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Limiting Criminal Law's "In for a Penny, In for a Pound" Doctrine

WESLEY M. OLIVER*

INTRODUCTION

The Supreme Court took two cases this Term involving doctrines of criminal law typically dealt with by state courts, and in each of them, it limited criminal liability for harms not attributable to a defendant's culpability.

Criminal statutes typically require the prosecution to demonstrate, beyond a reasonable doubt, that a defendant had a particular mental state—that he intended to kill, that he knew he had drugs, or that he drove recklessly.[1] There are very few strict liability crimes, and when they exist, they are recognized as anomalies.[2] A culpable mental state is thus generally assumed to be a requirement for criminal punishment even though determining its existence requires juries or judges to engage in the very difficult task of reading the defendant's mind.[3]

It is therefore remarkable how often defendants are punished for crimes or consequences for which they bear nothing close to traditional criminal culpability. Once a defendant engages in a felony, he is liable for homicide if a death foreseeably follows.[4] If the defendant possesses a gun during a federal crime, he is liable for its accidental discharge even if no one is injured.[5] If the prosecution is able to demonstrate that the defendant knew he possessed illegal drugs, neither the type nor the quantity of the drugs has to be foreseeable, and the defendant is liable for whatever he happens to possess.[6] Mail and wire fraud are punished under the provision of the Federal Sentencing Guidelines relating to all theft crimes under which the punishment is primarily determined by the amount of the loss, making the length of the sentence unrelated to whether the defendant misrepresented an insignificant fact or committed a brazen act of larceny.[7] A member of a conspiracy is liable for all the foreseeable acts of co-conspirators in furtherance

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[1] Where statutes do not themselves expressly include mens rea terms, courts often infer the presence of such a requirement. *See* Darryl K. Brown, *Criminal Law Reform and the Persistence of Strict Liability*, 62 DUKE L.J. 285, 316 (2012) (noting that courts often require "greater drafting clarity before finding that legislators intended to reject" the mens rea presumption in a particular code section).

[2] *See, e.g.*, James J. Hippard, Sr., *The Unconstitutionality of Criminal Liability Without Fault: An Argument for a Constitutional Doctrine of Mens Rea*, 10 HOUS. L. REV. 1039, 1040 (1973) (describing strict liability crimes as "unconstitutional anomalies").

[3] *See* Deborah W. Denno, *Criminal Law in a Post-Freudian World*, 2005 U. ILL. L. REV. 601, 605 (observing that a defendant's mental state "can be inferred solely through an attempted reconstruction using whatever circumstantial evidence exists" because "[s]cience has yet to discover a tool with which to read minds").

[4] *See* James J. Tomkovicz, *The Endurance of the Felony-Murder Rule: A Study of the Forces that Shape Our Criminal Law*, 51 WASH. & LEE L. REV. 1429, 1442–48 (1994) (describing history of felony murder rule).

[5] *See* 18 U.S.C. § 924(c)(1)(A) (2012); Dean v. United States, 556 U.S. 568, 576 (2009).

[6] People v. Scheffer, 224 P.3d 279, 288–89 (Colo. App. 2009). The New York Court of Appeals appears to be the only court in the country to require the defendant to know the quantity of drugs he possessed, *see* People v. Ryan, 626 N.E.2d 51, 54 (N.Y. 1993), but the New York Legislature subsequently amended its drug laws to eliminate the knowledge requirement that the court implicitly found in the New York statute. *See* N.Y. PENAL LAW § 15.20(4) (McKinney 2009).

[7] *See* Frank O. Bowman, III, *The 2001 Federal Economic Crime Sentencing Reforms: An Analysis and Legislative History*, 35 IND. L. REV. 5, 18 (2001); Frank O. Bowman, III, *Coping with "Loss": A Re-Examination of Sentencing Federal Economic Crimes Under the Guidelines*, 51 VAND. L. REV. 461, 464 (1998).

of the agreement.[8] In short, once it has been established that a defendant was criminally culpable for *some* crime, the prosecution frequently does not have to demonstrate that he was criminally culpable for the crimes that flowed from the initial wrongdoing. If the defendant is in for a penny, he is in for a pound.

A somewhat lesser known application of this principle is the doctrine of natural and probable consequences,[9] wherein "an accessory is liable for any criminal act which in the ordinary course of things was the natural and probable consequences of the crime that he advised or commanded, although such consequence may not have been intended by him."[10] Those who aid and abet crimes are equally as responsible as those assisted. Under this form of liability, known as complicity, the prosecution must establish that the defendant intended to promote or facilitate the crime.[11] This is the most demanding mens rea standard the law requires—the prosecution must demonstrate that it was the defendant's conscious desire to have another engage in forbidden conduct or bring about a forbidden result.[12] Under the doctrine of natural and probable consequences, however, once the prosecution demonstrates that an accomplice assisted a principal in committing a crime he intended the principal to commit, the defendant is also criminally liable for any crimes the principal commits that are foreseeable.[13] To show the defendant's complicity in another's crimes, the prosecution must demonstrate the most exacting mental state in the criminal code; but once that has been demonstrated, the least exacting requirement for criminal (or civil) liability will suffice for subsequent crimes.

This "in for a penny, in for a pound" basis of liability has been roundly criticized by academic and judicial commentators for at least a century.[14] As with most types of criminal liability, this doctrine has the greatest effect at the state level. This Term, however, the U.S.

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[8] *See* Paul H. Robinson, *Imputed Criminal Liability*, 93 YALE L.J. 609, 617 (1984) (describing *Pinkerton* liability).

[9] *See* Baruch Weiss, *What Were They Thinking?: The Mental States of the Aider and Abettor and the Causer Under Federal Law*, 70 FORDHAM L. REV. 1341, 1425–26 (2002) (observing that it is not surprising that federal circuits embraced the doctrine of natural and foreseeable consequences "since the doctrine has a close counterpart in the well-established *Pinkerton* doctrine, applicable to conspirators").

[10] Robinson, *supra* note 8, at 617 n.24 (quoting 22 C.J.S. *Criminal Law* § 92 (1961)) (internal quotation marks omitted); *see* Sanford H. Kadish, *Complicity, Cause and Blame: A Study in the Interpretation of Doctrine*, 73 CALIF. L. REV. 323, 347 (1985).

[11] *See* WAYNE R. LAFAVE, CRIMINAL LAW § 13.2, at 708 (5th ed. 2010). Some courts have suggested that the prosecution could satisfy its burden for complicity liability if the defendant had knowledge that he was assisting in a dangerous crime. *See* United States v. Fountain, 768 F.2d 790, 798–99 (7th Cir. 1985); People v. Lauria, 59 Cal. Rptr. 628, 634 (Cal. Ct. App. 1967). *See also* Robert Weisberg, *Reappraising Complicity*, 4 BUFF. CRIM. L. REV. 217, 244–45 (2000) (praising the reasoning of the *Lauria* case).

[12] *See* Stephen F. Smith, *Proportional Mens Rea*, 46 AM. CRIM. L. REV. 127, 130–31 (2009) (noting that, in certain cases, "the mental culpability . . . the Court demands can only come from proof that the defendant knew his conduct was illegal").

[13] *See* Kadish, *supra* note 10, at 347.

[14] These are simply examples of criticisms of each of the various forms of liability that increase a defendant's penalty for harm that follows once he is guilty of some crime. The criticisms are legion and could not be reproduced here. *See, e.g.*, Dean v. United States, 556 U.S. 568, 578 (2009) (Stevens, J., dissenting) (objecting to conviction for accidental discharge of weapon during bank robbery); Bruce A. Antkowiak, *The* Pinkerton *Problem*, 115 PENN ST. L. REV. 607, 610–11 (2011) (criticizing *Pinkerton* liability); Bowman, *Coping*, *supra* note 7, at 465 (criticizing loss calculations under Federal Sentencing Guidelines); David Crump, *Reconsidering the Felony Murder Rule in Light of Modern Criticisms: Doesn't the Conclusion Depend upon the Particular Rule at Issue?*, 32 HARV. J.L. & PUB. POL'Y 1155, 1158–61 (2009) (examining felony murder criticisms); Anders Walker, *The New Common Law: Courts, Culture, and the Localization of the Model Penal Code,* 62 HASTINGS L.J. 1633, 1655 (2011) (observing the Model Penal Code's rejection of the doctrine of natural and probable consequences).

Supreme Court weighed in with its own criticism of this view of liability. Although the Court interprets federal criminal statutes with some frequency, it rarely considers provisions of statutes that would provide persuasive authority for the interpretation of state criminal codes—at least not the most used provisions of state criminal codes. Unlike state criminal laws, federal criminal laws have jurisdictional requirements and generally have more complex components. It is typically these unique aspects of federal criminal laws that the Supreme Court considers.[15] Yet in two recent decisions, *Rosemond v. United States*[16] and *Burrage v. United States*,[17] the Court considered—and limited—the scope of accomplice liability and a drug-crime-specific version of the felony murder rule. These interpretations of federal criminal law are, of course, only persuasive authority for state courts interpreting similar state criminal codes, but as such authority goes, the Supreme Court of the United States tends to be fairly persuasive.[18]

Rosemond required a defendant to be fully aware of the scope of the crimes he was assisting before he could be found guilty of them, which limited the scope of complicity liability. In so doing, the Court seemed to strongly suggest its disapproval of the doctrine of natural and probable consequences.[19] The Court in *Burrage* held that a defendant who provided illegal drugs to another could not be liable for that person's death if the drugs acted in some combination with other drugs or pre-existing medical conditions to cause death.[20] For the defendant to be guilty of a federal crime forbidding drug distribution that leads to a death, the Court held in *Burrage* that the drugs may not merely be a contributing factor to the death.[21] *Burrage* thus appears to signal that many states' felony murder statutes sweep too broadly.

I. *ROSEMOND* AND THE DOCTRINE OF NATURAL AND PROBABLE CONSEQUENCES

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[15] *See* Daniel C. Richman & William J. Stuntz, *Al Capone's Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 COLUM. L. REV. 583, 617 (2005) (observing that jurisdictional requirements of federal crimes make them considerably more complex than state crimes).
[16] 134 S. Ct. 1240, 1248–52 (2014).
[17] 134 S. Ct. 881, 892 (2014).
[18] As early as 1922, Zechariah Chafee, Jr. observed that the state courts were following the lead of the U.S. Supreme Court in interpreting their state constitutions in criminal matters. *See* Zechariah Chafee, Jr., *The Progress of the Law, 1919-1922 Evidence*, 35 HARV. L. REV. 673, 696 (1922) (referencing state courts' adoption of the exclusionary rule following the U.S. Supreme Court's decision in *Weeks v. United States*). Factors other than the *Weeks* opinion surely influenced state court decisions to adopt this rule, as Prohibition coincided with the state courts' adoption of the exclusionary rule. *See* Comment, *Judicial Control of Illegal Search and Seizure*, 58 YALE L.J. 144, 150 (1948) (observing that "[w]ith the advent of prohibition . . . the illegal search cases came thick and fast, the [exclusionary rule] grew and developed limitations, and nearly half the states adopted it in one form or another" (footnotes omitted)). Chafee's crediting of the persuasive power of the Supreme Court, although incomplete in the context in which he offered it, has been recognized in many other contexts. *See* Victor E. Schwartz et al., *The Supreme Court's Common Law Approach to Excessive Punitive Damage Awards: A Guide for the Development of State Law*, 60 S.C. L. REV. 881, 901–02 (2009) (recognizing a number of areas in which states follow the persuasive authority of the Supreme Court).
[19] *Rosemond*, 134 S. Ct. at 1248, 1248 n.7.
[20] *Burrage*, 134 S. Ct. at 892.
[21] *See id.* at 886.

The majority of jurisdictions recognizes that one who aids another in committing a crime, with the intent that that crime occurs, is liable not just for the intended crime, but also for other crimes related to the intended crime.[22] As the California Supreme Court stated,

> [A] person who aids and abets a confederate in the commission of a criminal act is liable not only for that crime (the target crime), but also for any other offense (nontarget crime) committed by the confederate as a "natural and probable consequence" of the crime originally aided and abetted.[23]

As the District of Columbia Court of Appeals has described foreseeability in the group criminality context, a "'natural and probable' consequence in the 'ordinary course of things' presupposes an outcome within a reasonably predictable range."[24] State and federal courts have frequently held that a confederate's possession of a weapon in a drug deal is a natural and probable consequence of the venture.[25]

The majority in *Rosemond* nevertheless held that accomplices were liable only for those facts of which they were aware before assisting the criminal venture.[26] The facts of Justus Rosemond's case were not very complicated and frequently occur in drug trafficking cases. An acquaintance of Rosemond's, Vashti Perez, arranged to sell a pound of marijuana and took along Rosemond and another man, Ronald Joseph, to the transaction.[27] Rather than pay for the drugs at the encounter, the purchaser punched one of the sellers in the face, grabbed the drugs, and ran.[28] Either Rosemond or Joseph fired several shots from a semiautomatic weapon at the fleeing drug thief, though it was not clear which man did so.[29] Rosemond, for his part, claimed that he did not possess or use a firearm during any part of this drug transaction gone bad.[30]

Rosemond was charged with using a gun in connection with a drug trafficking crime, but because there was dispute as to whether Rosemond or Joseph fired the shots, he was charged with aiding and abetting the use of a gun during a drug crime.[31] Of course, if he aided this crime, he would be liable to the same extent as the person actually possessing the weapon.[32] The jury found him guilty of the crime, but it did not indicate whether it concluded Rosemond possessed the weapon or that it found him guilty on the basis of his aiding and abetting the offense of

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[22] *See* State v. Carson, 950 S.W.2d 951, 955 (Tenn. 1997) (noting that the rule is "applied by the majority of courts under a variety of statutes governing criminal responsibility").
[23] People v. Prettyman, 926 P.2d 1013, 1015 (Cal. 1996).
[24] Roy v. United States, 652 A.2d 1098, 1105 (D.C. 1995).
[25] *See, e.g.*, United States v. Sandoval-Curiel, 50 F.3d 1389, 1393 (7th Cir. 1995) ("This court has noted that it is reasonable for a jury to conclude that the presence of firearms in transactions involving a sizeable amount of money or drugs is reasonably foreseeable." (citing United States v. Allen, 930 F.2d 1270, 1275 (7th Cir. 1991))); United States v. Christian, 942 F.2d 363, 368 (6th Cir. 1991) (finding possession of firearm foreseeable in light of the well-recognized nexus between drugs and firearms); People v. Morceli, No. E044803, 2008 WL 4946645, at *5 (Cal. Ct. App. Nov. 19, 2008) (finding possession of gun by co-conspirator in drug deal foreseeable).
[26] Rosemond v. United States, 134 S. Ct. 1240, 1249 (2014).
[27] *Id.* at 1243.
[28] *Id.*
[29] *Id.*
[30] *Id.* at 1246.
[31] *Id.* at 1243–44.
[32] *See* Joshua Dressler, *Reforming Complicity Law: Trivial Assistance as a Lesser Offense?*, 5 OHIO ST. J. CRIM. L. 427, 433 (2008) (recognizing that accomplices are punished as principals but arguing for lesser liability for minor accomplices).

Joseph's possession of a gun during a drug crime.[33] Because the jury could have found him guilty of the crime under the complicity theory the issue on appeal was whether the jury was adequately instructed on aiding and abetting. A jury thus could have concluded that he either engaged in the drug crime himself with the gun or that he gave aid, encouragement, and assistance to Joseph to do so.

The Court observed that Rosemond had been charged with aiding and abetting a "combination crime."[34] To prove this crime, the government was required to prove both drug trafficking and possession of a gun during the trafficking. Justice Kagan concluded, however, that Rosemond did not have to assist in the commission of both aspects of this combination crime to be guilty of aiding and abetting the crime,[35] but he did have to intend that the principal commit both aspects of the crime.[36] And to prove he intended to aid a drug offense with the use of a weapon, Justice Kagan concluded that Rosemond had to be aware that Joseph possessed a gun *before* he lent his assistance to the drug transaction.[37]

The Court rejected Rosemond's argument that he had to intend that his confederate carry a weapon, as well as commit the drug crime, in order to be guilty of assisting this crime—knowledge that a gun would be involved in the crime he was aiding was sufficient.[38] As Justice Kagan wrote, "What matters for purposes of gauging intent . . . is that the defendant has chosen, with full knowledge, to participate in the illegal scheme—not that, if all had been left to him, he would have planned the identical crime."[39]

The majority found that the trial court erred by failing to require the prosecution to show Rosemond knew of the weapon before arriving for the drug transaction. Advanced knowledge of whether his confederates will be armed, according to the Court, "enables [the defendant] to make the relevant legal (and indeed, moral) choice" of whether he should lend his aid to their activities.[40] As Justice Kagan further explained, "When an accomplice knows beforehand of a confederate's design to carry a gun, he can attempt to alter that plan or, if unsuccessful, withdraw from the enterprise; it is deciding instead to go ahead with his role in the venture that shows his intent to aid an *armed* offense."[41]

Though the majority in *Rosemond* asserted that it did nothing to disturb the doctrine of natural and probable consequences in complicity cases, as it claimed that issue was not before

[33] *Rosemond*, 134 S. Ct. at 1244.
[34] *Id.* at 1248.
[35] *Id.* at 1246–47.
[36] *Id.* at 1249.
[37] *Id.*
[38] *Id.* at 1250.
[39] *Id.*
[40] *Id.* at 1249.
[41] *Id.* The dissent did not directly address the limits on natural and probable consequences that this opinion implicitly created. Justice Alito's dissent, joined by Justice Thomas, addressed only a point made by the majority in responding to a concern the government raised at oral argument that the defendant who observed a bulge in his confederate's jacket during a drug transaction, but who completes the transaction, should be held liable for aiding and abetting a drug crime while possessing a weapon. Justice Kagan's opinion for the majority concluded that walking away from the transaction at that point, as opposed to walking away from the enterprise when a gun was revealed to be part of the plan ahead of time, might increase the risk of violence. *Id.* at 1251. Justice Alito contended that this portion of the opinion confuses duress with mens rea requirements. *Id.* at 1254 (Alito, J. concurring in part and dissenting in part).

the Court, the majority's reasoning is completely at odds with this much criticized doctrine.[42] Knowledge is a much more exacting standard for the prosecution to meet than "natural and probable." Though it is defined using slightly different terms in other contexts, the Model Penal Code's widely accepted definition of "knowledge" requires a "practical[] certain[ty]" that the facts in question are true,[43] whereas a natural and probable fact is one within a "predictable range."[44] *Rosemond* thus permits liability only for those means or consequences of the criminal venture that the defendant is practically certain of when he gives his aid, encouragement, or assistance.

Rosemond has a wide potential persuasive swath, as many state accomplice statutes resemble the federal statute. Justice Kagan's majority opinion observed that the doctrine of natural and probable consequences had been subject to academic criticism and any subsequent effort to use it will be unlikely to overcome the logical force of her *Rosemond* opinion.[45]

II. *BURRAGE* AND THE UNDERPINNINGS OF THE FELONY MURDER DOCTRINE

The felony murder rule has probably been more criticized than the doctrine of natural and probable consequences, but this is doubtlessly because the felony murder rule is more easily graspable and is annually taught to thousands of law students.[46] The objection to the felony murder rule, at its core, is the same as the objection to the doctrine of natural and probable consequences or to the *Pinkerton* doctrine. In each case, the objection is to an increase in the defendant's punishment for the results the defendant caused without considering the defendant's culpability for those harmful results.

The Supreme Court did not consider a traditional felony murder case this Term, but it did consider a federal statute with the same features as a felony murder case. Under the Federal Controlled Substances Act, a defendant must be sentenced to a minimum 20-year prison term if he distributes a Schedule I or II substance and "death or serious bodily injury results from the use of such substance."[47] In *Burrage v. United States*, the defendant challenged his conviction, claiming that the statute did not permit a conviction under this provision if the drugs he provided acted in combination with other factors to increase the odds of death.[48] In agreeing with the defendant, the Court established a new limitation on the scope of results for which one category of felons (namely, drug dealers) could be liable.

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[42] *Id.* at 1248 n.7. Tellingly, Justice Scalia concurred in the entirety of the opinion of the Court with only the exception of footnotes 7 and 8. Supreme Court Justices often refuse to join portions of opinions, but it is very rare for them to take exception to individual footnotes. Justice Scalia therefore did not embrace the majority's conclusion that the opinion did not address the doctrine of natural and probable consequences.
[43] *See* Robin Charlow, *Wilful Ignorance and Criminal Culpability*, 70 TEX. L. REV. 1351, 1373 n.105 (1992) (quoting MODEL PENAL CODE § 2.02(2)(b)(ii) (Official Draft and Revised Comments 1985)).
[44] *See, e.g.*, Roy v. United States, 652 A.2d 1098, 1105 (D.C. 1995).
[45] *See Rosemond*, 134 S.Ct. at 1248 n.7 (observing academic criticism of the doctrine of natural and probable consequences).
[46] The criticisms of the felony murder rule appear to be far more numerous than the criticism of the doctrine of natural and probable consequences, though it would obviously be a difficult claim to support. *See generally*, Rudolph J. Gerber, *The Felony Murder Rule: Conundrum Without Principle*, 31 ARIZ. ST. L.J. 763 (1999) (describing history of felony murder rule and its criticisms).
[47] 21 U.S.C. § 841(a)(1), (b)(1)(A)–(C) (2012).
[48] *See* 134 S. Ct. 881, 886 (2014).

The victim in *Burrage*, Joshua Banka, began his last morning on earth smoking marijuana and injecting himself with oxycodone pills that he had crushed, cooked, and placed in a syringe.[49] Later that day, Marcus Burrage, the petitioner in this case, came to the apartment of Joshua and Tammy Banka and sold them one gram of heroin.[50] Joshua Banka immediately cooked and ingested the heroin, left the apartment, and returned sometime between midnight and 1:00 am when he ingested more heroin.[51] Joshua Banka was found dead in his bathtub the following morning.

A search of Banka's apartment revealed 0.59 grams of heroin and a variety of other drugs including alprazolam, clonazepam, oxycodone, and hydrocodone.[52] Many of these drugs were found to be in Banka's system at the time of his death including heroin, codeine, alprazolam, clonazepam, and oxycodone.[53] Other than the heroin, none of the other drugs were present in Banka's system at levels higher than are normally prescribed for medical purposes.[54]

Two medical experts agreed that a combination of drugs caused Banka's death. One of the experts testified that heroin "was a contributing factor" and, in combination with the other drugs in Banka's system, caused "respiratory and/or central nervous system depression."[55] The other medical expert contended a "mixed drug intoxication" caused the death.[56] Neither could testify that Banka would have died without the heroin, though one expert testified that his death would have been "[v]ery less likely."[57] Each testified, however, that the heroin was a contributing factor to Banka's death. The district court instructed the jury that Burrage was responsible for the death if "the heroin distributed by the Defendant was a contributing cause of Joshua Banka's death."[58] The jury found Burrage responsible for the death, resulting in the 20-year mandatory minimum sentence.[59]

Justice Scalia's majority opinion minted a more exacting causation requirement than has typically been applied in civil, or even criminal, cases. The Court held that the conviction could not stand because the prosecution had been unable to demonstrate that the heroin Burrage sold Banka was the but-for cause of death because the other drugs in Banka's system *could* have killed him without the heroin.[60]

In an ordinary criminal case, if a defendant intentionally sets in motion one mechanism that is sufficient to kill another while another defendant sets in motion another mechanism sufficient to kill another, and these mechanisms act simultaneously to bring about the death, both are guilty of the homicide. As Wayne LaFave has explained it:

> In the criminal law . . . the situation sometimes arises where two causes, each alone sufficient to bring about the harmful result, operate together to cause it.

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[49] *Id.* at 885.
[50] *Id.*
[51] *Id.*
[52] *Id.*
[53] *Id.*
[54] *Id.*
[55] *Id.* (internal quotation marks omitted).
[56] *Id.* at 886 (internal quotation marks omitted).
[57] *Id.*
[58] *Id.* (internal quotation marks omitted).
[59] *Id.*
[60] *Id.* at 892.

> Thus *A* stabs *B*, inflicting a fatal wound; while at the same moment *X*, acting independently, shoots *B* in the head with a gun, also inflicting such a wound; and *B* dies from the combined effects of the two wounds. It is held that *A* has caused *B*'s death . . . . (*X*, of course, being in exactly the same position as *A*, has equally caused *B*'s death.)[61]

As Professor LaFave describes, the best way to describe the question of causation in this instance is not whether the defendant's actions was a "but-for cause" of the harm, but rather, "Was the defendant's conduct a substantial factor in bringing about the forbidden result?"[62]

The majority in *Burrage* explicitly rejected the "substantial factor" test courts use in ordinary criminal cases to determine whether a harmful result has been caused by a defendant's actions.[63] But of course the provision of the Controlled Substances Act considered in *Burrage*—much like the felony murder rule—is not a standard form of liability. The Controlled Substances Act does not require that defendants deal in especially deadly drugs, or sell to youthful users likely to exceed normal dosages, to be liable for the deaths that result from their sales. The additional punishment that follows as a result of a drug customer's death is very much a matter of chance because the statute is indifferent to varying degrees of risk the drug seller took when he provided the drug. Although Professor LaFave has observed that the requirement of causation "has sometimes been used to limit the harshness of the felony-murder rule," the same principles of causation have been used in felony murder cases as in ordinary homicide cases.[64] In other words, under the principles traditionally used in felony murder cases—and in criminal cases generally—Burrage would be regarded as causally responsible for this death.

Justice Scalia's majority opinion in *Burrage* required a more stringent standard of causation than is typically required under ordinary principles of causation and injected something that looks like a mens rea term into the enhancement for a death resulting from a drug sale. If the drug customer's death is attributable solely to the drugs sold, especially if consumed in customary dosages, then the seller was placing his customer's life in considerable risk merely by providing the drugs. If, however, the drug user was consuming a very risky combination, even without the additional drugs the defendant provided, then it is harder to say it was the defendant who took an unreasonable risk with his customer's life that led to the customer's death. The Court's causation standard appears to require the prosecution to prove something that resembles manslaughter to obtain an enhancement for the death.[65]

Burrage has obvious implications for statutes involving deaths from drug sales, most prominently any effort to prosecute those who provided drugs to the late actor Philip Seymour Hoffman.[66] But *Burrage* could potentially have a greater persuasive impact. Felony murder

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[61] LAFAVE, *supra* note 11, § 6.4(b), at 353–54.
[62] *Id.* at 354.
[63] The district court's test, which the Supreme Court rejected, would have allowed a finding that the defendant caused the death if his actions were a "contributing cause" of the death. *Burrage*, 134 S. Ct. at 886, 891 & n.5.
[64] LAFAVE, *supra* note 11, § 14.5(d), at 791.
[65] *See* Michael T. Cahill, *Attempt, Reckless Homicide, and the Design of Criminal Law*, 78 U. COLO. L. REV. 879, 880–82 (2007) (describing state standards from involuntary manslaughter).
[66] CNN's Ashley Banfield and Alan Dershowitz sparred on the television program *Legal View* over whether Hoffman's drug provider should be charged and/or convicted of felony murder. Catherine Taibi, *Ashleigh Banfield: Philip Seymour Hoffman's Dealer 'Deserves to Go Away for Life,'* HUFFINGTON POST (Feb. 3, 2014, 12:45 PM), http://www.huffingtonpost.com/2014/02/03/ashleigh-banfield-philip-seymour-hoffman-dead-drug-dealer-

statutes rely on the same principle as the enhanced sentence under the Controlled Substances Act when a death results from a drug sale. Lower courts could well use *Burrage* to limit the scope of these highly criticized statutes so that some form of culpability is required for death occurring during the commission of a felony.

CONCLUSION

Criminal law is filled with statutes that punish defendants on the basis of the amount of harm caused. Once a defendant has crossed the threshold separating innocent conduct from criminal conduct, the law is often willing to punish the defendant for results that flow from his actions, regardless of his culpability for those actions—if the defendant is in for a penny, he is often in for a pound. Criticism of these statutes is not new, but the Supreme Court's concern about the issue appears to be. *Rosemond* and *Burrage* take small steps to limit this principle in two very important types of statutes—those dealing with group criminality and those following the felony murder model. State and federal courts looking to these opinions as persuasive authority beyond the limited contexts of these cases will be able to find support for requiring that punishments based on harm bear some correlation to the defendant's culpability.

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heroin_n_4718137.html. Although the *Burrage* opinion predated Hoffman's death by only six days, the *Burrage* case was not part of the Banfield/Dershowitz debate. As the ABA Journal observed, *Burrage* received little attention when it was decided. *See* Debra Cassens Weiss, *SCOTUS Ruling Will Make It Tougher to Get Enhanced Sentences for Drug Sales that Result in Deaths*, ABA JOURNAL (Mar. 4, 2014, 1:10 AM), http://www.abajournal.com/news/article/scotus_ruling_will_make_drug_cases_involving_deaths_harder_to_prove/.