92 *Ibid* at 101–103.

particular result, and fail to be found when one wants the alternative conclusion to be reached.

Assuming there is no "petering out" by the relevant stage of analysis, D's stabbing V will be an *indirect* cause of V's death, on the basis that the infection, *etc*, that followed (and did, medically, immediately cause V's death) was reasonably foreseeable at the point that D slashed V. And Simester is clear that whether directly or indirectly caused, V's death *is* caused by D's conduct, however egregious T's omission to intervene and prevent it.

I will tend to focus, in what follows, on the sufficiency of *direct* causation. This is because, in making *novus actus interveniens* rules expansive, rather than limiting, Simester has excluded the alternative that I wish to consider in more depth here.

The basic question raised by Simester's account is: if D's conduct directly caused *x*, why should the law accept that this is *sufficient* for a legal finding that D is responsible for *x* (subject to concerns of *mens rea* and defences)? Why not also allow the law's concepts of *novus actus interveniens* to impact upon the question of whether D should be held responsible for *x*?

A straightforward way of answering the basic question I have identified, to which Simester himself refers, is to invoke the truth that criminal liability does not require D to be *the* cause of *x*; it merely requires that D is *a* cause of *x*.[93] As it is sometimes explained, if D's conduct was an "operating" cause of *x*, it was a legal cause of *x*.[94] In consequence, the law should accept that (absent concerns over voluntariness, *etc*,) the *actus reus* of a result crime is satisfied by proof of direct or indirect causation, and all that is left to save the defendant from liability is a defence or an absence of *mens rea*.

Such explanations of the relevance of being *a* cause have nevertheless been given in the context of the common two-stage analysis, whereby *novus actus interveniens* doctrines tell us that, despite being a factual cause of *x*, D's conduct is not, after all, a legal cause of it. In such situations, it is entirely possible to distinguish between being *a* (factual) cause of *x* and being *the* (factual and legal) cause of *x*, and, if *novus actus interveniens* doctrines are seen as limiting, sometimes the law does care that D was *the* (factual and legal) cause (or, rather, that someone or something else other than D was *the* (factual and legal) cause). One need not even go this far: the law can identify a number of (factual and legal) causes of *x*, yet exclude D's contribution.

Note that I am not denying the obvious point that there *can* be multiple legally-recognised causes of *x*. I am denying that, once D's conduct is recognised as *a* factual cause of *x*, that is the end of the inquiry. The common law often obfuscates matters through vague tests such as "significance" to *x*, or relegation of D's contribution being "merely the [historical] setting: of the ultimate cause of death.[95] But its *novus actus interveniens* doctrines also play a vital role here in ensuring that it is appropriate to ascribe responsibility for *x* to D.

Of course, in running this all through one concept (causation), we risk fudging our analysis of causation of *x* and conclusions about appropriate responsibility for *x*. Indeed, part of Simester's project is to find the content of causation that exists

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93 *Ibid* at 101.

94 *R v Smith* [1959] 2 QB 35 at 42–43 (CA, Eng).

95 *Ibid*.

across legal realms, before the intrusion of norms (which might differ between, say, crime and tort).[96] This is a noble endeavour, but it still does not lead directly to the conclusion Simester wants. Why not jettison the "but for" test, agree that the question of whether D caused *x* is indeed resolved by the presence of direct (or indirect) causation, but then say that such causation is only part of the case for holding D responsible for *x*?[97] Given that this would be more like[98] the current, accepted doctrine, a more explicit answer is required.

The criminal law could, of course, make things clearer in this context. For instance, German criminal theory distinguishes between the question of whether D caused *x* (using, in essence, a "but for" test) and the question of whether *x* can appropriately be "imputed" or "fairly attributed" to D, making it his legal responsibility.[99] English theory could be clarified by holding that the question of whether D is appropriately held criminally responsible for *x* is not resolved by the conclusions that his voluntary conduct (directly or indirectly) caused *x*, he had *mens rea*, and he lacked a defence. We could accept everything Simester says about *those* conclusions, but still find room for doctrines that would allow an omission by T to block a finding of responsibility for an outcome. That English criminal law *presently* forces a conceptual fuzziness by forcing its related thinking into the concept of causation does not provide a normative case for continuing to do so. Nor does it give us reason to accept that, once we understand causation better, we should follow the law's apparent conclusion that causation of a result is all that is required for an *actus reus* in a result crime. That conclusion only follows *because* the common law presently allows normative constraints that are to do with the appropriateness of holding D responsible for *x* to impact upon the concept of causation of *x*.

None of this is to say that rejecting Simester's view would result in omissions relieving defendants of legal responsibility for many consequences. It seems unlikely that allowing omissions to impinge on the question of whether *x* can appropriately be "imputed" to the defendant would result in a radically different set of outcomes from Simester's approach. There are at least two reasons for this.

First, when attention is paid to the fact that most non-interventions are not in fact "omissions", in the legal sense, the category of potential responsibility-relieving-non-interventions is very small. In *Blaue*,[100] V was not under any legally-recognised duty to undergo the transfusion, and so did not "omit" to do so, in the sense that the criminal law cares about. The law could credibly hold that, absent such a *legal* "omission", there is no reason to contemplate relieving D of responsibility for V's death. Direct, physical causation of death, in such circumstances, *is* an appropriate basis for finding legal responsibility for that death. This point would

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96 Simester, *Fundamentals*, *supra* note 2 at 97.

97 Compare the comments in *ibid* at 106–107. Clarke's concern 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 he caused it" (Desmond M Clarke, "Causation and Liability in Tort Law" (2014) 5 Juris 217 at 218 (cited in Simester, *Foundations*, *supra* note 2 at 96)) is no doubt warranted, but only if we accept that the ground for holding D liable for *x* is *merely* that D caused it.

98 Direct causation is not precisely the same as "but for" causation, as explained in Part II, above.

99 See Walen and Weiße, *supra* note 29 at 58, 72-80. See, also, Glanville Williams, *Textbook of Criminal Law*, 2nd ed (London: Stevens, 1983) at 381.

100 *Blaue*, *supra* note 80.

have been a preferable one for the Court of Appeal to have made in *Blaue*, instead of one about taking one's victim as one finds them, and the inability to defendants to query the reasonableness of religious beliefs.[101]

The same conclusion presumably follows, less comfortably, in the various hypotheticals based on *Blaue* that are perennially used to challenge undergraduate law students in England and Wales:[102] "what if V simply did not like doctors, was afraid of needles, scared of catching blood-borne diseases, or even maliciously refused treatment in order to increase D's liability?"[103] What makes the conclusion that D caused V's death in such circumstances less intuitively comfortable is, presumably, the sense that, perhaps at some point, V *does* have an obligation to undergo the medical procedure and intervene in the causal chain leading to their death (even if, ultimately, we are prepared to reject that conclusion). Other cases where V suffered relatively trivial injuries and could have been saved had he consented to medical treatment raise similar conundrums.[104]

Secondly, if the view is taken that existing *novus actus interveniens* doctrines identify adequately situations where it is inappropriate to hold D responsible for *x*, what would be required is not merely[105] an omission on some other agent's part to prevent *x*, but one that was: (a) not reasonably foreseeable at the time of the defendant's contribution to *x*;[106] or (b) the result of a free, deliberate and informed decision not to intervene. Such criteria are going to be difficult to satisfy. *Dr Enemy* might be an example of such a case, but contrast Simester's example:

> *Antidote*: V is brought to hospital having been poisoned by P. D3, the on-duty doctor, correctly diagnoses V's condition but forgets to administer the standard antidote. V dies of the poison. Had the antidote been administered, V would have recovered.[107]

For Simester, *both* P and D3 have caused V's death. One way of telling that story is to point out that nothing got in the way of P's act directly leading to V's death. Another way is as follows: regrettably, such medical distraction is all too foreseeable, and *that* is why D3's omission does not relieve P of legal responsibility for causing V's death.[108]

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[101] *Ibid* at 1415.

[102] See Child *et al*, *supra* note 1 at 120.

[103] John J Child and David Ormerod, *Smith, Hogan and Ormerod's Essentials of Criminal Law*, 5th ed (Oxford: Oxford University Press, 2023) at 74. See, too, David Ormerod, Karl Laird and Matthew Gibson, *Smith, Hogan and Ormerod's Criminal Law*, 17th ed (Oxford: Oxford University Press, 2024) at 82.

[104] See, *eg*, *R v Holland* (1841) 174 ER 313 and *King-Emperor v San Pai* 1936 ILR 643.

[105] Note that we do not get this far if V in *Blaue* did not "omit" to undergo the transfusion: even if that was a free, deliberate and informed decision (which we might doubt, anyway), or not reasonably foreseeable, it would not be capable of dislodging D's responsibility for V's death.

[106] Or, as it is sometimes put, was "totally unexpected": *Nandkumar Natha v State* 1988 Cri LJ 1313 at 1319.

[107] Simester, *Fundamentals*, *supra* note 2 at 127.

[108] See, similarly, John E Stannard, "Criminal Causation and the Careless Doctor" (1992) 55 Mod L Rev 577 at 583.

V. Conclusion

Through his recent essays on causation, Andrew Simester has shone a great deal of light on the thorny topic of causation. It has not been disputed that Simester has vastly improved our collective understanding of causation. What has been argued here is that omissions seem to play a more significant role in the underlying architecture of direct (and thus indirect) causation than is suggested in Simester's work to date. What has also been doubted is the contention that, once better-understood, (direct or indirect) causation can do the work that is presently demanded of causation in the criminal law. Another concept is required to transparently ensure that it is appropriate to hold D responsible for *x*. At present, that work is shunted in common law systems into causation. Simester has shown us a way to extract this responsibility-ascribing element from the realm of causation and make its work more pellucid. He has not yet given us reason to reject its separate limiting role altogether.