THE CRIMINALISATION OF ADVERSE MEDICAL EVENTS IN CRIMINAL NEGLIGENCE CASES: EXPLORING FATE, AGENCY, AND PRAGMATISM IN THE CONSTRUCTION OF BLAME FOR ALLEGED PHYSICIAN NEGLIGENCE

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Abstract

The criminal law has been critiqued as an unsuitable system to regulate adverse medical events (AME) because the unintentional nature of AME renders it incompatible with the penal objectives of the criminal law. This project uses an interpretivist approach to examine how blameworthiness is constructed in criminal cases involving AME. Situated within a contextual constructionist paradigm, and utilizing a theoretical framework that draws on legal pragmatism, symbolic interactionism, Habermasian thought, and Goffmanian frame analysis, this project employs a case study approach to explore how appellate courts construct AME as a product of fate or agency. The British case of *Bawa-Garba v. R.* (2016) and the Canadian case of *R. v. Javanmardi* (2019) are analysed using thematic analysis. It is concluded that the majority of the Supreme Court of Canada in *Javanmardi* constructed the AME within the realm of fate, contrasting the minority in *Javanmardi* and full panel of the England and Wales Court of Appeal in *Bawa-Garba* which constructed the AME within the realm of agency. It is also concluded that the majority in *Javanmardi* utilised pragmatic adjudication to determine blameworthiness. It is suggested that these findings could reduce fear of criminal liability among Canadian health care professionals. Future research is suggested to examine the legal cultures underlying this variation, critically explore the intersection of race and criminal prosecution of AME, and apply structural violence as a theoretical frame to further interrogate AME as a systemic failure.

Keywords: adverse medical events; defensive medicine; criminalisation of medical error; medical manslaughter; medical negligence; pragmatic adjudication

Dedication

To Dr. Vickie J. Martin — whose empathic care, dedication, and skill is an inspirational standard for the profession of medicine

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List of Acronyms

AME	Adverse medical event
CMPA	Canadian Medical Protective Association
EWCA	England and Wales Court of Appeal
MRP	Most responsible physician
PONR	Point of no return
QCA	Quebec Court of Appeal
SCC	Supreme Court of Canada
TCA	Theory of communicative action

Epigraph

Philosophy, especially the philosophy of pragmatism, incites doubt, and doubt incites inquiry.

—Richard A. Posner (1996)

Chapter 1: Introduction

Adverse medical events (AME) refer to "injuries caused by medical management" (Brennan, et al., 1991, p. 370). AME can be caused by either omission or commission (Leape, 1997). Importantly, these iatrogenic injuries, which the Merriam-Webster (n.d.) dictionary defines as "induced inadvertently by a physician or surgeon or by medical treatment or diagnostic procedures", do not necessarily indicate an error or negligence. While "health care organizations have historically focused on identifying and disciplining clinicians who were closest to incidents…the greatest gains in improving patient safety will come from modifying the work environment of health care professionals, creating better defences for averting [AME] and mitigating their effects" (Baker et al., 2004, p. 1685).

The criminal law has been critiqued as an unsuitable system to regulate AME because the unintentional nature of AME renders it incompatible with the penal objectives of the criminal law (Allen, 2007; Brazier & Allen, 2007; Childs, 1999; Erin, 2007; McDonald, 2008; Merry & McCall Smith, 2001; Montgomery, 2007). In Canada, criminal prosecution of AME is rare, where the preferred option is compensation through civil tort litigation (McDonald, 2008). Criminal prosecution of AME in Canada is usually reserved for the most serious of cases, which are considered to be those that involve serious and/or intentional deviations from safe practice (Allen, 2007; McDonald, 2008; Merry & McCall Smith, 2001).

The British case of Dr. Hadiza Bawa-Garba, who was convicted of gross negligence manslaughter for omissions that the court determined were causative of her paediatric patient's death, led to panic among Canadian doctors, albeit anecdotally (see, for example: Glauser, 2018; Stechyson, 2018). The impact of physician fear of liability can have far reaching social effects and is closely associated with the emergence and increased practice of defensive medicine

(Toraldo et al., 2015). Kessler and McClellan (1996) summarize defensive medicine as the practice of medicine in which health care professionals employ "precautionary treatments with minimal expected medical benefit out of fear of legal liability" (p. 354). Similarly, Yan et al. (2016) define defensive medicine as "the practice of prescribing unnecessary medical care or avoiding high-risk situations out of a fear of litigation" (p. 53).

Defensive medicine, and fear of litigation more broadly, are documented to have detrimental impacts on the provision of care (Kessler & McClellan, 1996; Morita, 2018; Schouten & Brendel, 2009; Toraldo et al., 2015). Kessler and McClellan (1996) identify two harmful outcomes resulting from defensive medicine: increased health care costs; and, decreased quality of patient care. These outcomes are reported in consistent research findings that defensive medicine increases health care costs and reduces the physician supply in higher-risk specialities, meaning fewer specialists are available, which scholars frame as social harms (Morita, 2018; Schouten & Brendel, 2009; Studdert et al., 2005; Toraldo et al., 2015; Yan et al., 2016).

Yet, the Canadian case of *R. v. Javanmardi* (2019) contrasts *Bawa-Garba*. In *Javanmardi*, a naturopath in Quebec (where naturopathy is unregulated) was charged with criminal negligence causing death and unlawful act manslaughter, following her patient's death after an intravenous administration of nutrients. The defendant was acquitted at trial but, on appeal, the Quebec Court of Appeal extraordinarily "substituted a conviction on the charge of unlawful act manslaughter and ordered a new trial on the criminal negligence charge" (*Javanmardi*, 2019, para. 15). The majority of the SCC subsequently restored both acquittals.

Given the variation between the Canadian approach in *Javanmardi* and the British approach in *Bawa-Garba*, I started this research with the broad, overarching research question of: *How are AME framed by the criminal law in Canada and the United Kingdom?*

I begin by conducting a review of the literature, which I outline in chapter two. First, I define adverse medical events and situate AME within a Canadian legal context. I then synthesize the literature along three main themes: the harms and effects of AME, which considers the harm AME causes for patients, physicians, and society at-large; the regulation of AME, which problematizes the use of the criminal law in the context of AME; and, an emerging theme of AME as an opportunity for advancement, which considers the reparation of harm.

I then outline my theoretical framework in the third chapter. I first situate this project within the paradigm of contextual constructionism (Best, 1995). Here, I also discuss my ontological assumptions. I then outline legal pragmatism as the philosophical underpinning of my project. I then turn my attention to symbolic interactionism to set up my discussion of Habermasian thought; chiefly, Habermas' (1984, 1987) theory of communicative action (TCA). I locate a productive tension between legal pragmatism, symbolic interactionism, and concepts from Habermasian thought. I also locate a secondary productive tension by reading Habermas' (1984, 1987) TCA with Goffman's (1974) frame analysis. This allows me to explore how situating these productive tensions in my contextual constructionist paradigm forms an effective theoretical framework to serve as the foundation for my inquiry.

In chapter four, I discuss the methodology for this project. I set out my epistemological framework and discuss the interpretivist approach mobilized to analyse the data. I then turn my attention to preliminary elements of research design, such as my guiding research question, hypothesis, and aims. I also outline the case study approach and describe the dataset; the decisions of the Supreme Court of Canada (SCC) in *R. v. Javanmardi* (2019) and the England and Wales Court of Appeal (EWCA) in *Bawa-Garba v. R.* (2016). Next, I set out the method of thematic analysis used to conduct this research. Finally, I address broader questions of validity

and ethics, which leads to my discussion of this project's limitations. Throughout this chapter, I demonstrate that my assumptions are congruent with those of my theoretical framework.

I then turn to my analysis in chapter five, where I discuss the findings I gleaned from my analysis of *Javanmardi* (2019) and *Bawa-Garba* (2016). I outline the three themes I generated: (1) the construction of AME as the product of agency versus fate; (2) the treatment of external and intervening factors; and, (3) the modes of legal reasoning exercised. Throughout the elucidation of the findings presented in this chapter, I intertwine a theoretical discussion to contextualize my findings within the broader literature.

Finally, in chapter six, I discuss my conclusions. I suggest that the pragmatic adjudication harnessed by the majority of the SCC in *Javanmardi* better contextualized AME and, therefore, is more consistent with the literature's argument that the criminal law should only be utilised to regulate gross deviations from safe practice, which generally have an element of intentionality (Allen, 2007; McDonald, 2008; Merry & McCall Smith, 2001). Accordingly, I suggest that Canadian physicians' fear of criminal liability potentially arising out of AME may be misguided because the construction of blameworthiness in Canadian jurisprudence relating to the intersection of criminal law and AME, namely *Javanmardi*, appears more restrictive than British jurisprudence (i.e., *Bawa-Garba*).

I then suggest opportunities for future research, including examination of the legal cultures underlying the variation between the approaches of the EWCA in *Bawa-Garba* and the SCC in *Javanmardi*. I also situate these cases, in which both defendants are racialized women, in existing literature that finds, in a British context, that non-white health care professionals are disproportionately prosecuted (Quick, 2006). I suggest that future research and the body of work on AME would be advanced through a critical race analysis.

Chapter 2: Literature Review

I begin this review of the literature by defining and situating AME within a Canadian context. I then review and outline the harms and effects of AME to patients, physicians, and society. Throughout, I identify a theme in the literature that conceptualises AME as a systemic, rather than an individual, problem. I then discuss the legal regulation of AME, which forms the bulk of this review. Finally, I briefly discuss a growing theme in the literature that views AME as opportunities for advancement, centring around the restoration of harm.

2.1. Adverse Medical Events

Definitions of AME in the medical literature tend to be complex and technical. Leape's (1997) definition of medical error succinctly provides a foundational basis of what constitutes an AME: "an unintended act (either of omission or commission) or one that does not achieve its intended outcome" (p. 214). Importantly, however, while similar, there is a subtle distinction between medical error and AME. The United States Institute of Medicine Committee on Quality of Health Care in America (2000) draws on Brennan et al. (1991), Leape et al. (1991), and Reason (1990) to distinguish between medical error and AME.

Reason (1990) summarizes the primary categories of human error, accepted across disciplines, as errors of execution in which a planned action is not completed as intended, or as errors of planning in which the wrong plan is used to achieve the intended outcome. McDonald (2008) applies Reason's (1990) discussion of error to classify Canadian caselaw in which physicians were charged with criminal negligence or manslaughter as a result of alleged negligence in the course of practice: mistakes; slips or lapses; technical errors; and, violations. Violations are intentional deviations from safe practice, while the former three categories draw on errors of execution and errors of planning and involve a lesser degree of blameworthiness

(McDonald, 2008). These three categories of error are more likely to result because of systemic factors, as discussed later (McDonald, 2008).

Brennan, et al. (1991) define AME as "injuries caused by medical management" (p. 370). Importantly, these iatrogenic injuries, which the Merriam-Webster (n.d.) dictionary defines as "induced inadvertently by a physician or surgeon or by medical treatment or diagnostic procedures", do not necessarily indicate an error or negligence. Brennan, et al. (1991) provides the example of a patient suffering a drug reaction. The reaction would be an iatrogenic harm and, therefore, constitute an AME, but would not necessarily indicate an error unless the prescriber could have reasonably foreseen the patient's sensitivity or reaction. Yet, prescribing the drug with such foresight would likely be a human error (Reason, 1990). Both Brennan et al. (1991) and Leape et al. (1991) subgroup these types of AME—in which there could, or ought to, have been reasonable foresight—as preventable.

Similarly, in the first national study of AME in Canada, Baker et al. (2004) define AME as "an unintended injury or complication that results in disability at the time of discharge, death or prolonged hospital stay and that is caused by health care management rather than by the patient's underlying disease process" (p. 1679). Baker et al.'s (2004) definition recognizes that iatrogenic harm is sufficient to constitute an AME, while Brennan et al.'s (1991) and Leape et al.'s (1991) work contextualizes that iatrogenic harm is not a sufficient condition for negligence.

There is an important distinction between what the medical literature accepts as AME and what constitutes a blameworthy AME in law. This distinction is both semantic and substantive. Semantically, the medical literature tends to refer to AME as "errors" or "preventable adverse events", while the law characterises AME as some variation of "negligent acts or omissions" (McDonald, 2008, p. 1). Guillod (2013) succinctly distinguishes adverse

medical events from medical error in the following way:

> The notion of adverse events encompasses any harm to the patient which is due to the administration of health care. When an adverse event is caused by a medical error, we usually speak of a preventable adverse event. Medical error is itself defined as a behaviour which falls below a standard of care. (p. 182)

The substantive meaning of AME in law varies by jurisdiction. The broad determinant of Western law's characterisation of blameworthy AME, which I adopt for this project, is when a patient's death or serious injury results from a health care professional's negligent act or omissions, excluding the rare cases that involve intentional harm (McDonald, 2008).

2.1.1. Canadian and British Legal Contexts

In Canada, criminal prosecution of AME is rare, where the preferred option is compensation through civil tort litigation (McDonald, 2008). The limited application of the criminal law for AME in Canada may correlate to the high standard of criminal negligence in Canada of "'wanton and reckless disregard' for the patient's 'life and safety'" (McDonald, 2008, p. 15). However, the criminal law has some utility to regulate gross deviations from safe practice; that is, violations (McDonald, 2008). "A doctor's conduct may be so negligent as to render the doctor liable for criminal negligence under s. 191 [now s. 219] of the Criminal Code of Canada" (Sherman, 1966). The now-Ontario Court of Appeal's ruling in *R. v. Giardine* (1939, as cited in Sherman, 1966) provides the prominent jurisprudential foundation for the application of the criminal law to medical negligence in Canada:

> To convict a doctor of criminal negligence it must be shown that his negligence or incompetence showed a disregard for the life and safety of his patient as to amount to a crime against the state and conduct deserving punishment. (p. 238)

This is consistent with the relevant sections of the Canadian *Criminal Code* which provide that:

> **219 (1)** Every one is criminally negligent who

> **(a)** in doing anything, or
> **(b)** in omitting to do anything that it is his duty to do,
> shows wanton or reckless disregard for the lives or safety of other persons.
> **(2)** For the purposes of this section, duty means a ***duty*** [emphasis original] imposed by law…
> **220** Every person who by criminal negligence causes death to another person is guilty of an indictable offence and liable
> **(a)** where a firearm is used in the commission of the offence, to imprisonment for life and to a minimum punishment of imprisonment for a term of four years; and
> **(b)** in any other case, to imprisonment for life.

Although the statutory text of the offence includes the word *reckless*, the Supreme Court of Canada (SCC) has been resolutely clear that the requisite standard for criminal negligence is not recklessness. In *Javanmardi* (2019), the SCC confirmed the applicable standard is a marked (or in the case of criminal negligence causing death, a marked and substantial) departure from the standard of care of a reasonable person with the accused's experiences and skills (i.e., an activity-sensitive approach). The SCC's holding in *Javanmardi* (2019) draws on its earlier decisions in *Creighton* (1993), *Beatty* (2008), and *J.F.* (2008), which "confirm that while the standard is not determined by the accused's personal characteristics, it *is* [emphasis added] informed by the activity" (*Javanmardi*, 2019, para. 38).[1]

In the United Kingdom, the equivalent offence of Canada's criminal negligence causing death is gross negligence manslaughter (McDonald, 2008). McDonald (2008) asserts "in both countries the standard for culpability is the same – gross or criminal negligence" (p. 6). McDonald's (2008) assertion is based on Horder's (1997) argument that there is an affinity between the Canadian standard of a wanton and reckless disregard (not to be confused with the separate standard of recklessness) and that of the British standard of gross negligence.

The England and Wales Court of Appeal (EWCA) attempted to provide jurisprudential

[1] Although the majority in *Javanmardi* rely on *Creighton* for its "activity-sensitive approach" (para. 38), it should be noted that some legal scholars viewed *Creighton* as moving away from subjective tests for blameworthiness that the SCC had previously adopted in *Tutton* (Roach, 2011, 2018).

clarity on the requisite standard for gross negligence manslaughter in *R. v. Adomako* (1994). In *Adomako*, the EWCA held that there are varying degrees of negligence and it is incumbent on the jury (or trier of fact) to determine if the high degree of negligence to establish criminal liability is met (McDonald, 2008). Yet, the EWCA's clarification in *Adomako* attracted criticism for being circular (McDonald, 2008; Wheeler & Wheeler, 2019). Nonetheless, the Ontario Court of Appeal similarly held in *R. v. J.L.* (2006) that criminal negligence causing death demands a high degree of moral blameworthiness that ought to be assessed on a continuum (McDonald, 2008). Importantly, the outcome of the AME (i.e., the harm suffered by the affected patient) should not be factored into the assessment of the moral blameworthiness of the underlying act or omission that gave rise to an AME (McDonald, 2008; Runciman et al., 2017).

While McDonald's (2008) work provides a comprehensive review of the state of the intersection between AME and the criminal law in Canada, there is little available socio-legal literature on AME in a Canadian context. While there is more available medical literature that documents AME within a Canadian context, such literature is also sparse (see, for example, Baker et al., 2004; Smith et al., 2016). Therefore, there is an opportunity to build on the findings of the Canadian medical literature by interpreting these findings via a socio-legal analytic framework.

2.2. Harms and Effects of Adverse Medical Events

I now turn my attention to the harms and effects of AME in a broader jurisdictional context. My review of this literature is organized along the three primary actors who experience the harms and effects of AME: patients; physicians; and, society.

2.2.1. Harm to the Patient

Patients who experience AME often suffer a physical iatrogenic injury (Klaas et al.,

2014). Less obviously, however, patients who experience AME also experience a corresponding amount of emotional distress (Vincent et al., 1994). Accordingly, responses to AME must address a number of concerns beyond compensatory damages for physical harm to also account for, among other issues, emotional distress (Vincent et al., 1994). The criminal law is unsuited to address the emotional needs of patients; in fact, it could be experienced by patients who suffer AME as secondary victimization (Parsons & Bergin, 2010).

Guillod (2013) proposes a pragmatic approach, calling for society at large to adopt a broad shift towards no-fault compensation schemes.[2] However, Vincent et al. (1994) explicitly disagree, asserting that no-fault compensation schemes, "however well intended, would not address all patients' concerns" (p. 1613). In a similar fashion, no-fault compensation schemes likely would not satisfy Allen's (2007) requirement to, when warranted, denounce and deter socially egregious conduct. Guillod's (2013) approach focuses on compensatory restoration, without assigning blame or liability. Yet, the aspirational penal objective of deterrence cannot operate without punishment (Todarello, 2003).

Interestingly, Vincent et al. (1994) do not address the use of the criminal law in this context. Rather, focusing within a context of civil law, they contend that the litigation process does not resolve the emotional distress caused by AME, nor does it generally improve patient safety. Instead, it produces further distress for all parties, including the health care professional (Vincent et al., 1994). Hence, proponents of no-fault compensation schemes argue that replacing the adversarial relationship between the plaintiff (the injured patient) and the defendant (the treating physician) enables the physician to assist the injured patient in seeking compensation (Gibson, 2016). Indeed, actions such as a physician's candid explanation and apology after an

[2] Canada currently does not have a no-fault compensation scheme for medically-related injuries (Gibson, 2016).

AME have been shown to prevent injured patients from engaging in civil litigation (Vincent et al., 1994). More research is needed to contextualize this finding to the criminal law.

2.2.2. Harm to the Physician

Despite primarily conceptualising AME as a harm to the patient, Vincent et al. (1994) acknowledge the corresponding, and less apparent, conceptualisation of AME as a harm to the health care professional. The literature that conceptualises AME as a harm to the patient tends to assert the quantifiable harms suffered by patients who experience AME; for example, physical problems associated with the iatrogenic injury suffered and the resulting impact on their ability to work, as well as social impacts and effects on overall quality of life because of the AME (Vincent et al., 1994). In contrast, the literature that conceptualises AME as a harm to the health care professional does so in two ways: by latently situating physicians as victims; and, more obviously, by situating physicians as scapegoats.

2.2.2.1. Physicians as Victims. The trend, predominantly in the United Kingdom, to criminally prosecute within a medical context has had a major impact on both health care professionals and patients (Ost & Erin, 2007). While Ost and Erin (2007) do not explicitly describe the impact, it is presumable that they are referring to the penal harms associated with involvement with the criminal justice system. Involvement with the criminal justice system produces penal harm for both the victim and the accused person, including secondary victimization or punishment drift (Lippke, 2017; Parsons & Bergin, 2010).[3]

Indeed, Merry (2007) describes several harsh implications of criminal prosecution that health care professionals suffer within this context. The criminal law is the state's most serious response which provides for the harshest sanctions. Accordingly, criminal prosecutions are

[3] Here, I focus on individual penal harms. I discuss the negative collective, social impact (e.g., defensive medicine) in the next section.

significantly more punitive than civil remedies, such as civil litigation or regulatory disciplinary proceedings because criminal proceedings can threaten the defendant's liberty, unlike civil proceedings which generally produce compensatory outcomes (Merry, 2007).

Notwithstanding the detrimental effects associated with the processes of civil remedies, as noted by Vincent et al. (1994), Merry (2007) distinguishes the use of criminal law in this context as far more detrimental. Civil remedies are more transactional in nature, while the criminal law has far more serious implications because of the associated element of blameworthiness and potential for loss of liberty (Merry, 2007). While a regulatory disciplinary proceeding can threaten a physician's licence to practice, and therefore their livelihood, loss of liberty (i.e., imprisonment) is not within its range of outcomes.

The use of criminal law in this context also produces stigma against the health care professional, regardless of the outcome (Merry, 2007). Quick (2006) similarly argues: "At present, for the practitioners who are prosecuted (and mostly acquitted), the 'process is the punishment'" (p. 450). However, neither Merry (2007) nor Quick (2006) contextualize how the penal harms suffered by health care professionals in this context differ from those that other individuals prosecuted through the criminal justice system similarly suffer.

Merry (2007) argues that the criminal law is ineffective in preventing AME. The inherent unintentional nature of AME precludes the deterrent function of the criminal law from being effective because "deterrence is ineffective in preventing error" (Merry, 2007, p. 88).[4] Hence, the criminal law is not an appropriate mechanism to improve patient safety because it is ill-equipped to prevent error (Merry, 2007). Criminal prosecution does not correct deficiencies that would

[4] In the Canadian context, Gibson (2016) also argues that deterrence cannot be achieved through civil litigation because physicians are not personally liable for monetary settlements or awards arising out of civil litigation for alleged medical negligence. Although not an insurer, "the CMPA covers all awards and settlements in negligence, no matter how high the amount" (Gibson, 2016, p. 330).

prevent recurrence of AME (thereby, improving patient safety), nor does it tend to the need for patient compensation (Merry, 2007). However, this starkly contrasts Allen's (2007) argument that responses cannot simply be compensatory or corrective. Allen (2007) argues there is indeed a moral imperative to deter and denounce egregious conduct, which Todarello (2003) contends can only be achieved through individual punishment.

The penal objective of deterrence must be contextualized with the empirical finding that individual punishment in this context has a disproportionate racial impact. According to Quick's (2006) analysis, in a British context, non-white health care professionals are disproportionately prosecuted. Possible explanations may be that non-white health care professionals may be more likely to be trained overseas and thus have different training and language skills (Quick, 2006). Another possible explanation is that racist attitudes may factor into the decision to complain about, investigate, and prosecute non-white health care professionals (Quick, 2006). Moreover, "the legal frame…is effectively handed over to medical experts" because of the reliance on expert testimony to prosecute these types of offences (Quick, 2006). Yet, Quick (2006) does not differentiate how the racist underpinnings of prosecuting health care professionals differ from those that underpin the broader criminal justice system, which some criminological scholars argue is inherently and structurally racist (Monture-Angus, 1998).

Hence, there is a tension between the penal objective of deterrence and penal harms catalysed by criminal justice system involvement, which Ost and Erin (2007) attempt to resolve by adopting a Benthamite utilitarian approach. Yet, ultimately, Ost and Erin (2007) fail to answer whether the penal harm associated with the prosecution of health care professionals is justifiable for the purposes of deterrence, in contrast to Merry's (2007) position that would answer in the negative.

The more substantial theme in the literature, however, is to acknowledge the harm that physicians suffer via the criminal law when contemplating whether negligence (as an individual failure) gave rise to an AME, as opposed to a systemic failure leading to an AME.

2.2.2.2. Physicians as a Scapegoat. The narrow conceptualisation of AME as an individual failure by Wu et al. (2016) and Lin (2009) is consistent with the archaic expectation that good health care professionals do not make mistakes (Guillod, 2013). In contrast, conceptualizing AME as a systemic failure is consistent with Guillod's (2013) assertion that medical error should be regarded as a public health issue. In this view, the symbolic nature of reforming liability laws may have a positive effect on patient safety (Guillod, 2013). Yet, this correlation is tentative because Guillod (2013) crucially fails to provide strong empirical evidence that such law reform would shift the archaic culture of the medical profession beyond the expectation that good health care professionals do not make mistakes. Evidence of such a shift is necessary to assert the corollary condition of a positive effect on patient safety, which would be consistent with the findings of Bean (2016), Kessler et al. (2006), and Kessler and McClellan (1996). Nonetheless, there is strong support in the literature for conceptualizing AME as the result of systemic failures (Allen, 2007; Childs, 1999).

Most errors (mistakes, slips and lapses, and technical errors) "are more likely to be less morally blameworthy and causatively influenced by systemic factors, especially in complex environments such as healthcare" (McDonald, 2008, p. 8). Systemic components (e.g., defects in processes, policies, etc.) largely contribute to the likelihood of error (Leape, 1997). Accordingly, Canadian courts appear to reserve the conviction of medical errors for the most serious of cases, which are generally considered to be cases that involve intentional deviations from safe practice (McDonald, 2008; Merry & McCall Smith, 2001). Yet, courts in the United Kingdom seem more

likely to prosecute and convict physicians for errors that involve a "significant systemic component" (McDonald, 2008, p. 28).

Prosecuting individual health care professionals for AME is problematic because of the complexities of such errors and failures (Childs, 1999). Rarely, particularly in a hospital setting, is one individual clearly responsible, by error or omission, for giving rise to an AME (Capen, 1996; Childs, 1999). Instead, it may be more appropriate to conceptualise some AME as the result a variety of intersecting and competing factors and actors (Childs, 1999). "Health care organizations have historically focused on identifying and disciplining clinicians who were closest to incidents" (Baker et al., 2004, p. 1685). Yet, the nature of a hospital setting that involves a distributed care team lends credence to the argument of cumulative, not individual, fault (Childs, 1999). Identifying the most responsible physician[5] (MRP) can be difficult, without regard to how other members of the care team (e.g., nurses and other allied health professionals) may have contributed to the AME (Capen, 1996). If fault is conceptualised as individual and not cumulative, the harm of AME extends beyond the iatrogenic harm suffered by the injured patient to the physician who could suffer criminal liability as scapegoats for systemic failings (Allen, 2007; Childs, 1999).[6]

2.2.3. Harm to Society

Ost and Erin (2007) assert that "the milieu of our modern day 'blame-culture'" places greater pressure on medical professionals (p. 4). Doctors no longer enjoy the "privileged and haloed status" that previously protected the profession from both civil and criminal liability (Ost

[5] While the most responsible physician (MRP) is generally determined according to hospital policy, the Canadian Medical Protective Association (2016/2019) defines the MRP as "the physician, or other regulated healthcare professional, who has overall responsibility for directing and coordinating the care and management of a patient at a specific point in time" (para. 2).

[6] Further discussion of a systems approach to regulating AME occurs in s. 2.3.6.

& Erin, 2007, p. 4). Toraldo et al. (2015) similarly find, in an Italian context, that doctors no longer enjoy the "reverence" the profession once was regarded with by society (p. 5). Toraldo et al. (2015) attribute this shift to both the consumerization of health care and the finding that media reports of litigation arising from AME are frequently not factual or scientifically-sound. This is consistent with the finding of Ost and Erin (2007) that medical mistakes increasingly attract media attention and political scrutiny. As a result of this increased scrutiny, Toraldo et al. (2015) conclude that sensationalism frequently occurs in media reports of AME.

The reporting of extreme medical-legal cases in the media that lack important scientific and statistical context drives misinformation (Toraldo et al., 2015). These extreme cases are portrayed as commonplace when they are in fact outliers (Toraldo et al., 2015). For example, a patient might interpret a treatment that does not produce the expected outcome as an error when the outcome is reasonably within the expected range of possible outcomes (Toraldo et al., 2015). Thus, while the outcome is an AME, it is not an error or negligent.

Moreover, the increasing reliance on the internet by patients to self-diagnose and then seek confirmation from their doctor "demonstrates that the doctor-patient relationship is in crisis, with less time spent on communication" (Toraldo et al., 2015, p. 3). While the broad dissemination of medical information because of the internet can be a social good, Toraldo et al. (2005) suggest that patients' greater awareness of treatment (presumably, without the benefit of clinical judgement gleaned through formal medical training) correlate to increasing complaints about alleged medical malpractice.

Consequently, physicians increasingly rely on defensive medicine (Toraldo et al., 2015). Kessler and McClellan (1996) summarize defensive medicine as the practice of medicine in which health care professionals employ "precautionary treatments with minimal expected

medical benefit out of fear of legal liability" (p. 354). Similarly, Yan et al. (2016) define defensive medicine as "the practice of prescribing unnecessary medical care or avoiding high-risk situations out of a fear of litigation" (p. 53).

Studdert et al. (2005) found that 93% of physicians within a sample of high-risk specialities (e.g., obstetrics) in Pennsylvania[7] reported practicing defensive medicine. In particular, the most common behaviour of defensive medicine was "assurance behaviour," in which the physician may:

1) order more tests than medically indicated;
2) prescribe more medications than medically indicated;
3) refer to specialists in unnecessary circumstances; and
4) suggest invasive procedures against professional judgment. (Studdert et al., 2005, p. 2610)

This characterization is consistent with the description of Kessler and McClellan (1996) that focuses on the use of precautionary treatments that are not clinically indicated. Studdert et al.'s (2005) findings are also consistent with the findings of Ortashi et al. (2013) which sampled 300 British doctors. Of the British sample, 78% reported engaging in defensive medicine (Ortashi et al., 2013). Like Studdert et al.'s (2005) finding, Ortashi et al. (2013) also found that assurance behaviours were the most frequently practiced form of defensive medicine, with 59% reporting ordering unnecessary tests and 55% reporting unnecessary referral to other specialities.

There is consensus in the literature that assurance behaviours are empirically the most common form of defensive medicine (Borgan et al., 2020; Ortashi et al., 2013; Studdert et al., 2005). Studdert et al. (2005) also documented a trend of physicians' avoidance of procedures and patients that were perceived to be risky because of fear of litigation. This perception of risk is generally established because of clinical complexity (e.g., high-risk specialities such as

[7] Pennsylvania is disproportionately impacted by higher settlements and awards than the American national average for civil medical malpractice claims (Bovbjerg & Bartow, 2005; Studdert et al., 2005).

obstetrics) or because of a patient's perceived litigiousness based on personal characteristics that are seemingly irrelevant to clinical decision-making (e.g., patients receiving workers' compensation) (Studdert et al., 2005; Yan et al., 2016). There is a gap in the literature of whether a physician's unconscious bias impacts their perception of whether a patient is risky. Specifically, the literature would benefit from empirical examination of whether patient's gender or race affects a physician's perception of risk and practice of defensive medicine.[8]

Defensive medicine, and fear of litigation more broadly, are documented to have detrimental impacts on the provision of care (Kessler & McClellan, 1996; Morita, 2018; Schouten & Brendel, 2009; Toraldo et al., 2015). Kessler and McClellan (1996) identify two outcomes resulting from defensive medicine: increased health care costs; and, decreased quality of patient care. These outcomes are shown in consistent research findings that defensive medicine increases health care costs and reduces the physician supply in higher-risk specialities, meaning fewer specialists are available; scholars frame these outcomes as social harms (Morita, 2018; Schouten & Brendel, 2009; Studdert et al., 2005; Toraldo et al., 2015; Yan et al., 2016).

Yet, in stark contrast to the bulk of the literature that problematizes defensive medicine as a social harm, Merry (2007) disagrees that defensive medicine has a negative social impact and instead contends that defensive medicine may actually lead health care professionals to practice with greater thoroughness and to avoid shortcuts. Merry (2007) appears to concede that it would be misguided to conclude that defensive medicine correlates to better patient care and instead suggests that defensive medicine might encourage physicians to better communicate the possible risks, limitations, and benefits, which in turn might produce better care. Yet, Merry's (2007)

[8] At present, there is anecdotal evidence that physicians' burnout may correlate to the practice of defensive medicine (Wan, 2019). This anecdotal observation by Wan (2019) in the *Washington Post* is based on Dyrbye et al.'s (2019) scholarly finding of an association between burnout and racial bias. More investigation is needed to understand whether racial bias correlates to defensive medicine, when controlling for burnout.

argument is based on a myopic conceptualisation of defensive medicine that contrasts the preponderance of the literature.

There is a consensus in the literature that defensive medicine has far-reaching structural and systemic implications (Bean, 2016; Kessler & McClellan, 1996; Kessler et al., 2006; Morita, 2018; Ost & Erin, 2007; Studdert et al., 2005; Toraldo et al., 2015). In this view, AME are conceptualised beyond micro-level iatrogenic harm. The social effects of defensive medicine offer support to Guillod's (2013) framing of preventable medical error as a public health issue. Similarly, Yan et al. (2016) more narrowly argue that defensive medicine is a public health issue because, as discussed, it contributes to increased health care costs. In this sense, the impact of AME is dispersed across society. In addition to injured patients directly affected by iatrogenic harm, society at large also suffers a macro harm because the quality of the health care system weathers the negative consequences of defensive medicine; namely, fewer specialists and increased health care costs (Morita, 2018; Schouten & Brendel, 2009; Studdert et al., 2005; Toraldo et al., 2015; Yan et al., 2016). In extreme cases, defensive medicine could cause individual physical harm because a physician may proceed with a higher-risk course of action out of fear of liability (Studdert et al., 2005).[9]

Hence, the regulation and prosecution of AME is problematized as a social harm because of the causative, systemic effects of defensive medicine (Kessler et al., 2006). This view contrasts the conceptualisation of AME as an individual failure (Lin, 2009; Wu et al., 2016). Conceptualizing AME as a social harm further develops the conceptualisation by Ost and Erin (2007) and Merry (2007) of AME as a harm to the physician, wherein this line of argumentation suggests that physicians bear individual liability for systemic failings (Allen, 2007; Childs,

[9] More examination in the literature is needed to assess whether defensive medicine tactics might increase physician liability or risk exposure.

1999).

The systemic effects produced by defensive medicine are consistent with the systemic causes of defensive medicine. Defensive medicine occurs as a response to the systemic issue of hypervigilance towards possible legal liability (Kessler & McClellan, 1996). The emerging jurisprudential developments in the United Kingdom centered around "a more patient-orientated approach to causation" have, in part, cultivated this hypervigilance (Ost & Erin, 2007, p. 2). Ost and Erin (2007) problematize the correlation documented by Kessler et al. (2006) between the state of the law and the practice of defensive medicine and describe fears that an increase in litigation will correlate to an increased practice of defensive medicine; others have also found empirical support for this correlation (Bean, 2016; Kessler & McClellan, 1996).

Kessler and McClellan (1996) pioneered one of the early empirical studies examining the correlation between law reform and defensive medicine, finding that liability reforms can reduce the practice of defensive medicine. Similarly, reforms that affect physician behaviour (e.g., caps on damages, abolishing punitive damages, etc.) have been documented to increase physician supply in the United States (Kessler et al., 2006). Importantly, however, these findings are primarily within an American context. As such, these findings must be considered in conjunction with the finding of Smith et al. (2016) that the rate of defensive medicine by Canadian neurosurgeons is lower than their American contemporaries.[10]

Despite the findings of Kessler and McClellan (1996) and Kessler et al. (2006), which note the negative correlation between liability reforms and defensive medicine, Morita (2018) is

[10] More research is needed to investigate the causes of these different rates. The higher rate of defensive medicine among American physicians could be attributable to the capitalist system of health care in the United States. In such a system, defensive medicine could provide lucrative revenue opportunities. Defensive medicine may not provide Canadian and British physicians with such lucrative opportunities because of the socialised, as opposed to capitalist, system medicine in which they operate. This hypothesis could be affected by the capitalist features (e.g., fee for service payment model) of some socialised systems of medicine. Moreover, it is well documented that American citizens are especially litigious (Eisenberg & Farber, 1997; Kritzer, 1991).

more skeptical of the empirical link between tort reform and physician behaviour. Despite finding a negative correlation between hypervigilance towards possible litigation and physician supply, Morita (2018) questions whether tort law is a meaningful determinant of defensive medicine. Indeed, there is empirical evidence that tort reforms insignificantly reduce the practice of defensive medicine (Bean, 2016; Sloan & Shadle, 2009; Yan et al., 2016). However, Morita (2018) concedes that tort law may operate as an instrument of deterrence.

Bean (2016) conceptualises defensive medicine as "rational response to irrational risk" (p. 568). Like Bean (2016), the bulk of the literature tends to problematize the structural and systemic conditions that enable or, arguably, necessitate defensive medicine, rather than the practice of defensive medicine itself (Bean, 2016; Kessler & McClellan, 1996; Kessler et al., 2006; Morita, 2018; Ost & Erin, 2007; Studdert et al., 2005; Toraldo et al., 2015). Hence, I now turn my attention to the regulation of AME.

2.3. Regulating Adverse Medical Events

There is consistency in the literature that AME results in micro-level iatrogenic harm, but also broader social harm (Bean, 2016; Kessler & McClellan, 1996; Kessler et al., 2006; Morita, 2018; Ost & Erin, 2007; Studdert et al., 2005; Toraldo et al., 2015). While there is consensus in the literature that criminal law is not an appropriate system to regulate AME, there is divergence among why it is not an appropriate system of regulation. Accordingly, the bulk of the literature canvasses the pressing question of how to regulate AME and the appropriate "control system" that achieves a balance between ensuring patient safety while mitigating the systemic conditions that incite the reliance defensive medicine (Griffiths, 2007, p. 123). Chiefly, the literature questions to what extent, if any, the criminal law should apply in the desired control system to regulate AME.

2.3.1. Procedural Incompatibility

Criminal law, as a system of regulation, is procedurally incompatible to regulate AME (Di Landro, 2012; Quick, 2006). Di Landro (2012) argues that the depersonalization of medicine and the complexity of each AME renders the criminal law as an incompatible system of regulation because of its individualistic nature. Di Landro's (2012) recognition of the systemic nature of AME links to the earlier conceptualisation of adverse medical events as being the result of systemic, not individual, failings (Allen, 2007; Childs, 1999). This is consistent with Quick's (2006) assertion that the criminal law, in an English context, is incapable of objective and fair measurement in the context of AME because its broadness "translates into particular harshness for those operating in error-ridden activities who are exposed to risk of prosecution by virtue of their socially vital work…" (Quick, 2006, p. 449). Similarly, Montgomery (2007) argues that health is a special domain in which an implicit social contract offers physicians special treatment in return for their specialized services that constitute a social good.

The view that the criminal law is not a suitable system to regulate AME is consistent with the broader literature (Allen, 2007; Brazier & Allen, 2007; Childs, 1999; Erin, 2007; McDonald, 2008; Merry & McCall Smith, 2001; Montgomery, 2007). However, the nuanced view of Di Landro (2012) and Quick (2006) is novel because it asserts that the criminal law is not a suitable system of regulation because of its procedural features. In contrast, the broader and more common claim is that the criminal law is not a suitable system of regulation because of the purported incompatibility of its utilitarian justifications with AME (Allen, 2007; Brazier & Allen, 2007; Childs, 1999; Erin, 2007; McDonald, 2008; Merry & McCall Smith, 2001; Montgomery, 2007).

2.3.2. Utilitarian Justifications

The bulk of the literature's critique of the use of criminal law in the context of AME is situated within legal reasoning that considers its moral and philosophical justifications, or lack thereof. Chiefly, Merry (2007) questions the intended aim of using criminal law to regulate AME: deterrence, punishment, rehabilitation, or all three. Yet, the aim of using criminal law must be considered in conjunction with its purpose; for example, the reduction of medical error (Merry, 2007). However, this requires broader consideration within the conceptualisation of AME as a harm to society. Even when conceptualised as a systemic issue, the utilitarian aims of the criminal law to prevent and deter crime remain constant (Allen, 2007).

Therefore, plausibly, it would make logical sense to deploy the criminal law to respond to AME as a harm to society because the criminal law concerns itself with collective harm. However, the literature problematizes the structural *regulation* of AME as a harm to society, not the antecedent AME arising from an alleged act or omission on the part of a health care professional (Bean, 2016; Kessler & McClellan, 1996; Kessler et al., 2006; Morita, 2018; Ost & Erin, 2007; Studdert et al., 2005; Toraldo et al., 2015), thus diminishing support for the utilitarian justification that potential criminal liability will improve physician behaviour (Quick, 2006). Indeed, Merry (2007) argues that the criminal law is ineffective at improving patient safety because the penal objective of deterrence cannot reduce error.

It is well-settled within the literature that potential legal liability is a causative factor of defensive medicine, which is regarded as a social harm (Bean, 2016; Kessler & McClellan, 1996; Kessler et al., 2006; Morita, 2018; Ost & Erin, 2007; Studdert et al., 2005; Toraldo et al., 2015). Hence, the broad utilitarian argument in the literature emerges: if defensive medicine causes increased health care costs and reduced physician supply, it is a social good to augment physician liability because a health care system with decreased costs and increased physician

supply increases the welfare of society (Bean, 2016; Kessler & McClellan, 1996; Kessler et al., 2006; Morita, 2018; Ost & Erin, 2007; Studdert et al., 2005; Toraldo et al., 2015).

Importantly, however, the literature's consistent problematization of the use of criminal law does not assert a normative claim towards absolving all liability or regulation of AME. Merry (2007) asserts it is a difficult undertaking to determine the level of blameworthiness in which an AME should attract criminal liability.

2.3.3. Blameworthiness

The view of Merry and McCall Smith (2001), as advanced by McDonald (2008), to limit the use of criminal law to events involving some form of blameworthiness is a consistent view in the literature (Allen, 2007; Brazier & Allen, 2007; Childs, 1999; Erin, 2007; Merry, 2007; Montgomery, 2007). There is a consensus in the literature that the criminal law may be appropriately deployed in cases in which the AME resulted from a deviation of safe care and practice that implies some degree of individual blameworthiness (Allen, 2007; Brazier & Allen, 2007; Childs, 1999; Erin, 2007; McDonald, 2008; Merry & McCall Smith, 2001; Montgomery, 2007). Despite this consensus, there are ruptures in the literature regarding the operationalization of blameworthiness.

Some scholars suggest that convicting individual doctors at the lower threshold of gross negligence, as opposed to the higher standard of recklessness, "seems morally unsettling" (Allen, 2007, p. 66). Blameworthiness should only be established "with proof of recklessness" (Allen, 2007, p. 66). Hence, the use of criminal law in this context should be constrained by applying the higher standard of recklessness (Allen, 2007). Accordingly, only the most serious deviations from safe practice (i.e., the few cases that could satisfy the high standard of recklessness) would warrant criminal prosecution. Prosecuting only cases that involve violations—which, therefore,

are not errors—satisfies the moral and utilitarian aims of the criminal law to denounce and deter egregious conduct (Merry & McCall Smith, 2001).

2.3.4. Decriminalisation

The literature consistently problematizes the use of the criminal law to regulate AME (Allen, 2007; Brazier & Allen, 2007; Erin, 2007; McDonald, 2008; Merry & McCall Smith, 2001; Montgomery, 2007; Quick, 2006). Some scholars claim that the use of criminal law in this context is not desirable for patients or society (Merry, 2007; Ost & Erin, 2007). Merry's (2007) discussion of the increasing rate of criminal prosecutions for AME is consistent with the findings of Toraldo et al. (2015) and Ost and Erin (2007) that describe how criminalisation of AME is increasingly entering the public sphere. However, there is no empirical evidence that suggests this is occurring in Canada. Still, a relevant question for the Canadian context is: how should we regulate AME? There is consensus in the literature to limit the scope and application of the criminal law to regulate AME (Allen, 2007; Brazier & Allen, 2007; Erin, 2007; McDonald, 2008; Merry & McCall Smith, 2001; Montgomery, 2007; Quick, 2006).

2.3.5. Regulatory Mechanisms

A faction of the growing call in the literature that challenges the outright use of criminal law to prosecute AME suggests regulatory mechanisms as the appropriate control system. Both Guillod (2013) and Merry (2007) argue that the state should favour regulatory mechanisms instead of the criminal law. Guillod (2013) argues "disclosing medical error [which would increase patient safety] could be made easier by changing the rules on criminal liability" (p. 184). For Guillod (2013), regulatory mechanisms such as critical incident reporting systems are better suited to achieve the objective of patient safety than the criminal law. Critical incident reporting systems would allow health care professionals to report actual or near AME and, in

turn, receive feedback; in this sense, AME are conceptualised as an opportunity for education (Guillod, 2013).[11] However, Griffiths (2007) hypothesizes that a control system that adjudicates all AME causing death would encourage defensive medicine.

Merry (2007) highlights the New Zealand model of regulating AME to exemplify a systemic approach to reserving the criminal law only for the most culpable conduct that precede AME. This is consistent with other scholars who argue that the criminal law should only regulate violations (Allen, 2007; McDonald, 2008; Merry & McCall Smith, 2001). In the New Zealand model, the Health and Disability Commissioner "can initiate various processes to investigate, discipline, or rehabilitate practitioners who have allegedly breached a code of patient rights…and can make recommendations aimed at improving the system rather than punishing an individual" (Merry, 2007, pp. 94-95).

However, Allen (2007) asserts that it would be unfair to use non-criminal, regulatory mechanisms where the moral objectives and utilitarian aims of the criminal law are more appropriate. While Quick (2006) soundly critiques the utilitarian justifications of the criminal law in this context, as described earlier, Allen (2007) calls for consideration of the utilitarian aims to appropriately limit, not broaden, the scope of the criminal law. The discussion of the utilitarian aims by Allen (2007) strengthens the explicit qualification by Merry and McCall Smith (2001) to ensure that intentional harms are appropriately brought to justice. Allen's (2007) discussion is not oppositional to Quick (2006), despite superficial divergences. Similarly, Allen's (2007) view is not directly oppositional to Guillod's (2013) and Merry's (2007) support of regulatory mechanisms. Consistent with the broader literature, both Guillod (2013) and Merry (2007) acknowledge the criminal law has some utility to regulate AME in specific, exceptional

[11] This links to my later discussion of physician learning in s. 2.4.1. For now, however, the focus remains on regulatory mechanisms as a suitable alternative to regulate AME.

cases that involve violations (Allen, 2007; McDonald, 2008; Merry & McCall Smith, 2001).

Guillod (2013) acknowledges that regulatory mechanisms require a "delicate balance between competing interests" (p. 185). Yet, Guillod (2013) and Merry (2007) both appear to fail to address possible critiques of regulatory mechanisms, such as the potential for net-widening. Gemmell (1997) defines net-widening as occurring "when a sanction designed to be used in lieu of a more severe sanction such as imprisonment is applied instead as an addition to or a replacement of a less onerous punishment" (p. 340).[12] While literature contextualizing net-widening to the context of AME is sparse, it should be noted that a possible critique of Guillod's (2013) and Merry's (2007) support of regulatory mechanisms to displace the use of criminal law is the potential for net-widening. It is plausible, anecdotally, that regulatory mechanisms in this context, consistent with Gemmell (1997), could increase the state's penal control. Moreover, as previously discussed, Griffiths (2007) argues that a regulatory control system for AME could promote defensive medicine.

Merry (2007) argues that any deficiencies of regulatory mechanisms to regulate the medical profession should not warrant resorting to the use of the criminal law. To Merry (2007), if a regulatory mechanism—such as the ones previously discussed—is not working, it should be fixed; "this would be an argument for addressing their deficiencies and introducing mechanisms that do work: it would not be a justification for resorting to the criminal law as an alternative" (p. 95). Yet, more research is needed on regulatory mechanisms in the context of AME to examine whether critiques could be controlled for through policy measures—or whether those critiques are unresolvable.

2.3.6. Managerial Manslaughter

[12] Gemmell's (1997) work is in the context of conditional sentences. However, there is utility in contextualizing Gemmell's (1997) definition of net-widening to the regulation of AME.

Underlying Guillod's (2013) and Merry's (2007) support of regulatory mechanisms is a recognition that AME should be conceptualised as a systemic failure. Allen (2007) and Childs (1999) make this explicit. Proponents of a systemic conceptualisation of AME, as opposed to individual fault, argue that a systems approach improves patient care by modifying environmental defects (e.g., hospital policies, procedures, etc.) that contribute to AME (Baker et al., 2004; Leape, 1997).

Childs (1999) argues that holding corporate bodies criminally liable appropriately recognizes the cumulative, not individual, fault of AME (Childs, 1999). Drawing on Childs (1999), Allen (2007) further advances the argument that institutions, not individuals, should attract criminal liability for AME. This view is also explicitly shared by Merry (2007). Allen (2007) coins the term managerial manslaughter to refer to cases in which a hospital, not individual physician, should be held criminally liable for systemic failings. Allen's (2007) managerial manslaughter model is similar to Childs' (1999) discussion of corporate liability for AME. In both models, institutions are held liable, not the individual physician.

A growing discussion in the literature suggests that the potential for organizations to be held liable for AME may correlate to better patient care (Allen, 2007; Baker et al., 2004; Childs, 1999; Leape, 1997). However, Childs (1999) and Allen (2007) do not address the obvious critique that the negative effects of defensive medicine that have been identified by Morita (2018), Toraldo et al. (2015), and Kessler and McClellan (1996) within an individual context (i.e., the current system in where individual physicians are held liable) may simply replicate within a hypothetical model of managerial manslaughter. Despite this critique, the discussion of managerial manslaughter by Childs (1999) and Allen (2007) contributes to the conceptualisation of AME as systemic failures.

Not surprisingly, whether AME are conceptualised as individual or systemic failures affects the proposed response. When conceptualised as individual failures, the proposed responses do not focus on structural changes such as systems change or law reform. Instead, there is a preference for micro responses that attempt to manage the potential for criminal liability on an individual basis (Lin, 2009; Wu et al., 2016). For example, to simply avoid diagnostic errors by exercising more caution (i.e., defensive medicine), or to address the differential expectations between doctors and patients (Lin, 2009; Wu et al., 2016). These strategies could be seen as beneficial within a utilitarian lens. However, as discussed earlier, the literature problematizes the structural regulation of AME as a harm to society, not the antecedent AME arising from an alleged act or omission on the part of a health care professional (Bean, 2016; Kessler & McClellan, 1996; Kessler et al., 2006; Morita, 2018; Ost & Erin, 2007; Studdert et al., 2005; Toraldo et al., 2015), thus diminishing support for the utilitarian justification that potential criminal liability will improve physician behaviour (Quick, 2006).

Moreover, as also previously discussed, it is well-settled within the literature that defensive medicine is regarded as a social harm (Bean, 2016; Kessler & McClellan, 1996; Kessler et al., 2006; Morita, 2018; Ost & Erin, 2007; Studdert et al., 2005; Toraldo et al., 2015).[13] In this sense, Lin (2009) and Wu et al. (2016) do not seek to reconceptualise the current use of criminal law as suggested by the broader literature; instead, they offer techniques to mitigate the risk of failures and criminal liability. Contrasting the bulk of the literature, this view

[13] As noted in s. 2.2.3, in stark contrast to the bulk of the literature that problematizes defensive medicine as a social harm, Merry (2007) disagrees that defensive medicine has a negative social impact and instead contends that defensive medicine may actually lead health care professionals to practice with greater thoroughness and to avoid shortcuts. Merry (2007) appears to concede, however, that it would be misguided to conclude that defensive medicine correlates to better patient care. Instead, Merry (2007) suggests that defensive medicine might encourage physicians to better communicate the possible risks, limitations, and benefits, which in turn might produce better care. Yet, Merry's (2007) argument is based on a myopic conceptualisation of defensive medicine that contrasts the preponderance of the literature, which regards defensive medicine as a social harm (Bean, 2016; Kessler & McClellan, 1996; Kessler et al., 2006; Morita, 2018; Ost & Erin, 2007; Studdert et al., 2005; Toraldo et al., 2015).

is myopic in that it disregards structural and systemic considerations.

In contrast, structural responses tend to be favoured responses when AME are conceptualised as systemic failures (Allen, 2007; Childs, 1999; Guillod, 2013). Even when conceptualised as a systemic issue, the utilitarian aims of the criminal law to prevent and deter crime remain constant (Allen, 2007). Notably, the law reform sought by Childs (1999) and Allen (2007) aspires to displace the defendant, not the use of the criminal law. Within the model of managerial manslaughter that Childs (1999) and Allen (2007) suggest, the alleged causative systemic failures are addressed by prosecuting corporate or institutional bodies (e.g., hospitals), not individuals. In contrast, Guillod's (2013) framing of AME as a public health issue appears to be more radical, aiming to move beyond the use of criminal law in this context, but stopping short of an abolitionist position.[14] Nonetheless, the proposal of Guillod (2013) focuses on structural change.

The literature's conceptualisation of AME as resulting from systemic failures appear to favour structural responses and reforms that limit the criminal liability of individual health care professionals (Allen, 2007; Childs, 1999; Guillod, 2013). This is consistent with the broader literature that takes issue with the structural conditions that, as previously noted, enable and possibly necessitate the practice of defensive medicine (Bean, 2016; Kessler & McClellan, 1996; Kessler et al., 2006; Morita, 2018; Ost & Erin, 2007; Studdert et al., 2005; Toraldo et al., 2015).

2.4. Opportunities for Advancement

A growing theme in the literature conceptualises AME as opportunities for advancement, which is not necessarily oppositional to the literature that problematizes the use of criminal law as a control system to regulate AME. Rather, the emerging conceptualisation of AME as

[14] As noted earlier, consistent with the broader literature, Guillod (2013) acknowledges that the criminal law has some utility to regulate AME in specific, exceptional circumstances (e.g., AME that involve intentional conduct).

opportunities for advancement is less focused on examining the appropriate control system, and more focused on the reparation of harm. When conceptualised as opportunities for advancement, AME are not viewed dichotomously as, for example, an individual or systemic failure; rather, AME are conceptualised more abstractly and optimistically. A broad theme of holistic restoration of harm is evident within the literature's conceptualisation of AME as opportunities for advancement in terms of physician learning and apologies.

2.4.1. Physician Learning

The legal regulation of AME can constrain the learning and advancement of physicians because of a professional medical culture that rests on the expectation that good health care professionals do not make mistakes (Guillod, 2013). This insidious culture of secrecy is reinforced by the traditional legal approach to regulating AME, which discourages proactive disclosure of AME. On this point, it is worth quoting Guillod (2013) at length:

> Since the law has mainly focused on redressing what went wrong for the patient, it has so far shown little interest in the disclosure of adverse events and medical errors, especially when the latter did not harm the patient. In many countries, the legal advice traditionally given to physicians has been neither to disclose errors which did not affect the patient nor to apologize for errors which resulted in patient injury. This kind of legal advice has contributed to strengthen, or at least to keep alive, the traditional medical customs of secrecy and denial… The traditional medical culture as well as the traditional stance of the law is, it is submitted, short-sighted. Physicians do not disclose errors because they are afraid of being held liable. They fear that an apology be taken as an admission of guilt or liability. But it is well known today that most injured patients mainly seek an explanation and hope for an apology rather than strive for financial compensation. Keeping silent when something went wrong is a flawed strategy since many legal claims are due to deficits in the physician-patient communication. (Guillod, 2013, p. 183)

The traditional medical culture and traditional approach of the law that Guillod (2013) describes "…creates a world in which doctors have an incentive to conceal their errors" (Bourne, 2009, p. 670). However, this produces a tension between a physician's ethical obligations and their competing interests in protecting themselves against legal liability:

> [Physicians] are obligated to inform their patients about medical errors, regardless of the risk revelation may create through a lawsuit or rupture of the doctor-patient relationship. The law has been slow to require physicians to be forthcoming, however, and it does so only in circumstances where the failure of the doctor to tell the patient of his error causes the plaintiff actual harm. (Bourne, 2009, p. 670)

Indeed, the current fault-based system in most Western legal systems (including Canada) discourages open disclosure for fear of liability (Gibson, 2016; Manning, 2008). However, patient safety would benefit from a shift towards a culture of safety in which structural conditions enable health care professionals to be open and honest about their potential failings (Bourne, 2009; Guillod, 2013). Physicians cannot learn from mistakes if they are not encouraged to be open and honest about potential failings. The ability to be open and honest would encourage physicians to learn from errors, which is likely to correlate to better patient care (Gibson, 2016; Guillod, 2013; Manning, 2008). Moreover, openly speaking about and learning from errors is regarded as an adaptative coping mechanism for physicians in the wake of a medical error (Engel et al., 2006).

Among the literature that conceptualises AME as opportunities for improvement, there is a consistent normative claim to shift away from the incorporation of adversarial features of the law within the medical context (Bourne, 2009; Guillod, 2013; Schouten & Brendel, 2009). For example, Schouten and Brendel (2009) recommend that "clinicians should think clinically and leave lawyering to attorneys" (p. 292). Gibson (2016), Guillod (2013), and Manning (2008) all call for the abolition of fault-based systems in favour of no-fault systems, which provide patients who suffer iatrogenic injury with compensation without the burden of establishing a physician's negligence.

However, Vincent et al. (1994) conclude that a no-fault system (within a British context) would not address all concerns of injured patients. Beyond compensation, injured patients desire

an explanation: “the emotional needs of patients may be as important as their physical state” (Vincent et al., 1994, pp. 1612-1613). Injured patients also desire “to know that the practitioner and institution regret what happened, that they have learned from the error, and that they have plans for preventing similar errors in the future” (Gallagher et al., 2003, p. 1004). Hence, the importance of physician learning following AME is twofold: for a preventative effect; and, for the restoration of harm.

2.4.2. Apologies

The notion of physician learning is a part of the literature’s broader discussion of harm restoration following AME. While Montgomery (2007) describes a tension between the medical and criminal paradigms, a growing body of work hypothesizes that broader criminological theories may resolve this tension (Lin, 2015; Mannozzi, 2015). There is a growing discussion in the literature around incorporating elements of restorative justice within responses to AME (Farrell & Devaney, 2007; Hannawa, 2014; Lin, 2015; Mannozzi, 2015; Sparkman, 2005). Applying restorative justice principles to AME may offer a more positive resolution if, importantly, the true intention is the restoration of harmony, not the protection of bureaucratic interests (Lin, 2015; Mannozzi, 2015).

Lin’s (2015) work on the restorative role of apology following AME takes a person-centered approach, which focuses on the restoration of harm. Interestingly, Lin’s (2015) discussion is centred on the Chinese relations of humanity, which contrasts the “individual and private nature of the Western notion of apology” (p. 703).[15] Lin (2015) proposes a “a three-dimensional structure of apology that defines acknowledgement of fault, admission of

[15] It is important to contextualize Lin’s (2015) work within its Chinese context: “In contrast with the Western view of the medical relationship as being set between a medical provider and a patient, the Chinese view the relationship as a social network that is not limited to the two individuals” (p. 704).

responsibility, and offer of reparation as the three essential elements of an apology" (p. 705). Excluding these essential elements "leads to a one-dimensional apology that appears no more than an expression of sympathy or regret. Such a notion of apology has been criticized as subverting the moral ritual for strategic and instrumental purposes" (Lin, 2015, p. 700).

However, Lin (2015) acknowledges concern that some Western jurisdictions (particularly in the United States) might view an apology as an admission of liability that could be used against the physician in ensuing litigation. As discussed earlier, this produces a tension between a physician's ethical obligations to their patients and their competing interests in protecting themselves against legal liability. Interestingly, Lin (2015) argues that an apology is indeed an admission of liability because, as noted, admission of responsibility is considered an essential element of an apology and, accordingly, should be admissible in ensuing civil litigation. Yet, it should also be considered by the courts as a mitigating factor (Lin, 2015).

In the Canadian context, "most Canadian provinces and territories, with the exceptions of Quebec and Yukon, have now adopted 'apology legislation'" (Canadian Medical Protective Association [CMPA], 2008/2019, para. 3). For example, Ontario's *Apology Act*, S.O. 2009, c. 3 provides, with exceptions, that: "An apology made by or on behalf of a person in connection with any matter, does not, in law, constitute an express or implied admission of fault or liability by the person in connection with that matter…" (s. 2[1][a]).[16] This contrasts Lin's (2015) argument, although within a Chinese legal context, that while apologies have a restorative role, they should be admissible in ensuing litigation. Mannozzi (2015) argues that restorative justice (e.g., voluntary mediation),

[16] The Canadian Medical Protective Association (CMPA)—the organization that provides medico-legal defence to most Canadian physicians—adopts a more cautious approach, advising that "[physicians] are encouraged to contact the CMPA for advice prior to making an apology with acceptance of responsibility to a patient" (CMPA, 2008/2019, paras. 12-13).

> presents some advantages over litigation given that its core concern is to facilitate communication between the parties in a protected environment, where the doctors can freely explain why certain treatments or therapies were adopted (Reeves 1994), and offer apologies if necessary (Robeznieks 2003). (p. 308)

However, these apologies would not be protected under Ontario's apology legislation, which does not offer protection for apologies proffered during the course of an official proceeding:

> If a person makes an apology while testifying at a civil proceeding, including while testifying at an out of court examination in the context of the civil proceeding, at an administrative proceeding or at an arbitration, this section does not apply to the apology for the purposes of that proceeding or arbitration. (Ontario *Apology Act*, s. 2[4])

The conceptualisation of AME as opportunities for advancement is based on the purported shortcomings of the current civil system; specifically, that the current system is overly legalistic and fails to resolve the relational harm that occurs because of an AME.[17] Proponents of AME as opportunities for advancement appear to suggest that applying a person-centred approach (i.e., recognizing the relational aspects that require repair) to traditional legal avenues (e.g., civil litigation, mediation, etc.) would more effectively repair harm. However, this also requires addressing what Guillod (2013) describes as the institutionalized and archaic expectation that good health care professionals do not make mistakes.

2.5. Conclusion

In my review of the literature, I first defined AME as defined as "an unintended injury or complication that results in disability at the time of discharge, death or prolonged hospital stay and that is caused by health care management rather than by the patient's underlying disease process" (Baker et al., 2004, p. 1679). I then situated AME within the Canadian legal context. I also identified the spareness of socio-legal research on AME within a Canadian context as a

[17] The discussion in the literature that centres around AME as opportunities for advancements primarily considers regulation of AME within the context of civil litigation. While this project focuses on the regulation of AME via the criminal law, it necessary to consider this discussion because civil litigation is an alternative mechanism to the criminal law to regulate AME.

limitation of the current literature. Next, I synthesized the literature along three main threes: harms and effects of AME; the regulation of AME; and, AME as opportunities for advancement.

In my discussion of the harms and effects of AME, I developed the conceptualisation of AME as a harm to society because of the social effects of defensive medicine (Bean, 2016; Kessler & McClellan, 1996; Kessler et al., 2006; Morita, 2018; Ost & Erin, 2007; Studdert et al., 2005; Toraldo et al., 2015). Yet, even when framed as a social harm, my discussion of the regulation of AME demonstrated that the penal objectives of the criminal law are incompatible with AME; criminal law is ineffective at improving patient safety because the penal objective of deterrence cannot reduce error (Merry, 2007).[18] However, I also canvassed Merry's (2007) outlier view that defensive medicine might encourage physicians to better communicate the possible risks, limitations, and benefits, which in turn might produce better care.

I also discussed the views of Bourne (2009) and Guillod (2013) that patient safety would benefit from a shift towards a culture of safety in which structural conditions enable health care professionals to be open and honest about their potential failings. I outlined the emerging trend in the literature that encourages a systemic shift away from the incorporation of adversarial features of the law within the medical context (Bourne, 2009; Guillod, 2013; Schouten & Brendel, 2009). Indeed, beyond compensation, injured patients desire an explanation as "the emotional needs of patients may be as important as their physical state" (Vincent et al., 1994, pp. 1612-1613). I submit that the criminal law is an ill-suited mechanism to securing this kind of explanation. Having situated my project within the relevant literature, I now move to outline my theoretical framework.

[18] However, there is a logical fallacy inherent to Merry's (2007) argument that the criminal law cannot reduce error because it is premised on the criminal law having the ability to change practices via defensive medicine.

Chapter 3: Theoretical Framework

Both legal and policy analysis epitomize the project of modernity: to govern ourselves through reason. The law inherently aims to achieve this end. In particular, judicial precedent demonstrates pragmatic decision-making as an exercise in what Jürgen Habermas (1984, 1987) describes as communicative rationality, which refers to discourse that occurs with the aim of achieving consensus. The constitutive nature of language is embedded within Western systems of law that operate within the common law tradition. Communicative rationality is reflected in these systems, whereby opposing parties' arguments are canvassed before a trier of fact in an effort to reach consensus. Yet, in this sense, consensus does not necessarily refer to universal agreement (i.e., the goal of mediation), but rather to a just result.

Embedded within communicative rationality is the core aim of pragmatism: questioning what works. More specifically, legal pragmatism primarily takes a processual view that assigns greater importance to the operation of decision-making than to the outcome. Indeed, legal pragmatism offers a method of deliberative inquiry (Lind, 2012). Hence, as I will discuss later, both legal pragmatism and Habermas' (1984, 1987) communicative rationality offer insight into the development of common law.

In the context of this project, legal pragmatism and Habermasian thought (chiefly, communicative rationality) offer theoretical insight on how the common law (i.e., jurisprudence) operates to regulate AME by evaluating the physician conduct that precedes AME. Evidence of an AME is not a sufficient condition to establish culpability. Hence, the common law differentiates physician conduct that precedes AME as culpable or blameless. Yet, exploring this differentiation would be limited without also drawing on a broader sociological analysis of how the notion of medical error is constructed, which is why I also draw on social constructionism

and Goffman's (1974) frame analysis.

To weave these theories and concepts into a cogent theoretical framework, I position my work within the paradigm of contextual constructionism, which I set out in the first section of this chapter. Next, I outline legal pragmatism as the philosophical underpinning of my project. I then turn my attention to symbolic interactionism to set up my discussion of Habermasian thought; specifically, Habermas' (1984, 1987) theory of communicative action (TCA). I begin my conclusion by locating a productive tension between legal pragmatism, symbolic interactionism, and concepts from Habermasian thought. I also locate a secondary productive tension by reading Habermas's TCA with Goffman's (1974) frame analysis. Finally, I explore how situating this productive tension in my contextual constructionist paradigm forms an effective theoretical framework to serve as the foundation of my inquiry.

3.1. Contextual Constructionism

My work is best situated within a constructionist paradigm. Constructionism is not to be confused with the quasi-homophone constructivism. Constructivism is individualistic, focusing on cognition, while social constructionism focuses more on social interaction (Young & Collin, 2004). Moreover, social constructivism is firmly situated within a relativist ontology, which lends itself more to postmodern orientations (Guba & Lincoln, 2004). In contrast, the ontology of social constructionism is more malleable. While social constructionism is often viewed as adopting an anti-realist ontology, this continues to be debated (Young & Collin, 2004).

Constructionism emerged as a contrast to objectivism, critics of which charged that it did not consider the subjectivity embedded in the acts of identifying and defining social problems (Best, 1995). Joel Best (1995) refers to this classical form of constructionism as strict constructionism, which he situates as a type of phenomenology that attempts to rid us of our

assumptions of objective reality, in favour of adopting a relativist ontology. Relativism is essentially defined as an appreciation that variance in beliefs and interpretations depends on contextual circumstances (Barnes & Bloor, 1982).

Classical or strict constructionism focuses on claimsmaking, without regard to contextual social conditions, and it "avoid[s] making assumptions about objective reality" (Best, 1995, p. 341). This exposes strict constructionism to the critique that it engages in a kind of ontological gerrymandering by failing to consider the assumptions of social conditions that background claimsmaking efforts (Best, 1995). In response to this critique, champions of strict constructionism refocused attention to "putative conditions" (Best, 1995, p. 343). Yet, critics still argue that strict constructionism is an "elusive, unattainable goal" because one "can never jettison all assumptions" (Best, 1995, pp. 343-344).[19] Indeed, analysis requires language, which inherently embeds cultural assumptions in our analytic practices and thus, ultimately, our findings (Best, 1995).

Hence, strict constructionism is incompatible with this project because my analysis of the law begins with the assumption of a real and objective world that is mediated by subjective experiences. Contextual constructionism assumes a hybrid position of ontological realism and epistemological relativism (Best, 1995). Best (1995) suggests contextual constructionism as a middle ground between strict constructionism and the practice of attempting to debunk claims, referred to as vulgar constructionism. In contrast to the ontological relativism of constructivism and strict constructionism, contextual constructionism adopts a realist ontology by making assumptions about social conditions (Best, 1995; Guba & Lincoln, 2004). These assumptions centre the focus of contextual constructionism on the claimsmaking process by contextualizing

[19] As I later discuss, this critique is similar to those made about Rawls' (1971/1999) notion of the veil of ignorance.

the social conditions that backdrop the emergence and evolution of the social problems under analysis (Best, 1995).

Like the critique of strict constructionism, critics of contextual constructionism assert that the framework relies on ontological gerrymandering (Thibodeaux, 2014). However, the argument underpinning this critique is circular. Thibodeaux (2014) asserts that contextual constructionism must "show that it is the claims-making activities themselves *(relatively independent of context)* that produce the definitions of social problem [emphasis added]" (p. 832). Yet, Thibodeaux's (2014) critique misapprehends the crux of contextual constructionism: context is crucial and ought not to be separated out in favour of trying to attain causal integrity. Thibodeaux's (2014) critique is fashioned within a positivist praxis, rendering it paradigmatically incompatible with contextual constructionism. The ontological realism underlying my project, which is necessary to reflect the realist ontological assumptions of Western legal systems, is mediated by a simultaneous emphasis on the constitutive nature of language. Thus, despite my position of ontological realism, constructionism is a more appropriate paradigm than positivism or post-positivism because my work is not compatible with a concretely objectivist position.

Best's (1995) contextual constructionism moves beyond epistemological objectivism—like strict constructionism—while contemporaneously remaining firmly situated in a realist ontology, unlike strict constructionism which adopts a relativist ontology. Critics of contextual constructionism assert that separating objective reality from subjective reality is unnecessary (Thibodeaux, 2014). Yet, this critique fails to appreciate how the hybrid approach of contextual constructionism overcomes the limitations of strict constructionism. Contextual constructionism offers the ontological and epistemic conditions to extend beyond strict constructionism's limited focus on the claimsmaking process without regard to relevant social conditions that shape

claimsmaking (Best, 1995).

The epistemic relativism in conjunction with ontological realism inherent to contextual constructionism, enables examination of the claimsmaking process within the context of the claim (Best, 1995). I acknowledge that my paradigmatic positioning that draws on Best's (1995) contextual constructionism shares similarities with pragmatism. Indeed, pragmatism can be deployed as its own paradigm (Kaushik & Walsh, 2019; Kelder et al., 2005). While I incorporate pragmatic elements in my paradigmatic positioning, I have opted chiefly to draw on Best's (1995) contextual constructionism in order to draw on its strength of contextually locating the claimsmaking process.

This position of epistemological relativism is necessary for me to successfully adopt Stone's (1989) typology of causal stories:

> Causal stories have both an empirical and a moral dimension. On the empirical level, they purport to demonstrate the mechanism by which one set of people brings about harms to another set. On the normative level, they blame one set of people for causing the suffering of others. On both levels, causal stories move situations intellectually from the realm of fate to the realm of human agency. (p. 283)

Stone's (1989) typology allows me to examine the state's conception of AME; specifically, how those events are constructed as causal stories that move "from the realm of fate to the realm of human agency" (Stone, 1989, p. 283).

In turn, as I discuss in my next chapter, I operationalize AME as events that could be attributable to, as Stone (1989) describes, fate. I am then able to consider how the state's use of criminal law results from conceptualizing these events not as fate but as the result of human agency. This approach demands both ontological realism and epistemological relativism. Ontological realism is necessary for my analysis of the law because the law assumes a real and objective world. Yet, to enable socio-legal analysis, I must marry this realist worldview with

epistemological relativism to acknowledge the constitutive nature of language that is inherent to the common law tradition. Thus, Best's (1995) contextual constructionism, that assumes a hybrid position of ontological realism and epistemological relativism, is an appropriate paradigm for me to situate my work.

Having set out the paradigmatic assumptions that situate my work, I now turn my attention to the philosophical and theoretical constructs that form my theoretical framework.

3.2. Legal Pragmatism

Legal pragmatism is a philosophy of law that stems from the American school of pragmatic philosophy (Posner, 2004). Abandoning classical methods of reasoning, in favour of inductive methods,[20] legal and philosophical pragmatism co-evolved in the twentieth century (Posner, 2004). Oliver Wendell Holmes (1897) first presented what John Dewey (1924) later used as the foundation for what is now regarded as legal pragmatism.[21] Later in the twentieth century, Richard Rorty revived legal pragmatism,[22] prior to Jürgen Habermas' work on the subject (Posner, 2004). Nearing the end of the twentieth century, Posner was regarded as one of the leading proponents of legal pragmatism (Sullivan & Solove, 2003).

The premise of legal pragmatism is what Dewey (1924) described as the logic and technical procedure of legal reasoning and judicial decision-making. Legal pragmatism is a theory of law that attempts to generalize and explain legal decision-making and thus jurisprudence, as reflected in the fitting title of Posner's (2008) book, *How Judges Think*.

3.2.1. Formalism, Realism, and Pragmatism

[20] My discussion in the next chapter suggests that abductive methods more accurately demonstrate the pragmatic process.

[21] It is important to note that while Dewey is widely associated with what is modernly regarded as legal pragmatism, Dewey referred to his form of pragmatism as "experimentalism" (Posner, 2008, p. 231).

[22] As I discuss later, Rorty's revival of legal pragmatism is a post-modern rendition of legal pragmatism, in stark contrast to how I deploy legal pragmatism in this research project.

Legal pragmatism is in stark contrast to classical legal theory, also referred to as legal formalism. At its most basic level, legal formalism emphasizes the value of precedent and advocates for deductive reasoning in judicial decision-making. This type of legal reasoning, first credited to Christopher Columbus Langdell, favours judicial decision-making that applies "technical legal doctrine with syllogistic logic to the facts," without regard to competing questions of policy (Kelley, 2002, p. 29). Hence, formalist arguments harness deductive reasoning (Huhn, 2003). Yet, legal formalists argue this is an antiquated view.

Dworkin (1986, 1977/2013), one of the most prominent proponents of legal formalism, contrasts Langdell's caricatured depiction by placing "respect for moral claims at the center of his model of legal analysis" (Levinson, 1978, p. 1073). Leiter (2010) refers to the modern version of legal formalism as "sophisticated formalism", which rejects Langdellian deduction and the mechanical caricature of legal formalism, while valuing predictability (p. 112).

In contrast, Leiter (2010) refers to the Langdellian description of legal formalism as "vulgar formalism," in which judicial decision-making is reduced to mere the practice of "mechanical deduction" (pp. 111, 116). That is, law is regarded as a technical science (Tamanaha, 2009). Tamanaha (2009) disputes the claim that vulgar formalism ever took hold in the American legal system, arguing that the instrumental nature of American law "does not think of law as complete and logically ordered, does not think of law as autonomous, and does not view judging as a matter of mechanical deduction," all of which vulgar formalism (i.e., Langdell) would demand (p. 160).

Tamanaha (2009) attributes the fallacy of vulgar formalism to Roscoe Pound. Pound (1908) asserts that mechanical judicial decision-making, as an exercise in the scientific method, "tends to cut off individual initiative in the future, to stifle independent consideration of new

problems and of new phases of old problems, and to impose the ideas of one generation upon another" (p. 606). Yet, Tamanaha (2009) disputes the validity of Pound's (1908) claim, arguing that despite the frequent historical image of formalist judicial decision-making as mechanical, there is little empirical evidence that judicial decision-making took that form; instead, there is empirical evidence to the contrary. However, Leiter (2010) suggests that Tamanaha's (2009) argument against Pound (1908) is too generalized, exaggerated, and based on the selective use of evidence akin to confirmation bias.

Nonetheless, Pound remains relevant to the development of legal pragmatism. Pound's (1931) later work advocates for realist jurisprudence, which is interconnected with the development of legal pragmatism. The primary objective of legal realism is to approach the law empirically by drawing on social scientific methods (Thomas, 2005). Pound (1931) notes that legal realism generally differs from philosophical realist thought, in which legal realism denotes a "science of law" (p. 697). However, Pound's (1931) science of law is not a call for a physical science, which could render it similar to Langdellian formalism. Law as a physical science, focused on the outcome, "would lead back to the juristic pessimism of the historical school and the nineteenth-century positivists" (Pound, 1931, p. 703). Instead, legal realism "is concerned with what laws do…" (Pound, 1931, p. 703).

Posner (1990) notes that "the pragmatic movement gave legal realism such intellectual shape and content as it had" (p. 1653).[23] Perhaps, however, the most obvious foundational similarity between legal realism and legal pragmatism is located in their ontologies. Pound's (1931) legal realism is not premised on the existence of a universal, singular truth. Importantly,

[23] The pragmatic movement Posner (1990) is referring to in this quote is the philosophical pragmatic movement that predated legal pragmatism. As discussed later, Posner (2008) differentiates between philosophical and legal pragmatism; legal pragmatism is not "strongly derivative from philosophical pragmatism" (p. 234).

however, Pound (1931) does not suggest a multitude of truths, which would be consistent with postmodernism. Instead, Pound (1931) appears to accept both ontological realism and epistemological relativism. Consistent with epistemological relativism, Pound (1931) asserts a seemingly processual view, arguing the importance of an individual case, while also assigning similar importance to generalizations. Pound's (1931) processual view of legal realism shares similarities to that of legal pragmatism.

Unsurprisingly, both legal realism and legal pragmatism contrast formalism. Thomas (2005) asserts that historical legal realism was a necessary "insurrection against formalism" that exposed, for example, the illusion of certainty in legal formalist thought (p. 302). Yet, Thomas (2005) critiques the realist insurrection as overly ambitious. Its ultimate demise, according to Thomas (2005), was largely in part because the social science methods it advocated were based on positivist conceptions. However, Thomas (2005) fails to provide support for why underlying positivist conceptions were a fatal flaw. Nonetheless, Thomas (2005) argues that legal realism reflects "an irritated dissatisfaction with the continued domination and influence of [the] outdated legal approach" of formalism (p. 303). This view suggests that legal realism provided a foundation for legal pragmatism to resolve the deficiencies legal realism exposed in legal formalism, but ultimately could not resolve.

However, Thomas' (2005) view should not be read to suggest that legal pragmatism simply continued on from where legal realism left off. Indeed, both have different philosophical roots. Legal pragmatism is not a recapitulation of legal realism. Instead, legal realism provided a suitable entry point in legal discourse for the consideration of legal pragmatism. Hence, of greater concern to the understanding of legal pragmatism are the schisms differentiating legal formalism and legal pragmatism.

3.2.2. Precedent

One of the most evident contrasts between legal formalism and legal pragmatism is the treatment of precedent. Holmes (1897) argues that the formalist reverence of precedent reduces the law to merely a prediction (Posner, 2004). Yet, this argument is threatened by its reduction of formalism to what Leiter (2010), as discussed earlier, describes as "vulgar formalism" (p. 111). Despite the fierce criticism that advocates of legal pragmatism levy against legal formalism, it would be a strawman argument to claim that formalism singularly focuses on precedent without regard to some, albeit limited, contextual analysis. Indeed, Dworkin (1986) regards judicial consistency with precedent as a normative ideal; but, importantly, such conviction to precedent is not without some regard to moral claims (Levinson, 1978).

Posner's (2004) eloquent recapitulation of Holmes' more nuanced argument that "history illuminates but should not dominate law" highlights a fundamental tension between legal formalism and pragmatism (p. 148). The normative value that legal reasoning assigns to history is a primary contrast between legal formalism and legal pragmatism. Legal pragmatism is resolutely forward-looking (Posner, 2008). Yet, it would be too simplistic to suggest that legal formalism is backward-looking and thereby embraces precedent, while the forward-looking nature of legal pragmatism rejects precedent. Instead, a subtler distinction lay in how legal formalism and pragmatism each operationalize history as a normative ideal.

While forward-looking, legal pragmatism does not fully reject the value of precedent and, by extension, history. Holmes (1897) suggests that judicial decision-making would benefit from the clarity brought about by eradicating the constraints of strict abidance to historical precedent. Importantly, Holmes' (1897) assertion is not a rejection of history but a nuanced normative claim to appropriately scope the impact and influence of history on judicial decision-making. Posner

(2008) clarifies that "adherence to precedent performs important functions, but ultimately precedent, and thus the past, is a servant rather than master to the pragmatist" (p. 247).

In contrast, legal formalism places greater emphasis on the importance of coherency with precedent (Dworkin, 1986). The central justification to formalist adherence to precedent is that it produces certainty. However, Duxbury (2008) disputes that precedent actually provides certainty, while accepting, like Holmes (1897), that certainty is a human inclination. Yet, the assertion that precedent provides absolute certainty is a fallacy; rather, it is a central principle that precedent only provides a degree of certainty (Duxbury, 2008). Providing complete certainty would frustrate the purpose of the precedent doctrine because "opportunities for the courts to develop common-law principles would be seriously limited" (Duxbury, 2008, p. 160).

Critics of legal pragmatism frequently attack pragmatic judicial decision-making as disregarding precedent. For example, Dworkin (1986) levies the criticism that legal pragmatism fails to restrain the judiciary to adhere to precedent. Yet, in practice, "legal pragmatism treats following precedent as the first rule of adjudication for judges working in the common law tradition" (Lind, 2012, p. 264). Legal pragmatism does not disregard precedent in the way its critics assert. Indeed, legal pragmatists treat precedent differently than legal formalists; however, it is too simplistic to argue that legal pragmatism ignores precedent.

Precedent is a tool for legal pragmatism; it is not an absolute determinant of outcome (Dewey, 1924; Posner, 2004). Unlike legal formalism which looks to history as an authority to guide judicial decision-making, legal pragmatism operationalizes history "in the specific sense of being alert to the possibility that a current legal doctrine may be a mere vestige of historical circumstances" (Posner, 2004, p. 152). That is, legal pragmatism looks to history to identify "rules that have nothing to validate them but a historical pedigree" for the purpose of "critical

reexamination [*sic*]" (Posner, 2004, p. 152). Similarly, Duxbury (2008) also argues that precedent "requires that past events be respected as *guides* for present action, but not to the extent that judges must maintain outdated attitudes and a commitment to repeating their predecessors' mistakes [emphasis added]" (Duxbury, 2008, p. 183). Legal pragmatism operationalizes precedent as an opportunity for critical re-examination and views precedent as incomplete (Thomas, 2005). This incompleteness enables judicial decision-making to draw on the broad principles of precedent which, in turn, help us reach decisions that better suit the present case (Thomas, 2005). Cardozo (1965) notes the unique commitment of legal pragmatism to precedent that allows for the evolution of legal doctrine.

Hence, legal pragmatism is aptly suited to mobilize marginalized interpretations of law, such as feminist and Indigenous legal viewpoints and traditions. Sheppard (2008) describes how former Supreme Court Justice Bertha Wilson's legal interpretations reflected feminist pragmatism. Justice Wilson's approach "was based upon the centrality of social context and experiential knowledge rather than abstract legal formalism" while her "pragmatism was refracted through a lens of feminism" (Sheppard, 2008, pp. 83-84). Hence, Justice Wilson's feminist pragmatism demonstrates that legal pragmatism is positioned to advance social equality "while operating within the constraints of the rule of law and respecting the institutional limits on the role of judges" (Sheppard, 2008, p. 84). This feature of pragmatism is based on its view of precedent that allows for, unlike formalism, the mobilization of legal evolution (Cardozo, 1965; Thomas, 2005). Yet, the value of precedent and evolution of legal doctrine is only one feature of the judicial decision-making process in which legal pragmatists and legal formalists diverge.

3.2.3. Operation vs. Outcome

Perhaps the most prominent schism between legal formalism and legal pragmatism is the

importance each assigns to operation versus outcome of the judicial decision-making process. Where legal formalism focuses on outcomes, Dewey's (1924) pragmatism is less concerned with the outcome (in the traditional formalist sense) and assigns far greater importance to that of how the outcome was achieved. Dewey (1924) asserts that the focus of judicial decision-making ought not to be of the decision (i.e., the outcome), but rather the process by which courts expound their decisions. Without a logical method underlying courts' decisions, such decisions would simply be "arbitrary dicta", as a singular focus on the outcome of a decision fails to account for the operation in which the decision was reached (Dewey, 1924, p. 24).

Likewise, Holmes (1897) concludes that any question of legislative policy cannot be answered deductively, and if it is, that the outcome would not be widely accepted. To Dewey (1924), deduction provides an account of "the *results* of thinking, [but] has nothing to do with the *operation* of thinking [emphasis original]" (p. 22). Deductive judicial decision-making would merely be, to Dewey (1924), arbitrary dicta because it fails to account for the operation of the judicial thinking that reached the result. Dewey (1924) suggests that directing focus solely on the outcome of judicial decisions would lead to what Pound (1931) described as mechanical jurisprudence. Dewey (1924) accepts that this would appease what Holmes (1897) describes as a normal human inclination toward, but is ultimately an illusion of, certainty. This is consistent with Duxbury's (2008) argument that certainty in precedent is self-refuting because complete certainty would limit the opportunity for the making of common law, and, thereby, the development of precedent.

As discussed earlier, certainty was one of the illusions the insurrection of legal realism sought to expose within legal formalism (Thomas, 2005). Legal pragmatism similarly accepts certainty as an illusion. Instead, legal pragmatism "finds creative genius in judicial practice at the

delicate balance-point between certainty and stability in predictable outcomes and conscious, purposive growth of legal doctrine" (Lind, 2012, p. 262). Douglas Lind (2012) also notes that legal pragmatism is often critiqued for being "philosophically mushy and malleable" (p. 214). In addressing the critiques of legal pragmatism, Lind (2012) advocates for legal pragmatism in its "classical and analytic" form, contrasting Rorty's postmodernist pragmatism (pp. 265, 268). In its classical and analytic form, legal pragmatism "offers only a method of deliberative inquiry" which does not "champion any special results" (Lind, 2012, p. 267). Lind (2012) argues that offering a method of deliberative inquiry presents the "very conditions of coherence and consistency [critics of legal pragmatism] say it lacks" (p. 217).

The primary purpose of legal pragmatism is to offer a method of deliberative inquiry (James, 1907/1975). Yet, this does not mean that legal pragmatism views the outcome—and, by extension, the consequences—as unimportant. In contrast to formalist deduction, early pragmatists advocated radical empiricism, similar to proponents of legal realism, in which "propositions would be evaluated by their observable consequences rather than by their logical antecedents" (Posner, 2008, p. 231). Legal pragmatism considers the consequences, and associated effects, "as indicia in the measurement of truth" (Lind, 2012, p. 267). Importantly, however, this is markedly different from a utilitarian view that would favour one particular decision because it would maximize social benefits (Lind, 2012).

Cardozo (1965) emphasizes that legal pragmatism aptly limits the judicial decision-making process from having a primary focus on the common good, which would be consistent with utilitarianism. Yet, formalist critique of pragmatism, chiefly that advanced by Dworkin (2006), generally attacks pragmatism for permitting unconstrained judicial activism. However, formalism itself is not immune to judicial discretion. Posner (2008) suggests that the

manipulability of originalism (generally associated with formalism) casts doubt on the core claim of originalism that it reduces judicial discretion. Originalism, and, by extension and inference, formalism, is not of a theory of judicial restraint (Posner, 2008). Instead, to Posner (2008), political preferences may impact judicial discretion more than underlying philosophies that guide judicial decision-making.

3.2.4. Pragmatic Adjudication

Legal pragmatism, as noted, offers a method of deliberative inquiry (James, 1907/1975). This method, in the context of the judicial decision-making process, is best described as pragmatic adjudication. At its core, legal pragmatism demands judicial adjudication marry reasonableness within a broader context of social policy (Posner, 2004). Posner (1996) refers to pragmatic adjudication as the application of pragmatism. While it is unsettled whether legal pragmatism is a descriptive or normative theory, both Posner (2004) and Lind (2012) suggest that legal pragmatism does indeed have descriptive elements.

While Lind (2012) notes that legal pragmatism views adherence to precedent as a primary objective, pragmatic adjudication is the method of legal pragmatism's unique treatment of precedent—i.e., what Posner (2004) describes as the critical re-examination of precedent. Posner (2004) suggests that pragmatic adjudication sensitises the judiciary to consequences. As noted earlier, consequences are relevant to legal pragmatism "as indicia in the measurement of truth" (Lind, 2012, p. 267). While the relevance that legal pragmatism assigns to consequences does not transform it into a form of consequentialism (Posner, 2004), the relationship between legal pragmatism and consequentialism is contentious even for proponents of legal pragmatism.

Posner (2004) is explicitly clear that legal pragmatism, and thereby pragmatic adjudication, is not consequentialist. Nonetheless, Lind (2012) suggests that Posner favours legal

pragmatism because of its "supposed consequentialist leanings" (p. 238). While Lind (2012) recognizes that Posner disputes that legal pragmatism is consequentialist, Lind (2012) nonetheless asserts a nuanced argument that Posner's results-oriented approach is simply a masquerade for consequentialism. Indeed, Posner (2004) appears to assert a more results-oriented approach of legal pragmatism than, for example, Dewey's (1924) processual view of what is now regarded as legal pragmatism. Yet, Lind (2012) misapprehends the acceptable variance in approaches to legal pragmatism by arguing that Posner's results-oriented approach misappropriates legal pragmatism. Posner's (2004) rendition of legal pragmatism is consistent with Serra's (2010) teleological interpretation of pragmatist ethics, "where the end which is valued is neither imposed from without nor comes from within, but rather is discovered and developed in process" (p. 9). This also reflects Dewey's (1924) processual view. However, Lind (2012) contrasts this view by asserting that pragmatist truth is "consequential, not teleological…" (p. 251).

The divide between Posner's (2004) and Lind's (2012) view on the relationship between legal pragmatism and consequentialism may be resolved by understanding Posner's (1996) view on the disconnection between legal and philosophical pragmatism. Importantly, while Posner (2004) notes that legal and philosophical pragmatism co-evolved, his earlier work (see: Posner, 1996) explained that pragmatic adjudication—the method of legal pragmatism—cannot be derived from the philosophical stance of pragmatism:

> For it would be entirely consistent with pragmatism the philosophy *not* to want judges to be pragmatists… a pragmatist committed to judging a legal system by the results the system produced might think the best results would be produced if the judges did not make pragmatic judgments but simply applied rules. (p. 3)

Posner (2004) reiterates this position in later works.[24]

[24] See, for example, Posner (2008).

Pragmatic adjudication must be defended on its own merits, divorced from philosophical pragmatism (Posner, 1996). This is consistent with Posner's (2008) separate claim that legal pragmatism is not "strongly derivative from philosophical pragmatism" (p. 234). Instead, the origins of legal pragmatism are more likely connected to the nineteenth-century movement away from natural law and religion in light of the emergence of science and Darwinian thought (Posner, 2008). Posner's (2008) suggestion that American jurist Antonin Scalia's "acceptance of precedent is avowedly pragmatic" demonstrates the divergence between legal pragmatism and philosophical pragmatism (p. 345). Justice Scalia's apparent pragmatism is likely more consistent with philosophical pragmatism than the pragmatic judicial decision-making flowing from legal pragmatism.

Having outlined legal pragmatism, I now turn my attention to a brief examination of symbolic interactionism, which is a necessary foundational element of my later discussion of Habermasian thought.

3.3. Symbolic Interactionism

George Herbert Mead's early work contributed to what is now known as symbolic interactionism,[25] which stems from American pragmatism (Pascale, 2011). Mead's work—and, therefore, the foundation of symbolic interactionism, like legal pragmatism—was influenced by pragmatists such as William James and John Dewey (Pascale, 2011). Drawing on a social behaviourist perspective, Mead (1962) explored how symbols and gestures constitute language (Pascale, 2011). In its present form, symbolic interactionism is largely premised on Herbert

[25] "Scholars continue to debate whether researchers should refer to symbolic *interaction* [emphasis added] or symbolic *interactionism* [emphasis added]" (Pascale, 2011, p. 87). For the purposes of this project, I adopt Blumer's (1969) interpretation, which refers to symbolic interactionism.

Blumer's (1969) conception of Mead's work (Pascale, 2011).[26] Pascale (2011) draws on Blumer's (1969) work to outline the three basic tenets of symbolic interactionism:

> Firstly, people act toward things based on the meanings that the things hold for them…Second, the meanings of things are generated over time through human interaction…Third, meanings are modified during interaction through interpretive processes. (pp. 87-88)

Maxwell (2012) suggests that Blumer's (1969) interpretation of symbolic interactionism fused "ontological realism with an epistemological *constructivism* [emphasis added] (although, since this term was not available to him, he referred to this position as 'idealism')" (p. 10). Best (1993) argues that Blumer (along with John I. Kitsuse and Malcolm Spector) "laid the foundation for contemporary *constructionism* [emphasis added]" (p. 132). As noted earlier in this chapter, constructionism and constructivism are different. Blumer (1969) focuses on social interaction, which is consistent with social constructionism, not social constructivism which is individualistic and focuses on cognition (Young & Collin, 2004).

Callero (2003) notes that the pragmatic elements of symbolic interactionism share superficial similarities with postmodernism although epistemological differences typically situate symbolic interactionism within a modernist orientation. In particular, Callero (2003) argues that symbolic interactionism's conformity to the modernist aims of rationality and reason starkly contrasts the postmodern break with science. Moreover, postmodernism's rejection of the self through radical anti-essentialism precludes situating symbolic interaction in a postmodern orientation.

Symbolic interactionism conceptualises the self as socially constructed and contingent, while holding the ontological assumptions of a true and objective world and self. Its focus on

[26] While most symbolic interactionists claim Goffman as part of the scholarly foundation of that tradition, because he chose not to associate with it (Pascale, 2011), I elected to outline my use of Goffmanian frame analysis separately from my discussion of symbolic interactionism. See s. 3.5.

language and socially constructed meanings indicates it has taken a discursive turn, which helps to reconcile symbolic interactionism's realist ontological assumptions with its view that identities are socially contingent. Importantly, viewing identity as socially contingent is not akin to a postmodern interpretation of multiple selves (Pascale, 2011).

Having taken the discursive turn, Mead—and symbolic interactionism—moved away from Weberian instrumental rationality towards what Habermas (1984, 1987, 1992/1996) later described as communicative rationality. As a type of social action, instrumental rationality refers to "'conditions' or 'means' for the attainment of the actor's own rationally pursued and calculated ends" (Weber, 1922/1978, p. 24). Instrumental rationality typically conjures up images of efficiency and is generally associated with capitalism. In contrast, communicative rationality, as will be discussed in the next section, emphasizes language (i.e., discourse) as a means to negotiate consensus. Interestingly, Blau (2020) argues that critical theorists unfairly attack instrumental rationality and falsely dichotomize instrumental and communicative rationality. However, it is an assumption of this framework that instrumental rationality is incompatible with the communicative elements of the common law under examination.

Habermas' (1984, 1992/1996) theory of communicative action, from which the concept of communicative rationality derives, is only a subset of Habermas' ideas that offer an opportunity to re-examine symbolic interactionism, particularly as it relates to law.

3.4. Habermasian Thought

It is well settled that Habermas' work was largely influenced by symbolic interactionism and invites critical reconstruction of Mead (Corchia, 2019; Hinkle, 1992; McLuskie, 2003). Yet, Habermas' reconstruction of Mead is not without criticism. Carreira Da Silva's (2007) re-examination of Mead attempts to correct Habermas' interpretation, asserting that Habermas

failed to appreciate the full scope of the communicative elements in Mead's work. This critique is echoed by Corchia (2019) who observed that Habermas selectively relied on Mead's work. Nonetheless, applying Habermasian thought to symbolic interactionism offers new depth to the examination of symbolic interactionism, particularly in a legal context.

Chiefly, Habermas' work highlights an interesting tension between pragmatism and symbolic interactionism: power. Indeed, as discussed earlier, symbolic interactionism is rooted in pragmatist thought. However, a critique of symbolic interactionism is that, as a micro-theory, it fails to consider the "macro-micro linkage" (Shalin, 1992, p. 258). This is in direct tension with the critical[27] aspect of pragmatism that centres around an emancipatory effect, which is often not addressed by symbolic interactionism (Shalin, 1992). Habermas' work offers a reconstruction of symbolic interactionism in a way that enables novel cross-fertilization with pragmatism, thereby highlighting its critical and emancipatory dimensions at a broader structural level (Shalin, 1992).

Habermas' (1984, 1987) two-volume theory of communicative action (TCA) is an expansive—and, as Fast (2013) remarks, at times abstract—social theory of argumentation. Despite Habermas' predominance as a social theorist in the late twentieth century, his influence in the legal academy was mostly limited until the turn of the millennium, upon completion of his discourse theory of law and democracy (Baxter, 2002). Building on his earlier TCA which primarily considered moral discourse, Habermas' (1992/1996) discourse theory of law explores the way in which moral and legal discourse are not separated but rather intimately intertwined (Feteris, 2017). Habermas' (1992/1996) discourse theory of law is situated within an exploration of the tension between "law's 'facticity' and law's 'validity'" (Baxter, 2002, p. 207). That is, the relationship between the positivist characteristic of the law (e.g., predictability) and its normative

[27] For clarity, I am referring to critical analysis, not that the emancipatory effect is a foundational aspect of pragmatism.

legitimacy (Baxter, 2002).

For the purposes of this project, I intend to explore one aspect of Habermas' (1984, 1987) broader TCA—communicative rationality—by fusing it with Habermas' (1992/1996) elaboration of his later normative discourse theory of law. I contend this is theoretically coherent because Habermas' (1992/1996) discourse theory of law largely draws on his earlier TCA. To limit my focus to exploration of communicative rationality within the Western legal system, I will not explore Habermas' (1992/1996) social-theoretical discussion.[28]

Habermas' (1984, 1987) TCA propounds a communicative rationality, which "stresses the pragmatic function of language" (Fast, 2013, p. 87). Fast (2013) eloquently summarizes rationality as the unavoidable provision and evaluation of reasoning; that is, the use of reason to support one's ideas. Fast (2013) outlines the three types of reason that are consistent with communicative rationality:

> (1) "facts" grounded in the objective world providing reasons based on "truth", (2) norms grounded in the social world providing reasons based on "rightness" and (3) feelings and desires grounded in our subjective worlds providing reasons based on "sincerity" or "truthfulness." (p. 87)

These reasons, drawn from what Habermas (1984, 1987) describes as the lifeworld, which is "our shared set of taken-for granted knowledge", enable actors' interpretation and communication (Fast, 2013, p. 87). They are the basis of a "speech act's 'validity'" in which it can be criticized (Baxter, 2002, p. 211).

Communicative action occurs when actors, employing the reasons of facts, norms, and truthfulness, achieve consensus (Fast, 2013). A fundamental element of communicative action is that actors are oriented to a goal of mutual understanding (Baxter, 2002). Habermas' (1984, 1987) TCA advances normative conditions of argumentation, referred to as the ideal speech

[28] This approach is consistent with Baxter's (2002) work.

situation, to presumably achieve communicative action:

> 1. The equal participation of all stakeholders;
> 2. Unlimitedness, i.e., the fundamental openness concerning time and persons;
> 3. Freedom from constraint, i.e., the freedom, in principle, of discourse from interests and power relations;
> 4. Seriousness, i.e., people should not be misled or deceived; participants speak faithfully and authentically. (Metselaar & Widdershoven, 2016, pp. 897-898)

These conditions closely mirror principles of natural justice and fairness, which are of paramount importance to Western systems of law. They also share some similarities with Rawls' (1971/1999) veil of ignorance, also referred to as the Original Position.[29] Rawls' (1971/1999) veil of ignorance suggests that removing all potential for biases (i.e., inequalities) "[nullifies] the effects of specific contingencies which put men at odds and tempt them to exploit social and natural circumstances to their own advantage" (p. 118). Its maxim can be succinctly summarized as ensuring the best worst-case scenario. Yet, Rawls' (1971/1999) veil of ignorance has been heavily critiqued for its impracticality (Sandel, 1998). As noted earlier in this chapter, a parallel can be drawn between criticisms of the veil of ignorance and strict constructionism: like the veil of ignorance, strict constructionism is "elusive, unattainable goal" because one "can never jettison all assumptions" (Best, 1995, pp. 343-344).

In a similar vein, Habermas' (1984, 1987) conditions of argumentation can never be fully realized and are, therefore, more accurately conceptualised as a regulative ideal (Metselaar & Widdershoven, 2016). Nonetheless, they effect a procedural, ideal standard of which reasonable compliance would permit rational argumentation (Metselaar & Widdershoven, 2016). Hence, a parallel can be drawn between Habermas' (1984, 1987) ideal circumstances and the ideals of the

[29] It is important to note, however, that the literature recognizes an extensive debate between Rawls and Habermas. In particular, Habermas argues that Rawls' Original Position is too substantive and fails to provide a strictly procedural account (Gledhill, 2011). As I will discuss later, the superficial similarities provide an entry point for examination of substantive versus procedural conceptions of justice.

Western legal system (i.e., natural justice and fairness). The requirements of natural justice and fairness can be conceptualised (for the purposes of this framework) as a regulative ideal, in the same way Metselaar and Widdershoven (2016) conceptualise Habermas' conditions of argumentation. That is, both are accepted based on consensus.[30] Both regulative ideals do not demand a standard of perfection, but generally require contextual reasonableness.

Likewise, achievement of communicative action does not require perfect adherence to Habermas' (1984, 1987) conditions of argumentation. Fast (2013) refers to the "checks" of communicative rationality that serve a stabilizing function to achieve communicative action (p. 87). Without the checks of communicative rationality, actors may engage in strategic action. Strategic action refers to "when two or more actors pursue individual goals through independent calculation of another's interests…[and] is more likely to involve deception and concealing of true intent but is also highly effective in meeting goals" (Fast, 2013, p. 87).

Both strategic action and communicative action focus on social interaction (Baxter, 2002). The distinction lay in the actors' orientation. In strategic action, actors are oriented to success; whereas, in communicative action, as noted, actors are oriented to mutual understanding (Baxter, 2002). In contrast, "instrumental action is the solitary performance of a task according to 'technical rules'" (Baxter, 2002, p. 209). The Western legal system is decidedly based on social interaction; hence, instrumental action is only relevant to this framework as it was to Habermas' analysis, namely, "only so far as they function as the 'task elements' of patterns of communicative or strategic action" (Baxter, 2002, pp. 209-210). The fundamental element of social interaction in the Western legal system renders it most likely to produce strategic and/or

[30] While it is likely more accurate to conceptualise natural justice and fairness as a categorical imperative, I conceptualise them as a regulative ideal given that the frame of the project—Western systems of law that operate within the common law tradition—arguably accepts them via consensus as part of the broader social contract that exists within liberal democracies.

communicative action. Accordingly, while Habermas' (1984, 1987) TCA is a social theory of argumentation, it is highly applicable to the legal realm.

Communicative action—the destination of mutual understanding—is the normative goal of the Western systems of law that operate within the common law tradition. Yet, strategic action—in which actors are oriented to success—is more easily, although perhaps superficially, located in the Western legal system through its adversarial nature. The mechanism underlying strategic action is influence, which carries an implicit negative connotation in this context (Baxter, 2002).

Habermas (1984, 1987) defines two types of strategic action: open and concealed (Baxter, 2002). Baxter (2002) summarizes concealed strategic action as when "at least one participant pursues aims that he knows could not be avowed without jeopardizing that participant's success, while at least one participant assumes that all are acting communicatively" (Baxter, 2002, p. 214). This covert deception violates Habermas' (1984, 1987) conditions of argumentation; specifically, the ideal of seriousness which prohibits deception. Open strategic action is less easily distinguished from communicative action and is often characterized by "sheer assertion of power of the speaker over hearer" that is not "'normatively authorized'" (Baxter, 2002, p. 215). The assertion of power violates Habermas' (1984, 1987) conditions of argumentation that require the equal participation of all actors. Hence, in both strategic and open action, the ideal speech situation cannot be achieved because strategic action violates the prerequisite conditions of argumentation.

Habermas' (1984, 1987) concepts of strategic and communicative action highlights the procedural nature of his work. As noted earlier, this is in stark contrast to Rawls' (1995) argument that "procedural [i.e., process] and substantive [i.e., outcome] justice are connected and

not separate" (p. 170). While both normative theorists, Habermas (1984, 1987, 1995) recognizes process and substance as related but different. "Unlike Rawls, Habermas offers no answer to the question: what should we do?" (Blaug, 1994, p. 55). Accordingly, Habermas (1995) critiques Rawls by espousing a procedural theory of justice that expounds the conditions of *how* to argue, not *what* to argue.[31]

While Habermas (1987, 1995) does not champion any special results, to Habermas (1988, as cited in Feteris, 2017), "outcomes should also cohere with the existing legal order – its structure and decision-making procedures – as well as with various ethical-political and pragmatic standards that form part of the self-understanding and capabilities of a particular society" (p. 83). Notwithstanding that Habermas previously appeared to conceptualise legal processes as strategic action, it is clear that he conceptualises legal processes as a form of communicative action (Feteris, 2017). For Habermas, the institutionalization of legal processes is a normative ideal as it corrects the deficiencies of ordinary argumentation (Feteris, 2017).

Habermas acknowledges that "modern law is positivized into a functional, technical system that seems to have suspended any need for moral deliberation" (Deflem, 1994, p. 6). Yet, Habermas (1984, 1987, 1995) diverges from this seemingly Weberian instrumental rationality by recognizing law as in need of justification (Deflem, 1994). For Habermas, communicative rationality enables the discursive process by which law can be evaluated and justified, without resorting to logico-deductive formalism.

3.5. Goffmanian Frame Analysis

Lastly, I will draw from Goffman's (1974) frame analysis. While Goffman is not as avowedly pragmatic as the other theorists comprising my theoretical framework, I suggest that

[31] It should be noted that Habermas recognizes substantive elements of law (Feteris, 2017). For the purposes of this framework, I am intentionally focusing on Habermas' proceduralism.

his treatment of frame analysis, which I deploy as a theoretical approach rather than a method, offers depth to the ensuing analysis. I follow Chriss' (1995) assertion that "Habermas *needs* Goffman's fuller communication paradigm to flesh out his own theory of communicative action [emphasis original]" (p. 556). I contextualize Chriss' (1995) argument for the purposes of this project by positing that Goffman's (1974) frame analysis adds depth to the way I deploy Habermas' (1984, 1987) TCA, in which I narrow my focus to communicative rationality. Fusing together Goffman's frame analysis (1974) and Habermas' (1984, 1987) TCA as it relates to communicative rationality enables analysis of how judicial reasoning assesses human conduct.

Goffman (1974) defines a framework as a "schema of interpretation…a primary framework is one that is seen as rendering what would otherwise be a meaningless aspect of the scene into something that is meaningful" (p. 21). A social framework is a type of primary framework, which provides "background understanding for events that incorporate the will, aim, and controlling effort of an intelligence, a live agency, the chief one being the human being" (Goffman, 1974, p. 22). In contrast, a natural framework identifies unguided occurrences which "no willful agency causally and intentionally interferes [with, and] that no actor continuously guides the outcome" (Goffman, 1974, p. 22). Hence, I suggest that frameworks have utility when exploring judicial constructions of AME because they offer explanatory value in showing "that differentials in conduct and in others' responses to such conduct are either 'culturally,' 'socially,' or 'biologically,' or 'physiologically' based" (Psathas, 1996, p. 388). Hence, Goffman's (1974) frame analysis complements Habermas' (1984, 1987) TCA by exploring the social construction of norms that underpin and shape Habermas' (1984, 1987) communicative rationality.

I deploy Goffman's (1974) frame analysis theoretically to explore the judicial construction of conduct within what Stone (1989) describes as the realms of fate versus agency.

Put simply, I use Goffman's (1974) frame analysis as a theoretical concept to interrogate the norms embedded in communicative rationality. Importantly, I am intentionally not deploying Goffman's (1974) frame analysis as a method because, as I discuss in the next chapter, thematic analysis is the most appropriate method to respond to my research questions. Moreover, I do not use Goffman (1974) within a strictly phenomenological approach (Dolezal, 2017). My paradigmatic positioning, drawing on Best's (1996) contextual constructionism, recognizes the ontological realism underlying my project, which is necessary to reflect the realist ontological assumptions of Western legal systems. Yet, because I posit this ontological realism is mediated by a simultaneous emphasis on the constitutive nature of language, I can coherently deploy Goffman's (1974) frame analysis to offer depth to my findings, without sliding into a phenomenological approach that generally underpins frame analysis as a method (Lanigan, 1988). Finally, while most symbolic interactionists claim Goffman as part of the scholarly foundation of that tradition, because he chose not to associate with it (Pascale, 2011), I elected to outline my use of Goffmanian frame analysis separately from my discussion of symbolic interactionism.

3.6. Conclusion

Colin Koopman (2010) asserts that a productive tension exists between John Dewey's and Michel Foucault's work on modernity. My argument is not as bold, but draws on Koopman's (2010) line of reasoning that locating a productive tension between seemingly dichotomous perspectives leads to novel cross-fertilization, which is consistent with Deweyan experimentalism. In the spirit of pragmatism, I assert that a productive tension can be located between legal pragmatism, symbolic interactionism, concepts from Habermasian thought, and Goffmanian frame analysis.

As I have discussed in this chapter, legal pragmatism, symbolic interactionism, and Habermasian thought all have pragmatic roots. Legal pragmatism, as the name suggests, derives from American pragmatism (Posner, 2004). Symbolic interactionism, chiefly based on Mead's work, similarly stems from American pragmatism (Pascale, 2011). In turn, Habermas' work is analogously pragmatic because it largely drew from Mead's work (Corchia, 2019; Hinkle, 1992; McLuskie, 2003). Yet, I contend a productive tension can be located in my theoretical framework beyond the genealogical similarities between legal pragmatism, symbolic interactionism, and Habermasian thought.

While I do not suggest that Goffman shares similar pragmatic underpinnings, I posit, like Chriss (1995), that reading Habermas's (1984, 1987) TCA with Goffman's (1974) frame analysis is theoretically sound. Accordingly, I assert that deploying Goffman's (1974) frame analysis as a theoretical concept offers descriptive depth to my findings by allowing interrogation of the norms underpinning Habermas' (1984, 1987) communicative rationality. Hence, my theoretical framework offers explanatory power to Stone's (1989) typology which enables me to explore how the courts construct AME as causal stories that move "from the realm of fate to the realm of human agency" (Stone, 1989, p. 283).

Chapter 4: Methodology

The paradigmatic position and theoretical framework are foundational elements of research design. Having set out my paradigmatic position of contextual constructionism and theoretical framework drawing from legal pragmatism, symbolic interactionism, Habermasian thought, and Goffmanian frame analysis in the previous chapter, I now turn my attention to the methodology used to conduct my research.

I first set out the epistemological assumptions embedded within this project. Throughout this chapter, I demonstrate that my assumptions are congruent with those of my theoretical framework. I then turn my attention to preliminary elements of research design, such as my guiding research question, hypothesis, and aims. Next, I set out the method of thematic analysis that I used to conduct this research. Finally, I attempt to answer broader questions of validity and ethics, which leads to my discussion of the project's limitations.

4.1. Epistemological Framework

4.1.1. Interpretive Tradition

As detailed in the previous chapter, my work is consistent with Habermas' (1999/2003) claim of an objective reality that is mediated by language. Accordingly, my alignment with relativist epistemological assumptions recognizes that my realist ontological positioning is mediated by language. Therefore, my work is best situated within interpretive epistemologies, which recognize researcher subjectivity (Willis, 2007).

While the ontological realist positioning of positivism is compatible with my work, positivist epistemologies fail to encompass the relativist epistemological position I have adopted by recognizing that the objective world is mediated by language. The divergence between interpretivism, as I subscribe to it, and more traditional positivist methodological approaches

centres on epistemology, rather than ontology. Interpretive approaches do not necessarily critique the realist ontology of traditional approaches (Schwartz-Shea & Yanow, 2020; Yanow, 2000). Instead, the interpretive approach places greater emphasis on critiquing the realist epistemology of traditional positivist approaches. This epistemological critique focuses on the instrumental characterization of knowledge by positivist approaches (Schwartz-Shea & Yanow, 2020; Yanow, 2000). Hence, this is consistent with my paradigmatic positioning that draws on Best's (1995) contextual constructionism, which contextualizes the social conditions that underlie the social problems being analysed. It also congruent with my theoretical framework, which recognizes linguistic mediation.

Interpretive approaches attempt to overcome the epistemological limitation of traditional positivist approaches by placing greater emphasis on just that—interpretation. In practice, an interpretive approach focuses on sensemaking and understanding, not universalizability (Schwartz-Shea & Yanow, 2020; Willis, 2007; Yanow, 2000). At the core of the description of sensemaking is a search for contextual meaning (Schwartz-Shea & Yanow, 2020; Willis, 2007; Yanow, 2000). The quest for locating less explicit meaning is central to the interpretive tradition. It is similarly central to my research because of its exploratory nature.

Importantly, my use of the interpretivism reflects a methodological decision; it does not transform my paradigmatic positioning of Best's (1995) contextual constructionism. My use of interpretivism is not postmodern as I adopt a realist ontological position that conflicts with the tenets of the postmodern view of the self as fragmented. While this could be critiqued as paradigmatic and methodological gerrymandering, I follow Mitchell (2018) in that pluralism can lead to superior research. The way I adopt interpretivism, as a sort of soft interpretivism, is consistent with this project's pragmatic underpinnings by focusing on *what works* to generate

exploratory findings (Mitchell, 2018).

4.1.2. Relativism and Realism

Habermas' (1984, 1987) theory of communicative action demonstrates that relativist epistemologies are indeed compatible with realist ontologies. Habermas (1984, 1987) objected to positivistic interpretation because it did not account for human experiences accessible through rational discussion and that were, importantly, unable to be empirically verified (Blaug, 1994). The adoption of a relativist epistemology that enables inquiry into aspects of the objective world that are unverifiable through empirical measurement does not force the corresponding realist ontology to shift to relativism. Habermas' (1999/2003) later fortified this argument through his pragmatic theory of truth (also referred to more widely as Habermas' consensus theory of truth) which he argues overcomes relativism and contextualism (Levine, 2010).

However, Levine (2010) is not convinced. For Levine (2010), Habermas "resists relativism and contextualism by yoking truth to an overly narrow concept of objectivity, one not consistent with the larger pragmatic transformation of his thought…", which could be corrected by acknowledging "within *our discursive practices* that there is a difference between something's being true because *it is* true and our *finding* something-to-be-true because of its rational acceptance in a discourse [emphasis original]" (pp. 678, 692).

For the purposes of this project, I disagree with Levine's (2010) critique of Habermas. This project situates its examination within the Western systems of law that operate within the common law tradition and, thus, carry an adversarial feature. The adversarial feature acknowledges that what a litigant argues is presumed to be true insofar as "truth, according to Habermas, is something which a speaker implicitly claims for any assertion that he makes" (Pettit, 1982, p. 210). It is the role of the trier of fact to determine the truth beyond what Levine

(2010) describes as "our *finding* something-to-be-true because of its rational acceptance in a discourse [emphasis original]" (p. 692).

Yet, the law—and judges—are not infallible. Judgements are not accepted within the praxis of empirical positivism; that is, as an infallible reflection of the natural world. Instead, they are truth to the extent that can be apprehended by language. Hence, a relativist epistemology, which recognizes linguistic meditation, can indeed be congruent with realist ontological assumptions. This approach is avowedly pragmatic. It should be noted, however, that Rorty (1980) argues that "pragmatist epistemology does not view knowledge as reality" (Kaushik & Walsh, 2019). Importantly, however, Lind (2012), characterizes Rorty's pragmatism as post-modern. Hence, Rorty's (1980) pragmatism contrasts the way I deploy pragmatism as an interpretivist drawing from the modernist orientation.

4.2. Research Question

It was necessary for me to develop a research question that was broad enough to enable me to refine it as I conducted the research, while still being precise enough to soundly guide me. This technique is consistent with Blaikie's (2000) caution that the developmental nature of the research question cannot serve as an excuse for poorly formulated research questions. With Blaikie's (2000) caution in mind, I formulated a broad research question at the outset of my research: *How are AME framed by the criminal law in Canada and the United Kingdom?* This question considers the broad aim of my research—to examine the social and legal constructions of AME—while setting out a manageable, graduate-level project that focused on analysing how these events were framed by the criminal law through judicial decision-making. As I progressed in the research design process, I developed what Blaikie (2000) refers to as subsidiary research questions: *Do Canadian and British appellate courts conceptualise AME as the result of fate or*

agency? How do Canadian and British appellate courts construct blameworthiness?

To operationalize AME, I adopted Baker et al.'s (2004) definition of these events: "an unintended injury or complication that results in disability at the time of discharge, death or prolonged hospital stay and that is caused by health care management rather than by the patient's underlying disease process," including both acts of omission and commission (p. 1679). As discussed in Chapter 2, Baker et al.'s (2004) definition refers to iatrogenic harm. For the purposes of this project, I slightly refined Baker et al.'s (2004) definition to focus only on the acts of physicians, whether they be conventional (chiefly, allopathic) or naturopathic, as opposed to health professionals more broadly.

Moreover, I also adopted McDonald's (2008) definition of AME in order to exclude intentional harm. As I also discussed in Chapter 2, McDonald (2008) applies Reason's (1990) discussion of error to classify Canadian caselaw in which physicians were charged with criminal negligence or manslaughter as a result of alleged negligence in the course of practice: mistakes; slips or lapses; technical errors; and, violations. Violations are intentional deviations from safe practice, while the former three categories draw on errors of execution and errors of planning and involve a lesser degree of blameworthiness (McDonald, 2008).

I intentionally excluded violations from my operationalization of AME. Indeed, I operationalized AME as iatrogenic injuries lacking direct intent to harm. In doing so, my aim was to exclude the type of intentional events considered by the Honourable Eileen E. Gillese's (2019) report on the *Public Inquiry into the Safety and Security of Residents in the Long-Term Care Homes System* (the Wettlaufer Inquiry), which considered intentional harm; specifically, healthcare serial killings. Intentional harm is outside the scope of this project.

4.3. Goals, Purposes, and Hypothesis

As with my research question, I adopted a similar developmental approach with my hypothesis. I intentionally began my research without stating a particular hypothesis to prevent myself from unconsciously adopting a purely deductive approach. Instead, consistent with my interpretivist approach, I found it more appropriate for me to reflect on what I may expect to find. Accordingly, drawing on Stone (1989), at the outset I expected that my research would reveal that AME in Canada are constructed as the result of fate, compared to the United Kingdom where such events are constructed as the result of human fault. To prevent myself from slipping into a strictly deductive approach focused on confirmatory testing, I did not set this as a hypothesis at the outset of my research.

Instead, my research was guided by my goals and aims, as opposed to an intention to verify or falsify my hypothesis. I drew on Blaikie (2000) to set out my research objectives. My objectives were twofold: to develop a description of the legal construction of AME; and, to establish reasons for the state's use of criminal law in this context (Blaikie, 2000). As my research progressed, I refined my objective to describe the way, drawing on Stone's (1989) causal stories, in which AME are legally constructed as causal stories that move "from the realm of fate to the realm of human agency" (p. 283). These objectives were consistent with what Maxwell (1996) describes as the "practical" and "research" purposes (p. 16). Moreover, I engaged Blaikie's (2000) model of basic research; in particular, my objectives aligned with what Blaikie (2000) describes as exploration and understanding.

I must also consider what Maxwell (1996) describes as personal purposes. Beyond the practical and research purposes of my work, the primary personal purpose guiding my work is my desire to eventually practice health law; specifically, the criminal and civil defence of health care professionals. As Maxwell (1996) notes, my personal purpose for pursuing this research

does not necessarily weaken the research; instead, I must be aware of how it may shape my work. I will further discuss this, and other validity issues, in a later section of this chapter.

4.4. Mode of Reasoning

Morse and Niehaus (2009) describe a project's "theoretical drive" as the relationship between the mode of reasoning and methodological purpose (p. 39). However, Morse and Niehaus (2009) appear to conflate inductive modes of reasoning with qualitative methods and deductive reasoning with quantitative methods. Moreover, Morse and Niehaus' (2009) description of theoretical drives has been criticized for appearing as a feature of the overall project, not just the research question (Schoonenboom & Johnson, 2017). Yet, Morse and Niehaus' (2009) theoretical drives provided an opportunity for reflection as to the mode of reasoning I chose to embed in this project through my research design.

While this project engages in qualitative research, it does not rest on purely inductive or deductive reasoning. As noted, I purposely did not set out an explicit hypothesis, and, similarly, took a developmental approach for my research question to prevent adopting a strict deductive approach that focused on confirmatory testing. While I draw on Blaikie's (2000) description of basic (i.e., exploratory) research, I am alive to the fact that—as I discuss in more detail in my later discussion of thematic analysis—I draw partly on a deductive coding process; specifically, Braun and Clarke's (2006) elucidation of "'theoretical' thematic analysis" which "tend[s] to be driven by the researcher's theoretical or analytic interest in the area, and is thus more explicitly analyst driven" (pp. 83-84).

Despite the fact that my initial coding process is more deductively oriented, the purpose of this project is not to test and confirm that a particular theory provides explanatory value to the phenomena of interest. Indeed, my purpose is not to prove, for example, that symbolic

interactionism or legal pragmatism explains the phenomena of AME. Instead, my mode of reasoning engages in a decidedly pragmatist approach. While my initial coding takes a deductive approach—or what Braun and Clarke (2006) describe as theoretical thematic analysis—my subsequent coding draws on an inductive form of coding.

My engagement with both deductive and inductive modes of reasoning is a markedly pragmatist approach. As discussed in the previous chapter, my contextual constructionist paradigm, drawing on Best (1995), shares similarities with pragmatism. Accordingly, my pragmatist outlook allows me to break from the confines of thinking of modes of reasoning as binary. This approach is consistent with Mitchell's (2018) argument "that pragmatism supports the use of different research methods and that a continuous cycle of inductive, deductive and when appropriate, abductive reasoning, produces useful knowledge and serves as a rationale for rigorous research" (p. 103). While engaging two modes of reasoning could be critiqued as methodological gerrymandering, I posit that doing so—and, thereby, drawing on Mitchell's (2018) continuous cycle—only serves to enhance the exploratory purpose of this research.

4.5. Material and Sample

4.5.1. Case Study Approach

My study design adopts a case study approach. "As a study design, case study is defined by interest in individual cases rather than the methods of inquiry used" (Hyett et al., 2014, p. 2). I draw on what Stake (1995) describes as a collective instrumental case study. In contrast to an intrinsic case study, which focuses on understanding the details of a particular case, the collective instrumental approach centres around broader questions and is typically used with multiple cases (Stake, 1995). Yet, as Stake (1995) notes, it is hard to dichotomize intrinsic versus instrumental cases. While I primarily adopt the instrumental approach because I am interested in

the broader phenomena of judicial interpretations of AME, I recognize that my data are not entirely devoid of intrinsic elements. I adopted Stake's (1995) description of a collective case study insofar as my case study approach involves two cases.

Consistent with the interpretivist case study approach, I selected the data to analyse via purposeful sampling (Palinkas et al., 2015). My data sample consists of two recent landmark appellate decisions reviewing convictions by lower courts of health care professionals who, according to the decisions of the lower courts, caused their patient's death; namely, the decisions of the Supreme Court of Canada (SCC) in *R. v. Javanmardi* (2019) and the England and Wales Court of Appeal (EWCA) in *Bawa-Garba v. R.* (2016). Comparing Canadian and British cases is appropriate because Canada the United Kingdom share similar legal traditions as Canada's legal system is rooted in the British common law tradition. Moreover, both legal systems conceptualise the *actus reus* and *mens rea* of the offences at issue in similar ways (McDonald, 2008)[32] and have publicly funded health care systems.

4.5.2. R. v. Javanmardi (2019)

In *R. v. Javanmardi* (2019), the patient was 84 years old and sought naturopathy from the defendant, Mitra Javanmardi. Ms. Javanmardi held a doctorate in naturopathic medicine; however, naturopathy is not regulated in Quebec and the province of Quebec does not recognize the practice of naturopathy as the practice of medicine (Eggertson, 2012; *Javanmardi*, 2019, para. 1). For the purposes of this project, the patient's death is conceptualised as an AME because he sought naturopathy for medical purposes, as a result of being "frustrated with the treatment he had received at conventional medical clinics and hoped that naturopathy would improve his quality of life" (para. 2). Ms. Javanmardi was charged with manslaughter and

[32] See s. 2.1.1.

criminal negligence causing death, following the patient's death from endotoxic shock. The patient's death was alleged to have resulted from an intravenous injection that the accused administered to the patient. The accused was acquitted at trial. The acquittals were set aside on appeal, at which time the accused was convicted on the charge of manslaughter and a new trial was ordered for the charge of criminal negligence. On subsequent appeal, the SCC restored the trial court's original acquittals. The majority of the Court held that the proper test to apply is that of objective foreseeability of risk of bodily harm that is neither trivial nor transitory, not a risk of death. In contrast to the dissenting minority, the majority held that an activity-sensitive approach, including consideration of an accused's professional qualifications, is the appropriate standard. This is an apparent benefit to health care professionals. It increases the threshold in which an activity a health care professional engages in, in accordance with their training, etc., would be found to pose an objectively foreseeable risk of bodily harm.

4.5.3. Bawa-Garba v. R. (2016)

In contrast to *Javanmardi*, which focuses on an act of commission, *Bawa-Garba v. R.* (2016) focuses on acts of omission. The case of *Bawa-Garba v. R.* (2016) centres around a junior physician, Hadiza Bawa-Garba, (practicing conventional medicine) who was convicted of gross negligence manslaughter following the death of a six-year old paediatric patient under her care. Dr. Bawa-Garba was convicted by the trial court because the jury concluded the patient died "significantly sooner" because of her negligence in, primarily, diagnosing the patient's septic shock (*Bawa-Garba*, para. 6). The appellate court denied Dr. Bawa-Garba's application for leave to appeal. This decision follows the previous refusal of Mr. Justice Edis (as he was then), sitting as a single judge. The full panel of the EWCA in *Bawa-Garba v. R.* (2016) indicated the single judge previously provided "a masterly analysis of the case" (*Bawa-Garba*, para. 37). However,

the Criminal Appeals Office of the Royal Courts of Justice communicated to me that the single judge decision is not a public document and, therefore, could not be provided for this research. Accordingly, I relied on the full panel's reasons for decision in *Bawa-Garba v. R.* (2016) to form my sample. While the decision of the EWCA in *Bawa-Garba v. R.* (2016) is a judgement in response to Dr. Bawa-Garba's application for leave to appeal and thus does not consider legal issues in depth, it provides an excellent overview of both the trial and appellate courts' construction of AME.

The EWCA's review in *Bawa-Garba* offers a contextual review, focusing on causation as it applies to the facts of the case. This is in contrast to the more instructive nature of the SCC's decision in *Javanmardi* that focuses on a review of the law. Despite the fact that the precedential value of *Bawa-Garba* is low, it nonetheless garnered intense media attention and, anecdotally, caused heightened fear of liability among the medical community (see, for example: Glauser, 2018; Stechyson, 2018).

These cases are suitable to form my sample. Firstly, they are suitable to allow for analysis of the phenomenon of interest: the criminalisation of AME. Moreover, they are complementary in that, together, they canvass both acts of commission and omission. Given the scope of this project, and to ensure its feasibility as a master's level project, I intentionally sought the appellate courts' reasons for decisions, as opposed to trial transcripts. Analysis of transcripts—particularly in complex, medico-legal cases such as those in my sample—involves a significant financial and time-related investment, which rendered it unsuitable for this project, especially during the COVID-19 pandemic.

Moreover, my sample is intentionally small, consisting of only two cases, because I am not attempting to generalize my findings. Rather, consistent with what Stake (2000) refers to as

instrumental case studies, I am attempting to make a conceptual contribution as to the judicial constructions of blame in this context; that is, drawing on Stone (1989) by exploring the criteria that is negotiated to determine if the alleged result of health care professional's actions were the result of human agency or fate. This approach, as noted, draws on Blaikie's (2000) model of basic research, which seeks to deeply explore and describe the phenomenon. Thus, consistent with my interpretivist approach, a small sample that consists of highly relevant cases is more appropriate than a large sample intended to generalize findings.

4.6. Data Gathering/Production Strategy

My research does not require a sophisticated data gathering/production strategy because the material forming my sample is, purposefully, publicly accessible and easily available.[33] Both the decisions of the Supreme Court of Canada in *R. v. Javanmardi* (2019) and the England and Wales Court of Appeal in *Bawa-Garba v. R.* (2016) are available online via the Canadian Legal Information Institute (CanLII) and the British and Irish Legal Information Institute (BILII), respectively. As such, I obtained the decisions without issue, at no cost.

I also obtained supplementary material that does not officially form part of my sample but that provides additional context. I obtained the factums of the parties to *R. v. Javanmardi* (2019), as well as decisions of the lower courts, at no cost as they are part of the public record. However, the Quebec Court of Appeal's decision, that led to the appeal before the Supreme Court of Canada, is only available in French. I also obtained the transcript of the trial court's judgement that formed part of the appeal court's decision in *Bawa-Garba v. R.* (2016). This transcript was purchased for approximately forty Canadian dollars from the court-authorized transcriptionists for the trial, Epiq Europe Limited.

[33] Indeed, interviews were not selected as a data collection method because of the challenges and limitations in conducting interviews brought about by the COVID-19 pandemic.

To deploy my analytical strategy, which I discuss in the following section, I primarily used two pieces of software. Firstly, I used Zotero, a reference management software, to organize my data (in addition to the relevant literature). Prior to my coding, Zotero allowed me to easily notate and mark up the documents with initial observations. To conduct and organize my coding, I used NVivo, a qualitative data analysis software. NVivo also allowed me to run queries based on my coding to glean additional insights, such as a comparison of codes between the two cases.

4.7. Analytical Strategy

Having described the fundamental methodological assumptions embedded in my research, I now turn to a discussion of the strategy I used to conduct my analysis. First, I set out my primary method of thematic analysis. Throughout, I discuss how cogency can be located between my analytical framework and the paradigmatic and theoretical positioning of my work.

4.7.1. Thematic Analysis

Braun and Clarke's (2006) account of thematic analysis is one of the leading works on this analytic strategy. Thematic analysis is a qualitative "method for identifying, analysing and reporting patterns (themes) within data" (Braun & Clarke, 2006, p. 79). Braun and Clarke (2006) assert that one of the primary benefits of thematic analysis is its flexibility; specifically, it "can be applied across a range of theoretical and epistemological approaches" (p. 78). Braun and Clarke (2006) attempt to balance the theoretical and epistemological flexibility of thematic analysis with a demarcation of its analytic boundaries. In doing so, they counter the stale critique that qualitative research—which they note often involves some sort of thematic analysis—lacks analytic rigour (see, for example, Antaki et al., 2003).[34]

Braun and Clarke's (2006) thematic analysis is the appropriate method to answer my

[34] I further discuss rigour in s. 4.8.

overarching research question: How are AME framed by the criminal law in Canada and the United Kingdom? This research question reflects the exploratory nature of my work that seeks to understand the framing of AME by the criminal law. I posit that thematic analysis is consistent with the overarching purpose of this project which, drawing on Blaikie's (2000) model of basic research, seeks to deeply explore and describe the phenomenon.

Moreover, thematic analysis, as a method, is consistent with my paradigmatic positioning of contextual constructionism and theoretical positioning of, broadly, pragmatic interactionism. Indeed, cogency can be located between thematic analysis as a method and my paradigmatic and theoretical positioning. As Braun and Clarke (2006) note, thematic analysis is not limited to realist positionings:

> [Thematic analysis] can be a constructionist method, which examines the ways in which events, realities, meanings, experiences and so on are the effects of a range of discourses operating within society. It can also be a 'contextualist' method, sitting between the two poles of essentialism and constructionism, and characterized by theories, such as critical realism…which acknowledge the ways individuals make meaning of their experience, and, in turn, the ways the broader social context impinges on those meanings, while retaining focus on the material and other limits of 'reality'. (p. 81)

Braun and Clarke (2019) emphasize the different approaches and iterations of thematic analysis. Indeed, they argue it is of paramount importance for a researcher to "clearly specify and justify which type of TA they are using" (Braun & Clarke, 2021, p. 345). To deploy thematic analysis, I completed two separate investigations that draw broadly on Braun and Clarke's (2021, 2019) reflexive thematic analysis, which "captures approaches that fully embrace qualitative research values and the subjective skills the researcher brings to the process" (p. 333). These investigations were guided by my overarching research question, as noted above. However, separately, each investigation aimed to answer a subsidiary research question. While the subsidiary research questions—and, therefore, each investigation—are intertwined, as I will

discuss, in each investigation, I employed different modes of reasoning to answer each subsidiary research question. These investigations ultimately informed my findings and analysis.

4.7.1.1. First Investigation. In the first investigation, I attempted to answer my first subsidiary research question: *Do Canadian and British appellate courts view AME as the result of fate or agency?* To do so, I drew on a primarily deductive coding process; specifically, Braun and Clarke's (2006) elucidation of "'theoretical' thematic analysis" as an approach which "tend[s] to be driven by the researcher's theoretical or analytic interest in the area, and is thus more explicitly analyst driven" (pp. 83-84). Accordingly, Braun and Clarke's (2006) theoretical thematic analysis was the appropriate method for my first investigation because the research question was guided by theory; specifically, Stone's (1989) causal stories, in which AME are legally constructed as causal stories that move "from the realm of fate to the realm of human agency" (p. 283). Hence, this investigation necessitated a deductive approach.

The coding frame was developed *a priori*. Drawing on Miller and Crabtree (1992), I developed "*a priori* codes, based on either the research question or theoretical considerations" (p. 95). Miller and Crabtree (1992) note that their approach is balanced between logical positivism where codes are developed exclusively *a priori*, without any regard to the text (see, for example, Miles & Huberman, 1984), and strict inductive coding which formulates codes almost exclusively from the text (see, for example, Willms et al., 1990). Indeed, Miller and Crabtree (1992) "take the middle ground, beginning with a basic set of codes based on *a priori* theoretical understanding and expanding on these by reading the text" (p. 95).

I acknowledge that inductive coding more explicitly aligns with interpretivist qualitative research. Nonetheless, Kiger and Varpio (2020) observe that "Boyatzis (1998) forwards thematic analysis as a method that can bridge the chasm between the post-positivist pursuit of

understanding a reliable, objective, fact-based reality, and the more interpretive aims of many social science researchers" (p. 2). While I take an interpretivist approach in this research, I recognize that the liberal criminal justice system—the frame of this study—is a positivist exercise. Hence, I posit that marrying Miller and Crabtree's (1992) middle ground approach to deductive coding with Braun and Clarke's (2006, 2021, 2019) thematic analysis is agreeable with the fundamental assumptions of my work, particularly because of the pragmatist nature of this project.

First, the initial *a priori* codes were developed based on Stone's (1989) causal stories: (1) agency and (2) fate, as more fully outlined in Figure 1. Second, the data were analyzed using the *a priori* codes (Braun & Clarke, 2006; Miller and Crabtree, 1992). NVivo was used to conduct the coding. During the coding process, a third code emerged based on my interpretive observations: (3) fate conflated with agency, which is also more fully outlined in Figure 1. This emergence is consistent with Miller and Crabtree's (1992) middle ground approach which "[makes] it possible for many codes to originate from interpretive observations" (p. 95). Drawing on Fereday and Muir-Cochrane's (2006) application of Miller and Crabtree's (1992) middle ground approach, Boyatzis' (1998) inductive approach still offers some utility within a deductive coding process: "Analysis of the text at this stage was guided, but not confined, by the preliminary codes. During the coding…inductive codes were assigned to segments of data that described a new theme observed in the text" (p. 88). This is consistent with Braun and Clarke's (2021) recognition that deductive and inductive approaches to thematic analysis are not dichotomous but operate on a continuum.

Figure 1

First Investigation Coding Frame

Code	Label	Definition	Description
(1) AG	Agency	"…difficult conditions become problems only when people come to see them as amenable to human action" (Stone, 1989, p. 281).	Actors assign a difficult problem as controllable by human intervention/action.
(2) FA	Fate	"Until then, difficulties remain embedded in the realm of nature, accident, and fate—a realm where there is no choice about what happens to us" (Stone, 1989, p. 281).	Actors assign a difficult problem as uncontrollable by human intervention/action.
(3) CFA[a]	Fate conflated with agency	In which difficult conditions that could, interpretively, be assigned to fate are instead assigned to agency.	Observational only; based on the researcher's meta-interpretation of an actor's interpretation.

Note. The design of this table was adapted from Fereday and Muir-Cochrane (2006).
[a] The third code (CFA) was not developed *a priori*. It originated inductively from interpretive observations.

Third, the codes were collated to identify themes and generate a thematic map across the sample (Braun & Clarke, 2006). Fourth, the data were reviewed to ensure the themes accurately reflected the judicial interpretations and that no discrepant cases existed (Kilty & Mott, in press). Fifth, the themes were defined and named, as will be discussed in the next chapter (Braun & Clarke, 2006). Consistent with Nowell et al. (2017), the deductive coding process meant that the codes closely reflected the themes that were generated.

Nowell et al. (2017), drawing on Braun and Clarke (2006), note that "deductive analysis is driven by the researchers' theoretical or analytic interest and may provide a more detailed analysis of some aspect of the data but tends to produce a less rich description of the overall data" (p. 8). While the first investigation provided a detailed analysis of particular aspects of the data as they relate to Stone's (1989) causal stories, the deductive analysis deployed was limited in terms of providing thick, rich description. Accordingly, the first investigation provided a suitable entry point for this exploratory research and provided "a rich description/interpretation"

of a particular aspect of the data (Braun & Clarke, 2006, p. 94).

4.7.1.2. Second Investigation. In the second investigation, I attempted to answer my second subsidiary research question: *How do Canadian and British appellate courts construct blameworthiness?* Unlike the first investigation which was guided primarily by theoretical considerations, this investigation is reflective of Boyatzis' (1998) data driven approach, in which codes are generated from the data itself (i.e., inductively), not *a priori*. However, I do not subscribe to Boyatzis' (1998) phenomenological framework, which shares more similarities with social constructivism because of its individual focus than my paradigmatic position of contextual constructionism and theoretical position of pragmatic interactionism. As such, I rely on Boyatzis' (1998) data driven approach insofar as it is an authoritative text on inductive thematic analysis to use as a point of convergence with Braun and Clarke's (2021, 2019) reflexive thematic analysis, which more accurately captures the assumptions of researcher subjectivity embedded in this project.

Inductive reasoning was necessary to respond to my second subsidiary research question because the research question was not guided by theoretical consideration or a specific analytical interest. "An inductive approach means the themes identified are strongly linked to the data themselves" (Braun & Clarke, 2006, p. 83). Like Boyatzis' (1998) data driven approach, Braun and Clarke (2006) note that inductive "thematic analysis is data-driven" (p. 83). Importantly, however, my subscription to Braun and Clarke's (2006) work on thematic analysis meant I did not need to "subscribe to the implicit theoretical commitments of grounded theory" (p. 81). Indeed, my analysis is not geared towards theory development (Braun & Clarke, 2006). Instead, the purpose of this second investigation is to explore how the EWCA in *Bawa-Garba* and the SCC in *Javanmardi* converge and contrast in their constructions of AME, beyond the

constructions of fate and agency.

While this investigation was not directly guided by theory, as in the first investigation, "researchers cannot free themselves of their theoretical and epistemological commitments, and data are not coded in an epistemological vacuum" (Braun & Clarke, 2006, p. 84). Accordingly, I acknowledge that my coding, although inductive and data driven, was unquestionably influenced by my theoretical and epistemological commitments. However, this is not a methodological failing. Instead, it is consistent with my interpretivist approach and that of Braun and Clarke's (2019) reflexive thematic analysis: "paradigmatic, epistemological and ontological assumptions *inescapably* inform analysis [emphasis original]" (p. 331).

I employed a similar procedure as in the first investigation, except that a constant comparative approach was used, and codes were not developed *a priori*. While Glaser and Strauss' (1967/2006) constant comparative approach was used because it provides a degree of rigour to inductive qualitative data analysis, a grounded theory approach was not employed, as discussed earlier. By the time I was prepared to begin analyzing the data I had already read the data multiple times. NVivo software was used to code the data. In terms of coding, I conducted a first pass to reread and reflect on the data. I then proceeded to complete three separate readings to allow for the generation of codes. Second, open codes were generated to describe the data (Braun & Clarke, 2021). Third, codes were collated to identify themes and generate a thematic map across the sample (Braun & Clarke, 2006). Fourth, the data were reviewed to ensure the themes accurately reflected the judicial interpretations and that no discrepant cases existed (Kilty & Mott, in press). Fifth, the themes were defined and named (Braun & Clarke, 2006).

4.7.2. Paradigmatic, Theoretical, and Methodological Coherence

Having set out the method I used to conduct my research, I now turn to the conceptual

soundness of my thesis: ensuring paradigmatic and theoretical coherence with my methodological approach. Braun and Clarke (2006) are emphatic that "what is important is that the theoretical framework and methods match what the researcher wants to know, and that they acknowledge these decisions, and recognize them *as* decisions [emphasis original]" (p. 80).

My paradigmatic, theoretical, and methodological decisions are consistent with an interpretivist approach. As discussed earlier, the interpretive tradition recognizes researcher subjectivity and the mediating role of language, which is consistent with my contextual constructionist paradigm and theoretical underpinnings of legal pragmatism, symbolic interactionism, Habermasian thought, and Goffmanian frame analysis.[35] Methodologically, my interpretivist use of thematic analysis means that themes did not emerge but were instead generated based on interpretation (Braun & Clarke, 2021, 2019). Indeed, Braun and Clarke (2019) argue:

> Themes do not *passively* emerge from either data or coding; they are not 'in' the data, waiting to be identified and retrieved by the researcher. Themes are creative and interpretive *stories* about the data, produced at the intersection of the researcher's theoretical assumptions, their analytic resources and skill, and the data themselves [emphasis original]. (p. 594)

This is not a methodological pitfall; it is wholly consistent with my interpretivist approach, which recognizes that the analytic output—themes—were actively created by me, as the researcher, "at the intersection of data, analytic process and subjectivity" (Braun & Clarke, 2019, p. 594). Thus, subjectivity is not something to avoid (as it is in positivist research), but is something that the interpretivist tradition embraces, so long as the researcher recognizes that the analytic output is influenced by their subjective experiences.

Braun and Clarke (2019) also caution against the use of incompatible medleys of

[35] See s. 4.1.1.

methodological approaches. However, they permit "methodological 'mash-ups'" that are "warranted, justified and theoretically coherent…" (p. 337). I posit that my medley of methodological approaches, while primarily centring around Braun and Clarke's (2021, 2019) reflexive thematic analysis, at times married with similar approaches, meet these evaluative criteria because of the pragmatic nature of this work. My methodological decisions, that draw on both deductive and inductive analysis, are consistent with Mitchell's (2018) argument that pragmatist research is enhanced by various modes of reasoning.

My discussion about the paradigmatic and theoretical coherence of my methodological approach centres on the interpretivist approach adopted for this research, which also guides how we must understand the project's rigour.

4.8. Rigour

Interpretivist understandings of rigorous research greatly differ from objectivist understandings, which centre around positivist conceptions of validity, reliability, and generalizability. Accordingly, interpretivist research does not need to concern itself with the technical preoccupations of objectivist research (Bryman, 1988). Instead, interpretivist understandings of rigour centre around concepts better suited to assess qualitative research. The quality criteria relevant to my work draws chiefly from Lincoln and Guba's (1985) discussion of trustworthiness in qualitative research. Lincoln and Guba (1985) operationalise trustworthiness in qualitative research along four elements, as will be discussed herein: credibility, transferability, dependability, and confirmability.[36]

[36] This approach of drawing primarily on Lincoln and Guba (1985) is consistent within Nowell et al.'s (2017) approach of establishing trustworthiness in thematic analysis. Like Nowell et al. (2017), I recognize that others, such as Tracy (2010), have presented other markers for quality; however, consistent with Nowell et al. (2017), I "have chosen to use the original, widely accepted, and easily recognized criteria introduced by Lincoln and Guba to demonstrate trustworthiness…" (p. 3).

4.8.1. Credibility

"Guba and Lincoln (1989) claimed that the credibility of a study is determined when coresearchers or readers are confronted with the experience, they can recognize it" (Nowell et al., 2017, p. 3). Of the five techniques Lincoln and Guba (1985) present, two are relevant to establish the credibility of this project.

Firstly, Lincoln and Guba (1985) suggest that there are three "activities that make it more likely that credible findings and interpretations will be produced (prolonged engagement, persistent observation, and triangulation)" (p. 301). Lincoln and Guba's (1985) criteria for prolonged engagement, while of primarily relevance to *in vivo* research, can be applied to this work in that I spent sufficient time familiarizing myself with both the topic of AME at large and the two cases that form my data. Similarly, persistent observation was achieved by detailed exploration, in which observations were continually examined "to the point where either the initial assessment is seen to be erroneous, or the factors are understood in a nonsuperficial way" (Lincoln & Guba, 1985, p. 304). Lincoln and Guba (1985) suggest conducting triangulation "by using different sources, different methods, and sometimes multiple investigators…" (p. 307). However, the use of different sources of data collection is unachievable in this project because the research questions specifically contemplate the decisions of the Supreme Court of Canada in *R. v. Javanmardi* (2019) and the England and Wales Court of Appeal in *Bawa-Garba v. R.* (2016). The use of multiple investigators was similarly unachievable given the individualistic nature of a master's thesis. However, I achieved triangulation by using varied methodological approaches that drew both on deductive and inductive modes of reasoning.

Second, Lincoln and Guba (1985) outline "an activity that provides an external check on the inquiry process (peer debriefing)" (p. 301). Notwithstanding the individualistic nature of a

master's thesis, peer debriefing was conducted through my discussions with my research supervisor, Dr. Jennifer M. Kilty, and with colleagues in my master's program. These debriefings allowed for my "biases [to be] probed, meanings explored, the basis for interpretations clarified," which Lincoln and Guba (1985) suggest as a means to recognize my own subjectivity as the researcher (p. 308).

4.8.2. Transferability

Lincoln and Guba's (1985) discussion of transferability refers to a form of generalizability that is contextualized to qualitative research (Nowell et al., 2017). Researchers are required to provide thick descriptions "to enable someone interested in making a transfer to reach a conclusion about whether transfer can be contemplated as a possibility" (Lincoln & Guba, 1985, p. 316). According, transferability was achieved by providing thick, rich descriptions, which Braun and Clarke (2006) note is an advantage, and requirement, of thematic analysis.[37] Like Kilty and Mott (in press), I reject attempts to conceptualise saturation within a positivist paradigm. Instead, my interpretivist approach recognizes that my findings are my own interpretation of the data, and that new meaning can always be generated (Kilty & Mott, in press).

4.8.3. Dependability

Lincoln and Guba's (1985) description of dependability centres around consistency. Dependability, the demonstration of consistency, can be operationalised through audit trails (Lincoln & Guba, 1985; Nowell et al., 2017). An audit trail was created for this project in two ways. Firstly, all data and coding were retained (Nowell et al., 2017). Secondly, notes of

[37] Of note, Smith (2018) provides an alternative view, separate from Lincoln and Guba's (1985) transferability, that qualitative research can indeed be generalizable (but not in the same way as quantitative research). However, I have intentionally not adopted Smith's (2018) view because of the exploratory nature of this project.

decisions relating to paradigmatic, theoretical, and methodological decisions were made during the research process and retained (Nowell et al., 2017). This would enable independent evaluation of the research process to provide confirmation of the process' dependability (Lincoln & Guba, 1985). While audit trails were not conducted, examination of this work through the defence process provides a measure of assurance of the dependability of this work.

4.8.4. Confirmability

"According to Guba and Lincoln (1989), confirmability is established when credibility, transferability, and dependability are all achieved" (Nowell et al., 2017, p. 3). Confirmability also assesses potential confounding variables in the research design, such as researcher bias (Lincoln & Guba, 1985; Nowell et al., 2017). Confirmability was achieved by clearly documenting and explaining "the reasons for theoretical, methodological, and analytical choices throughout the entire study, so that others can understand how and why decisions were made" (Nowell et al., 2017, p. 3).

I must also consider the impact personal purposes, as described by Maxwell (1996), will have on my work. My personal purpose—to eventually practice the criminal and civil defence of health care professionals—guided my selection of this topic and research questions. It similarly guided how I conceptualise blameworthiness in AME and my position that only the most serious deviations from safe practice (violations) should attract criminal liability (Allen, 2007; Merry & McCall Smith, 2001; McDonald, 2008). My view is guided by the understanding of the correlation between physicians' fear of liability and defensive medicine, which has negative social effects, such as increased health care costs and fewer available specialists (Morita, 2018; Schouten & Brendel, 2009; Studdert et al., 2005; Toraldo et al., 2015; Yan et al., 2016). Hence, I see the possibility in achieving better social outcomes by mitigating physicians' fear of liability.

Yet, while there are certainly critical elements to this project, my interpretivist approach largely focuses on sensemaking and understanding, not universalizability (Schwartz-Shea & Yanow, 2020; Willis, 2007; Yanow, 2000).

My personal purpose for this research does not, according to Maxwell (1996), diminish the quality or rigour of my work. Similarly, Braun and Clarke (2019) conceptualise "researcher subjectivity…as a resource (see Gough and Madill 2012), rather than a potential threat to knowledge production, as it arguably is conceptualised in Boyatzis' and some other approaches to [thematic analysis]" (p. 591).[38] My personal purpose is not inconsistent with the interpretivist nature of this work, which recognizes—and appreciates—researcher subjectivity. Indeed, "demonstrating…the avoidance of 'bias' is illogical, incoherent and ultimately meaningless in a qualitative paradigm and in reflexive [thematic analysis]" (Braun & Clarke, 2021, p. 335). Instead, drawing on Braun and Clarke (2021, 2019), awareness and reflection of my personal purpose is a resource, not a threat.

4.9. Ethics and Power Issues

Consideration of ethics and power issues is also central to quality research. As my sample does not consist of human or animal participants and engages document analysis, the potential for ethics and power issues to arise was low and, therefore, did not require approval from the University of Ottawa's Research Ethics Board. While my research does not entail any *in vivo* elements, the nature of social science research demands that contemplation of ethics and power issues extend beyond traditional ethical considerations.

First, I must consider an ethical issue that is interrelated to my previous discussion of rigour: my positionality. Best (1995) notes that a common critique of constructionists is their

[38] Indeed, this is why, as discussed earlier in s. 4.7.1.2, I did not rely on the full extent of Boyatzis' (1998) data driven approach.

left-leaning political view. However, Best (1995) refutes this critique, arguing that this is an irrelevant consideration because constructionism is not developed by these political or moral positions. Nonetheless, as noted, it is necessary for me to be aware of my own positionality and how it may impact my work. Holmes (2020) defines positionality as a description of "an individual's world view and the position they adopt about a research task and its social and political context" (p. 1). There are two primary elements relevant my positionality. First, I have not suffered an AME. Second, as noted in the previous section, I wish to eventually practice the criminal and civil defence of health care professionals. I do not see the criminal law as a suitable system to regulate AME that are not serious deviations from safe practice or do not have an element of intentionality (Allen, 2007; Merry & McCall Smith, 2001; McDonald, 2008). Instead, I subscribe to the views of Guillod (2013) and Merry (2007), who argue against the use of criminal law in the context of AME, in favour of regulatory mechanisms outside of the criminal law that are better suited to achieve the objective of patient safety.

Yet, as discussed, the interpretivist approach of my work does not force me to strive for value-free objectivity. Recognizing my positionality as a person who has not suffered an AME and who wishes to eventually defend health care professionals does not mean that my interpretations are flawed. Instead, a reflexive approach enables me "to identify, construct, critique, and articulate [my] positionality" and therefore, critically assess how my own positionality "directly or indirectly influenced the design, execution, and interpretation of the research data findings" (Holmes, 2020, p. 2). A reflexive approach also allows me to recognize that my positionality "is never fixed and is always situation and context-dependent" (Holmes, 2020, p. 2). Moreover, Tracy (2010) notes that reflexivity is an element of ethical research.

I must also consider a subtler ethical issue that is bound to arise within my work: the

privilege of physicians. Social science research tends to focus on marginalized populations. While this type of research brings its own set of ethical considerations, these are not applicable to my work because my population of interest is not marginalized; in fact, they hold much power and privilege in Western societies. Yet, the apparent emancipatory element of my work towards the liberation of health care professionals from criminal liability has raised some criticism from my colleagues that my work is privileging an already-privileged social group.

I am not blind to the fact that my work does have a sort of, although unintentional, emancipatory effect. While I am not working within what Blaikie (2000) describes as applied research that focuses on changemaking, my examination of the construction of AME could be perceived as attempting to limit the criminal liability of health care professionals. I do not dispute this. Rather, it is a very important element of my work. However, I do not accept the assertion that examining a privileged population is somehow socially unjust, as some of my colleagues have argued. The literature documents detrimental social effects from the criminal regulation of AME; specifically, increased health care costs and the reduction of physician supply in higher-risk specialities, meaning fewer available specialists (Morita, 2018; Schouten & Brendel, 2009; Studdert et al., 2005; Toraldo et al., 2015; Yan et al., 2016).

Despite these social effects, I recognize that suffering an AME is a devastating and traumatic experience. Tracy (2010) notes that "researchers can take care to present findings so as to ward off victim blaming and their unjust appropriation" (p. 848). Accordingly, I wish to be explicitly clear: the intent of this research is not to suggest AME should be unregulated or that physicians who cause their patients to suffer harm should escape accountability. Consistent with the literature, I agree that the criminal law has utility in regulating physicians who intentionally inflict harm on their patients (McDonald, 2008).

4.10. Limitations

While it is certainly necessary to reflect on and discuss the limitations of this work, such reflection and discussion must be centred around qualitative understandings of research limitations. As discussed, it cannot be concerned with positivist conceptions and the technical preoccupations of objectivist research (Bryman, 1988). That is, the absence of quality criteria for objectivist research (e.g., generalizability) is not a limitation. Notwithstanding that generalizability was not an objective of this research, I nonetheless recognize that the small-scale exploratory design of this project means that the findings cannot be more broadly generalized (Kilty & Mott, in press).

Other limitations include that this project did not examine the transcripts of the hearings or parties' factums in the appellate decisions of *R. v. Javanmardi* (2019) and *Bawa-Garba v. R.* (2016), nor did it examine the transcripts, submissions, and decisions of the preceding trials. While the COVID-19 pandemic would have presented challenges in the procurement of some documents not already obtained, translated, or easily accessible, such data was not required to effectively answer the overarching and subsidiary research questions posed in this project. However, analysis of such data would present the opportunity for a richer and more fulsome analysis in future research.[39]

4.11. Conclusion

In this chapter, I set out the methodological assumptions guiding this research. I first outlined the interpretive approach adopted for this project. Next, I outlined the overarching research question (*How are AME framed by the criminal law in Canada and the United Kingdom?*), which led to a discussion of the methods used to conduct this research. I then

[39] I discuss suggestions for future research in s. 6.2.

described the two investigations I conducted to generate my findings. The first investigation, drawing on Braun and Clarke's (2006) theoretical thematic analysis, sought to answer my first subsidiary research question: *Do Canadian and British appellate courts view AME as the result of fate or agency?* The second investigation draws on Braun and Clarke's (2019, 2021) reflexive thematic analysis to approach my second subsidiary research question: *How do Canadian and British appellate courts construct blameworthiness?* Together, these investigations formed my analytical strategy that enabled my generation of themes. Finally, I discussed my positionality and limitations of this research. I also discussed issues relating to rigour by drawing on Lincoln and Guba's (1985) trustworthiness criteria. Now that I have outlined my methodological approach, I present the findings from my analysis in the next chapter.

Chapter 5: Construction of Blame in Appellate Courts' Examination of AME

In this chapter, I outline the findings gleaned from analysing the decision of the EWCA in *Bawa-Garba v. R.* (2016) and the majority and minority opinions of the SCC in *R. v. Javanmardi* (2019) using Braun and Clarke's (2006, 2019, 2021) approach to thematic analysis. The three themes I generated include: (1) the construction of AME as the product of agency versus fate; (2) the treatment of external and intervening factors; and, (3) the modes of legal reasoning exercised. Throughout the elucidation of the findings presented in this chapter, I intertwine a theoretical discussion to contextualize my findings within the broader literature.

5.1. Agency vs. Fate

The first theme examines the construction of AME as a product of agency versus fate. In *Bawa-Garba*, the EWCA constructed the AME—the patient's tragic death—as amenable to human action. That is, the AME in this case is constructed as having occurred because Dr. Bawa-Garba failed to appropriately intervene, thereby failing to meet the expected standard. The EWCA recognized that "the cause of death given after the post mortem was systemic sepsis complicating a streptococcal lower respiratory infection (pneumonia) combined with Down's syndrome and the repaired hole in the heart" (*Bawa-Garba*, para. 9). The prosecution sought to demonstrate that Dr. Bawa-Garba's negligence caused the AME (i.e., the patient's death). Accordingly,

> …the case for the Crown [at trial] was that [Dr. Bawa-Garba, and other accused persons including a nurse and a charge nurse] contributed to, or caused [the patient's] death, by serious neglect which fell so far below the standard of care expected by competent professionals that it amounted to the criminal offence of gross negligence manslaughter. (*Bawa-Garba*, para. 9)

The EWCA summarized the prosecution's successful case at trial along two lines. Firstly, Dr. Bawa-Garba failed to appropriately respond to initial blood test results which, in conjunction

with other clinical information, would have reasonably indicated septic shock. Secondly, Dr. Bawa-Garba failed to appropriately reassess, obtain necessary consultations, and act on clinical findings. The jury accepted that Dr. Bawa-Garba's failings (i.e., her omissions) caused the patient to die significantly sooner.

The EWCA held that: "If the jury found that death occurred significantly sooner because [the patient] did not receive the necessary treatment, it is an inescapable corollary that proper treatment would have prolonged, that is to say, lengthened life" (*Bawa-Garba*, para 30). Similarly, the EWCA held that "the converse must have been obvious: a defendant would only be guilty if her acts or omissions did make a significant contribution to [the patient] dying as and when he did" (*Bawa-Garba*, para. 33). Accordingly, the EWCA refused Dr. Bawa-Garba's application for leave to appeal, effectively upholding her conviction.

By upholding the conviction, the EWCA signals that Dr. Bawa-Garba's actions—or, more accurately, lack thereof—are so reprehensible that they deserve society's censure, which is achieved through the criminal law. However, this could sustain the archaic expectation that good health care professionals do not make mistakes (Guillod, 2013), which has detrimental impacts on the provision of care because it reinforces an insidious culture of secrecy in which health care professionals do not disclose errors out of fear of liability (Bourne, 2009; Guillod, 2013). Yet, proactive disclosure of medical error is a social good because it enables better (physical and emotional) healing both for the patient and the physician, and enables efforts to avert similar AME in the future (Baker et al., 2004; Gallagher et al., 2003).

Thus, it is of importance to note that the criminal law, although in a valiant effort to protect patients, could, in effect, do more harm than good by reinforcing the caricature that good health care professionals never make mistakes (Guillod, 2013). Accordingly, while it appears the

outcome of the EWCA's decision may do so, it is necessary to delve deeper and interrogate how the EWCA constructed Dr. Bawa-Garba's blameworthiness to assess whether its *reasoning*—its rationalities—do, in fact, reinforce this archaic expectation.

Applying Stone's (1989) typology of causal stories, the EWCA conceptualised the AME in this case as inadvertently caused. Dr. Bawa-Garba's actions were constructed as unintended but purposeful: "the Crown therefore relied on *Dr Bawa-Garba's treatment* [emphasis added] of [the patient] in light of those clinical findings and the obvious continuing deterioration in his condition *which she failed to* [emphasis added] properly reassess and her failure to seek advice from a consultant at any stage" (*Bawa-Garba*, para. 11). The prosecution's expert witness at trial, Dr. Simon Nadel, a consultant in paediatric intensive care, concluded that "had [the patient] subsequently been properly diagnosed and treated, he would not have died at the time and in the circumstances which he did" (*Bawa-Garba*, para. 10). Here, the EWCA emphasizes Dr. Bawa-Garba's individual agency; her actions are constructed as a departure from the requisite standard of care. This lends support to the proposition that criminalising AME sustains the archaic expectation that good health care professionals do not make mistakes (Guillod, 2013).

The EWCA concluded that the patient's death—the AME—was the result of what Stone (1989) describes as "the unintended consequences of willed human action" (p. 285). The crux of this argument, therefore, is the EWCA's construction of Dr. Bawa-Garba's actions as *willed* human action. Embedded within the EWCA's reasoning is that if Dr. Bawa-Garba was a competent doctor—a *good* doctor—she would have not made the mistakes that led to the AME. Despite the unintentional nature of this (and all) AME, the criminal justice system's search for responsibility conceptualises the AME as occurring within the realm of human agency, rather than fate (Stone, 1989).

The EWCA's search for a causal story to account for the AME in this case reflects what Stone (1989) describes as "the struggle between interpretations of accidental cause and controllable cause" (p. 292). The EWCA accepted the latter; in its view, Dr. Bawa-Garba's purported negligence was a controllable cause of the AME, notwithstanding that "it was accepted that even on his admission to hospital, [the patient] was at risk of death from [pneumonia and, later, sepsis] (quantified as being in the range 4-20.8%)" (*Bawa-Garba*, para. 8). Thus, the causal story embedded in the EWCA's decision illustrates the construction of the AME in this case as "amenable to human action" (Stone, 1989, p. 281).

In the EWCA's view, Dr. Bawa-Garba's failings were not accidental and thus not attributable to the realm of fate, "a realm where there is no choice about what happens to us" (Stone, 1989, p. 281). However, nor were Dr. Bawa-Garba's failings attributed as intentional, "where an action was willfully taken by human beings in order to bring about the consequences that actually happened" (Stone, 1989, p. 285).[40] Instead, Dr. Bawa-Garba's actions/omissions were constructed as unfortunate and inadvertent but, nevertheless, controllable by human action. The construction of the AME as amenable by human action—as a departure from the applicable standard of care—induces the legal construction of Dr. Bawa-Garba's criminal liability. The controllability of the AME, in the EWCA's view, is ultimately what rendered Dr. Bawa-Garba criminally liable. Embedded in this view is precisely what Guillod (2013) describes as the archaic expectation that good doctors do not make mistakes; that is, had Dr. Bawa-Garba been a *good* doctor, she would not have erred.

Similar to the EWCA in *Bawa-Garba*, the minority in *Javanmardi* constructed the AME—the patient's unfortunate death following naturopathic treatment—as controllable by

[40] Importantly, however, the requisite *mens rea* does not require evidence of (the legal concept of) intent.

human action. The minority opinion took great issue with Ms. Javanmardi's[41] conduct, which is worth quoting at length:

> I agree with the Court of Appeal that, in the same circumstances, a reasonable person would not have:
>
> - injected a product intravenously into a client without the required medical prescription, but would instead have administered authorized substances orally, in accordance with the provisions of Quebec's *Medical Act*;
> - drawn a product from a single-dose vial three times and then injected it into three different clients;
> - violated his or her normal treatment protocol, rather than deviating from it at the insistence of a patient being seen for the first time;
> - left it to an untrained member of his or her administrative staff to monitor the client during such a treatment;
> - recommended to a patient who was having alarming reactions within minutes of starting treatment (sudden hot flashes followed by shivering, confusion, erratic behaviour, vomiting and generalized weakness) that the patient ingest tea, honey or sweetened juice or be given a massage;
> - failed, when faced with symptoms unknown to the person, to refer the client to a physician's care;
> - failed, when advised a few hours later that the patient's condition was worsening, to recommend that the patient be taken to a hospital.
>
> It should also be noted that the vial used had no date of manufacture or expiration date on it, that the label showed a concentration that was not the actual concentration and that Ms. Javanmardi did not wear a smock or other proper clothing when she administered the injection… (*Javanmardi*, para. 79)[42]

The minority's reading of the facts constructs Ms. Javanmardi's actions as negligent. In the minority view, Ms. Javanmardi failed to take reasonable precautions to maintain sterility (e.g., not wearing a smock). Beyond this omission, the minority's construction of Ms. Javanmardi's actions is twofold. First, prior to the patient's reaction, Ms. Javanmardi engaged in negligent conduct by administering the intravenous injection, without legal authorization.[43] Second, Ms. Javanmardi's response to the patient's reaction was negligent (e.g., failing to refer the patient for

[41] Consistent with the SCC, I refer to the defendant as "Ms. Javanmardi". The practice of naturopathy is not regulated in Quebec and, therefore, does not permit the use of the title of "doctor" in a medical context.
[42] Part of this quote is a translation of the Quebec Court of Appeal's decision at para. 120, which the minority in *Javanmardi* cited at para. 79 of its dissent.
[43] Naturopathy is not regulated in Quebec, meaning that Ms. Javanmardi was not legally authorized to administer the intravenous injection and, therefore, her administration was a controlled act contrary to the Quebec *Medical Act*.

emergency care).

In contrast to the minority, the majority in *Javanmardi* constructed the resulting AME as uncontrollable by human action, thereby highlighting a distinction between bad conduct and bad outcomes. The majority noted that: "[the patient] was the third patient to whom L-Carnitine from the same vial had been administered that day. The other two patients did not have adverse reactions to their injections. The vial turned out to be contaminated" (*Javanmardi*, para 3).[44] The majority's recognition that the other two patients who had received injections from the contaminated vial did not have similar reactions illustrates how the deceased patient's reaction, although tragic, was because of misfortune, not Ms. Javanmardi's negligence. The majority does not suggest that the contamination is the result of Ms. Javanmardi's negligence, unlike the minority, which took issue with Ms. Javanmardi drawing three times from a single-dose vial: "a reasonable person would not have…drawn a product from a single-dose vial three times and then injected it into three different clients…" (*Javanmardi*, para. 79).

The majority also accepted the trial judge's factual findings (as is standard with appellate courts) to this effect:

> [The trial judge] found that Ms. Javanmardi was properly qualified to administer intravenous injections; aligned her practice with established professional standards in other jurisdictions; purchased nutrients from a reputable Ontario pharmacy; chose nutrients that were appropriate for [the patient's] condition; stored and preserved the vial used for the intravenous injection in a manner consistent with the properties of the vial and the instructions of the supplying pharmacist; and took the necessary precautions at every stage of administering the intravenous injection, including observing sufficient protocols to prevent sepsis. (*Javanmardi*, para. 41)

In contrast to the minority, the majority constructed Ms. Javanmardi's conduct as reasonable, appropriate, and acceptable.

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[44] L-Carnitine is a compound "derived from an amino acid" and "is important to energy production and is a well-tolerated and generally safe therapeutic agent" (National Institutes of Health Office of Dietary Supplements, 2021, paras. 1, 10).

Accordingly, the majority accepted the trial judge's findings that Ms. Javanmardi's conduct was not blameworthy:

> [The trial judge] was satisfied that Ms. Javanmardi had the necessary skills to administer intravenous injections, had observed the required protocols and had taken sufficient precautions at every stage of the process … [The trial judge] concluded that *Ms. Javanmardi's conduct did not show a marked departure from the standard of care that a reasonable person in her circumstances would have exercised* [emphasis added]. [The trial judge] was not satisfied that a reasonable person would have been aware of any risk inherent in Ms. Javanmardi's conduct and therefore concluded that the Crown had not proved beyond a reasonable doubt that Ms. Javanmardi's conduct showed wanton or reckless disregard for [the patient's] life or safety. (*Javanmardi*, paras. 11-12)

By finding that Ms. Javanmardi's conduct was not a marked departure (and, thus, not blameworthy), the majority accepts that the requisite *mens rea* was not present to secure a conviction. In doing so, the majority conceptualises the patient's reaction (i.e., the AME) within the realm of fate. The majority recognizes that:

> [The patient] died of endotoxic shock attributable to the presence of bacteria in the L-Carnitine vial from which Ms. Javanmardi drew nutrients for his injection. Due to the high concentration of bacteria in the injected solution, [the patient's] *death was inevitable from the moment he was given the intravenous injection* [emphasis added]. (*Javanmardi*, para. 10)

Interestingly, the majority conceptualises the AME within the realm of fate, despite the fact that it was Ms. Javanmardi's voluntary and conscious human action (i.e., the injection) that induced the patient's death, thereby satisfying the *actus reus*. However, Ms. Javanmardi could not be found guilty of criminal negligence causing death because, consistent with the majority's interpretation, her actions aligned with the standards of the profession; and, thus, were not a marked and substantial departure. Accordingly, her actions are not constructed as blameworthy and, therefore, do not warrant criminal liability.

It cannot be said, however, that the majority's holding in *Javanmardi* contrasted the EWCA in *Bawa-Garba* by rejecting the archaic expectation that good health care professionals

do not make mistakes (Guillod, 2013). There is insufficient evidence to assess whether the majority accepted or rejected this caricatured portrayal of good health care professionals. However, the majority is clear: Ms. Javanmardi's conduct was not blameworthy. Despite participating in the causal chain of the patient's death (satisfying the *actus reus*), the requisite standard of the *mens rea* for criminal negligence causing death was not met because Ms. Javanmardi's actions were not a marked and substantial departure from the standard of care expected of a reasonably prudent naturopath. Here, the majority clearly distinguishes between bad conduct and bad outcomes. In this sense, not all bad outcomes result from blameworthy conduct, despite health care professionals fear to the contrary (Kessler & McClellan, 1996). Indeed, some blameless conduct (i.e., conduct that aligns with the standards of the profession) can induce bad outcomes. This aligns with the literature's view that the outcome of the AME (i.e., the harm suffered by the affected patient) should generally not be factored into the assessment of the moral blameworthiness of the underlying conduct that gave rise to an AME (McDonald, 2008; Runciman et al., 2017).

In *Bawa-Garba*, the physician was convicted for her omissions, which were ultimately accepted as causative of the patient's death (the *actus reus*). Yet, in *Javanmardi*, the naturopath was acquitted, despite the fact that her actions were indisputably part of the causal chain in the patient's death (also, the *actus reus*). Comparing these cases, *mutatis mutandis*,[45] raises the question: how are actions that are directly causally linked to the AME less blameworthy than omissions that are more far removed in the causal chain? The answer lies simply in that satisfying the *actus reus* of a negligence-based offence is not sufficient to secure a conviction. Conduct that satisfies the *actus reus* may not satisfy the *mens rea*. Viewed in this way, the

[45] That is, allowing comparison notwithstanding the differences.

variation between *Bawa-Garba* and *Javanmardi* lies in how the SCC and EWCA apprehended the defendant's moral blameworthiness—not just the causal chain of events.

"Causal stories are… more than empirical claims about sequences of events. They are fights about the possibility of control and the assignment of responsibility" (Stone, 1989, p. 283). The causal stories advanced in *Bawa-Garba* and *Javanmardi* highlight the tension between, what in Habermasian thought are referred to as, facts and norms: "(1) 'facts' grounded in the objective world providing reasons based on 'truth', (2) norms grounded in the social world providing reasons based on 'rightness'" (Fast, 2013, p. 87). I posit that out of the space between facts and norms arises the legal construction of a person's criminal responsibility. Goffman's (1974) frame analysis enables insight into the space between facts and norms that ultimately produce the varying constructions of blame.

Goffman (1974) presupposes that we use causality "to refer to [both] the blind effect of nature and intended effect of man, the first seen as an infinitely extended chain of caused and causing effects and the second something that somehow begins with a mental decision" (p. 23; Stone, 1989). In *Javanmardi*, the majority decision of the SCC accepted that the contamination of the vial was not Ms. Javanmardi's fault; it was an event of fate, which Goffman (1974) refers to as "the blind effect of nature" (p. 23). Hence, Ms. Javanmardi could not be held criminally responsible for an event of fate. In contrast, the minority in *Javanmardi* and the EWCA in *Bawa-Garba* conceptualised Ms. Javanmardi's and Dr. Bawa-Garba's conduct, respectively, as what Goffman (1974) refers to as beginning "with a mental decision" (p. 23). Thus, even though Dr. Bawa-Garba's actions were more far removed in the causal chain than Ms. Javanmardi's, the EWCA constructed Dr. Bawa-Garba's conduct as willed human action, without regard to how

Dr. Bawa-Garba's agency was constrained by structural factors.[46]

Goffman's (1974) description of social frameworks helps explain what Stone (1989) describes as the fight over the possibility of control. A framework is a "schema of interpretation…a primary framework is one that is seen as rendering what would otherwise be a meaningless aspect of the scene into something that is meaningful" (Goffman, 1974, p. 21). A social framework provides "background understanding for events that incorporate the will, aim, and controlling effort of an intelligence, a live agency, the chief one being the human being" (Goffman, 1974, p. 22). Both the EWCA and the SCC implicitly reference a social framework in their consideration of blame. Yet, they differ based on their explanation.

I propose that the majority of the SCC in *Javanmardi* conceptualised the AME as "fortuitousness", which Goffman (1974) describes as when "a significant event can come to be seen as incidentally produced" (p. 33). The majority in *Javanmardi* implicitly accepted that the interaction between Ms. Javanmardi and the patient met with the natural workings of the world—that is, the contamination of the vial—in a way that could not be anticipated (i.e., not a departure from the requisite standard of care) but brought about consequential results (Goffman, 1974). Goffman's (1974) frame analysis contextualizes what Stone (1989) describes as the realm of fate. The majority's conceptualisation of the AME within the realm of fate does not transform the social framework employed in the majority's interpretation to that of a natural framework because "the ingredients upon which the natural forces operate are here socially guided doings" (Goffman, 1974, p. 34). That is, human action guides natural forces; the contamination of the vial, although a natural event, would have been inconsequential but for Ms. Javanmardi's and the patient's human actions.

[46] I further discuss systemic and structural factors in the next section, s. 5.2.1.

Hence, Goffman's (1974) frame analysis provides explanatory value to the way in which the majority in *Javanmardi* considered the AME as the product of fate, without reference to fate within a fatalist ontology, in which Ms. Javanmardi would not have had agency. Indeed, the majority implicitly accepted that Ms. Javanmardi possessed agency; her conduct was conscious and voluntary. The AME is not conceptualised as caused by an "extraordinary natural force" which would have displaced Ms. Javanmardi's agency (Goffman, 1974). Yet, the majority disagreed that her agency could have prevented the AME. In this sense, fate can still intervene and result in a bad outcome; however, the health care professional may not be criminally liable for negligence if their preceding conduct aligned with the standards of the profession, meaning it was not a marked (for criminal negligence causing death, and substantial) departure.

In contrast, the minority of the SCC in *Javanmardi* and the EWCA in *Bawa-Garba* conceptualised the AME as a "muffing", which Goffman (1974) refers to as when a person, in this context, "assumed to be under assured guidance, unexpectedly breaks free, deviates from course, or otherwise slips from control…with consequent disruption of orderly life" (p. 31). Hence, Ms. Javanmardi's and Dr. Bawa-Garba's actions could be conceptualised as muffings because they, although unintentionally, brought about the AME. Yet, the unintentional nature does not absolve them from responsibility because "the body retains its capacity as a natural, causal force" (p. 32). Indeed, intent is irrelevant to the requisite *mens rea*. It is this exercise of individual agency by Ms. Javanmardi and Dr. Bawa-Garba that the minority of the SCC and the EWCA, respectively, accepted as causative of the AME (the *actus reus*). Yet, it is also this exercise of individual agency that the minority of the SCC and the EWCA accepted as satisfying the *mens rea* because Ms. Javanmardi's and Dr. Bawa-Garba's conscious and voluntary conduct, in the courts' view, did not align with the standards of the profession. This view, however, does

not account for how Ms. Javanmardi's and Dr. Bawa-Garba's agency could have been constrained by factors beyond their control.

5.2. External Factors

The second theme I generated is the treatment of mitigating and intervening factors (which I refer to collectively as external factors) by the SCC and EWCA. I organize my discussion of this theme along two lines: (1) systemic failings; and, (2) the patient's agency.

5.2.1. Systemic Failings

My analysis of *Bawa-Garba* suggests that the presence of external factors did not break the causal chain. The EWCA notes the mitigating factors that Dr. Bawa-Garba relied on at trial:

> She had worked a double shift that day (12/13 hours straight) without any breaks and had been doing her clinical best, despite the demands placed upon her. She also called supportive expert evidence…to the effect that septic shock was difficult to diagnose and [the patient's] was a complicated case in which the symptoms were subtle and they were not all present. Finally, as intervening events, reliance was placed on the conduct of [the nurse] (including the delay in administering the antibiotics [Dr. Bawa-Garba] prescribed), the problems with the computer system [which delayed Dr. Bawa-Garba in obtaining the blood test results] and the administration of the enalapril [a drug for which Dr. Bawa-Garba bore no responsibility for its administration]. (*Bawa-Garba*, para. 18)

The causal story advanced in Dr. Bawa-Garba's defence at trial draws on what Stone (1989) describes as the complex systems model, in which "it is impossible to anticipate all possible events and effects; so failure or accident is inevitable" (p. 288). Hence, the external factors that were advanced in Dr. Bawa-Garba's defence are presented as confounding variables that could have displaced Dr. Bawa-Garba's blameworthiness. This framing conceptualises the AME within the realm of fate, thereby displacing Dr. Bawa-Garba's control by postulating "a kind of innocence, in that *no identifiable actor can exert control* [emphasis added] over the whole system or web of interactions" (Stone, 1989, p. 289). Accordingly, it would be "impossible to attribute blame in any fashion consistent with our cultural norm that responsibility

presupposes control" (Stone, 1989, p. 288).

Blumer (1969) maintains that a fundamental position of symbolic interactionism is that "the complex interlinkages of acts that comprise organization, institutions, division of labor, and networks of interdependency are moving and not static affairs" (p. 50). The defence's causal story in *Bawa-Garba* reflects the complex and moving interlinkages of acts that Blumer (1969) describes. If the jury or appellate court had accepted that the external events were so forceful that they interrupted the causal chain or constrained Dr. Bawa-Garba's agency in a way that rendered her conduct blameless, Dr. Bawa-Garba would have been acquitted.

For example, the EWCA recognized that: "As for the administration of enalapril [a drug for which Dr. Bawa-Garba bore no responsibility for its administration], the judge left to the jury whether that was or may have been the sole cause of death (on the basis that if it was, no defendant was guilty)" (*Bawa-Garba*, para. 20). If the jury had concluded that the administration of enalapril was the sole cause of death, the AME would not have been constructed as the causative effect of Dr. Bawa-Garba's acts or omissions because "Dr Bawa-Garba had deliberately not prescribed enalapril as she was aware (accurately) that it could lower blood pressure, particularly in a dehydrated child" (*Bawa-Garba*, para. 15).[47] Therefore, if this alternative theory had been accepted, Dr. Bawa-Garba would have escaped criminal liability because her actions would not be understood as causative of the AME.

The EWCA's decision is silent on how it (or the jury at trial) assessed whether or not the other external factors impacted the causal chain, including the fact that Dr. Bawa-Garba worked

[47] The administration of the patient's usual dose of enalapril by the patient's mother could be conceptualised within the realm of agency, because it was the mother's willing action, but this would be unlikely to attract criminal liability. The mother was administering the patient's usual dose and would not have been expected to have the reasonable foresight that the dose should not be administered because of the patient's condition. However, this was not addressed by the EWCA because it is not relevant to the determination of Dr. Bawa-Garba's blameworthiness.

a double shift that day, totalling about 12 to 13 hours without breaks. However, these factors are relevant to the construction of the AME as occurring within the realm of agency because they could impact the EWCA's contemplation of Dr. Bawa-Garba's actions as morally blameworthy.

In the previous theme, I identified the EWCA's conceptualisation of Dr. Bawa-Garba's omissions as a muffing, in which Dr. Bawa-Garba's willed and intentioned agency was displaced, while recognizing that "the body retains its capacity as a natural, causal force" (Goffman, 1974, p. 32). This finding is relevant to the present discussion. Perhaps external factors, such as working over 12 hours without breaks, forcefully constrained Dr. Bawa-Garba's agency, so as to displace her agency (Goffman, 1974; Stone, 1989). Thus, even though Dr. Bawa-Garba is an identifiable actor in the AME, the external (structural) factors may have rendered Dr. Bawa-Garba unable to exert enough control for her conduct to be considered blameworthy.

The presence of external factors in *Bawa-Garba*—chiefly, working over 12 hours without breaks—suggest that the AME was the result of systemic failure, however, the EWCA conceptualised the AME as an individual failure. In doing so, the EWCA constrained its consideration to Dr. Bawa-Garba's individual agency, without regard to broader structural factors. This lends support to the apparent preference of the majority of the SCC in *Javanmardi* to account for subjective elements—an apparent nod to *Tutton* (1989)—which may better account for structural considerations.

Indeed, the EWCA's construction of the AME as an individual failure contrasts the dominant view of the literature that conceptualises AME as a systemic failure (Baker et al., 2004; Leape, 1997). Indeed, most errors (mistakes, slips and lapses, and technical errors) "are more likely to be less morally blameworthy and causatively influenced by systemic factors,

especially in complex environments such as healthcare" (McDonald, 2008, p. 8). Systemic components (e.g., defects in processes, policies, etc.) largely contribute to the likelihood of error (Leape, 1997).

Hence, "the linking together of this knowledge of the concatenated actions yields a picture of the organized complex" (Blumer, 1969, p. 58). The concatenation of factors is relevant to the analysis of *Bawa-Garba*. Recognizing that a multitude of factors—that Dr. Bawa-Garba worked a double shift of over 12 hours without any breaks, the complexity and subtlety of symptoms in the patient's presentation, and the problems with the computer system that delayed the provision of blood tests results, etc. (*Bawa-Garba*, para. 18)—concatenated to produce the AME and thus conceptualises fault as cumulative and at least partly systemic, not individual. In this sense, even though Dr. Bawa-Garba's conduct may have satisfied the *actus reus* of the offence, it arguably could not satisfy the *mens rea* if her conduct was appropriate in the context of the significant external factors resulting from structural failings.

The conceptualisation of fault as individual, and not cumulative, in *Bawa-Garba* extends the harm of the AME beyond the deceased patient and his surviving family to Dr. Bawa-Garba who suffered criminal liability as a scapegoat for systemic failings, such as inappropriate staffing levels which necessitated, and allowed, Dr. Bawa-Garba to work a double shift, without proper rest (Allen, 2007; Childs, 1999). The outcome in *Bawa-Garba* is consistent with McDonald's (2008) assertion that courts in the United Kingdom seem more likely to prosecute and convict physicians for errors that involve a "significant systemic component" (p. 28). However, prosecuting individual health care professionals for AME is problematic because of the complexities of such errors and failures (Childs, 1999). Rarely, particularly in a hospital setting, is one individual clearly responsible, by error or omission, for giving rise to an AME (Capen,

1996; Childs, 1999). The fact that three individuals were charged—Dr. Bawa-Garba, a nurse, and charge nurse—does not diminish this argument against systemic fault as these individuals are not responsible for the systemic failings that contributed to the AME.

Accordingly, and consistent with Childs (1999), it may be more appropriate to conceptualise the AME in *Bawa-Garba* as the result a variety of intersecting and competing factors and actors—or as Blumer (1969) refers to as "concatenated actions" (p. 58). *Bawa-Garba* reflects what Baker et al. (2004) describes as the historical focus on "identifying and disciplining clinicians who were closest to incidents" (p. 1685). Yet, the nature of a hospital setting that involves a distributed care team lends credence to the argument of cumulative, not individual, fault (Childs, 1999). Identifying the most responsible physician can be difficult, without regard to how other members of the care team (e.g., nurses and other allied health professionals) may have contributed to the AME (Capen, 1996). Neither Dr. Bawa-Garba, nor the two nurses who were prosecuted, are individually responsible for systemic failings, such as problems with the computer system that delayed the blood test results.

Yet, despite the concatenation of actions and external factors that could be constructed as systemic fault, the EWCA accepted the conceptualisation of individual fault, rendering Dr. Bawa-Garba criminally liable. As also discussed in the previous theme, I suggest that the EWCA's construction in *Bawa-Garba* is developed by, and contemporaneously develops, what Guillod (2013) describes as the institutionalized and archaic expectation that good doctors do not make errors.

5.2.2. Patient's Agency

In my analysis of *Javanmardi*, I identified the patient's agency as an external factor. Both the majority and minority opinions construct the patient's agency in relation to two events: the

administration of the intravenous injection; and, the response to the post-injection reaction. Yet, the majority and minority diverge on the constructions of blame in each event.

The majority in *Javanmardi* emphasized the patient's agency,[48] citing the patient's insistence in having the intravenous injection: "Despite Ms. Javanmardi's telling him that she did not normally administer intravenous injections on a first visit, [the patient] insisted on having an intravenous treatment that day" (*Javanmardi*, para. 2). The majority also accepted the trial judge's finding that "[the patient] knew that Ms. Javanmardi was not a physician. [The patient] immediately wanted an intravenous injection of nutrients and validly consented to the procedure" (*Javanmardi*, para. 10). The majority's acknowledgement of the patient's consent illustrates their recognition of the patient's agency as a salient consideration. The patient not only freely consented to the procedure but also insisted that it be administered the same day, contrary to Ms. Javanmardi's regular practice.

It is interesting to consider whether Ms. Javanmardi's regular practice of not administering intravenous injections on the first visit is reflective of defensive medicine. It could plausibly be conceptualised as an avoidance behaviour, in which health care professionals exercise a greater degree of caution out of fear of litigation (Studdert et al., 2005). Conversely, however, Ms. Javanmardi's acquiescence to the patient's insistence could also be driven by fear of litigation, if she was concerned that not immediately administering the treatment could attract legal liability.

The majority also recognized the patient's agency in his refusal to go to the hospital after developing a reaction to the injection:

> Despite his symptoms, [the patient] *said that he did not want to go to the hospital* [emphasis added]. His wife and daughter took him home. In a call later that day with [the

[48] This is different than my discussion of the first theme, which focused on the construction of Ms. Javanmardi's agency. Here, I am examining the construction of the *patient's* agency.

> patient's] daughter, Ms. Javanmardi explained that [the patient] needed to stay hydrated and advised [the patient's] daughter to take him to the hospital if she was unable to keep him hydrated. (*Javanmardi*, para. 6)

Accordingly, the majority minimises Ms. Javanmardi's conduct by highlighting the patient's agency in both insisting on receiving the intravenous injection and refusing to go to the hospital. Importantly, the majority does not find that Ms. Javanmardi's deviation from her regular practice was also a marked and substantial departure from the expected standard of care, which would satisfy the *mens rea* of criminal negligence causing death.

The majority's assessment of the facts is, like human interaction, "mediated by the use of symbols, by interpretation, or by ascertaining the meaning of one another's actions" (Blumer, 1969, p. 79). The majority's interpretation conceptualises the AME within the realm of agency—but, uniquely, in terms of how the patient's agency affected the AME. Doing so forces consideration of the active role the patient played in affecting the outcome. This framing shifts attention away from the usual consideration of the health care provider's conduct. Thus, the AME is constructed as amenable to human control, but that of the patient's control, not the health care provider. In this view, the patient's agency is symbolically constructed as an external factor that displaced, or constrained, Ms. Javanmardi's conduct, so as to render such conduct as morally blameless.

In contrast, however, the minority in *Javanmardi* accepted the QCA's assertion that Ms. Javanmardi "failed, when advised a few hours later that the patient's condition was worsening, to recommend that the patient be taken to a hospital" and that a reasonable naturopath would not have "violated his or her normal treatment protocol, rather than deviating from it at the insistence of a patient being seen for the first time" (*Javanmardi*, para. 79).[49] Here, the minority's

[49] These quotes are translations of the Quebec Court of Appeal's decision at para. 120, which the minority in *Javanmardi* cited at para. 79 of its dissent.

interpretation ascribes meaning to Ms. Javanmardi's conduct (Blumer, 1969). Unlike the majority, the minority did not construct the exercise of the patient's agency as relevant. This is consistent with Childs' (1999) argument that rarely can AME be attributable to a single, identifiable individual. In contrast, in the minority's view, the blame falls squarely on Ms. Javanmardi because she deviated from her normal protocols at the patient's insistence and did not appropriately direct the patient to the hospital at the time of the post-injection reaction, which is constructed as a departure from the requisite standard of care.

Interestingly, this theme exposes how the majority's decision and minority's dissenting opinion in *Javanmardi* do not just diverge on questions of law, but that they also diverge on the facts of the case. The majority accepted that Ms. Javanmardi "advised [the patient's] daughter to take him to the hospital if she was unable to keep him hydrated", while the minority accepted the QCA's assertion that Ms. Javanmardi "failed, when advised a few hours later that the patient's condition was worsening, to recommend that the patient be taken to a hospital" (*Javanmardi*, paras. 6, 79).

I posit that the variation between the majority's and minority's construction of the patient's agency can be theorised through examination of the physician-patient relationship.[50] Blumer (1969), drawing on Mead's earlier work, asserts that "social interaction is obviously an interaction between people and not between roles…It is only in highly ritualistic relations that the direction and content of conduct can be explained by roles" (p. 75). The physician-patient relationship is a ritualised relationship, often marked by a relational power imbalance, in which the physician is regarded authoritatively by the patient (Hannawa, 2014; Lin, 2015; Nimmon &

[50] I posit that while much of the literature on the patient-physician relationship is within the context of conventional medicine, its principles still provide explanatory value to the professional, clinical relationship between a naturopath and their patient.

Stenfors-Hayes, 2016).

This power imbalance is evident in the way the minority in *Javanmardi* constructed the patient's agency as of less importance than its consideration of Ms. Javanmardi's agency. In the minority's view, Ms. Javanmardi is expected to discharge her obligations as a prudent and responsible naturopath, which includes not modifying her usual practice at the patient's insistence (*Javanmardi*, para. 79). Ultimately, in the minority's view, this amounted to a marked departure from the relevant standard of care (*Javanmardi*, paras. 79-80). Hence, the minority takes issue with Ms. Javanmardi's acquiescence, implying that she bears more responsibility for the conduct of the relationship. For the minority, Ms. Javanmardi's role as a naturopath is a symbol of the inherent power imbalance within the context of a doctor-patient relationship. Accordingly, the minority ascribes meaning to Ms. Javanmardi's actions as failing to discharge her obligations, thereby conceptualising the patient's agency as irrelevant.

In contrast, I theorise that the majority's construction of the patient in *Javanmardi* as agentic is because the patient was 84 years old without any noted cognitive impairments. Moreover, the patient was seeking elective treatment to improve overall quality of life. Hence, the capacity of the patient allowed for the sharing of power between Ms. Javanmardi and the patient, even within the context of a professional, clinical relationship (Nimmon & Stenfors-Hayes, 2016).

This was not the case in *Bawa-Garba*. In *Bawa-Garba*, the patient was six-years old and his parents were seeking conventional medicine to treat a specific serious illness on an emergency basis. Accordingly, the patient in *Javanmardi* was able to exercise a higher degree of agency than the patient in *Bawa-Garba*. In *Bawa-Garba*, the factual characteristics of the young patient rendered their legal construction as a patient in need of protection, which explains the

involvement of the criminal law. Yet, more analysis is needed to determine if the same outcomes (i.e., Dr. Bawa-Garba's conviction and Ms. Javanmardi's acquittal) would be likely, when controlling for the patient's age.

5.3. Legal Reasoning

The third theme explores the modes of legal reasoning exercised by the majority and minority of the SCC in *Javanmardi* and the EWCA in *Bawa-Garba*. I use the constructions of objective dangerousness in *Javanmardi* and the point of no return in *Bawa-Garba* to suggest that the majority in *Javanmardi* adopted a pragmatic approach to judicial decision-making, while the minority in *Javanmardi* and the EWCA in *Bawa-Garba* utilized a more formalist approach to legal reasoning. I then discuss Habermas' (1984, 1987) communicative rationality to postulate that the divergence between judicial decision-making in *Javanmardi* and *Bawa-Garba* lies within the degree to which pragmatic adjudication is utilised, not the underlying rationality.

5.3.1. Objective Dangerousness

Variation between the legal reasoning employed by the majority and minority in *Javanmardi* can be located in their respective formulations of objective dangerousness. The legal construction of whether the act of Ms. Javanmardi's administration of the intravenous injection to the patient was objectively dangerous is a key feature of the case and has precedential value.

The majority adopted a contextual approach, more consistent with pragmatism, by holding that "both charges against Ms. Javanmardi… required her conduct to be measured against the standard of a reasonable person *in her circumstances* [emphasis added] — as part of the fault element of both criminal negligence and the predicate offence for unlawful act manslaughter" (*Javanmardi*, para. 32). The majority accepted the trial judge's findings that Ms. Javanmardi's personal characteristics were a relevant consideration:

> [The trial judge] was satisfied that Ms. Javanmardi had the necessary skills to administer intravenous injections, had observed the required protocols and had taken sufficient precautions at every stage of the process… Based on these findings, [the trial judge] acquitted Ms. Javanmardi of both charges. (*Javanmardi*, paras. 11-12)

The majority's holding contrasts the minority's opinion that Ms. Javanmardi's personal characteristics (e.g., training) are only relevant to establish "that Ms. Javanmardi was qualified to exercise the care required to administer an intravenous injection" which does not remove "the need to analyze the second possibility for breaching the standard of care, that is, failure to exercise the required care" (*Javanmardi*, para. 76). In the minority's view, Ms. Javanmardi's personal characteristics are irrelevant to the determination of objective dangerousness:

> The act performed in the instant case was objectively dangerous, and Ms. Javanmardi's experience does not alter this. The dangerousness of the act would have been established even if it had been performed by a health professional who was authorized to do so: the difference lies rather in Ms. Javanmardi's qualifications to perform the act in question and in the care exercised in performing it. Injecting a substance across physiological barriers is an 'inherently dangerous activity'… (*Javanmardi*, para. 77)

However, the majority disagreed by accepting the trial judge's finding that "the intravenous injection was not objectively dangerous. A reasonable person *in Ms. Javanmardi's circumstances* [emphasis added] would not have foreseen that intravenously administering a benign solution, in accordance with proper procedures, would create a risk of harm" (*Javanmardi*, para. 13).

The majority's view is premised on the application of the modified objective test, which allows (albeit, limited) consideration of contextual factors. The minority opined, however, that the modified objective test can only be applied to assess *mens rea* (*Javanmardi*, para. 60). Accordingly, in the minority's view, the assessment of objective dangerousness should be assessed within the *actus reus*, without reference to the context of Ms. Javanmardi's training and experience. This contrasts the majority's holding that:

> The "objective dangerousness" requirement [in the *actus reus*] adds nothing to the analysis that is not captured within the fault element of unlawful act manslaughter — objective foreseeability of the risk of bodily harm that is neither trivial nor transitory (*Creighton*, at pp. 44-45). (*Javanmardi*, para. 26)

The majority then goes on to state that:

> There is little benefit, in my view, to inviting judges or juries to first consider the objective "dangerousness" of the accused's actions in a vacuum, and then duplicate that exercise with the benefit of context when they reach the fault element of the offence. Model jury instructions already avoid this repetition, which introduces unnecessary complexity into the offence of unlawful act manslaughter, increasing the risk of confusion and legal error. (*Javanmardi*, para. 29)

The majority's explanation adopts an activity-sensitive approach to the modified objective standard: "while the standard is not determined by the accused's personal characteristics, it *is* [emphasis original] informed by the activity…the activity is administering an intravenous injection, and the standard to be applied is that of the reasonably prudent naturopath in the circumstances" (*Javanmardi*, para. 38). The minority does not disagree on this specific point; however, the minority contends that an activity-sensitive approach is not appropriate in assessment of the *actus reus*: "the person's experience is not relevant in determining what is required by the standard of care or what special care is required by the activity in question" (*Javanmardi*, para. 74). Conversely, the majority recognizes that the dangerousness of an act must be assessed with reference to the relevant context.

The majority's deference to context in its formulation of objective dangerousness evidences its pragmatic approach. Contextual analysis is an essential element of legal pragmatism (Posner, 2004). The majority's adoption of the activity-sensitive approach to the modified objective standard acknowledges the importance of examining the case with reference to contextual factors and the aforementioned point that conduct cannot be assessed in "a vacuum" (*Javanmardi*, para. 29). Here, the majority adopts, consistent with legal pragmatism,

what Pound (1931) describes as the nearly equal importance of both the individual case *and* generalizations. In contrast, however, the minority takes a markedly more formalist approach by opining that an accused's personal characteristics are never relevant, regardless of the context.

Yet, to the majority, the context of *Javanmardi* is important. Ms. Javanmardi's qualifications as a naturopath (although not legally regulated in Quebec), and the nature of the clinical relationship between Ms. Javanmardi as the accused and her patient as the victim, are necessary to effectively analyse the case. An intravenous injection by an untrained individual is starkly different than a trained person, as Ms. Javanmardi was, doing the same to a consenting patient in the context of a clinical relationship. If the majority were to have held that administering an injection across physiological barriers was objectively dangerous, regardless of the context, it could contribute to health care professionals' fear of litigation and legal liability (even though an accused could later rebut this presumption). This could cause an increased *perception* of risk among health care professionals, which could, in turn, decrease the quality of care because fear of litigation is well documented as causing detrimental impacts on the provision of care (Kessler & McClellan, 1996; Morita, 2018; Schouten & Brendel, 2009; Toraldo et al., 2015).

Hence, pragmatic adjudication can also be located within the majority's marrying of reasonableness within a broader context of social policy (Posner, 2004). The majority's approach was "was based upon the centrality of social context and experiential knowledge rather than abstract legal formalism" (Sheppard, 2008, pp. 83-84). Although not explicit, the majority's reasoning serves to pre-emptively quell health care professionals' fears that routine activity, such as an intravenous injection, could be viewed the courts as objectively dangerous. Yet, the minority's formalist approach prevents it from, explicitly or implicitly, considering broader

issues of social context. That is not a defect *per se*—it is the intent of legal formalism, which aims to constrain the judiciary's focus to precedent (Dworkin, 1986).

The minority's formalist approach is also evident in their argument for an assessment of objective dangerousness in relation to both the *actus reus* and the *mens rea*: "My colleague is of the view that this element is superfluous in the case of manslaughter because it duplicates the fault element…" (*Javanmardi*, para. 58). In contrast, the majority held that "[case law] and academic writing confirm that there is no *independent* [emphasis added] *actus reus* [emphasis original] requirement of objective dangerousness" (*Javanmardi*, para. 28). In the majority's view, the two-part test is unnecessarily convoluted. While both the majority's and minority's approaches stem from *R. v. Creighton* (1993), each take vastly different positions that can be explained by analysing their legal reasoning.

The majority's attempt to remove convolution from the appropriate legal test for unlawful act manslaughter reflects their pragmatic approach. The majority relied on *Creighton* as precedent insofar as it helped to contextualize—but not unilaterally determine—*Javanmardi*, which reflects a markedly more pragmatic approach (Thomas, 2005). The approach of the majority, in its reliance on *Creighton,* is uniquely pragmatic in that the majority, while accepting *Creighton*, appears to revert back to the subjective elements that Justice Lamer (as he was then) advocated for in his concurrence in *Tutton* (1989). In doing so, the majority does not constrain itself to a logico-deductive consideration of precedent. Instead, it uses precedent as what Posner (2008) describes as a servant, rather than master.[51] In contrast, the minority adopted a more formalist approach in their reading of Creighton, which informed its logico-deductive reasoning. The minority's opinion that the objective dangerousness element must be assessed within the

[51] See s. 3.2.2.

actus reus, without reference to context, relies on Creighton as precedent to set out a prescriptive requirement that is viewed as generalizable across cases, which is a key feature of legal formalism (Dworkin, 1986).

5.3.2. Point of No Return

Similar to the minority in *Javanmardi*, the EWCA in *Bawa-Garba* adopted logico-deductive reasoning in their formalist approach. The EWCA's formalist approach is chiefly evidenced in its consideration of the point of no return (herein, "PONR").

The PONR is a temporal point in which the patient's condition would be too far deteriorated to render medical intervention useful. Accordingly, in *Bawa-Garba,* the PONR is the point in time after which Dr. Bawa-Garba could not be held criminally liable for her alleged omissions because they would not have affected the patient's death—or, conversely—the lengthening of the patient's life. That is, any negligence after the PONR was reached could not be conceptualised as causative of the patient's death.

The EWCA in *Bawa-Garba* accepted the trial judge's construction of "'the point of no return' i.e. the time after which [the patient] was more likely to die than to survive and, thus, after which the jury could not be sure that any gross negligence [by Dr. Bawa-Garba] was causative of death" (*Bawa-Garba*, para. 21). The EWCA summarised the trial judge's apprehension of the evidence given by the prosecution's expert witness, Dr. Simon Nadel, a consultant in paediatric intensive care, as: "Dr. Nadel…could not be sure that [the patient] had not passed the point of no return at 3.00, 4.00 or 5.00 pm because he had no information to work from apart from the lack of oxygen saturation reading after 2.30" (*Bawa-Garba*, para. 21).

The defence argued on appeal that the trial judge failed to appropriately direct the jury on the PONR, arguing that it was possible that the PONR was reached as early as 2:30 pm (*Bawa-*

Garba, para. 34). If this were true, Dr. Bawa-Garba could not be criminally liable for errors or omissions after 2:30 pm because *R(Khan) v. West Hertfordshire Coroner* (2002) required the prosecution to show that there was not only an opportunity to render care but that the care would have saved or prolonged life (*Bawa-Garba*, para. 29). This would have effectively invalidated the prosecution's charge that she did not properly act on test results received at about 4:15 pm, which were delayed because of an error in the hospital computer system (*Bawa-Garba*, paras. 17-18). Ultimately, however, the EWCA rejected this argument as untenable, finding that: "If the jury found that death occurred significantly sooner because [the patient] did not receive the necessary treatment, it is an inescapable corollary that proper treatment would have prolonged, that is to say, lengthened life" (*Bawa-Garba*, para 30).

Two striking features of legal formalism can be located within the EWCA's rejection of the defence's argument about the PONR.

First, while the EWCA notes the error in the hospital computer system that delayed Dr. Bawa-Garba receiving the results, it does not appear to consider this context in its reasoning. Yet, this context is critically important; indeed, the literature largely argues for a systems approach to conceptualising AME (Childs, 1999; Leape, 1997; Merry & McCall Smith, 2001) to recognize that most errors "are more likely to be less morally blameworthy and causatively influenced by systemic factors, especially in complex environments such as healthcare" (McDonald, 2008, p. 8). Although legal formalists could argue that these are, at best, mitigating factors that the EWCA intentionally disregarded, it does not rebut the argument that the EWCA's dismissal of this systemic factor is consistent with a formalist approach to legal reasoning. This contrasts pragmatic reasoning that places emphasis on social context and embraces experiential knowledge as a legitimate means of decision-making (Posner, 2004; Sheppard, 2008).

Second, the EWCA engages in logico-deductive reasoning, which is a mark of legal formalism (Huhn, 2003). In its reading of *R(Khan)* (2002), which requires the prosecution to show beyond that there was lost opportunity to render care in order to prove negligence, the EWCA held that death occurring sooner is syllogistic with life being prolonged: "In our judgment…the two concepts are not inverse but merely different sides of the same coin" (*Bawa-Garba*, para 30). Here, the EWCA's use of syllogism (i.e., a deductive logic) to expound its reasoning is consistent with its formalist approach (Huhn, 2003; Kelley, 2002).

5.3.3. Communicative Rationality

Perhaps the most noticeable mark of legal pragmatism is whether the focus of judicial decision-making is operation or outcome (Dewey, 1924; Holmes, 1897). In its classical and analytic form, legal pragmatism "offers only a method of deliberative inquiry" which does not "champion any special results" (Lind, 2012, p. 267). Hence, legal pragmatism is largely concerned with the *operation* of judicial decision-making (Dewey, 1924; James, 1907/1975; Lind, 2012; Pound, 1931). Yet, the common law is inherently concerned with the operation of decision-making; ergo, the importance of a judge expounding their *reasons*. Thus, I must concede that there is a pragmatic element intrinsic to the common law, although the degree to which an individual judge engages in pragmatic adjudication lies on a continuum, with the majority in *Javanmardi* more closely drawing on pragmatic adjudication than the minority in *Javanmardi* and the EWCA in *Bawa-Garba*. Indeed, I suggest that the divergence between judicial decision-making in *Javanmardi* and *Bawa-Garba* lies within the degree to which pragmatic adjudication is utilised, not the underlying rationality.

I posit that the majority's reasoning in *Javanmardi* is an exemplar of Habermas' (1984, 1987) communicative rationality. The constitutive nature of language is a key feature of

Habermasian thought that is embedded within Western systems of law operating within the common law tradition, such as the Canadian criminal law. In *Javanmardi*, the majority explicitly acknowledges language as constitutive in its adoption of the Quebec Court of Appeal's holding in *R. v. Fontaine* (2017), which rejects instrumental rationality in the formulation of fault:

> *These differences of degree cannot be measured by a ruler, a thermometer or any other instrument of calibrated scale* [emphasis added]. The words "marked and substantial" departure are adjectives used to paraphrase or interpret "wanton or reckless disregard" in section 219 of the Code but they do not, and cannot, indicate any objective and fixed order of magnitude that would have prescriptive value from one case to another. As with the assessment of conduct in cases of criminal negligence, *the assessment of fault by the trier of fact is entirely contextual* [emphasis added]. (*Javanmardi*, para. 22)[52]

In its reliance on *Fontaine*, the majority recognizes the law as contextually and discursively mediated.

Indeed, blameworthiness cannot be definitively calculated, nor does it exist independently in the natural world; instead, it is constituted through the discursive process of the common law tradition. Without these discursive processes, to Habermas, "modern law is positivized into a functional, technical system that seems to have suspended any need for moral deliberation" (Deflem, 1994, p. 6). Hence, it is the communicative nature of the common law that allows for the moral deliberation of norms.

While not as explicit as the majority in *Javanmardi*, the minority in *Javanmardi* and the EWCA in *Bawa-Garba* do not, implicitly or explicitly, reject that the law is linguistically mediated. Indeed, the very existence of the minority's opinion in *Javanmardi* and the EWCA's decision in *Bawa-Garba* is a testament to how language mediates the law. The trials of Ms. Javanmardi and Dr. Bawa-Garba for alleged offences are, *per se*, an attempt to resolve conflict through communication—and engage in moral deliberation of norms beyond the "technical legal

[52] The quote is at para. 27 in *Fontaine*; the majority in *Javanmardi* cited this at para. 22 of its decision.

doctrine with syllogistic logic to the facts" (Kelley, 2002, p. 29). Hence, the common law tradition, in itself, is an exercise in communicative rationality. This is entirely unsurprising considering, as I conceded earlier, there is an element of pragmatism (which in itself is consistent with Habermasian thought) intrinsic to the common law.

Thus, while a pragmatic element and communicative rationality are intrinsic features of the common law tradition, all aspects of judicial decision-making in this legal tradition cannot be attributable to pragmatic adjudication.[53] Hence, it is the lesser degree to which the EWCA in *Bawa-Garba* and the minority in *Javanmardi* harnesses pragmatic adjudication, not the rationality underlying their legal reasoning, that ultimately diverges from the majority in *Javanmardi*.

[53] As discussed, in s. 3.2.4, pragmatic adjudication is the method of applied pragmatism (Posner, 1996).

Chapter 6: Conclusion

The consistent question in this project has been: is the criminal law the appropriate mechanism to regulate AME? This is a pressing question that the literature has long engaged and broadly answers in the negative (Allen, 2007; Brazier & Allen, 2007; Childs, 1999; Erin, 2007; McDonald, 2008; Merry & McCall Smith, 2001; Montgomery, 2007). Through exploration of the construction of blameworthiness, this project built on the literature's contention that the criminal law is generally inappropriate to regulate AME. Guided by my overarching research question (*How are AME framed by the criminal law in Canada and the United Kingdom?*), I generated two subsidiary research questions and used thematic analysis to explore how the SCC in *Javanmardi* and EWCA in *Bawa-Garba* construct AME.

My thematic analysis of *Javanmardi* and *Bawa-Garba* generated three themes that I explored in the previous chapter. First, the construction of AME as the product of agency versus fate. Drawing on Stone's (1989) typology of error, I mapped the causal stories that I identified in *Javanmardi* and *Bawa-Garba*. I found that the majority in *Javanmardi* constructed the AME as the product of fate, where the minority in *Javanmardi* and the EWCA in *Bawa-Garba* constructed the AME as amenable to human action. I interrogated this finding by using the concept of Goffman's (1974) frame analysis to explore, drawing from Habermasian thought, the space between facts and norms that ultimately produce the varying constructions of blame. In doing so, I concluded that the majority in *Javanmardi* conceptualised the AME as incidentally produced, while the minority in *Javanmardi* and the EWCA in *Bawa-Garba* conceptualised the AME as what Goffman (1974) describes as a muffing, in which Ms. Javanmardi and Dr. Bawa-Garba, respectively, are positioned as agents bearing responsibility for the AME.

Second, the treatment of external and intervening factors. Using Blumer's (1969) concept

of concatenation, I found that the EWCA in *Bawa-Garba* disregarded systemic factors that could have affected Dr. Bawa-Garba's blameworthiness. Drawing on Goffman (1974) and Stone (1989), I discussed how systemic factors (e.g., working over 12 hours without any breaks) could have displaced Dr. Bawa-Garba's willed and intentioned agency. I also explored how the EWCA's holding on this specific point contrasts the broadly held view in the literature that AME is rarely an individual failure and often has a significant systemic component (Allen, 2007; Baker et al., 2004; Capen, 1996; Childs, 1999; Leape, 1997; McDonald, 2008).

I also found that the majority in *Javanmardi* constructed the patient as agentic, while the minority constructed the patient's agency as of less importance than its consideration of Ms. Javanmardi's agency. Drawing on Blumer (1969), I also theorised how the majority and minority ascribed meaning to Ms. Javanmardi's actions. I suggest that the majority's ascribing of meaning to the patient's agency is consistent with the view in the literature that AME is rarely attributable to a single, identifiable individual (Allen, 2007; Childs, 1999). I also explored how the minority's opinion in *Javanmardi* and the EWCA in *Bawa-Garba* could cultivate the institutionalized and archaic expectation that good doctors do not make errors (Guillod, 2013)

Third, the modes of legal reasoning exercised. I found that the majority in *Javanmardi* adopted a pragmatic approach to judicial decision-making, while the minority in *Javanmardi* and the EWCA in *Bawa-Garba* utilized a more formalist approach to legal reasoning. However, I ultimately conceded that there is a pragmatic element intrinsic to the common law, which then developed my argument, drawing on Habermas' (1984, 1987) communicative rationality, that the divergence between the judicial decision-making in *Javanmardi* and *Bawa-Garba* lies within the degree to which pragmatic adjudication is utilised, not the rationality underlying the judicial reasoning.

6.1. Research Implications

My findings suggest that the SCC's holding in *Javanmardi* (2019) constructs AME within the realm of fate, contrasting the EWCA in *Bawa-Garba* (2016) which constructs AME within the realm of agency. This finding is important because *Bawa-Garba* (2016) sparked, anecdotally, fear among Canadian physicians about potential criminal liability for AME (see, for example: Glauser, 2018; Stechyson, 2018). I suggest that this fear is misguided because the construction of blameworthiness in Canadian jurisprudence relating to the intersection of criminal law and AME, namely *Javanmardi* (2019), is more restrictive than it is in British jurisprudence.

Bawa-Garba (2016) is not contextually relevant to AME in Canada. Indeed, consistent with *Javanmardi* (2019), Canadian courts appear to reserve the conviction of medical errors for the most serious of cases, which are generally considered to be those that involve intentional deviations from safe practice (McDonald, 2008; Merry & McCall Smith, 2001). The minority considered Ms. Javanmardi's actions as intentional deviations from safe practice chiefly because naturopathy is not regulated in Quebec, meaning that Ms. Javanmardi was not legally authorized to administer the intravenous injection.

Yet, the majority disagreed, opting for a more pragmatic reading of *Creighton* (1993) and nod to *Tutton* (1989), and accepted that Ms. Javanmardi's actions were not objectively dangerous because she took mitigative action, such as aligning her practice with the standard of other provinces that do regulate naturopathy. In doing so, the majority accepted that Ms. Javanmardi's administration of the intravenous injection, although crossing a physiological barrier, was not likely to cause an objective foreseeability of bodily harm. The majority's holding in *Javanmardi* (2019) confirms that the requisite *mens rea* for criminal negligence causing death is a marked

and substantial departure, to be assessed via an activity-sensitive approach to the modified objective standard. The activity-sensitive approach, while not constructing the reasonable person in the same circumstances of the defendant, appreciates the skills and experience of the defendant. Indeed, health care professionals can only attract criminal liability for bad conduct—not bad outcomes. This should be welcome news to Canadian health care professionals.

My findings also suggest that the majority of the SCC in *Javanmardi* (2019) engaged in pragmatic legal reasoning in reaffirming the high threshold for criminal negligence. I suggest this pragmatic adjudication better contextualized AME and, therefore, reflects that the criminal law as practiced in Canada is primarily concerned with gross deviations from safe practice, which generally have an element of intentionality (Allen, 2007; McDonald, 2008). Together, I suggest that these findings could ease Canadian health care processionals' worries about liability, which is associated with, and arguably causative of, the practice of defensive medicine (Toraldo et al., 2015). This is socially beneficial.

Defensive medicine is a regarded as a social harm because of its negative effects, namely, increased health care costs and reduction of physician supply in higher-risk specialities, meaning fewer specialists are available (Morita, 2018; Schouten & Brendel, 2009; Studdert et al., 2005; Toraldo et al., 2015; Yan et al., 2016). Hence, I suggest that a more accurate understanding of medico-legal risk among Canadian health care professionals could reduce defensive medicine and, in turn, benefit the health care system and the provision of care. In particular, it could encourage health care professionals to be more open about AME, which ultimately serves to improve patient safety (Bean, 2016; Guillod, 2013; Kessler & McClellan, 1996; Kessler et al., 2006; Merry, 2007).

In my view, this project served its purpose; offering an entry point to explore the broad

topic of AME and its intersection with the criminal law. This project allowed me to engage with the relevant literature, develop a paradigmatic position and coherent theoretical framework, and to engender my ontological and epistemological assumptions as a researcher. These foundational elements of this project enabled me to design and conduct a socio-legal analysis through both deductive and inductive thematic analysis (Braun & Clarke, 2006, 2019, 2021).

6.2. Future Research

While my use of Habermasian thought was perhaps not as explicit as my use of legal pragmatism, Habermas' (1984, 1987, 1995, 1996, 2003) work nonetheless formed many of the implicit assumptions embedded within this project; chiefly, that the common law is an exercise in communicative rationality. In my view, it is necessary to make the underpinnings of these assumptions explicit, as I did in my theoretical framework. Yet, future research could engage more actively with Habermasian thought through, for example, the use of a Habermasian discourse analysis as an analytical method (Fast, 2013).

There is much work to be done to develop the socio-legal literature as it relates to AME within a Canadian context. Indeed, most of the literature is situated within the British or American contexts. While I hope that this project complements the work of scholars like Gibson (2016) and McDonald (2008) who have examined the topic of AME within a Canadian context, I suggest that further research is needed to examine the legal cultures underlying the variation between Canadian and British approaches to the construction of blame in AME cases.

Given the interpretivist approach adopted for this project, future researchers could examine this topic within a critical paradigm, which would undoubtedly shape the generation of different research findings. Indeed, a pressing angle that should be examined is the interplay of race. The fact that both of the defendants in *Javanmardi* (2019) and *Bawa-Garba* (2016) are

racialized women should be considered given Quick's (2006) analysis, in a British context, which found that non-white health care professionals are disproportionately prosecuted. The body of work on AME would be advanced through a critical race analysis.

As well, more analysis is necessary to explore if the same outcomes (i.e., Dr. Bawa-Garba's conviction and Ms. Javanmardi's acquittal) would be likely, when controlling for the patient's age and treatment sought. For example, future researchers could explore whether cases involving child patients are more likely to result in conviction, as in *Bawa-Garba*, where the patient was six-years old and seeking emergency treatment. Additionally, future research should examine the phenomenon of AME within the explicit frame of Galtung's (1969) structural violence. This would enable future researchers to further interrogate AME as a systemic failure.

While this project has been taxing at times, I am appreciative that it enabled me to explore this topic, develop my skills as a researcher, and generate interesting findings. What I have learned from this project will undoubtedly stay with me as I embark on a career of learning about, litigating, and—hopefully—shaping debate regarding medical-legal issues. I plan to build on the findings produced for this project as I enter the next stop in my academic journey: undertaking my Master of Science in Bioethics at Columbia University, where I will work with Dr. Robert Klitzman to examine physician blameworthiness as it relates to crisis standards of care in the context of the COVID-19 pandemic.

In closing, I wish to recognize that the topic of AME, both for the patients and physicians involved, has a profound emotional element that was not the focus of this research. It is my genuine hope that I have respectfully and meaningfully engaged with this important topic. As Justice Abella (2004) remarked at her swearing-in ceremony to the Supreme Court of Canada: "You tell the story, and let the listener do the defining" (para. 3).

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