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## A Simple Concept in a Complicated World: Actual Causation, Mixed-Drug Deaths and the Eighth Circuit's Opinion in *United States v. Burrage*

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# A SIMPLE CONCEPT IN A COMPLICATED WORLD: ACTUAL CAUSATION, MIXED-DRUG DEATHS AND THE EIGHTH CIRCUIT'S OPINION IN *UNITED STATES v. BURRAGE*

**Abstract:** On August 6, 2012, in *United States v. Burrage*, the U.S. Court of Appeals for the Eighth Circuit upheld the conviction of a defendant for the crime of distribution of drugs resulting in death where the defendant sold heroin that played a part in a mixed-drug overdose death. The court reasoned that the statute, which provides for a mandatory twenty-year prison sentence when a defendant sells illegal drugs and a death results, only requires that the defendant's drugs contribute to the death. This Comment argues that the contributory cause standard of actual causation endorsed by the Eighth Circuit is flawed and that, on review, the U.S. Supreme Court should hold that the crime of distribution resulting in death requires a showing that the defendant's drugs are a but-for cause of the death. When the but-for test of actual causation falters in the context of a death with multiple sufficient causes, courts should explain to jurors how they may find actual cause in these instances without resorting to the imperfect contributory cause standard.

## INTRODUCTION

Federal laws impose severe penalties upon drug dealers when they sell drugs and a death results.<sup>1</sup> Although distributing heroin, even in small quantities, is punishable by imprisonment for up to twenty years, when a death results, twenty years becomes the *minimum* sentence.<sup>2</sup> Because fatal overdoses often involve multiple substances, prosecuting the crime of distribution of drugs resulting in death may be fraught with complicated causation issues.<sup>3</sup>

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<sup>1</sup> See Controlled Substances Act, 21 U.S.C. § 841(a)–(b) (2006 & Supp. V 2012). The Controlled Substances Act (“CSA”) criminalizes the manufacture and distribution of controlled substances. See *id.* The CSA provides that “it shall be unlawful for any person knowingly or intentionally . . . to . . . distribute a controlled substance” and provides enhanced penalties “if death . . . results from the use of such substance.” See *id.*

<sup>2</sup> See *id.* 21 U.S.C. § 841(b) (outlining the penalties associated with various violations of the CSA).

<sup>3</sup> See Brief for the United States at 28–29, *Burrage v. United States*, 133 S. Ct. 2049 (U.S. Oct. 1, 2013) (No. 12-7515), 2013 WL 5461835, at \*28–29. According to the National Center for Injury Prevention and Control, forty-six percent of overdose deaths in 2010 involved more than one class of drugs. See *id.*

In 2012, in *United States v. Burrage*, the U.S. Court of Appeals for the Eighth Circuit upheld a distribution of drugs resulting in death conviction of a defendant whose drugs were a “contributing cause” that “played a part” in a death.<sup>4</sup> In contrast with the Eighth Circuit’s use of the contributory cause standard, the U.S. Court of Appeals for the Seventh Circuit has previously rejected the standard as a confusing gloss on the statute’s requirement that a death “result from” a defendant’s drugs.<sup>5</sup> Given the apparent split between the circuits, *Burrage* has garnered the attention of the U.S. Supreme Court and the case will be heard in the upcoming Term.<sup>6</sup>

This Comment argues that a contributory cause standard is improper because it allows for conviction where a defendant’s drugs are not conclusively shown to be an actual cause of the death.<sup>7</sup> Part I of this Comment discusses the factual and procedural history of the *Burrage* case and its context amongst other federal appeals court decisions.<sup>8</sup> Part II examines “actual cause” and explores the difficulty of defining that concept using traditional methods in the context of a death resulting from mixed-drug intoxication.<sup>9</sup> Part II then discusses the divergent approaches of the Eighth and Seventh Circuits in defining actual cause for distribution of drugs resulting in death.<sup>10</sup> Finally, Part III suggests that neither approach is correct and urges the Supreme Court to invalidate the contributory cause standard, order a new trial, and announce a more nuanced and comprehensive standard for actual causation, what this Comment terms “But-for Plus.”<sup>11</sup>

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<sup>4</sup> See 687 F.3d 1015, 1018 (8th Cir. 2012), *cert. granted in part*, 133 S. Ct. 2049 (U.S. Apr. 29, 2013) (No. 12-7515). The victim in *Burrage* died from an overdose after using multiple drugs, including heroin purchased from the defendant. *See id.*

<sup>5</sup> See *United States v. Hatfield*, 591 F.3d 945, 949, 951 (7th Cir. 2009).

<sup>6</sup> See *Burrage v. United States*, 133 S. Ct. 2049, 2049 (2013); William Peacock, *SCOTUS Grants Cert. in 8th Cir. Drug Overdose Case*, FINDLAW (Apr. 30, 2013, 3:22PM), [http://blogs.findlaw.com/eighth\\_circuit/2013/04/scotus-grants-cert-in-8th-cir-drug-overdose-case.html](http://blogs.findlaw.com/eighth_circuit/2013/04/scotus-grants-cert-in-8th-cir-drug-overdose-case.html), *archived at* <http://perma.cc/PZ36-ZX2R> (terming the circuit split a “minor implied disagreement”). The Court will consider whether a person can be convicted for distribution of heroin resulting in death when the jury instructions allow a conviction if the distributed heroin “contributed to” death by “mixed drug intoxication,” but was not the sole cause of death. *See Peacock, supra*; Petition for Writ of Certiorari at 1, *Burrage*, 133 S. Ct. 2049 (U.S. Nov. 27, 2012) (No. 12-7515), 2012 WL 7991899, at \*1. The Court will also consider whether the crime of distribution of drugs resulting in death is a strict liability crime, without a foreseeability or proximate cause requirement. Petition for Writ of Certiorari, *supra*, at 1. The Court declined to address a third issue concerning the admissibility of testimony that *Burrage* was a “known” drug dealer. *See id.* This Comment focuses solely on the contributing cause issue. *See infra* notes 7–95 and accompanying text.

<sup>7</sup> *See infra* notes 72–95 and accompanying text.

<sup>8</sup> *See infra* notes 12–33 and accompanying text.

<sup>9</sup> *See infra* notes 34–57 and accompanying text.

<sup>10</sup> *See infra* notes 58–71 and accompanying text.

<sup>11</sup> *See infra* notes 72–95 and accompanying text.

I. *UNITED STATES V. BURRAGE* AND THE CIRCUIT DISAGREEMENT

On April 14, 2010, Joshua Banka purchased one gram of heroin from Marcus Burrage.<sup>12</sup> That night, Banka used some of the heroin with several other illegal drugs, and was found dead of an overdose the next morning.<sup>13</sup> Federal prosecutors subsequently charged Burrage with distribution of heroin and distribution of heroin resulting in death.<sup>14</sup> By charging for distribution resulting in death, Burrage's potential sentence increased from a range of zero to twenty years imprisonment to a *mandatory minimum* of twenty years imprisonment.<sup>15</sup>

During Burrage's trial, medical experts testified that Banka died from mixed-drug intoxication.<sup>16</sup> Banka's toxicology screen revealed the presence of multiple drugs, including morphine (a metabolite of heroin), oxycodone, alprazolam, clonazepam, and marijuana.<sup>17</sup> Of all the drugs in Banka's system, morphine was the only one above the therapeutic range.<sup>18</sup> Although a doctor stated that death without ingesting heroin was "very less likely," neither she nor a toxicologist could rule out the possibility that Banka would have died even without the heroin.<sup>19</sup> As a result, neither expert could say the heroin supplied by Burrage was more than a contributing cause to the death.<sup>20</sup>

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<sup>12</sup> *Burrage*, 687 F.3d at 1018.

<sup>13</sup> *See id.*

<sup>14</sup> *See id.*

<sup>15</sup> *See* Controlled Substances Act, 21 U.S.C. § 841(b)(1)(C) (2006 & Supp. V 2012); OFFICE OF GEN. COUNSEL, U.S. SENTENCING COMM'N, DRUG PRIMER 1–2 (2013), *available at* [http://www.uscc.gov/Legal/Primers/Primer\\_Drug.pdf](http://www.uscc.gov/Legal/Primers/Primer_Drug.pdf), *archived at* <http://perma.cc/8HQ-F9U6>. The CSA did not initially contain a sentencing enhancement for distribution resulting in death. *See* Pub. L. No. 91-513, §§ 401–403, 84 Stat. 1236, 1260–64 (1970) (current version at 21 U.S.C. § 841(a)–(b)). The enhancement appeared in the Anti-Drug Abuse Act of 1986, enacted to provide a vehicle for more stringent enforcement of drug laws as part of the War on Drugs. *See* Pub. L. No. 99-570, § 1002, 100 Stat. 3207-2 to -4 (codified as amended at 21 U.S.C. § 841(b)–(c)); Frontline, *Thirty Years of America's Drug War: A Chronology*, PBS, <http://www.pbs.org/wgbh/pages/frontline/shows/drugs/cron>, *archived at* <http://perma.cc/YGC7-BC5X> (last visited Jan. 20, 2014). The national outcry over the high-profile overdose death of young basketball star Len Bias, among other events, prompted Congress's enactment of "extremely stiff penalties" for drug dealers, especially in the event of a drug-related death. *See* 132 CONG. REC. 27,161 (1986) (statement of Sen. Dennis DeConcini). Some have characterized the 1986 Act as hastily drafted and reactionary. *See* Brief of Families Against Mandatory Minimums as Amicus Curiae in Support of Petitioner at 13, *Burrage*, 133 S. Ct. 2049 (U.S. July 26, 2013) (No. 12-7515), 2013 WL 4737194, at \*13. Despite numerous amendments to § 841, however, the distribution resulting in death enhancement remains undisturbed. *See* Brief for the United States, *supra* note 3, at 4 & n.2.

<sup>16</sup> *Burrage*, 687 F.3d at 1018–19.

<sup>17</sup> *Id.* at 1018.

<sup>18</sup> *Id.* at 1018–19.

<sup>19</sup> *See id.*

<sup>20</sup> *See id.* Determining cause of death from a medical perspective when multiple drugs are present is often complicated, and the "problem is particularly encountered for opiate drugs with a

Burrage requested jury instructions requiring that the death had to be foreseeable and that, but-for the heroin, the death would not have occurred.<sup>21</sup> He argued that the government's evidence could not conclusively show that Banka's death resulted from the heroin.<sup>22</sup> The trial judge rejected this argument, however, and instead gave instructions permitting conviction if the heroin was a "contributing cause" in the death.<sup>23</sup> The jury entered a guilty verdict and Burrage was later sentenced to twenty years in prison.<sup>24</sup>

On appeal, the Eighth Circuit upheld Burrage's conviction.<sup>25</sup> *Burrage* reaffirmed a prior Eighth Circuit decision holding that distribution resulting in death requires only that the defendant's drugs be a "contributing cause" in the victim's death.<sup>26</sup> Moreover, the *Burrage* court held that the contributory cause standard would apply without regard for proximate cause or foreseeability because the statute imposes strict liability upon a defendant whenever a death results.<sup>27</sup>

The contributing cause standard is not universally accepted.<sup>28</sup> In 2009, in *United States v. Hatfield*, the U.S. Court of Appeals for the Seventh Cir-

wide range of therapeutic levels, such as morphine." See Michael Panella, *Problematic Legal Causes of Death: Interacting with the Medical Examiner*, 44 TENN. B.J. 21, 21, 27 (2008).

<sup>21</sup> See *Burrage*, 687 F.3d at 1020 & n.3. In his jury instructions, Burrage also proposed a definition of proximate cause that included a concept of but-for cause requiring the jury to find that the heroin "contribute[d] substantially to producing the death." See *id.*

<sup>22</sup> See *id.* at 1019.

<sup>23</sup> See *id.* The district court instructed the jury, "[f]or you to find that a death resulted from the use of heroin, the Government must prove, beyond a reasonable doubt, that the heroin distributed by the defendant was a contributing cause of Joshua Banka's death." *Id.* The instruction defined contributing cause as "a factor that, although not the primary cause, played a part in the death." *Id.*

<sup>24</sup> See *id.* at 1018, 1020.

<sup>25</sup> *Id.* at 1018. Burrage appealed the denial of his motion for a new trial. See *id.* He had moved for acquittal twice at trial and when he was convicted, moved for a new trial. See *id.* The district court denied all of the motions. See *id.*

<sup>26</sup> See *id.* at 1020; *United States v. Monnier*, 412 F.3d 859, 862 (8th Cir. 2005) (using contributory cause standard in distribution resulting in death case); cf. *United States v. Washington*, 596 F.3d 926, 944 (8th Cir. 2010) (upholding two counts of distribution of drugs resulting in death when medical testimony confirmed that each controlled substance ingested by the victim could have independently caused the victim's death).

<sup>27</sup> See *Burrage*, 687 F.3d at 1018–19; see also *United States v. McIntosh*, 236 F.3d 968, 973 (8th Cir. 2001) (holding that distribution resulting in death is a strict liability crime). This interpretation has been followed by a substantial majority of federal appeals courts holding that distribution resulting in death does not require proof of proximate cause, foreseeability, or mens rea. See, e.g., *United States v. Webb*, 655 F.3d 1238, 1250 (11th Cir. 2011), cert. denied, 132 S. Ct. 1131 (2012) (holding that § 841(b) does not require proximate cause or foreseeability); *United States v. Houston*, 406 F.3d 1121, 1123 (9th Cir. 2005) (same); *United States v. Rebmann*, 226 F.3d 521, 525 (6th Cir. 2000) (stating in dicta that § 841(b) is "[i]n effect, a strict liability statute"); *United States v. Robinson*, 167 F.3d 824, 831 (3d Cir. 1999) (holding that the statute does not require proximate cause). On petition for a writ of certiorari to the U.S. Supreme Court, Burrage argued that distribution resulting in death requires proof of proximate cause, foreseeability and mens rea. See *Petition for Writ of Certiorari*, *supra* note 6, at 1.

<sup>28</sup> See *Hatfield*, 591 F.3d at 951.

cuit held that the standard is ambiguous and likely to confuse a jury.<sup>29</sup> There, the defendants were charged with conspiracy to burglarize pharmacies and to distribute controlled substances, the use of which resulted in four deaths.<sup>30</sup> At trial, the jury received instructions similar to those given in *Burrage* and were told that the statute's "results from" requirement was met so long as the drugs "at least . . . played a part" in the deaths.<sup>31</sup> The defendants were convicted and sentenced to life imprisonment.<sup>32</sup> The Seventh Circuit later vacated the convictions, holding that the jury should have been instructed to use the "results from" language of the statute without embellishment.<sup>33</sup>

## II. ACTUAL CAUSATION IN THEORY AND AS APPLIED TO DISTRIBUTION RESULTING IN DEATH

Defendants in distribution resulting in death cases, like other criminal defendants, cannot be held responsible for a crime if their actions, however corrupt, are not an "actual cause" of the particular harm in question.<sup>34</sup> Thus, where a death allegedly "results from" a defendant's drugs, the government must prove a causal relationship between the drugs and the victim's death in order to obtain a conviction.<sup>35</sup> As important as this requirement is for attributing criminal culpability, actual causation remains an enigmatic concept that often confuses courts, juries and lawyers.<sup>36</sup> Section A of this Part dis-

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<sup>29</sup> See *id.*; *infra* notes 67–71 and accompanying text.

<sup>30</sup> See *Hatfield*, 591 F.3d at 947.

<sup>31</sup> See *id.*

<sup>32</sup> See *id.*

<sup>33</sup> See *id.* at 948–49.

<sup>34</sup> JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 184 (6th ed. 2012); CHARLES E. TORCIA, WHARTON'S CRIMINAL LAW 122–24 (14th ed. 1978) (categorizing actual causation as the "minimal requirement" for criminal liability); see also *United States v. Hatfield*, 591 F.3d 945, 948 (7th Cir. 2009) (stating that actual cause is the "minimum concept of cause"). Without the concept of actual cause, unlimited liability could result. See WILLIAM PROSSER ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 264 (5th ed. 1984); see also ROLLIN M. PERKINS ET AL., CRIMINAL LAW 687 (2d ed. 1969) ("[I]t is neither necessary nor useful to exhaust the philosophical possibilities of actual causation.").

<sup>35</sup> See *Hatfield*, 591 F.3d at 948. Although federal appeals courts agree that distribution resulting in death does not require *proximate* cause, a minimal causal connection between the defendant's drugs and the victim's death is required. See *United States v. Webb*, 655 F.3d 1238, 1254–55 (11th Cir. 2011), *cert. denied*, 132 S. Ct. 1131 (2012) ("The statute requires a[n] [actual causation] connection . . . . It does not require that the defendant's conduct proximately cause the death."); *United States v. Houston*, 406 F.3d 1121, 1125 (9th Cir. 2005) ("[Actual causation] is required by the 'results' language, but proximate cause . . . is not a required element.").

<sup>36</sup> See *Hatfield*, 591 F.3d at 947 ("Causation is an important issue . . . [y]et it continues to confuse lawyers, in part because of a proliferation of unhelpful terminology (for which we judges must accept a good deal of the blame)."); see also WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW 393 (2d ed. 2003) (noting that causation in criminal law is difficult in only a minority of cases, but arises often enough to warrant considerable attention by courts).

cusses the failure of the traditional but-for test to determine actual cause in a multiple-drug overdose.<sup>37</sup> Then, Section B discusses the divergent views of the Eighth and Seventh Circuits concerning the contributory cause standard as a test for actual cause in these circumstances.<sup>38</sup>

### A. Actual Causation in Theory: The Inadequacy of a But-for Test

The but-for test is traditionally used to determine actual causation.<sup>39</sup> This approach asks whether a result would have occurred but-for a defendant's conduct.<sup>40</sup> If the result would have occurred anyway, then the defendant's conduct is not an actual cause.<sup>41</sup> In this way, the but-for test is a fairly accurate proxy for actual causation because it rules out insignificant actions that have no bearing on a result.<sup>42</sup>

The but-for test fails, however, when multiple factors concurrently cause a result.<sup>43</sup> Suppose A fatally shoots V in the head, while B simultaneously delivers a fatal gunshot to V's heart.<sup>44</sup> Both actors are equally responsible for V's death and the law should allow for each to be prosecuted.<sup>45</sup> Under a but-for analysis, however, V would have died from B's shot to the

<sup>37</sup> See *infra* notes 39–57 and accompanying text.

<sup>38</sup> See *infra* notes 58–71 and accompanying text.

<sup>39</sup> See MODEL PENAL CODE § 2.03 cmt. 2 (1985) (noting that actual cause, formulated in terms of the but-for approach, is the “simple, pervasive meaning of causation in the penal law”); DRESSLER, *supra* note 34, at 184 (discussing the but-for approach); PERKINS, *supra* note 34, at 688–89 (discussing the but-for approach); TORCIA, *supra* note 34, at 122–23 (describing actual causation in terms of a but-for model). Burrage argued for the but-for approach at trial, on appeal, and on petition for a writ of certiorari to the U.S. Supreme Court. See *United States v. Burrage*, 687 F.3d 1015, 1020 & n.3 (8th Cir. 2012), *cert. granted in part*, 133 S. Ct. 2049 (U.S. Apr. 29, 2013) (No. 12-7515); Petitioner's Opening Brief at 33–36, *Burrage v. United States*, 133 S. Ct. 2049 (U.S. Jul. 19, 2013) (No. 12-7515), 2013 WL 3830502 at \*33–36; Petition for Writ of Certiorari, *supra* note 6, at 1. Some courts have used the but-for approach in the context of distribution resulting in death. See *Webb*, 655 F.3d. at 1255 (approving jury instructions defining actual causation under the but-for standard).

<sup>40</sup> See DRESSLER, *supra* note 34, at 184.

<sup>41</sup> See *id.*

<sup>42</sup> See *id.* The but-for test serves an exclusionary function. See *id.* For example, suppose defendant A rigs the car of victim, V, with a bomb. See *id.* Before V enters the car, he is shot dead by defendant B. See *id.* Because V would have died but-for A's car bomb, A's actions are not an actual cause of V's death. See *id.* at 185. The but-for test thus excludes A's actions from the ambit of actual causes of V's death. See *id.*; see also Ian P. Farrell & Justin F. Marceau, *Taking Voluntariness Seriously*, 54 B.C. L. REV. 1545, 1592 (2013) (discussing the ways in which the absence of but-for cause justifiably precludes criminal liability even where a crime's *actus reus* is committed voluntarily).

<sup>43</sup> See DRESSLER, *supra* note 34, at 187–88; LAFAVE, *supra* note 36, at 394–95 (discussing the inadequacy of a but-for test of actual causation where multiple sufficient causes exist).

<sup>44</sup> See DRESSLER, *supra* note 34, at 184; LAFAVE, *supra* note 36, at 394–95.

<sup>45</sup> See DRESSLER, *supra* note 34, at 184; LAFAVE, *supra* note 36, at 394–95; see also MODEL PENAL CODE § 2.03 cmt. 2 (1985) (“All who have considered the issue agree that each of the assailants should be liable . . .”).

heart even without A's shot to the head.<sup>46</sup> Thus, A's shot would *not* be an actual cause, and A could not be convicted for V's death.<sup>47</sup> This anomalous outcome reveals the inadequacy of the but-for approach.<sup>48</sup>

Multiple-drug overdoses provide fertile ground for situations that render the but-for test deficient.<sup>49</sup> Suppose a person dies after ingesting five drugs, V, W, X, Y and Z.<sup>50</sup> Medical evidence later reveals that either a combination of VWX or YZ was capable of producing death.<sup>51</sup> Just as the shots fired by A and B in the prior example were both actual causes, so too are each of the two drug combinations.<sup>52</sup> Importantly, if medical evidence revealed that the drug V was not a *necessary* element to make VWX lethal, V would *not* be an actual cause.<sup>53</sup> The but-for test, as these hypotheticals illustrate, is under-inclusive—it fails to account for all actual causes.<sup>54</sup>

Although the but-for test fails in these hypotheticals, such circumstances are easily defined as a special set of exceptions.<sup>55</sup> First, where two concurrent causes are each sufficient to produce a result, each is an actual cause of the result.<sup>56</sup> Second, where one such sufficient cause itself involves

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<sup>46</sup> See LAFAVE, *supra* note 36, at 394–95.

<sup>47</sup> See *id.* Conversely, B's shot appears not to be an actual cause of the death either because V would have died but-for B's shot. See *id.*

<sup>48</sup> *Id.* For a discussion of alternative formulations of the but-for test to accommodate these anomalies, see MODEL PENAL CODE § 2.03 cmt. 2 (suggesting a modification of the but-for test under which the inquiry is whether a result would have occurred *when and as it did* but-for a given action); DRESSLER, *supra* note 34, at 188 (same); LAFAVE, *supra* note 36, at 394–95 (suggesting the appropriate inquiry is whether an action is a substantial factor in bringing about a given result).

<sup>49</sup> See Brief for the United States, *supra* note 3, at 28–29. But see *Webb*, 655 F.3d at 1255 (finding the but-for test sufficient in a distribution resulting in death case).

<sup>50</sup> See DRESSLER, *supra* note 34, at 187–88 (discussing these deficiencies within the context of certain violent crimes).

<sup>51</sup> See *id.*

<sup>52</sup> See *id.*

<sup>53</sup> See *id.* Actual cause would be determined by applying a but-for test within the framework of the concurrent sufficient cause scenario. See *id.* at 184; PERKINS, *supra* note 34, at 688–89; TORCIA, *supra* note 34, at 122–23. WX would still have been fatal regardless of V, so V is not an actual cause in the death because it is not required for one of the concurrent sufficient causes of the death. See DRESSLER, *supra* note 34, at 184; PERKINS, *supra* note 34, at 688–89; TORCIA, *supra* note 34, at 122–23. See generally Eric A. Johnson, *Criminal Liability for Loss of a Chance*, 91 IOWA L. REV. 59 (2005) (exploring actual cause and “multiple sufficient causal sets” in the context of lost-chance and accelerated-result scenarios).

<sup>54</sup> See LAFAVE, *supra* note 36, at 394 (discussing actual causes not captured by the but-for test). The but-for test can also be over-inclusive if it is applied in the abstract. See *Hatfield*, 591 F.3d at 948–49. For example, when a gunsmith manufactures a firearm, that action becomes a but-for cause of any future gun-related death involving that particular firearm; the death would not have occurred but-for the gun's creation. See *id.*; see also MODEL PENAL CODE § 2.03 cmt. 2 (1985) (characterizing but-for causation as a “broad principle” needing limitation in certain applications). Typically, the concept of proximate cause is used to eliminate but-for causes that are not relevant for legal liability. See DRESSLER, *supra* note 34, at 188–89.

<sup>55</sup> See DRESSLER, *supra* note 34, at 186–88 (discussing “Special ‘Actual Cause’ Problems”).

<sup>56</sup> See *id.* at 187–88 (discussing concurrent sufficient causes).

a combination of factors, a factor is an actual cause of the result if it is essential to the combination.<sup>57</sup>

B. *Actual Causation as Applied: The Differing Approaches of the Eighth and Seventh Circuits*

Eschewing the traditional but-for test, for several years, the U.S. Court of Appeals for the Eighth Circuit has utilized a contributory cause standard for distribution resulting in death.<sup>58</sup> The court first adopted the standard in its 2005 decision *United States v. Monnier*.<sup>59</sup> There, the defendant was convicted of distributing methamphetamine resulting in death after a jury found his drugs to be the proximate cause of the victim's death.<sup>60</sup> On appeal, the Eighth Circuit upheld the conviction, but emphasized that the jury's finding of proximate cause was not required.<sup>61</sup> Nevertheless, the defendant was properly convicted, the court held, because "the jury found proximate cause beyond a reasonable doubt, which necessarily means that it found contributory cause."<sup>62</sup>

In *Burrage*, the Eighth Circuit hewed closely to *Monnier* and affirmed the lower court's decision to instruct the jury using the contributory cause standard.<sup>63</sup> The court clarified that a defendant may be convicted of distribution resulting in death if the ingestion of the defendant's drugs "play[ed] a part" in the victim's multiple-drug-related death.<sup>64</sup> Explicit but-for causation is not required.<sup>65</sup> Thus, although neither medical expert could testify that Banka would not have died but-for using Burrage's heroin, Burrage was convicted because the jury found that the heroin "played a part" in Banka's death.<sup>66</sup>

In the U.S. Court of Appeals for the Seventh Circuit, however, supplementing the "results from" language of the statute with the contributory

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<sup>57</sup> See *id.* In this context, "essential to the combination" means but-for the presence of the factor, the combination would not be sufficient to cause the result. See *id.*

<sup>58</sup> See *Burrage*, 687 F.3d at 1021; *United States v. Monnier*, 412 F.3d 859, 862 (8th Cir. 2005).

<sup>59</sup> See *Monnier*, 412 F.3d at 862.

<sup>60</sup> See *id.* at 860.

<sup>61</sup> See *id.* at 862.

<sup>62</sup> See *id.* The court defined "contributing cause" as "[a] factor that—though not the primary cause—plays a part in producing a result." See *id.*

<sup>63</sup> See *Burrage*, 687 F.3d at 1021 (citing *Monnier*, 412 F.3d at 862) ("[Section] 841(b)(1)'s 'results from' requirement is met by a 'contributing cause.'"); see also *supra* note 23 and accompanying text (discussing the district court's jury instructions).

<sup>64</sup> See *Burrage*, 687 F.3d at 1021. This contributory cause approach is alluring, especially for the prosecution, because it avoids the under-inclusiveness of the but-for test. See LAFAVE, *supra* note 36, at 464, 467.

<sup>65</sup> See *Burrage*, 687 F.3d at 1021.

<sup>66</sup> See *id.*

cause standard is forbidden.<sup>67</sup> In its 2009 decision *United States v. Hatfield*, the court considered the *Monnier* opinion and held that the contributory cause standard risked obscuring the requirements of actual cause.<sup>68</sup> Rather than aiding juries in parsing these problems, the Seventh Circuit held that phrases such as “contributory cause” and “played a part” were likely confusing to a jury.<sup>69</sup> The statute’s language alone, according to the court, was “a good deal clearer . . . and probably clear enough.”<sup>70</sup> Thus, the Seventh Circuit takes the position that juries can navigate these complicated fact scenarios involving multiple causes when presented with the unadorned requirement that a death must result from the defendant’s drugs.<sup>71</sup>

### III. A SUPERIOR APPROACH: INSTRUCTING JURIES ON ACTUAL CAUSATION

*Burrage v. United States* presents the U.S. Supreme Court with an opportunity to shed light on the frighteningly ambiguous “results from” language in the distribution resulting in death statute.<sup>72</sup> First, the Court should hold that the Eighth Circuit’s contributory cause standard is impermissibly expansive, as it allows a jury to convict a defendant absent a finding of actual causation.<sup>73</sup> The Court should emphasize that actual causation, under the but-for test, is a minimum requirement for criminal liability.<sup>74</sup> The Court should then announce a policy of explaining to the jury the exceptional factual circumstances where the but-for test fails and of describing how actual causation may nevertheless be found.<sup>75</sup> This approach avoids resorting to the imperfect contributory cause standard to accommodate these exceptional circumstances, while providing more comprehensive instruction to the

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<sup>67</sup> See *Hatfield*, 591 F.3d at 949.

<sup>68</sup> See *id.* at 950. In its 2009 decision *United States v. Hatfield*, the U.S. Court of Appeals for the Seventh Circuit read the contributory cause standard articulated by the U.S. Court of Appeals for the Eighth Circuit in its 2005 decision *United States v. Monnier* as trying, “not terribly successfully,” to explain that the statute did not require proximate cause. See *id.*

<sup>69</sup> See *id.* at 949.

<sup>70</sup> See *id.*

<sup>71</sup> See *id.*

<sup>72</sup> See Controlled Substances Act, 21 U.S.C. § 841(b) (2006 & Supp. V 2012); *United States v. Burrage*, 687 F.3d 1015, 1018 (8th Cir. 2012), *cert. granted in part*, 133 S. Ct. 2049 (U.S. Apr. 29, 2013) (No. 12-7515).

<sup>73</sup> See *United States v. Hatfield*, 591 F.3d 945, 949 (7th Cir. 2009); TORCIA, *supra* note 34, at 122; *cf. Burrage*, 687 F.3d at 1018, 1020 (approving of the contributory cause standard and upholding *Burrage*’s conviction, even though the jury was only required to find that the heroin “played a part” in the death).

<sup>74</sup> See *Hatfield*, 591 F.3d at 948 (stating that actual cause is the “minimum concept of cause”); TORCIA, *supra* note 34, at 122–23 (categorizing actual causation as the “minimal requirement” for criminal liability).

<sup>75</sup> See DRESSLER, *supra* note 34, at 186–88 (discussing “Special ‘Actual Cause’ Problems”); see also *supra* notes 55–57 and accompanying text (discussing special concurrent cause situations that may arise in a mixed drug overdose context).

jury than simply presenting the unadorned statutory language.<sup>76</sup> In light of the severe sentences accompanying a conviction for distribution resulting in death, the Court should provide a pellucid standard of actual causation for juries to apply in these cases.<sup>77</sup>

The Supreme Court should invalidate *Burrage*'s contributory cause standard because it misstates the level of causation required for liability for distribution resulting in death.<sup>78</sup> Under this standard, a jury might wrongly convict a defendant of distribution resulting in death without finding the distributed drugs to be an actual cause of the death.<sup>79</sup> Requiring that drugs "played a part" does not accurately convey the important contours of actual causation to the jury.<sup>80</sup> Instructions that the heroin must have "played a part" in the death, without more, do not sufficiently guide the jury through the confusing causal morass of a mixed-drug death.<sup>81</sup> Indeed, in *Burrage*, although prosecutors provided the jury with ample evidence that heroin "played a part" in Banka's death, the testimony failed to conclusively establish that the heroin, alone or in combination with other substances, was sufficient to bring about Banka's death.<sup>82</sup>

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<sup>76</sup> Cf. *Burrage*, 687 F.3d at 1018–19, 1021 (applying the contributory cause standard); *Hatfield*, 591 F.3d at 949 (applying the unadorned-statutory-language approach).

<sup>77</sup> See Petitioner's Opening Brief, *supra* note 39, at 36 (arguing for a stricter causal standard than contributory cause in light of the severe sentences accompanying a violation of the statute); Mark Motivans, *Federal Justice Statistics, 2009*, BUREAU OF JUST. STATS. 3 (Dec. 2011), <http://www.bjs.gov/content/pub/pdf/fjs09.pdf>, archived at <http://perma.cc/P5M9-9YJS>. Actual causation is highly important because distribution resulting in death has been characterized as a strict liability offense. See *United States v. Webb*, 655 F.3d 1238, 1250–55 (11th Cir. 2011), cert. denied, 132 S. Ct. 1131 (2012) (collecting cases); see also *Burrage v. United States*, 133 S. Ct. 2049, 2049 (2013) (granting certiorari on the question of whether distribution resulting in death is a strict liability offense). Strict liability offenses may present "the most important causation field in criminal law" because, absent mens rea or proximate cause, actual causation is the sole connection between a defendant's conduct and the crime with which he or she is charged. See Paul K. Ryu, *Causation in Criminal Law*, 106 U. PA. L. REV. 773, 802 (1958). A just resolution of this issue is even more urgent due to the fact that drug overdose deaths in the United States steadily rise and, perhaps as a result, federal drug offenders are aggressively policed, prosecuted and sentenced. See Christopher M. Jones et al., *Pharmaceutical Overdose Deaths, United States, 2010*, 309 J. AM. MED. ASS'N 657, 657–59 (2013). Data shows overdose deaths have increased for eleven consecutive years, with 38,329 people dying from a drug overdose in 2010. See *id.* Moreover, in 2009, over 25,000 defendants were convicted of drug offenses, with ninety-one percent of those defendants receiving prison sentences. See Motivans, *supra*, at 13 & tbl. 11.

<sup>78</sup> See *Hatfield*, 591 F.3d at 949; cf. *Burrage*, 687 F.3d at 1018.

<sup>79</sup> See *Hatfield*, 591 F.3d at 951 (noting that the contributory cause standard may confuse a jury and obscure the requirement of actual causation).

<sup>80</sup> See *Hatfield*, 591 F.3d at 949. A reasonable jury could understand "played a part" and "contributing factor" as permitting a conviction where the defendant's drugs were ingested by the victim but had an insignificant or dubious effect on causing the death. See *id.*

<sup>81</sup> See *id.*; Petitioner's Opening Brief, *supra* note 39, at 36. "Played a part" might be understood as "was present among the drugs ingested," or "played any role, however insignificant." See *Hatfield*, 591 F.3d at 949.

<sup>82</sup> See *Burrage*, 687 F.3d at 1018–19, 1021.

Improperly or insufficiently explaining the distribution resulting in death statute's ambiguous "results from" language risks a jury inadvertently including factors that are not actual causes.<sup>83</sup> Regardless of whether the "results from" language is supplemented by the contributory cause standard or left unadorned, both approaches risk a jury interpreting "results from" as not requiring actual causation.<sup>84</sup> Especially without proper judicial guidance, a jury could readily interpret "results from" as allowing for conviction absent actual causation.<sup>85</sup> In this way, although presenting the jury with the plain statutory language does not actively lead them astray, the *Hatfield* court's less-is-better approach still leaves open the possibility that the jury will misinterpret the statute's causal requirement.<sup>86</sup>

The Supreme Court's opinion in *Burrage v. United States* should not simply invalidate the contributory cause standard but should also guide lower courts in instructing juries on the proper standard of actual causation for distribution resulting in death.<sup>87</sup> Supplementing the but-for test with explicit jury instructions would fully capture the universe of actual causes and obviate the problem in *Burrage*.<sup>88</sup> To convict a defendant, juries should be instructed that they must find beyond a reasonable doubt the defendant's drugs were an actual cause of the victim's death.<sup>89</sup> Actual cause should be defined by the but-for test, and the jury should be told under what circumstances they could find actual cause in complicated situations.<sup>90</sup> In the event the but-for test is inadequate, juries should be instructed that actual cause may be found if a defendant's drugs were either sufficient to have caused the death independent of any other substance, or were an essential element

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<sup>83</sup> See Controlled Substances Act, 21 U.S.C. § 841(b) (2006 & Supp. V 2012); Petitioner's Opening Brief, *supra* note 39, at 36. The *Burrage* court approved of an improper explanation of "results from" to the jury: the contributory cause approach. See *Burrage*, 687 F.3d at 1018–19, 1021. Conversely, the *Hatfield* court's unadorned statutory language approach insufficiently explains the meaning of "results from" to a jury. See *Hatfield*, 591 F.3d at 949, 951. Both approaches are risky and improvident. Cf. *Burrage*, 687 F.3d at 1018–19, 1021; *Hatfield*, 591 F.3d at 949.

<sup>84</sup> See *Burrage*, 687 F.3d at 1018–19, 1021; *Hatfield*, 591 F.3d at 949, 951.

<sup>85</sup> See Petitioner's Opening Brief, *supra* note 39, at 36; cf. *Hatfield*, 591 F.3d at 949–950 (holding that the statutory language "results from" should not be explained to the jury because [e]laborating on a term often makes it less rather than more clear[]).

<sup>86</sup> See *Hatfield*, 591 F.3d at 949.

<sup>87</sup> See *id.* at 949, 951. The *Hatfield* court correctly held that the contributory cause language was likely to confuse a jury, but the opinion offered no solution to explaining complicated actual causation issues to juries in distribution resulting in death cases. See *id.*

<sup>88</sup> See DRESSLER, *supra* note 34, at 185–88. This standard will be referred to as the "But-for Plus" approach." See *infra* notes 93–95 and accompanying text (discussing the proposed standard).

<sup>89</sup> See LAFAVE, *supra* note 36, at 392 ("Causal connection requires something more than mere coincidence as to time and place.").

<sup>90</sup> See DRESSLER, *supra* note 34, at 186–88.

in a combination of drugs sufficient to cause the death.<sup>91</sup> If either prong is met, defendant's drugs are an actual cause even if another drug is independently sufficient to have caused the death or a combination of drugs not including the defendant's could have produced the death.<sup>92</sup>

The Supreme Court should adopt this proposed "But-for Plus" approach because it accomplishes two important goals.<sup>93</sup> First, the standard eliminates the contributory cause approach and thereby mitigates the risk of imprisoning a defendant for a minimum of twenty years where the defendant's drugs are not an actual cause of death.<sup>94</sup> Second, the standard's "plus" aspect is nimble enough to allow for effective prosecution of defendants where a death results from a mixed-drug overdose despite the difficulties of conclusively proving cause of death in these cases.<sup>95</sup>

### CONCLUSION

Actual cause is a touchstone of criminal liability. The contributory cause standard that the U.S. Court of Appeals for the Eighth Circuit endorsed in *United States v. Burrage* is too expansive because it permits juries to find criminal liability where the defendant's drugs are not an actual cause of the victim's death. The U.S. Supreme Court should reject the standard, vacate Burrage's conviction and remand the case for a new trial. The better approach is to explicitly instruct the jury that they must find actual causation. The proposed "But-for Plus" standard should take as a starting point the traditional but-for test and supplement it to account for the extraordinary situations. Juries should be told that, even if a defendant's drugs are not a but-for cause of the death, they are an actual cause if they are capable of causing death independently or are an essential element in a combination of

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<sup>91</sup> See *id.* at 187–88; Johnson, *supra* note 53, at 92–95; see also Brief for the United States, *supra* note 3, at 24–25 & n.10 (discussing problems in establishing actual causation where multiple factors are essential to a combination producing a result); *supra* notes 55–57 and accompanying text (discussing these special concurrent cause situations).

<sup>92</sup> See DRESSLER, *supra* note 34, at 184.

<sup>93</sup> See Petitioner's Opening Brief, *supra* note 39, at 36; Brief for the United States, *supra* note 3, at 24. A "But-for Plus" approach would satisfy defendant's concern for a stricter causal standard. See Petitioner's Opening Brief, *supra* note 39, at 36. Simultaneously, this approach would accommodate the concerns of prosecutors who worry that defendants might unjustifiably avoid liability if the but-for test mistakenly fails to account for a defendant's drugs as a cause. See Brief for the United States, *supra* note 3, at 24.

<sup>94</sup> See Petitioner's Opening Brief, *supra* note 39, at 36 (arguing for a stricter causal standard in light of the severe penalties imposed for distribution resulting in death); Brief of Families Against Mandatory Minimums as Amicus Curiae in Support of Petitioner, *supra* note 15, at 16–17 (arguing that proof of actual causation, in terms of a but-for cause model, is required under the Controlled Substances Act, 21 U.S.C. § 841(b) (2006 & Supp. V 2012)).

<sup>95</sup> See Brief for the United States, *supra* note 3, at 24 (expressing concern that an inflexible standard would "unduly limit criminal responsibility"). Explicitly defining the standard will also guide prosecutors in establishing relevant medical testimony at trial. See *id.*

drugs causing the death. This standard accommodates the difficult causation issues present in overdose deaths from multiple substances. Moreover, it provides sufficient protection for defendants while maintaining the government's ability to successfully prosecute offenders.

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