conditions for the truth and falsity of the theory in this essay will turn greatly on whether control over non-binding rules works in the public interest, or rather in a plurality of interests, as opposed to being captured by self-interested legal game players. Practical issues like consumer group participation in organizations like the American National Standards Institute, the International Organization for Standardization and industry self-regulation schemes are of import here.

Baldwin’s original thought in working through these types of non-compliers and the rule regime suggested by their compliance problem was that legislators should consider in advance whether regulatees were more likely to be political citizens, amoral calculators, organizationally incompetent or irrational non-compliers in a particular field. Then the form of rules could be crafted appropriately. Black’s more ambitious thought is that “rather than opting for one rule type, rule makers should adopt a tiered approach to rule design in which rule types are combined in such a way that each tries to compensate for the limitations of the other”.

This essay can be read as an extremely modest addition to that ambitious agenda.

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118 Black, above n 31 at 24.

119 There are other agendas rather like this one. For example, Geoffrey Brennan has the agenda of defining regulatory contexts that are minimin and those that are maximax. Minimin institutional design seeks to eliminate the worst-case scenarios — to protect us from knaves as Hobbes would have it. This Hobbesian concern is also one of Schauer’s in Playing by the Rules. Sometimes, in contrast, we want institutions that maximize our best shot (maximax) rather than protect us from the worst case. Universities and Olympic teams are examples, where we might want to maximize Nobel Prizes and gold medals. To some, it might not be clear that we would ever want regulatory institutions to be maximax. Christine Parker’s work shows that indeed quite often we should because fields like protection of the environment are often pulled ahead by the environmental innovators more than pushed from below by regulators who knock out the worst practices of the worst firms. (Christine Parker, The Open Corporation: Self-Regulation and Corporate Citizenship (2002). For Parker, the first stage of internalising for maximax corporate citizenship is dialogue that leads to commitment to a set of principles. Clearly a legal rule of principles accommodates this whereas “[r]ules doom decision making to mediocrity by mandating the inaccessibility of excellence” (Sunstein, above n 12 at 177). In contrast, precise rules are more likely to be needed for the minimin regulatory objective. Rules, as Schauer and others explain, give up some possibility of excellence in exchange for guarding against the most dangerous forms of mediocrity. Again, it may be that the package of binding principles, non-binding rules and rich deliberation might accommodate maximin where it is needed and minimin where it is needed.
While conceding that the but-for test works well in most cases, Honoré, and other contemporary legal scholars, have argued that there are cases in which it will find an act not to be a cause, even though it clearly is. I will argue that, properly understood, none of these cases provide a good reason for rejecting or modifying the but-for test.

The alleged counter-examples to the but-for test are usually called cases of overdetermination. In tort law a case of overdetermination is a situation in which two wrongful acts are followed by a harm; and if either of the wrongful acts had occurred without the other, the harm would still have occurred; but if neither of the wrongful acts had occurred, the harm would not have occurred. The but-for test does seem to lead to counterintuitive results in some cases of overdetermination. I believe, however, that this appearance is deceptive and can be explained away. Previous attempts to defend the but-for test have tried to do so by arguing, in effect, that there is no such thing as overdetermination. I will argue that these attempts to 'get rid of' overdetermination are misguided. The but-for test is quite compatible with the existence of genuine cases of overdetermination.

Trying to get rid of overdetermination

Rollin Perkins, when considering a hypothetical in which someone is struck simultaneously by two bullets, each of which would have been instantly fatal by itself, claims that the but-for test will accurately find that both shooters cause the victim’s death:

Whenever that would not have happened when and as it did happen, had it not been for this, this is an actual cause of that.


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5 The same terminology has entered the philosophical debate about causation through David Lewis, see 'Causation: Postscript E' 199. This debate is closely analogous to that in tort law, although naturally the philosophical debate is not restricted to causation between wrongful acts and harms. Although it is possible that more than two wrongful acts could overdetermine a harm, I think we can assume that such cases will be quite rare. Furthermore it is easy to extend what I say to them. Consequently I will restrict my comments to cases in which there are only two wrongful acts.


7 Arno C Becht and Frank W Miller, The Test of Factual Causation in Negligence and Strict Liability Cases (Washington University, St Louis, 1961) 18. Becht and Miller explicitly endorse what Perkins says about the two-bullets case. See Becht and Miller, ibid 17. They are quoting from the first edition, but the quote remains the same.

8 Lewis, 'Causation: Postscript E', above n 5, 197-98.
Even if you disagree with Lewis's position that a philosophical analysis of causation can be satisfied with getting intuitively correct answers only in 'real world' cases, it seems hard to fault a practical legal test for restricting its ambition in this way.

Nonetheless I do not endorse this strategy. The real problem with it is that it is inconsistent with many intuitively appealing negative causal judgements, because it counts anything that influences the time and/or manner of a harm as a cause of it. This problem is evident in a hypothetical discussed by Becht and Miller in which an inattentive driver hits a pedestrian who runs into the path of the driver's car: if the driver had been attentive, he could have swerved a little, but not enough to avoid causing the pedestrian an equally serious injury. If we adopted the Perkins, Becht and Miller strategy of ascribing very stringent conditions of occurrence to harms, the but-for test would find the driver's inattention to be a cause of the harm. This follows from the fact that they would have to count the injury caused by the actual inattentive driving and the counterfactual injury caused by attentive driving as different harms. Nonetheless, Becht and Miller concede that the intuition of most laymen and lawyers is that the inattentive driver in this example causes no harm.8 While insisting that this intuition 'is actually not true', they are understandably sceptical about the prospects of their position being widely accepted.9 Finally they decide to speak with the vulgar after all; saying that the driver's inattention "was not a cause" after all, and calling the process by which they arrived at this conclusion "equating the injuries".10 Richard W. Wright has objected, surely correctly, that this "introduces an inconsistency into their theory that undermines their use of the minute-detail approach to support a finding of causation in the merged-fires case."11

Becht and Miller might reply that the different treatment of the inattentive-driver case on the one hand, and the merged-fires and simultaneous-bullets cases on the other, is justified by the distinction between causation by an omission in the former case and causation by a positive act in the latter two. But there is no textual support for this suggestion and it seems to lack any independent motivation. I conclude that the need to preserve a distinction between merely affecting how or when a harm takes place, on the one hand, and causing it, on the other, implies that we should not always take harms to have extremely stringent identity conditions. Nor should we modify the but-for test to make the issue whether the harm would have occurred at the time and in the manner it did in the absence of the wrongdoing, rather than whether the harm would have occurred at all in those counterfactual circumstances.12

The two cases of overdetermination that have been considered so far have both been instances of what Wright calls duplicative causation.13 In such cases the causal status of the wrongful acts are symmetrical with respect to the harm they overdetermine; that is, they each have an equal claim to being causes of it. Intuitions tend to differ in such cases about whether we should say that both wrongful acts cause the harm, or whether we should say that neither does, but at least it is clear that there is no reason to say that one does, whereas the other does not. Because it is unclear what to say about such cases they are poor guides to the adequacy of any proposed test for causation. Some laymen and lawyers, for example, will follow Becht and Miller in thinking that both fires in their merged-fires example are causes, some will follow Wright in denying this.14 Intuitions seem equally unclear in the two-bullet case, despite the following argument by Perkins that we must accept that both shooters cause the death:

In the two-bullet case posed, if either shooter can claim correctly that his shot was not in fact a cause of death, so may the other. The unavoidable conclusion would be that the deceased did not in fact die as a result of being shot - which is absurd.16

But this conclusion is avoidable. It does not follow from the premise that the victim did not die as a result of being shot by either shooter that he did not die as a result of being shot by the combination of them; a combination which one can think of in either set-theoretical or mereological terms. Unless there was a conspiracy or other incitement, there seems to be nothing counter-intuitive about the conclusion that neither shooter caused the death. That is not to say that there is anything particularly intuitively appealing about this conclusion either. Intuitions about cases of duplicative causation just seem to be too indecisive to bear the weight of theory. Consequently, the but-for test is compatible with the existence of genuine cases of duplicative causation.

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8 Becht and Miller, above n 7, 29.
9 Ibid.
10 Ibid.
11 Ibid.
12 Wright (1985) above n 4, 1775. Wright describes the Perkins, Becht and Miller approach as a "modification" of the but-for test. I think it is better to see it as combination of that test with a particular view about the identity conditions of harms; namely that an actual harm could not have occurred at a different time nor in a different manner.
13 These two tests would amount to the same thing for all practical purposes; differing only over the metaphysical issue of the identity conditions of harms.
14 Wright, (1985) above n 4, 1775. In the philosophical literature these would be called 'symmetrical overdetermination' or 'symmetrical redundancy'.
15 Ibid 1779.
16 Perkins, above n 6, 689.
Preemption

But not all cases of overdetermination are symmetrical. In a subset of cases of overdetermination which have come to be known as cases of preemption our intuitions seem more decisive. Intuitively it seems reasonably clear that one of them, the preempting cause, does the causing; while the other, the preempted alternative does not: the alternative is not a cause; though it would have been one, if it had not been preempted. I will argue that a correct understanding of the identity conditions of harms in general will show that many putative cases of preemption are not cases of overdetermination at all. In such cases the but-for test will correctly find the so-called preempting cause to be a cause, and the so-called preempted alternative not to be a cause. In other cases I think the intuition that the so-called preempting cause is a genuine cause can be explained away. Which approach will be best may depend not only on the facts of the case, but the extent of the harm being claimed by the plaintiff.

The key to understanding most cases of preemption in the literature is, I submit, to focus on the fact that the preempting cause is a hastener of harm. This approach will not work, however, for the well-known McLaughlin Hypothetical, since, as we shall see, it is not essential to it that the preempting cause does hasten harm. Below, I have developed a strategy for handling the normal cases in which the preempting cause is a hastener of harm. A different strategy will inevitably be required for the McLaughlin Hypothetical.

Preemption as causing by hastening

In most examples of preemption in the legal literature, it is essential to the story that the harm (usually a death) occurs earlier than it would have without the preempting cause. A couple of examples: the defendant mortally burns the victim but before the victim dies of the burns someone else kills him with a blow to the head; the defendant pushes the victim from a tall building but on the way down the victim is shot and killed instantly by another. In response to such examples I will return to the idea of ascribing stringent, though not this time too stringent, identity conditions to the harm. In such cases there is no need to appeal to a detailed description of the manner in which it occurred; an idea which has already been undermined by drawing attention to the distinction between causing an event and merely affecting how it happens. Instead we can restrict ourselves to a detailed description of the time at which the harm occurs, since it would have been different, but for the preempting cause.

However, we must be careful. We do not want to say, for example, that a counterfactual death that occurs at any time other than an actual one is ipso facto a different death. That would entail that saving a person's life was causing that person's eventual death; since that death would not have occurred but for the life-saving action. Just as there is a distinction between affecting the manner of a death and causing it, there is a distinction between affecting the time of a death and causing it.

Arguably this distinction is only legitimate in one temporal direction. Although we typically do not want to say that delaying death is causing it, we typically do want to say that hastening death is causing it. Someone who brings it about that instead of dying now you die later is usually a life-saver, rather than a killer, and someone who brings it about that you die an "untimely" death is usually a killer, even though you would have died later anyway. We can accommodate this asymmetry by distinguishing actual deaths from any counterfactual deaths which would have occurred later than them, while identifying actual deaths with counterfactual deaths (of the same person) which would have occurred earlier than them. This will mean that the but-for test will find the preempting causes (which have been considered so far) to be genuine causes, without the undesirable side-effect of finding life-saving actions to be causes of the deaths they delay.

In the following passage Tony Honore makes it clear that he would reject this suggestion:

What has to be shown in a tort action is that the defendant's wrongful act caused the harm, in this case the victim's death. We know from the way in which the law structures actions for wrongful

17 Wright (1985) above n 4, 17; Wright (1988) above n 4, 1024. The same terminology has entered the philosophical debate about causation through Lewis, see ‘Causation: Postscript E’, above n 5, 199. Just as cases of preemption have been held to undermine the but-for test by much of the legal literature, cases of preemption have been held to refute 'naive' counterfactual analyses of causation by much of the philosophical literature. For an argument against this philosophical orthodoxy see my 'Preempting Preemption' in Jonathan Collins, LA Paul, and Ned Hall (eds), Causation and Counterfactuals (MIT Press, Boston, 2001).

18 Although my position is that strictly speaking there is no such thing as preemption, in what follows I will use the term 'preemption' to refer to putative examples of preemption.

19 This is also true of the parallel philosophical literature. The widespread use of examples of killing to illustrate theories of causation is easier to understand in the legal literature.

20 State v Scates, 50 N.C. 409 (N.C. 1858).

death that what is legally relevant is death, not death at this or that
time or place or by this or that process.22

This seems to assume incorrectly that we can individuate harms
independently of when, where or how they occur. It is particularly clear in
cases in which the harm is death that we cannot draw a clear-cut distinction
between causing it on the one hand, and causing it to occur at a certain time
and place or by a certain process on the other. This is why a lawyer cannot
legitimately argue that his client's so-called causing of death was instead a
hastening of death; that he is guilty merely of causing death at a certain time
and place and by a certain process, rather than many years later in bed and
of old age.

We ordinarily think that the earlier death occurs, all else being equal,
the more of a harm it is. Furthermore, we ordinarily think of causing death
to occur at an earlier time than it otherwise would have as causing death
simpliciter. It is true that some lawyers and lay people may be reluctant to
describe a person who hastens death by a matter of minutes or hours as a
killer, especially if he or she does so with a benevolent motive. This
reluctance may be increased, if the hastening of death is the result of an
omission rather than a positive act. Does a nurse kill a patient by taking him
off life-support at his request when it is clear that he is going to die soon
anyway? Does a doctor kill a patient when she slightly hastens that patient's
death by giving him a dose of morphine with the sole intention of relieving
his pain? Of course people opposed to such practices will say 'Yes!'. I
submit that those who are in favour of them should overcome their
reluctance and agree. This shared use of terminology makes a meaningful
debate about whether or when mercy killing can be justified possible.

II

We have already seen that unless we assume time discounting, the
hastening of death is the result of an omission rather than an act. Of
omission rather than a positive act. It is true that some lawyers and lay people may be reluctant to
describe a person who hastens death by a matter of minutes or hours as a
killer, especially if he or she does so with a benevolent motive. This
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reluctance and agree. This shared use of terminology makes a meaningful
debate about whether or when mercy killing can be justified possible.

My suggestion that a counterfactual death which occurs later than an
actual one should always count as a different death is not an ad hoc
stipulation designed to protect the but-for test against troublesome cases of

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22 Honore, above n 3, 378. Honore cites Wright (1985) above n 4, 1777-8 and
Wright (1988) above n 4, 1025-6, as authority for this claim about the way
in which the law is structured. I will leave it to the reader to determine
whether this is a reasonable interpretation of Wright's position in those
passages. I do not think it is; though it is easy to see how they could be
interpreted that way.

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preemption. Quite independently of this, it is supported by the plausible
view that to hasten death is always to cause death.23

But of course not all harms are deaths. Hart and Honore have
discussed a hypothetical in which the defendant starts a fire which would
have destroyed the victim's property were it not for a flood which puts out
the fire and destroys the property instead.24 Because each of us undergoes
exactly one death, it is particularly clear that causing death is (at least
typically) hastening death. This point about hastening is, however, not true
of harms in general. One can cause harm without hastening harm.25 I
submit, however, that one cannot hasten harm without causing harm; which
is not to say, of course, that one cannot hasten harm in order to avoid a
greater harm. Consequently I propose the general thesis that to hasten harm
is to cause harm. This accords with the human propensity for "time-
discounting", that is, of considering a harm in the immediate future to be
ipso facto a greater harm than an otherwise similar harm in the more distant
future. Many philosophers consider time discounting to be a species of
irrationality.26 Legal theory cannot afford, however, to treat actual human
attitudes and values so lightly, just as it cannot afford to allow consideration
of the inevitability of death to persuade it that there are no such things as
killers.

Of course hastening is a matter of degree. In the case under
consideration, the destruction of the house is presumably hastened only
very slightly by the flood. Hart and Honore claim that a person whose
negligence was responsible for the flood should bear sole liability for the
destruction of the property. I think that person could legitimately respond
that the destruction of a property that was about to burn down anyway is
little or no harm at all. It would only be a harm, if the property would be
been of benefit to the victim during the interval between the time it was in
fact destroyed and the time it otherwise would have burnt down. Similarly,
in the other cases of preemption we have considered, the killers could
concede that they caused death, but plausibly argue that the death in

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22 I say that hastening death is a sufficient condition for causing death. I am
tempted to say that it is also a necessary condition. I will not commit myself
to this stronger position however. Depending on how some of the details are
filled out, the McLaughlin Hypothetical, which I will shortly discuss, may
be a case in which a killer delays, rather than hastens, death.

24 H L A Hart and T Honore, Causation in the Law (2nd ed, Clarendon Press,
Oxford) 239.

25 For a more general discussion of the relation between hastening and causing
see Penelope Mackie, 'Causing, Delaying, and Hastening: Do Rains Cause

26 See Norman Daniels, Just Health Care, (Cambridge University Press,
Cambridge, 1985) 99, and Robert Goodin, No Smoking: the Ethical Issues,
question was not a great harm, since the victim would have died shortly afterwards anyway.

The McLaughlin Hypothetical

Not all cases of preemption in the literature are amenable to this treatment. In the well known McLaughlin hypothetical: person A seeks to kill person C by poisoning water needed by C to cross a desert, but, before C has occasion to have a drink, person B drains the poisoned water from the keg and C dies of thirst. The standard view of this case is that B, and not A, causes C's death; that is, that B's action is the preempting cause and A's action is the preempted alternative. It is not essential to this hypothetical, however, that B's action hastens death. In fact it will make the case more interesting if we assume that the poison was sufficiently fast-acting that B's action delayed C's death.

Not everyone, however, shares the standard view of this case. Hart and Honoré have long held that neither A nor B cause death. Honoré has recently recanted and joined the standard view. His reason for changing his mind is, however, not convincing:

My current reasoning is that B's conduct introduces a condition, lack of water, that in the circumstances, including the absence of an alternative water supply, is sufficient to bring about and does bring about C's death from dehydration.

But it appears that A's conduct also introduces a condition that in the circumstances is sufficient to bring about C's death, although not his death from dehydration.

This illustrates the fact that our considered judgements about the causes of what seems pre-theoretically to be a single event (or state, or

[27] (1925-6) 39 Harvard Law Review 149, 155 fn 25. In McLaughlin's original example B emplaces the water keg and fills it with salt. Hart and Honoré's Causation in the Law are responsible for the story as I am presenting it. This is the form in which it is now usually discussed.

The possibility of the preempting cause being a delay rather than a hastener is characteristic of what the parallel philosophical literature has called early preemption, in which the alternative (ie, preempted) process is cut off as a result of a side-effect of the main (ie, preempting) process. This contrasts with the previous examples of late preemption, in which the alternative is cut off by the premature occurrence of the effect itself. See Lewis 'Causation: Postscript E' above n 5.


I leave it to the reader to decide how or whether Honoré's appeal to the fact that death was by dehydration can be reconciled with the previous quotation, drawn from the same page, in which he says that "what is legally relevant is death, not death at this or that time or place or by this or that process."


[29] This phenomenon has given rise to a philosophical debate. See Alvin I Goldman, A Theory of Human Action, (Prentice-Hall, New Jersey, 1970) ch 1, would claim that it means that C's death and C's death by dehydration are in fact different events. Others would claim that, since C's death and C's death by dehydration are obviously the same event, the most fundamental kind of causal relation must be between something other than events. Thus Jonathan Bennett has claimed that it is a relation between facts, see Events and Their Names (Hackett, 1988), and Christopher Hitchcock has claimed that it is a relation between events-in-contrast-to-alternatives, see The Role of Contrast in Causal and Explanatory Claims' (1990) 85 Synthese 395-419. I would argue that we can (and should) accept that there is a sense in which C's death and C's death by dehydration are different events, while also doing to justice to the intuition that they are the same event, see my 'Preempting Premption' above n 17. Some sense of how this is possible can be gained by comparing it to the 'issue' of whether London and Greater London are different cities.

[30] The last-wrongdoer rule, for example, which was explicitly justified entirely in terms of policy, states that the wrongdoer closest in time to the effect was alone responsible for it. This implies that B is guilty of murder. The last-wrongdoer rule is discussed in Laurence Eldridge, 'Culpabil
detailed discussion of the subtle problem of why we treat unsuccessful assassins more leniently than successful ones, which is beyond the scope of this article.\textsuperscript{34} The but-for test does not help us to resolve the issue of whether B is a killer, but at least there seems no reason to believe that it would lead to a mistaken verdict.

If I am right that legitimate intuitions about the causes of an event may depend on how that event is described, then we should be prepared to make a distinction between the factors which cause C to be harmed (the concern of tort law), and the factors which cause C to die (the concern of criminal law), even though the harm in this case is death. I think that whether or not B causes C harm depends on the prosaic issue of whether or not death by dehydration is more of a harm than death by poison. If it is, then B causes the harm in question; if it is not, then neither A nor B cause it. If death by poison were sufficiently painful, B could plausibly argue that he did not cause any harm to the already doomed C. I have left open the possibility that B could be have killed C, without doing C any harm. This may seem strange, but the concept of mercy killing already makes it plain that there is room for this possibility.

Conclusion

I have tried to show that cases of overdetermination can be reconciled with the but-for test without giving up any compelling intuitions or legal principles. In cases of duplicative causation we want to say that both wrongs cause the harm, or that neither does. It is tempting to grab the former horn of this dilemma, because it may seem that otherwise we would be committed to the absurd view that the harm is uncaused. This conclusion can be resisted, however, by insisting that although neither of the wrongs causes the harm, the combination of them does.

Whether a case is an instance of overdetermination or not may depend on the extent of the harm being claimed by the plaintiff. In many cases of preemption we should say that one of the wrongs causes harm, because to hasten harm is to cause harm. In such cases the preempting cause is responsible for a lesser harm than he or she would be, if it were not for the preempted alternative. This lesser harm is not overdetermined; consequently the but-for test will correctly find the preempting cause to be responsible for it.

\textsuperscript{34} See Leo Katz, "Why the Successful Assassin is More Wicked than the Unsuccessful One" (2000) 88 California Law Review 791-812.


\textsuperscript{36} (1991) 171 CLR 506.