TWO KINDS OF COINCIDENCE: WHY COURTS DISTINGUISH DEPENDENT FROM INDEPENDENT INTERVENING CAUSES

Eric A. Johnson[*]*

INTRODUCTION

In *Utah v. Strieff*,[1] the Supreme Court declined to suppress evidence that the police had obtained as the result of an unlawful investigatory stop.[2] The Court reasoned that "the officer's discovery of the arrest warrant," which had intervened between the unlawful stop and the resulting search incident to arrest, had "attenuated the connection between the unlawful stop and the evidence seized incident to arrest," thus making the evidence admissible.[3] In dissent, however, Justice Kagan challenged the Court's conclusion that the officer's discovery of the warrant had "br[oken] the causal chain."[4] The officer's discovery of the warrant, she argued, far from being the kind of intervening circumstance that is sufficient to break the causal chain, was itself an "effect[]," a "consequence," of the unlawful stop.[5] "[R]ather than breaking the causal chain," she said, "predictable effects (e.g., X leads naturally to Y leads naturally to Z) are its very links."[6]

Justice Kagan's intuition—that the weight assigned to an intervening cause ought to depend in part on whether it was itself an "effect" of the actor's wrongdoing—is not unique to her. Courts and scholars long have distinguished dependent intervening causes from independent intervening causes.[7] In the usual formulation, an intervening cause will qualify as

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[*] Professor of Law and Associate Dean for Academic Affairs, University of Illinois College of Law.

1 Utah v. Strieff, 136 S. Ct. 2056 (2016).

2 *Id.* at 2064.

3 *Id.* at 2059.

4 *Id.* at 2072 (Kagan, J., dissenting).

5 *Id.* at 2073.

6 *Id.*; *cf. Strieff*, 136 S. Ct. at 2066 (Sotomayor, J., dissenting) ("The warrant check . . . was not an 'intervening circumstance' separating the stop from the search for drugs. It was part and parcel of the officer's illegal 'expedition for evidence in the hope that something might turn up.'"); MICHAEL S. MOORE, CAUSATION AND RESPONSIBILITY 236 (2009) ("If [the intervening event is a product of the defendant's act], then the event is merely part of the mechanism or means by which defendant's act caused the harm . . .").

7 *See* RESTATEMENT (SECOND) OF TORTS § 441 cmt. c (AM. LAW INST. 1965); JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 14.03[C][3] (7th ed. 2015); WAYNE LAFAVE, SUBSTANTIVE CRIMINAL LAW § 6.4(c) (2d ed. 2003).

dependent if it is itself a "product of defendant's act"[8]—if it "operates in response to or is a reaction to the stimulus of a situation for which the actor has made himself responsible by his [wrongful] conduct."[9] In contrast, an intervening cause will qualify as independent if it is *not* itself a product of the defendant's act.[10] Courts, particularly in criminal cases, often have relied on this distinction in deciding how much weight to assign to an intervening cause.[11] An independent intervening cause, they have said, "will break the chain of legal cause unless it was foreseeable."[12] A dependent intervening cause will not break the causal chain unless it was downright "abnormal" or freakish.[13]

This, in any event, is the traditional view. Nowadays courts disagree, as do scholars, about whether the distinction between dependent and independent intervening causes deserves a place in proximate cause analysis.[14] Some courts, when faced with proximate cause issues, apply a straight "foreseeability" or "probability" test without bothering to classify individual intervening events as dependent or independent.[15] Additionally, some courts and scholars affirmatively have criticized as archaic or confusing

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8 MOORE, *supra* note 6, at 236 (defining an independent intervening cause as one that is "not itself . . . the product of defendant's act").

9 RESTATEMENT (SECOND) OF TORTS § 441 cmt. c. (AM. LAW INST. 1965).

10 *Id.*

11 *See, e.g.*, State v. Baker, 607 S.W.2d 153, 157 (Mo. 1980) (holding that no "independent intervening cause" had cut off defendant's liability for victim's death: "It was defendant who initiated the gunfire and who set into motion the chain of events which caused Paula Campbell's death. The shooting of Paula Campbell by Ernest Campbell was not an independent intervening cause because it was the shots fired by the felons that provoked Ernest's reaction of shooting after being startled."); Leibreich v. A.J. Refrigeration, Inc., 617 N.E.2d 1068, 1071–72 (Ohio 1993) (quoting R.H. Macy & Co. v. Otis Elevator Co. 554 N.E.2d 1313, syllabus (Ohio 1990)) ("'The causal connection of the first act of negligence is broken and superseded by the second, *only if the intervening negligent act is both new and independent*. The term "independent" means the absence of any connection or relationship of cause and effect between the original and subsequent act of negligence.'"); Brown v. Com., 685 S.E.2d 43, 46 (Va. 2009) ("When a defendant's criminally negligent conduct 'put[s] into operation' an intervening cause of a death, the defendant remains criminally responsible for that death. . . . In contrast, an independent, intervening act that alone causes the victim's injury or death is recognized as a superseding cause that will exempt the defendant from criminal responsibility for his or her conduct.").

12 Kibbe v. Henderson, 534 F.2d 493, 498 n.6 (2d Cir. 1976) (quoting WAYNE R. LAFAVE & AUSTIN W. SCOTT, CRIMINAL LAW 257-263 (1972)), *rev'd on other grounds*, 431 U.S. 145 (1977).

13 *Id.*

14 *See* 1 CV OHIO JURY INSTRUCTIONS (2004); 7 TENN. PRAC. PATTERN JURY INSTR. –CRIM (TENN. JUD. CONF. 2017); 6 WASH. PATTERN JURY INSTR. CIV. (6th ed. 2013); RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM (AM. LAW INST. 2010).

15 *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 29 cmt. j (AM. LAW INST. 2010) ("Many jurisdictions employ a 'foreseeability' test for proximate cause, and in negligence actions such a rule is essentially consistent with the standard set forth in this Section."); GUYORA BINDER, CRIMINAL LAW 211 (2016) ("Over time, courts increasingly saw both natural events and human acts as intervening insofar as unforeseeable. Once foreseeability tests prevailed, it seemed simpler to ignore intervening events and just focus on the foreseeability of the result itself.").

the practice of distinguishing dependent from independent intervening causes.[16] Other courts and scholars, though, adhere to the traditional view.[17] For example, Professor LaFave's influential criminal law treatise treats the distinction between dependent and independent intervening causes as central to the law of proximate cause.[18] So does Professor Dressler's popular student hornbook.[19] Appellate courts, too, still invoke the distinction regularly.[20] And trial courts still instruct juries regularly that an intervening cause, in order to cut off the wrongdoer's liability, must be "independent" of the wrongdoer's conduct.[21]

Of course, Justice Kagan did not mean to weigh in on this controversy when she dismissed the critical intervening event in *Strieff* as a mere "effect" of the officer's wrongdoing.[22] She does not appear even to have been aware that courts traditionally have distinguished dependent from independent intervening causes.[23] But that is just what makes her *Strieff* dissent so interesting: Justice Kagan appears to have found this distinction utterly intuitive, and to have assumed that her readers likewise would find it

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16 *See* DAN B. DOBBS ET AL., HORNBOOK ON TORTS § 15.9, at 352–53 (2d ed. 2016) (arguing that the classificatory apparatus of superseding cause analysis merely "add[s] one more layer of confusion to the [proximate cause] analysis"); *id.* § 15.21, at 376–77 (urging the abolition of superseding cause analysis); JOHN G. FLEMING, THE LAW OF TORTS 192 (4th ed. 1971) (characterizing this and related distinctions as "only a screen behind which judges have all too often in the past retreated to avoid the irksome task of articulating the real grounds for their decision"); Jahnke-Leland v. State, No. A-4144, 1993 WL 13156690, at *3 (Alaska Ct. App. Apr. 21, 1993) ("[The trial judge] could certainly determine that the discussion of 'dependent intervening cause' and 'independent intervening cause' would not be helpful to the jury."); Commonwealth v. Askew, 536 N.E.2d 341, 343 (Mass. 1989) (concluding that these categories, "although perhaps helpful . . . for legal analysis and discussion, do not help a jury to understand the concept of proximate cause.").

17 *See* Leibreich, 617 N.E.2d 1068; Baker, 607 S.W.2d 153; Brown, 685 S.E.2d 43; DRESSLER, *supra* note 7; LAFAVE, *supra* note 7.

18 LAFAVE, *supra* note 7, § 6.4(c).

19 DRESSLER, *supra* note 7, § 14.03[C][3].

20 *See* Leibreich v. A.J. Refrigeration, Inc., 617 N.E.2d 1068, 1071–72 (Ohio 1993); State v. Baker, 607 S.W.2d 153, 157 (Mo. 1980); Brown v. Com., 685 S.E.2d 43, 46 (Va. 2009).

21 *See, e.g.*, 1 CV OHIO JURY INSTRUCTIONS 405.05 (2004) (instructing jury that the "[c]ausal connection is broken when another's (negligent) (intentional) act, which could not have been reasonably foreseen and is fully independent of the defendant's negligence, intervenes and completely removes the effect of the defendant's negligence, and becomes itself the proximate cause of the injury."); 7 TENN. PRAC. PATTERN JURY INSTR. – CRIM. 42.14 (TENN. JUD. CONF. 2017) ("[I]t is a defense to homicide if the proof shows that the death was caused by an independent intervening act [or omission] of the deceased or another which the defendant, in the exercise of ordinary care, could not reasonably have anticipated as likely to happen."); 6 WASH. PATTERN JURY INSTR. CIV. 15.05 (6th ed. 2013) ("A superseding cause is a new independent cause that breaks the chain of proximate causation between a defendant's negligence and an *[injury] [event]*."); *see also* Boyle v. State, No. A-9833, 2009 WL 3233720, at *3 n.6 (Alaska Ct. App. Oct. 7, 2009) (quoting the trial court's instructions to the jury, which provided in part: "If you find that there was an independent intervening act that the defendant could not have foreseen, then you must find that the defendant'[s] actions were not the proximate cause of death.").

22 Utah v. Strieff, 136 S. Ct. 2056, 2073 (2016) (Kagan, J., dissenting).

23 *See infra* notes 30–43and accompanying text.

intuitive. The intuitive appeal of this distinction to Justice Kagan—and in a setting far removed from the distinction's origins in tort and substantive criminal law—suggests that the distinction cannot be written off as, say, an artifact of long-superseded tort doctrines limiting allocation of fault among tortfeasors.[24]

This does not mean, necessarily, that courts ought routinely to classify intervening causes as dependent or independent. To decide whether intuitions about dependence and independence deserve a separate place in proximate cause analysis, we need to know what is behind these intuitions. For starters, it is possible that these intuitions, however deeply rooted, are just *wrong*—that they are "moral equivalents of optical illusions."[25] It is also possible that, contrary to what courts and scholars generally have supposed,[26] intuitions about dependence and independence really are intuitions about *probability* and so are adequately captured by foreseeability tests. Finally, it is possible that these shared intuitions about dependence and independence are *not* wrong and are *not* about probability, and that courts accordingly ought to distinguish dependent from independent intervening causes both in their analyses and in their instructions to juries. Again, it all depends on what is behind these intuitions.

This is the subject to which this Article is addressed. No one ever has tried very hard to explain what is behind the distinction between dependent and independent intervening causes. Adherents of the distinction have tended merely to invoke "common sense."[27] Critics of the distinction, meanwhile,

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24 *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 34 at cmt. a (AM. LAW INST. 2010) ("The advent of more refined tools for apportionment of liability . . . has undermined one important rationale for [superseding cause analysis]: the use of scope of liability to prevent a modestly negligent tortfeasor from being held liable for the entirety of another's harm when the tortious acts of other, more culpable persons were also a cause of the harm."); DOBBS, *supra* note 16, § 15.21 (raising the question whether "superseding cause analysis was developed to assist plaintiffs whose fault in the old regime of contributory negligence would have completely barred recovery, and [whether] with the coming of comparative fault allocations, this is no longer necessary.").

25 Ross Rudolph, *Obligations: Science and Philosophy in the Political Writings of Hobbes*, in HOBBES'S 'SCIENCE OF NATURAL JUSTICE' 57, 62 (Craig Walton & Paul J. Johnson eds., 1987) ("There are moral equivalents of optical illusions, 'for all men are by nature provided of notable multiplying glasses, that is their passions, self-love.'").

26 *See* MOORE, *supra* note 6, at 236 ("It is natural that those who favor a foreseeability approach to proximate causation will find [the distinction between preexisting conditions and intervening events, which underlies the distinction between dependent and independent intervening causes] problematic. After all, whether an extraordinarily unlikely thing occurs before or after a defendant's act, and whether that thing is an event or a state, makes no difference to the foreseeability of the harm that such a state or event makes possible."); Henry T. Terry, *Proximate Consequences in the Law of Torts*, 28 HARV. L. REV. 10, 17 (1914) (("There are three, and only three, tests of proximateness, namely, intention, probability and the non-intervention of an independent cause.") (treating the distinction between dependent and independent intervening causes as fundamentally distinct from probability)).

27 *See* LAFAVE, *supra* note 7, § 6.4(3) at 482–83 ("As common sense would suggest, the perimeters of legal cause are more closely drawn when the intervening cause was a matter of coincidence rather than

have done no more than suggest that the distinction is rooted in outmoded concerns about the allocation of fault among tortfeasors.[28] This Article is meant to fill this gap in the literature. The Article argues that the explanation for judges' intuitions about dependent and independent intervening causes ultimately is rooted in probability. In short, it argues that the kind of coincidence that typically is associated with independent intervening causes is more improbable than the kind of coincidence that typically is associated with dependent intervening causes.

The Article begins, in Part I, by explaining the basic distinction between dependent and independent intervening causes. Part II argues that this basic distinction is rooted in a deeper distinction between two kinds of coincidences: (1) the temporal concurrence of the wrongdoer's conduct, or of the events set in motion by the wrongdoer's conduct, with an independent intervening event; and (2) the temporal concurrence of the wrongdoer's conduct with a preexisting condition. Part III argues that the first of these two kinds of coincidences is, as a general rule, more improbable than the second, and that this difference in probability is what underlies the courts' practice of distinguishing dependent and independent intervening causes. Finally, the Conclusion briefly explores the implications of this explanation.

I. THE DISTINCTION BETWEEN DEPENDENT AND INDEPENDENT INTERVENING CAUSES

In the law, causation generally is regarded as a "hybrid concept, consisting of two constituent parts."[29] This is true in the law of torts, for example, where the plaintiff must prove that the defendant's wrongdoing was both a cause-in-fact and a proximate cause of the plaintiff's injuries to recover damages.[30] Likewise, in criminal law, the government usually must prove the same two elements—cause-in-fact and proximate cause—to convict the defendant of result-based offenses like murder and manslaughter.[31] Even in the law of search and seizure, which seems far

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response."); MOORE, *supra* note 6, at 238 (asserting that the distinction between dependent and independent intervening causes is "quite in accordance with case law and common-sense notions of causation"); Richard W. Wright, *The Grounds and Extent of Legal Responsibility*, 40 SAN DIEGO L. REV. 1425, 1472 (2003) (("There is less reason to let a defendant who tortiously caused the plaintiff's injury to escape liability . . . if the intervening cause was a 'dependent' reaction or response to the risky situation created by the defendant rather than something that occurred independently of the risky situation created by the defendant.") (summarizing the rationale underlying the distinction)).

28 DOBBS, *supra* note 16, § 15.21.

29 Burrage v. United States, 134 S. Ct. 881, 887 (2014).

30 DOBBS, *supra* note 16, §§ 14.2, 15.1; *see also* W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS §§ 41, 42 (5th ed. 1984) [hereinafter *PROSSER AND KEETON*].

31 *Burrage*, 134 S. Ct. at 887 (("When a crime requires 'not merely conduct but also a specified result of conduct,' a defendant generally may not be convicted unless his conduct is 'both (1) the actual

removed doctrinally from tort and criminal law, the question whether unlawfully obtained evidence is subject to suppression depends on a similar twofold inquiry: (1) whether the government would not have obtained the evidence but for the government's wrongdoing; and (2) whether the connection between the wrongdoing and the evidence is not so attenuated as to dissipate the taint of the wrongdoing.[32]

What concerns us here is the second of causation's "two constituent parts," which usually is called "proximate cause."[33] The term *proximate cause* is something of a misnomer. As Joseph Beale said, proximate cause has little, if anything, to do with spatial proximity: if a defendant mails poisoned candy from California to Delaware, where it is eaten by his intended victim with fatal consequences, the defendant's conduct will be treated as "the cause of death, though cause and effect were a continent apart."[34] Nor, really, does proximate cause have anything much to do with temporal proximity, as is evident in the widespread abrogation of the common-law "year and a day" rule in homicide.[35] As Beale said, the "proximity" required is not spatial and temporal proximity, but "proximity in causation."[36] In other words, what matters is the number and kind of the events that mediate the causal connection.[37]

Whether these mediating events will cut off the wrongdoer's liability depends in part on the probability, or "foreseeability," of the events, either individually or collectively.[38] Some courts focus their analyses on the

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cause, and (2) the "legal" cause (often called the "proximate cause") of the result.'") (quoting LAFAVE, *supra* note 7, § 6.4(a))).

32 *See* Segura v. United States, 468 U.S. 796, 815 (1984) ("[E]vidence will not be excluded as 'fruit' unless the illegality is at least the 'but for' cause of the discovery of the evidence."); United States v. Smith, 155 F.3d 1051, 1060 (9th Cir. 1998) (describing attenuation analysis in the law of search and seizure as "akin to a proximate causation analysis."); *see generally* Eric A. Johnson, *Causal Relevance in the Law of Search and Seizure*, 88 B.U. L. REV. 113, 115–16 (2008) (describing the operation of the twofold causation requirement in the law of search and seizure).

33 *See* DOBBS, *supra* note 16, § 15.1, at 338 ("This requirement is commonly known as proximate cause, although that well-worn term has been justly criticized for years as inaccurate, misleading, and confusing, and has been rejected by the Third Restatement of Torts, as it was in the Second.").

34 Joseph H. Beale, *The Proximate Consequences of an Act*, 33 HARV. L. REV. 633, 642 (1920); *cf.* DOBBS, *supra* note 16, § 15.13 ("Physical distance or the passage of time between the defendant's conduct and the ensuing injury is not, as such, determinative, but may be relevant in several specific ways.").

35 *See* LAFAVE, *supra* note 7, § 6.4(i).

36 Beale, *supra* note 34, at 643 ("It must be clear that the proximity called for by the principle under discussion is proximity in causation; too many new causes must not intervene between the human act and the result under consideration.").

37 *See id.*; James A. McLaughlin, *Proximate Cause*, 39 HARV. L. REV. 149, 179 (1925) ("It is generally agreed that probability or foreseeability is among the most important considerations in determining questions of proximate cause.").

38 *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 29 cmt. j (AM. LAW INST. 2010) (identifying the "foreseeability" test as the dominant test of proximate cause in tort); BINDER, *supra* note 15, at 211 (identifying "the foreseeability of the result" as the principal test of proximate cause in criminal law); *see also* Terry, *supra* note 26, at 17-20 (explaining the "probability"

probability of individual "intervening causes."[39] That is, they focus their analyses on individual temporally intervening events without which the wrongdoer's act would not have caused the result.[40] By comparison, other courts focus holistically on the entire causal sequence or "chain" rather than on individual "links."[41] It comes to much the same thing: the probability of any particular causal sequence depends directly on the probability of the individual events that contribute to or constitute the sequence.[42]

Probability is not all that matters, however, at least according to conventional wisdom.[43] Traditionally, courts also have inquired of intervening causes whether, probable or not, they were themselves "produced by the wrongful act or omission" or instead were "independent of it."[44] This

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component of proximate cause analysis); McLaughlin, *supra* note 37, at 179 ("It is generally agreed that probability or foreseeability is among the most important considerations in determining questions of proximate cause.").

39 *See* DOBBS, *supra* note 16, § 15.1, at 339 ("In these intervening cause cases, courts may phrase the foreseeability test somewhat narrowly, by asking whether the intervening cause itself was foreseeable rather than by asking whether the general type of harm was foreseeable."); FLEMING, *supra* note 16, at 191 ("[I]t has been a long-standing judicial technique to isolate certain intervening forces which, in combination with the defendant's default, precipitate or aggravate the plaintiff's injury.").

40 *See* Wright, *supra* note 27, at 1468 (explaining that an event will qualify as an intervening cause only if it "intervened [temporally] between the defendant's tortious conduct and the plaintiff's injury" and "was a necessary (but-for) cause of the plaintiff's injury").

41 MODEL PENAL CODE & COMMENTARIES § 2.03 cmt. 3, n.13 (AM. LAW INST. 1985) (in deciding whether the defendant's conduct counts as a proximate cause of the result, courts must focus on whether the probable risk associated with the defendant's conduct encompassed the "actual result" defined according to "its specific character and manner of occurrence.").

42 *See* DOBBS, *supra* note 16, § 15.1, at 339 ("Under either version of the foreseeability test, courts appear to be working toward the same central idea, that the defendant's liability is limited to those harms risked by his negligence, so that he escapes liability altogether for those harms that were not reasonably foreseeable at the time he acted."); Terry, *supra* note 26, at 28 ("If the probability of the definitional consequence following the act was ½ and the probability of the violative consequence following the definitional one was also ½, then the probability of the violative consequence being produced by the act was at the outset only ½ x ½, or ¼.").

43 Terry, *supra* note 26, at 17, 20 (identifying the distinction between dependent and independent intervening causes as separate from the probability requirement); *see also* MOORE, *supra* note 7, at 236 (arguing that whether an intervening cause is dependent or independent "makes no difference to the foreseeability of the harm that such a state or event makes possible").

44 *See* Purcell v. St. Paul City Ry. Co., 50 N.W. 1034, 1034–35 (Minn. 1892) ("The new, independent, intervening cause [if it is to break the causal chain and cut off liability] must be one not produced by the wrongful act or omission, but independent of it, and adequate to bring about the injurious result. Whether the natural connection of events was maintained, or was broken by such new, independent cause, is generally a question for the jury."); *see also* Milwaukee & St. Paul Ry. Co. v. Kellogg, 94 U.S. 469, 475 (1876) ("The inquiry must, therefore, always be whether there was any intermediate cause disconnected from the primary fault, and self-operating, which produced the injury."); Marble v. City of Worcester, 70 Mass. 395, 412 (1855) (Thomas, J., dissenting) ("The rule, as a practical one, may be thus stated: Having discovered an efficient, adequate cause, that is to be deemed the true cause, unless some new cause, not incidental to, but independent of the first, shall be found to intervene between it and the result."); Behling v. Sw. Pa. Pipe Lines, 28 A. 777, 778 (Pa. 1894) ("A proximate cause is one which in

distinction between dependent and independent intervening causes is illustrated by *Utah v. Strieff*,[45] where the Court held that the officer's discovery of an arrest warrant for Strieff, which intervened causally between the unlawful stop and the resulting search incident to arrest, had "broken" the causal connection between the stop and the search.[46] In *Strieff*, Officer Fackrell's discovery that Strieff had an outstanding warrant for a traffic violation was a "dependent" intervening cause, since—as Justice Kagan pointed out—this event was itself an "effect[]" of the officer's wrongdoing.[47] If Officer Fackrell had not stopped Strieff, he would not have learned Strieff's identity; if he had not learned Strieff's identity, he would not have relayed this information to the police dispatcher; if he had not relayed this information to the dispatcher, he would not have learned of the warrant.[48] As Justice Kagan said, the basic structure of the causal chain was X leads to Y, which in turn leads to Z.[49]

Things would have been different if Officer Fackrell had, in Justice Sotomayor's words, "ask[ed] Strieff to volunteer his name only to find out, days later, that Strieff had a warrant against him."[50] Suppose, for example, that Officer Fackrell had learned of the warrant against Strieff three days after the arrest, when a police captain, purely by happenstance, had mentioned the warrant at a morning briefing. If Officer Fackrell thereafter had used information acquired during the earlier unlawful stop to find Strieff and execute the warrant, the arrest and its fruits would be attributable in part to an *independent* intervening cause, namely, the captain's reference to the outstanding arrest warrant at the morning briefing. In this hypothetical, then, the basic structure of the causal chain is: event X causes Z, but only in combination with intervening event Y, which wasn't itself caused by X.[51] Y is independent.

The weight assigned to this classification has varied somewhat over time and among courts.[52] In some cases, particularly older cases, courts appear to assume that if an intervening cause is dependent, rather than independent, then it cannot break the causal chain, period, regardless of how

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natural sequence, undisturbed by any independent cause, produces the result complained of."); Livingston v. Commonwealth, 55 Va. 592, 602 (1857) (reasoning that the question whether the defendant's blow qualifies as a cause of the victim's death, in spite of the intervening role played by disease, depends in part on whether "the disease, but for the supervention of which the death would not have occurred, is, in its origin, independent of the wound or blow, and wholly out of the course of its consequences.").

45 Utah v. Strieff, 136 S. Ct. 2056 (2016).

46 *Id.* at 2059.

47 *Id.* at 2073 (Kagan, J., dissenting).

48 *See id.*

49 *Id.*

50 *Id*. at 2066 (Sotomayor, J., dissenting).

51 *See* Terry, *supra* note 26, at 20 (diagramming this kind of causal relationship).

52 *See* PROSSER AND KEETON, *supra* note 30, §§ 41, 42.

improbable it is.[53] "If a subsequent physical event would not have occurred but for the wrongful act"—if it was dependent, in other words—"it does not negative causal connection," say some courts.[54] The recent cases, though, suggest a somewhat more nuanced approach. Under this approach, the classification of a particular intervening event as dependent or independent merely determines *how* improbable the event must be to break the causal chain: a dependent intervening cause will not break the causal chain unless it is downright "abnormal" or freakish. [55] By contrast, an independent intervening cause need merely be "unforeseeable," or slightly improbable, in order to "break the chain of legal cause."[56]

In summary, then, the distinction between dependent and independent intervening causes is part of a three-step process for deciding whether conduct satisfies the "proximate cause" requirement. First, the factfinder identifies each of the intervening events without which the wrongdoer's conduct would not have caused the result. Second, the factfinder classifies each of these intervening events as dependent or independent of the wrongdoer's conduct. Third, and finally, the factfinder applies the appropriate probability threshold to determine whether the intervening event broke the causal chain. If the event was independent, the factfinder decides whether the event was at least somewhat improbable. If the event was dependent, the factfinder decides whether the event was quite improbable, or "abnormal."

Not everyone agrees that this distinction between dependent and independent intervening causes deserves a place in proximate cause analysis.[57] Nor, apparently, does everyone agree on the precise content of the distinction. In particular, some courts and scholars have suggested that the "dependent" classification ought to be confined to human or animal "responses" to the wrongdoer's conduct.[58] This was true, for example, of the

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53 *See id.* § 44 at 301–02 ("[F]orces caused or set in motion by the operation of the defendant's conduct upon the existing situation—as where the defendant's spark ignites gasoline vapor already present—are not intervening causes. Their origin is not external and independent, and they are to be attributed to the defendant.").

54 H.L.A. HART & TONY HONORÉ, CAUSATION IN THE LAW 176 (2d ed. 1985) (summarizing case law); *see also, e.g.*, Purcell v. Saint Paul City Ry. Co., 50 N.W. 1034, 1034–35 (Minn. 1892) (holding that an intervening cause will break the causal chain and cut off the defendant's liability only if it is "not produced by the wrongful act or omission, but independent of it").

55 Kibbe v. Henderson, 534 F.2d 493, 498 n.6 (2d Cir. 1976) (quoting WAYNE R. LAFAVE & AUSTIN W. SCOTT, CRIMINAL LAW 257-263 (1972)), *rev'd on other grounds*, 431 U.S. 145 (1977).

56 *Id.*; *see also* People v. Saavedra-Rodriguez, 971 P.2d 223, 226 (Colo. 1998), as modified (Feb. 11, 1999) ("For an independent intervening cause to relieve a defendant of liability it must not be reasonably foreseeable.").

57 *See* authorities cited *supra* note 16.

58 RESTATEMENT (FIRST) OF TORTS §§ 442(c), 443 (AM. LAW INST. 1934); LAFAVE, *supra* note 8, § 6.4(f)(3) ("[A]n intervening act may be said to be a *response* to the prior actions of the defendant when it involves reaction to the conditions created by the defendant."); McLaughlin, *supra* note 37, at 158

First Restatement of Torts, which said that the relevant distinction was between (1) an "intervening force . . . operating independently of any situation created by the actor's negligence"[59] and (2) "[a]n intervening act *of a human being or animal* which is a normal response to the stimulus of a situation created by the actor's negligent conduct."[60] Others have defined the "dependent" classification even more narrowly, as encompassing only "attempts to avoid or mitigate the risky situation created by the defendant."[61]

It is certainly true that many of the standard illustrations of causal "dependency" involve responsive or ameliorative acts by humans or animals.[62] In their classic book, *Causation in the Law*, Herbert Hart and Tony Honoré illustrated the distinction between dependent and independent intervening causes using a hypothetical case where the defendant had wrongfully imprisoned the plaintiff in a field occupied by a bull.[63] The plaintiff, they said, "might be injured by the bull either [1] because, just at that moment, the bull happened to see its mate on the other side of the field and charged in that direction . . . or [2] because the bull saw plaintiff and attacked him."[64] In the first case, they said, the intervening cause is independent, since "the bull would have moved as it did independently of plaintiff's presence."[65] In the second case, the intervening cause is dependent, since "the bull's conduct is a reaction to plaintiff's presence, itself a consequence of the wrongful act of defendant."[66]

It is not clear, though, why a charging bull ought to be treated differently than, say, a falling tree.[67] According to Hart and Honoré, if a tree falls on the victim of an assault, killing him, the question whether the assault proximately caused the victim's death hinges in part on whether the falling of the tree was itself caused by the wrongdoer's conduct.[68] If the tree "just happened" to fall on the victim as he lay on the ground stunned by the blow, the usual intuition

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(explaining that "dependent" intervening forces involve "human or animal action in the chain of causation after the defendant's act.").

59 RESTATEMENT (FIRST) OF TORTS § 442(c) (AM. LAW INST. 1934).

60 *Id.* § 443 (emphasis added).

61 Wright, *supra* note 27, at 1473.

62 HART & HONORÉ, *supra* note 54, at 181.

63 *Id.*

64 *Id.*

65 *Id.*

66 *Id.*

67 *See* Bunting v. Hogsett, 21 A. 31, 32 (Pa. 1891) (invoking the distinction between dependent and independent intervening causes where the dependent intervening cause—namely, the opening of a train engine's throttle as the result of a collision—was purely mechanical); RESTATEMENT (SECOND) OF TORTS § 443 cmt. a (AM. LAW INST. 1965) ("The rule stated in this Section applies not only to acts done by the person who is harmed or by a third person as a normal response to the stimulus of a situation created by the defendant's negligence, but also to acts of animals reacting thereto in a manner normal to them, and to the normal intervention of forces of nature."); MOORE, *supra* note 6, at 236–37 (classifying as "dependent" all intervening events that are "products" of the wrongdoer's conduct).

68 HART & HONORÉ, *supra* note 54, at 77–79.

is that this independent intervening event ought to break the causal chain, say Hart and Honoré.[69] If, instead, the tree fell only because the wrongdoer's blow drove the victim "against the tree with an impact sufficient to bring it down on him,"[70] then the usual intuition is that the falling of the tree probably should not break the causal chain.[71] Our intuitions about the falling-tree case track our intuitions about the charging bull case, then. In both cases, moreover, these intuitions seem to be driven, at least in part, by whether the intervening event "would not have occurred but for the wrongful act."[72]

Nor does anyone really argue otherwise. When scholars recognize distinctions among *kinds* of dependent intervening causes, it is only because they would consign some dependent intervening causes—mechanical and natural events, for example—to a still *less*-favored subclass.[73] In other words, they would treat dependent mechanical and natural events as even *less* likely than other dependent intervening causes to break the causal chain.[74] In substance, then, these scholars do not really deny the significance of the distinction between dependent and independent intervening events.[75] Rather, they merely recognize additional distinctions, additional subclasses, within the broader class of dependent intervening causes.[76] Even for these scholars, then, the question remains: why distinguish dependent from independent intervening causes?

II. THE DISTINCTION BEHIND THE DISTINCTION: PREEXISTING CONDITIONS AND INTERVENING EVENTS

To a person unversed in the law of proximate cause, it might seem as though the classification of an intervening cause as "dependent" could be evaded merely by shifting the focus to "independent" events or conditions that lay further back in the causal process. Take the *Strieff* case, for example.[77] Granted, the "intervening circumstance" to which the *Strieff* majority assigned significance—"the discovery of the arrest warrant"—was indeed

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69 *Id.* at 78.

70 *Id.* at 79.

71 *Id.*

72 *Id.* at 176.

73 Charles E. Carpenter, *Workable Rules for Determining Proximate Cause Part III: Proximate Consequences*, 20 CAL. L. REV. 471, 479 (1932) ("A dependent intervening inanimate force of nature should not be treated as a new intervening cause, but as an existing cause."); McLaughlin, *supra* note 38, at 157–58 (classifying as "direct causation" any causal chain in which the connection between the defendant's conduct and the result is mediated only by "dependent" natural or mechanical forces).

74 Carpenter, *supra* note 73at 479; McLaughlin, *supra* note 37, at 157–58.

75 *Id.*

76 *Id.*

77 Utah v. Strieff, 136 S. Ct. 2056 (2016).

produced by the officer's wrongdoing, and therefore was dependent.[78] But this intervening circumstance was attributable to a condition that was *not* itself produced by the officer's wrongdoing, namely, the existence of the warrant in the court's database. The existence of the warrant in the court's database was "independent" of the officer's wrongdoing, as were the events that brought about the warrant's presence in the database—the issuance of the warrant, for example, and the entry of the warrant into the database. So the "dependent" intervening cause really was, in part, a product of independent conditions or events.

Likewise, it might seem as though the classification of an intervening cause as independent could easily be evaded by shifting the focus to dependent intervening events that lie further along the causal chain leading to the result. Take, for example, Hart and Honoré's falling tree example, where "*A* hits *B* who falls to the ground stunned and bruised by the blow; at that moment a tree crashes to the ground and kills *B*."[79] In this case, the falling of the tree is an "independent" intervening cause, as everyone agrees.[80] But if this *independent* intervening cause is to play a role in mediating the consequences of the wrongdoer's conduct, then it must eventually make itself felt in a *dependent* intervening cause, namely, the impact of the tree on *B*'s body. This will always be true of independent intervening causes, moreover. An independent event—an event not produced by the wrongdoer's conduct—will count as an intervening *cause* only if it eventually combines with the wrongdoer's conduct, or with the forces set in motion by the wrongdoer's conduct, to bring about the result.[81] And this moment of combination always will qualify as a *dependent* intervening cause.[82]

In what follows, this Article explains why these two anomalies do not really undercut the practice of classifying intervening causes as dependent or independent. First, though, it will be useful to dwell briefly on what these anomalies show us about the causal process, namely: (1) if the wrongdoer's conduct qualifies as a cause-in-fact of the result, the conduct always will be connected to the result by a sequence of dependent intervening causes, even in cases that traditionally have been regarded as involving independent intervening causes; and (2) at each step in this causal sequence, forces attributable to the defendant's conduct must combine with "independent" or extrinsic causal factors to bring about the *next* step, even in cases that

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78 *Id.* at 2059.

79 HART & HONORÉ, *supra* note 53, at 77.

80 *Id.*

81 *See* Wright, *supra* note 27, at 1468 (explaining that an event will qualify as an intervening cause only if the event "was a necessary (but-for) cause of the plaintiff's injury").

82 *Id.*

traditionally have been classified as involving dependent intervening causes.[83]

The first of these two points goes to the fundamental role played by dependent intervening events in the causal chain. Dependent intervening events are, as Justice Kagan said in *Strieff*, the "very links" in the causal chain.[84] In every case where the wrongdoer's conduct is a cause-in-fact of the proscribed result, the conduct is connected to the result by a sequence of dependent intervening events.[85] This is true even of cases where an independent intervening cause also plays a role in bringing about the proscribed result.[86] And it is true, too, of cases where the connection between the wrongdoer's conduct and the result is quite direct.[87]

Suppose, for example, that the defendant kills the victim by firing a pistol at him, point blank. Despite the seeming directness of the causal relationship between this defendant's conduct and the victim's death, the causal relationship is mediated by a "causal chain" consisting of dependent intervening events. The defendant's voluntary act, which sets this sequence in motion, is just the crooking of his forefinger.[88] This crooking of the forefinger causes the gun's trigger to move, which causes the gun's hammer to fall, which causes the gunpowder in the cartridge to explode, which causes the bullet to leave the gun at high velocity. One could go on, exploring the physiological events set in motion by the bullet's impact with the victim's body, but the point already is clear enough. The defendant's conduct is connected to the result by a sequence of dependent intervening events: D_1, D_2, D_3, etc.

Notice, too, just how each of the "links" in the causal chain is connected to the next. Though dependent intervening events are, by definition, caused by the defendant's conduct, they are not caused *just* by the defendant's

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83 RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 29 cmt. b (AM. LAW INST. 2010) ("Multiple factual causes always exist . . . .").

84 Utah v. Strieff, 136 S. Ct. 2056, 2073 (2016) (Kagan, J., dissenting).

85 Terry, *supra* note 26, at 20 ("The principal cause seldom or never produces the consequence directly, but through a chain of intermediate causes, each of which is a consequence of the preceding one and a cause of the next."); *cf.* Milwaukee & Saint Paul Ry. Co. v. Kellogg, 94 U.S. 469, 476 (1876) ("In the nature of things, there is in every transaction a succession of events, more or less dependent upon those preceding, and it is the province of a jury to look at this succession of events or facts, and ascertain whether they are naturally and probably connected with each other by a continuous sequence, or are dissevered by new and independent agencies, and this must be determined in view of the circumstances existing at the time.").

86 *See* Terry, *supra* note 26, at 20.

87 *E.g.*, *Saint Paul Ry. Co.*, 94 U.S. at 476.

88 *See* OLIVER WENDELL HOLMES, JR., THE COMMON LAW 54 (Dover Publ'ns 1991) (1881) (identifying as the "act" in this shooting scenario as "crook[ing] the forefinger with a certain force"); RESTATEMENT (SECOND) OF TORTS § 2 (AM. LAW INST. 1965) (explaining that the wrongful "act" that provides the basis for tort liability "does not include any of its results, even the most direct, immediate, and intended").

conduct.[89] For each step in the causal sequence to produce the next step—in other words, for D_n to produce D_{n+1}—the conditions that constitute D_n must combine somehow with *other* conditions *not* attributable to the defendant's conduct. Granted, it is tempting to think of each step in the causal sequence, D_n, as just *causing* the next step, D_{n+1}, because in ordinary speech we often refer to one event as "causing" another.[90] As John Stuart Mill said, however, the antecedents in causal relationships are not individual events or conditions; they are, rather, *sets* of conditions.[91] For example, though we might be tempted to say that a smoker's disposal of a cigarette butt was "sufficient by itself" to cause the resulting forest fire, on closer examination we find that the fire actually depended on a number of other conditions as well: the presence of oxygen in the air, for instance, and of combustible materials on the forest floor.

This all sounds more complicated than it is. Consider the shooting hypothetical again. In the shooting hypothetical, what sets the causal chain in motion merely is the defendant's bare voluntary act of crooking his finger. Even at the earliest stages, this voluntary act must combine with extrinsic circumstances—circumstances not produced by the voluntary act—to bring about the succeeding steps in the causal sequence. The defendant's act of crooking his finger, for example, does not produce the movement of the trigger by itself. It produces the movement of the trigger only in combination with an extrinsic condition, namely, the proximity of the defendant's finger to the trigger. Likewise, the falling of the hammer does not, by itself, cause the gun to fire. It causes the gun to fire only in combination with an extrinsic condition, namely, the presence of a round in the chamber.[92]

It is possible now to reframe the question posed by the two anomalies mentioned above: if the wrongdoer's conduct is always connected to the

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89 RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 29 cmt. b (AM LAW INST. 2010) ("Multiple factual causes always exist . . . ."); HART & HONORÉ, *supra* note 54, at 19 (summarizing John Stuart Mill's insights about "the plurality of causes"); Terry, *supra* note 26, at 20 ("No consequence that ever happens is the result of a single cause or the end of a single sequence of causation. It is always the meeting place of many such sequences."); *cf.* Kenneth J. Rothman, *Causes*, 104 AM. J. EPIDEMIOLOGY 587, 588 (1976) ("Most causes that are of interest in the health field are . . . not sufficient in themselves. Drinking contaminated water is not sufficient to produce cholera, and smoking is not sufficient to produce lung cancer, but both of these are components of sufficient causes.").

90 *See* J.L. MACKIE, THE CEMENT OF THE UNIVERSE 248 (1974) ("Philosophers have long been inclined to speak of one *event* causing another."); MOORE, *supra* note 6, at 328 ("[W]e often treat *events* as both causes and effects, as in 'the firing of the gun caused Smith's death . . . .").

91 JOHN STUART MILL, A SYSTEM OF LOGIC RATIOCINATIVE AND INDUCTIVE, bk. 3, ch. 5, § 3, at 329-30, 332 (J.M. Robson, ed., Univ. of Toronto Press 1974) (1843); *see also* HART & HONORÉ, *supra* note 54, at 19 (summarizing Mill).

92 Neither the presence of the trigger next to the defendant's finger nor the presence of a round in the chamber is part of the defendant's "act." As Holmes said, "to crook the forefinger with a certain force is the same act whether the trigger of a pistol is next [to] it or not." HOLMES, *supra* note 89 at 54; *see also* Terry, *supra* note 26, at 11 ("If I strike in the air with a stick or throw a stone when no one is near, I do precisely the same act as though some person stood where he would be hit . . . .").

result by a sequence of dependent intervening causes, and if each step in this causal sequence requires an extrinsic condition to produce the next step, why is not every result as much a product of dependent and independent intervening causes as every other?

The answer to this seeming paradox, finally, is that law distinguishes two kinds of extrinsic conditions: (1) conditions that existed at the moment of the wrongful act; and (2) conditions attributable to independent events that occurred *after* the wrongful act.[93] The first of these two categories would include, for example, the various conditions by virtue of which the wrongdoer's crooking of his finger produced the victim's death in our shooting hypothetical—the proximity of the wrongdoer's finger to the gun's trigger, the presence of a round in the gun's chamber, and so on. Each of these conditions existed at the moment of the wrongdoer's voluntary act and each was produced by events that occurred *before* this act. By contrast, the second category embraces conditions that were produced by independent events that occurred *after* the moment of the wrongful act. Suppose that the shooting victim in our hypothetical had survived the shooting only to die two weeks later in a fire at the hospital. In this variation, the conditions created by the wrongdoer (the victim's presence in the hospital) produce the victim's death in combination with other conditions (heat and smoke) that are attributable to an independent event that occurred *after* the wrongdoer's act.

This distinction between preexisting conditions, on the one hand, and conditions attributable to independent intervening events, on the other, determines whether a particular condition can qualify as an intervening cause, and so determines whether the condition can break the causal chain.[94] Courts long have held that preexisting conditions cannot qualify as intervening causes, because the events that produce preexisting conditions do not intervene between the wrongdoer's conduct and the result.[95] In this

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93 HART & HONORÉ, *supra* note 54, at 172 ("If a contingency is, on account of its abnormality, to negative causal connection it must be an *event* and one later in time than, or possibly simultaneous with, the wrongful act. But a *state of the person or thing affected* existing at the time of the wrongful act (a 'circumstance'), however abnormal, does not negative causal connection."); Michael S. Moore, *The Metaphysics of Causal Intervention*, 88 CAL. L. REV. 827, 832 (2000) ("The most basic feature of an intervening cause is that it must *intervene*. This will obviously eliminate events occurring after the victim's harm from the category of intervening causes (or, indeed, causes of any kind, causation not working backwards through time). Less obviously, this rule also precludes events that predate the defendant's action and states that are in existence at the time the defendant acts, from being intervening causes."); Wright, *supra* note 27, at 1468 ("All preexisting conditions, no matter how unknown and unforeseeable at the time of the defendant's tortious conduct, are treated as part of the 'set stage' upon which the defendant's tortious conduct plays itself out."); *cf.* DRESSLER, *supra* note 7, at 190 (asserting that an intervening cause must "come[] into play *after* the [wrongdoer's] voluntary act has been committed").

94 *See* authorities cited *supra* note 93.

95 *E.g.*, Hamrick v. People, 624 P.2d 1320, 1324 (Colo. 1981) ("The defendant must take his victim as he finds him, and it is no defense that the victim is suffering from physical infirmities."); Swan v. State, 322 So. 2d 485, 487 (Fla. 1975) ("Criminals take their victims as they find them. Appellant cannot be

setting, the word *intervene* means "[t]o come or occur between two periods or points of time . . . ."[96] Specifically, it means to intervene temporally between the moment of the wrongdoer's voluntary act and the moment when the result comes to fruition.[97] Accordingly, "events that predate the defendant's action and states that are in existence at the time the defendant acts [cannot be] intervening causes."[98] By contrast, events that occur *after* the wrongdoer's conduct do "intervene."[99] The conditions created by these events (the smoke and heat from a fire, for example) therefore can qualify as intervening, and superseding, causes.[100]

This distinction between preexisting conditions and conditions attributable to intervening events is what is really behind the distinction between dependent and independent intervening causes. To explain: preexisting conditions cannot qualify as intervening causes and therefore cannot break the causal chain themselves. Just about everyone would agree, though, that preexisting conditions sometimes are sufficiently improbable to justify, intuitively, relieving the wrongdoer of liability for results attributable in part to those conditions.[101] Take this example, supposedly constructed by Glanville Williams from a 1960 news story: "X, wishing to murder P in the best detective-novel style, arranges the wiring in P's house in such a way that

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excused from guilt and punishment because his victim was weak and could not survive the torture he administered."); State v. Pelham, 824 A.2d 1082, 1093 (N.J. 2003) ("[A] defendant's criminal liability is not lessened by the existence in the victim of a medical condition that, unbeknownst to the defendant, made the victim particularly vulnerable to attack."); State v. Smith, 2007 OH Ct. App. 1884, ¶ 27 ("[T]he tortfeasor and the accused take the victim as they find him. Thus, Biser's preexisting condition does not break the chain of causation.") (citation omitted).

96 *Intervene*, AMERICAN HERITAGE DICTIONARY (3d ed. 1992).

97 Rossell v. Volkswagen of Am., 709 P.2d 517, 525 (Ariz. 1985) (en banc) ("An intervening [event] is one which intervenes between [a] defendant's negligent act and the final result and is a necessary component in bringing about that result."); State v. Holthaus, No. C2-99-1793, 2000 WL 821607, at *3 (Minn. Ct. App. June 27, 2000) (holding that the victim's ATV operation did not qualify as an intervening cause in Holthaus' drunk-driving homicide prosecution, because the victim's conduct "cannot be characterized as occurring *after* Holthaus' conduct or *between* Holthaus' conduct and the collision."); Hall v. Coble Dairies, 67 S.E.2d 63, 67 (N.C. 1951) (explaining that an intervening cause "intervene[s] between the original negligent act or omission and the injury ultimately suffered . . . ."); MOORE, *supra* note 6, at 234 ("Intervening causes must intervene between the defendant's act and the harm.").

98 MOORE, supra note 6, at 234; *see also* PROSSER AND KEETON, *supra* note 30, § 44 ("'Intervening' is used in a time sense; it refers to later events.").

99 PROSSER AND KEETON, *supra* note 30, § 44 ("'Intervening' is used in a time sense; it refers to later events.").

100 HART & HONORÉ, *supra* note 54, at 172.

101 *See* Francis H. Bohlen, *Book Review*, 47 HARV. L. REV. 556, 558 (1934) (reviewing FOWLER VINCENT HARPER, A TREATISE ON THE LAW OF TORTS) (criticizing the traditional distinction "between an independent intervening agency and a preëxisting condition" and implying that the distinction ought not to be assigned determinative role in proximate cause analysis); Glanville Williams, *Causation in the Law*, 1961 CAMBRIDGE L.J. 62, 80–82 (reviewing H.L.A. HART AND A.M. HONORÉ, CAUSATION IN THE LAW (1959)) (criticizing the view that "abnormal *conditions* existing at the time of the wrongful act . . . , however unexpected and unforeseeable, do not operate to make damage too remote.").

when the door-bell is pressed a high voltage current will be passed to his bath."[102] A mischievous but unsuspecting trespasser, D, subsequently "rings the door-bell and runs away, just as P is taking a bath, and P is electrocuted."[103]

In this example, as Williams argued, the arrangement of the wires in P's house is a preexisting condition; therefore, under traditional doctrine, the condition cannot relieve D of liability.[104] Still, our strong intuition is that D cannot possibly be liable. How, then, are courts to accommodate intuitions like these without abandoning the traditional doctrine? The answer is: *by shifting the focus from the preexisting condition itself to the dependent intervening event in which the preexisting condition played a part*. In Williams's hypothetical, for example, the court would shift its focus from the preexisting condition—the arrangement of the wires in P's house—to the dependent intervening event in which this preexisting condition played a part, namely, the delivery of an electrical shock to the bathtub. Since a dependent intervening event will relieve the defendant of liability if it is "abnormal"[105] or freakish, and since the occurrence of a doorbell-triggered electrical shock to the occupant of a bathtub definitely is abnormal, the defendant is relieved of liability.

The same kind of shift in focus occurred in *Strieff*.[106] In *Strieff*, the officer's search of Strieff incident to his arrest was attributable in part to a preexisting condition, namely, the existence of an outstanding warrant for Strieff's arrest in the law enforcement warrant-database.[107] But the Court could not very well have treated this preexisting condition as the sort of "intervening circumstance" that sometimes breaks the causal connection between illegal police conduct and evidence.[108] After all, this condition did not arise after the illegal conduct; it did not "intervene."[109] Accordingly, the Court shifted its focus from this preexisting condition to the later dependent intervening event in which this preexisting condition played a part, namely, "the officer's discovery of [an] arrest warrant."[110] This later event, though dependent on the wrongdoer's conduct, does qualify as an intervening cause.

In summary, when courts distinguish independent intervening causes from dependent intervening causes, what they are really doing is distinguishing (1) cases where an *independent intervening event*, or a condition created by an independent intervening event, combines with the

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102 Williams, *supra* note 101, at 82.

103 *Id.*

104 *Id.*

105 Kibbe v. Henderson, 534 F.2d 493, 498 n.6 (2d Cir. 1976) (quoting WAYNE R. LAFAVE & AUSTIN W. SCOTT, CRIMINAL LAW 257-263 (1972)), *rev'd on other grounds*, 431 U.S. 145 (1977).

106 Utah v. Strieff, 136 S. Ct. 2056 (2016).

107 *Id.* at 2059–60.

108 *Id.* at 2061.

109 *Id.* at 2062-63.

110 *Id.* at 2059, 2063.

defendant's conduct, or with forces set in motion by the defendant's conduct, to produce the next link in the causal chain; and (2) cases where a *preexisting condition* combines with the defendant's conduct, or with forces set in motion by the defendant's conduct, to produce the next link in the causal chain.[111] In the first case, the courts focus their attention on the "independent" intervening event that produces the critical extrinsic condition.[112] In the second, the courts focus on the "dependent" intervening event that is *produced by* the critical extrinsic condition.[113] What really distinguishes the two cases, though, is the nature of the condition that must concur with the wrongdoer's conduct to produce the next step in the causal sequence. In cases where courts classify the intervening cause as "dependent," this critical condition is preexisting;[114] in cases where courts classify the intervening event as "independent," this critical condition is produced by independent intervening events.[115] This is the distinction behind the distinction.

III. WHY THE DISTINCTION BETWEEN PREEXISTING CONDITIONS AND INDEPENDENT INTERVENING EVENTS MATTERS

What this Article has shown so far is that the distinction between dependent and independent intervening causes really is, at bottom, a distinction between (1) instances where the causal mechanism behind the result depends on the concurrence in time and space of the defendant's conduct with an independent intervening event; and (2) instances where the causal mechanism depends, instead, on the concurrence in time and space of the defendant's conduct with an independent preexisting condition.[116] But this distinction seems as much in need of explanation as the distinction between dependent and independent intervening causes.[117] Has the identification of this underlying distinction actually advanced this Article's effort to explain why judges intuitively have distinguished dependent from independent intervening causes?

The answer, arguably, is yes. What makes the distinction between dependent and independent intervening causes difficult to explain is, at least in part, the seeming incommensurability of these two categories. Independent intervening causes involve a kind of *coincidence*, namely, the concurrence in time and space of (1) the wrongdoer's conduct, or the chain of events set in motion by the wrongdoer's conduct; and (2) an independent event *not*

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111 *See supra* Part II.
112 *Id.*
113 *Id.*
114 *Id.*
115 *Id.*
116 *See supra* Part II.
117 *See supra* note 101and accompanying text.

produced by the wrongdoer's conduct.[118] By contrast, the relationship between *dependent* intervening causes and the wrongdoer's conduct is not coincidental.[119] Part of what characterizes a coincidence is the lack of any apparent causal connection between the two coinciding events or conditions.[120] By definition, dependent intervening events are *caused* by the defendant's conduct.[121] Therefore, dependent intervening events, even when they are improbable or even "freakish," still do not qualify as coincidences in the usual sense.[122]

By identifying the distinction behind the distinction, this Article has dissolved this incommensurability problem.[123] In effect, the Article has identified the common denominator of dependent and independent intervening causes. The common denominator is coincidence. Though *dependent* intervening causes are not themselves "coincidental" in relation to the defendant's conduct, they do involve coincidences, namely, the temporal and spatial concurrence of the defendant's conduct with an independent preexisting condition.[124] Since *independent* intervening causes, too, involve a kind of coincidence, the two categories now are directly comparable.

Does this comparison reveal anything? Why would courts intuitively treat one kind of coincidence as less likely to break the causal chain than the other? The answer is that one kind of coincidence—the kind associated with dependent intervening causes—is less improbable than the other. The reason why this kind of coincidence is less improbable is surprisingly simple: preexisting conditions *last longer* than intervening events and therefore are more likely to coincide, in space and time, with the wrongdoer's conduct than are intervening events.[125]

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118 *See* DRESSLER, *supra* note 7, at 193.

119 *Id.* at 192.

120 Persi Diaconis & Frederick Mosteller, *Methods for Studying Coincidences*, 84 J. AM. STAT. ASS'N. 853, 853 (1989) ("A coincidence is a surprising concurrence of events, perceived as meaningfully related, with no apparent causal connection."); *cf.* Trudenich v. Marshall, 34 F. Supp. 486, 489 (W.D. Wash. 1940) ("[W]hen the employment and the injury are not related causally, the unrelated manifestation of a pre-existing condition at the time the work is being performed is not a compensable injury. The appearance or manifestation of a pre-existing condition under such circumstances is deemed to be *coincidental* and *not causal*.").

121 *See, e.g.*, MOORE, *supra* note 6and accompanying text; MOORE, *supra* note 8and accompanying text; Dressler, *supra* note 7, at 192.

122 *See* HART & HONORÉ, *supra* note 54, at 79 ("[I]f [assault victim] *B* had fallen against the tree with an impact sufficient to bring it down on him, this sequence of physical events, though freakish in its way, would not be a coincidence . . . .").

123 *See supra* Part II; *supra* Part III.

124 *See supra* Part II; *supra* Part III.

125 In ordinary usage, a condition is a "state of being" that persists over time; an event, by contrast, is a transient momentary "occurrence." *Condition*, AMERICAN HERITAGE DICTIONARY (3d ed. 1992) ("A mode or state of being"); *Event*, AMERICAN HERITAGE DICTIONARY (3d ed. 1992) ("Something that takes place; an occurrence").

Consider, first, an example far removed from the law and far removed from intuitions about justice or fairness: avalanche safety. Mountain climbers intuitively distinguish between two different kinds of avalanche danger: (1) danger that the climber will be killed or injured by an avalanche that he triggers himself by treading on an unstable snowpack; and (2) danger that the climber will be killed or injured by an avalanche that coincidentally "sweep[s] down on the climber from above."[126] This distinction obviously corresponds closely to the distinction between dependent and independent intervening causes: avalanches triggered by the climber himself are dependent—are produced by him—while those that sweep down on him from above are independent. But the climber's practice of distinguishing these two kinds of avalanches obviously is not rooted in law or norms.[127] It is rooted in probabilities. Every climber knows that the likelihood of being killed by an avalanche that he himself has triggered is far greater than the likelihood of being killed by an avalanche that sweeps down on him from above.[128]

What is the source of this difference in probabilities? Notice, first, that although we are more likely to describe as "coincidental" those avalanches that sweep down on the climber from above, avalanches that are triggered by the climber himself likewise involve a kind of coincidence: they require the concurrence in time and space of the climber's passage across the snow slope with instability in the snowpack. Use of the word *coincidence* to refer to this sort of concurrence is in keeping with ordinary usage, moreover, contrary to what Hart and Honoré appear to have supposed.[129] Dictionaries treat the word "coincidence" as extending to the concurrence not only of things that "occur"—events, in other words—but of things that "exist," like conditions.[130] The Oxford English Dictionary, for example, defines "coincidence" in part as "[o]ccurrence or *existence* at the same time."[131]

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126 MOUNTAINEERING: THE FREEDOM OF THE HILLS 298 (E. Peters ed., 4th ed. 1982) ("Although avalanches have been considered thus far [in this discussion] as a menace sweeping down on the climber from above, relatively few victims are claimed by such slides. Most avalanches that involve a climber are triggered by the climber himself . . . ."); *see also* DAVID MCCLUNG & PETER SCHAERER, THE AVALANCHE HANDBOOK 217 (3d ed., 4th prtg. 2009) (observing that "human-triggered avalanches" "account[] for more than 80% of backcountry fatalities"); *id.* at 222 (describing researchers' findings "that natural releases accounted for 14% of the [avalanche] fatalities (about 10% in backcountry travel)"); RONALD I. PERLA & M. MARTINELLI, JR., AVALANCHE HANDBOOK 178 (1976) ("In almost all cases, the victims triggered their own avalanche while crossing the starting zone. In a few rare cases, the avalanche was triggered naturally and swept into the touring party lower down in the track or runout zone.").

127 *Compare* DOBBS, *supra* note 16, § 15.9 at 353 (suggesting that the various distinctions that figure in superseding cause analysis—like the distinction between dependent and independent intervening causes—are rooted in "judicial ideas about the appropriate scope of liability").

128 MOUNTAINEERING: THE FREEDOM OF THE HILLS, *supra* note 126, at 298.

129 HART & HONORÉ, *supra* note 54, at 79–80.

130 *Coincidence*, SHORTER OXFORD ENGLISH DICTIONARY (1959); *Coincidental*, MERRIAM WEBSTER'S COLLEGIATE DICTIONARY (10th ed. 1998).

131 *Coincidence*, SHORTER OXFORD ENGLISH DICTIONARY (1959) (emphasis added).

Merriam Webster's likewise defines "coincidental" in part as "occurring or *existing* at the same time."[132]

Hart and Honoré were right, however, in thinking that one of these two kinds of coincidences is more improbable, and so more coincidental, than the other.[133] Instability in the snowpack, like other preexisting conditions, can persist for days or weeks, while the sudden *change* in conditions represented by the avalanche's release occupies only an instant in time.[134] As a result, the climber's passage across a slope is far more likely to coincide temporally with instability in the snowpack than with the release of a snowpack situated above the climber.

The same difference in probabilities appears to be at work in cases where courts distinguish dependent from independent intervening causes. The risks associated with a wrongdoer's conduct, like the risks associated with a mountain climber's passage across or beneath an avalanche-prone slope, usually are short-lived.[135] The risks associated with a shooting, for example, usually "dissipate" when the shooter's bullet falls to the ground or strikes an obstacle.[136] Accordingly, if the coming-to-fruition of the risk posed by the wrongdoer's conduct depends on the occurrence of an *event*—on a *change* in conditions, in other words—then the change must occur during this short period.[137] Likewise, if the coming-to-fruition of the risk depends on the *existence* of a *condition*, the condition must exist during this short

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132 *Coincidental*, MERRIAM WEBSTER'S COLLEGIATE DICTIONARY (10th ed. 1998) (emphasis added).

133 HART & HONORÉ, *supra* note 54, at 79-80.

134 *See* PERLA & MARTINELLI, *supra* note 126, at 98 ("Although instability [in the snowpack] is mostly likely to be triggered during or immediately after storms, slopes with weak TG [temperature-gradient] layers remain unstable for long periods between storms."); *id.* at 182–183 (explaining variation among seasons: during the early season, from November to February, "instability persists between storms"; but from February through April, "[t]he snowpack is consolidating, and deep slab instability tends to relax a few days after a storm."); Chris Klint, *Skiers Walk Away After Being Caught in Turnagain Pass Avalanche, But Danger Remains*, ALASKA DISPATCH NEWS, December 30, 2016 (describing an unstable condition known as a "persistent slab" in which a "slab of snow on top of weak snow . . . can stay on top for weeks at a time.").

135 *See* Crooker v. Graft, 394 F.2d 2 (9th Cir. 1968); Henningsen v. Markowitz, 230 N.Y.S. 313 (Misc. 1928); Beale, *supra* note 34, at 651; John C.P. Goldberg & Benjamin C. Zipursky, *Unrealized Torts*, 88 VA. L. REV. 1625, 1640 (2002).

136 Courts frequently rely on this notion of "dissipation of the risk" in analyzing proximate cause issues. *See Crooker*, 394 F.2d at 3 ("The risk created by appellee's negligence, under the findings, was dissipated when the plane was safely landed and rolling to a stop."); *Henningsen*, 230 N.Y.S. 313, 316 (observing that the "active force" set in motion by the defendant's illegal sale of a gun to a child had "come to rest" when the child's mother took the gun from him); Beale, *supra* note 34, at 651 ("[W]here the defendant's active force has come to rest in a position of apparent safety, the court will follow it no longer; if some new force later combines with this condition to create harm, the result is remote from defendant's act."); Goldberg & Zipursky, *supra* note 135, at 1640 ("The idea . . . is that at a certain point the risks lurking within a wrongful act dissipate even though, as a matter of fact, the wrongful act ends up being a necessary step in a causal sequence leading to an injury unrelated to the risk.").

137 *See Event*, AMERICAN HERITAGE DICTIONARY (3d ed. 1992).

period.[138] In short, for the risk created by the wrongdoing to come to fruition, there must be a concurrence in time of (1) the risk set in motion by the wrongdoer's conduct; and (2) the event or condition on which the risk depends for its coming-to-fruition.[139]

Because conditions can exist for extended periods, in the usual case they are more likely than events to concur temporally with the risks set in motion by the wrongdoing. Events are by definition transient.[140] It is not necessary here to follow the physicists in defining an "event" as a "phenomenon or occurrence located at a single point in space time."[141] It is enough to acknowledge that an event is something that *happens* or *occurs* and then is over, like an avalanche's sudden release, or the falling of a tree, or the decision by a romantically inclined bull to cross to the other side of the field.[142] By contrast, a preexisting condition—like the instability in an avalanche-prone snow slope, or the rotten wood that makes a tree vulnerable to being pushed over, or a bull's angry disposition—might persist for hours, days, or longer.[143] Other things being equal, then, the concurrence of an *event* with the wrongdoing, or with the risks set in motion by the wrongdoing, is more coincidental and more improbable than the concurrence of a preexisting *condition* with the wrongdoing.[144]

This explanation seems to capture perfectly what is wrong with the majority's opinion in *Utah v. Strieff*.[145] Officer Fackrell's discovery of the outstanding arrest warrant for Strieff was, in a way, coincidental. For Officer Fackrell's wrongdoing to come to fruition as it did, his wrongdoing had to coincide temporally with the existence of an arrest warrant in the database.[146] But this sort of coincidence is not particularly improbable. Outstanding warrants often persist in government databases for months or years.[147] By comparison, the kind of coincidence hypothesized by Justice Sotomayor, where Officer Fackrell had learned of Strieff's warrant as the result of an independent intervening *event* (as the result of, say, a police captain's passing

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138 *See Condition*, AMERICAN HERITAGE DICTIONARY (3d ed. 1992).

139 *See generally* Eric A. Johnson, *Causal Relevance in the Law of Search and Seizure*, 88 B.U. L. REV. 113, 125 (2008) (describing the operation of the twofold causation requirement in the law of search and seizure).

140 *See Event*, AMERICAN HERITAGE DICTIONARY (3d ed. 1992) (defining *event* for purposes of physics as "[a] phenomenon or occurrence located at a single point in space-time, regarded as the fundamental observational entity in relativity theory.").

141 *Id.*

142 *Id.* ("Something that takes place; an occurrence.").

143 *See Condition*, AMERICAN HERITAGE DICTIONARY (3d ed. 1992) ("A mode or state of being").

144 *Id.*; *see also Event*, AMERICAN HERITAGE DICTIONARY (3d ed. 1992).

145 Utah v. Strieff, 136 S. Ct. 2056 (2016).

146 *Id.* at 2060.

147 *See* 17 N.J. PRAC., MUNICIPAL COURT PRACTICE § 5:42 (3d ed.) ("Essentially, bench warrants issued for the failure to appear will continue to be active until such time as they are either executed or recalled. It is not unusual for defendants to have outstanding bench warrants for months or years.").

reference to the warrant at a morning briefing) was far less probable.[148] From this perspective, there is nothing particularly surprising in the fact that the dispatcher discovered a warrant for Strieff when he searched the database.[149]

The same explanation appears to capture what is going on in the torts and criminal law cases. Take, for example, *Larson v. Boston Elevated Ry. Co.*,[150] where the plaintiff developed tuberculosis after being injured by a railway's negligence .[151] The liability of the railway for the plaintiff's tuberculosis depended, said the court, on just how her tuberculosis had come about.[152] "[I]f at the time of her injuries there were germs of tuberculosis in her system," and her injuries merely had caused the latent tuberculosis to develop into full-blown tuberculosis, then the defendant's negligence would qualify as a cause of the tuberculosis.[153] "If, however, her tuberculosis came from germs introduced into her system after she had sustained these injuries," then "it may well be that she could recover no damages."[154] This differential treatment is best explained in terms of probabilities. Tuberculosis can remain latent in a person's body for decades;[155] by contrast, the introduction of tuberculosis into her system occurs in a particular moment. A wrongdoer's negligence, therefore, is far more likely to concur temporally with the first than with the second.

This does not mean, of course, that *every* coincidence of the kind associated with independent intervening events is more improbable than *every* coincidence of the kind associated with preexisting conditions. Some preexisting conditions are evanescent—flammable gas in the hold of a ship, for example.[156] And some independent intervening events are highly predictable—cars traveling along a busy highway, for example.[157] Sometimes, moreover, the risks set in motion by the wrongdoer's conduct will persist for an extended period, as where injuries inflicted by the wrongdoer cause the victim to be hospitalized for weeks or months.[158] Not every case resembles the avalanche hypothetical, then. Still, in very general terms, because preexisting conditions occupy extended periods, they are more likely than events, or changes in conditions, to concur temporally with the wrongdoer's conduct.[159]

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148 *Strieff*, 136 S. Ct. at 2066 (Sotomayor, J., dissenting).

149 *Id.*

150 Larson v. Boston Elevated Ry. Co., 98 N.E. 1048, 1050 (Mass. 1912).

151 *Id.* at 1050.

152 *Id.* at 1050-51.

153 *Id.* at 1050.

154 *Id.*

155 *See* Hannah P. Gideon & JoAnne L. Flynn, *Latent tuberculosis: what the host "sees"?,* HHS PUBLIC ACCESS, Aug. 2011, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3788603.

156 *See* Moore, *supra* note 6, at 235-36 (discussing *In re Polemis*, 3 K.B. 560 (C.A. 1921)).

157 *See* Henderson v. Kibbe, 431 U.S. 145, 156 n.16 (1977).

158 *See* Brackett v. Peters, 11 F.3d 78, 79–80 (7th Cir. 1993).

159 *Id.*

Does the difference in probability between the two kinds of coincidences explain why courts have traditionally distinguished dependent from independent intervening causes? Yes. Nearly everyone agrees that proximate cause is mostly, if not entirely, about probability.[160] Some courts require, as a condition of liability, that the chain of events linking the wrongdoer's conduct to the result be "probable" or "foreseeable."[161] Others require that the wrongdoer's conduct "increase the risk" that a particular kind of result would occur.[162] In either case, though, the probability of the events linking the wrongdoer's conduct is central to the proximate cause inquiry. It is natural, then, that the difference in probability between two kinds of coincidences would inform the courts' intuitions about proximate cause.

CONCLUSION

This Article has shown, first, that underlying the distinction between dependent and independent intervening causes is a deeper distinction between two kinds of coincidences: (1) the temporal concurrence of the wrongdoer's conduct, or of the events set in motion by the wrongdoer's conduct, with an independent intervening event; and (2) the temporal concurrence of the wrongdoer's conduct with a preexisting condition. This Article also has shown that, in general, the first of these two kinds of coincidences is far less probable than the second. This difference in probability appears to explain why judges—including Justice Kagan in her dissent in *Strieff*—have intuitively treated the second kind of coincidence as more likely than the first to "break the causal chain." Probability, after all, lies at the core of proximate cause analysis.[163]

This explanation is both good news and bad news for those who would assign a prominent place in proximate cause analysis to the distinction between dependent and independent intervening causes. On one hand, this explanation shows that the intuition underlying the distinction is not *wrong*—

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160 *See* Terry, *supra* note 26, at 17.

161 *See, e.g.*, Johnson v. State, 224 P.3d 105, 105–06 (Alaska 2010) (identifying the relevant question as whether "a general type of harm was foreseeable"); *see also* MODEL PENAL CODE & COMMENTARIES, *supra* note 42, § 2.03 cmt. 3 n.13 (requiring courts to decide whether the probable risk associated with the defendant's conduct encompassed the "actual result" defined according to "its specific character and manner of occurrence."); RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM, § 29 cmt. e (AM. LAW INST. 2010) ("Currently, virtually all jurisdictions employ a foreseeability (or risk) standard for some range of scope-of-liability issues in negligence cases.").

162 *See* United States v. Hatfield, 591 F.3d 945, 948 (7th Cir. 2010) (identifying the relevant question as whether the defendant's conduct "increase[d] the risk that *this* sort of mishap would occur."); *Brackett*, 11 F.3d at 79 (explaining that a defendant's conduct will qualify as a legal cause of a result if, in addition to satisfying the cause-in-fact requirement, the conduct "made the event more likely.").

163 *See* Terry, *supra* note 26, at 17.

is not, say, the moral equivalent of an optical illusion.[164] Justice Kagan was not wrong, for example, when she criticized the *Strieff* majority's conclusion that the officer's discovery of the warrant had "br[oke][n] the causal chain."[165] The officer's discovery of the warrant merely represented the temporal concurrence of the officer's wrongdoing with a preexisting condition, namely, the existence of an outstanding warrant for Strieff's arrest in the warrant database.[166] This sort of coincidence is less improbable than the concurrence of wrongdoing, or of events set in motion by the wrongdoing, with an intervening *event*.[167]

On the other hand, this Article's explanation also suggests that jurors might not benefit from instruction on the distinction between dependent and independent intervening causes. Jurors are capable of reasoning about probability, and of sorting coincidences according to their degree of improbability, without the help of categories like dependent and independent intervening cause. Thus, whatever the utility of these two categories in judges' "legal analysis and discussion,"[168] the benefits of instructing the jury on this difficult distinction might not outweigh its very substantial costs in juror confusion, as some courts have suggested.[169]

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164 Rudolph, *supra* note 25, at 62.

165 Utah v. Strieff, 136 S. Ct. 2056, 2072 (2016) (Kagan, J., dissenting).

166 *Id.* at 2071–72.

167 *Id.* at 2069.

168 Commonwealth v. Askew, 536 N.E.2d 341, 343 (Mass. 1989) (concluding that these categories, "although perhaps helpful . . . for legal analysis and discussion, do not help a jury to understand the concept of proximate cause.").

169 *Id.*; *but see* Julie Beck, *Coincidences and the Meaning of Life*, THE ATLANTIC, Feb. 23, 2016 (suggesting that "humans generally aren't great at reasoning objectively about probability," or coincidences, "as they go about their everyday lives."), https://www.theatlantic.com/science/archive/2016/02/the-true-meaning-of-coincidences/463164/.