THE LONDON SCHOOL OF ECONOMICS AND POLITICAL SCIENCE

LSE Research Online

Andrew Summers

Commonsense causation in the law

Article (Accepted version)
(Refereed)

Original citation:
Summers, Andrew (2018) *Commonsense causation in the law*. Oxford Journal of Legal Studies. ISSN 0143-6503 (In Press)

© 2018 Oxford University Press

This version available at: http://eprints.lse.ac.uk/89505/
Available in LSE Research Online: July 2018

LSE has developed LSE Research Online so that users may access research output of the School. Copyright © and Moral Rights for the papers on this site are retained by the individual authors and/or other copyright owners. Users may download and/or print one copy of any article(s) in LSE Research Online to facilitate their private study or for non-commercial research. You may not engage in further distribution of the material or use it for any profit-making activities or any commercial gain. You may freely distribute the URL (http://eprints.lse.ac.uk) of the LSE Research Online website.

This document is the author's final accepted version of the journal article. There may be differences between this version and the published version. You are advised to consult the publisher's version if you wish to cite from it.

http://eprints.lse.ac.uk

Commonsense Causation in the Law

Andrew Summers, LSE (a.d.summers@lse.ac.uk)*

Judges often invoke 'common sense' when deciding questions of legal causation. I draw on recent work in experimental psychology to refine the commonsense theory of legal causation developed by Hart and Honoré in Causation in the Law*. I show that the two main principles of abnormality and choice that Hart and Honoré identified are empirically well-founded; I also show how experimental studies into causal selection can be used to specify these principles with greater precision than before. This approach can help provide legal scholars with a plausible new set of hypotheses to use in re-examining the decided cases on legal causation. If correct, the new commonsense theory that I develop has important implications not only for debates within legal scholarship, but also for judicial practice on issues of legal causation in criminal and private law.*

Keywords: causation; common sense; legal causation; causal selection; experimental psychology; Hart and Honoré

1. Introduction

In both criminal and private law, judges often invoke 'common sense' when deciding questions of causation. As Lord Wright put it, 'This choice of the real or efficient cause from out of the whole complex of the facts must be made by applying commonsense standards. Causation is to be understood as the man in the street, and not as either the scientist or the metaphysician, would understand it.'[1] Commonsense reasoning is most prevalent in questions of legal causation,[2] where the court must determine whether the defendant's liability was negated by an

---

* I am very grateful to Tatiana Cutts, Nicholas McBride and Fred Wilmot-Smith for many helpful suggestions on earlier drafts. Special thanks are due to Tobias Gerstenberg, Assistant Professor in Cognitive Psychology at the Causality in Cognition Lab at Stanford University, for his detailed comments on several drafts. Any errors in this article remain my own.

[1] *Yorkshire Dale Steamship Co Ltd v Minister of War Transport* [1942] AC 691 (HL) 706.

[2] Also referred to as 'intervening', 'supervening' or 'proximate' causation, or 'scope of liability'.

intervening event even though their conduct remained a but-for cause of the harm. In this context, 'common sense' appears to signpost a judicial attempt to incorporate into legal decision-making the way in which ordinary people make causal judgements outside the law. Legal scholars have been divided in their approach to this type of judicial reasoning.

The dominant approach has been to deny that decisions on legal causation have anything to do with common sense: such references are mistaken, or deliberately obscure the judges' real reasons; instead, legal causation turns exclusively on issues of 'legal policy', such as the scope and purpose of the relevant rule. Stapleton and Wright are the foremost proponents of this view, which has become widely accepted.[3] In *Causation in the Law*, Hart and Honoré took a different approach.[4] They considered that decisions on legal causation may really be based on common sense, meaning principles that affect ordinary people's causal judgements outside the law. On this approach, the first task for legal scholars is to specify what these commonsense principles are; only then can we examine whether or not they are also evident in the cases on legal causation. However, since Hart and Honoré's initial attempt, this approach has largely fallen out of favour within contemporary legal scholarship.

In this article I revive Hart and Honoré's approach, but I adopt a new method for identifying the principles that affect ordinary people's causal judgements outside the law. I argue that legal scholars have been premature to dismiss all judicial references to common sense as nothing more than an 'empty slogan';[5] Hart and Honoré were right to consider this 'a counsel of despair which we should hesitate to accept'.[6] But whereas Hart and Honoré sought to identify commonsense principles using only their own intuitions about the use of ordinary language, I

[3] Wright, 'Causation in Tort Law' (1985) 73 California Law Review 1735; Wright, 'Once More into the Bramble Bush: Duty, Causal Contribution, and the Extent of Legal Responsibility' (2001) 54 Vanderbilt Law Review 1071; Stapleton, 'Cause in Fact and the Scope of Liability for Consequences' (2003) 119 LQR 388; Stapleton, 'Choosing what we mean by "Causation" in the Law' (2008) 73 Missouri Law Review 433.

[4] Hart and Honoré, *Causation in the Law* (2nd edn, Clarendon 1985) (hereafter 'Hart and Honoré).

[5] Stapleton, 'Reflections on Common Sense Causation in Australia' in Simone Degeling and James Edelman (eds), *Torts in Commercial Law* (Thomson Reuters 2011), 331. See further text to n20 below.

[6] Hart and Honoré 26.

draw instead on empirical evidence from experimental psychology to specify these principles more reliably and with greater precision than before. Given that judges so often insist that their decisions on legal causation are based on common sense, this research provides a plausible new set of hypotheses for legal scholars to use in re-examining the case law.

The article proceeds in three parts. In part one, I highlight the prevalence of commonsense reasoning in judicial decisions on legal causation; then, I outline Hart and Honoré's explanation of this reasoning and evaluate the main criticisms of their theory. In part two, I develop a new commonsense theory that draws on empirical evidence to refine the two main commonsense principles of abnormality and choice that Hart and Honoré identified. In part three, I show why it matters if this theory is correct, not only for the shape and content of scholarly debates about legal causation, but also for judicial practice.

2. Hart and Honoré's Theory

Judges often say that questions of legal causation are a matter of 'common sense', but then fail to identify any of the specific factors or principles influencing their decision. Legal scholars have, understandably, criticised this judicial practice. In this part, I outline Hart and Honoré's attempt to specify the commonsense principles of causal reasoning that might affect judicial decisions on legal causation. I also evaluate the leading criticisms of Hart and Honoré's theory, which can be divided into three main strands: criticisms of their linguistic analysis and the commonsense principles that they identified using this method; criticisms of their legal analysis, in particular the consistency of the case law with the commonsense principles that they had identified; and finally, two misplaced criticisms that in my view mistake the purpose, or at least the surviving contribution, of their theory.

A. 'Common Sense' in Legal Causation

To establish liability in criminal or private law, it must usually be shown that the relevant harm would not have occurred 'but for' the defendant's wrongful conduct.[7] It must also be shown that there were no intervening events – such as the claimant's own conduct, the conduct of a third party, or a natural event – that negated the defendant's liability. These two stages of legal liability are often referred to as 'factual' and 'legal' causation respectively.[8] Legal scholars have sometimes questioned whether these stages are appropriately labelled, and whether they are substantively distinct;[9] nevertheless, most textbooks and judicial decisions continue to treat them separately.[10] In this article I focus exclusively on the latter (legal causation) stage; this is also the stage where judicial references to common sense are most prevalent.

Several House of Lords decisions have expressly endorsed a 'common sense' approach to questions of legal causation.[11] As Lord Reid put it in *Stapley v Gypsum Mines*:

> To determine what caused an accident from the point of view of legal liability is a most difficult task. If there is any valid logical or scientific theory of causation it is quite irrelevant in this connection … The question must be determined by applying common sense to the facts of each particular case.[12]

---

[7] There are some established exceptions to this requirement (for example, problems of overdetermination, pre-emption or evidential gaps); however, the but-for test remains at the core of most legal inquiries: see further Green, *Causation in Negligence* (Hart Publishing 2015) ch2.

[8] In experimental psychology, these two stages may instead be referred to as tests of 'causal involvement' and 'causal selection', respectively; see further text to n98 below.

[9] eg Broadbent, 'Fact and Law in the Causal Inquiry' (2009) 17 Legal Theory 173; Hamer, '"Factual Causation" and "Scope of Liability": What's the difference?' (2014) 77 MLR 155.

[10] eg *R v Hughes* [2013] UKSC 56, [2013] 1 WLR 2461 [23] (Lord Hughes and Lord Toulson), referring to 'the distinction between "cause" in the sense of a sine qua non without which the consequence would not have occurred, and "cause" in the sense of something which was a legally effective cause of that consequence.'

[11] *Leyland Shipping Co Ltd v Norwich Union Fire Insurance Society Ltd* [1918] AC 350 (HL) 363 (Lord Dunedin); *Hogan v Bentinck West Hartley Collieries* [1949] 1 All ER 588 (HL) 596 (Lord Normand); *Alphacell Ltd v Woodward* [1972] AC 824 (HL) 834 (Lord Wilberforce), 837 (Lord Salmon); *Smith New Court Securities Ltd v Citibank NA* [1997] AC 254 (HL) 285 (Lord Steyn); *Reeves v Commissioner of Police of the Metropolis* [2000] 1 AC 360 (HL) 391 (Lord Hobhouse).

[12] *Stapley v Gypsum Mines Ltd* [1953] AC 663 (HL) 781 (Lord Reid).

More recently, in *R v Hughes*, Lord Hughes and Lord Toulson held that 'there is a well-recognised distinction between conduct which sets the stage for an occurrence and conduct which *on a common sense view* is regarded as instrumental in bringing about the occurrence'.[13] Judges have expressly disclaimed any 'philosophical'[14] or 'scientific'[15] notion of causation that would preclude selection between but-for causes.[16] Instead, judges have often stated that in deciding questions of legal causation, their aim is to emulate 'ordinary everyday life and thoughts and expressions',[17] 'ordinary practical affairs',[18] and the views of 'the man in the street'.[19] Accordingly, in the context of legal causation, 'common sense' appears (at least provisionally) to signpost a judicial attempt to incorporate into legal reasoning the way in which ordinary people make causal judgements outside the law.

Commonsense reasoning has persisted in judicial decisions on legal causation despite extensive academic criticism. These criticisms are traceable to the work of the early American legal realists, who argued that the 'real' reasons for legal decisions were often contrary to the judges' express ('common sense') reasoning.[20] More recently, Stapleton has described judicial

---

[13] *R v Hughes* (n10) [23] (emphasis added). See also *Galoo Ltd v Bright Grahame Murray* [1994] 1 WLR 1360 (CA) 1374-1375 (Glidewell LJ).

[14] *Yorkshire Dale Steamship* (n1) 702 (Lord Macmillan). See also *Monarch Steamship Co Ltd v Karlshamns Oljefabriker* [1949] AC 196 (HL) (n17) 228 (Lord Wright), rejecting 'philosophic speculation'; *Alphacell* (n11) 847 (Lord Salmon), rejecting 'abstract metaphysical theory'.

[15] *Weld-Blundell v Stephens* [1920] AC 956 (HL) 986 (Lord Sumner), rejecting 'scientific inquests'; *Stapley* (n12) 681 (Lord Reid), rejecting 'logical or scientific theory'; *Grant v Sun Shipping Co Ltd* [1948] AC 549 (HL) 564 (Lord Du Parcq), rejecting 'the language of logicians'.

[16] eg Mill, *A System of Logic: Raciocentive and Inductive* (Longmans 1843) 360-361: '[Although] it is very common to single out one only of the antecedents under the denomination of cause, calling the others mere conditions … The real cause, is the whole of these antecedents; and we have, philosophically speaking, no right to give the name of cause to one of them, exclusively of the others.' See also Hume, *A Treatise of Human Nature* (London 1739) 171; Lewis, *Counterfactuals* (Blackwell 1973) 558-559.

[17] *Monarch* 228 (Lord Wright).

[18] *Hogan* (n11) 595 (Lord Normand).

[19] *Yorkshire Dale Steamship* 706 (n1) (Lord Wright). See also *Alphacell* (n11) (Lord Salmon): 'ordinary common sense'; *Reeves* (n11) 391 (Lord Hobhouse) 'Virtually every event will have a number of antecedent facts which satisfy [the but-for] test. The ordinary use of language then distinguishes between them, choosing some and discarding others.'

[20] eg Green, *Rationale of Proximate Cause* (Vernon 1927). See further Duxbury, *Patterns of American Jurisprudence* (Clarendon Press 1995) ch2; Stapleton, 'Causation in the Law' in Helen Beebee, Christopher Hitchcock and Peter Menzies (eds), *The Oxford Handbook of Causation* (OUP 2009) 754-756.

references to common sense as 'an empty slogan',[21] 'vacuous camouflage',[22] and 'so indeterminate that it is effectively worthless as an analytical guide'.[23] She argues that 'It brings the law into disrepute if, when confronted with a hotly disputed complex dispute about the appropriate point at which legal liability should be truncated, a court accepts the "glib submission" that its resolution rests on nothing much more than "common sense".'[24]

B. Hart and Honoré's Theory

In *Causation in the Law*, Hart and Honoré acknowledged the imprecision and indeterminacy of judicial references to common sense, but argued that this should not lead legal scholars to dismiss such reasoning altogether. Instead, they speculated that judges might be relying on the same principles that affected ordinary people's causal judgements outside the law; it was in this particular respect that judges might express their reasoning as a matter of 'common sense'. Hart and Honoré's approach involved two steps:[25] first, they sought to identify commonsense principles of causal reasoning, by analysing how people used causation in ordinary language;[26] second, they sought to establish whether the same principles explained judicial decisions on legal causation, by examining legal judgments from across criminal and private law.[27] Hart and

---

[21] Stapleton (n5) 331.

[22] Ibid 353.

[23] Ibid 350. See also Wright, 'The Nightmare and the Noble Dream: Hart and Honoré on Causation and Responsibility' in Matthew Kramer and others (eds), *The Legacy of HLA Hart: Legal, Political, and Moral Philosophy* (OUP 2008) 170.

[24] Stapleton (n5) 334. Burrows similarly criticises that 'unarticulated common sense or instinct is hardly a satisfactory basis for legal decision-making': Burrows, *Remedies for Torts and Breach of Contract* (3rd edn, OUP 2004) 97. See also McGregor, *McGregor on Damages* (19th edn, Sweet & Maxwell 2014) [8-009].

[25] Hart and Honoré 1: 'two related main objectives'. This bifurcated approach is also identified in Stapleton, 'Law, Causation and Common Sense' (1988) 8 OJLS 111, 112 and Lipton, 'Causation Outside the Law' in Hyman Gross and Ross Harrison (eds), *Jurisprudence: Cambridge Essays* (OUP 1992) 127.

[26] Hart and Honoré ch2 (Causation and Common Sense).

[27] Ibid especially ch6 (Tort), ch11 (Contract) and ch12 (Crime).

Honoré's aim was thus to specify principles of causal reasoning outside the law for the purpose of illuminating commonsense reasoning within the law.[28]

Hart and Honoré's first conclusion was that 'common sense is not a matter of inexplicable or arbitrary assertions', and could instead be shown to rest on statable principles.[29] They identified that outside the law, the 'central notion'[30] of cause is 'essentially something which interferes with or intervenes in the course of events which would normally take place'.[31] When ordinary people pick out 'the cause' from a range of counterfactually necessary conditions (but-for causes), they do so based on its 'departure from the normal, ordinary, or reasonably expected course of events'.[32] More specifically, Hart and Honoré identified two main commonsense principles affecting ordinary people's central notion of causation:[33] first, 'the contrast between what is abnormal and normal in relation to any given thing or subject-matter';[34] and second, the contrast 'between a free deliberate human action and all other conditions.[35] In this article, I call these two principles the 'abnormality' principle and the 'choice' principle respectively.

To illustrate the effect of the abnormality and choice principles in causal reasoning outside the law, Hart and Honoré gave the following example, concerning the outbreak of a fire:

> In most cases where a fire has broken out … the plain man would refuse to say that the cause of the fire was the presence of oxygen, though no fire would have occurred without it: [he] would reserve the title of cause for something of the order of a short-circuit, the dropping of a lighted cigarette, or lightning.[36]

---

[28] Lipton (n25).

[29] Hart and Honoré 26.

[30] Ibid 28-44. This article focuses on the central notion and does not address the other notions relating to 'interpersonal transactions' (see further 51-59) or 'opportunities' (see further 59-60).

[31] Ibid 29. See also Honoré, *Responsibility and Fault* (Hart 1999) 6.

[32] Hart and Honoré 33.

[33] These principles may overlap because voluntary conduct can sometimes also qualify as the cause by virtue of its abnormality: see further ibid 41, 136, 182-185, 335-336.

[34] Ibid 33.

[35] Ibid 33.

[36] Ibid 11.

The short-circuit and the lightning strike both reflect the abnormality principle, and the dropped cigarette reflects the choice principle. In this example, the purpose of the plain man's inquiry could be either explanatory or attributive.[37] Causal *explanations* respond to the initial puzzle of why something happened; they call for further facts before the cause can be identified.[38] Take, for example, the early stages of a police inquiry or a crash investigation. By contrast, causal *attributions* involve selecting the cause from amongst the range of necessary conditions (such as the oxygen in the air) for the purpose of assigning responsibility.[39] Hart and Honoré pointed out that lawyers and legal decisions are usually concerned with causal attributions rather than with explanations,[40] but they argued that both types of inquiry rely on the same principles.[41]

In relation to the abnormality principle, Hart and Honoré identified that 'what is abnormal … is what "makes the difference" between the accident and things going on as usual'.[42] They emphasised that 'what is normal and what is abnormal is, however, relative to the context'.[43] To illustrate this point, they gave an example of a fire breaking out in a laboratory where special precautions were normally taken to exclude oxygen; here, one might well say that the presence of oxygen *was* the cause of the fire.[44] They also emphasised that normality 'is very often an artefact of human habit, custom, or convention'.[45] In other words, what is abnormal may depend on social as well as physical factors. Furthermore, the cause need not be an 'event', in that it might equally consist of an absence, or a static condition. For example, 'the lack of rain was the

[37] Although this example initially features in the discussion of explanations, the same example is repeated in relation to attributions: see ibid 71-74.

[38] Ibid 23-24. See further 32-51.

[39] Ibid 24. See further ch3.

[40] Ibid 24.

[41] Ibid ch3, especially 68-70, 73.

[42] Ibid 35.

[43] Ibid 35.

[44] Ibid 35.

[45] Ibid 37.

cause of the failure of the corn crop; the icy condition of the road was the cause of the accident'.[46]

In relation to the choice principle, Hart and Honoré identified that 'a voluntary human action intended to bring about what in fact happens … has a special place in causal inquiries'.[47] In particular, 'the free deliberate and informed act or omission of a human being, intended to exploit the situation created by [an earlier event], negatives causal connection'.[48] Importantly, such action could be regarded as the cause even though it was both natural and probable;[49] the choice principle was accordingly distinct from the abnormality principle. Hart and Honoré rejected the view that omissions could not be considered causes.[50] For example, 'someone's failure to wrap up is commonly and intelligibly taken to be the cause of his catching cold, and driving in the dark without lights to be the cause of an accident'.[51] The reason is that these omissions represent 'an abnormal failure of a normal condition' under which the harm would not have occurred.[52]

Having specified these two main commonsense principles, Hart and Honoré proceeded to re-examine the judicial decisions on legal causation. They argued that numerous cases spanning tort, contract and criminal law, were 'consistent with the view that the courts, whether consciously or unconsciously, apply the [commonsense] causal criteria analysed in the first part of our book.'[53] In other words, it appeared that the judicial approach to legal causation was influenced by the same principles as those affecting ordinary people's causal judgements outside the law. On this basis, Hart and Honoré famously concluded that 'it is the plain man's

---

[46] Ibid 31.

[47] Ibid 42.

[48] Ibid 136.

[49] Ibid 158.

[50] Ibid 139. See also Honoré, *Responsibility and Fault* (n31) 12.

[51] Hart and Honoré 50.

[52] Ibid 40.

[53] Ibid xxxv.

notions of causation (and not the philosopher's or the scientist's) with which the law is concerned'.[54] Hart and Honoré did not deny that issues of legal policy *also* played some role in judicial decisions on legal causation;[55] however, they considered that it was a 'blinding error'[56] to dismiss all causal reasoning beyond the but-for test as 'a mere disguise for arbitrary decision or judicial policy'.[57]

C. Evaluating Criticisms

Hart and Honoré's commonsense theory of legal causation has been criticised by legal scholars on several grounds,[58] and has fallen almost entirely out of favour within contemporary legal scholarship.[59] In this section, I evaluate three main strands of criticism. The first two strands correspond with each of the two steps in Hart and Honoré's approach outlined above, namely their attempt to specify commonsense principles of causal reasoning outside the law, and their legal analysis of the decided cases. The third strand concerns two further criticisms that I argue are misplaced, because they mistake the purpose, or at least the surviving contribution, of Hart and Honoré's theory. In my view, their theory survives as an attempt to explain (without justifying) the judicial approach to legal causation, and their inquiry into commonsense principles of causal reasoning should be understood as a first step in service of that aim.

The first strand of criticism concerns the commonsense principles that Hart and Honoré identified.[60] These principles involved empirical claims about how ordinary people make causal

---

[54] Ibid 1.

[55] See further text to n79 below.

[56] Hart and Honoré 3; see also 26.

[57] Ibid 3. See further xxxv, 3-5, 88-108.

[58] For overviews, see Stapleton, 'Law, Causation and Common Sense' (n25); Howarth, 'Book Review' (1987) 96 Yale Law Journal 1389.

[59] For a rare defence, see Lucy, *Philosophy of Private Law* (OUP 2007) ch5, 163-204.

[60] See generally Stapleton, 'Law, Causation and Common Sense' (n25) 123-125; Howarth (n58) 1402-1407; Wright (n23) 170-175.

judgements outside the law.[61] The problem was with their method, which relied solely on their own observations about the use of ordinary language. It exposed their theory to the obvious criticism that the 'commonsense' principles they identified were really based on their own idiosyncratic (or even 'legalistic') use of language.[62] For this reason, Stapleton criticised that although 'the reader will often find the assertions easy to accept … the technique is deceptive'.[63] This methodological flaw meant that the abnormality and choice principles could easily be dismissed as 'merely an artefact derived from how lawyers used causal words, which [Hart and Honoré] asserted was the same way that ordinary people used them'.[64]

Legal scholars are correct that the commonsense principles identified by Hart and Honoré were established more by 'assertion rather than evidence'.[65] However, attempts to contradict these principles have suffered from precisely the same evidential deficit. For example, Stapleton criticises Hart and Honoré's definition of voluntary human conduct as 'a remarkable departure from ordinary usage',[66] even suggesting that 'the definition of "voluntary" is narrowed from its ordinary meaning in order to fit the cases',[67] but does not offer any empirical evidence of her

---

[61] Lloyd-Bostock, 'The Ordinary Man and the Psychology of Attributing Causes and Responsibility' (1979) 42 MLR 143, 144-145, 167.

[62] Cane, *Responsibility in Law and Morality* (Hart 2002) 129; Stapleton (n5) 334. See also Howarth (n58) 1403, who criticised Hart and Honoré's 'claim to be reporting on ordinary usages in languages of which they are not native speakers, such as German and American'.

[63] Stapleton, 'Law, Causation and Common Sense' (n25) 123. See also Howarth (n58) 1402: 'The most obvious, but also the most fundamental, way of attacking Hart and Honoré is to question their method.'; Lloyd-Bostock (n61) 148: 'any individual intuition will be a compound of several influences and effects which one cannot begin to disentangle without some form of sampling.'

[64] Stapleton, *Causation in the Law* (n20) 756. See also Stapleton, 'Law, Causation and Common Sense' (n25) 123; Stapleton, 'Choosing what we mean by 'Causation' in the Law' (n3), 459.

[65] Cane, *Responsibility in Law and Morality* (n62) 129. See also Stapleton, 'Law, Causation and Common Sense' (n25) 123; Stapleton, *Causation in the Law* (n20) 756; Stapleton, 'Choosing what we mean by 'Causation' in the Law' (n3) 462. Cf Lucy (n59) 200: 'it would seem that any competent user of the language is well equipped to make judgments about ordinary use and common sense. If Hart and Honoré qualify as such, then their views are surely worthy of consideration.'

[66] Stapleton, 'Law, Causation and Common Sense' (n25) 125. See also Howarth (n58) 1399: 'the terms "voluntary" and "coincidental" are defined technically, without much attention to ordinary usage'; Wright (n23) 173: 'these supposed causal principles are not supported by the ordinary use of causal language.'

[67] Stapleton, 'Law, Causation and Common Sense' (n25) 125.

own for this assertion.[68] Other counterexamples developed by legal scholars are similarly based on their individual intuitions, rather than any reliable empirical research.[69]

The second strand of criticism concerns Hart and Honoré's analysis of the case law.[70] These criticisms allege that the abnormality and choice principles cannot explain the judicial approach to legal causation because they are inconsistent with the reasoning and results of the decided cases in various respects.[71] To evaluate these criticisms of Hart and Honoré's theory would require a comprehensive analysis of cases across criminal and private law, which is beyond the scope of this article.[72] However, it is important to note that even Hart and Honoré's staunchest critics have acknowledged that at least in some respects the abnormality and choice principles appear impressively consistent with the decided cases.[73] The criticism is instead usually that these principles are not fully consistent with the cases because they omit the role of certain factors that cannot be accounted for by common sense.[74]

The most often-cited criticism of Hart and Honoré's legal analysis is that it underplays the role of 'legal policy' in judicial decisions on legal causation. Unfortunately, legal scholars have often been vague in defining what they mean by 'legal policy' in this context.[75] Legal policy might

---

[68] See also Howarth (n58) 1403, who asserts (similarly without any empirical evidence of his own) that 'if one really listened to ordinary speech, both in and out of the law, one would hear causal theories very different from the ones expounded by Hart and Honoré'.

[69] Lucy (n59) 200-201. See eg Stapleton, *Causation in the Law* (n20) 758; Stapleton, 'Choosing what we mean by 'Causation' in the Law' (n3) 462; Lipton (n25).

[70] See generally Stapleton, 'Law, Causation and Common Sense' (n25) 126-128, although the cases discussed in this section concern 'factual' rather than legal causation.

[71] eg Stapleton, 'Choosing what we mean by 'Causation' in the Law' (n3) 462-463, citing *Home Office v Dorset Yacht Co Ltd* [1970] AC 1004 (HL) 1027-1028.

[72] See further text to n179 below.

[73] Stapleton, 'Law, Causation and Common Sense' (n25) 116-117. See also *Environment Agency v Empress Car Co (Abertillery) Ltd* [1999] 2 AC 22 (HL) 30 (Lord Hoffmann): 'In answering questions of causation for the purposes of holding someone responsible, both the law and common sense normally attach great significance to deliberate human acts and extraordinary natural events.'

[74] See eg text to n140 below.

[75] Lucy (n59) 184-185. See further 164 fn33: 'For realist-influenced causal minimalists, "policy considerations" seem to refer most often, and completely unhelpfully, to considerations judges might regard as relevant in arriving at decisions; no general statement of the properties these considerations

mean the institutional values and purposes of the law,[76] or it might involve (instead or additionally) a moral appraisal of the parties' conduct and character.[77] Hart and Honoré denied that either of these types of consideration featured within commonsense causal reasoning outside the law.[78] However, they readily acknowledged that legal policy in the first sense did play some role in judicial decisions on legal causation.[79] Hart and Honoré's argument was simply that commonsense principles played some role *as well*;[80] it is this relatively modest claim that opponents of their commonsense theory of legal causation nevertheless reject.

The third strand concerns two criticisms that are, in my view, misplaced. First, Hart and Honoré's theory has sometimes been criticised for failing to determine, or for being inconsistent with, the philosophical concept of causation.[81] It is easy to see why *Causation in the Law* might be read in this way, because in Hart and Honoré's own words, the First Edition of their book (published in 1959) 'drew on the philosophical currents of the fifties [when] analysis of ordinary language was regarded by many as the key to the clarification of conceptual difficulties.'[82] However, by the time the Second Edition was published in 1985, ordinary language philosophy had faded almost to extinction.[83] Instead, prominent philosophers like Lewis and Mackie proceeded on the basis that the concept of causation could not be determined

---

have in common is ever forthcoming.' See eg Stapleton, 'Cause in Fact' (n3) 421, referring (without further definition) to 'normative "policy" reasons'.

[76] Lucy (n59) 185.

[77] Ibid 185-186. See further the examples cited at 186 fn75.

[78] On moral appraisals, see further text to n198 below.

[79] Hart and Honoré 304-307. Hart and Honoré summarised their position as 'reject[ing] causal minimalism without embracing causal maximalism': xxxv. See also Honoré, *Responsibility and Fault* (n31) 5.

[80] Hart and Honoré 2: 'the plain man's causal notions function as a species of basic model in the light of which the courts see the issues before them, and to which they seek analogies'.

[81] See eg Hancock, 'Books Reviewed' (1961) 6 The American Journal of Jurisprudence 143, 146-150; Wright, 'Causation in Tort Law' (n3) 1789-1791; Moore, 'The Metaphysics of Causal Intervention' (2000) 88 California Law Review 827, 852-877.

[82] Hart and Honoré xxxiii. See further Lacey, *A Life of HLA Hart: The Nightmare and the Noble Dream* (OUP 2004) 215.

[83] Forguson, 'Oxford and the "Epidemic" of Ordinary Language Philosophy' (2001) 84 The Monist 325.

by what people think it is,[84] reflecting the causal realist view that 'causal relations depend completely on a substructure of mind-independent relations'.[85]

In their Second Edition, Hart and Honoré sought to clarify that the decline of ordinary language philosophy 'does not show that our use of the methods of linguistic philosophy was inappropriate for our purpose', because 'courts have continually claimed that it is the ordinary man's conception of cause that is used by the law'.[86] Accordingly, whatever may have been their initial aims, in the Second Edition they refocused their analysis of ordinary language exclusively as a tool for explaining *judicial references* to common sense. Stapleton is thus correct to conclude that 'Theirs was not a metaphysical account'.[87] In any case, within criminal and private law, the purpose of the causal inquiry is not to identify abstract relations, but rather to attribute responsibility for a specific event to a specific person; consequently, there is no reason to assume that the judicial approach to causation does or should match those of philosophical inquiries.[88]

Second, *Causation in the Law* has often been read as an attempt to provide a normative justification of the judicial approach to legal causation. For example, Howarth asserts that 'despite the occasional protestation that their business is not to manipulate but to understand

---

[84] Lewis, *Counterfactuals* (n16); Mackie, *The Cement of the Universe: A Study of Causation* (OUP 1974). See further Clarke and others, 'Causation, Norms, and Omissions: A Study of Causal Judgments' (2015) 28 Philosophical Psychology 279, 290-292.

[85] Menzies, 'Causation in Context' in Price and Corry (eds), *Causation, Physics, and the Constitution of Reality* (OUP 2007) 193. Cf Hume, who insisted that causation is a psychological construct or 'feeling' rather than an external reality: Hume, *A Treatise of Human Nature* Part III, ch14.

[86] Hart and Honoré xxxiv.

[87] Stapleton, 'Choosing what we mean by 'Causation' in the Law' (n3) 459. See also Lucy (n59) 201: 'Since Hart and Honoré did not aim to offer a metaphysically 'deep' account of causation … the fact that their account lacks metaphysical depth seems irrelevant.'

[88] See further Green, Causation in Negligence (n7) ch1; Stapleton, *Causation in the Law* (n20) 749-753. In this article, I make no claims about the philosophical concept of causation. In particular, my use of causal terminology is intended merely to reflect the internal viewpoints of judges and ordinary people about which relations are 'causal', irrespective of whether philosophers would agree.

causal notions, *Causation in the Law*'s authors are advocates, not sociologists.'[89] Stapleton presents their work as contributing to 'the complex debate about which theory of "legal causation" is *more attractive in principle*', not just 'most effective in explaining the case law'.[90] Moore describes the book as 'the first sustained effort to justify the legal doctrines of intervening causation.'[91] Although in some parts of *Causation in the Law* Hart and Honoré formulated their aims in ways that invited confusion,[92] overall it is implausible to read their work as offering a normative theory of legal causation, for two main reasons.

First, if Hart and Honoré's aim was to justify the law, their argument was obviously incomplete. To move from the descriptive observation that ordinary people make causal judgements using certain principles, to the normative claim that judges should rely on the same principles to determine legal liability, would require further normative premises that are not defended in the book.[93] It would be surprising if Hart and Honoré made this basic mistake. Second, Hart and Honoré emphasised that 'It may, of course, well be that when we thoroughly understand the commonsense notions of causation we should no longer wish our thought on any matters, let alone legal judgments of responsibility, to be dominated by them'.[94] Their theory thus expressly left open that the commonsense judicial approach to legal causation may be unjustified.

Whatever the scope of Hart and Honoré's own aims, in my view their theory survives as an attempt to explain (without justifying) judicial reasoning.[95] In particular, I take their theory as

[89] Howarth (n58) 1404. See also 1402, where Howarth reads Hart and Honoré as claiming that 'ordinary usage is to be the measure of right and wrong'.

[90] Stapleton, 'Law, Causation and Common Sense' (n25) 131 (emphasis added). Stapleton considered that her own theory of legal causation both explained and justified the law: see 115.

[91] Moore (n81) 852. See also Wright (n23) 166-167.

[92] See eg Hart and Honoré xxxv, where the authors claim 'to put a *rational and critical foundation* under the case law as it stands' (emphasis added), which seems to suggest normative justification.

[93] cf Lucy (n59) 202, who adds the normative premise that 'the law should, whenever possible, track common sense'.

[94] Hart and Honoré 1-2. See also ibid 132, where the authors describe their aim as 'to understand rather than to manipulate the principles of legal responsibility'.

[95] Here, I assume a positivist distinction between descriptive and normative theory.

an attempt to specify the factors affecting judicial decisions on legal causation, for better or worse.[96] I agree with their starting-point that legal scholars should take the judges' references to common sense seriously. To this end, I maintain that their attempt to specify commonsense principles of causal reasoning was worthwhile. I recognise that the method they chose for this purpose was flawed, and casts legitimate doubt on the principles that they identified. Nevertheless, it is premature to dismiss the commonsense theory altogether. Instead, we should aim to specify these commonsense principles with greater reliability and precision; only then can we determine whether judicial decisions on legal causation are, or are not, affected by them.

3. The New Commonsense Theory

In this part I develop a new commonsense theory of legal causation that draws on empirical evidence from experimental psychology to refine the principles identified by Hart and Honoré. Whereas Hart and Honoré sought to identify commonsense principles of causal reasoning using only their own intuitions about the use of ordinary language, experimental psychologists have since specified these principles more reliably and with greater precision. I show that the principles of abnormality and choice that Hart and Honoré identified are empirically well-founded, but also that these principles need to be refined in crucial respects. These new insights into commonsense causal reasoning are entirely absent from contemporary critiques of Hart and Honoré's work,[97] and yet they provide the foundations for a revival of their approach.

A. A Primer on Experimental Psychology

Experimental psychologists use the term 'causal selection' to refer to the well-established observation that 'in situations in which several factors contribute to an outcome, people often

[96] And irrespective of whether the theory matches the philosophical concept of causation: text to n87 above.

[97] As experimental psychologists have observed of legal scholarship, 'Often missing from this debate is a precise description of everyday causal thought, or any discussion of relevant psychological work, and how this relates to the philosophical theories or the legal accounts that assume it': Lagnado and Gerstenberg, 'Causation in Legal and Moral Reasoning' in Michael Waldmann (ed), *The Oxford Handbook of Causal Reasoning* (OUP 2017) (n99) 568.

select one over the other factors and name it "the cause"'.[98] To investigate this phenomenon, experimental psychologists devise hypothetical scenarios ('vignettes') that are presented to participants under experimental conditions. These experiments typically require participants to attribute responsibility for an event to an individual human agent.[99] By manipulating variables such as the content of the vignette, researchers can test how participants' causal judgements are affected. In this way, experimental psychology aims to identify the specific factors or 'cognitive principles' that affect causal selection by ordinary people.

The empirical research into causal selection thus serves the same aim as Hart and Honoré's linguistic analysis. In *Causation in the Law*, Hart and Honoré's focus on ordinary language was not an end in itself, but rather the (flawed) method that they used to try to identify the cognitive principles affecting the causal reasoning of ordinary people.[100] As Gardner emphasises, in *Causation in the Law* 'Words play a supporting, mainly illustrative, role'.[101] The key difference within experimental psychology is its much-improved methodology. Although most experimental studies of causal selection rely to some extent on participants' use of the word 'cause',[102] they ensure randomisation and control of variables, an appropriate sample size, and scrutiny of the vignette and question designs. These methods offer far greater reliability and precision than Hart and Honoré's intuitive approach.

---

[98] Samland and Waldmann, 'How Prescriptive Norms Influence Causal Inferences' (2016) 156 Cognition 164, 165. Experimental psychology is a branch of cognitive science, which refers to the interdisciplinary study of the mind.

[99] Lagnado and Gerstenberg, *Causation in Legal and Moral Reasoning* 574. For an example of a vignette used by experimental psychologists, see text to n137 below.

[100] As Hart and Honoré put it, their aim in the first part of their book was to provide a 'delineation of the causal concepts which pervade ordinary thought': ibid 2.

[101] Gardner, 'A Life of HLA Hart: The Nightmare and the Noble Dream (Publication Review)' (2005) 121 LQR 329, 331.

[102] See further n110 below.

Some of the earliest experiments into causal selection drew hypotheses directly from Hart and Honoré's work;[103] other studies emerged independently.[104] What started as a trickle of experiments in the late 1980s,[105] developed into a steady stream through the 1990s and 2000s, and has become a flood in the 2010s.[106] Whereas empirical research into causal selection was still in its infancy at the time when Hart and Honoré's Second Edition of *Causation in the Law* was published in 1985,[107] it is now a vast, and still-growing, field. However, legal scholars continue to treat Hart and Honoré's linguistic analysis as if it was the only extant attempt to specify commonsense principles of causal reasoning. This oversight is all the more remarkable given that many of the relevant empirical studies refer directly to Hart and Honoré's work and set out explicitly to test the principles that they proposed.[108]

Two main issues arise for legal scholars seeking to utilise this new empirical research. The first concerns the internal validity of the research: how successful are the experiments at testing what they claim to test, namely the cognitive principles that affect causal selection by ordinary

[103] Hesslow, 'The Problem of Causal Selection' in Denis Hilton (ed), *Contemporary Science and Natural Explanations: Commonsense Conceptions of Causality* (New York University Press 1988); Cheng and Novick, 'Causes Versus Enabling Conditions' (1991) 40 Cognition 83.

[104] See eg Kahneman and Tversky, 'The Simulation Heuristic' in Kahneman, Slovic and Tversky (eds), *Judgment Under Uncertainty: Heuristics and Biases* (CUP 1982); Kahneman and Miller, 'Norm Theory: Comparing Reality to Its Alternatives' (1986) 93 Psychological Review 136. A recent book tells the story of Kahneman and Tversky's relationship and their pioneering contribution to psychology: Lewis, *The Undoing Project: A Friendship that Changed the World* (Allen Lane 2016).

[105] See eg Wells and Gavanski, 'Mental Simulation of Causality' (1989) 56 Journal of Personality and Social Psychology 161; McGill and Klein, 'Contrastive and Counterfactual Thinking in Causal Judgment' (1993) 64 Journal of Personality and Social Psychology 897.

[106] For recent overviews, see Alicke and others, 'Causal Conceptions in Social Explanation and Moral Evaluation: A Historical Tour' (2015) 10 Perspectives on Psychological Science 790; Waldmann (ed) *The Oxford Handbook of Causal Reasoning* (OUP 2017), especially ch29 and ch32.

[107] See further Jaspars, 'The Process of Attribution in Common Sense' in M R C Hewstone (ed), *Attribution Theory: Social and Functional Extensions* (Blackwell 1983). Cf Stapleton, 'Law, Causation and Common Sense' (n25) 123, citing Lloyd-Bostock (n61).

[108] eg Hilton and Slugoski, 'Knowledge-Based Causal Attribution: The Abnormal Conditions Focus Model' (1986) 93 Psychological Review 75; 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.

people?[109] The published studies within experimental psychology focus extensively on this question. For example, recent research has responded to: the risk of 'priming';[110] the concern that participants' unreflective responses may differ from their more considered causal judgements;[111] and the issue of 'conversational pragmatics'.[112] An evaluation of each of these issues is beyond the scope of this article; here, I merely note that experimental psychologists are keenly aware of these potential pitfalls and have sought to develop their experiment designs accordingly.

The second issue for legal scholars is one of external validity: how generalisable are the results of the experiments to the context of interest? In other areas of empirical legal scholarship, such as in mock jury research, this issue can raise difficult problems because there the aim is to replicate (as closely as possible) the judicial context.[113] However, that is not my aim in this article. Instead, I am investigating how ordinary people make causal judgements because in decisions on legal causation the judges themselves claim to be applying common sense. Furthermore, my aim is not to reach final conclusions about the principles that affect judicial reasoning, but rather to generate plausible hypotheses for legal scholars to use in re-examining

---

[109] More specifically, causal selection for the purpose of attributing responsibility for events to individual human agents: see text to n99 above.

[110] eg Clarke and others, 'Causation, Norms, and Omissions' (n84) 282. To address this concern, several recent studies use a method known as 'semantic integration', which requires participants to respond to a memory task instead of to survey questions that include the term 'cause': see eg Henne and others, 'Cause by Omission and Norm: Not Watering Plants' (2017) 95 Australasian Journal of Philosophy 270 (n129) 278-279; Bear and Knobe, 'Normality: Part Descriptive, Part Prescriptive' (2017) 167 Cognition 25, 26-29. See generally Powell and others, 'Semantic Integration as a Method for Investigating Concepts' in JR Beebe (ed), *Advances in Experimental Epistemology* (Bloomsbury 2014).

[111] eg Henne and others, 'Cause by Omission and Norm' (n129) 280-281. See generally Paxton and others, 'Reflection and Reasoning in Moral Judgment' (2012) 36 Cognitive Science 163.

[112] eg Hilton, 'Conversational Processes and Causal Explanation' (1990) 107 Psychological Bulletin 65, 73. Henne and others, 'Cause by Omission and Norm' (n129); Samland and Waldmann, 'How Prescriptive Norms Influence Causal Inferences' (n98) 165 See generally Noveck and Reboul, 'Experimental Pragmatics: A Gricean Turn in the Study of Language' (2008) 12 Trends in Cognitive Sciences 425.

[113] See eg Wiener and others, 'Mock Jury Research: Where Do We Go from Here?' (2011) 29 Behavioural Sciences and the Law 467, noting several difficulties with replicating the judicial context outside the courtroom.

the case law.[114] Consequently, for present purposes, it does not matter that the experimental context differs somewhat from the judicial context; my point is that the experiments plausibly match the context that judges have in mind when they invoke common sense.[115]

Hart and Honoré shared this motivation for investigating commonsense principles of causal reasoning. As they put it, 'the clarification of the structure of ordinary causal statements was and is an indispensable first step towards understanding the use of causal notions in the law' *because* 'courts have continually claimed that it is the ordinary man's conception of cause that is used by the law'.[116] Even Hart and Honoré's critics accepted this starting-point. For example, Stapleton acknowledges that their approach 'made obvious sense as a first step in the consideration of causation in the law—and still does despite the relative eclipse of linguistic philosophy—because courts often assert that it is the ordinary person's concept of causation which is to be applied'.[117] Instead, critics mostly doubted Hart and Honoré's methodology;[118] here, the research within experimental psychology marks an important advance.

B. What Hart and Honoré Got Right

In this section, I use the empirical research into causal selection to reassess the two main commonsense principles that Hart and Honoré identified. I show that there is now strong evidence to support Hart and Honoré's claims that ordinary people select abnormal events and voluntary human conduct as causes of an event, instead of other conditions that were also necessary (in a but-for sense) for the event to have occurred. In this respect, whilst Hart and

---

[114] See further text to n172 below.

[115] See further text to n17 above, referring to 'ordinary everyday life'.

[116] Hart and Honoré 2.

[117] Stapleton, 'Law, Causation and Common Sense' (n25) 112. See also Wright, 'Causation, Responsibility, Risk, Probability, Naked Statistics, and Proof: Pruning the Bramble Bush by Clarifying the Concepts' (1988) 73 Iowa Law Review 1019: 'we would benefit greatly from elaboration of the concept [of causation] that, unarticulated and imperfectly understood, underlies the intuitive judgments'; Hoffmann, 'Causation' (2005) 121 LQR 592, 593: 'What, then, could be more useful than trying to articulate, in ordinary language, a concept which judges declared to be a matter of common sense but could not explain except by resort to metaphors or Latin?'

[118] Text to n63 above.

Honoré's methods of linguistic analysis were flawed, their conclusions have now been corroborated using the more reliable methods of experimental psychology.

In relation to the abnormality principle, psychologists Kahneman and Miller coined the term 'norm theory' to describe the hypothesis that 'an event is more likely to be undone by altering exceptional than routine aspects of the causal chain that led to it'.[119] This insight followed from an earlier experiment in which participants were presented with a story where the subject 'did not drive home by his regular route' or 'left the office earlier than usual'.[120] Numerous studies have confirmed that people are more likely to attribute causal significance to descriptively abnormal events than to normal events, holding other factors constant.[121] This research convincingly supports the conclusions that Hart and Honoré drew (intuitively) from their famous example concerning the outbreak of a fire, in which the lightning strike was descriptively abnormal, whereas the oxygen in the air was not.[122]

In relation to the choice principle, the empirical research also supports Hart and Honoré's claim that voluntary human conduct has a special place in causal selection outside the law.[123] In particular, the evidence shows that people select voluntary human conduct over natural events as the cause of an outcome, even where both are abnormal. Much of the relevant research in this area has been inspired directly by Hart and Honoré's work. For example, McClure and others devised an experiment using the following example taken from *Causation in the Law*:

---

[119] Kahneman and Miller (n104) 143.

[120] Kahneman and Tversky (n104).

[121] Hilton and Slugoski, 'Knowledge-Based Causal Attribution'; Kominsky and others, 'Causal Superseding' (2015) 137 Cognition 196, 199-200, 205. See also Sytsma and others, 'Two Types of Typicality: Rethinking the Role of Statistical Typicality in Ordinary Causal Attributions' (2010) 43 Studies in History and Philosophy of Biological and Biomedical Sciences 814, which distinguishes between 'population-level' and 'agent-level' statistical norms.

[122] The lighted match is also descriptively abnormal; however, this event may additionally represent the violation of a prescriptive norm. See further text to n134 below.

[123] Text to n47 above.

> *A* throws a lighted cigarette into the bracken which catches fire. Just as the flames are about to flicker out, B, who is not acting in concert with *A*, deliberately pours petrol on them. The fire spreads and burns down the forest.[124]

Hart and Honoré claimed that in these circumstances the 'intervention displaces the prior action's title to be called the cause', whereas if a 'light breeze' had fanned the flames instead, people would trace causality back to the first person's conduct rather than regard the breeze as the cause.[125] When McClure and others tested these alternative scenarios under experimental conditions, their findings matched Hart and Honoré's intuitions. In particular, participants rated the causal importance of the person fanning the flames higher than when the wind fanned the flames; likewise, they rated the causal importance of a person igniting the flames higher than when the flames were ignited by lightning.[126] Subsequent studies have replicated the finding that voluntary causes are preferred to physical ones even where both kinds of cause produce the target effect with the same probability.[127]

Experimental psychologists have also investigated the contrast between actions and omissions in commonsense causal reasoning. The judicial tendency to identify omissions as causes has sometimes been criticised by legal scholars, particularly by those who model their (philosophical) concept of causation on physical processes rather than on counterfactual relations.[128] However, several recent empirical studies find that ordinary people (just like

[124] Hart and Honoré 74, discussed in McClure and others, 'Judgments of Voluntary and Physical Causes in Causal Chains' (n108) 880.

[125] Hart and Honoré 74.

[126] McClure and others, 'Judgments of Voluntary and Physical Causes in Causal Chains' (n108) 888. Note that in this scenario, the lightning (unlike the wind) is abnormal.

[127] Hilton and others, 'The Course of Events: Counterfactuals, Causal Sequences, and Explanation' in Mandel, Hitlon and Catellani (eds), *The Psychology of Counterfactual Thinking* (Routledge 2005) 52-55 (icy road vignette); Lagnado and Channon, 'Judgments of Cause and Blame: The Effects of Intentionality and Foreseeability' (2008) 108 Cognition 754, 760-763 (overdose vignette); Hilton and others, 'Selecting Explanations from Causal Chains: Do Statistical Principles Explain Preferences for Voluntary Causes' (40) European Journal of Social Psychology 383 (car, avalanche and train vignettes).

[128] See eg Moore, *Causation and Responsibility* (OUP 2009) ch18, discussed in Schaffer, 'Disconnection and Responsibility' (2012) 18 Legal Theory. See also Simester, 'Causation in (Criminal) Law' (2017) 133 LQR 416, 435-440, arguing that 'Omissions do not initiate causal processes; they permit other causal processes to unfold.'

judges) have no difficulty in selecting omissions as causes.[129] Just as Hart and Honoré predicted,[130] omissions are selected as causes where there was a corresponding norm to act.[131] In particular, 'when an omission does not violate a norm … it will not be identified as a cause, and when it does violate a norm it will be identified as a cause.'[132] Accordingly, commonsense reasoning about omissions appears to be a function of the abnormality principle rather than the choice principle, even where the omission also coincides with a voluntary choice not to act.[133]

C. Refining the Abnormality Principle

In this section, I show that Hart and Honoré's exposition of the abnormality principle needs to be refined in two crucial respects: first, whereas Hart and Honoré focused exclusively on events that were *descriptively* abnormal, experimental psychologists have shown that violations of *prescriptive* norms also affect commonsense causal reasoning; second, there is emerging evidence that for events involving *moral* norm violations, ordinary people's causal judgements may be affected by independent judgements of blame. Before affirming or dismissing the theory that judicial decisions on legal causation are affected by commonsense principles of causal reasoning, it is important for legal scholars to take account of these new insights.

Experimental psychologists have shown that commonsense causal reasoning is affected by both descriptive *and prescriptive* abnormality. Whereas descriptive (or 'statistical') norms concern

---

[129] Clarke and others, 'Causation, Norms, and Omissions' (n84); Henne and others, 'Cause by Omission and Norm'. See also Willemsen, 'Omissions and Expectations: A New Approach to the Things We Failed to Do' [2016] Synthese (published online 19/12/2016), which finds that norms 'not only decide which omissions are causes, but also what can count as an omission in the first place'.

[130] Text to n50 above.

[131] See also Schaffer, 'Contrastive Causation in the Law' (2010) 16 Legal Theory 259, 263-266.

[132] Henne and others, 'Cause by Omission and Norm' (n129) 274. Cf Livengood and Machery, 'The Folk Probably Don't Think What You Think They Think: Experiments in Causation by Absence' (2007) 31 Midwest Studies in Philosophy 107, in which salience alone did not prompt participants to regard a specified absence as a cause.

[133] Consistently with this understanding, Hart and Honoré described such instances as 'a failure to act in some way expected or required by the norm': Hart and Honoré 38.

what usually happens, prescriptive norms concern what should happen.[134] It is possible to violate a prescriptive norm without departing from any descriptive norm, or in other words, whilst acting statistically normally. For example, downloading pirated music violates legal norms relating to copyright and moral norms relating to theft, even if most people do it.[135] To test the effect of prescriptive abnormality on causal selection, Knobe and Fraser devised an experiment in which participants were presented with the following 'pen vignette':[136]

> The receptionist in the philosophy department keeps her desk stocked with pens. The administrative assistants are allowed to take the pens, but faculty members are supposed to buy their own. The administrative assistants typically do take the pens. Unfortunately, so do the faculty members. The receptionist has repeatedly e-mailed them reminders that only administrative assistants are allowed to take the pens. On Monday morning, one of the administrative assistants encounters Professor Smith walking past the receptionist's desk. Both take pens. Later that day, the receptionist needs to take an important message . . . but she has a problem. There are no pens left on her desk.[137]

Here, the conduct of both protagonists is descriptively normal (they both usually take pens), but only Professor Smith's conduct violates a prescriptive norm (to refrain from taking pens). Participants tended to agree strongly with the statement that Professor Smith caused the problem, but disagreed that the administrative assistant caused the problem.[138] The finding that

---

[134] Halpern and Hitchcock, 'Graded Causation and Defaults' (2015) 66 British Journal for the Philosophy of Science 413, 429-430.

[135] In addition to legal or moral norms, Halpern and Hitchcock also identify 'norms of proper functioning'. For example, 'there are specific ways that human hearts and car engines are "supposed" to work … a car engine that does not work properly is not guilty of a moral wrong, but there is nonetheless a sense in which it fails to live up to a certain kind of standard': ibid 429-430. See also Hitchcock and Knobe, 'Cause and Norm' (2009) 106 Journal of Philosophy 587, 597. There may also be instances of 'institutional' prescriptive norms that do not have any legal or moral force: for example 'gentlemen must wear a jacket and tie in the House of Commons'.

[136] Knobe and Fraser, 'Causal Judgment and Moral Judgment: Two Experiments' in Sinnott-Armstrong (ed), *Moral Psychology, Volume 2: The Cognitive Science of Morality* (MIT Press 2008) 443. See further Driver, 'Attributions of Causation and Moral Responsibility' in Sinnott-Armstrong (ed), *Moral Psychology, Volume 2: The Cognitive Science of Morality* (MIT Press 2008).

[137] Knobe and Fraser (n136) 443.

[138] Ibid 443 fn3: 'Each subject rated both statements on a scale ranging from -3 ("not at all") to +3 ("fully"), with the 0 point marked "somewhat." The mean rating for the statement that the professor caused the problem was 2.2; the mean for the statement that the assistant caused the problem was −1.2. This difference is statistically significant, $t(17) = 5.5$, $p < .001$.'

prescriptive (including moral) norm violations affect causal selection even in the absence of descriptive abnormality, has been replicated in numerous other studies.[139]

This new insight into commonsense causal reasoning provides a response to one of the main weaknesses of Hart and Honoré's theory of legal causation. In her review of *Causation in the Law*, Stapleton pointed out that 'in the context of many legal enquiries the law is concerned with departures not from normality, but from the mandated course of events'.[140] For example, the defendant may be held as the legal cause of a harm even though their conduct only violated a legal, not descriptive, norm; similarly, the conduct of a third party may be elevated to the status of an intervening cause even though it was descriptively normal. These legal decisions did not seem to fit with Hart and Honoré's exposition of the abnormality principle. Stapleton concluded that Hart and Honoré's commonsense theory 'has difficulty accommodating the fact that the law needs to and does identify normal departures from a mandated standard as "causes"'.[141]

This was a valid criticism of Hart and Honoré's theory. However, by drawing on the empirical research into causal selection, the new commonsense theory can accommodate it. The fact that judges recognise violations of prescriptive norms as the cause of a harm in deciding questions of legal causation does not (on its own) distinguish judicial reasoning from commonsense reasoning. This is because commonsense judgements of causal selection are *also* sensitive to violations of prescriptive norms: for example, the conduct of Professor Smith in the pen vignette.[142] In this respect, the fact that judges often select a defendant's or third party's

[139] Roxborough and Cumby, 'Folk Psychological Concepts: Causation ' (2009) 22 Philosophical Psychology 205; Phillips and others, 'Unifying Morality's Influence on Non-Moral Judgments: The Relevance of Alternative Possibilities' (2015) 145 Cognition 30; Kominsky and others, 'Causal Superseding' (n121); Icard and others, 'Normality and Actual Causal Strength' (2017) 161 Cognition 80; Hitchcock and Knobe, 'Cause and Norm' (n134) 605; Phillips and Kominksy, 'Causation and Norms of Proper Functioning: Counterfactuals are (Still) Relevant' (Proceedings of the 39th Annual Conference of the Cognitive Science Society, 2017).

[140] Stapleton, *Causation in the Law* (n20) 756. See also Stapleton, 'Choosing what we mean by 'Causation' in the Law' (n3) 460.

[141] Stapleton, *Causation in the Law* (n20) 758. In this context, by 'normal departures' Stapleton means events that are descriptively normal but that violate a prescriptive norm.

[142] Text to n136.

departure from 'the mandated course of events' as the cause of an outcome (even though their conduct was descriptively normal) does not show that their causal reasoning must really be a disguise for distinct issues of legal policy such as the scope and purpose of the relevant legal rule.

Recent empirical research also shows that ordinary people use descriptive and prescriptive cues together to generate a composite judgement of normality when making causal judgements. Bear and Knobe found that people generate 'an undifferentiated representation of what is normal' that is acquired through a process that integrates both statistical and moral learning and is neither purely descriptive nor purely prescriptive.[143] It is well-established that people often use heuristics or 'mental shortcuts' to support complex cognitive tasks.[144] In causal selection, it appears that people use descriptive and prescriptive norms as heuristics for one another, such that their (subconscious) application of the abnormality principle depends on a composite representation of normality that 'is not specifically designed either for statistical purposes or for prescriptive purposes but which manages to do a fairly decent job in both domains'.[145]

The second respect in which the abnormality principle needs to be refined concerns the role blame in causal selection. In relation to descriptive abnormality, there is consensus amongst experimental psychologists that descriptive norm violations impact the process of counterfactual reasoning by heightening the 'availability' of an imagined alternative in which the normal course of events transpired instead; this process in turn affects causal selection

[143] Bear and Knobe, 'Normality: Part Descriptive, Part Prescriptive' (n110) 25-26. See also Hitchcock and Knobe, 'Cause and Norm' (n134) 598.

[144] Tversky and Kahneman, 'Availability: A Heuristic for Judging Frequency and Probability' (1973) 5 Cognitive Psychology 207.

[145] Hitchcock and Knobe, 'Cause and Norm' (n134) 598. See also Kominsky and others, 'Causal Superseding' (n121) 198. See also Halpern and Hitchcock, 'Graded Causation and Defaults' (n134) 430.

('availability theory').[146] However, in relation to *moral* norm violations, whereas some experimental psychologists conclude that immoral behaviour affects causal selection in the same way as descriptive abnormality (by heightening the availability of alternatives), there is emerging evidence to suggest that in these circumstances causal selection is affected by independent judgements of blame ('blame theory').[147]

The difference between these two theories can be illustrated using the pen vignette outlined above.[148] According to availability theory, participants judge Professor Smith's conduct as the cause because the alternative world in which he does not take a pen is considered more 'available' than the world in which the assistant does not take a pen; in turn this affects the process of counterfactual reasoning that drives the judgement of causal selection.[149] By contrast, according to proponents of blame theory, the main reason why participants judge Professor Smith as the cause of the problem 'surely must be that he is a depraved pen pilferer.'[150] As Alicke and others put it, 'In the realm of offensive or harmful human behavior, blame is the engine that makes norm violations matter.'[151] This reverses the conventional view within cognitive science that judgements of blame depend on an antecedent judgement of causal responsibility.[152]

---

[146] Alicke and others, 'Causation, Norm Violation and Culpable Control' (2011) 108 Journal of Philosophy 670, 673; Icard and others, 'Normality and Actual Causal Strength' (n139).

[147] For an overview of this debate, see Samland and Waldmann, 'How Prescriptive Norms Influence Causal Inferences' (n98) 164.

[148] Text to n137.

[149] For studies in support of this theory, see: Hitchcock and Knobe, 'Cause and Norm' (n134); Kominsky and others, 'Causal Superseding' (n121); Phillips and others, 'Unifying Morality's Influence on Non-Moral Judgments'; Icard and others, 'Normality and Actual Causal Strength' (n139); Phillips and Kominksy, 'Causation and Norms of Proper Functioning' (n139). See also Driver (n136) 460.

[150] Alicke and others, 'Causation, Norm Violation and Culpable Control' (n146) 691-692. See also Alicke, 'Culpable Causation' (1992) 63 Journal of Personality and Social Psychology 368; Blanchard and Schaffer, 'Cause without Default' in Helen Beebee, Christopher Hitchcock and Huw Price (eds), *Making a Difference: Essays on the Philosophy of Causation* (OUP 2017) 206.

[151] Alicke and others, 'Causation, Norm Violation and Culpable Control' 692.

[152] Ibid (n146) 693. See further Driver (n20) 423-439.

The original pen experiment conducted by Knobe and Fraser did not provide any way of testing between availability theory and blame theory, because both explanations were consistent with the observed effect whereby participants judged that Professor Smith caused the problem.[153] A series of further experiments have since been conducted in an attempt to settle the explanation, but the debate remains ongoing.[154] A very recent study contended that in relation to moral norm violations, judgements of causal selection may also be sensitive to mental state factors such as 'the agent's intentionality, the foreseeability of the outcome, or the agent's knowledge about the existence and applicability of a prescriptive norm'.[155] It is currently too early to decide between each of these theories,[156] but if blame theory is correct then it may have important implications for judicial reliance on commonsense causal reasoning.[157]

D. Refining the Choice Principle

Empirical research into the choice principle is currently less developed than it is in relation to abnormality. Nevertheless, several studies provide new insights into Hart and Honoré's claim that outside the law, human conduct is only accorded special causal significance where it is 'free deliberate and informed'.[158] Emerging research also promises to deepen our understanding of *why* voluntary human conduct affects causal selection, which may provide the key to further refinements in the scope of the choice principle. In this section, as well as outlining the contributions that experimental psychologists have already made, I highlight promising new frontiers in this area of research. As these and other aspects of causal reasoning begin to be

---

[153] Hitchcock and Knobe, 'Cause and Norm' (n134) 603, noting that 'These various approaches all yield exactly the same prediction in the pen vignette'.

[154] In favour of availability theory: ibid 603-605; Kominsky and others, 'Causal Superseding' (n121) 201-202, 206; Icard and others, 'Normality and Actual Causal Strength' (n139); Phillips and Kominksy, 'Causation and Norms of Proper Functioning' (n139). In favour of blame theory: Alicke and others, 'Causation, Norm Violation and Culpable Control' (n146) 676-689.

[155] Samland and Waldmann, 'How Prescriptive Norms Influence Causal Inferences' (n98) 165.

[156] Lagnado and Gerstenberg, *Causation in Legal and Moral Reasoning* (n99) 585.

[157] See further text to n193 below.

[158] Hart and Honoré 136.

investigated by experimental psychologists, the new commonsense theory that I outline in this article can continue to be developed in greater detail.[159]

The empirical evidence tends to support Hart and Honoré's claim that in ordinary causal reasoning outside the law, a person's conduct must be informed in order for it to be selected as the cause of an event.[160] Hart and Honoré's further claim that conduct must be 'free' has not yet been investigated by experimental psychologists. In particular, there have not yet been any empirical studies in which the actor's voluntariness was constrained by pressures such as 'the influence of panic',[161] or legal or moral obligations.[162] This is an area that appears ripe for further research by experimental psychologists. Empirical evidence on the scope of voluntariness within ordinary causal reasoning could help to settle a widespread but empirically-unsubstantiated criticism of Hart and Honoré's theory, namely that their claims about voluntariness were 'a remarkable departure from ordinary usage'.[163]

As regards the requirement of deliberateness, the empirical research interestingly mirrors an ambivalence in Hart and Honoré's theory. In the First Edition of *Causation in the Law*, Hart and Honoré claimed that to count as voluntary, an act must be 'intended to produce the consequence which is in fact produced'.[164] However, in the Second Edition they recanted that 'This was a mistake'.[165] Instead, they revised that the actor need only treat the situation as 'providing the

---

[159] Experimental psychologists are open to engaging with legal scholars on the topic of causal selection, including to help identify new issues to explore within commonsense causal reasoning: see further Lagnado and Gerstenberg, *Causation in Legal and Moral Reasoning* (n99), and also my acknowledgements for this article.

[160] Fincham and Roberts, 'Intervening Causation and the Mitigation of Responsibility for Harm Doing II: The Role of Limited Mental Capacities' (1985) 21 Journal of Experimental Social Psychology 178. See also Samland and others, 'The Role of Prescriptive Norms and Knowledge in Children's and Adults' Causal Selection' (2016) 145 Journal of Experimental Psychology: General 125.

[161] Hart and Honoré 41, 149.

[162] Ibid 41, 142.

[163] Stapleton, 'Law, Causation and Common Sense' (n25) 125. See also Howarth (n58) 1399; Moore (n81) 836-837.

[164] This extract from the First Edition is quoted in the Second Edition at Hart and Honoré 137 fn23.

[165] Ibid 137 fn23.

opportunity or occasion for a certain course of conduct'; the actual consequences need not have been intended.[166] Several empirical studies have investigated the issue of intention as to consequences, but their findings so far appear contradictory.[167] This complex aspect of the choice principle may become clearer in the near future, as new research promises to develop 'a more fine-grained modelling of agents' mental states' as a factor in ordinary causal reasoning.[168]

Finally, empirical research reveals that the choice principle may influence causal selection by affecting judgements of how likely the event would have been to occur even if other conditions had been different. This insight arises from evidence that 'intentional actions are typically judged more robust than unintentional ones'.[169] A causal relation is 'robust' when it would have held even if there had been variations to other conditions, whereas it is 'sensitive' if it relies on a fragile and improbable set of other conditions.[170] Legal scholars have already suggested that the notion of sensitivity might help to explain the judicial approach to legal causation, particularly the significance of deliberate human intervention.[171] However, this hypothesis is currently based only on individual intuitions about commonsense reasoning and could usefully be refined using experimental methods.

---

[166] Ibid 137 fn23.

[167] Fincham and Shultz, 'Intervening Causation and the Mitigation of Responsibility for Harm' (1981) 20 British Journal of Social Psychology 113; Lagnado and Channon, 'Judgments of Cause and Blame' (n127); Lombrozo, 'Causal-Explanatory Pluralism: How Intentions, Functions, and Mechanisms Influence Causal Ascriptions' (2010) 61 Cognitive Psychology 303; Hilton and others, 'Selecting Explanations from Causal Chains' (n127).

[168] Lagnado and Gerstenberg, *Causation in Legal and Moral Reasoning* (n99) 584.

[169] Ibid 584. See further Lombrozo, 'Causal-Explanatory Pluralism' (n167) 327-329; Kominsky and others, 'Causal Superseding' (n121) 197-198.

[170] Woodward, 'Sensitive and Insensitive Causation' (2006) 115 The Philosophical Review 1, 46.

[171] Hamer (n9) 185-187.

[171] ibid 185.

E. Testing the Theory

The new commonsense theory developed above is aimed at generating *hypotheses* for legal scholars to test by re-examining the cases on legal causation.[172] At this stage, it is too early to say whether or not the law reflects the refined commonsense principles that I have outlined. Instead, my aim is to revive an approach that seems to have fallen out of favour amongst contemporary scholars of legal causation. As Lipton advocated before the advent of modern experimental psychology: 'First we construct a good model of our ordinary notion of causation; then we may embark on the task of showing the extent to which causal judgments in the law fit the model.'[173] In other words, before we can assess whether or not judges are correct in asserting that legal causation is a matter of 'common sense', we at least need to know, as reliably and precisely as possible, how ordinary people make causal judgements.

This two-stage approach underpinned Hart and Honoré's theory in *Causation in the Law*,[174] and in my view, it remains a sensible strategy for legal scholars to pursue. Against this approach, critics of the commonsense theory of legal causation have argued that 'the biggest payoff of … abandoning the slogan of "common sense causation" is that we can get to work on understanding what principles, policies and concerns govern the scope issue.'[175] This conclusion seems premature. It appears to be driven by the widespread assumption of legal scholars that the variety and complexity of concerns at play in judicial decisions on legal causation cannot possibly be accounted for by common sense.[176] My aim is to dislodge that assumption. I think it is worth renewing attempts to specify commonsense principles of causal reasoning, rather than rejecting the commonsense theory of legal causation altogether.

---

[172] I do not claim that there is any *necessary* connection between commonsense and judicial reasoning, in this area of the law or any other. Nor do I claim that judges *should* necessarily follow commonsense principles; my interest is to explain the law as it is, not to prescribe what the law should be. On the distinction between descriptive and normative theories, see further text to n95 above.

[173] Lipton (n25) 127.

[174] Text to n25 above.

[175] Stapleton (n5) 349.

[176] Ibid 349.

The empirical evidence that I have outlined shows that principles of commonsense causal reasoning *can* be specified: common sense is not so indeterminate as to be 'effectively worthless as an analytical guide'.[177] This evidence also shows that the principles of abnormality and choice are more rich and multifaceted than legal scholars (including Hart and Honoré) have previously appreciated. However, in my view this insight makes it *more* likely that common sense will eventually prove capable of explaining some aspects of the judicial approach to legal causation.[178] By synthesising the relevant empirical evidence to date, my aim is to provide an initial platform for legal scholars to use in re-examining the cases on legal causation. But as the work of experimental psychologists in this field continues to advance at a rapid pace, these hypotheses have the potential to be developed further.

It is beyond the scope of this article to test the extent to which judicial decisions on legal causation are consistent with the hypotheses that I have generated. In *Causation in the Law*, Hart and Honoré devoted three full chapters to this purpose: one each on tort, contract and criminal law.[179] The number of relevant cases in English law alone is vast; it would inevitably be partial for me to select individual decisions (or famous hypotheticals) that appear to be explained by reference to the specific principles that I have identified. A fuller analysis is required, but is a task for another occasion. It may be that when this task is performed, legal scholars will conclude that the commonsense principles identified by experimental psychologists are inconsistent with the reasoning and results of judicial decisions on legal causation. I leave that possibility open. My aim in the next part is to show that it is worth finding out, one way or the other.

---

[177] Ibid 350. See also Wright 170.

[178] For example, I have already shown how the insight into the effect of prescriptive norm violations on causal selection addresses one of the major weaknesses in Hart and Honoré's commonsense theory: text to n140 above.

[179] Hart and Honoré ch6 (Tort), ch11 (Contract) and ch12 (Crime).

4. Implications

If judicial decisions on legal causation do reflect (to some extent) the commonsense principles that I have specified, several implications follow. For judges, the empirical research can then be used to help articulate their current commonsense approach in more detail. In some cases, it may also show that judges need to change their approach to avoid influence by factors that would widely be regarded as improper grounds for determining legal liability. For legal scholars, the insights from experimental psychology show that certain prominent criticisms of Hart and Honoré's theory must now be abandoned, or at least modified. They also show that the main dividing line between the commonsense theory and rival explanations of legal causation needs to be redrawn, and the debate reframed.

A. For Judicial Practice

If the new commonsense theory is correct, the empirical research into causal selection can be used to help judges specify their current approach in more detail.[180] At present, judges are often able to state only the broad genus of their reasoning ('common sense'); beyond this, they have struggled to specify any reasons for their decisions. This form of judging is obviously unsatisfactory in several respects;[181] it has rightly been criticised both by legal scholars and occasionally by senior judiciary.[182] Most fundamentally, the common law doctrine of precedent arose from and continues to depend on the judicial practice of giving reasons.[183] Stating *only* that a decision was matter of 'common sense' makes it impossible to tell which facts of the case,

[180] Explanations of the current judicial approach may thus influence prospectively the continued practice of judging. Elsewhere in the social sciences, this effect has been called the 'double hermeneutic'; see further Giddens, *Social Theory and Modern Sociology* (Polity 1987) 20: 'The 'findings' of the social sciences very often enter constitutively into the world they describe'.

[181] Stapleton, 'Choosing what we mean by 'Causation' in the Law' (n3) 464 fn98.

[182] See eg Wright (n23) 176, lamenting that judges 'have often taken up Hart and Honoré's invocation of "common sense" without feeling any need to elaborate its content'; Hoffmann, 'Common Sense and Causing Loss' (Chancery Bar Association Lecture, 15th June 1999) 2.

[183] Duxbury, *The Nature and Authority of Precedent* (CUP 2008) 25: 'The first and crucial stage in the development of stare decisis was that judgments came to be supported by reasons'; see further 48-57.

if different, would have led to a different decision; the current judicial approach to legal causation thus stunts the very process by which the common law develops.[184]

It should not come as a surprise that judges have so far struggled to identify for themselves the factors affecting their commonsense intuitions. Even though causal reasoning is ubiquitous in everyday life,[185] ordinary people are notoriously bad at consciously identifying (let alone articulating) the factors affecting their own causal judgements.[186] This lack of self-awareness in performing routine cognitive tasks is a well-known phenomenon within psychology generally,[187] but is especially relevant to causal selection. That is why experimental psychologists devise experiments to test different hypotheses obliquely, rather than simply asking their participants to explain their causal judgements directly.[188] Cognitive science has developed increasingly-sophisticated techniques for overcoming the problem that people often cannot consciously identify the factors affecting their judgements of causal selection.

The empirical research into causal selection can therefore offer important help to judges by prompting them to consider consciously some of the factors known to affect commonsense causal reasoning. So, rather than stating baldly that their decision on legal causation is a matter of 'common sense' and nothing more, judges can begin to ask themselves, for example: did the relevant event involve the violation of a norm? Was it a descriptive or a prescriptive norm? Was the prescriptive norm moral or legal (or of another kind)? And so on. Of course, none of these prompts are determinative. On reflection, judges might hold that some of the factors affecting ordinary people's judgements of causal selection should not be used in the doctrine of legal

---

[184] As Goodhart put it, 'It is by his choice of the material facts that the judge creates law': Goodhart, 'Determining the *Ratio Decidendi* of a Case' in *Essays in Jurisprudence and the Common Law* (CUP 1931) 10; see further Duxbury (n183) ch3.

[185] See generally Roese, 'Counterfactual Thinking' (1997) 121 Psychological Bulletin 133.

[186] Lipton (n25) 127: 'as in the case of most cognitive skills, we are far better at making particular judgments than we are at stating the general principles that underlie them.'

[187] This insight has now been popularised by Kahneman, *Thinking, Fast and Slow* (Penguin 2012).

[188] Text to n102 above.

causation; if so, judges can reject the relevance of these factors, supported by reasons. In this way the common law can develop, released from its present stalemate.

In some cases, the empirical research into causal selection may also show that judges need to change their approach to avoid influence by factors that would widely be regarded as improper grounds for determining legal liability.[189] First, ordinary people appear to rely on heuristics or 'mental shortcuts' to generate the representations of normality that they use in causal selection.[190] This shortcut may be expedient for most everyday tasks, where an unreflective causal judgement is sufficient and less time-consuming. But many would regard it as improper for judges to rely on the same rough-and-ready process when deciding issues of legal liability using their common sense. If so, once aware of this heuristic tendency, judges could instead develop the law by specifying expressly which type of norm violation (descriptive or prescriptive) they consider to be legally dispositive.

Second, the experimental research shows that judgements of blame may affect commonsense causal reasoning. Hart and Honoré sought pre-emptively to deny this effect, asserting that 'what is selected as the cause from the total set of conditions will often … coincide with what is reprehensible by established standards of behaviour … [but] this does not justify the conclusion which some have drawn that it is so selected merely because it is reprehensible'.[191] By contrast, experimental psychologists have shown that when ordinary people are faced with 'reprehensible' behaviour, their judgement of causal selection may be affected by an independent judgement of blame.[192] Importantly, in the experiments that appear to support

[189] The conclusion that a factor in commonsense causal reasoning is an 'improper' ground for determining legal liability requires normative argument: see text to n93 above. I do not develop these normative arguments here, and so do not claim any firm conclusions, but I assume provisionally that the two factors I identify would widely be regarded as improper.

[190] Text to n143.

[191] Hart and Honoré 37-38.

[192] Text to n151 above.

blame theory, participants are not aware of this effect on their causal reasoning, even though researchers can demonstrate it obliquely; it operates entirely subconsciously.

The appropriate role of blame in determining legal liability is complex, and I do not seek to draw any firm conclusions here. However, if judgements of blame subconsciously affect causal selection, there is a risk that such judgements may inadvertently incorporate various biases into legal decision-making, concerning the parties' backgrounds, their prior conduct or convictions, their likeability in the witness box, and so on, that would widely be regarded as improper considerations.[193] My point is that the empirical evidence on causal selection provides judges with provisional grounds for caution where their decisions on legal causation arise against a backdrop of significant moral norm violations. Where judges describe these decisions as a matter of 'common sense', they should be alive to the risk that their conclusions may subconsciously be affected by factors that they would consider, on reflection, ought to be discounted.

B. For Legal Scholarship

For legal scholars, the most obvious implication of the empirical research into causal selection is the need to abandon or modify certain prominent criticisms of Hart and Honoré's original commonsense theory, so that the debate can move on. As I have acknowledged, legal scholars were justified in criticising Hart and Honoré's theory as empirically unfounded at the time when the Second Edition was published in 1985.[194] But legal scholars have continued (often vehemently) to criticise the validity of the abnormality and choice principles of commonsense causal reasoning, even within the past decade, when relevant evidence has been readily

[193] See generally Guthrie and others, 'Judging by Heuristic: Cognitive Illusions in Judicial Decision Making' (2002) 86 Judicature 1; Peer and Gamliel, 'Heuristics and Biases in Judicial Decisions' (2013) 51 Court Review 114.

[194] Text to n107.

available to support these principles.[195] In light of this evidence, it is no longer tenable to dismiss common sense as merely 'vacuous camouflage'.[196] Critiques of the commonsense theory must now engage with the insights that experimental psychology provides.

Secondly, the new commonsense theory that I have outlined shows that existing debates about legal causation need to be reframed. Although explanatory theories of legal causation have featured prominently in legal scholarship for almost a century, the debate's main dividing line has remained essentially the same. It continues to be framed as a disagreement about whether the rules of legal causation reflect 'common sense' or (alternatively) 'normative judgements'. This dividing line is traceable to the arguments of the early American legal realists in the 1920s,[197] and was unfortunately reinforced by Hart and Honoré in *Causation in the Law*, who incorrectly claimed that the commonsense principles they had identified raised only (non-normative) 'questions of fact'.[198] The same assumption is evident in the work of Stapleton and Wright, encapsulated by Stapleton's contemporary critique that legal causation 'is not a question of fact or "common sense" but of normative judgment'.[199]

I have shown that this contrast between common sense and normative judgements is a false dichotomy. The process of causal selection by ordinary people can and often does *incorporate* normative judgements.[200] Ordinary people's causal judgements are affected not only by descriptively abnormal events, but also by events that violate prescriptive norms, including

[195] See eg Wright (n23) 170-175; Stapleton, 'Choosing what we mean by 'Causation' in the Law' (n3) 462-463.

[196] Stapleton (n5) 353. See also 331: 'empty slogan'; Wright (n23) 170.

[197] Text to n20.

[198] Hart and Honoré 88-94. See also Honoré, *Responsibility and Fault* (n31) 106, 109, 120, emphasising that causal judgements are not 'normative'. See further Lucy (n59) 182-183.

[199] Stapleton (n5) 338; Wright, 'Causation in Tort Law' 1783. See further the discussion in Hamer (n9) 178-179.

[200] Contra Stapleton (n5) 335: 'In ordinary speech we tend to think of something either being a cause or not, and we often do not see our conclusions on the matter as requiring normative justification.'

legal or moral norms, even where the violation was descriptively normal.[201] Legal scholars have previously pointed out that commonsense causal reasoning may be 'normative' in the sense that it relies on shared 'social rules' for attributing responsibility.[202] However, I go further in showing that causal selection can also depend on moral appraisals.[203] The observation that judicial decisions on legal causation are affected by normative (including moral) judgements is thus entirely consistent with the proposition that judicial reasoning is based on common sense.[204]

The dividing line between the commonsense theory and rival explanations of legal causation needs to be redrawn to accommodate this insight. It does not make sense to ask whether judicial reasoning is based *either* on common sense *or* on normative judgements. The appropriate question is instead whether the *same* types of normative judgement that affect ordinary people's causal reasoning *also* affect judges' commonsense reasoning. One of Stapleton's most forceful criticisms of Hart and Honoré's theory was that 'appeals to "common sense causation" … obscure the task of identifying that it is this *normative* scope question that is in dispute.'[205] But on the new commonsense theory (which departs from Hart and Honoré's theory in acknowledging that commonsense causal reasoning does not only raise questions of fact), it is clear that normative issues arise on both sides of the traditional dividing line.

Instead, I propose that the dividing line between the commonsense theory and rival explanations of legal causation should be redrawn as follows. On one side of the line are factors that affect both commonsense causal reasoning *and* judicial decisions on legal causation. On the other side are factors that affect *only* judicial decisions on legal causation. This latter set of

[201] Text to n134 above.

[202] Lucy (n59) 196-198. Lucy concludes from this that commonsense principles are 'normative in the same way that rules of grammar are normative': 198.

[203] Text to n139 and n151 above. Cf Lucy, who sides with Hart and Honoré in denying the influence of moral appraisals on commonsense causal reasoning: ibid 198-199.

[204] Text to n140 above.

[205] Stapleton 360 (n5) (emphasis added). See also 335: 'what [Hart and Honoré] produced was merely a topography of causal usage not a geology of the normative reasoning lying beneath that usage'.

factors may then be said to raise issues of 'legal policy' in the specific sense that these factors uniquely apply to the attribution of *legal* responsibility, as administered by judges. Issues of this kind may include the purpose of the relevant legal rule and the nature of the relevant legal sanction. I do not doubt that issues of legal policy in this sense play some role in judicial decisions on legal causation; indeed, that role may be substantial.[206] But it seems to me unlikely that *all* of the factors affecting judicial reasoning will end up falling on this side of the line, once we understand commonsense causal reasoning more fully.

5. Conclusion

I began with the observation that judges often invoke 'common sense' when deciding questions of legal causation. I have argued that legal scholars should take these references seriously; it is premature to dismiss judges' commonsense reasoning as mistaken or misleading. The most appropriate response to doubts about the commonsense principles that Hart and Honoré identified is to search for new ways to specify those principles with greater reliability and precision; it is not to abandon their approach altogether. The new commonsense theory that I have outlined offers a platform for legal scholars to re-examine the case law on legal causation, drawing on insights from experimental psychology into how ordinary people make causal judgements. These hypotheses about the factors affecting judicial reasoning remain to be tested; my claim is that they are worth investigating.

[206] See eg the discussion by Lord Hoffmann in *Environment Agency* (n73) 31-32 and Hoffmann (n117) 594-595.