

WHEN CAUSE-IN-FACT IS, IN FACT, NOT
THE SOLUTION: HOW *BURRAGE* FAILED TO
NARROW THE SCOPE OF THE CONTROLLED
SUBSTANCES ACT'S "DEATH RESULTS"
SENTENCING ENHANCEMENT

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ABSTRACT

In the wake of the opioid crisis and the increasing role of prosecution as a way to combat the sale and use of drugs, this Note considers the twenty-year mandatory minimum sentencing enhancement for when "death results" under the Controlled Substances Act. In deciding *Burrage v. United States*, the Supreme Court settled the circuit split on what the correct causation standard is for the "death results", by applying a "but for" cause standard. Although the "but for" cause standard is narrower than the previously applied "contributing cause" and "substantial factor" standards, recent cases indicate that the scope of the statute has not narrowed in practice. This Note considers several possible reasons for this lack of impact: juror confusion and moral judgment, as well as difficult toxicological problems in cases where the defendant has taken multiple drugs. Although not a perfect solution, this Note proposes having Congress amend the CSA to require a proximate cause standard for the "death results" to address and resolve many of these concerns.

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INTRODUCTION

On a Saturday in December 2015, Kimberly Elkins gave her fiancé, Aaron Rost, a piece of one of her fentanyl patches.¹ They both swallowed the gel inside to get high.² Elkins woke up in the hospital hours later and learned that she and her fiancé had overdosed.³ Unfortunately, Rost did not survive.⁴ Two months after Rost's funeral, police arrived at Elkins's home and arrested her on murder charges.⁵ She pleaded guilty to manslaughter and is currently serving a four-year sentence in prison.⁶

The Minnesota manslaughter statute that Elkins was charged under is one of twenty state statutes known as "drug-induced homicide laws," which allow anyone involved in the "illegal manufacture, sale, distribution, or delivery of a controlled substance that causes death" to be charged with murder or manslaughter.⁷ As the opioid crisis swept the United States,⁸ prosecutions based on these provisions increased dramatically in the past several years.⁹

A similar provision exists at the federal level, where drug-induced homicide is prosecuted through the "death results" sentencing enhancement of the Controlled Substances Act ("CSA").¹⁰ Section 841 of the CSA provides that an offender "shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a

1. Rosa Goldensohn, *They Shared Drugs. Someone Died. Does That Make Them Killers?*, N.Y. TIMES (May 25, 2018), <https://www.nytimes.com/2018/05/25/us/drug-overdose-prosecution-crime.html> (on file with *Columbia Human Rights Law Review*).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. Lindsay LaSalle, *An Overdose Death Is Not Murder: Why Drug-Induced Homicide Laws Are Counterproductive and Inhumane*, DRUG POL'Y ALLIANCE, Nov. 2017, at 2, 8.

8. Rachel L. Rothberg and Kate Stith, *The Opioid Crisis and Federal Criminal Prosecution*, 46 J.L. MED. & ETHICS 292, 292–93 (2018) (discussing how in Connecticut, where the opioid epidemic has hit particularly hard, the number of deaths involving synthetic opioids increased by 540 percent from roughly 3,000 in 2013 to over 20,000 in 2016).

9. Valena Beety et al., *Drug-Induced Homicide Defense Toolkit*, HEALTH IN JUSTICE ACTION LAB 2, 2 (2018) (describing an increase from 363 prosecutions in 2011 to 1,178 in 2016).

10. See 21 U.S.C.S. § 841(b)(1)(C) (LexisNexis 2010).

term of imprisonment of not less than twenty years or more than life.”¹¹ Since 2017, there has been a ten percent increase in the number of people who received federal prison sentences under this provision, and a nearly 200 percent increase since 2013.¹²

Notably, the text of Section 841 does not define what is required for the “death results” sentencing enhancement to apply to a particular defendant. In 2014, the Supreme Court in *Burrage v. United States* held that the provision did not apply unless the defendant’s use of the controlled substance was a “but-for” cause of the death or injury,” finding that lower courts were applying the provision under too broad a standard.¹³ Five years after the *Burrage* decision, this Note argues that the “but for” causation standard has led to little, if any change in the scope of the “death results” sentencing enhancement. Part I of this Note recounts the history and treatment of the CSA, including its interpretation by lower courts and the Supreme Court. Part II discusses the difficulties that have arisen in applying the *Burrage* standard to cases of drug-induced homicide. Part III proposes a proximate cause requirement to address such problems.

I: BACKGROUND AND OVERVIEW OF THE CONTROLLED SUBSTANCES ACT

Why did a country afflicted by a drug epidemic turn to criminal prosecution of drug distributors as a primary legal strategy? Part I explores the trend towards prosecuting drug distributors for homicide in the context of the opioid crisis, with a focus on the CSA.¹⁴ Part I.A will explore the rise of prosecution of drug dealers for homicide and explain how the federal CSA fits within this trend. Part I.B will look at the legislative history of the CSA and its subsequent amendment that set penalties for a “death results” sentencing enhancement. Part I.C will review the differing interpretations of the causation requirement for the CSA’s sentencing enhancement and the *Burrage* decision.

11. *Id.*

12. U.S. SENTENCING COMM’N, USE OF GUIDELINES AND SPECIFIC OFFENSE CHARACTERISTICS (2017), at 28, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/guideline-application-frequencies/2017/Use_of_SOC_Offender_Based.pdf [https://perma.cc/QGW5-EL8S].

13. *Burrage v. United States*, 134 S. Ct. 881, 892 (2014).

14. 21 U.S.C.A. § 841 (West 2018).

A. National Trend of Prosecuting Drug Dealers for Homicide

On average, more than 130 people in the United States die every day from overdosing on opioids.¹⁵ Decades of increased prescription of opioid medications and assurances by pharmaceutical companies that the drugs were not addictive led to widespread use of opioids and rising rates of addiction.¹⁶ With the emergence of fentanyl, a powerful synthetic opioid, the opioid crisis has rapidly become a public health emergency.¹⁷

Although legislatures have addressed the opioid crisis with many strategies,¹⁸ use of the criminal justice system dominates local, state, and federal responses.¹⁹ This Note focuses on the prosecution of drug distributors for homicide or enhanced penalties in cases of drug overdose.²⁰ These cases have become increasingly common; according to a *New York Times* investigation, there have been more than 1,000 prosecutions or arrests in connection with accidental overdose deaths since 2015 “in fifteen states where data was available.”²¹

15. *Opioid Overdose Crisis*, NAT'L INST. ON DRUG ABUSE (Jan. 2019), <https://www.drugabuse.gov/drugs-abuse/opioids/opioid-overdose-crisis> [https://perma.cc/8KQK-283B].

16. *What Is the U.S. Opioid Epidemic?*, U.S. DEP'T HEALTH & HUM. SERV. (Sept. 19, 2018), <https://www.hhs.gov/opioids/about-the-epidemic/index.html> [https://perma.cc/W4G6-FTZG].

17. Nabarun Dasgupta et al., *Opioid Crisis: No Easy Fix to Its Social and Economic Determinants*, 108 AM. J. PUB. HEALTH 182, 183 (2018).

18. These strategies include a renewed emphasis on access to addiction treatment, increased federal funding to fund alternative pain medicine, and strengthening public health data reporting and collection to inform public-health responses. *Testimony on Addressing the Opioid Crisis in America: Prevention, Treatment, and Recovery Before the Senate Subcommittee*, NAT'L INST. HEALTH, (Dec. 5, 2017), <https://www.nih.gov/about-nih/who-we-are/nih-director/testimony-addressing-opioid-crisis-america-prevention-treatment-recovery-before-senate-subcommittee>. [https://perma.cc/M5V2-FA7D].

19. LaSalle, *supra* note 7, at 6 (“Despite media attention elsewhere, use of the criminal justice system continues to dominate local, state, and federal responses to increasing rates of opioid use and overdose.”).

20. *See, e.g.*, 21 U.S.C.S. § 841(b)(1)(C) (LexisNexis 2010) (providing a twenty-year mandatory minimum sentence for distributing drugs when “death . . . results”).

21. Goldensohn, *supra* note 1. With over 52,000 lethal drug overdoses in 2015, this rate of prosecutions indicates that there is a drug-induced homicide prosecution in at least two percent of all accidental overdoses. AM. SOC'Y ADDICTION MED., OPIOID ADDICTION: 2016 FACTS AND FIGURES 1–2 (2016) (explaining opioids were involved in nearly 30,000 out of 52,000 accidental overdose deaths in 2015).

The CSA is the federal statute used to prosecute drug distributors in cases of overdose.²² It is a comprehensive federal scheme for drug control, governing dangerous drugs and also providing a “death results” sentencing enhancement for when “death or serious bodily injury results” from unlawful drug distribution.²³ The statute’s causation requirement deserves much greater discussion and will be the subject of Part I.C.

B. History of the Controlled Substances Act

In 1970, Congress passed the Comprehensive Drug Abuse and Prevention Control Act.²⁴ Title II of this Act, relating to law enforcement and control, is now commonly known as the Controlled Substances Act.²⁵ The law prohibits the manufacture, sale, and possession for recreational use of any substance it controls.²⁶ It operates by dividing controlled substances into five “schedules,” each of which corresponds to a particular level of regulation.²⁷

When the law was first passed, the section that established penalties for the distribution of controlled substances contained no mechanism to penalize drug distributors in cases of accidental overdose.²⁸ The language for the “death . . . results” enhancement came more than a decade later with the passage of the Anti-Drug Abuse Act of 1986,²⁹ which amended the CSA to substantially increase the number of drug offenses with mandatory minimum sentences.³⁰After

22. 21 U.S.C.S. § 841(b) (LexisNexis 2010).

23. “[A]ny person who violates subsection (a) of this section involving [possession of controlled substances] . . . shall be sentenced to a term of imprisonment . . . and if death or serious bodily injury results from the use of such substance [the term of imprisonment] shall be not less than 20 years.” 21 U.S.C.S. § 841(b) (LexisNexis 2010); *see also* Thomas M. Quinn & Gerald T. McLaughlin, *The Evolution of Federal Drug Control Legislation*, 22 CATH. U. L. REV. 586, 605 (1973).

24. Comprehensive Drug Abuse and Prevention Control Act of 1970, 21 U.S.C.S. §§ 801–803 (LexisNexis 1970).

25. *See* 21 U.S.C. § 801 (LexisNexis 2018).

26. Alex Kreit, *Overdose: The Failure of the U.S. Drug War and Attempts at Legalization*, 6 ALB. GOV’T L. REV. 332, 336 (2013).

27. *Id.*

28. 21 U.S.C. §§ 801–803 (1970) (LexisNexis amended 1986).

29. 21 U.S.C. §§ 801–803 (1986) (LexisNexis amending 21 U.S.C. §§ 801 et. seq. (1970)).

30. The law also changed the system of federal supervised release from a rehabilitative system into a punitive system and enacted a sentencing disparity for possession of crack cocaine and powder cocaine. *Id.*

the Anti-Drug Abuse Act was enacted, Section 841(b)(1)(C) of the CSA, often referred to as the “death results” provision, was added.³¹

While the Supreme Court in *United States v. Booker* transformed the once-mandatory U.S. Sentencing Guidelines into advisory guidelines,³² the mandatory minimum sentences prescribed by the CSA and other federal drug laws have remained binding.³³ This means that while judges can vary from the sentencing guidelines, they cannot sentence less than the mandatory minimums.³⁴ From a procedural standpoint, a prosecutor includes the sentencing enhancement in the indictment with the underlying drug offense and bears the burden of proving both offenses beyond a reasonable doubt.³⁵ If convicted of this “death results” sentencing enhancement, the defendant will receive a twenty-year mandatory minimum penalty, which is imposed consecutively to the defendant’s sentence for the underlying drug distribution offense.³⁶

31. 21 U.S.C. § 841(b)(1)(C) (LexisNexis 2010); *see, e.g.*, Alyssa M. McClure, *Illegitimate Overprescription: How Burrage v. United States Is Hindering Punishment of Physicians and Bolstering the Opioid Epidemic*, 93 NOTRE DAME L. REV. 1747, 1755 (2018) (referring to 841(b)(1)(C) as the “death results” provision).

32. *United States v. Booker*, 543 U.S. 220, 245–46 (2005) (“[T]he federal sentencing statute . . . as amended, makes the guidelines effectively advisory. It requires a sentencing court to consider Guidelines ranges . . . but it permits the court to tailor the sentence in light of other statutory concerns as well.”) (internal citations omitted).

33. CHARLES DOYLE, CONG. RESEARCH SERV., R45074, MANDATORY MINIMUM SENTENCING OF FEDERAL DRUG OFFENSES 1, 2–3 (2018).

34. *How Federal Sentencing Works: Mandatory Minimums, Statutory Maximums, and Sentencing Guidelines*, FAM. AGAINST MANDATORY MINIMUMS (2012), <https://famm.org/wp-content/uploads/Chart-How-Fed-Sentencing-Works-9.5.pdf> [<https://perma.cc/DA8K-X5U6>].

35. *See, e.g.*, *United States v. Davis*, No. 1:16CR260, 2019 U.S. Dist. LEXIS 5609, at *1, *8 (N.D. Ohio Jan. 11, 2019) (recounting how the United States indicted the defendant on one count of distribution of a controlled substance and one count of intent to distribute cocaine and included the sentencing enhancement for the second count); *United States v. Pena*, 742 F.3d 508, 509 (1st Cir. 2014) (“In federal prosecutions, under the requirements of *Alleyne v. United States*, if the distribution of drugs is proven beyond a reasonable doubt to a jury to have resulted in a death, a defendant will face a 20-year mandatory minimum sentence.”) (internal citations omitted).

36. 21 U.S.C.S. § 841(b)(1)(C) (LexisNexis 2010); U.S. SENTENCING COMM’N, AN OVERVIEW OF MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM (2017), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20170711_Mand-Min.pdf [<https://perma.cc/9LDJ-RNHN>].

Despite the high levels of public outrage towards drug distributors at the time of the CSA's passage, the "death results" enhancement was rarely used during the 1980s.³⁷ As use of opioids increased, however, this provision became a major tool for federal law enforcement and prosecutors.³⁸ The use of drug-induced homicide laws on both the state and federal levels has already increased dramatically in recent years, and experts predict that it will continue to dominate as a tool to fight the opioid crisis.³⁹

C. Causation Requirement for the "Death Results" Sentencing Enhancement

The text of Section 841 of the CSA does not define what elements are required for the "death results" enhancement to apply to a particular defendant. Obviously, the defendant needs to distribute drugs and for a third party to die. The remaining question in 2014 was what level of causation was necessary for the enhancement to apply.

Prior to the Supreme Court's decision in *Burrage v. United States*, courts were split on how to instruct the jury for the requirements under the "death results" sentencing enhancement. The Eighth Circuit Court of Appeals held in *United States v. Monnier* that the government was not required to prove that the drugs the defendant provided to a victim were "actually enough to kill her," because the evidence demonstrated that the drugs were a *contributing cause* of the

37. Stephen Davis & Bryan Polcyn, *The Legacy of Len Bias: Police Treating Overdoses as Homicides*, FOX6 NEWS (Oct. 31, 2013, 9:29 PM), <https://fox6now.com/2013/10/31/the-legacy-of-len-bias-police-treating-drug-ods-as-homicides/> [<https://perma.cc/GTJ8-LR5N>] ("The [drug-induced homicide] law was created in the 1980's, but for the first 15–20 years, police and prosecutors rarely used it.").

38. Vann R. Newkirk II, *The People Trump's War on Drugs Will Actually Punish*, ATLANTIC (Mar. 26, 2018), <https://www.theatlantic.com/politics/archive/2018/03/killing-drug-dealers-opioid-epidemic/555782/> [perma.cc/R9TW-KSG8] (noting "as the opioid epidemic has worsened in recent years, [drug-induced] appear to be on the rise again. It's difficult to track death-penalty prosecutions for drug-induced homicide . . . but according to the Drug Policy Alliance, some measures indicate they've spiked over the past five years.").

39. Jack Shuler, *Overdose and Punishment*, NEW REPUBLIC (Sept. 10, 2018), <https://newrepublic.com/article/150465/prosecutors-reviving-reagan-era-drug-induced-homicide-laws> [<https://perma.cc/6A2P-B497>] (quoting Northeastern University Professor Leo Beletsky: "The use of drug-induced homicide laws 'has already skyrocketed in the last three to five years,' . . . 'and it's going to continue increasing substantially.'").

victim's death.⁴⁰ In that case, the defendant, William Monnier, provided methamphetamine to the victim, who later died of an overdose.⁴¹ His conviction was affirmed on the ground that the evidence satisfied either the standard of contributory cause or a primary cause standard.⁴²

By contrast, the Seventh Circuit Court of Appeals in *United States v. Hatfield* expressly rejected a "contributing cause" jury instruction, finding that "but for" cause language was sufficient to satisfy the CSA's causation requirement.⁴³ In *Hatfield*, the defendants were convicted of conspiracy to distribute controlled substances, the use of which resulted in four deaths and serious bodily injury.⁴⁴ The court found that the contributing cause standard language in the instruction was ambiguous and was likely to confuse a jury.⁴⁵

These cases represented a larger circuit split on how to interpret the "death results" provision.⁴⁶ The main difference in approach was whether a person could be convicted under the sentencing enhancement when the distributed substances "contributed to" death by "mixed drug intoxication," but was not the sole cause of death.⁴⁷ Courts like the Eighth Circuit in *Monnier* held that the "contributing cause" instruction was consistent with the "results from" requirement, which was expressly rejected by the Seventh Circuit in *Hatfield*.⁴⁸

In *Burrage v. United States*, the Supreme Court settled this disagreement.⁴⁹ The defendant, Marcus Burrage, sold heroin to Joshua

40. *United States v. Monnier*, 412 F.3d 859, 860, 862 (8th Cir. 2005), *cert. denied*, 546 U.S. 1116 (2006).

41. *Id.* at 860–61.

42. *Id.* at 861–62.

43. *United States v. Hatfield*, 591 F.3d 945, 947–51 (7th Cir. 2010).

44. *Id.* at 947.

45. *Id.* at 949–51.

46. See, e.g., Benjamin Ernst, *A Simple Concept in a Complicated World: Actual Causation, Mixed-Drug Deaths and the Eighth Circuit's Opinion in United States v. Burrage*, 55 B.C. L. REV. E. Supp. 1, 2 (2014), <http://lawdigitalcommons.bc.edu/bclr/vol55/iss6/2> [<https://perma.cc/K9K8-B5PQ>] ("Given the apparent split between the circuits, *Burrage* has garnered the attention of the U.S. Supreme Court[.]").

47. Petition for Writ of Certiorari at 1, *Burrage v. United States*, 133 S. Ct. 2049 (2014) (No. 12-7515), 2012 WL 7991899, at *1.

48. *United States v. Monnier*, 412 F.3d 859, 862 (8th Cir. 2005); *cf.* *United States v. Hatfield*, 591 F.3d 945, 950 (7th Cir. 2010) (rejecting a jury instruction adopting the "contributing cause" language from *Monnier*).

49. *Burrage v. United States*, 134 S. Ct. 881, 890 (2014).

Banka, who later used it with other illegal drugs and died of an overdose.⁵⁰ Burrage was charged with distribution of heroin and the “death results” sentencing enhancement.⁵¹ During Burrage’s trial, none of the experts who testified could rule out the possibility that Banka would have died without the heroin or that the heroin was more than a contributing cause of Banka’s death.⁵² Burrage requested jury instructions requiring both a “but for” and a proximate cause standard, arguing that the government’s evidence was insufficient to prove that the distribution of heroin resulted in Banka’s death.⁵³ However, the district court judge rejected this argument and instructed the jury on a theory of contributing cause.⁵⁴ Burrage was convicted and sentenced to twenty years in prison.⁵⁵

On appeal, Burrage argued that the district court erred by using “contributing cause” language to define the statute’s causation element.⁵⁶ Relying on *Monnier*, the Eighth Circuit Court of Appeals rejected this argument and affirmed Burrage’s conviction.⁵⁷ However, in a unanimous decision, the Supreme Court rejected the contributory cause standard, holding that “[t]he language Congress enacted requires death to ‘result from’ use of the unlawfully distributed drug, not from a combination of factors to which drug use merely contributed.”⁵⁸ The Court focused on the plain language of the statute, reasoning that “Congress could have written §841(b)(1)(C) to impose a mandatory minimum when the underlying crime ‘contributes to’ death or serious bodily injury, or adopted a modified causation test tailored to cases involving concurrent causes, as five States have done.”⁵⁹ Moreover, the Court noted that the “death results” enhancement is a

50. Burrage v. United States, 687 F.3d 1015, 1018 (8th Cir. 2012), *overruled* by Burrage v. United States, 134 S. Ct. 881 (2014).

51. Burrage v. United States, 687 F.3d 1015, 1018 (8th Cir. 2012).

52. *Id.* at 1018–19.

53. *Id.* at 1019–20 & n.3.

54. *Id.* at 1019 (“For you to find that a death resulted from the use of heroin, the Government must prove . . . that the heroin distributed by the Defendant was a *contributing cause* of Joshua Banka’s death. A contributing cause is a factor that, although not the primary cause, played a part in the death[.]”) (emphasis added).

55. *Id.* at 1018.

56. *Id.* at 1020–21.

57. *Id.* at 1021.

58. Burrage v. United States, 134 S. Ct. 881, 890 (2014).

59. *Id.* The court was referencing the causation tests in statutes in Alabama, Arkansas, Maine, North Dakota, and Texas. See ALA. CODE §13A-2-5(a) (LexisNexis 2005); ARK. CODE ANN. §5-2-205 (2006); ME. REV. STAT. ANN. tit. 17-A, §33 (LexisNexis 2006); N.D. CENT. CODE ANN. §12.1-02-05 (2012); TEX. PENAL CODE ANN. §6.04 (West 2011).

criminal statute subject to the rule of lenity,⁶⁰ further bolstering a finding that the statute’s meaning should not deviate from its “ordinary meaning.”⁶¹ In summary, the Court held that a drug must be a primary cause of death, but rejected a proximate cause or foreseeability requirement.⁶² This decision provided a clear answer to the question of which causation standard should be applied for the CSA. However, many difficulties remain in applying the *Burrage* standard, as discussed below.

II: APPLYING THE *BURRAGE* STANDARD

By requiring a “but for” causation standard in *Burrage*, the Supreme Court was, in theory, narrowing the scope of the statute to eliminate cases where a defendant’s actions were a contributing cause, but not the “but for” cause of a person’s death. In practice, however, this decision has led to little, if any, actual change in the statute’s application.

A. The Impact of *Burrage*

In the aftermath of the *Burrage* decision, prosecutors anticipated greater difficulty in convicting defendants under the “death results” sentencing enhancement. The U.S. Attorney for the District of Vermont, for example, warned at the time that “[the government] may not be able to meet the standard of proof in those cases. . . [i]t will have some impact.”⁶³ A Justice Department official

60. *Burrage*, 134 S. Ct. at 891. The court reserves lenity “for those situations in which a reasonable doubt persists about a statute’s intended scope even *after* resort to ‘the language and structure, legislative history, and motivating policies’ of the statute.” *Moskal v. United States*, 498 U.S. 103, 108 (1980) (quoting *Bifulco v. United States*, 447 U.S. 381, 387 (1980)). In *Burrage*, lenity for the defendant meant that the causation standard would be higher, resulting in a “but for,” rather than “contributing cause” standard.

61. *Burrage*, 134 S. Ct. at 891.

62. *Id.* at 892.

63. Douglas Berman, *Detailing the Impact and Import of Burrage on the Federal Drug War*, SENT’G L. & POL’Y (Mar. 3, 2014, 10:54 AM), https://sentencing.typepad.com/sentencing_law_and_policy/2014/03/detailing-the-impact-and-import-of-burrage-on-the-federal-drug-war-.html [<https://perma.cc/8YV3-H5TZ>]. Lower courts have also referred to *Burrage* as imposing a stricter burden of proof. *See, e.g.*, *United States v. Noble*, No. 1:14-cr-135, 2017 U.S. Dist. LEXIS 21444 at *13 (referring to the Supreme Court decision in *Burrage* as imposing “a new and stricter burden of proof that the government needs to prove[.]”).

described how finding medical experts who can determine a drug's exact role is difficult and "is a big burden on the government."⁶⁴

However, an examination of lower courts applying *Burrage* shows that fears that the "but for" cause standard would be too difficult a burden to bear proved mostly unfounded. While some defendants had their sentences vacated after *Burrage*,⁶⁵ the causation requirement remains remarkably broad, as seen in *United States v. Burkholder*.⁶⁶ In *Burkholder*, defendant Jerry Lee Burkholder was charged with the distribution of a controlled substance that "resulted in the death of Kyle Dollar."⁶⁷ Burkholder had been prescribed Suboxone⁶⁸ and admitted to giving Dollar a Suboxone tablet the night Dollar died.⁶⁹ The medical examiner who performed the autopsy on Dollar and a forensic toxicologist both testified that "Dollar's death was the result of his consumption of a combination of buprenorphine and alcohol."⁷⁰ However, a toxicologist testified for the defense that Dollar had actually died "from overdosing on a synthetic drug, which general drug-screening procedures would not have detected."⁷¹ The judge instructed the jury to find the defendant guilty if "*but for* Kyle Dollar ingesting the buprenorphine distributed by the Defendant, Kyle Dollar would not have died."⁷² The jury found Burkholder guilty.⁷³

The Tenth Circuit Court of Appeals affirmed the conviction, finding that the evidence was sufficient to find that Burkholder's actions were the "but for" cause of Dollar's death under *Burrage*.⁷⁴ This case aptly represents the issues remaining with the *Burrage* standard and the CSA's "death results" enhancement. Most notably, the "but for" standard did not account for superseding causes of Dollar's death, such

64. Berman, *supra* note 63.

65. See, e.g., Kreiger v. United States, 842 F.3d 490, 506 (7th Cir. 2016) (vacating the district court's decision sentencing defendant under the "death results"); Santilla v. Upton, 846 F.3d 779, 785 (5th Cir. 2017) (finding that defendant's conduct no longer satisfied the "death results" criteria under the *Burrage* "but for" standard).

66. See *infra* Section III.B.; United States v. Burkholder, 816 F.3d 607 (10th Cir. 2016).

67. *Burkholder*, 816 F.3d at 609.

68. Suboxone is an opioid "commonly prescribed for treating heroin addicts." *Id.* at 610.

69. *Id.* at 610.

70. *Id.* at 610.

71. *Id.* at 610.

72. *Id.* at 610–11.

73. *Id.* at 611.

74. *Id.* at 615–16, 627.

as his decision to take the drug with alcohol, nor did it allow for consideration of Burkholder's intent, as would have been required under a state homicide statute.⁷⁵ Additionally, this case illustrates how the CSA's "death results" enhancement is not limited to just high- or mid-level drug distributors, unlike in some state statutes⁷⁶—rather, individuals who distribute their own prescription medications can face a mandatory minimum sentence for distributing controlled substances.⁷⁷

United States v. Alvarado further illustrates problems with *Burrage*.⁷⁸ In that case, defendant Alvarado was convicted by a jury of distributing heroin to Eric Thomas, resulting in Thomas's death.⁷⁹ Alvarado admitted to police that he had sold five bags of heroin to Thomas and at trial, Thomas's fiancée testified that Thomas would often use a bundle of five bags or more immediately after purchase.⁸⁰ A forensic toxicologist testified that a drug screen of Thomas's blood and urine revealed the presence of not just metabolized heroin, but also levels of Xanax and Benadryl, both of which could have aggravated the effects of heroin.⁸¹ The medical examiner who performed the autopsy, however, concluded that neither the Xanax nor Benadryl "contributed to" Thomas's death, explaining that "without the heroin, [Thomas] doesn't die."⁸² The Fourth Circuit Court of Appeals affirmed Alvarado's conviction, noting that "the jury's verdict was necessarily consistent with the Supreme Court's requirement of "but for" causation" under *Burrage*.⁸³

This case, like *Burkholder*, shows how the *Burrage* standard has resulted in somewhat arbitrary line-drawing in holding drug

75. If Burkholder had been charged for Dollar's death under Wyoming state law, rather than federal law, the prosecution would have the burden of proving a *mens rea* element for murder or manslaughter charges. WY STAT ANN. § 6-2-101, 104, 105 (LexisNexis 2014).

76. The Vermont statute penalizing the distribution of a drug resulting in death explicitly states "[m]any people who become addicted to illegal drugs resort to small-scale sale of drugs to support their addiction. This act is not directed at those people, but rather at the entrepreneurial drug dealers who traffic in large amounts of illegal drugs for profit." 2003 H.B. 206 Vt. Acts & Resolves (LexisNexis). The New Jersey drug-induced homicide statute was similarly intended to target so-called drug "kingpins." N.J. Stat. Ann. § 2C:35-1.1 (West 1987).

77. *Burkholder*, 816 F.3d at 610.

78. *United States v. Alvarado*, 816 F.3d 242 (4th Cir. 2016).

79. *Id.* at 244.

80. *Id.* at 244–45.

81. *Id.* at 246.

82. *Id.* at 246.

83. *Id.* at 244.

distributors responsible for the deaths of their drug recipients based on the recipients' subsequent actions. The standard in *Alvarado* does not account for the role played by the Xanax or Benadryl in interacting with the heroin.⁸⁴ In *Kreiger v. United States*, by contrast, a medical examiner concluded that a victim had died from fentanyl toxicity, but because the victim had taken the fentanyl with several other drugs, there was insufficient evidence to conclude that the defendant's fentanyl was the "but for" cause of the victim's death under *Burrage*.⁸⁵ As a result, the defendant in that case had her sentence vacated and remanded for resentencing.⁸⁶

If the policy goal of the CSA's "death results" sentencing enhancement is to deter drug dealing, target particularly large-scale dealers, or to gain leverage against dealers to cooperate against distributors up the chain, drawing a line based on the conduct of the drug recipient, rather than on the conduct of the drug distributor, is counter-intuitive to those goals. Finally, both *Burkholder* and *Alvarado* serve to illustrate problems that will be discussed in greater detail in Parts II.B and II.C, including the assumption that jurors are able to adequately apply the *Burrage* causation standard and toxicological difficulties of determining a "but for" cause of a person's death.

B. The Role of Causation in Jury Instructions

From a criminal procedure standpoint, what was at issue in *Burrage* was really the language in the jury instructions.⁸⁷ By debating the precise language to be used in jury instructions, the courts presume that jurors are able to adequately understand the different types of causation and apply them to a present case. However, considering the complexity of different types of causation, confusion about the "but for" cause standard could be one reason as to why *Burrage* failed to sufficiently narrow the scope of the CSA.

Legal scholarship from the past several decades provides empirical evidence to support the contention that jurors are often

84. *Id.* at 246.

85. *Kreiger v. United States*, 842 F.3d 490, 493, 505 (7th Cir. 2016).

86. *Id.* at 505.

87. *Burrage v. United States*, 134 S. Ct. 881, 886 (2014) ("The court also declined to give *Burrage's* proposed jury instructions regarding causation. One of those instructions would have required the Government to prove that heroin use was the proximate cause of Banka's death.") (internal quotation marks omitted).

unable to comprehend standard jury instructions.⁸⁸ In cases involving the *Burrage* “but for” cause standard, judges often instruct juries using counterfactual reasoning, asking them to consider whether the person would have died *but for* the defendant’s distribution of drugs.⁸⁹ In giving such an instruction, the judge, and by extension, the legal system, presumes that jurors understand and can accurately make such a counterfactual inquiry. However, psychological research indicates that the assumed relationship between counterfactual and causal judgments does not always hold true.⁹⁰ Researchers Ahogni N’gbala and Nyla R. Branscombe asked subjects in one study to read a story in which a boy was injured in an automobile accident after the following sequence of events: (1) his father failed to pick him up from school; (2) a neighbor gave him a ride; and (3) a drunk driver crashed into the neighbor’s car.⁹¹ Subjects then rated each story character by how much they thought the character had caused the outcome.⁹² Although most subjects recognized that the father’s actions played a role, more causality was assigned to the drunk driver’s actions.⁹³ After changing aspects of the story, researchers demonstrated that when a

88. See, e.g., Geoffrey P. Kramer & Dorean M. Koenig, *Do Jurors Understand Criminal Jury Instructions? Analyzing the Results of the Michigan Juror Comprehension Project*, 23 U. MICH. J.L. REFORM 401, 429 (1990) (“This research supports a growing body of literature suggesting that jury instructions are often lost on jurors, and can sometimes even backfire.”); Edith Greene & Michal Johns, *Jurors’ Use of Instructions on Negligence*, 31 J. APPLIED SOC. PSYCHOL. 840, 852 (finding that only about sixty percent of studied jurors were able to comprehend standard jury instructions on negligence); Robert P. Charrow & Veda R. Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 COLUM. L. REV. 1306, 1358–59 (1976) (finding that standard jury instructions are not well understood by jurors as a result of particular linguistic and grammatical constructions).

89. See, e.g., *United States v. Snider*, 180 F. Supp. 3d 780, 786–87 (D. Or. 2016) (“According to the Supreme Court, 21 U.S.C. § 841(b)(1)(C) imposes . . . a requirement of actual causality that requires proof that the harm would not have occurred in the absence of—that is, but for—the defendant’s conduct.”) (internal quotations omitted).

90. Barbara Spellman & Alexandra Kincannon, *The Relation Between Counterfactual (‘But for’) and Causal Reasoning: Experimental Findings and Implications for Juror’s Decisions*, 64 L. & CONTEMP. PROBS. 241, 250 (2001).

91. Ahogni N’gbala & Nyla R. Branscombe, *Mental Simulation and Causal Attribution: When Simulating an Event Does Not Affect Fault Assignment*, 31 J. EXPERIMENTAL SOC. PSYCHOL. 139, 147–48 (1995).

92. *Id.* at 148–49.

93. *Id.* at 149–50.

character's actions were perceived as more immoral, subjects were more likely to attribute to them the cause of harm.⁹⁴

Applying these findings to the CSA “death results” cases, it is possible that jurors are attributing drug-induced deaths to the dealers out of a sense of moral judgment about their unlawful drug dealing. Since the question of whether a defendant caused a person's death is only relevant after the jury has determined the defendant's guilt of knowingly and intentionally distributing drugs,⁹⁵ jurors could be assigning greater responsibility for a person's drug-induced death to a guilty defendant. As a result, jury decisions about the “but for” cause of a person's death may be more steeped in moral judgments than in fact.

Bias and moral judgments aside, the question still remains as to whether jurors are able to understand and apply the complex concepts of causation in these cases. Legal and psychological literature indicate a significant lack of comprehension amongst jurors regarding causation, particularly in the case of “but for” causation.⁹⁶ A recent study surveyed a nationally representative group of nearly 1500 jury-eligible laypeople to test their understanding about the ordinary meaning of causal language in several statutes, including the CSA.⁹⁷ Some participants were randomly assigned to read a short vignette modeled on the facts of *Burrage* and asked whether death “resulted from” the drug sold by the protagonist.⁹⁸ The participants then answered a series of questions about different causes of death, including whether the use of the drug supplied by the protagonist was the “but for” cause of the person's death.⁹⁹

Most notably, in the version of the story where “but for” causation was absent, a substantial majority (74 percent) of study

94. *Id.*

95. *See* United States v. Walker, 721 F.3d 828, 842 (7th Cir. 2013) (reversing defendant's conviction and vacating his twenty-year sentence due to insufficient evidence to demonstrate the defendant's involvement with a drug conspiracy).

96. James A. Macleod, *Ordinary Causation: A Study in Experimental Statutory Interpretation*, 94 IND. L.J. 957, 1004–05 (2019) (finding that surveyed potential jurors evinced a lack of understanding of “but for” causation); N.J. Schweitzer & Michael J. Saks, *Jurors and Scientific Causation: What Don't They Know and What Can Be Done About It?*, 52 JURIMETRICS J. 433, 450 (2012) (finding that flawed scientific evidence related to causation did not affect mock jurors' trial decisions relative to scientifically valid evidence).

97. Macleod, *supra* note 96, at 962.

98. *Id.* at 955.

99. *Id.* This is the same standard that the Supreme Court applied in *Burrage*. *Burrage*, 134 S. Ct. at 892.

participants nonetheless found that the “death results” element of the statute was satisfied.¹⁰⁰ Even in the versions of the story where the drug supplied by the protagonist was neither necessary nor sufficient to the person’s death, a clear majority of study participants found that the causation element of the statute was satisfied.¹⁰¹

The study also asked participants to score each story character’s actions for their moral blameworthiness.¹⁰² Interestingly, and in further support of the N’gbala and Branscombe study findings,¹⁰³ the results indicated that participants’ moral blame judgments more closely tracked with statutory causation ascription than did “but for” causation.¹⁰⁴ Still, 59 percent of the group of participants given the version with low moral blameworthiness continued to incorrectly ascribe statutory causation where “but for” causation was absent.¹⁰⁵ Regardless of whether the source of inaccuracy comes from moral outrage or not, this study strongly indicates that jurors are unable to properly apply the *Burrage* “but for” cause standard, meaning that defendants are at risk of being improperly burdened with a twenty-year mandatory minimum sentence. These findings suggest that one possible reason for why *Burrage* failed to adequately narrow the scope of the “death results” sentencing enhancement is simply that jurors are unable to apply the *Burrage* “but for” test.

C. Toxicological Issues in Determining “But For” Cause

Even if jurors are able to adequately apply the “but for” cause standard in these cases, the standard remains problematic because it is difficult for medical examiners to determine and testify to the “but for” cause of a person’s death. This issue is particularly pronounced in the context of the opioid crisis, as drug-induced deaths are increasingly

100. Macleod, *supra* note 96, at 999.

101. *Id.* (finding that sixty percent of participants found statutory causation satisfied when it was absent). For the drugs supplied by the protagonist to be the “but for” cause of the person’s death, the drugs would have needed to be necessary to the person’s death. Tony Honoré, *Necessary and Sufficient Conditions in Tort Law*, THE PHILOSOPHICAL FOUNDATIONS OF TORT LAW 363, 363 (David G. Owen ed., 1997) (describing the “but for” causation test as the “test of strong necessity”).

102. Macleod, *supra* note 96, at 997.

103. See N’gbala & Branscombe, *supra* note 91, at 1007.

104. Macleod, *supra* note 96, at 1004–05 (finding that scores for how morally blameworthy the drug dealer was correlated more strongly with a determination of “but for” cause than use of a “but for” test for cause-in-fact).

105. *Id.*

caused by multiple types of drugs.¹⁰⁶ Determining the cause of death when multiple drugs are involved is even more difficult.¹⁰⁷ This problem is exacerbated by the increasing role of fentanyl in overdoses.¹⁰⁸ Fentanyl, a dangerously potent synthetic opioid, is commonly mixed with other drugs, particularly heroin, but drug users are often unaware that fentanyl is added.¹⁰⁹

When an overdose death occurs, a coroner “or medical examiner will determine the cause of death and complete a death certificate.”¹¹⁰ Determining a person’s cause of death in cases of drug overdose is already a complicated task.¹¹¹ One major obstacle is the fact that there is no standardized “lethal dose” to measure in a person’s body, meaning that individual tolerance to drugs impacts what a lethal dose of heroin would be for different people.¹¹²

Determining the cause of death is further complicated when there are multiple drugs in a person’s body,¹¹³ as exemplified in the case of *United States v. Ford*.¹¹⁴ In *Ford*, defendant Samuel Ford was

106. Ahmad FB et al., *Mortality Data from the National Vital Statistics System*, NAT’L CENTER FOR HEALTH STATISTICS, <https://www.cdc.gov/nchs/nvss/vsrr/drug-overdose-data.htm> (last updated Dec. 12, 2018) [<https://perma.cc/P2XS-2PFL>]. In nearly 80 percent of cases involving an overdose death from synthetic opioids, the overdose involved two or more drugs or alcohol. Christopher M. Jones et al., *Changes in Synthetic Opioid Involvement in Drug Overdose Deaths in the United States, 2010–2016*, 319 J. AM. MED. ASS’N. 1819, 1819 (2018).

107. Lynn R. Webster & Nabarun Dasgupta, *Obtaining Adequate Data to Determine Causes of Opioid-Related Overdose Deaths*, 12 PAIN MED. 86, 87 (2011).

108. Fentanyl is a synthetic opioid that resembles morphine, but is about 50 times more potent than heroin and 100 times more potent than morphine. Rachel L. Rothberg & Kate Stith, *Law and the Opioid Crisis: Fentanyl: A Whole New World?*, 46 J.L. MED. & ETHICS 314, 314 (2018).

109. Matthew K. Griswold et al., *Self-Identification of Nonpharmaceutical Fentanyl Exposure Following Heroin Overdose*, 56 J. CLINICAL TOXICOLOGY 37, 37–38 (2018) (finding that nearly half of studied drug users were unable to identify fentanyl in their heroin, thereby increasing their risk of overdose).

110. Svetla Slavova et al., *Drug Overdose Deaths: Let’s Get Specific*, 130 PUB. HEALTH REP. 339, 340 (2015).

111. Shepard Siegel et al., *Heroin “Overdose” Death: Contribution of Drug Associated-Environmental Cues*, 216 SCI. 436, 436 (1982). Other complications also include postmortem redistribution, or the or the changes that occur in drug concentrations after death. Derrick J. Pounder & Graham R. Jones, *Post-Mortem Drug Redistribution—A Toxicological Nightmare*, 45 FORENSIC SCI. INT’L 253, 260–61 (1990).

112. *Id.*

113. Shane Darke & Deborah Zador, *Fatal Heroin “Overdose”: A Review*, 91 ADDICTION 1765, 1768 (1996) (describing how co-administration of different types of drugs leads different, less well understood mechanism of death in autopsies).

114. *United States v. Ford*, 750 F.3d 952 (8th Cir. 2014).

convicted of “distributing a mixture of heroin to Joseph Scolaro, resulting in Scolaro’s death,” but his sentence was vacated and remanded in light of *Burrage*.¹¹⁵ The medical examiner at trial testified that the cause of Scolaro’s death was “polydrug toxicity,” qualifying that methamphetamine was the major contributing drug in the cause of death.¹¹⁶ While she was confident that the cause of death was the combination of multiple drugs, she explained “I don’t think I took into account the fact that morphine . . . and alcohol combined are a very lethal combination.”¹¹⁷ However, she acknowledged that she could not say whether Scolaro would have died without the morphine.¹¹⁸ The court reversed the conviction on the sentencing enhancement, finding that the Government “proved only that the heroin was a contributing factor to Scolaro’s death, not that heroin was a but-for cause of Scolaro’s death.”¹¹⁹

This case demonstrates the prominence of the medical examiner’s role in cases after *Burrage*. Although there were many types of drugs in Scolaro’s body, as is common in overdose cases,¹²⁰ the medical examiner and other toxicological experts are required to determine whether “but for” a single type of drug the victim would not have died.¹²¹ In *Ford*, neither government expert could testify that absent morphine, Scolaro would have lived, despite the presence of the other drugs.¹²² In order to know the answer to this question, the medical experts would have needed to know Scolaro’s levels of drug tolerance, the precise ways in which the drugs in his body would have interacted together, and how those interactions would have changed due to the presence of one or more other drugs.¹²³ This presents a

115. *Id.* at 953.

116. *Id.* at 955.

117. *Id.*

118. *Id.* When heroin is metabolized in the body, it turns into morphine. See Howard S. Smith, *Opioid Metabolism*, 84 MAYO CLINIC PROC. 613–15 (2009).

119. *Ford*, 750 F.3d at 955.

120. Jones et al., *supra* note 106, at 1819 (describing rates of death from synthetic opioids involving multiple drugs).

121. See, e.g., *United States v. Ewing*, No. 17-5496, 2018 U.S. App. LEXIS, at *24–26 (6th Cir. Aug. 31, 2018) (describing how expert medical witnesses testified that the dose of fentanyl in decedent’s body was “an independent, sufficient cause of [the decedent’s] death.”).

122. *Ford*, 750 F.3d at 955.

123. Joakim Strandberg, *Toxicological Studies of Opiate-Related Death*, KAROLINSKA INSTITUTET 1, 7–8 (2007).

complicated question for experts to determine, and requires a jury to make judgements based on this complex testimony.¹²⁴

Notably, it is rare for a medical examiner to include a “but for” causation opinion in an autopsy report,¹²⁵ because to prove with precision that a person could have died without a particular drug would require a retroactive experiment under controlled conditions. By requiring this “but for” standard in cases of multiple drug intoxication, courts are asking medical experts and jurors to do something that appears to be medically impossible. While there is other evidence aside from the medical examiner’s testimony, in cases like *Ford*, the lack of testimony that any one substance represents a “but for” cause of death will be sufficient to reverse a conviction under the “death results” sentencing enhancement.¹²⁶

While the battles between toxicologists may be a more common occurrence in civil litigation,¹²⁷ the presence of conflicting toxicological testimony in criminal cases such as these is troubling and dangerous where a twenty-year mandatory minimum prison sentence is at stake.¹²⁸ Further, studies have indicated that jurors have a particularly difficult time understanding evidence provided by expert testimony.¹²⁹ Researchers noted how in one case, one expert impressed jurors because of his credentials and prominent position in the field, observing how jurors “often make these kinds of judgments—personal judgments about the experts and *not* about the information relayed.”¹³⁰

124. *Id.*

125. William J. Ihlenfeld II, “Death Results” Prosecutions Remain Effective Tool Post-Burrage, 64 U.S. ATT’YS BULL. 45, 51 (2016).

126. Other possible evidence for consideration could include the terminal collapse circumstance information, the presence of only inactive metabolites of one of the substances, or whether certain drugs are “likely to produce death in and of themselves.” Thomas P. Gilson et al., *Rules for Establishing Causation in Opiate/Opioid Overdose Prosecutions—The Burrage Decision*, 7 ACAD. FORENSIC PATHOL. 87, 89 (2017).

127. Sanja Kutnjak Ivkovic & Valerie P. Hans, *Jurors’ Evaluations of Expert Testimony: Judging the Messenger and the Message*, 28 L & SOC. INQUIRY 441, 443 (2003) (“In contemporary criminal cases, experts testify in a sizeable minority of felony trials. Civil cases, on the other hand, appear to include a greater number of experts.”) (internal citations omitted).

128. 21 U.S.C.S. § 841(b) (LexisNexis 2010).

129. Ivkovic & Hans, *supra* note 127, at 444; *see also* Joseph Sanders, *Scientifically Complex Cases, Trial by Jury, and the Erosion of Adversarial Processes*, 48 DEPAUL L. REV. 355, 365 (1998) (“In sum, the interview and experimental data tend to indicate that jurors do have trouble with complex scientific expert testimony.”).

130. Ivkovic & Hans, *supra* note 127, at 444.

Since the “but for” cause standard puts significant emphasis on complex toxicological testimony, the risk of jury error is amplified.

The increasingly prominent role of medical experts in determining the “but for” cause of a person’s death is also problematic because requirements for medical experts vary by jurisdiction. A medical examiner is a physician who is appointed to determine the cause and manner of death and is often a trained forensic pathologist.¹³¹ By contrast, a coroner is a county-elected official, although similarly tasked with investigating deaths and determining the manner cause of death.¹³² Most importantly, coroners are not required to have any medical background and need only meet minimum statutory requirements such as residency and minimum age.¹³³ While the coroner system remains in only eleven states¹³⁴ and the qualifications of the medical examiner can certainly be challenged at trial and considered by a jury, cases like *Ford* turned on the conclusions by the medical experts, not their relevant expertise. Under *Burrage*, courts are increasing the weight of importance of medical expert testimony, placing responsibility in the hands of those who may not be qualified.

III: CALLING FOR A PROXIMATE CAUSE STANDARD

Amending the CSA’s “death results” sentencing enhancement to require that a defendant proximately caused the victim’s death would address many of the concerns addressed in Part II. For the “death results” sentencing enhancement to apply under a proximate cause standard, the person’s death must have been a reasonably foreseeable consequence of the defendant’s actions.¹³⁵

131. Beety, *supra* note 9, at 23.

132. *Id.*

133. *Id.* (citing Committee on Identifying the Needs of the Forensic Sciences Community, *Strengthening Forensic Science: A Path Forward*, NATIONAL RESEARCH COUNCIL, 247 (2009)). For example, in one Indiana county, two seventeen-year-old high school seniors were appointed as deputy coroners. *Id.*

134. There are an additional eighteen states with mixed coroner/medical examiner systems. INST. OF MED., MEDICOLEGAL DEATH INVESTIGATION SYSTEM: WORKSHOP SUMMARY 8 (2003).

135. *Black’s Law Dictionary* defines proximate cause as “that which, in a natural and continuous sequence, unbroken by any efficient intervening cause, produces injury, and without which the result would not have occurred.” BLACK’S LAW DICTIONARY (5th ed. 1979).

A. Defining Proximate Cause

Proximate cause is a cause that is legally sufficient to result in liability.¹³⁶ A standard jury instruction on proximate cause states: “[t]he proximate cause of an injury or damage is that cause which in a natural and continuous sequence, unbroken by any new or independent cause, produces the injury or damage, and without which it would not have occurred.”¹³⁷ Criminal cases applying this standard use the “foreseeability test,” asking whether death was a reasonably foreseeable consequence of the defendant’s actions.¹³⁸ Foreseeability is generally defined as “whether any ordinary prudent man would have foreseen that damage would probably result from his act.”¹³⁹

B. Applying the Proximate Cause Standard

A proximate cause standard would resolve the issue of superseding cause created by *Burrage*. A superseding cause is “[a]n intervening or force that the law considers sufficient to override the cause for which the original [actor] was responsible, thereby exonerating that [actor] from liability.”¹⁴⁰

A proximate cause standard would properly account for a situation in which the decedent increased her own risk of death by combining drugs and alcohol.¹⁴¹ In *Burkholder*,¹⁴² as described earlier in this Note, the decedent died after mixing the drug he received from the defendant with alcohol at a club.¹⁴³ If a proximate cause standard

136. *Cause Definition*, BLACK’S LAW DICTIONARY (10th ed. 2014).

137. Randall C. Lester, *The “Substantial Factor Test” for Causation: Juedeman v. Montana Deaconess Medical Center*, 48 MONT. L. REV. 391, 391–92 (1987).

138. *See, e.g.*, *United States v. Gonzalez*, 905 F.3d 165, 208 (3d Cir. 2018) (“[T]he District Court noted that [the defendant] played an instrumental role in the conspiracy against [the decedent], whose death was a reasonable foreseeable consequence of the conspiracy.”); *United States v. Martinez*, 588 F.3d 301, 319 (6th Cir. 2009) (“The evidence presented is sufficient for a rational jury to conclude that [the decedent’s] death was a reasonably foreseeable consequence of [the defendant’s] fraudulent treatment.”); *United States v. Johnson*, 151 F. Supp. 3d 1126, 1238 (D.N.M. 2015) (“[T]here was sufficient evidence from which the trier of fact could rationally have found . . . that such death was a reasonably foreseeable consequence of the robbery.”).

139. *Consol. Aluminum Corp. v. C.F. Bean Corp.*, 833 F.2d 65, 67 (5th Cir. 1987) (describing the concept of foreseeability).

140. *Cause Definition*, BLACK’S LAW DICTIONARY (10th ed. 2014).

141. *See Burkholder*, 816 F.3d at 607.

142. *See supra* Section II.A.

143. *See supra* notes 66–73.

had been required in *Burkholder*, the question of the defendant's culpability under the "death results" sentencing enhancement would have turned on whether Burkholder *should have reasonably known* that the drug he gave the decedent would have been taken with alcohol. In that case, there was evidence that Burkholder was aware of the dangerous risks of combining Suboxone with alcohol, and the context of distributing the drug in a nightclub would likely have indicated to him that it would be used with alcohol.¹⁴⁴ Although the proximate cause standard would likely have led to the same outcome in that case, its rationale is more consistent with trying to deter the behavior of drug distributors, since culpability would depend on the actions of the defendant, rather than the drug recipient.

Additionally, other issues of superseding cause, such as a decedent committing suicide with drugs received from a defendant, would be addressed through the proximate cause standard. In *Hatsfield*, the Seventh Circuit Court of Appeals warned against imposing strict liability for the "death results" sentencing enhancement because it could "lead to some strange results."¹⁴⁵ The court hypothesized that if a buyer decided to commit suicide by taking an overdose of drugs, unbeknownst to the dealer, that the dealer would still be culpable under a strict liability interpretation of the statute.¹⁴⁶ While the court states that "strict liability creates an incentive for a drug dealer to warn his customer about the strength of the particular batch of drugs being sold and to refuse to supply drugs to particularly vulnerable people," the court offers no evidence to show that the "death results" sentencing enhancement actually leads to any such results.¹⁴⁷

Imposing a proximate cause standard could also aid in the prosecution of physicians for patient overdoses. In the wake of the *Burrage* decision, concerns emerged as to whether the heightened causation standard would make it increasingly difficult to prosecute physicians who over-prescribed drugs.¹⁴⁸ Critics of *Burrage* refer to

144. *Id.* at 610 ("Mr. Burkholder signed a treatment agreement with his doctor . . . [t]he agreement further evinced his understanding that 'mixing buprenorphine with other medications . . . and/or other drugs of abuse, including alcohol, can be dangerous.'") (internal citations omitted).

145. *United States v. Hatsfield*, 591 F.3d 945, 950 (7th Cir. 2010).

146. *Id.*

147. *Id.* at 951.

148. McClure, *supra* note 31, at 1760 ("The chief concern regarding *Burrage's* role in the precedent governing criminal prosecution of physicians is that *Burrage* will reduce sentences of physician violators in a manner that detracts from the punishment that a factfinder has determined the physician deserves.").

United States v. Schneider, where the Kansas District Court reviewed the appeal of Dr. Stephen Schneider and his wife, Linda Schneider, post-*Burrage*.¹⁴⁹ The Schneiders were charged with distributing controlled substances resulting in death due to their over-prescription of dangerous and addictive drugs for pain management.¹⁵⁰ The court described their clinic as a “pill mill,” of which sixty-eight of their patients died of overdose over the course of six years.¹⁵¹ The government charged the Schneiders under the “death results” enhancement and a jury convicted them.¹⁵² After *Burrage* was decided, however, the district court found that the “death results” enhancement no longer applied to the Schneiders, and their sentences were significantly reduced.¹⁵³

If Congress were to adopt a proximate cause standard with both a subjective and objective component for the “death results” enhancement, the question of culpability would turn on whether a reasonable person in the defendant’s position could have foreseen the victim’s death. If this standard had been applied to the *Schneider* case, the jury would have focused on the Schneiders’ medical knowledge and training, particularly in relation to the use of prescription drugs, and make a conviction more likely. Due to the advanced medical training of physicians, it is significantly more likely that a reasonable *physician* in a physician’s position would be able to foresee that unrestrained prescriptions of addictive and dangerous medications would result in the death of their patients. As a result, this standard could reduce the burden of prosecution and account for the higher expectations of responsibility that society expects of medical professionals.

A proximate cause standard would also directly confront the complex toxicological issues with coroners and medical examiners determining the “but for” cause of a person’s death, which were discussed in Part II.C. The jury’s focus would be shifted to whether the person’s death was reasonably foreseeable from the defendant’s actions. Instead of a defendant’s culpability depending on the actions of a decedent, which are outside of the control of a defendant and are likely undeterrable for the defendant, culpability would depend on what a reasonable person in the defendant’s situation could have foreseen. In the case of *United States v. MacKay*, where the decedent

149. *Id.*; *United States v. Schneider*, 112 F. Supp. 3d 1197, 1202–03 (D. Kan. 2015).

150. *Schneider*, 112 F. Supp. 3d at 1202.

151. *Id.*

152. *Id.* at 1202–03.

153. *Id.* at 1203.

died from a combination of pneumonia and drug use,¹⁵⁴ a jury could look to whether the defendant was aware of the decedent's condition before selling him the drugs, and thereby determine whether the defendant could have reasonably foreseen the decedent's death.

Although a proximate cause standard resolves many of the issues raised in Part II, it is still an imperfect solution. Critics of *Burrage* often argue that the statute is used too frequently against co-users of drugs, rather than against high-level drug distributors.¹⁵⁵ It could be argued that a proximate cause standard would make it even more difficult to prosecute those high-level distributors, since they may be able to claim that the dealers further down the chain of sale were a superseding cause of a person's death. However, even if this raises the burden of proof required to prosecute those higher-level dealers, it would likely not be a *per se* bar to those prosecutions. Rather, it would be worth the trade-off of convicting people who should not be convicted under a "but for" standard but are still being convicted under *Burrage*. Still, a proximate cause standard would likely not address the issue of prosecuting co-users.¹⁵⁶

Although *Burrage*'s "but for" cause standard is narrower than the "contributing cause" and "substantial factor" standards used previously, the cases examined in this Note demonstrate that in practice, the standard has not narrowed the scope of the statute. The prevalence of convictions under this statute may be explained by juror moral judgment and general confusion about standards of causation. Further, *Burrage* creates extremely difficult toxicological problems in cases where the decedent has taken multiple drugs. Although not a

154. *United States v. MacKay*, 20 F. Supp. 3d, 1287, 1289–91 (D. Utah 2014).

155. Beety, *supra* note 9, at 32 ("Research shows that a majority of [drug induced homicide] cases prosecute mere users, not members of the drug trade. Our analysis of prosecutions reported in the media indicates that prosecutors usually charge friends and romantic partners of the overdose victim.").

156. A proximate cause standard may also not solve the issue of juror confusion surrounding the different standards of causation and the possibility of bias from moral judgment. However, scholarship seems to indicate that the source of confusion for jury instructions comes more from the quality of the explanation of the legal concepts as opposed to the legal concepts themselves. Macleod, *supra* note 96 (arguing that the plain meaning of "but for" causation is insufficient to explain to jurors what the standard of causation entails); Jerome J. Dornoff, *Proximate Cause—Confusion of Jurors by Misleading Label*, 34 MARQ. L. REV. 204, 204–05 (1951) (discussing how the term of "proximate cause" is confusing to jurors and requires further explanation). If judges are able to better elaborate on the concept of proximate cause, rather than relying on its "ordinary meaning" in jury instructions, this confusion can likely be avoided.

perfect solution, having Congress amend the CSA to require a proximate cause standard for the “death results” sentencing enhancement would address and resolve many of these concerns.