Rebooting the Discourse on Causation in the Criminal Law: A Pragmatic (and Imperfect) Approach

Mike C. Materni *

ABSTRACT

Causation in the criminal law is an extremely complex issue for several reasons. Prime among those reasons is the fact that most scholars who have tackled the issue have done so by searching for a universal, comprehensive solution. This Article starts from the premise that such a solution is unattainable. Rather than embarking in extravagant philosophical inquiries, the Article offers a pragmatic solution to the issue of causation in the criminal law. Applying a methodology that finds validation in the philosophy of science, the Article argues that causation in the criminal law should be constructed in functional terms. Linking the concept of cause to its function within the criminal law, the Article maintains that “cause” should be informed to the idea of necessity, not sufficiency—nor any other idea of “cause,” no matter how strong or even better that idea might be from the perspective of metaphysics. The proposal advanced in this Article, while necessarily imperfect, gives coherence to a concept (that of but for cause) that, as of today, has been thought to be faulty and flawed to the point of inadequacy. Only by understanding causation within this framework it will be possible to move past the flawed dichotomy of “cause in fact” and “proximate cause” and focus on the more delicate policy issues that relate to culpability. While it is not the Article’s goal to be the last word on the subject—indeed, the Article expressly aims to be an initial building block—the Article does clarify several basic (and yet, until now, somewhat obscure) concepts that relate to causation in the criminal law, thus raising the level of discourse and providing a stronger foundation for further debate on the subject.

I. INTRODUCTION

This Article deals with one of the longest-standing and most complicated issues in both philosophical and legal discourse—the issue of causation. 1 I should say right from the start that the framework within which the present work is set is one of deep skepticism: I don't believe it is possible to reach a perfect solution to the issue of causation—in the law or any other context. The inquiry on causation is the kind of inquiry where every proposed solution will leave problems open and bring about results that—at least to some—will seem intuitively morally unjust. It is not by chance that, in the field of causation—a field where, as Professor Alan Stone of the Harvard Law School once put it to me, everyone has drilled 2 —“confusion is still rampant.” 3 Simply put, the problem of causation is beyond an all-encompassing, comprehensive solution. Nevertheless, what is possible—and necessary—is to improve the current level of discourse on causation in the criminal law. This is precisely what this Article sets out to do, with the awareness that, since the best is the enemy of the good, 4 what is here proposed will neither advance a perfect solution, nor will it be the last word on the subject: one should not, in all honesty, raise the level of expectations.

To improve the debate it is necessary, in some sense, to “start over;” thus, this Article will reboot the discourse on causation by reinterpreting the notion of but for cause and producing a sensible elaboration of factual causation in the criminal law. The idea is for this Article to constitute an initial building block, a foundation upon which to re-design the discourse on causation in criminal law. 5
While much of the current elaboration of causation and related issues in criminal law “springs from tort law and from scholarly literature focused on that area,” I am going to proceed differently. Instead of looking at the law of torts, I will offer a concept of causation designed for and tailored to the peculiar needs of the criminal law—a criminal law seen as the *extrema ratio* and one that prefers “to let ten guilty defendants go free than to convict one innocent man.”

Traditionally, (factual) causation in the law has been identified with the idea of *condicio sine qua non*, or *but for* cause. However, as Michael Moore points out in his latest work on causation, despite the fact that causation is a central concept both in the law of crimes and in the law of torts, there are “thousands of separate usages of ‘cause’ in the thousands of liability rules in these areas of the law;” moreover, there are “nine variations of cause-in-fact tests, seven varieties of proximate cause tests and three proposals supposing that a unified test should supplant any of the 63 possible combinations of the bifurcated tests.”

As it happens, it is precisely a lack of understanding how *but for*—or *sine qua non*—should be interpreted in the law (the law in general and the criminal law in particular) that has led many refined scholars to focus on the wrong set of issues and, in some cases, to advocate abandoning *but for* cause in favor of alternative concepts. For example, in the field of tort law among the most notable—and challenging—attempts to substitute *but for* cause we find the following: Richard Wright's proposal to replace the *but for* test with the NESS test; Richard Epstein's four paradigms—force, fright and shock, compulsion, dangerous conditions; and Ronald Coase's proposed shift away from causation and toward a maximum welfare model.

In the field of criminal law, the most thorough works remain H.L.A. Hart and Tony Honoré's *Causation in the Law* (which is also the most influential) and, more recently, Michael Moore's *Causation and Responsibility*. While these essays provide an interesting and clever contribution to understanding causation, however, they bring us marginally closer to a sensible solution of the issue in the criminal law.

On the one hand, in fact, H.L.A. Hart and Tony Honoré define causation as an antecedent that, in common language, is “generally sufficient” to bring about the event and, by doing so, substitute the *but for* test of *necessity* with a less stringent test of *sufficiency*. Hart and Honoré advocate the test of sufficiency because, while in “ordinary cases, where only one sufficient cause is present, a causally relevant factor will also be a condition *sine qua non*,” in “abnormal cases where more than one sufficient cause is present, the *sine qua non* test will yield misleading answers.”

On the other hand, Moore's work, albeit commendable in its effort to make sense of the “bramble bush,” that is, causation, and despite being the most comprehensive work on causation in American law, simply—as one author put it—does not help. Moore tries, in fact, to find a universal concept of cause, a “metaphysical glue that actually exists in God's own true world” and that, being metaphysically accurate, is applicable to every field of knowledge. I am convinced that such an approach is fundamentally wrong—which is why in this Article I will not try to “expound metaphysical truths.”

Contrary to the two approaches outlined above, it will be argued that the notion of causation in the criminal law should be informed to the idea of *necessity, not sufficiency*. Additionally, rather than being “concerned with … the formulation of a metaphysics about the world,” the focus of the Article will be on trying to offer a *functional* conception of causation in criminal law—namely, to establish a *prima facie* case of liability against a defendant (or multiple defendants) in light of an *empirically verifiable* causal connection between the defendant's conduct and the forbidden result. This proposed approach—with its declared refusal to embark in extravagant philosophical journeys—is justified because, as Guido Calabresi teaches us, the law is a “human construct” designed “to serve human needs, and thus legal terms (which in other contexts may have other,
Rebooting the Discourse on Causation in the Criminal..., 50 No. 6 Crim. Law...

deeper meanings) must sooner or later be linked to the service of human needs.”24 With respect to the issue of causation, this means that “causal requirements, like all other legal requirements, must ultimately justify themselves in functional terms;”25 as a consequence “many seemingly significant philosophical questions concerning cause become irrelevant to the use of that term in law.”26

Indeed, it is precisely the policy choice mentioned earlier—the “bedrock, axiomatic and elementary principle”27 in a liberal democracy, of preferring to let the guilty go free rather than to unjustly convict the innocent—that renders the elaboration of the concept of causation in the criminal law such an important and delicate task. The fact of the matter is that, empirically, when unjustified and/or unexpected harm occurs rage, pain, fear, and disapproval soon follow.28 These feelings express a necessity to understand why that harm has occurred. The necessity to understand translates, in turn, into the necessity to blame someone for that harm. This is probably because of the powerful sense (maybe it is just human instinct) that people should be punished for making the world worst off. With causation, (at least) part of the notion is that we are sorry that something bad happened, and we want to locate the source of what happened. There is a powerful, real demand for cause; for pinning the harm on someone. Thus, causation serves the function of making someone objectively responsible for a harm they produced in the phenomenal world.

Even though it is the target of strong objections,29 this perspective is grounded too deeply on the criminal law practiced all over the world to be simply ignored or dismissed. Until the world changes—i.e., until there shall be no more emphasis on results in the criminal law30—causation is going to be relevant. Thus, this Article is meant to engage with the criminal law as it currently is; and for as long as the current model, with its emphasis on results, stands, so will causation and the argument for personal responsibility in event crimes.31

It will therefore be the thesis defended in this Article that the concept of but for cause, understood appropriately, constitutes the best available (rectius, the least worst) option for the criminal law and that such concept, as presented in this Article, will be able to effectively withstand the several objections brought against it by legal scholars. Throughout the Article, against those who claim that the concept of but for cause is unworkable and lacks coherence, I will demonstrate that but for cause can be made coherent and fit for the purposes it is meant to serve. I will also argue that we do not need the concept of proximate cause to limit an otherwise over-reaching concept of causality; rather, I will indicate that proximate cause serves the function of covering the subjective nexus between a factually (and objectively) causally relevant antecedent and a forbidden result, thus satisfying the criminal law’s requirement of culpability and that, therefore, issues of proximate cause are, in their essence, policy issues.32 Before entering in medias res, however, there are three premises that I need to articulate.

II. THREE PREMISES
The first premise aims to further narrow and define the scope of the inquiry of the present work. This Article is not meant to encompass the causal issue in criminal law in its entirety; rather, it will focus on a particular kind (or aspect) of causation in criminal law—namely, the backward-looking, ex post facto causation that links a harmful result to an illegal conduct.33

The second premise begins with acknowledging that the only reason we have backward-looking causation is because of the current emphasis on results in the criminal law.34 If we defined criminal conduct with reference to likely predictive probabilistic consequences, for example, all these problems would disappear. This Article, however, is part of a larger project; while in the end I may come to doubt the emphasis currently placed on results, here I will accept at face value the assumption that resulting harm matters—or, at any rate, that it matters more. The reason is that, while this issue—also known as the issue of “moral luck”—is a very long-standing and complicated philosophical and legal problem and the topic of a hot debate de iure condendo,35 the importance of resulting harm remains—de iure condito—an empirically verifiable characteristic of virtually
every legal system. Since this Article is framed within (and to fit) traditional criminal law, with its emphasis on results, I need not entangle myself in the thorny issue of moral luck.

The third premise is the commonly accepted classification of crimes into, on the one hand, mere conduct crimes and, on the other, event (or result) crimes 36—or, to use George Fletcher's formulation, “crimes of harmful actions” and “crimes of harmful consequences.” 37 This classification distinguishes between crimes that are completed simply with the undertaking of a certain conduct by an actor (e.g., burglary) and crimes that require, in addition to the commission of the action described by the legal norm, the occurrence of an event in consequence of the actor's conduct (e.g., homicide). The first type of crime will be perfected as soon as the actor engages in the forbidden conduct (for burglary: once the actor enters the private dwelling). However, for the second type of crime to be perfected the actor must engage in conduct which will cause the forbidden result (for homicide: the actor may choose any conduct—from shooting his victim in the head to spotting his victim “living somewhere in the middle of the twentieth century, and leave him there” 38—as long as the result of his conduct is the death of the victim). 39 In other words, the law makes a distinction between a juridical—or normative—event, which is present in every crime and which is constituted by the forbidden conduct, and a naturalistic event, which is described by the legal norm defining the crime and which is also an effect or consequence of the conduct (i.e., is caused by the conduct: causation becomes a constitutive element of the crime). 40 It is only with regard to this second category of crimes—so-called event crimes—that the causal problem with which we will be dealing in this Article arises. In this model of criminal law—which I will call the “classical model” of the criminal law of events 41—a causal nexus between the defendant's conduct and the (naturalistic) event is required by the law, which regards the causal nexus as a constitutive element of the crime. 42

Against the “rather orthodox view in criminal law theory” 43 outlined above, Michael Moore argues that a “causal structure” 44 exists also for mere conduct crimes. To prove his point, Moore invites the reader to consider two crimes traditionally classified as ‘mere conduct crimes,’ larceny and burglary:

Larceny requires the taking of property of another. One performs the action of taking only when one causes the movement of such property, and, by causing such movement, one causes oneself (or another) to come into possession of such property. Similarly, burglary requires the actions of breaking and entering the dwelling house of another. One “breaks” within the meaning of the burglary statutes only when one causes an opening of some part of the dwelling (door, window, etc); one “enters” only when one causes any part of one's body to be inside the dwelling. While theft and burglary also require that many circumstances be true at the time of these acts, this in no way diminishes the fact that these crimes require that certain states of affairs be caused by some willed bodily movement. 45

While Moore's argument may seem persuasive at first, it cannot be accepted: Moore is circumventing a qualitative classification that differentiates event crimes from conduct crimes with clever linguistic gimmicks. It is possible to abstractly define “murder” either as “killing a man” or “causing the death of a man;” equally, it is possible to abstractly define “theft” as “stealing the property of another” or “causing the property of another to be in one's own possession.” The truth of the matter is, however, that “event crimes” are characterized by an occurrence—what I called the naturalistic event—which is definable independently of the legal norm that establishes the crime. For example, the constitutive element of the crime of murder, “death of a person,” can be defined irrespective of there being a legal provision defining and prohibiting murder. Conversely, mere conduct crimes “bring about” a normative result, i.e., a result that requires us to resort to legal rules if we want to define it. For example, ownership is a normative conception; therefore, theft brings about a normative result.

Now that these three premises have been established, we can turn our attention to the issue of causation.
III. THE CONCEPT OF CAUSE IN THE CLASSICAL MODEL OF THE CRIMINAL LAW OF EVENTS

The task of this Article is to improve the current level of discourse on causation in the criminal law by offering a conceptualization of the word “cause” that suits the needs of the classical model of the criminal law of events as it is currently structured. To do this means to reboot the discourse and “start fresh.” The first thing to establish, then, is the methodology that can successfully guide us through this journey.

In Causation and Responsibility, Michael Moore is looking for the “true meaning” of the word “cause.” According to Moore, “It is better to think that ‘cause’ is univocal; it means the same thing in contexts of attributing responsibility as in contexts of explanation.” If the meaning of cause is univocal, it follows that the “true” meaning of cause must be the metaphysical one. In fact, Moore claims, “‘cause’ in law must mean what it means in morality.” But is Moore right? Is his methodology correct? I think not. Indeed, this approach is reminiscent of the old idea that there actually exists a “pure” concept of “cause,” common to all sciences or fields of knowledge or inquiry. As the philosopher of science Ernest Nagel has shown, however, such an idea is irremediably flawed:

[A] variety of senses … have been attached to the word ‘cause’—varying from the ancient legal associations of the word, through the popular conception of causes as efficient agents, to the more sophisticated modern notions of cause as invariable functional dependence. The fact that the term has this wide spectrum of uses immediately rules out the possibility that there is just one correct and privileged explication for it.

Nevertheless, Nagel argues that it is possible to identify a certain, well-defined meaning of the word “cause” within several different areas of science as well as common language. What is important is to avoid making the mistake of assuming that, if the word “cause” has a specific meaning within a certain field, then it has to have that same meaning in all other fields; or, conversely, that, if in a specific field of inquiry the word “cause” turns out to be useless, then it will be useless in every other field. The correct approach is not one that undertakes the “ungrateful and pointless task to canvass even partially all the different meanings that have been attached to the word “cause”; rather, what matters is the point of view—or the perspective —of the subject who is conducting the inquiry.

Similar observations, with specific regard to the law, were made, around the same time, by Jerome Hall. Hall writes:

There are, of course, other meanings of “causation”; indeed cause is an ultimate notion, deeply characteristic of human thought and expressed even among the most primitive people in their effort to understand “the way of things.” The first insight into the conditions of any adequate analysis of it is, therefore, that the meanings of “cause” must be related to definite perspectives. Whether the context is that of a philosophy or common sense or science or law or criminal law, there are always and necessarily distinctive questions that are raised; and this must be taken into account if something more than generalities about “cause” are sought.

Most recently, Jane Stapleton has observed that “causal language has been used to express the results of quite different interrogations of the world.” Therefore, Stapleton argues, “it will never be possible to formulate a reductive algorithm that will detect when some factor is, metaphysically, a ‘cause’ unless a choice of underlying interrogation has been specified at the outset.” I think Paul K. Ryu said it best when he observed, in a 1958 article: “Each science—natural, social and humanistic—
and philosophy have their own meaning of causation. The proper meaning of causation in law is also sui generis. That meaning can be found only by inquiry into the policy of law, which may vary in different legal provisions.”

Rather than there being a single “true,” “metaphysical” meaning for the word “cause,” what determines what is meant by “cause” in a given situation is the point of view, the interest of the subject conducting the inquiry. This means that every discipline is entitled to have its own peculiar meaning for the word “cause.” If this is true, then it follows that the juridical science, too, has a particular meaning (rectius, a range of meanings), which is itself a function of the goals that are being pursued. As a corollary, criminal law is entitled to its own particular meaning for the word “cause”: “the legal perspective … requires a relevant meaning of ‘cause,’ one which is significant in legal liability; and the perspective of criminal law emphasizes a narrower meaning than that, reflecting the distinctive type of liability of that branch of law.”

If in shaping the contours of the causal question what matters is the perspective from which the causal inquiry is being conducted, the next step of our inquiry should be to figure out what this implies with respect to the criminal law. To answer this question, it will be useful to briefly sketch how courts and scholars currently deal with causation.

Traditionally, the causal analysis in criminal law consists of two steps: first, we inquire whether the defendant (rectius, the defendant’s conduct) is a cause in fact of the event—a determination made via the but for test. Then, “to cope with the far-flung effects of a cause that satisfies the “but for” test,” we inquire as to whether the defendant was also the proximate or legal cause of the event. If the answer to both parts of the inquiry is yes, then we say that the defendant caused the event and thus—absent any justifications or defenses—we hold him criminally liable.

Against this received wisdom, I argue that the approach outlined above is methodologically unsound: it conflates issues of causation with issues of responsibility. Moreover, whether independently of that or as an unintended consequence, it treats the concept of but for cause as little more than mere intuition, which in turn prevents its development in a way that would allow the but for test to stand up to the several challenges and objections that have been moved against it. It is precisely to this more sophisticated elaboration, and to disproving the alleged inadequacy of the but for test, that I now turn.

The first step that we must take is to understand the concept of but for cause. To begin with, since at least John Stuart Mill it has been recognized that any given event has a multitude of causes, each and everyone of which is a but for cause of the given event. As Charles Dickens states at the beginning of A Christmas Carol referring to the fact that Marley was dead: “There is no doubt whatever about that.” This means that, from the perspective of logic, “the” cause of any given event is a multitude of equally necessary conditions that, altogether, form the so-called sufficient condition. This theory is also known as the theory of the equivalence of conditions. Since it is not possible to abstractly single out any but for cause as being “more of a cause” than any others, it follows that, in a sense, none of the necessary conditions can be properly identified as the cause. But if it is true that all conditions are equivalent, it would appear that the concept of a but for cause is useless. Ernest Nagel, however, eloquently shows that this is not the case:

Suppose that an event A occurs when a certain set of conditions C is realized, so that the statement S1, “If C is realized, then A occurs,” is assumed to be true; but we shall not assume that the converse of S1 (i.e. “If A occurs, then C is realized”) is true, in order to allow for the possibility that A will occur when some set of conditions C’ different from C is satisfied. Suppose further that the condition C consists in the conjuncture of a number of factors, one of which is C1 while the remaining ones are C2; and assume that A does not occur when either C1 alone or C2 alone is realized, but that the statement S2, “If C2 is realized, then A occurs if and only if C1 is also realized,” is true. In virtue of statement S1, and in consonance with standard usage in formal logic, the condition C is said to be a “sufficient condition” for the event A, and A
to be a “necessary condition” for C; but in view of the further assumptions we made, it is evident that C₁ is not a necessary condition for A in this sense of “necessary.” Nevertheless, since according to statement S₂, the event A will not occur when C₂ is realized but C₁ is not, although A will occur when both C₁ and C₂ are realized, C₁ is an indispensable condition for the occurrence of A if we assume that the condition C₂ is already satisfied. Relative to C₂, the condition C₁ can therefore be said to be a “contingently necessary condition” for A.  

Nagel offers an elegant solution to the dilemma posed by the equivalence of conditions: he tells us that “but for cause” must be interpreted as contingent necessary condition, i.e., necessary within the context of concrete conditions that are actually present. To be sure, given the limited nature of our ever-evolving knowledge—as Rudolf Carnap points out, “scientist today know more than scientists of any previous period, but they certainly know less than scientists will know (assuming civilization is not destroyed by a holocaust) a hundred years from now”—the causal explanation that we can produce will have an inherently probabilistic structure. By this I am by no means endorsing a probabilistic test for causation; rather, what I mean is that our explanation, based on the ceteris paribus clause, will be endowed with a high degree of rational credibility, or logical probability. Intrinsic probabilistic structure aside, however, what we can take away from Nagel's illustration is also that we can choose, from among the totality of necessary conditions, a specific but for cause. True, Nagel's explanation does not give us any criteria by which to effectuate that choice. The fact that we can choose, however, means that how we get to pick a given but for cause (= what are the criteria that will guide our choice) is a function of what policy goals we are pursuing. Guido Calabresi is adamantly clear about this: “in the law “cause in fact” …, like proximate cause, is in the end a functional concept designed to achieve human goals.” This is not to say that but for cause is simply an issue of policy, and not a factual inquiry: the quest for but for cause is indeed a quest for cause-in-fact and thus, in its very nature, factual—we are, after all, investigating a factual occurrence (the event) which is empirically verifiable in the phenomenal world—; however, the choice of what we pick to be cause remains a matter of policy. An example offered by Rudolf Carnap will help clarify the point:

When a man dies, a doctor must state the cause of death. He may write “tuberculosis,” as if only one thing caused the death. In everyday life, we often demand a single cause for an event—the cause of death, the cause of the collision. But when we examine the situation more carefully, we see that many answers can be given, depending on the point of view from which the question was raised. A road-building engineer could say: “Well, I have said many times before that this is a poor surface to use for a highway. It gets slippery when wet. Now we have another accident to prove it!” According to this engineer, the accident was caused by the slippery highway. He is interested in the event from his point of view. He singles this out as the cause … Other people, when asked about the cause of the accident, may mention other conditions. The traffic police who study the causes of traffic accidents will want to know if either driver violated any rules of the road. Their job is to supervise such activities, and if they find that the rules have been violated, they will refer to that violation as the cause of the crash. A psychologist who interviews one of the drivers may conclude that the driver was in a state of anxiety; so deeply concerned with his worries that he did not give full attention to the approach of the other car at the crossing. The psychologist will say that the man's disturbed state of mind was the cause of the crash. He is picking out the factor in the total situation that most concerns him. For him, this is the interesting, the decisive cause … An automobile construction engineer may find another cause, such as a defect in the structure of one of the cars. A repair-garage man may point out that the brake-lining of one car was worn out. Each person, looking at the total picture from his point of view, will find a certain condition such that he can correctly say: if that condition had not existed, the accident might not have occurred.
As it is clear from the example, in real life there will almost always be some overlap in what is “cause;” and rarely if ever any given event will have just one cause. This explains why each discipline and each field of inquiry will see the causal issue in a determinate perspective, which will lead, from that perspective, to indicate a certain antecedent as the cause. The question that we need to answer, then, becomes: What is the perspective of the criminal law? What is the criminal law trying to find out?

In a criminal trial the trier of fact is seeking to establish whether liability for a harmful event can be attached to the defendant: the causal nexus between the conduct and the resulting harm is the criterion that, if proven, constitutes the first of two steps necessary to establish the defendant’s liability. In other words, for liability to be attached to an actor, the harmful event from which the liability arises must be a consequence of his action or omission—or, as the Model Penal Code puts it, the defendant’s conduct must be “an antecedent but for which the result in question would not have occurred.” Therefore, rather than a generic “What caused the harm?” the question properly asked by the criminal law is, “Did this defendant cause this harm?” In a criminal trial, from the total sum of the necessary conditions that form the sufficient set the trier of fact will focus on the defendant’s conduct to test whether, but for that conduct and all else being equal (it’s the ceteris paribus clause mentioned supra), the harm would have occurred or not. To do so, the trier of fact will resort to a counterfactual conditional. According to the classical counterfactual formula, the trier of fact will “think away” the defendant’s conduct; if it is determined that absent the defendant’s conduct—and all else being equal: the only element to be changed is, in fact, the defendant’s conduct—the specific event that we are seeking to explain would not have occurred, then we will say that the defendant caused the event. Conversely, if absent the defendant’s conduct the event would have occurred anyway, then the defendant cannot be said to be the sine qua non of the event. To use Nagel’s formulation, the defendant—or rather, his conduct—must be the contingently necessary condition of the harmful result. As I will show later, this construction of but for cause will be able to stand against the objections traditionally moved vis-à-vis but for; before we turn to those, however, I think a brief summary of the points made thus far will be useful.

Here are the fixed points on but for cause in the classical model of the criminal law of events established up to now:

1) The defendant’s conduct cannot be but one among the many necessary conditions of the event. From the perspective of logic, in fact, cause cannot be but the sum of all the necessary conditions (C1, C2, …, Cn; known and unknown: hence the ceteris paribus clause), i.e., the sufficient condition. From a criminal law perspective, however, the defendant’s conduct must be proven to be the necessary condition, or sine qua non, of the event.

2) The defendant’s conduct is never an absolutely necessary condition: it is a contingently necessary condition, which means that it is necessary within the context of a group of concrete conditions (C1, C2, …, Cn) that actually obtained in the phenomenal world.

3) Since it is not possible to measure the “specific weight” that each of the concrete conditions has, we need to apply the principle of the equivalence of conditions and, again, the ceteris paribus clause, which allows us to think away the defendant’s conduct and see whether, but for such conduct and all else being equal, the harm would have occurred or not. Since we do not—and cannot—know all the conditions that concur to create the sufficient set, we need to be aware that the causal explanation will be intrinsically probabilistic, but this does not mean that we should accept probabilistic accounts of causation. It simply means that, due to our limited knowledge, we have to make do with the ceteris paribus clause, which endows our causal explanation with a high degree of rational credibility, or logical probability.
4) The *but for* test must be applied to the *concrete antecedent* (in a criminal trial, the defendant's conduct) that, in light of the point of view, or interest, which guides the inquiry is *chosen* among all the antecedents which form the sufficient condition. To make a comparison, we could say that the causal analysis in a criminal trial is like an experiment: based on the criminal law's perspective, the trier of fact *picks* the defendant's (supposedly illegal) conduct and *tries to verify* if it is causal with respect to the harm by applying to said conduct the *but for* test. The test is not aimed at verifying whether a generic conduct caused a generic harm; rather, the defendant's conduct must be the *but for* cause of the event as it happened *hic et nunc* (“here” and “now”)—in other words, it must be the *sine qua non* of the specific process which lead to the harmful event. A positive result of this first test—the existence of a causal nexus between the defendant's conduct and the result—will be the first step toward the attribution of criminal liability for the harm.  

**IV. THE STRUCTURE OF COUNTERFACTUALS AND THE OBJECTIONS AGAINST BUT FOR**

In the previous section I have offered a sensible elaboration of the concept of *but for* cause in criminal law; in this section, I will try to respond to the several objections that have been brought against *but for* by legal scholars.

Virtually all objections can be classified as pertaining to either of two groups. The first type of objection follows from a misunderstanding of how counterfactual conditionals are to be constructed in the criminal law; the second type of objection, aimed at showing the inability of the *but for* test to deal with more or less complicated (and more or less far-fetched) scenarios, follows from a failure to understand what *but for* should be taken to mean from the perspective of the criminal law. To be sure, there can be—and indeed there is—some overlap between the two, in the sense that the failure to understand counterfactual conditionals can lead to blaming the *but for* test for admittedly absurd results; however, for practical purposes, I am going to treat the two issues separately. I will deal with counterfactual conditionals first and with a variety of objections to the *but for* test second.

**A. Counterfactual Conditionals**

A counterfactual conditional “is an assertion that, if a certain event had not taken place, then a certain other event would have followed.” The use of counterfactual conditionals is generally the preferred method to ascertain whether a given antecedent is causal with respect to a given event. Despite the fact that counterfactual conditionals are the best tool to determine whether an antecedent is the *but for* cause of a given event, however, their correct formulation is not always understood, to the point that even a refined scholar such as Michael Moore fails to grasp how a counterfactual must be structured in the context of a legal inquiry. Observing that “counterfactuals by their nature are difficult to prove with any degree of certainty, for they require the fact-finder to speculate what would have happened if the defendant had not done what he did.” Moore goes on to argue:

Suppose a defendant culpably destroys a life-preserver on a sea-going tug. When a crewman falls overboard and drowns, was a necessary condition of his death the act of the defendant in destroying the life-preserver? If the life-preserver had been there, would anyone have thought to use it; thrown it in time; thrown it far enough; have gotten near enough to the victim that the victim would have reached it? We often lack the kind of precise information that could verify whether the culpable act of the defendant made any difference in this way.

Moreover, Moore continues, there is “an indeterminacy of meaning” in counterfactual conditionals, a “vagueness” which stems from the great difficulty in “specifying the possible world in which we are to test the counterfactual.”
To be sure, Michael Moore is not the only scholar who fails to grasp the structure of counterfactuals; for example, in a recent article Ken Levy makes a similar mistake when, discussing the criminal liability of two individuals, one of whom—Partygoer1—actively engages in an act of drowning, while the other—Partygoer2—merely watches the victim drown, he observes that “Partygoer2's presence is not necessary for [the victim]'s death. Had Partygoer2 not been there at all, [the victim] would still have died at just the same time in just the same way.”

While the two examples may seem very different at first, a brief analysis will show that they both incur in the same fundamental error. Let's start with Levy: the argument that had Partygoer2 not been there, the victim would have died anyways seems compelling, but it is a flawed argument because it is based on a false premise. The right counterfactual, in fact, is not one that imagines "some distant and possible world" where Partygoer2 does not exist. The essence of the counterfactual is to help us determine whether, ceteris paribus, had the defendant acted (or not acted) the harmful event wouldn't have occurred. Thus, in Levy's example, it is not the presence of Partygoer2 that we need to “think away,” but rather Partygoer2's conduct. In the correct counterfactual, Partygoer2 would still be exactly where he was in real life but, instead of not doing anything, he would go to the victim's rescue.

The same argument, of course, goes for Moore's counterfactual. In David Robertson words:

Traditional … law has an accepted answer to Moore's questions, one that blunts his “indeterminacy” criticism. The imagined counterfactual world must be the same as the actual world as shown by the evidence in the case in all respects save one: the defendant's wrongful conduct must be corrected to the extent necessary to make the conduct acceptable … This imagined correction of the defendant's conduct is the only allowable change, and this change must be done in an intellectually conservative way, employing as little creativity as possible. To lend emphasis to this crucial point, let us phrase it this way: The imagined correction of the defendant's conduct must never be imaginative.

Therefore, to answer Moore's questions, we can easily assert that the correct counterfactual would be one where, ceteris paribus, the defendant does throw a life-preserver to the crewman that fell overboard. Reason and experience would support a finding that, had the life-preserver been thrown at him, the crewman wouldn't have drowned, on the basis of the generalization of common sense and experience (“behind” or “underneath” which lie invariant generalizations of science that explain the flotation of solids under certain conditions) that someone provided with a life-preserver will not drown. As for Moore's ulterior point in his attempt to show the unfitness of the counterfactual, it must be observed that when we say “but for the defendant's act of destroying the life-preserver,” we need to replace this factual condition with a counterfactual condition that eliminates the defendant's illegal conduct (in Moore's example, the defendant was culpable in destroying the life-preserver, whether he did so intentionally, knowingly, recklessly or negligently). The right counterfactual, therefore, would be one where the defendant does not destroy the life-preserver. It doesn't make sense to imagine, as Moore suggests, a world where the life-preserver had been damaged by weather conditions: in such a case, in fact, there would be no (culpable) conduct by the defendant—and, actually, no defendant!—and hence no interest on the part of the criminal law. Even more absurd is Moore's subsequent suggestion to replace the defendant's culpable conduct with another equally culpable conduct (instead of destroying the life-preserver, the defendant pushed the crewman overboard knowing that there was no one around who could rescue the crewman). What Moore seems to forget is that what needs to be explained in a court of law is what happened hic et nunc—in Moore's own example, the drowning of the crewman following the culpable destruction of the life-preserver. It is this event that needs to be explained, and it is this conduct that needs to be thought away by means of the counterfactual judgment: the illicit conduct needs to be substituted with a licit conduct—in this case, the throwing of a life-preserver to the man who fell overboard. Therefore, the nature of the counterfactual judgment, combined with the perspective of inquiry of the criminal law which "comes to life" in a criminal trial, confers a sufficient degree of determinacy to the counterfactual. To repeat Robertson's words, "The imagined correction of
the defendant's conduct must never be imaginative.” This is, at any rate, how courts proceed to construct counterfactual conditionals. As Roberson illustrates, referring to Judge Friendly's opinion in the case *Lekas & Drivas v. Goulardris*: A ship loaded cheese at Salonika, Greece, intending to carry it via the Mediterranean, Gibraltar, and the North Atlantic to New York, a projected one-month, 5000-mile journey in cool weather. But before the ship left port, World War II intervened, forcing the ship to take a 13,000-mile detour through the Suez Canal, around Africa's Cape of Good Hope, and thence eventually to New York. Because of wartime conditions, this detour turned into a six-month journey that exposed the ship to extreme heat, and the cheese arrived at New York rotten and useless. The question arose whether the shipowner's negligence in stowing the cheese in the ship's poop, a poorly-ventilated spot, was a factual cause of the spoilage. Answering yes, the trial judge constructed a counterfactual world in which the cheese remained in the poop and the ship took the short North Atlantic trip (and the cheese still spoiled). This was a remarkably ambitious counterfactual construction. It imagined World War II out of existence. Moreover, it failed to do the one essential thing: change the defendant's putatively wrongful conduct. Judge Friendly reversed the trial judge on this point, pointing out that the proper counterfactual world was one in which the cheese was stowed at a better ventilated spot on the ship and then taken on the six-month de-tour through some hellishly hot weather. It was utterly clear that no cheese anywhere on that (unrefrigerated) ship could have survived the trip to hell and back, so the absence of factual causation was obvious.

Robertson's conclusion leaves no room for doubt:

So, to answer Moore's questions in the life-preserver case, the counterfactual world that is constructed to apply the but-for test must posit that an undestroyed life preserver was at its accustomed place on the tug the moment after the defendant's actual destruction of it was finished. Nothing else in the real world must be changed. The evidence—and not anyone's imagination—must answer such questions as whether a fellow crew member would have been available to throw the preserver to the victim and, if so, whether this would have done any good. These are tough questions—and if the plaintiff cannot convince the trier of fact that the undestroyed preserver would probably have saved him, he will lose the case—but they relate to the availability of evidence of facts in the real-world case, not to any “indeterminacy” flaw in the but-for test itself.

Summing up: a correct counterfactual conditional is not one where we randomly imagine a variety of possible worlds; rather, given a factual scenario—which includes the defendant's putatively wrongful conduct—we leave everything exactly as it was in reality (including known as well as unknown antecedents) and only think away the defendant's conduct to see whether, ceteris paribus, without the defendant's conduct (or, in case of crimes of “commission by omission,” with the conduct that the defendant was supposed to take, but didn't) the causal process which led to the harm would or would not have occurred. The putatively wrongful conduct is the only condition that needs to be changed; in changing it, however, we are not free to substitute it with whatever comes to our mind—be it an equally wrongful conduct or the intervention of aliens from some distant planet: we must substitute the defendant's wrongful conduct with the conduct that the defendant should have taken (or omitted), but didn't.

**B. Objections To the But For Test**

As anticipated, the second category of objections to the but for test follows from a lack of understanding the concept of but for as applied to and employed by the criminal law. Several objections have been moved against the concept of but for cause in many fields of study, ranging from the criminal law to the law of torts to the philosophy of science. For purposes of
simplicity, we can identify three main objections: the recursus ad infinitum argument, the overdetermination argument, and the alternative hypothetical causation argument. In this section, I will illustrate and respond to those objections. It is my claim that the but for test as developed above will be able to stand up to the challenges presented hereinafter.

1. The Recursus Ad Infinitum Argument

One of the most intuitive objections to the concept of but for cause is the recursus ad infinitum argument, also known as the “argument of the mother.” The core of this objection is that, since any given but for cause must have its own but for cause and so on and so forth, we could regress along an endless series, going from but for cause to but for cause, ad infinitum. In other words, “it is sometimes … assumed that since every causal condition for an event has its own causal conditions, the event is never properly explained unless the terms in the entire regressive (and theoretically endless) series of causal conditions are also explained.” Thus, for example, the victim of a robbery wouldn't have died but for the robber shooting her; the robber, however, wouldn't have been there to shoot the victim but for the robber's mother giving him birth, and so on and so forth back to Adam and Eve. If taken seriously, this objection would prove insurmountable, because such an idea of causality, it is clear, would lead to intuitively absurd results—the mother of the robber would be convicted of homicide alongside her murderous son—untenable for the criminal law. The fact of the matter, however, is that this objection cannot be taken seriously. As Ernest Nagel asks: “is violence being done to the truth by stopping at some arbitrary point in the regressive series? Is B not a cause of A, merely because C is a cause of B?” The answer, for Nagel, is quite clear: “the fact that one problem may suggest another, and so lead to a possibly endless series of new inquiries and further explanations, testifies simply to the vast complexity of a given subject matter.” Once again, then, the question becomes: How do we choose where to stop in the regressive series? And, once again, given that “all discursive knowledge is the product of research instituted for the sake of resolving determinate (and hence delimited) questions,” the answer is that how we choose is determined by the perspective, or point of view, under which the inquiry is being conducted. This is especially relevant because, in a criminal trial, contrary to what one may infer from the way that arguments are structured in traditional legal scholarship, we are not actually looking to determine the cause in a naturalistic or physiological sense. When the trier of fact asks if the defendant caused the harm, in fact, the inquiry is not as to the scientific cause of the harm per se—the answer to this question will be provided by a discipline other than the law. Rather, the question is whether, given a determinate physiological cause of the harm, the defendant is the but for of the specific causal process that lead to that harm. Nagel makes a comparison that can help clarify this point. “A geologist—Nagel writes—seeks to ascertain … the sequential order of geologic formations … but it is not the geologist's task, qua geologist, to establish the laws of mechanics or of radioactive disintegration which he employs in his investigations.” Likewise, in a criminal trial we have an antecedent (the defendant's illegal conduct) that we already suspect of being causal on the basis of well known causal generalizations that link a certain type of conduct to a certain event (e.g., the conduct “shooting” to the event “death”) and, through counterfactual reasoning, we verify whether said conduct is, indeed, causal. So for example, if we have a victim who died because of poisoning, we do not, technically, ask what did the victim die of; rather, we think away the defendant's conduct (ex hypothesi, the administering of the poison to the victim) and see whether, but for such conduct, the victim would still be alive. This whole process is possible because we do not live in a fantasy world that is only populated by lawyers; rather, we live in the real world—a world that, aside from lawyers, among its other inhabitants also counts medical examiners, who have the required scientific knowledge to determine the physiological, naturalistic cause of death of our victim. If, for example, the ME were to determine that our victim had died of a heart attack independent of and unrelated to the poison (say, before the poison could have its effects) then the poisoner's conduct would not be the but for cause of death (and the poisoner could only be convicted of attempted murder). What is left for the trier of fact is to determine whether the defendant (= his conduct) is the sine qua non (or but for) of the causal process that occurred and that led to the harm (in our example, death by poisoning vs. heart attack). From all the above it is then clear that, even if in the abstract it could be possible to keep going back up along the causal chain “to infinity and beyond,” in practice the objection doesn't hold water, because all
we have to do is pick were to stop in the causal inquiry in function of the interests we are pursuing. To claim anything else would mean “to subscribe to the confusion underlying romantic philosophies of irrationalism, which despair of the capacity of discursive human intelligence to discover the “real” nature of things because scientific inquiry cannot answer the question why something exists rather than nothing at all.” 128

2. The Overdetermination Argument

When we say “overdetermination,” we are using a technical word that identifies situations where “each of two events \(c_1\) and \(c_2\) are individually causally sufficient for \(e\) (i.e., each causally determines that \(e\) will occur).” 129 The argument is often made that in so-called overdetermination cases the but for test fails to carry out its task. 130 In this section, I will lay out the most common overdetermination-based counterexamples to the but for test (also known as cases of additional causation 131 ) and show that the elaboration of but for advanced in this Article is able to withstand those counterexamples.

Cases of additional causation are those cases where (at least) two factors, each independently sufficient to produce the harm, concur to cause a certain harm at the same time so that, had one of the factors been absent (= if we think away one of the two factors), the event would have occurred anyway because of the other factor. Examples of such cases include A and B separately starting two fires that reach a house at the same time and burn it down, but each of which fires would have been sufficient, absent the other, to burn down the house; 132 A and B, unbeknownst to one another, causing the breaking of two adjacent dams: from each of the damaged dams enough water erupts to cause a flood, and the two masses of water merge, creating a giant flood; 133 A and B simultaneously and independently shooting C in the heart and C dying as a result. 134

Contrary to popular opinion, I do not believe that these cases pose insurmountable difficulties for the but for test. Remember that we established that when talking about a defendant “being the but for cause” we are actually trying to determine whether the defendant's conduct is the but for cause of the specific process which lead to the event. 135 This means that, going back to the examples of the two fires and the two floods, it is possible to assert—according to well known causal generalizations—that the two fires, which simultaneously reach the house, burn it down faster than it would burn down with just one fire, which means that the concrete event (= the specific process) contemplated by the legal provision would not have happened nunc if there had only been one fire. 136 And with respect to the flood, again, basic laws of physics tell us that a giant flood takes up a giant space, which is enough to affirm that, but for the merging of the two floods (= but for A’s and B’s conducts) the event wouldn't have happened hic. 137

Admittedly, the case of the two bullets seems more complicated. Again, there are two possible ways to tackle the issue using the but for test. One could claim, on the basis of the well-known causal generalization that a bullet in the heart causes it to stop (a generalization which makes the bullets relevant to the event—death—described by the legal provision proscribing it, whereas the color of the victim's sweater, for example, would be irrelevant to the event death), that, but for A's and B's shooting, the victim would not have died with two bullets in the heart—in other words, that the specific process would have been different. 138 The other way would be to consider—assuming that a man cannot die twice, and on the basis of scientific laws—that the sum of the two bullets has had a “synergic effect:” the two bullets, acting together, have accelerated, even if only by a moment, the death of the victim. 139 If forensic analysis can prove that such acceleration has occurred, nulla quaestio: the event would not have happened nunc if the heart had been hit by just one bullet. 140 The same would go, of course, if one bullet had reached the victim's heart a moment sooner than the other: in this case, the shooter of the first bullet would have committed murder, whereas the shooter of the second bullet would have committed attempted murder, just as he would have if he had shot a victim that died struck by lightning a moment before being hit by the bullet. 141 Rather than an issue having to do with the concept of sine qua non, then, it seems to me that the issue presented by the two bullets case is an issue that has to do with proof of
causation. Imagine, for example, that there are ten men in a firing squad, each armed with a rifle, but only one of those rifles is charged with bullets: the others are filled with blanks. The ten men simultaneously shoot A, who dies with a bullet in his heart; ballistic analysis is unable to determine which of the ten rifles shot the bullet. In such a case, it is clear that the cause of A's death is a bullet in the heart; but there aren't sufficient elements to prove where the bullet came from—to prove who killed A. Or again, imagine a closed community (no one gets in; no one gets out) of 100 individuals; one individual is found lying dead on the ground with his throat slit open. Again, we can know for sure that the physiological cause of death was having one's throat cut open, but, ex hypothesi, we do not have enough forensic evidence to determine which one of the remaining ninety-nine people is the perpetrator of the crime, even though we know for sure that at least one of them is. In these two cases, much like in the two bullets case, it is not a question of inadequacy of the concept of but for cause; rather, it is a question of lack of evidence. While the two latter examples may be faulted for bearing little resemblance to reality, so can be the example of two shooters who contemporaneously yet independently shoot the same victim.

3. The Alternative Hypothetical Causation Argument

Cases of alternative hypothetical causation—also known as cases of preemptive overdetermination—occur when we have (at least) two alternative factors, both equally susceptible of causing a certain harm, of which only one occurs and thus causes the harm but, had factor number 1 not occurred, the harm would have occurred anyway because it would have been brought about by factor number 2. A classic example of such situations is the case where A substitutes the water in B's canteen with poison; B leaves for a trip in the desert, but C, unbeknownst to both A and B, has cut a hole through B's canteen, so that B dies of thirst before he can die of poisoning. If we think away C's action of sabotaging B's water canteen, B would have died anyway because of A's poisoning. Thus, it would appear that the but for test fails us in cases of alternative hypothetical causation. The philosopher John Mackie has proposed a solution to the problem—namely, describing the event in detail: not “death,” but “death by thirst.” Richard Wright dismisses this solution as a tautology: claiming that B died of thirst, in fact, assumes the very fact that we are supposed to prove, i.e., the cause of death. I think, however, that Wright is too hasty in dismissing Mackie's proposal; I will make the case in defense of Mackie's argument in two ways, both of which allow the but for test to effectively tackle the hypothetical.

The first way is to simply dismiss the tautology objection and focus on the real world. In the real world, as we have seen supra, a coroner will conduct an autopsy of B and determine that the medical cause of death was thirst. The question to which the trier of fact will then have to answer will not be “Why did B die?” but rather, “Why did B die the way he died, i.e., of thirst?” The answer will be “Because C tampered with his water canteen. But for C's tampering, B would not have died (when and) how he died.” As for A, in the real world he will be charged with attempted murder. In other words, the tautology objection asks the wrong question: once again, it is not the physiological cause of death that needs to be determined by the criminal law; rather, once science—in the case of death, forensic medicine—has determined the physiological cause of death, the criminal law will verify whether this can be attributed to the defendant by virtue of his conduct.

The second way to defend Mackie's proposal is to point out that—rather than presenting a tautology—Mackie is on the right course: an effective way to tackle cases of alternative hypothetical causation is in fact to rely on a correct understanding of how the event must be described. A description of the concrete event as it happened offers no obstacles to the concept of sine qua non and the application of the but for test; the problem is to select what elements are to be included in the description.
description, of course, cannot include each and every factor present when the event occurred: to quote Wright, it doesn't matter if B died while “gazing at the moon.” Again, the issue, thus framed, is an issue of selection. When selecting which factors are to be included in the explanation, however, we are not free to choose at random, including any factors we please, such as the fact that the victim was staring at the moon when she died. Rather, in making the selection, we are only allowed to include those factors that are statistically relevant to the event that we have to explain. In the words of Wesley Salmon:

[A valid explanation] is an assemblage of all and only those factors relevant to the fact-to-be-explained. For instance, to explain why Albert, an American teenager, committed an act of delinquency, we cite such relevant factors as his sex, the socioeconomic status of his family, his religious background, his place of residence (urban versus suburban or rural), ethnic background, etc. It would clearly be a mistake to mention such factors as the day of the week on which he was born or whether his social security number is odd or even, for they are statistically irrelevant to the commission of delinquent acts.

The selection of the antecedents to be included in the description is to be made on the basis of well-known causal generalizations that link those antecedents to the type of harm we need to explain. As Jerome Hall aptly observes:

In criminal law “cause” is limited by the references of the rules of penal law, i.e. to certain conducts and harms … The definitions of the various crimes not only select the relevant facts to be considered in the investigation of cause, but also … they participate normatively in the determination of the meaning of causation in penal law. This does not imply that the issue of causation is identical with that of liability but rather that the narrower issue of causation is limited and in part defined by penal policy.

An appropriate description of the event is therefore one which considers each and every element which is relevant to the concrete event, which itself mirrors the event described in the legal provision in question (e.g., for homicide, death of a man) that happens hit et nunc (this event, happening now). This means, for example, that, in the water canteen case, but for the sabotage of the canteen, this event (death) would not have happened nunc; it would have happened at some other time.

To be sure, one could think—as the German jurist Karl Engisch did—of more sophisticated cases where, thanks to the alternative causal factor (i.e., the (potentially) causal antecedent that did not obtain: in the water canteen example, this would be the poisoning), the event would actually have occurred at the same time and place that it actually did. For example: A is about to be executed but, before the executioner can act, the victim's father, overcome by hatred, pushes away the executioner and activates the execution “mechanism” so that A dies at exactly the same time that he would have died at the hand of the executioner. Or yet again: A is having a quarrel with B and, filled with rage, screams that he wished he had club so that he could give B what he deserves; C and D, friends with A, see a club laying nearby and run to get it; C is faster and picks up the club and hands it to A, who then beats B with it (D is the alternative causal antecedent: if C had not picked up the club, D would have, etc.). Cases like these seem to be harder because it would appear that sine qua non and the but for test do not work even when we describe the event as it happened hic et nunc. At a closer look, however, it is easy to see how the real problem lies not in the description of the event hic et nunc, but in the selection of the alternative factors. We have seen supra that the but for test operates through a counterfactual judgment; we have also seen how, when reasoning through counterfactual conditionals, we are not free to create any sort of imaginable counterfactual world: imagination is not a legal criterion. Rather than indulging in imagining any possible world, we must determine whether, ceteris paribus, had the defendant acted (or not acted), the harmful event would or would not have occurred. This must be done by referring to the antecedents and the empirical knowledge that we possess; and our empirical knowledge tells us that the alternative antecedents in our examples (the mere presence of the executioner on the scaffold and the mere action of D who tries to grab the club but is anticipated by C) are not per se sufficient to claim that the
event would still have occurred hic et nunc—not unless we resort to fantasy and imagination. By the same reasoning that would lead us to affirm that the event would have occurred anyway, in fact, who's to say, for instance, that the executioner would not have had a stroke, or that D would not have tripped on his way to the club? And, for that matter, we could imagine a world where A would have been kidnapped by aliens; and B would have been run over by a truck or eaten by a bear before anyone could hit him with the club. All these hypotheses belong to a possible, imaginary world; but in their silliness, they prove that we cannot build our counterfactual on alternative antecedents that did not occur. As Jerome Hall bluntly points out, “It is not what would have happened but what did happen that is material.”

All we can rely on to build the counterfactual are those factors that actually came to be; but on the basis of those alone it is not possible to claim that, without them, the event would have occurred anyway, at the same time and through the same process as it actually occurred. Indeed, the same principles apply to the water canteen example: after all, if the canteen hadn't leaked, B could have realized that the water was poisoned and he wouldn't have drunk it. Or, he could have been struck by lightning before the water leaked, or before he could drink it: but we would still be in the realm of a fantastic, imaginary world, that can have no place in the criminal law (or the law of torts, for that matter) which, instead, has to operate in the real world—a world where, in our original example, B dies of thirst, as the water leaks out before he can drink it and hence the potential causal antecedent of the poisoning simply does not obtain.

A seemingly more difficult example of alternative hypothetical causation is one that professor Ned Hall of the philosophy department at Harvard University posed to me during a conversation on but for causation. In the hypothetical, both A and B have their hand on a button that, if pushed, will blow up C. The hypothetical is structured so that, if A does not push the button, B will push the button at the exact same time that A would have pushed it, so that C dies in the same way and at the same time that he would have died if A had pushed the button. Therefore, in the hypothetical, we would have to say that the event—death of C—but for A's conduct, would have occurred anyway, and it would have occurred hic et nunc. Once again, however, the perspective under which the causal inquiry is conducted offers a solution to the problem. In a criminal trial, what matters is, in fact, what actually happened, and not what could have happened. Therefore, if we assume that A pushes the button, the question to be asked is, “Is defendant A the but for cause of the specific process which has lead to the death of C?” The answer to this question is “Yes.” Little does it matter that, had A not acted, B would have: either forensic evidence will tell us that A pressed the button, or, in the worst case scenario, we will not know who pushed the button and, lacking other elements, in such a case we would have to acquit. While the complete identity of the result (mode and time of death, hic et nunc) makes this case appear trickier, a more careful look will show that this case isn’t really all that different from the other cases involving alternative hypothetical causation. Just as in those cases, in fact, what matters in this case is what actually occurred. This is because, in a criminal trial, we do not ask after cause in some absolute, general sense; rather, we ask for the specific cause of a specific occurrence. Thus, in Ned Hall's example, if A pushes the button, he starts a causal process that leads to the death of C. It is against this premise that we need to test whether A is a but for cause of the death of C: but for A pushing the button, would that very same process which lead to the death of C have occurred? The answer is, of course, that it wouldn't have: rather, another process, to which B would give start, would have occurred. This, I claim, is sufficient—for the purposes of the criminal law, if not for metaphysics—to hold A criminally responsible for C's death under the but for test as elaborated in this Article.

This example also ends the treatment of causation proper.

V. CAUSATION AND RESPONSIBILITY

Having advanced and defended what I see as the most viable option for a concept of cause in the criminal law, I want to spend a few words on how causation relates to responsibility. The core of the argument that I am going to make is that causation is just a step in the process of establishing a defendant's liability. Contrary to what Moore seems to claim, causation does not necessarily and by itself matter to responsibility.
The approach that I am here advocating maintains the distinction between the factual inquiry and the subsequent attribution of responsibility; however, it clearly states that the only aspect of the process that deals with causation is the factual inquiry. The factual inquiry will apply the but for test to determine whether the harmful event can be said to be a “naturalistic” consequence of the action or omission of the defendant; in other words, the event—as a matter of empirical occurrence in the physical world—will be objectively ascribed to the defendant on the sole basis of the causal nexus. Of course, I agree that a determination of criminal responsibility on the sole basis of the causal nexus would be far too broad; the reason, however, is not that the but for test is inadequate. Indeed, the but for test as construed in this Article will be able to tell us to a high degree of rational credibility whether the defendant's conduct was the sine qua non—in the sense of contingently necessary condition—of the forbidden result, and thus establish a prima facie case for liability. What the but for test doesn't tell us, however—and what instead matters greatly for criminal responsibility—is whether the defendant, while being a but for cause of the event, is also culpable with respect to the event. It is the presence of culpability, coupled with the existence of an objective causal nexus between conduct and result, which warrants the imposition of criminal liability. To repropose one of Michael Moore's examples, supposedly meant to show the inadequacy of the but for test and of counterfactual conditionals:

Suppose a defendant culpably delays his train at \( t_1 \); much, much later at \( t_2 \), and much further down the track, the train is hit by a flood. Since but for the delay at \( t_1 \), there would have been no damage or loss of life at \( t_2 \), the counterfactual test yields the unwelcome result that the defendant's delaying caused the harm.

In the framework of analysis proposed in this Article this example wouldn't be problematic: at most, the counterfactual conditional would enable us to ascertain the existence of an objective nexus between the defendant's conduct and the harmful result. This is where the inquiry as to culpability—the second prong of the test, deceptively called proximate cause analysis—comes into play: once the existence of an objective nexus has been verified, we need to inquire whether such connection is also covered by a subjective nexus between the defendant's state of mind and the harmful result. Thus, once we verify the existence of the objective nexus—the defendant did, in the physical world, cause the harm—we need to ask, “Was the defendant culpable in causing the harm?” If the answer is yes, the defendant will be held responsible; if the answer is no, the defendant will have to be acquitted.

To be sure, there is some authority that explicitly recognizes that “proximate cause” is essentially a foreseeability—and thus, I maintain, culpability—test; at the same time, “proximate cause” remains, for the most, an “obscure” concept. I think that the main reason behind this “obscurity” is twofold: on one hand, “proximate cause” employs causal terminology to conduct a non-causal analysis; on the other hand, the development of what meets the standard of “proximate cause” has traditionally been left to the courts, which, in turn, have produced a variety of outcomes, elaborations, and tests. While the latter is a feature—and, I daresay, a beauty—of the common law, which tends to leave the definition of at least certain moral questions to juries (and, almost as a reflection, to courts), the former—calling “cause” for what is, in fact, “culpability”—is just a source of confusion. I believe that deflating the issue of causation and the issue of responsibility is the second, necessary step to effectively keep “pruning” the “bramble bush.”

VI. CONCLUSIONS
As I noted at the very beginning, the context within which this Article is set is one of deep skepticism. Indeed, the great challenge of causation is that it is impossible to conceive a single perfect answer to the problem. This doesn't mean, however, that one shouldn't try to improve upon the current state of affairs: trying to achieve more clarity in the concepts employed in and by the law is, in and of itself, a good worthy of our dedication.
Given its current state, the best way to improve the discourse on causation in criminal law is to reboot it—and this is what this Article has done. Breaking with previous scholarship, this Article rejects more or less complex philosophical elaborations and advances a sensible, functional theory of but for cause designed for and tailored to the criminal law. Having cleared up (for what is possible) the confusion surrounding the concept of but for cause in the criminal law, the Article opens the way to the next step of the debate, i.e., the debate over issues pertaining to culpability and responsibility. These are important because, practically speaking, most cases involving causation in American criminal law are more-or-less-straightforward homicide cases, and in most of those cases it is clear that (1) either more than one defendant has played a role in the occurrence of the harmful results and thus is one of multiple but for causes of the death, and the issue is then one of apportioning and delimiting liability; or (2) one defendant has engaged in a course of conduct that, in a somewhat freakish way, has somehow ended up in the death of another, and the issue is whether the actual result is “too remote or accidental in its occurrence to have a just bearing on the actor’s liability.”

Deciding instances of concurring causation (i.e., situations where multiple causes, whether preexisting, simultaneous, or supervening, all concur to produce the harmful result), which is the type of problem exemplified sub (1); and whether the harm occurred in “too remote or accidental” a way, which is the type of problem exemplified sub (2), does not involve, strictly speaking, causation; rather, these are policy choices. As of today, the decision of whether the “causal chain” in a given case has been “broken” has been left to the intuition of the judge or jury who is presiding over that case, and—assuming that these issues will still be called issues of proximate causation—the next step of the debate should focus on whether some uniformity and coherence in the area of proximate cause should be provided and whether some clear and uniform standards to be met for the causal chain to be “broken” should be established.

To be sure, the construction of but for cause outlined in this Article may in some cases allow for the casting of a fairly wide net over the range of potentially liable defendants; the restriction of the reproachable conducts, however, needs to be undertaken in the field of culpability. Culpability allows us, in fact, not only to restrict the liability of subjects that are a but for cause of the harm but do not deserve to be held (fully or partially) responsible; but also to eliminate from our inquiry all those but for elements whose conduct was not substandard. This is because, negligence being the minimum threshold of liability, for a conduct to fall within the interest of the criminal law, it must have been at the very least negligent.

In the end, while—as acknowledged—the proposal advanced in this Article is necessarily imperfect, the methodology employed allows the Article to shed some light and clarity on an exceedingly complicated issue and to advance a proposal that, whatever its shortcomings may be, has the merit of being sound in theory and applicable in practice.
In the words of Rudolf Carnap, “The concept of causality, one of the central topics in today's philosophy of science, has occupied the attention of distinguished philosophers from the time of the ancient Greeks down to the present.” Rudolf Carnap, Philosophical Foundations of Physics 187 (Martin Gardner ed., 1995) (re-printed as An Introduction to the Philosophy of Science). In the same sense, see also Wesley C. Salmon, Causality and Explanation 13 (1998) (arguing that “[p]hilosophers have been asking th[e] question [of what is causality] for more than two millennia”).

This expression, which nowadays is a common proverb in both France and Italy, is attributed to Voltaire, whose poem La Béguele begins, “Dans ses écrits, un sàge Italien/Dit que le mieux est l'ennemi du bien.” M. De Voltaire, La Béguele, Conte Moral 3 (Geneva, 1772).

This declared goal, by its very nature, limits the contents and the reach of this Article; however, I believe that it is of the utmost necessity to clarify the core of causation in criminal law before tackling other interesting aspects of the topic (such as, for example, the relationship between proximate cause and foreseeability). I should also stress that while many observations that I will make throughout the Article may prove useful to shed some light on causation in the law of torts, the focus of this Article is the criminal law; given the very peculiar characteristics and requirements of this branch of the law, what is good for—or required by—it may not work for tort law.

Joshua Dressler, Understanding Criminal Law 183 (2012). See also Michael S. Moore, Causation and Responsibility: An Essay in Law, Morals, and Metaphysics 83 (2009) (“Many of the leading cases on causation, most of the causal doctrines finding some acceptance in the law, and most of the theorizing about causation, originate in the law of tort and not in the criminal law. Criminal law … has been a borrower from torts on the issue of causation.”); Hart & Honoré, supra note 1, at 84, (observing how “the most important modern literature on causation in the law is concerned almost exclusively with the extent of liability for the tort of negligence.”).

For the extrema ratio as the appropriate role for the criminal law in a liberal democracy, see, e.g., Mike C. Materni, Criminal Punishment and the Pursuit of Justice, 2 Brit. J. Am. Leg. Studies 263, 269, 296–99 (2013).

This is the maxim that, historically, has been at the foundation of the rule of proof beyond reasonable doubt in American criminal trials, see, e.g., Coffin v. U.S., 156 U.S. 432, 15 S. Ct. 394, 39 L. Ed. 481 (1895) (opinion of White, J.). As Alan Dershowitz has argued, this “primitive formula”—which is first found on record in the argument between Yahweh and Abraham over whether the presence of ten innocent men should be cause to spare the city of Sodom—“is about the best we have come up with in the thousands of years we have been seeking to balance the rights of innocent defendants against the power of the state to punish guilty defendants.” The balance has been struck in favor of having ten “false negatives” rather than even one “false positive.” Alan M. Dershowitz, Preemption: A Knife that Cuts Both Ways 22 (2006).
Rebooting the Discourse on Causation in the Criminal..., 50 No. 6 Crim. Law...

25 Calabresi, supra note 24, at 105.
26 Calabresi, supra note 24, at 105. Likewise, the decision of focusing exclusively on causation in the criminal law is justified by the “higher stakes” of this branch of the law, and the peculiar nature of the sanctions imposed for its violation. As Dressler observes, “Tort law seeks to identify the most suitable party on whom to place financial responsibility for negligently or innocently caused harm. In contrast, the criminal law seeks to determine whether and to what extent a wrongdoer … ought to be condemned by the community and have his liberty restricted.” Dressler, supra note 6, at 183. For similar arguments, see also Wayne LaFave, 1 Substantive Criminal Law 472 (2003).

28 See, e.g., Karl Engisch, Vom Weltbild des Juristen 133 (1965).
29 See infra notes 34–35 and accompanying text.
30 See infra notes 34–35 and accompanying text.
31 For the notion of event crimes, see infra notes 36–42 and accompanying text.
32 As I will show throughout the Article, there are two elements to the inquiry about but for cause. On the one hand, in fact, the quest for but for cause is, in its very essence, a factual (and thus, in a sense, objective) inquiry, as it aims to determine the existence of an empirically verifiable connection between a given conduct and a result in the physical world. On the other hand, what one picks to be “the” but for cause of a given event is a function of the perspective, or point of view, from which the inquiry is being conducted; thus, ultimately, what cause is picked will be a function of what policy is being pursued. See infra note 170 and accompanying text.
33 The issue of causation in criminal law is much broader than the somewhat narrow aspect dealt with in this Article. As Paul K. Ryu notes, “If causal relationship is viewed in a broad sense, most criminal law problems can be interpreted as involving such relationship. For every occurrence in criminal law produces some effect. Thus, complicity was analyzed in terms of causation both in the Anglo-American legal system and in Germany. [C]ausality has been considered relevant in crimes committed by the medium of innocent human agents and in conspiracy. [C]ausal tests have been used in law in a number of other contexts, foremost among them … that of insanity as a defense in criminal cases. However, all the mentioned areas of law—complicity, attempt, crime by the medium of an innocent agent, conspiracy, insanity—raise completely different issues from that involved in determining the relationship between criminal conduct and its result as a requisite of criminal responsibility. The tests of causation applicable to them need not be identical with that involved in the latter relationship. The erroneous assumption—often unconsciously made—that the test of causation must be the same in all these areas of criminal law, notwithstanding the fact that each may be governed by distinct legislative policies, has led to considerable confusion.” Paul K. Ryu, Causation in Criminal Law, 106 U. Pa. L. Rev. 776, 774–75 (1958). In this Article, I will only deal with the narrow yet fundamental aspect of backward-looking but for causation in event crimes; I chose to do so because —reasons of space aside—this kind of causation is at the core of the classical model of the criminal law of events and it is with this type of causation that most criminal courts have to deal with in practice.
34 See supra note 29 and accompanying text.
37 George P. Fletcher, Basic Concepts of Criminal Law 60 (1998) [hereinafter Basic Concepts]. For a somewhat more complex elaboration, see George P. Fletcher, Rethinking Criminal Law 388–89 (1978) [hereinafter Rethinking Criminal Law].
38 From the poem Five Ways to Kill a Man by Edwin Brock (1997).
39 This distinction, albeit with a slightly different phrasing, is the same illustrated by Fletcher in Rethinking Criminal Law, supra note 37, at 388–90.
40 A naturalistic event—as opposed to a juridical event—is intended as an effect or consequence of the actor’s conduct or, in other words, as a phenomenal (but not in the sense of extraordinary) change in the external world brought about by a man’s conduct. What characterizes the event then is a spatial as well as temporal hiatus between the conduct and the event. The “bond” that “unites” the
conduct to the event is the causal nexus. On the other hand, by juridical event, we intend the offense to the legal interest protected by the law that is violated, which is not a consequence of the actor's conduct (something that would have to be proven), but rather, is the conduct itself. It follows that while the juridical event is present in every crime, only certain crimes—event crimes—entail a naturalistic event. See, e.g., Mario Romano, Commentario Sistematico del Codice Penale—Parte Generale at 317 42–43; 337 104 (Giuffrè, 2004.)

The “classical model” of criminal law was developed by the Classical School in the mid-1800s, under the inspiration and push of Cesare Beccaria’s *On Crimes and Punishments*. Among the core principles of the classical model was the emphasis on moving away from a criminal law that punished thought and status, and focusing instead on objective elements as the basis for liability.

In this perspective, causation becomes the objective element that links a given defendant to a resulting forbidden harm and allows us to attribute this harm to this defendant. In other words, “causation is the instrument society employs to make sure that criminal responsibility is personal.” Dressler, supra note 6, at 183. For the notion of the “classical model” of the criminal law of event, see Federico Stella, *Giustizia e Modernità. La protezione dell'innocente e la tutela delle vittime* 221 (Giuffrè, 2003).

See, e.g., Dressler, supra note 6, at 182. It follows that, causation being a constitutive element of the crime, the existence of the causal nexus must be proven beyond a reasonable doubt. See, e.g., LaFave, supra note 26, at 466.

Moore, supra note 6, at 14.

Moore, supra note 6, at 17.

Moore, supra note 6, at 17 (citations omitted). Moore also claims that “Sometimes the liability rules of the criminal law and of torts do not use the word, ‘cause.’ Sometimes they use what linguists call ‘causatives’, those verbs that rather transparently seem to require that there be some causal relation even if they do not use the word, ‘cause.’ I refer to verbs like ‘kill’, ‘hit’, ‘penetrate’, ‘disfigure’, ‘abuse’, etc. Thus, liability doctrines that do not explicitly use the word ‘cause’ nonetheless define homicide (or wrongful death) as *killing*, not causing death; battery as *hitting*, not as causing contact; rape as *penetrating*, not as causing penetration; mayhem as *disfiguring*, not as causing disfigurement; child abuse as abusing a child, not as causing abuse; etc. On the surface at least, the law of torts and of crimes treats this second form of liability doctrines as equivalent to the first. That is, ‘killing’ is treated as equivalent to ‘causing death’, ‘hitting’, with ‘causing contact’, etc. If this equivalence is true, then whenever the law uses causative verbs it is requiring causation as a prerequisite to liability fully as much as when it uses the word ‘cause.’” Moore, supra note 6, at 5.

See supra notes 21–22 and accompanying text.

Moore, supra note 6, at 5. This is extremely puzzling, especially in light of the fact that a couple of pages before Moore acknowledges that “It is of course possible that although the law uses the word ‘cause’, it does not refer to the causal relation. It is possible, in other words, that what these doctrines call causation has nothing to do with causation as a real relation in the world; rather, the possibility is that here as elsewhere the law uses a word in a technical, distinctively legal sense, even though the word already has an established meaning in non-legal English. This is certainly true with words like ‘malice’ (and even ‘intention’) in criminal law, and it is possibly so with regard to the law’s usage of ‘cause.’ Whether this is so depends on what sort of policies lie behind legal doctrines. Such policies can demand that ordinary words be given very non-ordinary meanings in legal contexts, or they can demand that legal usage conform to ordinary, non-legal meaning.” Moore, supra note 6, at 3. Later on Moore also acknowledges that “Unsurprisingly, the law has its own theories about the nature of causation, theories put in terms of a variety of general tests of causation proposed for use throughout the law of torts and of crimes.” Moore, supra note 6, at 81.

Moore, supra note 6, at 4.

See, e.g., Max Ernst Mayer, Der Allgemeine Teil des Deutschen Strafrechts 136 (Heidelberg, 1923) (claiming that there is only one concept of causation—the philosophical one); Maximilian von Buri, Über Kausalität und Deren Verantwortung 2 (Leipzig, 1873) (arguing that the causal nexus needed not be explained juridically); Karl Engisch, Die Kausalität als Merkmal der strafrechtlichen Tatbestände 21 (Tubingen, 1931) (stating that the only valid concept of causation is the one which pertains to natural sciences).

Nagel, supra note 1, at 73. In the same sense, see also Hart & Honoré, supra note 1, at 28 (arguing that “there is not a single concept of causation, but a group or family of concepts”).

Nagel, supra note 1, at 73. Nagel's methodology finds confirmation in Salmon, who argues that “[i]t is a basic principle … that we cannot get very far in attempting to understand scientific explanation if we try to articulate a universally applicable logic of scientific explanation. What constitutes an adequate explanation depends crucially, I think, on the kind of world in which we live; moreover, what constitutes an adequate explanation may differ from one domain to another in the actual world. [For example, “[e]ven if a causal account of explanation cannot be extended into the quantum domain, that does not mean that its application in other domains is illegitimate.” Salmon, supra note 2, at 326.

Nagel, supra note 1, at 73.
As a matter of fact, Salmon observes, “[c]ausal concepts are ubiquitous: in every branch of theoretical science—physical, biological, behavioral, and social; in the practical disciplines—architecture, ecology, engineering, law, and medicine; in everyday life—making decisions regarding ourselves, our loved ones, other living persons, and members of future generations.” Salmon, supra note 2, at 4.

For a similar argument, see John L. Mackie, The Cement of the Universe: A Study of Causation 120 (1980) (arguing that “[d]eliberate human actions are particularly relevant as causes just because they are the focus of interest with respect to responsibility and various forms of control. But since even the choice of a field is relative to a purpose or a point of view, and since even apart from this what we recognize as a cause, rather than a mere condition, commonly depends on what we know—or what we knew first—or what is closely related to our interests, [then, f]rom a theoretical point of view, [w]hat is not a cause in relation to one field may be so in relation to another.”).


Jane Stapleton, Choosing What We Mean by “Causation” in the Law, 73 Mo. L. Rev. 433, 447 (2008).

Ryu, supra note 33, at 805. In the same sense, see also Calabresi, supra note 24, at 106, arguing that in law “cause is used in different guises, but always to identify those pressure points that are most amenable to the social goals we wish to accomplish.”

See, e.g., Engisch, supra note 28, at 132; Federico Stella, Leggi Scientifiche e Spiegazione Causale nel Diritto Penale 335 (Giuffrè, 2000). In the same sense, see also Hall, supra note 55, at 247 (“Cause has a distinctive meaning in law”); and Hall, supra note 55, at 293 (“An attributive inquiry is … a type of explanatory inquiry which finds cause in human conduct, including criminal conduct. This, indeed, is the cause that is especially important in law.”). Even Moore seems to be aware of the importance of the context in which a given inquiry is being conducted: “In seeking an explanation, for example, of why the Spanish Armada was defeated,” Moore writes, “we are most interested in voluntary actions like Drake’s decision to take advantage of the rather stupid Spanish decision to arrange their ships in the shape of a giant bird (pleasing to God in Heaven, no doubt, but exposed to concentrated fire at the tips of the wings). Add to this the great storm in the North Sea that dispatched a number of the ships that escaped Drake’s fire, and we may well end up satisfied that we understand why the Spanish Armada was defeated … so satisfied, indeed, that we look no further for earlier ‘underlying’ or ‘root’ causes … There surely is an explanation behind the decisions of Drake and of the Spanish, and behind the great storm. There just is no explanation in which we are much interested, given that our curiosity began with the defeat of the Armada.” Moore, supra note 6, at 253–54. Moore, however, takes the wrong lesson from his own example. Driven—no doubt—by his search for the metaphysical meaning of cause, he in fact claims: “surely our interest, or the lack of it, cannot determine whether the decisions of Drake and the Spanish, or the North Sea storm, were caused. If we were to take any other view, no tree would fall in the proverbial forest so long as we had no interest in hearing about it.” Moore, supra note 6, at 254 While philosophically this may indeed be accurate, Moore fails to acknowledge that in the context of a criminal trial (= in the context of a precisely defined inquiry) it is the question that is being asked—did this defendant cause this harm?—that shapes the inquiry, defining (and thus limiting) the perspective under which the inquiry will be conducted.

Hall, supra note 52, at 249.

See, e.g., Richard G. Singer & John Q. LaFond, Criminal Law: Examples and Explanations 123 (2004). The but for test is also the test endorsed by the Model Penal Code: “The actor's conduct must be an antecedent but for which the result would not have occurred.” Model Penal Code § 2.03 explanatory note at 254. Besides the United States, the but for test is the commonly accepted test in, among others, the United Kingdom (see, e.g., Michael Allen, Textbook on Criminal Law 33 (London, 1991)); Germany (see, e.g., Jescheck-Weigend, Lehrbuch des Strafrechts, Allgemeiner Teil 279 (Berlin, 1996)); France (see, e.g., Merle-Vitu, Traité de Droit Criminel 552 (Paris, 1973)); Spain (see, e.g., Gimbernat Ordeig, Causalidad, Omisión e Imprudencia, en Ensayos Penales 193 (Madrid, 1999)); Italy (see, e.g., Giorgio Marinucci & Emilio Dolcini, Manuale di Diritto Penale — Parte Generale 164–65 (Milano, 2003).

Basic Concepts, supra note 37, at 64.

For a brief account of how this confusion started and of why it still persists, see Wright, supra note 12, at 1008, 1012–14.

For example, Lawrence Crocker claims that “It is not of any very great importance to have a definition of cause in fact. The work that needs to be done at this stage will be done quite well by our everyday sense of causation, guided by the general idea of a “but for” cause.” Lawrence Crocker, A Retributive Theory of Criminal Causation, J. Contemp. Legal Issues 65, 69 (1994). Even Hart and Honoré begin their seminal treatise on causation in the law by asserting that the “plain man's notion of causation” is what matters for the law. Hart & Honoré, supra note 1, at 1; likewise, George Fletcher, discussing cases of causal preemption (for which, see infra Part II and Part III) claims that those are hard cases and that the “logical and scientific account of causation” should be abandoned in favor of the “simpler question whether ordinary observers would perceive causal power operative in the facts.” Basic Concepts,
Rebooting the Discourse on Causation in the Criminal..., 50 No. 6 Crim. Law...

supra note 37, at 64. As we will see in a moment, however, this very attitude is one of the roots of the confusion and problems in the treatment of causation in the law.

65 I believe it is precisely this lack of understanding of how the concept of but for cause is to be constructed in the law—and, especially, in the criminal law—that has led even a refined scholar such as Richard Epstein to assert that the concept of but for cause “cannot handle the simplest of cases.” Richard Epstein, supra note 13, at 161. For a vibrant critique of Epstein’s article, see Wright, supra note 12, at 1015–18.

66 See, e.g., Hart & Honoré, supra note 1, at 111 (illustrating Mill view that “the cause of an event is a special member of a complex set of conditions which are sufficient to produce that event in the sense that the set is ‘invariably and unconditionally’ followed by it”). See also Moore, supra note 6, at 113 (“John Stuart Mill [held the view that each temporally present necessary condition had equal claim with every other such condition to be called the cause of some happening, in any suitably scientific sense of ‘cause.’ Mill relegated the discrimination we do make in ordinary speech, between ‘the cause’ and ‘a mere background condition’, to pragmatic features of the contexts in which such things were said. If we are doctors, we pick out the factors that we can treat; if we are moralists, those that are blamable; if we are historians, those that have appeal to normal human interest, as ‘the cause.’ In reality, Mill held, all such conditions together constituted the cause.”) (citations omitted).


68 See, e.g., Wright, supra note 12, at 1018.

69 As Rudolf Carnap puts it, “given a certain event and a multitude of necessary conditions—or ‘causes’—‘no single cause can be singled out as the cause. Indeed, it is obvious that there is no such thing as the cause. There are many relevant components in a complex situation, each contributing to the [event] in the sense that, had the component been absent, the [event] might not have happened.” Carnap, supra note 2, at 192.

70 Nagel, supra note 1, at 559–60. Technically speaking, we could define “necessary condition” for causation as follows: “(NC) if X causes Y then (I) there is a possible intervention that changes the value of X such that (II) if this intervention (and no other) were carried out, the value of Y (or the probability of some value of Y) would change.” James Woodward, Making Things Happen: A Theory of Causal Explanation 43 (2003).

71 The conditions can be known or unknown, hence the ceteris paribus clause. See infra, note 74 and accompanying text.

72 Carnap, supra note 2, at 193–94.

73 Wright hints to—and rejects—probabilistic accounts of causation. See Wright, supra note 12, at 1042–44. Probabilistic causation, which is forward-looking, is ill-suited for the purposes of this Article, which only deals with backward-looking causation. This is not to say, however, that it is a concept without merits: for example, a policy-maker, or a legal economist, will rely on the concept of causal linkage and its degree of probability to deter or promote a certain kind of behavior. The main point that I want to get across—echoing Wright—is that “probabilistic causation” tells us nothing about what happened in a particular case, and therefore cannot be of any help in establishing liability for a resulting harm in a criminal trial, where the prosecutor needs to prove not that the defendant probably caused the harm, but rather that the defendant caused the harm beyond a reasonable doubt.

74 Relying on the ceteris paribus—or “all else being equal”—clause is a perfectly legitimate means to reach an epistemologically valid explanation. As Nagel illustrates: “The ceteris paribus clause is often tacitly employed even in highly developed branches of physics. For example, the path traversed by a bullet on a given occasion can be explained with the help of Newtonian theory, supplemented by instantaneous data concerning a number of items. The explanation of the bullet's trajectory mentions explicitly the latitude at which the gun is fired, the direction in which the gun is pointed, the muzzle velocity of the projectile, and the resistance of the air; but it is not likely to mention the position of the earth with respect to its own and other galactic systems. The explanation ignores the latter items because of the assumption, built into the Newtonian theory, that the mass of the projectile is constant and is independent not only of its velocity but also of its distance from other bodies. Until Ernst Mach's critique of Newtonian mechanics, it apparently did not occur to physicists that the inertia of a body might be a function of its distance from all other bodies in the universe … Accordingly, although a projectile's distance from all other bodies obviously varies, the variation is normally not mentioned in explanations of a bullet's trajectory, and is tacitly subsumed under the ceteris paribus reservation.” Nagel, supra note 1, at 560 n.8.

75 I must, at this point, elucidate the fundamental difference between probability per se and logical probability. To do so, I refer to Rudolf Carnap's excellent explanation: “There are two fundamentally different kinds of probability, and I distinguish between them by calling one “statistical” probability,” and the other “logical probability.” It is unfortunate that the same word, “probability,” has been used in two such widely differing senses. Failing to make the distinction is a source of enormous confusion in books on the philosophy of science as well as in the discourse of scientists themselves.” Carnap goes on: “logical probability is a logical relation somewhat similar to logical implication; indeed, I think probability may be regarded as a partial implication. If the evidence is so
strong that the hypothesis follows logically from it—is logically implied by it—we have one extreme case in which the probability is 1 … Similarly, if the negation of a hypothesis is logically implied by the evidence, the logical probability of the hypothesis is 0. In between, there is a continuum of cases about which deductive logic tells us nothing beyond the negative assertion that neither the hypothesis nor its negation can be deduced from the evidence.” For example, Carnap continues, “We say to a scientist: ‘You tell me that I can rely on this law in making a certain prediction. How well established is the law? How trustworthy is the prediction?’ The scientist today may or may not be willing to answer a metascientific question of this kind in quantitative terms. But I believe that, once inductive logic is sufficiently developed, he could reply: ‘This hypothesis is confirmed to a degree .8 on the basis of the available evidence.’ A scientist who answers in this way is making a statement about a logical relation between the evidence and the hypothesis in question. The sort of probability he has in mind is logical probability, which I also call ‘degree of confirmation.’

His statement that the value of this probability is .8 is, in this context, not a synthetic (empirical) statement, but an analytic one. It is analytic because no empirical investigation is demanded. It expresses a logical relation between a sentence that states the evidence and a sentence that states the hypothesis.” Carnap, supra note 2, at 22–35. Thus, a causal explanation will be endowed with a high degree of logical probability when we will be able to assert, ceteris paribus, a strong logical correlation between the antecedent we pick as cause and the event that we want to explain.

76 See supra notes 24–26 and accompanying text.
77 Calabresi, supra note 24, at 107.
78 This was the position adopted by some legal realists as well as by the Critical Legal Studies movement. See, e.g., Mark Kelman, The Necessary Myth of Objective Causation Judgments in Liberal Political Theory, 63 Chi.-Kent L. Rev. 579 (1987); see also Wright, supra note 8, at 1007–08.
79 As Paul K. Ryu observes, “causation in law is a matter of imputation. It is a factor in determining whether an accused is to be subject to criminal sanctions for certain conduct. The test of causality must be geared to this function and the choice of the proper test is, therefore, ultimately a matter of legal policy rather than of science or philosophy.” Ryu, supra note 33, at 785 (citations omitted).
80 Carnap, supra note 2, at 191–92.
81 See supra notes 24–26 and accompanying text.
82 In the elegant words of Hart and Honoré: “criminal offences are often defined in simple terms as acts causing specific harms: in such cases a causal connection between some action of the accused and the specified harm must be shown in order to establish the existence of liability.” Hart & Honoré, supra note 1, at 84. This first step, as I will argue infra, establishes an objective connection between conduct and result; in order to make the defendant criminally liable, however, a second, subjective connection is also required. See infra Part V.
83 This formulation follows the formulation adopted by article 40 of the Italian penal code.
84 Model Penal Code § 2.03(1)(a). As one author puts it: “The inquiry concerning causation in fact turns on whether the harm in question actually resulted from the defendant's conduct. If causation in fact has been established, the question of proximity arises—may the defendant justly be held responsible for the occurrence of the harm which resulted from his conduct?” David J. Karp, Causation in the Model Penal Code, 78 Colum. L. Rev. 1249 (1978).
85 To repeat the words of Joshua Dressler, “The principle of causation is the instrument society employs to ensure that criminal responsibility is personal. It is the basis that links the actor to the social harm.” Dressler, supra note 6, at 183.
86 As Federico Stella observes, a judge—or a jury—is not interested in why (in the sense of why per se) a given event occurred; rather, the judge and jury are interested in determining whether a given defendant can be held responsible for a criminally relevant resulting harm. Stella, supra note 59, at 113.
87 On counterfactual conditionals as essential in determining causation, see infra Part IV A.
89 It is the so called “double formula” of the condicio sine qua non, first employed by Günter Spendel, Die Kausalitätsformel der Bindungstheorie für die Handlungsdelikte (Dissertation) 9–10 (1948).
90 For the summary below, see Federico Stella, La Vitalità del Modello della Sussunzione Sotto Leggi: A Confronto il Pensiero di Wright e di Mackie, in I Saperi del Giudice: La Causalità e il Ragionevole Dubbio 1, 47 (Milano, Federico Stella ed., 2004).
91 See supra note 73 and accompanying text.
92 See supra note 72 and accompanying text.
93 See supra note 75 and accompanying text.
94 See supra note 82 and accompanying text.
Legal scholars are not, of course, the only ones who have raised issues with but for causation; it is with legal scholarship, however, that this Article is concerned. The point that I am trying to make, in fact, is that, while the but for concept of cause may not be suited for every field of knowledge or inquiry, and it is perhaps especially ill-fitted for the realm of metaphysics, it is suited perfectly for the classical model of the criminal law of events.

Carnap, supra note 2, at 209. To this we could add, “and vice versa.”

This idea goes back to at least David Hume, who wrote: “we may define a cause to be an object, followed by another, and where all the objects similar to the first are followed by objects similar to the second. Or in other words, where, if the first object had not been, the second never had existed.” 37 (3) David Hume. An Enquiry Concerning Human Understanding 1909–14, available at http://www.bartleby.com/37/3/). For more contemporary references, see generally Woodward, supra note 7, at 191 (arguing that that a counterfactual theory of explanation based on notions of invariant relationships, manipulation and control is best suited for the social and behavioral sciences, and that “explanation is a matter of exhibiting systematic counterfactual dependence”); Causation and Counterfactuals 1 (John Collins et al. eds., 2004) (hereinafter Collins) (arguing that today “causality” is understood in terms of counterfactual dependence); Nagel, supra note 1, at 588 (observing that “[c]ontrary-to-fact judgments are often explicitly introduced into historical analyses, usually to support some claim that a certain event had consequences crucial for subsequent developments. To cite a famous example, many historians believe that the battle of Marathon in 490 B.C. was one of the decisive military conflicts in human history; and they support this belief by the contrary-to-fact judgment that, had the Persian been victorious, an Oriental theocratic-religious culture would have been established in Athens, with the consequence that Greek science and philosophy, in which Western civilization has its roots, would not have been developed.”) For the legal literature, see, e.g., Robert Stassfield. If …: Counterfactuals in the Law, 60 Geo. Wash. L. Rev. 339, 342 (1992) (“[W]e encounter [counterfactual thinking] whenever we identify a cause.”) (quoted in Eric A. Johnson, Criminal Liability for Loss of a Chance, 91 Iowa L. Rev. 59, 99 (2005–06), who also observes that “Counterfactual reasoning is an element of all causal analysis.” Johnson, supra note 97, at 99).

“The” in the sense specified in Part III, supra.

Moore, supra note 6, at 84.

Moore, supra note 6, at 84–85 (citations omitted).

Moore, supra note 6, at 85.

Moore, supra note 6, at 85.


Levy, supra note 103, at 652.

See supra note 74 and accompanying text.

While this is not the place to discuss the causal relevance of omissions, as a side note I must observe how also Levy's ulterior conditions to deny causal relevance to Partygoer2's omission—(a) Partygoer2's performing a failed attempt to rescue the victim and (b) Partygoer2's just not being there and therefore neither letting nor not letting the victim die—are without merit. On Partygoer2 not being there I already said; I just want to add, as an extra element in support of my analysis, that if Partygoer2 wasn't there in the first place, we wouldn't be discussing of Partygoer2 at all. His not being there, in fact, by definition excludes Partygoer2 from the reach of the criminal law. But the thing is, Partygoer2 was actually there. As for condition (a), if Partygoer2 performed an unsuccessful attempt, the scenario would change. Partygoer2 would not be liable if his attempt failed because aiding the victim was beyond his means—ad impossibilia nemo tenetur!—; if, on the other hand, the failure can be linked to an at least negligent conduct of Partygoer2 in attempting the save, then, not barring other policy considerations, he may be held responsible for his negligence.

Robertson, supra note 20, at 1061 (citations omitted). While Robertson's example refers to tort law, the reasoning applies just as well to criminal law.

Granted, of course, that there were not unusually high seas, or a pack of sharks, or other conditions that would have challenged the possibility of survival; this however, as we will see in a moment, is an issue that has to do with evidence, and not with the supposed inadequacy of the but for test.

Robertson, supra note 20, at 1061.


Robertson, supra note 20, at 1061–62 (citations omitted).

Robertson, supra note 20, at 1062–63 (citations omitted). For similar arguments and conclusions, see also Woodward, supra note 70, at 227: “Often, we are not interested in, and our request for explanation should not be taken as a request to account for, the contrast
between the explanandum phenomenon and other alternatives outside this set of interest. In other words, there is a specific what-if-things-had-been-different question or range of such questions that we want answered. Broadly pragmatic considerations play a role in specifying which of these are of interest. For example, in the case of the doctor who fails to come to the aid of the patient P who dies, we will almost certainly be interested in the contrast between the actual situation in which P dies and similar, non-far-fetched alternative situations in which P lives, rather than in contrasts involving outlandish scenarios in which P lives. The most obvious candidates for non-far-fetched situations in which P lives are actual situations in which patients like P survive: situations in which say, other patients in hospitals who are the responsibility of the same or similar doctors and who develop a similar fever have survived."

In this sense we could say that the “presumption of innocence” operates, as a matter of practice, as a “presumption of guilt:” in any given criminal trial in fact—absent corruption and other pathological factors—the prosecutor will bring the charges against someone he honestly believes is or, at the very least, suspects of, being guilty. Of course the prosecutor will then have to prove his case beyond a reasonable doubt; but any honest prosecutor believes that they are prosecuting a guilty defendant.


See generally Coase, supra note 14; Epstein, supra note 13; Woodward, supra note 1; Collins, supra note 97; Moore, supra note 6.

See, e.g., Basic Concepts, supra note 37, at 63 (arguing that “the “but for” test suffers from three major deficiencies”).

I do not consider an objection (at least not in the strict sense of the word) the issue of intervening causation, and hence I will not treat it extensively in this Article. Issues of intervening causation—and how we deal with them—are, in fact, a matter of policy. Let me explain: consistently with the elaboration of but for cause defended in this Article, any causal antecedent to a given event is a but for cause of that event. In cases of intervening causation, some other antecedent—whether it be the action of a third party or an act of God and whether it be preexisting, simultaneous or supervening—concur with the defendant's conduct in causing the result. The question presented by these cases is whether the intervening element is sufficient to “break” the causal chain and thus relieve the defendant from liability. Since logically, however, no causal chain can be “broken,” the real issue (at least for what the law is concerned) is in which cases (“when”) the intervening cause—whether preexisting, concurring, or supervening—is so egregious that it would be unfair to hold the defendant liable. Thus framed, the issue is clearly one of policy. Take, for example, People v. Acosta, 284 Cal. Rptr. 117 (App. 4th Dist. 1991), opinion modified, (Aug. 2, 1991) and opinion modified, (Aug. 14, 1991) and opinion modified, (Aug. 28, 1991). In that case a fugitive was recklessly driving down the highway, pursued by the police on the ground; two police helicopters were assisting in the high-speed pursuit from above. At some point the first helicopter, which was positioned below the second, after ending communication with the second helicopter in violation of FAA protocols crashed into the second helicopter, resulting in the death of three officers. The driver—Acosta—was convicted of three counts of second degree murder on the basis that Acosta's escape may be classified as a criminally relevant but for cause of the helicopters being crashing (if Acosta hadn't been escaping, then the helicopters wouldn't have been there to crash), the negligent decision of the pilot of the first helicopter is also undoubtedly a but for cause of the crash (if the pilot had not negligently interrupted communication with the other helicopter, the two helicopters wouldn't have collided). Whether this second causal chain is “strong enough” to “break” the first is plainly a matter of policy choice. Over the dissent of Justice Crosby, who claimed that foreseeing the death of airborne observers was “beyond the long arm of the criminal law,” the Court held that Acosta was also the proximate cause of the deaths. In other words, the concurring cause—the pilot's negligence—was not considered sufficient to break the causal chain. For a systematic classification of intervening causes (including their treatment by case law), see Dressler, supra note 6, at 190–96; LaFave, supra note 26, at 481–89.

See, e.g., Stella, supra note 59, at 345.

Nagel, supra note 1, at 578.

See, e.g., Dressler, supra note 6, at 188–89. Moore offers the following example: “Where Jones moves his finger on the trigger pointed at Smith's heart, causing the gun to discharge and thereby causing the death of Smith by the bullet lodged in Smith's heart, there is no doubt of the propriety of re-describing Jones's actions as ‘killing Smith.’ But there are a variety of related cases where we might think that Smith caused the death of Jones but that Smith did not kill Jones. One such kind of case is where there is some spatial and temporal remoteness between Jones' act and the death. For example, Jones picks up a stone in a field and finding it too heavy, drops it on the side of a hill on his way home. During the course of a year normal weather patterns cause sufficient erosion that the stone rolls down the hill on to a path, and a year after that Smith's horse trips on the stone, throwing Smith on to it, which kills him. One might be tempted to say that Jones caused Smith's death but there seems to be little temptation to say that Jones killed Smith.” Moore, supra note 6, at 8.
Rebooting the Discourse on Causation in the Criminal..., 50 No. 6 Crim. Law...

120 Nagel, supra note 1, at 578. That Nagel is right and his approach correct is confirmed by the nature of explanation in sciences other than the law: thus, for example, “When a position of a planet at a stated time is explained in terms of gravitational theory and information about the initial condition of the solar system at some previous time, is the explanation unsatisfactory on the ground that these initial conditions have not themselves been explained and that they are the outcome of still earlier configurations of the solar system? Is there a fault in explaining Boyle's law in terms of the kinetic theory of gases, because this theory is not itself explained? Is a proof of the Pythagorean theorem suspect because the starting point of the demonstration is set on assumptions that are not proved in turn? These are rhetorical questions, and the answers to all of them are obviously and uniformly in the negative.” Nagel, supra note 1, at 579.

121 Nagel, supra note 1, at 579. To make the point even more incisive, consider the following observation: “The basic question raised by this claim in whether an account of some past event becomes inevitably distorted and erroneous by the mere fact that the historian addresses himself to a limited problem and attempts to solve it by investigations that do not deal with the entire past. However, the contention that the answer to the question is affirmative entails the view that we cannot have competent knowledge of anything unless we know everything … Were this doctrine sound, every historical account that could be constructed by a finite intelligence would have to be considered a necessarily mutilated version of what actually happened; indeed all science and all analytical discourse would have to be condemned in an identical manner. But the claim that all historical explanations are inherently arbitrary and subjective is intelligible only on the assumption that knowledge of a subject matter must be identical with that subject matter or must reproduce it in some fashion; and this assumption, as well as the claim accompanying it, must be rejected as absurd. Thus, a map cannot be sensibly characterized as a distorted version of the region it represents, merely because the map does not coincide with the region or does not mention every item that may actually exist in that region; on the contrary, a “map” which was drawn to scale and which omitted nothing would be a monstrosity utterly without purpose. Similarly, knowledge as the outcome of historical inquiry is not inadequate merely because it is not about everything in the past, or because it answers only the specific question about the past that initiated the inquiry, but fails to answer every other problem concerning what happened.” Nagel, supra note 1, at 577.

122 Nagel, supra note 1, at 577 (emphasis in original).

123 As Hart and Honoré point out, lawyers and historians—as opposed to scientists—do not aim to formulate scientific laws or generalizations; rather, their goal is to apply generalizations that are already known/accepted as true. In other words, lawyers are consumers, not producers of causal generalizations. See Hart & Honoré, supra note 1, at 10.

124 As Carnap observes, “Strictly speaking, it is not a thing that causes an event, but a process. In everyday life we speak of certain things causing events. What we really mean is that certain processes or events cause other processes or events.” Carnap, supra note 2, at 190.

125 Nagel, supra note 1, at 550.

126 “To infinity and beyond” is the catchphrase of Buzz Lightyear, from Disney-Pixar's animated movie Toy Story.

127 Nagel, supra note 1, at 579.

128 Woodward, Making Things Happen, supra note 70, at 82.

129 For example, Michael Moore argues that in overdetermination cases, “where each of two events c 1 and c 2 is independently sufficient for some third event e [the logical conclusion is that] neither c 1 nor c 2 is necessary for e, and thus, on the counterfactual analysis of causation, neither can be the cause of e. [Since ]just about everybody rejects this conclusion [it follows that] such cases pose a real problem for the counterfactual analysis of causation.” Moore, supra note 6, at 86. On the same point, see also Wright, supra note 12, at 10.

130 See, e.g., Stella, supra note 90, at 64.

131 See, e.g., Wright, supra note 12, at 1018 (“[A]ssume fire X and fire Y each would be independently sufficient—that is, sufficient in the absence of the other fire, when combined with other existing conditions—to destroy a certain house if it reached the house. Few, if any, would disagree with the following propositions: (1) fire X was a cause of—the destruction of the house if fire X, but not fire Y, reached the house and the house would not have been destroyed if fire X had been absent; (2) fire X and fire Y both were causes of the destruction of the house if they reached the house simultaneously and the house would not have been destroyed if both had been absent; and (3) fire X was a cause of the destruction of the house but fire Y was not if fire X reached the house before fire Y, the house was destroyed before fire Y arrived, and the house would not have been destroyed if both fires had been absent.”). According to Wright, the but for test would only support the causal judgment in situation (1); moreover, “the but-for test entails the obviously ridiculous conclusion that neither fire was a cause of the house's destruction in situations (2) and (3), leaving the cause of the destruction mysteriously unidentified” (Id. at 1022. We will see, infra, that point (3) represents an instance of alternative hypothetical causation).

132 See, e.g., Stella, La Vitalità, supra note 90, at 62.

133 See, e.g., Dressler, supra note 6, at 187; LaFave, supra note 26, at 468; Hart & Honoré, supra note 1, at 239–40.
Rebooting the Discourse on Causation in the Criminal..., 50 No. 6 Crim. Law...

135 See supra note 94 and accompanying text.
136 See, e.g., Stella, supra note 90, at 62–63.
137 Stella, supra note 90, at 62–63.
138 This solution has been denounced as a tautology, see Wright, supra note 8, at 1025–28. However, I believe that we can easily avoid the tautology objection because we have a well-known causal generalization that links a bullet in the heart to the event death as part of the hypothetical: hence, we already know that the bullet is causal with respect to the death, and we can “add” the two bullets to the description of the event. A German scholar suggested to tackle cases of overdetermination where either cause would have been sufficient to produce the event hic et nunc by “correcting” the counterfactual formula, adding to it a “cumulative elimination,” so that the formula would sound as follows: of several conditions that can be thought away alternatively but not cumulatively without the event not occurring, they are all causal. Hans Tarnovsky, Die systematische Bedeutung der adaequaten Kausalitätstheorie für den Aufbau des Verbrechensbegriffes 47 (1927). I believe, however, that focusing on the specific process that brought about the event in which we are interested is the better way to deal with cases of additional causation. See also infra Part IV C.
139 For this solution, see Stella, supra note 90, at 64.
140 Stella, supra note 90, at 64.
141 Stella, supra note 90, at 64. Dressler classifies these hypotheses as instances of “obstructed cause.” Dressler, supra note 6, at 188.
142 Stella, supra note 90, at 64.
143 This example—as well as the following one—first came up during a heated post-dinner discussion on but for cause with my friends and former Harvard Law School colleagues Matt Lee and Krystof Turek. What my friends failed to see back then—and what I am still arguing here—is that the problem posed by these hypotheticals does not concern the validity of but for causation; rather, it is a problem of evidence and proof.
144 If the men in the squad were acting in concert, however, I believe a reasonable case could be made to hold them all responsible under principles of accomplice liability. Rather than focusing on the individual shooters, the focus would be on the squad as a unit.
145 This example is similar in character to a hypothetical advanced by Charles Nesson: “In an enclosed yard are twenty-five identically dressed prisoners and a prison guard. The sole witness is too far away to distinguish individual features. He sees the guard, recognizable by his uniform, trip and fall, apparently knocking himself out. The prisoners huddle and argue. One breaks away from the others and goes to a shed in the corner of the yard to hide. The other twenty-four set upon the fallen guard and kill him. After the killing, the hidden prisoner emerges from the shed and mixes with the other prisoners. When the authorities later enter the yard, they find the dead guard and the twenty-five prisoners. Given these facts, twenty-four of the twenty-five are guilty of murder.” Charles R. Nesson, Reasonable Doubt and Permissive Inferences: the Value of Complexity, 92 Harv. L. Rev. 1187, 1192–93 (1979). Again, we can know for certain what the physiological cause of death but, absent any other evidence, we won't be able to know who the one innocent inmate is. Convicting in this hypothetical, much like in my example, would be tantamount to convicting defendants by lot (although, in Nesson’s example, the likelihood of each defendant being guilty would be at 96%. Whether this, coupled with the certainty that 1 out of 25 defendants is surely innocent, is or ought to be enough to convict is another delicate policy issue).
146 See, e.g., Robertson, supra note 20, at 1063.
147 See, e.g., Dressler, supra note 6, at 187 (observing that “In the real world such events rarely occur”).
148 See, e.g., Moore, supra note 6, at 86.
149 This example—the original version of which is to be found in J.A. McLaughlin, Proximate cause, 25 Harv. L. Rev. 39, 155 (1925) —has become commonplace in the literature on causation. See, e.g., Basic Concepts, supra note 37, at 63–64; LaFave, supra note 26, at 470; Hart & Honoré, supra note 1, at 239–40; Wright supra note 12, at 1024–25 and Richard W. Wright, Once More Into the Bramble Bush, 54 Vand. L. Rev. 1071 (2001) at 1115–17; Moore, supra note 6, at 117.
150 Mackie, supra note 54, at 46. In the same sense, see also Dressler, supra note 6, at 188 (arguing that the but for test should ask whether the harm occurred “when and as it did”) (emphasis in original).
151 Wright, supra note 12, at 1025.
152 For a mathematical demonstration that the puncturing of the water canteen is the actual cause of death, see Woodward, Making Things Happen, supra note 70, at 77–79.
153 See supra note 125 and accompanying text.
154 See supra note 126 and accompanying text.
155 Even remaining on a purely theoretical level, however, I think the tautology objection is moot: in the water canteen example, we know ex hypothesi that B dies of thirst because his death by thirst is a constitutive part of the hypothetical; and since the starting assumption
is that B dies of thirst, one can logically claim that, but for C's tampering with the water canteen, B would not have died of thirst. In other
words, since the cause of death is provided in the hypothetical, one cannot be faulted for employing the information that one has in order to answer the hypothetical. And if we omit the cause of death from the hypothetical, we go back to the real world where the coroner will perform an autopsy and determine that the cause of death was thirst or poisoning or whatever else may have killed B.

Wright, supra note 12, at 1004 n.129.

Salmon, supra note 2, at 312 (citations omitted). In the typical homicide case the selection won't be too hard to make. As Michael Moore puts it: “We know enough about how poisons and burns work to cause death, and we know enough about how gunshots or blows to the head work to cause death, that, when we see cases like [these] we know that a particular victim was shot to death, not poisoned to death, or bludgeoned to death, not burned to death.” Moore, supra note 6, at 261–62. By the same reasoning, we also know that the color of one's sweater, or the presence or absence of sun in the sky are irrelevant to the event death.

As Moore himself observes, “Whenever we know enough of the underlying causal mechanism at work in a given case, we often see that one cause preempts some other factor from doing what it otherwise would have done.” Moore, supra note 6, at 262.

Hall, supra note 55, at 250. On this point, see also Carl Gustav Hempel, Aspects of Scientific Explanation, in Aspects of Scientific Explanation and Other Essays in the Philosophy of Science 421 (The Free Press, 1965) (emphasis added): “The familiar question of whether individual events permit of a complete explanation is no doubt inspired to a large extent by the conception of an individual event as a concrete event. But what could be meant, in this case, by a complete explanation? Presumably, one that accounts for every aspect of the given event. If that is the idea, then indeed no concrete event can be completely explained. For a concrete event has infinitely many different aspects and thus cannot even be completely described, let alone completely explained. For example, a complete description of the eruption of Mt. Vesuvius in A.D. 79 would have to specify the exact time of its occurrence; the path of the lava stream as well as its physical and chemical characteristics—including temperatures, pressures, densities, at every point—and their changes in the course of time; the most minute details of the destruction wreaked upon Pompeii and Herculaneum; full information about all persons and animals involved in the catastrophe, including the fact that the remains of such and such victims, found at such and such places, are on display at a museum in Naples; and so on ad infinitum. [However], when we speak of explaining a particular event, such as [the eruption of Mt. Vesuvius or] the abdication of Edward III, we normally think only of certain aspects of the event under scrutiny; what aspects are thus mean to be singled out for explanatory attention will depend on the context of the inquiry.” (emphasis added).

In other words: we have a legal provision, which establishes an abstract type of crime—e.g., homicide. The qualifying event for this type of crime to be completed is the death of a man. In re-describing the concrete event that we need to explain (the death of this man as it happened hic et nunc) the only elements that are to be included in the re-description are those that are causally relevant to the abstract type of event chosen by the legislator and described in the norm (in this case, death). Thus, all and only those factors that, in the concrete case, were relevant to the event death can (and must) be included in the description. This is because the decision of what elements to include in the description has already been made, ex-ante, by the legislator, who chose to punish the event death: it is clear, then, that only those elements relevant to the death need to become part of the explanation. If, and only if, the general legal provision established the crime of “death while wearing a red sweater” or “death while gazing at the moon,” would those factors (“wearing a red sweater” and “gazing at the moon,” respectively) enter the re-description, as they would be relevant to the abstract event typified by the legislator.

For these examples, see Engsch, supra note 49, at 16; Stella, supra note 90, at 60.

See supra notes 97–98 and accompanying text.

See supra, note 109 and accompanying text.

See supra notes 105–114 and accompanying text.

Hall, supra note 55, at 266 (emphasis added).

Hall, supra note 55, at 266.

The arguments I make and the conclusions I reach in Parts II and III supra find support in Jane Stapleton, who observes: “Legal doctrine's individuation of outcome renders irrelevant many … “pre-emption” complications perceived by philosophers. For example, suppose x plants a bomb under V's bed timed to explode at 2 a.m., but Y places another bomb under the bed, which is timed to, and does, explode at 1 a.m. killing V instantaneously. While some philosophers are troubled by such cases, in Law no issue of Y's bomb pre-empting X's bomb is relevant because X's bomb did not, and with hindsight we know was never going to, result in V's actual death by explosion at 1 a.m. It is irrelevant that the 2 a.m. bomb seems to guarantee “death.” Moreover, since the Law is concerned with the result individuated at the time and place it occurred, most lawyers would not regard V's death as “overdetermined.” Even where x plants a bomb under V's bed timed to explode at 2 a.m., and Z replaces it with another bomb timed to explode at 2 a.m.,
the Law has no difficulty in acquitting \( x \) from any involvement in \( V \)'s death by explosion at 2 a.m., given what we know about physical laws and evidence of behaviour. This will still be the situation if \( Z \)'s bomb had been timed to, and did, explode at 1 a.m., hastening what would, save for \( Z \)'s conduct, have been \( V \)'s time of death, namely 2 a.m. Similarly this is so even if \( Z \)'s replacement bomb had been timed to, and did, explode at 3 a.m., delaying what would, save for \( Z \)'s conduct, have been \( V \)'s time of death. The Law will not ignore the incontestable physical fact that for a bomb to be involved in the actual outcome, which is individuated to the actual time and place it occurred, that bomb had to have been present at the time of the lethal explosion!” Stapleton, supra note 56, at 452–53 (citations omitted).

See Moore, supra note 6, at 110.

Despite the similar terminology, I am not endorsing, with this approach, the “objektiive Zurechnungslehre” (objective attribution theory), extensively developed by German scholars to delimit under a normative criterion the criminally relevant causal conducts, see, e.g., Claus Roxin, Finalität und objektiive Zurechnungslehre, in Gedächtnisschrift für Armin Kaufmann 237 (C. Heymann, 1989); Manfred Maiwald, Zurechnungsprobleme im Rahmen Erfolgsqualifizierter Delikte — BGHSt. 31, 96, (in JuSch 1984); Günther Jakobs, Strafrecht, Allgemeiner Teil: die Grundlagen und die Zurechnungslehre (de Gruyter, 1993); Jürgen Wolter, Objektive und personale Zurechnung von Verhalten, Gefahr und Verletzung in einem funktionalen Straftatssystem (Strafrechtliche Abhandlungen) (Duncker & Humboldt, 1981). Rather, I intend to say that causation per se will be determined solely on the objective basis of the existence of a nexus between conduct and event. Other tools will then be used to “cope” with the alleged “far flung effects” of the but-for test.

See supra note 62 and accompanying text.

See supra, note 70–71 and accompanying text.

See supra note 94 and accompanying text.

Moore, supra note 6, at 85 (citations omitted).

An even clearer example of the point I am arguing would be the following: Imagine that the engineer of a train, who is running the train according to all the proper protocols, runs over someone, thereby causing her death. While the engineer is an actual cause of the victim's death, it would be against the basic principles of criminal law to hold him liable if the victim had suddenly jumped in front of the train and there was nothing the engineer could have done to avoid the fatal impact. The engineer has no culpability with respect to the harm that he factually caused. In traditional common law language, we would say that he is not the proximate cause of the victim's death.

See, e.g., LaFave, supra note 26, at 466, 471–73; Dressler, supra note 6, at 204; Singer & LaFond, supra note 61, at 125. Moore himself admits as much, although he then goes on to ask the wrong question: “Precisely because it is a culpability test,” Moore writes, “the foreseeability test becomes subject to its own policy-based objection, that of redundancy. Why should we ask two culpability questions in determining either blameworthiness or duties to compensate?” Moore, supra note 6, at 98–99. As I have demonstrated supra, however, the cause-in-fact question is only a prerequisite—the “first half”—of a finding of responsibility and, contrary to what Moore claims, it is not per se sufficient to attribute responsibility.

Model Penal Code § 2.03 comment, at 255.

Hart and Honoré were fully aware that the rules limiting liability on proximate cause grounds “have nothing whatever to do with causation.” Rather, what is commonly referred to as “proximate cause” are a bunch of rules “limiting the extent of liability simply out of consideration of what is expedient or just or both: they represent a particular policy which a particular legal system has adopted in a particular branch of the law.” Hart & Honoré, supra note 1, at 89.

One of the stated goals of the Model Penal Code's proposed reformulation of the analysis of causation was to standardize the way that issues of proximate causation—i.e., those instances where the actual result differs in some manner from the intended result—by “dealing with the subject in the penal code itself, rather than leaving it exclusively to case law development,” which had produced “varying and sometimes inconsistent rules.” Model Penal Code § 2.03 comment, at 256.

See supra note 32 and accompanying text.

See, e.g., Dressler, supra note 6, at 182, (arguing that “[a]s a practical matter … causation problems seldom arise outside the context of homicide prosecutions”) (citations omitted); see also LaFave, supra note 26, at 471 (noting that “most of the actual cases [that involve causation] concern homicide”).

Michael Moore's observation on this point bears repeating: “We know enough about how poisons and burns work to cause death, and we know enough about how gunshots or blows to the head work to cause death, that, when we see cases like [these] we know that a particular victim was shot to death, not poisoned to death, or bludgeoned to death, not burned to death.” Moore, supra note
6, at 261–62. The point is that when we know enough of the underlying causal mechanisms and generalizations at work in a given circumstance, we will be able to effectively employ the but for test.

182 Model Penal Code § 2.03(2)(b).

183 See, e.g., LaFave, supra note 26, at 468–70, 482–88 and accompanying cases referenced therein; Dressler, supra note 6, at 190–96 and accompanying cases.

184 Of course, being negligence a culpable yet non-intentional violation of the standards of expected conduct, any degree of \textit{mens rea} higher than negligence—recklessness, knowledge, intent—can be said to “contain” negligence within its scope.