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# CAUSE-IN-FACT AFTER *BURRAGE V. UNITED STATES*

*Eric A. Johnson*[*]

## Abstract

What significance, if any, should state courts assign to the U.S. Supreme Court's unanimous 2014 decision in *Burrage v. United States*? In *Burrage*, the Supreme Court relied on "ordinary meaning" and "traditional understanding" in concluding that causation elements in federal criminal statutes nearly always require so-called "but-for" causation. State courts, by contrast, traditionally have applied two important modifications to the but-for test: (1) an acceleration rule, which assigns liability to defendants who hasten "even by a moment" the coming to fruition of the proscribed harm; and (2) a contribution rule, which assigns liability to defendants who "contribute" incrementally to the underlying causal mechanism. This Article defends the state courts' approach. It argues that the acceleration rule and the contribution rule both are necessary to address cases where the but-for test fails to capture ordinary usage. Specifically, these supplementary rules are necessary to address cases of spurious, or preempted, causal sufficiency and cases of causal overdetermination.

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* Professor of Law and Associate Dean for Academic Affairs, University of Illinois College of Law. I am grateful for having had the opportunity to present earlier versions of this Article at the 2015 Illinois Advanced Judicial Academy and at a CJA seminar sponsored by the Federal Public Defender for the Central District of Illinois. I also am grateful, as always, to my father, Ernest Johnson, for his careful reading of the draft.



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## INTRODUCTION

State courts already have begun wrestling with the implications for state criminal law of the Supreme Court's 2014 decision in *Burrage v. United States*.[1] In *Burrage*, the Supreme Court held that causation elements in federal criminal statutes generally are satisfied only by proof that "the harm would not have occurred in the absence of—that is, but for—the defendant's conduct."[2] The Court acknowledged that the "text[] or context[]" of a particular federal criminal statute might, on rare occasions, require a departure from this "but-for" test.[3] The Court also appeared to acknowledge the existence of a more general exception for cases where the defendant's conduct is "independently sufficient" to bring about the harm.[4] Neither of these narrow exceptions was implicated

1. 134 S. Ct. 881 (2014). For state cases addressing *Burrage*'s implications, see, for example, Rollf v. State, 472 S.W.3d 490, 495–96 (Ark. Ct. App. 2015) (reaffirming, in spite of *Burrage*, Arkansas's Supreme Court rule that "where there are concurrent causes of death, conduct which hastens or contributes to a person's death is a cause of death" (quoting Cox v. State, 305 Ark. 244, 248 (1991))); People v. Alquicira, No. B247115, 2014 WL 2725986, at *9 (Cal. Ct. App. June 16, 2014) ("We find *Burrage* distinguishable."); People v. Wright, 854 N.W.2d 728, 728 (Mich. 2014) (denying defendant's motion for reconsideration "without prejudice to the defendant seeking [post-conviction] relief . . . based on *Burrage v. United States*"); State v. Bennett, 466 S.W.3d 561, 563 n.1 (Mo. Ct. App. 2015) ("We decline Defendant's invitation to reinterpret Missouri's felony-murder statute in light of *Burrage v. U.S.*" (citation omitted)); Commonwealth v. Kakhankham, No. 712 MDA 2014, 2015 WL 6508110, at *5 & n.6 (Pa. Super. Ct. Oct. 28, 2015) (relying on *Burrage* in concluding that Pennsylvania's statutory definition of causation '"establishes the "but-for" test of causation"' (quoting 18 PA. CONS. STAT. § 303 cmt. (2016))); Wagoner v. Commonwealth, 756 S.E.2d 165, 176 (Va. Ct. App. 2014) ("We are persuaded by *Burrage* that, where the legislature has not clarified otherwise, this Court should give the phrase 'results in' its ordinary meaning, which imports 'but for' causation."), *aff'd*, 770 S.E.2d 479 (Va. 2015).

2. *Burrage*, 134 S. Ct. at 887–88 (quoting Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2525 (2013)).

3. *Id.* at 888 ("Where there is no textual or contextual indication to the contrary, courts regularly read phrases like 'results from' to require but-for causality."). Just a few months after *Burrage*, the Supreme Court found just such a "'textual or contextual' reason to conclude otherwise" in the federal statutes governing restitution for victims of child-pornography offenses. Paroline v. United States, 134 S. Ct. 1710, 1727 (2014) (quoting *Burrage*, 134 S. Ct. at 888). The Court in *Paroline* did not, however, back off on *Burrage*'s holding that the but-for test exhausts the ordinary meaning of words like "cause" and "result." To the contrary, it characterized the "alternative causal tests" required under the restitution statutes as making use of "a kind of legal fiction or construct." *Id.* at 1724.

4. *Burrage*, 134 S. Ct. at 892 (holding that the statute in Burrage's case required but-for causation "at least where use of the drug distributed by the defendant is not an independently sufficient cause of the victim's death or serious bodily injury").

in Burrage's own case, however. So the Court applied the but-for test to Burrage and rejected the lower courts' "contribution" analysis.[5]

*Burrage* obviously isn't binding on state courts. State courts decide for themselves what their own state's statutes mean.[6] But *Burrage* nevertheless is likely to receive considerable attention from state courts. Like the federal criminal code, most state codes include no general provision defining the required causal relationship between a defendant's conduct and the proscribed result.[7] Accordingly, in giving content to statutory causation requirements, state courts generally have drawn on the same body of judge-made criminal law doctrine as the federal courts.[8] The state courts can hardly be expected, then, to ignore the Court's assertion in *Burrage* that the "but-for requirement is part of the common understanding of cause."[9] Nor can they be expected to ignore the Court's assertion that the but-for requirement "is one of the traditional background principles 'against which Congress legislate[s].'"[10]

Still, the question of *Burrage*'s implications for state law would be of little interest if *Burrage*'s holding were consistent with existing state law—if, as Justice Antonin Scalia asserted in his opinion for the Court, state courts "usually" interpret similarly worded criminal statutes to require but-for causation.[11] But Justice Scalia's assertion is mistaken. Though a few state courts appear to require but-for causation exclusively,[12] many more state courts have recognized one or both of two

5. *Id.* at 891–92.

6. *See* United States v. Thirty-Seven (37) Photographs, 402 U.S. 363, 369 (1971) ("[W]e lack jurisdiction authoritatively to construe state legislation.").

7. *See* MODEL PENAL CODE § 2.03 cmt. 5 (AM. LAW INST., Proposed Official Draft 1962) ("In the majority of jurisdictions that have adopted or considered revised codes, no explicit provision on causation has been included . . . .").

8. *See, e.g.*, State v. David, 141 P.3d 646, 651 (Wash. Ct. App. 2006) (holding that Washington's legislature, when it adopted the state's vehicular manslaughter statute, "implied that the judiciary should continue to define "proximate causation" according to common law principles"); Eric A. Johnson, *Dynamic Incorporation of the General Part: Criminal Law's Missing (Hyper)Link*, 48 U.C. DAVIS L. REV. 1831, 1838 (2015) (arguing that when the statutes defining an offense "fail adequately to articulate critical offense-requirements," like the causation requirement, courts generally should "construe the statutes as 'hyperlinked' to the still-evolving judge-made law of the General Part").

9. *Burrage*, 134 S. Ct. at 888.

10. *Id.* at 889 (alteration in original) (quoting Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2525 (2013)). The potential implications of *Burrage* for state criminal law were the focus of an amicus brief filed in *Burrage* on behalf of nine state attorneys general. *See* Brief of Amici Curiae States of Alaska, Colorado, Hawai'i, Kansas, New Mexico, South Dakota, Tennessee, Wisconsin, and Wyoming in Support of Respondent, *Burrage*, 134 S. Ct. 881 (No. 12-7515), 2013 WL 5616723.

11. *Burrage*, 134 S. Ct. at 889.

12. *E.g.*, State v. Bowen, 356 P.3d 449, 456 (Mont. 2015) ("A party's conduct is a cause-in-fact of an event if the event would not have occurred but for that conduct. Further, the

broad exceptions to the but-for test. The first exception assigns responsibility to any defendant who, though not a "but-for cause" of the result, nevertheless accelerates "even by a moment or instant of time"[13] the coming to fruition of the proscribed harm.[14] The second exception assigns responsibility to any defendant who "contributes" to the causal mechanism underlying the proscribed harm.[15] When state courts confront cases like *Burrage*, for example, where a defendant drug-dealer's conduct contributes incrementally to a purchaser's death but isn't a but-for cause, they routinely impose liability under a contribution theory.[16]

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defendant's conduct is not a cause of the event, if the event would have occurred without the conduct." (citation omitted)); State v. Muro, 695 N.W.2d 425, 432 (Neb. 2005) (holding that "conduct is not a proximate cause of an event if that event would have occurred without such conduct"); Commonwealth v. Spotti, 94 A.3d 367, 375 (Pa. Super. Ct. 2014) ("[T]he defendant's conduct must be an antecedent, but for which the result in question would not have occurred."), *appeal dismissed*, No. 1 WAP 2015, 2016 WL 617906 (Pa. 2016).

13. State v. Hanahan, 96 S.E. 667, 671 (S.C. 1918) (approving trial judge's instruction to the jury, which said in part that an injury inflicted by the defendant will count as a cause of the victim's death if it "even by a moment or instant of time hastens the death"); *see also* H. L. A. HART & TONY HONORÉ, CAUSATION IN THE LAW 352 (2d ed. 1985) ("The slightest shortening of life, for example, is homicide.").

14. 1 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 6.4(b), at 469 (2d ed. 2003).

15. *See, e.g.*, People v. Jennings, 237 P.3d 474, 496 (Cal. 2010) ("'When the conduct of two or more persons contributes concurrently as the proximate cause of the death, the conduct of each is a proximate cause of the death if that conduct was also a substantial factor contributing to the result.'" (emphasis omitted)); State v. Block, 89 A. 167, 169 (Conn. 1913) ("[I]t is not necessary that the act or omission was the direct cause of the death; it is sufficient if it was a contributory cause."); People v. Brown, 661 N.E.2d 287, 296 (Ill. 1996) ("[T]he defendant's act need only contribute to the victim's death to prove the defendant guilty of murder."); Miller v. State, 335 N.E.2d 206, 208 (Ind. 1975) ("An individual who inflicts injury upon another is deemed by law to be guilty of homicide if the injury contributes mediately or immediately to the death of that other person."); Commonwealth v. Osachuk, 681 N.E.2d 292, 294 (Mass. App. Ct. 1997) ("When the conduct of two or more persons contributes concurrently to the death, the conduct of each is the proximate cause, regardless of the extent to which each contributes."); People v. Bailey, 549 N.W.2d 325, 334 (Mich. 1996) ("In assessing criminal liability for some harm, it is not necessary that the party convicted of a crime be the sole cause of that harm, only that he be a contributory cause that was a substantial factor in producing the harm."); State v. Smith, 119 N.W.2d 838, 848 (Minn. 1962) ("Responsibility attaches for an injury which causes or contributes to death although the condition from which the victim was suffering might itself have caused death in time."); State v. Woods, No. W2003-02762-CCA-R3-CD, 2005 WL 396382, at *4 (Tenn. Crim. App. Feb. 17, 2005) ("It is only necessary that the defendant unlawfully contributed to the death of the deceased." (quoting State v. Richardson, 995 S.W.2d 119, 125 (1998))); Wilson v. State, 24 S.W. 409, 410 (Tex. Crim. App. 1893) (where defendant struck the victim on the head with a rock and someone else "stabb[ed] him with a knife, inflicting a mortal wound," the defendant's liability for homicide depends on whether "the blow with the rock contributed materially to the death"); State v. Rounds, 160 A. 249, 252 (Vt. 1932) ("The respondent's unlawful acts need not be the sole cause of death; it is sufficient if they were a contributory cause."); State v. Christman, 249 P.3d 680, 687 (Wash. Ct. App. 2011) ("Under the substantial factor test, all parties whose actions contributed to the outcome are held liable.").

16. *Osachuk*, 681 N.E.2d at 293–94 (applying the contribution test to a defendant who, by supplying the victim with drugs on multiple occasions, had contributed to his death from combined "cocaine, heroin and methadone intoxication"); *see also* People v. Wright, No. 308765,

Should state courts abandon their own causation rules for the Supreme Court's? The answer is no, as this Article explains. The Supreme Court's *Burrage* opinion fails on its own terms—as an analysis of the "ordinary meaning" of terms like "causes" and "results from." Scholars have long recognized that the but-for test fails in two very important respects to capture ordinary usage.[17] It fails, first, to capture ordinary usage in cases where the defendant's conduct preempts, or cuts off, another causal process that would in time have caused the same result.[18] And it fails, too, to capture ordinary usage in cases of "causal overdetermination," where the defendant's conduct, though it plays a role in the causal mechanism underlying the harm, is potentially superfluous.[19]

It is to these two categories of cases—preemption cases and overdetermination cases—that the state courts' acceleration and contribution rules are addressed. This isn't to say, however, that one of these two rules is addressed to the preemption problem and the other to the overdetermination problem. Rather, each of the two rules is addressed to *both* problems. The acceleration rule resolves some of the preemption cases and some of the overdetermination cases, while the contribution rule resolves cases from both categories that aren't resolved by the acceleration rule. The two rules complement one another, then, as the courts appear to have acknowledged by referring to them frequently together. In homicide cases, for example, courts often say that a defendant's conduct will qualify as a cause of the victim's death if his conduct "contributed to or accelerated the death."[20]

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2013 WL 6692747, at *5 (Mich. Ct. App. Dec. 19, 2013) (approving trial court's jury instructions to the effect that the heroin supplied by the defendant "only needs to be a contributing cause that was a substantial factor in the death of [the purchaser]"); *Christman*, 249 P.3d at 687–88 (applying the contribution test to a drug dealer who had supplied the victim with one of several controlled substances that had contributed to his death from intoxication).

17. *See* RESTATEMENT (THIRD) OF TORTS § 27 cmt. a at 385 (AM. LAW INST. 2010) ("There is near-universal recognition of the inappropriateness of the but-for standard for factual causation when multiple sufficient causes exist.").

18. *See* Richard W. Wright, *Causation in Tort Law*, 73 CALIF. L. REV. 1735, 1775 (1985) (explaining but-for test's shortcomings in cases of "preemptive causation").

19. *See* Eric A. Johnson, *Wrongful-Aspect Overdetermination: The Scope-of-the-Risk Requirement in Drunk-Driving Homicide*, 46 CONN. L. REV. 601, 633–34 (2013) (explaining but-for test's shortcomings in cases of "causal-overdetermination").

20. Turner v. State, 409 So. 2d 922, 923 (Ala. Crim. App. 1981) ("All that is required is that the jury be convinced from the evidence that the wounds inflicted by the accused were dangerous and contributed to or accelerated the death of the deceased . . . ."); *see also* Rollf v. State, 472 S.W.3d 490, 495–96 (Ark. Ct. App. 2015) ("[W]here there are concurrent causes of death, conduct which hastens or contributes to a person's death is a cause of death." (quoting Cox v. State, 808 S.W.2d 306, 309 (Ark. 1991))); People v. Brown, 216 P. 411, 413 (Cal. Ct. App. 1923) ("If appellant did not fire the last shot in self-defense, and if the wound inflicted by it contributed to or hastened Antior's death, the jury could properly find appellant guilty of homicide

In defending the state courts' acceleration and contribution rules, this Article will not quarrel with the way the Supreme Court framed the relevant question. Rather, the Article will assume, as the Supreme Court did in *Burrage*, that the various tests of cause-in-fact should be judged according to how well they capture "the plain man's notions of causation."[21] The Article also will assume, as the Supreme Court did in *Burrage*, that our efforts to capture this "common understanding of cause" in a test or rule necessarily are constrained by "the need for clarity and certainty," and for relative simplicity, in the criminal law.[22] Accordingly, the Article will not try to construct an exhaustive account of the astonishingly complex unspoken rules that underlie this common understanding.[23] Instead, the Article will show that the acceleration and contribution tests, like the but-for test they supplement, are defensible as heuristics—as shorthand tools for arriving at answers that are roughly in keeping with the ordinary person's understanding of causation.

This Article will begin, in Part I, with a very short introduction to the *Burrage* decision. It then will discuss, in sequence, the three causal heuristics that state courts apply in resolving questions of cause-in-fact: Part II will discuss the but-for test, which provides the right answer to the cause-in-fact question in ordinary causal situations; Parts III and IV will discuss the acceleration and contribution tests, which together provide the right answer in cases of preempted or overdetermined causation.

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by reason of that shot . . . ."); People v. Cox, 228 P.2d 163, 165 (Colo. 1951) ("I may not wantonly attack a dying man, and if thereby I hasten or contribute to his death, it is no defense that he would have died in any event."); Lawson v. State, 561 S.E.2d 72, 73 (Ga. 2002) ("[W]e conclude that the jury was authorized to find from the extensive medical evidence presented at trial that even if appellant's beating did not directly cause the victim's death, the beating either materially contributed to the death or materially accelerated it."); State v. Wood, 84 N.W. 520, 521 (Iowa 1900) ("No principle is better settled than that he who, by his wrongful act, accelerates or hastens death, or contributes to its cause, is guilty of homicide . . . ."); State v. Jones, 598 So. 2d 511, 514 (La. Ct. App. 1992) ("If the act hastened the termination of life, or contributed directly or indirectly to the victim's death, in a degree sufficient to be a clearly contributing cause, the defendant's act constituted the 'legal cause' of death."); State v. McDonald, 953 P.2d 470, 474 (Wash. Ct. App. 1998) (holding that a defendant qualifies as a cause of the victim's death if '"the act of the accused contributed to or accelerated his death"' (quoting United States v. Kinder, 14 C.M.R. 742, 767 (A.B.F.R. 1954)), *aff'd*, 981 P.2d 443 (Wash. 1999); State v. Reedy, 127 S.E.24, 29 (W. Va. 1923) ("[I]f the jury believed that the defendant contributed to, hastened, or accelerated the death of the deceased, then they would have been justified in finding him guilty of the homicide . . . ."); State v. Rice, 156 N.W.2d 409, 417 (Wis. 1968) ("[P]rior injury and even one which will or might lead to death does not affect the liability for homicide of an accused whose act contributed to or accelerated the death . . . .").

21. HART & HONORÉ, *supra* note 13, at 1 ("[I]t is the plain man's notions of causation (and not the philosopher's or the scientist's) with which the law is concerned . . . .").

22. Burrage v. United States, 134 S. Ct. 881, 888, 891 (2014).

23. *See* HART & HONORÉ, *supra* note 13, at xxxiii ("[T]he concept of causation, as we use it in ordinary life, is not a unitary one.").

## I. *BURRAGE V. UNITED STATES*

The petitioner in *Burrage*, Marcus Burrage, sold heroin to Joshua Banka, who died of "mixed-drug intoxication" shortly after injecting it.[24] Several different drugs (or their metabolites) were present in Banka's system when he died, including heroin, oxycodone, clonazepam, and alprazolam.[25] Though all of these drugs but the heroin were present only at therapeutic levels, all of them contributed—by depressing Banka's central nervous system—to the causal mechanism behind Banka's death.[26] As a result, neither the pathologist who performed the autopsy nor the toxicologist who tested Banka's blood could say that Banka would not have died "but for" his use of the heroin supplied by Burrage.[27] Instead, they could say only that the heroin was a "contributing factor."[28]

For his role in Banka's death, the government charged Burrage under 21 U.S.C. § 841(b)(1)(C), which makes heroin dealers subject to enhanced sentences if "death or serious bodily injury results from the use of such substance."[29] At Burrage's trial, defense counsel proposed a jury instruction that would have required the government to prove, among other things, that the heroin supplied by Burrage was a but-for cause of Banka's death.[30] Specifically, the instruction would have required the government to prove that '"except for [Burrage's conduct] the death would not have occurred."'[31] The district court declined so to instruct the jury.[32] Instead, the court instructed the jury—in keeping with the 2005 decision of the U.S. Court of Appeals for the Eighth Circuit in *United States v. Monnier*[33]—that the government was required merely to prove that the heroin supplied by Burrage "was a contributing cause."[34] The jury convicted Burrage,[35] and the Eighth Circuit affirmed the conviction on appeal.[36] The Eighth Circuit panel concluded, first, that an event need merely be a "contributing cause" to satisfy the causation requirement in 21 U.S.C. § 841(b)(1)(C),[37] and, second, that the testimonies of the

24. *Burrage*, 134 S. Ct. at 885–86.
25. *Id.* at 885.
26. *Id.*
27. *Id.* at 885–86.
28. *Id.*
29. *Id.* at 885 (quoting 21 U.S.C. § 841(a)(1), (b)(1)(A)–(C) (2012)).
30. *Id.* at 886.
31. *Id.*
32. *Id.*
33. 412 F.3d 859 (8th Cir. 2005).
34. *Burrage*, 134 S. Ct. at 886.
35. *Id.*
36. *Id.*
37. United States v. Burrage, 687 F.3d 1015, 1021 (8th Cir. 2012).

pathologist and the toxicologist were sufficient to sustain the verdict.[38] The Supreme Court reversed.[39] Justice Scalia, writing for the Court, said that the statute required but-for causation:

> [A]t least where use of the drug distributed by the defendant is not an independently sufficient cause of the victim's death or serious bodily injury, a defendant cannot be liable under the penalty enhancement provision of 21 U.S.C. § 841(b)(1)(C) unless such use is a but-for cause of the death or injury.[40]

Justice Scalia implied, moreover, that the same interpretation would be required of any federal criminal statute that includes causation as an element, at least in the absence of some "textual or contextual indication to the contrary."[41] The bases for the Court's adoption of the but-for test as the exclusive—or nearly exclusive—test of factual causation under federal criminal law were twofold. First, the Court relied on ordinary usage. '"[I]n common talk,"' said the Court, phrases like "results from," "because of," and "by reason of" are used to '"indicate[] a but-for causal relationship."'[42] Second, the Court relied on the legal "background" against which Congress had adopted 21 U.S.C. § 841(b)(1)(C).[43] In particular, the Court relied on the Model Penal Code and on decisions by "[s]tate courts, which hear and decide the bulk of the Nation's criminal matters."[44]

This Article will show, in the sections that follow, both that the but-for test often fails to capture ordinary usage and that the state courts rarely have treated the but-for test as the exclusive measure of cause-in-fact. It's worth pausing briefly, though, to consider just how the Court arrived at the opposite view.

First, for the proposition that state courts "usually" have required but-for causation—as opposed to, say, "contribution"—the Court relied on just two state-court criminal cases, one from Iowa and the other from Michigan.[45] In neither of these two jurisdictions, though, have the courts

38. *Id.* at 1024.

39. *Burrage*, 134 S. Ct. at 892.

40. *Id.*

41. *Id*. at 888.

42. *Id.* at 887, 889 (quoting Safeco Ins. Co. of Am. v. Burr, 551 U.S. 47, 63 (2007)).

43. *Id.* at 889.

44. *Id.* at 888–90.

45. *Id.* at 889 (citing People v. Wood, 741 N.W.2d 574, 575–78 (Mich. 2007); State v. Hennings, 791 N.W.2d 828, 833–35 (Iowa 2010)). In support of its claim that state courts "usually interpret similarly worded criminal statutes" to require but-for causation, the Court also cited a case where the statute at issue codified criminal procedure's fruit of the poisonous tree doctrine. *Id.* (citing State v. Richardson, 245 S.E.2d 754, 763 (N.C. 1978)). The Court's reliance on this

consistently treated the but-for test as the exclusive test of cause-in-fact. To the contrary, both the Iowa and Michigan courts sometimes have applied a "contribution" test. The Michigan Supreme Court has said, for example, that a criminal defendant who contributes to the harm qualifies as a cause of the harm,[46] even if "another contributory cause would have [caused the harm] without the aid of this act."[47] Likewise, the Iowa Supreme Court has said that, in homicide cases, a defendant is responsible for the victim's death if his acts "hasten or contribute to or cause death sooner than it would otherwise occur."[48]

Second, for the proposition that the but-for test reflects the "traditional understanding" of causation in criminal law,[49] the Court relied in part on section 2.03 of the Model Penal Code, which appears to adopt the but-for test as the Code's exclusive test of cause-in-fact.[50] The Court also relied in part on the history of section 2.03. It pointed out that the American Law Institute (ALI), in adopting section 2.03, specifically had rejected an amendment that would have created a broad exception to the but-for test.[51] The amendment, which Professor Jerome Hall proposed during debate on section 2.03, would have added to section 2.03 the words: "or

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case was seriously misplaced. Causation plays a fundamentally different role in criminal procedure than it does in substantive criminal law. *See* Eric A. Johnson, *Causal Relevance in the Law of Search and Seizure*, 88 B.U. L. REV. 113, 157–61 (2008).

46. People v. Bailey, 549 N.W.2d 325, 334 (Mich. 1996). The Michigan case relied on by the Supreme Court in *Burrage* and *People v. Wood* did not raise questions of concurrent causation. *Wood*, 741 N.W.2d at 578. On the contrary, the defendant's conduct in *Wood* easily satisfied the but-for test: "Because the officer's death would not have occurred absent defendant's fleeing and eluding, i.e., the police officer would not have lost control of his vehicle during the pursuit of the fleeing defendant, factual causation exists." *Id.*

47. *Bailey*, 549 N.W.2d at 334 (quoting ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 783 (3d ed. 1982)).

48. State v. Smith, 34 N.W. 597, 601 (Iowa 1887) ("It surely ought not to be the law that because a person is afflicted with a mortal malady, from which he must soon die, whether his ailment be caused by natural or artificial causes, another may be excused for acts of violence which hasten or contribute to or cause death sooner than it would otherwise occur."). Other state courts frequently have quoted this statement from *Smith*. *See, e.g.*, Rutledge v. State, 15 P.2d 255, 257 (Ariz. 1932); People v. Cox, 228 P.2d 163, 165 (Colo. 1951); State v. Locke, 2014 WL 839202, at *3 (N.J. Super. Ct. App. Div. Mar. 5, 2014); State v. McDonald, 953 P.2d 470, 475 n.6 (Wash. Ct. App. 1998). Current Iowa law on this subject is somewhat unclear. In *State v. Tribble*, the Iowa Supreme Court said that the but-for test "requires further assistance" in cases of concurrent causation. 790 N.W.2d 121, 126–27 (Iowa 2010). But the court gave mixed signals as to exactly what sort of "further assistance" was required. On one hand, the court implied that the exception to the but-for test would be limited to contributions that were sufficient "alone" to cause the result. *Id.* at 127. On the other hand, the court appeared to endorse § 27 of the Restatement (Third) of Torts, which does not require that the defendant's contribution be independently sufficient. *Id.* at 127 & n.2. For a discussion of the Restatement's position, see *infra* text accompanying notes 109–14.

49. *Burrage*, 134 S. Ct. at 888.

50. *See* MODEL PENAL CODE § 2.03(1)(a) (AM. LAW INST., Proposed Official Draft 1962) (providing that a defendant's conduct will qualify as a cause-in-fact only if "it is an antecedent but for which the result in question would not have occurred").

51. *Burrage*, 134 S. Ct. at 890.

which was a substantial factor in producing that result."[52] The ALI rejected the amendment by a vote of 36 to 32.[53]

The Court's reliance on the Model Penal Code and on the ALI debates is misplaced, however. Though Model Penal Code section 2.03 does, indeed, adopt a version of the but-for test, the commentary to section 2.03 explains that the drafters thought the test could be adjusted to accommodate cases of concurrent causation.[54] In cases of concurrent causation, says the commentary, "the result . . . should be viewed as including the precise way in which the forbidden consequence occurs."[55] The Code's reporter, Herbert Wechsler, illustrated this refinement in his verbal response to Hall's proposed amendment. Under section 2.03, he said, if the victim had died from two simultaneous bullet wounds, the result would be described as death "from two bullet wounds,"[56] not merely as "death." In resolving this case, then, the fact finder would *not* decide simply whether the victim "would not have died" but for the defendant's conduct. Rather, the fact finder would decide whether the victim would not have died *from two bullet wounds* but for the defendant's conduct.[57] This refined version of the but-for test would, Wechsler said, produce the right result in cases involving concurrent causation. It would make "each of [the two bullet wounds] an antecedent but for which the result in question would not have occurred."[58]

Wechsler's proposed refinement of the but-for test, though it has proven popular among scholars,[59] never really caught on with judges[60]—

52. *Thursday Morning Session, May 24, 1962*, 39 A.L.I. PROC. 135, 135 (1962) [hereinafter ALI PROCEEDINGS].

53. *Id.* at 139.

54. MODEL PENAL CODE § 2.03 cmt. 2 at 259.

55. *Id.*

56. ALI PROCEEDINGS, *supra* note 52, at 137; *see also* MODEL PENAL CODE § 2.03 cmt. 2 at 259 (explaining that, in a case where the victim dies from two simultaneous mortal blows, "the result should be characterized as 'death from two mortal blows'").

57. *See* ALI PROCEEDINGS, *supra* note 52, at 137; *see also* MODEL PENAL CODE § 2.03 cmt. 2 at 259 ("So described, the victim's demise has as but-for causes each assailant's blow.").

58. ALI PROCEEDINGS, *supra* note 52, at 137.

59. *See, e.g.*, JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 187–88 (5th ed. 2009) ("A preferable method of resolving the causal quandary [in cases of concurrent causation] is to retain the but-for test in these circumstances, but to elaborate on it. Two extra words are added, so that the test becomes: 'But for *D*'s voluntary act would the social harm have occurred when *and as* it did?' In essence, this technique refines the description of the result for which the defendants are prosecuted." (footnote omitted)); J.L. MACKIE, THE CEMENT OF THE UNIVERSE 46–47 (1974) (arguing that the but-for test delivers the right result in the poisoned-canteen hypothetical if the result is described not as the victim's "death" but as her "death from thirst"); PERKINS & BOYCE, *supra* note 47, at 773 ("Whenever that would not have happened when and as it did happen, had it not been for this, this is an actual cause of that." (emphasis omitted)).

60. Richard W. Wright, *The NESS Account of Natural Causation: A Response to Criticisms*, *in* PERSPECTIVES ON CAUSATION 285, 294 (Richard Goldberg ed., 2011) ("The courts and the secondary literature generally do not qualify the consequence by specifying its non-salient details

perhaps with good reason, as this Article will explain later.[61] What matters for present purposes, though, is that this refined version of the but-for test is at least as broad as the "contribution" test that the Court derided in *Burrage.* In *Burrage* itself, for example, Wechsler's test would have permitted the fact finder to assign responsibility to Burrage if, but for Burrage's conduct, victim Joshua Banka would not have died *from the combined effects of heroin, oxycodone, clonazepam, and alprazolam*. The Court was wrong, then, when it relied on the Model Penal Code, and on the ALI's rejection of Hall's proposed amendment, in support of its claim that "the traditional understanding" of causation would require application of the *un*refined but-for test in *Burrage.*[62]

The real trouble with *Burrage*, of course, is not that the Court relied on the wrong authorities. The real trouble with *Burrage*, as this Article will explain, is that the but-for test, when applied as an exclusive test of cause-in-fact, delivers results that are starkly at odds with the common understanding of causation.

## II. THE BUT-FOR TEST

The but-for test has real virtues. First, it assigns liability even in cases where the defendant's conduct is not the "immediate cause" of the result.[63] Take, for example, *Brackett v. Peters*,[64] where defendant Randy Brackett argued that his elderly victim's death from asphyxiation had not been "caused" by his brutal assault on her of one month before.[65] Brackett complained that the victim had died from choking on food at a nursing home, not from any of the injuries he had inflicted on her.[66] The U.S. Court of Appeals for the Seventh Circuit, in an opinion by Judge Richard Posner, relied on the but-for test in rejecting Brackett's argument.[67] Brackett's assault, said Judge Posner, had set in motion his elderly victim's physical decline, which ultimately had left her too weak to expel the food that had become lodged in her trachea.[68] Thus, "had she not been assaulted," she would not have "entered the hospital the next day and died a month later."[69] In cases like *Brackett*, the but-for test produces what

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or the time, location or manner of its occurrence when describing or applying the *sine qua non* analysis.").

61. *See infra* text accompanying notes 147–53.

62. Burrage v. United States, 134 S. Ct. 881, 888–90 (2014).

63. *See* Glanville Williams, *Causation in the Law*, 1961 CAMBRIDGE L.J. 62, 65.

64. 11 F.3d 78 (7th Cir. 1993).

65. *Id.* at 79.

66. *Id.* at 79–80.

67. *Id.* at 79 (explaining that cause-in-fact requires proof that "the event would not have occurred without the act").

68. *Id.* at 80.

69. *Id.*

everyone agrees is the right result: the ascription of responsibility to defendants whose conduct, though perhaps not strictly the "cause" of the harm,[70] was a "cause of the cause."[71]

A second virtue of the but-for test is that a defendant's responsibility under the test does not depend on the magnitude of the defendant's contribution to the causal mechanism underlying the result. Under the but-for test, the defendant's conduct need not be sufficient "in itself," or sufficient in isolation from other non-background causal factors,[72] to bring about the result. Rather, as the Supreme Court acknowledged in *Burrage*, a defendant's conduct will qualify as a but-for cause even if it "combines with other factors to produce the result, so long as the other factors alone would not have done so—if, so to speak, it was the straw that broke the camel's back."[73] In the Court's illustration: "[I]f poison is administered to a man debilitated by multiple diseases, it is a but-for cause of his death even if those diseases played a part in his demise, so long as, without the incremental effect of the poison, he would have lived."[74] In this respect too, then, the but-for test produces the right result, namely, the ascription of responsibility to defendants whose conduct, though not sufficient "in itself" to cause the result, still makes a critical contribution.

To the degree that the but-for test identifies these sorts of contributions—indirect contributions and minor but critical contributions—as *sufficient* to trigger responsibility, it is useful and

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70. *See* HART & HONORÉ, *supra* note 13, at 74–76 (acknowledging that an ordinary user of English would not describe actor A as having "caused" a broken window, "where *A* hits *B*, who staggers against a glass window and breaks it").

71. *Causa Causae Est Causa Causati*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining "causa causae est causa causati" as "[t]he principle that the cause of the cause (rather than only the immediate cause) should also be considered as the cause of the effect"); *see also* 1 MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN 428 (1800) (explaining that if "fever or gangrene was the immediate cause of [the victim's] death, yet the wound [inflicted by the defendant] was the cause of the gangrene or fever," the defendant's conduct—as the "causa causati," or "cause of the cause"—nevertheless qualifies as a cause of death).

72. The distinction between background and non-background causal factors is discussed briefly later in the text accompanying notes 108–14.

73. Burrage v. United States, 134 S. Ct. 881, 888 (2014) ("Thus, if poison is administered to a man debilitated by multiple diseases, it is a but-for cause of his death even if those diseases played a part in his demise, so long as, without the incremental effect of the poison, he would have lived."); *see also* 1 HALE, *supra* note 71, at 428 ("If a man give another a stroke, which it may be, is not in itself so mortal, but that with good care he might be cured, yet if he die of this wound within the year and day, it is homicide or murder, as the case is, and so it hath been always ruled.").

74. *Burrage*, 134 S. Ct. at 888.

uncontroversial.[75] The hard question is whether, as the Supreme Court held in *Burrage*, the but-for test also defines a *necessary* condition of criminal liability. In other words, the hard question is whether the but-for test operates not only as a rule of *inclusion* but also as a rule of *exclusion.* If the but-for test operates as a rule of exclusion—if a defendant's conduct must satisfy the but-for test to count as a cause-in-fact—then the test creates two anomalies, one arising from spurious causal sufficiency and the other arising from causal overdetermination.

### A. *The But-For Test's Spurious-Sufficiency Problem*

The but-for test proves unworkable, first, in cases where the defendant's conduct cuts off, or "preempts," a separate causal mechanism that would have caused the same result if the defendant's conduct had not. To illustrate: Suppose that Bob, with the intent to kill Mary, puts a deadly poison into Mary's tea. After Mary drinks the poisoned tea, but before the tea takes effect, another would-be killer, Dave, shoots Mary from outside her window. The shot is instantly fatal.[76] In this hypothetical, Dave's conduct rather than Bob's is the cause-in-fact of Mary's death, as everyone agrees.[77] But Dave's conduct isn't a but-for

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75. *See* State v. Tribble, 790 N.W.2d 121, 126–27 (Iowa 2010) (holding that the but-for test produces the right result in most cases but "requires further assistance" in cases of concurrent causation); 1 DAN B. DOBBS, THE LAW OF TORTS § 168, at 409 (2000) (observing that the but-for test provides the right answer to the cause-in-fact question in "the great mass of cases"); Richard Fumerton & Ken Kress, *Causation and the Law: Preemption, Lawful Sufficiency, and Causal Sufficiency*, LAW & CONTEMP. PROBS., Autumn 2001, at 83, 95–96 ("The 'but for' test seems to work well with garden-variety examples of causation.").

76. HART & HONORÉ, *supra* note 13, at 124 (discussing the same example); *see also* Wright, *supra* note 18, at 1775, 1795 (same); Richard W. Wright, *Once More into the Bramble Bush: Duty, Causal Contribution, and the Extent of Legal Responsibility*, 54 VAND. L. REV. 1071, 1112–13 (2001) (same).

77. *See* Wright, *supra* note 18, at 1795 ("[E]ven if *P* actually had drunk the poisoned tea, *C*'s poisoning of the tea still would not be a cause of *P*'s death if the poison did not work instantaneously but the shot did."); *see also* HYMAN GROSS, A THEORY OF CRIMINAL JUSTICE 243–44 (1979) ("[N]either the responsibility principle nor anything else bearing on liability requires that we not hold the accused liable when what someone else did would have caused the death in any case (though it didn't). We determine liability not according to what fate had in store for the victim, but according to the conduct of the accused and the harm that it produced."); HART & HONORÉ, *supra* note 13, at 124–25 (observing that the but-for test produces anomalous and "absurd" results in cases like these); PERKINS & BOYCE, *supra* note 59, at 773 ("Suppose, for example, an unarmed man is so completely surrounded by enemies bent on his destruction, and armed with knives, that he has no possible chance to escape; but only one blow is struck because it is instantly fatal. It may be very true that without this blow he would have been killed at almost the same instant by some other knife; but no amount of repetition . . . can conceal the fact that the actual cause of death was the blow struck."); Fumerton & Kress, *supra* note 75, at 96 ("[I]ntuitively, we want the gunshot to be the cause (or at least a causally relevant factor) of [Dave's] death."); J. L. Mackie, *Causes and Conditions*, 2 AM. PHIL. Q. 245, 251 (1965)

cause. That is, since Mary would have died from the poisoned tea if Dave had not shot her, Dave's conduct is not "an antecedent but for which the result in question would not have occurred."[78] Even in this straightforward hypothetical, then, the but-for test produces a result that is starkly at odds with common sense.

It is tempting, at first, to think that the answer to this difficulty lies in the "independently sufficient" exception to the but-for test, as tentatively articulated by the Supreme Court in *Burrage.*[79] After all, Dave's conduct—firing the fatal shot at Mary—does appear to have been independently sufficient to bring about Mary's death. But this resort to the independently-sufficient exception doesn't work. The trouble with the exception is that Bob's earlier conduct—putting deadly poison into Mary's tea—*also* appears to have been independently sufficient to cause Mary's death. This isn't the answer we wanted, of course; Bob's conduct cannot really be a cause-in-fact of Mary's death, since Dave entirely cut off the causal processes set in motion by Bob.[80] Thus, the exception for independently sufficient conduct, like the but-for test itself, provides the wrong answer to the question of who caused Mary's death. The but-for test says, wrongly, that *neither* Bob nor Dave caused Mary's death. The independently-sufficient-causes test says, wrongly, that *both* men caused it.

The failures of both tests to provide the right answer in Mary's case are traceable to the same basic difficulty, namely, the difficulty we

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(concluding that "we can say that A was a necessary condition *post factum*" where "*A* combines with one set of the standing conditions . . . by one route: but the absence of *A* would have combined with another set of . . . conditions to [cause] the same result by another route"); Williams, *supra* note 63, at 72 ("Suppose that D and E independently entrust loaded guns to a boy of eight. Such conduct is negligent. The boy, having both guns in his possession, uses D's gun to shoot P. D is liable to P, since his negligent act was a factual cause (and also a legal cause) of the injury. D cannot defend himself by saying that, even if he had not lent the gun, the boy would have shot P with E's gun.").

78. *See* MODEL PENAL CODE § 2.03(1)(a) (AM. LAW. INST., Proposed Official Draft 1962).

79. *Burrage*, 134 S. Ct. at 890 (declining to decide whether the but-for test is subject to an exception for "independently sufficient" concurrent causes, "since there was no evidence here that Banka's heroin use was an independently sufficient cause of his death").

80. *See* People v. Bonilla, 467 N.Y.S.2d 599, 621 (N.Y. App. Div. 1983) ("[I]f the defendant has inflicted a wound which would prove fatal and a third party comes along while the victim has but hours to live and kills him instantly, the third-party's act substantially hastening death constitutes the cause of death and the defendant cannot be convicted of homicide."), *aff'd sub nom.* People v. Eulo, 472 N.E.2d 286 (N.Y. 1984); State v. Wood, 53 Vt. 560, 566 (1881) ("If one inflicts a mortal wound, but before death ensues, another kills the same person by an independent act, without concert with, or procurement of, the first man, how can he be said to have done the killing?"); Wright, *supra* note 18, at 1795 ("[E]ven if *P* actually had drunk the poisoned tea, *C*'s poisoning of the tea still would not be a cause of *P*'s death if the poison did not work instantaneously but the shot did.").

encounter in trying to distinguish *spurious*, or preempted, causal sufficiency—like the sufficiency of the poisoned tea in our hypothetical—from *genuine* causal sufficiency.[81] It is the apparent causal sufficiency of the poisoned tea that makes the shooting by Dave unnecessary to the result and thereby defeats the application of the but-for test.[82] Likewise, if more obviously, it is the apparent causal sufficiency of the poisoned tea that makes the poisoning itself satisfy, or appear to satisfy, the exception for independently sufficient causes.

At first glance, it seems as though this underlying difficulty would be easy to resolve. What appears to be required is just a clear articulation of the distinction between spurious and genuine causal sufficiency. Unfortunately, articulating this distinction is harder than it would appear to be.

Efforts to articulate a rigorous definition of causal "sufficiency" date back at least to the 1950s and 1960s, when H.L.A. Hart and Tony Honoré and, separately, J.L. Mackie advanced theories of causation that assigned a central role to the causal "sufficiency" of sets of conditions.[83] Though Hart and Honoré's and Mackie's accounts differed in some particulars, both accounts shared the recognition (1) that causation isn't just about causal *necessity* (as the but-for test appears to be) but is fundamentally about causal *sufficiency* as well; and (2) that what are *sufficient* to produce particular results are not individual conditions or events but rather "sets" of conditions and events.[84] The influence of these accounts—which Professor Richard Wright later refined and defended[85]—is evident in, among many other things, the Restatement (Third) of Torts, which assigns responsibility to any defendant whose conduct is necessary to the sufficiency of at least one "sufficient causal set."[86]

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81. *See* HART & HONORÉ, *supra* note 13, at 124 ("[B]ecause of the presence of the first [spuriously sufficient set of conditions] we cannot say the 'harm' would not have happened without [the real cause]."); MICHAEL S. MOORE, CAUSATION AND RESPONSIBILITY 86–87 (2009) (referring to this phenomenon as "pre-emptive overdetermination").

82. HART & HONORÉ, *supra* note 13, at 124.

83. *Id.* at 111 (asserting that a defendant's conduct will qualify as a cause-in-fact only if it "is necessary to complete [a sufficient causal] set . . . linked by regular sequence to the consequent"); Mackie, *supra* note 77, at 245 (arguing that part of what we mean when we identify a particular event as a cause is that "there is a set of conditions . . . which combined with the [event] constituted a complex condition that was sufficient for the [result]").

84. HART & HONORÉ, *supra* note 13, at 109–14 (ascribing to John Stuart Mill, and endorsing, the idea that "the cause of an event is a special member of a complex set of conditions which [together] are sufficient to produce that event in the sense that the set is 'invariably and unconditionally' followed by it"); Mackie, *supra* note 77, at 245 (explaining his "INUS" test for causation, which requires that the relevant event be "an *insufficient* but *necessary* part of a [complex] condition which is itself *unnecessary* but *sufficient* for the result").

85. *See* Wright, *supra* note 18, at 1774–1801.

86. RESTATEMENT (THIRD) OF TORTS § 27 cmt. f at 380 (AM. LAW. INST. 2010).

Despite the influence of the sufficiency-centered account of causation, scholars have struggled to articulate the distinction between spurious and genuine causal sufficiency.[87] Probably the most fully developed account of this distinction is Wright's.[88] Wright argues that a causal set is genuinely sufficient only if the causal set is "fully instantiated"—only, that is, if *all* the conditions for the coming to fruition of the result ultimately are satisfied.[89] This sufficient set of conditions always will include, however, a temporal condition.[90] A set of conditions, as Wright argues, is truly sufficient only if it cannot be preempted by another causal process—only if no time remains during which another causal process might preempt it, in other words.[91] This means, however, that a causal set is truly "sufficient" only if "the instantiation of all the conditions in the [causal set] entails the *immediate* instantiation of the [result]."[92] On this view, then, the sufficient causal set consists exclusively of conditions that existed, or were "instantiated," in the moment before the result occurred.

Unfortunately, this account of causal sufficiency leaves out what really concerns us, namely, the defendant's conduct. The defendant's conduct, which will have occurred seconds, hours, or days before the result, obviously is not a member of the set of conditions that immediately precedes the result. To connect the defendant's conduct to the result, the fact finder would have to construct a sequence of intermediate causal sets—a series of time slices, each defined as a complex set of

87. *Id.* § 26 reporters' note cmt. k at 373 ("There are a number of quite puzzling situations . . . in which there is no rigorous method for determining whether a cause is an actual one or a preempted one."); David A. Fischer, *Insufficient Causes*, 94 KY. L.J. 277, 308–12 (2005) (discussing the difficulty of distinguishing "'[e]mpirically' sufficient conditions"—conditions that "'would-have-been sufficient' if they had not been preempted"—from "'causally' sufficient conditions"); Fumerton & Kress, *supra* note 75, at 101–02 (exploring the difficulties that Richard Wright has encountered in using his variant of the necessary-element-of-a-sufficient-set to distinguish genuine from preempted causal factors).

88. *See* Fumerton & Kress, *supra* note 75, at 83 (describing the importance of Wright's work in developing and refining Hart and Honoré's "necessary element" of a sufficient set approach).

89. Wright, *supra* note 60, at 298 ("For causal sufficiency, the condition at issue must be part of the instantiation of a fully instantiated causal law that is part of a sequence of such fully instantiated causal laws that link the condition at issue with the consequence.").

90. *See* Kenneth J. Rothman, *Causes*, 104 AM. J. EPIDEMIOLOGY 587, 588 (1976) ("The inevitability of disease after a sufficient cause calls for qualification: disease usually requires time to become manifest, and during this gestation, while disease may no longer be preventable, it might be fortuitously cured, or death might intervene."); Wright, *supra* note 18, at 1795 ("[A] necessary condition for the sufficiency of any set of actual antecedent conditions is that the injury not have occurred already as a result of other actual conditions outside the set.").

91. *See* Wright, *supra* note 76, at 1126 ("Although the second fire would have been sufficient to burn the house down if the first fire had not already destroyed the house, it was not actually sufficient because the first fire had already destroyed the house." (emphasis omitted)).

92. Wright, *supra* note 60, at 289 (emphasis added).

conditions—connecting the moment of the defendant's conduct to the moment of the result.[93] Is this really what ordinary people do, unconsciously, when they identify conduct as the "cause" of a particular result? Maybe.[94] But if courts were to require fact finders to apply, consciously, the very complex rules underlying these sorts of unconscious, ascriptive processes, the fact finders' work would be impossibly complex.[95] Something else is required.

### B. *The But-For Test's Causal-Overdetermination Problem*

The but-for test also proves unworkable in cases of causal overdetermination, where the defendant's conduct contributes to the causal mechanism underlying the result but is potentially superfluous. Suppose that two assailants, without preconcert, simultaneously and with intent to kill shoot the same victim.[96] Both bullets strike the victim at the same instant, and both prove instantly fatal.[97] In this case, since either assailant's conduct by itself would have caused the victim's death, neither assailant's conduct is necessary.[98] Neither assailant's conduct is a but-for cause, then. Absolving both assailants of responsibility would be bizarre, however, as everyone acknowledges.[99] So the but-for test requires an exception.

Notice, first, how cases like this one differ from the spurious-sufficiency cases. In the spurious-sufficiency cases, one or another of multiple causal processes gets preempted or cut off—and so is deprived

93. *See id.* at 291 ("When analysing singular instances of causation, an actual condition *c* was a cause of an actual condition *e* if and only if *c* was a part of (rather than being necessary for) the instantiation of one of the abstract conditions in the completely instantiated antecedent of a causal law, the consequent of which was instantiated by *e* immediately after the complete instantiation of its antecedent, *or (as is more often the case) if* c *is connected to* e *through a sequence of such instantiations of causal laws*." (emphasis added)); *cf.* Fumerton & Kress, *supra* note 75, at 103 ("Perhaps for X to be a cause of Y, X must be part of a causal *chain* running through time where each link in the causal chain is just prior to the next link in the causal chain.").

94. *Cf.* Wright, *supra* note 60, at 290 ("[T]he generalisations that we employ usually refer elliptically to a large number of simultaneously or successively operative causal laws.").

95. *Cf.* HART AND HONORÉ, *supra* note 13, at 39–41 (explaining that, in ordinary usage, the identification of a particular event as a "cause" usually does not hinge on the identification of later, mediating states of affairs as "causes" as well; indeed, we generally "refus[e] the title of cause to events which are later phases in processes initiated by abnormal events or interventions"). For comparison, imagine what would happen if an outfielder tried to calculate every fly ball's trajectory before fielding it.

96. MODEL PENAL CODE § 2.03 cmt. 2 at 258–59 (AM. LAW. INST., Proposed Official Draft 1962).

97. *Id.*

98. *Id.* at 259.

99. *Id.*; *see also* 1 LAFAVE, *supra* note 14, § 6.4(b), at 468–69 (acknowledging that, in this two-assailant scenario, both assailants must be regarded as having caused the victim's death).

of any effect. By contrast, in the two-assailant hypothetical, and in other overdetermination cases, none of the multiple causal processes gets cut off. Rather, "at the very instant of death," each continues to operate—and to contribute to the result.[100] Each of the operative causal processes is individually superfluous, however, since even in its absence the others would (or might) have brought about the same result. None of the processes satisfies the but-for test, then, even though some or all of them must, logically, qualify as causes.[101]

Everybody, including the Supreme Court in *Burrage*, appears to acknowledge that overdetermination cases require an exception to the but-for test.[102] In *Burrage*, though, the Court proposed a very narrow exception targeted exclusively at the two-assailant hypothetical. Again, it suggested that the but-for test might require an exception for cases where the conduct of each of several actors is "an independently sufficient cause of the victim's death or serious bodily injury."[103] The Court was not the first to propose this test. The drafters of the Restatement of Torts, for example, also espoused the "independently sufficient" test. The First Restatement, as adopted in 1934, said that but-for causation was not required "[i]f two forces are actively operating, one because of the actor's negligence, the other not because of any misconduct on his part, and *each of itself is sufficient to bring about harm to another*."[104]

The proposed "independently sufficient" exception is itself problematic, though. Part of the trouble with this formula is that individual events never really are "independently sufficient" to cause other events.[105] Rather, as John Stuart Mill said, the antecedents in causal relationships consist of *sets* of "conditions, positive and negative taken together; the whole of the contingencies of every description, which being realized, the consequent invariably follows."[106] For example, though it might be tempting to say that a smoker's disposal of a cigarette

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100. *See* People v. Lewis, 57 P. 470, 473 (Cal. 1899).

101. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 241 (1989) (acknowledging that, in cases like these, the but-for test would lead to the absurd conclusion that the result "may not have any 'cause' at all").

102. Burrage v. United States, 134 S. Ct. 881, 892 (2014) (implicitly acknowledging that an exception to the but-for test might be warranted in cases "where use of the drug distributed by the defendant is . . . an independently sufficient cause of the victim's death or serious bodily injury").

103. *Id.*

104. RESTATEMENT OF TORTS § 432 (AM. LAW INST. 1934) (emphasis added).

105. HART & HONORÉ, *supra* note 13, at 19; *cf.* Rothman, *supra* note 90, at 588 ("Most causes that are of interest in the health field . . . are not sufficient in themselves. Drinking contaminated water is not sufficient to produce cholera, and smoking is not sufficient to produce lung cancer, but both of these are components of sufficient causes.").

106. 1 JOHN STUART MILL, SYSTEM OF LOGIC, RATIOCINATIVE AND INDUCTIVE, BEING A CONNECTED VIEW OF THE PRINCIPLES OF EVIDENCE, AND THE METHODS OF SCIENTIFIC INVESTIGATION 345 (3d ed. 1974).

butt was "sufficient by itself" to cause the resulting forest fire, on closer examination one finds that the fire actually depended on a number of conditions as well: the presence of oxygen in the air, for example, and of combustible materials on the forest floor. What is *sufficient* to cause a result is "not a single condition . . . but a set of conditions."[107]

What, then, did the *Burrage* Court mean by the phrase "independently sufficient cause?" It could not have meant merely that the defendant's conduct must be sufficient in combination with other conditions. After all, in *Burrage* itself the heroin provided by Burrage clearly was sufficient to cause Banka's death in combination with other conditions, namely, the oxycodone, the clonazepam, and the alprazolam. What the Court appears to have meant by "independently sufficient," rather, was that the defendant's conduct must be sufficient in combination with *background conditions* (like the state of Banka's physical health, for example), as distinct from other *nonbackground conditions* (like the other drugs in Banka's system).[108]

Even supposing that the proposed distinction between background and nonbackground conditions is coherent, however, the distinction seems arbitrary. The Restatement (Third) of Torts uses an illustration to make this point:

> Able, Baker, and Charlie, acting independently but simultaneously, each negligently lean on Paul's car, which is parked at a scenic overlook at the edge of a mountain. Their combined force results in the car rolling over the edge of a diminutive curbstone and plummeting down the mountain to its destruction. The force exerted by each of Able, Baker, and Charlie would have been insufficient to propel Paul's car past the curbstone, but the combined force of any two of them is sufficient. . . .[109]

In this hypothetical, each "actor's conduct requires other conduct to be sufficient to cause another's harm."[110] But no less than in the case where two assailants independently inflict mortal wounds, it seems absurd to conclude that the harm "may not have any 'cause' at all."[111] Our intuition, rather, is that "Able, Baker, and Charlie are each a factual cause of the destruction of Paul's car."[112] More broadly, our intuition is that "such positive, albeit [potentially] unnecessary, contributions to the

107. HART & HONORÉ, *supra* note 13, at 19.

108. *See* Wright, *supra* note 76, at 1098 (suggesting that "independently sufficient" means sufficient in the absence of other non-background factors).

109. RESTATEMENT (THIRD) OF TORTS § 27 cmt. f, illus. 3 (AM. LAW INST. 2010).

110. *Id.* at § 27 cmt. f.

111. Price Waterhouse v. Hopkins, 490 U.S. 228, 241 (1989).

112. RESTATEMENT (THIRD) OF TORTS § 27 cmt. f, illus. 3.

relevant mechanism by which an . . . injury occurred should be identified by the law as factual 'causes,'"[113] regardless of whether they "require[] other conduct to be sufficient" or instead require only "background" conditions.[114]

In summary, then, the but-for test has a causal-overdetermination problem. And this causal-overdetermination problem, like the but-for test's spurious-sufficiency problem, would not adequately be resolved by an exception for "independently sufficient" conduct. Again, something more is required.

## III. THE ACCELERATION RULE

Part of the answer both to the spurious-sufficiency problem and to the causal-overdetermination problem lies in a state court rule that, on its face, seems to have nothing to do with either problem: namely, the rule that a defendant who accelerates the coming to fruition of a result counts as a cause-in-fact of the result.

### A. *What the State Courts Do*

As a preliminary example, consider the facts of *State v. Phillips*.[115] Three-year-old Sheila Evans died on January 18, 1993, just a few hours

113. Jane Stapleton, *Unnecessary Causes*, 129 L.Q. REV. 39, 45 (2013); *see also* 2 JOEL PRENTISS BISHOP, COMMENTARIES ON THE CRIMINAL LAW § 653 (2d ed. 1859) (explaining that a defendant's contribution to the causal mechanism will qualify as a cause-in-fact regardless of whether the victim "would have died from other causes, or would not have died from this one, *had not others operated with it*" (emphasis added)).

114. RESTATEMENT (THIRD) OF TORTS § 27 cmt. f ("The fact that an actor's conduct requires other conduct to be sufficient to cause another's harm does not obviate the applicability of [the rule governing multiple sufficient causes]."); Stapleton, *supra* note 113, at 60 ("There is no reason to think courts would take a different view in cases where the defendant's tortious contribution was not only unnecessary for the threshold to have been reached but was also insufficient for it to be reached . . . ."). The inadequacy of the "independently sufficient" exception is even clearer in cases where the defendant himself performs several distinct acts, each of which contributes to the proscribed result but none of which is "independently" sufficient to bring about the result. Take, for example, *Commonwealth v. Osachuk*, where the victim's death from drug intoxication was attributable to the combined effects of three separate acts by the defendant: (1) his act of giving the victim methadone tablets, (2) his later act of giving the victim money to purchase cocaine and heroin, and (3) his still-later act of injecting the victim with additional cocaine. *See* 681 N.E.2d 292, 293–94 (Mass. App. Ct. 1997). If the law were to require that an overdetermining cause be "independently" sufficient to bring about the harm, the court in *Osachuk* would have had to conclude, absurdly, that the defendant had not caused the victim's death. After all, in criminal law as in tort, the question of causation is resolved in relation to a particular act, not in relation to a series of acts. *See* MICHAEL S. MOORE, ACT AND CRIME 35–36 (1993) (explaining that the State must prove all the conditions of criminal liability, including causation, in relation to a specific "voluntary act").

115. 656 N.E.2d 643 (Ohio 1995).

after her mother's boyfriend, defendant Ronald Philips, savagely beat her.[116] A subsequent autopsy revealed, however, that Sheila had suffered a separate beating—apparently at the hands of her mother—on January 16, just two days before Phillips's assault.[117] This earlier beating had resulted in an intestinal injury that, if left untreated, would eventually have proven fatal by itself.[118] Phillips's assault, which ruptured Sheila's already gangrenous and necrotic intestine, merely had hastened Sheila's death.[119]

Phillips's assault was not a "but-for cause" of Sheila's death, since Sheila would, or might, have died anyway from her mother's earlier beating.[120] But the Ohio Supreme Court upheld Phillips's conviction nevertheless.[121] The court invoked the acceleration rule, saying only: "The evidence in the instant action clearly demonstrates that appellant hastened Sheila's death. Having done so, appellant cannot escape criminal liability by arguing that Sheila was going to die anyway."[122]

When the Ohio Supreme Court invoked the acceleration rule in *Phillips*, it didn't cite any precedent.[123] Nor, really, did it need to. In criminal cases, American and English courts long have accepted the rule that—in Professor Wayne LaFave's words—"one who hastens the victim's death is a cause of his death."[124] In England, the rule dates back

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116. *Id.* at 650–51.

117. *Id.* at 651, 652 n.1.

118. *Id.* at 656.

119. *Id.* at 651, 656 ("Dr. Cox testified that the beating Sheila suffered on the morning of her death caused her intestine to rupture, which, along with numerous associated complications, led to her death.").

120. In a criminal case, where the reasonable doubt standard applies, any "real possibility" that the victim would have died anyway would be sufficient to defeat the government's proof of causation under the but-for test. *Definition of Reasonable Doubt*, PATTERN CRIMINAL JURY INSTRUCTION 21 (1987) (recommending use of phrase "real possibility" in pattern instruction on the reasonable doubt standard); *see also* Eric A. Johnson, *Criminal Liability for Loss of a Chance*, 91 IOWA L. REV. 59, 68–69 (2005) (discussing "the interaction of the but-for test and the constitutional requirement of proof beyond a reasonable doubt").

121. *Phillips*, 656 N.E.2d at 653.

122. *Id.* at 655 n.2.

123. *Id.*

124. 1 LAFAVE, *supra* note 14, § 6.4(b), at 469; *see also, e.g.*, 2 BISHOP, *supra* note 113, § 653 ("[T]hough the person . . . would have died from [some] other cause[]" already operating, it is enough that the wound hastened the termination of life; as, for example, if another had already mortally wounded him.); WM. L. CLARK, JR., HANDBOOK OF CRIMINAL LAW 170 (William E. Mikell ed., 3d ed. 1915) ("[I]f a person has been mortally wounded by another, a third person who afterwards kills him by an independent act commits a homicide, though he merely hastened a death which was bound to happen without his interference."); DRESSLER, *supra* note 59, at 186 (explaining that a defendant's conduct will count as a cause-in-fact of harm if, but for the conduct, "the harm would [not] have occurred *when it did*"); JEROME HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 265 (2d ed. 1960) ("[I]f the last blow hastened [the victim's] death, . . . the

at least to 1607, when jurist Matthew Hale mentioned it in his *History of the Pleas of the Crown.*[125] James Fitzjames Stephen, in his *History of the Criminal Law of England*, characterized the acceleration rule as "perfectly clear."[126] In the United States, likewise, the rule is clear and long-standing. Joel Prentiss Bishop's *Commentaries on the Criminal Law* summarized the American rule as of 1858: "[I]f the person would have died from some other cause already operating, yet if the wound hastened the termination of life, this is enough."[127]

In substance, the acceleration rule operates as a refinement of the but-for test. Under the ordinary but-for test, the fact finder must decide whether, say, the homicide victim "would not have died" but for the defendant's conduct.[128] By contrast, under the but-for test as supplemented by the acceleration rule, the fact finder must decide whether the victim would not have died "when [she] did,"[129] or "as soon as she did."[130] Courts usually do not say by how much time—months, days, or seconds—the defendant must accelerate the victim's death. But it appears that any acceleration at all, "even by a moment or instant of time," will suffice.[131]

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defendant would be guilty . . . ."); 3 JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 6–7 (1883) ("[I]f by reason of the [defendant's] assault [the victim] died in the spring of a disease which must have killed him, say in the summer, the assault was a cause of his death . . . .").

125. 1 HALE, *supra* note 71, at 428 ("If a man be sick of some such disease, which possibly by course of nature would end his life in half a year, and another gives him a wound or hurt, which hastens his end by irritating and provoking the disease to operate more violently or speedily, this hastening of his death sooner than it would have been is homicide or murder . . . .").

126. 3 STEPHEN, *supra* note 124, at 6–7.

127. 2 BISHOP, *supra* note 113, § 654. The Supreme Court in *Burrage* did not explicitly reject the acceleration rule. Apart from the Court's seeming satisfaction with the ordinary but-for test, which does not include a temporal component, the only clue to the Court's views on acceleration is the Court's reliance on search and seizure cases. *See* Burrage v. United States, 134 S. Ct. 881, 889 (2014). The law of search and seizure does not have an acceleration rule. *See* Murray v. United States, 487 U.S. 533, 541–42 (1988) (holding that evidence discovered during an illegal search that merely accelerates the discovery of evidence the police would otherwise have discovered is not subject to suppression as a "fruit" of the illegal search).

128. *See supra* Part II.

129. Joshua Dressler, *Reassessing the Theoretical Underpinnings of Accomplice Liability: New Solutions to an Old Problem*, 37 HASTINGS L.J. 91, 99 (1985); *see also* Baker v. State, 11 So. 492, 499 (Fla. 1892) (upholding the defendant's homicide conviction on the basis of proof that his assault "brought to a close a life which but for it would have lasted longer"); Commonwealth v. Fox, 73 Mass. 585, 587 (1856) ("[T]he jury, in order to convict the prisoner, must be satisfied beyond a reasonable doubt that the death of his wife, at the time it occurred, would not have happened but for the assault and battery by him as charged in the indictment.").

130. Brackett v. Peters, 11 F.3d 78, 80 (7th Cir. 1993).

131. State v. Hanahan, 96 S.E. 667, 671 (S.C. 1918) (approving trial judge's instruction to the jury, which said in part that an injury the defendant inflicted will count as a cause of the victim's death if it "even by a moment or instant of time hastens the death"); *see also* Collins v.

Courts also rarely bother to explain the basis in policy for the acceleration rule. When they do, however, they usually offer some variation on an explanation put forward by the Massachusetts Supreme Court in 1856, namely, that since human beings are mortal, *all* homicide merely hastens the victim's death:

> As death is appointed to all the living, and must come to all sooner or later, every act of homicide only hastens the inevitable event. The law therefore does not permit a party charged with murder to speculate on the chances of the life of his victim, or to endeavor to apportion his own wicked act by dividing its effects with the operation of natural causes on the body of the deceased.[132]

The concern articulated by the Massachusetts Supreme Court clearly demands *some* sort of acceleration rule: If the but-for test were applied without a temporal component, then no homicide defendant would ever qualify as a cause of the victim's death, since every victim is bound to die sooner or later. But it is unclear whether the Massachusetts court's all-humans-are-mortal rationale, by itself, justifies assigning responsibility in cases where the defendant's conduct deprives the victim not of decades or years but only of seconds, minutes, or hours of additional life.[133] It is unclear, for example, whether this rationale would

Hertenstein, 90 S.W.3d 87, 96 (Mo. Ct. App. 2002) ("'[A]n act which accelerates death . . . causes death[.]' This is true even if the act hastens death by merely a moment." (alterations in original) (citation omitted) (quoting *In re* Estate of Eliasen, 668 P.2d 110, 120 (Idaho 1983)); State v. Montoya, 61 P.3d 793, 804 (N.M. 2002) (holding that "[d]efendant's act of isolating the victim and preventing medical treatment" qualified as a cause-in-fact of the victim's death, since "the victim would have lived longer than he did, even if by a matter of hours, had he received medical treatment"); State v. Francis, 149 S.E.348, 364 (S.C. 1929) ("[T]he length of time life would otherwise have continued, [is an] immaterial consideration[]."); HART & HONORÉ, *supra* note 13, at 352 ("The slightest shortening of life, for example, is homicide."). *But see* James L. Focht, Jr., *Proximate Cause in the Law of Homicide—with Special Reference to California Cases*, 12 S. CAL. L. REV. 19, 27 (1938) ("[P]robably most courts would require a more or less substantial acceleration of death to be shown.").

132. *Fox*, 73 Mass. at 586–87; *see also*, *e.g.*, Zeigler Coal Co. v. Dir., Office of Workers' Comp. Programs, 312 F.3d 332, 334 (7th Cir. 2002) ("Even the murder of an infant just hastens death, given that death comes eventually to us all."); People v. Phillips, 414 P.2d 353, 358 (Cal. 1966) ("Murder is never more than the shortening of life; if a defendant's culpable act has . . . decreased the span of a human life, the law will not hear him say that his victim would thereafter have died in any event."); State v. Matthews, 38 La. Ann. 795, 797 (1886) ("In a certain sense, every man is born and lives, mortally wounded; that is, subject to laws which inevitably doom him to death. No murder does more than to hasten the termination of life.").

133. *See* Larry Alexander & Michael Moore, *Deontological Ethics*, *in* STANFORD ENCYCLOPEDIA OF PHILOSOPHY (2012), http://plato.stanford.edu/entries/ethics-deontological/ (arguing that under some forms of agent-centered deontology "our agency is said not to be

justify assigning responsibility to an emergency-room physician or an ambulance driver whose negligence shortened only by a few minutes or hours the life of a patient who was certain to die anyway. And, indeed, some scholars have argued that, given the limitations of the all-humans-are-mortal rationale, the acceleration rule requires a *de minimis* exception.[134]

The court in *Phillips* didn't mention a *de minimis* exception, however. Nor would many of us be inclined to apply a *de minimis* exception in a case like *Phillips*. This disinclination in relation to *Phillips* might be chalked up to our hostility toward people who savagely beat three-year-old children. But another possibility is that the acceleration rule isn't grounded exclusively in the all-humans-are-mortal rationale. In what follows, this Article will explore this possibility. Specifically, the Article will explore the possibility that the acceleration rule is justified, at least in part, by its utility in resolving problems of spurious causal sufficiency and causal overdetermination.

### B. *Acceleration and Spurious Sufficiency*

In the *Phillips* case, Phillips's assault on Sheila appeared to have contributed to, or complemented, the operation of causal processes that had been set in motion by another beating two days before.[135] But it's easy to imagine slight variations on *Phillips* where Phillips's assault instead preempts these already-operating causal processes. Suppose, for example, that Phillips had caused Sheila's death not by striking her in the abdomen but by striking her in the head.[136] And suppose that these blows to Sheila's head had, without any contribution from the pre-existing abdominal injuries, brought about injuries to Sheila's brain that were immediately fatal.

This hypothetical variation on *Phillips* shares the basic structure of our earlier poisoned-tea hypothetical, where Mary died from a gunshot wound shortly after drinking a poisoned cup of tea.[137] It's a "spurious

involved in mere *acceleration*s of evils about to happen anyway, as opposed to *causing* such evils by doing acts necessary for such evils to occur").

134. Dressler, *supra* note 129, at 132 n.203 ("If the harm would have occurred a day or even an hour later, it seems fair to say that this is a different crime entirely; when the harm would have occurred just a second later as the result of an alternative cause, then it would seem reasonable for a jury to say that this is the same crime."); *cf.* Wright, *supra* note 60, at 292–93 (arguing that one shortcoming of the acceleration rule is that it assigns significance to "minute differences in the time . . . of a specific event").

135. *Phillips*, 656 N.E.2d at 656.

136. These hypothetical facts are not farfetched. Phillips's beating extended to every part of Sheila's body, including her head. *Id.* at 651 ("The bruising indicated that Sheila had been severely beaten about her head, face, upper and lower torso, arms, legs, and genitalia.").

137. *See supra* Section II.A.

sufficiency" case, in other words. In both this case and the poisoned-tea hypothetical, the question of who caused the result seems, intuitively, to have a very easy answer; after all, in both cases, one actor's conduct entirely preempted the other actor's conduct. Still, in both cases, the but-for test produces the wrong answer. Since the defendant's conduct preempted another causal process that would, if not preempted, eventually have caused the same result, the defendant's conduct is not a but-for cause of the result.

In both cases, the acceleration rule elegantly solves the spurious sufficiency problem.[138] In our hypothetical variation on *Phillips*, Sheila still would have died if Phillips had not assaulted her, but she would not have died when she did, or as soon as she did.[139] Thus, Phillips's assault qualifies as a cause-in-fact of Sheila's death under the acceleration rule. Likewise, in the poisoned-tea hypothetical, though Mary still would have died (from the poison administered by Bob) if Dave had not shot her, she would not have died when she did.[140] Thus, though Dave's conduct does not satisfy the but-for test, it does satisfy the acceleration rule.

Moreover, not only does the acceleration rule rightly identify these two actors—Dave, in the poisoned-tea hypothetical, and Phillips, in our hypothetical variation on the *Phillips* case—as causes-in-fact of their victims' deaths, it also rightly does *not* identify as causes-in-fact the two actors who were the authors of the *preempted* causal mechanisms. In our hypothetical variation on *Phillips*, the earlier assault by Sheila's mother, though it would have caused Sheila's death within a few hours or days, ultimately had no effect on *when* Sheila died. So it wouldn't count as a cause-in-fact under the acceleration rule. Likewise, in the poisoned-tea hypothetical, Bob's poisoning of Mary's tea, though it would have caused Mary's death within a few hours or days if not preempted by the shooting, ultimately had no effect on when Mary died. So it wouldn't count as a cause-in-fact under the acceleration rule.

How does this work? How exactly does the acceleration rule, which on its face has nothing to do with causal sufficiency, fix the spurious-

138. *See* HART & HONORÉ, *supra* note 13, at 124 ("Legal systems tend to dispose of [spurious-sufficiency] cases on the basis that causal connection is made out when the supposed cause both determines the mode of death or destruction and shortens life or accelerates the damage."); *Wednesday Morning Session, May 15, 2002*, 79 A.L.I. PROC. 224, 273 (2002) (proposing an amendment to Restatement (Third) of Torts § 26 that would have modified the but-for test by adding the phrase "at the time it occurred"; and explaining that this amendment would enable § 26 to "handle preempted conditions"); *cf.* Jane Stapleton, *Choosing What We Mean by "Causation" in the Law*, 73 MO. L. REV. 433, 452 (2008) (arguing that "the Law" addresses spurious-sufficiency problems by "individuat[ing]" results on the basis of "the time and place [they] occurred").

139. *See supra* text accompanying notes 133–34.

140. DRESSLER, *supra* note 59, at 186.

sufficiency problem? The answer is that in the spurious-sufficiency cases, where one causal mechanism preempts another, the two causal mechanisms often, though not always,[141] will have different "incubation periods."[142] In the poisoned-tea hypothetical, for example, the poison probably would have killed Mary within a few minutes or hours after she consumed it; by contrast, the gunshot wound inflicted by Dave killed her instantly. In our hypothetical variation on the *Phillips* case, too, the two causal mechanisms had different incubation periods: The intestinal injuries inflicted by Sheila's mother would have killed Sheila in a few days; the beating by Phillips killed her instantly.

Where the two causal mechanisms have different incubation periods, the acceleration rule enables us to distinguish the *actual* from the *spurious* causal mechanism through the simple expedient of specifying the time when the result came to fruition.[143] The acceleration rule, again, modifies the but-for test to require proof that the result would not have occurred "when it did" but for the defendant's conduct.[144] Where the timing of the result is consistent with the incubation period for the defendant's conduct—or, more accurately, with the incubation period for the causal mechanism of which the defendant's conduct is a component—but not with the incubation period for the spurious causal mechanism, then the defendant's conduct will qualify as an antecedent but for which the result would not have occurred when it did. This is true, moreover, even in cases where the incubation periods for the two causal mechanisms differ from one another only by minutes or seconds.

It would be easy to take this kind of reasoning too far. It would be tempting, for example, to use the causal mechanisms' incubation periods to distinguish the actual from the spurious causal mechanism even in cases of causal *deceleration*. The potential usefulness of a deceleration rule is illustrated by Professor James McLaughlin's classic "poisoned water-keg" hypothetical: "Suppose *A* is entering a desert. *B* secretly puts a fatal dose of poison in *A*'s water keg. *A* takes the keg into the desert where *C* steals it, thinking that it contains pure water. *A* dies of thirst. Who killed him?"[145] In this hypothetical, as most scholars appear to agree, *C* is the exclusive cause of *A*'s death, since by stealing the water keg, he cut off the causal process set in motion by *B*'s poisoning of the

141. *See infra* Section IV.B.

142. *See* Rothman, *supra* note 90, at 592 ("The term *incubation period* has often been applied to the period between the accumulation of a sufficient cause and the time at which disease becomes manifest.").

143. *See supra* note 138.

144. DRESSLER, *supra* note 59, at 186.

145. HART & HONORÉ, *supra* note 13, at 239 (quoting James Angell McLaughlin, *Proximate Cause*, 39 HARV. L. REV. 149, 155 n.25 (1927)).

water.[146] Application of the time-sensitive but-for test to this hypothetical produces the right result, in spite of the fact that *C*'s theft of the canteen presumably caused *A* to die *later*, not sooner, than he otherwise would have. *A* would not have died "when he did" but for *C*'s theft of the canteen, so *C* is a cause of *A*'s death.

But a deceleration rule would prove problematic in ways that the acceleration rule does not. Suppose, for example, that an innocent bystander provided first aid to a shooting victim and, by doing so, slowed the victim's bleeding enough to extend his life. Under a deceleration rule, the bystander would count as a cause-in-fact of the victim's death. This, needless to say, is the wrong answer.[147] The acceleration rule, by comparison, would capture only actors who, at the very least, somewhat *shorten* the victim's life. Granted, it is possible to imagine cases where we wouldn't want a brief shortening of the victim's life to trigger criminal liability, as where a risky but potentially life-saving medical procedure caused the victim to die a few minutes sooner than he otherwise would have. But our intuitions about *these* cases probably have more to do with the defendant's nonculpability than with causation.[148]

A second possible variation on the acceleration rule would require the fact finder, in applying the but-for test, to specify not only *when* the result came about but *how*. Under this approach, in other words, the fact finder wouldn't just decide whether the result would not have occurred "when it did" but for the defendant's conduct. Rather, the fact finder would decide whether the result would not have happened "*when and as* it did happen" but for the defendant's conduct.[149] In the poisoned-tea hypothetical, then, this "when and as it did" test would frame the causation question as whether the victim would not have died "as he did"—from a gunshot wound—but for the defendant's conduct.[150]

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146. MACKIE, *supra* note 59, at 46 ("[I]t is the chain puncturing-lack-of-water-thirst-death that was realized, whereas the rival chain that starts with poison-in-can was not completed.").

147. *Cf.* HART & HONORÉ, *supra* note 13, at 239–40 (arguing that "'causing death' involves the notion of shortening [life]" and accordingly that in the poisoned-canteen hypothetical, "it is not possible to describe *C*'s later action [of stealing the canteen] as causing *A*'s death").

148. *See* Baruch Brody, *Withdrawal of Treatment Versus Killing of Patients*, *in* INTENDING DEATH 90, 101–02 (Tom L. Beauchamp ed., 1996) (acknowledging the difficulty of determining, in cases involving the medical acceleration of death, whether our intuitions are about causation or about blameworthiness).

149. PERKINS & BOYCE, *supra* note 59, at 773; *see also* MODEL PENAL CODE § 2.03 cmt. 2 at 259 (AM. LAW. INST., Proposed Official Draft 1962) (explaining that, in a case where the victim dies from two simultaneous mortal blows, "the result should be characterized as 'death from two mortal blows'"); DRESSLER, *supra* note 59, at 187–88 (arguing that the but-for test should be refined to ask: "But for *D*'s voluntary act would the social harm have occurred when *and as* it did.").

150. *See* MODEL PENAL CODE § 2.03 cmt. 2 at 259 ("So described, the victim's demise has as but-for causes each assailant's blow."); ALI PROCEEDINGS, *supra* note 52, at 137.

Redescribing the result this way would seem to enable us to reach the right result even in those spurious-sufficiency cases where the two causal mechanisms have the same incubation period.

Unfortunately, as the courts appear to have intuited,[151] this reformulation of the but-for test is "circular"[152] and "fundamentally question-begging."[153] To appropriately "refine[] the description of the result,"[154] the fact finder first would have to decide exactly *how* the result came about. Specifically, the fact finder would have to decide what causal factors to include in the refined description of the result. Once the fact finder had made this determination, of course, the outcome of the but-for test usually would be a foregone conclusion. Once the fact finder had decided, for example, to describe the result as in Burrage's case as death from the combined effects of heroin, oxycodone, alprazolam, and clonazepam, the question whether Banka would not have died "as he did" but for Burrage's heroin would be easy.[155] But the hard questions wouldn't have disappeared. They merely would have relocated. They now would arise in connection with the preliminary question of what causal factors to include in the refined description of the result.[156] Needless to say, the reformulated but-for test wouldn't help the fact finder resolve this preliminary question.

The strategy underlying the acceleration test can't really be extended, then. It can't be extended to cases where the defendant's conduct *decelerates* the result. Nor can it be extended to cases where the defendant's conduct, though it doesn't determine *when* the result comes about, does determine *how* the result comes about. Still, within its limited scope the acceleration test does what we require of it. It enables us, sometimes, to distinguish genuine causes from spuriously sufficient causes.

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151. *See* Wright, *supra* note 60, at 294 ("The courts and the secondary literature generally do not qualify the consequence by specifying its non-salient details or the time, location or manner of its occurrence when describing or applying the *sine qua non* analysis.").

152. Lawrence Crocker, *A Retributive Theory of Criminal Causation*, 5 J. CONTEMP. LEGAL ISSUES 65, 68 n.10 (1994) ("[T]he circularity of building the causation into the description of the death robs the characterization of all analytical force."); Wright, *supra* note 60, at 292–93 (observing that this approach—which "qualif[ies] [the result] by the manner of its occurrence, 'as and how it came about'"—is "viciously circular").

153. David J. Karp, Note, *Causation in the Model Penal Code*, 78 COLUM. L. REV. 1249, 1262 (1978) ("[T]he proposed solution in [sic] fundamentally question-begging; it amounts to saying, 'describe the result so that but-for causation will be found whenever the actor should be held legally responsible for the result.' This is unsatisfactory, because the point of [Model Penal Code] section 2.03 is to provide a standard for determining when an actor should be held legally responsible for a result.").

154. DRESSLER, *supra* note 59, at 187–88.

155. Burrage v. United States, 134 S. Ct. 881, 885 (2014).

156. *See* Crocker, *supra* note 152, at 68 n.10.

## C. *Acceleration and Causal Overdetermination*

So the acceleration rule is partly explained by its facility in weeding out causal factors whose sufficiency is spurious. As it happens, though, the acceleration rule also proves very useful in causal-overdetermination cases. In cases where two or more complementary factors overdetermine a result—as in the Restatement's "Able, Baker, Charlie" hypothetical[157]—it often, though not always, will be true that each of the complementary factors also *accelerates* the result.

Cases that share the basic structure of the "Able, Baker, Charlie" hypothetical are commonplace. The critical feature of these cases is that one of the components of the causal mechanism by which the injury is known to have occurred "requires a certain amount of an element."[158] In other words, one of the components requires the satisfaction of a quantitative *threshold*. Whatever else the causal mechanism at work in the "Able, Baker, Charlie" hypothetical required—a relatively low curbstone, for example, or a flat or downward-sloping parking lot—it also required a particular quantity of *force*. Each of the three actors made fungible contributions to the satisfaction of this *force threshold*.[159] Much the same thing was true in *Burrage*, where the victim's death appears to have hinged on the satisfaction of a threshold amount of central-nervous-system-depressing substances.[160]

In these kinds of cases, the defendant's contribution, even if it doesn't determine *whether* the threshold is reached, often will determine *when* the threshold is reached.[161] Take the blood-loss or "exsanguination" cases, for example. In the exsanguination cases, where each of several assailants contributes incrementally to the defendant's death from blood loss, it often will be possible for the expert to say that—whatever the precise threshold at which death would have occurred, and whatever the magnitude of the defendant's contribution—the defendant's contribution must necessarily have accelerated the satisfaction of this threshold and therefore "could only have hastened death."[162] In other words, it often

157. *See supra* text accompanying notes 109–16.

158. Stapleton, *supra* note 113, at 55.

159. RESTATEMENT (THIRD) OF TORTS § 27 cmt. f, illus. 3 (AM. LAW INST. 2010).

160. *Burrage*, 134 S. Ct. at 885.

161. Wright, *supra* note 60, at 292 ("The *sine qua non* analysis is able to reach the proper conclusion in many overdetermined causation situations if the consequence is qualified by the time at which it occurred . . . ."). *But cf.* Wright, *supra* note 76, at 1114 (denying the existence of the acceleration rule in finding that "the relevant legal injury in tort law (or for homicide in criminal law) is not death at any particular time, but rather death per se").

162. State v. McDonald, 953 P.2d 470, 475 (Wash. Ct. App. 1998) ("Michael Bassett continued breathing after being shot both by Bassett and McDonald. Although either shot alone would have been fatal, both shots contributed to Michael's death. McDonald's shot occurring last, could only have hastened death, as McDonald intended. The shot fired by McDonald was a cause

will be possible to conclude that the defendant's contribution must "at least" have "accelerated the death."[163]

The easiest cases in this category will be those where the defendant and another actor each inflict, say, a knife or a gunshot wound and "[d]rop by drop the life current [goes] out from both wounds."[164] But the acceleration rule also will prove useful in overdetermination cases where the defendant's and the other contributions to the causal mechanism, though of different kinds, nevertheless are complementary. In *People v. Flores*,[165] for example, the government's theory was that the defendant's battery of the victim, after the victim already had suffered a fatal gunshot wound, would have accelerated the victim's breathing and would thereby have accelerated his blood loss as well.[166] In another case—this one from the world of torts—an expert opined that the defendant police officer, by repeatedly "tasering[]" the plaintiff, who already have been fatally shot by another officer, accelerated the plaintiff's death: "Deputy Brown's multiple taserings of Joshua after he was shot hastened Joshua's blood loss, resulting in his death before paramedics could arrive."[167]

It won't always be possible, as it was in these last two cases, to say which of two injuries was "fatal" and which merely accelerated the victim's death. Sometimes the experts will be unable to identify *either* of two injuries as a but-for cause of the victim's death. In *Oxendine v. State*,[168] for example, where defendant Oxendine and his girlfriend had

'in fact' of Michael Bassett's death." (footnote omitted)), *aff'd*, 981 P.2d 443 (Wash. 1999); *see also* State v. Weston, 64 P.2d 536, 539, 545 (Or. 1937) (recounting testimony by the expert: "I certainly would think that the broken bones in the forearm and the hand and the wounds in the face would contribute to hasten death by virtue of shock and the little loss—or local loss of blood, whatever it might be, in addition to that already occurring in the chest and abdominal cavity").

163. United States v. Kinder, 14 C.M.R. 742, 766–67 (A.F.B.R. 1954) ("A medical expert, shown to be a qualified physician, testified in response to a hypothetical question that a gunshot wound shown to have been suffered by the victim, would have at least accelerated the death of the victim regardless of whether or not head injuries of the nature shown to have been inflicted on the victim had fractured the skull.").

164. *E.g.*, People v. Lewis, 57 P. 470, 471, 473 (Cal. 1899) (describing the cause of the victim's death as a gunshot wound inflicted by the defendant and a knife wound self-inflicted by the deceased).

165. No. E049218, 2011 WL 1303368 (Cal. Ct. App. Apr. 6, 2011).

166. *Id.* at *8 (recounting testimony by the "autopsy surgeon": "[A]ny time there would be an altercation after a serious injury, that would perhaps exacerbate that injury and accelerate death because the demands on the body would be greater. [The victim] had a [rapidly fatal] gunshot that affected his right lung. He had extensive hemorrhaging into his right chest. So if he were in some sort of altercation, that could cause an accelerated heart rate, accelerated breathing, . . . [t]hat could cause more bleeding more rapidly into his chest. That would certainly accelerate that . . . survivable time frame . . . ." (alterations in original)).

167. Salvato v. Blair, No. 5:12-cv-635-Oc-10PRL, 2014 WL 1899011, at *18 (M.D. Fla. May 12, 2014), *aff'd sub nom.* Salvato v. Miley, 790 F.3d 1286 (11th Cir. 2016).

168. 528 A.2d 870 (Del. 1987).

separately battered Oxendine's six-year-old son on successive days, one of the government's experts, Dr. Inguito, said he "could not separate the effects of the two injuries."[169] "Dr. Inguito could not place any quantitative value on either of the hemorrhages nor could he state whether the fresh hemorrhage or the older hemorrhage caused the death."[170] It is exactly in cases like this, where either of two contributions to the victim's death *might* have proven decisive—and where, as a result, neither defendant's conduct qualifies as a but-for cause[171]—that the acceleration rule proves most useful. Even when expert witnesses are unable to say whether a defendant's contribution was decisive, they often will be able to say—as was an expert in *Oxendine*—that the defendant's conduct "certainly would have an impact on shortening this [victim's] life."[172] Without the acceleration rule or some alternative, both defendants who contributed to the result might escape responsibility.[173]

The acceleration rule won't resolve every causal overdetermination case, as this Article will explain later.[174] Nor even will the acceleration rule resolve every causal overdetermination case that involves incremental contributions to a causal "threshold."[175] In the cases it covers, however, the acceleration rule provides an exceptionally useful tool for gauging causal contribution. The acceleration rule obviates the difficulties associated with tests that require the fact finder to decide, say, whether the defendant's conduct was a necessary element of a "sufficient causal set."[176] And, by requiring that the defendant's contribution to the victim's death measurably affect the time of death, it obviates too the potential difficulties faced by the "contribution" test in distinguishing merely *de minimis* contributions from substantial contributions.[177]

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169. *Id.* at 871–72.

170. *Id.* at 872.

171. *See* Johnson, *supra* note 120, at 68–69 (discussing "the interaction of the but-for test and the constitutional requirement of proof beyond a reasonable doubt").

172. *Oxendine*, 528 A.2d at 872.

173. As it turned out, Oxendine did escape manslaughter liability for his son's death, but only because the prosecution failed during its case-in-chief to elicit testimony about causal acceleration. *Id.* at 873–74. During the defense case, an expert testified on behalf of Oxendine's girlfriend (and co-defendant) that the injuries inflicted by Oxendine "certainly would have an impact on shortening this child's life." *Id.* at 872. But the Delaware Supreme Court held this testimony came "too late to sustain the State's case-in-chief for manslaughter" and accordingly set aside Oxendine's conviction and remanded with instructions to convict Oxendine of the lesser crime of assault in the second degree. *Id.* at 873–74.

174. *See infra* Section IV.C.

175. *See infra* Section IV.C.

176. RESTATEMENT (THIRD) OF TORTS § 27 cmt. f. (AM. LAW INST. 2010)

177. *See infra* text accompanying notes 249–54.

## IV. THE CONTRIBUTION RULE

For all its usefulness, the acceleration rule is too dependent on happenstance. The acceleration rule will resolve spurious-sufficiency problems only if the two "sufficient" causal mechanisms happen to have different "incubation periods." And it will resolve overdetermination problems only if an expert is able to say, beyond a reasonable doubt, that the defendant's contribution affected at least slightly the timing of the result. Responsibility shouldn't depend on happenstance, of course. So state courts have applied another rule which complements the acceleration rule, namely, the contribution rule. The contribution rule resolves spurious-sufficiency and overdetermination cases that can't be resolved under the acceleration rule.

### A. *What the State Courts Do*

State courts often invoke the acceleration rule in conjunction with a contribution rule. State courts often say, for example, that a homicide defendant's conduct will qualify as a cause of the victim's death if the conduct "contributed to or accelerated [the] death."[178] State courts don't always invoke this contribution rule in combination with the acceleration rule, however. Sometimes they invoke the contribution rule by itself. Sometimes they say simply—as the California Supreme Court did in *People v. Lewis*[179]—that a defendant's conduct will qualify as a cause-in-fact of death if "the wound inflicted by the defendant did contribute to the event."[180] But whether they invoke the contribution rule together with the acceleration rule or instead invoke it in isolation, state courts *do* frequently invoke the contribution rule in cases of concurrent causation, contrary to what the Supreme Court implied in *Burrage*.[181]

178. State v. McDonald, 953 P.2d 470, 474 (Wash. Ct. App. 1998), *aff'd*, 981 P.2d 443 (Wash. 1999).

179. 57 P. 470 (Cal. 1899).

180. *Id.* at 473.

181. *See* Burrage v. United States, 134 S. Ct. 881, 891 (2014). Moreover, cases where courts explicitly invoke the contribution test, either alone or in conjunction with the acceleration test, are just the tip of the iceberg. In a large number of other criminal cases, courts have reached the same results by asking whether a homicide defendant's conduct deprived the victim of a "chance[] of surviving" some other causal factor—usually an illness or injury. Johnson, *supra* note 120, at 61 & n.3; *see also, e.g.*, Grayer v. State, 647 S.E.2d 264, 268 (Ga. 2007) (finding sufficient evidence for murder conviction after concluding that but for the defendant's failure to seek medical care for the infant victim, "the baby might have survived"); People v. Hoerer, 872 N.E.2d 572, 574, 579 (Ill. App. Ct. 2007) (stating there was sufficient evidence to convict the defendant for manslaughter after concluding that, but for the defendant's efforts to prevent his friends from summoning assistance for the victim, the victim "might have survived" the methadone overdose that killed her). The effect of this "lost-chance" rule is to require the government to prove, basically, (1) that the defendant contributed to, or "complemented," the underlying causal

The contribution rule is not a recent departure from "traditional understanding" either.[182] The rule appears to have been well-established even in the nineteenth century. Joel Prentiss Bishop, whose 1858 *Commentaries on the Criminal Law* was as influential in Bishop's day as LaFave's treatise is in ours, formulated the basic causation requirement in the law of homicide as a "contribution" requirement: "The general rule, both of law and of reason, is, that whenever a man contributes to a particular result he is holden for the result, the same as if his sole [act] produced it."[183] Bishop wasn't just being careless in his choice of words, moreover. He wasn't just using "contribution" as shorthand for but-for causation. Under the contribution rule, said Bishop, it doesn't matter whether the victim "would have died from other causes, or would not have died from this one, had not others operated with it."[184] What matters, rather, is whether the defendant's conduct "really contributed mediately or immediately to the death, as it actually took place, in a degree sufficient for the law's notice."[185]

Nor have the state courts failed to appreciate the implications of the contribution rule for cases like *Burrage.* On the contrary, state courts have applied the contribution rule to facts that are strikingly similar to those in *Burrage.* In *State v. Christman*,[186] for example, the Washington Court of Appeals applied the contribution test to a drug dealer who had supplied the victim with one of several controlled substances that had contributed to his death from intoxication.[187] In *Commonwealth v. Osachuk*,[188] the Massachusetts Court of Appeals applied the contribution test to a defendant who, by supplying the victim with drugs on multiple occasions, had contributed to his death from combined "cocaine, heroin, and methadone intoxication."[189] And in *People v. Jennings*,[190] the California Supreme Court applied the contribution test to a defendant

mechanism, and (2) that the defendant's contribution *might* have been decisive. Johnson, *supra* note 120, at 106.

182. *See Burrage*, 134 S. Ct. at 888–89 (asserting that the but-for requirement "is one of the traditional background principles 'against which Congress legislate[s]'" (alteration in original)).

183. *See* 2 BISHOP, *supra* note 113, § 653; *see also* CLARK, *supra* note 124, at 129 ("It is sufficient if [the defendant's conduct] was a contributing cause."). Several cases have cited to Bishop for this proposition. *See, e.g.*, Kee v. State, 28 Ark. 155, 160 (1873); State v. Matthews, 38 La. Ann. 795, 797 (1886); Burnett v. State, 82 Tenn. 439, 444 (1884); Williams v. State, 2 Tex. App. 271, 282–83 (1877).

184. 2 BISHOP, *supra* note 113, § 653.

185. *Id.*

186. 249 P.3d 680 (Wash. Ct. App. 2011).

187. *Id.* at 682, 687–88.

188. 681 N.E.2d 292 (Mass. Ct. App. 1997).

189. *Id.* at 294.

190. 237 P.3d 474 (Cal. 2010).

whose physical abuse of the victim had contributed, by weakening him, to his death from "combined drug toxicity."[191]

The contribution rule is firmly rooted in precedent, then. It also is firmly rooted in the "common understanding of cause."[192] Again, the but-for test, for all its usefulness "in ordinary causal situations,"[193] fails to capture the "common understanding" in cases of overdetermination or spurious sufficiency. The contribution test captures the common understanding in both of these sorts of cases, as this Article will explain in the sections that follow.

### B. *Contribution and Spurious Sufficiency*

Some cases of spurious sufficiency won't lend themselves to resolution under the acceleration rule. This will be true, in particular, where the spuriously sufficient causal mechanism would have caused the victim's death in the same instant as the actual causal mechanism. For example, suppose a heroin user, *X*, purchases heroin from two separate dealers, Seller *A* and Seller *B*, in rapid succession; the two purchases are identical in content and are identically packaged. Afterwards, *X* returns home, where he injects the heroin he purchased from Seller *A*. If he hadn't injected the heroin from Seller *A*, he would have injected the heroin from Seller *B*. The heroin from Seller *A*, together with the background conditions, causes *X*'s death from overdose.

Just about everybody would agree that Seller *A*'s actions qualify as a factual cause of *X*'s death in these circumstances.[194] But neither the but-for test nor the acceleration rule can explain this result. Seller *A*'s delivery of the heroin to *X* doesn't satisfy the unmodified version of the but-for test, since *X* still would have injected heroin and still would have died even if he had not obtained the heroin from *A*.[195] Seller *A*'s delivery of the heroin to *X* does not satisfy the acceleration test either, since there is no reason to suppose that the heroin from Seller *A* caused *X*'s death any sooner than the heroin from Seller *B* would have.

This sort of spurious causal sufficiency is commonplace in accomplice liability cases.[196] Suppose, for example, that an accomplice

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191. *Id.* at 494, 496.

192. *Cf.* Burrage v. United States, 134 S. Ct. 881, 888 (2014) (finding that the but-for requirement "is part of the common understanding of cause").

193. Wright, *supra* note 18, at 1792.

194. *See supra* note 77.

195. *See* Mackie, *supra* note 77, at 251 ("It is true that in this case we cannot say what will usually serve as an informal substitute for the formal account, that the cause, here *A*, was necessary . . . in the circumstances; for [the alternative condition] would have done just as well.").

196. Dressler, *supra* note 129, at 131–32; *cf.* Mastafa v. Australian Wheat Bd. Ltd., No. 07 CIV. 7955 (GEL), 2008 WL 4378443, at *3 (S.D.N.Y. Sept. 25, 2008) (explaining that a requirement of but-for causation on plaintiffs alleging accessorial liability "would significantly

supplies the principal with a critical instrumentality for the crime—a gun, say—but the principal, if he had not obtained the gun from this accomplice, could readily have obtained the gun elsewhere from a substitute accomplice.[197] In this situation too, the but-for test ordinarily will not be satisfied.[198] Nor, usually, will the acceleration rule be satisfied, since the day and time of the principal's commission of the crime usually will not vary, or will not vary provably, with the identity of his accomplice.[199] This accomplice-liability problem shares the structure of the other spurious-sufficiency problems, then.[200] The assistance that would have been provided by the *substitute* accomplice is part of a causal mechanism that would have sufficed to bring about the commission of the offense by the principal. As it happened, though, this causal mechanism was preempted by another, overlapping causal mechanism, of which the *real* accomplice's conduct was a necessary component.[201]

No one seems to be inclined to relieve accomplices of liability on the ground that somebody else would have helped the principal if the actual accomplice had not. On the contrary, courts consistently have taken the view that an accomplice's conduct need not be a but-for cause.[202] Nor

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undermine [civil] aiding and abetting liability in the federal courts, since it is often the case that an accessorial defendant is not the 'but for' cause of the principal tortfeasor's tortious acts").

197. *See* Karp, *supra* note 153, at 1279.

198. *See* GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW § 8.8, at 681 (2000) (acknowledging that "merely aiding an existing criminal plan" ordinarily does not "satisf[y] the 'but for' criteria of causation"); *id.* § 8.8, at 680 ("If the perpetrator is very likely to kill, regardless of whether he receives the aid, the accessory's minimal contribution does not meet the minimal test of 'but for' causation, and a fortiori it fails to meet the more demanding criteria of the 'common-sense' view of causation."); Karp, *supra* note 153, at 1279 ("[T]he recipient could easily have obtained a gun elsewhere if the supplier in question had refused to give him one. But-for causation then does not exist in any straightforward sense.").

199. *But cf.* Dressler, *supra* note 129, at 132 (arguing that the acceleration rule "usually" will accommodate these cases: "[A]ny evidence of a hypothetical alternative cause would usually prove only that the crime would have occurred later, not when it did").

200. *See supra* text accompanying notes 77–79.

201. Glanville Williams argued, improbably, that one could address this difficulty by imposing limits on the kinds of counterfactual manipulation that the but-for test permits. *See* Williams, *supra* note 63, at 72 ("[T]he imaginary subtraction of the alleged causal fact must not be accompanied by the invention of any other imaginary facts in its place, however likely it may be that such a replacement would have occurred in reality."); *see also* Mike C. Materni, *Rebooting the Discourse on Causation in the Criminal Law: A Pragmatic (and Imperfect) Approach*, 50 CRIM. L. BULL. 1313, 1353 (2014) ("[W]e *cannot* build our counterfactual on alternative antecedents *that did not occur*."). Wright's criticism of this view appears to be correct, if too mild. *See* Wright, *supra* note 18, at 1780.

202. *See, e.g.*, State *ex rel.* Martin v. Tally, 15 So. 722, 738 (Ala. 1894) ("The assistance given, however, need not contribute to the criminal result in the sense that but for it the result would not have ensued. It is quite sufficient if it facilitated a result that would have transpired without it."); People v. Franzen, 148 Cal. Rptr. 3d 863, 880 (Ct. App. 2012) ("[W]hile the defendant must 'in fact assist[ ]' the primary actor to commit the offense, there is no requirement

does anybody appear to be inclined to relieve heroin dealers of liability for a purchaser's death on the ground that the purchaser would have obtained heroin from somebody else if he hadn't obtained it from the defendant.[203] How, then, are courts to accommodate cases like these?

This Article has already considered and rejected two possible solutions, neither of which has any following in criminal cases anyway. First, this Article has rejected the possibility of requiring the fact finder to decide which of two apparently sufficient causal sets actually was "instantiated" in the moment before the result occurred.[204] The terminology of "sufficient causal sets," whatever its value in describing the unconscious processes by which ordinary people identify conduct as the cause of a result, is far too complex to be of any real utility to lay fact finders.[205] Second, this Article has considered the possibility of modifying the but-for test by refining the description of the result to include *how* the result happened.[206] As applied in our heroin hypothetical, for example, this test presumably would require the fact finder to decide whether *X* would have died "from ingesting heroin supplied by *A*" but for *A*'s conduct. But this reformulation makes the but-for test circular.[207]

How, then, do courts handle spurious sufficiency of the kind that characterizes accomplice liability? The answer appears to be that, in place of but-for causation, they require only that the defendant's conduct

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that his conduct be a but-for cause or even an essential factor in bringing it about." (second alteration in original)).

203. *See supra* note 77.

204. *See supra* text accompanying notes 87–95.

205. *See supra* text accompanying notes 87–95; *see also* Johnson, *supra* note 120, at 102 (explaining why application of the rule of "sufficient causal sets" would prove "extraordinarily complicated": "Imagine arguing to jurors about the 'construction' of a 'sufficient causal set' whose elements include counterfactuals. And then imagine further explaining the limits on the plausibility of counterfactuals"); *cf.* Wright, *supra* note 76, at 1083 (acknowledging that the courts in tort cases have "clearly rejected" the Restatement-type approach in favor of requiring the plaintiff "prove that the tortious aspect of the defendant's conduct contributed to the plaintiff's injury").

206. *See supra* text accompanying notes 54–62, 149–60.

207. A more radical alternative would be to dispense with the causation requirement entirely, as the Model Penal Code does in the "aiding" cases. Under Model Penal Code section 2.06(3)(a)(ii) and a few state statutes derived from section 2.06, an "attempt[] to aid," though not an attempt to solicit, will suffice to trigger accomplice liability. *See, e.g.*, DEL. CODE ANN. tit. 11, § 271 (2016); HAW. REV. STAT. § 702-222 (2016); MONT. CODE ANN. § 45-2-302 (2015). As the Model Penal Code commentary acknowledges, however, the imposition of liability for "attempts to aid" represents a departure from existing law. MODEL PENAL CODE § 2.06 cmt. 6(c) at 314 (AM. LAW INST., Proposed Official Draft 1962) (acknowledging that section "may go in part beyond the present law"); *cf.* Kit Kinports, Rosemond*, Mens Rea, and the Elements of Complicity*, 52 SAN DIEGO L. REV. 133, 136 (2015) (suggesting that the Model Penal Code rule is the standard approach: "But any voluntary act of aid or encouragement, no matter how trivial, suffices. The prosecution is not required to establish that the crime would not have occurred but for the accessory or that the accomplice contributed a substantial amount of assistance").

"contribute" to the result,[208] or—in cases of accomplice liability—to the principal's offense.[209] The difference between the actual accomplice and the would-be substitute accomplice, on this account, is that the actual accomplice actually "contributed" to the commission of the offense, while the would-be substitute accomplice did not. Likewise, the difference in the drug-dealing example between Seller *A* and Seller *B* is that the drugs sold by Seller *A*, unlike those sold by Seller *B*, actually "contributed" to the purchaser's demise.

Courts and scholars generally haven't defined the word "contribute" in this setting. And it seems likely that any effort to formulate a rigorous definition would founder on the same difficulties that have bedeviled scholars' efforts to distinguish real from spurious causal sufficiency.[210] Instead, in applying the contribution requirement—in identifying what distinguishes spurious from actual causal sufficiency in these cases—even the most sophisticated of scholars have tended to fall back on words like "actually" and "really." Bishop, for example, said that the question in cases like these is whether the defendant's conduct "*really* contributed mediately or immediately to the death, *as it actually took place*."[211]

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208. *See supra* notes 15, 20.

209. *See, e.g.*, Damato v. Hermanson, 153 F.3d 464, 470 (7th Cir. 1998) ("By definition, an aider and abettor knowingly contributes to the principal's violation, rather than committing an independent violation of its own."); People v. Prettyman, 926 P.2d 1013, 1018 (Cal. 1996) ("Accomplice liability is 'derivative,' that is, it results from an act by the perpetrator to which the accomplice contributed."); State v. Crowley, No. A-4547-11T3, 2014 WL 3055959, at *6 (N.J. Super. Ct. App. Div. July 8, 2014) ("Even if defendant's shot was not fatal in itself, the evidence suggested defendant promoted and participated in the commission of the murder by shooting the victim. Therefore, the jury was permitted to convict him as an accomplice because his conduct contributed to causing Pretlow's death."); State v. Davis, 356 S.E.2d 340, 343 (N.C. 1987) ("In cases where a defendant is prosecuted as an accessory before the fact to murder, the state must prove beyond a reasonable doubt that the actions or statements of the defendant somehow caused or contributed to the actions of the principal, which in turn caused the victim's death."); State v. Patterson, No. 82AP-660, 1982 WL 4608, at *2 (Ohio Ct. App. Dec. 30, 1982) ("A person aids or abets when he knowingly assists another in the commission of the crime; if he has a purpose in common with the principal offender to commit the crime, and the principal offender performs one part and the person participates by performing another, or by doing something to contribute to the principal offender's committing the crime, he aids and abets the principal offender."); State v. Merida-Medina, 191 P.3d 708, 711 n.2 (Or. Ct. App. 2008) (remarking that Oregon's accomplice liability statutes "create an alternative form of criminal liability—accomplice liability—for contributing to the commission of a crime by, among other things, aiding and abetting the person who commits it").

210. *See supra* text accompanying notes 83–95.

211. 2 BISHOP, *supra* note 113, § 653 (emphasis added); *cf.* PERKINS & BOYCE, *supra* note 59, at 773 ("Suppose, for example, an unarmed man is so completely surrounded by enemies bent on his destruction, and armed with knives, that he has no possible chance to escape; but only one blow is struck because it is instantly fatal. It may be very true that without this blow he would have been killed at almost the same instant by some other knife; but no amount of repetition of

Professor Joseph Beale said, likewise: "The question is not what would have happened, but what did happen."[212] J.L. Mackie said the question is whether the actor's contribution, if not "necessary" in the sense required by the but-for test, nevertheless is "a necessary condition *post factum*."[213]

The difficulty of saying exactly what "contribute" means in this setting hasn't deterred either courts or scholars from making use of the contribution test, however. Criminal law scholars say routinely that accomplice liability requires mere "contribution," as distinct from but-for causation.[214] Courts too sometimes formulate the demands of accomplice liability in terms of "contribution."[215] In North Carolina, for example, trial judges instruct juries that the prosecution must "prove . . . beyond a reasonable doubt . . . that the defendant's actions or statements caused *or contributed to* the commission of the crime by [the principal]."[216] In other jurisdictions, the requirement of contribution is treated as implicit in the language of the aiding-and-abetting instruction—in words like "aid," "facilitate," "instigate," and "promote."[217] In both sorts of jurisdictions, however, the courts appear to agree that the essence of what the accomplice does is *contribute* to the criminal enterprise.[218] And they appear to know intuitively what the word "contribute" means."

The contribution test's utility in distinguishing genuine from spurious causal factors probably explains, in part, why courts invoke the test not

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such argument can conceal the fact that the *actual cause of death* was the blow struck." (emphasis added)).

212. Joseph H. Beale, *The Proximate Consequences of an Act*, 33 HARV. L. REV. 633, 638 (1920).

213. Mackie, *supra* note 77, at 251.

214. *E.g.*, FLETCHER, *supra* note 198, § 8.8, at 680 ("That one can contribute to a result without causing it lies at the foundation of accessorial liability."); John Gardner, *Complicity and Causality*, 1 CRIM. L. & PHIL. 127, 130 (1997) (describing an "accomplice" as "a secondary wrongdoer who contributed to the commission of [the principal's] wrongs").

215. *See supra* note 209; *cf.* Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp. 2d 289, 323–24 (S.D.N.Y. 2003) ("The [International Criminal Tribunal for Rwanda] has similarly held that the *actus reus* of aiding and abetting is constituted by 'all acts of assistance in the form of either physical or moral support' that 'substantially contribute to the commission of the crime.' While the assistance must be substantial, it 'need not constitute an indispensable element, that is, a *conditio sine qua non* for the acts of the principal.'" (citation omitted) (first quoting Prosecutor v. Musema, Case No. ICTR-96-13-T, Judgment, ¶ 126 (Jan. 27, 2000); and then quoting Prosecutor v. Furundzija, Case No. IT-95-17/1-T, Judgment, ¶ 209 (Dec. 10, 1998)).

216. *Aiding and Abetting—Felony, Misdemeanor*, NORTH CAROLINA PATTERN JURY INSTRUCTION—CRIMINAL 202.20 (2015) (emphasis added).

217. For example, though California's courts long have acknowledged that accomplice liability is grounded in "contribution," *see* People v. Prettyman, 926 P.2d 1013, 1018 (Cal. 1996), their pattern jury instructions require proof only that the defendant "does in fact, aid, facilitate, promote, encourage, or instigate the perpetrator's commission of that crime." *Aiding and Abetting: Intended Crimes*, JUDICIAL COUNCIL OF CALIFORNIA CRIMINAL JURY INSTRUCTION 401 (2016).

218. *See supra* note 209.

only in accomplice-liability cases but also in direct-liability cases. At least where causation is concerned, direct liability isn't fundamentally different from accomplice liability: In direct liability, as in accomplice liability, the defendant's conduct only ever is one component of the set of "conditions, positive and negative," that together are sufficient to precipitate the result.[219] It would be unsurprising, then, if the kind of spurious sufficiency that characterizes accomplice liability were sometimes to arise in direct liability—as in the hypothetical where the heroin user would have ingested heroin from Seller *B* if he had not ingested the heroin from Seller *A*.[220] In these direct-liability cases, as in the accomplice-liability cases, the word "contribute" captures intuitively what distinguishes genuine causal factors from spurious "would be" causal factors.

### C. *Contribution and Overdetermination*

The contribution rule also remedies the but-for test's shortcomings in cases of overdetermination. Not all overdetermination cases require resort to the contribution rule, of course. The acceleration rule often suffices, especially when the overdetermined causal component involves a threshold. In cases involving thresholds, the defendant's contribution to the causal mechanism, even if it doesn't determine *whether* the threshold is reached, sometimes will determine *when* the threshold is reached. This acceleration shortcut won't work in every overdetermination case, however. Nor even will it work in every overdetermination case that involves a threshold.

Take, for example, a typical drunk-driving homicide case where an intoxicated driver strikes a bicyclist who is riding legally in the driver's lane of travel.[221] In this case, whether an accident occurs will depend in part on how quickly the driver notices and reacts to the cyclist. It will depend, in other words, on whether the defendant's reaction time exceeds a certain critical threshold.[222] A number of factors will contribute to this threshold, including the driver's intoxication, the weather and lighting conditions, the degree of the driver's attention to the roadway, the brightness of the cyclist's clothing, etc. If the various contributions to the driver's reaction time exceed the critical threshold, the driver will strike the cyclist. But factors that increase the driver's reaction time *further*, beyond this threshold, won't accelerate the accident. They'll just overdetermine it.[223] So the drunk driver often will have a viable argument

219. 1 MILL, *supra* note 106, at 345.

220. *See* PERKINS & BOYCE, *supra* note 59, at 773.

221. *See, e.g.*, State v. Rumsey, No. 2 CA-CR 2009-0041, 2010 WL 3410824, at *1 (Ariz. Ct. App. Aug. 31, 2010).

222. Johnson, *supra* note 19, at 636–38.

223. *See id.* (analyzing drunk-driving homicide cases as causal-overdetermination cases).

that the death might have occurred *when it did* even if he had not been intoxicated.

Moreover, even in the kinds of cases where additional contributions to the causal threshold often *do* accelerate the result—exsanguination cases, for example—the government's experts often will be unable to say definitively whether the defendant's contribution to the threshold actually accelerated the death.[224] To illustrate: In *People v. Brown*,[225] defendant Cortez Brown was one of two men who had shot Curtis Sims in the moments before Sims died.[226] During a subsequent autopsy, the pathologist found three bullets from two different guns—a .45 caliber Uzi and a 9-millimeter handgun—in Sims's body.[227] "The pathologist could not say which of the three wounds caused Sims' death . . . ."[228] Nor, apparently, could the pathologist say whether each of the three wounds had accelerated Sims' death. He was able to testify only that "'any three of [the wounds]' could have killed him."[229]

What the Illinois Supreme Court said in *Brown*, and what state courts have said consistently in cases like *Brown*, is that contribution is enough: "[T]he defendant's act need only contribute to the victim's death to prove the defendant guilty of murder."[230] In a few states, the legislature has adopted a variant of the contribution test by statute.[231] In other states, where the legislature has left the law of causation to the courts, the courts have adopted the contribution test as judge-made law.[232] As in the

224. *See* 3 STEPHEN, *supra* note 124, at 7 (acknowledging that the evidentiary difficulties associated with the question of acceleration are "often very great"); Wright, *supra* note 60, at 292 ("[I]n many situations it will be impossible to determine whether the condition at issue had any effect on the timing or location of the consequence.").

225. 661 N.E.2d 287 (Ill. 1996).

226. *Id.* at 290.

227. *Id.* at 296.

228. *Id.* at 290.

229. *Id.* at 296–97. The same sort of overdetermination frequently occurs in accomplice-liability cases, particularly where the accomplice's liability hinges on "abetting," or encouragement, rather than "aiding."

230. *Id.* at 296.

231. Specifically, these codes adopt a modified but-for test, under which the fact finder is permitted to combine the defendant's conduct with another complementary causal factor before applying the but-for test. *See* ALA. CODE § 13A-2-5(a) (2016); ARK. CODE ANN. § 5-2-205 (2016); ME. STAT. tit. 17-a, § 33 (2016); N.D. CENT. CODE § 12.1-02-05 (2016); TEX. PENAL CODE ANN. § 6.04 (West 2015). Maine's statute, for example, says that "causation may be found where the result would not have occurred but for the conduct of the defendant operating either alone *or concurrently with another cause*, unless the concurrent cause was clearly sufficient to produce the result and the conduct of the defendant was clearly insufficient." ME. REV. STAT. tit. 17-a, § 33 (2016) (emphasis added). The state legislatures modeled these statutes closely on Section 305 of the Brown Commission's 1971 draft federal criminal code. *See* NAT'L COMM'N ON REFORM OF FED. CRIMINAL LAWS, PROPOSED NEW FEDERAL CRIMINAL CODE 31 (1971).

232. *See, e.g.*, People v. Jennings, 237 P.3d 474, 496 (Cal. 2010); Commonwealth v. Osachuk, 681 N.E.2d 292, 294 (Mass. App. Ct. 1997); People v. Bailey, 549 N.W.2d 325, 334–

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spurious-sufficiency cases, courts in the causal-overdetermination cases often leave this contribution requirement undefined and unelaborated.[233] But some courts have been slightly more forthcoming. The California Supreme Court, for example, has said that a defendant contributes to the result if his conduct '"was operative at the time of the [result] and acted with another cause to produce the [result]."'[234]

This definition nicely captures what courts mean by "contribute" in this setting. If the forces set in motion by the defendant are not "operative in the moment of the result"—if they are cut off or "preempted" at the last moment, say, or if the various conditions on which the conduct's causal efficacy depends are not present—then the defendant's conduct doesn't really "contribute" to the result.[235] Nor does the defendant's conduct "contribute" in the required sense unless it "acts with another cause"—unless it complements the other events and conditions that, together with the defendant's conduct, overdetermine the result.[236] This twofold definition was satisfied in the *Brown* case, for example, where the blood loss from each of the victim's wounds complemented the blood loss from the others, and where "at the very instant of death [each] wound was contributing to the event."[237] It also would be satisfied in drunk-driving homicide cases where the driver's impairment complements native "limitations on the driver's ability to perceive and react" to hazards.[238]

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36 (Mich. 1996); State v. Woods, No. W2003-02762-CCA-R3-CD, 2005 WL 396382, at *4 (Tenn. Crim. App. 2005); State v. Christman, 249 P.3d 680, 687 (Wash. Ct. App. 2011).

233. For example, Illinois's pattern jury instructions, in keeping with *Brown*, require the government simply to prove "that defendant's acts were a contributing cause of the death." *Causation in Homicide Cases Excluding Felony Murder*, ILLINOIS PATTERN JURY INSTRUCTION—CRIMINAL 7.15 (2015).

234. *Jennings*, 237 P.3d at 496 (quoting People v. Sanchez, 29 P.3d 209 (2001)); *see also* Commonwealth v. McLeod, 477 N.E.2d 972, 985 n.21 (Mass. 1985) (approving use of jury instruction based on California's formulation).

235. Johnson, *supra* note 120, at 78–79.

236. *See id.* at 77 (discussing what it means for the defendant's conduct to "complement" another causal factor); *id.* at 104 (discussing the relationship between this complementarity and Wright's necessary-element-of-a-sufficient-set test: "Where this complementary relationship exists—where, in Wright's words, the defendant makes an 'incremental, cumulative contribution' to the other non-background causal factor, it will always be possible to construct a sufficient causal set of which the defendant's contribution is a necessary element by varying the efficacy of the other non-background causal factor" (footnote omitted)); Rothman, *supra* note 90, at 590 (discussing complementarity and "synergy" among causal factors).

237. People v. Lewis, 57 P. 470, 473 (Cal. 1899).

238. Johnson, *supra* note 19, at 636–38; *see also* State v. Baker, 720 So.2d 767, 773 (La. Ct. App. 1998) (explaining, in drunk-driving homicide appeal, that "the defendant's conduct need not be the sole proximate cause of the victim's death; it is sufficient for the defendant's acts to be a contributing cause or a substantial factor"); State v. Bartlett, 355 S.E.2d 913, 916–17 (W. Va. 1987) (approving a jury instruction that required the government to prove, as element of the

By comparison, the contribution test wouldn't be satisfied in a case like *Summers v. Tice*.[239] The facts of *Summers* are familiar to most lawyers from their first-year course on torts. Summers, Tice, and Simonson were hunting quail when, at exactly the same moment, Tice and Simonson both negligently fired their shotguns in Summers's direction.[240] A shotgun pellet struck Summers in the eye.[241] But the evidence didn't show whose shot had struck Summers.[242] Did Tice and Simonson both "contribute" to Summers's injuries, then? Of course not.[243] The pellets from Tice's shotgun did not *complement* those from Simonson's; they posed a risk to Summers, to be sure, but they didn't increase the risk posed by the pellets from the *other* shotgun.[244] Accordingly, it wouldn't make sense to treat the pellets from Tice's shotgun as somehow "acting with another cause." A pellet from one of the two shotguns struck Summers. The person who fired the other shotgun "contributed" nothing.

This sort of lawyerly elaboration of the word "contribute" probably isn't necessary in the usual case. The requirement that the defendant's conduct complement another causal factor is implicit in the word "contribute."[245] The Supreme Court in *Burrage*, moreover, appears to have understood the word "contribute" perfectly without any elaboration.[246] The Court even offered an illustration of what it means for

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offense defined in W. VA. CODE § 17C-5-2, that the defendant-driver's "intoxication was a *contributing cause* of [the victim's] death").

239. 199 P.2d 1 (Cal. 1948).

240. *Id.* at 2.

241. *Id.*

242. *Id.*

243. *See* Crocker, *supra* note 152, at 68–69 ("[I]t would be a retributive horror for the shooter whose shot safely impacted a tree to be found criminally liable for a wounding."). The Canada Supreme Court got this question wrong, surprisingly, in Resurfice Corp. v. Hanke, [2007] 1 S.C.R. 333 (Can.). The Canada Supreme Court traditionally has applied a "material contribution" test in "special circumstances," as an exception to the but-for test. *Id.* at ¶ 24. Among these special circumstances, said the court in *Resurfice Corp.*, "is the situation where it is impossible to say which of two tortious sources caused the injury, as where two shots are carelessly fired at the victim, but it is impossible to say which shot injured him." *Id.* at ¶ 27.

244. Johnson, *supra* note 120, at 77–78; *see also* Stapleton, *supra* note 113, at 40 ("[W]here in breach of duty A and B carelessly shoot towards a person who is hit by only one bullet, we know that A's breach would either have made a positive and necessary contribution to the occurrence of the injury (i.e. it was A's bullet that hit), or it would have been completely uninvolved.").

245. *Contribute*, OXFORD ENGLISH DICTIONARY 848 (2d ed. 1989) (defining "contribute" as "[t]o give or pay jointly with others; to furnish to a common fund or charge"); Stapleton, *supra* note 113, at 45 ("[T]he phrase 'contributed to' . . . accommodates the positive, albeit unnecessary, contributions being discussed here.").

246. Burrage v. United States, 134 S. Ct. 881, 891 (2014) ("Taken literally, [the government's] 'contributing-cause' test would treat as a cause-in-fact every act or omission that makes a positive incremental contribution, however small, to a particular result.").

conduct to "contribute" to an overdetermined result. A baseball player who hits "an early non-dispositive home run" in a game where his team wins by a score of 5 to 2 plays "a nonessential *contributing* role" in his team's winning effort, said the Court, just as do all the players who score for the winning team.[247] Nor does the Court appear to have had any doubts about whether Burrage's conduct would have satisfied the contribution requirement. The heroin supplied by Burrage complemented the other drugs in depressing Banka's central nervous system and was "operative in the moment of the result." It contributed to Banka's death.

The *Burrage* Court's doubts about the contribution test weren't addressed to its meaning but to its *breadth*. "Taken literally," said Justice Scalia in his majority opinion, the government's "'contributing-cause' test would treat as a cause-in-fact every act or omission that makes a positive incremental contribution, however small, to a particular result."[248] Justice Scalia said, too, that any effort to limit the breadth of the contribution rule—by, say, excluding "insubstantial" or "not important" contributions to the causal mechanism—would prove unavailing.[249] Limitations like these, he said, would be too vague to pass muster under the Due Process Clause.[250]

Justice Scalia's concerns are overstated. First of all, there's nothing novel about the idea of limiting the contribution rule's breadth. Courts often have excluded contributions that are "insignificant or merely theoretical" from the scope of the rule.[251] Sometimes, courts have used phrases like "substantial factor" to embody this limitation.[252] Sometimes, though, courts and legislatures have formulated this limitation more specifically. For example, the Brown Commission's 1971 draft federal criminal code provided that a defendant's contribution would not qualify as a cause if "the concurrent cause was clearly sufficient to produce the result and the conduct of the accused clearly insufficient."[253] Under this twofold test, a defendant's contribution will qualify as a cause if, first, it might *actually* have made a difference—if the other causal factors at

247. *Id.* at 888 (emphasis added).

248. *Id.* at 891.

249. *Id.* at 892.

250. *Id.*

251. People v. Jennings, 237 P.3d 474, 496 (Cal. 2010) (quoting People v. Briscoe 112 Cal. Rptr. 2d 401 (2001)); *see also* People v. Wells, 355 N.W.2d 105, 107 (Mich. 1984) (Levin, J., dissenting); PERKINS & BOYCE, *supra* note 59, at 781.

252. *Jennings*, 237 P.3d at 496 (quoting People v. Sanchez, 29 P.3d 209 (2001)).

253. *See* NAT'L COMM'N ON REFORM OF FED. CRIMINAL LAWS, *supra* note 231, at 31. Though Congress never adopted the Brown Commission's draft federal criminal code, § 305 of the Brown Commission draft influenced the codes of several states. *See* ALA. CODE § 13A-2-5(a) (2016); ARK. CODE ANN. § 5-2-205 (2016); ME. STAT. tit. 17-a, § 33 (2016); N.D. CENT. CODE § 12.1-02-05 (2016); TEX. PENAL CODE ANN. § 6.04 (West 2015).

work were not "clearly sufficient" to cause the result by themselves.[254] Alternatively, a defendant's contribution will qualify as a cause if, in the absence of the other causal factors, it might still have caused the result—if it was not "clearly insufficient" to cause the result by itself.

Moreover, it just isn't true that terms like "substantial" and "important" make statutes unconstitutionally vague. Criminal statutes routinely use terms like "substantial" and "important," and really couldn't do otherwise.[255] Indeed, Justice Scalia acknowledged as much in his 2015 opinion for the Court in *Johnson v. United States*.[256] In *Johnson*, the Court struck down as unconstitutionally vague the residual clause of the Armed Career Criminal Act, under which a defendant's prior felonies would trigger enhanced sentencing if they involved "serious potential risk."[257] What made the statute vague, said Justice Scalia, was not its use of the phrase "serious potential risk."[258] What made the statute vague was that it required the courts to apply this standard to "an idealized ordinary case of the [charged] crime."[259] Justice Scalia acknowledged that "dozens of federal and state criminal laws use terms like 'substantial risk,' 'grave risk,' and 'unreasonable risk'" and that the use of phrases like these are not constitutionally suspect: "As a general matter, we do not doubt the constitutionality of laws that call for the application of a qualitative standard such as 'substantial risk' to real-world conduct; 'the law is full of instances where a man's fate depends on his estimating rightly . . . some matter of degree.'"[260] The traditional exclusion of "insignificant or merely theoretical" contributions from the contribution rule's scope is not really constitutionally suspect, then.

With this traditional exclusion, the contribution rule perfectly complements the acceleration rule. It assigns responsibility in just those overdetermination cases where the defendant's contribution to the causal

254. As it happens, this test closely corresponds to what courts require by way of contribution in the "lost chance" homicide cases. In the lost-chance cases, the courts require the government to prove that the defendant's conduct contributed to, or complemented, the causal mechanism behind the victim's death. *See* Johnson, *supra* note 120, at 77–78, 106. But they also require the government to prove that "the victim *might* not have died but for the defendant's conduct." *Id.* at 104; *see also, e.g.*, Armstrong v. State, 502 P.2d 440, 444 (Alaska 1972) (relying on evidence that "in the absence of any one of the factors in this case, the victim might have survived").

255. Among the many criminal law rules that make use of terms like "important" or "substantial" are the rules that govern "proximate" or "legal" causation. *See* PERKINS & BOYCE, *supra* note 59, at 776 ("The line of demarcation between causes which will be recognized as proximate and those which will be disregarded as remote 'is really a flexible line.'").

256. 135 S. Ct. 2551 (2015).

257. *Id.* at 2556 (discussing 18 U.S.C. § 924(e)(2)(B)).

258. *Id.* at 2577.

259. *Id.* at 2558, 2561 ("It is one thing to apply an imprecise 'serious potential risk' standard to real-world facts; it is quite another to apply it to a judge-imagined abstraction.").

260. *Id.* at 2561 (quoting Nash v. United States, 229 U.S. 373, 377 (1913)).

mechanism, though substantial and potentially determinative, still does not affect the timing of the result. And so it captures the "common understanding of cause" in cases where the but-for test fails to do so.

## CONCLUSION

Causation is complicated. You wouldn't know it from the Supreme Court's opinion in *Burrage*, though. In *Burrage*, the Supreme Court didn't just say that the but-for test makes the best of a bad situation. It didn't just say that, given this subject's extraordinary complexity, courts have little choice but to oversimplify. Rather, it said that the but-for test captures what ordinary people mean when they identify a wrongdoer's conduct as the "cause" of harm, period.[261] This claim isn't supported by the authorities the Court cited; it isn't supported by the Model Penal Code, for example.[262] Worse, it's demonstrably false. In ordinary usage, a person who beats a child to death, as the defendant in *State v. Phillips* did, is a "cause" of the child's death even if the child probably "was going to die anyway" within a day or two.[263] The but-for test gets this and many other seemingly easy cases wrong.

By contrast, the acceleration and contribution rules, as applied by state courts, usually get these cases right. They get these cases right, moreover, without making unreasonable demands of fact finders—without demanding, say, that fact finders decide which of several "sufficient causal sets" actually was "instantiated" in the defendant's case.[264] In cases where the defendant's conduct affects the timing of the result, the acceleration rule uses a simple, time-sensitive variant of the but-for test to solve, elegantly, both causal-overdetermination and spurious-causal-sufficiency problems. Contributions to the result, even *large* contributions, won't always affect the timing of the result, however. And so the courts complement the acceleration rule with a contribution rule. Though it sweeps more broadly, the contribution rule serves exactly the same ends—solves exactly the same kinds of difficulties—as the acceleration rule. It has been, and ought still to be, no more controversial. The state courts ought, then, to reject *Burrage* and to continue to apply the contribution and acceleration rules.

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261. *See* Burrage v. United States, 134 S. Ct. 881, 889 (2014).
262. *See supra* text accompanying notes 49–62.
263. 656 N.E.2d 643, 655 n.2 (Ohio 1995).
264. *See supra* text accompanying notes 87–95.