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Wrongful-Aspect Overdetermination: The Scope-of-the-Risk Requirement in Drunk-Driving Homicide

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Wrongful-Aspect Overdetermination: The Scope-of-the-Risk Requirement in Drunk-Driving Homicide

ERIC A. JOHNSON

Tort law's scope-of-the-risk rule says that a defendant is liable for another person's injury only if the injury resulted from the very risks that made the defendant's conduct wrongful. Criminal law scholars have neglected the question whether the scope-of-the-risk rule (or its wrongful-aspect variant) also applies in criminal cases. But the question has divided the courts. In drunk-driving homicide cases, many courts have said that the government must prove a causal nexus between the defendant's intoxication—the wrongful-aspect of his conduct—and the fatal accident. Many others, though, have said the opposite. In this Article, I will argue that courts on both sides of this seeming divide have recognized intuitively: (1) that the scope-of-the-risk rule does apply to drunk-driving homicide cases; but (2) that what is required by way of a causal nexus between the defendant's intoxication and the fatal accident is something less than but-for causation. What is required, specifically, is that the intoxication contribute incrementally to the causal mechanism behind the fatal accident. In effect, the courts have recognized intuitively that most drunk-driving homicide cases are causal-overdetermination cases.

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Wrongful-Aspect Overdetermination: The Scope-of-the-Risk Requirement in Drunk-Driving Homicide

ERIC A. JOHNSON*

I. INTRODUCTION

On the evening of January 12, 2008, Jose Rincon and Oscar Perez, both fourteen years old, were riding their bicycles in a bike lane on Broadway Boulevard in Tucson when a car struck Rincon from behind, killing him.¹ The car's driver, Glenda Rumsey, stopped her car after driving another 1600 feet.² Then she walked back to the crash scene, where she was arrested.³ Subsequent tests showed that Rumsey's blood-alcohol level was 0.25%, more than three times the legal limit.⁴ The state charged Rumsey with reckless manslaughter.⁵ At her trial on this charge, Rumsey challenged the state's evidence of causation.⁶ In particular, she claimed that Rincon's death was attributable not to her intoxication, but to the defective design of the intersection where the accident occurred.⁷ She argued, in substance, that even a driver who was *not* intoxicated might have struck Rincon.⁸

In criminal cases, courts usually conceive of the causation requirement as having two components: (1) a requirement of "but-for" causation; and (2) a requirement of causal "proximity."⁹ But Rumsey's causation defense—her claim that even a sober driver might have struck Rincon—

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¹ State v. Rumsey, No. 2 CA-CR 2009-0041, 2010 WL 3410824, at *1 (Ariz. Ct. App. Aug. 31, 2010); A.J. Flick, *Drunk Driver to Spend 14 Years in Prison*, TUCSON CITIZEN, Jan. 21, 2009, at A10.

² Appellee's Answering Brief at 1, *Rumsey*, 2010 WL 3410824 (No. 2 CA-CR 2009-0041).

³ *Id.*

⁴ Flick, *supra* note 1.

⁵ *Rumsey*, 2010 WL 3410824, at *1.

⁶ *Id.* at *8.

⁷ Appellant's Opening Brief at 4–5, *Rumsey*, 2010 WL 3410824 (No. 2 CA-CR 2009-0041).

⁸ *See id.* at 13 ("Here the expert testimony indicated that there would have been no accident if the road had been designed differently, whether Glenda was intoxicated or not. Thus, . . . Glenda's intoxication would not have been the cause of Jose's death and Oscar's injury if the road had been built correctly because witnesses testified that her driving was normal.").

⁹ *See* People v. Schaefer, 703 N.W.2d 774, 785 (Mich. 2005) ("In criminal jurisprudence, the causation element of an offense is generally comprised of two components: factual cause and proximate cause. . . . [Proximate causation] is a legal construct designed to prevent criminal liability from attaching when the result of the defendant's conduct is viewed as too remote or too unnatural."); *see also* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 14.02[A] (6th ed. 2012) ("Causation analysis is divisible into two parts: 'actual cause' . . . and 'proximate cause' . . .").

was not addressed to either of these two standard components of criminal law causation.

First, Rumsey's defense casts no doubt on the existence of a but-for causal relationship between her conduct and the victim's death. The but-for test requires the fact finder to subtract counterfactually the "conduct" that is the basis for the criminal charge—in Rumsey's case, her driving¹⁰—and then to decide whether the victim's injury still would have occurred in this counterfactual universe.¹¹ In Rumsey's case, it was obvious that if she had not gotten behind the wheel on the night of the accident, she would not have struck Rincon. And so, as Rumsey's attorney appears to have conceded, Rumsey's conduct was a but-for cause of the accident.¹² Rumsey's defense was not addressed to the but-for requirement, then.

Neither, though, was Rumsey's defense addressed to the questions of causal proximity and intervention. Rumsey's was not a case where the causal sequence connecting the actor's conduct to the result was long or tenuous.¹³ Nor did her case involve any "intervening cause." Intervening causes, by definition, intervene temporally between the actor's conduct and the result.¹⁴ Thus, "events that predate the defendant's action and states that are in existence at the time of the defendant's acts [cannot be] intervening causes."¹⁵ The alleged defects in the design of the intersection

¹⁰ See MODEL PENAL CODE § 1.13(5), (9) (1985) (defining "conduct" as "an action or omission" and distinguishing "conduct" elements from "attendant circumstance" elements); see also *State v. Wheeler*, 219 P.3d 1170, 1178 (Haw. 2009) ("[I]n order to commit the offense of [operating a vehicle under the influence of an intoxicant], a person must either drive or assume actual physical control of a vehicle. . . . Under the analytical framework established by the Model Penal Code, this is the conduct element of the offense."); *Kelly v. State*, 527 N.E.2d 1148, 1155 (Ind. Ct. App. 1988) ("[T]he crime [of] operating a vehicle while intoxicated . . . consists of the prohibited conduct, operating a vehicle, and the presence of an attendant circumstance, intoxication.").

¹¹ MODEL PENAL CODE § 2.03(1) & explanatory note.

¹² Appellant's Opening Brief, *supra* note 7, at 13 ("[T]he jury was free to apply this instruction to the [manslaughter charge] and conclude that but for the fact that Glenda drove in the bicycle lane the death of Jose and injury of Oscar would not have occurred.").

¹³ See Richard W. Wright, *The Grounds and Extent of Legal Responsibility*, 40 SAN DIEGO L. REV. 1425, 1467–68 (2003) (identifying the traditional requirement of causal proximity as something distinct both from the requirement of but-for causation and from the scope-of-the-risk limitation).

¹⁴ MICHAEL S. MOORE, CAUSATION AND RESPONSIBILITY: AN ESSAY IN LAW, MORALS, AND METAPHYSICS 234 (2009) ("Intervening causes must intervene between the defendant's act and the harm . . ."); see also *Rossell v. Volkswagen of Am.*, 709 P.2d 517, 525 (Ariz. 1985) (en banc) ("[An intervening event] is one which intervenes between [a] defendant's negligent act and the final result and is a necessary component in bringing about that result."); *State v. Holthaus*, No. C2-99-1793, 2000 WL 821607, at *3 (Minn. Ct. App. June 27, 2000) (holding that the victim's ATV operation did not qualify as an intervening cause in Holthaus' drunk-driving homicide prosecution, because the victim's conduct "cannot be characterized as occurring *after* Holthaus' conduct or *between* Holthaus' conduct and the collision").

¹⁵ MOORE, *supra* note 14, at 234; see also *Zelman v. Stauder*, 466 P.2d 766, 769 (Ariz. Ct. App. 1970) ("[If the] negligent course of conduct (as distinguished from the risk of harm created) actively continues up to the time the injury is sustained, then any outside force which is also a substantial factor in bringing about the injury is a concurrent cause of the injury and never an 'intervening' force.").

where Rumsey ran over Rincon were “states in existence” at the time of the accident, not intervening events.

Rumsey’s defense instead was addressed to a third component of causation, which I will call the *scope-of-the-risk limitation*. Though rarely mentioned by criminal law scholars, the scope-of-the-risk limitation is an established part of what tort law requires by way of causation. The Restatement (Third) of Torts, for example, requires a plaintiff in a tort case to show that his harm “result[ed] from the risks that made the actor’s conduct tortious.”¹⁶ A criminal law counterpart of this Restatement provision—requiring the government to show that the victim’s harm represented the coming-to-fruit of the risks that made the actor’s conduct *wrongful*—is exactly what Rumsey’s defense presupposed. What made Rumsey’s drunk driving wrongful, of course, was Rumsey’s intoxication—and more particularly the risks associated with intoxication’s effects on her judgment, motor function, and perception. If, as Rumsey claimed, even a sober driver might have struck Rincon under the circumstances, then Rincon’s death could not be said (or, more precisely, could not be said beyond a reasonable doubt) to have resulted from the risks that made Rumsey’s conduct wrongful.

The viability of Rumsey’s defense appears to depend, then, on whether the scope-of-the-risk limitation applies to criminal cases. As it happens, the courts are split roughly equally on this question. In cases like Rumsey’s, some courts have said that the government is required to prove beyond a reasonable doubt not just that the defendant’s driving was a cause of the victim’s death but, in addition, that “that the intoxication was a cause of the victim’s death.”¹⁷ Other courts, though, have said explicitly

¹⁶ RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 29 (2010).

¹⁷ *Lupro v. State*, 603 P.2d 468, 475 (Alaska 1979); *see also* *State v. Robinett*, No. 28564, 2004 WL 32949, at *2 (Idaho Ct. App. Jan. 7, 2004) (interpreting an “aggravated DUI” statute to require that a defendant’s intoxication be a cause of the victim’s injuries), *aff’d*, 106 P.3d 436 (Idaho 2005); *State v. Price*, 952 So. 2d 112, 117 (La. Ct. App. 2006) (holding that “[u]nder the vehicular homicide statute, ‘the state . . . must prove that an offender’s unlawful blood alcohol concentration combined with his operation of a vehicle to cause the death of a human being’” and noting that “[i]t is insufficient for the State to prove merely that the alcohol consumption ‘coincides’ with the accident” (second alteration in original) (quoting *State v. Taylor*, 463 So. 2d 1274, 1275 (La. 1985))); *Webber v. State*, 577 A.2d 58, 63 (Md. 1990) (holding that under a statute defining the offense of “homicide by motor vehicle while intoxicated” it “was incumbent upon the State to prove, not merely that appellant was intoxicated when he drove the automobile that struck and killed the victim, but also that his negligence [i.e., his intoxication or some other form of negligence] caused the victim’s death”); *State v. Sommers*, 272 N.W.2d 367, 371 (Neb. 1978) (interpreting a “motor vehicle homicide” statute to require proof that “the alcohol level in defendant’s body was an important link in the cause of decedent’s death”); *People v. Baker*, 826 N.Y.S.2d 550, 553 (Essex County Ct. 2006) (holding that a vehicular manslaughter statute “requires a defendant’s intoxication to be causally connected to the cause of death”); *Commonwealth v. Molinaro*, 631 A.2d 1040, 1042 (Pa. Super. Ct. 1993) (requiring the government to prove, as an element of “homicide by vehicle while driving under the influence” of alcohol, that a

that the government is *not* required to prove “a causal connection between intoxication and death.”¹⁸ Decisions like these appear, at first glance anyway, to mark a stark divide between two clearly defined and utterly opposed positions. Neither of these positions would seem particularly difficult to defend, moreover. Even in tort law, scholars have reached very different conclusions about the advisability of the scope-of-the-risk limitation. Many, and probably most, tort scholars agree that this limitation on tort liability is required—“that accidental tortfeasors should not be held liable for harm that is outside the scope of the risk that made the act tortious.”¹⁹ But some widely respected tort scholars have argued that this scope-of-the-risk limitation is inadvisable or even incoherent.²⁰ It

defendant’s “intoxication was a direct and substantial cause of the accident”); *Hale v. State*, 194 S.W.3d 39, 42 (Tex. App. 2006) (holding that to support a conviction for intoxication manslaughter, the State must prove that a driver’s “intoxication, not just his operation of a vehicle, caused the fatal result”); *Wyatt v. State*, 624 S.E.2d 118, 121 (Va. Ct. App. 2006) (holding that a conviction for involuntary intoxication based on drunk driving requires proof “that a causal connection exists between the driver’s intoxication and the death of another person”); *State v. Papazoni*, 596 A.2d 1276, 1276–77 (Vt. 1991) (requiring the government to prove, as an element of “driving under the influence, death resulting,” that there was a “nexus between defendant’s intoxicated state and the collision”); *State v. Bartlett*, 355 S.E.2d 913, 916–17 (W. Va. 1987) (approving a jury instruction that required the government to prove, as an element of section 17C-5-2(a) of the West Virginia Code, that the defendant-driver’s “intoxication was a *contributing cause* of [the victim’s] death”); *Hodgins v. State*, 706 P.2d 655, 657 (Wyo. 1985) (interpreting a statute to require that the impairment of the driver was a cause of the victim’s death).

¹⁸ *State v. Rivas*, 896 P.2d 57, 62 (Wash. 1995) (en banc); see also *People v. Acosta*, 860 P.2d 1376, 1381 (Colo. App. 1993) (holding that “under the vehicular homicide statute, it is not necessary to establish that the intoxication was the proximate cause of the victim’s death”); *State v. Van Hubbard*, 751 So. 2d 552, 558 (Fla. 1999) (holding that “the state is not required to prove that the operator’s drinking caused the accident”); *People v. Martin*, 955 N.E.2d 1058, 1064–65 (Ill. 2011) (holding that when a DUI homicide charge is based on proof that the driver’s blood-alcohol level exceeded the statutory limit, the charge requires “a causal link only between the physical act of driving and another person’s death”); *Micinski v. State*, 487 N.E.2d 150, 154 (Ind. 1986) (holding that the offense of “driving under the influence resulting in serious bodily injury” does not require proof that the driver’s intoxication caused the injury); *State v. Adams*, 810 N.W.2d 365, 371 (Iowa 2012) (holding that Iowa’s drunk-driving homicide statute “does not impose a burden on the State to prove a specific causal connection between the defendant’s *intoxication* and the victim’s death”); *People v. Schaefer*, 703 N.W.2d 774, 777, 784 (Mich. 2005) (holding that a statute defining the offense of “operating a motor vehicle while under the influence of liquor and causing death” does not require the State to prove that intoxication contributed to death); *State v. Benoit*, 650 A.2d 1230, 1233–34 (R.I. 1995) (holding that a statute that defines the offense of “[d]riving under the influence of liquor or drugs, resulting in serious bodily injury” does not require proof of the “defendant’s intoxication as a causal element of the offense but merely requires that the defendant be legally intoxicated at the time of the accident”); *State v. Caibaosai*, 363 N.W.2d 574, 575, 578 (Wis. 1985) (interpreting a statute that defines the offense of “homicide by an intoxicated operation of a motor vehicle” not to require proof of a “causal connection between the defendant’s intoxication and death”).

¹⁹ RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 29 reporters’ note cmt. c.

²⁰ See Heidi M. Hurd & Michael S. Moore, *Negligence in the Air*, 3 THEORETICAL INQUIRIES L. 333, 380, 385 (2002) (arguing that “risk analysis” in tort and contract law is both conceptually incoherent and normatively undesirable); Benjamin C. Zipursky, *Foreseeability in Breach, Duty, and*

is tempting to suppose, then, that the courts in the drunk-driving homicide cases are simply taking sides in this debate. And it is tempting to suppose, too, that the divide among the courts is no more bridgeable than the divide among the tort scholars.

The cases themselves do not bear out this view of the issue, however. Instead, the cases suggest that the courts on both sides of this seeming divide are stumbling toward a common approach. Among courts that purport to have rejected the scope-of-the-risk limitation, many have permitted the scope-of-the-risk limitation to re-enter through the backdoor—in the form of a mysterious requirement that the accident result from the defendant’s “misoperation” or “manner of operating.”²¹ By the same token, among courts that purport to have adopted a strict scope-of-the-risk requirement, some have moderated this requirement by demanding less than a “but-for” causal connection between the defendant’s intoxication and the accident.²² On both sides of the seeming divide, then, the courts’ intuitions appear to be pushing them toward middle ground.

What the courts appear to have recognized intuitively is that most drunk-driving homicide cases are “causal-overdetermination” cases, at least where the scope-of-the-risk question is concerned. Courts and scholars long have recognized that a defendant’s conduct will qualify as a factual cause if it contributes incrementally to the causal mechanism behind the victim’s injury, even if the defendant’s contribution is not itself a “but-for” cause of the injury—even if, in other words, the result is “overdetermined” by the various contributions to the causal mechanism.²³ This causal-overdetermination principle would be implicated, for example, in a case where (1) three different actors independently administered equal doses of poison to their intended victim and (2) any two of the three doses

Proximate Cause, 44 WAKE FOREST L. REV. 1247, 1266–69 (2009) (“[S]erious questions exist regarding not only whether the scope-of-the-risk standard is justifiable but also whether it is coherent.”).

²¹ See *Van Hubbard*, 751 So. 2d at 563 (misoperation); *Benoit*, 650 A.2d at 1234 (manner of operating).

²² See *infra* Part V.

²³ See, e.g., *United States v. Kearney*, 672 F.3d 81, 98 (1st Cir. 2012) (“Proximate cause exists where the tortious conduct of multiple actors has combined to bring about harm, even if the harm suffered by the plaintiff might be the same if one of the numerous tortfeasors had not committed the tort.”); RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 27 cmt. b (“Courts and scholars have long recognized the problem of overdetermined harm—harm produced by multiple sufficient causes”); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 41 (5th ed. 1984) (stating that a defendant is not liable for negligent conduct unless the plaintiff’s injury would not have occurred in its absence); NAT’L COMM’N ON REFORM OF FED. CRIMINAL LAWS, A PROPOSED NEW FEDERAL CRIMINAL CODE § 305 (1971) (“Causation may be found where the result would not have occurred but for the conduct of the accused operating either alone or concurrently with another cause, unless the concurrent cause was clearly sufficient to produce the result and the conduct of the accused clearly insufficient.”).

would have sufficed to bring about the victim's death.²⁴ In this hypothetical, none of the three actors' contributions was *necessary* to bring about the victim's death. Still, each actor's conduct would count as a factual cause of the victim's death, because each actor's conduct contributed incrementally to the causal mechanism that brought about the victim's death.²⁵

Most drunk-driving homicide cases are just like this poisoning hypothetical. In the usual drunk-driving homicide, the causal mechanism behind the fatal accident is the interplay of roadway hazards with limitations on the driver's ability to perceive and react. The wrongful-aspect of the drunk driver's conduct—his intoxication—contributes to this mechanism by diminishing his ability to perceive and react. And so, on this analysis, the driver's intoxication counts as a cause of the victim's death, regardless of whether it was necessary—regardless, that is, of whether the driver's intoxication “overdetermined” the fatal accident. This analysis of the drunk-driving homicide cases appears to explain why courts on both sides of the causal-nexus question have proved uncomfortable with the positions they have staked out. The right answer to the causal-nexus question lies neither in the outright rejection of the scope-of-the-risk limitation nor in a strict requirement that the government prove a but-for causal connection between the defendant's intoxication and the accident. It lies, rather, in a requirement only that, under the circumstances, the driver's intoxication contributed incrementally to the causal mechanism behind the fatal accident.

The argument will proceed as follows: In Parts II and III, I will explain first one and then the other of two distinct components of the scope-of-the-risk limitation. In Part IV, I will explain why the wrongful-aspect test, which seems merely to be a refinement of the but-for test, really is a variant of the scope-of-the-risk limitation. In Parts V and VI, I will examine the drunk-driving homicide cases: first in states where the courts purport to have adopted the scope-of-the-risk limitation and then in states where the courts purport to have rejected it. In Parts VII and VIII, I will formulate the rule on which these two groups of courts appear to be converging: namely, a requirement that the wrongful-aspect of the defendant's conduct contribute incrementally to the causal mechanism behind the fatal accident. Finally, in Part IX, I will explain why this rule appears to be part of a broader trend in the evolution of criminal law.

²⁴ See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 27 reporters' note cmt. f (discussing “multiple insufficient incremental tortious acts as factual causes”).

²⁵ *Id.*

II. THE CAUSAL LINK COMPONENT OF THE SCOPE-OF-THE-RISK LIMITATION

Causation doctrine is “more developed” in tort than in criminal law, as Judge Posner has said.²⁶ This is especially true where the scope-of-the-risk limitation is concerned. Though the Model Penal Code includes a rough variant of the scope-of-the-risk limitation,²⁷ the Code’s formulation has had little influence on state criminal codes²⁸ and has rightly been criticized by scholars as, among other things, “unnecessarily complex (and misleading).”²⁹

By contrast, the Restatement (Third) of Torts distills the complex intuitions underlying the scope-of-the-risk limitation into a strikingly simple formula: “An actor’s liability is limited to those harms that result from the risks that made the actor’s conduct tortious.”³⁰ As the comments to the Restatement explain, this formula requires the jury first to identify “the risks that made the actor’s conduct tortious”—or wrongful³¹—and then to decide whether the harm at issue “was a result of any of those risks.”³²

Though neither the Restatement nor its comments say so explicitly, the phrase “the risks that made the actor’s conduct tortious” really captures

²⁶ *Brackett v. Peters*, 11 F.3d 78, 82 (7th Cir. 1993).

²⁷ MODEL PENAL CODE § 2.03(2)–(3) (1985); *see also* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 29 reporters’ note cmt. d (“The Model Penal Code rejects traditional use of proximate-cause language and adopts as the central limitation on guilt a standard very similar to the one adopted in § 29.”).

²⁸ For a few states that appear to have adopted statutes closely patterned on Model Penal Code § 2.03, *see* ARIZ. REV. STAT. ANN. § 13-203(A) (West 2010); DEL. CODE ANN. tit. 11, § 261 (2007); HAW. REV. STAT. § 702-214 (1993); KY. REV. STAT. ANN. § 501.060(1) (West 2006); MONT. CODE ANN. § 45-2-201 (West 2011); N.J. STAT. ANN. § 2C:2-3 (West 2005); 18 PA. CONS. STAT. ANN. § 303 (West 1998).

²⁹ Paul H. Robinson, *Reforming the Federal Criminal Code: A Top Ten List*, 1 BUFF. CRIM. L. REV. 225, 240 (1997); *see also* H.L.A. HART & TONY HONORÉ, CAUSATION IN THE LAW 398 (2d ed. 1985) (criticizing the Model Penal Code provision for failing to “provide *specifically* for those cases where causal problems arise because, although the accused did not intend it, another human action besides the accused’s is involved in the production of the proscribed harm”). Also among the shortcomings of the Model Penal Code provision is its conflation of the scope-of-the-risk question with the foreseeability question. *See* MODEL PENAL CODE § 2.03(3) (restricting liability to cases where the victim’s injury is “within the risk of which the actor is aware or, in the case of negligence, of which he should be aware”). As Judge Friendly explained in *In re Kinsman Transit Co.*, an outcome might be attributable to “the very risks that rendered [the defendant’s] conduct negligent” and still be “other . . . than . . . fairly foreseeable.” 338 F.2d 708, 723–24 (2d Cir. 1964).

³⁰ RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 29.

³¹ *See* John C.P. Goldberg, Comment, *Misconduct, Misfortune, and Just Compensation: Weinstein on Torts*, 97 COLUM. L. REV. 2034, 2061 (1997) (formulating the scope-of-the-risk limitation as “the rule that one should be held responsible only for harms flowing from the realization of the sort of risks that led society to regard the conduct as wrongful in the first place”).

³² RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 29 cmt. d.

two different limitations. The first limitation, which Judge Calabresi has referred to both in his scholarly writing and in his judicial opinions as the “causal-link” requirement, precludes liability unless the defendant’s conduct is of a kind that “increases the chances of such harm occurring in general.”³³ Put somewhat differently, this first limitation precludes liability where the victim’s harm is not part of the ex ante risk created or enhanced by the defendant’s conduct. By comparison, the second limitation draws a distinction between two *parts* of the ex ante risk: (1) the part by virtue of which the conduct’s aggregate risks exceeded its aggregate benefits; and (2) the part of the risk that would have been posed even by a non-wrongful version of the defendant’s conduct.

Courts in criminal cases rarely have articulated the first requirement—the causal-link requirement—with any precision. Judge Posner’s recent opinion for the Seventh Circuit in *United States v. Hatfield*³⁴ is the exception. In *Hatfield*, the court was called upon to interpret 21 U.S.C. § 841(b)(1)(C), which imposes a sentence of life imprisonment on any defendant who distributes a Schedule I or II controlled substance “if death or serious bodily injury results from the use of such substance.”³⁵ Judge Posner said that this statute’s causation requirement would not be satisfied merely by evidence that the distribution of the drug was a but-for cause of the victim’s death.³⁶ To make this point, Judge Posner constructed the following hypothetical: “Suppose a defendant sells an illegal drug to a person who, not wanting to be seen ingesting it, takes it into his bathroom, and while he is there the bathroom ceiling collapses and kills him.”³⁷ As Judge Posner said, this case would satisfy the but-for test: “Had [the victim] not ingested the drug, he would not have been killed.”³⁸ At the same time, though, “it would be strange to think that the seller of the drug was punishable under 21 U.S.C. § 841(b)(1)(C).”³⁹

The trouble with imposing liability in the bathroom-ceiling case, as Judge Posner explained, is that the defendant’s distribution of the drug “did not increase the risk posed by the unsafe ceiling—did not increase the risk

³³ *Zuchowicz v. United States*, 140 F.3d 381, 388 n.7 (2d Cir. 1998); *see also* *United States v. Nelson*, 277 F.3d 164, 186 (2d Cir. 2002) (distinguishing “causal link” from “‘but for’ cause [and] ‘proximate’ or ‘legal’ cause”); Guido Calabresi, *Concerning Cause and the Law of Torts: An Essay for Harry Kalven, Jr.*, 43 U. CHI. L. REV. 69, 71 (1975) (“There is a causal link between an act or activity and an injury when we conclude on the basis of the available evidence that the recurrence of that act or activity will increase the chances that the injury will also occur.”).

³⁴ 591 F.3d 945 (7th Cir. 2010).

³⁵ *Id.* at 947 (quoting 21 U.S.C. § 841(b)(1)(C) (2006)).

³⁶ *Id.* at 948 (“Probably what the government’s lawyer meant is that a but-for cause is not always (in fact not often) a cause relevant to legal liability. And that is true, and critical.”).

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

that *this* sort of mishap would occur.”⁴⁰ To put this slightly differently: Both in criminal law and in tort, the risks that make a defendant’s conduct *wrongful* are *ex ante* risks—risks evaluated as of “the time the defendant acted”⁴¹ and on the basis of just those circumstances that were “known to him.”⁴² From the perspective of the drug dealer *ex ante*, the sale of the drug to the victim did not increase the risk posed by unsafe ceilings. Under the circumstances known to him, the bathroom ceiling was no more likely to collapse than was the ceiling of the room the victim would have occupied but for the drug sale. And so the risk of a ceiling collapse was not among the risks that made the defendant’s conduct wrongful.

Though this causal-link limitation rarely is implicated in real-world drunk-driving cases, it is easy to construct drunk-driving hypotheticals that share the structure of the bathroom-ceiling hypothetical. Suppose, for example, that a legally intoxicated driver stops to pick up a hitchhiker on a remote country road. And suppose that when the two have traveled about five miles, a malfunctioning single-engine airplane plunges from the sky, striking the defendant’s car and killing the passenger. In this hypothetical, the defendant’s drunk driving obviously was a *but-for* cause of the hitchhiker’s death; if the defendant had decided against driving, the hitchhiker would not have been in the spot where the plane crashed. Still, it would be “absurd” to impose homicide liability on the defendant, as the Rhode Island Supreme Court said of roughly this hypothetical case in *State v. Benoit*.⁴³ The reason it would be absurd is, in Judge Calabresi’s words, that the driver’s conduct did not “increase[] the chances of such harm occurring in general.”⁴⁴ From any but an omniscient perspective, the hitchhiker was no more likely to be killed by a malfunctioning single-engine plane in the place where the driver had taken him than in the place where the driver had picked him up.⁴⁵

Finally, it deserves emphasis that this causal-link requirement is different from, and more fundamental than, any requirement that the

⁴⁰ *Id.*; see also *Zuchowicz v. United States*, 140 F.3d 381, 388 (2d Cir. 1998) (“Causal link says that, even if defendant’s wrong was a *but for* cause of the injury in a given case, no liability ensues unless defendant’s wrong increases the chances of such harm occurring in general.”).

⁴¹ *Zuchowicz*, 140 F.3d at 388 n.7.

⁴² OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 75 (1881); see also MODEL PENAL CODE § 2.03(2)(c)–(d) (1985) (providing that the degree of risk posed by the defendant’s conduct in cases of negligence and recklessness is calculated on the basis of “the circumstances known to him”).

⁴³ 650 A.2d 1230, 1233 (R.I. 1994).

⁴⁴ *Zuchowicz*, 140 F.3d at 388 n.7.

⁴⁵ *Cf.* HART & HONORÉ, *supra* note 29, at 121–22 (suggesting that cases like these might best be addressed by a separate rule “that a factor, which is merely sufficient to secure the presence of a person or thing at a given place at a time different from what it would otherwise have been, is not to be treated as causally connected with the ensuing accident, unless the risk of the accident occurring at that different time was greater”).

victim's harm be "foreseeable."⁴⁶ In the malfunctioning plane and bathroom-ceiling hypotheticals, the trouble wasn't that the defendants could not have foreseen that their conduct would increase the risk to their victims from defective ceilings and malfunctioning single-engine airplanes. Rather, the problem was that their conduct did not increase those risks *at all*. The very notions of risk and probability presuppose "a perspective that is defined by possession of certain information but not other information."⁴⁷ If we knew everything there was to know about the objective facts—"all the forces by which nature is animated and the respective situation of the beings who compose it"⁴⁸—most probabilities and risks would give way to certainties.⁴⁹ In criminal law and tort, the law resolves this difficulty by calculating risks on the basis of just those background facts that were known to the defendant at "the time the defendant acted."⁵⁰ Since neither the structural deficiency of the bathroom ceiling nor the trajectory of the malfunctioning plane was among the background facts known to the defendants in our hypothetical cases, the defendants' conduct in those cases could not, in the relevant sense, be said to have increased the risks from collapsing ceilings or plummeting airplanes. This is why the victims' injuries in these cases cannot be said to have resulted from risks that made the defendants' conduct wrongful.

III. THE DETERMINATIVE-RISK COMPONENT OF THE SCOPE-OF-THE-RISK LIMITATION

So the first component of the scope-of-the-risk limitation—the causal-link component—requires the fact finder merely to decide whether outcomes like the victim's were any part of the *ex ante* risk created or enhanced by the defendant's conduct. It requires the fact finder merely to map the outer boundary of the *ex ante* risk, in other words. In contrast, the

⁴⁶ See Zipursky, *supra* note 20, at 1254 ("[The] scope of the risk and foreseeability are not quite the same."). In *In re Kinsman Transit Co.*, Judge Friendly explained that foreseeability and scope of the risk are different questions. 338 F.2d 708, 723 (2d Cir. 1964). An outcome might be attributable to "the very risks that rendered [the defendant's] conduct negligent," he said, and still not be "fairly foreseeable." *Id.* at 723–24. Judge Friendly also declined to adopt a foreseeability requirement to supplement the scope-of-the-risk requirement, stating that "where, as here, the damages resulted from the same physical forces whose existence required the exercise of greater care than was displayed and were of the same general sort that was expectable, unforeseeability of the exact developments and the extent of the loss will not limit liability." *Id.* at 726.

⁴⁷ LARRY ALEXANDER & KIMBERLY KESSLER FERZAN, *CRIME AND CULPABILITY: A THEORY OF CRIMINAL LAW* 28 (2009); see also *Long v. State*, 931 S.W.2d 285, 289 (Tex. Crim. App. 1996) (en banc) (concluding that a stalking statute's use of the phrase "reasonably likely" was ambiguous because the statute did not specify the perspective from which this probability determination was to be made).

⁴⁸ PIERRE SIMON, MARQUIS DE LAPLACE, *A PHILOSOPHICAL ESSAY ON PROBABILITIES* 4 (Frederick Wilson Truscott & Frederick Lincoln Emory, trans., John Wiley & Sons 1902) (1814).

⁴⁹ *Id.* at 7.

⁵⁰ *Zuchowicz v. United States*, 140 F.3d 381, 388 n.7 (2d Cir. 1998).

second component of the scope-of-the-risk limitation requires the fact finder to distinguish between two *parts* of the ex ante risk: (1) the part by virtue of which the conduct's aggregate risks exceeded its aggregate benefits; and (2) the part of the risk that would have been posed even by a non-wrongful version of the defendant's conduct.

By way of illustration, suppose that Richard, a duck hunter, is walking home from a day in the field when he decides to stop by the home of a friend. His friend's nine-year-old daughter, Kim, answers the door, and Richard hands his loaded shotgun to Kim as he enters the house. Kim drops the shotgun, which lands on her toe, breaking the toe. In this hypothetical (variations of which appear in both the Second and Third Restatements of Torts),⁵¹ Richard plainly is negligent in handing the shotgun to Kim. But the risk that makes his conduct wrongful—the risk by virtue of which the conduct's aggregate risks exceed its aggregate benefits—is the risk that Kim will accidentally shoot herself or someone else with the gun, not that she will drop the gun on her toe.⁵² Thus, according to the Restatement's comment, "Kim's broken toe is outside the scope of Richard's liability, even though Richard's tortious conduct was a factual cause of Kim's harm."⁵³

Notice, first, that the injury to Kim's toe, in addition to satisfying the factual-cause requirement, also satisfies the causal-link requirement. From an ex ante perspective, Richard's conduct "increase[d] the chances of such harm occurring in general."⁵⁴ Shotguns are heavy; on average, they weigh seven to eight pounds. And so, under the circumstances known to Richard, his decision to hand the shotgun to Kim increased, if only slightly, the likelihood that she would break her toe by dropping something heavy on it.⁵⁵ Granted, the risk of such accidents usually does not deter even cautious adults from handing heavy objects to nine-year-old children. The reason, though, is that the cost of precautions designed to stem this slight risk—the cost both in terms of limits on the activities of children and in terms of the mental effort adults would devote to implementing these limits—outweighs the risk posed to children by the handling of eight pound objects.

⁵¹ RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 29 cmt. d, illus. 3 (2010); RESTATEMENT (SECOND) OF TORTS § 281 cmt. f, illus. 3 (1965).

⁵² RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 29 cmt. d, illus. 3.

⁵³ *Id.*

⁵⁴ *Zuchowicz*, 140 F.3d at 388 n.7.

⁵⁵ Compare Zipursky, *supra* note 20, at 1254 ("[I]t is not unforeseeable that a child might drop a gun on someone's foot."), with Jane Stapleton, *Legal Cause: Cause-in-Fact and the Scope of Liability for Consequences*, 54 VAND. L. REV. 941, 993 n.133 (2001) ("[W]e could explain the outcome on the basis that the handing over of the gun would have seemed careless to an observer at the time because it seemed to increase the risk of wounding by gunshot but would not have seemed to increase the risk of an injury from a dropped object (unless, for example, the gun was exceptionally heavy).")

This, as it turns out, is why Kim's broken toe does not satisfy the *second* component of the scope-of-the-risk rule—the requirement that the victim's injury result from those *ex ante* risks by virtue of which the conduct's aggregate risks outweighed its aggregate benefits. The risks posed to Kim by the shotgun's weight would not, by themselves, outweigh the benefits to Richard of handing her the shotgun as he entered her family's dwelling. What made Richard's conduct wrongful—what tipped the balance of aggregate risks and aggregate benefits—was the risk that the loaded shotgun would discharge accidentally. But this risk, again, did not play a role in bringing about Kim's injuries.

This distinction between determinative risks and non-determinative risks is not wholly unproblematic.⁵⁶ When the fact finder undertakes to decide whether the risks posed by the defendant's conduct outweighed its benefits, he or she will aggregate *all* the risks and benefits of the conduct.⁵⁷ Moreover, it seems at first glance as though every part of this aggregate risk is just as potentially determinative as every other part.⁵⁸ In other words, it seems as though it would always be possible mentally to rearrange the various risks in such a way as to make any risk, even the risk of a broken toe, into the determinative risk—the risk by virtue of which the aggregate risks finally exceeded the aggregate benefits. On this view of things, every part of the risk is equally among “the risks that make the conduct wrongful,” just as in a close election where every vote for the winning candidate is equally the vote that determined the election's outcome.⁵⁹ And so the question posed by the scope-of-the-risk limitation—whether the victim's injury was within the risk that made the conduct wrongful—seems undecidable.

But this objection appears to be wrong. The trouble with the objection is that risks, unlike votes, are lumpy. Precautions generally do not eliminate adverse outcomes one at a time. Rather, they eliminate great lumps of similar outcomes. In the shotgun case, for example, unloading

⁵⁶ See Hurd & Moore, *supra* note 20, at 365–74 (arguing that “it would appear that *all* harms are within the risks that make a defendant's conduct negligent” and rejecting “five possible distinctions” designed to differentiate determinative from non-determinative risks).

⁵⁷ See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 3 cmt. e (explaining that the Restatement's test for negligence “suggest[s] a ‘risk-benefit test’ for negligence, where the ‘risk’ is the overall level of the foreseeable risk created by the actor's conduct and the ‘benefit’ is the advantages that the actor or others gain if the actor refrains from taking precautions”).

⁵⁸ See Hurd & Moore, *supra* note 20, at 365 (“[I]f *all* harms, discounted by their probability, are to be included in the calculus of risk, then it would appear that any harm that happens as a result of a defendant's unjustified conduct is within the risks that make the defendant's conduct unjustified.”).

⁵⁹ See Michael Herz, *How the Electoral College Imitates the World Series*, 23 CARDOZO L. REV. 1191, 1214 n.53 (2002) (“No vote or bloc of votes within a winning total is more or less ‘decisive’ than any other. The baseball analogy here is not the World Series but the sport's short-lived and appropriately abandoned use of the ‘game-winning run batted in’ statistic.”).

the shotgun would eliminate a large number of similar risks, among them: (1) the risk that Kim would accidentally discharge the gun into the kitchen, killing her father, who was cooking breakfast; (2) the risk that Kim would accidentally discharge the gun into the ceiling, injuring her brother, who was sleeping in an upstairs bedroom; and (3) the risk that Kim, supposing the gun to be unloaded, would injure herself by pulling trigger in jest. For this reason, it is easy to imagine a counterfactual version of Richard's conduct where the aggregate benefits of his conduct outweigh the risks—where Richard's conduct is not wrongful—but where Kim still drops the gun on her toe, breaking it.⁶⁰ We need merely suppose that he unloaded the gun before he handed it to her.

In contrast, it is impossible to construct a counterfactual version of Richard's conduct where the aggregate benefits of his conduct outweigh the risks and yet Kim still, say, shoots her brother accidentally through the ceiling. In order to reduce sufficiently the aggregate risk posed by Richard's conduct in this counterfactual universe, we would need to eliminate, through some imagined precaution or another, lots of risks that closely resemble the risk that actually comes to fruition in the injury to Kim's brother. We would need to eliminate, for example, the risk that Kim would accidentally shoot her father as he worked in the kitchen, and the risk that Kim would injure herself by pulling the gun's trigger in jest. The trouble is: the least costly and only obvious way of eliminating *these* risks—namely, unloading the shotgun—also would eliminate the risk to Kim's brother upstairs. Even if we could conceive of some elaborate measure by which Richard might eliminate all of the risks posed by the loaded shotgun *except* the risk of Kim shooting her brother through the ceiling, this elaborate measure would be more costly than the simple expedient of unloading the gun. Given the availability of the less costly and safer alternative of unloading the gun, the adoption of any other course of conduct—any course of conduct that left the risk to Kim's brother unabated—would necessarily be wrongful. The risk that Kim will shoot her brother through the ceiling is necessarily among the risks that make Richard's conduct wrongful, then.

This distinction between determinative and non-determinative risks also appears to be defensible in the drunk-driving homicide cases. Consider this hypothetical case, which was incorporated into a legislative

⁶⁰ This is roughly how some torts scholars conceive of the fact finder's task in applying the scope-of-the-risk limitation. See Robert N. Strassfeld, *If . . . : Counterfactuals in the Law*, 60 GEO. WASH. L. REV. 339, 401 (1992) (explaining that the fact finder, in constructing the counterfactual version of the defendant's conduct, should change the facts "only enough to make [the defendant's conduct] conform to the legal standard"). In this view, the fact finder constructs a counterfactual version of the defendant's conduct in which the conduct is minimally lawful and then asks whether the same result would have occurred in this counterfactual universe.

staff report on Florida's vehicular homicide statute: "An intoxicated person drives an automobile to an intersection and properly stops at a stop light. While there in a stationary position, the vehicle is struck from behind by another automobile due to negligent operation by the driver. The negligent driver dies from injuries received in the collision."⁶¹ In this scenario, as in the shotgun hypothetical, the defendant's wrongful conduct is a factual cause of the victim's injury: the accident would not have occurred if the defendant had stayed home, say, instead of driving drunk. At the same time, the victim's death in this drunk-driving hypothetical—like Kim's broken toe in the shotgun hypothetical—seems not to result from the risks that made the drunk driver's conduct wrongful. What makes drunk driving wrongful, we want to say, are the risks attributable to the drunk driver's intoxication—for example, the risk that the driver's impairment will make him cross the highway's center line and strike an oncoming car.

To put this somewhat more rigorously: It is easy to construct a counterfactual version of the stoplight case where (1) the aggregate benefits of the defendant's conduct outweigh the aggregate risks and yet (2) the other driver still runs into the back of the defendant's car. We merely would subtract counterfactually the defendant's intoxication. Thus, the risk of being rear-ended at a stoplight is among the risks that would have been posed even by a non-wrongful version of the defendant's conduct. It is *not*, then, among the risks by virtue of which the conduct's aggregate risks exceeded its aggregate benefits; it is not among the risks that made the driver's conduct wrongful. What this means, finally, is that we can coherently say of some drunk-driving cases that the victim's injury did *not* result from the risks that made the defendant's conduct wrongful.

Equally, though, it is possible to identify drunk-driving cases where the risk that comes to fruition *is* part of the determinative risk. Suppose, for example, that a driver's intoxication causes him to cross the road's center line and strike an oncoming motorist. It would be impossible to construct a counterfactual version of this case where (1) the aggregate benefits of the defendant's conduct outweigh the aggregate risks *and* (2) the defendant's intoxication still causes him to cross the center line and strike an oncoming motorist. The risk of drunkenly crossing the center line is part of a lump of related risks that are most cheaply addressed by the simple expedient of refraining from drinking to excess in the hours before driving. Even if we could imagine some alternative measure by which the driver could eliminate all of the *other* risks associated with drunk driving *without* at the same time eliminating the risk of drunkenly crossing the center line, this alternative would be *more* costly and less safe than

⁶¹ Magaw v. State, 537 So. 2d 564, 566–67 (Fla. 1989) (Boyd, J., dissenting) (quoting Baker v. State, 377 So. 2d 17, 21 (Fla. 1979)).

eliminating the entire lump of risks at once—it would be more costly and less safe than simply refraining from drinking. In this case, then, the injury to the oncoming driver can coherently be said to have resulted from the risks that made the defendant’s conduct wrongful.

IV. WRONGFUL-ASPECT CAUSATION AS A VARIANT OF THE SCOPE-OF-THE-RISK LIMITATION

In cases where courts adopt or reject the scope-of-the-risk limitation, they rarely formulate the limitation just as the Restatement (Third) of Torts does. In other words, they rarely ask specifically whether the law requires the government to prove that the victim’s injury “result[ed] from the risks that made the actor’s conduct [wrongful].”⁶² Instead, they usually pose the question using a common variant of the scope-of-the-risk limitation: the wrongful-aspect test.⁶³

The wrongful-aspect test requires the fact finder first to identify the specific factual circumstance that made the defendant’s conduct wrongful and then to determine whether that circumstance was itself a factual cause of the victim’s harm.⁶⁴ In the Restatement’s loaded-shotgun hypothetical, for example, the wrongful-aspect test would require the fact finder to decide whether the victim’s injury was caused by the fact that the shotgun was loaded. In a drunk-driving homicide case, it would require the fact finder to decide whether the victim’s death was caused by the fact that the defendant was legally intoxicated.

In its usual formulation, the wrongful-aspect test resembles the traditional but-for test.⁶⁵ The two tests are alike, first, in that both require

⁶² RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 29.

⁶³ See *id.* at § 29 reporters’ note cmt. d (identifying the wrongful-aspect test as a variant of the scope-of-the-risk limitation); Richard W. Wright, *Once More into the Bramble Bush: Duty, Causal Contribution, and the Extent of Legal Responsibility*, 54 VAND. L. REV. 1071, 1083 (2001) (commenting that “courts have clearly rejected” the Restatement-type approach in favor of requiring the plaintiff to “prove that the tortious aspect of the defendant’s conduct contributed to the plaintiff’s injury”); see also, e.g., *Zuchowicz v. United States*, 140 F.3d 381, 390 (2d Cir. 1998) (formulating the scope-of-the-risk question as whether the wrongful aspect of the defendant doctor’s conduct—namely, the amount by which the drug dose administered to the patient by the doctor exceeded the dose recommended by the Food and Drug Administration—was “a but for cause of Mrs. Zuchowicz’s illness”); *Commonwealth v. Molinaro*, 631 A.2d 1040, 1042 (Pa. Super. Ct. 1993) (requiring the government to prove, as an element of “homicide by vehicle while driving under the influence,” that the defendant’s “intoxication was a direct and substantial cause of the accident”); *Hale v. State*, 194 S.W.3d 39, 42 (Tex. App. 2006) (holding that, in order to prove intoxication manslaughter, the State must prove that driver’s “intoxication, not just his operation of a vehicle, caused the fatal result”).

⁶⁴ See Eric A. Johnson, *Causal Relevance in the Law of Search and Seizure*, 88 B.U. L. REV. 113, 124–32 (2008) (discussing in relation to a Fourth Amendment issue both the wrongful-aspect test and its relationship to the scope-of-the-risk limitation).

⁶⁵ See Fleming James Jr. & Roger F. Perry, *Legal Cause*, 60 YALE L.J. 761, 789 (1951) (“Under this approach the court asks whether the same injury would have been caused if defendant’s conduct

the fact finder to answer a question roughly of the form, “Would *Y* have occurred if *X* had not?”⁶⁶ In both tests, moreover, *Y* represents the injury for which the government or the plaintiff would hold the defendant liable. The difference between the two tests lies in the nature of *X*—the subtrahend.⁶⁷ Under the traditional but-for test, what the fact finder subtracts counterfactually is the defendant’s “conduct.”⁶⁸ Under the wrongful-aspect test, by contrast, what the fact finder subtracts is “*that aspect of the defendant’s conduct which is wrongful.*”⁶⁹

To illustrate, consider again the case of *State v. Rumsey*.⁷⁰ In applying the traditional but-for test to the *Rumsey* case, the fact finder would counterfactually subtract Glenda Rumsey’s “conduct,” i.e., the event that consisted of Rumsey driving drunk. In other words, the fact finder would determine simply whether Jose Rincon would have been killed if Rumsey had not driven her car home that night but instead had, say, remained at the bar. Under the wrongful-aspect test, by contrast, the fact finder would counterfactually subtract not Rumsey’s conduct but her intoxication, since her intoxication was “the aspect of the conduct that [made] it wrongful.”⁷¹ The question for the fact finder then would be whether, but for Rumsey’s intoxication, Rincon would have been killed that day. If, as Rumsey argued, the fatal accident was attributable exclusively to the defective design of the intersection where the accident occurred, then she would be entitled to an acquittal.⁷²

It would be natural to suppose—as Justice Breyer did in a recent search-and-seizure case—that the difference between the wrongful-aspect

had been careful (or not violative of statute) but in all other respects had been the same as it actually was.”).

⁶⁶ HART & HONORÉ, *supra* note 29, at 110. Hart and Honoré posed this question for the “cause in fact” test. *Id.*; cf. MODEL PENAL CODE § 2.03 (1985) (formulating but-for test to provide that *X* is the cause of a result when *X* “is an antecedent but for which the result in question [*Y*] would not have occurred”).

⁶⁷ Strassfeld, *supra* note 60, at 398–99.

⁶⁸ MODEL PENAL CODE § 2.03(1).

⁶⁹ James & Perry, *supra* note 65, at 789.

⁷⁰ See *supra* text accompanying notes 1–8.

⁷¹ Johnson, *supra* note 64, at 126.

⁷² Application of the wrongful-aspect test is not always this easy. See David Howarth, “*O Madness of Discourse, That Cause Sets Up with and Against Itself!*,” 96 YALE L.J. 1389, 1413 n.110 (1987) (reviewing HART & HONORÉ, *supra* note 29) (observing that proponents of the wrongful-aspect approach “fail to appreciate that . . . there are always two ways of acting lawfully: Carry on as before, but obey the statute . . . or refrain completely from the activity in question”); David W. Robertson, *The Common Sense of Cause in Fact*, 75 TEX. L. REV. 1765, 1770 (1997) (acknowledging that the preliminary task of identifying the conduct’s wrongful aspect is “trick[y]”). Application of the test is particularly difficult where the defendant’s conduct has multiple wrongful aspects, as where the defendant both drives while intoxicated and exceeds the posted speed limit. Richard W. Wright, *Causation in Tort Law*, 73 CALIF. L. REV. 1735, 1768 n.135 (1985) (“When there is more than one tortious aspect, each must be considered, and the tortious-aspect causation requirement is satisfied if any of them contributed.”).

test and the traditional event-based version of the but-for test lies in how finely the fact finder “slice[s]” the defendant’s wrongdoing.⁷³ But the difference between the two tests is not a matter of degree; it is not a question of adopting one or another level of precision in “slicing” the wrongdoing into discrete events.⁷⁴ “It is, rather, a [question] of deciding whether to frame the counterfactual antecedent in terms of an *event*, however narrowly sliced, or in terms of a fact *about* the event.”⁷⁵

In Rumsey’s case, for example, a fact finder applying the traditional but-for test might identify the relevant conduct as, e.g., setting out to drive home from the bar that night, or, alternatively and more precisely, as Rumsey’s continued operation of the car in the moment immediately before the accident. But the fact finder cannot, merely by increasing his or her level of precision, “slice off” Rumsey’s intoxication in the moment of the accident as a separate event.⁷⁶ True, Rumsey’s intoxication is a *consequence* of an earlier event, namely, Rumsey’s drinking on the day of the accident. But this earlier act of drinking is not the basis for liability. Rather, the basis for liability is Rumsey’s intoxication when she engaged in the conduct of driving. This intoxication is not itself an event but rather is a fact about—an aspect of—the conduct of driving. In the terminology of the Model Penal Code, the intoxication is an “attendant circumstance” rather than a “conduct” element.⁷⁷

Not only are the wrongful-aspect test and the traditional event-based but-for test different; they also play different roles. The courts treat the event-based version of the but-for test as defining the basic, threshold requirement of factual causation both in criminal law and in tort.⁷⁸ And they treat the scope-of-the-risk limitation, in all its variant forms, as a

⁷³ See *Hudson v. Michigan*, 547 U.S. 586, 615 (2006) (Breyer, J., dissenting) (arguing that the majority, in “separating the ‘manner of entry’ from the related search” in a knock-and-announce case, had “slice[d] the violation too finely”).

⁷⁴ Johnson, *supra* note 64, at 127.

⁷⁵ *Id.*; see also J.L. MACKIE, *THE CEMENT OF THE UNIVERSE* 248–69 (1974) (explaining the difference between two distinct kinds of statements about causation, one of which takes “concrete occurrences” as causes and the other of which takes “facts, rather than events,” as causes); Robertson, *supra* note 72, at 1770–71 (treating the identification of the conduct’s wrongful aspect as distinct from the preliminary step of “fixing as precisely as possible the piece of conduct—the exact act or omission—with which the defendant is charged”).

⁷⁶ Johnson, *supra* note 64, at 127.

⁷⁷ See MODEL PENAL CODE § 1.13 (1985) (defining “element of an offense” to include both “conduct” elements and “attendant circumstance” elements); MARKUS D. DUBBER, *CRIMINAL LAW: MODEL PENAL CODE* 43–44 (2002) (explaining the Model Penal Code’s use of the term “attendant circumstance” and identifying “under the influence of alcohol” as an attendant-circumstance element).

⁷⁸ See *Zuchowicz v. United States*, 140 F.3d 381, 389–90 (2d Cir. 1998) (addressing the threshold question of whether the “defendant’s act in giving Mrs. Zuchowicz Danocrine was the source of her illness and death,” before addressing (in a separate section of the opinion) the question of whether “it was not just the Danocrine, but its negligent overdose that led to Mrs. Zuchowicz’s demise”).

separate and additional limitation on liability.⁷⁹

This conventional division of labor is evident, for example, in the Model Penal Code. Under the Code, the threshold requirement of factual causation is defined in terms of the “causal relationship between *conduct* and results.”⁸⁰ Specifically, what the Code requires by way of factual causation is just that the actor’s “conduct” be “an antecedent but for which the result in question would not have occurred.”⁸¹ The Code also imposes a scope-of-the-risk limitation.⁸² But the Code treats this scope-of-the-risk limitation as posing a “[f]urther question[],” not as a refinement of the question posed by the threshold cause-in-fact inquiry.⁸³

The Restatement (Third) of Torts, too, adopts a traditional event-based version of the but-for test as its basic test of factual causation, while treating the scope-of-the-risk limitation as a separate, supplemental requirement.⁸⁴ Section 26, which defines the basic requirement of “factual cause” in tort cases, requires the fact finder to answer the question whether the harm in question “would not have occurred absent the *conduct*.”⁸⁵ The Restatement’s scope-of-the-risk limitation, meanwhile, appears not just in a different section but in a different *chapter* than the Restatement’s definition of factual cause. This separation was deliberate, moreover. A special note explains: “[T]his Restatement separates factual cause from scope-of-liability limitations and, to further that end, no longer employs an umbrella term [“proximate cause”] to encompass both concepts.”⁸⁶

All of this is just to say: When courts ask whether a defendant’s intoxication, as opposed to his driving, was a cause of the victim’s death or injury, they are applying a variant of the scope-of-the-risk limitation. They are not just applying the traditional but-for test of factual causation.

In the usual case, moreover, this wrongful-aspect variant will produce the same result as the Restatement’s risk-payout formulation. In the shotgun hypothetical, for example, the fact finder would arrive at the same

⁷⁹ *Id.*

⁸⁰ MODEL PENAL CODE § 2.03(1) (emphasis added) (defining circumstances under which “[c]onduct is the cause of a result”).

⁸¹ *Id.*

⁸² *Id.* § 2.03(2), (3).

⁸³ *Id.* § 2.03 cmt. at 258.

⁸⁴ RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 26 cmt. a (2010).

⁸⁵ *Id.* (emphasis added); *see also* RESTATEMENT (SECOND) OF TORTS § 430 (1965) (defining basic test of factual causation in terms of the relationship between the “actor’s conduct” and “[an]other’s harm”). The comments to section 26 of the Restatement (Third) of Torts hedge occasionally on this question, at one point suggesting that in rare cases the test of factual causation must be applied to the tortious aspect of the conduct, rather than to the conduct itself. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 26 cmt. g (“For example, there may be no doubt that the actor’s agent or instrumentality caused another’s harm, but there may be a dispute about whether the tortious aspect of the actor’s conduct was a cause of the harm.”).

⁸⁶ RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM 492.

result under either test: Kim's injury did not, in the Restatement's formulation, result from the risks that made Richard's conduct wrongful.⁸⁷ But neither did Kim's injury result from the "wrongful aspect" of Richard's conduct, that is, the fact that the shotgun was loaded.

Likewise, the two tests will produce the same results in the malfunctioning-airplane hypothetical. In this hypothetical case, recall, a single-engine airplane struck and killed a hitchhiker who had accepted a ride from a drunk driver. The defendant's conduct counted as a but-for cause of the hitchhiker's injury, since the hitchhiker would not have been under the plane at the critical moment but for the driver's conduct. But the case did not satisfy the scope-of-the-risk limitation, since the driver's conduct did not "increase[] the chances of such harm occurring in general."⁸⁸ A fact finder applying the wrongful-aspect test probably would arrive at the same result: the wrongful aspect of the driver's conduct—his intoxication—appears to bear no causal relationship to the victim's death.

In rare cases, the wrongful-aspect test will produce results that depart both from the Restatement's formulation of the scope-of-the-risk limitation and from the intuitions that underlie it.⁸⁹ For example, some state legislatures have adopted statutes that make it a felony to cause injury or death while engaging in a particular activity—practicing medicine, say, or driving—without a required license.⁹⁰ The Restatement formulation offers a plausible interpretation of these statutes—it limits liability under these statutes to cases where (1) the defendant's "conduct" was a but-for cause of the death or injury; and (2) the death or injury resulted from the risks that led the legislature to make this conduct criminal, e.g., the risk that the unlicensed actor would be incompetent to engage in the licensed activity.⁹¹ In contrast, adherents of the wrongful-aspect approach can do nothing with these cases. In these cases, the "wrongful aspect" of the person's conduct appears to be her lack of a license. But as even proponents of the wrongful-aspect test have acknowledged, it is never really the case that an injury or death is "caused" by the fact that a person does not have a particular piece of paper.⁹²

⁸⁷ *Id.* § 29 cmt. d.

⁸⁸ *Zuchowicz v. United States*, 140 F.3d 381, 388 n.7 (2d Cir. 1998).

⁸⁹ Johnson, *supra* note 64, at 130; *see also* Benjamin C. Zipursky, *Rights, Wrongs, and Recourse in the Law of Torts*, 51 VAND. L. REV. 1, 36 n.149 ("[T]here is a category of risk rule . . . cases that cannot plausibly be handled in this manner.").

⁹⁰ *See, e.g.*, FLA. STAT. ANN. § 456.065 (West 2007) (defining penalties and enforcement procedure for the unlicensed practice of medicine); GA. CODE ANN. § 40-6-393(c) (West 2008) (defining homicide by motor vehicle); MICH. COMP. LAWS § 257.904(4) (2010) (restricting the operation of motor vehicles for those who do not possess a license).

⁹¹ *See* MACKIE, *supra* note 75, at 265.

⁹² *See* *People v. Penny*, 285 P.2d 926, 930 (Cal. 1955) ("It is extremely dubious that defendant's lack of license had any causal connection with Mrs. Stanley's death . . ."); Strassfeld, *supra* note 60, at 398 (arguing that courts "incorrectly identify the violation of a licensing law as a responsible cause of

Whatever its shortcomings, though, in the vast majority of cases the wrongful-aspect variant of the scope-of-the-risk limitation produces the same results as the Restatement variant.⁹³ This is the critical point: The wrongful-aspect variant and the Restatement variant are *designed* to limit liability in exactly the same way. This point will inform our reading of the drunk-driving homicide cases, as will our recognition that both variants are meant to supplement, not to displace, the “initial and very basic requirement” that the defendant’s *conduct*—“the defendant’s operation of his or her motor vehicle,” for example—qualify as a factual cause of the victim’s injury.⁹⁴

V. THE CASES: STATES THAT EXPLICITLY REQUIRE A CAUSAL NEXUS

It is by way of the wrongful-aspect variant that courts in the drunk-driving homicide cases have approached the question whether to impose a scope-of-the-risk limitation. The question, the courts have said, is whether the government “is required to prove that the operator’s drinking caused the accident.”⁹⁵ Of the state courts that have addressed this question, a slim majority has concluded that the answer to the question is yes.⁹⁶ The Alaska Supreme Court, for example, has held that the government is required to prove “that the [driver’s] intoxication was the cause of the victim’s death.”⁹⁷ Likewise, the Texas Court of Appeals has held that the government must prove that the driver’s “intoxication, not just his operation of a vehicle, caused the fatal result.”⁹⁸

What this holding appears to mean—at least at first glance—is that the

the accident” by erroneously specifying the counterfactual antecedent); Wright, *supra* note 72, at 1773 (acknowledging that “[a]lthough the overall conduct of driving or practicing medicine contributed to the injury, the failure to have the required piece of paper (the license) did not”). *But see* Commonwealth v. Samson, 196 A. 564, 568 (Pa. Super. Ct. 1938) (appearing to conclude that the Commonwealth had proved the requisite causal connection between a landlord’s failure to obtain a license to operate his premises as a tenant house and the death of seven tenants).

⁹³ HART & HONORÉ, *supra* note 29, at lxii–lxiii (characterizing the two variants as “equivalent to one another”); ROBERT KEETON, LEGAL CAUSE IN THE LAW OF TORTS 12 (1963) (acknowledging that the Restatement-type formulation of the scope-of-the-risk limitation poses “the same inquiry as the question whether there is causal relation between *that aspect of the defendant’s conduct which is wrongful* and the injury” (internal quotation marks omitted)).

⁹⁴ State v. Benoit, 650 A.2d 1230, 1233 (R.I. 1994).

⁹⁵ Magaw v. State, 537 So. 2d 564, 567 (Fla. 1989); *see also* Commonwealth v. Molinaro, 631 A.2d 1040, 1042 (Pa. Super. Ct. 1993) (addressing the question of whether the government is required to prove, as an element of “homicide by [motor] vehicle while under the influence [of alcohol],” that the defendant’s “intoxication was a direct and substantial cause of the accident”); Hale v. State, 194 S.W.3d 39, 42 (Tex. App. 2006) (addressing the question of whether the government, in order to prove intoxication manslaughter, must prove that the driver’s “intoxication, not just his operation of a vehicle, caused the fatal result”).

⁹⁶ *See supra* note 20 (giving examples of cases that argue against the scope-of-the-risk limitation).

⁹⁷ Lupro v. State, 603 P.2d 468, 475 (Alaska 1979).

⁹⁸ Hale v. State, 194 S.W.3d 39, 42 (Tex. App. 2006).

government is required to prove beyond a reasonable doubt that the victim's death *would not* have occurred *but for* the defendant's intoxication. After all, the wrongful-aspect test appears to "ask a 'but-for' kind of question: 'Is it the driver's intoxication that caused him to hit the victim?'"⁹⁹ Moreover, this wrongful-aspect element, like other elements of the government's case, appears to require proof beyond a reasonable doubt.¹⁰⁰ The reasonable doubt standard is a demanding one, of course. With respect to the wrongful-aspect element, it would require the government to negate, by its evidence, any "real possibility" that the victim's death still would have occurred if the defendant had been sober.¹⁰¹

What the courts actually have required, though, is something less than this. Consider, for example, the decision of the New Mexico Court of Appeals in *State v. Guzman*.¹⁰² Defendant Bertha Guzman left the Golden Spur Saloon in Magdalena, New Mexico, at about 2:00 a.m. after drinking six to eight beers.¹⁰³ As she drove home on Elm Street, she struck and killed a pedestrian.¹⁰⁴ When the police arrested Guzman about four hours later, her blood-alcohol level was still 0.13%, though she acknowledged not having consumed any alcoholic beverages after the accident.¹⁰⁵ The government charged Guzman with vehicular homicide on the theory that she had killed the victim while driving under the influence of alcohol.¹⁰⁶ After a trial, the jury returned a guilty verdict.¹⁰⁷ On appeal, Guzman challenged the sufficiency of the government's evidence on the question of causation. In particular, she argued that "there was no '[e]vidence of a causal link' between [her] driving while intoxicated and the victim's death."¹⁰⁸

Guzman's causation argument had a strong basis in precedent. The New Mexico Supreme Court had adopted a scope-of-the-risk requirement six years earlier in *State v. Munoz*.¹⁰⁹ In *Munoz*, where the government had charged the defendant under both a driving-while-intoxicated theory and a

⁹⁹ *Micinski v. State*, 487 N.E.2d 150, 154 (Ind. 1986).

¹⁰⁰ See *In re Winship*, 397 U.S. 358, 364 (1970) ("[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.").

¹⁰¹ See FED. JUDICIAL CTR., PATTERN CRIMINAL JURY INSTRUCTIONS 28 (1987) (recommending a reasonable doubt instruction that provides: "If on the other hand, you think there is a real possibility that he is not guilty, you must give him the benefit of the doubt and find him not guilty"), quoted in *Victor v. Nebraska*, 511 U.S. 1, 27 (1994) (Ginsburg, J., concurring).

¹⁰² 96 P.3d 1173, 1177–78 (N.M. Ct. App. 2004).

¹⁰³ *Id.* at 1177.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 1178.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* (first alteration in original).

¹⁰⁹ 970 P.2d 143, 149 (N.M. 1998).

recklessness theory,¹¹⁰ the court said that the government was required to prove that the fatal accident was connected causally either to the defendant's intoxication or to his recklessness. Specifically, the court said that the statute required the government to prove that the defendant "had the power to prevent the victim's death by driving lawfully instead of recklessly or while intoxicated."¹¹¹ By implication, then, the same statute would have required the government to prove in Guzman's case that the accident would not have occurred if Guzman "had not been intoxicated."¹¹²

Guzman's causation defense also appears to have had a very strong basis in the evidence. At trial, Guzman introduced evidence that the victim, who had left the Golden Spur just moments before Guzman, was wearing dark clothing and had a blood-alcohol level of 0.319% at the time of the accident.¹¹³ The evidence also suggested that the victim had wandered into Guzman's lane of travel before Guzman struck him: The government's own accident-reconstruction expert attributed the accident to "pedestrian error" and "agreed with Defendant that she was operating her vehicle in a safe manner" at the time of the accident.¹¹⁴ By way of contrary evidence, the appeals court cited only (1) evidence that "[t]here was no indication at the scene that Defendant took any evasive action prior to hitting the victim" and (2) a toxicologist's testimony "that once a blood alcohol level exceeds .10, the individual's field of vision narrows 'significantly' and reaction time is slowed."¹¹⁵

The appeals court upheld Guzman's conviction, however, specifically rejecting her claim that the government had failed to prove the "causal link" required under *Munoz*.¹¹⁶ Given the evidence in the case, even the bare fact that the court upheld Guzman's conviction suggests that the court was doing something other than what *Munoz* required—something other than deciding whether the trial evidence was sufficient to prove beyond a reasonable doubt that the accident would not have occurred but for Guzman's intoxication. Even more telling, though, is the court's almost exclusive reliance on the toxicologist's testimony. The toxicologist's testimony shows only that Guzman's intoxication *increased* whatever level

¹¹⁰ *Id.* at 145.

¹¹¹ *Id.* at 148.

¹¹² *See id.* at 148–49 (holding that the causal nexus requirement was satisfied by the government's evidence "that if Defendant had not been intoxicated or driving recklessly, he would have applied his brakes or otherwise been able to avoid ramming the victim's car").

¹¹³ *Guzman*, 96 P.3d at 1177.

¹¹⁴ *Id.* at 1178. Currently, the road where Guzman struck the victim, Elm Street, does not have a sidewalk. But it does appear to have well-traveled dirt footpaths on either side, which are separated from the roadway by a curb. *See* Google Streetview for 3rd St. & Elm St., Magdalena, NM, GOOGLE MAPS, <http://maps.google.com> (enter "3rd St. & Elm St., Magdalena, Socorro, New Mexico 87825" into search and select "streetview").

¹¹⁵ *Guzman*, 96 P.3d at 1178.

¹¹⁶ *Id.* (citing *Munoz*, 970 P.2d at 149).

of risk already was posed by her encounter with the victim on the night of the accident.¹¹⁷ The testimony does not show what base level of risk would have existed if Guzman had been sober when she encountered the victim. It does not tell us, then, whether a sober driver would have struck the victim. In summary: The court, instead of requiring the government to prove that the accident *would not* have occurred but for Guzman's intoxication, appears merely to have required the government to prove that the accident *might not* have occurred.

The court in *Guzman* did not actually say this, of course—but other courts have. Consider, once again, *State v. Rumsey*.¹¹⁸ Defendant Glenda Rumsey was charged with manslaughter after running over fourteen-year-old bicyclist, Jose Rincon.¹¹⁹ Rumsey claimed that, given the defective design of the intersection where the accident occurred, even a sober driver might have struck Rincon.¹²⁰ The appeals court appeared to accept—as had another Arizona appeals court—the proposition that the offense of vehicular homicide required the government to prove a causal nexus between the defendant's intoxication and the accident.¹²¹ What the appeals court required by way of a causal nexus, however, was something less than a but-for connection. The court did not require the government to prove that the accident would not have occurred but for Rumsey's intoxication. Instead, it asked only whether Rumsey's intoxication had “increased the risk that she might strike and seriously injure or kill someone in the bicycle lane of this allegedly dangerous intersection.”¹²²

The Minnesota courts appear to have settled on much the same approach. The Minnesota courts, like the courts in Arizona and New Mexico, require proof of a causal nexus between the defendant's intoxication and the fatal accident.¹²³ In applying this requirement,

¹¹⁷ See *Cornfeldt v. Tongen*, 295 N.W.2d 638, 640–41 (Minn. 1980) (holding that a mere increase in risk of death or serious harm is insufficient to establish causation without testimony that death probably resulted from this increased risk); *Sherer v. James*, 351 S.E.2d 148, 150 (S.C. 1986) (holding that evidence of increased risk is insufficient to show causation).

¹¹⁸ No. 2 CA-CR 2009-0041, 2010 WL 3410824 (Ariz. Ct. App. Aug. 31, 2010).

¹¹⁹ *Id.* at *1; Flick, *supra* note 1.

¹²⁰ *Rumsey*, 2010 WL 3410824, at *8.

¹²¹ *Id.* at *8–9; see also *State v. Fisher*, No. 1 CA-CR 07-0310, 2008 WL 2447377, at *4 (Ariz. Ct. App. June 12, 2008) (tacitly accepting the legal premise of Fisher's claim on appeal “that his intoxication played no role in causing L.W.'s death,” but rejecting Fisher's claim on the facts because “based on the evidence, the jury reasonably could have found that Fisher failed to observe his surroundings and failed to avoid the collision because he was intoxicated”).

¹²² *Rumsey*, 2010 WL 3410824, at *9; cf. *Fisher*, 2008 WL 2447377, at *4 (explaining that the “sudden emergency” doctrine is available to a drunk driver who strikes a pedestrian only if the driver did not “contribut[e] to the danger by his own conduct”).

¹²³ See, e.g., *State v. Dunagan*, No. C4-94-318, 1994 WL 246076, at *1 (Minn. Ct. App. June 7, 1994) (requiring the government to prove that a fatal “accident was caused by [the defendant's] intoxication”), *rev'd on other grounds*, 521 N.W.2d 355 (Minn. 1994); see also *State v. Holthaus*, No.

however, the Minnesota courts have demanded something less than a but-for causal connection between the defendant's intoxication and the accident. Consider, for example, *State v. Holthaus*,¹²⁴ where the drunk driver, Holthaus, struck an all-terrain vehicle (ATV) and killed its passenger.¹²⁵ Holthaus was convicted of vehicular manslaughter but argued on appeal that the government had failed to prove the required causal nexus between his intoxication and the fatal accident.¹²⁶ He pointed out that the ATV was "traveling in the driving lane of a rural, dark road [and was] not legally equipped for highway travel" when Holthaus struck it.¹²⁷ He also said that the headlights from an oncoming car had obscured his vision.¹²⁸

The Minnesota Court of Appeals rejected Holthaus's argument, concluding that his "intoxication and other conduct were *substantial factors* in causing the ATV passenger's death."¹²⁹ This might sound like a resolution of the question whether Holthaus's intoxication was a but-for cause of the passenger's death, but it is not. What Minnesota courts mean by the phrase "substantial factor"—or at any rate what they mean by this phrase in vehicular homicide cases—is essentially that the wrongful event or circumstance increased the risk to the victim.¹³⁰ The question under Minnesota's substantial-factor test, as the Minnesota Supreme Court held in *State v. Southern*, is whether the victim *might* have survived but for the wrongful event or circumstance, not whether the victim *would* have survived.¹³¹ Accordingly, what the Minnesota Court of Appeals meant when it said that Holthaus's intoxication was a "substantial factor[]" in causing the ATV passenger's death" was only that Holthaus's intoxication had reduced the ATV passenger's chances of surviving their encounter on

C2-99-1793, 2000 WL 821607, at *2 (Minn. Ct. App. June 27, 2000) (affirming the trial court's analysis on whether the defendant's conduct constituted a "substantial cause" of the victim's death).

¹²⁴ 2000 WL 821607.

¹²⁵ *Id.* at *1.

¹²⁶ *Id.* at *3.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.* (emphasis added).

¹³⁰ *State v. Southern*, 304 N.W.2d 329, 330 (Minn. 1981); *cf.* *State v. Baker*, 720 So. 2d 767, 773 (La. Ct. App. 1998) (explaining in a 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").

¹³¹ *Southern*, 304 N.W.2d at 330 (upholding a driver's conviction for negligent vehicular homicide after concluding that the child victim "may well have survived" if the defendant had not driven off negligently and that the defendant's negligent conduct "had the effect of ensuring the child's death"); *see also* *State v. Shane*, No. A06-1581, 2008 WL 660543, at *4-5 (Minn. Ct. App. Mar. 11, 2008) (recognizing that the Minnesota Supreme Court in *Southern* rejected the driver's argument that her gross negligence in leaving the scene was not proven to be "a substantial factor causing the child's death").

the night of the accident.¹³²

This is not to say, of course, that that appeals court in *Holthaus* required something less than a but-for causal connection between Holthaus's wrongful *conduct* and the victim's death. Neither in *Holthaus* nor in *Guzman* or *Rumsey* was there any question as to whether the defendant's operation of the motor vehicle was itself a but-for cause of the victim's death. It was only in connection with the question of wrongful-*aspect* causation that the courts were reluctant to require the usual sort of causal connection—a *but-for* causal connection. In summary, then, among courts that require a causal nexus between the defendant's intoxication and the victim's death, at least a few appear to be uncomfortable intuitively with what the usual but-for formulation of the wrongful-aspect test would require.

VI. THE CASES: STATES THAT EXPLICITLY HAVE DECLINED TO REQUIRE A CAUSAL NEXUS

Courts in nine states—Colorado, Florida, Illinois, Indiana, Iowa, Michigan, Rhode Island, Washington, and Wisconsin—have explicitly rejected the view that the government, in prosecutions for drunk-driving homicide, must prove that the defendant's intoxication was a cause of the fatal crash.¹³³ The Rhode Island Supreme Court, for example, has said that the state's statute defining drunk-driving homicide “does not require the *intoxication* of the defendant to be a proximate cause of death.”¹³⁴ The Colorado Supreme Court likewise has said that Colorado's drunk-driving homicide statute “does not require evidence that the intoxication affected the driver's operation in a manner that results in a collision.”¹³⁵

In reaching the conclusion that the defendant's intoxication need not be a cause of the fatal collision, the courts have relied on varying rationales. Some courts have assigned significance to the statutes' wording.¹³⁶ Others have relied, at least in part, on policy rationales, among them (1) the importance of deterring drunk-driving homicides and (2) the

¹³² *Holthaus*, 2000 WL 821607, at *9.

¹³³ See *supra* note 18.

¹³⁴ *State v. Benoit*, 650 A.2d 1230, 1233 (R.I. 1994).

¹³⁵ *People v. Garner*, 781 P.2d 87, 89 (Colo. 1989).

¹³⁶ Michigan's statute, for example, provides: “A person . . . who operates a motor vehicle [while intoxicated] and *by the operation of that motor vehicle* causes the death of another person is guilty of a crime” MICH. COMP. LAWS. § 257.625(4) (Supp. 2013) (emphasis added). This language probably justifies the Michigan Supreme Court's conclusion that the statute “requires the victim's death to be caused by the defendant's *operation* of the vehicle, rather than the defendant's *intoxicated manner of operation*.” *People v. Schaefer*, 703 N.W.2d 774, 784 (Mich. 2005). More often, the courts have been confronted with ambiguous language. See, e.g., *Garner*, 781 P.2d at 89 (interpreting COLO. REV. STAT. § 18-3-106(1)(b)(I) (1986), which provided: “If a person operates or drives a motor vehicle while under the influence of any drug or intoxicant and *such conduct* is the proximate cause of the death of another, he commits vehicular homicide.” (emphasis added)).

difficulty of proving beyond a reasonable doubt that the defendant's intoxication was causally connected to the fatal accident. The Florida Supreme Court, for example, said that imposing liability without proof of a causal nexus between the intoxication and the accident arguably "has the effect not only of inducing persons to engage in that activity with greater caution, but may also have the effect of keeping a relatively large class of persons from engaging in the conduct at all."¹³⁷ Other courts have emphasized that this deterrent objective might be undercut if the government were required to satisfy the "demanding" and "onerous" burden of proving beyond a reasonable doubt that the collision *would not* have occurred if the defendant had been sober.¹³⁸

Despite having explicitly rejected the scope-of-the-risk limitation, however, and despite having provided solid reasons for this rejection, the courts simultaneously have expressed reservations about imposing liability in just those cases where, as it happens, the scope-of-the-risk limitation is not satisfied. Usually the courts have relied on hypothetical cases in articulating these concerns. The Rhode Island Supreme Court, for example, said it would be "absurd" to impose liability "if a person were driving while legally intoxicated and an airplane suddenly plunged from the sky into the driver's motor vehicle, killing the pilot."¹³⁹ Likewise, the Florida Supreme Court said that the state legislature could not have meant to impose liability in a case where, say, "[a]n intoxicated person drives an automobile to an intersection and properly stops at a stop light" and while he is "there in a stationary position, the vehicle is struck from behind" by a negligent driver, who "dies from injuries received in the collision."¹⁴⁰ The Indiana Supreme Court used a somewhat less fanciful example to articulate the same basic concern: "[A] drunk driver who hits a child who has run out from behind two parked cars," the court said, is "entitled to ask a jury to find him not guilty because there is [a] reasonable doubt whether he caused

¹³⁷ Baker v. State, 377 So. 2d 17, 19–20 (Fla. 1979).

¹³⁸ See People v. Lardie, 551 N.W.2d 656, 674–75 & n.13 (Mich. 1996) (Weaver, J., concurring) (describing the burden imposed on the government by the majority's ruling as "demanding" and "onerous"), *overruled by Schaefer*, 703 N.W.2d 774; see also Micinski v. State, 487 N.E.2d 150, 154 (Ind. 1986) ("Analysis [under] this statute should focus on the driver's acts and not on speculation about whether he could have stopped if he had been sober."); State v. Adams, 810 N.W.2d 365, 378 (Iowa 2012) (Waterman, J., concurring) (explaining that the Iowa legislature's decision to "stop[] short of requiring proof that alcohol intoxication . . . actually caused the fatal accident" was driven in part by "the difficulties of proof separating intoxication from driving"); State v. Resler, 55 N.W.2d 35, 38 (Wis. 1952) ("[T]o require that facts be shown to prove that defendant's operation of the car was so affected by his intoxication that the accident would not have happened if he had been sober, would be to impose an impossible burden upon the State in the prosecution of such a case.").

¹³⁹ State v. Benoit, 650 A.2d 1230, 1233 (R.I. 1994). Interestingly, the court in *Benoit* also said that "if a person suffered a sudden heart attack while driving in a legally intoxicated state which resulted in a fatal collision, the operator would be criminally liable." *Id.*

¹⁴⁰ Magaw v. State, 537 So. 2d 564, 567 (Fla. 1989).

the collision.”¹⁴¹

To accommodate cases like these, the courts—though still insisting that the law requires no causal connection between the intoxication and the accident—have adopted other, less well-defined causal limitations to supplement the standard requirements of but-for and proximate causation. The Rhode Island Supreme Court, for example, has said that the government, in addition to proving that the defendant’s driving was a but-for cause of the fatal accident, also must prove “that the defendant’s *manner* of operating his or her motor vehicle was a proximate cause of the injury in question.”¹⁴² Likewise, the Iowa Supreme Court, despite insisting that the state’s drunk-driving homicide statute “does not impose a burden on the State to prove a specific causal connection between the defendant’s *intoxication* and the victim’s death,”¹⁴³ has said nevertheless that “the statute demands more than mere proof that the defendant’s *driving* caused the death of another person.”¹⁴⁴ What “more” the statute demands, though, is unclear. The Iowa Supreme Court has said by way of clarification only that “a defendant may be found guilty of homicide by vehicle only if the jury finds beyond a reasonable doubt that his criminal act of driving [while intoxicated] caused the victim’s death.”¹⁴⁵

One way of giving content to this mysterious additional requirement would be to interpret it as a requirement that the defendant drive *negligently*—that the manner in which he operates his car qualify as a deviation from what a reasonable driver would have done under the circumstances.¹⁴⁶ But the courts have rejected this interpretation of their decisions. The Florida Supreme Court, for example, has insisted that Florida’s drunk-driving homicide statute—though it requires more than a but-for causal connection between the defendant’s driving and the accident—“does not require proof of the separate and independent element of ‘simple negligence.’”¹⁴⁷ Likewise, the Rhode Island Supreme Court has insisted that the state’s drunk-driving homicide statute does not require the state to prove that the defendant’s manner of driving “rose to the level of criminal negligence or recklessness.”¹⁴⁸ It would be difficult for the courts to conclude otherwise, moreover, since most states’ drunk-driving homicide statutes clearly are designed to dispense with any requirement

¹⁴¹ *Micinski*, 487 N.E.2d at 154.

¹⁴² *Benoit*, 650 A.2d at 1234 (emphasis added).

¹⁴³ *Adams*, 810 N.W.2d at 371 (majority opinion).

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *State v. Van Hubbard*, 751 So. 2d 552, 558 (Fla. 1999) (acknowledging that the court’s earlier decisions on the subject of causation in drunk-driving homicide had been “interpreted as reading a required simple negligence element into the statute”).

¹⁴⁷ *Id.* at 564.

¹⁴⁸ *State v. Benoit*, 650 A.2d 1230, 1234 (R.I. 1994).

that the government prove recklessness or negligence; most states' drunk-driving homicide statutes treat drunk driving as a kind of criminal negligence per se.¹⁴⁹

The only apparent alternative is to interpret the decisions as requiring some sort of "misoperation" short of negligence.¹⁵⁰ A misoperation requirement works well enough if we confine our consideration to cases where, say, a driver crosses the road's center line and strikes an oncoming car. But if we expand our focus to the kinds of drunk-driving cases where causation really is at issue, it becomes apparent that the misoperation requirement lacks substance. Take, for example, *State v. Guzman*, where the driver struck a pedestrian who apparently was walking in the driver's lane of travel.¹⁵¹ Or take *State v. Holthaus*, where the driver struck an ATV that was "traveling in the driving lane of a rural, dark road."¹⁵² In cases like these—where the driver does not, say, deviate from his lane or run a red light—the question whether the driver's "manner of driving" qualified as "misoperation" could only be addressed by measuring the defendant's conduct against a hypothetical sober driver's. But measuring the defendant's conduct against a sober driver's is exactly what these courts have declined to do. They have explicitly declined to require the government to prove a causal connection between the defendant's intoxication and the fatal accident.

VII. THE SEARCH FOR MIDDLE GROUND

In what they *say*—as distinct from what they *do*—the courts in drunk-driving homicide cases appear to be starkly divided. Some courts say that the law requires the government to prove a causal nexus between the defendant's intoxication and the fatal accident; others say that it does not. On neither side of this divide, though, do the courts seem comfortable with the consequences of the positions they have staked out. Among courts that purport to require proof of a causal nexus, this discomfort is reflected in the courts' seeming reluctance to require the government to prove genuine but-for causation. Among courts that purport *not* to require proof of a causal nexus, the courts' discomfort is reflected in their adoption of a

¹⁴⁹ See Eric A. Johnson, *Mens Rea for Sexual Abuse: The Case for Defining the Acceptable Risk*, 99 J. CRIM. L. & CRIMINOLOGY 1, 11–20 (2009) (explaining how general intent offenses, such as drunk driving, are treated as negligence per se); see also *Van Hubbard*, 751 So. 2d at 561 ("It is negligence per se to operate a motor vehicle while under the influence of intoxicants."); *State v. Caibaosai*, 363 N.W.2d 574, 577 (Wis. 1985) ("The commission of the offense [operating a motor vehicle while under the influence of an intoxicant resulting in death] does not require any erratic or negligent driving.")

¹⁵⁰ *Van Hubbard*, 751 So. 2d at 563.

¹⁵¹ See *State v. Guzman*, 96 P.3d 1173, 1178 (N.M. Ct. App. 2004) (acknowledging that "the State's accident reconstruction expert assigned the cause of the accident to 'pedestrian error' and . . . agreed with Defendant that she was operating her vehicle in a safe manner").

¹⁵² No. C2-99-1793, 2000 WL 821607, at *3 (Minn. Ct. App. June 27, 2000).

mysterious requirement that the fatal accident be attributable to the defendant's "manner of driving" or "misoperation." The courts on both sides of the causal-nexus question appear to be searching for middle ground.

It is tempting to suppose that the courts' discomfort in these cases merely is a reflection of the practical difficulties associated with determining in any particular case whether the fatal accident was attributable to the defendant's intoxication.¹⁵³ In other words, it is tempting to suppose both (1) that the courts on both sides of the causal-nexus question recognize intuitively that liability for homicide ought to depend on whether the victim's death resulted from the risk that made the defendant's conduct wrong; and (2) at the same time, that courts on both sides recognize the government cannot realistically be expected to shoulder the "impossible,"¹⁵⁴ or at least "onerous,"¹⁵⁵ burden of showing definitively that the fatal accident would not have occurred but for the driver's intoxication.

This view of the problem as essentially practical or evidentiary finds support in tort cases, where courts have said that the practical difficulty of proving wrongful-aspect causation sometimes will justify shifting or moderating the plaintiff's burden of proof. This approach is best illustrated by Judge Calabresi's opinion for the Second Circuit in *Zuchowicz v. United States*.¹⁵⁶ Writing for the court, Judge Calabresi acknowledged that plaintiffs often face insurmountable difficulties in affirmatively "linking defendant's negligence to the harm," even in cases where the defendant's negligent *conduct*—as opposed to his conduct's negligent *aspect*—"was undoubtedly a *but for* cause of the harm."¹⁵⁷ In response to this difficulty, he said that a plaintiff satisfies his burden of proving wrongful-aspect causation if he shows both (1) that the defendant's negligence "increased the chances that a particular type of accident would occur," and (2) that "a mishap of that very sort did happen."¹⁵⁸

Judge Calabresi did not mean by this remark that increased risk is *legally* sufficient; that increased risk is all the law requires by way of a causal nexus between the wrongful aspect of the defendant's conduct and

¹⁵³ *State v. Resler*, 55 N.W.2d 35, 38 (Wis. 1952) ("[T]o require that facts be shown to prove that defendant's operation of the car was so affected by his intoxication that the accident would not have happened if he had been sober, would be to impose an impossible burden upon the State in the prosecution of such a case.")

¹⁵⁴ *Id.*

¹⁵⁵ *People v. Lardie*, 551 N.W.2d 656, 675 n.13 (Mich. 1996) (Weaver, J., concurring) (describing the burden imposed on the government by the majority's ruling as difficult and "onerous"), *overruled by People v. Schaefer*, 703 N.W.2d 774 (Mich. 2005).

¹⁵⁶ 140 F.3d 381 (2d Cir. 1998).

¹⁵⁷ *Id.* at 390.

¹⁵⁸ *Id.*

the plaintiff's harm. He meant, rather, that evidence of increased risk, taken together with evidence that "a mishap of [the threatened] sort did happen," is sufficient as an *evidentiary* matter to satisfy the plaintiff's burden of proof.¹⁵⁹ Once the plaintiff has made this required *prima facie* showing, Judge Calabresi said, "it is up to the negligent party to bring in evidence" that disproves the existence of a "but-for" causation connection between the conduct's wrongful aspect and the victim's harm.¹⁶⁰ For Judge Calabresi, then, the legal question facing the fact finder in *Zuchowicz* still was whether the wrongful aspect was a but-for cause of the victim's harm.¹⁶¹

One state legislature, Wisconsin's, has adopted a *Zuchowicz*-like burden-shifting approach to the drunk-driving homicide cases. Wisconsin's drunk-driving homicide statute "does not include as an element of the crime a direct causal connection between the fact of defendant's intoxication . . . and the victim's death."¹⁶² But the statute does create an affirmative defense on this subject.¹⁶³ The statute provides that "the defendant has a defense if he or she proves by a preponderance of the evidence that the death would have occurred even if he or she had been exercising due care and he or she had not been under the influence of an intoxicant."¹⁶⁴ This provision, like Judge Calabresi's ruling in *Zuchowicz*, does not change the substantive legal question put to the fact finder; the question remains whether the defendant's intoxication was a but-for cause of the defendant's conduct. The effect of the provision merely is to shift the burden of persuasion on this "but for" question to the defendant.¹⁶⁵

Though plausible, the diagnosis implied by this burden-shifting rule seems inconsistent with what the courts actually have said in the drunk-driving homicide cases. The burden-shifting rule implies, of course, that the shortcomings of the aspect-based but-for test in this context are procedural or evidentiary rather than substantive. But the courts' decisions

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 390–91.

¹⁶¹ *Id.*; see also RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 28 reporters' note cmt. b (2010) (treating *Zuchowicz* and like cases as addressing the burden-of-proof question).

¹⁶² *State v. Caibaosai*, 363 N.W.2d 574, 577 (Wis. 1985).

¹⁶³ WIS. STAT. ANN. § 940.09(2)(a) (West 2005).

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*; see also N.Y. PENAL LAW § 125.12 (McKinney 2009) (creating a permissive presumption that the driver's intoxication caused the death: "If it is established that the person operating such motor vehicle, vessel, public vessel, snowmobile or all terrain vehicle caused such death while unlawfully intoxicated or impaired by the use of alcohol or a drug, then there shall be a rebuttable presumption that, as a result of such intoxication or impairment by the use of alcohol or a drug, or by the combined influence of drugs or of alcohol and any drug or drugs, such person operated the motor vehicle, vessel, public vessel, snowmobile or all terrain vehicle in a manner that caused such death, as required by this section").

in the drunk-driving homicide cases seem to betray discomfort not merely with this but-for test's evidentiary demands but with the test itself. In *Rumsey*, for example, the court appeared to treat the "increased risk" created by Rumsey's intoxication as legally sufficient to satisfy the causal nexus requirement.¹⁶⁶ It was determinative, the court said, that Rumsey's intoxication had "increased the risk that she might strike and seriously injure or kill someone in the bicycle lane of this allegedly dangerous intersection."¹⁶⁷ Likewise, in *Holthaus*, the court's use of the phrase "substantial factors" suggested that something short of a but-for relationship between the defendant's intoxication and the fatal accident might suffice legally to satisfy the scope-of-the-risk requirement.¹⁶⁸

More importantly, though, the substantive law of causation points to a clear, if not easy, alternative explanation for the courts' intuitive discomfort with the demands of the but-for test in these cases. The drunk-driving homicide cases are so-called "causal-overdetermination" cases.¹⁶⁹

VIII. INTOXICATION AS CAUSAL OVERDETERMINATION

In "the great mass of cases," the but-for test produces the right answer to the question whether a defendant's conduct is a factual cause of the harm.¹⁷⁰ Everyone agrees, however, that in some cases the but-for test does not capture our shared intuitions about factual causation.¹⁷¹ The easiest of these are cases where "two causes concur to bring about an event, and either one of them, operating alone, would have been sufficient to cause the identical result."¹⁷² Suppose, for example, that "two assailants without preconcert attack their victim with intent to kill, and death results because each has simultaneously struck a mortal blow."¹⁷³ In this case, either of the two assaults would have been sufficient to bring about the result, and so neither really is necessary. Neither assault is a but-for cause, in other words. Tort and criminal scholars alike have long recognized, however, that in cases like these "there are good reasons both for saying that some given event was caused by some action and also that it would

¹⁶⁶ *State v. Rumsey*, No. 2 CA-CR 2009-0041, 2010 WL 3410824, at *9 (Ariz. Ct. App. Aug. 31, 2010).

¹⁶⁷ *Id.*

¹⁶⁸ *State v. Holthaus*, No. C2-99-1793, 2000 WL 821607, at *3 (Minn. Ct. App. June 27, 2000).

¹⁶⁹ *See Boeing Co. v. Cascade Corp.*, 207 F.3d 1177, 1184-85 (9th Cir. 2000) (using and explaining the phrase "causal overdetermination").

¹⁷⁰ DAN B. DOBBS, *THE LAW OF TORTS* 409 (2000).

¹⁷¹ *See* MODEL PENAL CODE § 2.03 cmt. 2 (1985) ("All who have considered the issue agree that each of the assailants [in the standard two-actor overdetermination scenario] should be liable . . .").

¹⁷² KEETON ET AL., *supra* note 23, § 41; *see also* MODEL PENAL CODE § 2.03 cmt. 2.

¹⁷³ MODEL PENAL CODE § 2.03 cmt. 2.

have happened without this action.”¹⁷⁴

This so-called “causal-overdetermination” problem cannot be confined to cases where the actor’s conduct was independently sufficient to cause the harm. Suppose, for example, that three different actors independently administer equal doses of the same poison to their intended victim, and that any two of the three equal doses would have sufficed to bring about the victim’s death. In this case, none of the three actors’ contributions was *necessary* to bring about the victim’s death, since any two of the contributions would have sufficed. But neither was any of the three actor’s contributions *independently sufficient* to bring about the victim’s death, since a single dose would not have caused the victim’s death. Still, nearly everyone would regard each of these actors as responsible for the victim’s death.¹⁷⁵ Widely shared intuitions tell us that “such positive, albeit unnecessary, contributions to the relevant mechanism by which an . . . injury occurred should be identified by our law as factual ‘causes.’”¹⁷⁶

These intuitions are reflected, for example, in Prosser’s test for cases of multiple causation, namely:

When the conduct of two or more actors is so related to an event that their combined conduct, viewed as a whole, is a but-for cause of the event, and application of the but-for rule to them individually would absolve all of them, the conduct of each is a cause in fact of the event.¹⁷⁷

The same basic intuitions also are reflected in the Restatement (Third) of Torts, which provides that, in cases of multiple causation, an actor’s conduct will count as a cause of the harm if it is possible, by counterfactually subtracting some “other act(s),” to construct a world in which the actor’s conduct is a necessary element of a sufficient causal set.¹⁷⁸ In our poisoning hypothetical, for example, the Restatement would permit the fact finder to subtract counterfactually the conduct of *one* of the

¹⁷⁴ HART & HONORÉ, *supra* note 29, at 123; *see also* MODEL PENAL CODE § 2.03 cmt. 2 (discussing the issue of separate actions that simultaneously act as but-for causes).

¹⁷⁵ *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 27 cmt. f (2010) (“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.]”); Jane Stapleton, *Unnecessary Causes*, 129 L.Q. REV. 39, 60 (2013) (“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.”).

¹⁷⁶ Stapleton, *supra* note 175, at 45.

¹⁷⁷ KEETON ET AL., *supra* note 23, § 41; *see also* DOBBS, *supra* note 170, at 417 (describing a popular “variation on the but-for rule” in which “the conduct of all defendants as a group is aggregated and considered as a whole . . . [and the] but-for test is then applied to their conduct taken as a unit or set”).

¹⁷⁸ RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 27.

three poisoners, thus making the conduct of each poisoner a necessary element of a sufficient causal set consisting of just two doses of poison.

Though questions of causal overdetermination arise less frequently (or at least receive less attention) in criminal law than in tort, courts and scholars have recognized that the same rules apply.¹⁷⁹ Probably the most influential effort to formulate these rules for criminal cases occurred in connection with the Brown Commission's 1971 report on a proposed federal criminal code revision.¹⁸⁰ Under the proposed code section, as under Prosser's test, a defendant's conduct counts as a factual cause of a proscribed result if it contributes to a causal mechanism that, in the aggregate, is a but-for cause of the result.¹⁸¹ In the words of the revised code: "Causation may be found where the result would not have occurred but for the conduct of the accused operating either alone or *concurrently with another cause*, unless the concurrent cause was clearly sufficient to produce the result and the conduct of the accused clearly insufficient."¹⁸² Neither this nor any other federal definition of causation ever was adopted by Congress. (Congress apparently decided, as most state legislatures have done, to leave the development of causation doctrine to the courts.¹⁸³) But legislatures in several states—Alabama, Arkansas, Maine, North Dakota, and Texas—later adopted state code provisions that were identical or nearly identical to the draft federal provision.¹⁸⁴

The differences among the various tests are less important, for our purposes, than what they have in common. What they have in common is that each permits the fact finder to "combine" the actor's conduct with some other causal factor or factors and then to assign liability on the basis of the causal role played, in the aggregate, by the entire causal mechanism. Notice, however, that this approach to causal overdetermination is subject to an unspoken limitation. Only when the actor's conduct bears a *complementary* relationship to the other causal factor is it permissible to

¹⁷⁹ See *United States v. Kearney*, 672 F.3d 81, 98 (1st Cir. 2012) (invoking the tests for causal overdetermination from both Prosser and the Restatement in resolving the question of whether the defendant's distribution and possession of child pornography were a cause of the victim's harm); FINAL NAT'L COMM'N ON REFORM OF FED. CRIMINAL LAWS, *supra* note 23, at 31–32 (proposing a test for cases of concurrent causation that roughly tracks Prosser's test).

¹⁸⁰ See NAT'L COMM'N ON REFORM OF FED. CRIMINAL LAWS, *supra* note 23, at xi–xiv (describing the basic features of the proposed Code).

¹⁸¹ *Id.* at 31–32.

¹⁸² *Id.* (emphasis added).

¹⁸³ See MODEL PENAL CODE § 2.03 cmt. 5 (1985) (observing that "[i]n the majority of jurisdictions that have adopted or considered revised codes, no explicit provision on causation has been included"). A few jurisdictions have adopted general causation provisions based on Model Penal Code § 2.03. See *supra* note 28 (listing a few such states).

¹⁸⁴ ALA. CODE § 13A-2-5(a) (LexisNexis 2005); ARK. CODE ANN. § 5-2-205 (LexisNexis 2006); ME. REV. STAT. tit. 17A, § 33 (1964); N.D. CENT. CODE § 12.1-02-05 (2012); TEX. PENAL CODE ANN. § 6.04 (West 2011).

“combine” them.¹⁸⁵

To illustrate, suppose that two archers, each with a single arrow, fire independently at an unknowing victim, and that one of the two arrows—no one knows whose—strikes the victim. In this hypothetical case, no one would argue that the conduct of the two archers could be combined or aggregated, for neither archer contributed to the likelihood that the other’s arrow would strike the victim; neither archer *complemented* the danger posed by the other.¹⁸⁶ In the poisoning hypothetical, by contrast, the actions of the three poisoners are complementary: each poisoner’s conduct enhances the risk posed by the others’ conduct; and each contributes to a “causal set” that, in the aggregate, clearly is sufficient to bring about the victim’s injury.¹⁸⁷

Just the required sort of complementary relationship appears to be present in the drunk-driving homicide cases. Once again, consider the *Rumsey* case.¹⁸⁸ At her trial for manslaughter, Rumsey claimed that the fatal accident was attributable not to her gross intoxication but to the defective design of the intersection where the accident occurred.¹⁸⁹ She claimed, specifically, that the intersection’s design—the fact that “the width of the lane on one side of the intersection is narrower than on the other”—would have made it difficult for even a sober driver to notice and then avoid cyclists traveling on the side of the roadway.¹⁹⁰ But Rumsey’s gross intoxication plainly would have *complemented* whatever danger was created by the roadway’s design. After all, any danger posed by the intersection would have inhered in the intersection’s demands on drivers’ abilities to perceive and react. And in Rumsey’s case, these very abilities were badly impaired by her intoxication. Rumsey’s intoxication did not just increase the likelihood that a fatal accident would occur. As the court said, it “increased the likelihood that any defect in the design of the roadway would result in a serious accident.”¹⁹¹ It *complemented* the danger posed by the very defect to which Rumsey attributed the accident.

The *Guzman* case illustrates the same point.¹⁹² At her trial for vehicular homicide, Guzman claimed that the fatal accident was

¹⁸⁵ See Eric A. Johnson, *Criminal Liability for Loss of a Chance*, 91 IOWA L. REV. 59, 101, 104 (2005) (arguing that the “complementary relationship [among the causal factors] serves as the pivot of the rule of multiple sufficient causal sets”).

¹⁸⁶ *Id.* at 77–78; see also Stapleton, *supra* note 175, 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.”).

¹⁸⁷ Johnson, *supra* note 185, at 96.

¹⁸⁸ State v. Rumsey, No. 2 CA-CR 2009-0041, 2010 WL 3410824 (Ariz. Ct. App. Aug. 31, 2010).

¹⁸⁹ *Id.* at *8.

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at *9.

¹⁹² State v. Guzman, 96 P.3d 1173 (N.M. Ct. App. 2004).

attributable not to her intoxication but to the fact that the victim, a pedestrian who “was wearing dark clothing and had a blood alcohol content of .319,” had wandered into her lane of travel.¹⁹³ She claimed that she “could only reasonably be expected to evade a pedestrian who was visible to her; [the victim’s] dark clothing and doubtlessly erratic movements would have precluded this.”¹⁹⁴ But Guzman’s intoxication would have complemented whatever danger was posed by the victim’s dark clothing and erratic movements. A toxicologist testified at Guzman’s trial that “once a blood alcohol level exceeds .10, the individual’s field of vision narrows ‘significantly’ and reaction time is slowed.”¹⁹⁵ Thus, Guzman’s impairment would only have made it harder for her to see the victim in his dark clothing and would only have made it harder for her to react to his erratic movements. Guzman’s intoxication did not just increase the likelihood that an accident would occur, then. It complemented the very factors to which Guzman attributed the accident.

Not only do the *Rumsey* and *Guzman* cases satisfy this basic contribution requirement; they also satisfy an additional limitation imposed by the Brown Commission’s variation on the Prosser test. Under the Brown Commission test, even conduct that contributes to the operative causal mechanism will fail to qualify as a cause if the *other* contributions to the causal mechanism were “clearly sufficient to produce the result.”¹⁹⁶ In other words, the Brown Commission test is satisfied only if the defendant’s contribution *might* have made a difference. This requirement is easily satisfied in cases like *Rumsey* and *Guzman*. Neither the defective intersection in *Rumsey* nor the erratic movements and dark clothing of the victim in *Guzman* made the fatal accident inevitable.¹⁹⁷ Neither factor, then, was “clearly sufficient to produce” the accident.¹⁹⁸

Causal overdetermination appears, then, to account for the intuitions at work in the drunk-driving homicide cases. It appears to explain, first, why the courts in these cases intuitively have required something less than a but-for causal connection between the defendant’s intoxication and the fatal accident. In most drunk-driving homicide cases, as in *Guzman* and *Rumsey*, the causal mechanism behind the fatal accident is the interplay of roadway hazards with limitations on the driver’s ability to perceive and

¹⁹³ *Id.* at 1177–78.

¹⁹⁴ *Id.* at 1178.

¹⁹⁵ *Id.*

¹⁹⁶ NAT’L COMM’N ON REFORM OF FED. CRIMINAL LAWS, *supra* note 23, at 32.

¹⁹⁷ The court in *Rumsey* implied as much when it said that Rumsey’s intoxication had “increased the likelihood that any defect in the design of the roadway would result in a serious accident.” *State v. Rumsey*, No. 2 CA-CR 2009-0041, 2010 WL 3410824, at *9 (Ariz. Ct. App. Aug. 31, 2010). If the intersection’s design defect had made an accident inevitable, then Rumsey’s intoxication could not have increased the likelihood of an accident.

¹⁹⁸ NAT’L COMM’N ON REFORM OF FED. CRIMINAL LAWS, *supra* note 23, at 32.

react.¹⁹⁹ The driver's intoxication usually will contribute to this causal mechanism by exacerbating existing limitations on the driver's ability to perceive and react. What is more, this contribution nearly always will be potentially decisive; the roadway hazards almost never will make the accident inevitable. This sort of incremental contribution is enough, according to the standard accounts of causal overdetermination. On these accounts, the law requires at most that the defendant's conduct—or the wrongful-aspect of the defendant's conduct—make a potentially decisive contribution to the mechanism underlying the victim's injury. It does not require in addition that the defendant's contribution qualify as a but-for cause of the injury.²⁰⁰

The causal-overdetermination rules not only explain the cases where the courts have imposed liability for drunk-driving homicide; they also explain the courts' avowed reluctance to impose liability in, say, the red light hypothetical, or the malfunctioning airplane hypothetical.²⁰¹ What these two hypotheticals have in common is that in neither case is the accident attributable to the interplay of roadway hazards with the driver's ability to perceive and react. Drivers cannot be expected to react to airplanes plunging steeply from the sky, nor can they be expected to evade cars approaching from behind at stoplights. Under these circumstances, there simply is no room for intoxication to affect the course of events. And so the driver's intoxication cannot be said to have made a potentially decisive contribution to the causal mechanism behind the fatal accident.

IX. THE LOST-CHANCE CASES

The courts in the drunk-driving homicide cases have not mentioned causal overdetermination, of course. But there are good reasons for thinking that the courts' struggles with the causal-nexus question in these cases are traceable to their intuitions about causal overdetermination rather than, say, to the procedural difficulties associated with proof of causation in this setting. Among these reasons is the fact that the same intuitions appear to have made themselves felt in other sorts of homicide cases—

¹⁹⁹ See *Rumsey*, 2010 WL 3410824, at *9 (discussing the increased risk that defendant might injure someone in the bicycle lane because of her intoxication); *Guzman*, 96 P.3d at 1178 (summarizing toxicologist testimony that “once a blood alcohol level exceeds .10, the individual's field of vision narrows ‘significantly’ and reaction time is slowed”).

²⁰⁰ See Johnson, *supra* note 185, at 61 (noting the emergence of cases which “do not satisfy the criminal law's traditional requirement of ‘but-for’ causation”).

²⁰¹ See *Magaw v. State*, 537 So. 2d 564, 567 (Fla. 1989) (narrating a hypothetical accident where a drunk driver is struck from behind while stopped at a red light); *State v. Benoit*, 650 A.2d 1230, 1233 (R.I. 1994) (describing a similar no-fault situation in which a drunk driver is struck by a crashing plane and the pilot is killed).

many far removed factually from drunk-driving homicide.²⁰² In these other cases, as in drunk-driving homicide, courts have struggled to articulate the intuitions underlying their causation rulings.²⁰³ And in these other cases, as in the drunk-driving homicide cases, the courts' rulings are explained by the standard account of causal overdetermination.²⁰⁴

Consider, for example, *State v. Montoya*.²⁰⁵ Adam Montoya was charged with murder for his role in the death of Ty Lowery.²⁰⁶ Lowery died from a gunshot wound, but Montoya himself didn't shoot Lowery, nor was he implicated in the shooting as an accomplice.²⁰⁷ Rather, shortly after the shooting, Montoya kidnapped the injured Lowery and drove him to a nearby river, where he left him to die.²⁰⁸ At Montoya's trial, the state's pathologist could not testify that Montoya's actions were a but-for cause of Lowery's death.²⁰⁹ He acknowledged that "he thought it was still more than likely that the victim would have died even if he would have been taken to the hospital."²¹⁰ But the pathologist testified "there was 'some chance' that immediate medical attention could have prevented the victim's death."²¹¹ In upholding Montoya's conviction, the court said it was enough that Montoya had deprived Lowery of this "chance" of survival: "This evidence permits a finding that the victim was not put on an unalterable course of death once he had been shot. Immediate medical intervention could possibly have saved his life."²¹²

Or consider *Armstrong v. State*,²¹³ where Polee Armstrong was charged with manslaughter on the basis of evidence that he had severely beaten his wife, Corrine, on the night of her death.²¹⁴ The cause of Corrine's death "was asphyxiation resulting from the blockage of [her] wind passage by a dense and viscus [sic] mucous clot located at the vocal cords in the

²⁰² See Johnson, *supra* note 185, at 61–65 (analyzing homicide cases in which the defendants' conduct "merely reduced the victim's chances of surviving").

²⁰³ See *id.* at 64 ("[C]ourts widely scattered around the country have arrived at eerily similar results without . . . any rationale to guide them. The cases reflect only a remarkable uniformity of intuition.").

²⁰⁴ See *id.* at 106 (arguing that "cases that satisfy the lost-chance doctrine also will satisfy the rule of multiple sufficient causal sets if we properly define lost chance").

²⁰⁵ 61 P.3d 793 (N.M. 2002).

²⁰⁶ *Id.* at 795.

²⁰⁷ *Id.* at 796.

²⁰⁸ *Id.*

²⁰⁹ See *id.* (recounting testimony from the pathologist who performed the autopsy on the victim, saying that there was "some chance" the victim's death could have been prevented, though it was "more than likely that the victim would have died" regardless of the defendant's actions).

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.* at 801.

²¹³ 502 P.2d 440 (Alaska 1972).

²¹⁴ *Id.* at 442–43.

larynx.”²¹⁵ According to the pathologist, “such a mucous clot ordinarily would have been expectorated automatically by an innate coughing reflex.”²¹⁶ In Corrine’s case, however, “unconsciousness inhibited that innate reflex, and asphyxiation resulted.”²¹⁷ What made the question of causation problematic was the presence of “[t]wo possible causes of the reflex-inhibiting unconsciousness . . . : excessive alcohol consumption and blows to the head”²¹⁸ administered by Armstrong. Because Corrine had an extraordinarily high blood-alcohol level at the time of her death, the pathologist was unable to say that she would have survived but for the blows administered by Armstrong. He could say only that she “might have survived” but for the beating.²¹⁹ Nevertheless, the appeals court held that his testimony was sufficient to prove causation.

Decisions like *Montoya* and *Armstrong* obviously cannot be explained by the but-for test of causation. In cases like these, the government’s evidence at best shows that, but for the defendant’s wrongdoing, the victim *might* have survived the injury or illness that killed her. The evidence does not show that she *would* have survived, and so it does not satisfy the but-for test.

The evidence in these cases does satisfy the standard tests of causal overdetermination, however. For example, in *Armstrong* the beating administered by the defendant contributed, along with the victim’s intoxication, to the victim’s deep unconsciousness, which in turn inhibited her ability to expel the mucous clot stuck in her windpipe.²²⁰ Because the beating made a positive contribution to a causal mechanism that brought about the victim’s death—namely, her deep unconsciousness—the beating counts as a factual cause, quite apart from whether it was necessary; quite apart, that is, from whether the victim’s intoxication might by itself have sufficed to cause the requisite degree of unconsciousness.²²¹ The same is true of the defendant’s conduct in *Montoya*.²²² In *Montoya*, the defendant’s kidnapping of the victim *complemented* the victim’s gunshot wound by depriving the victim of medical care that would have stopped the

²¹⁵ *Id.* at 444.

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *See id.* at 444 n.5 (recounting expert testimony regarding the victim’s injury).

²²¹ *See Johnson, supra* note 185, at 76–81, 97–98 (analyzing *Armstrong*); *see also* Stapleton, *supra* note 175, at 50 (analyzing a similar case, where the victim’s fatal inhalation of vomit was attributable to her physically weakened state, which in turn was attributable both to her underlying pancreatitis and to the defendant’s tortious conduct).

²²² *State v. Montoya*, 61 P.3d 793 (N.M. 2002).

bleeding.²²³ Because the kidnapping of the victim made a positive contribution to the causal mechanism that brought about the victim's death—namely, blood loss—it qualifies as a factual cause quite apart from whether the victim might have died anyway.

Armstrong and *Montoya* are representative of a very large class of cases.²²⁴ Yet the courts in these cases, like the courts in the drunk-driving homicide cases, have struggled to articulate the intuitions underlying their decisions. Some, including the *Montoya* and *Armstrong* courts, insisted that they merely were applying the but-for test as they always had.²²⁵ None of them explicitly has invoked principles of causal overdetermination. What they have said to justify their conclusions, when they have said anything at all, is that the defendant's conduct deprived the victim of a "chance of survival."²²⁶

This "lost-chance" formula is, as it happens, identical in substance to the Brown Commission test for causal overdetermination. First, like the Brown Commission test, it requires the government to prove that the actor's conduct contributed to or complemented a causal mechanism that, in the aggregate, was responsible for bringing about the proscribed result. In ordinary usage, after all, a defendant's conduct would not be said to have deprived the victim of a "chance" of surviving another illness or injury unless it either (1) had itself caused the victim's death; or (2) had complemented the other illness or injury.²²⁷

Second, like the Brown Commission test, the lost-chance test requires

²²³ *Id.* at 796–97; see also Johnson, *supra* note 185, at 78 (noting that in *Montoya* the "defendant's conduct had *actually* complemented some other non-background causal factor, not merely that the defendant's conduct *might* have complemented the other causal factor").

²²⁴ See Johnson, *supra* note 185, at 61 n.3 (listing lost-chance cases decided prior to 2005); see also *People v. Bonilla*, No. B232473, 2012 WL 3538731, at *3 (Cal. Ct. App. Aug. 17, 2012) (upholding doctor's manslaughter conviction on the basis of evidence that the victim "would have had a better than 50 percent chance of survival" if the doctor promptly had initiated resuscitation efforts after the victim exhibited a toxic reaction to lidocaine anesthetic); *Grayer v. State*, 647 S.E.2d 264, 268 (Ga. 2007) (upholding defendant's conviction for murder 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) (upholding defendant's conviction for involuntary 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); *State v. Shane*, No. A06-1581, 2008 WL 660543, at *3 (Minn. Ct. App. May 28, 2008) (upholding a defendant's conviction for second-degree murder after concluding that the defendant's failure to seek prompt medical assistance for her infant daughter had deprived the daughter of "between a two and ten percent chance of survival").

²²⁵ See *Armstrong v. State*, 502 P.2d 440, 446 n.12 (Alaska 1972) (upholding the "proper" jury instruction on causal connection); *Montoya*, 61 P.3d at 798 (confirming the jury instruction on the correct legal standard as to causation); *Commonwealth v. Barnhart*, 497 A.2d 616, 626 (Pa. Super. Ct. 1985) ("The charge, though strongly worded, stated the law in the Commonwealth today.").

²²⁶ *Shane*, 2008 WL 660543, at *3; *Montoya*, 61 P.3d at 796; *People v. Knapp*, 495 N.Y.S.2d 985, 993 (N.Y. App. Div. 1985).

²²⁷ Johnson, *supra* note 185, at 77–78.

that the defendant's contribution to this causal mechanism be potentially decisive. A defendant's contribution would not be said to have deprived the victim of a chance of survival if the other contributions were, in the words of the Brown Commission test, "clearly sufficient to produce the result."²²⁸ These "lost-chance" cases, then, like the drunk-driving homicide cases, suggest the emergence, unbidden, of intuitions about causal overdetermination.

This comparison of the drunk-driving homicide cases and the lost-chance cases might appear, at first glance, to founder on the critical distinction between conduct-based causation and aspect-based causation. In the lost-chance cases, after all, the courts' lost-chance reasoning is brought to bear on the basic threshold question whether the defendant's *conduct* was a but-for cause of the victim's injury. In the drunk-driving homicide cases, by contrast, the courts' lost-chance-type reasoning is brought to bear on the additional, and very different, question whether the wrongful *aspect* of the defendant's conduct was a cause of the victim's injury. Given that wrongful-*aspect* causation plays a different role in the law than does wrongful-*conduct* causation,²²⁹ must not we assume that any analogy between the lost-chance cases and the drunk-driving cases is misguided?

The answer to this question is no. Though aspect- and conduct-based causal rules play different roles in the law, they nevertheless are grounded in the same basic intuitions. This intuitive connection can best be illustrated by a comparison of two closely-related hypothetical scenarios.²³⁰ In both scenarios, a doctor is prosecuted for administering a fatal overdose of a prescription drug to a patient. Specifically, the doctor administers to the patient a dose of medication that is twice the amount approved by the Food and Drug Administration. Everyone agrees that the administration of the approved dose would not have been negligent, but that the administration of the double-dose was negligent. Where the expert witnesses disagree is on whether the patient's death was (1) attributable to the overdose or (2) attributable to an adverse reaction that would have occurred even if the patient had received only the approved dose.

For the first variation of this scenario, suppose the doctor administers the double-dose in two separate doses that are fifteen minutes apart. At 2:00 p.m., she administers the first dose. At 2:15 p.m., she administers a second dose. The patient dies the next day. In this scenario, the dispute over causation would center on the basic threshold question whether the

²²⁸ NAT'L COMM'N ON REFORM OF FED. CRIMINAL LAWS, *supra* note 23, at 31.

²²⁹ See *supra* text accompanying notes 80–87.

²³⁰ These hypothetical cases are based on *Zuchowicz v. United States*, 140 F.3d 381, 383–85 (2d Cir. 1998), where a patient's surviving spouse sought damages from a physician who had administered a 1600 milligram overdose of Danocrine to the patient.

doctor's negligent *conduct* was a cause of the victim's death. After all, the doctor's administration of the second dose was a separate act, and the plaintiff's negligence claim necessarily is based exclusively on this separate act; the doctor's administration of the first dose was not wrongful.

For the second variation of this scenario, suppose instead that the doctor administers the double-dose all at once at 2:00 p.m. Again, the patient dies the next day. In this scenario, the threshold question of but-for causation would not be in dispute: the doctor's single act of administering the double dose plainly was a but-for cause of the victim's death. The dispute over causation would center instead on the separate question whether the patient's death was attributable to the risks that made the doctor's conduct wrongful. It would center on the question whether the patient's death was attributable to the increment by which the dose exceeded the approved dose.²³¹ In other words, the dispute would center on the scope-of-the-risk question.

Our intuition, I think, is that the doctor's liability ought to depend in both cases on the causal connection, if any, between the patient's death and the increment by which the dose administered to the patient exceeded the approved dose. It should not matter whether the overdose was administered in a single act or in two acts separated by fifteen minutes. This intuition becomes stronger, moreover, as we reduce the time separating the two doses—to fifteen seconds, say, rather than fifteen minutes. In a case like this, the scope-of-the-risk limitation and its wrongful-aspect variant seem merely to be natural extensions of our efforts to define as precisely as possible the specific *act* that provides the basis for the defendant's prosecution.²³² At bottom, the scope-of-the-risk rule and its wrongful-aspect variant appear to be grounded in the same basic intuition as the traditional threshold requirement of but-for causation.

There is little reason, then, to ascribe to mere coincidence the emergent symmetry between (1) cases where the wrongful *aspect* of the defendant's

²³¹ See *id.* at 389–90 (addressing sequentially (1) the question of whether the doctor's administration of a 1600 milligram dose of Danocrine was a but-for cause of Mrs. Zuchowicz's death, and (2) the question of whether the overdose (the increment by which the dose exceeded the 800 milligram dose recommended by the FDA) was a but-for cause of Mrs. Zuchowicz's death).

²³² See Gerard Lynch, *RICO: The Crime of Being a Criminal, Pts. III and IV*, 87 COLUM. L. REV. 920, 933 (1987) (explaining that in criminal law the required act must be "conceived as taking place in an instant of time so precise that it can be associated with a particular mental state of intention, awareness of risk, or neglect of due care"); Samuel H. Pillsbury, *The Meaning of Deserved Punishment: An Essay on Choice, Character, and Responsibility*, 67 IND. L.J. 719, 727 (1992) ("American criminal law generally restricts its view of choice to the actor's immediate decision to do wrong."); Deborah Tuerkheimer, *Recognizing and Remediating the Harm of Battering: A Call to Criminalize Domestic Violence*, 94 J. CRIM. L. & CRIMINOLOGY 959, 972 (2004) ("At common law, crime was conceived as occurring at a discrete moment, and this template endures."); see also *Hales v. Petit*, 75 Eng. Rep. 387, 397 (C.B. 1562); 1 Plow. 253, 259 ("[T]he doing of the Act is the only Point which the Law regards . . .").

conduct contributes to the causal mechanism responsible for another person's death; and (2) cases where the defendant's wrongful *conduct* contributes to the causal mechanism that is responsible for another person's death. This symmetry instead appears to speak to the existence of an intuitive recognition that an actor's conduct or its wrongful aspect counts as a cause if it makes a potentially decisive contribution to a causal mechanism that, in the aggregate, is responsible for the result.

X. CONCLUSION

It would be easy to get the impression that—in the words of philosopher Jonathan Schaffer—“overdetermination is *everywhere*.”²³³ But most criminal cases are not causal overdetermination cases. In most criminal cases, as in most tort cases, the defendant's conduct either “would have been . . . necessary for the occurrence, . . . or would not have been involved in that occurrence in any way at all.”²³⁴ Suppose, for example, that the defendant is one of two archers who carelessly (and independently) fire in the victim's direction, and that the victim dies after being struck by a single arrow. In this case, the defendant's conduct either will have “made a positive and necessary contribution to the occurrence of the injury” or will “have been completely uninvolved.”²³⁵ Because most criminal cases are “either/or” cases, rather than causal-overdetermination cases, the courts usually are justified in applying the traditional but-for test without modification.²³⁶

Still, criminal law scholars are wrong in supposing that causal-overdetermination cases are “extraordinary”²³⁷ or “extremely rare.”²³⁸ For starters, the logic of causal overdetermination informs the courts' decisions in the lost-chance homicide cases, whether the courts realize it or not. In these cases, which are utterly commonplace,²³⁹ the courts have imposed liability for homicide after concluding only that the defendant's conduct deprived the victim of a “chance” of surviving another illness or injury.²⁴⁰ Proof that the defendant's conduct deprived the victim of a “chance” of

²³³ Jonathan Schaffer, *Overdetermining Causes*, 114 PHIL. STUD. 23, 26 (2003).

²³⁴ Stapleton, *supra* note 175, at 40; *see also* HART & HONORÉ, *supra* note 29, at 113 (“In ordinary cases, where only one sufficient cause is present, a causally relevant factor will also be a condition *sine qua non* It is this fact that accounts for the prominence in law of the negative *sine qua non* test.”).

²³⁵ Stapleton, *supra* note 175, at 40.

²³⁶ *Id.* at 46.

²³⁷ MODEL PENAL CODE § 2.03 cmt. 2 (1985).

²³⁸ Larry Alexander, *Michael Moore and the Mysteries of Causation in the Law*, 42 RUTGERS L.J. 301, 311 (2011).

²³⁹ *See* Johnson, *supra* note 185, at 61 n.3 (citing cases which apply lost-chance reasoning in place of but-for causation).

²⁴⁰ *Id.* at 76.

survival is not proof of but-for causation, of course. Rather, it is proof of causal overdetermination; it is proof that the defendant contributed incrementally to the causal mechanism underlying the victim's death and that the defendant's contribution was potentially decisive.²⁴¹

Drunk-driving homicide cases, too, are causal-overdetermination cases. What makes the drunk-driving homicide cases interesting and distinctive is that the logic of causal overdetermination is brought to bear not in resolving the threshold question whether the defendant's *conduct* caused the harm but in resolving the separate and additional question whether the *wrongful aspect* of the defendant's conduct caused the harm. In drunk-driving homicide cases, the wrongful aspect of the defendant's conduct—his intoxication—nearly always will contribute incrementally to the causal mechanism behind the accident. Again, most traffic accidents result from the interplay of roadway hazards with limitations on the driver's ability to perceive and react. Intoxication contributes to this mechanism by diminishing the driver's abilities.

This, in any event, is the most plausible explanation for what the courts have been doing in the drunk-driving homicide cases. Both in states where the courts purport to have adopted the scope-of-the-risk requirement and in states where the courts purport to have rejected this requirement, the courts appear to have recognized intuitively that liability for drunk-driving homicide is appropriate only where the scope-of-the-risk requirement is satisfied. At the same time, however, courts on both sides of this seeming divide appear to have recognized that the required connection between the conduct's wrongful aspect and the result need not be a but-for connection. The courts' intuitions in these cases, like their intuitions in the lost-chance cases, point toward causal overdetermination. What remains is only for the courts to make explicit the logic at work in these cases.

²⁴¹ See *id.* at 76–86 (describing cases where the “victim would have had a ‘chance’ of surviving but for the defendant’s culpable acts or omissions”).